

Good Faith: a Characteristic of Enhanced Cooperation

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1. This submission addresses the question: “1. What are the high level characteristics of enhanced cooperation?”
2. We submit that good faith in negotiations is a characteristic of enhanced cooperation, and make a specific recommendation in paragraph 8 at the end of this paper. The recommendation is underlined.
3. The concept of “good faith” is an important element of many, but not all, legal systems, including international law, as explained in a draft academic paper² by Barry O’Neill. However, the concept is not defined precisely and it is not always easy to determine whether a certain act is or is not in “good faith” in the legal sense of the term.
4. We propose to adopt as a working definition the one proposed by O’Neill (emphases in original): “Parties negotiate in good faith if they use **reasonable negotiating strategies** implemented **sincerely** with the **mutual intention** to **negotiate** an agreement, if that agreement is **possible**.”
5. It is sometimes easier to determine that an act is not in good faith.³ Acts that are widely considered to be not in good faith include:
 1. To contradict oneself, referred to legally as *venire contra factum proprium*. According to this principle, “A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct.”⁴
 2. To violate the principle of procedural good faith, which requires that procedural objections be raised as soon as possible, and not at the last minute.
 3. To make inconsistent or contradictory statements in different forums dealing with the same matter.
6. There are undoubtedly many examples of the violation of the principle of good faith in negotiations, both nationally and internationally. We outline here, purely for illustrative purposes, and without criticizing the concerned states, some particular situations that illustrate the violations outlined above. The details of the situations have been omitted in order to maintain anonymity. However, full written evidence can be provided if necessary:
 1. A party proposed to discuss topic X in forum Y, arguing that the topic meets condition Z, despite objections from other parties that the topic did not meet condition Z. After discussion of the topic, forum Y adopted a decision. Party X now opposed that decision, on the grounds that the

¹ <http://www.apig.ch>

² <http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf>

³ See the examples in the cited paper.

⁴ <http://www.trans-lex.org/907000/>

topic did not meet condition Z. Since forum Y acted in reasonable reliance of Party X's submission that the topic met condition Z, Party X should not have contradicted itself by subsequently taking the position that the topic did not meet that condition.

2. In Forum X, party Y proposed that Provision X be included in a decision. Party W opposed that inclusion. After much discussion, the Chairman proposed that the provision in question be removed from the decision. Despite this, Party W continued to oppose the decision. Thus Party W contradicted itself, because there was a reasonable expectation that it would have approved the decision once Provision X was removed.
3. In sub-committee X of Forum Y, decision X was taken. That decision related to administrative and financial issues. Subsequently, in sub-committee Z of Forum Y, which dealt with substantive and not administrative issues, Party W proposed to refer to decision X in a decision that related to substantive matters and not to administrative matters. Thus Party W contradicted itself, because there was a reasonable expectation that decision X, which related to administrative issues, would not be referred to in the context of substantive issues.
4. The rules of Forum X provide that decisions can be made by consensus (meaning lack of formal opposition), or by majority vote. Following difficult discussions, the Chairman announced that decision Y was approved. Several parties objected, but they did not call for a vote (if there had been a vote, decision Y would have been approved by a majority). Consequently, under the rules of Forum X, the decision was approved. Subsequently, some of the parties that had objected declared that they did not accept decisions that were not made by consensus. That is, they refused to abide by the rules of the organization that provide for making decisions by majority vote.
5. Forum X decided that its sub-committee Y should study Issue Z. When some parties proposed to study that issue, other parties objected. The parties that had proposed to study the issue in question had a reasonable reliance that the other parties would not oppose discussions of the matter. Thus, the opposition to considering the issue can be viewed as contradictory behavior.
6. Forum X discussed topic Y. The forum uses a hierarchical structure for discussions, that is, sub-committees within committees. Topic Y was discussed in a sub-sub-committee, then in a sub-committee, then in a committee. Provision Z was agreed at all three levels. Subsequently, prior to formal approval by the plenary of Forum X, a party proposed to delete provision Z. The party in question had participated in the discussions in the sub-sub-committee, the sub-committee, and the committee. Thus the party in question should have raised its objection to provision Z earlier in order to conform to the principle of good faith in procedure.
7. During a discussion in forum X, it was unanimously agreed that statement Y was factually correct. Some parties request that the agreed statement be included in a document, but other parties refuse to include the statement, while admitting that it was factually correct.

7. We submit that such situations are not characteristics of enhanced cooperation, and, as stated above, we submit that negotiation in good faith is a characteristic of enhanced cooperation.

8. We would therefore recommend that it be agreed that a characteristic of enhanced cooperation is that parties use **reasonable negotiating strategies** implemented **sincerely** with the **mutual intention to negotiate** an agreement, if that agreement is **possible**.

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