THE OPERATION OF MULTISTAKEHOLDERISM IN BRAZILIAN INTERNET GOVERNANCE: GOVERNANCE INNOVATION THROUGH MULTISTAKEHOLDERISM GENERATIVITY

Abstract

The thesis examines the operation of multistakeholderism in the Brazilian Internet governance system. It investigates how multistakeholderism operates in Internet policy-making processes and what are the effects of this operation in governance and regulatory instruments. The thesis focuses on and unpacks the elements and interactions that constitute and support the operation of multistakeholderism in Internet policy-making in Brazil. It looks at key governance structures, practices and processes analysing policy-making processes operated under a multistakeholder perspective to identify and explain the underlying elements, rationale and effects of this innovative policy-making approach. To investigate in depth what elements and configurations underpin the operation of multistakeholderism in Internet policy-making, the thesis explores, under a case study perspective, three governance practices where the operation of multistakeholderism was developed in the Brazilian Internet governance context. It observes multistakeholderism policy-making operational rationale in an international scenario influenced by the need to develop a soft-law regulatory instrument and the behaviour of stakeholders with different cultural, economic and legal values. Borrowing ideas and findings from socio-legal studies on governance and on Internet governance and applying a multi-dimensional policy-making approach, the thesis analyses these three governance practices and identifies that the operational rationale supporting multistakeholderism policy-making is based on mechanisms combining and balancing three interconnected elements: inclusion, expertise and consensus. The thesis also suggests that this policy-making mechanism is heavily influenced by a consensual orientation rationale able to mediate the contrasting tensions between inclusion and expertise at the same time that it stimulates policy cross-fertilisation and governance innovation. Unpacking these observations and findings, the thesis proposes the term 'multistakeholderism generativity' in order to illustrate its suggestion that multistakeholderism, when operated under optimal conditions, instrumentalise policy-making practices to support more innovative and legitimate governance and regulatory processes.

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The thesis examines the operation of multistakeholderism in the Brazilian Internet governance system. It investigates how multistakeholderism operates in Internet policy-making processes and what are the effects of this operation in governance and regulatory instruments. The thesis focuses on and unpacks the elements and interactions that constitute and support the operation of multistakeholderism in Internet policy-making in Brazil. It looks at key governance structures, practices and processes analysing policy-making processes operated under a multistakeholder perspective to identify and explain the underlying elements, rationale and effects of this innovative policy-making approach.

To investigate in depth what elements and configurations underpin the operation of multistakeholderism in Internet policy-making, the thesis explores, under a case study perspective, three governance practices where the operation of multistakeholderism was developed in the Brazilian Internet governance context. The first governance practice investigates and unpacks the elements and dynamics orientating Internet policy-making in a multistakeholder governance actor, the Comitê Gestor da Internet no Brasil – CGI.br (The Brazilian Internet Steering Committee) and in a non multistakeholder agent, the Agência Nacional de Telecomunicações – ANATEL (National Telecommunication Agency). The second governance practice examines how these two actors (CGI.br and ANATEL) engaged in the regulation of network neutrality in the drafting process of the Marco Civil da Internet, a regulatory instrument establishing principles, guarantees, rights and obligations for the use of Internet in Brazil. It interrogates how multistakeholderism operates in one specific and very sensitive regulation-making practice like the regulation of network neutrality in the Marco Civil da Internet and exposes in more details the effects of this operation on the development of governance structures and regulatory instruments. The third site looks to the operation of multistakeholderism in the Global Multistakeholder Meeting on the Future of Internet Governance – NETmundial. It observes multistakeholderism policy-making operational rationale in

an international scenario influenced by the need to develop a soft-law regulatory instrument and the behaviour of stakeholders with different cultural, economic and legal values.

Borrowing ideas and findings from socio-legal studies on governance and on Internet governance and applying a multi-dimensional policy-making approach, the thesis analyses these three governance practices and identifies that the operational rationale supporting multistakeholderism policy-making is based on mechanisms combining and balancing three interconnected elements: inclusion, expertise and consensus. The thesis also suggests that this policy-making mechanism is heavily influenced by a consensual orientation rationale able to mediate the contrasting tensions between inclusion and expertise at the same time that it stimulates policy cross-fertilisation and governance innovation. Unpacking these observations and findings, the thesis proposes the term 'multistakeholderism generativity' in order to illustrate its suggestion that multistakeholderism, when operated under optimal conditions, instrumentalise policy-making practices to support more innovative and legitimate governance and regulatory processes.

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Sincerely,

João Araújo Monteiro Neto

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INTRODUCTION

INTRODUCTION

This thesis examines how multistakeholderism affects Internet governance structures and regulatory outputs. In order to do so it provides an in-depth analysis of three different elements of a well-established multistakeholder governance system. This introduction presents the methodological and theoretical elements framing the present investigation. It examines the methodological elements grounding the research design and its adopted case study approach, pointing out in particular the criteria guiding the case study design, its selection rationality, the internal units investigated, the elements supporting data collection and analysis, and the mechanisms used to validate the research process. The present introduction also presents a review of the literature used to identify shadows and gaps in the Internet governance scholarship and the theoretical framework used to recognize, interpret and validate the research process and findings.

The methodological and theoretical elements supporting the research design and operation play a central role in the development of the theoretical contributions proposed in this thesis. The decisions to conduct a case study and to use socio-legal analysis to shed light on research questions that investigate multi-layered phenomena involving Internet governance, science and technology studies, and law is not common and must be rooted in solid methodological and theoretical bases. The chapter is divided into three sections. The first part presents the conceptual elements informing the methodological design and the research rationality. In particular, it presents the guiding rationality supporting the case study mode selection process, the sampling operation, the significance of the case under investigation, the instruments and techniques used to gather and analyse data, and the assurance practices adopted

to provide internal and external validity to the research. The second section presents the theoretical elements used to frame the research operation, setting out the lenses used to identify shadows and gaps in the literature, to frame the research questions and to analyse the evidence gathered during the investigation. Finally, the last section explores aspects concerning the research findings, particularly the extent to which they can be generalized and the limitations of the theoretical framework used to conduct the research.

I. Research design: Methodological elements and case study rationality

Structuring the research design is one of the most challenging stages of doing research. It is a key element guiding knowledge production and supporting its scientific characteristics. It is a rational process that must take into account not only the strengths of the methodological path selected, but also recognise its limitations and the influence that it will have on the research process and outcomes. This section presents the rationality guiding the methodological decisions shaping the research design. This is an important element of the thesis as the first subsection presents the elements grounding the adoption of a case study approach, the interplay between the case study modes during the evolution of the research and the criteria guiding the case selection. The second subsection considers the logic guiding the case investigation, indicating the internal units analysed, the nature of the data collected, how the evidence was analysed and the mechanisms used to guarantee the internal and external validity of the research and generalisation aspects.

A. Research design and case study justification

As noted above this thesis examines the operation and the influence of multistakeholderism on Internet governance. It analyses one particularly national Internet governance system, the Brazilian Internet governance system, where

multistakeholder structures and practices are representative and well developed, and aims to answer the following research questions:

- **Main research question**: How does multistakeholderism operate in the Brazilian Internet governance system?
- **Main research question:** How has the operation of multistakeholderism influenced Brazilian Internet governance structures and their regulatory activity?
- **Secondary Research question:** To what extent is it possible to identify ambiguities in the operation of multistakeholderism in the Brazilian Internet governance system?
- **Secondary research question:** What are the limitations and potentialities of multistakeholderism in the Brazilian Internet governance system?

Following the rationality offered by Yin (2014), Bryman (2012) and Swanborn (2012), this research has its design guided by two central factors: a) the nature of the research questions; b) the characteristics of the phenomenon under investigation. The need to look in depth at a spatially and temporally delimited contemporary phenomenon of theoretical significance (Gerring, 2017, 27) indicates strongly the use of a case study research design (Yin, 2014; Ridder, 2017). Conceptualised as an "intensive study of a single case or a small number of cases which draws on observational data and promises to shed light on a larger population of cases" (Gerring, 2017, 28), or an "empirical enquiry that investigates a contemporary phenomenon (the "case") in depth and within its real-world context" (Yin, 2014, 16), the case study method provides an adequate methodological frame through which to investigate the object of this research. The case study offers a more fine-grained approach to research and the understanding of the operation and effects of multistakeholderism in national Internet governance systems.

Despite using a solid and reliable criterion to justify the research design, the researcher recognises that the case study approach, although methodologically compatible with the research to be developed, has some limitations (Bryman, 2012; Yin, 2014; Gerring, 2017). A significative segment of methodology scholarship criticise

the case study method as lacking mechanisms to guarantee its constructive (Yin, 2014), internal and external validity (Gering, 2017; Bryman, 2012) and question its capacity to produce generalisable developments (Yin, 2014, 20). Despite these recognised limitations, the case study approach provides a unique mechanism to investigate, in depth and with access to a wide range of evidence, a particular phenomenon with theoretical relevance. It also enables the research process to search for explanations about one particular case and at the same time generate findings that could shed light on a larger dimension of the phenomenon studied (Gerring, 2017, 30).

The selection of the case study methodology entails the need to set a series of secondary design elements: a) the mode used to undertake the case study; b) the elements informing the case(s) selection; c) the sampling/selection criteria; and d) the internal research rationality indicating the units of analysis. The first of these elements indicates the mode in which the "detailed and intensive" (Bryman, 2012, 66) investigation will be developed. The methodology scholarship (Yin, 2014; Bryman, 2012; Gerring, 2017) offers different typologies of cases study modes. The present research adopts the classification proposed by Gerring (2017, 40) to whom the case study research can be developed under the causal (exploratory, estimating and diagnostic) or descriptive mode. It is important to note that while the research questions guide the initial selection of the case mode type, the research development also provides important guidance to this process. The selection of the case study mode used in this research was the result of an evolving process that took into account and merged the research early design arrangements, its intermediary findings and the analysis thereof (Gerring 2017).

The research started by using a descriptive-typical case study mode aiming primarily to recognise multistakeholderism's operational mechanisms in a national Internet governance system. During the research progress some findings and theoretical developments influencing the research questions and research rationality shaping process indicated the need to change the case mode and pointed to the adoption of a causal-exploratory mode (Gerring, 2017, 65). This is not an uncommon development in case study research. Collier & Sambanis (2005a; 2005b) noted that this interplay leading to constant tuning and reshaping is one key characteristic of the case

study research methodology. It creates a fluid space particularly fruitful to hypothesis and theory generation. This process is exemplified by Collier and Sambanis (2005a, 27), who point out that: "our approach changed somewhat over time as we moved away from the idea of using cases to test the theory toward the idea of using the cases to develop theory and explore their issues such as mechanisms, sequences, measurement, and unit homogeneity". Following this rationality, the final case study mode used in the research adopted an explanatory (Gerring, 2017), representative (Yin, 2014), and exemplifying (Bryman, 2012) mode as its final objective is to investigate and explain the operation of multistakeholderism in national Internet governance settings and proposed theoretical concepts that could be used to shed light on this phenomenon.

As a result of these reflections and interactions between the research process and findings and considering the need to examine important socio-legal processes (Bryman, 2012, 70) the research design was adjusted to adopt the conceptual and exploratory case mode based on a representative case selection strategy[1]. This change directly led the sampling process to consider the representativeness or exemplifying perspective of the case to the phenomenon under investigation. The case should have the ability to provide not only a locus where multistakeholderism operates and produces regulatory outcomes, but also have active non-multistakeholder governance structures, practices and regulatory outcomes in order provide an observational space where these two contrasting governance rationalities operate. Finally, using the research questions and the initial research design as guiding instruments the research project crafted a list of criteria to orientate the case study selection pool and the sampling process. The case selected should: a) be a national Internet governance system centred on multistakeholderism with national and international recognition; b) have governance structures and practices based and non-based on multistakeholderism; c) have expertise applying multistakeholder practices to Internet governance and regulation; d) demonstrate the existence of regulatory

[1] Using Yin (2014) cases study modes typology Bryman (2012) suggests five types of cases modes: a) critical case; b) extreme or unique case; c) representative or typical case; d) revelatory case; and e) longitudinal case.

outcomes resulting from the operation of multistakeholderism. These criteria were also balanced by the influential omnibus of elements selected by Gerring (2017, 41): a) the case intrinsic importance; b) the case independence; c) the within-case evidence availability; d) the case representativeness; and logistics factors.

From a limited population[2] fulfilling the criteria - and it is important to note the lack of research and scholarship focusing on national Internet governance system -, the researcher chose to analyse the Brazilian Internet governance system. Recognized by scholars engaged in Internet governance research (Drake & Price, 2014a; Drake & Price, 2014b; Price, 2014; Wagner and Mueller, 2014; Lerman, 2015; Trinkunas & Wallace, 2015) as one of the most developed Internet governance system (case representativeness and intrinsic importance), the Brazilian system has implemented and embodied multistakeholderism in its governance operations since 1995. Moreover, the Internet Steering Committee – CGI.br, the Marco Civil da Internet (Brazilian Internet user's right and obligations Law) and the NETmundial meeting (Global Multistakeholder Meeting on the Future of Internet governance), despite being completely ignored by Brazilian scholars (Anastacio, 2015), are internationally celebrated multistakeholder practices that are able to provide observational units to investigate the operation of multistakeholderism in national Internet governance systems (with-in case evidence).

It is also important to note that Brazil's governance system consists of three different actors including two that do not operate under multistakeholderism rationality (National Telecommunication Agency – ANATEL and the Brazilian Network Information Center – NIC.br, a regulatory body and a private non-profit company, respectively). This secondary characteristic provides important opportunities to observe, gather evidence and compare the operation of governance in multistakeholder and non-multistakeholder settings and the interplay between the opposing governance modes. Beyond the opportunity to investigate and analyse rival explanations, the Brazilian system also has, from a logistics, within-evidence and longitudinal perspective, some important features. It has showcased a well-documented and accessible group of practices, arrangements and operations covering

[2]The pre-listed countries included: Argentina, Brazil, Colombia, Costa Rica, Mexico and United States

the governance of the Internet during the last 15 years. It also has made a wide range of observations as it provides the opportunity to investigate the operation of multistakeholderism in three different perspectives: in national governance structures; in the national regulatory framework; and in the international governance ecosystem, as the country pushed forward a set of policy initiatives to promote multistakeholderism internationally.

Although the general structure of the research process is designed and aligned with the research questions, it is also important to clarify the rationality guiding the internal case study framework and to consider how the research process will embed key instruments and practices to minimise the limitations and criticisms normally associated with case study research, particularly those related to internal and external validity and the capacity to produce generalising findings. The next subsection presents all these elements and also points to the assurance mechanisms and strategies adopted by the researcher to enhance the "quality of the research design" (Yin, 2014, 45).

B. Case study internal rationality

The Brazilian Internet governance system will be investigated using an embedded design rationality (Yin, 2014, 50). The case is divided into two units of analysis each focusing on one main research question guiding the investigation, which are explored in different chapters of the present thesis. The first unit of analysis examines the operation of multistakeholderism in the Brazilian governance system. The evidence and its analysis will take into account the development of the governance structure, particularly the role played by multistakeholderism on the design and operation of governance structures like the CGI.br, NIC.br and ANATEL. The second unit of analysis focuses on the system's regulatory production, focusing particularly on the operation of multistakeholderism during three regulatory initiatives: the drafting and enactment of CGI.br principles for the governance and use of the Internet in Brazil (Resolution CGI.br 2009/003/P); the drafting process of the Marco Civil da Internet (Federal Law n. 12.965/14) and the Netmundial Statement and its drafting process.

The analysis of both units will follow a set of criteria adapted from the literature on Internet governance and global governance (Take, 2012; Mena & Palazzo, 2012) that provides an instrumental capacity to map and assess the operation and influence of multistakeholderism in different governance spaces and layers (structures and regulation-making processes). The investigation of the operation of multistakeholderism in governance structures focuses on its: a) composition; b) representativeness; c) policy-making process; and d) legitimacy). In a second dimension, the regulatory instruments are assessed according to their: a) internal and external legitimacy, particularly on the drafting process of the MCI dealing with governance institutionalisation, network neutrality, and privacy protection. Finally, when evaluating the effects of the operation of multistakeholderism on the international activities of the governance system the research observes: a) the level of regulatory entrepreneurship; b) policies supported by international governance settings (WSIS/IGF and ITU. All these elements are important not only to provide evidence grounding theoretical developments but also to mitigate criticism and reinforce the research process outcomes (Yin, 2014).

The adoption of an embedded single case study means that all units of analysis will be "decomposed" (Gerring, 2017) and the source of critical information supporting the arguments and theoretical elements developed on the case level. Considering that "a key characteristic of case study research is the intermingling of case selection and case analysis" (Gerring, 2017, 137), the research questions guiding the investigation of the operation of multistakeholderism in the Brazilian Internet governance system will be conducted mainly through the study of legal and non-legal documents (reports, policies, laws, guidelines, standards, normative instruments, regulations, treaties, conventions, speeches, meetings minutes and interviews publicised in any media platform (audios, videos, blogs or newspaper) that were produced by any actor/stakeholder participating directly or indirectly in the Internet governance process in Brazil.

Despite its longitudinal and within-case range the qualitative nature of the evidence produced by a case study, particularly a single case study, constantly raises methodological criticism regarding the unscientific nature of its processes and

outcomes (Yin, 2014; Bryman, 2012; Gerring, 2017). Aiming to minimise these negative impacts the research design adopted different rules (Gerring, 2017) and tactics[3] (Yin, 2014) to address both the validity (construct, internal and external) and reliability of the qualitative aspect of the research. Following Gerring's indications of best practices in qualitative research, a set of practices were adopted to assure the quality of evidence collection and data analysis. Firstly, the operation of multistakeholderism in the Brazilian governance system was based on the use of multiple sources. Adopting a broader perspective than the one normally embodied in the idea of triangulation, which is largely discussed in the case study scholarship (Yin, 2014; Bryman, 2012), the research process used Gerring's framework of multiple sources (2017, 170-176) analysing them under the following rationality:

> Relevance: The source speaks to the question of theoretical interest.
>
> Proximity: The source is in a position to know what you want to know. It is close to action.
>
> Authenticity: The source is not fake or doctored, or under the influence of someone else.
>
> Validity: The source is not biased. Or it is biased in ways that (a) are readily apparent and therefore can be taken into account or (b) do not affect the theoretical question of interest.
>
> Diversity: Collectively, the chosen sources exemplify a diversity of viewpoints, interests, and/or data collection methods, allowing one to triangulate across sources that may conflict with one another (Gerring, 2017, 172).

With a view to strengthening the consistency and reliability of its outcomes, the research supplemented the case study techniques outlined above, the research process with theoretical identification practices (Yin, 2014, 45; Gerring 2017, 177) and process tracing strategies (Gerring, 2017; Bennett & Checkel, 2014). To this extent the research proposes an original theoretical framework exploring factors that are either neglected

[3] Yin (2014, 45) proposes a four-layered approach to assess the quality of case study research. He combines elements testing the case study construct, internal and external validity, as well the case reliability.

or poorly understood (Gerring, 2017, 177) by different bodies of literature informing Internet governance scholarship. The formulation of concepts like *multistakeholderism's generativity* is important as these theoretical developments shed light on investigations about the operation of multistakeholderism on Internet governance multistakeholderism limitations, potentialities and regulatory effects. It also creates a conceptual mechanism able to connect, in an interdisciplinary perspective, different bodies of literature concerned with the governance and regulation of the Internet, with particular regard to: Internet governance scholarship, law and regulation scholarship and information technology law scholarship.

Finally, under the process tracing rationality, the investigation used chronologies, timeframes and diagrams to "clarify temporal and causal interrelationships" (Gerring, 2017, 191) related to how multistakeholderism operates in Internet governance settings and its effects on governance structures and regulatory outcomes. The blending of these techniques is particularly useful in case studies like the one developed in this thesis where the phenomena under investigation are produced in different loci (e.g. governance structures or policy-making processes) and timeframes (e.g. multistakeholder institutionalisation in Brazil can be traced to 1995 and can be categorised in three different waves).

It is also important to note that as discussed previously another important design point to be addressed in case study research is its validity (Yin, 2014; Bryman, 2012; Gerring, 2017; Swanborn, 2012). Using Yin's (2014) and Swanborn's (2012, 36) validity typology the research followed a set of strategies to reinforce its construct, internal and external validity. The construct validity is assessed by the level of interconnection and efficiency of the instruments used to "measure the concepts being studied" (Yin, 2014, 46). The research must delimitate clearly not only the key concepts being investigated but must also set and calibrate instruments to evaluate them. It should, to enable a good level of construct validity, "identify operational measures that match the concepts" (Yin, 2014, 46) under investigation.

The present research, following the strategies developed by Yin (2014) and Gerring (2017) bases its construct validity on two different grounds. Firstly, it applied conceptualisation efforts to clarify the phenomenon being investigated: the operation

of multistakeholderism on Internet governance. Secondly it framed a research design promoting the in-depth investigation of units of observation operating either under multistakeholder rationality or under non-multistakeholder governance rationalities. The observation of governance structures (composition, representativeness, policy-making processes and legitimacy), regulatory instruments (internal legitimacy and external legitimacy) and international agency (regulatory entrepreneurship and impact on the international policy-making agenda) provided reliable sources of evidence on the phenomenon investigated and other related matters.

The internal validity is a key component of explanatory case study investigations, particularly when the research during its development builds causal relations models (Yin, 2014, 47). This is particularly relevant to this research format because of the predominance of qualitative research carried out in case study projects. In a broader sense, as pointed by Yin (2014, 47), the lack of internal validity is connected with the researcher's need to make inferences:

> Basically, a case study involves an inference every time an event cannot be directly be observed. An investigator will 'infer' that a particular event resulted from some earlier occurrence base in interview and document evidence collected as part of the case study.

In order to address the criticisms to the internal validity of case study research the methodology scholarship, including Yin (2014), Bryman (2012) Gerring (2017) and (Gerring & McDermott (2007) suggest to reinforce the analysis of case study evidence using two different techniques: a) adopting an explanation-building rationality (particularly on its hypothesis generating mode) and b) using logical models to present the research process and findings. Explanation building is based on the stipulation of "a presumed set of causal links about it, or 'how' or 'why'" some phenomenon occurred (Yin, 2014, 146). This process is normally developed around the following cycle:

- Making an initial theoretical statement or an initial explanatory proposition;
- Comparing the findings of an initial case against such a statement or proposition;

- Revising the statement or proposition;
- Comparing other details of the case against the revision (Yin, 2014, 149)".

Aiming to explain the operational rationality of multistakeholderism on national Internet governance systems and to identify possible effects of this process on governance outcomes, the present research has its starting point at the establishment of theoretical-explanatory propositions that are confronted with the case study findings. The theoretical concepts of multistakeholderism's operational ambiguity and regulatory generativity will be the central elements guiding the investigation and assisting the explanatory model that supports the research's internal validity. This process will also be reinforced by the "matching of empirically observed events to theoretically predicted events" (Yin, 2014, 155), which has been termed by methodology scholarship as "logic modelling". This means that each exploratory and explanatory process or theoretical proposition will be mapped and presented in models stipulating in detail all the elements and operations occurring during the observed period (Yin, 2014, 155). Using the dynamic noted above the research will be able to identify and explore theoretically the existence of possible relations between the events and operations observed. The combination of these two analytical instruments will reinforce the internal validity of the research and contribute towards strengthening its external validity.

Notably one of the most criticised characteristics of the case study research is its external validity or "generalisability. The capacity to expand or generalise its research findings to other similar spheres or populations (Swanborn, 2012, 36) is one key concern to all research designs (Yin, 2014; Gerring, 2017), although, as noted by Yin (2014), the nature of the cases study research made it more prone to concerns about its capacity to produce results able to be generalised. Recognising in the early stages of the research this limitation is crucial to adopt measures to strengthen the external validity of the case study research (Yin, 2014, 48). One important element guiding the strengthening of the case study generalisation capacity is the design of the research question(s) (Yin, 2014). The research question format has particular influence over to important factors guiding the research external validity. It frames the theoretical

elements establishing the "scope conditions" (Gerring, 2017, 228) that set which parts of the research are concerned only with the case under investigation and which ones "are intended to apply to a broader set of cases" (Gerring, 2017, 228) and can be used to produce generalizable research outputs.

The framing of the extent to which the research can be generalised will be clearly discussed and established during this thesis and is a key factor embedded in the research design. As will be further explored during the last chapter, evidence-based findings like regulatory entrepreneurship and the development of theoretical concepts like multistakeholderism's operational ambiguity will be clearly signalled either as in-case findings to be interpreted only in reference to the particular case or as generalising elements that could be used to explain phenomena outside the domain of the case studied. All these elements not only ensure the robustness of the research process but also support the frames used to review the literature informing the research, which will be presented in the next section.

II. Theoretical framework and literature review: Identifying lenses, and gaps

The study of Internet governance, despite recent interdisciplinary developments, is in large part led by traditional legal scholarship. The present research deviates from this dominant path and promotes a socio-legal approach to connect different sets of academic literatures. Blending Internet studies, including those guided under science and technology perspectives, global governance and regulation studies, and legal scholarship (information technology law), the present thesis uses a different set of lenses to identify and investigate a set of gaps concerning the under-researched socio-legal aspects of the operation of multistakeholderism in Internet governance. Going one step further, it also proposes theoretical instruments aiming to provide a conceptual understanding of the operation multistakeholderism in Internet governance multistakeholderism's operation its limitations and potentialities.

The current section is formed of two main parts: the first one indicates the theoretical elements guiding and framing the research development. It presents the

lenses used to illuminate the shadows and investigate the gaps identified during the research process, particularly focusing on the use of non-traditional mechanisms adopted by legal scholarship to investigate aspects of national Internet governance systems. The second subsection presents the main gaps and questions raised during the literature review guiding the research. It identifies the lack of studies concerning national Internet governance systems since the majority of the existing research concentrates its focus on international or global governance structures, institutions and practices. The review also indicates the absence of evidence-based research explaining the operation and effects of multistakeholderism on Internet governance policy making as the majority of the existing studies focus rather on aspects related to legitimacy, transparency and accountability. Finally, the literature review indicates the predominance of investigations based on traditional legal approaches and shows that the predominant traditional legal approach was not able to unpack the diffused legal implications of an interdisciplinary, techno-scientific and transnational phenomenon like the Internet and suggests the opportunity to use an alternative socio-legal approach to investigate legal aspects of Internet governance.

A. Theoretical framework: setting the lenses

This subsection presents the major theoretical elements framing the research process. It indicates the conceptual elements and theories used to investigate and make sense of the operation of multistakeholderism in Internet governance settings and its effects on governance and regulatory outcomes. The legal analysis of this research, because it intends to explore the legal operation of multistakeholderism and its effects on legal phenomena, does not use a traditional doctrinal approach. It relies on two non-traditional sets of legal scholarship, using a socio-legal approach, based on Internet governance studies, governance and regulations studies, and science and technology studies, to ground its data analyses. The first subsection presents the elements of Internet governance, and governance and regulation scholarship, setting out the theoretical instruments and concepts used to investigate the research questions and to analyse the data collected from the case study. The second part presents the socio-legal instruments and mechanisms used during the research, which indicates certain

aspects supporting the research's socio-legal approach. This section explores the positive and negative consequences of using a socio-legal framing to investigate a complex space where opposing binaries rationalities (Landauer, 2016) like, for example, privacy and security-surveillance have to be coordinated.

A.1 Internet governance and regulation theories

The objective of this research is to contribute critically to an under researched dimension of Internet governance and regulation scholarship. Most studies on Internet governance produced by legal scholars focus on topics related to the rule of law (law enforcement, jurisdiction, etc.) or the protection and promotion of human rights (freedom of expression or privacy) on the Internet. There is little legal research questioning or even analysing the legal development of Internet governance particularly its operation, and in how the adoption of certain policy and norm-making practices influence the production of legal and regulatory outcomes. The research also proposes concepts and theoretical elements to investigate limitations and potentialities of multistakeholderism in Internet governance. Drawing insights from the interplay between Internet governance and regulatory theory the research identifies and explores theoretically the concept of regulatory generativity, particularly on governance spaces adopting multistakeholderism as its grounding policy and norm-making rationality.

Using tools and conceptual approaches from Internet governance scholarship the research aims to: a) explore the legal implications of the operation of multistakeholderism; b) uncover the roles of law on multistakeholderism embodiment in the governance system and; c) assess the effects of the operation of multistakeholderism on traditional and non-tradition legal governance/regulatory outcomes, and in particular its influence on less investigated areas like the drafting process of legal documents.

In this scenario conceptual and theoretical developments from Internet governance studies provide alternative instruments to illuminate some of the blind spots around the legal perspective of the operation of multistakeholderism. Hofmann

et al.'s (2016) concept of governance based on reflexive coordination and the established notion that Internet governance is constructed through a combination of social networks and practices of ongoing coordination and collaboration and formal structures (Mathew, 2016; Hofmann et al., 2016; Muller, 2010; van Eeten & Mueller, 2013; Pohle, 2016; Pohle et al., 2016) is instrumental in outlining the operation of multistakeholderism. It presents the elements supporting the development of multistakeholderism in governance structures and policy-making processes, which include not only the ways governance institutions are organised but also how legal instruments like regulations are created. Internet governance studies focusing on multistakeholderism development point out a set of conceptual elements, particularly multistakeholderism governmentality and multistakeholderism performativity that are central to highlight the rationalities guiding the operation of multistakeholderism in Internet governance systems. They are core theoretical tools not only to observe and make sense of the legal phenomena being investigated, but also to support the theoretical contributions that will be presented later on in this thesis.

The theoretical elements gathered from Internet governance and regulation studies despite being used for "pure" legal investigations play a central role in the present research. They will provide a fresh and innovative approach to investigate the legal aspects of the operation of multistakeholderism. These conceptual elements when connected with the "non-traditional" qualitative data provided by the case study approach will not only contribute to the strengthening of the research design but will also support its socio-legal approach.

A.2 Socio-legal approach to Internet governance and regulation

The second element of the theoretical framework guiding the research process is the use of a socio-legal approach. The research relies on two major socio-legal instruments to support the investigation of the operation of multistakeholderism in Internet governance. The first one is related to data sources and the second one entails the mechanisms used to observe and analyse the legal phenomenon researched. Moving away from traditional legal research and its doctrinal rationality that "focused exclusively on traditional legal materials and techniques" (Cownie & Bradney, 2013,

34), what has been recognised by Thornton (1998, 376) as the technocentric approach to legal research, the present investigation uses different and non-traditional sources of evidence and an alternative set of lenses through which to investigate and analyse the operation of multistakeholderism on Internet governance settings.

While it is difficult to establish a clear definition of socio-legal studies, as it encompasses a variety of research practices and approaches that occur within boundaries that are not "well-defined" (Cownie & Bradney, 2013, 35), the general agreement is reflected in the observation that "the word socio in socio legal studies means to us an interface with a context within which law exists, be that a sociological, historical, economic, geographical or other context" (Wheeller & Thomas, 2000, 271). Using this approach, the research investigates and analyses the operation of multistakeholderism on the Brazilian Internet governance system not only taking into account legal elements, but also looking carefully at political and economic elements supporting the operation and the influence of the operation of multistakeholderism in the case under review. It does so by observing law and legal processes not only within a singular and self-existing realm, but primarily as a social phenomenon (ESRC, 1994, 1).

The research also uses a set of conceptual instruments and theoretical elements developed by scholars studying Internet governance through socio-legal perspectives (Pohle, 2016; Epstein et al., 2016; Musiani, 2015; DeNardis & Musiani, 2016). This implicates the use of a different conceptual framework (Epstein et al., 2016, 5), particularly when confronted with traditional legal research. This background sets two important concepts that are used during the entire research analysis. It understands Internet governance as a set of different systems that interconnect and interrelate in various complex ways (Epstein et al., 2016). It also recognises that Internet governance "takes shape through a myriad of infrastructures, devices, data fluxes and technical architectures that are often discrete and invisible, yet nevertheless crucial" (Epstein et al., 2016, 6). These theoretical concepts set the frame used to observe and analyse the researched legal phenomena through non-traditional perspectives, but in a way that is useful to the purposes of this project. They provide an alternative approach to observe and explore the operation of multistakeholderism.

This theoretical framework despite being tuned and developed during the research process was applied from the early stages of the research. It was this set of theoretical lenses that informed and guided the design of the research project and also the identification of the gaps in the revised scholarship.

B. Literature review: identifying shadows and gaps

Academic interest in Internet governance and related legal aspects has occurred only recently. Although relevant legal scholarship could be traced back to the mid-90s and early 2000s[4] it was more concerned with topical developments of information technology law, such as intellectual property and cybercrimes, rather than with governance and policy making. The development of Internet governance studies, despite being dominated by legal scholars (Denardis, 2014), is notably influenced by a series of techno-political developments (Kurbalija, 2016) that could be embodied, as pointed by Mueller (2010, 10) in the creation of ICANN and the WSIS process:

> Two landmarks stand out in the evolution of Internet governance as a focal point of international political contention. One was the creation of ICANN in 1998. ICANN arose from a unilateral construction of a global regime by the United States, and was based on a new, nongovernmental model. The other was the United Nations' World Summit on the Information Society (WSIS) — an emphatically multilateral, state-centric series of diplomatic conferences held from 2002 to 2005 that attempted to "address the whole range of relevant issues related to the information society (UN Resolution 56/183, 2001).

It was only after these key structural and institutionalising steps that academic interest shifted from discussing topical legal questions to a broader academic interest encompassing elements of governance and regulation. At this point, scholars started to debate not only the governance institutionalisation process and its related elements,

[44] For example: Cyberspace and the Law of the Horse, Easterbrook, 1996; CODE, Lessig, 1999; Old Crimes in New Bottles: Sanctioning Cybercrime, 2000, O'Neill)

but also to interrogate regulatory mechanisms and legal structures (Mueller, 2012; Drake, 2011; Malcolm, 2008). In fact, DeNardis (2012, 721) pointed out that:

> Internet governance scholarship and policy have generally focused attention on three areas: the role of sovereign nation states and the rule of law in governing the Internet; the role of the United Nations Internet governance Forum; and specific functions of traditional Internet governance institutions such as the Internet Corporation for Assigned Names and Numbers (ICANN), standards-setting organizations, and regional Internet registries (RIRs). These subjects, whether examined through the lens of political science, legal jurisprudence, or market economics, focus primarily on institutions and their role in establishing public policy.

Locating this thesis within the wider Internet governance scholarship, the present sub-section explains these approaches in more detail. It initially reviews general elements grounding legal scholarship focused on Internet governance and regulation pointing to its core theoretical elements as contested areas. Secondly, the subsection explores the literature about multistakeholderism concerning Internet governance and interrogates the legalities of this operation. The final subsection identifies the gaps found in the body of knowledge supporting the research. In particular, it indicates the need to subject Internet governance research to socio-legal instruments and tools; the lack of studies about the operation of multistakeholderism in national Internet governance settings; and the need to understand the effects of the operation of multistakeholderism on Internet governance policy-making processes and outcomes.

B.1 Legal scholarship on Internet governance and regulation

Internet governance is one of the key topics on the global agenda. Influenced by social economic and technological aspects its transnational and multi-layered structure is responsible for designing and implementing policies that can at the same time enhance the creation of innovative life changing technologies or the promotion of

practices violating freedoms and rights. These contrasting aspects reflected in the day-to-day operation of the Internet were also extremely influential during the early stages of the process leading to the institutionalising of its governance structures. The initial technological set of values and principles used to coin early governance arrangements is, now, blended with economic, political and cultural elements that in the absence of an "overarching political authority" (Rosenau & Czempiel 1992) "takes place in a vortex of many acronymic entities" (Price, 2014, 4) that are coordinated and regulated by independent structures and actors. As pointed out by Mueller (2010, 10): "Internet governance is the simplest, most direct, and inclusive label for the ongoing set of disputes and deliberations over how the Internet is coordinated, managed, and shaped to reflect policies". This conflictual approach is also noticed in DeNardis's *The Global War for Internet governance* (2014) and Monroe who not only compared Internet governance to a quasi-Olympic sport (Price, 2014b, 130), but also indicated that:

> (…) there are the significant debates over the actual content and substance of internet policy, tooth and nail questions of how restrictive or how unencumbered the internet should and must be. These include, as well, internet infrastructural issues. Pervasive, too, is the discourse over core internet values, issues of access, net neutrality, freedom of expression online, and others. Churning alongside these substantive debates is the highly consequential and encompassing discussion of how the institutions of internet policy formation should themselves be structured: Who are the participants, and how should weight be distributed among them? How and where are decisions made and how do conclusions from these debates gain the ability to move from idea to adoption? How do we work towards consensus, for example, if consensus is the standard? (2014, 4)

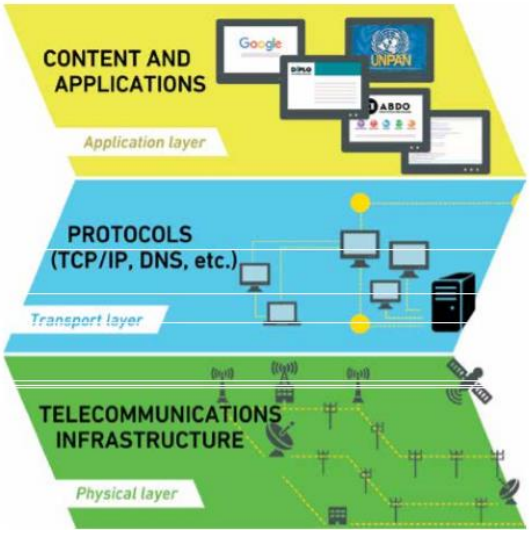
Reflecting over the nature of Internet governance, Madeline Carr notes that like other "large-scale systems like the environment or global finance, Internet governance is not a single, unitary function or practice. Rather, it is a complex matrix of technical standard setting, resource allocation and legal arrangements" (2015, 645), coordinating the use and development of the Internet. The range of the debates held

under the scope of Internet governance reflects not only the social and economic perspectives of its development, but is also influenced by the technological principles underlying its growth. The interweaving of technological and socio-economic normative principles gave rise to a set of techno-regulatory elements that ground the network of technical and social governance (Braman, 2010; DeNardis, 2014; Carr, 2015). As pointed by DeNardis (2014, 8):

> Internet governance decisions involve both scientific reasoning and social considerations of power and authority. For example, the design of the Internet address space (the collection of all available Internet addresses) and the domain name space specified a technical requirement for each name and number to be globally unique. Whereas this requirement for global uniqueness has necessitated forms of centralized coordination, control of names and numbers has been a fundamental global struggle of Internet governance since 1990´s.

The network technical development was an important element impacting the network governance design. It created a group of architectural principles that would guide not only the technical development and operation of the network, but also its governance Investigating elements influencing the network development Ziewitz & Brown (2013) listed a group of technical principles that also shaped the development of governance practices and structures: the techno governance elements of openness, interoperability, redundancy an end-to-end. The first two impact more directly Internet governance and its regulatory development. Meanwhile, openness, for example, as noted by Ziewitz & Brown (2013, 15) "has come to denote the absence of centralized points of control - a feature that is assumed to make it easy for new users to join and new uses to unfold". It is deeply connected to the rise of the open culture associated with Internet policy-making and the open Internet policies, coalitions, initiatives or structures being rooted in early technical movements like open software and open standards. It became an element that represented a technical and governance approach committed to concepts of distributed authority and democratic participation that are so close to the way that the Internet governance ecosystems were structured and are operated.

The Internet's multi-layered structure implicates the existence of three interconnected layers (the physical layer - telecommunication infrastructure; the transport layer – standards and protocols; and the application layer - content). Figure 1 illustrates a set of distributed governance and regulatory regimes that need to be highly coordinated to avoid disruptions or harm to its normal development and use. The decision, for example, to implement a new transport protocol can contribute to reducing the costs of infrastructure use but also to the violation of digital rights such as those regarding privacy.



(Fig. 01)

One clear example of this techno-legal normative interpenetration process and also of the power relations involved in Internet governance policy making can be observed in the discussions about the regulation of network neutrality. Envisaged as a technical element grounded in Internet design, its socio-economic implications are so extensive that they assume a techno-regulatory rationality. It is able to shape not only the ways in which the Internet evolves but also its economic and social nature. One of the central topics of the current Internet governance agenda is network neutrality. In a general definition, network neutrality is the guarantee that data packages transiting through the Internet will be treated in an isonomic way not being discriminated or degraded. Legislation is the United States restricts the "ability of broadband ISPs, insofar as they provide "Internet access service," to treat IP packets differently on the basis of their content or to charge content providers for transmitting those packets to the ISPs" (Nuechterlein & Weiser, 2013, 188). In a more legally

developed approach it is defined in the Brazilian governance framework as the obligation that "the party responsible for the transmission, switching or routing has the duty to process, on an equal basis, any data packages, regardless of content, origin and destination, service, terminal or application"[5] (Brasil, Lei Federal 12.965/2014).

In practice, network neutrality means that an Internet service provider (ISP) like SKY broadband must not filter or deteriorate the data packages transmitted by and for its customers nor could it charge its customers a different rate because they are using streaming services like Netflix or Amazon TV. It is important to note that the rationality supporting the network neutrality and the need to protect the data packages flow in the network from unjustified and unfair filtering or deterioration is an important element promoting not only privacy, but also innovation (Zittrain, 2008).

Assuming that the network will not discriminate data traffic and that all data packages will be transported under the same conditions not suffering any technical deterioration or economic discrimination being for example delayed or overcharged, developers and innovators can develop experimental applications and services without being technically or financially limited. This is a key element supporting the high level of innovation and usability of the Internet and its associated applications (Wu, 2003; Lessig, 2001; Van Schewick, 2007; Frischmann & Van Schewick, 2017). The equal treatment of data packages in the Internet promoted by the respect to the network neutrality supported the development of applications offering innovative services of voice over IP (Skype), instant messaging (WhatsApp) and video streaming (Netflix, Amazon TV and YouTube TV). The network neutrality also shapes directly the economic use of the network as ISPs could not charge more for customers using online services and accessing content that demands more data routing, switching and processing by the ISP. It also reinforces in a technical-normative way the protection of privacy, as if the ISP can filter or deteriorate data package traffic, it will have to inspect the data package and at least will have access to metadata that could provide access to users' sensitive information like location and destination of the data package, which could, for instance, expose certain customers that at a particular moment were streaming the likes of pornographic or sensitive content.

[5] Article 9 of the Lei nº. 12.965/2014, the Marco Civil da Internet.

The emergence of topics like network neutrality and its techno-social-normative nature highlights not only the peculiarities surrounding the practical aspects of Internet governance and regulation, but also reinvents and exposes past and recent developments of Internet governance scholarship. As noted by Kleinwächter (2018, 06) "20 years ago, Internet governance was a technical issue with some political implications. Today, Internet governance is a key political issue with some technical components", which calls for "closer collaboration among code-makers and law-makers, both nationally and globally" (Kleinwächter, 2018, 06). The emergence of topics like network neutrality and its normative nature highlights not only the peculiarities surrounding the practical aspects of Internet governance and regulation, but also reshapes and exposes past and recent developments of Internet governance scholarship. The academic debates about the focus of Internet governance were heavily influenced by this interpenetration of the technical and legal (Braman, 2010), which led some scholars like DeNardis (2014) to argue that Internet governance should be restrained to Internet core resources and its technical architecture. This long-standing debate lost much significance after the WSIS processes and the publication of the Tunis Agenda adopting a broader working definition of Internet governance[6].

> This architecture is usually extraneous to the Internet user´s field of view or the meaning of specific content but nevertheless affects access to knowledge, the pace of innovation, and individual rights. The objects of Internet governance inquiry are technical architecture, the private and public entities and rules that control this architecture, and policies about this architecture. Studying Internet use or the meaning of content but does address the technologically mediated control of content or the rights of users in accessing this content (DeNardis 2014, 21).

[6] The Tunis Agenda established that "A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet" (WSIS, 2005). Moreover, when interpreted with other of its propositions the definition clearly encompass "technical and public policy issues" (WSIS, 2005).

As already mentioned in the thesis, this was not the approach embodied in the WSIS process and replicated throughout the dominant academic scholarship (Mueller, 2010; Brown & Marsden, 2013; Balleste, 2015), for whom Internet governance "does not only mean to address technical issues as software standards or the domain name system. It furthermore includes the cultural implications new technologies like the internet have, including implications for fundamental human rights like the right to freedom of expression" (Moller, 2008, 96).

This broader approach to Internet governance resulted in an academic fragmentation between the governance and regulation of Internet core resources - focusing on more technical elements - and the governance of the Internet's social and economic elements that is more focused on its legal aspects and consequently dominated by legal academics and their traditional research approaches. One key element linking these two segments was and still is the general focus on the global aspect of Internet governance. Most of the legal scholarship related to Internet governance focuses on its global character (Souter, 2012). In particular, it concentrates on research about the top layers, structures and actors of the governance system. While most academic literature and practitioners agree that "there is a need for a global political and regulatory framework to guarantee the security, stability, flexibility and further development of the Internet" (Kleinwächter, 2006, 473; Benedek, 2008), there is a complete lack of interest in investigating and debating the national governance layers and how they interconnect with global structures.

Most research initiatives are related to topics involving the role of IGF, ICANN, IEFT, WSIS, ITU (Carr, 2015) or the need to protect globally the online world assuring digital rights like freedom of expression, privacy and intellectual property, regulating e-commerce or combating cybercrime. This approach neglects the role of national, regional and local governance systems. Paradoxically fails to take into account the notion that despite being considered global and romantically borderless, the Internet operates and is increasingly regulated locally.

> The importance of Internet governance at national level, however, should not be underestimated. While the technical standards for Internet governance are inherently global, what can actually be achieved in individual countries

> depends on many factors which are country-specific, such as the quality of available national infrastructure and its international connectedness. National communications policies and regulations are important factors in determining how infrastructure, access and affordability evolve. National communications ministries and regulatory agencies are therefore important decision-making fora. Country-level domains – which are more or less important in different countries – are managed by national entities of varying kinds (some governmental, some private sector, some non-profit or civil society). ISPs may be national or international, may work together in ISP Associations and may exchange traffic through IXPs. Governments in many countries have agreed national strategies to exploit ICTs and the Internet to meet development objectives and to deliver services through e-government. Legislation and social norms differ from one country to another, particularly in areas such as content regulation (Souter, 2012, 29).

These characteristics make the operation of Internet governance an unexplored phenomenon quite similar to that identified by Luis Eslava's (2015, 251) study of international law and development operation and its "re-embodiment of the international as local", but also of the reversing of the dissociation of technical and political policy making (Pahuja, 2011) and the interpenetration of the technical, political and legal (Braman, 2010). The present research aims to explore the unresearched spaces situated in between traditional Internet governance research by using alternative lenses through which to investigate an overlooked site of Internet governance. It looks in particular at the legal operation and effects of multistakeholderism in Internet governance.

The origins of multistakeholderism is not associated with Internet governance. In a broader perspective, Doria (2014, 119) points out that "various models of participatory democracy that lead the way for multistakeholderism" could be traced back to some exploratory works in economic governance and sustainable development published in the 1990s and early 2000s. Although multistakeholder practices can be traced to other international governance regimes like human rights,

international security (La Chapele, 2007) and environment protection[7] (Hemmati, 2002), "it is in the Internet governance regime that multistakeholderism has been most comprehensively implemented and that different actors have successfully evolved into, first, "policy entrepreneurs" and then into creators of norms" (Kettemann, 2013, 111). Multistakeholderism, as noted by Carr (2015, 641) emerged as the dominant approach to navigate the complex set of interests, agendas and implications surrounding our increasing dependence of this technology, namely the Internet. As a result of its complex technical and social features Internet governance resonates with an array of complexities that challenge traditional governance regimes. In such a global and multifaceted issue, "whose multi-dimensional nature calls for an early involvement of all the different actors" (La Chapelle 2007, 258), interested in contributing to the policy-shaping process, the multistakeholder approach found a fertile ground. Multistakeholderism thus became deeply embedded in Internet governance and during the WSIS was considered one of the cornerstones grounding the Internet governance institutionalisation process.

There is no clear concept of multistakeholderism (Kleinwächter, 2018). While the WSIS process had drafted some initial lines and while the Net Mundial Declaration (2014) established a group of key elements[8], there is no wide consensus (Drake, 2011; Anastacio, 2015) about what a multistakeholder model actually is. Using these elements provided by soft law, Urs Gasser et al. (2015, 2) noted that the concept of multistakeholderism "implies the incorporation of representatives from multiple groups in discussions and decision making" and provides theoretically, a policy-making environment able to enhance development through inclusionary participation, resource maximization and knowledge sharing. These elements ground the main narratives supporting the claims of multistakeholderism: inclusion,

[7] Minu Hemmati (2002) proposes that the multistakeholderism "hype" gained significant traction in the international policy-making scenario after the 1992 Rio de Janeiro United Nations Conference on Environment and Development – UNCED. She indicates that was during the conference that the international community became aware of the incapacity of established policy-making practices to deal with the environmental and developmental challenges endangering the planet.

[8] The NETmundial Multistakeholder Statement (2014) suggests that a multistakeholder process is bottom up oriented, open, transparent, inclusive and human rights-based.

legitimacy and expertise. These narratives are also present in the characteristics existing in the operation of multistakeholderism:

- Openness, Transparency and Accessibility: The processes and discussions need to be open to participation of all actors interested, it also requisite to have clear and public engaging rules that need to be accessible to all involved;
- Credibility and Accountability: The actors engaged on the decision-making process should have been recognized by their credibility and knowledge-based leadership, and must be responsible and accountable to the communities involved in the policy-shaping process;
- Consensus-based: need to build a decision-making process grounded on process and practices that enable consensus to develop among those engaged in the decision-making phase (Waz & Weiser, 2013).

Established to coordinate different governance approaches, practices and discourses, this "hybrid space" (Pohle, 2016) is based on processes and practices promoting a policy-making environment based on "dialogue, legitimacy and negotiated consent" (Brousseau et al., 2012, 17). It promises, as pointed out by Carr (2015), the possibility of accommodating all those interested in Internet-related topics as it maximises at the same time the utilisation of expertise that fosters creativity and innovative solutions. However, despite the growing academic interest in Internet governance multistakeholderism there is little research about how multistakeholderism operates and what its effects on policy and regulatory instruments are. The existing literature only addresses partially the issue as it concentrates its investigation in the operation of multistakeholderism in global structures that normally struggle to produce regulatory instruments. It portrays multistakeholderism as an instrument promoting "discursive spaces" (Epstein, 2012; Pohle, 2016, 11) where social ordering practices (Flyverbom, 2011; Pohle, 2016) based on non-binding regulatory elements take place.

As noted above the recent scholarship on Internet governance has contributed to clarifying the operation of multistakeholderism in Internet governance, but was not

able to show clearly how these "discursive spaces" are created, operated and what influences multistakeholderism in the governance system. The present research aims to explore these spaces in two ways. Firstly, it applies a socio-legal lens through which to analyse the operation of multistakeholderism and its legal effects. Secondly the research focuses on one governance locus that despite being overlooked by mainstream academic Internet governance literature is a central element of Internet day-to-day operation as it is in the national level that policies and regulations are mainly enforced.

B.2 Gaps

The following sub-section presents the gaps identified during the literature review. It indicates the main elements informing the formulation of the thesis research questions and consequently the research design. The in-depth analysis of the academic literatures informing the research, as noted previously, was fundamental to identifying the key elements orientating the research design process not only by highlighting gaps and shadows in the researched field but also by promoting the opportunity to evaluate the theoretical lenses used throughout the investigation. This made it possible to assess potentialities and limitations and to critically calibrate the theoretical instruments used to carry out the research.

The review also revealed important fractures in the literature. In order to contribute to the clarification of these interstices the research was organised following a structure maximising their interconnections and optimising the research effort. Under this rationality, the gaps were classified into four different categories: contextual, operational, consequential and theoretical-methodological.

B.2.1 Contextual gap: the research concentration on international elements of Internet governance

The vast majority of research in the field of Internet governance is directed to the study of global, international or transnational aspects. There are few studies that have focused on regional or national Internet governance systems. This is interesting as it

reflects how the academic literature also embodies and promotes the contrasting rationality observed in the loci of Internet governance production. While the governance and regulatory narratives are produced and developed in policy-making spaces featuring a global approach, its operation in a techno-regulatory normative sense is always operated on the local/national level. As noted by Souter (2012, 3):

> Just as Internet governance encompasses both technical and public policy issues, it includes governance processes and structures at global, regional and national levels. While the Internet is often described as global rather than national in character, national entities such as ccTLD registrars and IXPs feature prominently in how it is made available at national level. The ISPs and other businesses that deliver Internet access and services to end-users, and the businesses and other organisations that use the Internet to interface with the general population, are usually national rather than global and subject to national laws and regulations. Infrastructure operators are licensed nationally, though they often form part of global corporations. Governments increasingly use the Internet to deliver public services to their citizens and are concerned to understand, influence and sometimes direct the impact of the Internet on public and even private life.

The study of national Internet governance systems is both relevant and under-researched. It thus provides a unique opportunity to shed light on the interchanges between these two governance spheres, particularly by discovering elements that help understand not only the day-to-day operation of multistakeholderism, but also the interactions and interplays between international and national, global and local.

B.2.2 Operational gap: the lack of understanding about the operation of multistakeholderism in Internet governance

Despite being considered one of the cornerstones of Internet governance institutionalisation and development (La Chapelle, 2007; Epistein, 2012; Carr, 2015) multistakeholderism has only recently attracted the interest of Internet governance scholars (Epistein, 2012; Mueller, 2012; Carr, 2015; Pohle, 2016; Hofmann, 2016). And

although academic interest has grown, most studies still focus on the investigation of multistakeholder structures, practices, processes or arrangements that have been developed in international or global settings. There appears a clear lack of research efforts aiming to understand the operation of mulstistakholderism in national/local levels. Consequently, the mainstream Internet governance scholarship ignores the possibility of analysing not only possible similarities of the operation of multistakeholderism in these different settings, but also the existence of significant differences and particular features developed only on the national level.

Another important consequence of not adequately researching the operation of multistakeholderism on the national governance level is the inability to assess whether or not the potentials and limitations of multistakeholderism observed on the global and international level are replicated in the national systems. It is also important to stress that as pointed out in the last subsection the absence of research on the operation of multistakeholderism in national governance systems creates lacunae that obscure the possibility of clarifying the interactions between the international and national levels of the Internet governance. These are some key elements informing the research development and the theoretical propositions grounded on its findings. The investigation of the operation of multistakeholderism in Brazilian Internet governance provides substantive evidence supporting theoretical developments clarifying the potentialities and limitations of multistakeholderism. The observation and theoretical conceptualisation of an operational ambiguity in multistakeholderism governance practices are important elements that can help to explain the contrasting generative and normalising aspects involving Internet governance institutionalisation.

B.2.3 Consequential gap: insufficient research-led evidence of multistakeholderism's effects on regulatory outcomes

The third gap identified, the consequential, relates to the lack of studies on the effects of multistakeholderism on Internet governance structures and on their regulatory outcomes. Despite the growing literature on Internet governance, and on multistakeholderism in particular, there remain unanswered questions about how its

operation affects governance development. Although there are some studies (Raymond & DeNardis, 2015; Bäckstrand & Kylsäter, 2014) questioning the impact of multistakeholderism on Internet governance, the positive aspects of the operation of multistakeholderism, in a romanticised way (Hoffman, 2016) are on the whole maximised and little about its non-positive effects is discussed. This trend is replicated also on the national level. Despite being a more sensitive governance locus where positive and negatives effects could be easily noticed, the study of local governance systems is completely ignored.

The research aims to explore this under-researched socio-legal phenomenon by looking carefully at the effects of the operation of multistakeholderism in the structuring of Brazilian Internet governance system as well as its techno-regulatory outcomes. These observations will provide important evidence supporting the development of concepts like multistakeholderism ambiguity, and also theoretical advances about concepts like multistakeholderism regulatory generativity, that, once fully developed, could help to shed light on multistakeholderism's potentialities and limitations.

B.2.4 Theoretical-methodological gap: the dominance of traditional legal scholarship and the need for alternative approaches to investigate the operation of multistakeholderism in Internet governance

The last gap found is better characterised as theoretical-methodological, which reflects the predominance of traditional scholarship on Internet governance research. This dominance creates theoretical-methodological shadows over the phenomenon investigated. Law conditions those who inhabit the legal profession according to its own ontology, and is said to involve a particular mode of existence and a way of seeing the world (Eslava, 2015, 37). The overuse of traditional legal research techniques and processes overstretch the strength of legal research techniques and can also highlight its deficiencies and limitations. It creates blind spots where important features of Internet governance operation have become under investigated either due to a limited scope (research insignificance) or an inability to engage with the research object (substantial limitation) This is evidenced by the incapacity of traditional legal

scholarship to shed light on the central operations supporting Internet governance policy making. This inability results from a combination of characteristics inherent to Internet governance that are disruptive to traditional structured ways in which the law operates, with particular regard to the interconnection of techno and social elements and its multi-layered nature.[9]

One consequence of this theoretical-methodological gap is the need to use alternative research approaches. Only recently has legal Internet governance scholarship began to experiment with alternative models to analyse phenomena that previously were investigated exclusively under the lenses of "hard law". The current development of socio-legal research themes, particularly those grounded in science and technology studies, is an important development of Internet governance scholarship (Epstein et al., 2016; Badouard & Mabi & Sire, 2016; Mathew, 2016; Pohle, 2016). It opens spaces and provides the possibility of using some alternative theoretical concepts and methodological instruments to shed light on some unresearched objects and phenomena of Internet governance, particularly those that

[9]One good example of these intersections is the regulation and management of the Domain Name Systen - DNS. It involves a relevant variety of topics like trademarks, human rights and also elements associated to state sovereignty as the allocation of country codes. Imagine the political implications of the assignment of top-level country codes to Catalonia or Kurdistan for example. Explaining the DNS Kurbalija (2016, 45-46) notes that "The DNS translates Internet domain names (like google.com) – easier to remember and use by individuals – into IP addresses, used by computers and other devices to identify a certain Internet resource. From an infrastructure point of view, the DNS consists of root servers, top-level domain (TLD) servers, and a large number of DNS servers located around the world. A TLD is the highest level in the hierarchical DNS of the Internet. The DNS includes two main types of top-level domains: generic top-level domains and country code top-level do- mains (ccTLDs). gTLDs include traditional TLDs such as com, .info, .net, and .org, as well as relatively new gTLDs (introduced starting 2014) such as .pub, .بازار (bazaar), .rentals, .ngo, or .游戏 (game). While most gTLDs have an open registration policy, allowing the registration of domain names by any interested individual or entity, there are also gTLDs that are restricted or reserved to specific groups/sectors/communities. For example, .aero is open for registration only for the air-transport industry, while .bank can only be used by authorised banking institutions. ccTLDs are two-letter TLDs that designate specific countries or territories (such as .uk for the United Kingdom, .cn for China, and .br from Brazil). Each gTLD and ccTLD is managed by a registry (also called a registry operator), whose main responsibility is to maintain and administer a database with all domain names registered in the respective TLD. For example, the .com gTLD is managed by VeriSign, while .uk is managed by Nominet. The actual registration of domain names, by end-users (called registrants) is performed through registrars. While in most cases the registry and registrar functions are clearly separated, there are also exceptions; for some ccTLDs, for example, the registry operator can also perform the registrar function."

have been avoided because of limitations regarding theoretical and methodological aspects of traditional legal scholarship.

The present research has drawn on these theoretical-methodological spaces to apply an experimental socio-legal approach to explore this fracture. It aims to contribute to the development of Internet governance scholarship by investigating the research questions that are designed to address, in an interconnected way, the gaps identified above.

III. Some Considerations about the Research Design

The case study approach entails, as this current research shows, ambiguous elements. At the same time as it offers researchers a potent set of methodological instruments supporting in-depth investigation and the unpacking of intricate phenomena (Ridder, 2017), it has, according to some scholarly opinion, a limited scientific scope that in most cases minimises its processes and results. Despite drawing on best practices in terms of the analytical techniques and instruments embodied in the research design it is clear that the research process and findings of this thesis have limitations. Having been considerate of a strong method when the research needs adequate instruments to draw causal insights based on mechanisms and operations like those investigated in this thesis, the case study is also an important methodological device to promote research aiming to generate hypotheses or theoretical developments (Yin, 2014, Bryman, 2012). However, these findings, theoretical propositions or developments, have most of the time, as pointed out by some scholars (Yin, 2014, Bryman, 2012; Gerring, 2017) significant limitations. Most of the criticism directed to case study research concerns two major points: a lack of scientific rigour in its research operation process; and its limited capacity to produce consistent and coherent generalisable outputs. The present research recognises the limitations resulting from its methodological and theoretical design, particularly those related to its conceived lack of "scientific rigour" (Yin, 2014) and to its inability to generalise theoretical propositions (Yin, 2014, Bryman, 2012; Gerring, 2017; Sawanborn, 2010).

Despite the case study method sometimes being labelled as "soft research" (Yin, 2014, 23) and generally being portrayed as not "rigorous enough" (Yin, 2014, 19) the present research recognised in its early stages the need to follow a systemic procedural methodology, particularly when producing and using evidence that could shape the research direction. Recognising the scarcity of literature on systemic approaches (Yin, 2014) to be applied during case study research the current project, drawing from the existing scholarship, followed, as noted above, a strict and well-established rationality to systematise its evidence and ground its findings. Although it is important to note that all efforts depended on the research design and theoretical framing minor flaws inherent to the case study approach could not have been avoided. The existence and consequences of these aspects are acknowledged and considered during all phases of the research and should not be used to condemn the quality or scientificity of the investigation. The case study approach, as any other methodological path, is imperfectly ambiguous and as any scientific or academic endeavour full of potentialities and limitations.

The second main concern pointed out by the methodology scholarship is its "apparent inability to generalize from case study findings" (Yins, 2014, 20). This inability to generalise (Gerring, 2017; Swanborn, 2010), is inherent to case study research as it is the result of the "structural conflict between the two moments of the case study – the particularizing and the generalizing" (Gerring, 2017, 228). As already mentioned, the use of mechanisms like analytic generalisation (Yin, 2014), theory generation or setting clear scopes – in case and extra case findings - (Gerring, 2017) are important to minimise these limitations, but it is also important to recognise that this is an significant element limiting the results of the present research. Despite its tenuous capacity to generalise, case study research and the theoretical developments it spawns should not be considered irrelevant and less scientific than the theories and results of so-called "hard science" methodologies. Accordingly, to Gerring (2017, 243): "Case studies are more useful for some research settings than for others. Like any method, the case study has its limits, and we should be cautious about employing it unless it really is the best available tool for the job. Also, we should not stretch the

limits of the method, forcing it to accomplish goals that it is not well designed for". It is a matter of choice, compromise and comprehension of the trade-offs.

IV. Chapter summaries

The key contributions proposed by this thesis to the academic literature on Internet governance are presented and explored in more detail throughout five chapters.

Chapter One lays out the historical and legal context of the case investigated in this research: the Brazilian Internet governance system. It traces the development and institutionalisation of multistakeholderism in the governance system and maps how this policy-making approach was embedded in Brazilian governance actors, policies and regulations. The chapter also stress that the open, collaborative and resource-sharing interactions between different stakeholders during the early stages of Internet implementation in the country were extremely important to create an enabling environment capable of supporting the development of practices promoting governance experimentation and the development of multistakeholderism.

Chapter Two presents the first of three governance practices investigated in this thesis. In particular, it initiates the process of investigating the two main research questions of this PhD thesis: a) How does multistakeholderism operate in the Brazilian Internet governance system? b) How does the operation of multistakeholderism influence Brazilian Internet governance structures and their regulatory activity? In order to answer these questions the chapter proposes and articulates a three-dimensional policy-making process to investigate and analyse Internet policy-making in two important actors of the Brazilian Internet governance system: the CGI.br (Brazilian Internet Steering Committee) and the ANATEL (National Telecommunication Agency). Critically observing to elements such as representativeness, engagement, decision-making guidelines and regulatory outputs efficacy the chapter offers a cross-cases comparative analysis of the policy-making

operational rationale of these two actors and also analyses which elements support and affects the operation of their governance processes and outcomes.

Chapter three examines the second governance practice investigated in this thesis. It presents and analyses the operation of multistakeholderism in one specific regulation-making practice: the regulation of network neutrality in the Marco Civil da Internet law. By examining the participation of CGI.br and ANATEL in the Marco Civil da Internet drafting process, the chapter seeks to investigate the interactions and intersections between internal and external policy-making aspects of the operation of multistakeholderism in actors with contrasting policy-making rationalities. It identifies some of the key elements and dynamics supporting the operation of multistakeholderism in Brazilian Internet governance policy making, particularly the interconnection between inclusion, expertise and consensus.

Chapter Four introduces the third governance practice investigated in this research. It examines CGI.br and ANATEL policy-making activities in the context of an international governance process: the Global Multistakeholder Meeting on the Future of Internet Governance – NETmundial. The level of inclusion of stakeholders in international processes like this, while promoting the participation of groups that normally are not represented in national processes due to a lack of expertise or resources also influences the policy-making engagement dynamics. The integration into the various stages of the policy-making process of different legal, economic and cultural aspects influencing perceptions on the topics discussed creates an ambiguous policy-making dynamic that can promote policy cross-fertilisation and innovation, but also affects levels of trust, confidence and the ability to make decisions. Specifically, the chapter describes how these two actors participated in the NETmundial and how their policy-making dynamics affected their level of engagement and contribution to the initiative. The chapter also reinforces the notion of multistakeholderism's inclusion–expertise-consensus operational dynamic observed in the previous governance practices investigated.

Chapter Six presents the main findings observed during this research process and proposes theoretical elements to clarify the operation and effects of

multistakeholderism in the Brazilian Internet governance. It provides insights and theoretical propositions clarifying this phenomenon and identifies and presents the dynamics supporting multistakeholderism's policy-making engine. Drawing from these observations the chapter also introduces theoretical elements exploring the operation and effects of multistakeholderism in governance and regulation making, particularly its generative and innovative aspects. The chapter also identifies and explores the theoretical relation between multistakeholderism and governance entrepreneurship practices.

CHAPTER ONE

CASE CONTEXTUALISATION: THE BRAZILIAN INTERNET GOVERNANCE SYSTEM – ACTORS AND REGULATORY FRAMEWORK CONTEXT

Introduction

Over the last two decades Brazil has developed an open, democratic, innovative and relatively stable Internet governance system. One of its distinctive elements is the embedding of multistakeholderism in its institutional and regulatory framework. Brazil was one of the first countries to legally design and operate a governance system based on the multistakeholder approach on institutional and policy-making levels. Recent Internet governance studies (Knight, 2014; Aguerre & Galperin, 2015, 4) recognised the success of the Brazilian governance system and also its regional and global influence. These effects are mainly the result of the governance system's innovative and substantive operation of multistakeholderism, which consists of several central elements: the Comitê Gestor da Internet no Brasil - CGI.br (Internet steering committee); the Marco Civil da Internet no Brasil - MCI (Brazilian Internet user's obligations and rights law); and the NETmundial meeting (Global multistakeholder meeting on the future of Internet governance) and initiative (global platform to promote Internet governance development). The Brazilian governance polycentric structure, legal framework, and actors, with the co-existence of

multistakeholder and non-multistakeholder policy-making institutions and practices provide a unique opportunity to research how multistakeholderism operates and its effects on governance and regulatory practice.

This chapter frames the case investigated and presents the structural and legal context of the Brazilian Internet governance system. It devotes attention to factors enabling the development and institutionalisation of multistakeholderism in the governance system. It describes and maps how multistakeholderism has developed and how it was embedded in governance actors, policies and regulations. The chapter reveals that the Brazilian governance system was developed and relies on the strong levels of coordination between stakeholders engaged in the technical management and governance of the Internet in Brazil. The open, collaborative and resource-sharing interactions between these stakeholders during the early stages of Internet implementation in the country were extremely important to create an enabling environment capable of supporting the development of practices promoting governance experimentation and the later institutionalisation of multistakeholderism. It also indicates the existence of inconsistences, like the uncoordinated and occasionally conflicting relations between the actors responsible for steering Internet governance and telecommunication policies that had been halting the development of more efficient policies and regulatory instruments.

The first section presents the historical development of the governance system. It analyses the governance system institutionalisation phases tracing processes leading to the embedding of multistakeholderism in governance structures and practices. It particularly points to a three-stage development process characterised by the use of law and legal mechanisms to explore legal gaps as mechanisms to develop multistakeholderism in Brazilian Internet governance. The second section introduces the central actors within the governance structures and focuses on their legal characteristics and responsibilities and discusses their use of multistakeholderism in policy making. The third section analyses the regulatory framework as part of the context of the governance system. Finally, the last section indicates contextual findings that are relevant to the conceptual framework of this thesis and to the theoretical and practical contributions that will be presented in the last chapter.

I. The historical development of multistakeholderism in Internet governance in Brazil

The development of the Internet in Brazil was the result of policies developed during the complex democratisation transition started in the early 1980s. The resulting governance system was grounded in innovative practices and an early commitment to the active engagement in all sectors impacted by Internet policies. Using evidence produced by qualitative analysis of the historical development of the Brazilian governance system this thesis shows that the embedding of multistakeholderism in the Internet governance in Brazil was the result of a three-stage process. It is important to stress that through these different stages, one key element played a central role. Although each stage had its singular characteristics and contributions, law was the strategic element used by different actors to shape the governance structure and the power relations. In the Brazilian case, law and its normative instruments were used by non-traditional power players - technical communities and civil society - to balance power relations and to shape the governance system structure and its regulatory activities.

The Brazilian governance system has its origin in state centralising policies enacted during the military dictatorship initiated in 1964 (Carvalho, 2006, 53). The policies' key elements were the centralisation of the governance of information technologies under the rule of state bodies and the prevalence of a protective agenda grounded on the development of national technologies with the objective of enhancing national security and exercising international influence (Carvalho, 2006, 53; Trinkunas & Wallace, 2015, 16). This rationality changed drastically during the re-democratisation period. The country began to experience waves of political and economic openings that influenced the development of new governance initiatives. At that moment the technical community and civil society, identifying a governance gap, took a leadership role in shaping the Internet's technical development and institutionalising its policy-making process in Brazil. The early engagement of civil society organisations in the development of the Internet in Brazil was one decisive

factor promoting the creation of CGI.br and the incorporation of multistakeholderism in the governance system (Carvalho, 2006).

The present section explores political, economic and technical aspects of the context in which Brazil's Internet governance system developed. It is divided into three sub-sections: each one presenting one stage. The first sub-section analyses the governance system's origins in terms of the influence of the military's rationality on its development. The second explores the impact of the country's re-democratisation on the evolution of the governance system and how the new political and economic order created space to institutionalise multistakeholderism. Finally, the last subsection reviews how the reformulation of the governance system contributed to consolidating the multistakeholder model at the same time that it fostered the development of auxiliary institutions supporting the Internet's technical management and the creation of a governance and regulatory framework.

A. Early arrangements: the military approach to technology governance

Although the origins of the Brazilian Internet governance system are associated with the creation of CGI.br in 1995, some of its elements can be traced to governance practices initiated in the early 1970s. The development of its innovative multistakeholder approach, locally branded as "multi-sectoral[10]" governance model, was the result of governance and policy experimentations. Just after the military took power in 1964 the government began to implement policies aiming to enhance Brazilian influence on the international arena (Trinkunas, 2014, 10). These policies were grounded on two important factors: centralization and control of the policy-making process by government bodies; and the use of technology, including

[10] There is no official translation of the word multistakeholder to Portuguese. The use of multi-sectoral instead of multistakeholderism although encompasses a slightly different from perspective. Instead of focusing on actors or stakeholders, the Brazilian systematic focus on sectors. This approach impacts change the distribution of the categories represented in the governance system and produce a different balance in the legitimacy structure of the governance system.

computing[11], as a vector to promote the country's internal and external security and an instrument to enhance Brazilian aspirations to exercise international influence.

This process started with the enactment of the Federal Law n. 4.516/64[12] and the creation of the Serviço Federal de Processamento de Dados – SERPRO (Federal Data Processing Service). A public company, SERPRO was created to assume all governmental data processing activities and to consequently decrease the government's dependency on foreign companies[13]. Despite this early symbolic movement, it was not until 1972 that the foundation of the governance system would be legally laid down. The Decree 70.370 of the 5th of April 1972 created the first information technology advisory policy committee. The Comissão de Coordenação das Atividades de Processamento Eletrônico - CAPRE (Coordinating Committee for Electronic Processing Activities) was designed to shape and control, under a centralizing rationality, the information technology (computing and data processing) policy-making process.

Composed of representatives of different governmental branches (Army, Air Force, Navy, Planning and Finance, SERPRO, the Brazilian Institute of Informatics and the National Development Bank) CAPRE centralised the governance of computing and data processing resources under government control[14]. Its centralising approach and blended composition significantly influenced Internet governance development in Brazil. Despite its centralizing and controlling aspects, CAPRE was the locus of a set of practices that extended opportunities to non-traditional governance actors, particularly representatives of technical institutions, to engage in policy-making

[11] During the 60's, 70's, 80's and early 90's, the main stream terminology used to describe the field were computer and computing. The term information technology only will be popularised in the late 90's and early 2000's.

[12] Article 2 of the Federal Law n. 4.516/1964: The Federal Data Processing Service will be responsible for the execution of all data processing services and treatment of information required by the Finance Ministry.

[13] A good example of this dependency can be traced to International Business Machines Corporation - IBM operation in Brazil. The company has been acting in Brazil since 1924. Curiously just after SERPRO's creation the Brazilian government, through the Federal Decree 63.106/1968, revoked IBM's authorization to operate in Brazil. The decision was shortly reverted but demonstrated the forthcoming shift in the Brazilian approach to computing policies.

[14] CAPRE's main attributions were: a) organize and maintain a detailed register of computers and software (type of equipment, programs and degree of use of computing facilities); b) propose measures to establish a governmental funding system to foster the development of private data processing activities.

processes. However, CAPRE was guided by a military developmental/securitization rationality that shaped the country's technology industry. The commission set the tone for further centralization and control of the governing policies by governmental bodies at the same time that it pushed forward national industry protective policies that resulted in prohibitions against the importing of computational goods (Baaklini & Rego, 1988, 89).

This technological development agenda, grounded on a rationality of securitization, continued to be the main vector guiding the computing industry policy framework until 1979 when the governance regime was completely redesigned with the creation of the Secretaria Especial de Informática – SEI (Special Commission for Informatics)[15]. Tightening the links between national security and informatics policy making, the SEI was directly subordinated to one of the key governing institutions under military rule, the Brazilian National Security Council, and it was informed by two key objectives: economic development and national security. Its main strategic function was to enable and promote scientific and technological development of informatics by: preparing, proposing and executing the national plan for informatics; participating in the development of technical norms and standards; and technically supporting the armed forces and the national security policy needs.[16]

The operational arm of the SEI was the Comissão de Informática - CI (Commission of Informatics)[17]. The CI was formed by representatives of the Brazilian government (11 members) and up to four representatives of the private sector nominated by the National Security Council.[18] Notwithstanding its limitations,[19] the legal framework allowing the participation of non-governmental actors, particularly coming from the private sector and academia, was an innovative approach in the Brazilian policy-making environment and can be considered an early legal structural element grounding the Brazilian rationalisation of multistakeholder governance.

[15] Federal Decree 84.067/1979.
[16] Articles 1 and 5 of the Decree 84.067/1979.
[17] Article 11 of the Decree 84.067/1979.
[18] Article 6, §2 of the Decree 84.067/1979.
[19] There is little evidence about the criteria guiding the selection of representatives of private sector. Moreover, the political scenario at the time indicates that the commission had an unequal power balance once the government had the majority seats in the commission.

The SEI improved the centralised governance environment and was efficient in regulating and controlling the development of informatics in accordance with the military government agenda. One of its main achievements was the design and implementation of the first coordinated effort to embody the developmental/securitization technological agenda in Brazil: the Plano Nacional de Informática – PNI (National Plan for Informatics) established in 1984 by the Federal Law 7.234/1984. Despite opening space for the participation of non-government stakeholders in the policy-shaping process, the SEI embodied a restrictive rationality. According to Carvalho (2006, 58) "In the early 80s the implementation of the market reserve policy damaged the existing relationship between governance actors and immersed the Brazilian incipient governance system in the anachronistic Latin American authoritarianism"[20]. This rationality is clearly evidenced by the public positioning of Brazilian authorities in international meetings, as the speech of the Executive Secretary of the SEI, Lieutenant Colonel Joubert Brízida, illustrates:

> Informatics is not neutral; it carries the cultural values of its origins. Therefore, it is essential that each country can exercise control over information that cross its border [...]. The country which is not concerned with the control of strategic information used by its agents is risking becoming dependent on the economic and political interests of groups located outside its borders (Dantas, 1988, p. 235).

This scenario began to change in 1984 with the enactment of the Federal Law 7.232/1984. Reflecting the country's re-democratisation process the "Lei de Informática" (Informatics law) shared authority over the informatics policy-making process between the executive and the legislative (Carvalho, 2006). The law was approved after an intense public debate and the setting of principles guiding the development of the Brazilian informatics industry. Although its aim was to regulate the restrictive informatics trade policy, the informatics law contributed indirectly to the democratization of governance practices through the creation of the Conselho Nacional de Informática e Automação – CONIN (National Council of Informatics and

[20] Original in Portuguese.

Automation) (Tigre, 1987, 56). And although it strengthened restrictions on informatics trade, the new policy was grounded much more on an economic and developmental rationality[21] than on the need to protect national security.

CONIN's regulatory approach had two major implications. Firstly, it promoted a controlled regime restricting access to computing goods and services that endured for eight years[22]. This restrictive system created regulatory and governance obstacles to the development of the Internet and limited access to important resources of communities engaged in the implementation of the Internet in Brazil (Knight, 2014). This scenario was important not only because it required the creativity and persistence of Brazilian Internet pioneers, but also because it fostered the development of active communities composed of government representatives, academics, entrepreneurs and civil society organizations. These actors were central to foster, using the democratisation rationality, an innovative governance design based on multi-sectorial participation.

This is evidenced by CONIN's innovative participatory spectrum and governance structural positioning. While still representing a high level of centralisation and government interventionism, CONIN promoted a more democratic approach. The centralisation was reflected in the strategic positioning of CONIN on the Brazilian government structure. The council was part of the strategic advisory body of the president's cabinet[23] and had a more balanced composition. It was formed by representatives of the ministries of economy, finance, infrastructure, foreign affairs, armed forces, and of the secretaries of science and technology and the federal administration. It also mandated the participation of non-governmental entities representing the informatics and computing industry, users, informatics and computing professionals, scientific and technological community, press community and legal community[24].

[21] The main attributions of the CONIN were: a) enforce the governmental active role of guiding, coordinating and stimulating informatics and computer science activities; b) to ensure protection of domestic production of national informatics industry; c) Government protective policies to enable the development of national informatics and computing industries. (Art. 1º and 2º of Federal Law 7.232/1984).
[22] Article 4, VIII of the Federal Law 7.232/1984.
[23] Article 5 of the Federal Law 7.232/1984.
[24] Article 6 of the Federal Law 7.232/1984.

This was a significant step forward on the implementation of a more plural and democratic governance system. It signalled a slight change in the governance landscape and showed, despite the criticism overshadowing CONIN´s activities during its existence (Carvalho, 2006), the possibility of communities engaged in computing and Internet development in Brazil creating a more participatory and legitimate system of governance. The active engagement of stakeholders representing different sectors of the society, notwithstanding the centralisation rationality guiding the policy-making agenda, represented the initial phase of a process leading to the development of the Brazilian approach to multistakeholderism. The practices developed in the SEI and CONIN, in particular the inclusion of non-governmental representatives of the informatics policy-making process, were a key element supporting the development of multistakeholderism in Brazil. The experience and the collaborative network resulting from policy-making interactions held in these two institutions were fundamental to pave the way to the development of new governance actors that embraced this inclusionary and collaborative governance approach: The Comitê Gestor da Internet no Brasil – CGI.br (Brazilian Internet Steering Committee).

B. Governance democratisation: the rise of CGI.br and the institutionalisation of multistakeholderism

The enactment of the Federal Constitution in 1988 and the evolution of the democratisation process transformed the development of Internet governance. Members of the technical community and academics used the opportunities created under the new constitutional and political scenario to foster the development of the Internet in the country (Carvalho 2006; Benakouche 1995; Benakouche, 1997; Knight 2014; Carvalho et. al., 2014). This process centred on academic and technical elements shifted completely in 1992 with the first active engagement of representatives of civil society, during the United Nations Conference on Environment and Development (UNCED) hosted in Rio de Janeiro. In order to offer to the conference participants, access to an international communication network of computer devices the Brazilian government authorized the collaboration between the academic Rede Nacional de Pesquisa - RNP (National Research Network), the Brazilian NGO Instituto Brasileiro

de Analises Econômicas e Sociais – IBASE (Brazilian Institute for Economic and Social Analysis) and the international NGO Association for Progressive Communication-APC (Lucero, 2011). The collaboration between these actors, particularly the bonds formed between IBASE-RNP-APC, was an important element supporting not only Internet implementation and development in Brazil. According to IBASE director Carlos Afonso, this alliance "marked the successful beginning of a significant working relationship between the research community and an independent NGO to build a strategic project" (Afonso, in Maclean, 2004, 295).

Concurrently with the deeper involvement of academic and civil society actors in the development of the Internet, the SEI was transformed into the Departamento Nacional de Informatica - DEPIN (National Department for Informatics) and completely sidelined from participating in policy-making processes. This led to the termination of the market protective policy and also to the creation of an institutional governance gap. The absence of SEI created an uncoordinated and unregulated space that began to threaten the Internet's economic, scientific and social development in the country and provoked informal discussions around the development of an institutional framework for Internet governance in Brazil (Knight, 2014; Carvalho, 2006). Influenced by the 1992 UNCED experience and the governance model used by the international technical community to manage Internet technical standards, the Brazilian government decided to create a committee formed by representatives of different communities to coordinate Brazilian Internet governance.

The Brazilian Internet Steering Committee – CGI.br was created in 1995 by the Portaria Inter-Ministerial 147 (Inter-Ministerial Administrative rule 147). The normative rule enacted jointly by the Ministry of Science and Technology and the Ministry of Communications institutionalized CGI.br as the main actor of the structuring governance system. The committee was characterized by an experimental legal design and a technological management focus. From a legal perspective, CGI.br was created experimentally by an administrative normative instrument similar to the American executive order. It has a very fragile legal status as it can be modified or extinguished by the enactment of another normative instrument without the need for discussion in parliament. It is usually used in Brazil to regulate minor administrative

procedures but in this particular case, CGI.br was used early on to create an important governance body. The committee also incorporated the need for integration and coordination of policies affecting the management and development of the Internet in Brazil. Primarily its general objectives concerned the management and development of technological and economic aspects of the Internet mainly by: a) ensuring the quality and efficiency of the services offered; b) promoting a free and competitive environment among Internet providers and; c) establishing and maintaining a basic regulatory framework regarding the activities of users and Internet service providers (Portaria Interministerial 147/1995)[25] .

Despite not being a governmental agency and lacking the powers to perform operational activities[26], the committee became an institutional space to coordinate the agenda setting, negotiation, implementation, monitoring and enforcement of policies related to the Internet in Brazil (Lucero, 2011, Carvalho, 2006). The creation of the network engineering working group (GTER) in 1996 (CGI.br, 2018a) and the edition of the Normative Instructions 1, 2 and 3 creating the first set of formal rules to regulate the domain name registry process, Internet exchange points and the distribution of Internet Protocols-IPs, respectively, are good examples of the committee's coordination efforts as all these normative instructions were collectively produced and discussed with the communities engaged with the development of the Internet in Brazil. This participative and engaging policy-making process reflected one key and influential structural element of CGI.br: multi-sectorial composition and policy-making process.

[25] The Ministry of Communication Administrative Rule 147 established that The committees' attributions were: a) Monitoring the provision and development of the Internet service; b) Establishing recommendations and guidelines setting strategies about network connections, implementation and management, including analysis and selection of specific technologies and operational procedures; c) Recommending technical standards, technical and operational procedures to Internet service management; d) Recommending an Internet code of ethics and conduct for Internet users and providers; e) Coordinating the assignment and use of Internet Protocols - IPs; f) Coordinating and manage the domain name registration process of the domain names assigned to the country code top level domain .br; g) Collect, organize and disseminate information about Internet operation and service in Brazil.

[26] One of the first acts of CGI.br was delegate to the Fundação de Amparo à Pesquisa do Estado de São Paulo – FAPESP the operationalisation of the domain name management in Brazil.

The steering group was designed using a multistakeholder/multisectorial perspective and initially was formed by nine members divided in two main groups: governmental and non-governmental representatives[27]:

Government

1) Representative of the Ministry of Communications;
2) Representative of the Ministry of Science and Technology;
3) Representative of the Telebras System (State Telecommunication Company);
4) Representative of the National Council for Scientific Development – CNPq;
5) Representative of the National Research Network – RNP;

Non-government

6) Representative of the academic community;
7) Representative of the Internet service provider;
8) Representative of the business community;
9) Representative of the user community.

The presence of non-governmental actors in the composition of the committee, according to Lucero (2011, 132) "represented the recognition of the contribution of these sectors in the implementation of Internet in Brazil. Moreover, it will be the basis of the multi-sectoral representation model that would be institutionalized" in the coming years. Although this formal recognition represented an inclusive and democratic approach, the committee, as indicated by its composition and nomination process, was notably led by the government. Firstly, the majority of the members were from governmental institutions; secondly, the presidency of the committee was legally determined to be exercised exclusively by the representative of the Ministry of Science and Technology[28].

The representatives of the non-governmental sector embraced the opportunity to contribute to the policy-making process and fostered the development of CGI.br. The increasing complexity of the issues that the committee dealt with and the social-economic expansion of Internet use in Brazil meant more attention was given to the

[27] Article 2 of the Portaria Inter-Ministerial 147.
[28] Article 2 of the Portaria Inter-Ministerial 147.

legal, administrative and operational limitations of the CGI.br. These issues clearly showed in one controversial strategic policy decision. In the face of its limitations and exploring its legal flexibility the committee, exercising unregulated normative capacity, delegated to FAPESP (São Paulo State Research Funding Agency) the capacity to manage the domain name registration process in 1998 (Resolution 002/1998).

At that time CGI.br did not have the technical, administrative and legal capacity to execute most of its attributions, particularly the management of domain names. The FAPESP already had an important role in the development of the Internet in Brazil. It was one of the key institutions congregating the technical community responsible for creating the operational capacity to support a computational network able to connect Brazilian universities to the Internet in 1991. As a result of its technical leadership and the absence of a governance system, in 1989 the FAPESP, received from IANA the control and management of the domain names registered under the .br. When CGI.br was created in 1995 the FAPESP allowed the committee to use its facilities providing administrative and logistics support. Later, the creation of the research project "Cômite Gestor da Internet" allowed, in a creative and peculiar way, CGI.br to have a minimum of legal and financial capacity.

The level of technical, administrative and legal dependency of CGI.br on FAPESP resulted in the formal delegation of the management of the IP allocation and the domain name to FAPESP. This was a questionable decision that later raised several concerns, particularly in two areas: legal and financial. When the first disputes around domain names and intellectual property rights started, the lack of legal capacity of CGI.br resulted in FAPESP being called to respond to the law. Secondly the resources generated from the domain name registration went direct to FAPESP accounts and the institution had total control over a resource that should have been managed and applied by CGI.br thus raising questions about the legality of the arrangement (Castro, 2006; Knight, 2014).

The adoption of the first to file, first to use[29] policy and the rise of cyber squatter practices[30] motivated the first lawsuits using arguments based on administrative law and intellectual property rights to question CGI.br regulatory practices. The controversies surrounding the committee's normative capacity and the assignment of an activity with national implications to a non-federal government department were interpreted as strong signals of CGI.br's limitations and prompted discussions about its reformulation.

Troubled by these controversies the committee began to discuss its future with the first formal discussion taking place in a meeting held on the 15th of June 2000 (CGI.br, 2000a). Stimulated by representatives of non-governmental actors the reform of the CGI.br was put on the committee's agenda. The reform process was guided by CGI.br's interest in the enactment of a more robust legal framework that would reinforce its key role in the governance system and also stabilise it. This process resulted in three important outcomes: a) the reformulation of the committee´s legal constitution and attributions; b) the enhancement of multistakeholderism; and c) the creation of administrative, financial and legal instruments for CGI.br governance activities. The consequence was the enactment of federal legislation reformulating CGI.br and institutionalising multistakeholderism, in a multi-sectoral perspective, as a pillar of the governance system.

C. Multistakeholderism consolidation: CGI.br reformulation and internationalisation

The CGI.br reform process was the result of an intense period of internal discussion that culminated in the enactment of the Decree 4.829 in 2003. The process formally

[29] The first person or institution requesting the domain name registry will be granted it.

[30] According to the World Intellectual Property Association – WIPO, "domain name disputes arise largely from the practice of cybersquatting, which involves the pre-emptive registration of trademarks by third parties as domain names. Cyber-squatters exploit the first-come, first-served nature of the domain name registration system to register names of trademarks, famous people or businesses with which they have no connection. Since registration of domain names is relatively simple, cyber-squatters can register numerous examples of such names as domain names. As the holders of these registrations, cyber-squatters often then put the domain names up for auction or offer them for sale directly to the company or person involved, at prices far beyond the cost of registration. Alternatively, they can keep the registration and use the name of the person or business associated with that domain name to attract business for their own sites." (WIPO, 2016).

started in November of 2000 with discussions being held inside the two ministries responsible for supporting the committee. Members of CGI.br met representatives of the Ministry of Science and Technology and the Ministry of Communication to present a report on the problems and issues the committee has been facing and propose a reform process able to address the problems identified (CGI.br, 2000b).

CGI.br's ambition was to address its lack of legal certainty and operational capacity and redesign its membership configuration. The committee's initial proposition was to "create a nongovernmental organisation (NGO) in the model of ICANN" (CGI.br, 2000b) with representative blocks being oriented by criteria resonating with the main mission of CGI.br: manage the domain names and the distribution of IPs" (CGI.br, 2000b). This was a well-considered proposal that would enable the committee to solve all its deficiencies at that time. The constitution of a non-profit private organisation with attributions to manage IPs' allocation and the domain .br would allow CGI.br to avoid government funding bureaucracy and political disputes, and at the same time would grant to CGI.br legal, economic and operational stability (CGI.br 2000b, 2000c).

This was an innovative proposal that contrasted with the Brazilian regulatory tradition and with the rationality of regulatory agencies[31] that began to develop in the late 1990s with the creation of the Agência Nacional de Telecomunicações – ANATEL (National Telecommunications Regulator) in 1997. The inception of a regulatory system based on a private actor would be completely new to the Brazilian regulatory ecosystem that was heavily grounded on state oversight and control. In 2001 the institutionalisation project was formally sent to be legally analysed in governmental departments (CGI.br, 2001a; 2001b; 2001c; 2001d; 2001e). The result of the reformulation process was embodied in the enactment of the Decree 4.829/2003. The decree, a more robust and legally binding legal instrument than the ministerial administrative order, created/recreated the Comitê Gestor da Internet no Brasil –

[31] Brazil has 10 regulatory agencies: National Telecommunications Agency (ANATEL); National Petroleum Agency (ANP); National Electric Energy Agency (ANEEL); National Health Agency (ANS); National Health Surveillance Agency (ANVISA); National Water Agency (ANA); National Cinema Agency (ANCINE) National Waterway Transportation Agency (ANTAQ); National Agency for Land Transport (ANTT) National Civil Aviation Agency (ANAC).

CGI.br and implemented a hybrid model of institutionalisation. It recognized the committee's key role in the governance system and legally authorised the creation of an operational institution to offer auxiliary support to CGI.br technical activities.

One of the main consequences of the reform of CGI.br was the reinforcement of the centrality of multi-sectoralism/multistakeholderism in the structure of the governance system and in the policy-making practice. The reform increased the size, plurality and representativeness of the committee's membership. The number of members was increased to 21 and embodied a multistakeholder composition with members from three different groups representing four segments of stakeholders[32]:

Government spectrum (9 representatives):

Representative of the Ministry of Science and Technology

Representative of Presidential Civil Advisory House

Representative of the Ministry of Communications

Representative of the Ministry of Defence

Representative of the Ministry of Development, Industry and Foreign Trade

Representative of the Ministry of Planning, Budget and Management

Representative of the National Telecommunications Agency – ANATEL

Representative of the National Council for Scientific Development – CNPq

Representative of the National Forum of State Secretaries for Science and Technology.

Non-government spectrum:

Representative of Internet expert community

4 Representatives of the business sector:

- Representative of the internet service and content providers segment;
- Representative of the telecommunication infrastructure providers segment;
- Representative of the telecommunication, informatics and software industry segment;
- Representative of the business users;

4 Representatives of the third sector or civil society;

[32] Article 2 of the Decree 4.829/2003.

3 Representatives of the scientific and technological community:

The reconfiguration balanced the committee's composition giving the impression that CGI.br was largely controlled by non-governmental institutions. Despite the non-governmental majority (11 members) and the democratic appointment process,[33] coordination of the committee remained with the representative of the Ministry of Science and Technology[34]. Another important consequence of the reformulation process was that CGI.br was legally authorised to create an institution to support its operational technical attributions. The Núcleo de Informação e Coordenação do ponto br - NIC.br (Centre of Information and Coordination of the .br), a non-profit private company was created in 2003 with the objective to provide administrative, technical and operational support to CGI.br. Two years later, the committee, using the authorisation inserted in its regulatory framework[35], delegated to NIC.br the technical execution and the administrative management of the domain name registry process and the IP (Internet Protocols) allocation. Using this governance manoeuvre the members of the committee began to develop an operational ecosystem able to support CGI.br administratively, financially and legally.

Using this governance manoeuvre the members of the committee began to develop an operational ecosystem able to support CGI.br administratively, financially and legally. This legal engineering was fundamental to promote CGI.br's independence from governmental administrative and financial support. The cornerstone of this empowering process was NIC.br. While created as a private company, the NIC.br is legally connected to CGI.br via a complex set of rules regulating its composition inserted in its bylaws and also by having for example one director dedicated exclusively to CGI.br activities. NIC.br's bylaws in its article 35 establish that the company director for CGI.br's activities is responsible for providing operational and administrative support to CGI.br's activities in particular organising

[33] Articles 4 to 8 of the Decree 4.829/2003.
[34] Article 2, I, A of the Decree 4.829/2003.
[35] Article 10 of the Decree 4.829/2003.

meetings, undertaking administrative procedures, elaborating policy briefs and reports, monitoring and managing projects and also assisting CGI.br's institutional relations through the preparation of agreements and contracts (NIC, 2010). NIC.br also generated an important income. The professional management of the .br domain names and the commercialisation of other technical activities generate before tax and other deductions more than R$146 million (approximately £28 million,) and a profit of R$12 million/£2 million (NIC.br, 2018), that were partially used to cover some of CGI.br's operational and policy-making costs.

The result of this political, economic and technical symbiosis was the development of a balanced and distributed governance ecosystem where different actors share the responsibility to promote the development of the Internet in Brazil. Anchoring the system, CGI.br is responsible for coordinating the policy-making process and the regulatory initiatives. On the operational level NIC.br coordinates and operates a group of specialized units responsible for the technical management and enhancement of the Internet in Brazil[36]. The maturity of the governance system is evident from some of the committee's regulatory activities. The publication of the principles for Internet governance in Brazil and the committee´s key role in the drafting of the Marco Civil da Internet (Federal Law 12.965/2014 – Marco Civil da Internet) are important evidence of CGI.br's normative achievements and also of the legal and operational expression of its multistakeholderism.[37]

The committee's institutionalisation and the reform of its regulatory framework were also important elements driving and supporting its internationalisation agenda. CGI.br's international activities engaged strategically with the Internet Governance Forum – IGF, Internet Corporation for Assignment of Number and Names – ICANN, and the Internet society. It also had a critical and

[36] The CGI.br governance structure comprises the following units: Registro.br (Domain name registration and IP assignment); Cert.br (Security and incident response); Cetic.br (Studies and surveys about IT use in Brazil); Ceptro.br (Internet engineering and new projects); Ptt.br (Traffic exchange); Ceweb.br (Web technologies); W3C Brasil (Web standards).

[37] The Resolution CGI.br/RES2009/003/P established the principles for Internet governance and use in Brazil. The resolution states that governance: "must be exercised in a transparent, multilateral and democratic manner, with the participation of the various sectors of society, thereby preserving and encouraging its character as a collective creation" (CGI.br, 2009).

strategic stance advising the Brazilian government during the Snowden revelations[38] and by promoting, through the NETmundial Initiative, multistakeholderism as the most suitable approach to govern internationally the Internet. The Netmundial – Global Multistakeholder Meeting on the Future of Internet Governance took place in May 2014 in São Paulo, Brazil. It was organized by CGI.br as a collaborative meeting to discuss new proposals for developing the Internet governance framework and resulted in the publication of the Netmundial Statement, which contained two parts: The Internet Governance Principles and The Roadmap for the future of the Internet Governance Ecosystem (NETmundial, 2014a).

CGI.br reformulation, the creation of NIC.br, the development of a multistakeholder-based regulatory framework, and the NETmundial initiative are important sites and practices revealing the development, embodiment and operation of multistakeholderism in Brazil. The next sections contextualise the system's central actors and regulatory elements, particularly looking to its relations with multistakeholderism.

II. Governance Actors: CGI.br, NIC.br and ANATEL

After 20 years of exploratory experimentation the Brazilian Internet governance system reached maturity enhancing the development of a well-designed governance structure. The governance ecosystem design encompasses a group of institutions responsible for both the coordination of the policy-making processes and the technical management of the Internet in the country (Varon, 2014a, 16; Varon, 2014b). The structural and regulatory accomplishments of the governance system, particularly the development of the Comitê Gestor da Internet no Brasil – CGI.br and the enactment of the Marco Civil da Internet no Brazil – MCI (Federal Law 12.965/2014, Marco Civil da Internet Civil Rights Framework for the Internet) fostered not only the

[38] Edward Snowden was a subcontracted employee working in the United States of America National Security Agency – NSA. He leaked documents revealing the extension of the NSA electronic surveillance programs. For more information about Snowden's revelations please access: https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1

enhancement of Internet governance and regulation in Brazil, but also promoted the Brazilian system as an example reference to the international community (Aguere & Gualperin, 2015).

The design of the governance structure includes a combination of multistakeholder, private and governmental institutions with different regulatory scopes and governing techniques. The cornerstone of the governance system is the Comitê Gestor da Internet no Brasil, a government-coordinated multistakeholder body that is legally responsible for the policy-making process and the management of Internet-core resources in Brazil. As originally conceived, however, the CGI.br lacked the legal and operational capacity to fulfil its legal responsibilities which endangered Internet development in Brazil. The creation of an operational institution was a key structural element to overcome these legal design limitations. The Núcleo da Informação e Coordenação do .br – NIC.br, a non-profit private institution, was created in 2003 and shortly after was given the responsibility to manage core technical elements of the Internet in Brazil. NIC.br also provided technical, legal and financial support to CGI.br allowing the committee to focus on policy-making activities. More recently, a third actor, initially marginalised, began to play a more prominent role with the enactment of the Marco Civil da Internet and its regulatory Decree in 2016 (Federal Decree 8.771/2016). The Decree particularly strengthened the role and importance of the Agência Nacional de Telecomunicações – ANATEL (National Telecommunication Agency) in the governance system by attributing to ANATEK a central role in the oversight of the Internet's technical-regulatory architecture, and particularly violations to network neutrality.

The present section presents the Brazilian Internet governance key actors: CGI.br, NIC.br and ANATEL. It is divided into three sub-sections, each one looking at a different actor, particularly stressing its legal contextualisation, key responsibilities and role in the governance system. The main objective of this section is to contextualise these actors presenting key aspects that will be explored in depth in the following analytical chapters that investigate the operation of multistakeholderism in the Brazilian governance system.

A. Comitê Gestor da Internet no Brasil – CGI.br (Brazilian Internet Steering Committee)

The Brazilian Internet governance system operates under the activity of three different actors. This polycentric governance structure (Black, 2008) embodies different governance elements and combines private, governmental and multistakeholder models. Guiding the policy-making process and the development of regulatory instruments, CGI.br is the anchoring point and the innovative element of the governance system. The Comitê Gestor da Internet no Brasil - CGI.br (Brazilian Internet Steering Committee), is a multistakeholder body, legally designed to be steered by the Brazilian government, that uses legal instruments not only to reaffirm its leading position in the governance structure, but also to promote and consolidate multistakeholderism as the key element of the Brazilian governance system.

The CGI.br was legally constituted on the 15th of May 1995. The Ministry of Science and Technology and the Ministry of Communications aiming to clarify the introduction of the Internet in Brazil published an administrative joint order (Nota Conjunta) establishing and communicating: a) the legal definition of the Internet in Brazil; the regulation of the Internet service providers market, particularly determining the establishment of an open and free market to be explored by private companies; c) the limits to public companies activities in the Internet service provider market; d) the creation of private backbones; e) the creation of the Comitê Gestor da Internet (Nota Conjunta do Ministério da Ciência e da Tecnologia & Ministério das Comunicações, 1995):

> 7.1 In order to make effective the participation of society in decisions involving the deployment, administration and use of the Internet, an Internet Steering Committee will be constituted, which will include the participation of representatives of the Ministry of Communications and Ministry of Science and Technology, backbones operators, internet access, users and the academic community.

The 1995 MCT/MC Nota Conjunta was one of three[39] interconnected legal documents that were extremely important to the foundation of the governance regime. They were instrumental to shape and influence the design of the governance structure, rationality and operation. The second document, the Portaria Interministerial 147 on the 31st of May 1995 created formally the CGI.br. It indicated legally the committee's original design, characteristics and attributions: elements that would influence profoundly the development of the Internet and its governance in the oncoming years. These key features, multistakeholder composition, governmental steering, technical focus and legal instability, would also cause problems for the committee during its first phase. They would also be key elements grounding, as already pointed out in the last section, its reformulation in 2003. The reformulation/re-foundation of Decree 4.829/2003 embodied 10 years of governance development and consolidated CGI.br as the key element of the policy-making process reinforcing and strengthening its multistakeholder composition while at the same time recalibrating the committee's responsibilities and allowing for the creation of auxiliary organisations.

CGI.br has an unusual legal design and an unclear positioning in the Brazilian governance ecosystem. The committee's lack of legal personality and its legal instability embrace potentialities and limitations. These ambiguous characteristics merge elements that at the same time restrict CGI.br's operations and also promote regulatory experimentation and governance innovation. Its lack of legal personality and consequently the incapacity to form contracts or binding agreements contrasts with its institutional flexibility and capacity for experimentation that facilitated the adoption of innovative governance practices. One consequence of this hybrid status was the development of a refined regulatory activity. Despite lacking legal attribution and competence, the committee, since its inception in 1995, using a plethora of normative tools existing in the Brazilian legal system, began to explore the possibility of producing regulatory instruments. It used, for example, the fragile administrative atos normativos (normative acts – executive order) to regulate the domain name

[39] Portaria Interministerial n. 147/1995; Portaria Interministerial n. 148 and Instrução normativa 04/1995.

registration process. After the 2003 reform the committee adopted a more elaborate and formal instrument, the Resolução to enhance its regulatory authority. This movement, representing the committee's normative maturation was also accompanied by its engagement with a broader set of topics. Shifting from an early technical-managerial focus to a more strategic position, CGI.br began to focus on designing and intervening in policy-making processes with the objective of influencing the Internet's technological, economic, educational and cultural development in Brazil.

This complex set of responsibilities reveals three different dimensions of the committee governance activities: a) regulatory/normative; b) technical; c) institutional/administrative. This mixed set of technical and socio-legal responsibilities[40] are established in Decree 4.829/2003 and in the committee's bylaws which indicate that CGI.br's responsibilities are:

> I - to establish strategic directives related to the use and development of the Internet in Brazil;
>
> II – to establish guidelines for the organization of relations between the government and society in the implementation of the Domain Name registration, allocation of IP address and the administration of the country code Top Level Domain (ccTLD)".br";
>
> III - to propose research and Internet-related development programs, which allow the technical level of quality and innovation in the use of Internet to be maintained and to encourage its spread throughout the national territory;
>
> IV – to promote and recommend studies, procedures and technical and operational standards promoting the security of networks and Internet services;
>
> V – to articulate and organize actions and activities related to the proposition of rules and procedures for the regulation of Internet;
>
> VI - to be represented in national and international technical forums on the Internet;
>
> VII - to adopt administrative and operational procedures for the management

[40] Article 1 of the Decree 4.829/2003.

of the Internet in Brazil;

VIII - to decide on any matters referred to in relation to Internet services in the country; and

IX – to approve its bylaws.

Analysis of CGI.br responsibilities in light of its legal and operational limitations shows that it would have been very difficult for the committee to fulfil all of its obligations. CGI.br took the strategic decision not to commit significant resources to the management of technical elements of the Internet. The committee decided to delegate to NIC.br the operation of Internet critical resources and focus on policy making. The results of this governance shift were the strengthening of the committee's regulatory activity and the enhancement of its influence on Internet policy making in Brazil. Three distinct processes give evidence of this transformation: a) publication of the Resolução RES/2009/003P establishing principles for the governance and use of the Internet in Brazil; b) regulation of technical aspects of the anti-spam policy (Port 25/TCP Management)[41]; c) the drafting process of the Marco Civil da Internet no Brasil – MCI.

These initiatives had three core characteristics: a) participation and engagement of different stakeholders; b) CGI.br's active articulating role; c) the making of normative outcomes reinforcing CGI.br leadership and policy preferences. The development of the principles for Internet governance in Brazil is a good example of this policy-making strategy. The 10 principles drafted with the participation of representatives of different stakeholders reflect the committee's interest in protecting human rights in the online environment and establishing governance based on: a) multistakeholderism and democratic practices; b) technical and operational functionality, stability and security; and c) the development of a stable regulatory

[41] For more information about the management of the Port 25/TCP in Brazil read:
Ronaldo Lemos, Carlos Affonso Souza, Fabro Steibel, and Juliana Nolasco. Fighting Spam the Multistakeholder Way – A Case Study on the Port 25/TCP Management in the Brazilian Internet. In Urs Gasser, Ryan Budish and Sarah Myers West (Org –Ed). Multistakeholder as Governance Groups: Observations from Case Studies. The Berkman Center of internet & Society at Harvard University, January 2015. The Social Science Research Network Electronic Paper Collection:
Available at SSRN: http://ssrn.com/abstract=2549270

framework.[42] As will be explored later in this thesis, the same policy-shaping strategy was put in practice during the drafting process of the MCI enshrining in the law the same core values, which resulted in the creation of a more stable and enforceable legal matrix.[43]

The conjunction of techno-operational and regulatory duties combined with the committee's actions of the past 15 years resulted in the establishment of the CGI.br as the main institution grounding the Brazilian governance system (Knight, 2014). Despite still struggling with its institutional fragility (Varon, 2013, 12; Trikunas & Wallace, 2015, 20) CGI.br grounded its development in two elements: the embodiment of multistakeholderism on the policy-making process (Lerman, 2015) and the development of an auxiliary ecosystem providing the committee with the administrative-organizational flexibility necessary to manage the Internet's techno-operational elements. The first element is characterized by the inclusion of different stakeholders in the policy-making process positioning them as elected members of the most important governance institution of the system. This approach confers not only technical expertise to the system, but also a good level of legitimacy. The election of the representatives of the non-governmental spectrum is an important feature to promote the governance legitimacy as pointed out by Trikunas & Wallace (2015, 19):

> In Brazil, the multi-stakeholder model that CGI.br developed also brings multiple private and civil society actors to the table together with government, but the model is based on explicit representation of different sectors (private businesses, civil society, academia, and the scientific and technical community); non-governmental representatives are selected through elections. In fact, the literal translation of the Brazilian term for multi-stakeholder model (…) is "multi-sectoral" governance. This approach has its roots in Brazilian society's predilection for dialogue and negotiation among organized sectors of society

[42] The Resolução RES/003/2009P establishes the following principles for governance and use of the Internet in Brazil: 1) Freedom, privacy and human rights; 2) Democratic and collaborative governance 3) Universality; 4) Diversity; 5) Innovation; 6) Neutrality of the network; 7) Non-liability of the network 8) Functionality, security and stability; 9) Standardization and interoperability; 10) Legal and regulatory environments;

[43] All the principles proposed by CGI.br were included in the Federal Law 14.915/2014 – The Marco Civil da Internet no Brasil.

to resolve governance problems. And so, while it accomplishes the essential task of bringing the relevant technical experts to the decision-making table, it does so in a way that ensures more structured representation of relevant social actors.

The second element supporting CGI.br policy development was the committee's need to address its lack of legal and operational capacity. Through both its sui generis legal design and administrative position in the Brazilian governance structure, the committee overcame its limitations by experimenting with the flexibility resulting from its legal and organisational nature. The innovative creation of the Núcleo da Informação e Coordenação do .br -NIC.br (Brazilian Network Information Centre) gave to CGI.br legal, operational and financial stability. This more secure condition provided the committee with room to concentrate its efforts on steering policy making resulting in a significant impact on Internet development in Brazil.

B. Núcleo da Informação e Coordenação do .br – NIC.br (Brazilian Network Information Centre)

The operation of Internet critical resources is a demanding, complex and time-consuming activity. Since its origins CGI.br used legal manoeuvres to delegate these activities to other institutions. The early arrangements transferred these functions to the FAPESP (Fundação de Amparo a Pesquisa do Estado de São Paulo - São Paulo State Research Agency) the responsibility to run and manage Internet core functions in Brazil. However, the increased use of the Internet and the rise of legal, financial and technical issues highlighted the need for a governance arrangement that is better designed and structured. Under the positives developments resulting from its institutionalisation process and the new regulatory framework in force the committee moved forward its plans to create a supporting structure and created in March 2005 a private company. Legally designed to be kept under CGI.br oversight the private institutions were set up to provide administrative and technical support during the management of Internet technical operation in Brazil. The Núcleo da Informação e Coordenação do .br – NIC.br was created to operationalise CGI.br policies and

projects, particularly those related to the technical management of Internet core resources in Brazil. It is legally a non-profit private organisation grounded in three legal instruments: The Decree 4.829/2003, the Resolução CGI.br 001/2005 and its 2014 bylaws.

It is important to note that the analyses of the minutes of the committee's meetings held in 2001, 2002 and 2003 demonstrate that the idea of creating a private institution able to provide to CGI.br institutional support was one of the topics brought up during the discussions leading to the institutionalisation of CGI.br's new structure in 2003. In fact, CGI.br's original plan, following the Internet Corporation for Assignment of Numbers and Names – ICANN model, was to transfer to a non-profit private institution the committee's policy and technical powers. This approach was rejected by the Brazilian government which decided, notwithstanding the CGI.br's lack of legal and operational capacity, to maintain the committee as the central actor steering the policy-making process and technical management of the Internet in Brazil. Notwithstanding its initial limited institutionalisation effect the Decree gave to CGI.br an important alternative to address its lack of legal and operational capacity:

> Article 10: The implementation of the Domain Name registration process, the allocation of IP address (Internet Protocol) and the administration of the Top-level Domain can be awarded to non-profit, public or private entity, respecting the applicable laws (Decree 4.829/2003).

This provision was used by the committee to foster the development of a set of auxiliary institutions. On the 21st of October 2005 the committee approved the Resolução 001/2005 establishing the Núcleo de Informação e Coordenação (CGI.br, 2005a):

> Art. 1 – The implementation of the Domain Name registration process, the allocation of IP address (Internet Protocol) and the administration of the TopLevel Domain are assigned to the Núcleo de Informação e Coordenação do Ponto BR – NIC.br.

Art. 2 - When proceeding the registration or cancellation of Domain Names NIC.br needs to act in accordance with the rules established by CGI.br.

Art. 3 – When performing the tasks referred in article 1 of this Resolution NIC.br is authorized to charge, after CGI.br approval, fees in accordance with the international values.

Art. 4 - The financial resources generated by the fees, after CGI.br authorization, will be directed to the reimbursement of expenditure taken by NIC.br to perform the tasks referred in article 1 of this resolution and to promote activities related to the development of the Internet in Brazil.

The Resolution allocating to NIC.br responsibility for the technical management of CGI.br's core operational powers is a well-tailored normative instrument. It established three important points: NIC.br's operational duty (Art. 1); CGI.br's normative command over the operational process (Art. 2); and CGI.br's control over the economic resources resulting from NIC.br's management of technical aspects of the Internet in Brazil (Art. 3 and 4). The committee, using the legal instruments offered by the Decree 4.829/2003, imaginatively overcame its institutional limitations creating a supportive organization to provide legal, operational and economic support to its activities. This is also recognized by NIC.br on its website that states: "The Brazilian Network Information Centre – NIC.br was created to implement the decisions and projects designed by the Brazilian Internet Steering Committee – CGI.br, which is responsible for the co-ordination and integration of all Internet service initiatives in the country" (NIC.br, 2016).

This key operational actor was legally created, according to its bylaws, on the 8th of March 2005. It is a private non-profit association located in São Paulo with administrative, patrimonial and financial autonomy, and as such is an exception to the principle that the management of core Internet resources should be conducted under CGI.br guidelines only. Despite the acknowledgement that standards and technical guidelines have an increasing normative component (Lessig, 1999; Floridi, 2014) NIC.br has a limited explicit regulatory capacity. This is the result of its operational and technological scope and of CGI.br's central position. As already

highlighted NIC.br has a technical operational focus on the core NIC.br activities related to the management and development of two technical elements of the Internet: Domain names registration and IP allocation. These primary duties are grounded on the legislation related to NIC.br (Decree 4.829/2003 and Resolução 001/2005). The secondary group of responsibilities is established by NIC.br bylaws (Art. 4) and encompasses activities related to training, research and security as indicated in the following table (NIC.br, 2014):

Primary Duties	Secondary Duties
to register domain names under the <.br> TLD (Top Level Domain);	to comply with the security and emergency requirements of the Brazilian Internet, together and in cooperation with other organisations and bodies in charge;
to distribute IP (Internet Protocol) addresses;	to design and implement projects to improve the quality of the Internet in Brazil and to promote its use, particularly focusing on its technical and infrastructural aspects;
to operate computers, servers and networks and any infrastructure as required to ensure proper operating conditions for the registration and maintenance of domain names under the <.br> TLD;	to encourage and monitor the availability and universalisation of Internet services in the country;
	to promote or assist in the organisation of courses, symposia, seminars, conferences, and trade shows, in order to contribute to the development and improvement of education and knowledge in its fields of specialisation.

(Table 01[44])

NIC.br embraces a set of important responsibilities that despite its technical aspects has important implications to Internet policy making operation in Brazil. The company's primary obligations indicate clearly its technical and operational focus, while its legal structure and the responsibility to execute CGI.br policies consolidate the committee's prominent role in the policy making process. It also shows that NIC.br bylaws were used to establish a secondary set of obligations not directly

[44] Based in the article 4 of NIC.br bylaws

related to its original responsibilities. This development was important to enhance the influence of CGI.br/NIC.br and to develop auxiliary technical structures in areas like network security and traffic management for example. Finally, it set up an alternative mechanism to provide CGI.br financial independency and stability as NIC.br must invest the proceedings coming from its fees on the development of activities and polices established by CGI.br" (NIC.br, 2014)[45].

The use of NIC.br bylaws to create a set of complementary powers not directly related to its original duties reveals the ability of CGI.br/NIC.br to extend the authorisation embodied in article 10 of the Decree 4.829/2003 to advance its policy objectives. Using NIC.br bylaws CGI.br created legal possibilities to explore different governance activities that were not predicted in the original legal framework. These legal manoeuvres opened space for the expansion of the governance space and the creation of different projects supporting CGI.br policy-making efforts. One result of this strategy was the creation of a structure able to support NIC.br's operational activities and CGI.br's policy-making processes. The establishment of a supporting group was important to support the development of governance practices promoting Internet technical expansion and use in Brazil. Actually, this structure is responsible for activities and projects ranging from IP's allocation to the implementation of web technologies and embraces the following ecosystem:

Registro.br (Domains Names registration and IP assignment);

Cert.br (Security and incident response);

Cetic.br (Studies and surveys about IT use in Brazil);

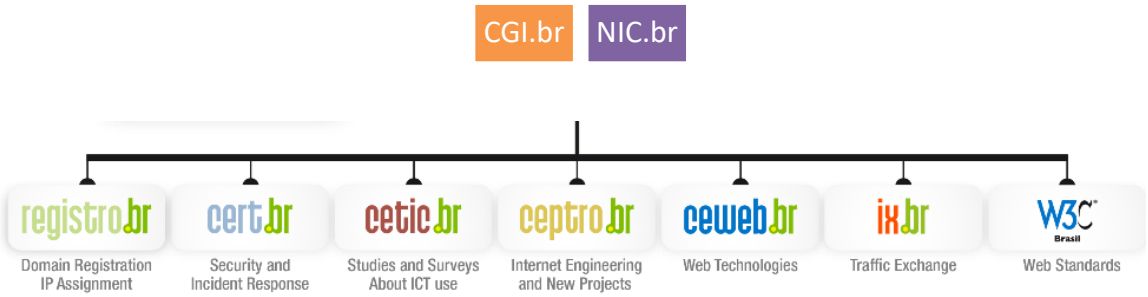
Ceptro.br (Internet Engineering and new projects);

Ptt.br (Traffic exchange);

Ceweb.br (Web technologies);

W3C Brasil (Web standards).

[45] Paragraph 2 of article 4 of NIC.br bylaws.



(Fig. 02[46])

The creation of NIC.br was a landmark in the development of the Internet in Brazil. In addition to providing CGI.br with legal, financial and administrative support it enhanced the management of technical elements of the Internet in Brazil. It stimulated an increased level of professionalization and expertise within the governance system as NIC.br hired highly-skilled professionals and adopted a more commercial approach to some activities that were guided previously by a research ethos incompatible with the fast-growing demand for Internet services like domain name registration and IP allocation. The number of departments, projects and activities developed by NIC.br stimulated different communities and actors to engage with core elements of Internet techno-governance which increased stakeholders' level of engagement and improved the legitimacy and efficiency of the governance activities.

C. Agência Nacional de Telecomunicações - ANATEL (National Telecommunications Agency)

In 1995 the Brazilian government influenced by a neoliberal agenda began to implement a set of policies opening the Brazilian market and terminating state monopoly in strategic areas. The telecommunication market was one of the first areas where these policies were applied. The Constitutional Amendment 8 published in 1995 changed completely the telecommunication services regime. At that time, only companies under Brazilian government control could operate in Brazil providing telecommunication services. The amendment extinguished that requirement thus

[46] NIC.br, Núcleo de Informação e Coordenação do Ponto BR., 2016. Who we are. [Online] Available at: https://www.nic.br/who-we-are/[Accessed 20 April 2016]

creating a regime where private actors could be licensed to develop telecommunication activities, particularly telephony. The constitutional reform changed the market and the design of its regulation transforming the former provider into a regulator. Shortly after the constitutional amendment the Federal law 9.472/1997 was enacted aiming to regulate the new telecommunication market. One of its key contributions was the inception in Brazil of a regulatory model based on regulatory agencies. The Lei Geral das Telecomunicações (General telecommunication law) created the first regulatory agency in Brazil: the Agência Nacional de Telecomunicações – ANATEL (National Telecommunication Agency).

The Internet is a complex set of technological assemblages, and is composed of a set of coordinated layers enabling the flow of data and information. The network is formed, in the most basic explanatory model, by three different, but interconnected technical layers: the physical that is responsible for providing the structural elements (cables and wires) backing the flow of information; the transport layer that organises the logical (protocols and standards) elements supporting data exchanges; and the application layer that is responsible for instruments able to mediate the usability of the capacities provided by the other layers; for example, as in the application layer that apps like Skype or Netflix are located. Another way to present this layered aspect is proposed by Kurbalija (2016, 35) for whom the Internet is composed of the following layers: "the telecommunications infrastructure, through which all Internet traffic flows; Technical issues related to standards (technical and web standards) and critical Internet resources (IP numbers, the DNS, and the root zone); and Cross-cutting issues including net neutrality, cloud computing, the IoT, and convergence."

This intricate multi-layered design has important consequences for Internet governance and regulation as it requires policy coordination between the three different layers. For example, a policy aiming to enhance the privacy of personal data in the Internet can not only rely on requiring ISPs and application providers to enable privacy by design and privacy-friendly processing activities. This policy, in order to be efficient, must be coupled with protective policies regulating the physical layer of the network, like for example enacting rules that protect network neutrality or minimize the use of deep package inspection (DPI) techniques. The regulation of this

hidden layer, most of the time neglected or overlooked during the policy-making process, is a key element of any Internet governance system, and in the Brazilian case ANATEL has been empowered as a key actor in this governance locus.

The agency was created to regulate and oversee the implementation, execution, commercialisation and use of telecommunication services in Brazil (Federal Law 9.472/1997)[47]. ANATEL integrates the indirect Brazilian federal public administration under an autarchic regime having financial and administrative autonomy, and is linked to the Ministry of Science, Technology, Innovation and Communication. The agency is also regulated by the Decrees 2.338/1997 and 4.733/2003 and by its bylaws. This legal framework characterises the agency, despite its legally-depicted administrative and financial autonomy, as an institutional body linked to the Brazilian government. The agency also has some expanding normative and regulatory competencies (articles 19, IV of the Federal Law 9.472/1997 and 16, V and 17 of the Decree 2.388/1997[48]) encompassing areas like telephony, radio frequency use[49], satellite homologation[50] and drone certification[51]. ANATEL's core responsibilities are (Federal Law 9.472/1997):

> a) to enact rules on the granting, rendering and use of telecommunication services under the public and private system;
>
> b) to manage and issue rules on the radio-frequency spectrum and the use of orbits;
>
> c) to issue norms and standards to be followed by telecommunication service providers regarding equipment utilization;

[47] Article 1 - The Union, through a regulatory body and in accordance with the policies established by the Executive and Legislative Branches, shall organise the operation of telecommunications services.
Single paragraph - The organization includes, among other aspects, the disciplining and supervision of the execution, commercialization and use of services and the implementation and operation of telecommunications networks, as well as the use of orbit and radiofrequency spectrum resources.

[48] Art.16. The Agency shall take the necessary measures to meet the public interest and the development of Brazilian telecommunications, and especially:
V - exercise normative power in relation to telecommunications;
Art.17. In exercising its regulatory powers in respect of telecommunications (…).

[49] Resolução ANATEL 665/2016 - Designed radio frequency bands and approves the Regulations on Channelling and Conditions of Use of Radio range of 380 MHz to 400 MHz

[50] Resolução ANATEL 430/2006 - Approves Standards for Certification and Homologation of Mobile Devices Access to Satellite Telecommunications Services.

[51] Resolução ANATEL 242/2000 e Resolução ANATEL 323/2002.

d) to issue norms and standards that ensure compatibility with the integrated operation and interconnection between networks, also encompassing terminal equipment;

e) to repress violations of user rights;

f) to represent Brazil before international communications entities;

These responsibilities, despite being more connected to the regulation of telecommunication infra-structure, have a direct impact on, and in some cases overlap with, CGI.br policy processes. This has been generating in the past few years, some tension between the two governance actors in face of their different governance and regulatory approaches and decision-making processes. These differences and their impact on governance can be easily perceived in international and national policy developments. Until recently the Brazilian position on Internet governance issues varied depending on which institution was representing the country internationally. It was only after Snowden's revelations and the NETmundial Meeting held in Sao Paulo on 23-24th of April that Brazil consolidated its position supporting multistakeholderism in the international governance scenario. Before that the country's contrasting positions led to its critical characterisation by Maurer & Morgus (2014) as a swing state in the Internet governance scenario.

This inconstant position reflected the policy-making approach and agenda of the governance actor representing the country internationally. CGI.br was the Brazilian representative in Internet governance meetings in arenas like ICANN, IETF and IGF and always supported a governance regime grounded on multistakeholderism. Contrasting this position, ANATEL and the Ministry of Communication were the representatives in other arenas like the ITU and some processes led by the United Nations and supported the development of a governance regime based on multilateralism and state leadership. This contrast can be observed for example, when the country, despite supporting the development of IGF, proposed in the 2011 United Nation General Assembly the creation of a United Nations Internet Governance body in the models of ITU (Varon, 2013).

Tensions can clearly be noticed on the contrasting approaches adopted by each actor in policy debates about access to the Internet, broadband regulation and network neutrality. One key example of these tensions erupted in April of 2016. ANATEL, under pressure from telecom companies, began to discuss changes in the broadband commercialisation policies. Its general concept was to allow companies to implement data limits to broadband plans authorising companies to disconnect users once they reach their allowance (UOL, 2016; Folha de Sao Paulo, 2016). The ongoing broadband policy tradition in Brazil applied to mobile, landline and fibre-based access, and allowed companies to create unlimited access plans[52] that were openly used to attract clients. This discussion sparked many controversies mainly because the policy proposal disregarded provisions of the Brazilian Consumer Code (Federal law 8.078/1990)[53] and of the Marco Civil da Internet[54] that granted the maintenance of essential public services like Internet access.

Acting cautiously, CGI.br published in June 2016 the Resolução CGI.br/RES/2016/015. The document indirectly rejected policies limiting Internet access and claimed the development of a collaborative policy to address the question:

> any decision regarding the current debate on data franchise in broadband services in Brazil must be grounded in technical, legal and economic studies that must be legally, theoretically and empirically validated, and also take in account the international experience in this regard;
>
> ANATEL, the SENACON[55], CADE[56], the CGI.br, user associations and companies, ISPs and telecom operators, all collaboratively, and in support of

[52] The broadband plans normally had limit but after the consumption of the contracted limit the customer continued to have access to the service but with lower transmitting rates.

[53] Article 22 - Public agencies, by themselves or through their companies, service providers, or any other form of entrepreneurship, will be required to provide products that are adequate, efficient, safe and, regarding the essential ones, in a continuous way.

[54] Article 7 - The access to the internet is essential to the exercise of citizenship, and the following rights are guaranteed to users:
V - non-suspension of Internet connection, except if due to a debt resulting directly from its use;

[55] Secretária Nacional do Consumidor - SENACON (National Department for Consumer Protection). SENACON is a department of the Ministry of Justice in charge of formulating, promoting and implementing the national policy for consumer protection.

[56] Conselho Administrativo de Defesa Econômica – CADE (Administrative Council for Economic Defense).

Internet development in Brazil, seek, including through public consultations, balanced solutions to address this issue (CGI.br, 2016a).

Another point of friction was exposed with the enactment of the Decree 8.771/2016. According to articles 5, 6 and 17, ANATEL has, shared with CGI.br, regulatory, oversight and enforcement powers related to the implementation of network neutrality protective policies. While CGI.br was one of the key actors lobbying for the inclusion of provisions protecting network neutrality in the MCI, ANATEL, traditionally affiliated to the telecoms lobbying, has been more conservative and open to a more commercially-friendly approach to network neutrality. This governance dichotomy and the power struggle between these contrasting actors are two major points undermining not only the governance system balance, but also the efforts to develop a regulatory framework able to defend a set of core values promoting the development of a free, open and protected Internet in Brazil.

The empowerment of ANATEL, particularly via Decree 8.771/2016, increased the agency's role and relevance in the governance system. The new policy framework allocated to ANATEL key roles in relevant areas, signalling some contrasting changes in the way that the Brazilian government plans its role in Internet governance. Although ANATEL's legal framework positions the agency as an autonomous and independent regulator, its structure and policy-making process, as will be discussed in the following chapters, are deeply linked to the Brazilian government's policies interests. Interestingly, the re-empowerment of ANATEL coincides with the development of initiatives aiming to reframe CGI.br's structure and its role in the governance system[57].

Finally, it is also important to notice that the rise of a more conservative legislative parliament in 2014 and the new centre-right presidential cabinet formed after the 2016 "constitutional coup" have deeply influenced CGI.br's activities by

[57] After assuming the presidency Mr Michel Temer changed some governmental representatives in the CGI.br. After it recomposition the committee approved an internal ruling (Resolution CGI.br/RES/2016/024) creating a working group to review its by-laws and internal procedures.

promoting the nomination of new government representatives and calling for discussions of topics more aligned with a command and control governance. These are key elements informing the need to understand ANATEL's role in the actual governance system as future modifications could not only reshape the governance power balance but also the system's design, decision makers and policy-making process.

III. Governance legal framework: Main regulatory instruments and practices

The legal framework regulating Internet use and governance in Brazil resembles a complex set of paths with different origins leading not to the same place, but always in the vicinities of each other. Most of the regulatory framework is formed by a complex disorganised network of laws and regulatory instruments regulating issues ranging from elections to child pornography. Only recently, with the open discussion about the drafting and enactment of the Federal Law 12.965/2014 (Marco Civil da Internet) and the Decree 8.771/2016, has Brazil begun to develop a more coordinated and coherent regulatory framework. The current section presents the general elements of this framework, and focuses primarily on the legal instruments establishing the governance design and instruments, particularly looking at the legalisation of multistakeholderism. To accomplish this objective, the section is divided into two main subsections covering: a) general legal aspects of the governance structure and Internet use. This subsection discusses the legal elements guiding Internet governance and Internet use in Brazil. It focusses mainly on the MCI as other important legal instruments were already presented in previous sections of this thesis; and b) Brazilian international regulatory initiatives. This subsection examines the engagement of the Brazilian governance system with international governance in an attempt to develop a set of international legal instruments to guide international Internet governance. It presents the Global Multistakeholder Conference on the Future of Internet Governance (Net Mundial Meeting) and the publication of the NETmundial principles for Internet governance.

A. Legal aspects of Internet use and governance in Brazil

One of the first attempts to regulate computer and Internet-related issues in a more comprehensive way in Brazil goes back to 1999. Using a rationale from criminal law, cyber-criminal law was under parliamentary discussion for more than 10 years. After one update in 2007 the draft law went again under discussion in parliament. The bill was heavily criticised by human rights activists, civil society actors and segments of the business sector. One of the key criticisms was about the proposition determining that Internet service providers must, without court order, implement technical measures to monitor users' access to the Internet and prevent illegal activities (Solagna, 2015; Rezende & Lima, 2016, 143). The creation of the "online petition veto the Cybercrime Bill – in defence of freedom and the development of Brazilian internet" (Lemos, 2014a) was an important development which brought the discussion about the cyber-crime law to the country's attention. With more than 160,000 signatures the petition stressed the problematic points of the bill and called on Brazilian parliament members not to approve it (Ferreira Nolasco, 2014, 30).

> "strong public reaction against the passing of a draconian cybercrime bill in Brazil in 2007, nicknamed "Azeredo Law," in reference to a senator called Eduardo Azeredo, rapporteur and lead proponent of the bill. If the bill had been passed, it would have established penalties of up to four years in jail for anyone "jailbreaking" a mobile phone, and four years in jail for anyone transferring songs from an iPod back into their computers" (Lemos, 2014a, 63).

This controversial scenario stimulated the search for alternative legal models for regulating the Internet in Brazil. Although the discussion about the criminal aspect of the Internet advocated a more restrictive approach with provisions harmful to freedom of expression and privacy, the movement promoting a civil legal framework gained support and in 2009 after a meeting between the former Brazilian President Luiz Inacio Lula da Silva and representatives of the Brazilian Internet community (Ferreira Nolasco, 2014, 31) the Marco Civil da Internet concept gained more support. Later in the same year the Ministry of Justice signed an agreement with the Centre for Technology and Society at the Getulio Vargas Foundation Law School in Rio de

Janeiro (CTS-FGV Rio Law School) assigning to the research centre the design and organisation of an open, transparent and inclusive consultation process (Lerman, 2015, 16) about a new law regulating civil aspects of Internet use and governance in Brazil.

> Given the novelty of the theme, the Ministry and CTS-FGV opted for a public consultation that would take shape through two phases. The first phase was an open, online call for comments that allowed participants to submit comments through an open blogging platform or via Twitter. In the second phase, the Ministry of Justice presented a draft law for comments. The consultation was carried out via digital tools because the leaders of the process were committed to making the debate truly inclusive for all internet users in Brazilian society (Ferreira Nolasco, 2014, 32).

The result of the MCI process was twofold: a) creation of a comprehensive civil law framework regulating Internet use and governance in Brazil; b) formulation and application of a drafting process promoting legitimacy, transparency, inclusion and participation (Schulz, 2014, 18). The overall result was the development of a legal framework protecting rights (net neutrality, privacy, freedom of expression) grounded on an open, and collaborative building process encompassing multistakeholder characteristics (Lemos, 2014a, 62).

A.1 The Marco Civil da Internet – Federal Law 12.961/2014

The Marco Civil da Internet is the statutory name of the Federal Law 12.965/2014. This legal instrument establishes principles, guaranties, rights and obligations regulating Internet use and governance in Brazil. It is important to note that despite being an ordinary federal law the option to consider the law as a "framework" is more related to a legislative tendency to produce laws regulating general aspects of strategic areas like telecommunication and infrastructure (Salgado & Mota, 2005) than a special status of the law. Although it is important to highlight that regarding the law as a framework was an interesting manoeuvre to boost its popularity with the

international community as the first translations normally it as "Internet Civil Rights Framework[58]", "Internet Bill of Rights"[59] or "Brazil's Magna Carta for the web"[60] (Medeiros & Bygrave, 2015).

> **Marco Civil** is a very unique Internet-centric statute. Instead of creating protection regimes based on the general types of rights involved, Brazil has chosen, with **Marco Civil**, to focus primarily on the protection of those rights in the specific context of the Internet. Thus, instead of introducing a general data privacy regime, such as is established in Europe, this new law only regulates particular Internet-related aspects of data privacy. The same is true for data retention and network neutrality (…) the legislation is mostly about how the Brazilian legal system shall deal with particular issues related to Internet use, such as data privacy and liability of Internet service providers (ISPs). Admittedly, it does embrace a 'multistakeholder' model of governance (Art. 24(I)) and it does acknowledge the role of the Brazilian Internet Steering Committee (CGI.br), established already in 1995, in managing the Internet in Brazil (Art. 24(II)), but it does not provide comprehensive regulation of Internet deployment and use (Medeiros & Bygrave, 2015, 121).

The law has the usual structure of a Brazilian statute encompassing 32 articles distributed across several chapters and sections. The provisions inserted in the first chapter delimit the law's scope (Art. 1), set out foundational elements and principles (articles 2 and 3), indicate the objective to be achieved with Internet regulation (Art. 4), and establish definitions and interpretative guidelines (articles 5 and 6). The second chapter indicates the rights and guarantees of Internet users in Brazil (articles 7 and 8). The third chapter regulates the provision of Internet connection and Internet applications (articles 9 to 23) covering the following topics: a) network neutrality (Section I, article 9 and paragraphs); b) personal data retention and private communication protection (Section II, articles 10 to 17); c) intermediaries' liability

[58] https://en.wikipedia.org/wiki/Brazilian_Civil_Rights_Framework_for_the_Internet
[59] http://www.lexology.com/library/detail.aspx?g=81c0f2c4-09fb-41ad-82f0-5ac46e7e7b17 and http://www.americasquarterly.org/content/brazils-internet-bill-rights
[60] http://www.economist.com/news/americas/21599781-brazils-magna-carta-web-net-closes

(Section 3, articles 18 to 21); d) Judicial request for records (Section 4, articles 22 and 23). Chapter 4 (articles 24 to 28) focuses on the role of public authorities promoting the development of the Internet, particularly setting attributions and objectives to be taken into account during the policy-making process. Finally, Chapter 5 (articles 29 to 32) or the so-called final provisions section concerns topics related to parental control over content accessed by children and copyright issues.

The analysis of the provisions enacted by MCI reveals three important points. Firstly, the legislation, despite being designed as an innovative digital bill of rights, is centred on very traditional offline issues that have been directly impacted by Internet use like privacy and freedom of expression. Even when covering issues more connected with Internet technicalities like network neutrality the law does not enact any provision creating or protecting rights that are not already protected in other countries (Medeiros & Bygrave, 2015).

Secondly, its regulatory focus is directed to Internet use and not to governance. In particular, it uses a general approach establishing principles and values to be observed by different actors engaged in the development and implementation of Internet-related policies. It sets a general framework to be observed during the design and operation of instruments regulating specific topics like e-commerce or online-content removal and also to guide the interpretation of other regulatory instruments when applied to a context involving the Internet. This explains the lack of provisions regulating critical Internet resources (IP management and domain name system, for example) and also the existence of loose provisions embracing the promotion of multistakeholderism or the existing governance arrangements. The adoption of a flexible and expansive regulatory approach (Medeiros & Bygrave, 2015, 123) based on principles and values (Schulz, 2014) can be identified not only in the formal structure of the law where more than half of its articles (articles 17 from 32) are dedicated to principles, values, objectives policy guidelines, but also in the actual text of the provisions like the one inserted in article 6 establishing that:

> In the interpretation of this Law – in addition to the foundations, principles and purposes set forth – the nature of internet, its particular uses and costumes and

its importance for the promotion of human, economic, social and cultural development, shall be taken into account.

The law is basically formed by a group of general rules and another set of concrete regulatory provisions. The general rules are distributed across three categories that indicate programmatic goals, policy models and fundamental rights (Medeiros & Bygrave, 2015). It is important to note that most of the fundamental rights listed in the law were already part of the Brazilian legal order being only "revamped" to fit better in the online environment (privacy and freedom of expression, for example). Although the law also includes rights specific to Internet use like the protection to network neutrality and the indication of a right to access the Internet.

The core elements forming the law, as the next chapters will explore, are connected to the reaffirmation and superficial regulation of rights in the Internet. Only in its last section does the MCI enact provisions providing governance guidelines to governmental actors. The law sets diverse policy recommendations and courses of action that vary from the promotion of digital culture and heritage to the adoption of open and free technologies.[61] It is important to note that while the law was designed to establish a detailed governance framework there are two legal provisions relevant

[61] Federal law 12.965/2014, Art. 24 - The following are guidelines for the performance of Federal Government, States, Federal District and municipalities in the development of Internet in Brazil: I - establishment of mechanisms of governance that are multi-stakeholder, transparent, cooperative and democratic, with the participation of the government, the business sector, the civil society and the academia; II - promotion of the rationalization of management, expansion and use of the internet, with the participation of Brazilian Internet Steering Committee (CGI.Br); III - promotion of rationalization and technological interoperability of e-Government services, within different branches and levels of the federation, to allow the exchange of information and speed of procedures; IV - promotion of interoperability between different systems and terminals, including among the different federal levels and different sectors of society; V - preferred adoption of open and free technologies, standards and formats; VI - advertising and dissemination of public data and information in an open and structured manner; VII - optimization of network infrastructures and promoting the implementation of storage, managing and dissemination of data centers in the country, promoting the technical quality, innovation and the dissemination of internet applications, without impairment to the openness, neutrality and participatory nature; VIII - development of initiatives and training programs for internet use; IX - the promotion of culture and citizenship; and X - provide public services for attending citizens in an integrated, efficient and simple manner and through multi-channel access, including remote access.

to reinforce the existing governance framework. The first one legally establishes the obligation of state actors to adopt multistakeholder-based governance mechanisms for policy making and the regulation of Internet in Brazil (article 24, I). The second reinforces CGI.br's central role on the governance of Internet in the country:

> Art. 24. The following are guidelines for the performance of Federal Government, States, Federal District and municipalities in the development of Internet in Brazil:
>
> - establishment of mechanisms of governance that are multi-stakeholder, transparent, cooperative and democratic, with the participation of the government, the business sector, the civil society and the academia;
>
> - promotion of the rationalization of management, expansion and use of the internet, with the participation of Brazilian Internet Steering Committee - CGI.br.

These two simple guidelines set the key rationality that Brazil should follow when formulating and implementing policy-making processes related to the Internet. They are relevant in addressing the governance system's legal instability already noted in this thesis. The provisions inserted in article 24 stabilize the regime in two ways. Initially, it enacts for the first time in the governance legal framework the need to use a multistakeholder approach for any Internet policy making or norm-making process. It legally recognises all multistakeholder practices and values developed by CGI.br in the last 15 years. In doing so the provision established a norm-making process based on multistakeholder grounding values (openness, inclusion and democratic) that have been already applied in other initiatives[62]. It also recognises the significance of multistakeholderism and its important role providing legitimacy, inclusion and expertise to Internet governance in Brazil. Finally, as will be discussed further in this thesis, the law, even indirectly, moved CGI.br's legal anchoring on the

[62] The Brazilian Ministry of Justice has been applying the same process to create other norms. The participatory process was already used to develop the Personal data protection bill and the Anti-corruption bill. More information available at: http://pensando.mj.gov.br/debates/

governance system from a secondary normative instrument, a Decree, to a more robust and stable regulatory source, a Federal Law.

B. Practices promoting the Brazilian multistakeholder model internationally: The Global Multistakeholder Meeting on the Future of Internet Governance and the NETmundial principles

Shortly after Snowden revealed the extent of the United States of America's electronic surveillance programs, noting specifically that the US National Security Agency had accessed emails and other communications from Brazilian public companies and officers, including the telephone of the Brazilian president, the country began to claim, in the International arena, the need to reform the U.S.-centric international Internet governance system (Kummer, 2014; Varon 2014). "The Snowden surveillance revelations raised a whole host of other issues among global stakeholders, and Brazil took up the mantle of leadership in calling on the world to come together on a common vision for the future of internet governance" (Nwakanma, 2014).

Acting on different fronts (United Nations, BRICS, IBSA, MERCOSUL and internally) the Brazilian government stepped up the promotion of the development of an international governance system focused on democratic multistakeholder practices and the protection of human rights. These were, according to the Brazilian view, unique instruments able to rebuild the trust of all actors engaged in governance processes, mainly because these are mechanisms promoting and supporting "Internet openness, freedom, stability and unity" (Kleiwätcher, 2014, 118). Using the achievements of its national governance system, particularly stressing CGI.br's multistakeholder experience (Wagner & Mueller, 2014) and the drafting process of the MCI (Varon, 2014) the country proposed an international multistakeholder meeting to discuss the future of Internet governance:

> After meeting with Chehadé on October 9, President Rousseff announced via Twitter that "Brazil will host in April 2014 an international summit of government, industry, civil society and academia." Later in November, the date and title of the event was set: it will be called the Global Multistakeholder

> Conference on the Future of Internet Governance and will be held in Sao Paulo, Brazil April 23 and 24, 2013. According to a Brazilian government news release: "[T]he meeting will aim to produce universal internet principles and an institutional framework for multistakeholder Internet governance. The framework will include a roadmap to evolve and globalize current institutions, and new mechanisms to address the emerging internet governance topics" (Wagner & Muller, 2014, 1-2).

The meeting's objective was to tackle two key problematic issues surrounding the dynamics of Internet governance: "the need to identify a set of universally acceptable internet governance principles and the need to propose a way forward for the evolution of the Internet governance ecosystem" (Maciel, 2014). Looking for an opportunity to secure the promotion of its agenda and also to exercise leadership during the process, the organization of the meeting was assigned to CGI.br. The committee, using its own governance experience, structured the meeting applying a multistakeholder rationality. The general structure was composed of two main bodies: The High Level Multistakeholder Committee (HLC) and the Chair of the Meeting (Varon, 2014).

> The HLC, chaired by the Brazilian Minister of Communications was responsible for overseeing the overall strategy of the meeting and fostering the involvement of the international community. It is composed of: Ministerial-level representation from twelve governments; twelve members of the multistakeholder community (3 from civil society, 3 from the private sector, 3 from academia and 3 from the technical community); and two representatives from International Organizations, appointed by the Secretary General of the United Nations[63] (NETmundial, 2014b).

[63] 12 countries were represented in the organizing committee: Argentina, Brazil, France, Ghana, Germany, India, Indonesia, South Africa, South Korea, Tunisia, Turkey, and United States of America. The group was formed for the following representatives: Jovan Kurbalija, Stephanie Perrin and Louis Pouzin representing the civil Society. Joe Alhadeff, Christoph Steck and Jimson Olufuye representing the private sector. Jeanette Hofmann, David Johnson and Derrick Cogburn representing the academia. Kathy Brown, Tarek Kamel and Mathieu Weill representing the technical community. Hamadoun Touré and Wu Hongbo representing International Organizations.

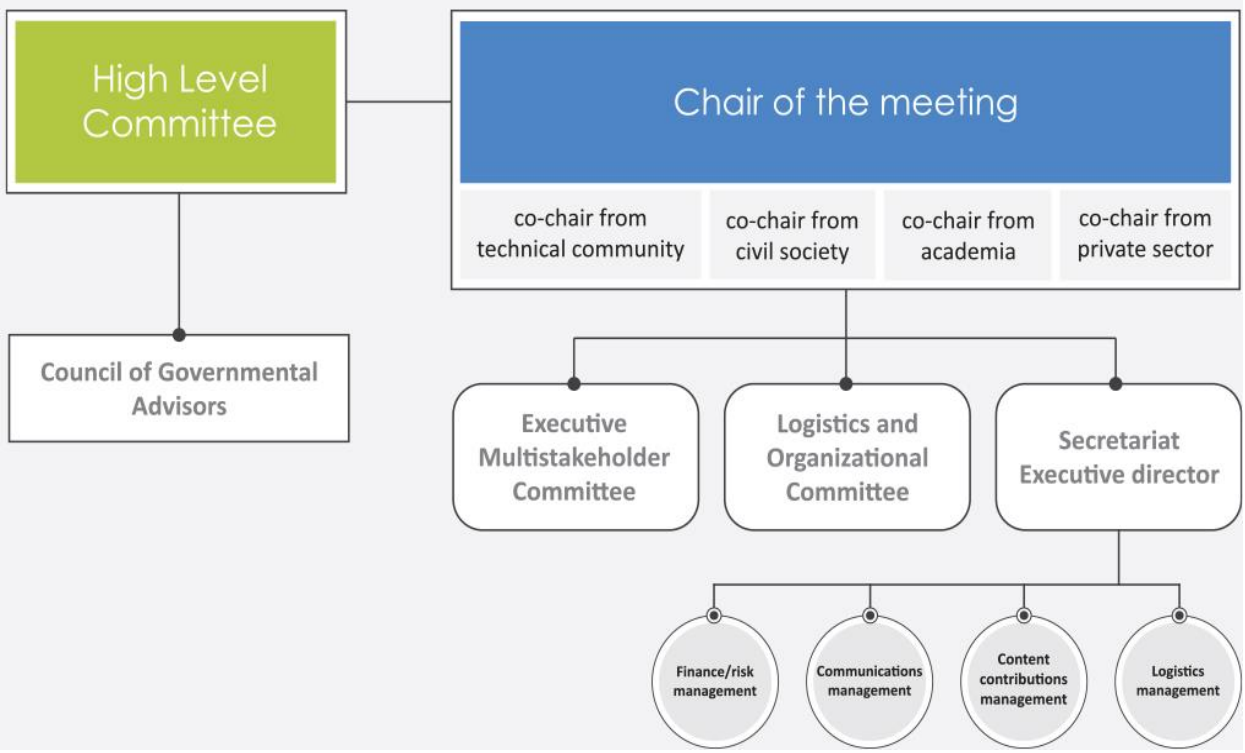
Drawing on its multistakeholder processes, the chair of the meeting, Virgílio Almeida (Coordinator of CGI.br, representing the Ministry of Science and Technology), invited representatives of other stakeholders (the academic community, civil society, the technical community and the private sector) to co-chair[64] and steer the meeting (NETmundial, 2014b). Linked to the two main governing structures were three committees with distinct roles. The Executive Multistakeholder Committee (EMC) was responsible "for the meeting agenda, the design of the meeting format and the invitation of attendees, all equally balanced across the global multistakeholder community" (NETmundial, 2014c; Kleiwachter, 2014). It was composed of 17 members, eight of whom were nominated by the CGI.br and nine nominated by 1Net[65] representing the global multistakeholder community, including one representative from one international organisation.

The Logistic and Organizational Committee - LOC "was responsible for guiding all logistical aspects of the meeting including: media outreach, international communications, website design and management, awareness raising, meeting venue, traveler funding strategy, security, and remote participation" (Varon, 2014, 16; NETmundial, 2014d). It was composed of: two representatives from CGI.br; one representative from ICANN; one representative from the Ministry of Justice; one representative from the Ministry of Foreign Affairs; one representative from the Cabinet of the Presidency; and one representative from 1Net" (Kleiwachter, 2014). The Council of Governmental Advisors (CGA) was composed of all government representatives and officials who participated and contributed to the meeting (NETmundial, 2014e).

[64] Jeanette Hofmann (academic community), Subi Chaturvedi (civil society), Fadi Chedadé (technical community) and Andile Ngcaba (private sector).

[65] 1net is an open, inclusive, multistakeholder platform for advancing global discussions on Internet governance. The purpose of 1net is to provide an inclusive and open platform for discussion of Internet governance matters among all those interested - whether they represent business, academia, governments, civil society organizations, the technical community or are just interested individuals. (1Net, 2016)

NETmundial Meeting Structure



(Fig. 03[66])

Using the experience gathered through the MCI process the meeting was planned to occur in two distinct but connected stages: the preparatory phase and the plenary sessions. Taking into account its objectives and time limitation (two days) the organising commission decided to adopt a two-stage preparatory consultation dynamic: a preliminary stage to collect open contributions towards general topics and a second stage to collect comments on a drafted document. During the initial stage, using an online platform available on the meeting's webpage, "contributors from all stakeholder groups could submit ideas and references on the two main tracks: principles and the roadmap" (Varon, 2014). The first stage received 180 contributions from stakeholders representing 46 different countries (Netmundial, 2014f). After that, all the suggestions and contributions were systematised by the EMC in a draft document.

[66] NETmundial, NETmundial, The Global Multistakeholder Meeting on the Future of Internet Governance, 2014e. Council of Governmental Advisors. São Paulo [Online] Available at: http://netmundial.br/cga/

This initial version was sent to be approved by the HLC, but while under discussion by that committee the document was published by WikiLeaks (Varon, 2014). After dealing with the incident the HLC approved the first draft with minor changes and published the document. The second stage was the commenting of the draft document. Using an open and free online platform the participants were able to comment and see all other comments submitted in a paragraph-by-paragraph mode (Varon, 2014, 19). Between April 15th and 21st the draft received 1,370 comments distributed in three categories: Introduction; Principles; and Roadmap.

	N/A	ACADEMIA	TECHNICAL COMMUNITY	GOVERNMENT	PRIVATE SECTOR	CIVIL SOCIETY	TOTAL
Introduction	1	3	1	10	2	23	40
Principles	59	55	78	62	221	357	832
Roadmap	20	39	41	75	119	204	498
Total	80	97	120	147	**342**	**584**	1370

(Table 02[67])

Shortly after the on-line consultation the NETmundial meeting started. The event had 1,229 on-site participants and 33 official hubs in 23 different countries. According to Varon (2014, 22) the main objective of the plenary sessions was to discuss the draft document and the comments made on the online platform. These interactions were made under a multistakeholder rationality of engagement:

After the debates the drafting committees composed of the chairs and co-chairs of each session worked to produce a final text. The document was forwarded for the consideration of the HLC. In contrast with the inclusive and participative approach used previously, the session discussed the final version of the NETmundial statement held under a different arrangement. The document produced was drafted during a session where only the HLC members had a voice and decision-making power. Despite not addressing key topics like network neutrality and the IANA transition and being criticised by civil society actors for not following a multistakeholder

[67] NETmundial, NETmundial, The Global Multistakeholder Meeting on the Future of Internet Governance, 2014f. NETmundial Draft Outcome Document Public Consultation: final report on comments. São Paulo [Online] Available at: http://netmundial.br/wp-content/uploads/2014/04/NETmundialPublicConsultation-FinalReport20140421.pdf

approach in its final drafting stages (Varon, 2014, 23), the final document designated the NETmundial Multistakeholder Statement and was approved overwhelmingly (NETmundial, 2014f).

The meeting outcome was a declaration containing two different documents: The Internet governance principles; and the Roadmap for the future evolution of Internet governance. In a broad sense the principles and the roadmap, as will be explored in the next chapters, promote the development of a governance system based on democratic values, multistakeholder practices and the protection of human rights (Estehuysen, 2014). The outcome of this bottom-up, open, participatory and collaborative process was one of a non-binding document promoting the following values and guidelines:

- Human rights and shared values: Human rights should be the pillars of the Internet governance regime and must not only be protected on the Internet but also be promoted by its use. Those rights include but are not limited to (NETmundial, 2014a):
  - Freedom of expression;
  - Freedom of association;
  - Privacy and protection against electronic surveillance;
  - Accessibility;
  - Freedom of information and access to information;
  - Development;

- Protection of intermediaries: Intermediary liability and its limitations must be regulated respecting and fostering economic growth, innovation, creativity and the free flow of information (NETmundial, 2014a);
- Culture and linguistic diversity;
- Unified and unfragmented space;
- Security, stability and resilience of the Internet;
- Open and distributed architecture;
- Enabling environment for sustainable innovation and creativity;
- Open standards;
- A governance process based on:
  - Multistakeholderism;
  - An open, participative and consensus-driven governance;
  - Transparent and accountable;
  - Inclusive and equitable;
  - Distributed, participative and collaborative.

The second part of the document, the Roadmap for future evolution of the Internet governance outlined "possible steps forward in the process of continuously improving the existing Internet governance framework ensuring the full involvement of all stakeholders in their respective roles and responsibilities" (NETmundial, 2014a, 8). The roadmap provides reflections and guidance on issues related to the future of Internet governance like the need to develop multistakeholder mechanisms in national levels and capacity-building initiatives; institutional improvements like the strengthening and empowerment of the Internet Governance Forum (IGF); and also complex policy-making topics like network neutrality, cybersecurity and surveillance.

Considered by some scholars as a watershed moment in Internet policy making (Kleiwachter, 2014; Kummer, 2014) the meeting's main contributions were: a) the promotion of multistakeholderism as a viable governance approach, particularly demonstrating its potential and viability (Varon, 2014); b) the publication of a document recognising the need to address the lack of democracy and accountability of actual governance arrangement (Maciel, 2014). Finally, the meeting was also an important opportunity for Brazil to influence the global agenda through the promotion of its governance model. Championing an open, participatory, inclusive and innovative multistakeholder Internet governance process made the country, not only emerge as a new and legitimate leader (Nwakanma, 2014), but also promote its internal governance framework on the international arena.

IV. Some concluding remarks and observations

The Brazilian Internet governance approach to multistakeholderism or multi-sectoral governance model is particularly built around the coordination of stakeholders using their expertise and resources in order to promote Internet development and use by leading governance structures and regulatory practices. Although grounded on this conceptual framework the legal design of Brazilian Internet governance structure encompasses a contrasting rationality. The clear separation and sometimes uncoordinated relations between the governance and regulation of telecommunication and Internet has created two different governance spaces. The

differences between multistakeholderism applied to the Internet level and the governmental-centred approach in practice on the telecommunication regime reveal not only a distinct aspect of policies designed by each system, but also on the way that each builds its legitimacy and exercises its policy-making processes. The main source of this difference is the embodiment or not of instruments or practices supporting the development of multistakeholder approaches on legislation design and decision-making processes.

While CGI.br grounds its legal constitution and activities on multistakeholderism ANATEL is legally and policy-making oriented on traditional governmental policy-making rationality. Whether using its normative capacity, applying the Brazilian Law of Telecommunications or representing the country's interests internationally, the agency replicated its state-led governance preference, supporting a prominent role of the state on policy-making activities, which generating tension and contrasts with the multistakeholder rationality that grounds Internet governance in the country. Despite not using explicitly the term multistakeholderism, the first set of normative instruments legally establishing the governance foundation, Joint Statement of Ministry of Science and Technology and Ministry of Communication and the Portaria Inter ministerial MCT and MC 147/1995, indicate the creation of governance based on inclusion and representativeness:

> "in order to make effective the participation of society in decisions involving the deployment, administration and use of the Internet, an Internet Steering Committee will be created, which will include the participation of the Ministry of Communication and Ministry of Science and Technology, infrastructure operators, representatives of internet service providers, users and the academic community[68]" (Brasil, 1995).

Even after the 2003 institutionalisation reform[69], the idea of a governance model based on multistakeholder elements was more the result of the committee's plural composition and multistakeholderism's internalisation than from direct legal

[68] Item 7.1 of the Joint Statement of Ministry of Science and Technology and Ministry of Communication
[69] The Federal Decree 4.829/2003 does not mention the term multistakeholder.

intervention. One example of this internalisation can be noted during the development of GCI.br principles of governance and the use of the Internet in Brazil. After more than a year discussing with all stakeholders the committee published 10 principles guiding the use and governance of the Internet in the country. Interestingly the principles only refer to multistakeholderism in an indirect way when mentioning the need of establishing collaborative and democratic governance: "Internet governance must be exercised in a transparent, multilateral and democratic manner, with the participation of the various sectors of society, thereby preserving and encouraging its character as a collective creation (CGI.br, 2009).

This reluctance to express its internal governance concepts and practices, and the mention of a contrasting approach (multilateralism) reveals the struggle about which position the country should adopt to move forward not only in the governance of the Internet in Brazil, but also its aspirations to influence the global governance arena. At that time, the country was supporting the development of an international Internet governance system based on state multilateralism and United Nation intervention (Abdenur & Gama, 2015, 462). That was contrasting with the internal governance model that year after year has been being internalised on its governance and regulatory practices. This factor combined with CGI.br's unstable institutionalisation[70] explains why the committee acted so cautiously and did not express openly its governance values.

The impact of the Snowden revelations in 2013 (Rossini et al., 2015) led the country to change its position in the international arena. Before Snowden's whistleblowing about the extent of the U.S governmental Internet-based surveillance programs Brazil supported the creation of a multilateral regime and the development of a "wide political concertation at international level for making the global Internet governance regime as multilateral, democratic and transparent as provided by the World Summit on Information Society" (IBSA, 2010, 1). It was only in 2013, after the Snowden revelations, that Brazil changed its international position (Trikunas & Wallace, 2014) and began to call for reforms to the international governance structure.

[70] CGI.br legal existence, structure and policy making elements are grounded on a Presidential Decree that could be revoked at any moment without the hearing of the Parliament.

Using the revelations about the electronic mass surveillance program executed by the U.S., the country led, jointly with Germany, an international process to discuss privacy and human rights in the Internet. The Brazilian initiative reframed a debate about electronic espionage, moving the central discussion to the need to reform Internet governance (Abdenur & Gama, 2015). This initiative, fostering international regulation, resulted in the adoption, by consensus (United Nations General Assembly, 2013), of the United Nation Resolution 68/167 on the 21st of January 2014. The resolution recognised the right to privacy in the digital age and was heralded by Brazilian diplomacy as an important step in the direction of a multistakeholder regulation model.

This new international position was a significant step towards reinforcing CGI.br's leadership position both nationally and internationally while at the same time it reaffirmed the importance of multistakeholderism in Internet policy making. In fact, it was a symbiotic process as at the same time that the committee used the growing support of the government to strengthen the embodiment of multistakeholderism in Brazilian Internet governance, the government began to use the governance model and the MCI, particularly its innovative drafting process (Segurado, 2011), as instruments legitimating and supporting its international reform claims. CGI.br and its multistakeholderism operation rationality moved from the shadows to the spotlight. The result of this process was twofold. The Brazilian government used CGI.br's expertise in its regulatory framework as an instrument to support its regulatory entrepreneurship endeavour in favour of multistakeholderism[71] and CGI.br, now in a more prominent position, articulated the embodiment of its governance values, particularly multistakeholderism, on the Brazilian policy-making process.

[71] After the publication of the UN Resolution 68/167 the Brazilian government proposed the realisation of the Netmundial: Global Multistakeholder Meeting on the Future of Internet Governance. During the meeting the Brazilian President signed the Marco Civil da Internet Law.

CHAPTER TWO

THE OPERATION OF MULTISTAKEHOLDER INTERNET POLICY-MAKING IN BRAZIL: ANALYSIS OF GOVERNANCE ACTORS

Introduction

This thesis examines how multistakeholderism operates in Internet governance policy-making and how this operation affects governance and norm-making practices. While there is growing academic interest in multistakeholderism policy-making initiatives (Take, 2012a; Mena & Palazzo, 2012; DeNardis, 2014), these practices are mainly studied from the perspectives of international relations or business studies by scholars investigating the rise of transnational private governance arrangements in areas like corporate social responsibility or environmental protection for example (Gilbert & Rasch, 2008; Utting, 2002; Waddock, 2008). Despite recent critical scholarship questioning multistakeholderism policy-making processes these research initiatives are mainly concerned with investigating the legitimacy, transparency or accountability of transnational actors operating under multistakeholder arrangements. These studies lack two important points that this thesis aims to address: a) the operation of multistakeholderism in national Internet governance processes; and b) what are the effects of this operation in governance actors' policy-making activities?

Multistakeholder-based governance approaches are one important structural element of the current global regulatory scenario and despite some criticism

(Bäckstrand, 2006; Bernstein & Cashore, 2007; Börzel & Risse, 2005; Bouslah & M'Zah & Turcotte & Kooli, 2010) it is considered one of the cornerstones supporting Internet governance development. Characterised by Rosenau & Czempiel (1992) as a governance approach that at the same time excludes and encompasses the government, multistakeholderism policy-making operations have yet to be thoroughly investigated and are still poorly understood. The present chapter investigates this process in three innovative ways. Initially it aims to investigate a topic not yet covered by scholarship working on multistakeholderism or Internet governance and does not focus on traditionally researched transnational governance actors or arrangements: rather, it observes multistakeholderism policy-making operation in a national governance system. Secondly it uses a blended set of criteria adapted from international relations and political science literature to investigate Brazilian Internet policy-making operation and trace how multistakeholderism translates its broader inclusion, representativeness and expertise into governance practices and regulatory outcomes. Finally, it compares, in order to map multistakeholderism effects on governance outputs, two governance actors operating in contrasting rationalities (multistakeholder and non-multistakeholder).

The chapter is divided into three sections. The first presents the conceptual elements used to analyse policy-making operation in two central actors of the Brazilian governance system: CGI.br and ANATEL. It articulates the theoretical framework used to materialise the concept of policy-making operation that will be used to assess and compare the activities developed by CGI.br and ANATEL. It also indicates how this process is traced and observed to finally indicate a set of criteria adapted from international relations critical scholarship that is used to analyse and compare the operational rationale of these actors. The second section subjects the governance actors' policy-making operation to critical analysis, particularly looking at elements such as representativeness, engagement, decision-making guidelines and regulatory outputs efficacy. The last section offers a cross-comparative analysis of each actor and analyses the effects of the multistakeholderism operation in governance processes and outcomes.

I. Mapping multistakeholderism policy-making operation in the Brazilian Internet governance system.

The present section introduces the conceptual elements used to map and trace policy-making operation in the Brazilian Internet governance system. The first sub-section presents the theoretical socio-legal approach used to observe and analyse policy-making operation in the two governance actors under investigation. The second sub-section introduces the aspects and criteria used to asses and compare the different governance policy-making operations (multistakeholder and non-multistakeholder) observed during the analysis of the two aforementioned Brazilian governance actors.

A. Tracing multistakeholderism policy-making operation: a multidimensional approach.

In order to observe and trace policy-making operation in CGI.br and ANATEL (multistakeholder and non-multistakeholder bodies) this research adapts a set of criteria used by international relations, political sciences and business scholars researching transnational policy-making and multistakeholderism. Based on the work carried out by Take (2012a, 2012b and 2013) and Mena & Palazzo (2012) that analysed multistakeholder governance arrangements using elements of legitimacy and democratic theories, and also on the contributions of Black (2008) in her studies about legitimacy and accountability in regulatory regimes, this thesis uses a policy-making process characterisation based on an interlaced three-layer dimension: input, throughput and output (Take, 2012a; Mena & Palazzo, 2012). Each one of these three layers has intrinsic elements that are adapted from the literature already pointed out to guide the observations and evaluations of policy-making operation in the investigated actors.

Based on the conceptual framework proposed by Take (2012a, 2012b, 2013) to investigate the legitimacy of multistakeholder initiatives the present research suggests and applies a multidimensional approach to policy-making operation. The use of a policy-making process conceptualised in three interconnected stages offers an alternative arrangement to trace policy-making operation in more detail. The

multidimensional approach provides innovative mechanisms to trace and evaluate the design and operation of Internet policy-making processes independent of their multistakeholder or non-multistakeholder approach (Mena & Palazzo, 2012). The first dimension, the input, comprehends one key element of multistakholderism: inclusion. It encompasses, as pointed out by Scharpf (1999) and Take (2012a), two important points influencing the dynamics of policy-making processes that are embodied in the idea of representativeness: a) who participates in the policy-making process; and b) which processes and what values guide the selection of these participants. This optimal operation in the first dimension indicates that governance structures and regulatory instruments in order to be legitimate and effective should be grounded on a deliberative policy-making process based on the active and equal participation of all stakeholders (Benz & Papadopoulus, 2006; Take, 2012a).

The second layer of the multidimensional policy-making analysis is the throughput. This dimension involves elements supporting the procedural stage of the policy-making operation. It concentrates on the rationalities guiding and supporting the decision-making phase of the policy-making process. Despite being traditionally anchored in practices promoting transparency and accountability (Take, 2012a; Zürn, 2000) this thesis interprets the throughput dimension differently. In order to observe and trace more in-depth policy-making operation in multistakeholder and non-multistakeholder governance actors it is important to stress the need to take into account elements that normally are not observed, particularly those more associated with the decision-making aspect of policy-making like the levels of procedural fairness, consensual orientation and use of expertise/technical knowledge. The main concept grounding this approach is the need to understand the throughput dimension more broadly not only focusing on making policy-makers accountable (Take, 2012a; Take, 2012b) or transparent, but also to have a fair and substantive process that based on the participants' expertise can generate effective solutions to the problems under discussion. The third dimension, output, deals with the acceptance and efficiency of the solutions originated from the policy-making process. It indicates how the results of the policy-making process are efficient to solve the problem originating from the

policy intervention (Scharpf, 1999) and to what extent this solution is accepted by the affected communities (Buchanan & Keohane 2006; Palazzo & Mena, 2012).

A.1 – Dimensions of policy-making operation

The input dimension is constructed around the concept of representativeness. Disengaging from the representativeness framing endorsed by Mena & Palazzo (2012), Take (2012a) and Black (2008) for whom the key element informing representativeness is the need that "governance arrangements have to include all relevant stakeholders in the decision-making process" (Take, 2012a), the present research includes another aspect that should be considered in the characterisation of representativeness; namely, the governance arrangement and its policy-making operations not only have to identify and effectively integrate the stakeholders (Mena & Palazzo, 2012; Take, 2012a), but it must also have a clear, transparent and democratic process to select stakeholder representatives. This is an important element that has been overlooked and must be observed carefully. It influences the legitimacy and efficiency of policy-making "even if the stakeholders disagree with the process outcome, they must accept the decision take as it resulted from an inclusive process" (Young, 2000, 52). Following this rationale, the present research treats representativeness using a dual approach. It focuses not only on the number of stakeholders/segments participating in the policy-making process, but also on the procedures and rules used to select who represent these stakeholders.

The second dimension used to analyse policy-making operation processes is the throughput. It encompasses the procedural aspects grounding policy-making and decision making. Normally, the throughput dimension is formed or analysed through the observation of two main elements: the accountability of decision makers and the transparency of policy-making process (Mena & Palazzo, 2012; Take, 2012a; Black, 2008). As already pointed out, this research understands that Internet governance is made mainly by coordinating different governance approaches, practices and discourses conducted under procedural rationalities enhancing dialogue and consensus (Brousseau et al., 2012). In order to be able to capture and investigate the

singularities arising from this particular governance structure this thesis includes in the throughput dimension the elements of procedural fairness, consensus-orientation and expertise.

This first part of the throughput dimension is formed by the elements accountability and transparency. As pointed out by Black (2008, 150) "to be accountable is to agree to subject oneself to relationships of external scrutiny which can have consequences". This dialectical relation based on the interdependency of accountee and accountor is characterised mainly by the possibility of policy-making activities being externally assessed and, in cases of wrongdoing being subject to sanctions. This process, as indicated by Scholte (2011, 17) and Take (2012a, 503), is based on three factors: a) the existence of instruments and mechanisms coordinating and controlling the policy-making process, including the decision-making stage; b) instruments to oversee and assess how rules, protocols and standards are implemented; and c) disclosure of information about the policy-making activities, as the accountee must inform, explain and justify their decisions (Bovens 2007).

An important element supporting the legitimacy of policy-makers' accountability (Chan & Pattberg 2008) is the ability of these actors to share information containing the elements supporting their decisions and actions. Transparency is an essential and autonomous element interconnected with accountability. An open and transparent policy-making process constitutes one important element supporting governance legitimacy, particularly in arrangements encompassing non-state actors (Elms & Phillips, 2009) once it enables stakeholders to have access to critical information (Black, 2008) about the decisions made, assess the appropriateness of the decision (Bemstein & Cashore, 2007) and push forward the accountability of decision makers (Mena & Palazzo, 2012). When policy-making institutions have a higher level of transparency and make available to the public and all interested actors the motives underpinning their actions (Hale, 2008, 75) in timely and low-cost conditions (Keohane 2011, p. 102) (Buchanan & Keohane 2006; Gupta 2008), it impacts directly the exercise of accountability practices: only stakeholders fully informed can comprehend, monitor and question the policy-making process (Take, 2012a, 502; Haufler, 2006).

The second part of the throughput dimension is formed by the elements of procedural fairness, consensus orientation and expertise use. The concept of procedural fairness is based on the level of real influence that engaged stakeholders have on the policy-making process (Young, 2000). According to Mena and Palazzo (2012) the idea of procedural fairness is connected and mediated by inclusion. It "refers to stakeholder involvement in the activities, structures, and processes of MSIs, and the fairness of deliberations relates to the right that these stakeholders have been given to influence the decisions made. In other words, stakeholders could have been included in the MSI, but marginalized in the decision-making process" (Mena & Palazzo, 2012, 539). Although an important element, the policy-making process should not only be concerned with this dimension of inclusion. Inclusion solely is not sufficient to guarantee the stakeholders active and effective participation. In addition, it is important to establish procedural safeguards and mechanisms fostering a fair participative process able to recognise and neutralise or level the power imbalance between different stakeholders.

The simple inclusion of an actor in the policy-making arrangement is not sufficient to guarantee the legitimacy and efficiency of the policy-making process. Stakeholders must have the same degree of influence. As noted by Take (2012a, 502) a key problem of policy-making processes is the "the asymmetrical allocation of power, resources, and communicative capabilities" that can lead to the under-representation of stakeholders (Schmitter 2002; Take, 2012a) or to the capture of structures and processes. Take (2012a) suggests that the need to control the power imbalances that critically undermine policy-making legitimacy and efficiency should be "countered by institutional provisions" directed to level the power relations and stabilise stakeholder equality on policy-making processes. In order to evaluate procedural fairness, Take (2012a, 539) indicates that one should look to: a) the extent that all actors possess equal participation rights; b) if actors' rights are guaranteed in practice; c) if there are resource allocation to support less-funded stakeholders to participate in relevant stages of the policy-making process.

Procedural fairness is deeply influential in multistakeholder-based governance regimes, particularly in terms of Internet governance. It is, as explored previously in

this thesis, an important foundational element of Internet governance multistakeholderism and is normally expressed through the equal-footing rationale. The consensus orientation in the policy-making process aims to create a decision-making environment where power relations are levelled and the focus on adversarial confrontation is minimised. In Habermas's concept of ideal discourse where policy-makers should recognise the "force of the better argument", a consensus-driven policy-making process "is important, because it signals the ability and willingness of the involved actors to change their position on the basis of convincing reasons" (Mena & Palazzo, 2012, 540), thus building more legitimate and acceptable decisions. The willingness of stakeholders to change their preconceived stances and demonstrate an interest to achieve common solutions (Mena & Palazzo (2012) is understood to lead to a broader reasoning process that is commonly more legitimate and efficient (Young, 2000). The inclusion of these two elements, procedural fairness and consensual orientation in the set of elements making up the throughput dimension policy-making operation is intended to provide the research with more adequate granular instruments with which to observe and map how multistakeholderism policy-making operation occurs. This a consequence of both elements being deeply connected to multistakeholderism and Internet governance practices, as for example the influential notion of "rough consensus" originated in the Internet Engineering Task Force – IETF standard-setting practices.

The last element of the second block of the throughput dimension captures the role played by participants' expertise in policy-making processes. Policy-makers are expected to reflect in their decisions "the state-of-the-art of scientific–technical knowledge" (Take, 2012a, 503). Efficient and legitimate governance systems are expected to ground their policies and regulatory instruments in policy-making processes based on accurate information, scientific findings, technical know-how and external knowledge developed and shared by engaged stakeholders. A key feature of legitimate and efficient policy-making processes is the capacity to use expertise to tailor solutions to complex problems. The way policy-makers drawn, use and translate expertise into tangible policy outcomes is a central element informing and differentiating modern and efficient policy-making processes. Investigating how

policy-making bodies realise this is crucial in order to shed light on the operation of multistakeholderism dynamics and to obtain a granular understating of the effects that multistakeholder practices have on governance structuring and regulation-making.

The last policy-making process observed in this thesis is the output dimension. Encompassing both acceptance and efficiency this aspect relates to the endless stream of policy-making processes and observes the acceptance and efficiency of the resulting governance arrangements and regulatory instruments. Acceptance is observed depending on whether internal and external stakeholders recognise the policy-maker's authority to engage in governance and regulatory processes while at the same time believing that these policy-making claims are justifiable and appropriate and should be followed (Take, 2012a). Tracing the acceptance level of policy-making processes is central to the investigation of multistakeholderism nuances (UNESCO, 2017a; UNESCO 2017b; Hofmann, 2016). Efficacy, as noted by Mena & Palazzo (2012, 541), indicates how policy-making outcomes are adequate and relevant to solve the issues they aim to tackle. Using a Habermasian approach (Habermas, 1996), policy-making processes aiming to create enforceable regulatory frameworks have to create mechanisms able to trace and balance stakeholders' interests and assemble efficient policies (Take, 2012a). Observing the acceptance and efficacy of policy-making operation is an important component of this thesis. The investigation of these elements will shed light on what the effects of multistakeholderism are on policy-making outcomes and also what processes triggers these effects.

The use of a three-dimensional approach to policy-making operation is a key distinctive element of this thesis. The observation of these three dimensions and their internal elements allows for an in-depth and more granular investigation of the dynamics operating in Internet governance policy-making, particularly indicating elements that trace and analyse mechanisms associated with multistakeholderism's limitations and potentialities. The next subsection indicates the elements and criteria informing how the findings gathered from the observation of these three dimensions are assessed and compared.

B. Assessing multistakeholderism policy-making operation

To observe and trace elements grounding multistakeholderism policy-making operation this thesis adopts a set of criteria extracted and adapted from international relations and business scholarship investigating multistakeholder initiatives, particularly focusing on the frameworks established by Mena and Palazzo (2012) and Take (2012a). Each element of the policy-making dimension has defined observational units that are assessed according to evolutional standards that are applied to the policy-making operation of the two Brazilian Internet governance actors researched. This approach is applied to each element of the multidimensional policy-making dynamics adopted in this research. They are observed, assessed and compared according to the criteria and the aspects presented in this subsection.

Taking into account the three dimensions used to conceptualise policy-making operation in this research, the first phase observed and analysed is input. As pointed out previously the input dimension is based on the level of "involvement of stakeholders affected by the issue" (Mena & Palazzo 2012, 537) in policy-making institutions (structures) and in policy-making activities (processes). This should be observed, as pointed out by Mena & Palazzo (2012, 537) by investigating the policy-making process that involves representatives of all stakeholders interested in the policy under development or if there are any significant group of stakeholders excluded from these structures and processes. It is important to stress that the representativeness of the policy-making operation is characterised in this research not only in the inclusion or exclusion of stakeholders, but also in the way stakeholder representatives are selected.

Adapting and blending the instruments developed by Take (2012a, 2012b) and Mena & Palazzo (2012) and the rationale stressed in the last paragraph the element of representativeness is observed by looking at the number of different stakeholders represented and participating in governance structures and policy-making processes. The research also looks at the representativeness by analysing the existence of concerns, criticisms and protests voicing the exclusion of the determined stakeholder segment or the existence of mechanisms, structures or processes favouring any

particular group. Adapting standards by Take (2012a, 2012b) and Mena and Palazzo, 2012, 502) to assess legitimacy and inclusion in policy-making, an optimal degree of representativeness is achieved when the governance arrangement or policy-making operation integrates all interested stakeholders and the representative selection process is open and transparent; an intermediate level is given in cases where key stakeholders are included but the nomination process is not fully open and transparent; finally an inadequate degree is noted when there are stakeholder exclusions and the nomination process is closed and not transparent.

The more complex throughput dimension elements are analysed according to the following elements and aspects:

Transparency	**What is observed**: Transparency of Internet governance and policy-making structures, processes and outcomes; **Guiding question:** What is the level of transparency of policy-making structures and process?
	How it is observed: a) Level of publicity and traceability of policy-making processes. **Guiding question:** Is there publically available information about the policy-making process? b) Information access. **Guiding question:** Is there obstacles to access information related to policy-making processes? How can information be accessed?
	Assessing criteria: a) Optimal level is attributed when governance structures and policy-making processes have enforceable reporting obligations that allow any interested stakeholders or external actors to access information about a specific decision. b) Intermediate level is assigned when despite the existence of transparent governance structures and policy-making processes there is no access to internal decisions and also limited enforceable reporting attributions.

	c) Inadequate level will be attributed when only members of the governance arrangement have access to critical information about policy decision making and there are reporting limitations (Take, 2012a, 502).

Accountability	**What is observed**: Accountability of Internet governance structures and processes; **Guiding questions:** Is there any monitoring mechanism or enforceable oversight structure or process? Are the decision makers accountable for their activities?
	How it is observed: a) Existence of clear policy-making guidelines; **Guiding question:** Is there a clear framework establishing how the policy-making process and the decision making are made? b) Existence of monitoring mechanisms; **Guiding question:** Is there any monitoring body, instruments or processes? c) Publicity of accountability procedures; **Guiding question:** Are monitoring results made public? (Mena & Palazzo, 2012, 547)
	Assessing criteria: a) Optimal level is attributed when it is possible to identify an active external mechanism of control based on clear procedures that could result in effective accountability measures; b) Intermediate level is assigned when the external mechanisms have restricted access to some key actors and there is a lack of a clarity on the accountability procedures and measures; c) Inadequate level will be attributed when accountability mechanisms are inexistent or accessible only to actors directly involved in the governance arrangement and there is no clear accountable sanction fixed.

Procedural fairness	**What is observed: P**ower balance between the different actors involved in the policy-making process. **Guiding question:** Is there any actor with privileges or any form of control over the policy-making process?
	How it is observed: a) Existence of power imbalances in the governance structure and/or policy-making process **Guiding question:** Do all stakeholders have the same participation and voting rights? b) Operation of arrangements to neutralise or minimise power/ resources inequalities; **Guiding question:** Is there any supporting structure or mechanism to neutralise power imbalances?
	Assessing criteria: a) Optimal level is attributed to governance arrangements and policy-making processes where all stakeholders have the same participation and voting rights and the policy-making process is structured to correct power inequality; b) Intermediate level is assigned when actors have the same formal rights but there are no mechanisms to neutralise power and resources imbalances; c) Inadequate level will be attributed when the policy-making structures and processes are based on stratified levels of participations.

	What is observed: A decision-making process based on a culture of cooperation that promotes mutual agreement; **Guiding question:** Is the decision-making process oriented towards consensus?

Consensual orientation	**How it is observed:** a) Existence of cooperation and resources sharing between stakeholders; **Guiding question:** Is there evidence of cooperation between different stakeholders (sharing critical information and resources)
	Assessing criteria: a) Optimal level is attributed when it is possible to identify strong elements supporting a culture of cooperation between all stakeholders and the policy-making/decision-making process is based on a consensus-building approach; b) Intermediate level is assigned in cases where cooperation is restricted to some stakeholder groups and the policy-making process is built through consensus but the decision-making is based on traditional confrontational rationalities grounded on majority voting approaches; c) Inadequate level will be attributed when there is no clear evidence of a policy-making process driven by consensus and cooperation or that it is based on confrontational decision-structures.
Expertise	**What is observed:** The capacity of the governance arrangement structures and process to convey resources and technical/scientific knowledge into policy-making processes and outcomes. **Guiding questions:** Does the policy-making process integrate experts in its activities? Are policies based on technical evidence and scientific knowledge?
	How it is observed: a) Experts integration into policy-making process; **Guiding question:** Are experts integrated into the policy and decision-making processes? b) Policy-makers technical expertise; **Guiding question:** Do policy-makers demonstrate knowledge or receive appropriate support to engage in the decision-making process? c) Policies based on technical-based evidence:

	Guiding question: Are policies based on scientific or technical knowledge evidence?
	Assessing criteria: a) Optimal level is attributed when policy-makers structure participatory processes that are able to convey evidence-based policies grounded on technical and scientific knowledge; b) Intermediate level is assigned when the governance arrangement occasionally asks external actors, including the public, to input its know-how on the policy-making or when it integrates a limited number of external experts (epistemic communities) to support its policy-making; c) Inadequate level will be attributed when policy makers have a lack of knowledge; promote limited efforts to coordinate with experts and produce policies based on a lack of evidence; (Mena & Palazzo, eta all, 2012, 503).

(Table 03)

The output policy-making dimension is formed by two elements: acceptance and efficacy (Levi & Sacks 2009). The perception levels of acceptance are assessed looking particularly at the "the degree to which a governance arrangement succeeds in generating acceptance in by its internal and external stakeholders" (Take, 2012a, 504). It is important to stress that in this context acceptance is not related to enforceability, or the compulsory aspect implicating the need to follow the policy. In the context of this research, acceptance is related to how rule-addressees receive the policy and externalise their beliefs over the policy-making process and the solutions proposed. It is mainly traced by identifying a stakeholder's manifestations and positionings over the policy's approval, criticisms or denial. Following this rationale and adapting aspects as pointed out by Take (2012a, 504) the actors investigated in this research will receive an optimal level of acceptance when different internal and external stakeholder groups express positive and supportive declarations over the policy-making operation and its outcomes; an intermediate degree of acceptance is appointed when positive reactions are concentrated in the internal circle of

stakeholders; and an inadequate degree of acceptance is demonstrated when manifestations from internal and external stakeholders are more inclined to point to failures and criticisms than support.

The last element of the output dimension to be observed is efficacy. Restricting the sense of efficiency to the degree to which the policy is able to address the situation that generates intervention (Take, 2012a), the present research looks to external manifestations over the overall efficacy of the policy mechanism under investigation. It looks to reports and other documents evaluating the efficacy of governance structures and their policies. In particular, it aims to sense the perceptions of internal and external stakeholders over the policy's capacity to "solve the problems" with which it aims to confront. The existence of an overall perception of acceptance signifies an optimal level of efficacy; a balanced perception indicates an intermediate degree, and a predominant sense of inefficiency supports an inadequate level of efficiency.

The framework outlined in this subsection and the innovative configuration thereof central elements grounding the current investigation. The framework's elements and standards were established to observe and evaluate the granular elements of policy-making operation in Internet governance, particularly to highlight the similarities and contrasting points of the policy-making process in multistakeholder and non-multistakeholder actors and processes. The next section starts this evaluation by applying these elements to the two main actors of Brazilian Internet governance.

II. Internet governance policy-making operation in Brazil: analysing the actors

This section uses the multidimensional framework and its observational elements presented in the previous section to outline the governance operation of CGI.br and ANATEL. In order to trace and analyse multistakeholderism policy-making operation in the Brazilian governance system this section starts by detailing the policy-making operation of each actor. Each embodies a different policy-making rationale that is reflected in its governance structure, policy-making procedures and policy outcomes.

The different ways that these two actors conceptualise and operate policy-making is central to the investigation carried out in this thesis. The opportunity to observe and compare two contrasting actors directly engaged in the governance of the Internet in Brazil can provide evidence to clarify what the differences are in policy-making operation between multistakeholder and non-multistakeholder bodies. The evidence gathered from the observations and analysis of these two actors is crucial to shed light on multistakeholderism policy-making operation and the effects thereof. While CGI.br was since its inception designed to operate under an innovative and experimental multistakeholder approach, ANATEL, despite being portrayed as an independent and autonomous regulator, reflects more clearly a traditional and consolidated state-led, -oriented and -controlled policy-making approach commonly operated in Brazil.

Presenting the elements guiding the activity of CGI.br an ANATEL through the policy making process this section looks to common and contrasting elements, characteristics and practices that could shed light on how multistakeholderism operates in Internet governance policy-making in Brazil. In order to do so it investigates CGI.br and ANATEL's composition and representative selection process (input dimension), their policy-making process (throughput dimension) and their policy outcomes (output dimension). The section is divided into two main subsections: the first one examines CGI.br and the second ANATEL.

A. The Comitê Gestor da Internet no Brasil - CGI.br policy-making operation

After 20 years of exploratory experimentation the Brazilian Internet governance system has developed into a mature and established structure. Its organisational ecosystem is responsible for policy-making coordination and technical management of the Internet in Brazil (Varon, 2014, 16). The Comitê Gestor da Internet do Brasil (CGI.br) and the Marco Civil da Internet no Brazil (Federal Law 12.965/2014 – Brazilian Federal Law regulating the use and governance of Internet) are key elements supporting Internet governance operation both in Brazil and internationally (Aguere & Gualperin, 2015). The governance structure is based on a combination of

multistakeholder, private and governmental institutions. CGI.br, a multistakeholder committee is responsible for steering this regime. The committee developed an innovative policy-making approach that set the foundations for a governance ecosystem able to stimulate the engagement of different agents in the management and technical development of the Internet that is considered legitimate and efficient and to promote the country internationally (Trinkunas & Wallace, 2015).

The present subsection analyses CGI.br policy-making operation according to the multidimensional perspective presented previously. The first policy-making operational dimension encompasses the committee's inclusion and representativeness that in practice are extracted from CGI.br's structural composition and representative selection process.

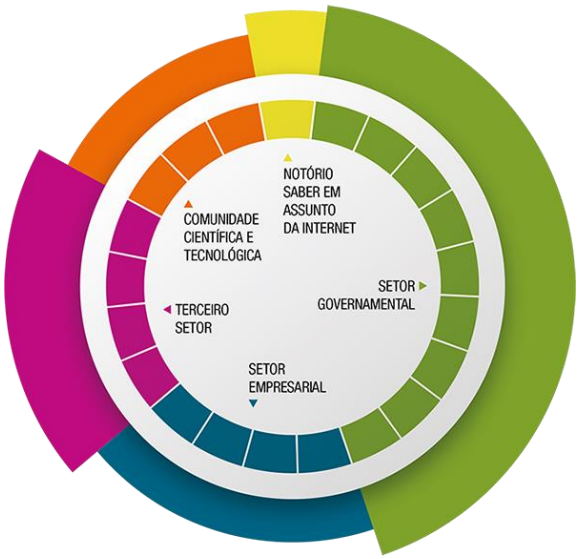
A.1 CGI.br's input dimension (committee composition and representative selection process)

Federal Decree 4.829/2003 and the committee's bylaws set out CGI.br's composition and establish the guidelines structuring how the committee members are selected. In fact, as already pointed in the last chapter, CGI.br has 21 members representing four different groups of stakeholders: government, business, civil society and technical-academic community. The committee's last reconfiguration, which occurred in 2003, enhanced its multistakeholder characteristic mainly by increasing the number of representatives from non-governmental spheres and promoting a more balanced level of interests represented.[72]

[72] The new committee has a more inclusive and representative composition. One good example of this transformation is the new set of representatives of the business sector and of the civil society. In the old structure CGI.br had two representatives of the business sector, one representing Internet services providers and other representing private companies, and one representative from the civil society representing Internet users. The new composition increased these numbers and its distribution between different segments of each stakeholder. Both groups have now four representatives that in the case of the business sector have to represent each of the following sectors: a) Internet service providers; b) telecommunication and infrastructure providers; information and telecommunication industry; business companies using Internet. Another change affecting significantly the committee's legitimacy and representativity was the inclusion of one representative of the forum of states secretaries for science, communication and innovation. This is an overlooked development that was important to increase CGI.br policy-making activities particularly by: a) maximising the committee's policies capillarity by allowing the adoption of policies in state level; creating opportunities to representatives of regional policy-making bodies to contribute to national policies.

CGI.br composition
Government Spectrum
1) Ministry of Science, Technology, Innovation and Communication[73]; **2) Presidential Civil Advisory Cabinet;** **3) Ministry of Science, Technology, Innovation and Communication;** **4) Ministry of Defence;** **5) Ministry of Development, Industry and Foreign Trade;** **6) Ministry of Planning, Budget and Management;** **7) National Telecommunications Agency** **8) National Council for Scientific Development** **9) National Council of Secretaries for Science, Technology and Innovation Affairs**
Non-Government Spectrum
10) Internet Expert; **11) Representative of the internet service and content providers segment;** **12) Representative of the telecommunication infrastructure providers segment;** **13) Representative of the telecommunication, informatics and software industry segment;** **14) Representative of the business users.** **15) Representative of civil society;** **16) Representative of civil society;** **17) Representative of civil society;** **18) Representative of civil society;** **19) Representative of scientific and technological community;** **20) Representative of scientific and technological community;** **21) Representative of scientific and technological community.**

(Table 04)



(Fig. 04[74])

[73] After the removal of the Brazilian President Dilma Roussef, the acting President enacted the Medida Provisória 726/2016 (executive order 726/2016) changing the Brazilian administrative organization. The Ministry of Communications was merged with the Ministry of Science and Technology. In order to compensate and maintain the balance of the committee's composition the Ministry of Science, Technology, Innovation and Communication now indicates two representatives. (Portaria Interministerial 440 of 22 Junho of 2016).

[74] (CGI.br, 2017a).

CGI.br involves in its policy-making operation major governmental sectors including security and defence, communication, research and innovation, finance and commerce. Despite intense governmental involvement the majority of committee members are representatives from non-governmental sectors like academia, the technological community, civil society and business. This composition with a slight majority of non-governmental actors is an important element supporting CGI.br's policy-making operation. The inclusion in the policy-making process of the principal actors involved in Internet development, management and use in Brazil is a key element reinforcing CGI.br's legitimacy, acceptance and expertise to coordinate Internet governance development in the country.

The committee's representativeness is the result of its composition and also of the way that representatives are selected. The committee's legal framework, particularly the Federal Decree 4.829/2003, establishes two different nomination processes. One is based on a direct nomination that is applied to governmental representatives and the other is grounded on elections applied to the majority of non-governmental representatives. The Decree's Article 8 establishes that each of the governmental institutions that are part of CGI.br (Article 2, item I) has a representative on the committee. As pointed out previously the only exception is the new Ministry of Science, Technology, Innovation and Communication (MSTIC) that was the result of a fusion of the Ministries of Science and Technology and the Ministry of Communication. The MSTIC indicates two representatives in order to maintain the committee's original composition.

Each one of the listed governmental institutions nominates to the Ministry of Science, Technology, Innovation and Communication one representative and one deputy representative. Normally the nominees are civil servants working at the institution, but there is no restriction on the nomination of non-civil servants. The MSTIC, after making some superficial assessments, formalise the nomination by publishing an administrative ordinance. The nomination is based on techno-political grounds and consequently members of the governmental institutions, except the representative of the National Council of Secretaries for Science, Technology and Innovation Affairs, have an instable mandate. They can be substituted at any moment

and without any reasonable justification. This feature has provoked some degree of instability to the composition of the CGI.br; however, it has also made an interesting contribution to the committee's policy-making dynamics that will be explored later.

The nomination process of the governmental representative of the National Council of Secretaries for Science, Technology and Innovation Affairs differs slightly from that outlined above. The Council is formed of representatives of state secretaries for science, technology and innovation and is intended to represent, in the national policy-making process, the interests of regional governments. The Council's board of directors appoints a representative and a deputy-representative to the Presidential Advisory Cabinet and to the Ministry of Science, Technology, Innovation and Communication. The Presidential Advisory Cabinet and the Ministry of Science, Technology, Innovation and Communication publish a joint administrative ordinance formalising the nomination. Unlike other governmental members the representative of the National Council of Secretaries for Science, Technology and Innovation Affairs has a mandate of three years and can be reappointed to one more final mandate (Article 3 of the Federal Decree 4.829/2003). The representative of the so-called neutral group, the "Internet Expert" follows the same rationale but their nomination has one peculiarity, namely that they do not have a deputy or substitutive representative.

The nomination process of the representatives of business, civil society and the technical-academic community despite being more complex is also more transparent, democratic and legitimate. The representatives and their deputies are elected following an open electoral process. They have a mandate of three years and can be re-elected. The process begins with the constitution of the electoral college that coordinates the candidates' registrations and the pool. Each particular stakeholder segment has its own electoral college, registration and voting requirements. In the business sector for example, each group (internet service and content providers; telecommunication infrastructure providers; ICT and software industry; and business users) has its own electoral process. The college is formed by institutions representing the interests of each specific area. The Decree 4.829/2003 establishes that institutions interested in participates in the electoral process nominating a candidate or simply registering to vote in the nominees must submit an application proving that: it has

been constituted at least two years before the nomination process; it has been developing activities related the area to which it intends to participate; and it has fixed in its bylaws the attribution to develop activities in the industry sector it intends to participate in the electoral process. Each registered institution can indicate and vote only one candidate. The candidate with the most votes in each business sector is nominated the representative and the second one the deputy representative. In the event of a draw a second round of voting should be realised and if a tie persists the oldest candidate will be proclaimed elected[75].

The process to elect civil society representatives follows the same rationale. According to Article 6 of Decree 4.829/2003 the institutions representing the third sector will constitute an electoral college to elect four representatives and four deputy representatives. In order to participate in the electoral process, third sector/civil society institutions must comply with the following requirements: a) have legal existence for at least two years prior to the nomination process; b) have established in its bylaws the mission to represent interests of civil society; and c) do not represent or have links with any of the sectors covered by the business sector. Each institution can indicate one candidate and vote in four different ones. The four with the most votes are elected representatives and the fifth, sixth, seventh and eighth are indicated as deputy representatives. Once elected the representatives have a three-year mandate that can be renewed for one extra term.

The representatives of the scientific and technological community are elected following the same general rules. The institutions forming the electoral college must have a scientific or technological objective or to have been created to represent research organizations. Each institution nominates one candidate and can vote in three. The three most voted are then elected as representatives and the fourth, fifth and sixth their deputies. As other representatives of non-governmental stakeholders the members of CGI.br representing the academic-scientific community have a three-year mandate and can run in one re-election. Finally, the participation of the

[75] Article 5, §8 of the Decree 4.829/2003.

committee is considered a relevant public interest activity but it does not entail any kind of direct remuneration[76].

Despite its complexity the nomination process based on elections enhances CGI.br's legitimacy and expertise. Its pluralistic and inclusionary approach increases the committee's level of representativeness and promotes its legitimacy as stakeholders have a direct and legitimate channel through which to participate and influence the policy-making process. It is also important to note that the election process contributes indirectly to the enhancement of the committee's technical expertise. Although the election guidelines do not refer directly to the need for nominees to have advanced knowledge and technical expertise related to Internet governance topics, the existence of an open and transparent electoral process creates a competitive space and indirectly leads to the selection, in most cases, of representatives with a solid technical and policy background that can contribute effectively to Internet policy-making.

A.2 – CGI.br's policy-making throughput dimension

Analysis of the throughput dimension encompasses the need to observe the following elements: procedural fairness, consensus orientation, use of expertise, transparency, and accountability mechanisms. This complex group of elements is presented in accordance with the following rationale. Initially the sub-section offers an overview of the structure and processes supporting CGI.br policy-making operation. Once the overall policy-making routine is contextualised each of the elements forming the throughput dimension is analysed.

CGI.br policy-making operation is regulated by its bylaws and Federal Decree 4.829/2003. According to this regulatory framework the committee's coordination is exercised exclusively by the representative of the Ministry of Science, Technology, Innovation and Communication (Article 2 item I letter a, of the Decree and Article 4 of CGI.br bylaws). In cases where the representative of the Ministry of Science, Technology, Innovation and Communications is unable to act they will be substituted

[76] Article 9 of the Decree 4.829/2003

by their deputy or they can delegate the function to another member of the committee. However, it is extremely rare that a non-governmental representative coordinates committee meetings. Moreover, the administrative management of CGI.br is exercised exclusively by its coordinator. This particular administrative feature, despite not being formally criticised raises some concerns over the committee being government-controlled. Although in practice this has not been the reality, the existence of a scheme distributing coordination over other stakeholder groups should be considered as a mechanism to enhance CGI.br's legitimacy.

The committee is divided into four different working units: coordination, thematic advisory commissions, working groups and CGI.br members meetings (CGI.br, 2005b). The president's main responsibilities are (Article 5 of CGI.br bylaws): a) to chair meetings and coordinate decision-making processes; b) to sign and take the necessary steps for dissemination and publication of resolutions and administrative acts; c) to take necessary steps to implement CGI.br's decisions; d) to represent institutionally CGI.br or to designate another committee member for this purpose; and e) to take decisions on urgent matters without consulting beforehand committee members.

Most of the coordinator's duties are part of the traditional set of responsibilities granted to leadership positions. However, when analysed more carefully these duties indicate an interesting manoeuvre to balance the committee power relations. The superficial analysis of CGI.br composition may lead to a false perception that the committee's agenda and operation is dominated by non-governmental stakeholders. However, it is importan to note that while the minority of the committee members represent governmental interests, the careful observation of the policy-making structure reveals some operational mechanisms that were put in place in order to give to the Brazilian government some degree of control over CGI.br activities. This approach is clearly noted in the maintenance of the committee coordination under the permanent direction of the representative of the Brazilian Ministry of Science and Technology.

The other three policy-making operational structures are the thematic advisory chambers, the working groups and the committee meetings. The thematic advisory

chambers originated from the working commissions. Article 7 of the CGI.br bylaws allowed the committee to create working commissions to conduct studies and propose policy recommendations. These working commissions were informal and fluid contributing to CGI.br policy-making and management activities on an irregular basis[77]. However, in 2010[78], aiming to create a more formal, stable and efficient policy-making operating space, CGI.br restructured the working commission structure. Consolidating all permanent and temporary commissions, the committee created thematic advisory chambers in the following areas: a) Security and Rights in the Internet; b) Innovation and Technological Development; c) Content and Cultural Heritage; and d) Universalization and Digital Inclusion.

The creation of permanent thematic advisory chambers resulted in the discontinuation of old and irregular working structures. In contrast to the commission that on the whole is formed by members of the CGI.br, the advisory chambers are coordinated by CGI.br members and composed of representatives of a plurality of public and private institutions interested in actively participating in Internet governance.[79] With more than 50 members from different stakeholders including banks, research centres, law and enforcement agencies, private companies, NGOs and professional association, the thematic advisory chambers are one of the key features of CGI.br policy operation. They truly embody multistakeholderism's main features: inclusion, consensus-orientation and expertise.

The working groups are the last functioning division of CGI.br, and are composed of largely CGI.br members; however, they can invite experts or interested parties to contribute to their activities. They are positioned as an auxiliary body with more focused responsibilities than the advisory chambers. They mostly work on studies and proposals concerning specific issues related to CGI.br policy interests. The most recent working groups, for example, reflect the committee's concerns with the

[77] One exception was the enactment of the anti-spam policy already discussed in this thesis.
[78] CGI.br meetings realized in: 15/01, 26/02, 07/05, 27/08 and 08/10 of 2010. Available at http://www.cgi.br/reunioes/pautas/2010
[79] The thematic advisory chambers have more than 40 institutions representing all the four stakeholders/sectors groups used on CGI.br taxonomy. A list of all institution participating in the chambers can be found at: http://www.cgi.br/camaras-consultoria/

regulation of the Marco Civil da Internet, the enactment of a very restrictive cybercriminal law and the use of the Internet in the upcoming elections[80].

Despite its instrumental responsibilities, recently, in an unusual move, as there is no available information explaining its development process or its approval by the committee's governing bodies, CGI.br published in 31 January 2018 a policy-shaping document aimed to influence the application, enforcement and legal interpretation by courts of the provisions of the Marco Civil da Internet (CGI.br, 2018b). This new policy-making development stands in contrast with the normal processes adopted by CGI.br and may indicate that other stable policy-making mechanisms may too be under pressure to be reformed, as there is a growing political movement to reform CGI.br.

CGI.br meetings are based on a consensus-orientated approach. The existence of valid evidence extracted from qualitative analyses of the minutes of the committee meetings shows that critical information is shared between stakeholders or that positions are changed based on other stakeholder arguments. Although the decision-making process does not follow the multistakeholder "rough-consensus mantra," the deliberations and decisions are taken following majority voting (Articles 12 and 15). This is an interesting point as it reveals that the committee's decision-making process, despite its procedural fairness, does not fully obey the traditionally multistakeholder building consensus rationale embedded on the rough consensus principle[81].

Another interesting point is that by default the meetings are not open to the general public. Article 20 of the bylaws rules that "if it is of the CGI.br interest and the majority of its members approve, the meetings could be open to the general public".

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[80] Resolução CGI.br/RES/2016/021, Resolução CGI.br CGI.br/RES/2016/022 and Resolução CGI.br/RES/2017/044 (CGI.br, 2016b; 2016c; 2017b).

[81] We reject: kings, presidents and voting. We believe in: rough consensus and running code. That is, our credo is that we don't let a single individual dictate decision (a king or president), nor should decisions be made by a vote, nor do we want decisions to be made in a vacuum without practical experience. Instead, we strive to make our decisions by the consent of all participants, though allowing for some dissent (rough consensus) […] Rough consensus is achieved when all issues are addressed, but not necessarily accommodated; Consensus is the path, not the destination. (IEFT, RFC 7282). According to Calliess & Zumbansen (2012, 135) this process, that avoids formal majority voting and use the concept of consensus to escape from self-destruction looping discussion and, generates three implications: a) the capture of a fairly prevailing opinion; b) the presence of a common core; and c) the recognition of the potential for future development of the policy or decision adopted.

Nevertheless, in practice the committee is engaged with the publicization of its activities, which include the publication of all its activities, the meetings minutes and on some occasions the live online streaming of meetings.

These practices which are also provisioned on CGI.br bylaws (Articles 18 to 21) are meant to enhance the committee's high degree of transparency. In particular Article 21 establishes that "Decisions or resolutions approved by CGI.br shall be published on the CGI.br webpages within a maximum period of 14 (fourteen) days after its approval" (CGI.br, 2005b). This high level of transparency however contrasts significantly with the complete lack of accountability, mechanisms or enforceable measures to contest the committee's decisions. The existing regulatory framework does not even mention the concept of accountability or any other similar concept that could be used to challenge CGI.br's policy-making decisions. The only alternative is costly and time-consuming judicial proceedings. It is important to note that the absence of accountability mechanisms and the need to appeal to judicial procedures is common practice in Brazilian governance. This expensive, complex and time-consuming indirect accountability mechanism is also problematic because only recently has the Brazilian courts changed their position to now allow the judicial review of administrative acts, like CGI.br decisions[82], to analyse the merit of the administrative act and to even overturn it.

CGI.br uses an intricate and complex set of structural and procedural measures to interconnect and convey its policy-making operation resources and technical/scientific knowledge. Three important features highlight this. Firstly, the committee's composition, since its inceptions, reflects the participation of key

[82] The Brazilian administrative legal system provides the public administration with two ways of exercising its administrative power: the use of administrative bound act or administrative discretionary act. While both cases should respect the legality, impersonality, morality, publicity and efficiency constitutional principles, in the bound act the regulatory framework establishes a tight legal path to be followed while in the discretionary act the legal boundaries are looser allowing the public officer some discretion to choose between different options (De Pietro, 2015; Meireles, 2018). This structure influenced the development of a review system limiting the review of administrative acts by the judiciary. In the case of bond acts, as the law established tightly the form and the substance of the act, the judiciary could only review the act in case of no compliance to the elements set by the legal framework. The judiciary review could only address the form not the substance of the act. In contrast, the discretionary act allowed the judiciary to review the forma and the merit of the questioned act. This understanding is slowly changing but still dominant.

stakeholders or sectors relevant to Internet governance and management. Moreover, the committee's members have, historically, demonstrated a high level of expertise[83] about policy-making topics, being mostly recognised internally and externally as capable of participating actively and efficiently in these activities. Secondly, the supporting structures, particularly the advisory thematic chambers and the working groups, embody the multistakeholder ethos including in their compositions a plurality of external experts from different sectors that contribute to producing technical and scientific support to CGI.br's policy operation. These elements and how they operate are central to CGI.br's distinctive policy-making operation. They also contribute, as the next subsection points out, to CGI.br's acceptance and efficacy.

A.3 – CGI.br policy-making acceptance and efficacy

The final dimension of CGI.br's policy-making process encompasses the committee's processes of policy acceptance and efficiency. Understanding acceptance and efficiency as the process by which rule-addresses perceive and externalise their impressions about the policy-making process, the policies proposed and their capacity to solve the problems they intend to address, CGI.br presents an elevated degree of acceptance. Clear evidence of CGI.br's acceptance and efficacy can be found not only in the role and interventions it plays during the Marco Civil da Internet drafting process or when it puts forward the NETmundial initiative, as the next chapter will explore, but also in the development of policies to combat spam via regulation of the management of Port 25/TCP. As pointed out by Lemos et al. in Gasser et al. (2015, Appendix D, 92):

> Although the technical solution to the spam problem in Brazil was relatively clear, convincing stakeholders to adopt the solution was challenging.

[83]The first members of the committee included the Emeritus Professor of Computer Science at Universidade Federal de Minas Gerais Ivan Moura Campos, one of the founders of the Rede Nacional de Pesquisa – RNP (national research network) and Internet hall of fame nominee Eduardo Tadao Takahashi, the Professor of Computer Science at the Pontifícia Universidade Católica do Rio de Janeiro Carlos José Pereira de Lucena, Carlos Alberto Afonso and Demi Getschko, the first one of the key activist promoting Internet development in the country, the secon one of the key actors of the technical community supporting the connection of Brazil to Internet and also a member of the Internet Society hall of fame.

> Telecommunications companies and ISPs initially resisted this recommendation out of concern around the costs of switching and the challenges of communicating the change to end users (…) CGI.br's Anti-Spam Working Commission (CT-Spam Commission) highlights how collaborative governance can be applied in an iterative and educational fashion. Addressing the spam issue would require buy-in and cooperation from a variety of parties, and by engaging all stakeholders, the CT Spam Commission was able to identify the concerns of stakeholders and then develop a variety of educational materials, technical reports, and policy changes in order to address those concerns. By developing the policy in such a fashion, the CT-Spam Commission was able to gain the support of the telecommunications companies and ISPs without regulatory oversight. Ultimately, with the buy-in of key stakeholders, implementation of the Port 25/TCP recommendation in 2013 led to a dramatic decrease in spam in Brazil.

This sense of acceptance and efficacy is interestingly connected to the committee's consensual orientation. Once the decision-making process is based on negotiation, normally an agreement is achieved once all arguments are discussed and exhausted. Analysing CGI.br's policy-making process after interviewing a number of CGI.br representatives, Anastasio recognises that the committee members support the use of a consensual approach and points out that although decisions are more time consuming, as discussions are longer, the committee's resolutions "have a higher coercive force" as they result from an intense and focused debate involving all stakeholders (2015, 11)

CGI.br has a layered policy-making operation based on multistakeholderism. It reflects an open, inclusive, evidence-based, knowledgeable, and fairly transparent consensus-driven policy-making process. Despite being efficient, legitimate and considerate both nationally and internationally (Aguere and Gualperin, 2015), CGI.br still lacks, as do most Brazilian governance institutions, accountability mechanisms (Anastacio, 2015). In order to prevent the deconstruction of its legitimacy, acceptance

and efficacy, CGI.br should start the implementation of stable and enforceable accountability mechanisms applicable to Internet policy-making processes in Brazil.

Finally, it is important to note that CGI.br developed innovative governance practices to address the traditional lack of efficiency and enforceability of multistakeholder governance institutions like in the case of the Internet Governance Forum that is constantly criticised for lacking tangible outcomes to the "development of laws and regulations by governments, the development of terms of service and policies by companies, and the design of software, standards, and tech by coders and hackers" (Malcon, 2018). Contrasted to the "place for discussion" rationale, CGI.br had an effective impact driving Internet policy-making in Brazil. Key examples include the adoption of soft law instruments, like a resolution establishing the principles for Internet governance and use in Brazil and its central role in mediating and shaping the Marco Civil da Internet drafting process. The committee is also continuously promoting initiatives aiming to address its limitations. More recently it published a document providing guidelines about the Marco Civil da Internet in order to address one of its deficiencies in composition, as there is no representative of the Ministry of Justice or any superior court in CGI.br Another interesting development was the creation of the Internet Observatory in Brazil,[84] a multistakeholder feed initiative that aims to enhance the committee levels of inclusion and transparency. Although these are all positive developments, one important point continues to escape the committee's sight: there is no initiative or proper discussion addressing CGI.br's accountability either in the committee's relationship with Brazilian society, or in relation to representatives and their electoral college. This is a concerning aspect that, as already mentioned, should be addressed urgently in order to enhance CGI.br's development.

B. Agência Nacional de Telecomunicações (ANATEL) policy-making operation

The emergence of regulatory agencies in strategic areas like infrastructure services in Brazil is deeply linked to the implementation, during the government of Fernando

[84] http://observatoriodainternet.br/sobre/

Henrique Cardoso in the mid-1990s, of a neoliberal agenda promoting structural reforms designed to minimise state intervention in particular economic sectors like telecommunication and energy. While the existence of a plurality of indirect regulatory bodies like public companies exercising indirect regulation of state monopoly services or economic activities can be traced to the 1930s with the creation of the Instituto Nacional do Açúcar e do Álcool (Sugar and Alcohol National Institute) and the Departamento Nacional do Café (Coffee National Department) both in 1933 (de Souza, 2007, 81) the adoption of a regulatory model based on the creation of regulatory agencies was the direct result of the privatization of public infrastructure services in the country.

This new regulatory format based on the creation of regulatory agencies was the result of the Brazilian government project to establish an institutional and management model able to affect positively foreign investors and influence the country's capacity of attracting investments. This process was institutionalized through Federal Law 8.031/1990 and the proposition of the Programa Nacional de Desestatização – PND (National Privatisation Program). The PND promoted the sale of government assets in private companies and the privatization of public companies in order to minimise the level of state intervention and control in the public services sector, particularly in areas considered problematic and those that could be attractive for foreign investment. Explored under a monopolistic regime and affected by structural problems causing the offering of a low-cost, high-quality service, the telecommunication service was the first sector to follow the new regulatory model with the enactment of the Lei Geral de Telecomunicações and the creation of the Agência Nacional de Telecomunicações in 1997 (Paula et al., 2017).

Created in 1997 by the Federal Law 9.472/97 the Agência Nacional de Telecomunicações – ANATEL was originally designed to regulate the commercial development of telecommunication services in Brazil. Linked to the Ministry of Science, Technology, Innovation and Communication the agency integrates the indirect federal public administration under an autarchic regime while having financial and administrative autonomy (Article 8 and paragraphs 1 and 2). ANATEL is responsible for regulating and supervising the implementation of national

telecommunication policies. This involves a complex regulatory ecosystem deeply connected to Internet governance and regulation. The Agency's main functions are: a) licensing, supervising and sanctioning private companies operating telecommunication services; b) protection of users' interests; and c) administration of the radioelectric spectrum (Scholze & Wimmer 2009, 157). ANATEL's policy operation is mainly regulated by Decrees 2.338/1997 and 4.733/2003 and bylaws published in Resolução 612/2013.

ANATEL is an important player and has regulatory influence in three different levels of Brazilian policy-making. The Agency's activities impact the country's economic development once it is responsible for proposing, managing and overseeing public calls and contracts involving telecommunication services delegations. In terms of the social regulatory aspect, it plays a central role ensuring basic levels of security during telecommunications transmissions and receptions. Finally, it is ANATEL that establishes the technical, legal and administrative rules applied to private companies exploring telecommunication services (Souza & Baidya, 2016).

The following subsection analyses ANATEL's policy-making operation according to the multidimensional framework presented previously. The first stage of the analysis observes the Agency's levels of inclusion and representativeness. These elements are investigated in light of ANATEL's governance structure, particularly by looking at the following aspects: a) composition of the policy-making body; and b) representative selection processes.

B.1 ANATEL input dimension (agency composition and representative selection process)

ANATEL is part of the Brazilian public administration system. It is a regulatory authority linked to the Ministry of Science, Technology, Communication and Innovation (with no hierarchal dependency) established under special regime and having financial and administrative autonomy. Its composition is hybrid and encompasses technical and political representatives: a) officers with tenure grounded on political appointment representing the government; officers with tenure grounded on political appointment representing private telecommunication companies, telecom

users and civil society; and c) officers with tenure grounded on a public selection process that under the Brazilian administrative law are denominated technical civil servants.

Technical civil servants are hired after an open public selection and are mainly assigned to administrative, operational and technical functions. Mostly they produce technical evidence or administrative support for policy-making bodies. The other two categories are nominated to participate in ANATEL's senior policy-making structures. Both categories, despite being portrayed as based on technical knowledge and expertise, are heavily influenced and steered by political lobbying. These representatives integrate two major decision-making structures of ANATEL: The Board of Directors and the Advisory Council.

Under the provisions of the Federal Law 9.472/1997 and the Federal Decree 2.388/1997 the Board of Directors is formed by five members directly nominated by the Brazilian president after their nomination is approved by the Brazilian Senate. A nominee needs to be a Brazilian citizen with an untarnished reputation, a university degree and recognition in their professional field. They have a five-year mandate and can be reappointed for one subsequent five-year term. Due to the politically and economically sensitive nature of the position the board member needs to respect a 'quarantine' period of one year without working or participating in activities related to ANATEL's scope after leaving their position (Art. 30, Federal Law 9.472/1997).

The second decision-making body, the Advisory Council, is formed by 12 members. They are nominated by the Brazilian president and represent each of the following segments: two members representing the federal government; two members representing the Senate; two members representing the Chamber of Deputies; two representing the telecommunication companies; two representing the telecommunication users; and two representing civil society. The advisory counsellors have a mandate of three years with no reappointment; they do not receive remuneration and must have professional or academic qualifications compatible with the exercise of the public function.

The government representatives (Federal government, Senate and Chamber of Deputies) are directly nominated by each institution to the president. The

representatives of the other three sectors are nominated after a more complex and controversial process that lacks guidelines. The last nomination process was based on three public calls published in the Federal Government Journal[85]. The call convoked the institutions representing each segment to indicate three names. The formal nomination should be made during a 30-days period succeeding the call's publication and contain the curriculum vitae and qualifications of the nominees and the credential of the institution offering the nomination. After that the president is to select under their political convenience one name to be nominated member of the Advisory Council.

The composition of ANATEL's major policy-making bodies and the representative nomination process reveals a set of incongruities that impact its policy operation. There is no balance between stakeholder groups in the decision-making bodies. Both the Board of Directors and the Advisory Council are dominated by government representatives.[86] Moreover the selection processes do not have clear guidelines and are heavily influenced politically (Souza, 2007, 14). For example, in 2013, Dilma Roussef, the former Brazilian president, appointed as representative of civil society in the Advisory Council a businessman nominated by an Internet business association (Intervozes, 2013). Other examples can be seen in the headline of the economic newspaper Valor Economico noting the "personal victory" of the Ministry of Communication over the nomination of ANATEL's next president (Senado, 2005) or in the Estadão newspaper noting the composition between different political parties in accepting the nominations of representatives of the Senate in 2015 (Estadão, 2015). These characteristics minimise ANATEL's policy-operation input levels and, as will be discusses later in this chapter, they also affect the Agency's policy-making acceptance and efficiency perception.

[85] Ministry of Science, Technology, Innovation and Communication Public Call 1, 2 and 3 of 2017. Available at:
http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?jornal=3&pagina=5&data=20/02/2017

[86] ANATEL's actual Board of Directors have one former member from the Ministry of Communication, one member of the Agency's technical services and one former Senator. The other two members are lawyers with former advisory functions in different ministries. The Advisory council has a unbalanced and overlapping composition. There is a majority of representatives from the government spectrum (6) and overlapping categories in the non-government sector, like for example the categories of users and civil society.

B.2 – ANATEL policy-making operation structure

ANATEL's policy-making operation is complex and fragmented. Most of the decision-making process is concentrated in the hands of the Board of Directors with secondary support from the Advisory Council and other supportive structures operating technical, legal and administrative roles[87]. The Board of Directors is the central structure of ANATEL's policy-making activities. According to Federal Law 9.472/1997, Federal Decree 2.338/2003 and its bylaws the Board is responsible for: a) proposing new telecommunication policies or the reformation of current ones; b) coordinating ANATEL's regulatory activity, editing norms and regulations; and c) approving the delegation of telecommunication services to private actors. The Board can decide to use an absolute majority system and formally express it decisions using four instruments: Resoluções, Súmulas, Portarias and Atos Administrativos (resolutions, precedents, ordinances and administrative acts). The collegial decisions are taken in formal meetings or in "deliberative circuits": a voting system executed independently of formal meetings (ANATEL, 2016b).

The Advisory Council provides non-governmental actors with opportunities of institutional participation in ANATEL's policy-making operation. The Council's main responsibility is to provide support and advice to the Board of Directors (Article 35 of the Federal Law 9.742/1997) mainly by issuing advisory positions over telecommunication policies[88], analysing the Board of Directors' annual reports and making policy proposals under the Board's evaluation. Regulated by Federal Law 9.472/1997, Federal Decree 2.338/2003 and by its bylaws, the Advisory Council should have an ordinary meeting in April and could be convoked to extraordinary sessions by the Board of Directors. The meeting starts with the presence of a minimum of six members and is based on an agenda that lists the topics under discussion. Each topic has one pre-assigned rapporteur who elaborates and presents their position on the policy issue under discussion. Under a simple majority voting system, and

[87] ANATEL has the following supporting offices: international relations, institutional relations, communication, compliance, consumers, regulation and oversight functions.
[88] The Advisory Council bylaws describe in detail the council attributions in Article 7. F.

following an adversarial approach, the other members will decide to follow or to repeal the position presented by the rapporteur. The voting is nominal and open and once the decision is made the Advisory Council publishes its proceedings[89] (ANATEL, 2001)

It is important to note that while the Advisory Council was designed to play a significant role in ANATEL's policy-making operation the analysis of the Council's activities during the last few years reveals a contrasting reality. Between August 2015 and January 2018 the Council only held two meetings. This was partially justified by the incompleteness of the Council as during this period some positions became vacant and ANATEL's governing body and the Brazilian presidency did little to address the Advisory Council's ineffectiveness. These recent developments indicate a complete lack of institutional interest in the regular functioning of ANATEL's Advisory Council and consequently the weakening of its contribution to the Agency's policy-making operation. This particular approach also provide evidence reinforcing ANATEL's resistance to engage in multistakeholder based policy making activities as it disinterests in the Advisory Council reveals its unwillingness to support the unique institutional body promoting the active participation of a broader number of stakeholders.

ANATEL's policy-making operation is mainly located in the Board of Directors. The Board using the support of the Advisory Council and other departments follows the framework established in its bylaws and conducts its policy-making activities following two elements. Firstly, all regulatory initiatives must be debated in public sessions and secondly all proposals must be submitted to public consultation[90] (ANATEL, 2013). The regulatory initiative can originate from any party interested in the regulation of telecommunications. It will be assessed by technical and administrative commissions before it arrives at the Advisory Council. After the Council's consideration the Board of Directors submits directly or via one of its administrative bodies the proposed regulatory instrument for public consultation. The public consultation call has to be published on the Agency's website and in the

[89] Advisory Council bylaws Articles 11 to 16.
[90] ANATEL bylaws Articles 56, 60 and 62.

Federal public journal. It will present the issue under consultation and set the rules of engagement. After the conclusion of the consultation processes all contributions are consolidated into one document and sent to the decision-making body to be evaluated. The Board of Directors analyses all manifestations and the compulsory regulatory impact study (ANATEL, 2013). Once the Board decides its position it publishes a normative order (Resolução) enacting its ruling.

Analyses of ANATEL's policy-making operation reveal some contrasting characteristics. It has a high level of formal transparency as there is easy access to the meeting agendas, videos and minutes, even including the Board of Directors' voting reports; however, there is little substantial evidence of the debates or any evidence supporting the existence of a consensus-driven rationale. Most of the content is convened via a technical and legal framework that overshadows the policies discussions. There is an overwhelming sense of "automated technicality". The debates and the decision are based on pre-established reports and follow much more of an adversarial approach than one on consensus.

The Advisory Council's composition and functions embodies not only its role on ANATEL governing design but also the mains characteristics of the Agency governance model. The precarious representative regime embodied in the Advisory Council can be considered an attempt to carve out some level of legitimacy. However, the limited number of representatives, the low level of representativeness, the opaque and restricted appointment process when combined with the lack of influence in the policy-making process, all reveal that the Advisory Council, while designed to strengthen ANATEL's policy-making legitimacy and efficacy, has not played, as the next chapter explores, a significant role in providing legitimacy or influencing the Agency's policies.

One point to be stressed here is that this bureaucratic, layered and fragmented policy-making operation impacts directly on ANATEL's levels of accountability. The Agency's regulatory framework establishes clearly the possibility to question and overrule policy decisions made by the Board of Directors or any of its supportive bodies (Articles 126 and 115 of ANATEL's by-law). The main instrument to question any decision from the Board of Directors is the "Pedido de Reconsideração". However,

the review request is addressed and evaluated by the same body that issued the questioned decision what lead to questions about the systems mechanisms of accountability. The only alternative to this internal and questionable accountability instrument is the use of judicial proceedings to challenge the administrative acts.

ANATEL's policy operation relies profoundly on its techno-legal expertise to regulate complex and interconnected telecommunication regulatory problems. The Agency, in terms of its limited "input" dimension aspects, operates a different and more selective mechanism of convening expertise and technical knowledge than CGI.br. The embodiment of expertise through the policy-making process is mainly based on the Agency's internal and external consultation processes. Despite providing a path to different stakeholders' participation in the decision making process and the Agency's technical and administrative bodies providing a good level of evidence-based support, the highly techno-legal nature of the consultation processes constitutes an obstacle to non-expert stakeholders' participation.

The excessive use of techno-legal rationalities and the lack of support given to external actors to fully engage in the consultation processes create a contrasting space where opportunities to access formal expertise are formalised but not substantially operationalized. The result is a policy process that, despite being focused on technical expertise, prioritises the internal sources to the detriment of the external. It is also important to note that the highly specialised narratives used to ground the Agency's policy operation also works as a disguise to cover the heavy influence of political interests in the steering of ANATEL's policy operation.

All these elements impact directly on ANATEL's efficiency and acceptance. Despite the fact that the Agency has been quite successful in fostering telecommunication market development, its policy-making operation and regulatory developments have been criticized on a regular basis (Knight, 2014). Disregarding the debates about ANATEL's legitimacy, representativeness and inclusion as already discussed above, the Agency's heavily politicised policy-making has recently been scrutinised by unexpected actors. In a surprising move the Federal Accounting Oversight Tribunal, an institution in charge of supervising financial and legal acts practiced by federal public institutions, published a report indicating ANATEL's high

level of inefficiency in managing telecommunication delegation processes. The same report, produced by two federal compliance officers, requested that the court open an investigation to clarify the responsibility of ANATEL's top policy-making actors (Board of Directors) in these irregular operations (Berbet, 2017).

ANATEL's policy-making operation contrasts with CGI.br's policy-making structure and operation whereby governance practices and policies are the result of effective stakeholder engagement. The recent empowerment of ANATEL in the Internet governance system and increasing government criticism about CGI.br's composition (IDGnow, 2016) signals that the impact of ANATEL in the governance system could be more intense than the literature suggests[91]. And although this relationship may evoke some discussion on a global level (DeNardis, 2014; Mueller & van Eaten, 2013) there is no discussion in the Brazilian literature on Internet governance about the impact of ANATEL on the governance system or even about its policies related to Internet regulation. This is interesting because although ANATEL is largely considered a secondary actor with questionable legitimacy, its recent empowerment can reveal a tendency to change the governance design and develop an alternative to the current multistakeholder model.

The rise of a more conservative legislative power in 2014 and of a new centre-right presidential cabinet in 2016, the appointment of new government representatives, (Portaria Interministerial 440 of June 2016) and the nature of the topics discussed in CGI.br 2016 meetings (CGI.br, 2016d;, 2016e), all suggest the call for a more command and control approach to Internet governance and the use of techno-structure regulators like ANATEL as a gatekeeper to provide support to a government-centred approach to Internet governance. ANATEL has a more restricted model of participation in the sense of representativeness of different groups and the real impact of representatives from outside of the governmental arena on the policy-making process[92]. This governance dichotomy and the power struggle between these contrasting actors are two major points undermining not only the Brazilian

[91] Most of the literature in Internet governance in Brazil ignore the role of ANATEL in the Brazilian Internet governance system.

[92] ANATEL advisory council is a good example of these limitations as it has a lack of legitimacy and a lower level of influence in the big policies adopted by the agency.

governance system, but also the efforts to develop a regulatory framework able to defend an open, democratic, legitimate and efficient governance system.

III. Policy-operation comparison: contradictions and similarities

The duality of the Brazilian Internet governance system is not unique. The contrasting operation of two policy-making models, one based on multistakeholderism and the other centred on a more "traditional" state-centred regulatory-based approach reflects the political and power struggle surrounding international Internet governance. The dichotomy between a governance model based on multistakeholderism supported by Western democracies (the U.S and Europe) is fiercely opposed by a multilateral state-centred approach sustained by Russia and China. The recent discussions around the design and structure of the governance system, mostly gravitating between the WSIS-IGF model and the empowerment of ITU (International Telecommunication Union) are also transported to the national level as in the Brazilian governance system.

While most of the outside layers of the Internet are openly discussed under multistakeholderism-based structures like IGF and WSIS, the not-so-visible part has been debated and conducted in the direction of ITU and other multilateral-centred mechanisms. The effects of this contrasting organisational governance structure bring not only governance and regulatory instability, but also a constant power struggle that undermines the system's effectiveness. These conflicts are reflected in the differences and similarities identified between CGI.br and ANATEL policy operation in the last two sections. The following table summarises this comparison:

Policy-making operation comparison		
Policy-making operation dimension/element	**CGI.br**	**ANATEL**
1. Input	-	-

1.1 Inclusion	Optimal	Inadequate
1.2 Representativeness	Optimal	Inadequate
2. Throughput	-	-
2.1 Procedural fairness	Intermediate	Inadequate
2.2 Consensus orientation	Optimal	Inadequate
2.2 Expertise	Optimal	Optimal
2.3 Transparency	Optimal	Intermediate
2.4 Accountability	Lower	Intermediate
3. Output dimension	-	-
3.1 Acceptance	Intermediate to Optimal	Inadequate
3.2 Efficacy	Intermediate to Optimal	Inadequate

(Table 05)

A. Policy-making operation contrasts

The observation and analysis of the policy-making operation dynamics in CGI.br and ANATEL point to the existence of similarities but also distinctions. The main contrasting dimension relates to input. There is clearly an accentuated difference between the levels of representativeness present in CGI.br and ANATEL. CGI.br's policy-making operation is designed to enhance stakeholder participation by including formally in its composition representatives of the main sectors directly engaged in Internet governance activities in Brazil and is in accordance with the international stakeholder taxonomy established in the WSIS definition of Internet governance. Additionally, CGI.br has developed a more encompassing, transparent and democratic process of representatives' nomination, particularly those representing the non-governmental spectrum. In contrast, ANATEL has a structural design and a policy-making operation process that constrains inclusion and representativeness. The main decision-making body has a non-transparent and opaque nomination process that is heavily influenced politically and does not fully encompass representatives from all stakeholders interested in telecommunication and Internet policy-making. Moreover, the advisory policy-making structure despite

having a broader representative spectrum does not engage properly with all stakeholders and also has a nomination process equally controlled by political actors and lacking clarity.

The second major distinctive element observed is the opposing rationalities supporting decision-making in CGI.br and in ANATEL. CGI.br is oriented towards a consensus-based approach where stakeholders share information and resources. ANATEL organises its decision-making process so that on some occasions it is possible to identify the achievement of consensus during the decision-making stage; although this is not the main purpose of this process. Secondly it is interesting to note that despite exhibiting higher levels of expertise throughout the policy-making operation, the way that expertise operates in both environments is distinct. While in CGI.br expertise is based on inclusion and results from the engagement and contribution of a large audience of stakeholders, ANATEL uses expertise to limit the engagement and participation of stakeholders. The use of highly specialised techno-legal procedures and narratives based on the need to address "technical problems" via expert knowledge is performed in a way that creates more exclusion than inclusion of stakeholders interested in ANATEL's policy-making process.

The third significant distinction between CGI.br and ANATEL policy-operation is identified in the output dimension. CGI.br has substantially higher levels of perceived acceptance and efficacy than ANATEL. There is a broader sense in the community engaged in Internet governance in Brazil (Knight, 2014; Lemos et al. in Gasser et al., 2015; Anastacio, 2015) that CGI.br's policy-making is more legitimate, acceptable and efficient. This is an interesting perception as despite ANATEL's less participatory and more politically-influenced policy-making operation its regulatory production, in a techno-legal sense, can be considered efficient but clearly has a lower level of acceptance than CGI.br. This different perception is deeply connected with the committee's adoption of a policy-making model based on multistakeholderism (Anastacio, 2015). The inclusion of multiple stakeholders in different phases of the policy-making operation promotes the engagement of expertise and technical knowledge that under a consensus-driven policy-making rationale produces more legitimate, acceptable and efficient governance and regulatory outcomes. These

operations based on the interplay between inclusion, expertise and consensus-driven decision-making identified in multistakeholder policy-making operations are key elements supporting the arguments of this thesis and will be explored further in the next chapters.

B. Policy-making operation similarities

Despite these contrasting elements, it is important to note the strong similarities between the policy operations of both actors. CGI.br and ANATEL have policy-making operations with a relative degree of transparency. The policy-making structures publish regularly their meeting agendas and minutes and even in some occasions stream online their sessions. All normative and regulatory instruments are available on their websites and the majority of the documents supporting their decision-making processes are also available. But these similarities have some particular nuances. Despite making more available information about its policy making activities, particularly through online publications, ANATEL's level of transparency can be considered lower than CGI.br's. These results, again, stem from the agency's use and embedment of dense techno-legal discourses and narratives to ground its policy and decision-making, thus exacerbating the complexity of the information made available and weakening its transparency.

Another important observation is that both actors have a low level of accountability. In fact, ANATEL, in terms of its more developed and bureaucratic regulatory and policy-making framework presents, despite its inefficiency, a higher degree of accountability than CGI.br. ANATEL's accountability mechanisms are fairly transparent and publicly established in the Agency's regulatory framework. Despite this positive aspect overall accountability is negatively impacted by technical legalities and bureaucracy orienting certain procedural aspects. Moreover, the most problematic issue is the existence of a loophole process that establishes the Board of Directors as the body responsible for reviewing not only the decisions of other administrative and policy-making structures, but also its own. This scenario is similar to that observed in CGI.br. The committee's regulatory framework does not predict

any accountability mechanisms or processes (Anastacio, 2015). This lack of accountability affects CGI.br's legitimacy and efficacy and was recently pointed out by critics as a vulnerability that impacts the committee's policy-making operation and development. The uncertainty surrounding CGI.br's accountability is not a feature particular to the Brazilian approach to multistakeholder policy-making; it reproduces the same lack of noted in the Internet-governance international multistakeholder institutions. The accountability opacity of multistakeholderism governance arrangements also identified in CGI.br is one critical element limiting multistakeholderism's policy-making operation and will be further explored in the last chapter of this thesis.

IV. Some concluding remarks and observations

The main objective of this thesis is to investigate how multistakeholderism operates in Internet policy-making and what are the effects thereof. Using a multidimensional policy-making operation concept the present chapter observed and compared two different actors engaged on Internet governance in Brazil. Tracing how multistakeholderism operates in CGI.br policy-making and comparing this process with the operation of policy-making in a non-multistakeholder actor like ANATEL, particularly their similarities and limitations, provided an important opportunity to shed light on the research questions guiding this thesis. Mapping the interplays of multistakeholderism operations in Internet policy-making is a vital practice to understand theoretically multistakeholderism's limitations and potentialities. Some of these elements were already observed in day-to-day practices and are part of the conceptual contributions proposed by this thesis. The present chapter provided important evidence supporting not only the impact of multistakholderism on the acceptance and efficacy of governance arrangements but also indicates the policy-making mechanics enabling these generative effects.

Multistakeholderism is one innovative, complex and central element of the actual global governance order (Mena & Palazzo, 2012; Rosenau et al, 1992). Its

widespread embodiment in critical global governance regimes like the Internet makes it important to understand its policy operation and the effects thereof. Using mechanisms and criteria adapted from the international relations and political science literature the present chapter characterized policy-making under a three-dimensional process and observing policy-making practices in one multistakeholder actor (CGI.br) and in one non-multistakeholder actor (ANATEL) traced their similarities and contrasting points. During this mapping process it was possible to identify the central mechanism guiding multistakeholderism's policy-making operation. Understanding policymaking operation as the process through which inclusion and expertise are translated into governance arrangements and regulatory instruments, the chapter evidences that during multistakeholder policy-making operation the higher level of inclusion and representativeness are mediated via a consensus-driven decision-making approach that generates more acceptable and efficient policy outcomes.

Despite the perceived positive effects, the analysis also indicates that when these policy-operation mechanisms are not properly implemented like for example in cases where operational safeguards are used to preserve substantive inclusion and representativeness there is a higher possibility of exposing incurring multistakeholderism limitations. It particularly this can lead to the creation of techno-legal epistemic communities promoting the replication of multistakeholder governance structures and practices as a mechanism to support their dominant positions in the policy-making process.

These findings illustrate and support the theoretical developments proposed in the present thesis, particularly the existence of ambiguity in the operation of multistakeholder policy-making. Multistakeholderism's operational ambiguity and its generative and normalising effects are mainly the result of the way in which multistakeholderism mediates the interplay between inclusion and expertise in governance and regulatory outcomes. Grounding these dynamics are two elements of multistakeholder policy-making throughput dimension (procedural fairness and consensus driven) that are embodied in one core characteristic of multistakeholder practices: equal-footing rationale. Under these arrangements, the operation of multistakeholder policy-making can promote inclusion, governance innovation and

regulatory efficiency, or it can be an instrument replicating the colonialist rationale of "excluding yet encompassing" (Darian-Smith & Fitzpatrick, 1999, 2) or excluding via inclusion and promoting capture and normalisation.

CHAPTER THREE

THE OPERATION OF MULTISTAKEHOLDER INTERNET POLICY-MAKING IN BRAZIL: AN ANALYSIS OF A NATIONAL REGULATION-MAKING PRACTICE

Introduction

This chapter continues to analyse the operation of multistakeholderism in the Brazilian Internet governance system. After having investigated how multistakeholderism operates in Brazilian governance actors in the previous chapter, this part of the thesis explores the operation of multistakeholderism in one specific regulation-making practice. Aiming to obtain a more fine-grained understanding and to shed light on the dynamics investigated in this research, this chapter discusses the participation of CGI.br and ANATEL in the Marco Civil da Internet (Federal Law 12.965/14) drafting process. Instead of looking at the operation of multistakeholderism in an abstract and static way, this chapter investigates the operation of multistakeholderism "in the making" of a concrete regulatory provision. This approach affords an opportunity to observe the interactions and intersections between internal and external policy-making aspects of the operation of multistakeholderism in actors with contrasting policy-making rationalities. It also contributes to a more fine-tuned observation because the debate about techno-legal policy mechanisms (Hoskins, 2017, 2) like network neutrality has social, political and economic implications. It interconnects ideas and values such as access to information, freedom of expression, privacy, innovation and generativity (Bauer & Obar 2014;

Powell & Cooper 2011; Hoskins, 2017; Zittrain, 2008) that normally vary across different social, economic, and cultural contexts, representing in this way a unique site to observe how multistakeholder and non-multistakeholder actors work in such a multi-faceted and demanding policy-making environment.

The evidence extracted from this discussion is crucial to provide a clear understanding of the operation and effects of multistakeholderism in Internet governance in Brazil. The investigation of a specific regulation-making process contributes to clarifying the main objective of this thesis. It unpacks the dynamics and effects of the operation of multistakeholderism in Internet governance and sheds light on key elements supporting multistakeholder policy-making in Brazilian Internet governance. This analysis also permits the observation of what effects multistakeholderism has on the regulatory outcomes of these governance practices and processes.

This chapter is divided into five sections. The first part contextualises politically and legally the Marco Civil da Internet law drafting process. The second section presents a key stage of the Marco Civil da Internet law drafting process, namely the regulation of network neutrality. The third and fourth sections trace and analyse ANATEL's and CGI.br's involvement in the regulation of network neutrality in the Marco Civil drafting. The last section presents the main elements observed in the analyses carried out in the chapter, particularly the key insights supporting the theoretical developments presented in the previous chapter and some concluding remarks.

I. Political and legal aspects of the Marco Civil da Internet law drafting process

Creating an overarching regulatory framework for the Internet is an idealised goal. The complexities and power struggles arising from a multi-layered, transdisciplinary and fragmented regulatory object deeply incorporated in society's day-to-day operation is one of the most challenging items on the global agenda. The existence of legal gaps at the international level and the adoption of a compartmentalized and

topical regulatory approach[93] to the detriment of a more holistic one, affects the regulation of the Internet at all levels. The absence of international frameworks or comprehensive guidelines impacts directly on the regulation of the Internet at the national level and creates a regulatory environment that promotes fragmented and contrasting approaches that replicate, as pointed out by Landauer (2016), the Internet's legal analytical binary opposition.[94] It is not surprising that the Brazilian Internet governance and regulatory framework has followed this rationale, developing a fragmented and complex legal ecosystem that has decoupled completely the regulation of technical elements from its social implications.

Most of the Brazilian Internet regulatory framework is still formed by isolated legal instruments that do not interact with one another and were developed under a traditional top-down and non-participative norm-making process. The development of the Federal Law 12965/2014, the Marco Civil da Internet (hereafter, Marco Civil da Internet), embodied a conceptual change that can be traced not to 2009, when this Marco Civil began to be discussed, but to 1995 when CGI.br was created. Learning from the experiences developed in the national Internet governance system, the Brazilian government changed its fragmented regulatory approach and championed the development of a legal instrument establishing principles, guarantees, rights and obligations for the use of the Internet in Brazil (Marco Civil da Internet). This was a key step in the direction toward a more stable and comprehensive legal framework able to promote a cohesive regulatory environment supporting the Internet's technical, economic and social development.

The Marco Civil da Internet drafting process was innovative, participative and complex (Lemos, 2014a). Engineered collaboratively by the Brazilian Ministry of Justice and the Centro de Tecnologia e Sociedade of the Fundação Getulio Vargas Law School in Rio de Janeiro (CTS/FGV), the drafting process was designed to use

[93] Despite recent developments recognising the application of Human Rights protective framework in the online environment (United Nations Resolution A/RES/69/166 - Right to privacy online) the only international legal instrument regulating internet today is the European Convention in Cybercrime (ETS – 185).

[94] Landauer notes that: the literature on the Internet and Internet law is marked by its binary thinking, setting out analytical binary oppositions or, commonly, setting out Manichean oppositions of good versus evil – everything is either a '1' or a '0'" (2016, 1133).

information technology resources and promote substantive public participation. As noted by Hoskins (2017, 6) "The Marco Civil da Internet architects constructed a multistage policy development process with two phases of online public consultations and a concurrent and loose form of multistakeholderism through which corporations, civil society, and state entities could contribute recommendations"

The process, while initially designed to have two distinct phases, was in practice, due to political and legal aspects, developed in three different stages: a) public consultation; b) multistakeholder input; and c) congressional debate (Hoskins, 2017, 3). The first and second phases, classified as pre-parliament stages, were coordinated and conducted by the Brazilian Ministry of Justice and the CTS/FGV. It was formed by an online public consultation regarding the bill's general features, particularly its aims, objectives and structure. The second consultation stage focused on the drafting of the bill's provisions. The third phase was coordinated and conducted by the Brazilian parliament (Chamber of Deputies and Senate). Using the Brazilian traditional norm-making process, which included expert hearings and political lobbying, the Brazilian parliament restructured the bill via parliamentary amendments and sent the bill for presidential approval (Lemos, 2014a).

Although the Marco Civil da Internet law would attract national attention in the final stages of its parliamentary debate in 2013, the drafting process started formally in October 2009 when the Ministry of Justice and the CTS/FGV launched an online consultation using a purpose-built platform calling for interested stakeholders to contribute to the initial design of the bill's structure. The Marco Civil da Internet platform was hosted in an experimental space maintained by the Brazilian Ministry of Culture. The Cultural Digital (http://culturadigital.br) was an open and collaborative online space structured to promote participation in policy-making initiatives. It allowed the publication of strategic pieces of information, supported resources and expertise exchange and enabled different stakeholder groups to connect. The platform's design and accessibility were intuitive and provided users with all information necessary to engage in and contribute to the initiative (Rezende & Lima, 2016). Using a multidimensional approach, the coordination team firstly

asked participants to indicate the most important dimensions or axes that should be addressed by a civil law regulating the Internet.

The first axis sought to identify individual and collective rights connected to Internet use and governance. It encompassed new rights arising from the socio-economic transformations caused by the Internet, like the right to access the Internet or the protection of network neutrality. It also included the need to legally express a commitment that already recognised rights like privacy, and state that these should be protected in the online environment. The second axis was designed to identify the attributions and responsibilities of actors providing the technical services enabling Internet operation, particularly the activities of Internet service providers, Internet content providers, application providers and hosting providers. The third axis aimed to collect contributions about elements to guide the development of Internet policy-making, governance and regulation in the country and was particularly interested in contributions supporting the update of legal instruments intersecting or influencing Internet regulation (Brasil, Ministério da Justiça et al., 2010).

After 50 days of online consultations, the first phase was concluded on 17th December 2009. During this period, the platform was accessed more than 70,000 times and 800 formal submissions were received (Brasil, Ministério da Justiça et al., 2010). The coordination team clustered contributions to the first axis under an "individual and collective rights" theme, grouping them in three sub-sections: privacy; freedom of expression; and right to access the Internet. The second axis involved the responsibilities of actors participating in the technical management of the Internet and resulted in the development of two core areas: intermediaries' liability; and network neutrality. The main contributions to the third axis reflected concerns regarding topics like open standards, interoperability, access to information held by government and capacity-building initiatives (Brasil, Ministério da Justiça et al., 2010).

Once all submitted contributions were analysed, the coordination team published in January 2010 a complete report making public all contributions and supporting arguments (Ministério da Justiça et al., 2010). The report also made public the preliminary version of the bill drafted by the coordination team. Despite its broad scope, it is interesting to note that during the first phase the coordination team decided

to leave some important issues out of the discussion. The consolidated report and the preliminary draft proposal did not mention and did not incorporate in the bill for further discussion any provision about electronic commerce, electronic mass communication and management of the Internet's core resources like IP allocation or domain name system management. The exclusion of these topics was based on the understanding of the coordination team that these issues either touched the borders of other complex regulatory contexts or that they were so singular that they should be objects of dedicated and more specific regulatory instruments (Rezende & Lima, 2016, 143). Not incorporating these topics was a decision not only in coherence with the original generalist regulatory ethos of the project, but also a strategic decision to avoid sensitive topics that could halt the drafting process.

The second phase began with the publication of the preliminary proposal in the online platform. The consultation rationale followed the same approach used in the first phase. The proposal was published, and participants could use a variety of different channels to provide suggestions and comments. In this phase, the coordination team received comments and contributions via three different mechanisms. Firstly, it allowed the interested actors to directly submit in the consultation platform or via the project's Twitter profile comments about the bill's draft provisions. Secondly, the coordination team encouraged government bodies and institutions representing civil society, academia, technical community and private companies to submit more structured contributions using a dedicated communication channel. Thirdly, it realised a series of meetings, seminars and open discussions to receive contributions about the bill proposal (Santarem, 2010).

The proposition of a more concrete instrument in the form of a preliminary proposal, the use of multiple participatory channels and the adoption of a broader consultation approach led to an increase in the level of participation. Academic institutions, government departments, telecommunications companies, copyright associations and other important actors that were absent during the first phase of the consultation engaged in the drafting process in a very intense way (Rezende & Lima, 2016, 144). During this phase more than 1,100 comments and suggestions were made on the online platform and more than 20 institutional manifestations were sent to the

coordination team (Santarem, 2010, 101). It was in this phase that issues like users' identification, content removal, intermediaries' liability and network neutrality (Lemos, 2014a) began to be discussed more intensely, which started to create some friction between different groups of stakeholders. Nevertheless, in August 2011, after all suggestions were compiled and analysed, a final version of the bill endorsed by four ministries[95] was sent to the Brazilian parliament (Lemos, 2014a, 63).

The Marco Civil da Internet drafting process then moved to its third phase. In the Brazilian Congress the bill was classified and numbered as Projeto da Lei 2.126 (Lemos 2014a; Hoskins, 2017). The beginning of the formal congressional process encompassed a complete change in the coordination of the drafting process. Following the procedures assigned in the Brazilian constitution and in the parliament guidelines, the last stage was coordinated by a member of the Brazilian parliament appointed by the Chamber of Deputies. This stage was characterized by intense political negotiation, strong lobbying and conflict between stakeholders (Medeiros & Bygrave, 2015, 122). To illustrate these tensions, Solagna (2015, 88) and Hoskins (2017, 10) noted that within two years plans were made for the bill to be discussed, voted and approved at eight different moments. In each moment, political arrangements caused the voting to be blocked and the bill to be removed from the voting agenda.

The process followed the traditional rationale used during law-making processes in Brazil and was centred on two different stages. In accordance with the Brazilian constitution, any bill proposal must be discussed and approved in both parliament chambers: the Chamber of Deputies and the Federal Senate[96]. During this process, parliamentarians of the house where the bill is under discussion can suggest amendments that should be analysed and put to a vote. However, the Marco Civil da Internet parliamentary process had a more inclusive and expertise-based approach than the one normally used in other bills. In an unusual approach aimed at promoting dialogue and to mediate the conflicts between different stakeholders, the bill's

[95] Ministry of Justice, Ministry of Science and Technology, Ministry of Communication and Ministry of Culture.

[96] The Chamber of Deputies have 513 members and the Federal Senate 81. They Federal Deputies represent the interests of the people of the constituency from where they are elected, and the Senators represent the interests of the unit of the Brazilian federation from where they were elected.

rapporteur, congressman Alessandro Molon, decided to promote an open, transparent and encompassing public debate about the Marco Civil da Internet bill. More than 65 public hearings took place in the Brazilian parliament and in different regions of the country. He also used a scarcely used parliamentary instrument, the online platform e-democracy, to receive contributions and promote the debate about the bill's provisions (Rezende & Lima, 2016; Medeiros & Bygrave, 2015; Rossini et al., 2015).

During this phase, strong disagreements emerged. Topics like intermediaries' liability, privacy, data storage, freedom of expression, inclusion, and network neutrality, all generated proposals for different regulatory models and strategies (Rossini et al., 2015) and increased the tension between actors involved in the complex political negotiations underpinning the norm-making process. One key example illustrating the complexity of this negotiation process can be observed in the battle for the regulation of network neutrality. Telecommunications companies lobbied, via parliamentary amendments, for the inclusion in the bill of provisions authorising the commercialisation of segmented data and connection packages. The proposal caused a fierce debate between different stakeholder groups, largely because once accepted it would ruin the protective approach to network neutrality included in the original proposal of the bill (Medeiros & Bygrave, 2015; Hoskins, 2017). The complexity of the negotiation process around topics like network neutrality and intellectual property combined with the lack of political will of most Brazilian congressmen led to numerous gridlocks that prolonged the parliamentary process by almost three years. As noted by Hoskins (2017, 11) "by the end of 2013, the force opposing the Marco Civil da Internet had deadlocked, and the bill appeared to be in danger of dying."

The publication of news announcing that Brazilian governmental officers had been targeted by U.S. surveillance agencies reignited the debates about the strategic importance of regulating Internet use and governance in Brazil. In 2013, Edward Snowden exposed the reach and invasiveness of the Internet-based surveillance programmes executed by the American National Security Agency (NSA). He also disclosed that NSA agents, in an illegal exercise of power, had intercepted communications of Brazilian companies, government officials and had even monitored the President's mobile phone (BBC, 2014; The Guardian, 2013a; 2013b).

After Snowden's revelations, Internet governance and regulation became one of the central elements of the Brazilian governmental agenda. Abdneur & Gama (2015, 467) noted that the call for an overarching regulatory framework able to safeguard the Internet (Lyon, 2015; Hoskins, 2017) was one tactic move used by the Brazilian government to support its demand for a leading international role in the reorganisation process of international governance of the Internet.

After acknowledging the scale of the NSA's surveillance programme, the Brazilian President took three important actions. On 24th September 2013, during her speech at the 68th General Assembly of the United Nations in New York, she called for international actors to assess carefully the future of international governance and regulation of the Internet. Condemning the use of the Internet for espionage purposes, President Dilma Rousseff invited world leaders to develop an international governance framework based on principles already in use in Brazil[97] (Ferreira Nolasco, 2014; Varon, 2014a, 16). The Brazilian president's second action was taken after a meeting with the President of the Internet Corporation for Assigned Names and Numbers (ICANN), Fadi Chehadé, when it was decided that the Brazilian government would convene and organise an international meeting to discuss the future of Internet governance. Finally, taking advantage of the political momentum, the Brazilian president classified the Marco Civil da Internet bill under the constitutional urgency regime[98] and promoted political negotiations aimed at speeding up its approval in parliament.

[97] "1 - Freedom of expression, privacy of the individual and respect for human rights.
2 - Open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, Governments and the private sector.
3 - Universality that ensures the social and human development and the construction of inclusive and non-discriminatory societies
4 - Cultural diversity, without the imposition of beliefs, customs and values.
5 - Neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to restrict it for political, commercial, religious or any other purposes.
Harnessing the full potential of the internet requires, therefore, responsible regulation, which ensures at the same time freedom of expression, security and respect for human rights.

[98] Under the Brazilian law the constitutional urgency regime determines that the bill must be voted in the parliament within 90 days (45 days to be approved in the Chamber of Deputies and 45 in the Senate). After this time span if the law was not approved no other law could be voted causing a parliament lockdown. In fact, the parliament failed to vote the law in time causing other bills to be stalled.

On 22nd April 2014, the Brazilian Senate was under pressure to vote on the bill. Previous parliament lockdowns and the forthcoming international event led the bill to be approved only on the brink of the NETmundial meeting. However, to the international community which was not aware of the perils leading up to the approval of the Marco Civil da Internet law, this appeared to be perfectly timed to boost Brazilian ambitions to promote its national regulatory framework as a model to be followed. The country enacted a "principles oriented" regulatory framework for Internet governance and use on the eve of a global meeting to discuss the very same topic. It was during her speech at the opening ceremony of the NETmundial meeting that Dilma Rousseff signed the law in a performative act promoting Brazilian leadership aspirations. The Marco Civil da Internet enacting process was perfectly timed to attract international attention to the Brazilian governance model and regulatory framework (Hoskins, 2017, 2). In fact, the new law was labelled by Tim Berners Lee[99] as "the best birthday present for Brazil and global web users"(World Wide Web Foundation, 2014) and considered by The Economist (2014) to be the "Magna Carta for the Web" (Hoskins, 2017).

II. Network neutrality regulation in Brazil

The techno-regulatory concept of network neutrality has its origins in the technical set of principles underpinning the early architectural functionality of the Internet that promoted the free circulation of data[100]. Observing the influence of these architectural

[99] Sir Timothy John Berners-Lee also known as TimBL, is an English engineer and computer scientist, best known as the inventor of the World Wide Web. He made a proposal for an information management system in March 1989, and he implemented the first successful communication between a Hypertext Transfer Protocol (HTTP) client and server via the internet in mid-November the same year (Wikipedia, 2018).

[100] Ziewitz and Brown (2013) point to the following techno-regulatory principles: openness, interoperability, redundancy and end-to-end. Openness, as pointed by Ziewitz & Brown (2013,15) "has come to denote the absence of centralized points of control - a feature that is assumed to make it easy for new users to join and new uses to unfold. It is deeply connected to the rise of the `open' culture associated to Internet policy making and the "open Internet policies, coalitions, initiatives or structures" being rooted on early technical movements like "open software" and "open standards". It became an element representing a technical and governance approach committed with concepts of distributed authority and democratic participation that are so close to the way that Internet governance ecosystems were structured and are operated. Interoperability is the network capacity to allow devices to connect and communicate having an important contribution to the network expansion, particularly fostering

elements, particularly the principles of openness and end-to-end in the development of better policies to promote innovation and competition in telecommunications, Tim Wu (2003) coined the expression "network neutrality." The concept "describes the normative goal that all data should move across the Internet without being subject to discrimination based on origin or type" (Hoskins, 2017, 4; Wu, 2003). Despite its controversial conceptual perspective[101] (Zhu, 2007), the idea gained traction with different stakeholders particularly in academia and civil society. It became deeply associated with the promotion and protection of economic development, innovation and competition and a core element supporting freedom of expression, speech and access to information (Nunziato, 2009; Hoskins, 2017).

Network neutrality, given its techno-regulatory nature, is an important example of the increasing intersection between the technical and the political (Latour, 1994; DeNardis, 2014). This technical decision to not treat data packages on the Internet differently has important economic and social effects. Telecommunications companies and Internet service providers (ISPs), position themselves against, or in favour of, network neutrality according to the policy issue under discussion. When the topic concerns innovation and competition, they are completely against network neutrality. Using an economic approach, telecommunications companies and ISPs agree that the inability to charge consumers according to the type of data that they are using creates a levelling of the field that is unfair, as those consuming less data bandwidth share the costs with those consuming more. However, when they want to promote "intermediaries' non-liability" they use network neutrality as a key supporting element as they cannot inspect data packages, so they cannot know the content and consequently cannot be held liable.

independent players to contribute to the network development without central permission or planning (Ziewitz and Brown, 2013,16). Redundancy refers to the idea that the same network function can be carried by more than one element. Ziewitz and Brown, 2013,16). This technical principle also influenced the international institutionalization process of Internet governance, particularly when one observes the much of the competences of the big institutions like ICANN, IANA and IETF are sometimes overlapped or redundant. The end-to-end principle asserts that the network main function is to transmit data in an efficient and flexible way (The RFC 1958): "Everything else should be done at the fringes" (Carpenter, 1996).

[101] Bringing Neutrality to Network Neutrality from Kai Zhu (2007) provides a fair recollection of the arguments in favour and against network neutrality.

This complex environment led to network neutrality policies becoming one of the most intense battlefields in Internet governance both nationally and internationally. For more than a decade, network neutrality "has been at the centre of contentious Internet policy debates in North America and Europe" (Ly et al., 2012), and until today, despite being gradually recognised and being protected in the European Union (Regulation EU 2015/2120[102][103]) and countries[104] like Brazil, India and Canada (Global Net Neutrality Coalition, 2018), it recently returned to the centre of the international Internet governance agenda. In 2015, the U.S. government decided to enact regulations protecting and championing network neutrality. Under "President Obama's Plan for a Free and Open Internet" (The Obama White House, 2014) the Federal Communication Commission (FCC) voted on the Open Internet Order and reclassified ISPs as common carriers under Title II of the U.S. Telecommunications Act. One consequence of this decision was that ISPs were unable to legally implement technical and economic measures to manage a user's Internet traffic. However, this position has changed drastically under Donald Trump's administration. In December 2017, the FCC repealed the Open Internet Order, damaging the regulatory elements promoting the protection of network neutrality in the U.S., thereby causing alarm for contrasting regulatory models. While it is still too early to understand the operational consequences of the FCC's decision as it is still pending implementation and is under judicial scrutiny in several law suits, it is important to note that the policy change sparked not only international criticism, but also some unexpected regulatory developments regarding the protection of network neutrality in the U.S.. On 6th March 2018, for example, Washington Governor Jay Inslee signed the first state net neutrality bill (New York Times, 2018) and spearheaded a movement of more than 27 states which followed the same strategy.

[102] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.310.01.0001.01.ENG&toc=OJ:L:2015:310:TOC?xid=PS_smithsonian

[103] More information about recent development in network protection in the European Union in: http://berec.europa.eu/eng/document_register/subject_matter/berec/others/7243-study-on-net-neutrality-regulation?xid=PS_smithsonian

[104] For an updated map of countries protecting network neutrality please access: https://www.thisisnetneutrality.org/

The network neutrality debate in Brazil followed a similar path the same path, with some interesting nuances. Despite being one of the most controversial topics debated during the Marco Civil da Internet drafting process (Solagna, 2015; Paap, 2014), which led the Brazilian media to highlight the topic as a key factor delaying the process in parliament (Cruz, 2015), network neutrality had not attracted much interest or debate in Brazilian academia until the final moments of the bill's approval. During his investigation of network neutrality regulation in Brazil, Ramos (2015, 16) noted that until 2014 there had been no information about the topic "network neutrality" in the CAPES[105] thesis repository[106].

However, this lack of research interest did not prevent the development of regulatory instruments dealing with instrumental aspects of network neutrality in the country. The network neutrality regulatory process can be traced back to 1995 and the enactment of the Norma 004 by the Ministry of Communications. As mentioned in the second chapter, this landmark regulatory instrument classified the Internet as a value-added service and not a telecommunications service. This measure promoted Internet development in Brazil in various ways, but its main impact was the creation of an open market for Internet services and ISPs in particular. At that time, the regulatory framework conditioned telecommunications services to be developed exclusively under a state monopoly regime that could only be commercialised by private actors under an extremely complex and bureaucratic regime. In contrast, value-added services were free to be explored commercially by private actors independently of state authorisation which led to the creation of a variety of small- and medium-sized local and regional ISPs in the country.

Another crucial element of this inaugural regulatory instrument was inserted in provision 5.4. It established that "institutions exploring telecommunications services when providing access to the public telecommunications network for provision of Internet connection services must not practice any discrimination against Internet service provider's activities" (Ministry of Communications, Norma 004,

[105] The Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (CAPES) is a Brazilian federal government agency responsible for quality assurance in postgraduate taught and research courses in Brazil (Wikipedia, 2018).
[106] Which contrasts with the 358 results in the Social Science Research Network - SSRN.

1995). This rudimentary protective provision is understood as the first regulatory mechanism to establish protection against data discrimination in the country (Ramos, 2014). It also set the foundational elements indirectly grounding the development of a broader and technically more adequate protective regime.

The regulatory process advanced further in 1997. The new telecommunications regulatory framework, the Federal Law 9.472/1997, established in its Article 3, III, a protective provision determining that telecommunications users must not face discrimination when accessing and using telecommunications services, including added-value services. While the provision was mainly directed at traditional telecommunications services like telephony, the overall understanding was that the protection against discrimination in data traffic applied to the entire telecommunications ecosystem. It was only in 2005 that a more structured and formal position protecting network neutrality was developed. Under pressure to establish a regulatory position about Internet applications offering voice-over IP services (VOIPS) (Hoskins, 2017; Ramos, 2015), ANATEL enacted an administrative regulation determining that ISPs could not prohibit or discriminate against data traffic generated by VOIPS (Hoskins, 2017; Ramos, 2015). This decision re-focused the protection against discrimination from the traffic generated by ISPs to the traffic created by end-users and shaped the development of a more user-centred policy framework.

The regulation of network neutrality shifted again in 2007. At that time, the discrimination of data packages on the Internet had become a prominent topic in the Brazilian telecommunications regulatory context (Ramos, 2015). Concerned about possible negative effects of the deployment of news services and applications based on high-speed broadband and the convergence of companies simultaneously providing telecommunications and Internet connection services, ANATEL began to enact instruments regulating data discrimination. The Resolution 477/07 of 2007 and the Resolution 614/13 of 2013 were established to regulate the Serviço Móvel Pessoal (SMP) (Personal Communication Services – PCS) and the Serviço de Comunicação Multimídia (SMC) (Multimedia Communication Service). The new ruling established in both regimes the prohibition of discriminating financially and technically against

the data flow generated by Internet end-users discriminate financially and technically the data flow resulting generated by Internet end-users.

In an attempt to create a more structured regulatory approach, ANATEL launched in 2011 a public consultation to receive contributions about the regulation of network neutrality. Consultation n. 45 aimed to collect inputs about a new regulatory instrument to SMC services that would directly shape economically and technically the flux of data packages on the Internet and affect the protection or not of network neutrality. The document proposed important provisions regulating network neutrality and caused strong debate, causing particularly strong opposition from the telecommunications industry. Under pressure, ANATEL decided to change the regulatory proposition, indicating that the issue would be better regulated in the Marco Civil da Internet context. It is important to note that the Brazilian parliament at that time was taken by surprise over the high stakes surrounding the Marco Civil da Internet bill and particularly the conflicts arising around network neutrality, a topic it had completely ignored in the past (Ramos, 2015, 69; Hoskins, 2017).

Having previously been ignored by the Brazilian parliament, network neutrality has become an important governance topic. Since 2009, it has gradually received more attention from the governance system, as evidenced when CGI.br enacted the Resolução RES/2009/003/P establishing the "principles for the governance and use of the internet" in Brazil. This soft law instrument setting principles to guide Internet governance and use, established that "filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious and cultural factors or any other form of discrimination or preferential treatment" (CGI.br, RES/2009/003/P,). Following the influence of CGI.br governance principles, network neutrality protection was elevated to one of the three pillars of the Marco Civil da Internet process (Solagna, 2015; Ramos, 2015) and was included in the proposal from an early stage.

The Projeto Lei 2126/2011[107] protected network neutrality in two different provisions. It proposed a layered framework embracing elements to guide the general interpretation of Internet regulation and more objective provisions framing the

[107] Formal numbering of the Marco Civil da Internet bill during the parliamentary debate.

network neutrality concept and its application. Initially the bill proposed in section IV of Article 3 the preservation of network neutrality as a general principle guiding the use and governance of Internet in Brazil. The classification of network neutrality as a principle evidences two interesting aspects of the bill. Firstly, it indicated the relevance of the actors involved in the Marco Civil da Internet drafting process. Network neutrality was driven to the same level of importance of social and legal values as freedom of expression and privacy as the key principles proposed to guide Internet use in Brazil. Secondly, strategically noted as a principle, network neutrality would later assume an important role in shaping not only the concrete application of the law in courts, but also future policy and regulatory developments that should follow the protective principle proposed. The second protective layer proposed was placed in Article 9. Located in the section regulating ISP, the provision established that "the party responsible for the transmission, switching or routing has the duty to process, on an isonomic basis, any data packages, regardless of content, origin and destination, service, terminal or application" (Brasil, Projeto de Lei 2126/2011). Under this non-discriminatory approach the regulatory model proposed in the bill authorised degradation or discrimination of data traffic only in cases where the measure was technically necessary to maintain the levels of quality of the service provided (Brasil, Projeto de Lei 2126/2011).

After a polarised political process with the involvement of key actors (Paap, 2014), particularly during the debate about network neutrality, the Marco Civil da Internet was approved, enacting the two-layered frame presented earlier. The Marco Civil da Internet established network neutrality among the guarantees of freedom of speech, communication and expression; protection of privacy and personal data; the preservation of stability, security and functionality of the network; the liability of agents according to their activities; the preservation of the participative nature of the network; and the freedom of business models promoted on the internet, as principles disciplining the use and governance of the Internet in Brazil (Federal law Brazil 12.965/2014, Article 3).

The law also made provision to technically establish (despite the need of further regulation) an intermediary level of protection to network neutrality.

Notwithstanding the criticism of some actors that advocated the establishment of a more enforceable set of provisions (Marques et al., 2015), the political consensus built at the time led to an intermediary solution (Paap, 2014). In its Article 9 the law established the techno-normative boundaries of network neutrality in the country mainly by fixing the prohibition of "discriminating" data packages traffic and listing the possible exceptions to this regime. The elements grounding the implementation and operation of this regime, however, were left to be established in a complementary decree:

> Art. 9 - The party responsible for the transmission, switching or routing has the duty to process, on an isonomic basis, any data packages, regardless of content, origin and destination, service, terminal or application.
>
> § 1 - The discrimination or degradation of traffic shall be regulated in accordance with the private attributions granted to the President by means of Item IV of art. 84 of the Federal Constitution, aimed at the full application of this Law, upon consultation with the Internet Steering Committee and the National Telecommunications Agency, and can only result from:
>
> I - technical requirements essential to the adequate provision of services and applications; and
>
> II - prioritization of emergency services.

The Marco Civil da Internet clearly stated that it needed further regulation in two elements of its core protective framework: network neutrality and privacy. Trying to avoid the collapse of the Marco Civil da Internet the Brazilian Ministry of Justice, using an enhanced version of the drafting process used to create the Marco Civil da Internet started in January of 2015 a public process to develop in an open, transparent and collaborative way a decree regulating the law. Coordinated by the Secretary of Legislative Affairs (SAL) of the Ministry of Justice the process was divided in two phases. During the first, taking place between January and April of 2015, interested actors could visit the campaign's website and provide suggestions and comments in four specific areas: network neutrality, connections records, privacy and a general topic for others non-categorised considerations.

After all contributions were systematised the final version was reviewed and consolidated in Decree 8.771/2016. The regulatory decree reinforced the protective provisions of the Marco Civil da Internet and characterised the discrimination or degradation of Internet traffic as exceptional measures only to be enforced in cases listed in the Decree (Articles, 1, 2 and 3 of Decree 8.771/2016). The protection of network neutrality can only be waived in the following cases: a) to guarantee to the adequate provision of Internet-based services; b) the management of security incidents; and c) the provision of emergency services (Articles 4 and 5 the Decree 8.771/2016). The Decree also tried to balance and mediate the power struggle between the governance system's main actors. It established a shared governance regime attributing to CGI.br the responsibility for fixing policy guidelines and to ANATEL the operational oversight of the policies.

III. ANATEL policy-making dynamics in the Marco Civil da Internet drafting process

Much of the controversies surrounding the Marco Civil da Internet parliamentary discussion were about the regulatory model to be applied to network neutrality. While other topics like intellectual property and privacy were somehow sidelined after strong conflicts (Paap, 2014), network neutrality remained a critical issue halting the Marco Civil da Internet drafting process until the last minute. The social, legal and economic dimensions of the topic created an oppositional dynamic between actors representing the telecommunication industry and civil society. The present section analyses the role played by CGI.br and ANATEL during this process. It observes the role played by internal policy-making mechanisms in shaping the intervention of these actors during the Marco Civil da Internet drafting process. It particularly analyses their engagement, interventions and policy-making operations during the debate about the regulation of network neutrality.

The investigation of these activities is relevant to indicate the influence of the operation of multistakeholderism in the external policy-making activities of these institutions as they provide important insights into how their internal policy-making

dynamics are transferred and expressed in their institutional policy-making interactions. The actors are observed through reviewing the meeting minutes and recordings of their main policy-making bodies and through analyses of their direct contributions to the platforms coordinating the Marco Civil da Internet drafting process.

The parliamentary phase of the Marco Civil da Internet was highly influenced by lobbying activities (Papp, 2014; Cruz, 2015; Solagna, 2015), particularly in topics like intellectual property and network neutrality. According to Papp (2014, 9), "despite of its participative approach, the Marco Civil was not immune to political games and dispute between contrasting groups. During a long battle in the parliament the bill was almost disfigured and suffered several loses in consequence of all external frictions caused by its provisions". It is important to note that throughout all the fierce debate in the parliament and the political manoeuvres adopted by deputies aligned with telecommunication companies and industry (Papp, 2014), the bill rapporteur, Congressman Alessandro Molon (MP representing Rio de Janeiro) always made clear that despite all of the controversies, he would never remove from the bill the provision protecting network neutrality: "the principle of network neutrality is non-negotiable and untouchable"(CCTCI, 2013, 4:54'15''). However, the political negotiations were complex and the struggles around network neutrality caused several standstills. Under pressure from the Brazilian presidency the bill was approved after the rapporteur and the representatives of key sectors, particularly the telecommunication industry, reached a compromise that resulted in the insertion in the law of provisions recognising network neutrality but that needed further regulation to be considered effective (Paap, 2014; Marques et al., 2015).

Since the first phase of the Marco Civil da Internet drafting process the telecommunication industry demonstrated its concerns about the inclusion of provisions protecting network neutrality in the law. According to Papp (2016, 69) director of the telecommunication companies association (Sinditelebrasil), Alexander Castro, expressed that the Marco Civil sought to regulate a sector that was already regulated, and that the bill intended to regulate points that were already regulated by ANATEL. It is important to note that the agency, as mentioned in the last section, has

been trying to establish a comprehensive regulatory framework for network neutrality. During the Marco Civil da Internet drafting process ANATEL launched Consultation 45. The consultation process aimed to collect suggestions about the reformulation of the SCM and incidentally network neutrality. However, the consultation was sidelined once ANATEL decided that the network neutrality debate would be better placed in the Marco Civil da Internet context. It is important to note that just after this decision ANATEL adopted a passive stance and focussed its efforts on shaping the regulatory process using its privileged working relation with the Ministry of Communications (Santos, 2016, 176).

ANATEL's institutional approach to network neutrality regulation reflected another ongoing set of undisclosed disputes. The creation of the Marco Civil da Internet law reignited the debate about which institution should play the leading role in the governance and regulation of the Internet in Brazil, and thus network neutrality became rapidly the focal point of this debate. According to Marcelo Bechara, a former member of ANATEL's Board of Directors and Advisory Council (Santos, 2016, 176) "what happened during the Marco Civil da Internet process was a big political debate and a dispute over who would regulate the Internet". This was evidenced later when the agency began to explore alternative approaches to regulate network neutrality, particularly using its normative capacity (Santos, 2016), and in a lesser scale through Resolution 614 in 2013.

The adoption of a peripheral and somewhat shadowy strategy during the Marco Civil da Internet drafting process was the alternative found by ANATEL to minimize the impact that its close connections with the telecommunication sector could have on its public policy-making interventions. In contrast, Sinditelebrasil began assuming a more active voice against the inclusion of provisions about network neutrality in the Marco Civil da Internet law. Assuming a confrontational approach the telecommunication industry representative was against the regulatory model proposed: it voiced concerns about the economic impact of the proposed regulation, its intrusiveness in the business model of some companies and in the unnecessary regulatory authority shift from ANATEL to CGI.br

It is important to note that ANATEL's passive position raised criticism (Papp, 2014; Solagna, 2015), particularly because it indicated a possible connivance with the position supported by the representative of the telecommunications industry. However, there is no evidence supporting ANATEL's collaboration with industry representatives during this process, and it is important to note that Brazilian scholars investigating the Marco Civil da Internet process (Santos, 2016; Paap, 2014) expressed the agency's inability to engage with the open, transparent and collaborative dynamics used in the Marco Civil da Internet process. Marcelo Bechara (Santos, 2016, 177) illustrates clearly the motives leading to the agency's failure to play an active role during this process. He believes that one of the central elements was the inability of ANATEL to participate proactively in the discussions, as the agency only interacted when it was demanded that it did so. According to him the agency "still has a military ethos, because in Brazil the communication industries comes from militarism, the Embratel building was run by the military, and the military is very disciplined. It seems like this: I am only going to participate when formally invited or demanded. Incredibly this culture still exists in the industry and in ANATEL until today" (Santos, 2016, 177).

A. ANATEL's board of directors' policy-making activity on network neutrality during the Marco Civil da Internet drafting process

The passive approach adopted by ANATEL through the Marco Civil da Internet drafting process, particularly in relation to the regulation of network neutrality is observed in the documents registering the agency's policy-making operations. The documents registering the meetings of the agency's top policy-making bodies, the board of directors and the Advisory Council, were revised and analysed. This section investigates the documents, meetings minutes and video records of the sessions[108]

[108] ANATEL makes public the record of the Board of Directors meetings in the YouTube. For more information access: https://www.youtube.com/playlist?list=PLDFD28C3776C6D8E8

registering 307 meetings[109] covering the period of discussion of the Marco Civil da Internet law (27th January 2009 to 15th December 2016).

The board of directors avoided any substantial policy-making engagement or discussion connected to the Marco Civil da Internet drafting or to Internet-related policies. Until 2013 the expressions "neutralidade da rede" (network neutrality), and "Marco Civil" or "Marco Civil da Internet" do not appear in the minutes. Most of the board activities were related to technical and administrative procedures like the authorisation of companies to explore telecommunications-related services and the application of penalties to companies not complying with telecommunications policies.

The most significant engagement with Internet policy making was observed in 2011 when during the meetings 600 and 601 the board discussed a collaboration agreement with CGI.br to implement technical requirements and policies to combat spamming (ANATEL, 2011a and 2011b). In most of the meetings the board used a "legalised" approach to conduct and mediate its decisions. After topics under consideration are included in the meeting agenda the board of directors' secretariat appoints one of the councillors to report on each topic. During the session the rapporteur must present a comprehensive report about the topic under consideration. Once the report is presented the other councillors can agree with the proposition or present another opinion. In the case of conflictive views or positions, the board decision is made by a simple voting process as an extract from meeting 605 of the board of directors illustrates:

> Process no. 53500.030806/2010. Agreement proposal to include ANATEL in the CGI.br Cooperation Agreement to Implement the Recommendation of the Port Management 25. (...) At this Meeting of the Board of Directors the Councillor Emília Maria Silva Ribeiro Curi presented the voting report 44/2011-GCER, dated April 27, 2011, proposing to approve ANATEL's participation in the Cooperation Agreement to Implement the Recommendation of Port

[109] Meetings 509 to 816. All minutes are available in www.anatel.gov.br/institucional/conselho-diretor/reunioes-e-sorteios-de-materias-do-conselho-diretor/conselho-diretor-detalhe/atas-das-reunioes

> Management 25, under the approval by the coordinating institution of the following amendments: a) give item 4 the following wording: 4.1 Participate in the working groups formed by Internet service providers, providers of telecommunications services providing Internet connectivity and their associations with a view to promote the implementation of the activities covered by this Agreement and encouraging the participation of non-signatory third parties; b) give item 4.2 the following wording: 4.2 Support the providers of telecommunications services providing Internet connectivity and their associations in the implementation of the themes related to the object of the Agreement; c) give item 4.4 the following wording: 4.4 Disseminate, through its website, the content of the Agreement to providers of telecommunications services providing Internet connectivity; d) give item 4.5 the following wording: 4.5 Maintain on its website a link to information about the Agreement. The Board, examining the case, unanimously voted to approve the "vote" of Counsellor Emília Maria Silva Ribeiro Curi, under the terms contained in VOTE no. 44/2011-GCER, dated 4/27/11, acting in accordance with mentioned above (ANATEL, 2011c, 8).

The documents analysed reveal that the first substantial intervention of the board of directors in relation to the Marco Civil da Internet and the regulation of network neutrality was made during meeting 708 held on the 8th September 2013. During the meeting Counsellor Marcelo Bechara de Souza Hobaika praised the participation of ANATEL in the public hearing convened by the Council of Social Communication of the National Congress. He also noted the important participation of Councillor Jarbas José Valente in the hearing about the law in the Commission of Science, Technology, Communication and Informatics (ANATEL, 2013b, 1). The analyses of the meeting record[110] reveals that on this occasion (ANATEL, 2013c, 23'' to 1'40'') the councillors only mentioned the Marco Civil da Internet during an informal session of the meeting dedicated to "brief or general" communications, and

[110] Available at: ANATEL's YouTube channel: https://www.youtube.com/channel/UCMzB_Ihgd2O-Vvu-Pn3dqWA

that there were no deliberations or more deep reflections about the Marco Civil da Internet law. It does not reveal the existence of any reflection over the topics debated in the mentioned meeting or any evidence of the debates supporting the development of ANATEL's institutional positioning on this topic. It also does not register any reflection over external stakeholders' views and arguments about the agency policy making that could have been expressed during these external hearings. The agency performs a superficial engagement with a minimum level of participation in the process and in the following regulation of network neutrality (2015 and 2016)[111].

This perception is further reinforced when observing ANATEL's participation in the public hearing held by the Commission for Science, Technology, Communication and Information Technology (CCTCI, 2013) of the Chamber of Deputies on the 7th August 2013. Councillor Jarbas Valente expressed the agency's position in the hearing using evasive technical language to raise ANATEL's concerns about two important aspects of the Marco Civil da Internet bill. Under the influence of technical and economic aspects, which included a digression about the legal regime of international satellites, and the denial of inserting in the bill any provision referring to human rights, the councillor manifested that ANATEL firmly opposes the development of alternative or experimental governance models in telecommunications, including the Internet. The regulator supports the development of governance dynamics replicating the international telecommunications model based on the leading role played by states. He also stressed that the agency understands that in accordance with the existing legal framework created by Federal Law 9.472/1997 the regulation of network neutrality was already the responsibility of ANATEL under its technical-economic rationale and that any proposed shift in this scenario would be unnecessary (CCTCI, 2013).

During his presentation, Councillor Jarbas Valente exposed in more than one occasion (CCTCI, 2013, 15'10'', 16'00'', 21'00'') ANATEL's opposition to the multistakeholder governance model proposed in the Marco Civil da Internet bill. He praised that "the Marco Civil da Internet, as we (ANATEL) understand, cannot

[111] There is no relevant evidence of the discussion of the Marco Civil da Internet regulation (the Decree establishing the network neutrality rules) in 2015 and 2016.

propose to replicate in Brazil a (governance) model that does not exist in any other country legal framework or is being discussed in any other parliament" (CCTCI, 2013, 15'17). Supporting the idea that the Marco Civil da Internet law should not replicate in the Brazilian governance system the U.S.-centric dominant logic existing at that time, Councillor Jarbas Valente stressed that ANATEL's position was to support the development of an Internet governance model centred on the state and under a multilateral regime similar to that in place in the international telecommunication governance under the International Telecommunication Union – the ITU system (CCTCI, 2013, 21'00'').

When questioned about ANATEL's position on the regulation of network neutrality proposed in the Marco Civil da Internet bill, Councillor Jose Valente noted that the topic aroused heated controversies during the ITU's 2012 World Conference on International Telecommunications (WCIT-12) and that the agency's position was in favour of regulating network neutrality, but under different arrangements than those proposed in the bill. He noted that the framework already in use to regulate international telephony commuting practices set since 1988, and the provisions of the Brazilian telecommunication law, particularly Article 61, §2, that "somehow" protects the network neutrality of telephony-based communication, should also be applied to Internet data flow (CCTCI, 2013, 4:49'00''). While indicating the need to protect network neutrality, he however emphasised that the regulation should be developed and coordinated by ANATEL and that the agency should use a traditional technical and economic regulatory approach. He criticised heavily the Marco Civil da Internet for proposing a more human rights-based scope for the regulation of network neutrality and for moving the regulatory competence from ANATEL to CGI.br (CCTCI, 2013, 4:50'05'').

This analysis of the institutional position of ANATEL's board of directors regarding the Marco Civil da Internet and its proposed framework regulating network neutrality reveals some important characteristics of ANATEL's policy-making process. The first important point is the dissociation of the agency's formal policy-making process, particularly the meetings of the board of directors and its interventions in external policy-making processes. ANATEL demonstrated a minor

degree of interest in engaging actively in the drafting process. It participated only when formally called upon and on these few occasions stressed clearly its opposition to some substantive aspects of the bill, particularly with the propositions about network neutrality and Internet governance. This position openly presented in the CCTCI hearing cannot be traced to any of the board of directors' meetings investigated. There is no discussion in the policy-making body backing the position adopted or even any secondary sources of information such as reports informing the process and the motives leading the board of directors to assume this position. This lack of information suggests that the closed and isonomic composition of the board of directors with members exclusively indicated by the government and representing a techno-legal community[112], has a hidden policy-making dynamic where important decisions are made under closed, non-transparent and unaccountable arrangements.

The agency's positioning also reveals its strong opposition to the adoption of governance practices based on multistakeholder dynamics. ANATEL pointed clearly its support for the development of a governance model replicating the ITU multilateral regime where the state is the sole relevant actor coordinating the governance structure and the policy-making operation. Not surprisingly, the same rationale is operated by ANATEL in the governance of telecommunications in Brazil. Finally, the lack of interest in the Marco Civil da Internet process and particularly the regulation of network neutrality indicates the adoption of an evasive strategy to undermine the bill and strengthen ANATEL's claims to be the most suitable actor to regulate the matter. This intention was later revealed not only by the inclusion of ANATEL as one of the key actors overseeing the implementation of Marco Civil da Internet provisions about network neutrality, but also by other affirmative actions like the publication of the Portaria 1.103/2015 establishing the development of a network neutrality regulation plan as one core element of ANATEL's regulatory agenda (ANATEL, 2015, 2).

[112] Historically the Board of Directors has be formed by representatives with legal or engineering education and professional background. Please see chapter 3, section II, B.

B. ANATEL's Advisory Council policy making in relation to network neutrality during the Marco Civil da Internet drafting process

The observation of the ANATEL Advisory Council in the network neutrality regulation in the Marco Civil da Internet law followed the same approach used to investigate the agency's board of directors. The analyses covered 76 meetings that happened between 13th February 2009 and the 12th February 2016. The Advisory Council enjoyed a more active debate about the Marco Civil da Internet and the regulation of network neutrality than the board of directors. The meetings' minutes and video recordings reveal a more engaged, pluralistic and participative debate about Internet governance in general, the Marco Civil da Internet law and how ANATEL should develop a close involvement with Internet governance policy making.

This could be observed during the Advisory Council meeting 128 when a member of ANATEL's technical team noted that the meeting was productive and created a valuable opportunity to evaluate and assess the problems happening in the sector. The technical officer also noticed that after the meeting the institutions started to collaborate in different initiatives to tackle the issues identified and that one important step made was to create an accreditation scheme to certify providers meet the minimum quality standards (ANATEL 2009a, 6).

Moreover, the meetings reveal an open, more inclusive and participative space where advisory councillors can engage in dialogues with representatives from different stakeholders in order to provide support to ANATEL's future policy-making agenda in areas like the implementation of the national broadband plan (ANATEL, 2010a); the development of capillarizations activities enhancing Internet expansion in rural areas (ANATEL, 2010b); and the creation of Internet exchange points across the country (ANATEL, 2011d).

It was in 2011 that the Advisory Council began to discuss in more detail the Marco Civil da Internet bill and the regulation of network neutrality. In meeting 148 held on the 6th May 2011 the Advisory Council held an intense debate about ANATEL's proposal to regulate the provision of mobile telephony. During the meeting, several advisory councillors, particularly Fabio Luis Mendes, raised the

importance of regulating network neutrality and asked ANATEL's regulatory manager, Rodrigo Santana, why there was nothing about network neutrality in the proposed regulatory plan. The presenter responded that there were no propositions about network neutrality in the proposal because the agency, at that time, did not have a clear position about the topic (ANATEL, 2011e). The issue returned in meeting 153 in September 2001 when the Advisory Council debated ANATEL's proposal to regulate the service of multimedia communication (SCM). The proposal aimed to promote a regulatory framework able to enhance the quality of services using telecommunication networks to transfer data, video or voice and among other technical elements, as mentioned previously, covered some elements strongly connected to network neutrality.

During the meeting ANATEL's regulatory manager also noted that "in relation to network neutrality and the registration of connections, the proposal establishes that the provider is prohibited from performing blocking or discriminatory treatment of any type of traffic. They are only allowed to adopt blocking or traffic management measures if necessary for maintaining the stability and security of the service" (ANATEL, 2011f, 3). After the presentation the debate between the participants was both intense and constructive. It was during this moment that Councillors James Marlon Azevedo Görgen and Fabio Luis Mendes noted that some elements of the regulation were not compatible with the provisions of international instruments like the European Convention in Cybercrimes (Budapest Convention – ETS n. 185) and the Marco Civil da Internet bill that was being discussed in the Brazilian parliament. It was noted in particular that the level of protection proposed in the regulation was considerably lower than in the one proposed in the Marco Civil da Internet bill and it was agreed that ANATEL should make efforts to align the proposed regulation with the legal framework under discussion in the parliament (ANATEL, 2011f, 4).

Despite the level of engagement observed in meeting 153 there is no evidence supporting the influence of the Advisory Council activities in the effective engagement of ANATEL in the Marco Civil da Internet drafting process and the agency's institutional position on network neutrality regulation. There was no formal manifestation of the board of directors in relation to the suggestions and criticism

made by the Advisory Committee of the proposed regulation. Moreover, after a brief discussion during meeting 155 in 2011, the topic of network neutrality and the Marco Civil da Internet bill would only be discussed properly again in 2013. Under a new composition and a more formalised participation structure the committee dedicated three entire meetings to the Marco Civil da Internet bill and the regulation of network neutrality.

Meeting 180 held on 25th October 2011 was dedicated exclusively to the Marco Civil da Internet bill and included the participation of representatives of the CGI.br and the telecommunication industry association (Sinditelebrasil). The meeting began with Eduardo Parajo, representative of the CGI.br and Alexander Castro, representative of the Sinditelebrasil presenting their views about the Marco Civil da Internet bill. While Alexander Castro indicated that the bill was distorting the concept of network neutrality adopted in countries that had already regulated the issue (Colombia, Chile and U.S) (ANATEL, 2013d, 14'42''), Eduardo Parajo stressed that the proposal recognised the network neutrality not only as a fundamental axis of Internet operation but also as a mechanism promoting innovation. He also stressed the need to foster inclusive governance mechanisms able to curb the efforts of telecommunication companies to shape and design, under an exclusive economic rationale, the development of the Internet (ANATEL, 2013d, 29'30'').

Reacting to the contrasting presentations Councillor Leonardo Roscoe (ANATEL, 2013d, 46'27'') noted that he had been following the debate about the Marco Civil da Internet particularly in relation to the need to create a more comprehensive framework protecting privacy and network neutrality. His position was endorsed by Councillor Marcelo Miranda (ANATEL, 2013d, 1h01'33'') and by Councillor Fabiano Vergani. Vergani noted that the proposed regulation was crafted to protect network neutrality and contained provisions enabling the creation of mechanisms to promote the network's technical management (ANATEL, 2013d, 1h39'02''). After two hours debating the topic Councillor Leonardo Bessa proposed that the committee should express publicly its support to the Marco Civil da Internet bill (ANATEL, 2013d 2h07'00''). His proposal was supported by Councillors Marcelo Miranda and Fabiano Vergani but faced some contestation from other members of the

Advisory Council. Councillors Artur Coimbra, Joao Barizon and Octavio Pieranti agreed with the importance of the topic but argued that they needed more time and evidence to understand the topic and formulate their position. After some debate it was agreed that Councillor Fabiano Vergani would produce a report analysing the last version of the bill and that the topic would be analysed in the following meeting (ANATEL, 2013d 2h15'00'').

In meeting 181, held on the 8th November 2013, the Advisory Council continued the discussion. After presenting his report Councillor Fabiano Vergani indicated his support for the bill but proposed the postponement of deliberations about supporting the Marco Civil da Internet law because the bill was still receiving amendments and that the provisions about network neutrality could undergo significant changes during this process (ANATEL, 2013e, 4'50''). Alleging the bill was being changed and that the report produced by Councillor Fabiano Vergani had not been circulated previously as required by the internal rules of the Advisory Council, Councillor Octavio Pierranti suggested a new postponing of the deliberations (ANATEL, 2013e, 35'22''). Councillor Marcelo Miranda strongly disagreed with the postponement proposal and indicated that he could not understand why the representatives of the government in the council, particularly the representatives of the Ministry of Communications, were using a strictly legal rationalisation to block deliberations about the Marco Civil da Internet and transform the Advisory Council into a space where people only get together to have coffee. Despite Councillor Marcelo Miranda's fierce protests, the remaining councillors decided to postpone the deliberation again.

In the following meeting held on the 6th December 2013 the Advisory Council analysed again the Marco Civil da Internet bill and the network neutrality regulation. During the meeting Councillor Fabiano Vergani presented once more his report proposing to the Advisory Council the publication of a motion supporting the Marco Civil da Internet bill and the protection of network neutrality (ANATEL, 2013f, 6'20''). Commenting on the proposal Councillor Eduardo Moreira (ANATEL, 2013f, 10'40'') raised concerns about the fact that the bill, at that time, still under review could suffer amendments. Observing the possibility of the bill being changed Councillor Octavio Pieranti suggested the removal of the topic from the Council's agenda. He observed

that in the absence of a final text of the law the Advisory Council should not make a public statement supporting a bill that could be changed at any moment, particularly in sensitive areas like network neutrality (ANATEL, 2013f, 25'10''). Receiving support from councillors representing governmental departments and the business sector the proposal was accepted and the deliberation over the Marco Civil da Internet bill was removed indefinitely from the Advisory Council's agenda.

It is important to note that after the discussion held during the meetings 180, 181 and 182 the topic never returned to the Advisory Council's agenda. Shortly after the last session the council representation suffered drastic changes. The mandates of three councillors supporting the discussion about the Marco Civil da Internet ended. The new composition led the Council to completely sideline the debate about the Marco Civil da Internet bill and network neutrality regulation in the 12 meetings that occurred between the law's enactment in 2014 and publication of the network neutrality regulatory decree in 2015. This shift in the Advisory Council's operation coincides not only with ANATEL distancing itself from the Marco Civil da Internet drafting process but also indicates what were the motives supporting the agency's lack of interest in this process.

Firstly, the agency has always made clear its strong support for Internet governance practices based on state-controlled regimes and multilateralism which contrasts with the more participative multistakeholder model backed and supported in the Marco Civil da Internet law. Secondly, the bill's protective embrace of network neutrality undermined ANATEL's regulatory efforts to strengthen its influence on Brazilian Internet governance. During that period, not coincidently, ANATEL enacted Resolution 614/2013. This normative instrument established the regulation of the offer of multimedia communication services (Internet service connection, for example) and fixed some technical measures supporting network neutrality in a bid to use its technical competence to influence the governance of Internet in Brazil. It is important to note that despite having a more pluralistic composition able to promote an open and rich discussion of ANATEL's policy-making activities, there is no evidence supporting any form of influence of the Advisory Council on the agency's policy-making operation and in the macro decisions made by the board of directors.

Overall ANATEL's policy-making process is guided significantly by a techno-legal rationale and operates under a hierarchical structure that despite efforts to be transparent and inclusive is still very closed and non-transparent. The absence of evidence of the board of directors supporting the institutional manifestations and the struggles of the Advisory Council to support the Marco Civil da Internet suggests the existence of a controlled policy-making process that operates under closed and non-public decision dynamics. This is evidenced by the concentration of decision-making power in the board of directors, a government-led body; the level of homogeneity of the members of the board of directors and the supremacy of their techno-legal background representing different segments of the government's political spectrum; and the lack of evidence supporting key policy-shaping decisions.

IV. CGI.br policy-making dynamics in the Marco Civil da Internet drafting process

CGI.br was an early supporter of the Marco Civil da Internet bill. It recognised the importance of developing an overarching and human-rights-based regulatory framework for Internet governance and engaged actively to promote the inclusion of its governance agenda in the bill (Santos, 2016; Solagna, 2015; Papp, 2014; Cruz, 2015). In 2009, the committee enacted Resolution CGI.br/RES/2009/003/P establishing principles for the governance and use of the Internet in Brazil. The CGI.br Decalogue recognised the need to create a legal and regulatory environment able to "preserve the dynamics of the Internet as a space for collaboration" (CGI, 2009a) and to protect Internet core values regarding freedom of expression, privacy and network neutrality. The committee also promoted the inclusion in the bill of elements supporting democratic and multistakeholder-based governance practices as a strategy to reinforce legally its own governance approach.

CGI.br principles were the result of an open and participatory process responding to the cyber-crime bill that was being discussed at that time in the Brazilian parliament. The committee firstly debated the topic in a meeting held on the 4th May 2007 when it decided to create a set of principles to guide the governance and

use of the Internet in Brazil. In the same meeting the committee listed three key priorities to be addressed through the protection of network neutrality and the network non-imputable rule (CGI, 2007). The principles were drafted in a long, inclusive and consensus-based process. They were discussed in various meetings (12th September 2008, 17th October 2008, 28th November 2008, 6th February 2009, and the 12th and 13th March 2009) and approved at the meeting held on the 5th June 2009. It is important to note that the publication of CGI.br strategically indicated the need to create a more stable and coordinated regulatory environment while highlighting the core values to be observed during this process. In fact, all values embodied in the principles were incorporated in the Marco Civil da Internet law, which demonstrates the level of engagement of the committee in this process and reveals the strategy used by CGI.br to influence the future of the governance system.

The committee used a careful approach to informally steer the Marco Civil da Internet process in the direction of its governance interest. Initially, CGI.br used soft law instruments, particularly the principles for the use and governance of the Internet in Brazil, to frame any regulatory effort to be developed. Secondly, the CGI.br channelled the legitimacy produced by its inclusionary and expertise-based multistakeholder policy-making operation to promote itself and its members as reliable and legitimate actors able to advise and support the Marco Civil da Internet process coordination team. Santos (2016, 174) noted that the committee was central to the discussion about the Marco Civil in different ways, both as an institution and by the individual actions of its members[113]. This included the enactment of soft-law instruments, and a well the implementation of an advocacy strategy involving the publication of declarations, formal contribution to the bill provisions (CGI.br, 2015a), organisation of meetings and participation in public hearings about the bill.

This level of integration and engagement with the Marco Civil da Internet was not a coincidence or a casuistic development. Since 2008 the committee, conscious of its own legal instability, began to discuss the need to create a more stable regulatory framework grounding the Brazilian Internet governance regime. Before the initial

[113] The Committee members participate actively of public hearings and workshops. They also published in news outlets and made public presentations promoting the law.

discussions about the governance principles, the committee already had been following and discussing the regulatory scenario in the country, particularly through parliamentary debate about the cyber-crime bill[114] (CGI.br, 2008a; 2008b). To maximise its capacity to monitor and influence regulatory developments the committee adopted three important initiatives: it created a working group focused on regulation; it contracted a consultancy company to review the existing legal framework and to suggest improvements (CGI.br, 2008b); and it recruited a consultant specialised in parliamentary lobbying to follow and intervene in parliamentary proposals influencing Internet regulation of the committee activities (CGI.br, 2008b).

The Marco Civil da Internet bill formally entered the CGI.br policy-making agenda in a meeting held on the 16th October 2009. During the meeting representatives of the Ministry of Justice presented the Marco Civil da Internet bill and its regulatory approach to freedom of expression, privacy and network neutrality (CGI.br, 2009c). The topic then became a central element of the CGI.br agenda and was discussed in more than 15 meetings between October 2009 and May 2014. Institutionally the committee took a more public stance in 2012 when it published the Resolução CGI.br/RES/2012/005/P and Resolução CGI.br/RES/2012/10/P (CGI.br, 2012a; 2012b). The first was the result of a consensus reached during a meeting held on the 18th May 2012 when committee members accorded to "recommend the immediate approval of the Marco Civil da Internet bill as an important instrument to preserve, protect and improve CGI.br principles for the governance and use of the Internet in Brazil" (CGI.br, 2012a). In the same document the committee also recognised the importance of promoting the Marco Civil da Internet bill as a counter point to the international and national legislative initiatives conflicting with CGI.br governance principles (CGI.br, 2012a).

Shortly after this public manifestation the committee received the rapporteur of the Marco Civil da Internet bill. Congressman Alessandro Molon presented the last amendments to the bill and reinforced to CGI.br his commitment to maintaining the protection of network neutrality as a core element of the proposal. He also used the opportunity to praise CGI.br engagement and the contributions of committee

[114] Meetings of 18th January and 14th of March in 2008.

members to public hearings, seminars and workshops supporting the development of the bill (CGI.br, 2012c). Shortly after the meeting the committee consensually decided to publish another public document stressing its support for the Marco Civil da Internet bill. The Resolução CGI.br/RES/2012/010/P stated:

> O Comite Gestor da Internet no Brasil – CGI.br:
>
> Considering that the CGI.br has already made public its recommendation for the timely approval of the Marco Civil da Internet law (Bill no. 2126/2011);
>
> Considering the wide and diverse debates, seminars and public hearings promoted by the Chamber of Deputies Special Commission created to analyse the bill;
>
> Considering the "Principles for the governance and use of the Internet in Brazil" established in the Resolution CGI.br/RES/2009/003/P;
>
> Decides:
>
> a) To maintain its recommendation for timely approval of the Marco Civil da Internet, as expressed in Resolution CGI.br/RES/2012/005/P;
>
> b) To make public its support for the final report of the Special Rapporteur of the Special Committee in the Chamber of Deputies, Federal Deputy Alessandro Molon. The committee also congratulates the rapporteur for the inclusive and consensus driven approach that lead to the clarifying changes and precise improvements promoted in the bill.
>
> c) To reiterate CGI.br commitment to promote the future implementation of the Marco Civil da Internet bill and the strengthening of the 10 Principles for Governance and Internet Use in Brazil (Resolution CGI.br / RES / 2009/003 / P). (CGI.br, 2012b)

Aware of the need to raise awareness of the Marco Civil da Internet bill, CGI.br continued to include the topic in its 2013 meetings and publication agenda. In March 2013 it published the booklet *O CGI.br e o Marco Civil da Internet: Defesa da privacidade de todos que utilizam a Internet; Neutralidade da rede; Inimputabilade da rede (*CGI.br and the Marco Civil da Internet: defending Internet users privacy; network neutrality and the network non imputable rule). Using a didactic and explanatory approach the

committee exposed to a broader audience its support for the Marco Civil da Internet bill and the protection of network neutrality. The committee also created a specific working commission[115] to discuss and implement activities promoting the CGI.br's backing of the Marco Civil da Internet bill (Resolução CGI.br/RES/2013/013; CGI.br, 2013a)

The topic returned to play a central role in the CGI.br agenda after two unrelated developments. The first was the enactment of ANATEL's new SCM regulatory framework. As noted in section two of this chapter, ANATEL used the regulation of SCM, under a telecommunication regulatory framing, to develop and strengthen its position and role in the governance ecosystem. During the meeting held on the 28th June 2013 the committee dedicated a session to the issue. A representative from ANATEL presented and discussed with CGI.br members the controversial aspects of the regulation, including provisions about network neutrality (CGI.br, 2013b). The second development was the revelation of the extent to which the electronic surveillance programme was executed by the U.S. National Security Agency – NSA, known better as Snowden's surveillance revelations.

At a meeting held on the 29th June 2013 the CGI.br discussed in depth the implications of Snowden's revelations. The committee consensually combined the proposals and considerations made by its members, particularly Eduardo Parajo, Henrique Faulhaber, Sergio Amadeu, Eduardo Lei, Casio Vecchiatti and Veridiana Alimonti, to adopt a more comprehensive strategy condemning the use of the Internet for surveillance purposes and to promote the approval of the Marco Civil da Internet bill (CGI.br, 2013c). The plan focused on mechanisms promoting CGI.br's support of the Marco Civil da Internet bill and the development of more effective dialogue with the federal government. During the meeting the committee agreed to: a) send a formal communication to the presidency cabinet requesting an audience with President Dilma Rousseff to discuss the effects of Snowden's revelations regarding the use of

[115] Considering CGI.br recommendation supporting the approval of the Marco Civil da Internet bill and the committee's commitment in promoting into different sectors of the Brazilian society the CGI principles for the governance and use of the Internet in Brazil, CGI.br decide to:
Create a working commission to meet the political leaders of the Brazilian Chamber of Deputies to present and discuss CGI.br recommendations in support of the Marco Civil da Internet Resolução CGI.br/RES/2013/013).

the Internet in Brazil and to express the committee's support for the Marco Civil da Internet bill; b) forward to all members of the Brazilian parliament a letter providing technical clarifications and expressing support for the Marco Civil da Internet bill; and c) forward a letter to the inter-ministerial technical group created to analyse technically and legally the activities developed by the U.S. National Security Agency, noting CGI.br's availability to support the group (CGI.br, 2013c).

The meeting with the Brazilian president was effective. The principles for the governance and use of Internet in Brazil and the Marco Civil da Internet bill were greatly influential in the shaping of the Brazilian international and domestic response to the governance and regulatory challenges raised by Snowden's revelations. In the international arena the CGI.br principles were the focal element supporting Brazil's call for a new Internet international governance and regulatory regime. They were promoted internationally as desirable governance standards in a statement made by President Dilma Rousseff in the opening of the 68th session of the United Nations General Assembly in New York, held on the 24th September 2013. In her speech the Brazilian president expressed that:

> The United Nations must play a leading role in the effort to regulate the conduct of States with regard to these technologies.
>
> For this reason, Brazil will present proposals for the establishment of a civilian multilateral framework for the governance and use of the Internet and to ensure the effective protection of data that travels through the web.
>
> We need to create multilateral mechanisms for the worldwide network that are capable of ensuring principles such as:
>
> 1 - Freedom of expression, privacy of the individual and respect for human rights.
>
> 2 - Open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, Governments and the private sector.
>
> 3 - Universality that ensures the social and human development and the construction of inclusive and non-discriminatory societies.
>
> 4 - Cultural diversity, without the imposition of beliefs, customs and values.

> 5 - Neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to restrict it for political, commercial, religious or any other purposes.
>
> Harnessing the full potential of the Internet requires, therefore, responsible regulation, which ensures at the same time freedom of expression, security and respect for human rights. (Brazil, 2013)

The speech made traction and sparked momentum around the need to promote the protection of human rights online and the development of more open, democratic and participative governance arrangements. It was the foundational element supporting the adoption of the United Nations Resolution 68/167 - the right to privacy in the digital age: one of the first international legal instruments recognising digital human rights. It also prompted the Brazilian government to adopt a more prominent position in the reorganisation of Internet international governance, particularly using its national governance system to champion the establishment and strengthening of multistakeholder governance structures and practices at the international level. Shortly after the U.N. speech, President Dilma Rousseff met with ICANN CEO Fadi Chehadé and agreed to collaborate in convening a global multistakeholder meeting on the future of Internet governance (CGI.br, 2013d).

The meeting between CGI.br and the Brazilian president also was significant at the domestic level, and was held shortly after the Brazilian president requested the Marco Civil da Internet bill to be processed through urgency regime in the Brazilian parliament. The committee stated its support for the president's request and urged the approval of the Marco Civil da Internet bill under the terms of the report submitted by the bill's rapporteur. It was during this period that CGI.br used more strategically the legitimacy and technical expertise arising from its multistakeholder composition (Solagna, 2015) to influence the parliamentary debate and create the consensus necessary to unlock the congress gridlock and approve the bill (Santos, 2016).

This central position was later reinforced during the regulation of the Marco Civil da Internet law. One of the compromises made during the political negotiations was to remove from the bill more specific provisions about network neutrality and

privacy maintaining the overall sense of a principles-based law that should be further regulated. Aware of the risk of losing political momentum and the lack of interest in regulating the Marco Civil da Internet law the committee created a working group to follow the implementation of the law and its regulatory process (CGI.br, 2014a). The working group respected the multistakeholder framing used in the committee, particularly its expertise and consensual orientation. It was created by Resolução CGI.br/RES/2014/017, which established the creation of "a multistakeholder working group formed by representatives of civil society, business, academic, government and NIC.br to monitor the regulation of the Marco Civil da Internet law and coordinate CGI.br contribution to this process" (CGI.br, 2014a). The working group and the regulation of the Marco Civil da Internet were constantly present in the CGI.br meetings during the decree drafting process. In 10 different meetings the working group presented its contributions and the committee members discussed openly the proposal that was finally made public during the Internet Governance Forum held in João Pessoa, Brazil in November 2015 (CGI.br, 2015b).

The analysis of the documents registering CGI.br meetings convened in the one-year-and-three-months period during which the committee discussed the regulation of the Marco Civil da Internet law reveal a dynamic policy-making process that while marked by contrasting positions was consensus-orientated and expertise-based (CGI.br 2015c; 2015d, 2015e; 2015a). The last meeting held before the publication of the committee contribution is strong evidence of this process, particularly because it informs the decision-making process used to produce the proposal. After five draft versions and the exchange of dozens of contributions via the working group mailing list (CGI.br, 2015e) the committee was discussing using a "line-by-line" approach the text to be published. During a tense discussion about autonomous systems (AS) and network neutrality the committee coordinator, Virgilho Almeida, emphasized that while the topic discussed was extremely controversial the committee would need to find a minimum consensus and reminded all the CGI.br counsellors that "CGI.br is a multi-sectorial committee and that under this approach one sector does not prevail over the others which prompts the need to find a consensus that somehow meets the interest of all sectors represented in the committee" (CGI.br, 2015e). Shortly after,

when tensions were rising again, the committee's coordinator "thanked all the councillors for trying to find consensus and produce a final text of the committee contribution" (CGI.br, 2015e). He then asked the meeting to be suspended and proposed for the councillors to discuss this issue informally during the coffee interval (CGI.br, 2015e). Not surprisingly, after the coffee break a consensus was reached, and the final text was sent to be considered by two councillors who were absent.

In January 2016 the federal government started a public consultation about the decree regulating the Marco Civil da Internet law and published a draft version of the decree in a call for public contributions. The committee and its working group continued to discuss CGI.br's contribution using the same expertise and consensus-based approach. The meetings held on February, March and April 2016 (CGI.br, 2016f; 2016g; 2016h) reveal more conflictive dynamics. The more protective approach to network neutrality gathered support from representatives of the technical community and civil society but was firmly refuted by representatives of the telecommunication industry (CGI.br, 2016f; 2016g; 2016h). This contested scenario led to extensive discussions that despite delaying the committee's formal contribution to the process did not influence significantly the delivery of a valid proposal (CGI.br, 2016i).

CGI.br played an important role in the process leading to network neutrality regulation in Brazil. The committee participated actively in both stages of the regulatory process being one of the key actors supporting the Marco Civil da Internet process and the drafting of the regulatory decree. Since 2009 with the publication of the 10 principles for the governance and use of the Internet in Brazil CGI.br assumed a clear stance supporting the implementation of a legal and regulatory environment able to promote human rights, democratic governance and network neutrality. The committee's multistakeholder operation and its inclusive, expertise-based and consensus-focused policy-making dynamics was one important element promoting CGI.br's legitimacy and trust.

These characteristics were essential to enable CGI.br to assume an influential position in the Marco Civil da Internet process as the committee was perceived as a more legitimate and neutral mediator than ANATEL which operated under less legitimate arrangements and closer to the telecommunication industry. CGI.br's

pluralistic composition, expertise and consensus-driven policy-making operation not only contributed to the committee being perceived as a more legitimate, technically-capable actor and more efficient to shape the governance, it also suggests what elements and dynamics supports multistakeholderism operation in policy-making processes.

V. Some concluding remarks and observations

The main objective of this thesis is to investigate the operation of multistakeholderism in Internet policy making and the effects of this operation in policy outcomes. This chapter has analysed this operation through the actors participating in the development of one key structural regulatory process, the Marco Civil da Internet law drafting process. The observations provided by the study of CGI.br and ANATEL policy-making activities and interventions during the regulation of network neutrality in the Marco Civil da Internet provide evidence and insights contributing to the clarification of the research questions and the theoretical propositions that are developed in the last chapter of this thesis.

The insights extracted from the investigation of the policy-making dynamics and the effects of the operation of multistakeholderism in the Brazilian Internet policy-making scenario pieced together with the analyses carried out in the last chapter create a clearer picture of the ambiguous multistakeholder policy-making engine and the effects that its operation can cause in policy-making outcomes. The observation of CGI.br and ANATEL in the drafting process of the Marco Civil da Internet, particularly the policy-making interventions shaping the regulation of network neutrality, stressed the operational differences between these actors and indicated the mechanisms guiding the operation of multistakeholder in CGI.br. It suggests, as it will be explored later in this thesis, how the interplay and interconnection between inclusion, expertise and consensus support the operation of CGI.br multistakeholder policy making and how this engine, when substantially tuned, can produce more innovative, accepted and effective regulatory instruments and promote policy cross-fertilisation and governance generativity.

CHAPTER FOUR

THE OPERATION OF MULTISTAKEHOLDER INTERNET POLICY MAKING IN BRAZIL: THE NETMUNDIAL GLOBAL MULTISTAKEHOLDER MEETING ON THE FUTURE OF INTERNET GOVERNANCE ANALYSIS

Introduction

Moved by the idea to push forward innovative governance arrangements able to promote "cooperation towards the Internet as a shared, neutral & global resource for human solidarity & economic progress" (NETmundial Initiative, 2018) the NETmundial process[116] started in April 2014 with the realisation in Sao Paulo, Brazil, of the Global Multistakeholder Meeting on the Future of Internet Governance. Organised by the Brazilian government and the civil society group 1net[117] the meeting used a bottom-up, open and participatory process to engage more than 1,400 stakeholders from 97 countries representing governments, the private sector, civil society, the technical community and academia from 97 countries (NETmundial,

[116] The Netmundial process is formed by the NETmundial meeting and the NETmundial Initiative. The Netmundial Initiative was launched in 6 November 2014 with the support from CGI.br, ICANN and the World Economic Forum - WEF. Its mission was to "to provide a platform that helps catalyze practical cooperation between all stakeholders in order to address Internet issues and advance the implementation of the NETmundial Principles and Roadmap" (Netmundial, 2018)

[117] "1net is an open, inclusive, multistakeholder platform for advancing global discussions on Internet governance. The purpose of 1net is to provide an inclusive and open platform for discussion of Internet governance matters among all those interested - whether they represent business, academia, governments, civil society organizations, the technical community or are just interested individuals (1net, 2016 (http://1net.org/).

2014f). While being considered a success[118] (Varon, 2014; Lemos, 2014b; Mueller, 2017; Pohle, 2015; Kleinwächter, 2014) and effectively producing a tangible set of principles to orientate the development of an open, inclusive, democratic, transparent and accountable Internet governance system, the meeting did not escape criticism[119] (Global Partners Digital, 2014; West, 2017) and failed to produce sufficient traction to guarantee its continuity with the collapse of the NETmundial Initiative.

An investigation of CGI.br and ANATEL policy-making activities in the context of the NETmundial meeting provides an alternative opportunity to observe the operation of multistakeholderism in a different scenario from those studied in the previous two chapters. This makes it possible to observe in more detail the operation of multistakeholderism in a concrete policy-making practice with different characteristics from the general approach used in chapter 3 and particularly from the analyses of the Marco Civil da Internet in two dimensions: the legal aspects of its outcome and its international scope. The NETmundial was designed to result in the publication of a set of international non-binding principles guiding the operation of Internet governance and policy making. The development of an international soft-law instrument follows different dynamics and arrangements from those used in national hard-law mechanisms.

The level of inclusion of stakeholders in international processes like this, while promoting the participation of groups that normally are not represented in national processes due to a lack of expertise or resources also influences the policy-making engagement dynamics. The integration in the various stages of the policy-making process of different legal, economic and cultural aspects influencing perceptions on the topics discussed creates an ambiguous policy-making dynamic that can promote

[118] Shortly after the NETmundial meeting the ITU Secretary-General, Dr Hamadoun Touré presented to ITU counsellors a brief about his participation in the meeting. In his speech he recognised that the meeting operation and the outcome document, particularly the Internet governance principles "will help to inform upcoming forums, including UN-hosted events such as the Internet Governance Forum (IGF) and the WSIS+10 related processes and forums" (Touré, 2014). This influence was latter perceived in the study about NETmundial carried out by Sarah West. She noted that the NETmundial had an important downstream effect on the scope of Internet discussions. It informed the terms for debate at several key subsequent fora, particularly the UN-led ITU Plenipotentiary meeting (West, 2014, 31)

[119] Some of the criticisms pointed to the NETmundial were related to the lack of clarity of some processes, particularly the drafting sessions carried out by the EMC and the approval of the outcome document by the HLMC (APC, 2014).

policy cross-fertilisation and innovation, but also affects levels of trust, confidence and the ability to make decisions. These factors differentiate the observation of NETmundial from the practices previously investigated and provide an opportunity to observe the processes under investigation from different angles thus contributing to a more detailed observation of the phenomenon researched.

This chapter analyses the engagement and behaviour of CGI.br and ANATEL in the Global Multistakeholder Meeting on the Future of Internet Governance (NETmundial). It observes their support of the meeting and their participation in the drafting of the NETmundial statement and roadmap. Exploring documents registering the meeting and the records of CGI.br and ANATEL policy-making activities, this chapter aims to identify how the operation of multistakeholderism affected the engagement of these actors in Internet international policy-making practices. The first section presents the operational elements of the NETmundial meeting focusing on its organisation, working sessions and on-site drafting activities. The second section analyses how CGI.br and ANATEL participated in this process and how their policy-making dynamics affected their level of engagement and contribution to the initiative. The last section provides some observations and concluding thoughts.

I. NETmundial governance and operational context

The Global Multistakeholder Meeting on the Future of Internet Governance, NETmundial, was convened during a period when Internet governance structures and arrangements were under criticism (West, 2017, Maciel et al, 2014; APC, 2014; Mueller & Wagner, 2014). The "political fracture between multistakeholder and multilateral modes of governance" (West, 2017, 29) had been increasing rapidly since the collapse of negotiations held during the 2012 World Conference on International Telecommunication - WCIT12, and the questioning of the legitimacy of existing governance arrangements. At the same time, Edward Snowden's revelations impacted significantly the level of trust in the operations of governance structures and increased the tensions between stakeholders and within stakeholder groups, particularly in

relation to the government sector and the existence of states involved in mass surveillance activities. As a consequence of these developments, West (2017, 29) noted the development of two contrasting perspectives in the governance scenario: a) an increase in calls "for strong limits to be placed on the capacity of governments to intervene in the Internet"; and b) "a rapid acceleration in the use of Internet controls by nation states" (2017, 29).

The NETmundial was instrumentally designed to counter the development of this call for a state-centred governance model and to reshape the legitimacy arrangements of the existing governance structures that despite being characterised as multistakeholder were heavily influenced by the US government. Observing this scenario and being directly affected by mass surveillance practices, the Brazilian government seized on the opportunity to play a leadership role influencing the Internet's international regulatory agenda. Exploring this regulatory window, the Brazilian president, during her speech at the 68th General Assembly of the United Nations, promoted the development of an open, democratic, participatory governance system based on global principles like those established by the Brazilian Internet governance steering committee (APC, 2014). Not surprisingly, shortly after her speech and influenced by the meetings held with Fadi Chehadé, chief executive officer of the Internet Corporation for Assigned Names and Numbers – ICANN and the CGI.br, the Brazilian president announced the realisation of a global meeting to discuss the future of Internet governance and produce a set of governance principles to guide Internet governance development[120].

[120] A more detailed account of the political developments grounding the NETmundial meeting is offered by the Association for Progressive Communication- APC (2014, 6): The main catalyst for convening NETmundial was the revelation of mass surveillance of digital communications by the US National Security Agency (NSA). Edward Snowden's disclosures revealed that then-President of Brazil Dilma Rousseff's personal cell phone was successfully targeted for the content of calls, emails, and messages by the NSA. The disclosures revealed that Brazil's state oil company Petrobras was also a target of surveillance. After an advisory meeting with the board of the Brazilian Internet Steering Committee (CGI.br), in September 2013, President Rousseff gave a speech at the opening of the 68th Session of the United Nations General Assembly, in which she criticised policies of mass surveillance. President Rousseff also emphasised the need to develop a framework for the governance and use of the internet, and to create mechanisms to ensure basic principles are guaranteed, such as privacy, freedom of speech, and net neutrality. The following month she received a visit from Fadi Chehadé, chief executive officer of the Internet Corporation for Assigned Names and Numbers (ICANN) – in parallel, the main technical community organisations issued a statement in Montevideo on October in defence

The meeting preparation and organisation was developed under a multistakeholder structure. As pointed out previously in this thesis the meeting chair Professor Virgilio Almeida (appointed by the Brazilian government) invited one representative of each stakeholder group (civil society, technical community, academia and private sector) to co-chair the meeting. The organising structure also encompassed: a) High-Level Multistakeholder Committee (HLMC), responsible for conducting the political articulation and fostering the involvement of the international community; b) Executive Multistakeholder Committee (EMC), responsible for organising the event, including the agenda and execution, and for the review of the proposals from participants; c) Logistics and Organisational Committee (LOC), responsible for overseeing the logistical aspects of the meeting; and d) Council of Governmental Advisors (CGA), the space designed to engage states willing to contribute to the meeting (NETmundial, 2014f; APC, 2014; Maciel et al, 2014).

Each committee had a different mandate and characteristics, which guided their organisational dynamics (Maciel, et al., 2014). The organisation involved physical meetings, virtual meetings and the exchange of electronic messages between committee members. In relation to the decision making of the meeting organisation, APC (2014, 9) reported that:

> all EMC decisions were reported to the NETmundial chair by the Secretariat. Board meetings were conducted to review the EMC decisions and provide further input. Such meetings were the ultimate decision-making point and included the chair and co-chairs of NETmundial and the chairs of the EMC and HLMC. Discussions mostly served to review and endorse the approaches adopted by the EMC, and any substantive suggestions from the board were taken to the EMC through its chairs.

While the meeting organisation process proven to be very fruitful, it was the approach used in the drafting of the meeting statement, the governance principles and the road map for the future of Internet governance that was considered a key factor

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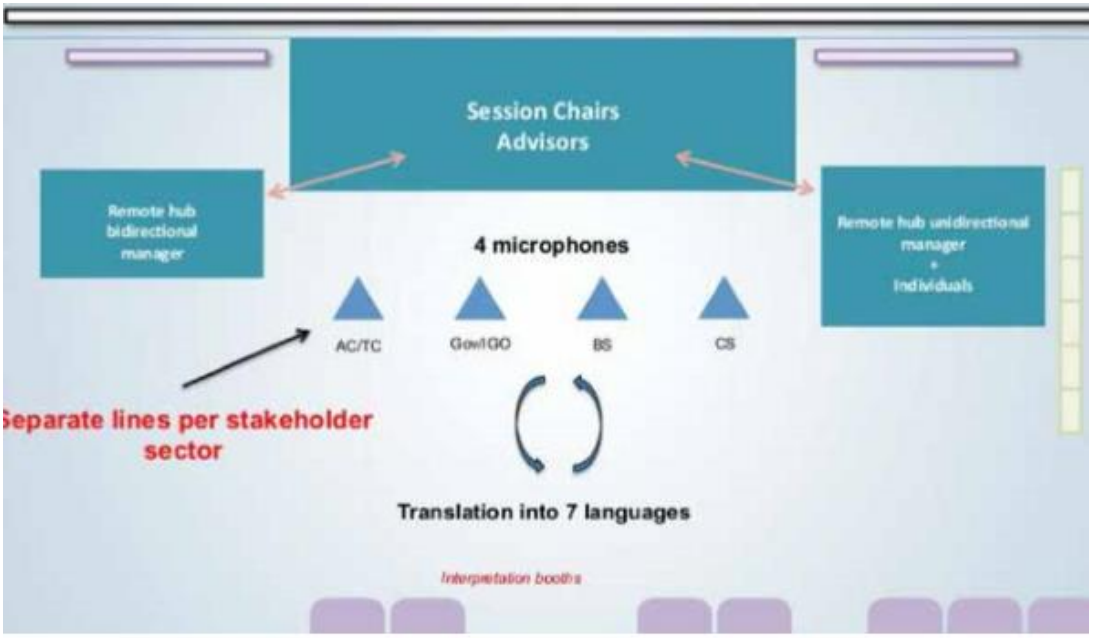
of an open internet and against pervasive surveillance. After this conversation, the global meeting was announced.

supporting the Netmundial success. (APC, 2014; West, 2014). The drafting process was formed from two different phases: a pre-meeting consultation and draft sessions during the meeting. The pre-meeting consultation involved a first stage where interested stakeholders were allowed to submit general contributions using an online platform, and a second stage where actors could comment on a draft proposal produced by the EMC and published online (NETmundial, 2014f; Maciel et al., 2014). During the consultation first stage, an open call for contributions held between 14 February and 8 March 2014 received 188 contributions, with 69 related to the road map, 65 to principles and 54 combining both. From this total the US with 31 submissions, Brazil with 16 and the United Kingdom with 7 were the three countries most active in this phase (NETmundial, 2014g; APC, 2014). After the first stage the Executive Multistakeholder Committee – EMC elaborated a draft statement containing the proposed principles and the Internet governance road map. The proposal was open to comments from 15 to 21 April via an online consultation platform. In this phase, more than 280 persons submitted approximately 1,300 contributions. The meeting secretariat produced and published a summary of the contributions and these two documents, the proposed statement and the summary of the comments submitted were used to guide the drafting working sessions held during the meeting (NETmundial, 2014f; West, 2017).

One day after the publication of the summary of contributions, the NETmundial Global Stakeholder Meeting on the Future of Internet governance started. Convening 1,229 participants from 97 countries the meeting, aside the traditional opening and closing ceremonies had four working sessions dedicated to the final drafting of the outcome document: two on principles and two on the road map. Each working session had chairs representing stakeholder groups and advisors to support the drafting process. The working session dynamics were quite innovative and inclusive (Maciel et. al., 2014). Varon (2014a, 22,) noted that:

> Unlike the usual diplomatic meeting, NETmundial had an innovative dynamic for interaction with the floor in the plenary sessions. Every participant, government representatives included, had to queue for the microphone according to their respective stakeholder group. There was one microphone per

group: one for civil society, one for government, one for business and another for the academic and technical community. Interventions would rotate, one per stakeholder group for a maximum of two minutes, which was then reduced to 1:30. In addition to the interventions from participants in Brazil, the right to intervene would also rotate for a two-minute interaction to one of the remote participation hubs, which were capable of making real-time video communications (bidirectional hubs) and for additional interventions from the unidirectional hubs, capable only of voice interaction. Individuals not participating through hubs were also able to make voice interventions, competing with the slot of unidirectional hubs. Therefore, one full round of interactions was composed of six slots, four for the microphones in São Paulo and two for remote participation.



(Fig. 5[121])

Another important element was the possibility of live remote participation in the working sessions. Participants unable to attend the meeting in Sao Paulo could use two different mechanisms to effectively engage in the document drafting. The first alternative was to use Adobe Connect and send their proposal or contribution to be read by the online moderator. The second was to participate via a direct link in one of the 33 hubs available in 23 different countries (APC, 2014; Varon, 2014a; Maciel, et. al.,

[121] Maciel et. al., 2014

2014). The working sessions were designed to collect the contributions and to assess the submissions made during the second stage of the online consultation. The effective drafting of the NETmundial statement was made in meetings held after the end of the activities planned for the day. Two separate groups, one for each main section of the outcome document were formed. The drafting groups, one working on the principles and the other on the road map, were formed by working sessions chairs and EMC members. They were allowed to make changes to the document in "order to reflect comments made in the online consultation and in the plenary sessions" (APC, 2014, 14).

> The drafting room was open to observers and the text was displayed on the screen of the conference room along with the modifications as they were made, allowing for transparency in the drafting process. Although the procedures for the drafting session explicitly prohibited any interference from observers, this prohibition was not strictly enforced and as a result several observers engaged in bilateral conversations with members of the drafting committee, influencing the drafting process (Maciel et. al., 2014, 15).

After the final working session, the drafting groups incorporated the last contributions and presented the final proposal to the High Level Multistakeholder Committee – HLMC. The HLMC analysed the document in a heavily criticised session (Maciel, et. al. 2014; Kaspar et. al., 2014) that despite being open to observers did not allow any sort of external intervention. During this final drafting session some substantial changes were made to the final version of the outcome document, particularly on topics related to mass surveillance, the IANA transition process and intermediaries liability (APC, 2014, 14; Maciel et. al., 2014). The final document was then sent to the meeting's chair and after being read to all present the NETmundial Multistakeholder Statement was approved by acclamation. Although approved over "cheers and applause from the audience" (APC, 2014, 14) the outcome document was strongly criticised by representatives of the governments of Russia, India, Cuba and from the member of the NGO "Article 19" convening concerns raised by other NGOs (APC, 2014, Maciel et. al., 2014).

While there were some key issues not incorporated into the outcome document, particularly regarding network neutrality, and also some criticism concerning the lack of transparency in some stages of the process, the meeting was considered a success, much because it was able to deliver a tangible set of principles and a road map to guide the future of Internet development and because it gave a concrete and objective demonstration of how multistakeholder-based practices could innovatively and effectively contribute to the management and operation of Internet governance (APC, 2014; Varon, 2014; Kaspar et al, 2014).

II. CGI.br and ANATEL participation in the NETmundial meeting

The NETmundial meeting was considered a landmark event and was influential in two different dimensions: internationally, and in the Brazilian context. At the international level, it played a significate role demonstrating the viability of multistakeholder policy-making mechanisms. Its main contribution was to show that multistakeholder processes could, despite the existing criticism, increase the levels of inclusion and legitimacy and produce tangible outcomes. At the national level the meeting had two significate effects. The first one was to set clear the position of the Brazilian government supporting the development of an international governance system based on multistakeholderism. Until the NETmundial, the Brazilian government oscillated between supporting multistakeholderism and multilateralism and was characterised as a "swing state" (Maurer & Morgus, 2014, 6). Secondly, the meeting exposed the contrasting position of the main governance actors: CGI.br and ANATEL. While CGI.br supported and engaged fully in the meeting organisation and operation, ANATEL, an assumed supporter of a governance model based on the ITU multilateral model played an insignificant role, mainly acting as an incredulous spectator.

CGI.br was an early supporter of the NETmundial and was strongly involved in the meeting's organisation and in the drafting of the outcome document. The committee was represented in the meeting chair by Professor Virgílio Fernandes

Almeida, CGI.br coordinator at that time; in the Executive Multistakeholder Committee – EMC by Demi Getschko, Flávio Rech Wagner, Maximiliano Martinhão, Carlos Afonso, Percival Henriques, Cassio Vecchiatti and Henrique Faulhaber, all members of CGI.br at the time of the meeting; and, in the Logistics and Organizational Committee – LOC by its members Hartmut Glaser and Eduardo Parajo. It is important to note that the committee was well represented in key steering bodies of the meeting, particularly in the EMC that, as pointed out earlier, was responsible for drafting the first version of the outcome document and participated in the drafting sessions of the NETmundial statement.

After a meeting between the Ministries of Communication, Foreign Affairs and Science, Technology and Innovation, CGI.br coordinator, Professor Virgilio Almeida was appointed the meeting's coordinator and rapidly engaged the entire CGI.br structure in the organisation of NETmundial. During a committee meeting held on 25 November 2013, CGI.br recognised the NETmundial meeting as "a great opportunity to discuss key elements of Internet governance in a global multistakeholder approach" (CGI.br, 2013d). During this meeting NETmundial's organisation bodies were also decided on, particularly the HLMC, EMC, LOC and the role of CGI.br members in the overall organising process (CGI.br, 2013d). The topic was further developed in the meetings held on 13 December 2013, 24 January 2014 and 21 February 2014. The committee discussed the logistics and overall arrangements of the meeting, including dates, security aspects, international engagement and the funding of some members of the organising committees (CGI.br, 2013e; CGI.br, 2014b; 2014c). During the last meeting before the NETmundial (4th April 2014), the committee discussed the overall organising process, particularly analysing the contributions of the outcome document provided by the international community.

Interestingly, CGI.br members also discussed the need to reinforce why Brazil was hosting the meeting. The committee coordinator, Professor Virgilio Almeida explained noted that: "a) the country has almost 20 years of experience with Internet governance multistakeholder practices under CGI.br inspirational model; b) the country has more than 100 million of Internet users; and c) Brazil, as a developing country, has a more adequate understanding of the needs of other developing

countries that are normally excluded from Internet governance process" (CGI.br, 2014c). The CGI.br coordinator also indicated that these three factors were the central elements promoting the privileged position of Brazil to convene and steer the meeting CGI.br, 2014c). While largely symbolic, this passage reveals how the committee perceived the need to create a sound and credible narrative supporting its legitimacy to conduct this international policy-shaping process; moreover, it reveals the committee's interest in promoting its governance model and leadership position internationally.

This important role in the organisation and operation of the NETmundial meeting, as well as in the drafting of the meeting's outcome document led the CGI.br to be recognised by the international community, particularly the Internet Corporation for Assigned Names and Numbers - ICANN and the World Economic Forum – WEF, as a key institutional player in the further development of NETmundial values and the deployment later in 2014 of the NETmundial Initiative. Through participating remotely in the CGI.br meeting held on 22 August of 2014, ICANN's CEO, expressed that "there was no possible continuity of the NETmundial process without CGI.br and Brazil" (CGI.br, 2014e). The minutes of the committee meetings held after the NETmundial demonstrate the strong involvement of CGI.br in the continuation of the NETmundial process. The topic was raised in 18 meetings between September 2014 and October 2016, encompassing the planning, operation and collapse of the NETmundial Initiative[122].

Despite this perceived involvement in the organisation, the most significant evidence of CGI.br's influence on the NETmundial process can be observed in the outcome document. The NETmundial principles reflect 8 of the 10 principles established by the CGI.br in 2009 with the publication of the principles for the governance and use of Internet in Brazil. Only the principles establishing the protection of network neutrality and the creation of a binding legal and regulatory

[122] Meetings held in 26/06/14, 24/10/14, 12/12/14, 29 and 30/01/15, 27/02/15, 27/03/15, 08/05/15, 12/06/15, 03/07/15, 28/08/15, 25/09/15, 22/01/16, 18/03/16, 20/05/16, 24/06/16, 22/07/16, 23/09/16, 21/10/16.

system, that was clearly not the intention of the meeting, were not included in the NETmundial outcome document as the following table presents:

CGI.br governance principles[123]	NETmundial principles[124]
Freedom, privacy and human rights: The use of the Internet must be driven by the principles of freedom of expression, individual privacy and the respect for human rights, recognizing them as essential to the preservation of a fair and democratic society. **Universality:** Internet access must be universal so that it becomes a tool for human and social development, thereby contributing to the formation of an inclusive and nondiscriminatory society, for the benefit of all.	**Human rights and shared values:** Human rights are universal as reflected in the Universal Declaration of Human Rights and that should underpin Internet governance principles (…) Those rights include, but are not limited to: Freedom of expression, privacy, accessibility, freedom of information and access to information and development.
Democratic and collaborative governance: Internet governance must be exercised in a transparent, multilateral and democratic manner, with the participation of the various sectors of society, thereby preserving and encouraging its character as a collective creation.	**Internet governance process principles:** Multistakeholder, open, participative, consensus driven governance, transparent, accountable, inclusive and equitable, distributed, collaborative and agile.
Diversity: Cultural diversity must be respected and preserved and its expression must be stimulated, without the imposition of beliefs, customs or values	**Culture and linguistic diversity:** Internet governance must respect, protect and promote cultural and linguistic diversity in all its forms.
Innovation: Internet governance must promote the continuous development and widespread dissemination of new technologies and models for access and use.	**Enabling environment for sustainable innovation and creativity:** The ability to innovate and create has been at the heart of the remarkable growth of the Internet and it has brought great value to the global society. For the preservation of its dynamism, Internet governance must continue to allow

[123] Source: CGI.br, 2014. Principles for the governance and use of the Internet. Available at: https://www.cgi.br/resolucoes-2009-003-en/

[124] Source: NETmundial, 2014. The NETmundial Principles. Available at: http://netmundial.org/principles

	permissionless innovation through an enabling Internet environment, consistent with other principles in this document. Enterprise and investment in infrastructure are essential components of an enabling environment.
Neutrality of the network: Filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious and cultural factors or any other form of discrimination or preferential treatment.	Not inserted in the NETmundial principles
Non-liability of the network: All action taken against illicit activity on the network must be aimed at those directly responsible for such activities, and not at the means of access and transport, always upholding the fundamental principles of freedom, privacy and the respect for human rights.	**Protection of intermediaries:** Intermediary liability limitations should be implemented in a way that respects and promotes economic growth, innovation, creativity and free flow of information. In this regard, cooperation among all stakeholders should be encouraged to address and deter illegal activity, consistent with fair process.
Functionality, security and stability: The stability, security and overall functionality of the network must be actively preserved through the adoption of technical measures that are consistent with international standards and encourage the adoption of best practices.	**Security, stability and resilience of the internet:** Security, stability and resilience of the Internet should be a key objective of all stakeholders in Internet governance. As a universal global resource, the Internet should be a secure, stable, resilient, reliable and trustworthy network. Effectiveness in addressing risks and threats to security and stability of the Internet depends on strong cooperation among different stakeholders.
Standardization and interoperability: The Internet must be based on open standards that facilitate interoperability and enable all to participate in its development.	**Open standards:** Internet governance should promote open standards, informed by individual and collective expertise and decisions made by rough consensus, that allow for a global, interoperable, resilient, stable, decentralized, secure, and interconnected network, available to all. Standards must be consistent with human rights and allow development and innovation.

Legal and regulatory environments: The legal and regulatory environments must preserve the dynamics of the Internet as a space for collaboration.	Not inserted in the NETmundial principles

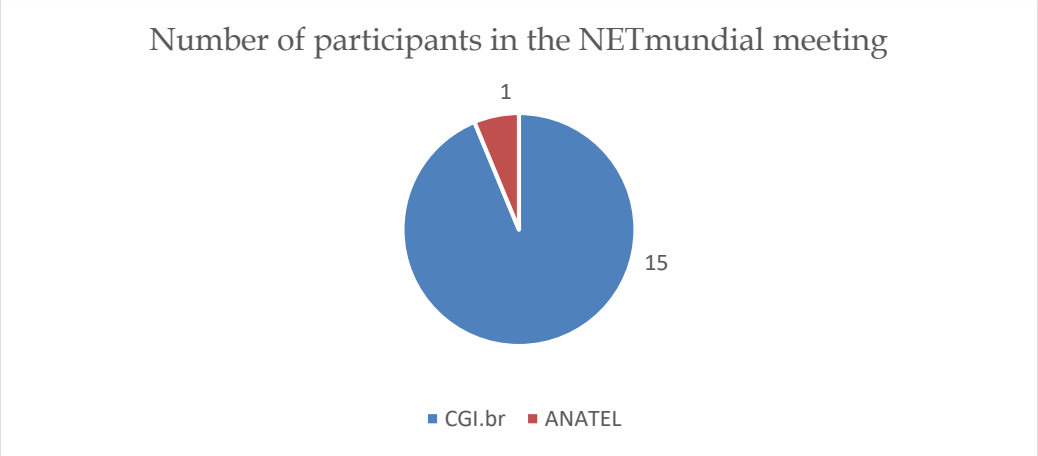
(Table 06)

In contrast to CGI.br, ANATEL demonstrated a complete lack of interest in organising, supporting or even participating in the meeting. ANATEL's only member engaged in the meeting's organisation was Marcelo Bechara that at that time was a member of ANATEL's Board of Directors and the agency representative in the CGI.br. It is also important to note that when attending the meeting, Marcelo Bechara registered himself not as a representative of ANATEL, but as a CGI.br representative (NETmundial, 2014h). None of the others Board of Directors or of the Advisory Council members took part in the organisation or even attended as registered participants in the meeting. The only registered participant representing ANATEL in the meeting was José Alexandre Novaes Bicalho, the agency's superintendent of planning and regulation.

Aside the participation of a single representative, in contrast to more than 15 members of CGI.br, there is no evidence in the transcripts of the working sessions[125] and in the submissions made during the online consultation process of any substantive contribution of ANATEL to the development of the meeting's outcome document. Moreover, there is no reference to the NETmundial in any of the 24 meetings of the Board of Directors held during the period encompassing the organisation and realisation of the NETmundial[126]. The same lack of interest and engagement can be observed in the Advisory Council where any reference to the NETmundial meeting can be traced in the minutes of its meetings held during the period encompassing the planning and realisation of the NETMundial.

[125]Session Setting NETmundial Goals, Wednesday, April 23, 2014 – 14:00 to 15:00; Working Session 1: Principles Part I Wednesday, April 23, 2014 – 15:00 to 17:00; Working Session 2: Roadmap Part I Wednesday, April 23, 2014 – 17:30 to 19:30; Working Session 3: Principles Part II Thursday, April 24, 2014 – 08:30 to 10:30; Working Session 4: Roadmap Part II Thursday, April 24, 2014 – 11:00 to 13:00; NETmundial – Beyond NETmundial – Panel 1 Thursday, April 24, 2014 – 14:00 to 16:30; NETmundial – Beyond NETmundial – Panel 2 Thursday, April 24, 2014 – 14:00 to 16:30, all available at: http://netmundial.br/references/ (NETmundial, 2014i).

[126] Meetings held between 03/10/2013 to 08/05/2014.



(Graph 1)

The lack of evidence supporting ANATEL's active engagement and participation in the NETmundial process (meeting organisation and drafting of the outcome document) indicates ANATEL's complete lack of interest in the development of a governance model based on values and organisational structures that operates in contrast with its own structural governance and regulatory model. The Agency perceived its non-inclusive, hierarchical and politically-influenced governance structure and its non-consensus-orientated techno-legal policy-making process incompatible with the multistakeholder rationale promoted and supported in the NETmundial. ANATEL continued to support an Internet governance system focused on the role played by states under a multilateral regime like the one in place in the international governance and regulation of telecommunications, the very same model that the agency mirrors on the Brazilian national level. Not engaging in the NETmundial meeting, and not discussing the issues during the public phases of its policy-making process was a veiled statement of non-support of the efforts made by the Brazilian government and the CGI.br to promote multistakeholderism as a key mechanism to enhance the international governance system.

III. Some concluding remarks and observations

This chapter has investigated the participation of CGI.br and ANATEL in the policy-making activities developed in the organisation and realisation of the NETmundial meeting. It aims to contribute to the study of the operation of multistakeholderism in

Internet governance by observing the development of different practice than the ones investigated in the previous chapters of this thesis. In looking to the CGI.br and ANATEL acting through an international policy-making process designed to produce a soft-law instrument it intends to observe in a granular form and under different circumstances the dynamics supporting multistakeholder policy making. While the lack of evidence compromises to some degree the research process, the observations made in this chapter reinforces some elements and aspects of the operation of multistakeholder policy making in Internet governance observed in the previous chapters, and also indicates the occurrence of interesting phenomena that were not in the original scope of this research.

The policy-making interactions observed during the NETmundial meeting reinforced the dynamics perceived and sketched in the previous chapters. The multistakeholder policy-making engine operates using a mechanism combining inclusion, expertise and consensus. The contrasting aspects of an inclusive process based on expertise is balanced by the levelling consensual rationality used during the policy-making decision stage. The consensual orientation mediates the dialogue and the resource sharing between stakeholder that despite being included, have different levels of expertise and understanding of the techno-legal aspects underpinning the operation of the Internet and its regulation. Consensus-based decision making is the element used to bridge the gaps between and inclusion and expertise as perceived in the CGI.br policy-making structure, in the regulation of network neutrality in the Marco Civil da Internet law and in the NETmundial meeting. This process, its dynamics and theoretical developments will be further explored in the next chapter.

The second important aspect observed in the investigation of the NETmundial meeting was the use, by the Brazilian government and CGI.br, of the national governance system and its practices, like the Marco Civil da Internet and the CGI.br itself, to influence Internet governance global agenda. Exploring its well-established governance system, Brazilian government acted strategically to exercise a leadership role during the re-institutionalisation of Internet governance arrangements held after Snowden revelations. The Brazilian government and CGI.br, perceiving the regulatory window and the lack of trust in the existing governance arrangements and

actors that were caused by the failure of the WCIT-2012 and Snowden revelations of Internet mass surveillance programmes, used the Brazilian national governance system and its regulatory instruments in a bid to shape the development of international arrangements where it could exercise an influential position and fulfil its longstanding calls to be a global leader (Trikunas, 2014).

The reinforcement of multistakeholderism policy-making engine operation, particularly the clarification of its main elements (inclusion, expertise and consensus) contributes to the clarification of the research questions guiding this thesis in two aspects: a) it provides supporting evidence unpacking the operation of multistakeholderism in Internet policy making in Brazil and the development of theoretical elements exploring and explaining this operation; and b) it offers evidence clarifying the effects of the operation of multistakeholderism in the regulatory instruments developed in the Brazilian Internet governance system. The chapter also incidentally indicates the existence of regulatory entrepreneurship practices developed by the Brazilian government and key governance actors. Despite not being in the initial focus of this research these activities will be further analysed in the next chapter due to its potential connections with the main elements under investigation.

CHAPTER FIVE

THE OPERATION OF MULTISTAKEHOLDERISM IN THE BRAZILIAN INTERNET GOVERNANCE SYSTEM: DYNAMICS AND EFFECTS

Introduction

The main objective of this thesis is to examine how multistakeholderism operates and affects Internet governance in Brazil. It uses socio-legal framing to analyse three different aspects of the Brazilian Internet governance system. The thesis collects data and insights from the investigation of governance structures, particularly policy-making practices developed by non-multistakeholder and multistakeholder actors. The third chapter examined the governance structure's main actors and their policy-making dynamics. Continuing the investigation process the fourth chapter analysed the participation of ANATEL and CGI.br in the regulation of network neutrality in the Marco Civil da Internet law process. The fifth chapter investigated the participation of CGI.br and ANATEL in the development of an international soft-law regulatory initiative, the NETmundial meeting.

The current chapter presents the main findings observed during this research process and proposes theoretical elements to clarify the operation and effects of multistakeholderism identified in Brazilian Internet governance. It provides insights and theoretical propositions clarifying this phenomenon and identifies and presents the dynamics supporting multistakeholderism's policy-making engine. Drawing from these observations the chapter also introduces theoretical elements exploring the

operation and effects of multistakeholderism in governance and regulation making, particularly its generative and innovative aspects. The chapter also identifies and explores the theoretical relation between multistakeholderism and governance entrepreneurship practices developed by Brazilian actors, which despite not being the main objective of this research, sheds light on the operation of multistakeholderism in the Brazilian governance system.

The chapter is split into three main sections. The first one uses data collected in the three units of analysis studied in this research to offer an explanatory model of the operation of multistakeholderism in the Internet governance in Brazil. Its first subsection presents the operations supporting multistakeholder policy-making practices and structures in the Brazilian Internet governance system. The second subsection theorises about the effects of this operation in governance system outcomes, particularly exploring the development of concepts able to shed light on the already perceived potentialities of multistakeholder-based policy making. The second main section explores incidental findings that suggest the development of governance entrepreneurship practices in Internet policy-making in Brazil. The final section provides some concluding remarks and observations.

I. The operation of multistakeholderism in the Brazilian Internet governance system

This section presents and analyses the dynamics supporting the operation of multistakeholderism in the Brazilian Internet governance system. It observes how the interplay between inclusion, expertise and consensus orientates multistakeholder practices during policy-making activities. It also uses elements supporting the operation of multistakeholderism in the Brazilian Internet governance policy making to theorise about the perceived generative and entrepreneurial governance aspects visualised during multistakeholderism operations. Borrowing ideas from Internet governance, regulation and socio-legal studies this section argues that the operation of multistakeholderism, particularly the interactions between its key policy-making elements, has been mostly overlooked and simplified. The lack of critical analysis of

the key elements and dynamics supporting the operation of multistakeholderism policy making has led to an increasing "hype" that oversimplifies and does not investigate properly its policy-making mechanisms and interactions. This oversimplification contributes to the lack of interest in investigating more systemically the operation of multistakeholderism and the development of a deeper understanding of its effects.

A. The operation of multistakeholderism in the Brazilian Internet governance system: tracing multistakeholder policy-making dynamics.

This subsection presents the dynamics supporting the operation of multistakeholder policy making in the Brazilian Internet governance system. It analyses elements and processes supporting the operation of multistakeholderism in Internet governance policy making in Brazil and discusses which elements and rationale ground the operation of multistakeholderism in Brazil. It indicates the unique role played by the procedural interconnection of inclusion, expertise and consensus observed in CGI.br policy-making activities.

Balancing inclusion and expertise are crucial to support the optimal operation of multistakeholderism in policy-making processes. These two factors are apparently antagonistic as they oppose two contrasting values. Any policy-making system operating under this inclusion and expertise scheme encompasses an operational ambiguity that is based on the opposing relationship between expertise and inclusion. The demand for expertise reduces the selection of actors able to contribute. The level of expertise requested impacts directly the number of people able to effectively engage in the process. Highly-specialised governance processes constrain the levels of inclusion as only a few experts can participate. This filtering criteria reduces significantly the level of inclusion of a given policy-making process. This ambiguity indicates that multistakeholder-based policy-making operations will always struggle to deal with this tension. While it is still possible to identify practices with good levels of inclusion, like the CGI.br, the NETmundial and the IGF, it is important to note that when the optimal balance between these two factors is not correctly set, there is a

natural predisposition to over specialise the policy-making operation and curb the overall levels of inclusion of the governance system.

This dichotomy and the common prevalence of expertise over inclusion in governance arrangements, including the Internet is also perceived in the Brazilian scenario, particularly in ANATEL's highly fraught policy-making operation. While evident in ANATEL, this tendency to focus on expertise and consequently to lower the level of inclusion, is reduced in CGI.br. The governance committee operates under the same dichotomised elements observed in ANATEL and builds its governance rationale over the same two elements: inclusion and expertise. However, in CGI.br this "expertisation" tendency and the consequent decrease of inclusion are minimised through consensus. The committee's consensus-driven orientation mediates the relationship between inclusion and expertise creating a procedural buffer able to ease tensions between conflicting rationalities and to produce a balanced policy-making mechanism. The dynamics supporting the operation of multistakeholderism in the CGI.br alleviates pressures from these contrasting rationalities and promotes the development of a governance space able to balance in a workable way inclusion and expertise.

This dynamic supports a collaborative approach able to deconstruct multistakeholderism's "operational ambiguity" mainly by stimulating the creation of a policy-making environment based on trust and resource sharing. This policy-making space eases tensions arising from contrasting rationalities mainly by promoting the levelling of the expertise gap between technical and non-technical actors. This collaborative and supporting environment uses a consensus-driven approach to stimulate resource sharing and information exchange to balance the expertise gap between technical and non-technical stakeholders. This same resource sharing approach creates an information flow able to spread strategic information and support more evidence-based decisions.

The use of consensus to reduce pressures resulting from the operation of multistakeholderism also contributes to inclusion in the policy-making process of "out of the technical box" elements and views that are normally ignored, bypassed or overlooked by technical stakeholders. The active participation of stakeholders with

different backgrounds and levels of expertise allows a more varied view of the technical and non-technical elements influencing the policy under debate. Moreover, it provides alternative perspectives of the social, cultural and economic impacts of the decisions made under exclusive technical considerations. The active participation of stakeholders with different backgrounds and expertise levels, once substantially integrated in the policy-making process through an environment based on trust, tolerance and resource sharing, creates a unique policy-making environment where collaboration and innovation are stimulated. This strategic resource and collaborative ethos supports more transparency and facilitates the dialogue between opposing groups, promoting more opportunities to supplant differences and achieve a consensus-approved solution. This operation is observed not only in CGI.br, but also in the Marco Civil da Internet drafting process.

CGI.br has a remarkable inclusive composition. Despite its recent homogenisation, as most of its members have been being reappointed and have a predominant techno-legal background, the committee structure has historically included stakeholders representing different segments of the Brazilian society and diverse levels of expertise. It is formed of 21 members representing four different sectors (government, business, civil society and academia) in the following areas: science, technology and innovation; federal administration; communication; defence and national security; development and trade; planning and public management; regulation; research; Internet and contend providers; telecom infrastructure; informatics industry; business as users; civil society; and academia. Moreover, CGI.br's actual members have the following training and professional background:

Representative Institution	Expertise
Ministry of Science, Technology and Innovation	Telecommunication engineering Management Law
Presidential Cabinet	Mechatronic engineering Management Marketing
Ministry of Communication	Civil engineering Informatics Law
Ministry of Defence	Economics Management

Ministry of Development, Industry and Foreign Trade	Economics Informatics
Ministry of Planning, Budget and Management	Informatics Information management
National Telecommunication Agency	Law Regulation
National Council for Scientific and Technological Development	Law Public management
National Council of State Secretariats for Science, Technology and Information Issues - CONSECTI	Electrical engineering Computing
Business sector	Entrepreneurship Regulation
Business sector	Electrical and telecommunication engineering
Business sector	Maths Engineering
Business sector	Electrical engineering Accountancy
Civil Society	Law
Civil Society	Physics Law Public management
Civil Society	Law Development
Civil Society	Electrical engineering Computing Informatics
Academia	Communication Information sciences Education
Academia	Political science Education
Academia	Computing
Internet expert	Electrical engineering

(Table 07)

(Fig. 6)

This observed multifaceted expertise embedded in the CGI.br's policy-making operation results directly from its inclusive structure and design. This dispersed knowledge ecosystem, despite its techno-legal inclination, provides a diverse and broader level of input to the committee's policy-making activities. CGI.br's higher level of diverse and specialised inputs stimulates access to information and knowledge that are critical to decision making and increases the level of cross-fertilisation of the policy-making process; although, this same quantitative and

qualitative variety of expertise can create disturbance and prevent the normal operation of policy-making activities as access to strategic information can be used to stimulate convergence so as to exacerbate contrasting positions. The critical element balancing this contradictory operation is consensus. As indicated earlier in this section, the adoption of a decision-making process guided by a consensus rationale creates space for a more stable and dialogic relationship between different actors. This trusted environment minimises tensions arising from contrasting interests and paves the way for the collaboration necessary for moving the policy-making process forward. This operational model is clearly identified in CGI.br, particularly during the committee discussion over its support to the Marco Civil da Internet bill and the organisation of the NETmundial meeting.[127]

The development of a policy-making process anchored in the use of a consensual mechanism to equalise the dichotomy generated by the ambiguous multistakeholder rationale (inclusion vs. expertise) is the central element supporting the operation of multistakeholderism in the Brazilian Internet governance system. While this is not an exclusive feature of the Brazilian system, as it also can be observed in practices developed by the IETF, the way Brazil interweaves these elements can be considered unique. The CGI.br policy-making structural design and policy-making processes use consensus to play a dual function: it minimises and balances tensions while maximises and channels the broader and variable universe of contributions to promote a more inclusive, legitimate and innovative governance system. CGI.br's operation of multistakeholderism truly embodies these interconnected elements either in its organisational design or in its policy-making practices. The process leading to the committee's creation and reformulation, the establishment of the NIC.br, the enactment of the principles for Internet governance and use in Brazil (CGI.br/RES/2009/003/P), and the Marco Civil da Internet are all good examples of these dynamics. This singular structural and procedural policy-making architecture that is based on the balance of inclusion and expertise through a consensus-oriented

[127] The CGI.br policy-making process, the Marco Civil da Internet drafting process and the Netmundial meeting are presented and analysed in the chapter 4 of this thesis.

rationale is an essential element supporting the flourishing of the Brazilian Internet governance system and its innovative regulatory activities.

B. Effects of the multistakeholderism operation in the Brazilian governance system

The singular structural and procedural policy-making architecture used in the CGI.br influenced significantly the development of the Brazilian governance system and its regulatory activities. This subsection theorises about the observed effects of the operation of multistakeholderism in the Brazilian Internet governance system. It analyses the effects of multistakeholderism in the Brazilian policy-making structures, processes and outcomes and explores theoretical notions that can help to explain the organisational, procedural and regulatory elements and effects of multistakeholderism in Internet policy making.

B.1 Multistakeholderism's generativity and the regulatory innovation impulse

The Brazilian Internet governance system and its practices, despite some criticism (Wagner and Mueller, 2014; Aguerre & Galperin, 2015), is recognised by Internet governance scholarship as a well-established and fruitful model (Knight, 2014; Carvalho, 2006). Moreover, its approach to multistakeholderism and the operation of an effective and innovative policy-making process (Varon, 2014b) has influenced significantly the development of similar initiatives in other South American countries (Aguerre & Galperin, 2015) and promoted the country's model internationally (Trinkunas & Wallace). The Brazilian Internet Steering Committee (CGI.br), the NET Mundial Initiative and particularly the Marco Civil da Internet embody and exemplify much of this inclusionary and innovative ethos. Analysing the Marco Civil da Internet process, Tim Berners-Lee (World Wide Web Foundation, 2014) noted that:

> Like the Web, Marco Civil has been built by its users – the ground breaking, inclusive and participatory process has resulted in a policy that balances the rights and responsibilities of the individuals, governments and corporations who use the Internet. Of course, there is still discussion around some areas, but ultimately the draft Bill reflects the Internet as it

> should be: an open, neutral and decentralized network, in which users are the engine for collaboration and innovation. Commendably, the Bill has among its foundations the guarantee of human rights such as privacy, of citizenship and the preservation of the diversity and the social purpose of the web.

Much of these innovative and inclusive practices are influenced and at the same time exemplify one important aspect already noted by Zittrain in his seminal work (2006, 2008): the notion of Internet generativity. Nonetheless, the phenomenon perceived in this research has a more focused scope than the one originally visualised by Zittrain, as Internet governance multistakeholderism generativity replicates in the governance and regulatory processes the technical and economic generativity observed by Zittrain during Internet development. According to Zittrain (2006, 1974) the Internet has this "generative capacity to promote unrelated and unaccredited audiences to build and distribute code and content through the Internet to its tens of millions of attached personal computers has ignited growth and innovation in information technology and has facilitated new creative endeavours." While perceiving superficially the implications of Internet generativity to its governance and regulation, Zittrain concentrates his analysis and the application of the "generative grid" (Zittrain, 2006) on economic and technical aspects of Internet development. According to him:

> Generativity pairs an input consisting of unfiltered contributions from diverse people and groups, who may or may not be working in concert, with the output of unanticipated change. For the inputs, how much the system facilitates audience contribution is a function of both technological design and social behaviour. A system's generativity describes not only its objective characteristics, but also the ways the system relates to its users and the ways users relate to one another. In turn, these relationships reflect how much the users identify as contributors or participants, rather than as mere consumers (Zittrain, 2008, 70).

The operation of multistakeholderism in Internet governance in general, and particularly in Brazil, replicates much of this procedural rationale that boosts governance and regulatory innovation. Internet governance multistakeholderism embodies the same generative quality observed by Zittrain in the economic and technological operation of the network. It promotes governance structures and policy-making processes inclined to enhance inclusion, cross-fertilisation and innovation. This similarity is also observed in the congruences between some of the elements informing the operation of multistakeholderism and those supporting technological generativity. According to Zittrain, a generative system has five characteristics: leverage, adaptability, ease of mastery, accessibility and transferability. Four of these elements can be observed during the operation of multistakeholderism in Internet governance, particularly when the operation is observed under a more procedural analysis.

In the approach suggested by Zittrain the combination of all these characteristics is crucial to create a technological system able to support economic and technical innovation. Under this rationale, a generative system must have leverage or the capacity to use a resource to its maximum advantage, facilitating or simplifying tasks, activities or processes. It makes a "difficult job easier" (Zittrain, 2008, 71) or in a wider perspective it implies that some task is made easier - something that was not possible, or just impractical, becomes doable. In a broader sense a lift, a lever, a saw, a car, a computer and an algorithm (code or law) are examples of instruments and processes that decomplicate tasks. It is interesting to note that this same "easing" element can be observed in the use and operation of multistakeholderism in Internet governance in the Brazilian system. Internet governance multistakeholderism embodies and reflects the Internet's leveragability in its capacity to stimulate the development of policy-making processes based on values (inclusion, consensus and resource sharing) that facilitate and simplify policy-making interactions, unlock gridlocks during decision-making processes and promote policy and regulation cross-fertilisation and innovation.

The second characteristic of a generative system reflects its capacity to be modified with the purpose to be used in different areas than the one originally

planned. It embodies the capacity of being transformed and adapted to new uses or processes not fully envisaged during its initial development. As noted by Zittrain (2008, 71) "a technology that affords hundreds of different, additional kinds of uses beyond its essential application is more adaptable and, all else being equal, more generative than a technology that offers fewer kinds of uses." The third aspect, the ease of mastery, "reflects how easy it is for broad audiences to understand how to adopt and adapt it" (Zittrain (2008, 72) and "transferability indicates how easily changes in the technology can be conveyed to others" Zittrain (2008, 72). Multistakeholderism is also very adaptive, has an ease of mastering and transferable policy-making mechanism. It can be adapted to operate in different policy-making settings and areas. While originally associated with corporate social responsibility and sustainable development studies (Doria, 2013; Musiani, 2015), it was easily modified and applied to different governance areas and levels like Internet governance, aviation, water management, intellectual property and cybersecurity (Gasser, et. al. 2015) and to formal and non-formal governance structures and processes like the IETF, the IGF, the CGI.br and the Swiss ComCom FTTH Roundtable (Gasser, et. al. 2015).

The perception of these similarities, overlooked somehow by traditional Internet governance and legal scholarship, is a crucial element supporting one of the key theoretical contributions of this thesis: the notion of Internet governance multistakeholderism generativity. While the Internet has a set of characteristics supporting the development of an economic and technological system capable of generativity and innovation, multistakeholderism, particularly in the governance system investigated, reflects the same generative effect. Once operated under optimal conditions, multitakeholderism is an enabling element promoting regulatory and governance innovation. The observations made during the research suggests that multistakeholderism generativity is the capacity that multistakeholderism has to influence policy-making processes to produce legitimate, innovative and unplanned regulatory outcomes. Receiving input from a broader and unfiltered audience, multistakeholderism supports the operation of a policy-making process based on expertise and guided by a consensus-driven rationale that stimulates generative

changes able to stimulate policy fertilisation and innovation in a given governance system.

The operation of multistakeholderism in the Brazilian Internet governance system embodied a generative element that led to the development of legitimate governance structures, inclusive policy-making processes and innovative regulatory instruments, like the CGI.br, the Marco Civil da Internet Law and the Netmundial meeting. All these practices embodied multistakeholder-based processes to convene a broader audience and increase its policy-making operation levels of inclusion and expertise. At the same time, multistakeholderism consensus decision-making rationale promoted a higher level of interaction between policy-making actors, stimulating trust and resource sharing as key elements of the these policy-making operations. The combination of these factors, as already pointed out above, proved to create a very rich space where different sources of information, resources and expertise led the way to allow cross-fertilisation, creativity and the development of evidence-based innovative solutions. Following these observations, the concept of multistakeholderism generativity encompasses the capacity of multistakeholderism, when operated under optimal conditions, to promote a policy-making process able to support governance and regulatory processes more legitimately and innovatively.

II. Multistakeholderism and the development of "governance entrepreneurship"

The present section analyses a group of findings not related to the main research question guiding this thesis. These findings point to an under researched dimension of the multistakeholderism policy-making operation in Brazil which indicates the existence of an unnoticed relationship between the operation of multistakeholderism, regulatory innovation and governance entrepreneurship practices. The investigation revealed an interesting relationship between the increase of multistakeholderism embedded in the Brazilian governance system and the increase of governance entrepreneurship activities. This relationship is noted in CGI.br's internal policy-making practices like the publication of principles for the governance and use of

Internet in Brazil, the Marco Civil da Internet law and the NETmundial meeting, as in the use of the Brazilian governance system to promote the country internationally. The section explores and analyses this scenario under three subsections. The first section explores theoretically and adapts the concept of regulatory entrepreneurship to explain Brazilian efforts to shape the international Internet governance agenda. The second subsection analyses the Brazilian activities and practices during the Internet governance regulatory window opened after Snowden's revelations and the last subsection analyses the possible relations between multistakeholderism and "governacne entrepreneurship".

A. Brazilian international leadership ambitions: from "regulatory entrepreneurship" to "governance entrepreneurship"

The increasing number of regulatory entrepreneurship practices, particularly by non-state actors reflects the ongoing transformation of the global regulatory scenario. This transformation, according to Büthe & Mattli (2013), has been characterised by the delegation of regulatory authority from government to specialised hybrid regulatory bodies. This process "is driven, in part, by governments' lack of requisite technical expertise, financial resources, or flexibility to deal expeditiously with ever more complex and urgent regulatory tasks" (Büthe & Mattli 2013, 5). The actual regulatory scenario, particularly due to the slow pace and retrospective nature of regulatory responses to technological development, creates, for different actors, more opportunities to influence all stages of the regulation-making process (agenda setting, negotiation, implementation, monitoring and enforcement).

Another important factor influencing the ongoing changes in the regulatory scenario is the increasing levels of tension perceived in regulatory processes that mediate frictions between values like inclusion, accountability and transparency and the need to take into account during the policy-making operation an increased level of technical expertise. The regulation of the Internet exchange points, the protection of personal data, and the governance of cryptocurrencies or artificial intelligence are good examples of this ongoing set of disputes. This complex and sometimes contrasting environment creates regulatory gaps that once perceived as opportunity

windows are explored by different actors to promote their own economic or political interests.

The existence of actors attempting to influence the regulatory process is not a new phenomenon. Companies hire consultants to lobby for their regulatory interests, NGOs exercise advocacy to influence the development of regulations more favourable to their members and States play different games to promote internationally their own economic and political agendas. Pollman & Barry (2017, 393) note that "the growth of the regulatory state and the increasing role of government in the economic sphere, spawned a responsive increase in corporate politicking" particularly by prompting corporations to influence more strategic regulation making. Analysing these practices, Pollman & Barry (2017) shaped the concept of regulatory entrepreneurship. According to them:

> "some companies pursue a line of business that has a legal issue at its core—a significant uncertainty regarding how the law will apply to a main part of the business operations, a need for new regulations in order for products to be feasible or profitable, or a legal restriction that prevents the long-term operation of the business. For these entrepreneurs, political activity is generally a major component of their business models. Essentially, these companies are in the business of trying to change or shape the law. We term such businesses "regulatory entrepreneurs," and this class of business activity "regulatory entrepreneurship" (Pollman & Barry, 2017, 392).

Pollman and Barry differentiate regulatory entrepreneurship from traditional lobbying indicating that regulatory entrepreneurs "pursue lines of business knowing that changing the legal environment is crucially important for the business's growth, or even its legality, and with the intention of effecting that change. Changing the law is not a side project, it is a material part of the business plan" (Pollman & Barry, 2017, 393). While the concept contributes significantly to investigate the influence of private actors' regulation-making processes it is important to note two critical points limiting its theoretical application, particularly with regard to the need to broaden its conceptual boundaries.

The concept is heavily influenced by the culture of technological entrepreneurship created in the United States by companies like Uber, Tesla, and Airbnb. It focuses primarily on the transformations and practices developed in the North American legal and regulatory context and limits the practice of regulatory entrepreneurship to private companies ignoring the existence of interventions in the international regulatory scenario made by other actors like NGOs, governments and technical bodies like the IETF and the ICANN (Mattli & Woods, 2009; Büthe & Mattli, 2013; Gasser et. al., 2015).

In fact, when analysing the politics of global regulation, Mattli & Woods (2009, 28) suggests a similar concept but framed from a different angle. According to them, "entrepreneurs of change" use their "resources, power and expertise to bring about effective regulatory changes" motivated by economic or non-economic interests. While not restricting the practice of regulatory entrepreneurship activities to the business context, Mattli & Woods (2009, 29-34) also recognise the role played by other stakeholder groups indicating three categories of "entrepreneurs of regulatory change: nongovernmental; public officials and private sector (2009, 29-34)." This broader approach of "regulatory entrepreneurship" is more adequate to frame the ongoing set of "regulatory shaping practices" observed in the past years developed by private actors like the ones identified by Pollman & Barry (2017)[128] and the ones practiced by NGOs[129], public officials[130] and technical bodies[131].

Although both concepts provide important theoretical elements to explain the influence of different stakeholders in the regulation-making process and when combined the concepts create an interesting frame to analyse the phenomenon observed in this thesis, the notion of regulatory entrepreneurship only addresses one dimension of the activities developed by the Brazilian government and the CGI.br to

[128] Pollman & Barry (2017) investigated regulatory shaping initiatives developed by tech companies like Tesla, Uber and Airbnb but also identified practices in non-tech companies like UFC and ResponsibleOhio.
[129] ISOC and Article 19 are good example of NGOs working to influence the global regulation of Internet.
[130] Brazil, China, Russia, India and the ITU are examples of public institutions developing practices to shape Internet governance and regulation.
[131] IETF, IEEE and ISO are technical bodies that play a significant role in the governance and regulation of the Internet.

shape the international governance regime. The noted phenomenon has a different scope as it does not apply only to regulation but to governance conceptualisation, structure and operation. This focus suggests the existence of practices prompting a broader concept of "governance entrepreneurship" where actors or stakeholders act to shape the governance system's conceptual, structural and operational dynamics. Governance entrepreneurship explores ideas encapsulated in the notions of "regulatory entrepreneurship" and "entrepreneurs for regulatory change" expanding their reach to a theoretical context able to shed light not only on the practices observed in the case studied but also on other governance systems.

This thesis proposes that governance entrepreneurship is characterised by practices strategically developed by stakeholders, independently of their nature (governments, civil society, business and technical community), directed to influence and shape the conceptualisation, structure and operation of the governance system. Differently from the concepts formulated by Mattli & Woods (2009) and Pollman & Barry (2017) the concept of governance entrepreneurship does not focus on regulation making (Mattli & Woods, 2009). Rather, it enlargers its conceptual framing to a broader perspective including aspects related to governance conceptual, structural and operational dimensions. It also does not restrict the acting capacity to one category of stakeholder as suggested by Pollman & Barry (2017) once the concept recognises that any stakeholder can strategically act to shape the governance landscape.

The idea of governance entrepreneurship observed in study of the Brazilian government and CGI.br acting in the Internet governance scenario, not only explains the rationale supporting these practices, but also, potentially, can be used to study similar practises developed by other "governance entrepreneurs" and in other scenarios, like finance and environmental governance. The "governance entrepreneur" strategically uses governance crises to develop practices aiming to shape the concept, structure or operation of the governance system in accordance with its political and economic agenda. As the next subsection explores, the Brazilian government and the CGI.br identified a governance gap and strategically acted to change the Internet governance system.

B. Brazilian governance ambitions and the Internet governance entrepreneurship opportunity

Brazil has in recent history called for having a more prominent role in the international political arena. From an influential regional position during the late XIX and early XX century, Brazil has played particularly significant roles in regional border disputes (Goes Filho, 2013), mediating between the United States of America and European countries (Ricupero, 2012) and in the II Peace Conference of Haia in 1907 (Mialhe & Rodrigues, 2003;). Geopolitical fragmentation in the aftermath of the First World War, the polarisation following the Second World War and the loss of economic power resulting from its late industrialisation all cast a shadow on the country's leadership ambitions and forced Brazil to adopt a secondary position in the international arena.

This scenario began to change in the late 1960s with the increasing interest of Brazil's military government in playing a more significant role internationally. Under a combination of a developmental and securitisation agenda the Brazilian government began to develop strategies to increase its influence globally (Trinkunas & Wallace, 2015). Its initial attempt to strengthen its international leadership was focused on the country's bid to become a permanent member of the United Nations Security Council (Trinkunas, 2014) and its constant calls for the Council's reform.

After the Second World War, Brazil recognised its lack of hard power and began to try to use soft power instruments, particularly political capital, collaboration and diplomacy (Dauvergne & Farias, 2012) to strengthen its position in different international governance domains in a bid to develop a more influential position in the global political order. Pursuing its ambitions, the country played a significant role in the development of international governance frameworks in sensitive areas like environmental protection, poverty eradication, democracy development and the fight against HIV (Trinkunas & Wallace, 2015; Dauvergne & Farias, 2012). Recently, particularly after the Snowden revelations and the exposure of invasive electronic surveillance programs carried out by the United States of America, Brazil began to support the development of an Internet governance system that is more transparent, democratic and participatory.

Using its own governance model and regulatory instruments the country promoted the engagement of its main national governance actor, the CGI.br, with key structures of the Internet's global governance to call for the restructuring of the governance system and the promotion of multistakeholderism. This attempt can be observed in the use of the Marco Civil da Internet law and the organisation of the Netmundial meeting. This research suggests that the Brazilian government and its main Internet governance structure, the CGI.br, perceived a "governance-shaping opportunity" and acted. The promotion of an efficient and stable Brazilian governance system embodied the country's ambition to explore the governance window in a bid to strengthen its influence globally (Trinkunas and Wallace, 2015). It is important to note that Brazil's attempt to increase its international political capital via the reshuffling of international Internet governance was not a random and occasional practice. Rather, this attempt was developed strategically and structured through the identification of a governance-shaping opportunity created by the institutional crises triggered by Snowden's revelations.

This strategy can be observed by looking at two interesting developments: the publication by the Ministry of International Relations of the book *Governança da Internet - aspectos da formação de um regime global e oportunidades para ação diplomática* (*Internet governance – the development for an international regime and diplomatic opportunities*) and the increase of CGI.br participation in key international governance processes and structures. Lucero (2011), a well-established member of Brazil's diplomacy circle, identified and promoted in the Brazilian international relations environment the importance of Brazil engaging more significantly in international discussions about Internet governance. He particularly identifies "opportunities to diplomatic acting" (Lucero, 2011) and supports the need to develop leadership and influence in areas like the technical management of Internet core resources and other policy-making processes.

At the same time, the CGI.br increased its international activity. The committee began to support financially and logistically IGF and ICANN meetings and other events and projects like the Internet Jurisdiction project and the European School in Internet Governance. It also intensified its profile in South America by participating

in events and meetings like the South American School in Internet Governance and the Internet Addresses Registry for Latin America and Caribbean – LANIC. Through all these activities, the committee promoted its multistakeholder governance model using the principles for the use and governance of the Internet, the Marco Civil da Internet, the Netmundial process and its own governance structure.

This process was characterised by the combination of the Brazilian government's ambitions to increase its position in the international governance arena and the interest of CGI.br to promote its governance model internationally. CGI.br coupled the interests of the Brazilian government with its own objectives and worked to promote the country's call for greater leadership and its governance model as one important element to guide the future development of the Internet's international governance framework.

One important piece of evidence supporting this perception is the involvement of the Brazilian government and of CGI.br in the adoption, by the United Nations General Assembly, of Resolution A/RES/68/167: The right to privacy in the digital age. Co-sponsored by Germany and approved without voting the Resolution called all UN member states to "review their procedures, practices and legislation on the surveillance of communications, their interception and collection of personal data, including mass surveillance, with a view to upholding the right to privacy by ensuring the full and effective implementation of all relevant obligations under international human rights law" (UN, 2014).

The resolution on the right to privacy in the digital age was the first international document recognising the need to protect human rights online and to reframe the debate around Snowden's revelations. It shifted the debate from security, national defence and espionage narratives to the fields of Internet governance and human rights. It was also relevant because it promoted Brazil as one of the key actors calling for reforms in the Internet governance system and the development of a governance system based on multistakeholderism (Trikunas & Wallace, 2015; Abdneur & Gama, 2015). This process was later strengthened with the international promotion of the Marco Civil da Internet law and the direct involvement of CGI.br in influential governance practices like the NETmundial process and the IGF.

The Brazilian government foresaw the impact of Snowden's revelations in the existing Internet governance structure and decided to explore this "window of opportunity" to develop its international political capital and influences the transformation of the Internet's international governance structures. Using its main governance actor, the Brazilian government deployed an intervention strategy based on the promotion of CGI.br and its key regulatory practices, like the Marco Civil da Internet and the NETmundial. Not surprisingly, these three elements shared one key aspect that became central to all Brazilian efforts to influence the reorganisation of the global governance regime. The practices were based on multistakeholderism and were used to support Brazil's governance entrepreneurship practices. The association between multistakeholderism and "governance entrepreneurship" in the Brazilian context has not yet been noticed or investigated by governance or legal scholars, which suggests that multistakeholderism can, under certain operational conditions, create a policy-making environment stimulating innovation and "governance entrepreneurship".

C. Multistakeholderism and governance entrepreneurship

The investigation of the operation of multistakeholderism in the Brazilian Internet governance system indicates the existence of a relationship between this policy-making operation and an increase in "governance entrepreneurship" activities developed in and through the Brazilian governance system. These operations are evidenced in the structure and in the acting of CGI.br in its own activities and also in the Marco Civil da Internet process and in the Netmundial meeting. The analysis of these three spaces suggests that multistakeholderism is a mechanism able to trigger "governance and regulatory entrepreneurship". It is important to note that this suggestion was observed in policy-making structures and practices where multistakeholderism operates in optimal conditions. The units analysed, particularly the Brazilian policy-making engine, relies on the use of consensus-oriented decision-making processes to balance its other critical elements: a) democratic mechanisms

promoting inclusion; b) the high level of technical expertise of governance actors and policy-makers.

This relationship is partially grounded in the development of a governance system based on policy-making processes characterised by openness, democratic inclusion, technical expertise and consensus orientation. The combination of these factors influences the development of "governance entrepreneurship" practices as it promotes a policy-making environment where actors develop trusted, stable and plural relations. The increased level of trust originated from the consensus-oriented decision-making process stimulates higher levels of cooperation and leads to a more effective exchange of resources and strategic information between actors and structures.

This collaborative policy-making environment is also influenced by multistakeholderism's higher level of inclusion. The plurality resulting from its openness and democratic participation structure integrates in the policy-making process a diverse set of interests and expertise that uses the resources shared to promote policy cross-fertilisation and supports the development of a governance system that encourages governance entrepreneurship.

The dynamic observed in Brazilian governance practices indicates that the operation of multistakeholderism in optimal conditions influences the development of governance entrepreneurship practices. While it is important to note that these activities were also influenced by the country's interest in developing strategies to strengthen its position in global politics, the main factor supporting the flourishing of "governance entrepreneurship" practices in Brazil were the strong role played by multistakeholderism in the country's Internet governance system. The operation of multistakeholderism, particularly its embodiment in CGI.br structure and policy-making activities, can be observed, as already noted, in the process leading to CGI.br principles for the use and governance of the Internet in Brazil and in the Marco Civil da Internet law process. This relation with multistakeholderism also helped generate a higher level of interaction between stakeholders and a governance environment able to support a generative governnace space where innovation and entrepreneurship practices could flourish.

While the relevance of the relationship observed between the operation of multistakeholderism and "governance entrepreneurship" practices is an important element that needs to be better investigated, it is also relevant to note the limited capacity of this research to generalise these findings to other governance regimes. Whereas the identification and investigation of this relationship was not initially part of the research guiding this thesis, this secondary finding indicates an under-researched phenomenon that once better studied may be crucial to unpack the effects of multistakeholderism in a broader range of governance and regulatory activities.

III. Some Concluding Remarks and Observations

Multistakeholderism was embraced by the Brazilian Internet governance system and was used in different areas of its policy-making structures and processes, particularly in the design and operation of core elements like the CGI.br and the Marco Civil da Internet law. Although the development of multistakeholderism in the Brazilian Internet governance system was initially inspired by some practices adopted by members of the Internet's early technical-regulatory communities, the operation of multistakeholderism in Brazil was adapted and developed using its own rationale. Combining inclusion and expertise and using consensus to promote trust and resource sharing, the Brazilian Internet governance mulstistakholderism developed an operational mechanism able to balance inclusion and expertise and at the same time promote policy cross-fertilisation and innovation.

Initially aimed to promote a governance approach able to coordinate and integrate Internet development policies and activities in Brazil, the adoption of multistakeholderism in the Brazilian Internet governance system led to the inclusion in the governance structures and processes of all major communities engaged in the technical, economic and regulatory aspects of the Internet in the country. Consequently, the committee was left with the need to include in its policy-making operation different actors with varying levels of technical and regulatory expertise. To assemble policy-making processes and practices able to include and reduce the expertise gap between stakeholders, the CGI.br embodied multistakeholderism in its

operations and developed a fruitful policy-making mechanism promoting not only the increase of the governance system's legitimacy, but also a generative pattern stimulating governance and regulatory innovation.

The analysis of the policy making adopted in the CGI.br and applied in the Marco Civil da Internet law drafting process, which are central aspects of the Brazilian Internet governance system, exposes important insights about the ways multistakeholderism operates and how it embodies a generative element able to affects governance and regulatory practices. The observation of CGI.br's international activities, particularly through the NETmundial meeting, indicates how the operation of multistakeholderism promoted not only regulatory innovation, but also governance entrepreneurship.

Using multistakeholderism through the promotion of the CGI.br, the Marco Civil da Internet law and the Netmundial meeting, the Brazilian government aimed to influence the design of a global Internet governance system adopting the Brazilian approach to multistakeholderism in a bid to support its historical bid for international leadership. As noted by Lucero (2011, 203-204) is his seminal work in Brasil, "Governança da Internet - aspectos da formação de um regime global e oportunidades para ação diplomática" (Internet governance – the development for an international regime and diplomatic opportunities):

> "O regime brasileiro para a governança da Internet foi construído a partir de experiencia genuína com a gestão de recursos da Internet, em colaboração entre setores acadêmicos, não governamental e governamental. O Brasil criou modelo de gestão aberto à participação equilibrada de diversos setores da sociedade, coordenado pelo Comitê Gestor da Internet no Brasil (CGI.br). com a estrutura de que dispõe, o Brasil confere legitimidade e substância à sua participação internacional. A ação diplomática no contexto do regime de governança global da Internet pode-se beneficiar de estreita coordenação com o CGI.br.
>
> A extensão e diversidade da pauta e governança da Internet justificam a elaboração de estratégia para o acompanhamento coordenado, pela chancelaria brasileira, dos temas de interesse nacional. Cabe à diplomacia

brasileira articular parcerias que reforcem a legitimidade e o peso específico das demandas nacionais. Nesse intuito, recomenda-se persistir na defesa de regime de governança da Internet que seja transparente, democrático e representativo, no contexto da formação da sociedade da informação inclusiva, centrada na pessoa e orientada ao desenvolvimento, com a observância integral do consenso emanado da CMSI. Deve o Brasil, por seu peso específico no cenário internacional, pelas condições de aportar experiencia própria e pelas qualificações técnicas e tecnológicas existentes no País, participar plenamente de modo sistêmico e coordenado, de todos os foros, negociações, mecanismos e articulações que tratem de temas relacionados à pauta da governança da Internet."[132]

Broader conclusions about the dynamics informing the operation of multistakeholderism in the Brazilian Internet governance system and the direct and indirect effects thereof can be drawn out from the observations presented in this chapter. The operation of multistakeholderism in the Brazilian Internet governance system suggests that multistakeholderism, when operated under optimal conditions, replicates the same generative pattern observed by Zittrain (2006, 2008) in the technical and economic operations of the Internet and can influence the development of innovative governance and regulatory practices. Moreover, the analysis of the operation of Internet governance multistakeholderism in Brazil reveals a well-elaborated and complex political, economic and legal project aimed at supporting

[132] The Brazilian regime for Internet governance was built from genuine experience with the management of Internet resources, in collaboration between academic, non-governmental and governmental sectors. Brazil created a management model open to the balanced participation of several sectors of society, coordinated by the Internet Steering Committee in Brazil (CGI.br). With the structure at its disposal, Brazil confers legitimacy and substance to its international participation. Diplomatic action in the context of the global Internet governance regime may benefit from close coordination with CGI.br.
The extension and diversity of the agenda and governance of the Internet justify the elaboration of a strategy for the coordinated monitoring by the Brazilian Foreign Office of topics of national interest. It is up to Brazilian diplomacy to articulate partnerships that reinforce the legitimacy and specific weight of national demands. To that end, it is recommended to persist in advocating a transparent, democratic and representative Internet governance regime in the context of inclusive, person-centered and development-oriented information society formation, with full respect for the emanated consensus from the WSIS. Brazil, due to its specific weight in the international scenario, must be able to participate fully in a systemic and coordinated manner in all forums, negotiations, mechanisms and articulations that deal with themes related to the Internet governance agenda.

governance entrepreneurship practices directed at influencing the Internet's international governance system through the promotion of key elements like the CGI.br and the Marco Civil da Internet law. Not surprisingly, all these elements reinforce the capacity of Internet governance multistakeholderism to generate more legitimate and innovative governance structures and regulatory instruments.

CONCLUSION

This thesis has investigated the development and operation of multistakeholderism in the Brazilian Internet governance system. It researched how multistakeholderism operates in the Brazilian Internet governance policy-making and what effects this operation had on governance and regulatory practices and regulatory elements. It concentrated its research observation on and unpacked different elements and processes that guided and supported the operation of multistakeholderism in the Brazilian Internet governance system, the effects of this operation in regulation making and how the Brazilian government used this particularly governance mechanism to increase its influence in the international scenario. Specifically, the thesis mapped the development of multistakeholderism in the Brazilian Internet governance and analysed the inclusion-expertise-consensus mechanism supporting the operation of multistakeholderism in Internet governance practices. It also examined how the development of this operational mode and its positive effects can be used to understand and conceptualise multistakeholderism's policy-making potentialities and limitations.

One of the main objectives of this thesis was to make sense of the operation of multistakeholderism in policy-making. It initially sought to explain how this operation take place, particularly indicating its core dynamic mechanism and explaining the role played by its central elements: inclusion, expertise and consensus. Secondly it sought to identify and explain what effects the operation of multistakeholderism had in Brazilian Internet policy-making and in its regulatory outcomes. Finally, the thesis problematised the elements supporting the operation of multistakeholderism in the Brazilian governance system, specially its inclusion-

expertise-consensus policy-making engine. It also attempted to note and discuss some of the generative and entrepreneurship elements associated to multistakeholderism operation in Brazil.

These research objectives were reached through the investigation of three different dimensions of the Brazilian Internet governance system: its governance structure, a national policy-making operation and an international policy-making practice. These research sites were observed and analysed through methodological tools, theoretical elements and conceptual elements borrowed from socio-legal academic literature on Internet governance, Internet regulation, and governance and regulation studies.

The investigation of the operation of multistakeholderism and the use of a multidimensional approach adapted from governance scholars to observe this process, was particularly helpful to explain some of the main effects of multistakeholderism in governance structures and regulation making processes. The use of governance and regulation elements to structure and conceptualise the notion of multistakeholderism operation also allowed to the research project to be situated within wider trends of global governance and regulation processes. The operation of multistakeholderism was analysed in this thesis using a socio-legal conceptual framework based on the application of a multidimensional approach to policy-making operation. The use of a policy-making process conceptualised in three interconnected stages offered an alternative mechanism to trace and analyse these operations in more detail.

Drawing from social-legal studies on governance and regulation the thesis shed light on multistakeholderism in Internet governance and its internal operational rationale. Multistakeholder structures and practices were analysed exposing multistakeholderism' s effects on Internet governance and Internet policy-making projects, specially stressing its generative and entrepreneurship potentialities.

I. The operation of multistakeholderism in the governance actors

The operation of multistakeholderism in the CGI.br and in the ANATEL, two main actors of the Brazilian Internet governance system, was examined in the research as one of the key sites where multistakeholderism occurs in the Brazilian Internet governance. Despite its critical influence on the design of governance structures and policy-making processes, the operation of multistakeholderism has not being properly investigated or problematized in a broader range of academic scholarship. Arguably, the lack of proper methodological elements able to assess and compare policy-making operations in multistakeholder and non-multistakeholder environments has not been properly addressed and contributed to this phenomenon not being fully investigated. More significantly to the findings of this research, the assessment and measurement of the operation of multistakeholderism in Internet policy-making has not been investigated at and theorised as central elements to unpack multistakeholderism operation and its potentialities and limitations in policy-making.

This thesis has not only questioned the lack of mechanisms to analyse and compare the operation of multistakeholderism in Internet policy-making, it used a multidimensional policy-making approach to trace and analyse how multistakeholderism operates and how it affects governance and regulatory mechanisms. Based on a policy-making approach conceptualised over an interlaced three-layer dimension (input, throughput and output) this thesis observed and evaluated the granular elements supporting the operation of multistakeholderism in Internet policy-making in two different governance actors and pointed out the similarities and also the contrasting rationalities underpinning the policy-making operation of a multistakeholder and a non-multistakeholder governance actor.

Mapping the interplays of multistakeholderism operations in Internet policy-making and comparing them to similar practices in non-multistakeholder actors were vital to understanding the elements and procedural dimensions that inform and influence the operation of multistakeholderism in policy-making practices. These processes of mapping and comparison were also relevant to provide refined insights about how these elements interact, particularly the ones related to inclusion, expertise

and consensus, and how they combine to support multistakeholderism's perceived higher level of governance legitimacy and innovation. The analysis of the operation of multistakeholderism in the Brazilian Internet governance actors provided important evidence supporting the impact of multistakeholderism on the acceptance and efficacy of governance arrangements and indicated some of the operational mechanics supporting its generative effects.

II. The operation of multistakeholderism in the regulation-making process: the regulation of network neutrality in the Marco Civil da Internet

The second governance practice observed and examined in the thesis was the regulation of network neutrality in the Marco Civil da Internet drafting process. The investigation of how multistakeholderism operated in one specific regulation-making practice like the Marco Civil da Internet drafting process was crucial to obtain a more fine-tuned understanding of the elements and dynamics supporting the operation of multistakeholderism in Internet policy-making in Brazil. By examining the participation of a multistakeholder governance actor, the CGI.br, and a non-multistakeholder one, the ANATEL, the research was able to observe and analyse the interactions and interplays between internal and external aspects influencing these actors during a very sensitive and influential policy-making practice. The investigation of the policy-making interactions supporting the regulation of network neutrality, a techno-legal policy mechanism (Hoskins, 2017, 2), was also relevant to understand how multistakeholderism operates in a multi-faceted and demanding policy-making environment that connects a plurality of interests and different social, economic, and cultural interests.

The evidence extracted from the investigation of the participation of the CGI.br and the ANATEL in the regulation of network neutrality in the Marco Civil da Internet was crucial to clarify the operation and effects of multistakeholderism in Internet governance in Brazil. Observing and analysing these two actors during the drafting process of the Marco Civil da Internet, especially their practices directed to influencing

the regulation of network neutrality, demonstrated important operational differences between the CGI.br and the ANATEL. It stressed the importance of the interplay between inclusion, expertise and consensus in the operation of multistakeholderism in the CGI.br policy-making and how these elements, when substantially balanced, promoted the development of policy-making cross-fertilisation and governance generativity.

III. The operation of multistakeholderism in the international governance level: the NETmundial meeting

The third and final practice where the operation of multistakeholderism in Internet policy-making was presented and investigated in this thesis was the Global Multistakeholder Meeting on the Future of Internet Governance – NETmundial. The analysis of this particular practice provided an alternative point of view to the study of the operation of multistakeholderism. The NETmundial, differently from the other governance practices, was structured to produce a declaration containing non-binding international principles guiding the future of Internet governance.

The investigation of the CGI.br and the ANATEL acting during the NETmundial meeting was important to observe the dynamics supporting multistakeholder policy-making under a scenario with circumstances and characteristics different from the other practices studied. It highlighted in particular the need to integrate into the policy-making process actors with different, and sometimes completely opposing cultural, economic and legal values and interests; and the challenges of doing do effectively.

The analyses of the CGI.br and the ANATEL of the participation in the NETmundial meeting was important to reinforce the policy-making operational dynamics perceived and sketched in the other practices investigated. It highlighted and clarified, in a different scenario, the existence of a policy-making mechanism based on the combination and balance of three factors: inclusion, expertise and consensus. It also indicated more clearly that the consensual orientation mediates dialogue and resource sharing between stakeholders that despite being included, have

different levels of expertise and understanding of the techno-legal aspects underpinning the operation of Internet and its regulation. The observation of the NETmundial also revealed an incidental finding: the use of Brazilian governance practices, like the Marco Civil da Internet and the CGI.br itself, by the Brazilian government to influence the Internet governance global agenda through the exercise of governance entrepreneurship.

IV. Key Findings: The Theoretical Implications of the Thesis

The investigation of the operation of multistakeholderism in the Brazilian Internet governance system, particularly in the three governance practices analysed in this thesis, has made it possible to identify and visualise the core elements and processes that support and shape the operation of multistakeholderism in Internet policy-making in Brazil. In a more specific perspective, the research underpinning this thesis exposed key aspects of the operation of multistakeholderism in the Brazilian Internet governance system pointing to its core operational elements, its consensus driven rationale and the effects that this operation have in the governance structure and in the regulatory framework developed. The role played by inclusion, expertise and the consensus-driven approach came to be particularly apparent during the investigation and analysis of the operation of multistakeholderism in the Marco Civil da Internet and in the NETmundial. As a result of these observations, this thesis proposed an explanatory re-contextualisation of how multistakeholderism operates in Internet policy-making processes. It also has suggested viewing and theorising multistakeholderism as a generative element able to promote governance entrepreneurship and regulatory innovation.

This thesis used a multi-dimensional policy-making approach to introduce two important aspects that seek to explain the operation of multistakeholderism in the Brazilian Internet governance system. It identifies the interconnections and interplays between inclusion and expertise and the consensus-driven operational process able to balance the contrast between these two elements and promote a policy-making environment prone to collaboration and resource sharing. Tracing these elements and

presenting its internal relations provides Internet governance and global governance scholarship with the analytical elements to explore and interrogate in greater detail policy-making processes based in multistakeholder mechanisms. Moreover, it indicates which operational mechanisms need to be better investigated to understand multistakeholderism's policy-making potentialities and limitations.

The research also found that the operation of multistakeholderism in the Brazilian Internet governance system reflected a generative element supporting the development of more legitimate governance structures, inclusive policy-making processes and innovative regulatory instruments like the CGI.br, the Marco Civil da Internet Law and the Netmundial meeting exemplifies. All these practices were able, through the operation of multistakeholderism, to successfully mediate the inclusion of a broader number of participants in a highly specialised policy-making space. At the same time, multistakeholderism's consensus rationale was able to connect these diverse and unbalanced set of participants in a way that promoted trust and resource sharing. This policy-making operational mechanism created a very rich space where different sources of information, resources and expertise stimulated cross-fertilisation and the development of innovative governance and regulatory solutions.

Furthermore, exploring this generative pattern, the thesis proposed the novel concept of multistakeholderism generativity. Defined as the capacity of multistakeholderism, when operated under optimal conditions, to promote a policy-making process able to support more legitimate and innovative governance and regulatory processes, multistakeholderism generativity was particularly useful to comprehend in a theoretical perspective, multistakeholderism potentialities and limitations in Internet policy-making processes. It offers an alternative way to theorise and problematise multistakeholderism use and the conditions that affect the result of its implementation not only in Internet policy-making, but also in others international governance regimes.

The thesis studied three distinct governance practices where the operation of multistakeholderism was considered one pivotal aspect of successful and innovative regulatory interventions. The analysis of these multistakeholder operational sites was crucial to expose important elements and mechanisms orienting this generative effect

and it provided an evidence-based theoretical explanation of multistakeholderism's potential.

The combination of these two contributions, the indication of multistakeholderism operational rationale and its generative characteristics provide an alternative theoretical instrument to access multistakeholderism practices, particularly to investigate and identify what operational conditions and which operational elements can effectively shape more inclusive, legitimate and innovative policy-making processes.

In addition to this, the thesis developed another novel concept of governance entrepreneurship. Characterised as the development by stakeholders, independently of their identity (governments, civil society, business and technical community), of practices strategically designed to influence and shape a given governance system's conceptualisation, structure and operation, the concept of governance entrepreneurship was particularly useful to characterise and question recent activities of the Brazilian government on the international governance arena. The "governance entrepreneur" strategically uses governance crisis or opportunities to develop practices aiming to shape the governance system in accordance with its political and economic agenda. The concept, as observed in the analysis of the Brazilian government acting in the Internet governance scenario is an important instrument to explain the rationale supporting recent influential governance shaping developments noted in international Internet, environment and financial governance.

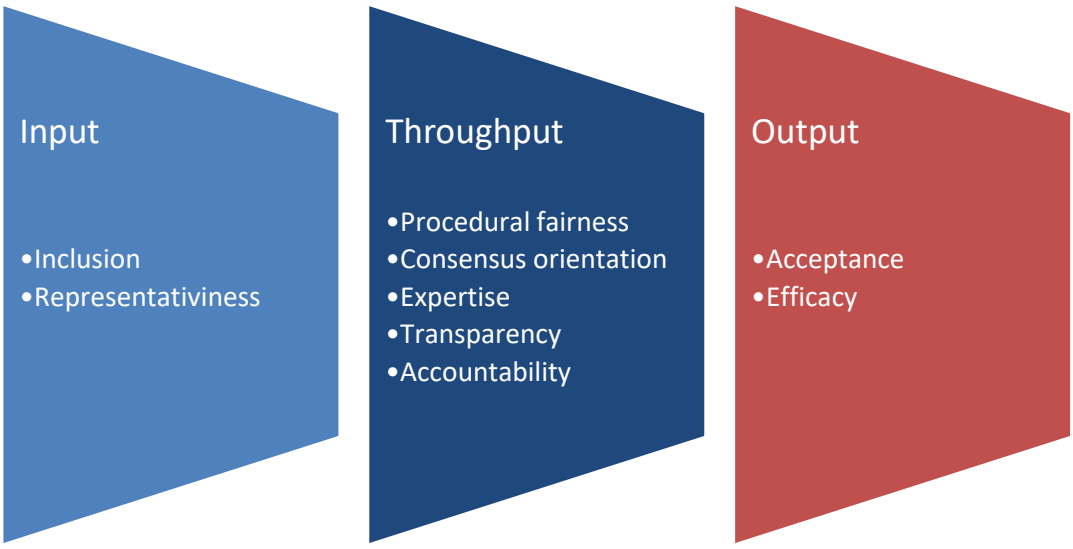
V. Key Findings: The Policy Implications of the Thesis

The work carried out through this research potentially contributes not only to Internet policy-making but also to other governance regimes susceptible to operating multistakeholderism. Combining theoretical elements and observations from scholars working in the field of Internet governance and governance and regulation this thesis investigated the operation of multistakeholderism in real policy-making practices and observed its "on the making" practices and effects. Moreover, it questioned the lack of theoretical models and instruments to observe and assess multistakeholderism's

effective functioning. The analyses carried out in three different operational policy-making practices revealed a dynamic involving a complex set of legal, social, economic, political, and cultural relationships and interactions between stakeholders that in order to be better observed and analysed demands the development of theoretical and methodological instruments able to capture the plurality and complexity of these dynamics.

The thesis has shown that in order to successfully observe and analyse the operation of multistakeholderism in real policy-making practices, particularly the ones carried out in the Internet governance field, it is crucial to: a) develop a methodological tool encompassing a detailed group of criteria to assess the operation of multistakeholder policy-making processes; b) understand the operational elements backing multistakeholderism policy-making and how to evaluate them; c) develop a conceptual map indicating what operational conditions enable multistakeholderism generativity and stimulate innovative and legitimate policy-making outcomes.

This research addressed directly these three concerns. Initially it proposed a multidimensional assessment tool to observe and evaluate, in a systemic or stage-by-stage perspective, policy-making operation in multistakeholder processes. The suggested multi-dimensional model observes and assesses policy-making operations in the Input, Throughput and Output stage by investigating the following dimensions and elements:



(Fig. 7)

Secondly, the research also indicated a set of criteria framing what aspects should be observed in each element, the questions guiding this observation, how the element should be observed, the questions leading this observation and indicates assessing criteria and its levels of accomplishment as the table below exemplifies:

Transparency
What is observed: Transparency of Internet governance and policy-making structures, processes and outcomes; **Guiding question:** What is the level of transparency of policy-making structures and process?
How it is observed: a) Level of publicity and traceability of policy-making processes. **Guiding question:** Is there publicly available information about the policy-making process? b) Information access. **Guiding question:** Is there obstacles to access information related to policy-making processes? How can information be accessed?
Assessing criteria: a) Optimal level is attributed when governance structures and policy-making processes have enforceable reporting obligations that allow any interested stakeholders or external actors to access information about a specific decision. b) Intermediate level is assigned when despite the existence of transparent governance structures and policy-making processes there is no access to internal decisions and limited enforceable reporting attributions. c) Inadequate level will be attributed when only members of the governance arrangement have access to critical information about policy decision making and there are reporting limitations (Take, 2012a, 502).

(Table 08)

The indication of a detailed evaluation toolkit provides to policy-makers an important starting point to develop their own instruments to observe, evaluate and compare their policy-making activities, particularly the ones applying a multistakeholder approach. This is an important mechanism supporting the development of more effective policy-making operations. It also allows policy-makers to realize pre-assessment testing to analyse if multistakeholderism is the adequate policy-making rationale to be used in a given policy process. It is a mechanism that can be used to plan the deployment of multistakeholderism, assess its ongoing

operation, and monitor its operational level in order to promote its optimal functioning.

In addition, this thesis also contributes to policy-making by exposing to policy-makers multistakeholderism's core operational elements and its key dynamic. Revealing that multistakeholder policy-making is characterised as a process through which inclusion and expertise are translated into governance arrangements and regulatory instruments, where higher levels of inclusion and representativeness are mediated via a consensus-driven decision-making approach that alleviate the tensions from the apparent contrast between inclusion and expertise. The understanding of this rationale facilitates the comprehension of which elements and how they should connect and interact to deploy a multistakeholder policy-making process able to reach all its generative potentialities.

The combination of these contributions provides important practical tools and instruments to enable "on the ground" policy-makers to assess and evaluate the implementation or the operation of policy-making processes adopting multistakeholderism. Moreover, it offers an alternative mechanism to monitor these processes and adopt corrective measures in order to promote its optimal operation and the development of more inclusive, legitimate and innovative policy-making processes.

VI. Limitations to the Study Findings

The research endeavour carried out through this thesis was concluded by indicating three suggestions. One proposal to use a multidimensional policy-making assessment instrument to observe and analyse the operation of multistakeholderism in Internet policy-making. Another proposes a generative effect to multistakeholder policy-making processes when operated in optimal circumstances. It also has drawn on insights from the activities developed by the Brazilian government, through the international promotion of CGI.br, the Marco Civil da Internet and the NETmundial, to establish a relationship between the deployment and operation of multistakeholder policy-making and the exercise of governance entrepreneurship. Despite the

relevance of these observations to a wider academics and policy community, it is important to note that the research and the findings presented in this thesis have some limitations that are worth indicating here.

Initially it is important to note that all findings of this research, including the indication of multistakeholderism policy-making operational rationale, and the theoretical concepts of multistakeholderism generativity and governance entrepreneurship were developed as a result of the investigation of governance practices developed in the Brazilian Internet governance system. This is crucial element influencing this research. The selection of this particular governance system and these governance practices has had a direct effect over the observations supporting the development of these concepts. The investigation of other governance systems or different governance practices could have produced alternatives perceptions and diverse theoretical concepts. Interestingly, this same limiting element provides some future research opportunities that will be explored in the last section of this chapter.

Secondly, the research into the operation of multistakeholderism in Internet policy-making was significantly influenced and substantiated through elements and dynamics extracted from the observations of the Brazilian Internet governance system and the extensive analyses of the literature on Internet governance, global governance and regulation theory. It is important to recognise that these sources influenced significantly the perception of the phenomenon investigate in its theoretical framing and also in the selection of the elements observed and analysed during the operation of multistakeholderism in the Brazilian Internet governance system. However, it is important to acknowledge the limitations of this set of theoretical and methodological lenses as they shape directly the way the operation of multistakeholderism was analysed, particularly by informing which elements were focused on during the research process.

These limitations, when combined with the methodological framework used on this research, the case study approach, are important. While it is important to recognise the strengths of the case study research, particularly in the in-depth investigation of phenomenon like the operation of multistakeholderism in a given

governance space, it is necessary to recognise also that this research method produces findings with lower level of generalisation. The generalisation level is lowered further by the points listed above, particularly the characteristics of the phenomenon investigated and the theoretical framing used to carry the investigation. Yet it is important to recognise that these limitations also indicate opportunities, as the next section will explore, to develop further the research supporting this thesis and its theoretical and policy-making contributions.

VII. Recommendations for Further Research

Identifying the limitations of this thesis is important. It does not express a negative perspective, but the perception of being transparent and ethical inn doing research. Moreover, it is also as an important element to guide future research, particularly to expand and validate in other research scenarios the theoretical concepts and the methodological instruments developed in this research.

One particular aspect to be explored further is the investigation of various governance processes and practices that operate multistakeholderism in their policy-making activities. Examining different governance practices could provide extremely rich opportunities to explore in different governance scenarios, including regimes not associated to Internet, the proposed operational elements and dynamics supporting multistakeholderism policy-making. The observation of a broader set of governance practices and processes would be crucial to increase the level of generalisation of the operational rationale and the elements supporting multistakeholderism that were proposed in this thesis. Comparative studies could demonstrate more convincingly multistakeholderism's proposed operational rationale and effects.

The investigation of new governance practices would also allow additional interrogation of the concept of multistakeholderism generativity proposed in this thesis. The investigation of different sites and the analyses of other elements informing the operation of multistakeholderism could be important to refine and enrich the concept. The access to a more plural and variable group of governance practices operating multistakeholder policy-making process could be crucial not only to collect

evidence validating and reinforcing the concept of multistakeholderism generativity, but also to develop a more granular understanding of its conceptual elements and effects in a wider set of policy-making processes.

Besides further development of the concept of multistakeholderism generativity, future research could also extend academic examination into the concept of governance entrepreneurship. Governance entrepreneurship could assist the investigation and theorisation of other areas of Internet governance, global governance and international relations where particular stakeholders, more frequently civil society and non-governmental bodies, develop a series of activities and processes aiming to actively shape the governance concept, structure, operation or regulatory framework of a given governance system. The concept could even be useful to conceptualise and interrogate recent governance phenomenon observed in a variety of governance *loci* in the international arena like the International Internet governance and the WISIS-IGF process, the international financial system governance regime developed in the aftermath of the 2009 global financial crisis and also in national and regional levels like the development of the European General Data Protection Regulation – GDPR or the process leading to the British Exit of the European Union. Moreover, the relation between multistakeholderism and the development of governance entrepreneurship practices should be further observed and analysed.

Other important research developments could focus on exploring the further application of the multidimensional assessment mechanism proposed in this thesis to other multistakeholder governance processes or even to non-multistakeholder practices. Better tuning the proposed instrument through it empirical use in other policy-making processes could push forward the development of a more comprehensive and granular set of practical mechanisms supporting the investigation and practice of multistakeholderism and will contribute significantly to demystify its operation in policy-making.

Although further investigation on the aspects proposed above suggests the need to investigate only the positive aspects of multistakeholderism policy-making operation, it is important to note that more research initiatives should also observe

and interrogate some of the less visible and discussed negative aspects noted on the operation of multistakeholderism in Brazil. Research focus on the lack of accountability of actors, the development of epistemic communities and the tendency to governance normalisation should be better investigated and could produce ground-breaking insights on the ways in which multistakeholderism is imagined and operated.

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