

Discussion Paper: Developing a Public Interest Framework

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Background

Operationalizing the concept of the global public interest (GPI)¹ remains an ongoing 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 stated 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 an explicit community consensus definition that contributes to ICANN's work, without going beyond our mission.

In discussions, it was realized that by linking the Commitments and Core Values ([ICANN Bylaws 1.2](#)) 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, 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 evaluate 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.

¹ Global Public Interest and Public Interest will be used interchangeably in this document.

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."
- ⦿ 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.

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

Expectations for the Framework

	What the framework IS:	What the framework is NOT:
How to use the framework	<ul style="list-style-type: none"> ⊙ The framework is a tool that can be used as the community ascertains the relevant public interests on a given decision and on a case-by-case basis. ⊙ It is meant as a tool that could help the community in its efforts to ascertain which decisions are in the public interest and how a particular decision is anchored in the mission and Bylaws. ⊙ Ultimately, any determination of the public interest is made through the bottom-up multistakeholder community. 	<ul style="list-style-type: none"> ⊙ The framework is not meant to replace existing processes, including the bottom-up multistakeholder processes ⊙ The framework is not to be formalized as part of existing processes. ⊙ It is not meant to be used as a standalone. ⊙ The framework is not intended as a tool to pre-empt or pre-determine the outcome of the bottom-up multistakeholder processes. ⊙ The framework is not meant to complicate or lengthen the bottom-up multistakeholder process.
When to use the framework	<ul style="list-style-type: none"> ⊙ The community, through the bottom-up multistakeholder processes, should determine which decisions, if any, may warrant the use of the framework. ⊙ As with any tool, it can be used when it is considered relevant by the stakeholders making the recommendation or giving the advice. ⊙ The Board would use the framework as an evaluative tool when appropriate. The community can also use the tool when evaluating its recommendations and advice. ⊙ Given the nature of the Bylaws and ICANN's accountability mechanisms, the Board considers the GPI frequently. In the case of the Board, the framework would be considered in Board actions. ⊙ When reviewing the community's recommendations and advice, the Board will consider if there was a community determination of the GPI (i.e., if the community elected to use the framework and make such a determination). 	<ul style="list-style-type: none"> ⊙ The Board does not seek to impose or prescribe which processes should make use of the framework. ⊙ The framework is not regimented - it is a tool that would be used by the ICANN Board and Org and that the community is invited to use. ⊙ The framework can evolve and be modified as experience is gained in its use.

Balancing	<ul style="list-style-type: none"> ⦿ The community is invited to give the Board its view on how to balance considerations when applying the GPI. ⦿ When submitting recommendations and advice, community groups would be encouraged to discuss how the different and potentially opposing views could be balanced in light of the various GPI perspectives. 	<ul style="list-style-type: none"> ⦿ It is not expected that the community will identify a single definitive Bylaws anchor in determination of the GPI; indeed several Bylaws anchors could be used to explain how the community would recommend balancing among those anchors.
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A Proposed Framework

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

This framework is anchored in the Articles and Bylaws. 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.

Note that the Bylaws are not quoted in full in this framework. Communities seeking to use this framework are encouraged to refer to the full ICANN Bylaws to support their recommendations.

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 fit within the existing bottom-up multistakeholder processes and methods without change², the standard accountability measures, such as an appeals process relating to public interest-related decisions, would be available, as always.

The Board recognizes that the framework can be used to justify or support different interpretations of the GPI and that one decision may positively affect some GPI categories, but negatively affect other categories. The responsibility to balance the various GPI elements in the various deliberations rests with the respective groups, and any decisions and rationales provided should capture this notion of balancing.³

² The final results of ICANN's bottom-up multistakeholder processes are a fundamental method by which consensus on the GPI on a specific issue can be determined.

³ For more context on the notion of balancing, see the [WorkStream 1 Accountability Report](#): "Balancing or Reconciliation Test 137: The CCWG-Accountability recommends modification to the 'balancing' language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically: These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an

Overall ICANN Categories	Public Interest Categories	Bylaws Considerations
ICANN's technical coordination	Stable Secure Open Resilient Interoperable	<ul style="list-style-type: none"> ⦿ 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) ⦿ 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) ⦿ 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.)
ICANN's role in the DNS marketplace	Fair Trusted Supportive of competition	<ul style="list-style-type: none"> ⦿ 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) ⦿ 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)
Benefit to the Internet community	Beneficial Inclusive	<ul style="list-style-type: none"> ⦿ 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)

important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process." (pp.27-28)

<p>ICANN's global multistakeholder community and policy development processes</p>	<p>Diverse Respectful Inclusive⁴ Innovative Transparent Open Balanced</p>	<ul style="list-style-type: none"> ⦿ Will it 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? (Commitment a.iii) ⦿ Will it 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. (Commitment a.iv) ⦿ Will it 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? (Core value b.ii) ⦿ Will it striv[e] to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture? (Core value b.vii) ⦿ Will it, 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? (Core value b.vi)
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⁴ 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.

ICANN's policies and practices	Neutral Objective Responsive Accountable Sustainable Fair Fiscally responsible	<ul style="list-style-type: none"> ⦿ 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) ⦿ Will it <i>remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness?</i> (Commitment a.vi) ⦿ 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) ⦿ 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)⁵
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Further Considerations

Defining terms in the framework

Owing to the context-driven nature of the public interest and based on previous community discussions, there is an increasingly shared understanding that any strict definition will be either too aspirational or become obsolete over time since a strict definition cannot simply account for all of the possible considerations that may arise on a given public interest decision. To date, there appears to be strong support for a framework approach that does not explicitly define the GPI, though there is still some support for a continuing effort to define a GPI statement.⁶

As outlined in the Bylaws, any determination of the global public interest, including identifying the relevant 'public' in a specific situation, should be determined by the community through its defined processes. The relevant 'public' may also differ from situation to situation. The global public interest that is served is determined by the Bylaws, which includes all stakeholders.

Additional guidance on which terms ought to be defined would be useful in updating the framework. If the community can reach consensus on terms and definitions, a glossary could be added to the proposed framework.

⁵ The ICANN community has developed a Human Rights Framework of Interpretation (FOI), which was recently approved by the Board (November 2019).

⁶ One constituency disagrees and proposes the following definition: "In ICANN's context and limited mission, the Global Public Interest should be measured in terms of the integrity and availability of registrations and resolutions."

Adding further categories to the framework

The framework is anchored in the Articles and Bylaws. If it is perceived that the proposed framework is missing relevant language from either the Articles or the Bylaws, the Board would welcome community input on how to further enhance the document.

Next Steps

From September 2019 to November 2019, the Board held a consultation with the community to gather input on the proposed framework. It received written feedback from the GNSO Council, ALAC, RySG, BC, and individual contributions. As part of the community consultation, two webinars were also hosted, as well as a public session at ICANN66, in order to gather additional community feedback; each session featured participation from across community groups.

This proposed version of the framework has been updated to reflect the feedback from the community consultation.⁷

After carefully reviewing the feedback, the Board will pilot the framework/toolkit for a period of one year (FY21). In this time, the Board will explore if a working definition of the global public interest could emerge from the Board's experience, or from any relevant community-developed definition(s) and experience, including the possible use of the framework by the community. The Board will identify and document relevant use cases during this pilot year, (i.e., decision on a particular issue, various viewpoints, extent to which toolkit was leveraged, gaps identified, etc).

A report on the pilot will be produced for the community at the end of the pilot, and the Board will hold a public session with the community to share their experience of implementing the framework as part of their decision-making process.

Interested community groups are welcome to pilot the framework at the same time as the Board. The Board invites community members who have opted to pilot the framework in their evaluations to share their experience and comments.

Throughout this year, the conversation with the community will be ongoing, and the associated [wiki](#) webpage will be regularly updated and will feature space for comments and suggestions about the Board's and community's experiences and feedback.

⁷ A full list of input will be made available to the community and is provided to the Board as reference. Overall, there was overall positive feedback for the initiative, though some noted a perception of framework inflexibility and a need for more clarity around the flexible use of the framework, as well as clarification that the framework would not replace existing community processes or be used to predetermine the outcome of the bottom-up multistakeholder process. This document was revised to take into account these takeaways.

Appendix

Community Consultation Questionnaire

The Board asked the ICANN community to consider the following questions:

- 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?

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 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.

