INTERNET GOVERNANCE: THE PUBLIC-PRIVATE PARTNERSHIP

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Good afternoon:

In this short address, I will speak to the principal issues that have arisen in the context of the ICANN Governmental Advisory Committee (GAC). I would like to thank CIGREF, MEDEF and ISOC France for organising this event. I would also like to take this opportunity to greet all those present who over the past five years have participated in the domain name process in Europe: IFWP, EC-POP, Dot EU, IIG, ICANN and its constituencies and of course GAC itself.

The Chair of the GAC is Mohamed Sharil Tarmizi from Malaysia. We have three Vice-Chairs, from Brazil, Kenya and Sweden. Many of you were at the recent ICANN and GAC meetings in Montreal. The GAC meeting was particularly well attended with thirty eight delegations. Twelve countries have either joined or re-activated their GAC membership during the past six months.

The relationships between ICANN and GAC and their memberships - the Internet community on the one hand and the governments on the other hand – is an unique template for international public-private partnership in the Information Society. At a time when some governments are groping for new forms of international governance, this case-study merits attention both as a valuable experience and as a source of some salutary lessons.

I shall argue that at the present time, this kind of solution to global Internet governance is the only viable way forward. However, I shall not argue that this is a model for <u>all</u> other forms of global *partenariats*. GAC and ICANN are still evolving. Although I support the reforms to ICANN and GAC that were agreed last year, and are now being implemented, the present position is clearly not the last word. There is no doubt room for improvement; and the end-point is not yet discernible. It would be wrong to suggest that particular individuals, entities or governments have access to tested alternative solutions that could be implemented directly, now. They do not.

Thus, most ICANN and GAC participants accept that we are still in an experimental phase and are prepared to adapt to the speed of change and learn from experience.

It is also necessary to emphasise that both ICANN and GAC must be open and open-minded organisations. ICANN is the global forum for the debate and negotiation of technical and economic solutions to a range of Internet management policies. It has an obligation to facilitate the growth of the naming and addressing space in line with the growth of Internet usage and its global reach. It is not a trade association and must avoid capture by established interests at the expense of new entrants or competitors. That is one reason why effective represent-ation and participation by all categories of Internet users is critically important.

Neither is the GAC a club for first mover governments in the global Internet. Its membership has steadily grown and is currently accelerating. Effective participation is inhibited for many countries by the high cost of international air travel, international telephone charges and low band-width. These are real problems that we must address, but notwithstanding, there is a high level of interest and enthusiasm in many countries where the associated effort must be very costly. In the GAC Secretariat we are doing our best to maintain information and communications services for all our members, particularly those who find it difficult to attend the formal face-to-face meetings.

Allow me to review briefly several aspects of this *problématique*:

1.   The essential characteristics of a public-private partnership

2.   The relationship between global and local obligations and rights

3.   The particular role of GAC vis-à-vis ICANN

4.   GAC Secretariat - Practical aspects of the distributed policy-making process.

1.   PUBLIC PRIVATE PARTNERSHIP

The relationship between GAC and ICANN is an unique international experiment in a public–private partnership. The origin of this relationship lies in the extensive and distributed private operation of the Internet in most of the world, and the growing public policy interest in many aspects of the organisation and management of the Internet, and certain aspects of its use.

It is a fact that during the formative years of the Internet in North America and Europe during the 1980's and early 1990's, governments and international organisations were generally absent. Indeed, official networking policy, and standardisation was,

at the time, quite different from that of the Internet.

However, by the mid-1990's it became clear that the past dichotomy between governments and the private operation of the Internet was unsustainable. That realisation gave rise to a series of initiatives – that are not our theme today – including the ISOC IAHC and the US Green and White Papers, that led to the creation of ICANN and GAC.

Consequently, now, ICANN is a private international entity incorporated in California, and GAC is an Advisory Committee, with a mandate to be consulted on all public policy issues arising from ICANN's work. Although I believe that most interested parties consider that this relationship is functioning correctly, and that good progress is being made on several fronts, the relationship is not without its problems and its critics.

Furthermore in the absence of any real precedent, GAC Members, the Chair, Vice Chairs and Secretariat have to feel their way forward, in a rather informal environment, often subject to considerable time pressure.

Such challenges can only be resolved through time and experience.

ICANN and GAC are being criticised from two opposing points of view:

The traditional Internet view has been that governments had no place in cyberspace and that the Internet was:

     (a)   uniquely technical and
     (b)   entirely self-regulating, should it be governed at all.

Vestiges of this view survive among the older Internet technical and operator community, but today the vast majority of Internet participants recognise that the wind turned some time ago and that governments

now have to play their part and take their responsibility.

More recently, it is the role of private self-regulation itself that is being challenged:

(a) because ICANN is incorporated in the United States and still operates under a contract with the US Department of Commerce, and

(b) because GAC has "only" an advisory role and lacks the authority of an inter-governmental organisation.

These views reflect understandable concern as to the slow progress of internationalising Internet governance and - less excusably – a certain hankering that the Internet should conform to the technical and political architecture of the international tele-communications system.

While the former requires continued progress towards previously agreed objectives by the United States and the International Internet community, the latter is a practical impossibility. The Internet's architecture, technology and protocols do not conform to those of the international telecommunications system. Furthermore, the Internet is already global; it is not necessary to unify it by nurturing inter-operability through formal links and agreements between States.

Many of you will be aware that this issue has been pushed up the agenda of the current World Information Society Summit exercise. As I read the debate it would appear that most governments generally seek a fully international approach to Internet management, whereas a few governments believe that only an inter-governmental solution is acceptable.

However, in view of the degree of private operation and self-regulation of the Internet that already prevails, it is not at all clear how an inter-governmental solution would operate, absent the cooperation of relevant constituencies and operators, that would clearly not be forthcoming. Thus one would have to revert to a form of *parternariat*, in any event. Which is more or less what we have already got with ICANN and GAC.

It is also not clear what would be the interim solution during the necessarily long drawn-out period of negotiation and constitution of such an option. Other, that is, than the status quo which is the GAC in relation to ICANN and the other Internet constituencies.

2. GLOBAL AND LOCAL ISSUES

It is a truism that the Internet is global. Any domain name or IP address can theoretically reach any computer attached to the network. There is no need here to dwell on the undoubted advantages and, indeed, disadvantages inherent in such a system. That is how it is. Consequently, certain aspects of Internet management are necessarily global. It has always been thus.

Furthermore, without attempting to para-phrase Laurence Lessig, there is much truth in the assertion that "the code is the law". What happens on the Internet has much more to do with the implementation of RFCs, protocols, names and addresses than it has to do with what ICANN, or even governments say, or what they would like to see happen. Accordingly it is naïve and potentially dangerous to ignore or minimise the global dimension of the Internet.

Yet many yearn for a high degree of local autonomy and authority over operation of the Internet in each country, jurisdiction, or whatever. This issue has been talked out thoroughly in the recent debate over the constitution of the CCNSO, where the principle of restricting the scope of global Internet management policies has been enunciated. However, it remains to be seen what this means in practice. We already know that domestic laws and policies are

difficult to enforce unilaterally on Internet operators in other jurisdictions.

We also know that as long as the international consensus is to maintain a globally interoperable Internet based on the "legacy Root", there will always be a nexus of critical global policies that will have to be respected by all concerned. Accordingly, I find the current debate about whether certain technical policies and standards are "binding" or "non-binding", rather sterile. There are aspects of Internet policies that local communities and their governments would be eager to determine "locally", but in areas such as IDN, UDRP, Registry-Registrar protocols, among others, I am persuaded that ultimately the scope for full local autonomy is in practice quite limited.

Accordingly, the parallel debate about "National Sovereignty" is equally sterile in this context. Sovereignty over what, precisely? Sovereignty is, if anything, an attribute of Governments. As far as governments are concerned, my experience during the past five years is that when they understand how the Internet works, their real demands are not for sovereignty over their bit of the Internet, but rather a shared authority over critical functions for the global Internet as a whole. Contrary-wise, if all that most governments can ask for, and hope for, is sovereignty over their ccTLD, in practice that would reduce, not increase, their influence over the Internet in their jurisdiction. A very bad deal indeed. On the contrary, the GAC in relation to ICANN does provide a forum for the development and implementation of shared public authority, where necessary.

Accordingly the political architecture of the GAC is based on an entirely different concept from that of national sovereignty. It is that the public policy issues arising in Internet governance must be dealt with co-operatively, jointly and with a shared authority. Certainly, sensitive to the need to move away from the initially predominant US-EU dipole, and from the dis-

proportionate use of English. Certainly, sensitive to national differences, for example in IDN. In essence, governments acting collectively in the common interest of their populations and Internet users. Avoiding measures and positions that risk splitting the public interest and *a fortiori* avoiding splitting the Internet.

3. GAC'S ROLE VIS-A-VIS ICANN

On the basis of the revised ICANN Bylaws agreed in Shanghai last October, GAC is now extensively implicated in a wide range of ICANN policies and procedures.

While remaining an Advisory Body, the Committee, must be consulted by the Board on **public policy** issues.

I am not sure whether there is a formally agreed definition of what is public policy in this context, but experience with the ICANN and GAC during the past five years amply illustrates that such issues may arise in areas like competition, intellectual property, privacy and data protection, geographical terms, languages and scripts. The terms and conditions of the concessions in the public interest enjoyed by national Country Code Top Level Domain Registries (ccTLDs) have particularly exercised the attention of the GAC and many of its Members. - One of the first substantive jobs in the GAC was the preparation and publication in 2000 of the Principles for the Delegation and Administration of Country Code Top Level Domains (ccTLDs).

In the event that ICANN is not able to or does not want to adopt GAC advice, the **Board should consult** with GAC to find a mutually acceptable solution and explain its reasons. This provision has been in effect for less than one year, and is not yet operating to everyone's satisfaction:

I believe that several of you here consider that ICANN is not giving sufficient weight to GAC advice, for instance over the protection of country names or the

constitution of the ccNSO. However, the overwhelming majority of GAC members is on the contrary willing to work with ICANN within the present procedures and constraints. Let us explore this relationship in a little more detail:

(a)   GAC Advice is **not mandatory**. The basic reason for that is that GAC members themselves insisted that the ultimate responsibility for ICANN decisions – and eventual liability – must remain with the ICANN Board.

(b)   GAC Advice is **not self-executing**. I believe that many governments would be troubled by the proposition that - at least at the present level of experience and resources – they were adopting measures with immediate effect. This is indeed a public-private partnership; GAC members generally do not want to overturn that balance of responsibility nor do they want to engage in the technicalities of the code, although it is indeed at that level that authority is ultimately exercised on the Internet.

(c)   GAC Advice is one component of an often complex and multi-facetted **negotiation within ICANN** among the private sector participants. Consequently GAC members have a choice of either depositing their Advice on ICANN's doorstep on a take-it-or-leave-it basis, or of entering the house and taking account of the negotiation as a whole. For instance, few GAC members would claim that the cNSO agreement in Montreal is perfect. However, most would recognise that GAC and ICANN went as far as they could to obtain a settlement that is an adequate point of departure for the new Supporting Organisation. A very large majority of GAC members were of the view that the primary priority is to create an inclusive ccNSO organisation, now. To understand the degree of animation surrounding this question, one must be aware of the frustration in many parts of the world arising from the failure of

the ccTLD Registries and ICANN to settle on a stable relationship – and this for the past five years. The abstention of large parts of the ccTLD community from ICANN has compromised the underlying objective of internationalisation of the organisation. We may all hope that handicap has now been overcome.

Another question is the speed and timing of GAC Advice and related ICANN decisions. GAC has asked to be consulted by ICANN in a timely manner. To date that has not always happened. Although GAC has taken steps to be able to respond to requests for Advice quite quickly, it would be advisable for "Internet Speed" to slow down a bit when complex policy issues, involving many governments, are on the table.

Also, GAC has to be able to arbitrate between the advantages of taking time to be thorough, and acting quickly to influence the debate in the ICANN constituencies and the Board. GAC does not intend to be the one who stops the train in motion, particularly as in the CCNSO case, the train is finally moving in the right direction!

4.   THE GAC SECRETARIAT

It has been my privilege to manage the GAC Secretariat for the past six months. The Secretariat currently comprises five people. We work in close collaboration with the GAC Chair, Vice Chairs and GAC Members. Much of the practical work of the Secretariat is related to organising the activities of GAC as a whole. For example:

- GAC meetings in Rio de Janeiro, Montreal and, next, in Carthage, Tunisia.

- Regular conference calls among GAC members

- Facilitating activities of six specialised working groups: gTLDs, ccTLDs, IDN, Whois, Ipv6 and Security.

- Providing support for the GAC-ICANN Liaisons and the Convenors of the Working Groups

- Maintaining membership records, mailing lists; facilitating new membership

- Creating and maintaining the GAC Web-pages, e-mail reflectors and web-based discussion groups.

These activities inevitably bring the Secretariat into close contact with all the policy issues that are currently considered by ICANN and GAC. Although the actual policy-development work is effectively distributed among the membership, the Secretariat provides background information and practical support whenever necessary.

More generally, it is necessary that GAC not bite off more than it can chew. Both the Members and the Secretariat have limited - indeed small – resources. We will continue to concentrate on a few issues that have high priority. It would be a mistake to claim formal competence across a wide range of subjects, on which we are not able to deliver in substance and on time. Thus, the GAC Chair may from time to time discourage ICANN from consulting GAC on matters that few would regard as seriously coming within the scope of public policy. A great deal of work goes on in the framework of ICANN, some of which is highly technical. GAC should avoid getting involved across a wide spectrum to the detriment of the key issues where governments have to exercise their responsibilities.

4.   CONCLUSIONS

In conclusion, I have mentioned:

- the nature of the public-private partnership between GAC and ICANN.

- the distinctions between global and local issues

- GAC's role vis-à-vis ICANN and [1]

- The GAC Secretariat.

I believe that the predominant view in GAC is that the public-private partnership that I have described is the only viable way of organising Internet governance at the global level, and that significant dimensions of global public policies will have to be addressed in future in this context.

GAC's Advisory role with ICANN has been re-defined in the current Reform, but is still experimental. GAC must focus on a few issues for which the Membership and Secretariat have the resources to deliver a thoroughly prepared product in good time. ICANN should consult GAC as early as possible, on the major issues.

The GAC Secretariat has a supporting role, across a wide range of GAC activities and depends primarily on substantive input from the GAC membership, through working groups and liaisons. The GAC Secretariat is too small to become a bureaucracy, and should stay that way!

Thank you very much for your attention.

Brussels and Paris, 3 July 2003