

Possible “common ground” proposal based on the Brazilian proposal and feedback from our discussions so far, including concerns regarding “consensus”.

[The amendments are marked in red]

ARTICLE XI: ADVISORY COMMITTEES

Section 1. GENERAL

“The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.

~~*Where the ICANN Board is obliged to pay due deference to advice from Advisory Committees and where that advice, if not followed, requires finding mutually agreed solutions for implementation of that advice, the Advisory Committee will make every effort to ensure that the advice provided is clear and reflects the consensus view of the committee.*~~

Where the Board is required to seek a mutually acceptable solution to an advisory committee's advice if the Board does not follow that advice, the Board is not obliged to seek such a solution if that Advisory Committee's advice was not supported by consensus. Advisory Committees should ensure that their advice to the Board is clear.

In this context, each Advisory Committee has the right to determine its particular definition of consensus.

[1]”

Footnote [1]: It is understood that determining consensus does not include reaching a decision based on majority voting whereby a fundamental disagreement with or objections to the advice by a minority of the AC representatives may be overridden. It is also understood that “consensus” does not necessarily mean “unanimity” or a broad measure of agreement that would allow an AC member or a very small minority of AC members to block consensus advice.

ARTICLE XI: ADVISORY COMMITTEES

Section 2. SPECIFIC ADVISORY COMMITTEES

Item 1.j

*“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **Any GAC Advice approved by a GAC consensus may only be rejected by a vote of more than two-thirds (2/3) of the Board.** The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”*

In addition, we could perhaps work on the following “rationale” which is based on elements suggested by different stakeholders (including Steve dB last version of the rationale) and countries during the GAC Dublin meeting:

Rationale

To avoid placing the ICANN Board in a position where it would be obliged to arbitrate between divergent views or interests of parts of an advisory committee, which in the case of the GAC would be sovereign

governments, the obligation for the ICANN Board to try and find a mutually acceptable solution only applies where the advice of such an advisory committee is supported by consensus.

In addition, provision has to be made that in such cases the advice from the Advisory Committee is expressed in clear terms, so as to avoid misunderstandings on the side of the ICANN Board.

At the same time, provision is made that Advisory Committees retain a certain degree of autonomy in establishing their particular definition of consensus. There is no "one size fits all" definition of consensus and some flexibility must be provided to adapt to the different circumstances and characteristics of each Advisory Committee. In any case, it is understood that any definition of consensus means that majority voting is ruled out by definition. Hence, no definition may be established whereby a majority within an Advisory Committee may impose their views, to the disadvantage of the views of a minority of that Committee. On the other side, consensus does not mean unanimity and should not be construed as allowing a single or a very small minority within an Advisory Committee to block a consensus advice as this would amount to a risk of capture of the named Advisory Committee, and would prevent it from properly exercising its advisory role.

In what specifically affects the GAC, and mindful of the ATRT2 report and the recommendations of the Board-GAC Recommendation Implementation Working Group, it is considered that a 2/3 majority vote needs to be required in the Board to turn down a consensus GAC advice on public policy matters. This is consistent with current Board practice vis-à-vis GAC consensus advice, and would guarantee a thoughtful consideration by the Board of public policy advice supported by GAC consensus within the new framework, bearing in mind that the special historical role of the US on these matters will be missing, and advice from the GAC amounts to a significant element of the multistakeholder model. In addition, this would place the GAC in equivalent terms as to decision-making thresholds required of the Board regarding proposals submitted by GNSO and ccNSO supported by supermajorities in those supporting organizations, while not changing its advisory role of the GAC vis-à-vis the Board.