New Technologies And The Need Of A Uniform Legal System
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1. The subject of legal regulation of the Internet.

The attempts made so far at legal regulation of the cyberspace are based mainly on the already existing regulations of national spaces. They are made by adopting the existing rules of local law and international private law to actions taken in the Internet. But those regulations are only of a partial character and limited scope of territorial application and often prove that traditional legislative mechanisms cannot fully follow the development of the Internet and the possibilities it has to offer.

Following L. Lessig, one can divide the spheres of Internet activity onto three layers:[2] the very core of the way the Internet functions is the "physical" layer, within which the messages are conveyed. It consists of computers and computer-wires, which, interconnected, make up the very international net. The "physical" layer is surrounded by the "logical" layer, also called the layer of code, which allows for the abovementioned equipment to function properly. Here we are dealing with protocols, which define the Internet and software, upon which these protocols rely. The widest and most "outer" layer of the Internet is the layer of "content", which describes everything being conveyed by these intertwined computers and wires. These three layers respectively address: the role of technical coordination of the Internet, which allows different components of the Internet to interact; technical coordination of the key protocols and addresses and numbers, which lie at the very fundaments of technical operation of the Net and the management of political policy issues, which should definitely be the subject of open discussion of governments, business and civil society. [3]

The two first of the abovementioned issues are dealt with by a wide scope of NGOs, using open procedures, ensuring effective cooperation among a wide scope of participants, including representatives of the governments. The third element is however the traditional domain of the national governments, acting through their legislative procedures. For a feasible functioning of the global net it is essential to make sure that all partners of this dialogue are aware of the existence of the three layers and their mutual influences. For the thesis of this paper the key is the idea of the middle layer, the so-called layer of code, as the very aim of its functioning is the delimitation of competencies between the elements influencing the functioning of the Net and the means by which this influence may be achieved within the political or social spheres. It is essential to pay close attention to the areas in which the code-layer interacts with the layer of content. It is at the very meeting point of these two areas, where the legal issues concerning the Internet lie. This fragment of the cybersociety is of great importance, as the very management of the code-layer relies upon the already functioning procedures (many organizations taking part in the management of the code-layer are the traditional telecommunication lines operators, but there are also new, self-regulating units, related directly to the Internet as such), where any forms of cooperation in managing the content layer are at the very initial phase of their development.

2. Who rules the Net?

Let's look at the evolution of the way the code-layer has been managed through the

years. In the 1980s the technical supervision over what was going on with the Internet was conducted by a number of agreements and "Requests for Comments", originated by the U.S. Government Agencies, sent out to e.g. *US Defence Advanced Research Project Agency* (ARPA). After the creation of the *Internet Society* (ISOC) in 1992 the support of these action was taken over by this new entity. This organization with time developed to be a team of interrelated institutions and committees, amongst which the *Internet Architecture Board* (IAB) was the most important, next to the *Internet Engineering Task Force* (IETF), which together have created technical standards and have introduced the Domain Names System (DNS, discussed in more detail in further part of this paper). The *Internet Assigned Numbers Authority* (IANA) was also functioning in similar areas, as based on an agreement with ARPA, until 1998, when the *Internet Corporation for Assigned Names and Numbers* (ICANN) was created, with the aim to fulfil the abovementioned duties and new tasks, based on financial support from entrepreneurs and an agreement with the US Department of Trade.[4] Despite the fact that those organizations were initially within the structure of U.S. governmental agencies, their structure was set out to be autonomous and independent. Standards and structure of the way those agencies function were designated by their participants (mainly voluntaries) in a process based mainly on a discussion on technical issues and in-depth analysis of the existing circumstances.

The entity, which evokes most controversy and receives most media attention is without a doubt the *Internet Corporation for Assigned Names and Numbers* (ICANN).[5] ICANN is a private, non-profit organization, functioning under the law of the U.S. State of California. No member of its Board may serve as a governmental employee or an employee of any corporation, organization or international institution.[6] Founded in 1998 ICANN is responsible for the supervision of the technical standards and internet protocols. ICANN also makes the decisions when it comes to asserting county-codes for top-level domain names (*Country-Code Top-Level Domains*; ccTLDs). In the very concept of its creation ICANN was to "*represent the interests of all global internet society*",[7] which means, in accordance with the ICANN statute, that the corporation should conduct its actions in accordance with international law and conventions as well as local law, in a transparent manner, allowing for fair competition and free access to Internet markets.[8] In order to comply with these requirements, the composition of ICANN has been divided geographically (regions: Europe, Asia/Australia/Pacific, Latin America/Caribbean, Africa, North America). Before 1998 the work presently conducted by ICANN was done (also with the authorization of the U.S. Government) by the *Internet Assigned Numbers Authority* (IANA).

A Top-Level Domain (TLD) is an internet domain, above which there are no other domain-names in the hierarchical Domain Name System. There are two types of TLDs, both of which are created and managed by ICANN: these are country code TLDs (ccTLDs), always consisting of two letters, and generic TLDs (gTLDs), showing the profile of the activity conducted within a given webpage. When it comes to gTLDs, their character is usually strictly commercial, but when it comes to ccTLDs, the way they are managed may have far-reaching, international implications. Especially regarding the fact, that on one side there is no power given to the governments to influence the procedures of the designation of

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[4]	*Memorandum Of Understanding Between The U.P. Department Of Commerce And Internet Corporation For Assigned Names And Numbers,* 1998, available on 16 June 2006 at: http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm.

[5]	www.icann.org

[6]	Art. VI, section 4, *Bylaws For Internet Corporation For Assigned Names And Numbers a California Nonprofit Public-Benefit Corporation*, 28 February 2006, available on 16 June 2006 at: http://www.icann.org/general/bylawp.htm#VI-3.

[7]	*Memorandum Of Understanding…*, pt. II a.

[8]	*Bylaws…*, art. I, section 2.

the national entities, managing a ccTLD assigned to the country, on the other hand: ICANN enjoys a wide autonomy when it comes to designating those entities and the choice of geographical areas, being in disposition of a "national" domain-name. This is a very important – regarding from the international law point of view – vice of management of the DNS system, which so far has not gathered enough international and medial attention, therefore is worth a closer look within this paper.

3. Factual and legal basis for the regulation of electronic content.

It should be emphasized, that the way the ccTLDs are managed differs somewhat from the way the gTLDs are administered and created. This difference originates from the early days of the Internet and the rules set out by its creators. This stepping-stone of all internet regulation lies within the regulations of a key document: RFC 1591[9] (where RFC initially represents "Request For Comments", eventually however it became the name of documents setting the broadly accepted internet standards). [10] While RFC have no formal binding power, they are commonly accepted standards, which are agreed upon by the entities responsible for the technical functioning of the Internet.[11] The function of the RFCs is to secure an „ *equitable, just, honest, and competent*" execution of functions of the domain names managers.[12] The father of the DNS system, J. Postel, noticed the need to create a set of guidelines for the way the ccTLDs are created and assigned, which would be free from any arbitrary decisions and uncertainty when it came to its administration. That's why RFC1591 calls upon the ISO 3166, in order to avoid situations, where a private entity would by itself decide on the acknowledgment or refusal of a request for a ccTLD by a subject claiming to be internationally recognized.

Within RFC 1591 J. Postel called upon two-letter symbols of geographical regions, presently used by ICANN for ccTLDs (the database consists of over 240 categories). In practice however, ICANN does not strictly obey the dispositions of ISO 3166, creating by itself some of the abbreviations, functioning as ccTLDs not mentioned in the source-document, (e.g. .ac, .gg, .im, .je or .uk). Moreover, ICANN gives ccTLDs to regions, which have not attained the virtue of independent statehood on the international arena. [13]

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[9] *IETF Standard RFC 1591 Domain Name System Structure and Delegation*, 1994, availiable on 1 May 2007 at: http://www.isi.edu/in-notes/rfc1591.txt.

[10] Presently the RFC 1591 is completed by an ICANN document, entitled „*Internet Coordination Policy – 1: Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation*" from May 1999, available on 1 May 2007 at: www.icann.org/icp/icp-1.htm) and an IANA document: "*ccTLD Redelegation Step-by-Step Overview*" (available on 1 May 2007 at: www.iana.org/cctld/redelegation-overview-19jun02.htm). Other documents, relevant for managing the ccTLDs include: "*ICANN Yokohama Meeting Topic: ccTLD Delegation and Administration Policies*", 5 July 2000, available on 1 May 2007 at: www.icann.org/yokohama/cctld-topic.htm, a letter from GAC Chairman Paula Tworney "*Letter from GAC Chairman Paul Tworney Transmitting GAC Views on ccTLD Delegation and Administration Principles*", 23 February 2000, available on 1 May 2007 at: www.icann.org/committees/gac/twomey-letter-23feb00.htm as well as "*March 2000 ICANN Meeting in Cairo: ccTLD Delegation and Administration Policies*", March 2002, available on 1 May 2007 at: www.icann.org/cairo2000/cctld-topic.htm; documents mentioned by: M. Watkins, *Government Regulation of the Dot-ca Domain Name Space*, University Of Ottawa Law & Technology Journal, Vol. 2, No. 1, 2005, available on 29 April 2007 at:
http://www.uoltj.ca/articles/vol2.1/2005.2.1.uoltj.Watkinp.145-172.pdf, p. 152).

[11] Ib idem.

[12] RFC 1591, p. 4.

[13] A dangerous precedent is the ICANN decision from September 2005, when the first TLD (.cat) was assigned to the Catalonian language and culture. ICANN's decision was based on the ground of equal treatment of all cultures in cyberspace and was the result of a years-long campaign of Catalonian activists, fighting for their independence also outside the cyber-realm. The Spanish government was opposing the acknowledgement of the Catalonian domain name as a ccTLD, therefore the aim of the Catalonian activists was to receive a generic

The official way to broaden the catalogue mentioned in ISO 3166, and therefore acquire the rights to a ccTLD, is the accession to the UN, one of its agencies or becoming a party of the ICJ Statute. If the name of a state or a territory can be found on the list of members of one of the above mentioned organisations, this name automatically becomes a part of the ISO 3166 catalogue. [14] What is more, „*the named authorities are the trustees of the delegated domain and have the duty to serve the community.*"[15] Additionally, the named administrator is the "*trustee of the ccTLD for the nation, when it comes to the national domain, as well as the whole internet society*". [16] This regulation shows clearly, that ccTLDs are closely bound with a particular state or territory, to which they have been assigned. Important rules, set out in RFC 1591 consist of regulations concerning the agreement and retaining the status-quo. ICANN only redelegates the administration of a ccTLDs, when all "*parties having a legitimate interest in managing the domain name come to an agreement*", if this is not the case, it does not introduce any alterations. [17] Nevertheless there is an important exception to this rule: ICANN has the right to step in and change the existing state of affairs, should it find as improper the way the administration of the domain name is conducted, meaning a situation, where the proper administration of the domain is not assured.[18] Generally the role of ICANN consists of delegating the management of the domain name to an another organization, should such an action lie within the interest of proper functioning of the DNS system, in the view of ICANN and if there are no means of direct remedy to the accruing inefficiencies. [19] Therefore, RFC 1591 creates the competencies of ICANN, which are assigned to it in the light of its functions – deciding upon the management of a ccTLDs.

RFC is completed by another ICANN document - Internet Coordination Policy (ICP-1, "*Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation).*"[20] In accordance with the rules set out in RFC 1591, ICP-1 gives the details concerning the administration and delegations of the ccTLDs. ICP-1 states, that the managers of the ccTLDs treat „*all group within the domain*", which ask to be given a domain name, equally and justly. [21] The managing entity has to be in disposition of the technical and practical ability to fulfil its duties, necessary to carry out its obligations as a ccTLDs register, in particular, the duty to operate a database in a accurate, feasible and dynamic manner and to actively cooperate with ICANN on all technical issues.[22]

ICANN is currently within the process of creating a new committee: Country Code

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TLD as a recognition of the unique character of the region, the culture and the people. In its decision ICANN called upon the sufficient distinction of the region, based not only on using its own language on the internet, but also on providing a broadband access, an user interface, a operating system, including a language version of the most popular office software and internet search machines. With this decision ICANN took on the responsibility to decide upon the sufficient formation of a nation and culture – a privilege so far available only to the members of the international community through the process of recognizing states. More on this controversial decision: P. Gerrand, *Cultural diversity in cyberspace: The Catalan campaign to win the new .cat top level domain*, First Monday, vol. 11, number 1, January 2006, available on 9 February 2006 pod:
http://firstmonday.org/issues/issue11_1/gerrand/index.html.

[14]   In the light of his above mentioned Policy, it is the ICANN, not the UN, that decides upon the recognition of the statehood of a developing nation, if not in the "real" life, than at least in cyberspace.

[15]   RFC 1591, pt. 2, p. 4.

[16]   P. Gerrand, *Cultural diversity in cyberspace… .*

[17]   RFC 1591, pt. 4 p. 5 and pt. 6 p. 6.

[18]   RFC 1591, pt. 5 p. 6.

[19]   M. Stuart Lynn, *President's Report: ICANN—The Case for Reform,* 24 February 2002, available on 11 June 2007 at: http://www.icann.org/general/lynn-reform-proposal-24feb02.htm.

[20]   *Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)*, May 1999, available on 11 June 2007 at: http://www.icann.org/icp/icp-1.htm

[21]   Ib. id., pt. c.

[22]   Ib. id.

Name Supporting Organization (ccNSO), which is supposed to consist of representatives of national domain names registrars (meaning the administrators assigned by ICANN). The basic duties of this committee are to oversee the development and the creation of global practice concerning the country domains and the support of the multifaceted consensus among domain names registrars and a general cooperation with the ICANN committees.[23] It is quite likely, that this organization might become an important forum for creating the policies concerning the ccTLDs, but in order for it to fulfil this function a clear division of competences between this new organization and the already existing GAC is essential, especially due to the fact, that within the ccNSO entities of different levels of state dependence shall be represented. If ccNSO should be controlled by ccTLDs registrars, which, on the other hand, are strongly influenced by national governments, it will become nothing more than a second GAC. If however ccNSO should consist in a large measure of entities independent of national authorities, the influence of politics onto the ccTLD will be even slighter than it is now.

ICANN shows a growing interest in regulating its relationship with the ccTLDs managers through written agreements. In order to do so it has created two model agreements: one of them is applicable in order to legitimize the already existing delegation to manage the ccTLD (the so-called "*legacy situation*")[24], where the management of a country domain has been handed over to a registrar without a contractual involvement of the national government. The other model agreement should find its application in a three-sided situation: it is designated to contractually bind the registrar, ICANN and the authorizing government (the so-called „*triangular situation*").[25] At present this second kind of agreement is represented in practice in Japan[26] (Japan Registry Service Co., Ltd., "JPRS"),[27] Australia[28] (.au Domain Administration Limited, "auDA"),[29] Taiwan[30] (Taiwan Network Information Center63 or "TWNIC")[31] and some other countries.[32] These agreements are not however widely popular as of yet, as a matter of fact only a few of them have been signed, despite the fact that the models have been introduced quite a few years back. The registrars seem satisfied with the present situation and reluctant to enter legally binding contracts with ICANN, probably assuming that they might loose some of its autonomy and would be subject to an even stronger influences from ICANN, when it comes to creating their policies, than they have been so far. National governments also seem reluctant to enter these agreements, as so far the states have more or less precisely regulated the Net with their national laws concerning the TLDs and these regulation would need alteration, should such an agreement be signed. States which have already enacted their national TLDs law will probably be even less interested entering those agreements, afraid of a competing legal system, deciding over their country

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[23]   *ICANN Bylaws*, art. IX, available on 11 June 2007 at: www.icann.org/general/bylawp.htm#IX.

[24]   *Model ICANN-ccTLD Manager Memorandum of Understanding—Legacy Situation,* 23 March 2002, available on 11 June 2007 at: http://www.icann.org/cctlds/model-legacy-mou-23mar02.htm.

[25]   *Model ccTLD Sponsorship Agreement—Triangular Situation*, 31 January 2002, available on 11 June 2007 at: http://www.icann.org/cctlds/model-tscsa-31jan02.htm.

[26]   *.jp ccTLD Sponsorship Agreement*, 1 April 2002, available on 11 June 2007 at: http://www.icann.org/cctlds/jp/.

[27]   http://jprp.jp/en/.

[28]   *.au ccTLD Sponsorship Agreement,* 25 October 2001, available on 11 June 2007 at: http://www.icann.org/cctlds/au/.

[29]   http://www.auda.org.au/.

[30]   *.tw ccTLD Sponsorship Agreement,* 26 March 2003, available on 11 June 2007 at: http://www.icann.org/cctlds/tw/.

[31]   http://www.twnic.net/English/Index.htm.

[32]   The full list is available on 11 June 2007 at: http://www.icann.org/cctlds/agreementp.html. The contracts bind amongst others Germany, United Kingdom, Lithuania, Namibia, Chile, Hungary, Panama, Finland and Brazil.

domain-name.[33]

The role of ICANN as the coordinating entity, managing the root-servers, who decides which domain-name is managed by which registrar, clearly depicts the fact, that each registrar, responsible for managing a part of the DNS assigned to it, functions only upon the "grace" of ICANN and it is this very corporation, that can single-handedly decide upon the change of a way a domain-name is managed, and which is more – about the entity managing it.

It is quite clear, that any regulation of a ccTLD by a national government (which means in fact the regulation of the DNS itself) stays completely out of the hands of any national government, as it is an integral part of Internet's architecture. The basic function of ICANN is to relegate the power to manage a domain name into the hands of another entity, if this action lies in the interest of the proper functioning of the DNS, in the view of ICANN decision makers and if there are no clear circumstances advising against such a solution.[34]

ccTLDs play a growing role in the ongoing debate on the international governance of the domain names, which increases as the states realize the potential that the DNS holds, as a centre of control of electronic communication and a mean of marking the state territory in the seemingly unlimited and borderless cyberspace. Therefore it seems only a matter of time, before the states decide to particularly regulate their ccTLDs.

To describe the present condition and the possibilities of regulating this area by independent states it is necessary to set out the scope, within which the very involvement of a state is at all possible. The basic supposition, that can be made, is the ascertainment, that the states may only prescribe as much, as they can adjudicate[35] (only the complete power to prescribe together with the power to adjudicate within a certain area can bring the full exercise of a state sovereignty, naturally within the limits set out by international law). Therefore, based on the territorial doctrine of exercising state power, the competencies of a state authority may be exercised only within the state geographical boarders – within its territory.[36] Sometimes the exclusive competence of a state, allowing it to regulate within its boarders, is limited by international treaties and conventions, which the state must respect as a part of the *pacta sunt servanda* principle. In the case of the DNS, the state power is further limited by the technical architecture of the Internet and the administrative infrastructure, based upon it. These limitations should be analyzed within the perspective of the three-sided relationship of the state, ICANN and the managing entity (the registrar), assigned by ICANN.

To be able to analyze this complex situation properly from the legal perspective, it is necessary to at least browse the technical functioning of the DNS, which prove the truth of L. Lessig's statement: "*code is law*". DNS plays the key role in the coordination of the electronic communication.[37] It allows to assign a certain IP number with a certain domain name, making

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[33]   Even the already existent three-sided agreements have not so far been signed by the respective governments, although these governments have officially acknowledged the operators of their ccTLDs.

[34]   Ct: M. Stuart Lynn, *President's Report: ICANN—The Case for Reform*, 24 February 2004, available on 1 May 2007 at: www.icann.org/general/lynn-reform-proposal-24feb02.htm.

[35]   H. H. Perritt, Jr., *Towards a Hybrid Regulatory Scheme for the Internet,* 2001, University of Chicago Legal Forum 215, p. 249 and p. 256, following M. Watkins, *Government ….*

[36]   D. Johnson, D. Post, *Law And Borders—The Rise of Law in Cyberspace*, 1996, 48 Stanford Law Review, nr 1367, p. 1368, available on 11 June 2007 at: http://www.cli.org/X0025_LBFIN.html; C. T. Struve, Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act,* 2002, 17 Berkeley Technical Law Journal 989, p. 1024, available on 11 June 2007 at:
http://paperp.ssrn.com/sol3/Delivery.cfm/SSRN_ID321901_code020813570.pdf?abstractid=321901&mirid=5;
A. Mefford, *Lex Informatica: Foundations of Law on the Internet*, 1997, 5 Indiana Journal of Global Legal Studies nr 211, p. 214, following M. Watkins, *Government...*

[37]   J. Zittrain, *ICANN: Between the Public and the Private—Comments Before Congress*, 1999, 14 Berkeley Technology Law Review 1071, available on 11 June 2007 at:
www.law.berkeley.edu/journals/btlj/articles/vol14/Zittrain/html/ reader.html, p. 1073.

the whole internet communication process much easier and user-friendly. One of the bigger virtues of the DNS is that it allows to keep the same domain name, whilst the IP numbers may change. The "translation" of the domain-names onto IP numbers and back again is the key function of the DNS servers. In order to allow for the interconnection of all servers, a database of all name servers for all TLDs is kept. This database – called the root zone file – is kept by operators of each TLD. In the case of ccTLDs they are the managers of these domain names. To allow for the feasible functioning of TLDs, the DNS has to clearly show, where the servers, assigned to each and every TLD, should be kept. This task – of assigning the competence of each name server – is done by Root Server A and its 12 accompanying servers, scattered over the world.[38] Root Server A is managed by ICANN. The database of the root-servers, called the root zone file, holds information on the localization of the server, which hold the databases for each category of the domain name.

It should be emphasized, that the power of ICANN is based mainly on the common agreement of all users. While ICANN holds its competences based on the decision of the US government, the power concerning the technical regulations emanates directly from the fact, that the most servers in the world acknowledge the Root Server A run by ICANN as a trustworthy domain names database.[39] It is this very „acknowledgment" of the root server to a database gives that source to the great power that ICANN holds. As a result of this practice, DNS has become a unique international regime, the functioning of which depends on the decisions of one standardization body. Regarding the fact, that today's internet communication in a large degree is based on the proper functioning of the DNS system, the hierarchical nature of the system and a widely accepted authority of the entity overseeing the system gives it a great advantage over any alternative, that might ever be introduced or want to take its place.[40] Individual users already have the possibility to set their software to alternative systems, other than the DNS. Nevertheless the position of ICANN is strong, as almost all servers and software applications are based on its root server.

It becomes clear, that any national regulation, concerning the ccTLD, must consider the fact, that the very subject of such a regulation does not lie exclusively within the competences of a national authority, quite to the opposite – it relies mainly on the architecture of the Net and lies in the hands of one entity, to the authority of which there is a common, silent acceptance from the users, or – to be more accurate – internet providers acting on their behalf. The possibility to regulate ccTLDs is therefore blocked by the technical structure as well as by the power of ICANN to set out the policies of delegating domain names, discussed in detail below. Despite the abovementioned remarks, it should be emphasized, that ccTLDs are somewhat different from gTLDs, when it comes to their character – they were set out to serve certain countries and their citizens.

Some hope onto this worrying situations sheds the strengthening of the already existent within ICANN *Governmental Advisory Committee (GAC)*. It consists of representatives of national governments and it is the only place, where the governmental representatives may strive to influence the ICANN policies. The basic area of GAC activities are the very issues of managing the ccTLDs. Based on the RFC 1591, in February 2000 GAC published *Principles for the Delegation and Administration of ccTLDs Presented by Governmental Advisory*

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[38]   More on this subject: P. K. Yu, *The Origins of ccTLD Lawmaking,* 2003, available on 11 June 2007 at: http://www.peteryu.com/cctld.pdf, p. 2.

[39]   K. G. von Arx, G. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control,* 2002, 9 Richmond Journal of Law and Technology 4, p. 77, available on 11 June 2007 at: http://law.richmond.edu/jolt/v9i1/Article4.html, p. 11.

[40]   More on his issue: http://www.opennic.unrated.net and http://www.open-rsc.org, as well as: J. Weinberg, *ICANN and the Problem of Legitimacy,* 2000, 50 Duke Law Journal 187, available on 11 June 2007 at: http://www.law.duke.edu/journals/dlj/articles/dlj50p187.htm p. 215.

Committee.[41] Within this document, GAC confirms the rules set out by J. Postel, which say, that the ccTLD manager is "*the trustee of the top-level domain for both the nation, in the case of a country code, and the global Internet community*". [42] Other, however, than in the text of the RFC 1591, the GAC Principles strengthen the position of national governments, stating that "*The delegee should recognise that ultimate public policy authority over the relevant ccTLD rests with the relevant government or public authority.*" [43] It should however be emphasized, that the GAC document holds no binding power, and its application is far lesser than that of the RFC.[44]

Despite the fact, that the international community defines "internet governance" in a far wider manner, than the actions of ICANN themselves, it is a fact, that this very corporation is the key element of most of the issues bound with this subject. The allegations against ICANN consist mainly of the unilateralism of U.S. government, manifested in the control of the DNS and the supervision of ICANN, that it exercises autonomously. They also cover the dissatisfaction with the way that the GAC works, where national governments hold only advisory position and their opinion in no way influences the ICANN policies. It is also a common belief, that the ICANN governance scheme does not satisfy the interests of both: developing and developed countries, as well as the internet providers and internet users, who are not sufficiently represented. Having in mind the constant changes and the lack of clear rules of cooperation, there is a growing agitation on the relationship among ICANN, domain names operators and national governments. The most significant allegations however concern the common conviction, that ICANN does not dispose of international legitimization. In order to solve these problems and to fight off the rising reproaches, there is forever more discussion on the necessity of limiting ICANN's power and of submitting it to international supervision, possibly based on an international agreement, narrowly defining the ICANN competences and substituting the present role of the U.S. government by international supervision. Moreover, what should be introduced is a healthy, clearly set out by legal norms, competition. What could be one solution to the present situation, is the division of the present ICANN duties between a reformed ICANN and the International Telecommunications Union in such a way, that would allow the ccTLD managers and IP users to choose from different options of domain name registrations agreements. [45]

4. On ICANN and the need for change

The initial intent of creating ICANN consisted of principles, that still incorporate an international compromise: ICANN was to be an independent, non-governmental organization. The U.S. government took on itself the obligation to privatize the Internet, which was to mean, that the power would be conveyed to ICANN as an independent corporation, subject directly to the community, through its members and their opinions. As an NGO, ICANN was to stay clear of any allegations concerning the unbalanced participation of different states. At the same time the initial ICANN had a more evenly balanced internal representation, than it

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[41]   *Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee,* 23 February 2000, available on 1 May 2007 at: www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm.

[42]   RFC 1591, p. 4.

[43]   GAC, *Principles…*, pt. 4.4.

[44]   GAC suggests moreover the formalization of the three-sided relationship among ICANN, the domain name administrator and the government, in the form of written agreements. Ib. id., pt. 3.5. This idea has won the approval of ICANN, which is aiming at the formal confirmation of its agreements with national authorities.

[45]   Following, among others: G. Huston, *ICANN, the ITU, WSIS, and Internet Governance*, The Internet Protocol Journal, vol. 8, nr 1, available on 5 May 2006 at:
http://www.cisco.com/web/about/ac123/ac147/archived_issues/ipj_8-1/internet_governance.html.

does nowadays. The participation of industry representatives was then balanced by the number of user representatives, chosen in a global election. ICANN policies were to be based directly on the consent of those being governed. These basic suppositions were however eliminated, even before they were fully introduced. The 2002 ICANN reform eliminated the At Large Membership – the users' representation as an element of the Board, at the same time the U.S. government still kept its privileges of supervising ICANN, as the only political power in the world.

It is a fact, that presently ICANN holds a quasi-governmental power. Nevertheless there are no proper management, control or representation mechanisms in place. ICANN creates global social policies in many areas. For example it creates the competition policy controlling the entrance onto the electronic market through the domain names system and determines the structure of a market estimated to be worth 2 billion USD a year.[46] It is involved in the creation of prices, setting the basic fees for most domain-names resellers. It creates the policy in the area of intellectual property, defining and enforcing the common "laws" concerning domain names. Indirectly ICANN influences the freedom of speech, as its rules concerning trade marks protection in domain names set the limit of public use of certain words and rules concerning entities being registered, which do not allow for anonymous activities in Internet. There is also a common truth, that ICANN influences the taxes: it sets the fees for domain names onto the local managers, and these fees have grown dramatically with time. Therefore the power of ICANN is unlimited – entities have to subject themselves to all decisions made by the corporation. ICANN actions set the global policy in a way that is commonly exercised by national governments, possibly international entities.

Presently the supervision over ICANN is exercised by only one government: the government of the United States, which is in written agreement with ICANN on the exercise of central coordination functions over the DNS and IP addresses. It is also in disposition of the Memorandum of Understanding, based on which it may exercise certain functions, which shape the domain names policy. The U.S. government keeps its influence over the shaping of the policy concerning the DNS administration, thanks to which it is able to subject ICANN to its decisions. This unique position of the U. S. government in its relation to ICANN creates an ill balance. The DNS is a common resource, and the Internet is one of the basis of the infrastructure used by all states. Already in 1998, when the U.S. Department of Trade published its Green Book,[47] concerning the Internet administration, other states have declared having the right to participate in the Internet management. Despite this fact, today only one government oversees ICANN. ICANN has evolver far from its initial character, structure and function, it lacks verifying mechanisms, and other state governments criticize its relationship with the U.S. With such an image of the ICANN in the present international society the need for reform and change is more clear than ever before.

The problem of lack of a proper internet governing mechanism came onto the scene during the 2003 *World Summit on the Information Society* (WSIS) in Geneva, where members of all the worlds governments were present. A clear signal, calling for the international society to take active part on the discussed issue was an appeal by the UN Secretary General, where he called upon the UN to create an international *Working Group on Internet Governance* (WGIG). The official statement signed by the participants of the Summit was entitled "*The Declaration of Principles*" [48] and it mentioned the necessity of

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[46]　Following: Internet Governance Project, *What to do About ICANN: a Proposal for Structural Reform*, 5 April 2005, available on 2 April 2007 at: http://internetgovernance.org/pdf/igp-icannreform.pdf, p. 2.

[47]　Following: Internet Governance Project, *What to do…*, p. 2.

[48]　*Declaration of Principles*, World Summit of Information Society, 2003, available on 11 February 2007 at: http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf.

taking a position by the international community on the issues of internet governance. The members of the Summit asked the Secretary-General of the United Nations "*to set up a working group on Internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005.*"[49]

An element, which inflamed the discussion on the subject of working out a new way of managing the global net and the DNS was the fact, that the (so far supportive of the U.S.) European Union took side of the states opposing the U.S. hegemony (the leaders of this group are some fast developing countries, such as China, India, Brazil or Iran). The proposal introduced by the EU during the summit comprised of the creation of a new international organization, which would be to govern the Net and it became the source of one of deeper conflict in the recent transatlantic political relations. In its new proposal, the EU proposed creating a new body, which could set out guidelines concerning the entity or organization controlling the internet addresses and could play a part in creating an international system of dispute resolution.

A clear victory for the U.S. abandoned in their battle was keeping (at least so far) the control over the technical administration of the Internet where it has always been – at the seat of ICANN in California. In September of 2006 - as it showed – it was the U.S. administration, who had the final word in the battle over the Internet. The next *Memorandum of Understanding* between the U.S. Department of Trade and ICANN was prolonged by a next 3-year period – till 30th of September 2009, [50] where the controversial structure of the *Memorandum…* - giving ICANN under the auspices of U.S. Department of Trade – was only slightly, "cosmetically", altered. Despite ICANN declarations of newly won independence (as a result of the *Joint Project Agreement...*), its only real designate was an alteration of the duty of a midyear report to the Department of Trade, traded in for a yearly report to the internet community. [51]

*Joint Project Agreement...*is designated by its parties as a step towards the full privatization of the Internet. In fact however ICANN remains strictly bound by the guidelines of the Department of Trade and stays under its supervision.[52] The biggest controversy, surrounding the *Joint Project Agreement...* is the privacy issue of ones registering their domain addresses.[53] A certain victory for the opponents to the U.S. hegemony was the U.S.

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[49]   Ib. id., preamble.

[50]   *Joint Project Agreement Between The U.P. Department Of Commerce And The Internet Corporation For Assigned Names And Numbers*, 29 September 2006, available on 22 March 2007 pod:
http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm.

[51]   *Joint Project Agreement…*, pt. II.

[52]   *Joint Project Agreement...*, pt. I.

[53]   Based on the regulations of JPA there is a dependence between data submitted during the registration (Whois database) and the individual right to privacy. The new Agreement demands of ICANN to "*continue to enforce existing policy relating to WHOIS",* which would require of ICANN to keep "*timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing and administrative contact information"* (the Agreement points to four categories of data, which should be included). (attachment A to the *Joint Project Agreement…*: *Affirmation Of Responsibilities For ICANN's Private Sector Management Approved by the ICANN Board of Directors 25 September 2006*, available on 22 March 2007 at:
http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNBoardResolution_09252006.htm, pt. 5). The controversy surrounding the Whois database, strengthened by the above mentioned regulation, concerns the damage to the right to privacy of those, who register their domain names. The Whois database is accessible to anyone, who has internet access. It contains data on the owner of each domain name. This policy is strongly opposed to by the defenders of privacy from e.g. Europe, as interfering into the right of privacy of domain name owners.

consent, granted during the Tunis meeting to create the Internet Governance Forum (*IGF*) under the auspices of UN Secretary General – an international organization of a global character, representative for the national governments, subsidiary on the issues relating to the Net, however – without any actual influence onto the IG policies. The first meeting of IGF took place between 30th October and 2nd November in Athens, Greece. Although in the eyes of the media commentators the meeting brought no spectacular results, the very meeting itself of all the representatives of all spheres of electronic exchange was a unique event. The potential that this forum holds is of a great change to the idea of internet governance as we know it. It is so far the only place, where this term may be further developed and described in more detail. The aim of these first meeting was achieved by the fact, that new networks of cooperation between entities working in the same fields were created. Certainly the next step for the IGF shall be to set out a work plan and call upon particular bodies to carry it out. Definitely a big step towards constructing the legal framework for the Internet is the work initiated on the Internet Bill of Rights, which is to set the basic rights and obligations resting upon all the actors of the electronic scene.[54] It is certain, that the IGF is the first step towards setting an international standard for internet governance, but it is also sure, that its actions must be intensified in order for them to come to life before the future of one, international network is in serious danger of disintegration. The international community has the time to do this before the 30th of September 2009, when the *JPA* will have to be substituted with a new – hopefully an international, representative and universal, solution.

Despite the fact, that the power still rests in the hands of the United States, thanks to the creation of the IGF comes the first chance of a change. One could even say, that any further change is only a matter of time. In the final document form the Tunis summit in 2005 the governmental interest in the internet governance was literally captured for the first time: "*We recognize that all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet.*"[55] This document defines Internet governance as „*more than Internet naming and addressing*", including also "*other significant public policy issues such as, inter alia, critical Internet resources, the security and safety of the Internet, and developmental aspects and issues pertaining to the use of the Internet.*" It also mentions, that the newly created IGF "*would have no oversight function and would not replace existing arrangements, mechanisms, institutions or organizations.*"[56]

The participants of the Tunis Summit acknowledged, that international internet governance should involve many stakeholders, be democratic and transparent and engage actively all governments, the private sector, civil society and international organizations. It should provide for an even distribution of assets, grant equal access to all and provide a stable and safe functioning of the Internet, considering its multilingual character.[57]

It should be emphasized, that ICANN has played an immensely important role as an important, innovative institution. Setting its functioning upon a civil law agreement was the answer to a unique, global structure of the Net and unprecedented character of the global phenomenon, originating from it. But the ICANN monopoly over the DNS and IP system actually transfers the power over the Internet, that rightfully belong to national governments, to a civil law organization. For this authority to be regarded as legitimate, it has to be based upon a wide, international consensus and a wide delegation of its responsibility verification

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[54] More on this issue e.g.: D. Waters, *Internet bill of rights proposed*, 1 November 2006, available on 22 March 2007 at: http://newp.bbc.co.uk/2/hi/technology/6106452.stm.

[55] *Tunis Agenda for the Information Society*, World Summit of Information Society, Tunis, 2005, available on 4 April 2007 at: http://www.itu.int/wsis/docs2/tunis/off/6rev1.html, preamble.

[56] Ib. id., pt. 77.

[57] Ib. id., pt. 29.

mechanisms. The top-to-bottom control scheme has been already tested in practice by the ICANN and U.S. government. The bottom-up responsibility wound bind ICANN with the international public interests, giving legitimisation similar to the one enjoyed by the democratic national governments. Eventually the mutual responsibility would be a strong impulse for both – ICANN and (possibly) ITU – to comply with the need of all users.

It must be emphasized, that it is not possible to deny the righteousness of the initial U.S. supposition, that the body overseeing the technical organization of the Net should be free from political influence. It is clearly justified to strive for keeping the management of internet domain names and addresses free from the attempts of governments and political organizations. At the same time however it is hard to miss, that this danger is exactly incorporated by the present state of affairs. In order to avoid it the U.S. government should strive for sharing the power it holds and for the legitimisation of its single-handed actions (introducing a model of a legitimate, independent control, recognizing the role the U.S. has played in the creation and development of the Net, lies in the best interests of the U.S. government). The present position of the U.S. government is in clear contrast to its declarations made in the 1998 White Book. The unique role of the U.S. as the only authority overseeing and authorizing the actions of ICANN, is it is kept, shall be clearly contradictory to the two pillars of the policy declared in 1998 by the USA, which were privatisation and internationalization. At present the internet governance is neither privatized nor internationalized. Furthered unilateralism in the internet governance undermines the long-distance stability of the Net. It is clear, that the Internet developed from a local U.S. network, nevertheless it now comprises over a billion of users, and the U.S. users are in a distinctive minority. Internally contradictory is therefore the statement of the U.S. government, that the internet governance should be free of national interests, while at the same time this very authority allows itself to have more power than any other entity in the world. This contradiction is already resulting in a growing, ongoing conflict concerning the ICANN and its role. If nothing changes, the U.S. position will further inflame the growing criticism over the present form of internet governance in years to come, but what is more – it will also seriously endanger the security of the Network. If the DNS supervision shall be seen only as a sequence of strategic U.S. moves more than an element of global infrastructure, the risk of intended destruction and growing political influence shall increase. The growing political influence brings the risk of fragmentation the Net into small, independent, not interconnected networks, dependent of local/national authorities, functioning within frameset of a language or geographical region, independent of the present authorities. It is essential for the developing countries to take active part in the way the future of the Internet is shaped, before they make the dramatic decision of taking their own way in creating technical standards, possibly unacceptable to the present system. At the same time the internationalized Internet needs oversight – it should however be an oversight of an international, transparent and democratic nature. As a private organization, but of an international character, having the legislative powers and – indirectly – fiscal competences, distributing domain names, ICANN need a strong and sufficient control and verification mechanisms. This kind of control means a well defined, consulted on an international level set of rules or legal procedures, which will allow to take on action, should the "new" ICANN step beyond its competences or not comply with its obligations. The internationalization of these functions seems the only reasonable way to go for internet governance. None of the national governments can win enough international confidence and trust, to be able to comply with this task effectively and without being accused of stepping beyond its competences – it is necessary for this supervision to be common and fair.

As the above discussed arguments show, the less probable is a pessimistic scenario, called upon by the U.S. representatives, that it will be their autonomous decision on the

fragmentation of the Net, should the international community not comply with their views. The more probable scenario is that the Net shall be fragmented, is it is not provided with an authorized, legitimate supervision. It would be far better, should the U.S government take action to seek compromise on the way the further functioning of the Net – beyond 2009 – should look like.[58] It is quite clear, that without a transparent set of rules and regulations, based on a wide international consensus, most of the fats developing countries, who feel left out of the course of internet governance (e.g. China) shall put efforts into either controlling the existing network (through increased censorship, strictly conflicting the basic aim of a global information network) or through "unplugging" their territories from the existing web and – possibly – creating its smaller, regional substitutes.

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[58]   Such a cooperation may be based on the thesis of the *United Nations Working Group on Internet Governance,* 2005, available on 12 December 2006 at: http://www.wgig.org/WGIG-Report.html.