

# Discussion Paper: Developing a Public Interest Framework

4 September 2019



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## Background

Operationalizing the concept of the global public interest (GPI)<sup>1</sup> remains a challenge, despite years of attempts to understand and define it within ICANN. Many have decided that it is just too complex of a subject for us to make a determination on. Yet, it is central to many of ICANN's historic and current primary governance documents — the [Affirmation of Commitments](#), [Bylaws](#), and [Articles of Incorporation](#). So, we keep trying.

ICANN's Affirmation of Commitments state that ICANN should "[...] ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders." ICANN's Articles of Incorporation note that the "[...] global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process." Likewise, ICANN's Bylaws note a commitment to "ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest."

That effort to date has shown that trying to define the GPI in the abstract is, unfortunately, like trying to boil the ocean; while we have collected many wise but disconnected impressions of the Global Public Interest, we have not gotten much closer to defining it in a way that contributes to ICANN's work, without going beyond our mission.

In discussions, it was realized that by linking the commitments and core values mandated in our governing documents with the processes, procedures and charters we have developed over the years to create the ICANN bottom-up multistakeholder process (BUMP), we could represent a method for finding the GPI for each instance where we need to understand it. This method should be one that could augment the current policy development processes and methodologies without needing to change them.

Currently, however, there are no specific tools to help the community determine the relevant public interest on a given issue. The ICANN Board hopes to play a role in helping facilitate a bottom-up-multistakeholder community-driven process, as called for in the Articles of Incorporation and Bylaws, to develop the necessary tools.

As part of its obligations with regard to the GPI, within the past year, the Board began to include into each of its resolutions a statement of how that particular decision promotes the public interest. These statements are guided by the commitments and core values enshrined in the Bylaws.

Recent examples include:

- ◎ CCT Report - [Board Resolutions](#): "These considerations will also contribute to an understanding of how the resources allocated to any specific recommendations [...] support ICANN in serving its Mission and the **public interest** [...] This action is within ICANN's Mission and mandate and in the **public interest** as it is a fulfillment of a key commitment entered into in 2009 within the Affirmation of Commitments, now embodied in the ICANN Bylaws. ICANN's reviews are an important and essential part of how ICANN upholds its commitments. The scope of this review is inherently tied to ICANN's core values of introduction and promotion of competition in the registration of domain names."

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<sup>1</sup> Global Public Interest and Public Interest will be used interchangeably in this document.

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- ⦿ FY20 IANA Operating Plan and Budget - [Board Resolutions](#): "This decision is in the **public interest** and within ICANN's mission, as it is fully consistent with ICANN's strategic and operational plans, and the results of which in fact allow ICANN to satisfy its mission."
  - ⦿ .SS Delegation - [Board Resolutions](#): "The timely approval of country-code domain name managers that meet the various **public interest** criteria is positive toward ICANN's overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to obligations under the IANA Naming Function Contract"
  - ⦿ October 2021 ICANN Meeting Venue Contracting - [Board Resolutions](#): "ICANN conducts Public Meetings in support of its mission to ensure the stable and secure operation of the Internet's unique identifier systems, and acts in the **public interest** by providing free and open access to anyone wishing to participate, either in person or remotely, in open, transparent and bottom-up, multistakeholder policy development processes."

These examples illustrate the public interest within a context-driven framing: the Board considers specific cases, links those to ICANN's mission and Bylaws, as well as content gleaned from recommendations, advice and public comment, and provides a rationale for how the decision promotes the public interest. While there is consideration given to community view of the public interest in so far as it is known, this can only be done in so far as such reasoning can be found in the community's reporting. The development of a community procedural framework (toolkit) could help to proactively, and in a systematic manner, demonstrate how community recommendations, advice and comments meet the bylaws-defined public interest considerations before there being comment periods and discussions by the Board. This could become a significant driver to Board decisions made based on a bottom-up multistakeholder process driven understanding of the global public interest issues relevant to each decision.

To help get the process underway and as a starting point, the Board proposes the following methods for gathering public interest considerations. These considerations would not change the process by which decisions are made but could instead serve as tools for the community to reinforce the commitment to the public interest and to demonstrate how specific recommendations, advice and public comments are in the global public interest.

## A Public Interest Framework

*Note - not each category/question will be relevant to each policy. It should also be noted that these are a starting point for discussion and that the details of the framework would need to be worked out with the community.*

*The terms in the first column are intended to help categorize the considerations within the context of ICANN's work. The terms in the middle column either derive from or come directly from the Bylaws; they are not meant to encapsulate every category relating to the public interest, only those that are clearly related to ICANN's Bylaws. The questions in the third column use language directly from the Bylaws; italics is used to indicate quoted language.*

Based as it is on the Bylaws, this tool can only be used only after a determination is made that the issue under consideration is within ICANN's mission.

As the intent of this framework is to use existing bottom-up multistakeholder processes and methods without change, the standard accountability measures, such as an appeals process relating to public interest-related decisions, would be available, as always.

Overall ICANN Categories	Public Interest Categories	Bylaws Considerations
<b>ICANN's technical coordination</b>	Stable Secure Open Resilient Interoperable	<ul style="list-style-type: none"> <li>⦿ Will it <i>preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet?</i> (Commitment a.i)</li> <li>⦿ Will it <i>maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet?</i> (Commitment a.ii)</li> <li>⦿ Will it, <i>to the extent feasible and appropriate, delegat[e] coordination functions to or recogniz[e] the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies?</i> (Core value b.i.)</li> </ul>
<b>ICANN's role in the DNS marketplace</b>	Competitive Fair Trusted	<ul style="list-style-type: none"> <li>⦿ Will it, <i>where feasible and appropriate, dependen[d] on market mechanisms to promote and sustain a competitive environment in the DNS market?</i> (Core value b.iii)</li> <li>⦿ Will it <i>introduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process?</i> (Core value b.iv)</li> </ul>
<b>Benefit to the Internet community</b>	Beneficial	<ul style="list-style-type: none"> <li>⦿ Will it <i>operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole? In performing its Mission, ICANN must [operate in this manner], carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.</i> (Commitments a)</li> </ul>

<p><b>ICANN's global multistakeholder community and policy development processes</b></p>	<p>Diverse Respectful Inclusive<sup>2</sup> Innovative Transparent Open Balanced</p>	<ul style="list-style-type: none"> <li>⦿ Will it <i>respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination?</i> (Commitment a.iii)</li> <li>⦿ Will it <i>employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities [?] These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process.</i> (Commitment a.iv)</li> <li>⦿ Will it <i>see[k] and suppor[t] broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent?</i> (Core value b.ii)</li> <li>⦿ Will it <i>striv[e] to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture?</i> (Core value b.vii)</li> <li>⦿ Will it, <i>while remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recogniz[e] that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities?</i> (Core value b.vi)</li> </ul>
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<sup>2</sup> In identifying the public interest that is being served in a particular context, consideration should also be given to individuals and groups that are not a part of the conversation in order to support and promote inclusion.

<b>ICANN's policies and practices</b>	Neutral Objective Responsive Accountable Sustainable Fair Fiscally responsible	<ul style="list-style-type: none"> <li>⦿ Will it <i>make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)?</i> (Commitment a.v)</li> <li>⦿ Will it <i>remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness?</i> (Commitment a.vi)</li> <li>⦿ Will it <i>operat[e] with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community?</i> (Core value b.v)</li> <li>⦿ Will it, <i>subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respec[t] internationally recognized human rights as required by applicable law [?] This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.</i> (Core value b.viii)<sup>3</sup></li> </ul>
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## Next Steps

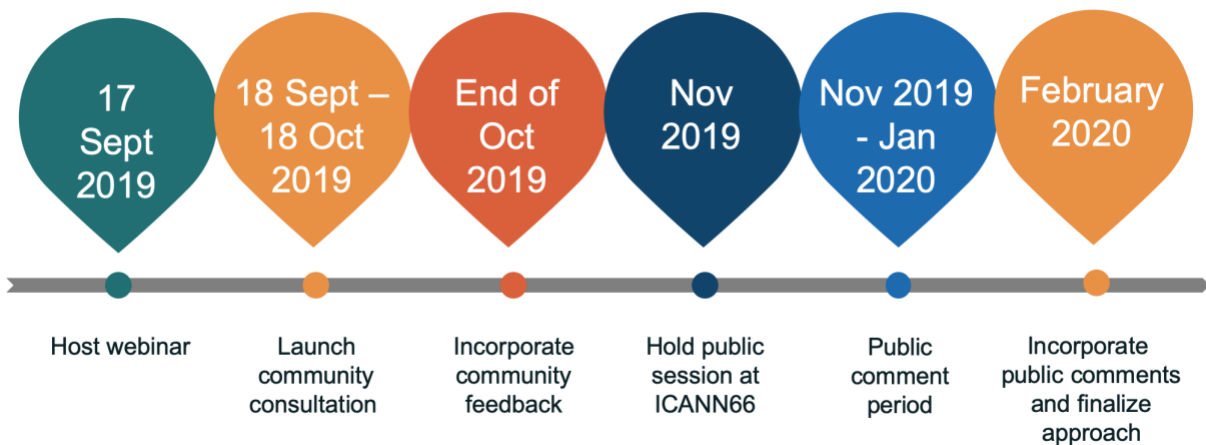
In reviewing this proposal, the Board is asking the ICANN community to consider the following questions for input to the Board:

- ⦿ What are your thoughts on the proposed framework approach? Do you have any suggestions for how it could be improved?
- ⦿ What are your thoughts on the proposed approach for decisions in the ICANN ecosystem to be accompanied by a consideration of their impact on the global public interest (as well as an explanation regarding what is meant by the GPI in the specific case)?
- ⦿ How do you see this working for the Supporting Organization (SO), Advisory Committee (AC), constituency, group, review team, or cross-community working group (CCWG) to which you are contributing?

<sup>3</sup> The ICANN community has developed a Human Rights Framework of Interpretation (FOI), which is pending Board adoption.

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The below timeline represents the steps that the Board plans to take in this process.



## Appendix

### Affirmation of Commitments

ICANN's 2009 [Affirmation of Commitments](#) with the U.S. Department of Commerce (DOC) demonstrate a commitment to the public interest:

- ⊙ 3. This document affirms key commitments by DOC and ICANN, including commitments to:
  - (a) ensure that decisions made related to the global technical coordination of the DNS are made in the **public interest** and are accountable and transparent [...]
- ⊙ 4. [...] A private coordinating process, the outcomes of which reflect the **public interest**, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN and DOC recognize that there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally. To ensure that its decisions are in the **public interest**, and not just the interests of a particular set of stakeholders, ICANN commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS.
- ⊙ 9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the **public interest** and be accountable to all stakeholders [...] Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the **public interest**. [...].

### Articles of Incorporation

ICANN's 2015 [Articles of Incorporation](#) provide context about the public interest:

- ⊙ 2.II: In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or

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organization, the Corporation shall, except as limited by Article IV hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global **public interest** in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation (“Bylaws”). Such global **public interest** may be determined from time to time. Any determination of such global **public interest** shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.

## ICANN Bylaws

ICANN's current [Bylaws](#) likewise demonstrate a commitment to the public interest:

- ⦿ Section 1.1 (C) (iv): ICANN shall have the ability to negotiate, enter into and enforce agreements, including **public interest** commitments, with any party in service of its Mission.
- ⦿ Section 1.2 (b) (ii): Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global **public interest** and that those processes are accountable and transparent
- ⦿ Section 1.2 (b) (iv): Introducing and promoting competition in the registration of domain names where practicable and beneficial to the **public interest** as identified through the bottom-up, multistakeholder policy development process
- ⦿ Section 3.6 (c): After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global **public interest**, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.
- ⦿ Section 4.6, on Specific Reviews, and Section 27.1, on Work Stream 2, detail further public interest considerations.



