

**GNSO
Operations Steering Committee (OSC) GNSO Council Operations Work Team
16 December 2009 at 17:00 UTC**

Note: The following is the output of transcribing from an audio recording of the Operations Steering Committee (OSC) GNSO Council Operations Work Team teleconference on 16 December 2009 at 17:00 UTC. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to the meeting, but should not be treated as an authoritative record.

<http://audio.icann.org/gnsso/gnsso-ops-20091216.mp3>

On page:

<http://gnsso.icann.org/calendar/index.html#dec>

(transcripts and recordings are found on the calendar page)

Participants on the Call:

Ray Fasset - Registries
Wolf Ulrich Knoben - ISPC
Ron Andruff - CBUC
Avri Doria – NCSG
Robin Gross - NCUC

Staff:

Ken Bour
Julie Hedlund
Glen de Saint Gery
Gisella Gruber-White

Apologies:

None

Coordinator: Thank you for standing by. I would like to remind all participants that today's call is being recorded. If you have any objections, please disconnect at this time.

Ray Fassett: Okay. Welcome everybody. This is Ray Fassett. Can we do a quick roll call?

Gisella Gruber-White: Absolutely Ray. Good morning, good afternoon, good evening to everyone. On today's call we have Ray Fassett, Avri Doria, Ron Andruff, Wolf-Ulrich Knoben. From staff we have Ken Bour, Julie Hedlund, Glen de Saint Gery and myself Gisella Gruber-White. No apologies noted today and if I could just remind everyone to please state their names for transcript purposes. Thank you. Over to you Ray.

Ray Fassett: Thank you very much. We're going to pick up - first I did not send out an agenda for this meeting, which I apologize. But I think we all know we're working on the - still the issue of abstentions as this relates to voting at the council level given the issue of a potential conflict of interest and then how does that affect the voting process in terms of changing the denominator.

In our last meeting we had two invited guests, Kristina Rosette and Steve Metalitz, who voiced a long-standing concern really as part of the GNSO Council voting processes of sometimes finding themselves in a position of a conflict of interest where they have to abstain. And in effect - that means in tallying the votes it in effect means a no vote.

So they've had this long-standing concern. So as I review an updating of the rules of procedures, this issue was again brought out potentially for us to look at, try to resolve in some capacity or at least address the issue which we've all agreed is reasonable for us to do.

So they were on the last call. They again expressed the issue. We tossed back I think as a work team a sort of consensus view that, you know, that the impetus of this whole revision of the rules of procedure was about the council being a manager of the process versus actually vetting or looking to produce the outcome of any particular policy process.

So as a manager, you know, does that sort of change the conflict issue? And then that dovetails into, are the council reps supposed to be representing the group's interest of their stakeholder group versus their own interests? And we talked about that for quite a bit with Steve and Kristina. They seem to understand that position as well.

And then we talked about the issue that some stakeholder groups, the registry constituency is one I think the ISP Constituency Stakeholder Group is another, where actually in the charters it says that the council reps are to be representing the group interest versus their own interest. But then, you know,

we discovered that not all stakeholder groups have that same kind of thing baked in if you will to their respective stakeholder group charters.

So these are all things we were floating around and again sort of a consensus view of our work team is well the conflict really doesn't sit at the council level, the conflict really sits at the stakeholder group level. So how can we resolve - what tools can we look at to implement in what we're looking to do to enable a stakeholder group to resolve the conflict at that level versus at getting into the council level.

So that's kind of just - I just wanted to give a quick overview of where we're at. Why? Because I just sent out something that Ken Bour sent. Hopefully you all have it. Anyway and I'll do a quick summary of what it's saying. And I think it's really accurate and it was crossing my mind.

As we were talking about potential options, if you will, of resolving at the stakeholder group level, we talked about how about if we resolve the conflict by allowing the rep that has the conflict at the stakeholder group level to move their vote to somebody else who - representing the stakeholder group who doesn't have such a conflict or otherwise transfer the vote.

And I think what Ken has come back with here is that well it's sort of a (veil) proxy thing. You know, doing that is - while it makes some common sense, you're really going down the path of a proxy vote. And whether fortunately or unfortunately however you want to look at it, ICANN staff/legal has thoroughly looked at this concept of proxy voting in the past and has pretty much landed that we don't want to go there as an organization. ICANN as an organization does not want the GNSO to go there.

Ken Bour: Ray. This is Ken.

Ray Fassett: But now I'm going to defer to Ken. Ken who's...

((Crosstalk))

Ray Fassett: Yeah. Go ahead now and if you could, you know, summarize yourself please. Go ahead.

Ken Bour: I was under the exact same impression that you were based on just picking up comments here and there that people have made. Well after talking with Liz Gasster she said, you know, you should see if you can go into the archives and do some research on this because we did thoroughly discuss all his back in the 2007 timeframe.

So I did that. I went on ICANN's site and did a bunch of searches and stuff and I found I think the sort of seminal document that everybody refers to. It was done by Liz and Dan Halloran in combination. The two of them are the authors. And they went through a whole bunch of series of questions and issues related to proxy voting in particular.

Now, there is nothing in my mind after reading it many, many times that actually tries to disabuse the GNSO of this approach but what they do is they laid out certain sort of ground rules or criteria that need to be met if you're going to do proxy voting.

Now keep in mind in 2007 the ICANN bylaws did not - there was a clause in the bylaws that was interpreted to make - that would make proxy voting inconsistent with the bylaws at that time. And I think that clause was something quite innocuous. It was something like, "All councilors need to be able to hear and participate with each other on a teleconference." It was something along those lines.

It wasn't any - it wasn't something in another section of the bylaws that says, "In all of ICANN there shall never be proxy voting," nothing like that. It was a very innocuous sentence. Now in this document that Liz and Dan prepared,

they just mentioned well, you know, if we're going to go down this path the bylaws will have to be changed.

Down toward the end of the document they said, "By the way, there's another alternative to proxy voting that you might want to consider and that would be absentee voting." Well the people who were involved back then, Philip Shepherd I think was leading the work team that was - a drafting team, whatever it was called then, that was actually working on this problem, they decided let's just go with absentee voting. That will get most of the problem done.

The whole issue of conflict of interest by the way didn't even really come up. It came up briefly but it was not the main thrust of this. It had to do with absenteeism. So if somebody was going to be absent, couldn't we proxy their vote to somebody else? Well, why don't we just give them absentee voting and we're there, right? So that was the context for all this.

Now when they made the absentee voting policy change, they changed the bylaws to take out that language that said, "Everybody has to be able to hear and talk to each other on the call," right. Because if you're going to be absent and vote absentee, you don't have to be physically on the call and hear each other and so that eliminated the one argument that was against proxy voting.

So two things happened. I don't believe today we have a bylaw constraint to do proxy voting of any kind, because it was already amended to fix it for absentee voting. So now that we're into a whole different reason for doing proxy voting which is conflict of interest issues, I think we have all of the makings to get this done.

All right. The document, the 2007 is basically a whole series of sort of questions and answers. Like, how would a proxy be addressed when there is a conflict of interest? What happens to the requirement for presence of members? What do you do with quorum calculations? It goes on and on and

on. And under each one of those I have written, where applicable, in red, in a different color, my assessment of how far along this team is in meeting that particular issue.

And you'll be happy to know that I don't think there's a single one, a single question, a single topic that we already aren't in compliance with or could easily become in compliant with. Therefore my overall conclusion is I think proxy voting is back on the table. We have not had a chance to get legal to completely get on board here yet. We sent all the material to them but they haven't quite had a chance to respond. So I have....

((Crosstalk))

Ken Bour: So what I want to leave open the notion that we could still run into a little bit of a problem here but after doing all this research I think any of the issues that legal/staff had back then, are now handled properly. And so I think we should be in pretty good shape. I'll stop there.

Man: (Unintelligible).

Avri Doria: Ken, this is Avri can I ask a question?

Ken Bour: Sure.

Avri Doria: Okay. Yeah, I mean I pretty much remember it similar to what you've recounted. It was yes, there's a whole lot of work that would have to be done before you could do proxy voting, so, you know, let's bag it for now. And I haven't obviously had a chance to read what you wrote.

Given the new consideration of proxy voting vis-à-vis conflict of interest, the question I would have when you go back to legal -- and perhaps you've already written this one or already asked them -- is if I have a conflict of interest and I hand off my vote to someone else, does that actually set - and I

guess it's a question for those that (brought up) - does it actually satisfy my conflict of interest or just hide it?

And as I can pass off my vote to someone who I know will vote as I wish and I've sort of dealt with my conflict of interest without dealing with it. I'm just wondering if that's any sort of concern and whether that's been dealt with.

Ken Bour: Yeah, fair - I think I understand. Great point. The way that we're couching this and in fact there was a comment in - about conflict of interest in the 2007 document that I guess is the point you're raising. Let me just summarize it rather than try to read it to everybody.

I think that legal had an issue on a conflict of interest where you - I don't think you individually proxy your vote to somebody. That's not the way - that's A, not the way we've recommended it and I don't think that would be acceptable.

What they were saying in that document was you have to go back and get a consensus position from your constituency and then that can be proxied. And that's exactly the way we handled it, right? They said in the absence of a consensus position, then you wouldn't meet the criteria. And when I read that I went, "But that's exactly what we did."

Ray Fassett: Right.

Ken Bour: We would say a conflicted councilor would go back to their organization and that organization would then proxy the vote to another councilor based upon, and this is important, based upon a consensus position. In the absence of a consensus position I think legal is going to say, "Can't do it."

Ray Fassett: Right. So let's say - let's (file) a scenario where they don't get a consensus position, then they would be at the council level having to abstain and in that case we would not be changing the denominator.

Ken Bour: No, we would be changing the denominator. If all of the remedy procedures are attempted and none of them work and the councilor abstains and the abstention is recorded then we would decrement the denominator.

Ray Fassett: I would think that if the stakeholder group is not agreeing in a consensus way, then we're sort of - then changing the denominator is going against what their own stakeholder group is - believes.

Avri Doria: Sorry. Can I bring a question into that particular point?

Ray Fassett: Yes.

Avri Doria: I think the thing is not necessarily that in others we have some stakeholder groups that basically enforce a consensus party discipline position. We have some for example, you know, NCSG is one where we'll talk about it, they'll try to reach consensus but there is no mandating of consensus position on the votes.

In other words when it comes right down to voting, they vote based upon what they think they understand is in the best interest of the stakeholder group but they make that decision themselves. There's no, you know, stakeholder group (wide) or executive committee or something that tells them. They are elected to represent the interest of the stakeholder group as best they understand it. And if we don't think they're doing it well, well then we don't elect them again.

But basically the vote is theirs to do the stakeholders best interest. And so in that case there would be no stakeholder group consensus because it's not the way the stakeholder group works. And...

Ken Bour: This is Ken. I have a different view. Go ahead.

((Crosstalk))

Avri Doria: Okay, yeah. I'm just trying to say it's not because we couldn't reach one, it's because we don't do it that way.

Ray Fassett: Right. And I've got a comment to that by the way. Ken you go first.

Ken Bour: Okay, sorry. I don't think it makes any difference whether stakeholder groups and/or constituencies in particular have any clauses or any requirements or any constraints on their councils as to what they should do in their voting. I don't think - I think it's irrelevant and let me say why.

I think that what happens is when somebody comes up and says, "I have a conflict and I cannot vote. I'm going back to my organization and asking them to develop a position - a consensus position so that I can be relieved. Even though I may never ask for it and I may never be constrained in my voting or even asked to represent anything particular, in this particular case I am asking for relief."

And therefore the constituency would put some process, I'm sure they have them, where they would go out and ask for points of view and they would try to develop a consensus to relieve me. If they cannot do it, then I have to abstain. If they can do it, then they would proxy the vote to somebody else and I would be relieved.

So I don't think we have to constrain the constituencies and the stakeholder groups to put in charter provisions or any such thing. All we have to do is ask them, "If you were asked, would you do it?"

Avri Doria: Okay.

Ray Fassett: Yeah. Here's my comment to that, Avri's and yours there is, you know, we definitely want to put the obligation where it belongs. In my view and

somebody can suggest otherwise but the obligation is upon that stakeholder group to resolve this conflict.

And if they choose not to resolve the conflict - let's say like your example right - you just said Ken, the council's rep goes back to the group and says, "I need a consensus position on this. How should I vote," and then the stakeholder group doesn't act, doesn't take on the obligation, then I don't think that's justified for the - at the council level for the denominator to be changed in that example.

Others have any thoughts on that? It's like the stakeholder group didn't take on their obligation and so they can't expect...

Ken Bour: This is Ken. I...

Ray Fassett: ...a vote at the council level. Okay, go ahead.

Ken Bour: I have a comment but I don't want to hog the mic here.

Ray Fassett: Anybody else? Ken, it's yours.

Ken Bour: Okay. I think you have to start with the premise that in the absence of a consensus position the proxy won't be allowed. I think that's going to be legal's point of view on this based on what I read in the 2007 document. And so in what we said by the way and the way we couched our procedures is, you start with a conflicted person that you try - you go through end steps to try to remedy it, whatever those end steps are.

Ray Fassett: Right.

Ken Bour: In the - if you are unable and everybody does what they're supposed to do and tries and they can't do it, that abstention then decrements - that's our flow-through logic procedure. Try A. Try B. As long as they're tried and they

don't - and they fail, then you end up with an abstention and you decrement the denominator.

If you say, "Hey, if you try and you fail and you try and you fail, we're still not going to decrement the denominator," then we don't end up taking into account what Steve and Kristina were saying.

They're...

Ray Fassett: Okay.

Ken Bour: Yeah.

Ray Fassett: Okay. So then how do you verify whether they tried?

Ken Bour: I'll defer that question.

Avri Doria: Yeah, this is Avri. Can I...

Ray Fassett: Yeah, yeah, yes.

Avri Doria: ...even though I'm the second hog at the microphone so that's why I'm being somewhat reticent. I know that's a strange notion me being reticent. But still I actually think that Ken's reasoning works. I think that - I mean I think we have to take a stakeholder group's declaration that it went through a process and it tried.

I know very often when I was in the chair saw various constituencies try to reach consensus on some things but the constituency was split and it was split and it was split and there was nothing that they could do about it.

And I think even in a constituency like the NCSG that's not taking a party discipline notion to voting certainly could say, "Yes, in this case we need to

find out if there is a consensus opinion and if there is a consensus opinion, then we can do a proxy and to try and develop that.” And I think that that’s reasonable and Ken is right, doesn’t require adopting a stakeholder group-wide notion of party discipline on votes.

So it actually seems to work. I think that trusting stakeholder groups to be doing what they’re supposed to be doing is just, you know, you have to trust them.

Ray Fassett: Yeah...

((Crosstalk))

Avri Doria: And by and large they are going to be trustworthy...

Ray Fassett: Yep, yep. I just...

Avri Doria: ...you know, about following internal processes.

Ray Fassett: Yeah. I’m just drawing out the point that what we’re saying here is an honor system to change the denominator. And that changing the denominator is really an important thing, crucial, you know, in those instances when it happens because it really affects a lot of things. It affects the outcome in a material way. So and I’m not necessarily...

Avri Doria: Not as much as you think.

Ray Fassett: ...against it, I’m just drawing out the point that we’re going to rely on the honor system on something - on a very material aspect.

Ken Bour: This is Ken.

((Crosstalk))

Avri Doria: Well, actually...

Ken Bour: Yeah.

Avri Doria: Okay, sorry.

Ken Bour: I'll wait till Avri.

Ray Fassett: Avri, go ahead.

Avri Doria: The only thing that I was going to say is, aren't stakeholder groups and constituencies supposed to be somewhat transparent? So it's not an honor system in a world that's totally opaque. It's an honor system in which not only are we peering over each other's shoulders but, you know, we have an immense number of staff people that are peering over our shoulders.

We're constantly talking. We have six councilors. I mean the idea that you could get a conspiracy of silence going in any of the stakeholder groups or constituencies that would hold for very long is hard to believe to me.

Ray Fassett: Okay. Fair, very fair. Ken.

Ken Bour: Yeah. I wanted to make essentially a similar point. In the procedures we are talking about documenting everything. The conflicted councilor rights to the constituency, rights to the GNSO secretariat, right. We asked for written responses back from the constituency, right, and/or stakeholder group. So I think there's mechanisms - by the way, some of those weren't there in the version you saw but they're in the new version because one of the things that I found in the 2007 document was this need for transparency. So Avri's right on there.

The second thing I wanted to say is that we're talking about a very fairly I hope rare circumstance. We've already said that a regular abstention that is not related to a material conflict of interest would not change the denominator. So we are narrowing down the abstentions to just those that are material conflicts of interest. That's got to be a pretty rare circumstance.

Ray Fassett: Well, I...

Ken Bour: And...

((Crosstalk))

Ray Fassett: I don't want to cut you off there but wasn't Steve and Kristina's point that that's not a path we should maybe going down but trying to distinguish between what is material and what isn't?

Ken Bour: I don't recall that. I don't recall...

Ray Fassett: No.

Ken Bour: ...that because - well I think what they were concerned about what we were going to call reasonable attempts at - the way...

Ray Fassett: Wolf - maybe Wolf recalls.

Ken Bour: The way we've written it and the way that in my research on this mater - what almost everybody says, I think even the ICANN Board of Directors COI procedures say this too, that there has to be some kind of like financial or...

Ray Fassett: Okay, yeah. Here's where I think we landed. I think we landed on that it's okay to describe examples of what the conflict of interest can be. I just think they had an issue with what is material and what isn't. Just using the term, almost semantics using the terms.

Ken Bour: Right. And maybe what happens is in the final analysis the councilor gets the final say as to whether it's material or not.

Ray Fassett: Yeah.

Ken Bour: We do everything we can to narrow down the bucket, right, the list of things that would qualify for materiality but in the end the councilor can say, "I have a material conflict of interest. I need to make an abstention. And so I'm declaring this to the people that be."

Now we execute the procedures in the GNSO operating procedure - we (obviously keep) those steps, we go through the remedies and if in fact either A, the constituency can direct or proxy things, then we don't change any denominators and the vote happens and we're good to go. And if all of those procedures fail, then we decrement the denominator because the councilor said it was material.

Ray Fassett: Ron, Wolf, any thoughts on all this discussion?

Wolf-Ulrich Knoben: Yes. Wolf speaking.

Ray Fassett: Yes, Wolf.

Wolf-Ulrich Knoben: I just think if we came back to the council thing I mean so I think the question of what is materialize is a conflict of interest. So and then I would like to refer again to what I have said sometimes so and I guess also Ken - I heard Ken saying so this kind of conflict may arise very rarely (that means).

So isn't that possible that we could think about, you know, what kind of cases could arise. So from your - for example, Avri is very familiar with that from her engagement (unintelligible) more than I am so (unintelligible) something (unintelligible) lay down here some points of which from our experience may

come up and some circumstances (on council) (unintelligible) which could end up in a conflict or could be a conflict of interest. And saying this and then we have some more material (points let me say) as it is (caused). Then that would be the one thing.

The second thing is for what I hear is still open (unintelligible) okay. If that is a materialize conflict of interest that this leads to a - to be returned to us with the constituency or a stakeholder group level to solve this conflict let's say and come up with kind of proxy voting or come up with a kind of direction from this stakeholder group how to vote. (Unintelligible).

So I would not refer to the constituency because the constituency may have the same problem, conflict of interest let me say if they have the conflict from the registrar point of view because somebody (or the council) representative of the registrar has some conflict regarding his registrar engagement. So (that's just my) constituency would have the same conflict I guess. So we'll have to go back at least to the stakeholder group level.

Ken Bour: This is Ken. I have...

Wolf-Ulrich Knoben: I have no solution to that but I would like really to find out what kind of cases could arise and (put the) - write those down and maybe in the future so we should keep that kind of list of (examples) of conflicts of interest, keep it open and add something in case something arises new.

Ray Fassett: Yeah. I think that's a great suggestion. So Ken has sort of a short list now of what - of examples, right, of financial interest, et cetera, some things.

Ken Bour: Yes, in...

Ray Fassett: But then...

Ken Bour: ...Section 4 of the procedures.

Ray Fassett: Yeah. So then in the future as we should have them a way to document other instances of a conflict of interest that we perhaps didn't think of and then can be added to the list. Is that what you're suggesting Wolf?

Wolf-Ulrich Knoben: Yes.

((Crosstalk))

Ray Fassett: Yeah. That's a good suggestion. So we can offer some examples up front but then in actual practice we may learn, you know, from experience there are others. And so somehow documenting that and who documents that, you know, would be a good suggestion from us.

Wolf-Ulrich Knoben: Yeah.

((Crosstalk))

Ray Fassett: Ron, do you have anything?

Ron Andruff: No. I'm just taking it all in. I don't have anything to add to this discussion at this stage. Thanks (unintelligible).

Ray Fassett: Okay.

Ken Bour: May I jump in? This is Ken.

Ray Fassett: Yes, Ken, please.

Ken Bour: Just a couple things. Yeah, I wanted to highlight that Section 4 of the current procedures, there's a whole section in which we discuss material conflict of interest. We asked five questions to a potentially conflicted councilor that would be sort of semi-helpful in terms of - what it says is the following

questions may provide guidance in determining whether an MCOI actually exists. You have an economic interest in the result. Is your economic interest directly involved? And so forth and so on.

And then following that there are actually one, two, three - there are actually five, you know, examples. They're not examples that directly relate to the GNSO but they're examples I picked up from other places on the Internet of where they say, these are situations that would typically give rise to a material conflict of interest.

So if we could take some time down the road or maybe ask some people in the larger community to, you know, flesh out some real cases that might fit in this model, we could add them into this particular section.

Ray Fassett: And by the way in the email that I forwarded earlier (to the) list, I'm looking at the five numerals - five things that Ken had in there plus the five points. I'm looking at a document that's called "GNSO Ops Procedures COI Proxy Voting Revised Redline."

Ken Bour: Yes.

Ray Fassett: And that's the attachment that was on the email if you guys want to follow along on that.

((Crosstalk))

Ken Bour: My second point to Wolf's...

Avri Doria: Can I...

Ken Bour: I'm sorry. Let me just - I'll - then I promise I'll be quiet. The second point Wolf raised that I disagree on I'm afraid to say is that we should raise everything to the stakeholder group. I remember very vividly Steve Metalitz saying, "Look,

you guys keep saying 'stakeholder group' but you got to understand in my stakeholder group the commercial, we don't have any kind of procedures to deal with this sort of a thing at that level." And that's when I said...

((Crosstalk))

Ken Bour: ..."If we say constituency and/or stakeholder group and we drop it down to the lowest level where there are such procedures, then that issue went away."

So I would suggest that we continue with the language "constituency and/or stakeholder group" so that that covers us to deal with the organizations maturity level.

Ray Fassett: I agree, yeah.

Wolf-Ulrich Knoben: May I just (I believe) the answer to that. But (by and off) these opinions though Ken because you have - in the different two houses you have different kind of leverage. So in the contracted house we have constituency equals stakeholder group. So that means so registrar constituency is registrar stakeholder group. There is no difference.

In the other house we have different groups in there. So even - so at the time being Steve Metalitz is right, we do not have any procedure - we do not have any fixed charter at the time being about - of the stakeholder group, the commercial stakeholder group because it's still under discussion. So I'm open to put something into that which is related to abstention as well. But at the time being and maybe also for some time more so we don't have (that correct).

Avri Doria: Yeah. Hi. This is Avri. I have two things. One, I think, yeah, I think (subsidiarity) works in terms of if the proper level to do it in a particular stakeholder group is constituency, then yes, that's where it should happen if the proper place to do it is stakeholder group.

It should happen at the appropriate, you know, layer that can make that kind of call. So I think, you know, what Ken is saying, you know, constituency and/or stakeholder group again allowing that most of these groups are doing their best to do the right thing and they'll figure out what the right level for them to do it is.

The other thing I wanted to bring in and I'm not sure. Now I abstained for many reasons many times and most of those weren't material. However, I did occasionally have one that I don't think was economic interest even though there was an economic link.

And so let me bring it up. As is well known I do a lot of contracting for the UN. A couple decisions were made that concerned decisions that related to some part of the UN system. There was a whole appeal at some point by international organizations for certain changes.

At that point even though there wasn't an economic view and it's not going to make more money or less money and I'm not going to get fired or not fired from my contract because of this decision, you know, it's a nonprofit-making thing so there isn't a financial interest in it. Yet it was still very concretely a conflict of interest for me to vote on something that would have a serious political effect or some -- maybe that's not the right word -- on the organization for which I was contracting.

And so and I think we may have to look a little wider for those who are employed or involved with non-commercial organizations to pinpoint what materiality actually means when financial is not the driving force.

Ray Fassett: Yeah, you're right. I mean these five points that are in here are all the examples which are all good ones. The questions are all economic - related around economic. And we all know there's different motivations and purposes

and what drives people to lobby things in this world outside of ICANN including, not always just economic interest.

Sometimes it's you vote for this now and I'll vote for that later. You know, there's all kinds of things that go on. So I don't know the answer to that offhand. You know, it kind of drives to what is a material conflict of interest as it relates to the GNSO?

Avri Doria: I mean...

Ray Fassett: That's why I go back to being a manager of the process. So it's almost like in managing the process does your conflict, you know, because you're not deciding. The idea of the councilors is not to decide or vet or produce the outcome, it's simply to manage it.

So in your role in managing the process, does - do you have an economic interest in the results? You know, something - so it's almost like qualifying it every time. In your role of managing - does that help any?

Avri Doria: It does. This is Avri again. But the question is - still is, does this have a significant effect on your organization? And the effect is yes, often financial in the situations that the GNSO deals with but not always. And that's where I'm sort of in a quandary because I know it's a fuzzy border to say, you know, when I'm working for the UN if anything has an effect on the UN to what extent am I, you know, am I bound.

Ray Fassett: Can any of these questions that we're talking about here be addressed in the declaration of interest and statements of interest forms? Can it be addressed there?

Avri Doria: Well certainly when I filled one of those out I would always say, you know - and, you know, I'm a contractor for the UN. And lately I've added that if anything - any decision reflects on any government that's a member of the

UN I have to sort of stay out of it and, you know, as a sort of civil - international civil servant almost.

Ray Fassett: Okay. So let's run with that example though for a minute. So then we have these five steps that you have to - whatever these steps are, right, Ken? We have these end steps that, you know, you think you have a conflict so there's these end steps that you go through.

If the stakeholder group does not or constituency does not - is not - unable to provide a consensus view on whatever it is, then this would be a situation where you could abstain at the council level and the denominator would be changed.

Avri Doria: As long as it wasn't restricted just to financial issues, yes.

Ken Bour: Yeah and this is Ken. I think Avri makes a great point and I thought I had tried to do that to say, you know, financial or otherwise. I think we just need to go back and in some of the language in the current version, yeah, well yeah I say advantage financially or economically. Maybe we should add or...

Avri Doria: Political.

Ken Bour: Politically, yeah, that might be another good way to do it. But I just think there's some - we could make some wordsmith changes to make it just a little bit broader than only financial and economic. Although that is the typical one that most organizations worry about because what they're worried mostly about Avri is that you personally or a family member of yours materially benefits from a decision you're making in another context, not so much that the organization that you're consulting gets some benefit out of it. I think that's a lesser concern.

Ray Fassett: Okay.

Avri Doria: Well that's the second...

((Crosstalk))

Avri Doria: Sorry, okay.

Ken Bour: No, go ahead.

Avri Doria: This is Avri again. That's a second order concern if I think I can get myself a better role at the UN by making sure they get X, you know, it's still, you know, it's not economic interest that I'm talking about, you know, it's...

Ken Bour: Yeah.

Avri Doria: ...more power.

Ken Bour: Yeah. That's a fair point.

Ray Fassett: So we're getting a little granular. Taking a step back and a little bit higher level, how do we feel as a work team that - comfortable that by putting this document in a - and I know you haven't all had a chance to read through it thoroughly - I haven't, to be honest with you. But I'm able to look at it now and I'm reading through it, how comfortable are we that the - by implementing this into the rules of procedure that we are - had a high confidence level that the situation of changing denominator at the council level will be rare, be the exception?

(That's what) I'm trying to get a handle on that now. It's like - because I think you're intending Ken as a suggestion to put this and some wordsmithing now - still some wordsmithing to do but putting this into the rules of procedure, correct?

Ken Bour: Correct.

Ray Fassett: Okay. So if we assume that they're in the rules of procedure, how comfortable are we as a work team that the instance of an abstention at the council level resulting in a change of the denominator will most likely be very rare? Anybody have any thoughts on that? Ken, I think you feel it will be rare, right?

Ken Bour: I think another way to phrase the question might be, does anybody recall or maybe if - I guess Glen's not on the call, but does anyone recall anyone ever having abstained due to a conflict of interest even if it wasn't material, just any conflict of interest?

Ray Fassett: I think Avri just said she...

Avri Doria: Oh, yeah.

Woman: Yes, yes, yes.

Avri Doria: No, people have.

Ken Bour: Okay.

Ron Andruff: And this is Ron. I think that the reality is that with the stronger SOI/DOI wording that we have I think it's going to be more often only from the point of view that the chair is now going to say, "Does anyone have a change in the declaration of interest," before the meeting starts or before they discuss a specific topic.

So from that point of view I think we're going to be seeing more of it. I don't know if it will be a lot or a little but I do believe that with these new changes in place in the rules of procedure, we'll see more of it.

Ken Bour: This is Ken. If I may, then I will change the question. I'll fix it so that maybe the way to say it is, how frequently do we think in the case of a conflict of interest that a constituency or if appropriate stakeholder group would be able to remedy it by developing a consensus position and then proxying it?

Ray Fassett: Yeah. That's...

((Crosstalk))

Avri Doria: This is Avri. I think mostly they could do it.

Ken Bour: Would constituencies and stakeholder groups be more interested in making sure that their vote counts versus being decremented and removed and therefore try to get this thing solved. I mean if we - that way if we had the answer to that then we would probably know how rare it would be that we'll change the denominator.

Avri Doria: This is Avri. Speaking from what I've seen both from watching constituencies for five years and from being in one for five weeks, maybe a little longer, yeah, no, they prefer to have their vote.

The mechanics of (guys if) I abstain then we only need six instead of seven, mechanics is much more difficult. It takes someone far more into political scheming to use that mechanism to gain an advantage. Mostly it's just we got six votes, I want to use all six of our votes, you know, let's figure this out," I think is much more the driving goal than you know real political backroom maneuvering to change the denominator.

Ken Bour: That's fair. Also -- this is Ken -- keep in mind that because the two houses have odd numbers, 7 and 13, one COI or one abstention due to that doesn't change the requirement in many cases, in most cases actually due to the thresholds. I sort of went through all the thresholds and said what happens if we went from 7 to 6, 13 to 12. And because of the way that, you know,

certainly majority it doesn't change, right, I think it might in a 75% case, but in many thresholds just one of those itself even if you decrement the denominator, the requirement to produce yes votes doesn't change.

Ray Fassett: Okay. That's good to know.

Ken Bour: Yeah.

Ray Fassett: Well I just - myself I feel that if these procedures that we add and if we're hearing now - which again, we're hearing now that proxy voting may not be the taboo or off limits thing for us to go down - if that's true, and we still need to hear a little bit from legal, and if we're felling comfortable that the procedures that we can incorporate into the rules of procedure to enable it is going to be the rare exception of change in the denominator, I'm for, you know, offering that kind of tool and answering sort of Kristina and Steve's long-standing issue. How do others feel? Avri are you okay with...

Avri Doria: I - okay. I wasn't going to jump in first. I seem to have argued in favor of it enough...

Ray Fassett: Okay.

Avri Doria: ...that it's probably almost obvious that...

Ray Fassett: All right.

Avri Doria: ...yeah. Sure. Why not?

Ray Fassett: That's the way I feel. Wolf, any reason not to? I think Ron might have jumped off.

Wolf-Ulrich Knoben: No, not at all.

Ray Fassett: All right. Well then with that said I'm kind of in favor of having, Ken if you don't mind, continuing as you're going along here - which is phenomenal work by the way that we really appreciate. I mean just outstanding. I can't say it enough. If you can continue on with the wordsmithing and maybe this is now the tool that you bring back to legal and of course talking with Liz as well and see if they have any pushback on this thing.

Ken Bour: Ray, Ken here. Happy to continue to do it. Yes, I'll make a few more tweaks. The document that actually says "Revised Redline" and I apologize for the complexity in the wording but I wanted to differentiate this from the one that already had redline changes that was already on the list that we really never cleaned up.

Ray Fassett: Yeah.

Ken Bour: So I had to clean that one up in order to make another set of changes to give to legal that really sticks to 2007 issues. So, you know, if you follow all that. But yes, I will make a few more changes to try to broaden that materiality thing as we discussed today.

I think politically is actually a pretty good one. And so and then I'll - legal already has all the current material. I don't think they need to see another version just yet but they might have a few other things to suggest to our text and I'll put all that in and try to get all that done before our next session. So then we'll - I think we'll have what we really need to focus on in terms of recommending something to go into the rule procedures.

Ray Fassett: Okay. I think that's a good game plan. And then from there in our next call we'll - let's take a consensus view of whether we want to send that document then over to the OSC for their review and our suggestion to incorporate it into the rules of procedure. Does that sound like an action plan?

Man: Yes.

Ken Bour: Sure.

Ray Fassett: Now I just want to point out the 30th - our next call if we stay in the two weeks - depends on how do we want as a group look at this? Today is the 16th. We were actually supposed to have a call last week on the 9th and we missed it thanks to me. Do we want to continue now two weeks from today? I think that's what we're saying. That would put us at the 30th. Now the 30th...

Avri Doria: How does that fit with Ken taking a vacation during the holidays and doing all this work?

Ken Bour: Fear not. I'm a paid consultant. I work all the time.

((Crosstalk))

Avri Doria: Yeah, that's what I always say (unintelligible). Us paid consultants we don't take holidays, that's called unemployment.

Ken Bour: That's right.

Ray Fassett: You don't have a conflict of interest here do you Ken?

Ken Bour: No I don't.

Ray Fassett: All right. Just making sure.

Ken Bour: You know, one of the things that we might also do in the interim is to do - see if we can't collect up maybe three or four or five, not too many more, examples. And the one that Avri articulated might be a great one to put into the procedures, right. So we have, "Here's some questions that you might ask, here are some examples that might lead - and here are some real GNSO cases that might help with a decision of that kind." Is that a good idea?

Ray Fassett: Yeah. I think it is. And maybe this is a good time to add that the chair of the OSC, Chuck Gomes, had a suggestion on - because I have to submit updates of where we're at and what we're doing. And so obviously I updated him that we're on this subject and here's where we're at and what we're talking about and Chuck had a suggestion that we could also reach out to - hold on. We could reach out to the constituency and stakeholder group work team chaired by (Ulga).

Why? Because I don't think it's in our mandate and others can disagree but I don't think it's in our mandate or scope to start at the rules of procedures level say and influence what individual stakeholder group or constituency charters are to say, right. Because if all of the stakeholder groups had the language that the registry constituency has or the ISP and a couple others, we probably wouldn't even be having this discussion because in those charters it's clear that the reps are to be representing the group at all times and they know that when they take the position.

And therefore there's the conflicts of interest just don't exist. So example, say and I'll just stay with Chuck for a minute. Chuck is obviously the chair of the council now but he's also the registry constituency council rep, VeriSign is his employer. He knows that whatever actions he takes at the council level can't have a conflict with his employer, you know, it's just not allowed or don't take the job quite frankly.

Ken Bour: Ray, this is Ken. I'd like to jump in here though and I think we've been down this path and I thought we had decided that that's - whether or not the constituency or stakeholder group allows you freedom in your voting doesn't change the conflict problem. This is Kristina's main point.

I have a professional conflict. I - no matter if some - even if somebody tells me, "Go vote like this," even if they write it down, "Go vote like this," my

conflict is still real and it's still there and I could be - my firm could be sued if I vote. So I think what we should do in our case, differentiate. We should...

((Crosstalk))

Ken Bour: ...put a hard line between...

Ray Fassett: Yeah.

Ken Bour: We're not making requirements on constituencies or stakeholder groups. And we're not asking anybody to change and charters. All we're going to say in the GNSO procedures is, "If you, councilor, have a conflict, we are asking you to go back to your constituencies and see if they can do a proxy." Now at that point...

Ray Fassett: Now I'm not disagreeing.

Ken Bour: Okay.

Ray Fassett: I'm not trying to rehash.

Ken Bour: Okay.

Ray Fassett: I'm not disagreeing with that.

Ken Bour: Okay.

Ray Fassett: I don't want to take this work team down the path of the charters. That's what I'm trying to say in a long-winded way.

Ken Bour: Okay.

Ray Fassett: The suggestion from Chuck was should the constituency and stakeholder groups do that? Is that - he seems to feel that that could be within their scope to examine and look at this particular issue. And my question was only, you know I don't want to go back to Chuck and say, "Yeah, that sounds like a great idea." What I'd like to...

((Crosstalk))

Avri Doria: This is Avri. Can I ask something?

Ken Bour: Go ahead. Yeah. All right. Sure. Allow Avri...

Ray Fassett: Yeah.

Ken Bour: Sure.

Ray Fassett: Yeah, go ahead Avri.

Avri Doria: One of the things that I'm not sure that that particular question is in their scope, but certainly looking at procedures for how a constituency or stakeholder group would do the right thing to be able to come to a consensus position for a vote, whether they've got party discipline or not does seem like something that would be worth sending off to their groups, you know, to basically give advice on. You know, if you don't normally go for consensus positions to mandate your (unintelligible), do you need a process or procedure to do that to meet this proxy condition?

Ray Fassett: Okay.

Avri Doria: So and we're certainly not mandating a change in charters or...

Ray Fassett: No. We don't want to go there. Right.

Avri Doria: ...internal processes. But it may be a useful tool, a useful problem for them to consider how, you know, in a constituency or a stakeholder group without voting discipline this gets managed, this can happen.

Ray Fassett: Okay.

Ken Bour: This is Ken.

Ray Fassett: Yeah, Ken.

Ken Bour: The other thing it would be timing. If we do decide to take something to the constituency ops team I would recommend that we at least wait until we've gone through - at least after our next meeting because even though I'm feeling more confident, I'm not 100% sure yet where we are with legal on this.

So why don't we - once we get to that point and we say, "You know what, we've got everything we need to go," maybe that would be a good time to share the procedure with the constituency and stakeholder group team and say, you know, "Here's where we're going with this. Do you guys have any thoughts as to what your work is with respect to constituencies and stakeholder groups and how this might apply to your stuff?" I mean I don't know.

Ray Fassett: Yeah, no, I hear you. I think what I'm hearing is no, let's not go back to Chuck as the chair of the OSC and say, "Yeah, we would like the - this other stakeholder - this other work team to look at the issue of mandating whatever in a charter," but let's wait until we get this part more baked and then go back to them and say, "Now here's areas of what we're implementing in the rules of procedure that we think that work team can put some procedure to." Is that what I'm hearing?

Ken Bour: Yeah. If nothing else for example, the stakeholder groups, charters and constituency charters might - they might want to put something in that says,

“We - if we are asked by a councilor of ours under the auspices of the GNSO procedures which now say this can be done, we want to put something in our charter that says we will do proxy voting. In other words, we will execute that procedure as allowed by the council.”

Ray Fassett: Okay.

Ken Bour: Yeah, and that might be the...

((Crosstalk))

Ken Bour: ...linkage.

Avri Doria: Thank you Ken. That's what I was trying to (verbal out).

Ray Fassett: Okay, good. All right. I think that's a great plan of action. So where are we? So the 30th - we'll target for now the 30th. Obviously we're running into the holidays and we're not going to hold legal or anybody else to anything.

But we'll plan on the 30th perhaps having a document maybe even a day before to look at and decide on the 30th whether we want to send that over to the OSC with the recommendation that it gets put into the rules of procedure. Is that where we're at?

Ken Bour: I believe so, yeah.

Ray Fassett: Okay. Now, here's a request I have with Julie. Are you still on the phone Julie?

Julie Hedlund: I sure am and I've just noted that those action items and I'll be sure to put them up on our Wiki and...

((Crosstalk))

Ray Fassett: Well here's another one. You know, we've spent so much time on the rules of procedure for really months now. You know, where do we head next? It's almost like we're at a point of reprioritizing our work. There's a lot of work to be done. There were a lot of things that came out of the Board Governance Committee for this particular work team to look at, et cetera.

Obviously that was quite awhile ago and maybe things have changed. You know, now it's time to reprioritize our work and I'm looking to - for suggestions on how we go about that.

Julie Hedlund: Ray, this is Julie. So I do have one thought. As you know the statement of interest, declaration of interest policy or procedure or whatever you want to call it, that group had devised, you know, went to ICANN legal staff, ICANN legal provided comments to it and that was sent around to the team some time ago but of course we were tied up in (unintelligible) procedures.

Ray Fassett: Yeah.

Julie Hedlund: Since there are now I think perhaps some related issues that have come out of discussion on abstention perhaps the next step might be to look at that document and the changes suggested by legal and take it up for discussion.

Ray Fassett: Okay. So double back to the SOI/DOI based on a comment that we asked for comments, we got them, we never addressed those comments so our next action item would be to start - to look at that. Could you resend that around to the list?

Julie Hedlund: Absolutely. I'll do that.

Ray Fassett: Doesn't have to be today.

Julie Hedlund: That's all right. I can send it today. It's ready to go. It's...

Ray Fassett: Okay. All right. So then beyond that also, you know, we need to discuss I think as a work team where we want to head next. And if there's nothing else, I don't have anything else. Anybody have anything else? If not, let's go ahead and adjourn the call and the recording. We'll end the recording first. First I'll say happy holidays to everybody.

Ken Bour: Same to you.

Avri Doria: Happy holidays.

Woman: (Unintelligible).

Julie: Thank you Ray.

Ray Fassett: Sure. And we'll end the call and I just want to say thanks again to all the effort and Ken especially, really nice work, really impressive.

Ken Bour: Thank you very much.

Ray Fassett: Okay.

Avri Doria: Bye-bye y'all.

Ray Fassett: Okay. Bye.

Group: Bye.

Man: Bye.

Coordinator: Thank you for attending today's conference. This call has concluded. You may disconnect at this time.

Gisella Gruber-White: Thank you (Joann). Enjoy the rest of your day.

Coordinator: You too.

Glen de Saint Gery: Gisella?

END