Governmental Advisory Committee

ICANN

Los Angeles, 31st October 2007

GAC Communiqué – Los Angeles

October 2007

I. INTRODUCTION

The Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) met in Los Angeles, during October 27-31, 2007.

40 members and 2 observers participated in the meeting.

The Governmental Advisory Committee expressed warm thanks to ICANN for hosting the annual meeting in Los Angeles.

II. IDNs

The GAC welcomes ICANN's progress on the introduction of test IDNs in the root.

In Los Angeles, the GAC had a brainstorming session on possible answers to the joint ccNSO-GAC issues paper: *selection of IDN ccTLDs associated with the ISO 3166-1 two letter codes*. The discussion mainly identified basic principles of agreement and highlighted issues that need further consideration. Discussion will continue on the answers with the intention of producing a final document at the Paris meeting in June 2008 as input to the anticipated ccNSO Policy Development Process.

The GAC reaffirms support in principle to the possibility of a fast track approach and welcomes the proposal of the ccNSO Council to create an IDN working group. The GAC will actively engage in the process.

III. WHOIS issues

The GAC welcomes the opportunity to respond to the "draft ICANN Procedure for Handling WHOIS Conflicts with National Privacy Laws". Due to the complexity of this issue related to the diversity of national policies and procedures among GAC members the GAC does not believe a uniform process is workable and accordingly the interim solution from the GAC's San Juan communiqué should be the basis of resolving any potential conflict:

> … specific cases should be referred to the relevant national government for advice on the authority of the request for derogation from the ICANN gTLD WHOIS policy.

The GAC reiterates its recommendation outlined in the GAC WHOIS principles that a study on uses and misuses of WHOIS data should be undertaken by ICANN and is prepared to contribute to the elaboration of the terms of reference of such a study.

IV. Accountability principles and definition

The GAC acknowledges ICANN's commitment to make further progress on transparency and accountability. In response to an ICANN Board request in San Juan the GAC submits a paper on *Definitions of Accountability in the ICANN Environment* (Annex A) as an input to the ongoing consultations on the "Accountability and Transparency Frameworks and Principles"

V. IPv4 free pool depletion and the deployment of IPv6

The GAC received a briefing from the NRO and appreciates ongoing work within ICANN in raising awareness about IPv4 and IPv6 issues. Specifically, the GAC noted the important need for the continued good management of the IPv4 address space in light of the depletion of the free pool and the urgent need for initiatives by all relevant stakeholders to ensure the acceleration of the deployment and use of IPv6 addresses. In this respect, the GAC noted the particular importance of such matters for developing countries.

VI. SSAC briefing

The SSAC provided a briefing to a session of the GAC also attended by the ccTLD community which gave a useful opportunity for discussion of issues surrounding the deployment of DNSSEC and issues related to signing the root. The GAC will keep these issues under review.

VII. New gTLDs

The GAC appreciates the work done by the GNSO regarding the proposal for principles, recommendations and implementation guidelines for new gTLDs. After initial analysis the GAC draws attention to the fact that the proposal does not properly take into account paragraph 2.2 in the *GAC principles regarding new gTLDs*, in particular on the avoidance of country names. In practice some countries would not be in a position to avail themselves of the proposed objection mechanism especially those not participating in ICANN activities. The GAC will monitor the implementation of the new gTLD policy and the new gTLD application round and will provide further input as necessary. GAC members also agree to reflect on the need to provide advice on the final report by the GNSO on the introduction of new generic top level domains.

VIII. Institutional issues

The GAC welcomes the announcement by the United States Department of Commerce that the mid-term review of the Joint Project Agreement will be conducted as planned through March 2008. The GAC will consider contributing to this review process.

Having discussed possible ways and means of implementation of WSIS outcomes in relation to Internet governance relevant to ICANN mandate and suggesting to improve communication about ICANN's relevant activities, the GAC considers it useful for ICANN to include, where possible, in its annual reports information on steps taken by the organization and its constituencies in implementing relevant outcomes of the Tunis agenda.

IX. GAC working group reform and working methods

Taking into account that all supporting organizations and advisory committees and the Board are undergoing review, the GAC revisited its current working methods.

Following its initial reflections, the GAC considers that translation of its deliberations and main documents into other languages would benefit the majority of GAC members, non-native English speakers.

X. Work Program 2008

IDN deployment will be a major priority for the GAC in 2008. The GAC is committed to provide written input to the ccNSO/GAC list of issues by June 2008. Matters related to IPv4 and IPv6 addressing and the security and stability of the DNS are considered as matters of priority in 2008.

The work program is subject to review and will be adjusted as challenges arise.

XI. Elections and nominations

Ms. Maimouna Diop Diagne from Senegal was reappointed to the position of Vice Chair of the GAC for 2008. Elections of two other Vice Chairs will take place in the New Delhi meeting.

The GAC thanks Frank March from New Zealand and Bill Graham from Canada for their service in capacity as Vice Chairs and their outstanding contribution to the work of the GAC.

The following members have been designated to serve as GAC representatives to the Emergency Numbers and Addresses Committee (ENAC) for 2008:

Ms. Suzanne Sene (USA)
Mr. Sune Jin Christensen (Denmark)
Ms. Manal Ismail (Egypt)
Ms. Olga Cavalli (Argentina)

Mr. Brenton Thomas (Australia)

The GAC will provide advice concerning the role of the GAC Liaison to the Nominating Committee in the course of the Nominating Committee Review. In the interim, the GAC will defer the appointment of a GAC Liaison to the new Nominating Committee.

XII. Tribute to Vint Cerf

The GAC acknowledges the outstanding contribution of the Chairman of the ICANN Board, Vint Cerf, and expresses its heartfelt gratitude for his commitment to ICANN and development of the Internet in general. Particularly, the GAC acknowledges his efforts in promoting accessibility of the Internet in the developing world.

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The GAC warmly thanks all those among the ICANN community who have contributed to the dialogue with GAC in Los Angeles.

The next GAC meeting will be during the period of the ICANN meeting in New Delhi, India, 9th -15th February 2008.
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Los Angeles, 31st October 2007

DEFINITIONS OF ACCOUNTABILITY IN THE ICANN ENVIRONMENT

There are several ways to look at the definition of accountability. Each has its own implications when applied to ICANN. This paper represents current GAC thinking on the issue, and is offered for consideration by the ICANN Board and the ICANN community more widely:

Accountability in the public sphere

In the public sphere (i.e., governmental), GAC members collectively have a wealth of experience. Our experience is relevant to the extent that ICANN performs a public trust function -- which seems to be an assumption consistent with the nature of the Corporation as defined in particular by Article 3 of the "Articles of Incorporation". But it would not be reasonable to suggest holding ICANN to the same standards of accountability that would apply to government officials, who in democratic societies are held to quite a high standard of accountability to the political level, and through them to the population. On the other hand, governments' definitions of accountability might prove useful for our consideration of this topic, and in that light GAC offers the following definition:

> *Accountability is the obligation to demonstrate and take responsibility for performance in light of commitments and expected outcomes.*

Governments often have mechanisms in place to assure the public that they have behaved responsibly, including mechanisms for reconsideration of decisions. This can take the form of an audit or evaluation, usually performed by an independent officer, such as an auditor general, inspector general. Others use outside auditors. These are integral to a system of checks and balances. As outlined in the Draft Management Operating Principles, ICANN does have review mechanisms (Board Reconsideration Committee, Independent Review Panel, Ombudsman), but these are somewhat circular in that they all return back to the Board for a final decision. The ultimate external accountability mechanism is succinctly stated: ICANN can be taken to court. While this is true, the cost of undertaking a court action against ICANN is prohibitively expensive in both cost and time.

Another aspect of accountability in the government realm can be referred to as a culture of accountability. For example, it is possible for an organization to have a good definition for accountability and good bylaws, but the culture of accountability can determine to a large degree how these are implemented. It is useful to think about how ICANN interprets and implements its existing mechanisms. Good policies can fail if appropriate enforcement is not provided, as recent experience has shown. More can be done in that respect. The definition of Internet governance in the Tunis Agenda refers to "the development and application … of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet." The "application" part covers both implementation and enforcement.

The GAC also considered the importance of the role of the ICANN Ombudsman in the broad accountability regime. The Ombudsman's role is to help assure ICANN stakeholders their problems will be addressed. That he cannot overturn decisions, and can be fired by the Board, serve as a check on his powers. A quick look at the 26 October 2007 Ombudsman's report shows that some recommendations were and some were not acted upon. In at least one country with an Ombudsman similar limitations exist, but there the government has very rarely not complied with Ombudsman recommendations (and has never dismissed an

Ombudsman). ICANN might consider what it can do to strengthen the visibility of the Ombudsman as it seeks to improve the organization's accountability. This could be accomplished by responding more vigorously to the Ombudsman's recommendations where possible, as a way of demonstrating its commitment to accountability. In cases where the ICANN Board determines it would be inappropriate to comply with a recommendation from the Ombudsman, as a general principle the Board should publicly state its reasoning, understanding always that in exceptional cases confidentiality may be deemed essential. Finally, when selecting a new Ombudsman, ICANN must employ a clear and transparent mechanism to ensure the appointee will have the respect and support of the full range of stakeholders. This is important to diminish the risk of the ICANN Board's having to dismiss the Ombudsman, an action which would not be well regarded by either stakeholders or the world at large..

Accountability in membership organizations

In the realm of membership organizations, accountability is to the members. That is usually thought of in two ways. First is fiduciary accountability ensuring the appropriate and responsible handling of funds. Second is political accountability whereby the members have an expectation that the executive perform functions in line with the wishes of the membership. The first is usually affirmed by auditors. The second is usually accomplished through elections (whose results can be affected by what is said by auditors). This is difficult in the ICANN context, where there is no membership, but there are "stakeholders," "participants" and "affected communities," some of whom have expressed a desire to see political accountability mechanisms in place, in addition to the fiduciary mechanisms. But in a context where there is no defined membership, it is more challenging to find an appropriate mechanism for political accountability. The GAC is not 100% persuaded by the argument that one difficult election experience rules out the possibility of any type of election mechanism being more successful, but I recognize more work is needed. A PDP or other open process may be the appropriate mechanism to ask stakeholders of all types to state precisely what they believe is missing from ICANN's political accountability. The GAC notes that the current reviews of the Board and of the NomCom are likely to attract useful comments on these topics.

Accountability in non-membership organizations

In the realm of non-membership organizations – there should normally be accountability to an incorporating body. Thinking in terms of NGOs and not-for-profit entities, these are usually incorporated in some jurisdiction. Accountability is usually of the fiduciary type -- ensuring that funds flowing into and out of the organization are handled in a manner appropriate to the charter, mission and aims of the organization – and there can be broader accountabilities governing responsible behaviour by the entity. ICANN is obviously this type of organization, and it has a fairly conventional mechanism for ensuring these types of accountability.   Like most non-membership organizations, ICANN also holds Annual General Meetings and issues a public Annual Report. The issues and debates around accountability seem to me to be framed by the expectations of some participating individuals and "communities" (see membership organizations above). The issue for ICANN's Board seems to me to be whether or not to attempt to find new ways to address the demands/desires of those individuals and communities.

Other considerations about accountability

Business entities also have accountability mechanisms, often a mix of those mentioned above. With regard to fiduciary accountability, there is almost always a requirement that finances be managed in a manner appropriate both for the proprietors or investors and for the

state (which has usually got expectations related to taxation, compliance with laws, and in some senses with ethical norms of behaviour). Sometimes a political mechanism is used to ensure fiduciary responsibility (shareholders' meetings; Board elections), sometimes a more administrative approach (appointed Boards, Annual Meetings, Annual Reports, etc.). The market also imposes its own kind of accountability: investors/shareholders/consumers "vote" by providing or withdrawing resources. This environment should perhaps be examined to see if any models can be found that would have lessons for ICANN, but the fundamental difference between the imperatives of for-profit businesses and not-for-profit organizations may muddy the waters. The fact that ICANN's responsibilities for naming and numbering have significant economic import for business entities suggest to me at least that some consideration should be given to accountability mechanisms in a business environment. In this respect, ICANN needs to be accountable to the community, and to anyone materially affected by its decisions.

The point of looking at these different models is to provide a framework for GAC to use in looking at "accountability and transparency" of ICANN. From the perspective of the GAC, ICANN has been making good progress on transparency issues. Nonetheless, the GAC believes a few issues remain to be dealt with: making information more easily/readily available is just one part of the process. Other important elements involve making certain the information is succinct, usable, and placed in context. The purpose of particular postings or deliberative processes must be made clear, and sufficient time has to be allowed for the submission of comments. Once comments have been submitted and reviewed, the results of the review need to be written up and explained, to facilitate a clear understanding of the premise and scope of whatever decision is taken by the board.

GAC members are aware that the ICANN Board sometimes deals with sensitive issues, such as cases concerning delegation and re-delegation, where it is not appropriate to publish all of the information considered in the decision making process. However, even in those circumstances, when the ICANN Board publishes its agendas and minutes it should identify which topics are regarded as sensitive, and offer an explanation of why they are considered sufficiently sensitive to justify keeping related information confidential.

After thinking through the framework above, it is clear that the issue of "accountability" for ICANN is difficult. By many measures, ICANN seems to have a reasonable set of mechanisms in place to assure accountability in a non-member organization, recognizing that improvement is always possible. The question the GAC would like to pose in this paper is whether ICANN's Board is satisfied that the organization is doing as well as possible not only to meet the requirements of its Articles of Incorporation and related official requirements, but also to answer the needs vocally being expressed by individuals and communities interested in the organization?

These questions will no doubt be addressed through the mechanism of the upcoming 2007 Review of the ICANN Board, for which the terms of reference were posted, with comments due October 11. The draft terms of reference clearly open the door to consideration of the issues outlined above. Similarly, concerns around accountability in how the Board is selected will be the subject of ongoing deliberations, through the review of the Nominating Committee. The review report will be submitted to the Board and posted for public review and comment.

Looking at accountability in these three different environments, it is possible to draw out some points that are common to all of them which can extend this discussion as it moves forward. For example, no matter how defined, accountability can be assessed and measured in terms of:

- processes by which decisions that affect the broader community are developed and adopted;
- mechanisms by which the inputs and rationales for such decisions are explained (this includes explanations of what inputs are used in a process and why inputs received via a public consultation process have been rejected); and
- processes by which stakeholders can raise concerns and seek redress.

The GAC also wants to point out that in some sense, ICANN's mandate puts it in a situation of having specific responsibilities to the entire global community. An Annual Report is a useful mechanism to report on its stewardship, but the organization should take care to show its sensitivity to the interests of the whole international community. The GAC's message to ICANN is that they may need to look for mechanisms to increase political accountability. This should be a consideration in the work of the President's Strategy Committee, including considerations of expanded internationalization.

In conclusion, the GAC believes that ICANN has made progress in its efforts to improve its transparency and accountability. But the GAC also believes that this must be an ongoing process. As government representatives, we are committed to continuing to work with ICANN and its communities in their ongoing work.

31 October 2007