Transcription ICANN Dublin
GNSO session Sunday 18 October 2015
Update on CCWG on Enhancing ICANN Accountability
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Jonathan: Great, so the next session is specifically to provide an update on the CCWG on enhancing accountability from one of the overworked co-chairs and our GNSO council colleague Thomas Rickert.

Thomas Rickert: Thanks so much, hello everyone again. So we're expecting some slides. The last slide deck that I sent right? Good so I think I can preface this by saying that there is a lot happening in the CCWG.

So what I'm going to present to you is a snapshot of where we are at the moment. It may be completely different if we speak tomorrow evening. You know, so it's great to see that we are moving at a very high pace but we're moving at a pace that allows for us to refine our recommendations towards consensus and that's a good thing.

And I think that some of you may have gotten the impression that we got derailed, that we are delayed, that we're getting nowhere. And I'll show you in a minute that, you know, this is really not the case.

I spoke to one of the advisors that - one of the PG advisors who said that, you know, he thinks that we're at 98% completion status and I think we really have to have a break through and confirmation some basic questions and then flush out the implementation and flush out our report on that. So I'm quite confident that we are about to make it.

The first slide that I would have shown to you is actually the overview of the parallel processes of the technical communities and the CWG showing that the CWG has other communities deliver to the ICG and that they're, you know, they're good to go.

And that we are the one area that is missing to complete the picture and get the thing done. So I can give you reassurance that we're not suffering from a lack of pressure at the moment. So we're all cognizant of that but actually we are really on the verge of a breakthrough I think.

We have analyzed public comment, we've got 90 plus public comments in response to our second report and the good news is that we got confirmation from most parts of the components of our report.

So you will remember and I would have shown to you if the upload was a little quicker and I know that this is not last fall but you will remember that we had this structure of the four building blocks, you know, with the board, the community, the amended bylaws and the independent review process being the judiciary.

And then a couple of community powers on board recall, you know, of the entire board, removal of individual directly, changes of standard bylaws that can be vetoed by the community if they're not to the community's liking.

The need for approval of changes to fundamental bylaws as well as and now actually I need to look at my notes - and the community power to veto the budgets strategic plan and operating plan.

So all these components have been confirmed. The community has said you need to have that right. So the level of support in response to the second report we issued is far higher than the level of support after the first report.

So I think that's really good news. If you take areas where we have disagreement, areas that need refinement only and areas that are supported I would have shown you a graph that clearly indicates that in the last two days basically we've been able to move a lot of things towards needing refinement only if not having reached agreement by our group.

And so that's really good and except for one item where we can't really make progress because, you know, we've done what we can I think we're doing great.

And this one item where we are at the end of what we can achieve is stress test 18. The stress test speaking to a consensus requirement for GAC advice and that's something that some GAC members took issue with.

And, if you could move to the next slide please. Back, back yes this one. So here you can see that when we came to Dublin we still had a couple of points where we had disagreement.

We now have, you know, the October 17 bars are the most recent ones. So we don't have anything in the disagreement area nor in the too be considered and only one item in the to be considered area.

We have increased the area, the number of items to the refined area and we also increased significantly the area where we have group support. And the one point that I was alluding to earlier as stress test 18 where we reached out to the GAC and said we are awaiting your feedback now.

We know that there is a sub-team in the GAC working on a proposal for stress test 18 so that's the point where we are waiting for their feedback.

Next slide and again next slide because I spoke to the four building blocks with some refinement already. So I think what the key concerns were coming out of the public comment period and at the same time the key features that we need to make sure we bake into our final recommendations are to avoid capture.

With the single membership model that we've proposed and a voting scheme for community decision making there is the actual or perceived fear that this leads to a concentration or a reallocation of power.

So there are many in the communities who claim and that's not only the board let's be very clear about that. We got a lot of comments saying okay if you vote if only a subset of the SO's and AC's get to vote that leads to a concentration of power and that could ultimately lead to a risk of capture. That's at least a perceived fear. Also they said it's not inclusive enough. If you only have a few groups with voting rights what about the others, how can we make sure that they're being heard and that their views are being taken into account.

So we need to make sure that with whatever we come up with it robustly avoids capture, it avoids the concentration and reallocation of power. It is inclusive and we have to make sure that it's workable that it's efficient.

So what did we do to address these? Next slide please. We came up with a different approach to community decision making. So where is this place and what we are doing in ICANN.

Let's step back for a moment. What we see both in the creation of the budget as well as in other areas of ICANN's decision making but let's take the -- let's step back and look at what's happening usually.

And I call this the triple E approach that we see in ICANN. You have an engagement phase. So before the board takes a resolution on the budget for example there is engagement with the community.

And then this exchange of thoughts with the community the board should absorb the community's wishes and needs. And only after that the board take a decision.

And we are not talking about this area in our work but yet it's a vital part and it needs some refinement and we potentially need to make it mandatory. In order to ensure that the engagement between the community and the board is sufficiently robust and thorough to reduce the risk that we need to escalate right.
So in an ideal world community would talk to the board, board passes a resolution on the budget, everyone likes it, done deal. You will never see the result of the CCWG work.

And it is only in case the board passes a resolution that the community takes issue with where in the second report that we publish we would have somebody taking issue with that petitioning for the execution of the community power.

In this case the budget veto and then we would have a deliberation phase and a decision phase by voting. And then if the voting threshold is reached the budget veto would come into effect.

And we're revisited that part and we said okay there needs to be an individual objection against the board resolution in the first place. So somebody who thinks that things went wrong with the board needs to find an SO or AC that supports this objection.

And then we would have what we call a pre-call so we don't want to cause undue administrative burden but we would schedule a telephone conference with the SO' and AC's with the whole community to discuss this.

And only if it gets traction sufficient traction and I'll speak to that in a moment, then we would say okay we need to have a physical meeting, a place where we discuss this concern.

And then there would be the community forum where the objection is discussed and after that the SO's and AC's would take the outcome, the information from the whole community back to their respective groups.

And they would form a view on whether they support the objection or whether they think the objection is unfounded. And then there would be a consensus call requiring a certain level of support for the opposition and there must not be more than one objection against the objection.

And if that carries then we would have a community decision. So that's consensus based. It's not full consensus but it's a mixture of a certain degree of support for the opposition and there must not be more than a certain number of objections by SO's and AC's.

So we are far more inclusive with this approach. We don't count noses in terms of voting but we would do a consensus call. And only if the community has reached or reaches consensus that let's say the budget must be vetoed.

Then we would tell the board hey guys, you know, you have a veto going on and then so the board could remedy by re-doing the budget. But if they don't they signal that they are not willing to help the community on that then we would have a discussion which we call the mediation phase.

And in that phase we could take this to the IRP right. And that and only then at that point we would come to the third E which is enforcement right. So we would then undergo an IRP.

And again there can be an IRP decision that is in favor of the community and then if the board implements the IRP decision all is well. We will never need the discussion about designator, membership or what have you right.

If the IRP decision says the community was wrong it's off the table anyway. So it's only in the case that the engagement phase, the escalation phase if we get a IRP result supporting the community's view and a reluctance of the board to implement an IRP decision that we will then need to discuss which model would be the most appropriate model to enforce this.

And next slide please. So I'd speak to the model discussion at the moment but this is actually the result of a breakout session where the breakout team and this got a lot of support in our group.

It's tentative support but yet there is a high degree of support in the CCWG. They spelled out the requirements for each of the community powers how many SO's, AC's you need to support, the level of objection needed. You know, you can take that with you, look at it we're not going to do that now.

Next slide please. So when it comes to the enforcement model it is our sense that the group very much leans towards a single community mechanism for enforcement purposes.

So as you know we have a single membership model that we proposed which got some criticism and concerns back from the community but we think that regardless of what model we ultimately choose the group really supports the notion of having a sole body the community as such having the community powers.

And now the question is which the pros and cons in the enforceability part are - and membership versus designator. So I think these are the two options that the group wants to consider further.

And the group has agreed on Friday that they are looking into the sole designator model more. Not to say yes to it instantly but just to give it proper evaluation because it could eliminate the doubt about de-stabilizing ICANN if we move to a membership organization.

So if you have a member there are certain statutory rights coming along with the membership. And under our construction we would have the community forming a single member but still the single member could exercise membership rights.

It could ultimately dissolve ICANN as board members could do today. This is a highly known fact but the board can today resolve - dissolve ICANN should they choose to do so.

But what we would do is make sure that the SO's and AC's jointly come to decisions in a single member or in a single designator model and thereby reduce the risk that a single organization could go rogue and do bad things right.

So we think that we can do that in the membership model, eliminate the risk associated with membership rights, derivative lawsuits and stuff like that by pulling these rights.

But we have different legal advice that speaks about, you know, potentially de-stabilizing. And that led us to believe that we need to try removed concerns because what we are doing in response to public comment is seek confirmation for the areas that are good to go and try to remove concerns issued by the community.

Whether they are actual concerns, whether they are legally robust or whether there is a perception of destabilization doesn't that much matter. We need to take all those concerns seriously and this is why we are now looking at these two options primarily the group is working on flushing that out.

More there are questions surrounding enforceability but the single designator model, the sole designator model, the model where the community as such will be the designator gives us the biggest stick available ever and that is take out board members individually or collectively, remove the old board.

And when we started our work as a CCWG I think it was Roelof Meijer the SIDN CEO who said to replace the U.S. Government backstop we need a very big stick and that is board removal as you would have in government.

If you are unhappy with the government you replace it right. And we would preserve that in both models. Only we would have a more nuanced set of sanctions under the single membership model but there are some in the CCWG would claim we don't need that more nuanced set of sanctions because why should we bother to enforce a budget veto if we can fire the board.

Or in other words is there a realistic chance that we're going to keep the board if we have to take the board to court because of a budget veto right. So I think, you know, why we can have all the community powers in the bylaws chances are good the board will play by the rules and accept the community's wishes.

And we're really talking about this last, last bit where everything else fails and there are many in the CCWG who say today that if we can remove the board that is a sufficiently big stick for us to have to rectify the direction that the organization is taking.

Next slide please. How am I doing in terms of time? Do I have a few more minutes? Good, good. So take away is that our group and we don't have a final decision so again this is just a snapshot but we are very much leaning towards a regime where we are not having voting.

We are going to lean towards a mechanism where all parts of the community can be part of the decision making regardless of their status. So they can all remain what they are.

We don't require SO's or AC's to change. Whether they have legal personality which would be required under some other models they don't need to change anything here.

So they can all chime in, support, object regardless of their legal status. And consensus is the term of the day let's say. Because if we're doing what we're doing here with the single community focused model I think we have a nice story to tell about how we're changing ICANN's accountability system.

We can say the U.S. Government has this backstop function. We're handing that backstop function over to the community including all its component parts and this community collectively exercises certain rights be they membership rights or designator rights, right but that's the idea that we have one collective which is the whole community.

Next slide please. So I can show you through it but I think I shouldn't go into too much detail but, you know, we had basically four main themes that we needed to work on.

That was the decision making I spoke to that. That was the enforceability model I spoke about that. And then we had two other community powers that had considerable debate and comment from the community.

They voiced the community power on budget veto which was perceived as being too harsh destabilizing in terms of the budget freeze, you know, that could paralyze the organization. So there were some concerns with that and also with the individual board removal.

And we had very good discussions and what, you know, including board members from the financial committee who had some concerns about this and we're now seeing light at the end of the tunnel because the sub-team actually came up with the idea of having a targeted veto.

So we would make a distinction between the inevitable expenditures that ICANN has and the parts where ICANN is flexible. And then the community could issue a veto only targeted on certain parts.

And we're going to see this in a more refined fashion but the end of the week I trust. So this is just to let you know that we are on our way to reach consensus on the budget community power which had some pushback.

Next slide please. And that is about individual board member removal where some said if you allow for the SO's and AC's that place people on the board to take them back that he board members would just parrot the views of their respective SO or AC fearing that they would be removed if they don't do what they are told.

And as you know once somebody has been placed on the board he or she should act in the interest of the community, in the interest of ICANN right. So there was a fear that if we do as we proposed with our second report we would change that and jeopardize the independence of the directors.

So we've now refined the process a little bit particularly I'd like to point out that we're going to bring it out to the public. You know, first if a certain - let's say the GNSO has an issue with their board member then we have a private

consultation with him whether they can remedy the issues they are seeing it will never surface daylight.

But if it's really severe then we're now baking something into the process where we have a public debate about the allegations and a public opportunity for the board member concerned to speak up in response to that.

And we're also, you know, while we're not establishing a catalogue for causes for removing individual directors we're asking for the provision of rationale for transparency purposes.

And these parts actually lead to much more support for the removal of individual directors compared to the second report. So I think that we're on our way to consensus with this as well.

We're also I think appropriately dealing with removing both directors that are being seated from the community as well as those coming from the NomCom.

Next slide please. I guess that's actually the last slide that I've prepared or actually others have prepared which I put into the slide deck. Is there one more? No, good.

Then let me just quickly summarize. I think what you can expect happening is that we will have a decision making model based on consensus primarily on consensus wherever possible on consensus.

We will make sure that it is capture proof. We will make sure that there is no reallocation or concentration of powers but that we're as inclusive as possible to incorporate the whole community's views.

And we're going to preserve the way the SO's, AC's are currently established so there is no incorporation or no legal personality required. I think I should pause here. Thank you for your attention and open it up for questions.

Jonathan: Thanks Thomas. We have a couple of questions coming up. Thank you for the slides or to others who prepared those slides whatever the case may be and for your very good delivery of them.

It's really useful and also interesting to see how the progress has been made with such focus and intensity over the last couple of days. First in line is Brett, go ahead Brett.

Brett Fausett: So Thomas thank you for all your work on this I've been grateful that you and many other people from the GNSO community have participated so thoughtfully in the process.

It's made it easy for me to not pay attention to this because I know that very smart people were working on it. So with the background that I haven't been paying attention to this a couple of things confuse me.

What was the fiduciary duty exemption to the appeals process because maybe go back a few slides to look at the one that presented the fiduciary duty piece. But your example in working through this was the budget and a budget approval vote.

It's hard for me to think of something that's not solidly, more solidly inside the board's fiduciary duty than the approval of the budget. So, you know, using the example that you gave how would we ever challenge that since that's really one of the board's core fiduciary duties?

Thomas Rickert: Yes I was just encouraging Jordan Carter who is the repertoire for that sub-team to provide information on that. We had legal memos on that so there is a lot to say and he is the one who can report best about this.

Jordan Carter: Thanks Brett, Jordan Carter as Jonathan said, repertoire for work party one in the CCWG. I apologize for my informal dress I didn't think I'd be talking today.

There are two kind of parts to that question. The first is that the CCWG has tried to be very respectful of the board's responsibility and being the entity that sets the budget which is why the proposal only had a top level veto of the whole budget.

It didn't get into a kind of line item veto process or giving the community the right to re-write the budget. But I think your question comes to the point about enforceability of such a veto.

And the two models that are being talked about in terms of the end of the line after all of the steps with a single designator, a single member. In a membership structure for powers that are reserved to that member and the board's fiduciary duty cannot be used as a reason to dissent from the ruling.

So if we had a single member model there is no question that illegal action by the board saying we can't if we don't agree with this assessment by the community you can't veto this budget.
That couldn't be upheld for reasons of fiduciary duties. In a designator or an arbitration model it could potentially be upheld there. But it's important to stress that that is at the end of a consultation process at least for the budget and then if concerns are lodged and the board approves it anyway you have the following on of, you know, either and IRP or the community vetoing the budget and then a second time.

So in any of these models that we're working with an alternative of removing directors or the entire board would be legally enforceable. So does that answer your question?

Brett Fausett: Probably not I'm still confused. I mean I am working under the assumption that if it gets to the point of dispute the board is always going to say what we did was within our fiduciary duty.

And they may well be right to say that. I think that, you know, legally that their fiduciary duty and the decisions they make and the resolutions that they pass will be deemed quite broad.

And so if that's going to be sort of the status quo you said that there is one model that allows that to be challenged and one that doesn't. Which one are we headed toward I don't have a sense of which way our discussions are taking us.

Jordan Carter: The honest answer to that particular question is that when we had a breakout group working with part of this yesterday the group was still evenly split. It's what it is.

Jonathan: I have Phil Corwin and then Greg Shatan.

Philip Corwin: Thank you, Philip Corwin representing the BC. Thank you Thomas and thank you to all the co-chairs and members of the CCWG for the tireless work you've been doing and the tremendous quantity and quality of the work.

I think the CCWG is proof that the multi-stakeholder model does work and can produce a very high quality product. I just want to recognize the work of Steve DelBianco from the business constituency who has been taking the lead for the commercial stakeholder group and I know the tremendous time and the many of the middle of the night calls he has been on.

I have one comment and then one question. The comment is that you touched on stress test 18. Fadi mentioned that at some point if there is a model that's agreed on he and Larry Strickland and perhaps others will be probably in front of the U.S. Congress explaining it.

And my personal view is that stress test 18 is incredibly important for convincing the U.S. Government that this, the final model does not capture subject to capture by governments which is of course a key criteria in the NTIA's original conditions for the transition.

I will note that even if there is a requirement that GAC advice to the board which has to get deference under the bylaws and that's not going to change. If it's required to be by consensus it's not necessarily the type of consensus they have now which is basically unanimity without objection.

It's certainly more than a simple majority but it could be the kind of consensus that the council has which is 2/3 support which means that a majority could rule over a 1/3 minority in giving advice to the board.

So I think that issue would need something strong in there to assure folks who care about this that ICANN is not subject to future governmental capture by some majority giving advice to the strong number of nations object to.

My question is on the timing. Let's say, you know, I think the best possible scenario is that we leave Dublin with agreement that some model perhaps a single designator is the path forward.

I certainly hope that we leave Dublin with at least that type of high level agreement. How much more work if something - if that occurs how much more work, how much more time is required to refine the final model to fill in all the details?

And will it be since you yourself the CCWG is wrestling with the difference in between that and the second proposal that was subject to public comment, will we need another round of public comment if for nothing else to demonstrate consensus community support for the final proposal?

So could you respond to that question? Thank you.

Thomas Rickert: Sure, thanks Phil and thanks for the kind words as well but let me echo this because you have been a very active and thoughtful contributor to our work as well.

The answer is that I can't tell you now. There is a correlation between the outcome of this week's work and the effort or the need for time to tidy things up after Dublin.

We are expecting at least a couple of week to really write up the results regardless of what they are. We need to work on both refining our report but our report was pretty much written for the ICANN community.

It has a lot of genesis of the recommendations in there and for an outsider it must be quite confusing. So we are currently considering not only to finalize our report but also to have a separate document that communicates better and easier to understand language what we're doing because we want to be really inclusive with these changes for everyone to understand how ICANN is going to change.

So that is going to take a couple of weeks. But the more important thing is the need for a public comment period. And that also depends on the level of change that we apply to the recommendations that we had in our second report.

So the more we're going to change the higher the probability that we're going to need a public comment period. The good news is that the models that are short listed now if you wish are not entirely new to the community.

I'm saying this very cautiously because there will be some that claiming that regardless of what we're doing we need another public comment period. But

in fact the single designator model has been mentioned in our first report already as an option.

We have discussed what the pros and cons of designator versus membership models are. We have spelled out the community powers in quite a lot of detail and we've come up with visualizations of the whole concept.

And in fact if you switched let's say if you or I'd say if you refined our recommendations to ultimately help the enforceability bit being a community designator model in everything that we've explained to the community will just need to replace the work membership by designator.

And a lot of parts would remain the same right, but that is not to say that our group will not ask for a public comment period. And I think we need to get this right but I think we will know by the end of next week whether what timing we need and we'll come up with a refined plan.

One word with respect to stress test 18. As I mentioned there is work underway in the GAC and while you are right that NTIA has established a requirement for us to keep stress test 18 it would be disrespectful of the work of the GAC not to await their feedback before we do a consensus call on that specific item.

Jonathan: Thanks Thomas. Speaking of timing that's it as far as the timing is concerned. We have some people patiently waiting so I think Phil had his chance, we've got certainly Greg, (Maria) and I see Malcolm has joined the line.

Please if I can encourage you and Thomas to be as brief as you can we want to wrap this up in the next few minutes. So Greg go ahead.

Greg Shatan: Dead mike, dead mike number two. As a member or rather a participant in the CCWG I just wanted to try to answer the part of your question that didn't get answered I think which was that the single member in the single member

model or rather a member of a California non-profit public benefit corporation essentially sits above the board with regard to certain powers that are reserved to it in the bylaws.

And essentially relieves the board of their final fiduciary say with regard to those specific reserved powers. So that if a member vetoes a budget item or a budget that cannot be then trumped by the board saying this is our fiduciary duty and we need to take it.

So in the designator model the designator does not sit above the board in any case except with regard to the designation and removal of directors that's why they're called designators.

They are kind of a single purpose entity. They can do other things but at that point they're just like regular community members but the member sits in a special place in the hierarchy of corporate governance for this kind of organization.

Philip Corwin: So I mean that's really helpful. Then the designator model doesn't work only the member model works right?

Greg Shatan: Well the member model works better and more broadly. The designator model works in many ways as well as in certain ways as well as the member model and certain ways not as well as the model.

It puts us more in a petition of petitioners rather than an empowered account party to which you're accountable.

Philip Corwin: Just on the basis of what I understand based on the conversation we've had here I'm in strong favor of the member model. I don't think the designator model works but I'll definitely want to hear more.

Greg Shatan: I'm trying to maintain an open mind but I can't say I disagree with you.

Philip Corwin: Okay, all right.

Greg Shatan: As a matter of fact I'll say I agree with you.

Philip Corwin: Okay thanks.

Jonathan: Next is (Maria) and then Malcolm.

(Maria):   Thank you this is (Maria) speaking. Well I just asked a question to (Theresa) with regards to the counter proposal sort of that has been presented by the board.

                  She mentioned that it is one comment among others in the public comment but of course it's more than that and I being an outsider I feel like it's a concerted effort to re-discuss things that have been discussed by the community before.

                  Not it is not the only cause why we are delayed in a process but it of course adds to the delay. But my question is picking up the point that (Heather) made before with regards to the fact that the U.S. elections and how this can be delayed and prolonged in time considering what had been discussed yesterday in the GNSO and all the PDP's that are coming down the line and considering that we need all the effort and manpower that we can possibly muster to tackle these PDP's.

                  What do you think in terms of timeframe? If this is indeed delayed in time and prolonged do you believe that the community needs to maintain this concerned effort (unintelligible) on what is being discussed?

                  Do you think that it will be dormant for some time until the moments that the political scenario in the U.S. is resolved and then both issues the transition, the accountability will be resolved?

How do you see that because I understand that we have put a lot of effort into this and it is of course very necessary but we do need to have people back for this next year?

So what do you think in terms of workload specifically considering what we have as GNSO in our agenda? Thanks.

Thomas Rickert: Thanks, I guess a lot of the parts of our report will remain. So I think the next report that you are getting will not need that much time to be analyzed as the previous reports.

So I think that takes away a little bit of the workload. Nonetheless you surely have to review our final report. You can expect that to happen towards the end of the year I guess.

And after that there will be more output from the CCWG as well as from the implementation of the recommendations in the report. You know we have work stream one recommendations that we put in our report.

These are going to be implemented and we're going to start on working on work stream two items. But the workload will be more evenly balanced so I think it will be better manageable for the components of the GNSO.

Jonathan: Malcolm.

Malcolm Hutty: Thank you, thank you is this on? Good. Can we put the enforcement slide back on the screen that we had a few moments ago please? Every version of the CCWG's proposal has proposed that the IRP should be binding on ICANN.

As I understand it the board's reply in their assessments of what they agree to and disagree with accepts the principle that the IRP should be binding in ICANN.

But this slide I think poses a question as to what extent that's achievable. And it's about this problem of the fiduciary duty. Now those of us who are qualified lawyers with a specialty in corporate governance admitted to practice in California has an advantage here but for the rest of us and I must say I'm amongst the rest of us.

We risk being blinded by this term fiduciary duty and what that means in practice to the intent that the IRP be binding. As I understand it will one of those people in that select group correct me if I'm wrong but as I understand it the fiduciary duty of the directors is always and every time to do what they think is in the best interest of the corporation?

That's what the fiduciary duty means as I understand it. And if that is the case then when we say the scope of the arbitration is limited by the board's fiduciary duty which cannot be arbitrated does that not mean that the arbitration cannot override the board's right to decide what is in the best interest of the corporation and to do that?

Now in the single member model there is an exception. The single - where there were reserved powers for the single member they are not overridden by that fiduciary duty not because of some special exception to the principle fiduciary duty there is no such exception as I understand it.

It is because it's not the board that's doing that. Wherein the single member uses a reserve power to recall the board or to veto the budget or to veto a bylaws change it's not the board that is recording the board or vetoing a budget or vetoing a bylaws change it is the single member that is doing that.

So the fiduciary duty doesn't apply because they are still acting in accordance with their fiduciary duty but they're not the one doing the action. But for everything else it's the board that's acting and the IRP is reviewing this and saying no you shouldn't sit on that that's inconsistent with the bylaws.

And the board's say well we believe that this is in the best interest of the corporation and it's our duty to go ahead. And if that can't be arbitrated don't we have a problem?

So my question to the chairs is that if we've identified for the last very recent legal advice in line with what I've just said do we not have something that might, that we may have to struggle with in a way that might cause (modelize), we look for solutions to this problem.

Do we not have to open up how we ensure that the agreed intent of the CCWG a consensus as I believe it to be within the CCWG and a consensus with the board so that the IRP must be binding arbitration can actually have effect given this understanding of what the fiduciary duty provides a get out for the board to override the IRP? Where do we stand?

Thomas Rickert: Thanks very much Malcolm and I had intentionally not got into that level of detail in my slide deck because this is actually something that we're currently looking at.

We have legal memos on this but I think it also, you know, what I can say is that the lawyers are working on ways to make that more robust. At the same time it clearly shows to me that the board removal, the board recalled part is actually the most important right the community has and that we have under both models.

So I think rather than - and this is my personal view rather than looking at the borderline cases, you know, first of all we're just talking about the five community powers here.

We're talking about a case where the engagement both as the escalation phase failed. Where the IRP decision is in favor of the community and then where the board is reluctant to implement and honor that decision that we will need this discussion.

And we will put the biggest stick as I mentioned at the tips of the community with the board removal which we're going to have. I think the community will not allow for a board member to stay or the whole board to stay if they exercise the fiduciary duty in a matter or in a fashion that is perceived as being detrimental to the organization.

But I think we, you know, we're losing more and more people in this room. We're going to have...

Jonathan: We also have a time constraint, we're 10 minutes over now.

Thomas Rickert: Let me just advertise a couple of sessions throughout the week. We're going to have an engagement session tomorrow after the opening ceremony where we inform about where we are and we're going to get, solicit some feedback on specific items in order not to have a very, very broad discussion with the community.

Tomorrow afternoon we're going to have a working session for four hours. There are some more working sessions that I'm not going to announce now but we're going to have another public engagement session to inform about the progress that's been made between today and Wednesday.

So please come to those sessions we're going to drill down to more detail during those sessions and there will be a place for those who are not members and participants to speak up, ask questions and exchange thoughts with us.

Jonathan: Thanks, it's a critical topic it's got very high billing throughout the meetings including the sessions that Thomas talked about on Monday. We have to draw the session to a close we've got an equally critical topic and that's to talk to our prospective GNSO council chairs now.

So can we stop the recording here for this session please.

END