

Preliminary Report v. 2

Analysis of Radication 1376, Regarding Domain Names, the Consejo de Estado [State Council - Tr.] [State Council - Tr.] (Sala de Consulta y Servicio Civil) [Consultation and Civil Service Room - Tr.] of Colombia.

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Introduction

This Report is an analysis of the document indicated in the title. It deals with determining reasons stated by the Consejo de Estado de Colombia [State Council of Colombia -Tr.], in reference to domain names. Similarly, it proposes arguments to many of the approaches mentioned in Radication 1376.

As indicated, this is a preliminary report that must be completed by a detailed study when more information is obtained, such as the letter of application to the State Council, by the Ministry of Communications, and the document sent by the NIC¹ Colombia to the same entity arguing its position regarding the Administration of ccTLDs² .co.

Analysis is developed following Radication 1376 structure and comparing statements by the Consejo de Estado de Colombia [State Council of Colombia - Tr.] with Administration of Domain Names customs and basic documents (RFCs³ and ICPS⁴) which are used for the process of the Administration of Domain Names as regards ccTLDs.

It is important to indicate that given the similar characteristics of the Derecho en Latinoamérica [Law in Latin-America - Tr.] and especially those in the Andean community, it is important to study arguments maintained by the State Council of Colombia, as the same arguments can be repeated in other countries in the region.

This report does not attempt to be ignorant of the Government's legitimate interest in participating in matters related to the Administration of Names for the ccTLDs. However, it wishes to suggest appropriate paths and sustainable arguments in order to cooperate with the Comunidad Local de Internet [Local Internet Community - Tr.], while respecting the custom and agreement of the Act.

¹ NIC: Network Information Center. Designation that refers to an administrator for a ccTLD, in relation to which it is an information point in the network for said ccTLD.

² CcTLD: Country Code Top Level Domain. Type of TLD based on ISO 3166-1 Alpha-2.

³ RFC: Request for Comments. Within the IETF this is a valid document used as the application standard for a determined use, service or concept in relation to the Internet.

⁴ IPC: ICANN Policy Documents. The document referring to a ccTLD is number 1.

Similarly, this report is produced within the framework of the LACTLD⁵ requirement to know the arguments maintained and their possible influence in other ccTLDs of the region, and to know a vision from Derecho Informático [Computer Law] in LAC about domain names.

1. Regarding the Nature of the Letter of Application from the Ministerio de Comunicaciones [Ministry of Communications - Tr.] to the Consejo de Estado Colombiano [State Council of Colombia - Tr.] about Domain Names.

The Ministry of Communications requested that the State Council of Colombia state its opinion about the "*Legal nature of the 'dot com' ... used in Internet addresses registered in Colombia and the consequences that it would have being recognized as having a public nature*"⁶. The Ministerio de Comunicaciones [Ministry of Communications - Tr.] asks three questions that will be elaborated on in the Report:

- 1. Its view of the public nature of the resource domain .co*
- 2. Accepting that this is a resource of public nature, we understand that this is a subject intrinsically related to telecommunications. Its view of this aspect is requested.*
- 3. Should the resource domain .co be related with telecommunications, where should the resources produced by its operation be directed?*⁷

This Preliminary Report will elaborate on arguments and comments made to the Report as it develops. It must be clarified that the purpose of the questions asked by the Ministry of Communications is not to form an analysis of "legal nature" (per se), the one that we feel does not conclude reliably, but rather to suggest the need to regulate domain names as a "telecommunications public service".

All analyses must be based on certain premises or presumptions, which the Ministry of Communications indicates, but these are non-neutral premises looking for the argument to sustain government's participation as a "leading entity" for the Domain Names System.

Although the Report will analyze other arguments, the concept previously stated will finally be found in the conclusions of Radicación 1376.

1.1. Regarding Radicación 1376 "Background"

⁵ LACTLD: Latin American & Caribbean Country Code Top Level Domain.

⁶ Consejo de Estado, Sala de Consulta y Servicio Social [State Council, Consultation and Service Room – Tr.]. "Radicación 1376, reference: INTERNET Domain Names". December 11, 2001, Bogota, Colombia.

⁷ Idem.

The first chapter (or section) analyzed by Radication is called "**Background**". It must be mentioned that we have not seen the original letter of the Ministry of Communications; however, the first paragraph of this section presents us with a first conceptual error on the part of the Ministry of Communications. The State Council later elaborates on this error.

In reference to the Ministry of Communications, the State Council indicates: *"The Minister of Communications explains the factors that contribute to the consultation. The first and main factor, being: the domain .co is the code corresponding to Colombia in order to identify this country in the network or Internet country directory just as .ca corresponds to Canada, .br to Brasil, .fr to France, .it to Italy, .uk to the United Kingdom, .us to the United States and so on to the various countries in the world affiliated with the Internet."*⁸

Clearly, the ISO 3166-1 Alpha-2⁹ Codes Table, the table maintained by ISO¹⁰ 3166 Maintenance Agency, was developed well before the first documents related to the DNS¹¹ appeared and, it is not the only table containing double codification used to designate countries. Other more widespread classifications include ANSI¹², JIS, DIN and BSI¹³, that at their time had a codification for countries. However, the criteria combination from 1974 with TC 46 resulted in greater use of the ISO Table. This did not prevent each user from using their own tables such as the Geonomenclature of the European Community¹⁴, in which each country has a numerical codification, and in the specific case of Colombia the code is 480.

To summarize, .co is not a term created so that "Colombia can be identified within the Internet or network country directory"¹⁵. Rather it is a part of a codification table that is one of many that identify countries, but that is the most used and indexed. Choosing the ISO 3166-1 Alpha-2 standard was arbitrary. Other organizations such as IATA have their own identification tables.

⁸ Idem.

⁹ <http://www.iso.org/iso/en/prods-services/iso3166ma/index.html>

¹⁰ ISO: International Organization for Standardization: <http://www.iso.org>

¹¹ DNS: Domain Name System.

¹² <http://www.ansi.org/> (American National Standard Institute)

¹³ The British Standards for country codes is BS 5374

¹⁴ <http://europa.eu.int/comm/eurostat/Public/datashop/print-catalogue/EN?catalogue=Eurostat&theme=6-External%20Trade&product=KS-BM-02-001-N-EN>.

¹⁵ Letter of the Minister of Communications to the State Council, quoted from: Consejo de Estado, Sala de Consulta y Servicio Social [State Council, Consultation and Service Room – Tr.]. "Radicación 1376, reference: INTERNET Domain Names". December 11, 2001, Bogota, Colombia.

In the background's third paragraph, the following statements were made on behalf of the Ministry of Communications "*the administrators of country code domains - the situation at the University in Colombia - are trustees in favour of the nation and the global Internet community.*" In fact, in point 3 of the *Administración de Dominios Delegados [Administration of Delegated Domains - Tr.]*, sub-item 2, the RFC 159¹⁶ indicates:

These designated authorities are trustees for the delegated domain, and have a duty to serve the community.

*The designated 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*¹⁷.

The Derecho Constitucional [Constitutional Law] tells us that the nation is a component of the State referring to the population. This means that a State can be a group of nations, as occurs, for example, in countries with indigenous groups, who are identified as nations, which they are considered to be according to the Derecho Constitucional [Constitutional Law]. In Peru, we would have a variety of nations in agreement with the anthropological principles. Yet, the argument maintained by the Ministry of Communications seeks to understand the nation-state comparison to be able to establish a set of rules for the administration of domain names under a ccTLD.

In order to maintain the nation-state comparison that is suggested throughout the document, there would not be a means of comparing a determined nation with the State of Republic of Colombia, as it comprises a group of nations.

The Postel¹⁸'s suggestion, stated in the RFC 1591, is that the entity delegated to administer a gTLD or a ccTLD¹⁹ has a responsibility to the Global Internet Community and to the nation, which has come to be understood as the Local Internet Community. As Postel cannot answer the suggestion, we can infer that, based on other documents by him and on the way that ccTLDs administration was distributed, the basic consideration was that of service to the community, to people. These people undoubtedly make up the State, but it is not a State service, rather a private infrastructure. So much so that other networks based on the TCP/IP²⁰ protocol can use names systems for identification in the way that .god or .satan²¹ function. This means that the DNS option is one of the possible forms for structure of the IP numbers²² under the TCP/IP.

¹⁶ Postel, J RFC 1591: Domain Name System Structure and Delegation, <http://www.nic.pe/interna/01-normas/1591.txt>

¹⁷ Idem.

¹⁸ Jon Postel. <http://www.postel.org/jonpostel.html>

¹⁹ gTLD: generic Top Level Domain, e.g. .biz, .com, .net, .org, .pro, .info

²⁰ TCP/IP. Basic Information Transmission Protocol on Internet

²¹ <http://www.dot-god.com>

²² IP number, Internet Protocol number. This is a combination of 4 numbers from 0 to 255 separated by points that identify a machine connected to a network.

In the fourth paragraph, the Ministry of Communications states a hypothesis that .co "*as a top level domain, would no longer be used exclusively to identify Colombia. It would be made a generic domain, synonymous to "company". As the generic domain .com is being overly used, it is assumed that it should attract many companies around the world to identify themselves with .co*"²³. Prior to this statement, the same Ministry of Communications made a statement that is quite useful to the analysis: "*the University of Los Andes, in its position as an administrator of the domain .co, resolved to develop bidding process to find an international operator of its own.*"

The nature of the TLDs was determined by the RFC 1591²⁴(and has two aspects: the gTLDs and the ccTLDs). The gTLDs were arbitrarily created (though ever since the first RFCs, they were already being analysed and proposed beginning with the first RFC linked to the DNSs)²⁵ and have increased the quantity of gTLDs²⁶. The ccTLDs are based in the ISO 3166-1 Alpha-2 Table and the creation of a ccTLD will depend on the expansion in the ISO Table previously mentioned.

From the documents and the public bidding indicated on the web, it is not inferred that a transfer in administration of the .co may take place, rather the bidding on the operation may occur without transfer. This is feasible. For example, .TV (Tuvalu) is operated by The TV. Corporation²⁷; however, the administration makes this domain correspond to the Ministry of Finance and Tourism of Tuvalu, as is noted in the IANA²⁸ and .TV²⁹ registries.

On the other hand, the fact that an international operator "operates" a ccTLD does not mean that it loses its nature and becomes a gTLD. This is not possible because the system is defined by what is a ccTLD and what is a gTLD. For something to happen, .co would have to be eliminated from the ISO 3166-1 Alpha-2 Table and would have to include itself in the Principal Root Server as corresponding to a generic.

It is important to indicate that there are ccTLDs that have various meanings in various languages. For example, .PE in Romanian means "of, belonging", which means that a domain <http://web.pe> in Roman would mean "web of", a style that was used for services type <http://come.to>³⁰, <http://pagina.de>³¹ or .md for Moldavia, which corresponds to the medical acronym in English, or others similar.

²³ Consejo de Estado , Sala de Consulta y Servicio Social [State Council, Consultation and Service Room – Tr.]. "Radicación 1376, reference: INTERNET Domain Names". December 11, 2001, Bogota, Colombia.

²⁴ Postel, J. RFC 1591: Domain Name System Structure and Delegation (<http://www.nic.pe/interna/01-normas/1591.txt>)

²⁵ For example, RFC 1035 <http://www.nic.pe/interna/01-normas/1591.txt> and previous ones.

²⁶ <http://www.icann.org/minutes/prelim-report-16nov00.htm#00.89>

²⁷ <http://www.tv>

²⁸ IANA: Internet Assigned Numbers Authority

²⁹ Registry for .TV in IANA: <http://www.iana.org/root-whois/tv.htm>

³⁰ <http://come.to>

³¹ <http://pagina.de>

In the same way, the arguments expanded by Radication stating that .com is only for commercial companies, have a deficiency, that is we can find not-for-profit organizations that have .com (including State bodies of some countries such as: <http://www.remateduanas.com> (of Peru) Customs Clerk) or commercial organizations with a registry .org (<http://derecho.org>).

It is then a risky assumption and it is not certain, to state that an international operation would deprive "... prevent it from being used exclusively to identify Colombia and become a generic domain". As demonstrated, this is not feasible.

It is worth mentioning that there are various administration policies for domain names under a ccTLD. They are differentiated by a tendency for open registry (types .DE, .AR, .PE, .MX and so on), for closed registry for residents (type .CO, .ES), for foreigners' registry through a local operator (.BR, .CU). Perhaps thinking about an open operation of the .co registry have led the Ministry of Communications to assume that a modification in the political registry might not favour the local Internet process. However, it is worth mentioning that there exists a diversity of Colombian companies whose registries are .com that are not interested even though they are Colombian, or foreign companies who are interested in having a .co registry but are unable to. Their positions must also be analyzed.

In the first section of Radication, the main arguments presented by the Minister of Communications are stated.

The first of them indicates:

"1. Management of Internet domain names and addresses is a matter of competence of the Ministry of Communications, as much for the general terms of Article 1 of the Act 72 of 1989, as for being the express regulation of Resolution 102 regarding Management of Internet Domain Names and addresses of the Plenipotentiary Conference of the International Telecommunication Union (ITU) of which Colombia is a part. The Act mentioned refers to Article 8 for the regulation of telecommunications, the standards and recommendations of the ITU."³²

This argument will develop further, particularly in an analysis of Resolution 102 of the ITU³³, which states that the United States must get involved in processing of Domain names, not that they must regulate the administration of the system.

³² Consejo de Estado, idem. Note 6.

³³ ITU: International Telecommunications Union.

In reference to the statements in the second argument³⁴ of those presented by those presented by the Ministry of Communications in its communication to the State Council, this mistake of confusing the international operation with a change of nature of the TLD³⁵ is emphasized. This statement is inaccurate and impossible. It is not possible to transform a ccTLD into a gTLD because the operation may be executed by a body outside of Colombia, as occurs with many ccTLDs operated internationally. They have not lost either their representation in the ccTLD constituency or their designation as ccTLDs in the IANA Table.

The third argument indicates:

*3. Transformation of the resource domain .co into a generic domain involves an intrinsic modification, and the decision to transform it is an act of disposition. The status of trustee, which the University has, does not allow it to dispose of the property that it has in trust without consent of the trusteeship and of the beneficiary. In addition, given the nature of property of general interest, its transformation in essence requires the State's consent, through the National Government, the Ministry of Communications.*³⁶

This argument is intrinsically linked to the very nature of the administrator of domain names as a trustee facing the nation, concept indicated in the previous lines and which refers to the Local Community, not the State, without excluding the latter. The administration must not be considered property as such, rather an operation.

Finally, three concepts are included in the first section of Radication: *"in the Ministry's opinion, the arguments of the University of Los Andes do not recognize the Ministry's authority to intervene in the point"*

"1. The domain .co, as a subject of Internet domains, is matter developed on a private international scale, outside of the Colombian legislation in general, and specifically the legislation proper to the Ministry of Communications.

2. The bidding process, which advances the University, does not involve the loss of the administration of the domain.

*3. The suspension of the bidding process could be damaging to the Internet community, the country and the University.*³⁷

³⁴ "2. If the University terminates the bidding process, Colombia loses the exclusive distinctiveness that .co confers upon it. This domain would no longer be only a country domain that strictly identifies Colombia to become a generic domain to identify companies. The previous argument means that the very nature of the resource would be transformed from a specific symbol of a country into a generic sign."

Consejo de Estado, idem, note 6.

³⁵ TLD: Top Level Domain

³⁶ Consejo de Estado, op. cit. Note 6.

³⁷ Idem.

It is necessary to assume that the items indicated are precise reflections of the statements by the University³⁸.

In the first item's case, we believe that although the administration of a ccTLD is originated from a private link, its application is in agreement with the legal framework suggested by the Administrator's residence. We therefore feel that it is not possible to say that the ccTLD .co is not outside the Colombian legislation. If it is certain that the private contract between the University of Los Andes and IANA (later ICANN) agrees with the concept of autonomy of will to contract, whereby the State cannot intervene regarding this contract, other than the exceptions stated in the Act.

The second item explicitly indicates that the process is not a transfer of administration, but rather of operation. With this statement the same Ministry is admitting that there neither is nor was an intention to transfer the ccTLD.

Regarding the third item, we cannot form an opinion in that we do not know the details of the process itself or the operational consequences.

Regarding the "Statements" of Radication 1376.

The State Council begins its analysis by discussing the Internet phenomenon. It begins the development of its argument with a definition about "virtual reality" that states: *"While in reality, time passes slowly and for this reason is measured in years, months, days, hours and minutes, in the virtual world, time passes quickly and is measured in seconds and nanoseconds ... Space and time then have a new meaning on the Internet, as it substantially reduces distances and periods of accessing information sources. It has also allowed digital information to become property of economic and social value, which situates knowledge as the basis of the current economy."*³⁹

Similarly, Radication uses part of Lawrence Lessig's suggestion referring to cyberspace as an argument, indicating that Lessig *"develops in his work a thesis pro regulation of the code for the space of the applications, because he deems that the 'governments become necessary in protecting freedom, though they can also destroy it themselves."*⁴⁰

³⁸ The lack of complementary documentation, letters to the Ministry, letters from the NIC as will be indicated in the presentation, constitute an element that prevents a greater analysis. We therefore have to assume that the statements are certain.

³⁹ Consejo de Estado, op. cit.

⁴⁰ Lessign, Lawrence. Code and other Laws of Cyberspace. Basic Books. United States, 1999.

Finally, in this item, the State Council indicates: *"The previous statements show that the subject linked to the point that concerns us incorporates in its context economic, cultural, philosophical, legal, political, social and technological content. Clearly, the consulting Ministry's questions define the reflection's purpose. Therefore, the Room will not broach points that although they are part of the general subject that make up the context; they are not indispensable to cast a light on them."*⁴¹

It is necessary to begin a complete analysis of the implications of the proposals made by the State Council of Colombia, beginning with the first one, regarding the meaning of "virtual".

In the Diccionario de la Real Academia de la Lengua (1992) Spanish Language Royal Academy Dictionary – Tr.], we find that the Latin word "virtud" (power, strength) is at the origin of our word "virtual" and means "that has the power to produce an effect, though it does not actually produce it ... being often used in opposition to effective or real." It is then clear that the definition refers to something implicit. On the other hand, the Enciclopedia Santillana [Santillana Encyclopedia – Tr.] states that "virtual" is "that which has the possibility or the ability to be or produce what the noun states, though at present it is not or has not yet been produced." Finally, neither strictly etymological definition refers to what we wish to express as virtual; we have to refer to practical definitions that are presented as much for the term "virtual" as for what is called "Virtual Reality".

Virtual Reality is making us believe that we are before a given reality, which it presents us through a given inter-phase (lens, helmets or special gloves) that put the individual in a similar experience to life itself, without being life to begin with. It is sitting in those mechanical games that, through hydraulic pistons, fairy lights and stereo sound, we are made to believe that we are immersed in a voyage down a fast-flowing river or in a space module, deceived by our senses.

⁴¹ Consejo de Estado, op. cit.

The "virtual" of reality, or toward the definition that is used now, a virtualization of the information is clearly defined by what Nicholas Negroponte, Chairman of the MIT Media Laboratory, tells us: *"The world of atoms consists of objects that have volume. Examples are a book, a record or a bottle of water. When we establish a library, we offer it to a person who borrows the atoms that make up a given book, brings it to their home and after a few days returns it to their original location. The byte, however, acts as an information signal that can move information at the speed of light. In this way, when the content of a book is digitalized, these data are stored in a computerized memory and the information is submitted - through bytes - to any citizen that requests it from their terminal. Imagine the advantages of this system: millions of people in any part of the world can access that book without having to move themselves. Furthermore, the process takes place through a medium that does not contaminate the environment. I believe that the change from a world thought of in atoms to another based on the exchange of bytes is a strong tendency, unstoppable"*⁴².

It is then clear to us the tendency that is being followed in terms of information (and Computer Sciences) by the use of the network of networks (Internet), increasing each day exponentially.

In principle, it was felt that the Internet might end as an individualization of each of the users, taking away their individual traits and transforming them into one homogenous unit. However, it did not turn out this way. The exchange of information and use of the Internet as a tool for education and preservation of cultural facts made it a social Internet, in which the predominating element is all that is humane within a collectivity, not just the human for himself.

We have therefore clearly defined that "virtual" does not imply that the object that we desire "does not exist in reality", since it has now a new form within reality (it is transformed into bytes). Isaac Asimov suggested then the appearance of a virtual world by stating *"...Now, for example, it is visualizing me; it cannot touch me, smell me, or do anything of the sort. However, if it were to see me, it could do all of that. At this moment, I am at least 300 km away. How can that be the same thing? Tell me."*⁴³

⁴² Ulanovsky Sach, Daniel, "Es hora de que las computadoras aprendan a ver y a oír" [It is time that computers learn to see and listen – Tr.]. Interview with Nicholas Negroponte, June 1996.

⁴³ Asimov, Isaac, "El Sol Desnudo" [The Naked Sun" – Tr.], Biblioteca de Ciencia Ficción [Science Fiction Library – Tr. No. 7, Editorial Hispanoamerica, Argentina, 1980.

Here, a new definition is presented that will make virtual time useful to us. For this reason and following the space-time-historical suggestions of Víctor Raul Haya de la Torre, we will have a new "virtual" space-time to discover. When someone accesses Internet there will be a point used as a "Portal" to the information that one wishes to view. The system is established through links (these links are called as such particularly on the web). From a physical point of view, it does not matter if the computers containing the information wanted are in the other room or on the other side of the planet. *"The modification of the perception of time and space that this supposes, in relation to the experiences that we have accumulated in the real world, is obvious".*⁴⁴

The State Council of Colombia bases one of its suggestions for regulating Internet on the statements made by Lawrence Lessig. This author makes an intense analysis of what determines the "code". He is very careful both in making the analysis of what it should be, and in choosing his words to state this.

Iñigo de la Maza in "Code and Other Laws of Cyberspace from Lawrence Lessig"⁴⁵ makes an extensive and detailed analysis of Lessig's ideas that he indicates in the following way: *"Loosely, Lessig's work attempts to draw our attention to two things. First, the fact that the physiomy of Internet has changed; it has separated decisively from the libertarian utopia of a space without "kings, presidents or votes" (Lessig,1999b, 4 supra nota 1) gradually configuring itself as a panoptic structure that makes possible perfect control. The second point that concerns this author is explaining how this resulted. According to Lessig, the cause is the plasticity of the Internet structure and the interests of commerce and the government."*

After conducting a large study, Lessig said that the State must not be outside the process, but that the regulation of structure is linked to content control. What is really sought is control of the citizen, who does not remain an anonymous individual in the society as expressed by H.G. Wells. Undoubtedly, Lessig is sufficiently pessimistic in his analysis and emphasizes possible motivation of government and powerful groups behind it.

⁴⁴ Manrique, Nelson. "La sociedad virtual y otros ensayos" [The Virtual Society and other Experiments – Tr.], Pontificia Universidad Católica del Perú, 1997.

⁴⁵ Maza, Iñigo de la. "Code and Other Laws of Cyberspace from Lawrence Lessig". Alfa-Redi. <http://alfa-redi.org/revista/data/47-9.asp>

Iñigo de la Maza concludes his analysis of Lessig indicating that, *"Lessig presents a pessimistic vision of the future. Some have argued that his distrust in the market is excessive and that the solution to the challenges that Internet presents is not found in the reasoned and deliberative collective decision, but in the individual's choice"*⁴⁶. *It is difficult, at least for me, to determine if Lessig is correct or not. It is not enough that the arguments of a book are consistent and cohesive or that its author presents them with elegance and intelligence to determine whether or not the book corresponds to reality or even whether its prognostics are accurate or not. In light of everything, at least one thing seems certain: if Lessig is correct, it means that once again we are aboard Titanic, but this time, as Paul Virilio warns, we are headed for the "accident of accidents"*⁴⁷ *and, as with the first, the life-boats are not sufficient.*"⁴⁸

We agree with Lessig's "hopes". We believe that there must be participation and regulation, but it is also clear to us that the process must be analysed from the social perspective. This is a social process in evolution in which the concepts of the law must be revised from the concepts of Sovereignty to those of Privacy including all the intermediate points. There is no fear worse than the fear of change".⁴⁹

Let us analyze Internet for a moment. Is it an anarchic world in which rules do not exist? Is it a technological bastion for those who wish to live outside the rules? Who governs Internet?

Internet is surrounded by rules. Since it began, users have determined a series of social customs that are fundamental and basic to survive on the Internet. This first level of Internet rules is called Net-Etiquette⁵⁰ or Etiqueta de la Red [Internet Etiquette - Tr.], and was fundamentally applied in the operation of electronic mail. These rules were later applied to chat rooms and web sites.

⁴⁶ See, for example, Post (S/F). (Note from Iñigo de la Maza)

⁴⁷ In the words of Virilio: Currently, new technologies constitute the vehicle for a certain type of accident that is not longer local or situated with precision such as the shipwrecked Titanic or the derailment of a train. Instead, a general accident is an accident that will immediately involve the whole world [Translation] (1997, 14, italics in the original). (Note from Iñigo de la Maza).

⁴⁸ Maza, Iñigo de la. "Code and Other Laws of Cyberspace from Lawrence Lessig". Op. Cit. Note 45

⁴⁹ "To he who lives in this era and insists on believing that he can behave as though he were living in the past, the same thing may happen to him that happens to he who looks back and walks forward: he ends up tripping and cracking his head open."

⁵⁰ <http://www.iso.org/policy/conduct/conduct.html>

The second level is called technical rules. These allow Internet to function. These conventions, used because they were validated in practice, are the development of IETF⁵¹ (The Internet Engineering Task Force)⁵², whose rules are called RFC and are the support of the entire system. These rules are open and are being improved over time and with everyone's participation. They are not validated by any international agreement and the IETF is not linked to any supra-national body; however, without the established rules, we might not have been able to read this article.

Given the interaction between users and scientists, and participation of states whose mission is to legally validate social surroundings, the social peace that is constantly sought, the system should function adequately.

Internet government is not in the hands of an entity or a power group that can "eliminate" the Internet resource (in fact, this is the greatest utopia in the world). The groups with power that are behind economic speculations and that have made us believe that Internet was the solution to economic problems of countries and people do not want to let the system advance. This is because people have the freedom to exchange information, and when small and medium-sized companies have a greater opportunity to act, this freedom of action that promotes rapid economies and generates greater resources adequately distributed are not suitable to transnational corporations. Clearly, this phenomenon is not new, it is the oldest: economic control is the best control. Yet, what happens when users revolted. Large business models stop functioning and rules that try to limit them are attacked; basic principles of the economy must be rethought. Negroponte spoke of going from the economy of atoms to the economy of bytes.

It is clear that the system has functioned and continues to, and that the pressure within the Internet for everyone to be recognized as having a space with their own identity, but not outside reality, is advancing. Those who are outside await their opportunity to access information. However, this topic related to the digital gap and digitally illiterate people must be studied with care⁵³.

We feel it is important to mention that Castells explains that Internet has transformed into much more than the infrastructure. In this sense, Radication has a weakness. To maintain a "technological" neutrality in the analysis, the complete analysis of Digital Society or Information Society, in which the entire process of domain names is found, was eliminated. The decision of not analyzing this aspect, did not come from the organizations involved, but it was because of the development process of domain names. Those are an important element, but not the only one, and much less the "back bone" as indicated in Radication.

⁵¹ IETF: The Internet Engineering Task Force is a large open international community concerned with the evolution of the Internet architecture and the smooth operation of Internet.

⁵² <http://www.ietf.org>

⁵³ Iriarte, Erick. Sobre la realidad de hacer E-commerce II (o El Sueño del Control del Internet). [The Reality of E-Commerce II (or the Dream of Control of the Internet – Tr.).

Castells states the following:

Internet is society; it expresses social processes, interests, values and institutions. What is then the specificity of Internet if the Internet is the society? The specificity is that it constitutes the technological material base of the network society. It is the technological infrastructure and the organizational means that allows development of a series of new forms of social relationships that do not originate from Internet, that are created by a series of historical changes, but that could not develop without Internet. That network society is the one I am analysing as a society whose social structure is made up of information networks from the technology of microelectronic information structured on Internet. However, Internet in that sense is not simply technology; it is the medium of communication that constitutes organizational form of our societies; it is the equivalent to the factory or the large corporation in the industrial era. Internet is the heart of a new socio-technical paradigm that constitutes in reality the material base of our lives, relationships, work and communication. Internet uses virtuality and transforms it into our reality, making up the network society, the society in which we live⁵⁴.

After the previous analysis, the State Council of Colombia suggested its analysis scheme to determine. This scheme includes 7 main questions and two related elements. The scheme is the following:

- a) *What is Internet? How and when did it come to be? How does the system operate?*
- b) *What are domain names?*
- c) *What are domains? What are domain classes?*
- d) *Who conducts the administration of domain names and how is it done?*
- e) *What is the domain .co? What is its legal nature?*
- f) *Does the University of Los Andes have rights for the domain .co? What class of rights does it have and do they allow bidding in order to choose an international operator for .co?*
- g) *Does the State of Colombia have rights for the domain .co? Is there a legal foundation that allows the State of Colombia to intervene in the management of the domain .co?*

There are other elements related to the problem:

- a) *Do the regulations of coordinating private foreign bodies of the Internet prevail or not over the Colombian legal order regarding subjects, objects of law and legal relations?*
- b) *Are there legal rules that allow the collection of taxes for the registry of domain names under the domain .co?⁵⁵*

⁵⁴ Inaugural reading for the doctoral program about society of information and knowledge at the Universitat Oberta de Catalunya – UOC <http://campus.uoc.es/web/cat/index.html>

⁵⁵ Consejo de Estado, op. cit.

The State Council continues with an item-by-item analysis, so we will follow the same scheme to comment on the suggestions made in Radication.

2.1 The Internet. What is it, when did it come to be and how does it operate?

We generally agree with the suggestions made by the State Council of Colombia in this analysis, but we have one dissenting opinion about what is argued regarding the regulation of Internet. The Consejo indicates that, *"In legal subject matter, a notion or definition of Internet has still not been formed. Dealing with a technological phenomenon, it is hardly starting to be taken into account in the law due to the effects that it is unleashing in legal relations."*⁵⁶ Contrarily to the statements of the State Council of Colombia, we believe that Internet is not a merely technological phenomenon (Similarly, in previous paragraphs, the same council recognizes that Internet is a complex process that involves all of life). The Internet process is a social process both fundamentally and primarily. As the Latin saying goes, "Ubi societas, ubi ius": where there is a society, there is law; we must understand that law is not removed from the Internet process, much less from the information society. The fact that there does not exist explicit sovereign rules (nationally), does not imply that the process does not exist or that there might not be rules, as indicated in previous paragraphs. A clear example of legal social phenomenon that do not have deliberate regulations are Incoterms, proposed by the Cámara de Comercio Internacional [International Chamber of Commerce -Tr.] and assimilated to daily life. The custom is also a source of law and we must not forget this. Law is constantly changing and evolving, and explicit regulations often take priority over legal relations, but it cannot be denied the existence of custom and legal relations.

In fact, the State Council of France states in its report on "Internet and Digital Networks" that, *"There does not exist a specific law for Internet or networks and there is no need for one. They are spaces in which all activities are practised and in which all of the rules that govern a specific field (publicity, taxation, intellectual property) have to be applied."*⁵⁷ This suggestion agrees with what we are stating: a deliberate regulation will not help the process.

⁵⁶ Consejo de Estado, op. cit.

⁵⁷ <http://internet.gouv.fr/français/textesref/rapce98/accueil.htm>

A second dissenting opinion is suggested by the State Council referring to the creation process of the names system, that it may be linked to an economic process and it states this in the following: *"Naturally, the appearance of nodes of communication in places in other countries different from those previously mentioned, required the adoption of specific technical solutions, beginning with the system of identifying the addressees."*⁵⁸ The DNS was created as an alternative system faced with the increase in connected machines. It was not at the beginning "the mechanism of communication with other countries". The RFCs clearly states that the DNS was one of the possible technical solutions because of the increase in IPs and for a greater identification. A good description of why the DNS was formed can be found in the introduction to the ccTLD .PE registry rules⁵⁹.

We agree with Javier Maestre, quoted by the State Council, (about the fact) that the Web links have to be stable. Maestre says (quoted from Radication), *"In fact, the reference to Internet and domain names system stability constitutes an argument or pretext commonly used by North American authorities to justify their extreme intervention in the system."*⁶⁰ We agree with Maestre who states that the "pretext" of the stability has been maintained not only by North American authorities, but also by other state entities. They have advanced this argument without realizing (or wanting to say so) that the real focus of the Internet system is in the IP numbers and in the transfer protocols. And the domain names are mere labels that can be changed as many times as are necessary and in as many environments as are believed to be suitable.

2.2 Domain Names

The State Council of Colombia continues with its analysis by making an account of the evolution and discussing the nature of domain names. It states that, *"the domain name is formed using letters that result in the use of denominations for public or private organizations, trading styles or trademarks."*⁶¹

The idea that domain names are combinations of alpha-numerical characters that reflect a given IP number is generic. These numerical combinations can also resemble denominations and signs that we already know and are present in our life. **They are not therefore combinations that "give way to the use of denominations". These combinations are rather similar to the resulting character combinations and inclusively to a part of the combination, not the whole (some case of total similarity may eventually occur).**

In reference to Domain Names nature, the WIPO⁶², indicates the following:

⁵⁸ Consejo de Estado, op. cit.

⁵⁹ <http://www.nic.pe/inter/normas.htm>

⁶⁰ Consejo de Estado, op. cit.

⁶¹ Idem.

⁶² WIPO: World Intellectual Property Organization.

"181. Domain names are a simple form of Internet addresses designed to allow users to easily locate Internet sites ... A domain name is an alpha-numerical address of a computer such as *www.wipo.int*, that allows the user to locate an Internet site without needing to resort to the only underlying numerical address, known as an Internet Protocol address (IP) ...

184. By increasing commercial activities on Internet, domain names have acquired more importance each time as commercial identifiers. As such, they have caused conflicts with the system of commercial identifiers, which existed before the Internet appeared ... A system, DNS, is administered on a mainly private level and creates registries that have a worldwide presence. They are accessible from anywhere in the world. The other system, system of intellectual property rights, is administered in a public manner on a territorial basis and creates rights that can be exercised only on the concerned territory."⁶³

In this way, Paloma Llana wrote "Internet y comunicaciones digitales" ["Internet and digital communications" - Tr.] (April 2000) states (p. 112), *"Domains have a hybrid nature. They are distinct denominations of an entity or assumed geographic location and an address to which one can go and with which one can communicate."*

Enrique Bardales, on "Conflicto entre nombres de dominios y los Derechos sobre Marcas"⁶⁴[Conflict of Domain Names and Rights on Trademarks" - Tr.] states: *"Internet was at first a useful tool that allowed communication between computers with the goal of exchanging and sharing information. This connection involved an address that allowed users to be identified. Thus the address was made up solely of a number or numerical code that was assigned to few users with the purpose of its perfect identification. The use of this system as a network emerged in the United States of America for proper military, academic and scientific use. However, it later was used for private and commercial purposes, and the increasing number of users determined that numerical codes were replaced with elements that were easy to remember. In this sense, friendly names were adopted to replace numerical addresses on Internet."*

The majority of the Doctrina de Derecho Informático [Computer Sciences Law Doctrine - Tr.] clearly states that the domain names are not trademarks, but identifiers on the Internet network. The WIPO states the same in its documents on Intellectual Property and Domain Names, differentiating both fields. However, WIPO takes into account that there are contradictions between these documents. Though there is much to debate, it is clear that the new meaning must be analyzed and taken into account as a new legal nature.

The State Council of Colombia continues Radication with a technical analysis that is relatively certain for the most part. Perhaps, further clarification is needed, in Radication 2.1, when referring to the Web as the most used resource on Internet. Electronic mail is in fact most utilized.

⁶³ WIPO. "Estudio sobre Comercio Electrónico y Propiedad Intelectual" ["Study on Electronic Commerce and Intellectual Property" - Tr.] (May 2000)

⁶⁴ <http://www.alfa-redi.org/revista/data/2-1.asp>

In the same way, the State Council states, *"Since each name is assigned a number and each site has only one number, a name is unique and can only be registered once."*⁶⁵ We fully share the view that a domain name can be registered once, as the system does not allow duplication. In the first years, it was necessary to distinguish; however the similarity of IP domain names exists. Nowadays, under an IP there can be a variety of domain names (hosting services type or, for example, companies that have a variety of domain names all directed to one IP number). What the State Council wanted to indicate was that a domain name always has one unique corresponding IP number. This is true, partly insofar as a domain name can be registered, but not assigned an IP number or have the IP number changed as many times as is necessary. This means that the combination of characters does not have one unique identity with the IP number, which is necessary, having a domain name is useless without the IP number. **In conclusion, we can indicate that an active domain name is related to an IP number, but an active IP number does not have to be related to a domain name.**

Further on, the State Council uses two examples of how a domain name is established. The first quotes Manuel José Cárdenas, who says that in order to establish a domain name, the root and extension must be chosen. The document states, *"The root corresponds to the name of the natural person or corporate body and the extension, to the type of activity or geographic zone in which those activities will be practised. The root for natural persons is generally created using the first letter of the given name and the surname in full. In the case of legal persons, with the title that corresponds to them."*⁶⁶ The council later quotes Peña Valenzuela stating, *"The domain name consists of two elements: the first is the identifying segment or domain, properly said, and the second is the designation of different levels, mainly first and second"...* It states two cases www.cocacola.com and www.museedulouvre.fr *"The identifying segment or domain, properly said, in both cases would be cocacola and museedulouvre. The other segments denote the following: www is the presence and location of the respective page on the world wide web. The following parts indicate whether it is a high or first level domain in .com's case, or, that is, if it is a commercial activity. In the second example, .fr is the second level or local domain, which implies that that domain was registered in France."*⁶⁷

We undoubtedly have our discrepancies with this "way of establishing a domain name" and with the "composition of a domain name", as expressed by Manuel José Cárdenas and Peña Valenzuela.

The domain names have a first particle, which is the one that indicates the type of TLD (if it is a generic or a country code), the only possible forms of TLDs, meaning that they are the only possible top level forms.

www.cocacola.com

⁶⁵ Consejo de Estado, op. cit.

⁶⁶ Idem.

⁶⁷ Idem.

www.cocacola.fr

In both cases, .com and .fr are TLDs and have the same level. It is a known fact that ccTLDs are related to geographic spaces, but do not necessarily represent a geographic location such as we have seen in cases that mean something in another language (see footnotes 18 and 19).

Some countries can undoubtedly have sub levels or a second level as in the cases of Mexico or England.

We then understand that .com, .fr, .mx, and .uk are TLDs or the top level, not concerned with their geographic location. Registration of these can be established from anywhere (except for registration applications for radication in the country as the Grand Cayman Islands).

The cocacola part of www.cocacola.com is a second level and a combination of registry characters. The cocacola part of www.cocola.fr is a second level and a combination of registry characters. The cocacola part of www.cocola.com.mix is a third level and a combination of registry characteristics. In every case, the combination up to this third or second level corresponds to the domain name. The www or any combination up to that which can be delegated (second or third level depending on the TLD) is optional and normally established by domain name owner for a better of management of information to be given as sub-directories.

On the other hand, construction of combination of characters that is registered is totally arbitrary. Therefore, this combination of characters can be equal to anything. Perhaps google (that would later become a trademark and a commercial denomination) means something or ebay or yahoo. When these character combinations were registered, they did not mean something that could be referenced, but something new, a new combination. In fact, there are many combinations of characters that if the parameters of trademark law are followed, they would never have been able to register as abogados.com or law.com or any other combination of a generic word.

2.3 The domains. What is (are) their classification(s)?

Using the previous definitions of Cárdenas and Valenzuela, that have a series of conceptual errors, the State Council clarifies the following, "In the previous point, the domain name was stated as having the root and the extension, or the identifying segment and others. While the first is used to identify the user, the second identifies a field of activity or country under which the user is registered."⁶⁸

Clearly, the RFC 1591 attempted to make this division of activity or country, but was unable to, as the system reinvents its own rules making it mainly useful, rather than making it distinct, as suggested by Postel.

⁶⁸ Idem.

One final note indicates that a domain name can be used to identify not only a "user", and rarely does it do so, but also to identify something on the Internet such as a brochure, a conversation site, a service, a product, an organization, and so on.

After this, the State Council classified TLDs, contradicting Valenzuela's statements by stating that ccTLDs would become second level domains [sic].

The council discusses TLDs, including gTLDs and ccTLDs. When it refers to the latter, it states, "*2. Those of country codes (ccTLD) that are used to identify the domain of each country.*"⁶⁹ In a strict sense, a ccTLD corresponds to a given economic territory, as Alejandro Pisantry (ICANN board) expressed. We have therefore proposed the TLD .EU for the European Community or those corresponding to Gibraltar or the Malvinas Islands, territories in conflict that cannot be designated independent countries. In fact, while assigning some ccTLDs, IANA made errors such as assigning .uk when it should have been .gb or .su, which is still used for Russia, when this denomination denoted the Soviet Union⁷⁰.

In this sense, we understand that though IANA did not create the ISO Table 3166-1, it uses it arbitrarily, IANA is not guided by it. In the strict sense, IANA uses the Table in an absolutely referential sense. In this way, proposals such as a ccTLD for the Moon⁷¹, can be feasible as well as a domain for the Antarctic (.aq)⁷².

⁶⁹ Idem.

⁷⁰ Wischhofer, Cord wischhofer@iso.org Re: Consult [E-mail Erik Iriarte faia@amauta.rcp.net.pe] May 13, 2002.

⁷¹ <http://news.com.com/2100-1023-209442.html>

⁷² <http://iana.org/root-whois/aq.htm>

Almost when concluding this section, the State Council of Colombia states, *"Under each country code, second level domain names are registered, which correspond to commercial, personal or institutional names that wish to have an Internet page or site in the respective country."*⁷³ From the beginning, the council stated that the domain names are instruments for a variety of "services" that the Internet provides in such a way that restricting the use of a domain name on a page seems limiting and wrong. In a strict sense, having a domain name is not necessary in order to have a web page an IP would be sufficient, and there is a variety of domain names that are not used for any purpose other than mail, gopher or another service on the web. We therefore disagree with the registry concept emitted by the State Council of Colombia. This discrepancy is increased by stating that not only are "commercial or persons names being registered", in an open sense, so can any combination of characters be that occur to an individual. Finally, there is no reason "to wish to have an Internet page or site in the respective country", as being on the network, it is not necessary to have a domain name under a ccTLD so that people of a country visit a page. Undoubtedly, one of the most visited pages to buy books on the networks for Latin Americans is amazon.com, and we know that this page is located in the USA under a gTLD , and that sales to Latin America (all of Latin America) do not even represent 5% of the total. Therefore, perhaps the concepts of national geographic location can be mistaken if we suggest that a domain name is necessary "sine qua non" so that someone can conduct Internet activities in a given country.

2.4 The administration of Domain names

The State Council of Colombia states, *"According to the information provided by the University of Los Andes, on December 24, 1991, IANA delegated the University of Los Andes to administer the registry service for domain names for Colombia under the denomination .co and later ICANN, in 1998, reiterated this delegation with the responsibilities to which the RFC 1951, of March 1994, alludes. The delegation does not appear in any document signed by the parties or at least this document was not provided for the purpose of this consultation, neither by the Ministry or the University of Los Andes."*⁷⁴

As expressed, it could mean that .CO exists administered under the University of Los Andes, by sort of "technological chance"; however, if we assess the IANA table regarding .CO⁷⁵, we see that the designation as administrators was done more than 10 years before, and the designation has to have been valid so that domain names under the ccTLD .CO may be resolved.

It is worth mentioning that through a private contract, to which IANA and the University of Los Andes virtually subscribed to in November 1991, the University became a local administrator for the Country Code Top Level Domain ".co". Similarly the ccTLDs

⁷³ Consejo de Estado, op. cit.

⁷⁴ Idem.

⁷⁵ [Http://www.iana.org/root-whois/co.htm](http://www.iana.org/root-whois/co.htm)

received their delegations by contract in the first years of the DNS, and were assigned by Jon Postel.

Following the ICANN constitution as a private sector entity in November 1998, this body did not adopt any measure of questioning with respect to the delegations made by IANA. On the contrary, as we have commented under previous subheadings, through the document ICP-1 of May 1999 emitted by its Directory, it has been arranged that IANA maintains its administrative responsibilities in terms of the Domain Names System, particularly regarding the assignation of IP addresses, Independent Number System and Top Level Domains.

In the same way, in July 2000, ICANN (of which IANA is a part), required a payment from the University of Los Andes as a contribution, given its status as an administrator of the Country Code Top Level Domain ".co", which is proof of recognition, on the part of IANA, of the University of Los Andes as an administrator of Country Code Top Level Domains. We have enclosed a copy of the relevant receipt as proof, with the respective translation.

Therefore, to this date and under the administration of ICANN (of which IANA is part), the University of Los Andes has the delegation corresponding to the administration of the Country Code Top Level Domain ".co", obtained through the private contract signed with IANA. This delegation appears in ICANN databases.

Clearly, the value of the electronic documents have been endorsed by the legislation in the majority of the countries in the region, as there are no formalisms expressed in the manifestation of will on the part of the individuals, those documents are valid, in agreement with the law's principle.

In the remainder of the text by the State Council, which the RFC 1951 reproduces, we agree, since there was no alteration in the text.

2.5 The Legal Nature of domain .co

As the fifth point in Radication 1376, the State Council of Colombia analyses the legal nature of .co.

However, we must begin the analysis with the University of Los Andes text regarding the registration of the ccTLD .co (this information is quoted by the State Council: *"In one of the legal views that supports the position of the University of Los Andes the following is stated: 'there is no international treaty, contract or legal text, by virtue of which it can be said that the State has, or had, the right to be assigned a country code by IANA. IANA created codes for countries because, by its judgement, doing so was suitable to the development of the Internet.'" Later on, the same study states, "When IANA created 'domains' for countries and assigned codes to them, it confined itself to applying one of*

the 'standards' created by the International Organization for Standardization, a private entity established in 1947: the so-called ISO Standard 3166.⁷⁶"

In previous paragraphs we have already stated that the standard used is the ISO 3166-1 alpha 2, which has come to be the Tabla de Códigos Reservados [Reserved Codes Table - Tr.]. There are exceptions in the IANA Table that are not found in ISO 3166-1 Alpha-2. Therefore, they are not strictly "official". They are the following: Guernsey (GG), Jersey (JE), Isle of Man (IM), Ascension Island (AC) and the United Kingdom (UK). These are from the reserved table⁷⁷.

What IANA did was take the ISO 3166-1 Alpha-2 Table and copied it in such a way that cases such as .SU for Russia are found that maintain the former code of the Soviet Union⁷⁸, while in the ISO Table, this code varied.

It is true that, in the beginning, the IANA Table, suggested by Postel, had not considered countries' governments, but was considering what would be local Internet communities in various countries and territories.

Postel's technical task for adequate development of the DNS⁷⁹ pioneered the way and considered a "clear philosophy about the internet". John Klensin discusses the matter: *"I believe one of Jon Postel's masterpieces, drawing together very different philosophies (e.g., his traditional view that people are basically reasonable and will do the right thing if told what it is with some stronger mechanism when that model is not successful) into a single whole."*⁸⁰

In light of documents quoted and considering in particular the Best Practice Guide, developed by the ccTLD Constituency (of ICANN)⁸¹, we understand that the special mission of the Administrator of a ccTLD is to serve Global and Local Internet Communities; and furthermore, *"IANA and the Local Internet Community, including governmental and other authorities, have a responsibility to support and protect the ccTLD Registry, and to assist the ccTLD Manager serve that community."*⁸²

⁷⁶ Consejo de Estado, op. cit.

⁷⁷ Wischhofer, Cord, wischhofer@iso.org Re: Consult [E-mail Erik Iriarte faia@amauta.rcp.net.pe] May 13, 2002.

⁷⁸ Idem.

⁷⁹ DNS: Domain Name System.

⁸⁰ Klensin, John C. Reflections on the DNS, RFC 1951, nd Categories of Domain, Internet Drafts, Internet Engineering Task Force, November 13, 2000.

⁸¹ ICANN: Internet Corporation for Assigned Names and Numbers

⁸² Best Practice Guide, Introduction.

It is also important to mention the statements of the GAC⁸³ (Governmental Advisory Committee of ICANN) in the Document entitled "**Principles for the Delegation and Management of Country Code Top Level Domains**", of February 2000, which states the following: *"As a result, DNS functions, including administration of the DNS root server system, development of policies for the registration and allocation of domain names, coordination of Internet Protocols, and delegation of Internet Protocol numbers are becoming more clearly delineated and formalised through the ICANN process. Similarly, procedures and framework of accountability for delegation and administration of ccTLDs need to evolve into a more robust, certain and reliable system as well."*⁸⁴ "The words of GAC are clear in understanding that the Internet phenomenon, and specifically that of the Administration of Domain Names involves the entire process of technical, political and administrative coordination as a whole. However, immediately after, the GAC also indicates, *"While evolution is needed, the principle of RFC 1951 remains sound: the manager of a ccTLD performs a public service on behalf of the relevant local community and as such the designated manager has a duty to serve his community. The designated manager also has a responsibility to the global Internet community."* It is therefore clear that the desire of the governments, expressed in this document, is to recognize the Administrator of ccTLD Domain Names as a service space to the Global and Local Community.

We feel that the State must actively participate in domain name processes, but we must not confuse the administration of a ccTLD with the policy that a country should adopt to develop the Sociedad de la Información Local⁸⁵ [Society of Local Information - Tr.], because main social agents might not even have local domains, as is the case with the Spanish newspaper Diario El Tiempo [The Time – Tr.] whose domain is <http://www.eltiempo.com>.

Following this point, the State Council develops historical analysis of the name Colombia, and its link with .co, making two comments that are especially interesting for the analysis, *"Consequently, IANA, ICANN or ISO did not give the name Colombia to our country, from which the acronym "co" was derived, to identify it in the UN documents."* It later indicates, *"CO is therefore the acronym for the word 'Colombia', the name over which the State of Colombia has rights, for having adopted it into its Political Constitution to be identified before the community of nations 180 years ago when Internet did not yet exist and the creation of domain names was even less surmised."*

There is no doubt as to the rights of the State of Colombia over the denomination "Colombia" in that it is the denomination as it is known on the level of the Community of Nations. The acronym .co in relation to the territory denominated Colombia is certain and there is no doubt about the intention upon the creation of the IANA Table.

⁸³ Governmental Advisory Committee of ICANN.

⁸⁴ GAC, "Principles for the Delegation and Management of Country Code Top Level Domains". Letter from Paul Twomey to Esther Dyson, ICANN Chair, February 23, 2000.

⁸⁵ Iriarte, Erik and Santoyo, Eduardo, "Acerca de la Teoría del Desarrollo Social del Internet". [About the Theory of the Social Development of Internet – Tr.] (on-line).

It is worth adding that .co is not the only acronym or abbreviation that exists for Colombia as we indicated in the first paragraphs.

Though the DNS is a private system, it has been of infinite public use and interest to the community. In this way, we see how the Basque Country wishes to have .eu for Euskerra or .ct for Catalonia without excluding other human groups that wish to have their own identifier, as human groups always want an identification.

The rights of the State of Colombia are clear and we respect and support them, and we must understand that government must participate as a representative of the nation in the administration process, as equally as the other sectors of the Community (meaning State), that are social agents in force whose participation is necessary.

The domain .co refers to the territory denominated Colombia just as each country code refers to a territory, and a local community lives in such a territory. This community must become involved in the process of the Administration of Domain Names without being ignorant of or underestimating the work carried out by the current administrator on domain names. The administrator has maintained the connectivity and the DNS in activity allowing the projects of the Information Society to exist. Administrators that, at least in Latin America, come from scientific communities, must understand that the process of the Internet has changed into a social phenomenon that requires a real and active participation of the Community from all of its social classes and of all level. This applies to all ccTLDs.

Shortly after suggestions regarding the nature of .co, the State Council of Colombia presented one of the key points of the document in the following way, “Can a country domain be considered “property” in a legal sense? In order to state that is property, it is essential to establish whether or not it combines the elements of being a thing that has use and that is susceptible to appropriation.”⁸⁶

Radication does not analyze the first two points, which are presumed valid for domain names, meaning that it a domain is a thing (therefore it is something), and it is useful. However, regarding the third point (“being susceptible to appropriation”) Radication begins a theoretical disquisition on that matter.

Before continuing with the analysis, it is worth mentioning that Radication is not analyzing the nature of a domain name, rather ccTLDs such that “.co” is considered a whole. Therefore, we are talking about the administration of the ccTLD .co, not about the administration of a domain name denominated ".co". This particular difference will allow us to clarify some issues later on, as there is no domain name ".co". It is the ccTLD .co, which is a distinct issue. We therefore understand that under any TLD there will exist various domain names. Not one, many. Analysis is therefore not in the legal nature of the domain name per se, but in the nature of the ccTLD.

⁸⁶ Consejo de Estado, op. cit.

However, is delegation considered property such as that which an administrator has? This should have been the question that the State Council of Colombia asked, as the matters of sub-delegating, bidding or selling ccTLDs revolves around this point on the part of the current administrator.

Therefore, it would seem that the debate would be given by determining whether the administration of a ccTLD would be susceptible to appropriation. The term "appropriation" can undoubtedly indicate something that is found in nature that can be taken if found. The State Council of Colombia uses the division between appropriable and non-appropriable things, a possible but doctrinarian division. There also exists other divisions including corporeal and non-corporeals⁸⁷, perishable and non-perishable, movable and non-movable, consumable and non-consumable, present or future, divisible and non-divisible, if we measure by its nature. On the other hand, through its title holder, property can be owned either by individuals or the State, which in turn sub-divides into public, private or cultural property. If we base ourselves on relationships within property, they may divide into simple and complex or accessories and principals. This means that there is such a variety of options for classification that we would always find one in which administration of ccTLDs would fit. However, these divisions from the Civil Code of France, find a variant or combinations in the majority of civil Latin American codes. For example, in Peru, property can only be movable or non-movable, with its internal subdivisions⁸⁸.

When the Código Civil Colombiano [Civil Code of Colombia - Tr.] discusses property, it indicates that the property consists of "*corporeal or incorporeal things ... incorporeal, those that consist of mere rights such as credits and active rights.*"⁸⁹ Suggestions made by the legislator must be analysed insofar as "*Not all things are objects of the law such that for an object to be an object of the law, the object must be property, meaning that it must be useful and appropriable*" This means that insofar as the administration of ccTLDs is useful and appropriable⁹⁰, it is an object of law in agreement with the Colombian legislation, according to the suggestion made by Jorge Ortega Torres.

⁸⁷ As they are in Chile, Article 565 Código Civil Chileno [Chilean Civil Code – Tr.]. Said in: González, O. Cristóbal wischhoefer@iso.org, Bienes Chile [Chilean Property – Tr.] [E-mail Erik Iriarte faia@amauta.rcp.net.pe]. May 14, 2002.

⁸⁸ Código Civil Peruano [Civil Code of Peru – Tr.], Articles 885 and 886.

⁸⁹ Article 653, Código Civil de Colombia.

⁹⁰ Ortega Torres, Jorge. "Código Civil", Comments on Article 653, p. 265. Editorial Themis, 1979.

Fernando de Trazegnies Granda states, *"the classification of property as movable and non-movable was recently contested by the alternative classification of registered and non-registered property. It follows that some paladins of "traditional" thinking have called for help two illustrious figures in order to defend their position: nature and the Romans. The division of movable and non-movable property has not always existed; it acquired legal importance only in the Middle Ages when the first signs of a modern economy are founded on the generalization of commercial transactions. On the contrary, the Romans did not pay much attention to such classification. In reality, the classification of Roman Law that played a relatively equivalent role is that of *mancipi* and *nec mancipi* things; however, the criteria for distinguishing some from others was based on elements totally beyond transportability."*⁹¹

Trazegnies ended his article with a comparison, which we have adopted: Trying to introduce new human creation by force: *"within the former patterns a solution can result that is similar to cutting the feet off of a corpse because the dead body was too big for the coffin that had been requested beforehand."*⁹²

The example used by the State Council of Colombia quoting Arturo Alessandri on common things, brings us to the memoirs of Justiniano in his Libro II - De la División de las Cosas [Book II - The Division of Things - Tr.], *"I. According to natural law, these are common things to everyone: air, running water, the sea and its coasts."*⁹³

Following this, the State Council of Colombia presents two quotes that must be analysed with extreme care: *"Regarding the "domain name", formed as expressed in point 2.2, there does not exist legal recognition in either the internal or international order regarding its nature of legally protected property."*⁹⁴ In fact, the domain name as a property is not regulated in a global way, through a supra-national entity. Rather, it is guided by guidelines of the RFC, X rules (of the ITU), Protocols, network rules of conduct and ICANN bylaws among others. To state that the DNS is not a system in force or with guidelines, is not true. There exists the GIS, which is a Georeferenced table that is not regulated under a proper regulation, but through ISO type and similar standards. However, the GIS is the basis for many of the services of Global Geopositioning function. To be ignorant that there exists a variety of technological functioning systems is to say that what exists does not exist.

⁹¹ Trazegnies Granda, Fernando de: "Bienes, Naturaleza y romanos". [Property, Nature and Romans" – Tr.]. Published in El Comercio, Lima, December 21, 1982.

⁹² Idem.

⁹³ Justiniano. "Institutas".

⁹⁴ Consejo de Estado. op. cit.

Domain names can be debated, as this is their legal nature, but the administration of ccTLDs is done through a contractual link between two parties in order to fulfill a purpose. As *"property is material and non-material values that are used as objects in legal relations"*⁹⁵, we understand that the administration of a TLD is the object of the legal relation between IANA/ICANN and the administrator. Therefore, the administration of a TLD becomes legal property.

To say that the administration is not protected is an error of legal excellence and of not understanding that the Law evolves. It is worth mentioning that if we quote the Civil Code of Peru, we will find that Article 866 states, *"Movable property is...10. The remaining property not contained in Article 885."* (Article 885 refers to non-movable property).

However, further on the State Council of Colombia presents as an argument what is referred to as domain names, and not the administration of TLDs. Quoting the RFC 1591: *"In fact, the allegation of property right over domain names is defeated when protection of trademarks, commercial names and intellectual property rights prevail. The very document RFC-1591 accepts the protection: "Registration of a domain name has no status of a registered trademark. The person who requests it must ensure that they are not violating someone else's registered trademark."*⁹⁶ The RFC text is related to domain names, not to the administration of TLDs, which is why using it as a basis from which to talk about the nature of the administration is erroneous.

⁹⁵ Rivera Ore, Jesus. Derechos Reales. [Real Rights – Tr.] Lecciones. UIGV 2002.

⁹⁶ Consejo de Estado, op. cit.

The State Council makes a similar error when it states *"The WIPO document of September 3, 2001 - section 278 - states that there does not exist an international legal order that clearly protects country names. However, in the internal legal order and in historical and cultural tradition, Colombia is recognized as the name of the Nation. When it is used as a part of commercial names or trademarks, it is specifically to state affiliation to the country, as in Café de Colombia, which is used worldwide as part of the commercialization strategy for coffee on the part of the Fondo Nacional de Café [National Coffee Fund - Tr.], which receives special tax contributions paid by producers of the bean."* The WIPO Report of September 3 is II Informe [2nd Report - Tr.] of WIPO regarding Domain Names, also called "Recognition of the Rights and the Use of Names in the Internet Domain Names System"⁹⁷. In this 2nd Report, the main issue is the use of country names in a domain name, meaning: colombia.com or australia.org, and whether or not they can be protected. The Text in Item 278 of this Report states, *"The Paris Convention is the international intellectual property instrument that has been more relevant in analysing the protection of country names in the domain names system. In Article 6 of this Convention, the protection of certain symbols related to the State is established against its registration and use as trademarks. Nonetheless, the Paris Convention does not specifically states the names of countries, though some state that in any case such denominations should fall into the field of application of the quoted instrument. Despite the innovative aspect of some of the arguments with which this position can be defended, following a strict interpretation of the relevant provisions and the negotiation of the Convention, we conclude that the instrument that concerns us does not protect the country names. Our observation is based in part on a textual comparison of paragraphs 1)a) and 1)b) of the Article and on the preparatory work of the Conferencia Diplomática de Ginebra [Diplomatic Conference in Geneva - Tr.] on the Revisión del Convenio de París [Revision of the Paris Convention - Tr.]"⁹⁸* In this item and the subsequent up to 288, analysis of protection of country names is presented with regards to its use by third parties under a gTLD (in fact, the document WIPO states this explicitly). This means that the argument that the State Council of Colombia suggests cannot be used in this context, as the WIPO document referred to other subjects that are not related to the legal nature of the administration of TLDs (specifically of ccTLDs), which is what the State Council tries to clarify. This is reflected in the following statement: *"If a little dietrology is applied, speculation about what is really behind the problem suggested in the consultation, the dispute is not over the use of the acronym for the name Republic of Colombia, but over the meaning and scope of the assignation of the domain to the country, and in the conditions to administrate the registration of names in the country."* Next, the State Council indicates: *"The fact that the assignation may have been in favour of the "country" and not the State, makes us think that the term "country" has unequivocal conceptual content: the community or town that occupies it. The following arguments are in favour of this thesis: a) That domains are also assigned to "territories" that are not states, but that do have a community residing in them; b) That in RFC 1591, it is clearly and repeatedly stated that the domain is "at the service of the community".* This argument is finished the following statement, *"The domain .co, though it is*

⁹⁷ <http://wipo2.int/process/index-es.html>

administrated by a private entity as is the University of Los Andes, it has well-known public interest."⁹⁹

The concept of "public interest" cannot be found in RFC 1591, ICP-1¹⁰⁰, or Best Practices¹⁰¹ of the ccTLD Constituency¹⁰². As mentioned in Radication 1376, "service to the community" is discussed explicitly and repeatedly in various documents. Reference to "public interest" in the administration of a ccTLD is found in "Principles for the Delegation and Administration of Country Code Top Level Domains"¹⁰³ of the GAC¹⁰⁴ which indicates in Chapter 9 ("Principles concerning the Communication between the relevant government or Public Authority and the Delegee"): *"9.1.4 Confirmation that the ccTLD is operated in trust in the public interest and that the delegee does not acquire property rights to the ccTLD itself."*¹⁰⁵

The notion of "public interest" should be analysed in relation to the Domain Names System and not in direct relation to a ccTLD, as any user in the system can access a domain name without being related to the country code from which it originates, as the system is global.

Next, Radication 1376 makes an interesting analysis of what it considers to be "public interest", which continues to be supported by the doctrine. However, in order to sustain "public interest" .co, they make a series of evaluations based on various documents beginning with the RFC 1591. These documents follow; the exact quotes from Radication that have been copied and after each item (from a to i), a commentary will follow:

a) The relevant aspect of document RFC 1591, which was already transcribed but deserves to be repeated, states: "The country code domains (for example, FR, NL, KR, US) are organized by an administrator for that country. These administrators deliver public service in the name of the Internet community..."
*IANA and ICANN clearly recognize the interest as much to the community of the country as to the global Internet community in the administration of domain names registration.*¹⁰⁶

⁹⁸ WIPO. II Proceso de Nombres de Dominio [2nd Domain Name Process – Tr.].

<http://wipo2.wipo.int/process2/index-es.html>

⁹⁹ Consejo de Estado. op. cit.

¹⁰⁰ ICANN. "Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation) <http://www.icann.org/icp/icp-1.htm>

¹⁰¹ <http://www.wwtld.org/ongoing/bestpractices/BestPractice01Jun2001.html>

¹⁰² <http://www.wwtld.org>

¹⁰³ <http://www.noie.gov.au/projets/international/DNS/gac/docs/cctld/cctld.txt>

¹⁰⁴ Government Advisory Committee of ICANN:

<http://www.noie.gov/projects/international/DNS/gac/index.htm>

¹⁰⁵ GAP: <http://www.noie.gov/projects/international/DNS/gac/docs/cctld/cctld.txt>

¹⁰⁶ Consejo de Estado, op. cit.

This text, taken from the RFC 1591, agrees with the basic documents of the administration of a ccTLD. In fact, they are totally in force. They discuss the public service (the original text states : "public service"). However, there is a theoretical discussion on what would be the translation of this text; the discussion is if it refers to a service to the public (to people) or a public service. The notion of public service is deeply rooted in Roman-based law, as that which is not related to persons, but to "public", to "State".

However, we feel that the translation of public service is correct, but the work of the Shaman, within a community (or nation to many pro-Indians), is also considered a public service .

This means that the notion of public service is not sine qua non to determine that it is a delegated state service because it is done publicly.

b) The same document states, "The designated administrator is the representative of superior domain levels as much for the nation, in the country code, as for the global Internet community."

The concerns regarding domain "rights" and "property" are inappropriate. It is appropriate to be concerned about "responsibilities" and "service" to the community¹⁰⁷.

In fact, Postel's document¹⁰⁸ discusses domain names, not delegation. It is very important that this error previously quoted be highlighted: the administration is one thing, any domain name is another.

c) The domain .co is assigned to the country, the Colombian community. Therefore, the individuals interests of those who may require or claim to register a domain name in Colombia will be satisfied only if the Colombian society or community have available, as a country, the valuable resource of the domain on the Internet¹⁰⁹.

Administration of the ccTLD .co is the operative part of the system, that as indicated by RFC, has a hierarchical structure. This is what is assigned to an administrator delegated in a country. A "domain" was never delegated because this would mean that there exists a single domain xxx.co around which everything else would be third levels, and this scheme does not exist.

By understanding that a domain name is registered in "a country" is a technical error. The fact of registering a domain in a ccTLD is not necessarily for the use in the country (as a geographic entity), but in order to be evaluated on a global level. This means that in a global process, the ccTLD is an administrative help to the DNS. It is not a restrictive

¹⁰⁷ Idem.

¹⁰⁸ RFC 1591: <http://www.nic.pe/interna/01-normas/1591.txt>

¹⁰⁹ Consejo de Estado, op. cit.

structure in which if a person is Colombian or Dutch they can register in only Colombia or Holland, respectively.

d) On May 4, 1989, the Ministerio de Educación Nacional [Ministry of National Education - Tr.] determined the participation of the Sistema de Educación Superior [Higher Education System - Tr.] in the RED BITNET [Bitnet Network - Tr.], by assigning the ICFES with the principal coordination of the Central Node and its operation for one-year periods at the University Nacional and the University of Los Andes, beginning with the University of Los Andes¹¹⁰.

In Latin America (as in Africa and Asia), most of the administrations were delegated to ONGs, universities and university networks for being the first to get connected or be the most relevant by getting connected and requesting an IP block to get connected to the Red Primaria [Primary Network - Tr.] in the USA.

*e) Article 70 of the Political Constitution states: "The State has the duty to promote and encourage access to the culture of all Colombians in equality of opportunities, through permanent education and scientific, technical, artistic and professional teaching at all stages of the creation process of **the national identity**."*

***Culture in its various manifestations is the basis of nationality.** The State acknowledges the equality and dignity of all who live in the country. The State will promote research, science, development and diffusion of the nation's cultural values." (Section in bold type face is not from the original text).¹¹¹*

We totally agree with this notion of the State Council, except that in this case and in the following paragraph, bases are suggested for the rights of connectivity and access to information related not to the DNS, but to the processes of the Information Society.

f) Article 71 of the Political Constitution states: "The search for knowledge and artistic _expression are free. Economic and social development plans shall include promotion of sciences and culture in general. The State shall create incentives for people and institutions which develop and promote science and technology and the remaining cultural manifestations, and shall provide special incentives for people and institutions that exercise these activities."

In order to develop both constitutional rules previously quoted, Congress drew up Act 397 of 1997 called "ley de la cultura" [Culture Act- Tr.]. In Article 1, culture is defined in the following terms:

¹¹⁰ Idem.

¹¹¹ Idem.

"Culture is the unit of distinct, spiritual, material, intellectual and emotional features that characterize human groups, and comprises, beyond arts and humanities, lifestyles, human rights, value systems, traditions and beliefs" (no.1).

"Culture in its various manifestations is a basis for nationality and activity specific to the Colombian society as a whole, as an individual and collective process generated by Colombians. These manifestations constitute an integral part of the Colombian identity and culture" (no.2).

Subsection 5 of the referred regulation ratifies the principle that "it is the obligation of the State and of the people to value, protect and diffuse the nation's cultural heritage" and subsection 7 states that "the State will protect Castilian as an official language of Colombia."

Article 2 of the quoted Act states that an imperative objective of the state policy on culture is "the preservation of the nation's cultural heritage" and Article 5 indicates that the main objectives of the policy referring to this one include, among others, the protection and conservation of this heritage with the aim of "being used as testimony of the national cultural identity, as much in present as in future."

Regarding the nation's cultural heritage, the first aside in Article 4 of the Culture Act mentions elements that constitute heritage. This rule is stated as follows:

*"Definition of the nation's cultural heritage. - The nation's cultural heritage consists of **all** cultural property and values that are an expression of Colombian nationality such as tradition, customs and habits as well as all material and **non-material**, movable and non-movable property that are of special historical, artistic, aesthetic, plastic, architectural, urban, archeological, environmental, ecological, **linguistic**, audio, musical, audio-visual, film, scientific, testimonial, documentary, literary, bibliographical, museum and anthropological interest, as well as manifestations, products, representations of pop culture" (emphasized the Room)¹¹².*

According to the transcribed regulations, the name "Colombia" has historical, linguistic and testimonial interest. Therefore, it is part of the nation's cultural heritage. Furthermore, since 1989, the national government has intervened in the activities specific to the RED [network - Tr.] through the Ministry of Education in order to "link the activity of the Sistema de Educación Superior [Higher Education System - Tr.] to

¹¹² Idem.

scientific information sources." This decision fully fits into the functions that the Political Constitution of 1991 assigns to the State, as it is enshrined in the previously issued quoted regulations.¹¹³

This is perhaps one of the most important points: determining that as the State has the name of its country, it should have the corresponding ccTLD. As the State is related to a ccTLD, it must have real and active participation in the process of the Administration of Domain Names insofar as it is used within the Process of the Information Society.

h) Registration of names with the domain .co cannot affect the rights of third parties, particularly those of industrial and intellectual property. Violation of those rights generates conflicts. The solution to such conflicts in lawsuits can require intervention from judicial authorities.¹¹⁴

A contract drawn up under legislation of a country can be appealed before the judicial power of the country in which it was unfulfilled. Insofar as the administration of domain names involves the delegation of domain names, parties involved will be able to turn to judicial power under a given jurisdiction without it being implied that the administration of domains are of "public interest".

*i) Registration of names under domain .co creates a tributary obligation imposed by the Act. In fact, Article 91 of Act 633 of 2000 on taxation reform states, "All Internet web pages and sites **of Colombian origin** that operate on the Internet and whose economic activity is commercial, financial or provides a service **must register in the commercial registry** and provide the Dirección de Impuestos y Aduanas Nacionales DIAN [Directory for National Taxes and Customs - Tr.], the information for economic transactions in the terms in which this entity requires"(emphasized the Room)¹¹⁵.*

At this point we have only one question left to ask ourselves. As the newspaper El Tiempo has its domain in www.eltiempo.com which is not in the ccTLD .co, it must also be registered. In this circumstance, is the TLD .com of "public interest" to Colombia? If it were, would the ccTLD .tv be of "public interest" to Colombia?

Undoubtedly, showing the "public interest" of a ccTLD can become complicated, but we feel that the State is interested in participating and taking part in the DNS Process under a ccTLD.

In this way, we cannot agree with the suggestions made by the State Council of Colombia when it concludes by saying, "Consequently, the domain .co is not "property" because its nature is not destined to be appropriated by a person or a particular group of persons, as

¹¹³ Idem.

¹¹⁴ Idem.

¹¹⁵ Idem.

it is "a branch of a tree of names comprised of a node and all the nodes under it. In other words, a domain is made up of all the names with a same ending." It is used as a database with all the names that are registered in order to ensure that all addresses be unique on Internet and in this way they make communication possible, as expressed in point 2.2."¹¹⁶ We believe that the domain .co is not a domain per se, rather a TLD, that is, a variety of domain names can exist under this TLD. Given its nature, a domain can be legal property with all the rights that it grants. However, if the nature is regulated by a relevant contract, this means that it cannot be excluded from the RFC 1591 or the IPC-1.

We must mention that it is not permitted that in this legal gap, an administrator of a ccTLD to "SELL" as property a given ccTLD, as there is an interest on the part of the community to which the administrator has a duty. If an administrator protects him or herself through his or her rights, the notion of "social function" is found at the top of their contract as this is property of general interest: "[property of general interest] is the one that reaches beyond that limit and is of interest to *the community*."¹¹⁷ However, the administrator of a ccTLD may seek to support their activity, as always through service to their local community from operators outside of the country without delegating the administration or transferring it.

2.6 Does the University of Los Andes have rights over the domain .co? What class of rights does it have and do they allow it to bid in order to select an international operator for .co?

As the University of Los Andes indicates (quoted by the State Council), it does not claim property rights over the ccTLD .co. Eventually it will have rights to possession over the ccTLD .co (as a usufructuary and immediate possession). What is clear is that this is not a possession over the domain .co, as we stated that this domain does not exist if the administration of a TLD called .co would not exist (this is the ccTLD type).

The State Council of Colombia indicates: *"Although there does not exist a written delegation, it is accepted that this delegation will administrate the registration of this domain. The University feels that its rights legally emanate from an unwritten contract, and therefore, in our opinion, without a date or specified place of celebration."*¹¹⁸ The contract that initiates the relation was done through digital media, which is indicated in IANA databases (as was previously indicated). This does not imply the non-existence of a contract. The written formality is not necessary for a series of contracts such as verbal contracts contemplated in the statutes. In the absence of written formality, if an adhesion contract is made on the Web, does it exist or not? We feel that it does exist. The fact that it is computerized and that this is publicly reflected makes it a contract with a specific date (at least for the initiation of the relation) and a place, in this case the USA, as the delegator is located in that country.

¹¹⁶ Idem.

¹¹⁷ Valencia Zea, Arturo. "Derecho Civil, T. II" Derechos Reales, Editorial Temis, Bogota, 5th Edition 1976, pp. 223-226.

¹¹⁸ Consejo de Estado, op. cit.

Undoubtedly, the process is thought to obtain an internationalization of the system and may change in the future. For now, the contract exists; it is reflected in the IANA Table in a truthful and real way, in addition to other internal IANA/ICANN documentation.

Immediately after, the State Council of Colombia states, *"It is worth stating that the delegated entity cannot change the object of the delegation, either spatially or territorially in terms of what it contracts, or in terms of the function attributed to the domain administered. This means that the registration of the domain cannot move to another country, nor can it lose its function as a higher country domain level to transform it into a domain or sub-domain identifier for other activities such as those of businesses. The reason for creating country domains and their assignation was that they were to serve a country"*¹¹⁹. The fact that a ccTLD operates through an international organization does not change its legal nature, as we indicated at the beginning of this report. The nature of a ccTLD cannot be changed because the operator changes and even less if what we are dealing with is commercialization, not the administration itself. We agree with the State Council of Colombia when it states that the reason for creating country domains and their assignments was to serve the local community. In fact, this is the issue: whether or not the community will benefit from the actions of the administrator. The State must intervene to defend the interest of the community to which the administrator has a duty.

The administration of a TLD (either gTLD or ccTLD) has a purpose of serving the local or global community (though the community will always end being global but localized). The administration of a TLD has an economic aspect because the accelerated development that began in 1994 of the DNS has been provided largely through private activity, especially through economic activity. However, this does not mean that the activity of a TLD is lucrative. It is necessary to distinguish and know on what that the money raised by a TLD administrator is being invested, as this is how it will be determined if the collected money is to the service of the community.

After the statements of the State Council follows a question that focus the debate: *"If the object of this contract is the operation of the domain .co by a commercial company, this means that the same University feels this domain is property, the nature which it is denied. On the other hand, the RFC 1591 rejects property as relevant to domain names. On the contrary, if the thesis is maintained that .co is not property, then what would be the object of the operation?"* The State Council confuses the statement by the RFC 1591 regarding domain names in general with the administration function, which must be done in favour of the community. There does not exist a domain .co, there exists a TLD called ".co". In previous paragraphs, we suggested that there would exist legal property that can be taken as such and for that reason we do not agree with the suggestions of the State Council.

¹¹⁹ Idem.

Given the above, the State Council states the "possible consequences" that would exist if the University of Los Andes bid for the operation of the ccTLD .co:

- a) *The persons, natural or legal, who decide for the first time to register a domain name under .co, must submit to the conditions fixed by the administrator, who substitutes the University of Los Andes. Within those conditions there will undoubtedly be a tax to pay that will be set by that new administrator at a quantity that will allow the greatest possible use, given the high cost that the transaction will involve. If this presumed new administrator has their business headquarters abroad, the user will accept the consequences that may result¹²⁰.*

First, an operator other than the administrator does not mean that the administrator has changed, as indicated for the Tuvalu or other similar cases.

Second, the assumption that the new operator will increase prices is ventured. With a great volume of domain registries, the prices of each lower, as shown by the registrations of all TLDs.

- b) *Persons who already have their domain name registry, completed before the University, must submit to the conditions of the new administrator, at least as of the expiration date of their current registration.*

[My view on this quotation is] similar to the previous comment, inasmuch as a new administrator does not exist. Therefore, conditions of the contract will not change in terms of having the same administrator. What is being sought (or was being sought) for bidding is the operation for commercialization.

- c) *The use of the domain .co for purposes other than country domains, will stop distinguishing the Republic of Colombia. Consequently, users of the domain, that is, the Colombian community, will lose the national identity that that domain attributes to it.*

The commentary is clear that changing the nature of a ccTLD is beyond the reach of a change in the administrator. The domain .co would have to disappear from the IANA Table of ccTLDs so that it may be considered a gTLD.

- d) *All Internet web pages and sites **of Colombian origin** that operate on the Internet and whose economic activity is commercial or financial or offers services will be withdrawn for the purposes of the private business relation or agreement between the University of Los Andes and the contractor, from the obligations imposed by Article 91 of Act 633 of 2000 regarding taxation reform*

¹²⁰ Idem.

In this point, we feel that the Colombian legislation is explicit. This legislation discusses "Internet sites of Colombian origin". They do not discuss having a .co, but rather of domains on Internet whose operators are Colombian, that is, any .com or .org or under any TLD that makes or has commercial or financial business relations or offers services of Colombian origin. We do not understand why the State Council used this argument, as it is clear that there presently exist and will exist Internet sites with a domain name under a TLD, other than .co and which will have to be registered.

Finally, the State Council states the following: *"The State of Colombia must regulate the conditions that favour and protect the domain .co, as it is of public interest, in order to ensure that all Colombians and the Internet community benefit and avoid actions that monopolize them."*

However, we agree with the statements, by understanding that the State must take action regarding the TLD .co. With respect to the monopoly, as it is a hierarchical infrastructure, it is impossible to have more than one point of contact for administration. Therefore, a "natural monopoly" is created. We agree with the remaining points of the State Council.

2.7 Legal bases that allow the State of Colombia to intervene in the field of the domain .co.

Regulation of telecommunications in Colombia

2.7.1. The notions of telecommunications and operator

2.7.2. Some powers of the Ministry of Communications

2.7.3. The legal classification of telecommunication services

The State Council of Colombia conducted a long analysis resorting to various articles of the legislation related to Telecommunications. The analysis sustains the rights of the State to intervene in all activities regarding the transmission of information through communication networks, through the Ministry of Communications.

The State Council of Colombia further indicates: *"As Internet transmissions are included within the notion of telecommunications and the national government has the powers to regulate matters of this sector, it must be inferred that the government has the authority to regulate the activities concerning the Internet according to the class of services that it offers. Clearly, this regulation does not include the content of communications. Insofar as the content affects the rights and fundamental duties of people, the means of regulation will be a statutory Act."*

We have a set of questions, as we were unable to clarify the document of the State Council or of the legislation of telecommunications. It refers to "Internet transmissions".

We assume that this refers to data transmission, if it is that, that concept has already been regulated through the ley de Telecomunicaciones [Telecommunications Act- Tr.]. In addition, if this concept refers to the Administration of Domains, we do not understand the relationship. In fact, it is the State Council which emphasizes in that paragraph that, should the rights and duties of persons be affected, a statutory Act will be the means of regulation. As the Administration of a TLD is based on a contract through which rights and obligations of a person emanate (in this case of a legal person), one must be careful not to violate these rights.

We agree with the statements of the State Council where it indicates: *"It is implied from the regulations that, local Internet servers or access suppliers provide telematic services and add any additional services for the users such as those indicated in the standard of distinguishable characteristics, they provide mark-up telecommunications service. An ISP provides telecommunication services and an administrator of domain names does not, according to the provisions of the Act."*

2.7.4. The administration of domain names is a matter of the telecommunications sector.

This point, analysed by the State Council of Colombia, has become the other main issue of the document and clearly gives us a sample of the intention to intervene in a regulatory way in the process of administration of domain names. Radication indicates: *"... Internet transmissions are telecommunications and, as the State Council of France expressed, the architecture of domain names constitutes "the back bone" of the Internet. It allows sites to be identified in such a way that without them, the system does not function ..."* The Report of the State Council of France, of September 8, 1998, referred to by the State Council of Colombia indicates: *"Finally, the architecture of field names, the true "back bone" of Internet, which allows the webs to be identified, must be improved within the framework of an international reflection ... Particularly, it is important for the future regulation body of field names system to obtain an international "power", which would establish general principles applicable to field names. In this point, it is essential that the European Union react to propositions made unilaterally by the American government in its Libro Blanco [White Book - Tr.]. Finally, in terms of the French field (fr.), a moderation of "letter of names" seems indispensable to restore the attraction of ".fr" to French companies."*

We feel that when the State Council of France discusses "the architecture of the domain names", we are dealing with IP numbers, real support of the DNS, as the form of "labelling" can vary and in fact varies regarding the same system as it was described by parallel roots.

Radication 1376 indicates: *"Consequently the administration of domain names in a country constitutes a telecommunications service, as it is essential to operate telecommunications through Internet".* The communications through Internet are transmitted through previously regulated telematic networks. Internet is regulated as a transmission of data. Determining that the administration of domain names under a TLD is a communication service means indicating that the DNS is the communication system

without understanding that the real support of the system are IP numbers which are distributed and administrated by international operators and (also) directly by IANA.

The DNS is a capture system for IP numbers through alpha-numerical combinations which makes it easier to use. However, some affirm that DNS is the "back bone" of the system because if this is eliminated, the system would stop functioning. However, it is important to clarify that if DNS disappear, the system will continue to be active, as everything is maintained on an IP number basis, which is the real basis of the system.

Further on, the State Council of Columbia indicates: *"In fact the administration of the country code domain such as the .co involves the domain name registration service under the code of this country. This is the relationship of the entry of the addresses of the national or foreign persons who want to identify their site on the Internet network as originating from this country or direct their messages and service to and from that address ..."*

We must make two precisions. The first is that a domain can be related to an IP number outside of a country. This means that the domain name is directly in a server outside of where it is registered (in the case of ccTLD), or in the case of a gTLD, it can be in any place. The second precision is that the registration of a domain name is not only to identify Internet sites. In fact, it can be used for a variety of services not necessarily linked to the Web (in fact, it will be able to create others in future).

Based on these precisions, registration of a domain name under ccTLD involves a variety of intentions such as the wish that the community of that location be identified. However, there may be no interest from the local community. It would rather protect its domain name on a global level. Special care must be taken upon registering a ccTLD, as the intention of the registrar is not presumed. We cannot know this for sure.

Next, the State Council of Columbia states: *"It is not possible to affirm that the administration of the domain .co is a subject outside the telecommunications sector and that the administration of domain does not constitute a telecommunication service, based on the argument that there is no Act that clearly qualifies it as such. Without that administration, addresses cannot be registered that identify space on Internet for a country or for people who want to participate in telecommunications for a given country through the Internet."* If the ccTLD .co did not exist, could information be sent and received from Columbia? The answer is yes, as people can register any TLD and have their server with information or other services on Internet. However, they will require IP numbers. Without IP numbers there would not be this "participation in telecommunications through the Internet". This means that the correct approach has not been applied to determine what is "telecommunications through Internet". A similar example is the GIS (previously mentioned). A series of identifiers have been invented for this system. However, that which must be suggested as an analysis are not the individually so-called GIS qualifiers, but rather the system itself.

In this point, reference is made to the GAC documents regarding the Administrators of ccTLDs. We agree with highlights made by the State Council, that these documents refer to redelegations (which is not the case) and new ccTLDs.

2.8. Do regulations of Internet private and foreign coordinating bodies prevail, or not, over the legal Colombian order regarding law subjects and objects and legal relations?

Before beginning the analysis of this item, it must be specified that there is a series of services that are provided and systems used, which are not regulated directly through local legislation. Instead they are considered validated, as in the ISO, GIS and Incoterm standards. In fact, while the agreement between parties is not contrary to legislation, it creates rights and obligations between parties.

We agree that the international standards cannot prevail over local legal standards, but it cannot be ignored that these local standards acknowledge freedom of contract and of private activity.

This means that the State is obligated to defend its sovereignty and also to respect independence of individuals.

2.9. Taxes

Finally, the State Council of Colombia presents allegations to justify the view that tax collection would be inappropriate. In fact, we feel that there cannot be a tax charged for TLD domain name registry to be collected by the State. An onerous compensation is possible in any contract, as long as the TLD administrator acts as an intermediary with the database centralized in ICANN, with whom it has a contract.

Collection of this operation does have to be regulated so that the system may be maintained. ICANN also uses the TLD administrator in order to maintain its system, as indicated in the budget of this organization.

3.0. Regarding the "Final Observation" of Radication 1376

After analysis by the State Council completed, this Final Observation was presented, putting particular emphasis on the interest that the State must have in the protection of the name Colombia, as well as its cities and places of economic interest. This proposal taken from II Informe [2nd Report - Tr.] of the WIPO regarding Domain Names is related to the possibility to seize a domain name that contains combinations of characters equal to the denominations of a country or its cities. The declaration of the State Council indicates: *"On the part of the national government it will also be very suitable for the country that it advances with other States in reaching an agreement regarding regulations of the above mentioned matters. It is important for Colombia to have Internet as a favourable space to scientific, cultural, social and commercial matter in our national community with others in the hemisphere, and as a complement to legislation that was adopted regarding electronic commerce."*

The Process of the Information Society must be understood as a global process in which the State must participate and adjust to technological changes in order to establish an appropriate framework for social development within this Society.

4. Regarding "The Room Responds" of Radication 1476

Radication 1376 concludes with three answers, which are the following:

4.1 The domain .co assigned to Colombia as the country code in the Internet domain names system is of public interest.

The analysis of this point has been long, but we understand that the TLD .co is of interest to the national Internet community, whereas the Colombian government is also one of the representatives, and the first. Following suggestions of the ITU for the Documento de Minnéapolis [Minneapolis Document - Tr.], the State must become involved in the administration process, but not intervene if it functions well and is found to be at the service of the community.

4.2 The administration of the domain .co is a point intrinsically related to telecommunications. By such virtue, the national government is competent, through the Ministry of Communications, to put into action its planning, regulation and control without prejudice to the functions that may have been attributed to the ICFES, as indicated in the official letter 0529 of May 4, 1989 of the Ministry of National Education - Tr.]

We feel that Internet in its very essence uses telecommunications networks to transmit information. This transmission has already been regulated both locally and internationally. The basis support of Internet are IP numbers and the TCP/IP Protocol. The domain names are a form of "labelling" these IP numbers. Therefore, Administration of a TLD is not a point strictly of Telecommunications.

4.3 As long as there is no Act adopted by the Congress of the Republic that allows the authorities to determine the tax to be collected to recover the costs for services for registration of names under the domain .co. , no amount can be charged under this heading.

It is essential to understand that the counter-service, onerous or not, for administration of a TLD depends on the administrator of the TLD and will be used in order to maintain its activities and those of the headquarter (that is ICANN). It is not a tax as it is not a public activity. In the cases in which the Administrator may be a state dependency such as Spain, Argentina or Cuba one may probably talk of a tax, but not in the specific case of .co.

5. Some First Conclusions

- a. A TLD is found in a contract between IANA/ICANN and the administrative entity of a TLD (either gTLDs or ccTLDs).
- b. The administration of a TLD creates a usufructuary/possessor link for this administration, as the immediate possessor of a technical delegation given by IANA/ICANN.
- c. The administration of a ccTLD is of interest to the community, and as a delegate by the community, the government has the right and the duty to participate actively in the development of a solid administration structure.
- d. The local Internet community is made up of not only domain names under a ccTLD but also all the domains that are related to the local community under any TLD.
- e. The IANA Table for ccTLDs is based on ISO 3166-1 Alpha-2, and some exceptions are found between ccTLDs and the official ISO Table.
- f. A domain name is property and its true nature is to be determined. However, it is susceptible of possession, use and enjoyment.
- g. The States must be especially careful to protect the proper names, and those of their cities and regions that may be appropriated by third parties in any TLD.
- h. The Administrator of a ccTLD had a duty to the community and must perform its task so that it is beneficial to the local Internet community development.
- i. The Administration of a ccTLD is not a Telecommunications service. Therefore, it cannot be regulated in accordance with the Legislación de Telecomunicaciones [Telecommunications Legislation - Tr.]. We feel that the State must propose a framework for action and participation within the international uses and customs for Domain Names.
- j. The payment made as an onerous counter-service for registration of a domain name is within rights of the freedom to contract enshrined in various international legislations. This payment is not a tax unless it is considered as such in a direct legislation. It is also very likely that it will occur in TLDs operated by state offices.

6. Some Final Reflections

"For he who lives in this era and insists on believing that he can behave as though he lived in the past, the same will happen to him as will happen to he who looks back and walks forward: they end up falling down and splitting their head open."

Cesar de Echague

Internet has changed since its initial conception, and is now configuring itself into a large space for meeting, participating and exchanging information, and it also represents a new configuration to which we must adjust.

The domain name is greatly debated in order to obtain a definition of its legal nature. However, we feel that establishing it as a new identifier is a progress over which the possessor has rights of use and enjoyment. We also believe that if its nature was determine it may configurate into property.

The world is changing and it is our turn to be sufficiently democratic, show our discourse using facts and opening spaces for the participation of the community in the processes. Internet has changed and will continue to change, but at this historical moment, we must participate and allow everyone to participate.

The change toward a Society of Knowledge exists and there is no turning back. We have to become involved in the process. If we do not participate actively and if we are not consistent with the political discourse of creating spaces, we will be exactly like those who we are trying to convince us that Internet is a space for everyone.

It is important to have Spanish-language spaces so that the greater number of the population in the region has access to information on Domain Names. LatinoamerIcann will therefore become a useful project for this purpose.

Annex: Proposal for a Consultative Committee on Policies

The creation of a **Consultative Committee on Policies**, which has the representation of the local Internet community, will become the best mechanism to put into action the suggestions of the RFC and the Best Practices for ccTLDs. In addition, it will become the best way for the work on ccTLDs to be applied and be effective.

We often fear Democracy because we do not know who will be elected or if they will do things better or worse than they are being done. However, Democracy undoubtedly involves taking risks and many heads always think better than one. Furthermore, the greater expertise and development are obtained in a subject such as this one, it will never be sufficient. Therefore, we can incur in the main problem that Internet was hoping to eliminate: the Authoritarianism of Knowledge.

The Committee must have a large structure where the current Administrator participates actively. He has to be part of this committee which in turn has to have representatives of the Academic, the Business, the Governmental, and the ONGs Sectors. However, not only organizations that are dedicated to Internet, Telecommunications or E-commerce have to participate. Internet is a social process through which the selection of the various social classes representatives has to be made from all the individuals and organizations. The use of the Internet by a telecommunications company is as valid as its use by a company that

sells shoes, and the interest of an ONG in supporting Technology is as valid as that of ONGs that are dedicated to the fight for Human Rights. Recognizing our involvement in a social process of change is the first step in understanding the Internet phenomenon.

This Committee should be not only dedicated to the subject of Domain Names, it should also be a kind of *Mesa de Concertación* [Table of Concertation - Tr.] on Information Technologies and Communication and their interrelation with Today's Society, its true mission, of which the subject of domains is no more than a part, an important one, but not the only one.

The most simple mechanism may be initiating the debate through some Open Conference in which social actors can debate their views on this committee. The community's participation must not merely be electing their "representatives". There must be a permanent forum for suggestions and criticisms through electronic means. The concept of Digital Democracy is based on the use of technologies for an active and pro-active participation in the processes that involve people and organizations.

The mission of the policies that this committee may suggest must be to improve and develop the Internet presence within the population, in daily life processes. It must not focus on economic aspects, either solely or as priorities. The Right of Access to Information for its future use is the mission of this Committee.