

**Comments by the Government of Canada
on the Continued Transition of the Technical Coordination
and Management of the Internet Domain Name and Addressing System**

(Ref.: Department of Commerce, National Telecommunications and Information Administration,
Docket No. 060519136-6136-01)

The Government of Canada is pleased to provide its comments to the Government of the United States on issues surrounding the continued transition of the technical coordination and management of the Internet domain name and addressing system (DNS).

Canada acknowledges and appreciates the vital role that the Government of the United States has played in the development of the Internet itself and, through the establishment of the Internet Corporation for Assigned Names and Numbers (ICANN), in initiating a process aimed at increasing competition, privatization, and enabling international participation in the management of the Internet's technical functions. It is our view that ICANN has been making progress in the direction of fulfilling its mandate. Certainly, Canada agrees that the path of increasing competition, privatization and internationalization continues to be relevant, and should be pursued. In the short period of ICANN's existence, since the first Memorandum of Understanding of 1998, there have been many opportunities to learn and to improve the functioning of this new body. The learning process has not always been smooth, but we are satisfied that the evolution of ICANN has demonstrated an openness to improvement. It is our conclusion that the fundamental model of ICANN – a private sector, not-for-profit body responsible for a narrowly defined set of tasks – should be continued. This paper is intended to outline Canada's views in detail, and to offer some suggestions of steps intended to assist in defining the way forward.

In addressing the issues raised in the Notice of Inquiry (NOI) recently launched by the NTIA, Canada believes it is essential to underscore and to reiterate the narrow technical nature of ICANN's mandate, as a body responsible for the administration of Internet names and Internet Protocol (IP) addresses. We recognize that these technical issues occasionally give rise to policy considerations. This has led to confusion about ICANN's role and sometimes distracted the organization from its core mandate. Canada is of the view that, going forward, ICANN and its stakeholders should be scrupulous in taking a very narrow view of ICANN's policy functions, ensuring that any policy issues considered arise directly from and/or are inextricably linked to the organization's core technical functions. Any other policy issues should be referred to other more appropriate bodies.

The Notice of Inquiry is timely, coming as it does in the year following the conclusion of the World Summit on the Information Society (WSIS). During the WSIS process, many governments expressed a desire to have more input on

issues which have come to be grouped under the broad heading of “Internet governance.” Some of those issues are pertinent to the DNS and to ICANN itself; others are not. For Canada, the expressed interest in having greater input is not inconsistent with the goal of increased internationalization articulated in the 1998 Policy Statement on the Management of Internet Names and Addresses. However, we acknowledge that some confusion exists with regard to the importance of this latter objective and its meaning in the current environment. For that reason, Canada suggests that it might be useful at this time for the Government of the United States to restate and elaborate its views and intentions with regard to internationalization, and specifically its views and intentions with regard to the exercise of US government authority over the root zone file.

Specifically, Canada would welcome a statement that the Government of the United States will restrict the exercise of its residual authority in authorizing changes or modifications to the root zone file to circumstances where such exercise is essential to preserve the technical stability and security of the Internet and/or the DNS. In all other circumstances, Canada would encourage the Government of the United States to put in place a mechanism to internationalize the functions of directing, approving or disapproving changes in the authoritative root zone file, ideally involving senior representatives of governments from all regions of the world. The goal of such a mechanism would be to increase transparency and engagement in this vital function, consistent with the goal of internationalization. Without necessarily advocating a specific mechanism, Canada notes with interest the proposal advanced by Ms Becky Burr and Ms Marilyn Cade in their submission to the NOI process, which could form a sound basis from which to work. The principles of representation and the combination of permanent and rotational participation proposed in that submission seem particularly worthy of consideration. Indeed, this function could be assigned to a sort of senior Governmental Advisory Committee (GAC), or “Senior GAC,” a suggestion put forward later in this submission.

With respect to the question of the future of ICANN and its relationship to the Government of the United States and to other governments, Canada has been a long-time and strong supporter of the ICANN model, as a not-for-profit, private and private-sector led, bottom-up entity. Indeed, it is because of the primarily technical nature of ICANN's mandate that Canada supports this approach. Looking forward, Canada intends to collaborate in the continuing evolution and reform of ICANN in the post-2006 environment. But Canada does not believe that the conditions have yet been established for the transition of ICANN from its current status to that of a fully independent private-sector body. Issues remaining to be addressed include: the need to strengthen the principles of transparency and accountability for its actions; the related need to improve its processes; and the need to continue to strengthen understanding and the relationship between ICANN and its Governmental Advisory Committee. The reforms advocated in this submission would be positive steps in this direction.

The past year has provided widely acknowledged examples of the need for improvement. In an open letter dated March 17, 2006 the Canadian Internet Registry Authority (CIRA) recommended several possible steps ICANN could take to bring about improvements in the areas of its openness, transparency, and accountability. Accountability¹ is key to the credibility and authority of the organization. In a second letter dated June 15, 2006², CIRA recommended to ICANN an appropriate starting point in the process of making improvements:

CIRA recommends that ICANN engage a non-governmental, independent consultant to conduct a wide-reaching, public review of ICANN's transparency, accountability and the fairness of its processes and to provide a road-map for ICANN's reform. This review can be conducted in a manner similar to the review of each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee as set out in Article IV, Section 4 of ICANN's Bylaws.

The Government of Canada commends CIRA for the constructive approach it is taking in recommending this practical step to ICANN, and requests that this recommendation be considered for inclusion when developing the next phase of the MOU with ICANN.

Turning to the question of relations between ICANN and the GAC, Canada is pleased by recent developments such as the ICANN Board-GAC Executive meetings, and open ICANN-GAC consultations. It is clear that the ICANN Board and staff are committed to enabling the GAC to play a useful advisory role in the organization. The recent development of a paper on "Communications timelines between the ICANN Board and the GAC," developed jointly by the GAC and ICANN Board representatives, as well as planning for a joint outreach program are also positive signs of this new relationship. But there is still room for improvement. Canada offers the following suggestions for consideration.

The GAC Role and How It Can Be Strengthened

In the current ICANN model, governments and the GAC need to maintain a certain distance from ICANN, in recognition of the ICANN Board's ultimate responsibility for ICANN decisions. Failure to maintain a clear line of responsibility could raise questions with regard to the Board's legal and fiduciary responsibilities and the possible requirement that governments and the GAC assume these and the entailing liabilities. This reality is recognized in Article XI, subsection 2.1(a) of ICANN's Bylaws, in which the GAC's primary role is defined

¹ Accountability is the obligation to demonstrate and take responsibility for performance in light of agreed expectations. There is a difference between responsibility and accountability: responsibility is the obligation to act; accountability is the obligation to answer for an action. (Government of Canada)

² Both letters are available on line at http://www.cira.ca/en/whatsnew_news.html

as being to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” Recognizing this reality, the GAC should not expect itself or be expected to be a decision-making body. Nor should it routinely be expected to provide official government “positions” or “directions” to ICANN on matters before it. GAC representatives rarely come to meetings empowered to provide official government positions, let alone bind their governments in this regard. On the other hand, their positions and backgrounds enable them to provide valuable insights and make valuable contributions to relevant issues at hand, without muddying the ICANN Board’s accountability.

In the same vein, the GAC should not expect or be expected to routinely provide a consensus view. It is laudable that the GAC so often is able to achieve a consensus on issues, and it should continue to strive to do so. However, the fact that government representatives do not all share the same view on a given topic should not come as a great surprise and in many instances would, in itself, likely provide useful information for ICANN. Learning more about the differences of opinion and the reasons for them could be of considerable value to ICANN, particularly if such information could be provided on a timely basis. Currently, GAC working group meetings, plenaries and communiqués tend to bear too many of the trappings of formal intergovernmental decision-making bodies and, partly for this reason, tend not to deliver the timely, meaningful advice that ICANN is seeking.

The GAC would improve its utility and effectiveness in carrying out its primary role by conducting itself in a manner that focuses on two principal aspects of that role. The first aspect should be to serve as a vehicle for providing an information conduit between world governments and ICANN, enabling GAC members on the one hand to share information and opinions on current issues in the process of developing advice for ICANN, and on the other hand to take back information and intelligence about ICANN’s deliberations to relevant authorities in their respective governments. The second aspect should be one of capacity building. In this role, the GAC could serve as an informal training body, information clearing house and networking hub for government employees involved in Internet issues in their home countries. In support of both these roles, GAC members could be facilitating and participating in informal workshops, presentations and discussions on issues directly related to the ICANN mandate.

Government Oversight

To facilitate the GAC in functioning as described above, as well as to further alleviate concerns regarding the degree of US government oversight of ICANN, consideration should be given to establishing a more senior level GAC that would provide direction to the GAC in setting priorities and whose representatives

would be in a position to address issues raised by the GAC in their respective countries. Such a body could perhaps meet once per year, in conjunction with one of the working level meetings of the currently established GAC.

The annual Senior GAC meetings could focus on relevant issues of mutual interest that had proven difficult or contentious over the course of the year, as well as new issues appearing on the horizon. Expected outputs could include contributing to ICANN agenda setting and identifying possible issues for the GAC to monitor and report back to governments on. A Senior GAC could also serve to help resolve issues pertaining to ongoing secretariat and financial support for the GAC overall. Finally, a Senior GAC could also provide the mechanism to internationalize the functions of directing, approving or disapproving changes in the authoritative root zone file mentioned earlier in this submission.

A senior GAC would also be well suited to serve as an interlocutory body for consultation between the Government of the United States and other governments on ICANN affairs. However, it would be important to clarify that a senior GAC would have no direct authority over ICANN's day-to-day decision making.

The GAC's Policy Role

In considering the policy-making aspect of ICANN's role, it is of fundamental importance to make a distinction between broad Internet-related public policy issues such as spam, fraud, child pornography, etc., which are clearly outside ICANN's mandate, and the more focused policy issues directly related to the technical functioning of the Internet, which are within its mandate to deal with, albeit without the aid of any special legal powers. As a practical matter, it must also be recognized that grey areas continue to arise where this distinction is sometimes difficult to make.

Whenever the GAC is considering giving policy advice to ICANN, it should make certain that it is clear as to which of the three categories the policy issue in question belongs (narrow – strictly within ICANN's mandate; broad – clearly beyond ICANN's mandate; or grey – partially within and partially beyond ICANN's mandate). Policy advice provided on issues falling into the broad or grey categories should be identified as such, and when discussed by the GAC should include considerations as to whether ICANN has adequate jurisdiction or capacity to deal with the issue(s), and whether there may be legal liability implications for ICANN should it attempt to do so. This approach to the provision of policy advice would have the added benefit of assisting ICANN in not straying beyond its mandate, and thus not creating unnecessary controversy or entanglements.

ICANN's Policy Role and How It Can Be Strengthened

Canada believes that transparency is essential for ICANN in its dealings with governments as well as with its private sector constituencies. ICANN's relationship with the GAC also would be greatly improved through better communication of its decisions and the reasons for them. It costs governments and others a great deal of time and money to participate in ICANN's bottom-up processes, and it becomes increasingly difficult to maintain that commitment if the advice being given often seems to be receiving less than full consideration or even to being mostly ignored. Moreover, when adequate reasons for decisions are not publicly provided, interested parties are left to guess as to what the real reasons are. Over time, this may create an environment of distrust, where false motives are imputed and hidden agendas are implied.

The solution to this is for the ICANN Board to post not only minutes of its meetings, but in the case of all policy and other decisions of major import to its stakeholders, to issue publicly available, written decisions which include the background and context for the issues being dealt with, acknowledgement of the positions of interested parties, an analysis of the issues and an explanation not only of the decisions taken, but why on balance they were considered appropriate. This approach would clearly add some time and expense to the process and perhaps some legal risk if not done carefully and thoroughly. These negatives would be greatly outweighed, however, by the understanding, confidence and trust that the ICANN Board would build in its relationship with its constituencies.

ICANN should try to better anticipate the type and length of process needed to afford interested parties an adequate opportunity to participate. In the case of important issues, it may be best for ICANN to place a form of public notice on its website that provides a good general description of the issue(s) at hand, and establishes a suitable process with suitable deadlines for each step. The proposed deadlines could always be debated and adjusted if necessary, but once set, the framework would provide a context and timeline for decision-making. In the absence of such an approach, ICANN can appear out of touch with its constituency, and arbitrary in its commitment to open and transparent processes.

As noted in the introductory section, throughout ICANN's existence, confusion has persisted as to its role as a policy maker. The WSIS process has helped shed some light on the subject, but uncertainty remains as to how to deal with a number of broad Internet-related public policy issues that must be resolved. The growing global importance and mainstream societies' acceptance of the Internet is raising government concern over a number of cybercrime and related Internet content issues. Sometimes, a seeming lack of any obvious international forum to deal with these and other broad Internet-related policy issues creates expectations and pressure on ICANN and its governmental advisory body to

somehow fill the perceived void. ICANN was never intended to fulfill such a role. It is not appropriate to put an operational body in the position of determining broad public policy. ICANN must operate according to contract law and to the laws established by any relevant international treaties. It has no special legal powers or protections and is ill equipped to take on a role of global gatekeeper or policeman for Internet content and activities.

The WSIS process has taken steps toward clarifying this distinction. As noted earlier in this submission, it is important that ICANN and its constituent entities focus activities on ICANN's specific mandate. It should not get sidetracked by broader issues best left to other organizations, bodies or processes.