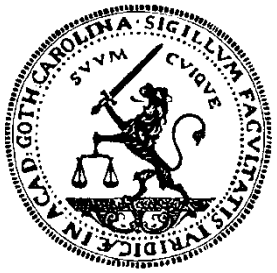

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The EU treaty-making competence in relation to Kosovo

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Contents

Summary

The Stabilisation and Association Process is the pre-accession policy of the EU which applies to its relations with the Western Balkans. The EU considers that the future of the region is within the Union, and seven countries have been given the prospect of full accession, i.e. EU membership. The most prominent feature in this regard is the establishment of contractual relations in the form of a Stabilisation and Association Agreement. So far, the EU and its Member States have on their part concluded a SAA with each one of the Western Balkan states within the SAP, except in the case of Kosovo.

In the light of these developments, this thesis seeks to explore whether the lack of contractual relations with Kosovo corresponds to a lack of competence on the EU´s part. In addition, it is also the aim to see what practical implications this brings to EU-Kosovo relations.

With the guidance of foundational principles of international institutional law as well as EU law and practice, the conclusion is that there is a legal basis for the establishment of a SAA with Kosovo. Despite the fact that the formal requirements for such an arrangement are fulfilled, the execution of it is affected by factors beyond its legal scope.

Sammanfattning

Stabiliserings- och associeringsprocessen är EU:s politiska ramverk för länderna på västra Balkan. EU anser att regionen har en framtid inom unionen och sju av länderna i regionen anses vara potentiella kandidater för EU-medlemskap. Det mest centrala instrumentet är ett så kallat associerings- och stabiliseringsavtal, vilket EU och dess medlemsstater har upprättat med samtliga av de berörda länderna på västra Balkan, utom i fallet med Kosovo.

Sett i ljuset av avsaknaden av kontraktsmässiga relationer med Kosovo i formen av ett stabiliserings- och associeringsavtal, avser förevarande uppsats att undersöka huruvida detta är ett resultat av att EU inte är behörig. Syftet är även att se vilka effekter detta får för EU i allmänhet och i dess relationer med Kosovo.

Genom ledning av grundläggande principer i internationell institutionell rätt samt av relevant EU-rätt går det att konstatera att det finns rättslig grund för upprättandet av ett stabiliserings- och associeringsavtal med Kosovo. Dock skulle ett praktiskt genomförande av en sådan handling till viss del motarbetas av faktorer som inte i direkt mening går att hänföra till avtalet som sådant.

Abbreviations

CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
ECJ	European Court of Justice
EULEX	European Union Rule of Law Mission in Kosovo
ICJ	International Court of Justice
IPA	Instrument for Pre-accession Assistance
LNTS	League of Nations Treaty Series
OJ	Official Journal of the European Union
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNSCR 1244	United Nations Security Council resolution 1244
UNTS	United Nations Treaty Series
VCLT	1969 Vienna Convention on the Law of Treaties
VCLTIO	1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

1 Introduction

The EU considers that the future of the Western Balkan region is within the Union, and has adapted an extensive pre-accession policy in order to support this integration process. The so-called Stabilisation and Association Process (SAP) is designed to support the membership aspiring states to take on the reforms necessary in their adjustment of domestic law in accordance with the *acquis communautaire*. The most prominent instrument on this regard is the conclusion of an Association and Stabilisation Agreement (SAA).

The establishment of contractual relations in the form of international agreements has been a vital way for subjects of international law, such as states and international organizations to handle their legal relations. The EU is aware of the fact that:

> To achieve the ultimate goal of the Stabilisation and Association process, which is integration into the European Union, the EU has to establish contractual relations with its partners.[1]

Stabilisation and Association Agreements have been concluded between the EU and its Member States on the one part, and each one of the Western Balkan states on the other part, except in the case of Kosovo. This is particularly peculiar, considering the fact that the EU´s relations with Kosovo tracks to the end of the Kosovo war in 1999. The EU has since then been extensively committed to the reconstruction of the political and socio-economical structures in Kosovo.

1.1 Purpose

The overall purpose of this thesis is to examine if the reason for the lack of contractual relations between the EU and Kosovo is a matter of competence deficit, and what effects this brings in terms of future EU-Kosovo relations.

In order to fulfil this purpose, the following questions have to be taken into consideration:

- What are the international legal regulations on contractual relations between an international organization and other subjects of international law?
- What is the legal foundation for the competence of the EU to conclude international agreements?

[1] Commission Communication on a European Future for Kosovo, COM(2005) 156 final, 20 April 2005, p. 4.

- How does the current EU-Kosovo relation occur in terms of contractual relations? Does the EU have the competence to conclude international agreements with Kosovo?
- What are the effects of the current EU approach towards Kosovo concerning the establishment of contractual relations? Is it a sustainable approach in a long-term perspective?

1.2 Methodology and materials

The core of the methodology applied in this thesis is the traditional legal (dogmatic) method, which is based on interpretation and systematization of applicable law, i.e. legislation, case law and doctrine, relevant for a well-defined legal question. It is primarily sources of EU law and international law that will be examined.

The theoretical legal take-off on the matter concerned is the capacities of international organizations, and then particularly the capacity to conclude international agreements. The discipline of international institutional law, i.e. the legal study of international organizations, tracks back to the early 1960´s when the first specialized textbooks were published.[2] The notion of international organizations as subjects of international law emerged as a specialised field of study within public international law and was nurtured by the contemporary drafting process of the Vienna Convention on the Law of Treaties. However, and despite holding a research tradition reaching back almost a handful of decades, the discipline has been criticized for lacking "a convincing theoretical framework"[3] since some fundamental issues remain unsolved. For the purpose of this thesis and the disciplinary controversies left alone, Jan Klabber´s "An Introduction to International Institutional Law" (2009), several articles published in *International Organizations Law Review* - a leading journal on international institutional law - and precedential case law has been used in order to outline the foundational legal aspects of international organizations and their capacities.

The scope of published research on EU treaty-making competence as well as on EU-Kosovo relations is extensive. However, the situation is the exact opposite when it comes to combining these two fields since the research available is extremely limited. This may seem a bit remarkable, especially since the question of contractual relations between the EU and Kosovo is one of great immediate interest due to the process of integrating the Western

[2] Among others, Derek Bowett´s *Law of International Institutions* (1964), which has later been revised and rewritten in collaboration with Phillippe Sands and Pierre Klein; *Bowett´s Law of International Institutions*. Latest edition (6th) published in 2009.
[3] Klabbers, Jan, 2009, *An Introduction to International Institutional Law*, p. 3. For further information on the author´s (critical) approach on the discipline; Klabbers, Jan, 2008, "The Paradox of International Institutional Law", *International Organizations Law Review*, Vol. 5 No. 1 (2008), pp. 151-173.

Balkans into the Union, on the one hand, and Kosovo´s declaration of independence in 2008, on the other.

Nevertheless, sources of primary EU law has been the founding Treaties as well as secondary sources, such as regulations, decisions, opinions, recommendations, communications and agreements have been of great value in order to outline the legal framework on Union treaty-making competence as well as the legal aspects of its Kosovo relations.

However, a traditional legal method does not provide a full answer to the research question. A law and politics perspective must be added. The contractual relationship between two legal subjects in international legal terms is an important aspect of the state-to-state interaction in international relations. EU-Kosovo relations, including the Kosovo status issue, are as much an issue of political policy nature as it is of legal nature. Even if this thesis intends to focus on the legal aspects, it would be unrealistic to look upon the fields of law versus politics as isolated from each other. Therefore, attention will be paid to political and policy views of both the EU and individual Member States when considered necessary.

Further, and in order to bring substance to the perspective of what effects the EU approach concerning contractual relations with Kosovo might have both policy documents and doctrine will be looked into. Regarding the latter, the aim has been to give a representative, even though not exhaustive, view on the opinions of the different scholars dominating the discussion on the subject in question.

All data is given as of 31 January 2012.

1.3 Delimitations

Since the end of the Kosovo war in 1999, EU has been engaged in the re-construction of Kosovo in different configurations and with different degrees of engagement. Adding the lack of a unified EU position on the Kosovo status and all what that brings, it is fair to say that EU-Kosovo relations are both extensive and complex in scope. Therefore, and due to the limited scope of this thesis some delimitations have to be set.

First, there will be no deepening discussion on the concept of international organizations. The law of international organizations is an extremely extensive and constantly growing research discipline, and it is only within the scope of this thesis to take into consideration some of the fundamental and most substantial aspects of it, i.e. the legal position of international organizations and thereto related competences according to international law.[4]

[4] See section 1.5 for applicable definition of an international organization.

Second, when talking about EU competence, distinction is often made between internal and external competences. The reason is that there is both an internal dimension as well as an external one to the EU cooperation model, due to that the initial purpose as the establishment of an internal market, and that EU over time has developed into an important global actor. This thesis will primarily focus on the area of external competences.

Third, it is beyond the scope of this thesis to deal with EU treaty-making competence in relation to the Common Foreign and Security Policy (CFSP).

Finally, it is not the intention to deal with the extensive discussion on whether Kosovo constitutes a state according to international law[5] or not. Since the primary focus for this thesis is EU´s relations with Kosovo, it is only the EU position on Kosovo that will be taken into consideration. As for now, 22 out of 27 Member States have recognized the statehood of Kosovo.

1.4 Disposition

The first segment of this thesis includes an examination of the legal framework for the competence of the EU to conclude international agreements based on international law and EU law. The second segment includes an explanation on the general approach adapted by the EU in its Kosovo relations within the SAP. The intention has also been to provide a comprehensive, but yet balanced background on EU-Kosovo relations. The final part, and with the aim of putting flesh to the bone of theory, includes a discussion based on the purpose of the thesis and some concluding remarks.

1.5 Terminology

The conceptual framework of this thesis is in some aspects complex since it contains a number of legal concepts that might give rise to diversified associations depending on in what context they occur. Therefore, the ones of most significance will be expounded in this section.

All throughout history sovereign states has been the main actors in international relations. However, in modern times *international organizations* has occurred on a larger scale and then often on the basis of specific means and ends. It is for this reason that there is no comprehensive blueprint for what actually defines an international organization. Though, and for the sake of this thesis, Jan Klabber's theory on what basic

[5] According to Article 1 of the Montevideo Convention on Rights and Duties of States (1933) the *objective* criteria for statehood in international law is the existence of (1) a permanent population, (2) a defined territory and (3) a government, and the *subjective* criteria of (4) having the capacity to enter into relations with other states, i.e. recognition from other states.

characteristics need to be established, in order to even talk in terms of an international organization, will be applied. According to this definition an organization needs to be (1) a subject under international law, (2) established by states, (3) based on a treaty, i.e. a constituent document, and (4) possessing a will distinguishable from its member states.[6] All these characteristics are possessed by the EU,[7] and it will therefore be treated as an international organization within the scope of this thesis.

Further, a *treaty* is an essential part of the every-day-action in international relations, or as expressed in the preamble of the 1969 Vienna Convention on the Law of Treaties[8] (VCLT); "the ever increasing importance of treaties as a source of international law and as means of developing peaceful cooperation among nations". The VCLT establishes a number of criteria upon whose fulfillment the existence of a treaty depends. A treaty is defined as "[1] an international agreement [2] concluded between states [3] in written form and [4] governed under international law, [5] whether embodied in a single instrument or in two or more related instrument or whatever its particular designation."[9] Do notice that the VCLT only applies to treaties concluded between states,[10] but a similar wording is used in the definition applied in the parallel Convention of 1986 on treaties concluded by international organizations.[11] However, the wording of the second criterion in the VCLT definition is modified. Instead, the corresponding criterion in the Convention of 1986[12] reads as follows; "between one or more States or more international organizations; or between international organizations". Even though VCLTIO has not yet entered into force[13], its treaty definition, which is considered to be a codification of customary law,[14] will be applied for the sake of this thesis.

Further, distinction can be made between treaties *establishing* an international organization (constituent documents) and treaties *concluded by* an international organization (international agreements).[15] The difference is to be found in the function of each treaty as well as the legal relations resulting from each of them. The former is a treaty upon which an international organization is founded while the latter is concluded on the

[6] Klabbers, 2009, pp. 6-12.
[7] For criterion (1) see Article 47 TEU, (2) Article 1 para. 1 TEU, (3) Article 1 para. 3 TEU, and (4) *inter alia*, Article 288 TFEU.
[8] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS*, 331.
[9] Article 2 VCLT.
[10] Article 1 VCLT.
[11] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO)
[12] Article 2 VCLTIO.
[13] VCLTIO has been open for signature since 21 March 1986 and its entry into force is dependent upon the ratification of, in total, 35 states according to Article 85 of the Convention.
[14] See Sybesma-Knol, Neri, 1985,"The New Law of Treaties: The Codification of the Law of Treaties between States and International Organizations or between Two or More International Organizations", *Georgia Journal of International and Comparative Law,* Vol. 15 No. 3, pp. 425-452:436-437.
[15] Klabbers, 2009, pp. 74-75.

behalf of an international organization. At the same time, the capacity to conclude international agreements derives from the constituent document due to the conferral of powers by the Member States. However, both types fall under the treaty definition of VCLTIO, which in turn clearly emphasizes that the same rules apply to both types of treaties.[16]

All references to *treaty-making power* or otherwise similar refer to the capacity of an international organization to participate in the formal process of becoming a party to a treaty.

Most of the references to *Kosovo* in this thesis primarily relates to its international legal status, which, since the 2008 independence declaration, is dominated by two different approaches. First, Kosovo might be defined in accordance with UNSCR 1244, which authorized the establishment of "an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia[17]".[18] Second, and as a result of the unilateral declaration of independence in 2008, Kosovo is defined as "an independent, sovereign, democratic, unique and indivisible state".[19] As a diametrical result, Kosovo is, according to the first approach, still a part of Serbia, though under temporary supervision of the UN, while under the second approach, Kosovo is defined as an independent and sovereign state. As the focus of this thesis is the EU´s relations with Kosovo, only a definition based on the EU´s Kosovo approach will be taken into consideration. All Member States agree upon that UNSCR 1244 is still in force, and will so be until the UN Security Council decides otherwise. At the same time, some Member States, 22 out of 27, have recognized the statehood of Kosovo according to the Kosovo constitution. Therefore, the EU has not proclaimed an official position on the Kosovo status. In theory, the Union applies a definition which is partly based on UNSCR 1244 and partly on the Constitution of the Republic of Kosovo. This approach might in terms of clarity occur as both confusing and imprecise, but at the same time, it is inevitable that this is the reality in which the EU operates in its relations with Kosovo.

[16] Article 5 VCLTIO.
[17] Serbia became the legal successor of the Federal Republic of Yugoslavia in 2006.
[18] UNSCR 1244 para. 10.
[19] Article 1(1) of the Constitution of the Republic of Kosovo.

2 The conclusion of international agreements by the EU

2.1 Legal personality

Legal personality is considered the most significant fundamental element of an international organization since it enables that organization to enter into legal relations with other subjects of international law and to create consequent rights and duties based on that capacity. In other words, the legal personality is the foundation upon all powers of an international organization is based.[20]

The concept of legal personality of international organizations was recognized by the International Court of Justice (ICJ) in its advisory opinion of 1949 regarding "*Reparation for Injuries Suffered in the Service of the United Nations"*[21] (the *Reparation* case), which is one of the leading cases on this matter. The ruling primarily focused on the capacity for the United Nations (UN) to bring an international claim against a third State for injuries suffered by UN agents. However, in order to bring an answer to the question of capacity the Court first had to establish "whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?"[22]. The Court identified a direct link between the rights possessed by an international organization and their approval by the Member States. In essence, the legal personality has to be determined based on the will of its founders, which in turn makes the constituent document of an organization the primary legal source.[23]

Regarding the EU, Article 47 TEU clearly states that "[t]he Union shall have legal personality." The expressed legal personality of the EU was one of the major changes brought by the Lisbon reform. Thereby, it put an end to the former three-pillar structure, in which only the first pillar, the Community had explicit legal personality. However, it is a well-established fact that also the EU had implied legal personality prior to the entering into force of the Lisbon Treaty, and engaged in treaty conclusion.[24]

[20] Klabbers, 2009, pp. 38-39. See also Sands and Klein, 2009, p. 473.
[21] ICJ Advisory Opinion of 11 April 1949 regarding *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 174.
[22] *Reparation* case, p. 178.
[23] *Reparation* case, p. 180.
[24] Piris, Jean-Claude, 2010, *The Lisbon Treaty. A Legal and Political Analysis*, pp. 86-87.

2.2 EU external competence

Historically, the co-operation within the Union started with primary focus on internal law-making and domestic law harmonization, but the EU has over time turned into an important global actor with great influence on international law-making. Therefore, the traditional internal competences are often separated from those related to the Union´s external relations. Internal competences relates to policies dealing with Member State-to-Member State matters, while external competences relates to the Union´s relations with third states or other international organizations. However, there is no sharp dividing line between the two since some internal competences, i.e. immigration[25], asylum[26] and environment[27] matters, have an indirect external connection in the sense that they enable for conclusion of international agreements.[28]

In its external relations, the EU has a set of different types of policies and actions at its disposal, provided for in the TFEU, which includes the Common Commercial Policy (CCP)[29], policies for development cooperation and humanitarian aid[30], relations with other international organizations[31], restrictive measures[32] and associations with overseas countries and territories[33]. Further, two external policies are provided for in the TEU, namely the Common Foreign and Security Policy (CFSP) and the neighborhood policy. The CFSP is defined as covering "all areas of foreign policy and all questions relating to the Union´s security"[34] and is governed by a particular set of procedures and institutions[35]. Compared to other fields of Union external relations, the CFSP is more of an intergovernmental nature.[36] The neighborhood policy provides for closer relations between the EU and neighboring third states through agreements on either specific areas or wider commitments.[37] For instance, the preparing arrangements for the accession of a third state to the EU, such as the SAP, is a part of this policy.[38]

[25] Among others, Article 78(2)(g) TFEU provides for readmission agreements with third states.
[26] Article 79(3) TFEU.
[27] Article 191(4) TFEU.
[28] Chalmers, Damian; Davies, Gareth and Monti, Giorgio, 2010, *European Union* Law, p. 639.
[29] Article 206 TFEU.
[30] Articles 208-214 TFEU.
[31] Article 220 TFEU.
[32] Article 215 TFEU.
[33] Article 198 TFEU.
[34] Article 24(1) TEU.
[35] See Article 24(1) TEU.
[36] Eeckhout, Piet, 2011, *EU External Relations Law,* pp. 166-167.
[37] Article 8 TEU.
[38] Chalmers, Davies, and Monti, 2010, pp. 639-640.

2.3 Main features of EU treaty-making competence

The ever-increasing presence of international organizations in modern international relations has made that certain competences have traditionally been identified as possessed by most organizations. The competence to enter into contractual relations is one of them.[39] However, that is not to say that an organization may conclude any type of international agreements. The scope of an act of treaty-making is determined based on the overall competence conferred upon the organization by its Member States.[40] This also applies to the EU, where the leading principle in deciding the limitation of Union competence is the principle of conferral, which states that the EU has to "act only within the limits of its competences conferred upon it by the Member States".[41] As a result, non-conferred competences remain with the Member States.[42] The EU is incapable of extending its own competences since it is required that every Union act is legally anchored in the Treaties.[43]

In order to clarify the division of powers between the EU and its Member States, Article 2 TFEU lists and defines three categories of competence. First, exclusive competence states the sole right for the EU to legislate and adopt legally binding acts, including the conclusion of international agreements[44], and the Member States are allowed to do the same when given authorization by the EU or when implementing Union acts. Second, shared competence implies the mutual right for the EU and its Member States to legislate and adopt legally binding acts, but in case the EU has already exercised its competence, the Member States may only exercise the same right to the extent that the EU has not. Third, supporting competence allows the EU to support, coordinate and supplement Member State actions, but the EU cannot adopt harmonized legislation.[45] It is listed in the Treaties what type of competence applies to what type of policy area.[46] The lists on exclusive and supporting competences are exhaustive.[47] Additionally, the EU has to, in accordance with the principle of subsidiarity, act on the basis of its non-exclusive competences only when an EU action is considered being more effective than action taken at national, regional or local level.

[39] Brölmann also identifies "[the] capacity to bring claim in case of breach of international law […] [and] the enjoyment of privileges and immunities from national jurisdictions" as other general legal powers of international organizations. See *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties*, 2007, pp. 134-135.
[40] *Reparation* case, p. 178. See also Article 6 VCLTIO.
[41] Article 5(1) TEU.
[42] Article 4(1) TEU.
[43] See also Article 1(1) TFEU.
[44] Eeckhout, 2011, p. 121.
[45] See also Chalmers, Davies and Monti, 2010, pp. 206-210.
[46] Articles 3, 4 and 6 TFEU.
[47] Piris, 2010, p. 77.

The Union action also has to be proportionate in relation to what is considered as necessary in order to achieve the objective in question.[48]

In order to determine the legal nature and scope of any power of an international organization, such as treaty-making, distinction is often made between expressed powers and implied powers.

Expressed powers relates to the literal wording of the rules of the organization,[49] which, according to Article 2 (1) (j) VCLTIO, are defined as "in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization." Implied powers relates to situations where a constituent document lacks explicit provisions on a certain power, but where the power in question can be granted the organization based on implication.[50] As recognized in the *Reparation* case, the powers of an organization "depends upon its purposes and functions as [...] implied in its constituent documents and developed in practice."[51] In essence, an organization can be considered to possess a certain power if its existence is necessary for the functioning of the organization, and in order for it to perform in accordance with the objectives set out in the constituent document.[52]

The competence to conclude international agreements is at the very core of EU external actions, and the choice of a proper legal basis might be the most important part of EU law, which provides a wide range of legal bases for Union´s competence to conclude international agreements - both expressed and implied. Whether the treaty-making competence is exclusive or non-exclusive depends upon what field of policy is covered by the international agreement in question. This particularly affects the choice of negotiation and conclusion procedure.[53] The main difference relates to whether the Council will act on the basis of unanimity or a qualified majority vote.

Article 216(1) TFEU is the general legal basis on treaty-making competence by stating that it "may conclude an agreement with one or more third countries or international organisations where the Treaties so provide". The second part of the same provision provides the Union with implied treaty-making power in cases where treaty conclusion is "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope." This is a codification of some of the foundational principles of the doctrine of implied powers, which were developed by the ECJ in its case law prior to the entering into force of the Lisbon Treaty.[54]

[48] Article 5(3-4) TEU.
[49] Article 6 VCLTIO.
[50] Klabbers, 2009, pp. 58-59.
[51] *Reparation* case, p. 182.
[52] Sands and Klein, 2009, p. 477.
[53] See Article 218 TFEU.
[54] See Eeckhout, 2011, pp. 70-119 for further reading on the development of the doctrine of implied powers in the ECJ case law.

2.4 Stabilisation and Association Agreement

The Stabilisation and Association Agreement instrument used within the SAP is a so-called association agreement, which has turned out to be one of the most prominent features of EU external actions. Article 217 TFEU provides the legal basis for its conclusion[55] by stating that:

> The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Even though association agreements are frequently used, the founding Treaties do not provide any further information of the association concept as such. Though, in *Demirel v Stadt Schwäbisch Gmünd*[56] (the *Demirel* case), the ECJ ruled on the scope of an association agreement with Turkey by emphasising that it created "special privileged links with a non-member country, which must, at least to a certain extent, take part in the Community system".[57] Thereby, the concept of association seems to be characterized by (1) reciprocal rights and obligations, (2) common actions and special procedures, (3) privileged links between the EU and the associated country and (4) participation by the associated country in the EU system.

The reference to participation in the EU system implies that most association agreements contain integration objectives. Even though, there is a fine line between association agreements containing extensive integration objectives, and those providing the prospect of full integration through EU accession, these are two different types of agreements. In other words, pre-accession agreements such as a SAA are often association agreements, but not all association agreements are pre-accession agreements.

In terms of treaty-making competence, a SAA is particularly interesting since it deals with issues, which is partly within Union competence, and partly within the competence of the Member States.[58] Thereby, a SAA is a mixed agreement, which, as the name indicates, is an international agreement concluded and signed by the EU *and* its Member States on the one part, and by an third state or international organization on the other.[59] The mixed nature of a SAA is primarily dependent upon provisions referring to "political dialogue" with the aim of developing closer political relations between the parties.[60] In a pre-accession context such as the SAP,

[55] Article 217 TFEU (ex. Article 300 TEC) has been the legal basis for the conclusion of all SAA within the SAP so far.
[56] Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719.
[57] Ibid. para. 9.
[58] Klabbers, 2009, p. 263.
[59] Chalmers, Davies, and Monti, 2010, p. 648.
[60] Maresceau, Marc, 2010, "A Typology of Mixed Agreements" in Hillion, Christophe and Koutrakos, Panos (ed.), 2010, *Mixed Agreements Revisited. The EU and its Member States in the World*, pp. 16-18. See also Eeckhout, 2011, pp. 126-127.

it is of the same political importance for the Member States, as it is for the EU, to show support for the associated country and its strive towards full EU integration. Thereby, a mixed pre-accession agreement becomes a way for the Member States to show this commitment since they become contracting parties alongside with the Union.[61] In this sense, "mixity" becomes as much a political phenomenon as it is a legal one.

Maresceau notices that there is a tendency in EU external relations to recur to a mixed treaty-making procedure even in cases of exclusive competence. The main disadvantage of mixity is that it requires a time-consuming procedure of ratification since each Member State need to do so in accordance with their domestic and constitutional legal framework. However, in situations where efficacious action is required mixity can easily be overcome in favour of exclusivity by applying a broad interpretation of the treaty-making competence based on implied powers. It is also possible, even though not frequently used, to separate the provisions on political dialogue from the agreement as a way to replace a mixed procedure with exclusivity.[62]

2.5 With whom?

As mentioned earlier, Article 216(1) TFEU provides the EU with competence to conclude international agreements with "one or more third countries".[63] An explicit definition of the term "third country" is nowhere to be found in the Treaties. However, the legal distinction made between citizens of the EU and of third countries might give some guidance. A Union citizen is defined as a "person holding the nationality of a Member State"[64], and enjoys the rights of movement, as defined in Article 2(5) of the Schengen Borders Code[65]. Thereby, based on the reversed definition in Article 2(6), a third-country national is a non-Union citizen and does not enjoy the right of movement laid down in Article 2(5).

Further, based on Union practice the EU has concluded international agreements within a wide range of areas and with a wide range of states and other international organizations.[66] Taken into account the special status of some international legal subjects, including Kosovo, the Union has also

[61] Hoffmeister, Frank, 2010, "Course or Blessing? Mixed Agreements in Recent Practice of the European Union and its Member States" in Hillion and Koutrakos (ed), 2010, p. 251.
[62] Maresceau, 2010 in Hillion and Koutrakos, p. 20; 29. See also, Eeckhout, 2011, p. 219.
[63] A similar wording is used in Article 217 TFEU, which constitutes the most probable legal basis for a future SAA with Kosovo.
[64] Article 20(1) TFEU.
[65] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.
[66] *The European Commission Treaties Office Database* provides further information on all bilateral and multilateral treaties and agreements concluded by the European Union and its predecessors.

entered into agreements with non-state actors, i.e. subjects of international law which are not recognized as sovereign states. For instance, there is a readmission agreement[67] and a cooperation agreement on customs matters[68] with Hong Kong; a bilateral readmission agreement[69] and a trade agreement[70] with Macao and a trade agreement[71] with the Palestine Liberation Organisation (PLO).

[67] Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation signed in Brussels on 27 November 2002 and entered into force on 1 March 2004.

[68] Agreement between the European Community and Hong Kong, China on cooperation and mutual administrative assistance in customs matters, signed in Hong Kong on 13 May 1999 and entered into force on 1 June 1999.

[69] Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, signed in Luxembourg on 13 October 2003 and entered into force on 1 June 2004.

[70] Agreement for trade and cooperation between the European Economic Community and Macao, signed in Luxembourg on 15 June 1992 and entered into force on 1 January 1993.

[71] Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, signed in Brussels on 24 February 1997 and entered into force on 1 July 1997.

3 The EU-Kosovo relations

3.1 The international engagement in Kosovo through an EU perspective

Kosovo is the story of a territory torn between external entities of power, and with little experience in self-determination. Under Tito´s lead, Kosovo was recaptured as a part of Yugoslavia in 1944. Kosovo became an autonomous province of Serbia from 1969 until 1989, when Slobodan Milosevic put an end to the self-rule. Internal tensions between Albanian guerrilla movements and Serbian troupes escalated into the Kosovo war, dominated by atrocities against the Albanian majority. In 1999 a NATO bombing campaign was initiated, which managed to drive Serbian troupes out of Kosovo.[72]

The end of the Kosovo war in 1999 marks the beginning of an era of grand investments made by the international community in institution building and stability maintenance in Kosovo. The EU has ever since been engaged in the reconstruction process in different configurations and with different degrees of engagement.

It all took off when the UN Security Council resolution 1244 (UNSCR 1244) was adopted on 10 June 1999, which authorized the establishment of an international civil presence in Kosovo. Kosovo was put under the authority of the United Nations Interim Administration Mission in Kosovo (UNMIK), headed by the Special Representative of the Secretary-General (SRSG).

Under the terms of UNSCR 1244, UNMIK has been given an extensive mandate, which remains the main basis for international engagement in Kosovo until the UN Security Council (UNSC) decides otherwise. [73] The mandate covers the building of a democratic polity and promotion of electoral democracy as well as establishment of the rule of law, development of power-sharing mechanisms and gradual transfer of competence to provisional institutions of self-governance.[74] This gradual competence transfer was initiated in 2001.[75]

The most exacting part of the UNMIK mandate was the facilitation of "a political process designed to determine Kosovo´s future status"[76]. It all laid more or less fallow until November 2005 when the UNSC approved the

[72] See specifically Judah, Tim, 2008, *Kosovo. What Everyone Needs to Know*, pp. 42-92.
[73] UNSCR1244, para. 19.
[74] UNSCR 1244, para. 10-11.
[75] See UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK/REG/2001/9, 15 May 2001.
[76] UNSCR 1244, para. 11 (e).

appointment of Martti Ahtisaari as the UN Special Envoy for the political process of determining the future status of Kosovo.[77] The overall process showed out to be concentrated to two major sets of negotiations, which both were under different lead. The EU was present during all steps of the process even though with various degrees of influence.

First, UN-led negotiations were held between Pristina and Belgrade with progress on technical matters, but without any breakthrough on the status issue. In February 2007, Ahtisaari presented a *Comprehensive Proposal for the Kosovo Status Settlement*[78] for the parties, which were also meant to be the basis for a UNSC resolution aimed to replace UNSCR 1244. The so-called Ahtisaari Plan covered a wide range of issues related to the status process and emphasized a "standards before status" policy, which promoted the establishment of proper standards and structures in Kosovo before deciding on the final status. The draft settlement suggested that, during a transitional period of 120 days, Kosovo authorities should adopt a legal framework capable of implementing all aspects of the settlement plan. The overall recommendation was that Kosovo should become independent subject to a period of international supervision. Even though not suggesting independence *per se*; the overall tone of the recommended "supervised independence" pointed more towards state independence than of Kosovo remaining a Serbian province.[79]

However, neither Pristina and Belgrade nor the UNSC managed to agree on a common position. The parties had "diametrically opposed positions"[80] and there was a risk that Russia intended to use its veto in case a draft resolution based on the settlement proposal was put on the UNSC table.[81] As a result, the draft resolution was put on hold and a new period of talks was proposed by the UNSC in July 2007.[82]

The second set of negotiations continued within the Contact Group, which was an informal policy discussion platform for a group of influential states with interest in the developments in the Balkans.[83] The EU was part of the troika that, alongside with Russia and the United States, resumed the stranded UN-led negotiations. After exploring all options to secure a

[77] UN Secretary-General Kofi Annan appointed Martti Ahtisaari as Special Envoy for status talks on 1 November 2005 and the appointment was welcomed by the UNSC in a letter dated 10 November 2005 (S/2005/709).
[78] See letter (S/2007/168/Add.1) dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council enclosing "Comprehensive Proposal for the Kosovo Status Settlement".
[79] Judah, 2008, pp. 111-113.
[80] Letter (S/2007/168) dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council enclosing "The Report of the Special Envoy of the Secretary-General on Kosovo´s future status", para. 2.
[81] Judah, 2008, p. 113.
[82] Draft resolution (S/2007/437) on Kosovo circulated on 17 July 2007 but withdrawn on 20 July 2007 during a UNSC closed-door meeting.
[83] See Statement issued on 20 July 2007 by Belgium, France, Germany, Italy, United Kingdom and the United States of America, co-sponsors of the draft resolution on Kosovo presented to the UNSC on 17 July.

negotiated settlement, the Troika reported the negotiations exhausted in December 2007.[84]

It was against the background of exhausted status negotiations that the Kosovo Assembly unanimously declared Kosovo an independent state on 17 February 2008.[85] Shortly after a constitution was adopted, in which the precedence of the Ahtisaari Plan was recognized.[86] The legality of the unilateral independence declaration made by the Provisional Institutions of Self-Government of Kosovo was questioned to the extent that the International Court of Justice (ICJ) delivered an advisory opinion on the issue in July 2010.[87] In essence, the Court concluded that Kosovo´s declaration of independence did not violate general international law due to the absence of rules in international law prohibiting such acts.[88]

Overall, Kosovo has gone from a responsibility for the international community towards a European one.[89] Most lately, a new framework of dialogue meetings between Pristina and Belgrade was launched, which is mostly coordinated by the EU.[90] Over time, the UN presence has been significantly reduced and the strategic goal of the mission is in practice reduced to the promotion of security, stability and respect of human rights.[91]

3.2 The Stabilisation and Association Process

As mentioned, the EU has been a part of most of the internationally dimensioned processes relating to the Kosovo situation since the adoption of UNSCR 1244. However, and parallel to the developments on the international level, the EU has also approached Kosovo on a regional level. Currently, the EU handles its relations with Kosovo, as for the rest of the Western Balkan region, within the Stabilisation and Association Process (SAP), which is a pre-accession policy framework aimed to promote regional stabilization, democracy and economic development through

[84] Letter (S/2007/723) dated 10 December 2007 from the Secretary-General to the President of the Security Council enclosing "Report of the European Union/United States/Russian Federation Troika on Kosovo", para. 11.
[85] Kosovo Declaration of Independence of 17 February 2008, para. 1.
[86] Article 143 of the Constitution of the Republic of Kosovo.
[87] See UN General Assembly resolution 63/3 of 8 October 2008.
[88] See ICJ Advisory Opinion of 22 July 2010 regarding *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo.*
[89] Apart from the SAP, the EU commitment to Kosovo includes the rule of law mission EULEX and the double-hatted EU/International Special Representative which supervises the implementation of the conditional independence approach as expressed in the Ahtisaari Plan.
[90] See UN General Assembly resolution 64/298 of 13 October 2010.
[91] See, *inter alia,* the Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 30 September 2009 (S/2009/497), of 5 January 2010 (S/2010/5), of 6 April 2010(S/2010/169), of 29 July 2010 (S/2010/461) and of 29 October 2010 (S/2010/562).

political and economic reforms compatible with EU standards. The SAP made a profound take-off in 2003, when seven Western Balkan states, including Kosovo,[92] were officially announced as potential candidates for EU membership. By providing them with a "European perspective", which marks the starting point for a journey towards full EU integration and an eventual EU accession as final destination, the EU has showed itself convinced that the future of the region lies within the Union.[93] The chosen strategy both holds a regional dimension as well as a state-by-state perspective. Regional co-operation is considered essential due to problems of cross-border nature, i.e. trade and energy related matters.[94] At the same time, the importance of tailored country strategies is underlined by the fact that each country has its own characteristics and in the end has to be evaluated on its own merits of progress.[95]

The most prominent instrument of the SAP is the conclusion of a Stabilisation and Association Agreement (SAA), which is a bilateral agreement between the EU and each one of the Western Balkan states. Under the SAA, the state concerned undertakes obligations to fulfill certain criteria related to democratization and institutional capacity strengthening.[96] In return, the EU undertakes to provide the financial support and technical guidance necessary. Thereby, the gist of using a framework based on conditionality is that each state carries the outmost responsibility for progress in reforms and in meeting established criteria and conditions. The progress of each country is evaluated in annual reports, whereby a good record of accomplishment is rewarded with a candidate status, which is the last pre-accession stage before the opening of official accession negotiations.[97]

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[92] Albania, Bosnia and Herzegovina, Croatia, Kosovo according to UNSCR 1244, the former Yugoslav Republic of Macedonia, Montenegro and Serbia.

[93] The SAP was launched in 1999 as a further development of the already existing regional approach for South-Eastern Europe through the Commission Communication on the Stabilisation and Association Process for countries in South-Eastern Europe (COM(1999) 235 final), which was confirmed by the General Affairs Council on 21-22 June 1999. Further confirmation in favour of the SAP was done by the European Council on its meeting in Santa de Maria de Feira on 19-20 June 2000, at the Zagreb Summit on 24 November 2000 and at the Thessaloniki Summit on 16 June 2003.

[94] European Commission Publication, 2005, "Regional cooperation in the western Balkans. A policy priority for the European Union.", pp. 3-7.

[95] Commission Communication on the 2005 enlargement strategy paper, COM (2005) 561 final, 9 November 2005, p. 3.

[96] Conditions and priorities within the SAP framework are based on the criteria laid down in the Declaration of the Copenhagen European Council Summit on 21-22 June 1993, whose fulfillment any state applying for EU membership need to attain. An applicant state need to prove the existence of (i) an institutional structure which guarantees democracy, the rule of law, human rights and the respect of minorities (the political criterion), (ii) a functioning market economy able to cope with Union market competition (the economic criterion) and (iii) an capacity to take on any obligation following an EU membership. Further, as expressed during the Madrid European Council Summit on 15-16 December 1995, the state concerned also requires an institutional, administrational and judicial capacity of effective implementation of EU legislation.

[97] See specifically the European Council Conclusions of the Santa Maria de Feira Summit on 19-20 June 2000, The Declaration of the Zagreb Summit on 24 November 2000 and The Declaration of the Thessaloniki Summit on 16 June 2003.

Kosovo is the only one among the Western Balkan states which has not signed a SAA.[98] Instead, the solution has been the establishment of a "SAP Dialogue", which makes it possible for Kosovo to be a part of the process without a SAA. The SAP Dialogue was launched as a more intensified replacement version of the former "Stabilisation and Association Tracking Mechanism" (STM), which was an instrument for political dialogue between the EU and Kosovo between 2002 and 2009. It aimed to prevent Kosovo from being an isolated part of the enlargement process in the Western Balkans. [99]

Further, European Partnerships are another pre-accession instrument aimed to address reform priorities for each state in order to facilitate the fulfillment of the criteria set out in the SAA.[100] These partnerships also serve as the basis for political dialogue as well as guidance for the programming and delivery of financial aid,[101] which is regulated under the Instrument for Pre-accession Assistance[102] (IPA). The priorities for Kosovo[103] cover to the areas of state building, good governance, the rule of law, and civil society development.[104]

3.3 The EU approach on Kosovo relations

When talking in terms of the establishment of contractual relations between the EU and Kosovo, some features of the EU approach on its Kosovo relations are prominent, and often recurring in Union policy documents and in the discussion between scholars.

One of the main advantages in this respect has been the change of focus from the status issue towards European integration brought by the provision of a European perspective to Kosovo in 2003. Earlier on, the EU engagement in the recovery of post-war Kosovo was interlinked with the developments on the international scene where the status issue was in the

[98] The SAA for Macedonia was signed in April 2001, for Croatia in October 2001, for Albania in June 2006, for Montenegro in October 2007, for Bosnia and Herzegovina in June 2008 and for Serbia in April 2008.
[99] Commission Communication on Kosovo – Fulfilling its European Perspective, COM(2009) 5343, 14 October 2009, p. 12.
[100] See Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of partnerships in the framework of the stabilisation and association process. Also, do notice that Kosovo is included in the European Partnership with Serbia due to reference to UNSCR 1244. Merely a technicality since both Serbia and Kosovo has their own partnership agenda and their own set of reform priorities.
[101] See, *inter alia*, Commission Communication on Enlargement Strategy and Main Challenges 2008-2009, COM(2008) 674 final, 5 November 2008, p. 6.
[102] See Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).
[103] Kosovo is included in the EU Partnership with Serbia, where both parties have individual sets of priorities.
[104] See Council Decisions 2004/520/EC, 2006/56/EC and 2008/213/EC.

centre of attraction due to the nature of the UNSCR 1244 mandate. Yannis means that the EU approach "provided a common language and a wider perspective"[105] to the situation. He also emphasizes that by widening the perspective, a way of moving forward has been provided rather than a solution to the actual problem.[106]

In the wake of the Kosovo independence declaration, the EU Council noted that the Member States had to "decide, in accordance with national practice and international law, on their relations with Kosovo."[107] In other words, recognition of states does not fall within Union competence. At the moment, 22 out of 27 Member States have unilaterally recognized the statehood of Kosovo,[108] which in turn has made it problematic for the adoption of a Union common position on the Kosovo status.[109] However, the EU finds the adopted constitution compatible with Union standards.[110] Further, and even though not holding competence within the common foreign policy, the European Parliament has encouraged all Member States to recognize Kosovo[111] and for the Union to "step up [its] common approach towards Kosovo".[112]

It has been announced by most of the non-recognizing Member States, that their recognition of Kosovo independence is dependent upon a Serbian consent.[113] Thereby, the EU5 do not buy into the premise of Kosovo as a sui generis case.

Despite the absence of unity on the status issue, the EU has continued to have a strong substantial commitment to Kosovo.[114] The EU has expressed its commitment to support the political and socio-economic development of Kosovo through a clear European perspective, and to fulfill its obligation under the same, [115] which is also in line with the Ahtisaari Plan and its

[105] Yannis, Alexandros, 2009, "The politics and geopolitics of the status of Kosovo: the circle is never round", *Southeast European and Black Sea Studies*, Vol. 9, pp. 161-171:163.
[106] Ibid. pp. 163-164.
[107] Council Conclusions on Kosovo, 18 February 2008.
[108] Cyprus, Greece, Romania, Slovakia and Spain are the only Member States that have not recognized Kosovo as an independent state.
[109] All references to Kosovo in official EU documents are made in accordance with the definition of Kosovo laid down in UNSCR 1244, i.e. a territory under the international administration of UNMIK.
[110] Commission Communication, COM(2008) 674 final, p. 55.
[111] European Parliament resolution on Kosovo and the role of the EU, 5 February 2009, para. 3.
[112] European Parliament resolution on the European integration process of Kosovo, 8 July 2010, para. 1.
[113] See, *inter alia*, written statements submitted to the ICJ on 17 April 2009 within its advisory procedure on the accordance with international law of the Kosovo independence declaration by Cyprus, pp.49-50; by Romania, p. 21; Slovakia, para. 1-13 and by Spain, p. 56.
[114] Commission Communication, COM(2009) 5343, p.2.
[115] See, *inter alia*, Commission Communication on the Western Balkans on the road to the EU: consolidating stability and raising prosperity, COM(2006) 27 final, 27 January 2006, pp. 2-3; COM(2008) 674 final, p. 14 and COM(2009) 5343, p. 2.

"standards before status" policy.[116] Even though the establishment of contractual relations with Kosovo has not been realisable, the EU has been committed to "exploring creative ways to ensure that Kosovo can fully benefit from all EU instruments".[117] Overall, this commitment is based on the conviction that "the approach of diversity on recognition, but unity in engagement provides a constructive basis for progress" [118] in order to prevent Kosovo from falling behind in the reform process compared to the rest of the region. Therefore, and rather than slowing down and carefully look into the status issue, an increase of speed regarding the adoption of European integration measures has been suggested.[119]

Another vital aspect of the EU approach is the reference to the *sui generis*[120] character of the Kosovo case. The EU subscribes to the view that Kosovo is a unique case, and that it cannot be considered as a precedent due to a lack of comparable cases.[121] Patterson and Mason argue that the grand investment made by the international community in institutional infrastructure and stability maintenance in Kosovo is beyond comparison.[122] They find that "the Kosovo experience simply is not a model for future international relations because it is an aberration from international norms",[123] and it is beyond reason that the same degree of involvement and engagement will be made ever again.

In essence, scholars argue that the EU-Kosovo relations reflect the current state of the common foreign policy, under which premise the Member States are committed to cooperate. Jovanović considers that the EU is covering up its inability of exercising a consistent and coherent common foreign policy by stating that state recognition is falling outside of Union competence. Even though this is a correct interpretation of Union law, fact still remains that the EU seeks to establish itself as a frontrunner in international relations. In terms of legitimacy, the EU faces difficulties when the common policies are challenged by national interests and the Union fails to speak with one voice.[124] Koeth agrees to the extent that a coherent foreign policy is not purely a legal matter and cannot be resolved only by legal means. Instead, the recalcitrant five Member States need to realize that when giving

[116] See, *inter alia*, the Thessaloniki Agenda, title 1, para. 2.
[117] Commission Communication, COM(2005) 156 final, p. 4.
[118] Commission Communication, COM(2009) 5343, p. 4
[119] Ibid. p. 13.
[120] The literal meaning of *sui generis* is "of its own kind", and in a legal context it refers to a specific entity, activity or relationship that is so unique in its nature, and the fact that it has no parallels it becomes subject to a narrowly designed set of rules and regulations.
[121] See, *inter alia*, Council Conclusions on Kosovo of 18 February 2008 and Commission Communication, COM(2008) 674 final, p. 5.
[122] Patterson, Eric and Mason, Roger, 2010, "Why Kosovo doesn´t matter and how it should", *International Politics*, Vol. 47, pp. 91-103:99-100.
[123] Ibid. p. 92.
[124] Jovanović, Miodrag, 2008, "EU and the Recognition of Kosovo – A Brief Look Through the Legitimacy Lenses", *Belgrade Law Review,* Vol. 3, pp.72-84:79-84.

in for national interests, it also risks the credibility of the EU as a reliable international actor.[125]

[125] Koeth, Wolfgang, 2010, "State Building without a State: The EU´s Dilemma in Defining Its Relations with Kosovo", *European Foreign Affairs Review*, Vol. 15, pp. 227-247:241.

4 Discussion

History shows that the EU has had an extensive commitment to the political and socio-economic development of Kosovo since the end of the war in 1999. This engagement has been carried out in various forms and on various levels. Initially, issues regarding the future of Kosovo were addressed on an international level, within the UN framework established by UNSCR 1244. However, the EU has also approached Kosovo on a regional level, and then primarily within the SAP, in which the conclusion of a SAA has been the most prominent feature. Kosovo was in 2003, alongside with six other Western Balkan states, provided with the prospect of full EU integration in the form of a European perspective. The EU considers that the future of the region lies within the Union, and is committed to support each state in its integration process. So far, it is only Kosovo that has not concluded a SAA with the EU.

The main purpose of this thesis has been to examine whether the lack of contractual relations between EU and Kosovo in the form of a SAA is a matter of competence deficit. In other words, does the EU possess the necessary competence to conclude a SAA with Kosovo?

There are two dimensions to the notion of an establishment of contractual relations between the EU and Kosovo in the form of a SAA that need to be addressed in order to fulfill the purpose of this thesis. The first dimension relates to the formal requirements for such an arrangement, and the second dimension covers the practical implications of the same.

4.1 Formal requirements

The EU is a prominent example of the development of the increased presence of international organizations in modern international relations. However, international institutional law rules that such participation is dependent upon the possession of a legal personality. The ICJ stated in the *Reparation* case that all powers of an international organization is based upon its legal personality, and that the scope of those powers is determined by the principle of conferral. The same applies for the EU, where the legal personality provided for in Article 47 TEU is a pre-requisite for the execution of the many powers conferred upon the Union by its Member States.

In EU external relations, the competence to conclude international agreements is the most prominent feature. Before diving into the substantial aspects of the treaty-making powers of the EU in relation to Kosovo, attention has to be paid to two types of distinctions often made on this regard. First, the nature of a certain power is either expressed or implied, where expressed powers relates to the literal wording of the rules of the

organization Implied powers relates to the fact that the legal personality concept extends beyond the expressed powers in the constituent instrument and also covers powers that are necessary in order for the organization to carry out its functions. Second, depending on the field of policy, Union competences are either exclusive or non-exclusive[126], which relates to whether the Union is authorized to act in its own or if Member State participation is required. In cases of exclusive treaty-making competence, the Union may conclude an international agreement on its own, while a non-exclusive treaty has to be concluded as a mixed agreement.

In terms of the establishment of contractual relation between the EU and Kosovo in the form of a SAA, the Union has an expressed non-exclusive competence to do so. The legal basis for this act of treaty-making is explicitly provided for in Article 217 TFEU and the non-exclusive nature is implied by fact that a SAA contains provisions on political dialogue.

Even though the treaty-making powers of an international organization is primarily focused on establishing the proper legal basis, attention also has to be paid to with *whom* an international agreement is concluded. In other words, who is the opposite party? Apart from the use of the term "third country" [127] when referring to the opposite treaty party[128], and EU membership as the differentiating feature between Union citizens and third-state nationals, the Treaties do not leave much to tell on the subject matter. The question on who will be placed on the opposite side of the negotiation table is particularly justified to ask when considering the two-folded understanding on the Kosovo status perceived among the Member States. A majority of them, 22 at the moment, recognizes Kosovo as an independent state, while the rest fall back on the UNSCR 1244 definition. However, and irrespective of whether Kosovo is defined as state or a non-state, the EU has a record of treaty-making with subjects that in a traditional sense cannot be considered as states. For instance, it has concluded agreements with Macao, Hong Kong and PLO.

Based on the fact that the EU lacks a common position on the Kosovo status, there are only two considerable scenarios where it is possible for the EU to establish contractual relations with Kosovo. The first scenario builds on the premise that UNMIK negotiates on the behalf of Kosovo, since the least common denominator for the Member States regarding the status issue is the one provided for in UNSCR 1244. Second, Kosovo can negotiate in its own right if it is done on issues covered by Union exclusive treaty-making competence. These types of agreements may be concluded by the Union itself and do not need to be based on unanimity. However, mixed agreements such as SAA´s are not included in this category.

[126] Non-exclusive competences includes both the concepts of *shared* and *supporting* competences provided for in Article 2 TEU.
[127] Do notice that when EU law refer to the opposite treaty party, it also includes other international organizations.
[128] For instance, in Articles 216 and 217 TFEU.

4.2 Practical implications

The EU has subscribed to an approach in its Kosovo relations where its substantial nature has been the most significant feature. Initially, this turned out to be a successful formula since it enabled a widening of the focus. Instead of concentrating on the status issue to the exclusion of everything else, the EU made it possible to put Kosovo in a regional context and providing it with the prospect of EU integration. As a result, the EU has striven to come up with creative alternatives to the ordinary SAP procedures. For instance, the SAP Dialogue is substantially equal to a SAA in the sense that it includes benchmarks and integration objectives. The practical implication has been that the EU has, despite its disunity on status, enabled Kosovo to participate in the SAP almost to the same extent as the other Western Balkan states. However, it is still a fact that it has been necessary to establish a parallel track for Kosovo in order for the EU to deliver on its commitments under the European perspective.

In essence, the EU approach on Kosovo relations remains neutral on the status issue. This is partly a result of the need for momentum in the reform process in the Western Balkans, and partly due to the lack of Union competence on state recognition. However, it is worth questioning to what extent such status neutrality is applicable in EU-Kosovo relations?

Status neutrality has proved to be a way of taking the focus away from the status issue, and has made way for progress on substantial issues. The EU has for a while put the status issue on hold, for the benefit of regional stability and progress on issues important for strengthening the political and economic structures in Kosovo. However, the question is whether the EU approach based on status neutrality is reaching its best-before date, considering the lack of contractual EU-Kosovo relations. The main reason is that it is hard to apply status neutrality on a situation which is basically all about status. The EU cannot enter a treaty-making procedure without knowing exactly who is sitting on the opposite side of the negotiation table. In other words, who will represent Kosovo?

Further, another practical implication relates to the issue of legitimacy, both regarding the EU´s commitment to Kosovo and in its role as a global actor Kosovo is considered to be a European responsibility, which is envisaged by a reduced UN presence in Kosovo and the fact that issues on Kosovo to a further extent is addressed in a European context. Therefore, there is a direct link between how the EU chooses to handle its Kosovo relations and the legitimacy of its Kosovo commitment as well as of its capability of becoming an important factor in international relations.

4.3 Concluding remarks

So far, it seems as though the EU has found a creative way to negotiate and cooperate with Kosovo in a manner that has avoided paying attention to the status issue. Taken into consideration the entire state of the SAP and the change of circumstances brought by the independence declaration in 2008, there is a need for the EU to re-evaluate its current approach.

Even though state recognition falls outside of EU competence, it is hard to see how the EU and its member states could continue to live up to their commitment to Kosovo in other ways than through the conclusion of a SAA. The fact is that the factual requirements for such an arrangement are already in place; partly in the form of a legal basis and partly due to the unity on the substantial content of a SAA. The only thing lacking is a political will to put it all into action.

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