

Difficult Steps to the Enlargement of the EU (Some Legal Aspects):

The EU's Foreign and Enlargement Policy for the Western Balkans

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I. Introduction:

The enlargement process activities represent an aspect of the EU's Common Foreign and Security Policy (CFSP), though institutionally placed into First Pillar. The Western Balkans provide in this respect for an interesting setting to observe unique aspects of the EU's CFSP with regard to the enlargement prospects of the relevant nations as a tool for stabilisation of the region.

Currently we are awaiting a UN Security Council (UNSC) Resolution regarding the future status of the southern Serbian province Kosovo, presently under the administration of the UN Mission in Kosovo (UNMIK), pursuant to UNSC Resolution 1244 (1999). The long-awaited proposal by the United Nations special envoy Martti Ahtisaari is expected to confirm the international community's expectations of a strong future role of the EU in the implementation of the decision.¹ For its part, the EU already began discussing Kosovo's accession prospects at the Thessaloniki European Council in 2003.

At the same time Serbia has been trying to establish a new government ever since elections on 21 January of this year. In April, Enlargement Commissioner Olli Rehn warned Serbian political leaders of the negative effects of this delay for the further negotiations on a Stabilization and Association Agreement (SAA).² The EU has also made it clear that the reopening of the negotiations is only possible if the new government proves to be pro-European and "provided it shows a clear commitment and takes concrete and effective action for full co-operation with the International Criminal Tribunal for the Former Yugoslavia". The negotiations adjourned last year because of the EU's dissatisfaction with the Serbian government's efforts to locate and transfer war crime suspects (including Mladić) to the Yugoslavia Tribunal.

At the time, the SAA prospects for Bosnia and Herzegovina also do not seem very tangible. During the election campaign a lot of nationalist rhetoric could be heard, and

¹ See UN Security Council, Letter dated 26 March 2007 from the Secretary-General Addressed to the President of the Security Council (S/2007/168) and Addendum: Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add. 1).

² Rehn renews call to Serbia to form government, Enlargement Newsletter, 25 April 2007; Serbia's EU perspective can help it "raise its sights", Enlargement Newsletter, 27 March 2007. Newsletters are available at : http://ec.europa.eu/enlargement/press_corner/newsletter/index_en.htm. If the agreement on the new government is not reached by 14 May, the president has to call new elections.

with the stagnation of the reforms the political climate has become very tense again. Among other shortcomings, the cooperation with the Yugoslav Tribunal has been assessed as insufficient, in particular with regard to the Entity Republika Srpska.³

The opposite can be observed for the youngest state on the Balkan. On 16 March Montenegro initialed its SAA, and EU Member States are expected to sign the agreement already this summer.⁴ At the same time, though, it was reported that this May the country signed an impunity agreement with the USA concerning the International Criminal Court,⁵ thereby acting against one of the EU's important concerns.

Already enjoying the status of candidate countries are Croatia and the Former Yugoslav Republic of Macedonia. The latter was granted the status by the European Council of 17 December 2005, while Croatia was awarded the candidate status on 18 June 2003 at the Thessaloniki summit and is expected to be the next new member of the Union. With regard to Albania, the country signed an SAA with the EU on 12 June 2006.

The foregoing summary of current events indicates the complexity of the situation the EU is dealing with on the Balkans. Currently, it seems that, apart from Croatia and partly Montenegro and Macedonia, the countries are still far away from any meaningful prospects regarding European integration. A detailed overview of all of the intricacies and activities of the European Union's foreign policy in the Western Balkans is beyond the scope of this paper. Instead, the following discussion addresses the main institutional and legal issues with regard to the process of integration for the countries of the Western Balkans. This process, the Stabilization and Association Process (SAP), is a precondition to enlargement procedures. In the light of the current events, the final part addresses the particularities of the role foreseen for the EU in Kosovo.

³ Time for Bosnia and Herzegovina to get serious, says Rehn, Enlargement Newsletter, 27 March 2007.

⁴ Montenegro initials Stabilisation and Association Agreement, Enlargement Newsletter, 27 March 2007.

⁵ Radulović: Sporazum nije tajna, Radio televizija Črne Gore, <http://www.rtcg.cg.yu/index.php?akcija=vijesti&id=23441> (8.5.2007).

II. Stabilization and Association Process (SAP)

1. From a Regional Approach to SAP

It is generally agreed that the EU was not able to achieve an efficient common position and strategy with regard to the Balkan crises in the first half of the 1990s, although the Treaty of Maastricht laid down some duties for Member States with regard to the intergovernmental form of CFSP under Art. 11 TEU.⁶ But whereas within the Community Pillar Member States are bound by the principle of cooperation in Art. 10 EC, the CFSP duties only reach to the general duties of Art. 11(2) TEU to “support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity”, to “work together to enhance and develop their mutual political solidarity” and to “refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.” Therefore it was not until the post-Dayton era that the EU was able to come up with a common position (strategy) towards the countries of former Yugoslavia and, because of geographical closeness and similar needs for a general political and economical reform, also Albania.

Following the Commission’s report of 14 February 1996 on the prospects for the development of regional cooperation for the former Yugoslavia and what the Community should do to foster cooperation,⁷ the Council of General Affairs on 26 February defined the so-called “regional approach” for the five countries for which the EC has not yet adopted directives for negotiations of the association agreements. The Council considered the future agreements with these countries as “a substantial incentive to political stability and as an instrument for economic development and cooperation between them, between those countries and their neighbours, and with the European Union.” The conclusion of such an agreement was conditioned on “the

⁶ R Kocjančič, ‘Stabilisierungs- und Assoziierungsprozess auf dem Gebiet des ehemaligen Jugoslawien’ 66 (2006) ZaöRV 438; F Hoffmeister, ‘Die Beziehungen der Europäischen Union zu den Staaten des Westbalkans’ in Kadelbach (eds.), *Die Außenbeziehungen der Europäischen Union* (2006) 125; C Pippan, ‘The Rocky Road to Europe; The EU’s Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality’ 9 (2004) EFA Rev 221.

⁷ COM(96) 476 final.

willingness of the countries concerned to work towards consolidating peace and to respect human rights, the rights of minorities and democratic principles.”⁸

Concrete political and economic conditions were then defined by the General Affairs Council on 29 April 1997.⁹ They included: the facilitation of the refugees’ return; readmission of a country’s own nationals who were at the time illegally present in the countries of the EU; compliance with the obligations of the peace agreements; cooperation with the ICTY; commitment to democratic reforms; compliance with human and minority rights standards; free and fair elections, non-discrimination of minorities; independent media; initiation of economic reform; proven readiness to enter into good relations with their neighbours; and compatibility of agreements between parties involved in the war with the Dayton peace agreements.

At the time, the political and economic development in the countries was at different levels. In order to maintain a coherent approach for the region but at the same time to differentiate between the countries based on level of development and capability to undertake reform, the EU developed a graduated approach. The level a country’s fulfilment of conditions defined its level of cooperation with the EC. The approach begins with autonomous trade preferences for the lowest level of conditionality compliance, followed by financial and technical support, and reaching as the highest cooperation level the conclusion of an agreement.¹⁰ The approach that EU/EC has taken towards the Western Balkan remains within the general framework of political conditionality in the EU’s development cooperation towards the countries of the South. However, differences pertain to additional specific conditionality with regard to the special problems of each country, here, for instance, cooperation with the ICTY.¹¹ However, the problem with this “regional, graduated approach” was that, while the conditions the countries were to comply with were relatively clear, the

⁸ Bull. EU 1/2-1996, point 1.4.108. For concrete guidelines cf. Commission’s report to the Council and European Parliament on “Common principles for future contractual relations with certain countries in South-Eastern Europe”, 2 October 1996; COM(96) 476 final.

⁹ “Conclusions on the Principle of Conditionality Governing the Development of the European Union’s Relations with Certain Countries of South-Eastern Europe”; Bull. EU 4-1997, point 2.2.1.

¹⁰ For a detailed analysis cf. Phipps (n. 6 above), 222 f.

¹¹ E G Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (2003) 165.

obligations of the EC towards them were vaguely defined and did not provide enough incentive to contribute to the desired reforms in the region.¹²

At the beginning of the EU's regional policy towards the Balkans, the perspective of full integration was not mentioned. It was not until 1999 that the EU showed willingness to consider the full integration of these countries into the Union. The change in the approach was phrased in para. 7 of the preamble of the Common Position concerning the launch of the Stability Pact for South-Eastern Europe, also with the first explicit mentioning of the Copenhagen Criteria.¹³ In the Common Position the EU bound itself to draw "the region closer to the perspective of full integration of these countries into its structures through a new kind of contractual relationship, taking into account the individual situation of each country, with the perspective of European Union membership on the basis of the Treaty of Amsterdam and once the Copenhagen criteria have been met."¹⁴ In the same month the European Commission then proposed a new approach towards the region, the so-called Stabilization and Association Process (SAP)¹⁵ with the prospect of EU integration, which was confirmed one month later by the General Affairs Council.¹⁶ An explicit mention of potential EU membership for all the countries of the Western Balkans was later confirmed at the meeting of the European Council at Santa Maria da Feira on 19 and 20 June 2000,¹⁷ at the Zagreb Summit on 24 November 2000, where the countries of the Western Balkans also committed themselves to the European Perspective,¹⁸ and at the Thessaloniki Summit on 16 June 2003.¹⁹

¹² Hoffmeister (n. 7 above), 128; cp. First Conditionality Report of 3 October 1997; Second Conditionality Report of 30 March 1998; Third Conditionality Report of 19 October 1998; Fourth Conditionality Report of 17 May 1999; Fifth Conditionality Report of 9 February 2000. Reports available at: http://ec.europa.eu/enlargement/key_documents/sap_en.htm.

¹³ Copenhagen European Council, Presidency Conclusions, 21 June 1993; Bull. EU 6-1993, point 13. To join the EU, a new Member State must meet three criteria:

- political: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- economic: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- acceptance of the Community *acquis*: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

For the European Council to decide to open negotiations, the political criterion must be satisfied.

¹⁴ Common Position of 17 May 1999 adopted by the Council on the basis of Article 15 of the Treaty on European Union, concerning a Stability Pact for South-Eastern Europe, (1999/345/CFSP); OJ 1999 L 133/1.

¹⁵ Operational Conclusions (COM (1999) 235 final.) of 26 May 1999.

¹⁶ Conclusions of the General Affairs Council of 21/22 June 1999. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/09008.EN9.htm.

¹⁷ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en0.htm.

¹⁸ http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm.

¹⁹ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/76201.pdf.

2. SAP and the Accession Perspective

The instruments of the SAP are threefold, and, as the previous instruments, they are based on the gradual approach. The countries are offered trade concessions (Autonomous Trade Measures – ATMs), economic and financial assistance and contractual relationships (Stabilisation and Association Agreement).

Trade preferences

Trade preferences represent the lowest level of cooperation within the SAP framework. With a 2000 EU Council regulation, the countries received duty- and quota-free access to the EU market for their industrial products and almost all agricultural products.²⁰ Since these preferences were introduced by a Community regulation and not by a bilateral agreement/treaty, the Community has no obligation towards the countries to uphold the preferences but has the discretion to suspend them at any time if any of the countries regresses in the fulfillment of criteria.²¹ According to the Commission, ATMs have in the period of 2000-2004 contributed to an average annual increase of 8% in the Western Balkans' exports to the EU.²²

Financial Assistance

While until 2006 the EC had not differentiated between candidate and potential candidate countries in providing the economic and financial assistance under the CARDS²³ (the financial instrument developed for the Western Balkans that replaced OBNOVA²⁴), in 2006 a new instrument was introduced to replace not just the Western Balkans' programme but all other pre-accession instruments. The so-called IPA, Instrument for Pre-Accession Assistance came into force on 1 January 2007.²⁵ The regulation based on Art. 181a TEC (Measures for economic, financial and technical cooperation with third countries) upholds the 1997 Council criteria with

²⁰ Council regulation (EC) No. 2007/2000 introducing exceptional trade measures for countries and territories participating in or linked to the Stabilisation and Association Process, OJ 2000 L 240/1. At first, the Serbian part of FYROM was excluded. The extension to the whole country was introduced after the political change in the republic. Council Regulation (EC) No. 2563/2000, OJ 2000 L 295/1. In 2005 they were extended until 2010. Council Regulation (EC) No 1946/2005, OJ 2005 L 312/1

²¹ cf. Pippan (n. 6 above), 231.

²² Communication of the Commission, The Western Balkans on the road to the EU: consolidating stability and raising prosperity, COM(2006) 27 final of 27 January 2006.

²³ Council Regulation (EC) No 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, OJ 2000 L 306/1. Officially this instrument ended in 2006.

²⁴ Regulation (EC) No 1628/96 ('Obnova regulation'): OJ 1996 L 204/1.

²⁵ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ 2006 L 210/82.

regard to the Western Balkans.²⁶ The candidate countries are listed in Annex I of the regulation (Croatia, Turkey, and the Former Yugoslav Republic of Macedonia) while Annex II lists the remaining potential candidate countries (Albania, Bosnia, Montenegro and Serbia, including Kosovo as defined in UNSCR 1244).

The objective was released to improve the efficiency of the EC's External Aid, and its main objective is the "progressive alignment of the beneficiary countries with the standards and policies of the European Union, including where appropriate the *acquis communautaire* with a view to membership."²⁷ The foreseen assistance is divided into five areas: Transition Assistance and Institution Building; Cross-Border Cooperation; Regional Development; Human Resources Development; and Rural Development (Art. 3). Assistance is to be provided within the framework of the European (candidate countries) and Accession (potential candidate countries) Partnerships (Art. 4). It is to be planned in view of the Copenhagen Criteria, the country's progress and either the progress made in the adoption and implementation of the *acquis communautaire* and regional cooperation of the candidate countries or the progress in implementing the stabilisation and association agreements, including regional cooperation, for the potential candidate countries. The first two components, Transition Assistance and Institution Building and Cross-Border Cooperation, are available to all countries whereas Regional Development, Human Resources Development and Rural Development are only available to candidate countries (Art. 8-12). Assistance may be used to finance various projects, including investments, procurement contracts, grants including interest rate subsidies, special loans, loan guarantees and financial assistance, budgetary support, other specific forms of budgetary aid, and the contribution to the capital of international financial organisations or regional development banks, whereas the budgetary support is to be granted only in exceptional cases (Art. 15). The implementation of assistance occurs on the basis of framework implementation agreements (Art. 17). With regard to the subject of this paper, the most interesting part is the clause on suspension of the assistance (Art. 21). In this clause, respect for democratic principles, the rule of law, human rights, minority rights and fundamental freedoms, as well as the Council's conclusions of 29 April 1997, are stressed as the essential elements for the application

²⁶ Council Regulation 1085/2006, Art. 21.

²⁷ Recital 30.

of the regulation and the granting of the assistance. If the Commission determines that the decisive country has failed to respect the essential principles or its progress towards fulfilment of the accession criteria is insufficient, it may propose to the Council that it suspend assistance. The Council may decide to do so by qualified majority.

The regulation does not make reference to the European Agency for Reconstruction seated in Thessaloniki that was later established with the aim of facilitating projects under CARDS. Its mandate is supposed to terminate after all the CARDS projects are completed, prospectively at the end of 2008.²⁸

Stabilisation and Association Agreement (SAA)

The most prominent of the instruments are the Stabilisation and Association Agreements, foreseen in Art. 310 TEC, which covers association agreements. They are comparable to the so-called Europe Agreements that were concluded with candidate countries from Central and Eastern Europe though they differ from them in many respects.²⁹ The SAAs are “mixed agreements”, thereby concluded between the given country and the EC and its Member States. For the agreement to become effective it has to be approved by the Council, which first has to obtain the assent of the European Parliament according to Art. 300 (3) TEC, and ratified by all Member States. For the transition period before the SAA enters into force, the Commission has introduced the practice of concluding Interim Agreements on Trade and Trade-Related Matters with the respective country.

The very designation of the SAA already indicates that the emphasis is not only on the association but even more importantly the stabilisation of the region. By naming these agreements differently from those with Central-European countries the EU (also because of lack of consensus among members on further enlargement) reaffirmed that the SAAs do not necessarily lead to membership, as was the case with the Europe Agreements. Therefore the countries who have signed these agreements are still also regarded only as “potential candidates”, and the agreements as such do not provide for

²⁸ *Interview with Daniel Giuglaris, Head of the Agency's Operational Centre in Belgrade, Politika, 08/01/2007, <http://www.ear.europa.eu/publications/main/EAR-InterviewwithDanielGiuglarisHeadofEARsOperationalCentreinBelgrade-08012007.htm>.*

²⁹ For comparison: D Phinnenmore, ‘Stabilisation and Association Agreements: Europe Agreements for the Western Balkans’, 8 (2003) EFA Rev 77.

a potential membership claim of the non-member country. Moreover the agreements concluded thus far with FYROM³⁰, Croatia³¹ and Albania³² do not include any provision that would indicate how the SAA could contribute to achieving membership.³³ Although in the case of Croatia the country was at the time of signing the SAA already given candidate status, “efforts to achieve membership” is not explicitly listed in Art. 2 among the aims of the association.

As to the structure, this is quite uniform for all the SAAs so far. They are divided into titles, starting with the General Principles, Political Dialogue and Regional Cooperation, continuing with titles relating to market liberties, Approximation of Laws, Law Enforcement, Competition Rules, Justice and Home Affairs, Cooperation Policies, Financial Cooperation and concluding with Institutional, General and Final Provisions. The substantial (market-related) provisions of the agreement are concretised in several Annexes and Protocols.

Art. 2 defines the terms of political conditionality: “Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation” as the basis of the domestic and external policies and the essential elements of the agreement. In the case of Croatia, the association according to the agreement is to be implemented within six years (by 2011). For Macedonia and Albania the timeframe is longer (10 years) and divided into two phases. After the first period of 4 years the Stabilisation and Association Council (SA Council) is supposed to evaluate the progress made and decide whether the progress was sufficient to continue with the second phase that is to lead into full association.

The SA Councils are established by the respective institutional provisions (Art.110 of the SAA with Croatia, Art. 108 SAA with FYROM, Art. 116 SAA with Albania).

³⁰ OJ2004 L 84/13.

³¹ OJ 2005 L 26/3.

³² Not yet published in OJ, available at: <http://www.delalib.ec.europa.eu/en/documents/st08164.en06.pdf>.

³³ Phinnenmore (n. 29 above) 79, 100.

They are to supervise the application and implementation of the agreements and consist of members of the Council, Commission and the respective country's government. The Council is supported by the Stabilisation and Association Committee whose duties are determined by the SA Council; the Committee can also create subcommittees. Furthermore the SAAs also established respective SA Parliamentary Committees as forums of members of the European Parliament and the country's parliament. The SA Councils also have the authority to settle any potential disputes among the contracting parties by means of a binding decision. According to Art. 120 SAA with Croatia, Art. 126 SAA with Albania and Art. 118 SAA with FYROM, the parties have to submit to the SA Council all the relevant information in cases in which they consider that the other party has failed to fulfill its obligations under the SAA, before they take appropriate measures, except in cases of special urgency. Such cases are specified in a Joint Declaration concerning the respective article of each SAA and refers to a material breach of the agreement by one of the two parties. This consists in repudiation of the agreement not sanctioned by the general rules of international law or violation of the essential elements of the agreement set out in Art. 2 of each agreement. Apart from these measures either party may also denounce the SAA by notifying the other Party. The denouncement becomes effective six months after such notification (Art. 124 SAA with Croatia, Art. 122 SAA with FYROM, Art. 130 SAA with Albania).

3. Monitoring the SAP Results and the Reaffirmation of Membership Prospects

Under the "Regional Approach" the conditionality compliance of the Western Balkans countries has been monitored by the so-called "Conditionality Reports," which have been released every 6 months.³⁴ Following the shift towards SAP, progress and compliance assessment has been occurring through the Commission's annual reports on SAP for South Eastern Europe. Reports on individual countries are complemented with a general regional report addressing the whole region.³⁵ In 2005 the reports remained structurally largely the same but were renamed "Progress Reports". The reports contain a general description of the relations between the EU

³⁴ See n. 14 above.

³⁵ Stabilisation and Association Process for South Eastern Europe, First Annual Report, COM(2002)163 final 3.4.2002; Stabilisation and Association Process for South Eastern Europe, Second Annual Report, COM(2003)139 final 26.3.2003; Stabilisation and Association Process for South Eastern Europe, Third Annual Report, COM(2004)202 final 30.03.2004.

and the relevant country, analysis of the political and economical situation and the progress made in these respects, and review of the capacity to implement European standards. In addition, the reports have started to examine the extent to which the country has addressed the European Partnership priorities.

The European Partnership is an instrument endorsed by the Thessaloniki European Council³⁶ as proposed by the Commission in its Communication “The Western Balkans and European Integration”.³⁷ This Communication foresees new measures that aim at stronger support of the countries in their preparation for future integration within the SAP. Apart from European Partnerships, they include strengthened political co-operation in the area of CFSP, enhanced support for institution building, increased promotion of economic development and opening of the Community Programs to the respective countries.³⁸ Nonetheless, European Partnership is the most important of the instruments. According to Council Regulation No 533/2004³⁹ they are established for each country by a Council Decision and are supposed to identify, on a regular basis, priorities and obligations to be fulfilled.⁴⁰ Financial assistance is also to be distributed in accordance with these priorities. After the country has been given candidate status, the same priorities are drawn within the Accession Partnership.

According to the Commission’s Communication from January 2006⁴¹ the SAP as enhanced by the Thessaloniki Agenda “has proved an effective policy framework for EU action in the Western Balkans”. Furthermore the Commission has suggested new concrete measures for the implementation of the Agenda, including assessment of the capacity to integrate specific countries at all key stages in the enlargement process and more systematic use of concrete benchmarks that would provide for concrete criteria for opening and closing negotiations on individual chapters.

³⁶ Cp. Croatia 2005 Progress Report, COM (2005) 561 final. All reports available at: http://ec.europa.eu/enlargement/archives/key_documents/reports_2005_en.htm#strategy.

³⁷ COM (2003) 285 final, 21.5.2003.

³⁸ The Thessaloniki agenda for the Western Balkans, General Affairs & External Relations Council (GAERC), 16 June 2003: Western Balkans - Council Conclusions, Annex A.

³⁹ Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European Partnerships in the framework of the stabilisation and association process, OJ 200 L 306/ 1.

⁴⁰ Cp. Council Decision 2006/55/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC, OJ 2006 L 35/19.

⁴¹ The Western Balkans on the road to the EU: consolidating stability and raising prosperity”, COM(2006) 27 final, 27.1.2006.

The first assessment of capacity to integrate was included in the Commission's Enlargement Strategy Paper of November 2006.⁴² The paper was discussed at the last European Council in December 2006. According to the Presidency Conclusions, "the enlargement strategy based on consolidation, conditionality and communication, combined with EU's capacity to integrate new members, forms the basis for a renewed consensus on the enlargement."⁴³ With regard to the Western Balkans, the European Council has reaffirmed that the Western Balkans' future lies in the EU but depends on each country's individual efforts to comply with the Copenhagen criteria and SAP conditionality.⁴⁴

This final statement, *inter alia*, suggests that the EU continues to pursue the same policy it has had toward the Western Balkans since the "regional approach". The most appropriate understanding of this policy would be to regard it as the policy of political and economic conditionality in exchange for *political* promises of membership but without any real *legal* commitment on the side of the EU ultimately to actualize these prospects.

III. EU Role in the Future of Kosovo

1. The Kosovo Status Settlement Process

Currently Kosovo is administered under Security Council Resolution 1244 which deployed international civil and security presences in Kosovo, under UN auspices. The Resolution was passed after the second Kosovo crisis in 1999 led to NATO air-strikes which in turn led to the removal of Yugoslav forces from the region. The Resolution also established civilian executive powers in the form of United Nations

⁴² Enlargement Strategy and Main Challenges 2006 – 2007, COM(2006) 649, 8.11.2006

⁴³ Presidency Conclusion 4. EU enlargement policy is today based on three basic principles: consolidation of commitments, conditionality and communication.

"Consolidation of the EU enlargement agenda means that the Union is cautious about assuming any new commitments, but honours its existing commitments towards countries already in the enlargement process. The EU has started accession negotiations with Turkey and Croatia and offered a European perspective to the other countries of the Western Balkans. This commitment is a strong incentive for the countries to continue their reforms.

Rigorous but fair conditionality is applied to all candidate and potential candidate countries. Every step forward depends on each country's own progress in meeting the necessary conditions at each stage of the accession process. This approach helps to consolidate reforms and to prepare new Member States to fulfil their obligations upon accession.

For enlargement to be a success, the EU must ensure the support of its citizens. Member States need to take the lead in communicating effectively the enlargement process and in particular the benefits that it offers for EU citizens. Democratic legitimacy remains essential for the EU accession process." COM (2006) 649, p. 5.

⁴⁴ Presidency Conclusion 8.

Interim Administration Mission in Kosovo (UNMIK) and an international military presence, the Kosovo Force (KFOR), a NATO-led international force responsible for establishing and maintaining security in Kosovo. UNMIK comprises four Pillars under UN leadership: (1) Police and Justice and (2) Civil Administration, both of which are under the direct responsibility of the United Nations, (3) Democratisation and Institution-Building under the responsibility of the OSCE, and (4) Economic Reconstruction, Recovery and Development under the responsibility of the EU.

Resolution 1244 also included general principles on a political solution to the Kosovo crisis as adopted by G-8 foreign ministers, but gave almost no guidance on how the settlement of the future status could develop. After almost 3 years of international presence and without any official statement on the status issue in 2002, Michael Steiner, the Special Representative of the Secretary General at that time in Kosovo, proposed the so-called “standard for status” with a set of eight benchmarks as a precondition for even starting the talks on Kosovo’s future status. The standards were published in December 2003 and were supposed to stress close chronological relationship between the two processes.⁴⁵ But after riots in March 2004, it was clear that the “standards for status” approach was not tenable anymore. With support of the Security Council in November 2005, the UN Secretary-General appointed Martti Ahtisaari as the Special Envoy for the future status process of Kosovo (UNOSEK). His mandate was not to finalize the status decision but to bring the parties together, to facilitate and mediate in the direct negotiations and then to report to the Secretary-General and Security Council, which has to formally implement it as a UNSC Resolution.

Formally the talks started in February 2006 and were finished this March. The first draft proposal was presented on 2 February, and the report and comprehensive proposals were then officially delivered to the UN Security Council on 26 March 2007.⁴⁶

⁴⁵ UNMIK, Standards for Kosovo, 10 December 2003, UNMIK/PR/1078. M Alfons, ‘Of Standards and Status. The Role the European Union in kososvo: From UNSCH 1224 to the Future Status Talks’ 54 (2006) Südosteuropa 340.

⁴⁶ For chronological review of the process cf. UNOSEK Website: <http://www.unosek.org/unosek/en/index.html>.

There has been much speculation about the future status of Kosovo.⁴⁷ From the public international law perspective it should be considered highly dubious whether granting Kosovo independence would be in line with the general rules and principles on territorial integrity and the right to self-determination since the right to secession is highly disputed among scholars. This is because the situation of Kosovo differs from the situation of other republics of the former Yugoslavia since only Slovenians, Croats, Serbs, Bosnian Muslims, Montenegrins and Macedonians were recognized as peoples and thereby holders of sovereignty under the Constitution of the Socialist Federal Republic of Yugoslavia whereas the Albanian population was defined solely as a nationality. Independence would also violate the highest maxim in international politics towards Balkans, namely the territorial integrity of the former Yugoslavian republics, a principle which was also repeated in Security Council Resolution 1244. Furthermore, the partition of the northern part of Kosovo (a majority of its population is Serbian) and its reunion with Serbia also seem unacceptable. However, UNOSEK came to the conclusion that with regard to the situation the “only viable option for Kosovo is independence, to be supervised for the initial period by the international community.”⁴⁸

According to the General Principles of the Proposal, Kosovo is to be a multi-ethnic society, governing itself democratically and with full respect for the rule of law, human rights and fundamental freedoms and must promote the peaceful and prosperous existence of all its inhabitants. Kosovo is to have no territorial claims against any country and would not be allowed to seek union with any State or part of any State. The temporary supervision of the international community is foreseen with regard to the effective and efficient implementation of the Settlement.⁴⁹

2. The EU in Kosovo

Currently, apart from the EU pillar of UNMIK, the EU is also represented in Kosovo by the European Agency for Reconstruction, the European Commission Liaison Office, the European Union Monitoring Mission, the European Union Member States’

⁴⁷ Alfons, n. 45 above, A S Neu, ‘Das Kosovo und die Statusfrage. Rechtliche Reflexionen und politische Optionen, 24 (2006) Sicherheit und Frieden, 62; R N Burn, ‘Kosovo: Current and Future Status LVI (2005) No. 1118, 10; V Demaj, *Kosovo/a: Recht auf Unabhängigkeit?* 2003.

⁴⁸ Point 5. Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, Recommendation, UNSC S/2007/168 Add. 1.

⁴⁹ Article 1, General Principles.

diplomatic representatives and the Personal Representative of the EU High Representative for CFSP. With more than 1.1 billion euros in assistance since 1999, the EU is also Kosovo's largest single donor.

According to the Ahtisaari's proposal, in the future the Union's role in Kosovo should become far more complex, since it would replace UNMIK, though with less authority. The responsibility for managing its own affairs and fulfilling its obligations under the Settlement would be given to Kosovo, whereas the supervision would be performed by the International Civilian Representative who would at the same time be the EU Special Representative, appointed by the International Steering Group (ISG)⁵⁰ and the Council of the EU, and would be the final authority regarding interpretation of the civilian aspects of the Settlement.⁵¹ The Representative would be supported by the International Civilian Office, which would be smaller than the present UNMIK with a substantially different role, since it would not have the executive mandate to administer Kosovo. But it would have the authority to annul all decisions it considers inconsistent with the Settlement.⁵² Its mandate would last until the ISG determines that Kosovo has implemented the Settlement.⁵³

The EU Special Representative would direct the European Security and Defence Policy Mission (ESDP) that would assist Kosovo in the development of effective, fair and representative rule-of-law of institutions with limited executive functions.⁵⁴ As for the international military presence, KFOR would remain in Kosovo until Kosovo's own institutions were capable of providing security without assistance. For an initial period, an international military presence would also supervise, monitor and exercise executive authority over a new Kosovo Security Force.⁵⁵ The EU Special Representative would replace UNMIK 120 days after the Settlement entered into force.⁵⁶

As for the Kosovo's prospects for EU membership, the European Commission in April 2005 adopted a Communication on "A European Future for Kosovo" in which it

⁵⁰ France, Germany, Italy, Russia, UK, USA, EU, European Commission, NATO.

⁵¹ Article 12.

⁵² Annex IX, Article 2.

⁵³ Art. 12.6.

⁵⁴ Annex X, Art. 1.

⁵⁵ Annex XI, Art. 1, 2.

⁵⁶ Art. 15.1.

repeated that according to the Thessaloniki Declaration the European Perspective is also open for Kosovo.⁵⁷ So far, two Progress Reports have been released, the latter in November of last year.⁵⁸ In January 2006, the Council also initiated European Partnership with Serbia and Montenegro including Kosovo as defined by UN Security Council Resolution 1244.⁵⁹

In the future the EU will therefore have a unique double position in Kosovo. On the one hand it will supervise Kosovo's implementation of the Settlement according to the UN Security Council Resolution, including the authority to annul inconsistent decisions which will allow it to essentially form Kosovo's future political and economic development. On the other hand, the European Commission will monitor and evaluate Kosovo's progress within the SAP framework and thus partly also evaluate and assess the EU's own achievements (and failures) in Kosovo. The question that arises out of this complex situation is which interests will prevail while the EU conducts both sets of activities. If Kosovo does not benefit sufficiently within the SAP framework, is it possible that the EU would nonetheless exaggerate the success, so as to downplay its failures or the incapacity of its Civilian Representative? Or, on the other hand, is it possible that the EU Civilian Representative would even use the SAP to put pressure on Kosovar authorities in order to strengthen its position and authority beyond what may be foreseen in future Security Council Resolutions? Is it possible that Kosovo could become some sort of a laboratory for the EU's democracy model?

IV. The Reality of the European Future for the Western Balkans

To answer the question of the actual chances for full membership for the countries of the Western Balkans, the answer still depends not only on the conditionality compliance of the respective countries. The countries have been promised a European perspective in many political statements, but after analyzing the existing legal instruments with regard to the accession of the Western Balkans, it must be concluded that the countries do not have any real claims against the EU with regard to their membership. But the reality of full accession is similar to the threat of sanctions that

⁵⁷ COM(2005) 156 final, April 20 2005.

⁵⁸ Kosovo (under UNSCR 1244) 2006 Progress Report, COM (2006) 649 final, 08. November 2006.

⁵⁹ Council Decision 2006/56/EC of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC, OJ 2006 L 35/32.

the EU can apply in cases of noncompliance. Both provide for a rather effective tool for political and economic reforms even if they are not realized. For now. In the future, though, the EU cannot afford to break its membership promises, if countries have fulfilled all the conditions. Doing so could even again destabilize the whole region. In addition, the Union would also need to carry the responsibility for unfulfilled promises.