

DIREITO:

A PENSAR TECNOLOGICAMENTE

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Do we have one real perception of the true degree of technological intrusiveness into the lives of citizens?

At this «Cyberlaw by CIJIC», 2nd edition, we intend to bring to one legal and technological debate some of the most worrying questions related with the weakness of the traditional concepts of public law. Take, for example, old problems where, alleged, threats to state security compress ordinary individual freedoms. Cyberspace currently dominates daily life. Where can we find the protection of the legal-subjective positions of individuals in it?

Traditional juridical and legal programs will lose all effectiveness, sliding into nominal, if the rule of law gives up to respond to the daily problems of netizens.

We all face new legal dimensions. In face of the ineluctable conclusion that the Internet is a global resource, which we dare say, incompatible, par excellence, with the old concept of territorial sovereignty of State, which scientific criteria need to be included in the construction of a dogmatic approach to the regulation of cyberspace? Furthermore, can it be regulated? Which - if any - new international, worldwide, legal solutions we must strive for? »

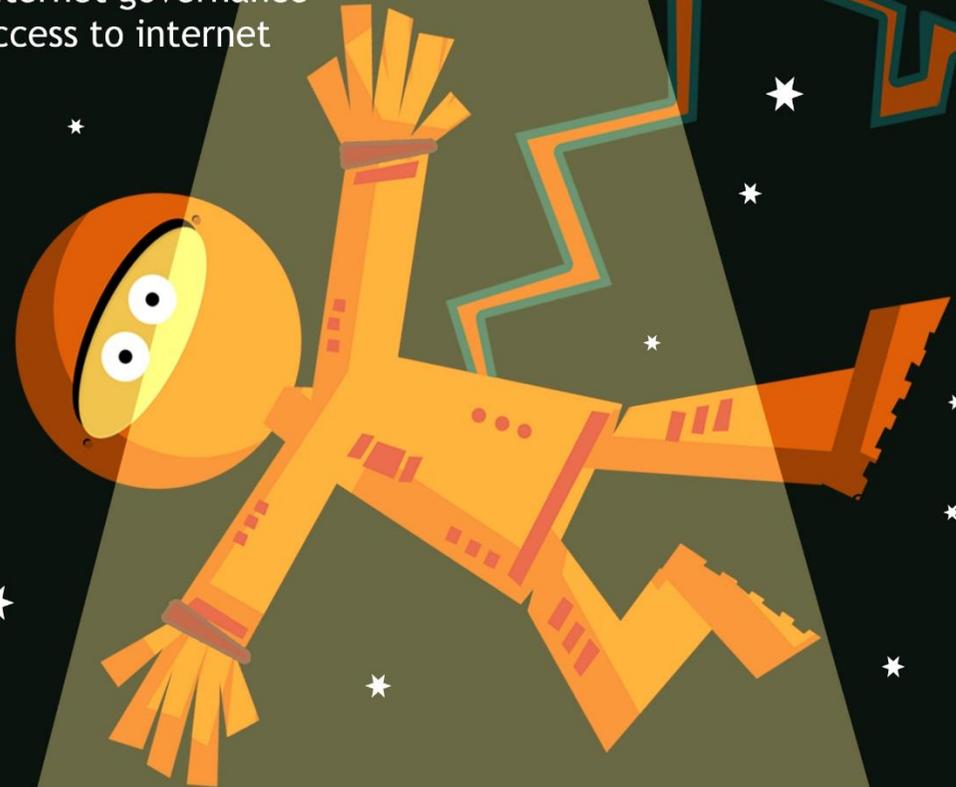


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internet:

- international tribunal for the internet
- open and free Internet
- internet governance
- access to internet

OUTROS: • international cooperation



CYBERLAW

by CIJIC

EDIÇÃO N.º II – JUNHO DE 2016

**REVISTA CIENTÍFICA SOBRE CYBERLAW DO CENTRO DE
INVESTIGAÇÃO JURÍDICA DO CIBERESPAÇO – CIJIC – DA
FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA**

CYBERLAW

by CIJIC

**REFLECTIONS ON INTERNET GOVERNANCE AND
REGULATION WITH SPECIAL CONSIDERATION OF THE
ICANN ***

**REFLEXÕES SOBRE O GOVERNO E A REGULAÇÃO DA
INTERNET COM PARTICULAR ÊNFASE SOBRE A ICANN**

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* - A first version of this work has been published in the *Estudos de Direito Intelectual em Homenagem ao Professor José de Oliveira Ascensão*, Coimbra, 2015.

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ABSTRACT

This article is focused on very general issues of Internet governance and regulation and on the potentialities of the adopted general conceptions with respect to the ICANN evolution. It advocates for an autonomous governance of the Internet, based upon a model of multistakeholder and globalized organizations. This autonomous governance is connected with a co-regulation of the Internet, through a combination of the principle of autonomous regulation with public regulation in all areas where autonomous regulation is insufficient. This public regulation should be fundamentally of international source. Regarding the evolution of ICANN, it is considered the very recent Proposal to Transition the stewardship of the Internet Assigned Numbers Authority (IANA) functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community and suggested the assumption by ICANN of the political role of a Non-Governmental Organization and the conclusion with the interested States and international organizations of standard quasi-treaties containing appropriate arbitration clauses.

Keywords: Internet governance; Internet regulation; ICANN; Domain name; Control of the Domain Name System

INTRODUCTION

Internet governance may be understood in a broad sense as comprising the legal regulation of the Internet as well as the organization and the action of the entities that coordinate its operation ⁽¹⁾. It is beyond doubt that these aspects are connected, but it seems appropriate to distinguish them, reserving the term “governance” for the institutional coordination of the network.

The *Internet* is a worldwide decentralized network of open computer networks that share a common communication technology. Its *genesis* still has today significant influence on the manner in which it is governed and regulated. The Internet was born in the U.S.A. as a project of the *Advanced Research Project Agency*, linked to the Defense Department ⁽²⁾. Since then, it has been developed through the interconnection of the networks created mainly by the civil society, giving rise to decentralized governance and regulation essentially carried out by autonomous entities. These entities undertake the task of assuring its operation and development, especially in respect to the definition of standards concerning communication protocol and the allocation and assignment of domain names and addresses that identify the computers connected to the network, working together with the U.S. Administration.

With the *globalization of the Internet*, its growing importance as a means of communication and information in all the spheres of social, political, economic and cultural life, these marks of origin raised new challenges. In face of its primarily private nature, the challenge of coordination with the values and policies pursued by the States and international organizations. Before the decentralized structure of the net governance and regulation, the need to ensure its internal consistency. Last but not the least, given the umbilical link with the U.S. Administration, the concern with the globalization and even, for some, with the intergovernmentalization of the entities that coordinate the Internet.

1 - See the conclusions of the United Nations Summit on the Information Society – Geneva 2003/Tunis 2005, in <http://www.itu.int/wsis/index.html>.

2 - See “A Brief History of the Internet”, in <http://www.Internetsociety.org/Internet/what-Internet/history-Internet/brief-history-Internet>.

Presently, the Governments of the main democratic countries, namely at the EU and USA level, ⁽³⁾, as well as the main fora in which the global Internet community has found its expression ⁽⁴⁾, converge towards a multistakeholder model of Internet governance, which includes not only Governments and international organizations, but also the civil society, namely the academic and technical communities, the economic actors, and the associations of Internet users. This does not exclude, naturally, some divergence in the details of this model.

This multistakeholder model corresponds, at the regulation level, to a co-regulation in which the applicable rules are created primarily by autonomous sources which are the expression of the Internet global community, but which needs to be complemented by State and supranational regulation.

This multistakeholder model should, for instance, be applied to the entity which coordinates the systems of exclusive identifiers of the Internet: the *Internet Corporation for Assigned Names and Numbers* (ICANN). It has just been delivered a proposal by the *IANA Stewardship Transition Coordination Group* to transfer the stewardship of the functions concerning the domain name system to the Internet multistakeholder community that must be referred in this context.

This article will focus, in first place, on very general issues of Internet governance and regulation (I). Thereafter, it will examine the potentialities of the adopted general conceptions in respect to the ICANN evolution (II). It will conclude with a few general remarks (III).

3 - See Communication from the European Commission “Internet Policy and Governance Europe's role in shaping the future of Internet Governance” COM (2014) 72 final and *Press Release of the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA)* of 14/3/2014.

4 - See, namely, the *NETmundial Multistakeholder Statement* issued by the *Global Multistakeholder Meeting on the Future of Internet Governance* held in Brazil in 2014, in <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>, the *Report by the Panel on Global Internet Cooperation and Governance Mechanisms* “Towards a Collaborative, Decentralized Internet Governance Ecosystem”, 2014, in http://Internetgovernancepanel.org/sites/default/files/ipdf/XPL_ICANI403_Internet%20Governance%20iPDF_06.pdf, and the “*Perspectives on the IANA Stewardship Transition Principles*”, issued by the *Internet Society* in 2015, in http://www.Internetsociety.org/sites/default/files/IANA-Transition-Perspectives-20150728-en_0.pdf.

I. INTERNET GOVERNANCE AND REGULATION

A) Internet governance

As a global reality, the Internet should be subject to a prevailing global governance and regulation⁽⁵⁾. The main alternative that arises in this context is between intergovernmentalization and globalization based upon a model of participation of all the interested parties⁽⁶⁾. It is in the light of the *policies that should guide Internet governance* that the issue must be considered.

Internet governance should, in the first place, assure the unity, openness, gratuity and freedom of access to the Internet, countering the tendencies to segment or restrict access to the Internet by countries that intend to limit the freedoms of expression and information on the net.

Internet governance should also grant efficiency, stability and security in the operation of the net, taking as much advantage as possible of the entities and expertise that have been providing it, and preserving the innovative spirit that has been shaping Internet development.

Last but not the least, Internet governance should allow sufficient participation in decision-making processes by the entities that are in charge of the pursuance of public legitimate interests as well as an appropriate coordination between the autonomous mechanisms of governance and regulation and the exercise of normative powers of States and international organizations.

There is no intergovernmental organization in position to adequately assume the tasks of Internet governance. The Internet, affecting many aspects of social life, also touches the sphere of action of several intergovernmental organizations, as it is the case of the World Trade Organization (WTO), but the scope of activity of organizations like these does not embrace the central issues of Internet governance and regulation⁽⁷⁾.

5 - See, namely, the remarks I made in "Portugal, Europe and Globalization in the Private Law Perspective", in *Portugal, Europe and the Globalization of the Law*, ed. by Vasco Pereira da Silva, 46-57, Ebook, Lisbon, 2015 (also accessible in SSRN: <http://ssrn.com/abstract=2465349>, 52-53, with more remarks.

6 - On the different Internet governance models, see Michael RUSTAD – *Global Internet Law*, 2nd ed., St. Paul, MN, 2016, 94 et seq.

7 - See also Pedro MIGUEL ASENSIO – *Derecho Privado de Internet*, 5th ed., Cizur Menor (Navarra), 2015, 43-44.

The intergovernmental organization that could be more suited for this purpose is the International Telecommunication Union (ITU), which is today a specialized agency of the United Nations ⁽⁸⁾. Among other areas of activity, the ITU develops the communications infrastructure's technical standards of operation. The ITU aims to extend its activity to the technical standards of all the technology of information and communication, but its organizational structure, based upon representatives of the Member States with equal voting rights, is unsuited for the reality of the Internet.

As remarked by Miguel Asensio ⁽⁹⁾, the ITU does not seem able to overcome the divergence that arises at the international scale regarding protection of fundamental and intellectual property rights on the Internet and the warranty of access and information exchange in the net by everybody. This has been expressed by the refusal of a high number of States, among which the EU Member States, the U.S.A., and Japan to sign the Final Acts of the World Conference on International Telecommunications, held in 2012, which included a revision to the International Telecommunications Regulation. Some of the rules of this instrument have raised doubts which could facilitate a higher control of Internet traffic and the new version adopted certain provisions on the net control of uncertain reach in its applicability by States which are not favorable to the Internet openness and do not share the same conceptions regarding fundamental rights.

These problems could be mitigated by the constitution of an intergovernmental organization with weighted voting and control of new members' admission. Nevertheless, it is doubtful that an organization of this type could shoulder all Internet governance tasks in an advantage position in relation to autonomous entities that represent not only the States and international organizations but also civil society and, in particular, the most dynamic forces that have been steering the Internet's efficient operation and development.

An indirect representation of civil society through representatives of autonomous entities and stakeholder groups of each Member State (like it happens, for instance, with the International Labor Organization), would not proportionate an

8 - See João MOTA DE CAMPOS (ed.) – *Organizações Internacionais*, 4th ed., Coimbra, 2010, 601 et seq.

9 - N. 7, 44-45.

appropriate representation of civil society, since, first of all, in the sphere of the Internet the civil society is more institutionalized in transnational organizations and fora than in national entities. On the other hand, such an organization would hardly count with the membership of all States. This could potentially lead to net fragmentation.

Therefore, *preference should be given to a globalization based on a multistakeholder model*. Accordingly, Internet governance should be entrusted to autonomous entities that are inclusive, transparent, and accountable, in which the Internet global community is appropriately represented ⁽¹⁰⁾.

The transparency of the processes embraces a certain degree of democratic legitimacy and credibility through active participation of interested parties as well as through a certain amount of control over the decision-making processes ⁽¹¹⁾. The accountability should be understood in wide sense, implying a justification of the decisions and an assumption of liability for any errors and failures ⁽¹²⁾.

At present, *the Internet is mainly governed by autonomous entities that form a decentralized structure with complex interrelations* ⁽¹³⁾.

In first place, it should be mentioned the *Internet Society* (ISOC), which is an association constituted under the law of the District of Columbia with an important role in Internet coordination, albeit it only intervenes indirectly in the adoption of rules, to the extent in which it contributes to the appointment of the members of the entities that adopt or draft them. Many of the rules governing the Internet are adopted by the *Internet Architecture Board* (IAB) based upon the works carried out by the *Internet Engineering Task Force* (IETF), which is an open community in which technicians, economic actors and other parties interested in the evolution of the Internet participate voluntarily and which takes charge of issues concerning net protocols and architecture; by the *Internet Research Task Force* (IRTF) focused on the research and development of new technologies in the sector, with a structure based on small research groups; and by the

10 - See also Rolf WEBER – *Shaping Internet Governance: Regulatory Challenges*, in collaboration with Mirina Grosz and Romana Weber, Zurich, Basel and Geneva, 2009, 63, 78 and 116-117.

11 - See, with more development, WEBER (n. 10) 121 et seq.

12 - See, with more development, WEBER (n. 10) 132 et seq.

13 - Cf. WEBER (n. 10) 43 et seq., RUSTAD (n. 6) 89 et seq., and MIGUEL ASENSIO (n. 7) 46 et seq.

Internet Engineering Steering Group (IESG) which concretizes the development of standards.

The *World Wide Web Consortium* also adopts “recommendations” which contain specifications and standards, especially on software, fundamental for the uniformity and operation of the world web. These “recommendations” deal with technical issues like the specifications concerning the languages and formats that may have projection in the users’ activities such as the selection and filtration of contents and data protection technology.

Besides these entities whose activities have a worldwide scope, there are autonomous entities with a geographically limited scope, such as those coordinating the assignment and use of domain names at regional and national levels, whenever such a role is not performed by public entities. In effect, these autonomous entities adopt regulations on the registration of domain names and take decisions on their allocation.

The autonomous entities that govern the Internet should reflect its global nature, reinforcing and perfecting the multistakeholder model, performing the main role in Internet coordination and regulation, and establishing with interested States and international organizations agreements and coordination structures meant to overcome the insufficiencies of the autonomous governance and regulation in a harmonious manner when strictly needed. It is conceivable that a central entity of coordination could stand out, and that this entity, in collaboration with the States and the international organizations, creates a standard agreement to be concluded with each of them.

B) Internet regulation

Internet regulation faces limits and constrains by virtue of the *net global character*, which in most cases involves more than one national legal order, and which prevents the chance of its coordinated and harmonious operation being provided by national regimes; the diminished role that the States’ territory plays in the cyberspace, triggering, among other aspects, the difficulty in localizing Internet users and the activities they carry out online; and its *decentralized structure*, coordinated by various entities, as a rule autonomous, with specific scopes and, sometimes, also geographically limited.

For this reason, there is a *normative production by autonomous centers* that perform a role in Internet regulation, although of limited reach. It essentially deals with the definition of the technical standards required by Internet operation and the allocation and assignment of domain names and IP addresses.

The autonomous rules on the operation of the Internet are normally called “*Request for Comments*” (RFC), a denomination that evokes the cooperative and voluntary nature that the normative creation in the Internet assumed at its genesis. They are frequently drafted by the IETF, revised and approved by the IESG, and published by the IAB, under the control of the ISOC, which delegates this function to the editor of RFC. The RFCs include the basic rules of the allocation of IP addresses and the structure of the domain names system ⁽¹⁴⁾.

The standards of behavior and decision created by these autonomous centers are true rules of law, since they are characterized by generality and binding force: they bind a plurality of addresses that are not determinable at the moment of their creation. For instance, an interested party cannot register a domain name if it does not fulfil the established pre-requisites and procedures. This binding effect precedes the registration agreement, which spells out the conditions for domain name use and alternative resolution procedure for the respective disputes ⁽¹⁵⁾.

Furthermore, there are soft law instruments with a wider scope, namely the codes of conduct adopted by professional or consumer organizations. However, its binding force is limited to cases in which they express customary rules or relevant trade usages, sometimes in connection with social sanctions – such as the publishing of transgressors lists or the exclusion of the organization promoting the code of conduct – , and with alternative dispute resolution methods.

According to the *subsidiarity principle* ⁽¹⁶⁾, the Internet should be regulated by rules created by autonomous sources which are the expression of the Internet global

14 - See MIGUEL ASENSIO (n. 7) 48.

15 - Therefore, these provision are not general contract conditions, which only bind through their incorporation into the individual contracts. For a different view, Dário MOURA VICENTE – *Direito Internacional Privado. Problemática Internacional da Sociedade da Informação*, Coimbra, 2005, 135; *A Tutela Internacional da Propriedade Intelectual*, Coimbra, 2008, 180.

16 - On the meaning and scope of the subsidiarity principle on the regulation of transnational relationships, as a corollary of the freedom value, see Luís de LIMA PINHEIRO – *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, 2005, § 40, and *Direito*

community, namely rules originated from entities which represent this community and customs and usages observed by its members except to the extent in which the protection of rights or public policies that cannot be appropriately pursued by autonomous law is at stake ⁽¹⁷⁾.

The *priority of autonomous regulation*, besides corresponding to a democratic and open conception of society ⁽¹⁸⁾, is justified by several advantages, namely:

- autonomous rules are adjusted to the technical reality of the Internet, tend to adjust to the interests of its stakeholders and stimulate the participation of all interested parties in their creation;
- its origin assures a high degree of compliance;
- rules created by autonomous entities are more easily modifiable than the rules created by international instruments and, therefore, are more suited to follow the evolution of the Internet ⁽¹⁹⁾.

Naturally, these advantages depend, to some extent, on a balanced representation of all the stakeholders; on the efficiency, transparency and suitability of the normative creation process; and on the foundation of the stakeholders representatives' conduct on the mutual respect, on the warranty of an essential core of fundamental rights and on the due consideration of the interests of the other stakeholders and of the common good in order to assure that the adopted rules are suited for the pursuance of common values before the conscience of the global Internet community members and are compatible with the conceptions prevailing in the international community ⁽²⁰⁾.

The phenomenon of autonomous regulation of the Internet is a particular manifestation of a broader phenomenon of development of autonomous law applicable to transnational relationships. This phenomenon has special importance in the realm of

Internacional Privado, vol. I – *Introdução e Direito de Conflitos/Parte Geral*, 3rd ed., Coimbra, 2014, 333-334. More in general, on its meaning for the general theory of law, see Miguel TEIXEIRA DE SOUSA – *Introdução ao Direito*, Coimbra, 2012, 64 et seq.

17 - See also WEBER (n. 10) 17 et seq.

18 - See also WEBER (n. 10) 78-79.

19 - Their production costs are also lower than the costs of the rules created by international instruments.

20 - See the convergent remarks of WEBER (n. 10) 22-23, 96 et seq., 120 e 207 et seq.

international business relationships, originating a new *lex mercatoria* ⁽²¹⁾. For this reason, the autonomous law of the Internet is sometimes referred to as *lex electronica*, though this expression tends to be employed in broader senses ⁽²²⁾.

It stems from the stated above that, so far, autonomous regulation has had a limited material scope, confined mainly to the definition of technological standards, the regulation of the technical issues required by the proper functioning of the network, and the allocation and assignment of domain names and IP addresses. The *lex electronica* does not yet perform a significant role in the shaping and regulation of the majority of private law relationships between Internet stakeholders. Nonetheless, an evolution towards the widening of its scope of regulation is entirely conceivable, namely the relationships between the involved telecommunications, hardware and software enterprises, the contracts between service providers and users, the electronic contracting, and the online provision of goods and services in interaction with the development of the *lex mercatoria* regarding international business relationships. It should be stressed that the expansion of the *lex electronica* does not mean that it should necessarily be the exclusive source of regulation in the above matters.

In parallel to the *lex mercatoria*, *the binding force of the autonomous rules and principles* of the *lex electronica* does not depend on their insertion in a legal order. Instead, it is grounded on the pursuance of the values shared by the majority of the global Internet community stakeholders; on the suitability of their content in the pursuance of these values, and to assure the Internet operation before the conscience of these stakeholders; on their formation through autonomous processes suited for the creation of binding rules according to the same stakeholders; on their conformity with the general principles of law and the fundamental values widely recognized by Public International Law and by the large majority of national legal orders;, and on their

21 - On the autonomous law of international business, see Luís de LIMA PINHEIRO – *Contrato de Empreendimento Comum (Joint Venture) em Direito Internacional Privado*, Coimbra, 1998, §§ 18-19; *Direito Comercial Internacional*, Coimbra, 2005, nos 37 et seq.; *Direito Internacional Privado* (n. 16) § 6, with more references.

22 - See, namely, Pierre TRUDEL – “La *lex electronica*”, in <http://www.chairelrwilson.ca/cours/drt3808/Lexelectronicastrudel.pdf>.

application in alternative dispute resolution methods regardless of their reception by a national legal order ⁽²³⁾.

The values at stake in Internet regulation do not exclusively concern private law and there are cases in which the autonomous regulation does not appropriately assure the protection of private law values. Even the definition of technical standards affects electronic contracting, the manner in which goods and services are provided online, the reach of some fundamental rights, such as freedom of the press, freedom of information, freedom of expression, privacy, personal data protection, and, regarding the domain names and IP addresses system, is related to important legislative policies ⁽²⁴⁾.

In the areas in which public regulation is needed – especially, in the fields of cybercrime, protection of personality and intellectual property rights ⁽²⁵⁾, tort, and consumer protection —, the global nature of the Internet justifies, in principle, endeavors of international unification through international conventions ⁽²⁶⁾. In effect, only international regimes may provide the effectivity, the certainty, and the foreseeability of legal solutions in those areas, as well as international legal harmony, and avoidance of concurrence of norms and conflict of duties which burden users and service providers on the net.

Although it is not inconceivable to entrust the drafting of these international conventions to an international organization specifically created for that purpose, with weighted voting and control of new member admissions, it seems that such a task may in principle be performed by preexisting organizations, such as the UNIDROIT, the World Intellectual Property Organization (WIPO), WTO, the United Nations Commission for International Trade Law (UNCITRAL), and the Hague Conference on Private International Law. This point of view has already obtained some acceptance, namely with the WIPO Treaties on Copyright and on Performances and Phonograms of 1996, which were mainly designed to develop and improve the regimes in force

23 - See, regarding *lex mercatoria*, LIMA PINHEIRO, *Arbitragem Transnacional...*(n. 16) 431-432, with more references.

24 - As remarked by MIGUEL ASENSIO (n. 7) 49-50.

25 - See, namely, Luís de LIMA PINHEIRO - “Algumas considerações sobre a lei aplicável ao direito de autor na Internet”, *ROA* 74 (2014) 13-34, Introdução and I.B (regarding the risk to the protection of the right of making the work available to the public resulting from the delocalization of operators who provide access to protected works, through the establishment in States with low copyright protection level).

26 - See also WEBER (n. 109) 16-17.

attending to the issues raised by new information and communication technologies and, especially, the Internet.

Whenever the creation of an international regime of a universal scope faces severe difficulties, and there is interest in regional regulations, it should also be accepted, in the areas in which public regulation is needed, the drafting of regional international conventions or legislation enacted by international organizations, as it is the case of the EU legislation.

To sum up, albeit Internet should be essentially autonomous governed, it will be more appropriate to tackle its regulation in a perspective of complementarity between autonomous and public regulation and, therefore, of *co-regulation* (27).

II. ICANN EVOLUTION IN THE PERSPECTIVE OF A MULTISTAKEHOLDERS MODEL

A) ICANN scope of activity and the domain names system

The ICANN is an autonomous entity. While it has a rather limited scope of activity, it performs especially important functions to the Internet operation and it may constitute the embryo of a central entity of Internet coordination. In effect, the ICANN has the mission to coordinate, on a general level, the global Internet's systems of unique identifiers, and, in particular, to ensure the stable and secure operation of the Internet's unique identifier system (Article 1(1) of the ICANN Bylaws).

In particular, the ICANN coordinates the allocation and assignment of the Internet's three sets of unique identifiers, which are domain names (forming a system referred to as "DNS"), the Internet protocol ("IP") addresses and autonomous system ("AS") numbers, and protocol ports and parameter numbers. It coordinates the

27 - For the same view, WEBER (n. 10) 5. For a partially divergent view, Alexandre DIAS PEREIRA – "Direito Ciberespacial: 'Soft Law' or 'Hard Law'?", in *Est. José Gomes Canotilho*, vol I., 685-710, Coimbra, 2012, 704 et seq., based upon legitimate concerns, but without taking into due account, in my opinion, the corollaries of the subsidiarity principle and the relativity which, in the global or transnational sphere, the interests and public policies of the single States assume.

operation and evolution of the DNS root name server system and coordinates policy development reasonably and appropriately related to these technical functions.

The ICANN does not operate as registry of domain names or IP addresses, but it accredits the entities which may act as registries of domain names under certain top level domains.

The *top level domains* may be generic or geographic. Generic top level domains are assigned worldwide, based upon material criteria (for example, .com). Geographic top level domains are assigned by countries (for example, .pt, for Portugal) or regions (for example, .eu).

The administration of geographic top level domains is entrusted, by delegation of the ICANN, to the national or regional Internet registries (*Network Information Centers*). There is a trend towards governmental control of these national register centers, but the compliance with the limitations of the ICANN delegation and the coordination between these centers and ICANN are fundamental to the proper operation of a unified system of domain names ⁽²⁸⁾.

The *top level generic domain names* are subdivided into sponsored and non-sponsored domain names.

The policies of the assignment of non-sponsored top level domain names, such as “.com” and “.net”, are defined by the ICANN, with which the operators of these domains conclude Registry Agreements regulating the generality of the assignment and use issues concerning these domain names ⁽²⁹⁾.

The sponsored top level domain names are coordinated by organizations that represent the sectors affected by these specialized domain names. These organizations have concluded agreements with the ICANN, which delegates the sponsors’ power to define the policies of assignment and use of these domain names taking into account their respective Charter.

An important part of the powers of the ICANN, namely the coordination of allocation of IP addresses and of autonomous numbers, and the management of the

28 - For this view, see MIGUEL ASENSIO (n. 7) 70.
29 - See MIGUEL ASENSIO (n. 7) 65-66.

DNS root server is entrusted to the *Internet Assigned Numbers Authority* (IANA), which is presently an ICANN department.

The IANA delegates the allocation of blocks of IP addresses in different geographic areas to 5 regional Internet registries ⁽³⁰⁾.

In order to understand the reach of the ICANN's powers it is important to examine the functions and nature of domain names.

Domain names have a double function. One is a *localizing function*, since they are the Internet address of websites, which provides access to its content. The other is a website's *identifying function*, which may also be relevant for the identification of the enterprise which operates the website and of the goods and services offered on the website, performing then a function analogous to other distinctive signs of trade ⁽³¹⁾.

The domain name is an intangible good with patrimonial value. *The holder of the domain name has the exclusive of its use as such*. This should not be confused with its use as a trademark or other distinctive sign of trade. Nonetheless, the right referring to the domain name is not usually deemed a right of intellectual property ⁽³²⁾.

A different issue is the possibility of the domain name holder benefiting from an autonomous right or other mode of protection by virtue of using the domain name as a firm, distinctive sign of the enterprise or work title, or of its register as trademark ⁽³³⁾.

30 - These regional registries created an organization which represents their collective interests and assures the coordination of their policies: the *Number Resource Organization*.

31 - See, for a convergent view, Gerald SPINDLER and Fabian SCHUSTER – *Recht der elektronischen Medien*, 3rd ed., Munich, 2015, Vorbemerkung: Allgemeine Grundsätze des Kennzeichenrechts..., nos 43 et seq.

32 - See, namely, SPINDLER/SCHUSTER (n. 31) Vorbemerkung: Allgemeine Grundsätze des Kennzeichenrechts... nos 47 and 70, who make reference to an enjoyment right analogous to property. On the main conceptions regarding the legal nature of the industrial property rights, see José de OLIVEIRA ASCENSÃO – *Direito Comercial. Direito Industrial*, vol. II, Lisbon, 1988, 389 et seq. The characterization as an intellectual property right faces two type of difficulties. On one hand, the principle of *numerus clausus* of the intellectual property rights associated with the territoriality principle regarding their effects. On the other hand, the fact that the right on the domain name is not assigned *ope legis* nor, in the great majority of the cases, by a public authority applying the law. Both difficulties may be relativized, because the statutory law is not the only source for the recognition of an intellectual property right – see OLIVEIRA ASCENSÃO, op. cit., 26, the assignment of the domain name has a global scope and the register of some domain names is legally regulated and/or organized by public authorities.

33 - See SPINDLER/SCHUSTER (n. 31) Vorbemerkung: Allgemeine Grundsätze des Kennzeichenrechts... no 73.

In the face of the limitations or difficulties met by claims grounded on the infringement of trademarks or on unfair competition due to the use or registration of a given domain name in State courts, in 1999 the ICANN established a dispute resolution procedure called *Uniform Dispute Resolution Policy* (UDRP). This Uniform Policy has been mainly based upon a WIPO recommendation.

The most evident practical advantages of this dispute resolution procedure are the speed and the comparatively low cost. These disputes are dealt with by “administrative panels” normally composed of just one member. The center in which the procedure is held may be chosen by the claimant among the centers authorized by ICANN. The most important is the center operating in the WIPO framework.

The dispute resolution procedure is governed by a set of Rules. According to these Rules, the applicable decision criteria are the ICANN rules and the rules and principles that the panel deems applicable (Article 15(a)). Often the decisions are based upon internationally accepted general principles of law, especially when the parties are not habitually resident in the same country ⁽³⁴⁾.

It is not an arbitration, because this procedure does not exclude the jurisdiction of the State courts and doesn't have jurisdictional effects. Its sole effect is the cancelling, modification or transference of the domain name registration ⁽³⁵⁾. It may be said, however, that it is an alternative dispute resolution method (ADR), different from either arbitration or mediation, in the sense that it allows the resolution of the dispute by a private person, outside the State courts (and not in the sense of a tribunal which would exclude the jurisdiction of a State court).

Every registry accredited by the ICANN is bound by this dispute resolution procedure. The domain name users, in turn, become bound by virtue of their registration agreements ⁽³⁶⁾.

In effect, the registration of second level domain names subordinate to certain top level domain names is dependent on the acceptance of this dispute resolution procedure. Presently, more than 50 States apply the Uniform Policy or extrajudicial

34 - See MIGUEL ASENSIO (n. 7) 487 et seq., and SPINDLER/SCHUSTER (n. 31) Verfahren in Kennzeichenstreitsachen..., nos 1 et seq.

35 - For a different view, SPINDLER/SCHUSTER (n. 31) loc. cit.

36 - Cf. SPINDLER/SCHUSTER (n. 31) no 9.

procedures inspired by it regarding disputes concerning domain names registered under the respective national top level domain names ⁽³⁷⁾.

For instance, in *Portugal*, the management, registration and maintenance of the *domain names pt.* are entrusted to the *Associação DNS.PT* ⁽³⁸⁾. This is an association of Private Law constituted by the public entity that supports the research on science and technology – the FCT – *Fundação para a Ciência e a Tecnologia, IP* –, by private entities – the *Associação do Comércio Eletrónico e Publicidade Interativa (ACEPI)*, and the *Associação Portuguesa para a Defesa do Consumidor (DECO)* –, representatives of business and consumers, and by the representative appointed by the IANA as the entity in charge of the delegation of the top level domain.

At the international level, the DNS.PT participates actively, as a member, in meetings and working groups of organizations accredited in the realm of the Internet such as the ICANN and the *Council of European National Top Level Domain Registries (CENTR)*.

The registration of domain names under *.pt* is not conditioned to the acceptance of an alternative dispute resolution method. However, the Rules of Register of Domains *.PT* allows the settlement of disputes between holders of domain names, that when registering the holder undertakes to settle the disputes on domain names by arbitration under the auspices of the ARBITRARE (*Centro de Arbitragem para a Propriedade Industrial, Nomes de Domínio, Firmas e Denominações*), and the undertaking of the *Associação DNS.PT*, which is entrusted with the registration of domain names under *.pt*, to settle any dispute concerning domain names by arbitration under the auspices of the same center (Article 38). The criteria for the settlement of disputes concerning domain names, defined in the same Rules (Article 40), follow the provision contained in Uniform Policy of the ICANN.

At the *EU level*, the *domain name .eu* is governed by the Regulation (EC) no 733/2002 on the implementation of the *.eu* Top Level Domain and by the Regulation (EC) no 874/2004 Laying Down Public Policy Rules Concerning the Implementation and Functions of the *.eu* Top Level Domain and the Principles Governing Registration.

37 - See MIGUEL ASENSIO (n. 7) 487-488.

38 - See <http://www.dns.pt/pt/>.

Article 22 of the Regulation no 874/2004 provides for an alternative dispute resolution procedure (ADR) based upon the Uniform Dispute Resolution Policy of the ICANN. The ADR is compulsory for the holder of a domain name and for the Registry (no 2). The results of ADR are binding to the parties and the Registry unless court proceedings are initiated within 30 calendar days of each party's receipt of the notification of the ADR procedure results. (no 13) (39).

After these very general remarks on the domain names system, I turn now to the structure and nature of the ICANN and the stewardship of the domain names system.

B) Characterization of the ICANN and stewardship of the domain names system

The ICANN is a legal person of State law, constituted in 1998 under the *California Corporation Code* as a non-profit corporation with seat in Los Angeles, California. In comparison with the types of legal persons known in Civil Law systems, it is not an association, nor a foundation, nor a company (since it does not have a profit purpose), but a *sui generis* legal person.

It is managed by a Board of Directors of 16 members who are directly or indirectly appointed by stakeholder groups, by autonomous entities, or by the stakeholder community at large which is somehow designed to represent the global Internet community (40).

Furthermore, ICANN has advisory organs and mechanisms aimed at receiving the contributions of the stakeholders who do not participate directly in the *Supporting*

39 - In general, on the ADR, see SPINDLER/SCHUSTER (n. 31), *Allgemeines...*, nos 113 et seq.

40 - According to Article 6(2) of the ICANN Bylaws, the Board is composed by:

- 8 members appointed by a Nomination Committee (the delegates of this committee are selected from the *Generic Names Supporting Organization*, being one delegate from the Registries Stakeholder Group, one delegate from the Registrars Stakeholder Group, two delegates from the Business Constituency, one delegate from the Internet Service Providers Constituency, one delegate from the Intellectual Property Constituency and one delegate from the consumer and civil society groups, selected by the Non-Commercial Users Constituency, one delegate selected by the *Council of the Country Code Names Supporting Organization*, one delegate selected by the *Council of the Address Supporting Organization* and one delegate selected by the IETF);
- 2 members selected by the *Address Supporting Organization*;
- 2 members selected by the *Country Code Names Supporting Organization*;
- 2 members selected by the *Generic Names Supporting Organization*;
- 1 member selected by the At-Large Community; and
- the President *ex officio*.

Organizations. This includes the Governmental Advisory Committee, which is composed of representatives of a high number of Governments of all over the world. ICANN has been coordinating its activity with intergovernmental organizations, especially with the WIPO, regarding the organization of the domain names system and its coordination with the protection of distinctive trade signs.

The ICANN has had operational platforms in Istanbul and Singapore since 2013.

The control of the US Department of Commerce over the ICANN ceased in 2009, but the ICANN continued to be linked to the same department by a contract [*Affirmation of Commitments*] during a period ending in 2015. It was later extended until September 2016. The above mentioned policy of the US Administration, (*supra* Introduction) pointed to the transference of the functions it performs regarding the domain names system to the Internet global community of stakeholders and considered the ICANN as the entity most well positioned for the drafting a plan for this transition.

The path followed was, however, to entrust two groups composed of representatives of the global Internet community – the *IANA Stewardship Transition Coordination Group* (ICG) and the *ICANN Cross Community Working Group on Accountability* (CCWG) – with the draft a proposal for the transference of stewardship of the domain names system to the global Internet community.

The IGP presented a *Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community* in march 2016⁽⁴¹⁾. This document is composed of a ICG report, which contains a summary of the proposal, by the proposals of the *Domain Names Community*, of the *Internet Numbers Community* and of the *Protocol Parameters Registries Community*, which develop it⁽⁴²⁾. This proposal obtained the support of the *Internet Society*⁽⁴³⁾ and has started being reviewed by the NTIA⁽⁴⁴⁾.

41 - <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>.

42 - No 12.

43 - Press release *Internet Society Statement in Support of the IANA Stewardship Transition*, 24 may 2016, in <https://www.Internetsociety.org/news/Internet-society-statement-support-iana-stewardship-transition>.

44 - Cf. Lawrence STRICKLING – “Reviewing the IANA Transition Proposal”, Blog of 11 march 2016, in <https://www.ntia.doc.gov/blog/2016/reviewing-iana-transition-proposal>.

The proposal includes the constitution of an affiliate of the ICANN – the *Post-Transition IANA (PTI)* –, to which would be transferred the human and material resources of IANA, designed to be the IANA functions operator ⁽⁴⁵⁾. According to the proposal, the ICANN maintains its seat in the U.S.A. and subcontracts the IANA functions with PTI ⁽⁴⁶⁾. The *Domain Names Community* proposal expressly states that PTI should be, along with ICANN, a non-profit corporation constituted under the California law ⁽⁴⁷⁾, and that its Board of Directors should be appointed by ICANN ⁽⁴⁸⁾. The oversight function until now performed by the US administration regarding the domain names system will be transferred to a *Customer Standing Committee* ⁽⁴⁹⁾ composed mainly by representatives of the registry operators of domain names elected by the respective communities ⁽⁵⁰⁾.

The ICG's Proposal embraces only a limited aspect of the Internet governance, which concerns mainly the control of the domain names system. Notwithstanding, having in mind the policies stated by the EU Commission (*supra* Introduction) and the US Administration, which follow the conclusions of the main global Internet community fora (*supra* Introduction), there is the chance of the ICANN evolving into a central multistakeholding structure of this community of Internet governance.

Regarding the ICANN evolving into a global multistakeholder entity, there are more formal and more substantial issues to be considered.

45 - Nos 13 e 23.

46 - *Ibidem*.

47 - No 1108.

48 - No 1112.

49 - No 13 and P1. Annex G, nos 1308 et seq.

50 - Nos 1327 e 1328. The Committee is composed in the minimum by 2 representatives of top level generic domain names registry operators, 2 representatives of geographic domain names registry operators, eventually 1 representative of a registry operator of domain names not included in the previous categories and 1 liaison from the PTI. It may be appointed liaisons from other organizations. The representatives and liaisons are appointed by the respective communities (no 1334), which are the *Country Code Names Supporting Organization*, the *Registry Stakeholder Group* and the *Generic Names Supporting Organization* (no 1336). On the structure of the supporting organizations, see Articles IX-X of the ICANN Bylaws. On the structure of the Registry Stakeholder Group, see Charter adopted by the ICANN Board of Directors, in <http://gnso.icann.org/en/about/stakeholders-constituencies/rys>.

C) Formal issues of the ICANN evolution

Regarding the most formal issues, one may ask what nature ICANN, or the entity succeeding it, should assume.

The ICANN powers, in particular the coordination of the domain names system, is not confined to strictly technical issues, since it affects the operation of several legal regimes of supranational and national sources and is, as previously remarked, connected to the pursuance of given public policies (*supra* I) ⁽⁵¹⁾. Such is the case with the definition of the criteria which determine the top level domain names as well as the fundamental decisions on their allocation and assignment. The democratic legitimacy of ICANN is controversial, because it does not assure the democratic control of its decisions by all interested parties, it does not exercise its powers through the delegation of international community bodies and does not hold merely technical powers ⁽⁵²⁾.

For this reason, it could be thought that this mission should be entrusted to the national political power or that, taking into account its global repercussion, it should be in charge of an international organization.

A *stricto sensu international organization*, i.e., an intergovernmental or supranational organization, is an association of International Law entities (traditionally States) constituted by act of International Law (international treaty or resolution of international organization) which pursues common goals of the Member States, has organs that express its own will, and has a legal personality distinct from the Member States ⁽⁵³⁾.

In the *intergovernmental organizations* the deliberative organs are composed of representatives of the Member States. Their deliberations, addressed to the Member States, are usually taken by unanimity. The most common solution is the equality voting of the Member States, but some international organizations take into account the real inequality between them and adopt weighted voting (for example, Security Council of UN, IMF, World Bank, BERD).

51 - See also WEBER (n. 10) 61 and MIGUEL ASENSIO (n. 7) 50 et seq.

52 - See, namely, Markus KÖHLER, Hans-Wolfgang ARNDT and Thomas FETZER – *Recht des Internet*, 7th ed., Heidelberg et al., 2011, nos 26 et seq.

53 - See, for a convergent view, ANDRÉ GONÇALVES PEREIRA and FAUSTO DE QUADROS – *Manual de Direito Internacional Público*, 3rd ed., Coimbra, 1993, 411 et seq.

Nonetheless, as stems from the above stated (*supra* I), since the Internet is a global reality, it should be governed by *global entities*. Not only is the creation of an intergovernmental organization assuring the pursuance of policies which should guide that governance hardly feasible, but is also fundamental that civil society is appropriately represented in those entities and does not see its dynamic curtailed by intergovernmental mechanisms.

It should be pointed out that the constitution of a legal person under a State law does not prevent that this legal person pursues international goals and has a global scope of action.

In the present context, the national nature of the legal person essentially means that its incorporation, transformation and winding up, the internal affairs, the patrimonial autonomy, the binding of the legal person by the acts of its organs and the liability of its organs towards third parties are ruled by a State law ⁽⁵⁴⁾. It should be added regarding internal affairs that the governing State law may allow for a wide freedom of choice.

The localization of the seat or establishment in a given State may also be relevant, at least in the absence of the choice of another law by the parties, to the determination of the law governing contractual and non-contractual relationships to which the legal person is party, as well as, in the absence of an arbitration agreement or of a jurisdiction agreement, to the determination of the State jurisdiction competent for the settlement of the disputes arising therefrom.

The incorporation of a legal person with an international scope of action under a State law, as well as the localization of its seat in the respective State, do not imply, in principle, that other aspects of its activity are governed by its law, nor that they are not governed by other laws.

To consider a legal person who pursues international goals and has a global scope of action as a mere national law entity, however, may constitute a too narrow vision.

54 - See Luís de LIMA PINHEIRO – *Direito Internacional Privado*, vol. II – *Direito de Conflitos/Parte Especial*, 4th ed., Coimbra, 2015, § 58 e 59.

In the last decades, the category of non-governmental organizations (NGOs) has assumed growing importance, which, in a first approach, are precisely organizations with transnational activity, not having been created by act of Public International Law, but which pursue international goals, i.e., collective goals that transcend the scope of a State ⁽⁵⁵⁾. Many of these organizations tend to avoid the applicability of any State law and jurisdiction, subjecting the disputes arising from the relationships which have been established with persons of domestic law to international arbitration.

The designation “non-governmental organization” expresses the idea that it is an international organization (in a broad sense) different from an intergovernmental organization, because it is not an association of States created by act of Public International Law.

The growing influence of the NGOs has been one of the most important developments at the international level ⁽⁵⁶⁾. They are one of the entities with transnational activity with which the States tend to share their powers – including political, social and security roles which are in the core of sovereignty –, in an era dominated by the end of the Cold War and by globalization. “A world that is more adaptable and in which power is more diffused could mean more peace, justice, and capacity to manage the burgeoning list of humankind's interconnected problems. At a time of accelerating change, NGOs are quicker than governments to respond to new demands and opportunities” ⁽⁵⁷⁾.

Very important organizations in the humanitarian field, such as the International Committee of the Red Cross, or in the economic field, such as the International Chamber of Commerce and the International Air Transport Association, are examples of NGOs. Nevertheless, there is no uniform concept of NGO. Some authors define it as an international association with members of different nationalities and non-profit aim ⁽⁵⁸⁾. Meanwhile, for the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (Strasbourg, 1986), a

55 - See LIMA PINHEIRO (n. 44) § 60, with more references.

56 - Cf. Barry CARTER, Phillip TRIMBLE and Allen WEINER – *International Law*, 5th ed., Austin et al., 2007, 144-145.

57 - Jessica MATHEWS – “Power Shift”, 76 *Foreign Aff.* 50, 50-64 (1997), also accessible at <https://www.foreignaffairs.com/articles/1997-01-01/power-shift>.

58 - Cf. Patrick DAILLIER, Mathias FORTEAU and Alain PELLET – *Droit international public*, 8th ed., Paris, 2009, no 417.

NGO is an entity with a non-profit-making aim of international utility, established by an instrument governed by domestic law, carrying out their activities with effect in at least two States.

In the face of this concept of NGO, *ICANN would be a NGO*. A future entity succeeding ICANN and which was not created by an act of Public International Law, as well as the proposed PTI, would also be NGOs.

What is *the relevance of the legal characterization of a legal person as NGO?*

The Strasbourg Convention lays down a special regime for the NGOs which have been created by act of domestic law of a party State or which have its statutory seat and its management and control in the territory of party States. This Convention provides for the recognition of the legal personality and capacity acquired under the law of the statutory seat. In legal systems, such as Common Law systems, in which domestic law legal persons are subject to the law of the State of incorporation (incorporation theory), this does not raise special difficulties. But in systems like the Portuguese, in which legal persons are, in principle, subject to the law of the main and effective seat of their administration (Article 33 of the Civil Code), is there a segmentation of the law governing the legal person or a choice of law rule defining the law governing the legal person as a whole?

The issue is very controversial⁽⁵⁹⁾. It seems to me there is a segmentation. The personality and the capacity become subject to the law of statutory seat⁽⁶⁰⁾. The determination of the law applicable to other aspects of the legal person will still depend on the domestic choice of law rule.

The relevance of NGOs in the international legal order is a different issue. There are acts of International Law assigning a consultative status to some NGOs regarding given international organizations (namely UN Resolutions). There are also States that assign to some NGOs a status relevant to the International Law. Thus, it seems that

59 - See Albert BLECKMANN – “Nongovernmental Organizations”, in *Universal Economic Organizations, IECL*, vol. XVII, ch. 25, 1981, no 14.

60 - This will often cause difficulties, because some of these organizations do not provide for a statutory seat. In this case, resort should eventually be made to the effective seat of their direction.

these NGOs have acquired an international personality, albeit very limited, which has been assigned to them by international organizations and States ⁽⁶¹⁾.

The Strasbourg Convention has only 11 party States, which are members of the Council of Europe, and it is obvious that the ICANN has not been created by an act of a party State nor has its seat in the territory of a party State.

Notwithstanding, *relevant issues regarding the determination of its status may arise.*

One of these issues, which is still open in legal systems such as the Portuguese, is the possibility of including these entities in the concept of *international legal person* for choice of law purposes ⁽⁶²⁾. This would lead, for instance in the Portuguese Private International Law, to apply to these entities the law (domestic or international) chosen in the constitutive act and, in the absence of a choice, the law of the country where the man seat is located (which is not necessarily the administration seat) (Article 34 of the Civil Code) instead of the law of the country where the main and effective seat of the administration is located ⁽⁶³⁾.

Another issue deserving reflection is whether the role recognized to ICANN or to a future entity which succeeds it by some international organizations (namely the UN and the WIPO) or by States, may be *relevant to International Law*.

Keeping in mind the doubts raised by the determination of the status of these type of entities, the possibility of an international convention to define their legal framework, without prejudice for its incorporation under a State law, could also be considered. A possibility which, naturally, would only have direct relevance to the States that became party to that convention. In this case, the NGO, or analogous entity,

61 - Cf. BLECKMANN (n. 59) no 14.

62 - ISABEL DE MAGALHÃES COLLAÇO – *Direito Internacional Privado*, parte II – “Sistema de normas de conflitos portuguesas”, t. I – “Direito das pessoas. § 2,º Pessoas Colectivas” (students notes), Lisbon, 1971, 49-50, advocated at the time being that could be included in Article 34 associations and foundations which, although not created by international convention, are designed for an activity at the international scale. She exemplified with the International Chamber of Commerce and the Institute de Droit International. On the contrary, João BAPTISTA MACHADO – *Lições de Direito Internacional Privado*, 2nd ed., Coimbra, 1982, 350, and António MARQUES DOS SANTOS – *Direito Internacional Privado. Sumários*, Lisboa, 1987, 261-262 exclude all the legal persons that are not created by an International Law instrument.

63 - See LIMA PINHEIRO (n. 44) § 60, with more references.

would have an international legal framework, which would be compatible with a model of autonomous multistakeholder governance.

In any case, it seems advisable that ICANN, or the entity succeeding it, politically assumes its role as a NGO.

Furthermore, in the relationships between this NGO and the public and private entities, namely in the standard contract to be concluded with the interested States and in the registration rules of domain names, *arbitration of the disputes* arising therefrom⁽⁶⁴⁾, the seat of the arbitration, and the rules of law applicable by the arbitral tribunal to the merits of the dispute, which would not always be State law, could be provided. It would also be appropriate to adopt rules of arbitration, or even eventually create an institutionalized center, at least for the arbitrations concerning the assignment, modification or cancelling of domain names. This would constitute an important step in the globalization of this entity.

D) Substantial issues of the ICANN evolution

Regarding the more substantial issues, one must reflect on the mode of representation of the Internet community multistakeholders and on its coordination with the interested States and international organizations.

The subcontracting of the IANA functions in an affiliate of ICANN is a possible solution to transfer the stewardship of the domain names system to the community of Internet multistakeholders because ICANN is oversighted by a *Customer Standing Committee* mainly composed by representatives of the communities of domain names registry operators. The merits of this solution require further analysis. I will only point out that, on one hand, this solution is supported by organizations representing the global Internet community. On the other hand, it seems depend to a larger extent on the structures and internal procedures of the communities concerned with the registration of domain names, and on the nature of their members (*supra* B).

64 - Compare the alternative proposal of an international tribunal for Internet put forward by Daniel FREIRE E ALMEIDA – *An International Tribunal for the Internet* (Ebook), Coimbra, 2016, Part II, Chapter 1. In my opinion, this proposal triggers the risk of contributing to the intergovernmentalization of Internet governance.

In general terms, I believe that the evolution of ICANN towards a multistakeholder structure of Internet governance, which I consider desirable, requires further steps.

First of all, in the direction of a *more balanced, inclusive and transparent representation* of the Internet community stakeholders in the appointment of the members of the Board of Directors.

This should include the *direct or indirect participation of delegates of States and international organizations* in that appointment, although without a hegemonic position and through a weighted voting which takes into account their relative political-economic weight. The mere participation in an advisory organ does not express appropriately the contribution that the States should give to the definition of some policies and to the decision-making where are at stake public interests that they should pursue.

With respect to the *external coordination of the entity's activity with the interested States and international organizations*, it seems advisable that these States and international organizations assign to it a status relevant to International Law, namely accepting its participation in advisory organs of international organizations and in conferences and fora even having an intergovernmental nature, as well as its contribution to the drafting of international conventions and in the preparatory work of normative acts of supranational organizations (such as the EU).

The entity may also participate in other *coordination structures* together with the interested States and should conclude with them agreements which, while not being international treaties in strict sense, may amount to *quasi-treaties*, since they are not exclusively subject to the law and the jurisdiction of the contracting State and are, by the procedures observed by the public party and by the position of the public organs that intervene in their conclusion, or authorize it, materially comparable to international treaties ⁽⁶⁵⁾.

65 - See LIMA PINHEIRO, *Contrato de Empreendimento Comum...* (n. 21) § 15 C and (n. 44) § 67, with more references. The exceptional possibility of agreements between NGOs and States constitute international treaties seems to be accepted by DAILLIER/FORTEAU/PELLET (n. 48) no 417.

In these ways, the autonomous entity may acquire a *limited international legal personality*, which consolidates its institutionalization as a global multistakeholder entity and reinforces its role as a global political actor.

As previously remarked, the agreements to be concluded with the interested States may conform to a standard contract assuring the uniformity of the entity's rights and obligations, and in which the inclusion of appropriate arbitration and choice of law clauses – which do not refer necessarily to State law –, may increase its autonomy and global nature.

III. FINAL REMARKS

This study does not intend to advance definitive conclusions nor to propose a plan of action. It is essentially comprised of a set of reflections that are mainly aimed to find some clues related to possible solutions for the evolution of Internet governance and regulation.

The transference of the stewardship of the domain names system to the community of Internet multistakeholders is on the table and may constitute a first step towards the governance of the Internet by a globalized autonomous entity based on a multistakeholder model, which seems to be the option most suited for the goals and values that should guide it.

In this evolution, the assumption of the role of an NGO by ICANN, or by the entity which succeeds it, and the recognition to this NGO, by States and international organizations, of status relevant to Public International Law, seems appropriate to its consolidation as an *autonomous global multistakeholder entity*.

For this purpose, however, improvements are required in the representation mechanisms of the global Internet community stakeholders. These include namely an increased emphasis in the role of the States. A network of coordination structures and agreements involving the autonomous entity, on one side, and the States and international organizations, on the other, is also required.

If this transition is successful, the autonomous entity may play a more important role in Internet governance than that presently played by ICANN and, eventually, may constitute the embryo of central structure of Internet governance.

The autonomous governance of the Internet, here advocated, is indissociably connected with a co-regulation of the Internet, through a combination of the primacy of autonomous regulation with public regulation in all the areas and issues in which the autonomous regulation is insufficient. This public regulation should be fundamentally of an international source, in principle of universal scope, but also regional whenever justified by the circumstances.

The autonomous regulation of the Internet (the so-called *lex electronica*), constitutes a particular manifestation of a phenomenon of development of autonomous

sets of rules governing transnational relationships. This assumes, together with its practical importance, a major theoretical interest for legal science. It raises the question whether these sets of rules may be seen as specific areas of International Law understood in a broad sense, or as subsystems of a complex global legal system ⁽⁶⁶⁾.

In the first case, International Law would be understood as the legal order of an international society comprised both of the interstate relationships and of the transnational relationships between private people.

In the second option, the global legal system would be the legal expression of a world society, integrating the universality of human interactions and of all the other societies, namely the State societies. No doubt globalization, and the Internet as its catalyst and tool, favor an evolution towards the formation of this world society and, with it, a global legal system.

66 - See, with more development and references, LIMA PINHEIRO, *Contrato de Empreendimento Comum...* (n. 21) 936 et seq.; and *Arbitragem Transnacional...* (n. 16) 433 et seq.