

Enhanced Cooperation

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This submission addresses the question: “1. What are the high level characteristics of enhanced cooperation?”

It does so by first identifying some examples of what are not characteristics of enhanced cooperation, and then proposing an operational definition of high level characteristics of enhanced cooperation.

Introduction

It has been difficult to date to agree on what was meant by enhanced cooperation in the Tunis Agenda. In this paper we propose to recognize what was not meant by enhanced cooperation, and we propose a possible for consideration for acceptance as a basis for enhanced cooperation. Specifically:

1. Enhanced cooperation was not meant to give private companies equal rights with respect to states for what regards public policy decisions.
2. The IANA transition process is not a good example of enhanced cooperation.
3. Recognition of sovereign equality, political independence and self-determination of peoples could be high level characteristics of enhanced cooperation.

Before considering those specific matters, we present the relevant agreed documents.

Background

The Tunis Agenda states:

34. A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.

35. We reaffirm that the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect it is recognized that:

- a. **Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.**
- b. **The private sector has had, and should continue to have, an important role in the development of the Internet, both in the technical and economic fields.**

¹ <http://www.apig.ch>

- c. Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role.**
- d. Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.**
- e. International organizations have also had and should continue to have an important role in the development of Internet-related technical standards and relevant policies.**

68. We recognize that all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet. **We also recognize** the need for development of public policy by governments in consultation with all stakeholders.

69. We further recognize the need for enhanced cooperation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues.

As already noted, it has proven difficult over the years to agree on exactly what enhanced cooperation is and how to implement it.

The purpose of the next two sections is to clarify what enhanced cooperation is not. We then propose in section 3 a high level principle that could be a basis for enhanced cooperation.

1. Enhanced cooperation is not equal rights in decisions-making

With respect to Internet governance, some² favor: “a multistakeholder approach that enjoins national governments to participate in Internet governance issues on equal footing with the private sector, civil society, and academia.”

Note the use of the term “equal footing” to apply not just to governments, as it is used in the Tunis Agenda, but to all stakeholders, thus putting non-government actors on an equal level with governments, including for public policy matters.

We submit that this formulation of the multi-stakeholder model is not consistent with the roles and responsibilities outlined in the Tunis Agenda and reaffirmed in UN Resolution A/RES/70/125³, the Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society, as well as in the outputs of the WSIS+10 High Level Event⁴ and Netmundial⁵.

² See for example:

http://www.circleid.com/posts/20160429_internet_governance_in_transition_itu_battleground_rival_visions/

³ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/125

⁴ <http://www.itu.int/net/wsis/implementation/2014/forum/>

⁵ <http://www.netmundial.br/>

Further, if private companies were to have equal rights with respect to governments for decisions relating to public policy matters, then it would be impossible to make certain decisions. In particular, network neutrality regulations could never be imposed, because some private companies are opposed to such regulations.

We submit that a multi-stakeholder approach that places national governments on an equal footing with the private sector is not consistent with the Tunis Agenda and is therefore not an implementation of enhanced cooperation.

2. Enhanced cooperation is not the IANA transition

Regarding specific processes, it has been said⁶ that “the IANA transition process is an outstanding example of ‘enhanced cooperation’, involving all stakeholder groups in an unprecedented way.”

While it is correct that the IANA transition process is unprecedented, we disagree that it is a good example of enhanced cooperation, and we submit that it is not a good example of a multi-stakeholder process. According to a peer-reviewed academic analysis⁷, the IANA transition does not comply with best practices regarding multi-stakeholder processes for a number of reasons, including:

1. Preconditions for the transition were set unilaterally by the US government, without any public consultation.
2. One of those preconditions was that ICANN, the entity providing the IANA function, would itself conduct the process to prepare a recommendation for the transition. Since ICANN was widely held to be insufficiently accountable at the time, it does not seem appropriate to ask it to convene a process that was supposed to be accountable to the ‘global multi-stakeholder community’.
3. The role of governments in ICANN is not consistent with the roles and responsibilities outlined in the Tunis Agenda (and recently reaffirmed), because in ICANN governments have a purely advisory role.
4. Several of the groups that prepared the actual transition proposal were not fully open (in the sense that anybody could participate with equal rights) and were not representative of the global community.
5. The volume of work was such that only dedicated participants could meaningfully influence the work, and the discussions were dominated by stakeholders with a commercial interest in the outcome.
6. The US government, and the US parliament (Congress) influenced the process and conditioned its outcome.
7. The outcome did not reflect the consensus of the ‘global Internet community’, even if it did reflect the view of the large majority of those who participated in the process.

⁶ http://unctad.org/meetings/en/Presentation/ecn162016p06_Kummer-ICANN_en.pdf

⁷ <http://dx.doi.org/10.1080/23738871.2016.1227866>

8. While the proposals were published for public comment, the final version was not published for further public comment. Thus, there was no mechanism for the public to express their views regarding whether or not the final version incorporated their comments.
9. The final outcome does not create any meaningful oversight of ICANN, it increases the dominance of the domain name and addressing industries with respect to the management of Internet names and addresses, and it still allows the US government to exercise influence because the IANA function remains under the jurisdiction of the United States.⁸

In summary, the IANA transition “cannot serve as an example to the world that the multi-stakeholder model can be used to address internet governance issues, even if it is an example of how a particular version of the multi-stakeholder model can be used to address a difficult issue and propose a solution that has broad, but not unanimous, support amongst a certain set of participants that represent a certain set of interests.”⁹

Thus, while it would be appropriate for the Working Group on Enhanced Cooperation to consider the IANA transition process in particular, and ICANN’s processes in general, we are of the view that those processes should be viewed critically and not be taken as models for multi-stakeholder processes to be used in the future.

3. A possible basis for enhanced cooperation

It is not disputed that offline law applies equally online, and that this is the case both for national law and international law. The *jus cogens* (mandatory international law) principles of the UN Charter include sovereign equality and political independence of states¹⁰. The UN Charter also recognizes the principle of self-determination of peoples. We submit that these principles should be characteristics of enhanced cooperation.

Thus we propose the following high level principle as a basis for enhanced cooperation:

“Member States shall have the sovereign right to establish and implement public policy, including international policy, on matters of Internet governance, to the extent that they respect international law, and in particular human rights, and to the extent that they do not impinge on the rights of other states to establish and implement their own national policies and regulations.”

⁸ <http://www.epw.in/journal/2016/42/web-exclusives/internet-governance.html> and <http://cis-india.org/internet-governance/blog/jurisdiction-the-taboo-topic-at-icann>

⁹ <http://dx.doi.org/10.1080/23738871.2016.1227866> . For a contrary view, see: <http://dx.doi.org/10.1080/23738871.2016.1241812>

¹⁰ See in particular Article 2 of the Charter, and Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, 3 Santa Clara J. Int'l L. 72 (2005), p. 24. Available at: <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1011&context=scujil>