



KOSOVO-SERBIA AGREEMENTS BETWEEN CREATIVE AND DESTRUCTIVE AMBIGUITY

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Abstract:

The European Union (EU) engagement through a pro-active approach in facilitating the negotiation process for normalization of Kosovo-Serbia relations is the most complex and challenging motion ever undertaken within the European External Action Service (EEAS). Since the process aimed to resolve the protracted disputes between the parties, efficient management of this process required the application of a specific approach. This article examines how the 'creative ambiguity' became the key approach to reaching the 2013 Agreement for Normalization of Relations between two countries, which foresaw the creation of a so-called Association of Serb Majority Municipalities. It concludes that the inertia of the process for normalization of relations between the engaged parties urged them to reach a comprehensive agreement, even with the possibility of a land swap.

Key words: mediation, normalization, creative ambiguity, Association, EU, Kosovo, Serbia

Título en Castellano: Los acuerdos entre Kosovo y Serbia entre una ambigüedad creativa y destructiva

Resumen:

La participación de la Unión Europea (UE) facilitando el proceso de negociación para la normalización de las relaciones entre Kosovo y Serbia con un enfoque proactivo es la actuación más compleja y desafiante jamás emprendida por el servicio europeo de acción exterior. Dado que el proceso pretendía resolver las prolongadas disputas entre las partes, la gestión eficiente de este proceso requería la aplicación de un enfoque específico. Este artículo examina cómo la "ambigüedad creativa" se convirtió en el enfoque clave para alcanzar el acuerdo de 2013 para la normalización de las relaciones entre dos países, previendo la creación de una llamada Asociación de Municipios Mayoritarios Serbios. El artículo concluye que la inercia del proceso de normalización de las relaciones entre las partes involucradas impulsó a la consecución de un acuerdo global, incluso con la posibilidad de un intercambio de territorios.

Palabras Clave: mediación, normalización, ambigüedad creativa, Asociación, UE, Kosovo, Serbia

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1. Introduction

In the context of the Western Balkans, "the EU has been increasingly involved in directly supporting peace negotiations in inter-and intra-state conflict by taking on the role of a third party mediator"³, since year 2000. To further substantiate the action strategy in the field of mediation in peace negotiations, in 2009, the Council of EU adopted a Concept of Strengthening EU Mediation and Dialogue Capacities, as a political document exclusively related to mediation and dialogue⁴. In this document it is emphasized "the EU has a lot to offer as an actor in mediation [...] The EU is in an excellent position to provide incentives to the conflict parties and can rely on its wide field presence"⁵. Since there was already a clear platform for action, the direct involvement of the EU as a third party in mediating peace negotiations for the normalization of relations between Kosovo and Serbia-which had started since March 2011-currently represents one of the most complex and ambitious activities ever conducted within the EEAS. First of all, the fact that both sides have been involved for a long time in a number of protracted disputes over politically sensitive issues, made the EU mediation efforts themselves to transform into a rather sensitive and complex process. Secondly, although these actions put the EU in a difficult position in maintaining its reputation⁶, it was quite ambitious to act because "the newly established EEAS needed a success in its early days, and the Serbia-Kosovo dialogue provided such an opportunity"⁷. EEAS had never before been involved in such a complex negotiating process, therefore this activity, besides being an incentive to become a success story, was also labelled as an experimental one⁸. The EEAS itself qualifies this effort to mediate in resolving these complex disagreements, as an ample opportunity to assess its own performance regarding the involvement in mediation in peace negotiations⁹. In this regard, taking advantage of some favourable circumstances and momentums¹⁰, through a pro-active

³Bergmann, Julian and Arne Niemann: "Mediating International Conflicts: The European Union as an Effective Peacemaker?", *Journal of Common Market Studies*, vol. 53, nº 5 (2015), p. 957.

⁴Bergmann, Julian and Arne Niemann: "What the Belgrade-Pristina dialogue says about the EU's role as a peace mediator", 12 December 2015, London School of Economics and Political Science at <https://core.ac.uk/display/80785423>

⁵ "Concept on Strengthening EU Mediation and Dialogue Capacities", Council of the European Union, Brussels, 10 November 2009, at

http://www.eeas.europa.eu/archives/docs/cfsp/conflict_prevention/docs/concept_strengthening_eu_med_en.pdf

⁶ Koeth, Wolfgang: "State Building Without a State: The EU's Dilemma in Defining its Relations With Kosovo", *European Foreign Affairs Review*, vol 15, nº 2 (2010), p. 241.

⁷Bieber, Florian: "The Serbia-Kosovo Agreements: An EU Success Story?", *Review of Central and East European Law*, vol. 40, nº 3,4 (December 2015), p 297.

⁸ *Ibid.*, p.316.

⁹ European External Action Service, 2014, at

http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/top_stories/2014/170214_ca_un_en.htm

¹⁰The first moment is the decision of the International Court of Justice (ICJ) on July 22, 2010, to Serbia's request regarding the validity of Kosovo's declaration of independence by its institutions. The ICJ ruled that "the declaration did not violate any applicable rule of international law", International Court of Justice, 2010 (<https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>). On the other hand, the second moment relates to the EU's management of the debate that was reopened by this ICJ decision amongst EU member states regarding the recognition of Kosovo's independence. The EU reaffirms the pursuit of an approach that the five pre-emptive countries of Kosovo have made possible to hold individual positions on this issue, as the Council of the European Union in 2008 stated, (http://europa.eu/rapid/press-release_PRES-08-41_en.htm). The third moment is that the EU managed to amortize Serbia's efforts, which through a UN-funded project resolution, attempted to renegotiate Kosovo's status. Thus, the EU succeeded in convincing Serbia to abandon its obstructive actions towards Kosovo, making it a co-sponsor of a subsequent resolution that paved the way for negotiations between the two countries and became the main platform for nature's definition and the format of these negotiations, European External Action Service, 2010, (http://europa.eu/rapid/press-release_PESC-10-213_en.htm).

line, the EU expressed readiness to facilitate a dialogue to resolve disputes between these countries¹¹.

Since 2011, under the leadership of the highest EEAS officials, 40 rounds of high-level negotiations were held, without mentioning countless rounds of technical negotiations. All these rounds were held in three phases where the parties reached an agreement on 23 issues, both technical and political¹². The most important of these agreements remained the 'First Agreement Governing the Principles for Normalization of Relations' (hereinafter the 'Brussels Agreement'), which was reached on 19 April 2013. This 15-point agreement provided the basic parameters for the integration of North of Kosovo¹³ within the Constitutional Order of Kosovo and set the frames for normalization of Kosovo-Serbia relations. In its first six points it foresees the creation of a legal entity for the self-government of Serbs living in Kosovo, especially in its Northern part; while nine other points regulate other issues of importance for the normalization of relations between the parties. However, since both, the initial process of introducing this dialogue as well as that of reaching agreements were characterized by many difficulties, it made the EU apply some unique approaches to managing this negotiating process, which was also unique. First, the EU based on its 'leverage', initially managed to encourage the parties to start the dialogue and then, at later stages, incite them to reach agreements and implement them. Secondly, since at that time, five of its twenty-eight member states did not recognize Kosovo's independence, the EU had to maintain a neutral position on Kosovo's status. This led to the application of a so-called 'status neutrality' approach by EU. Thirdly, since the EU was dealing with a process aimed at resolving many highly sensitive political disputes, it resorted to applying another unique approach, that of 'creative ambiguity'. Its application was made with the intention of both parties to overcome the profound disagreements they had for conceptual and substantive issues in reaching agreements.

Structurally, this study is organized in three sessions. In the first session, a brief conceptual elaboration of 'creative ambiguity' has been made. In the second session, we examine the effects of creative ambiguity in encouraging the parties to start the dialogue and then, at a later stage, in inciting them in achieving virtually all agreements. Within this section, we highlight how both parties use ambiguous language to justify their position. Although these six points set an orientation map for the establishment of the Association, they nevertheless left many issues blurred. The third session elaborates in detail the subsequent destructive impact of the unclear wording of the first six points of the Brussels Agreement, in the sense that for their clarification it was necessary to reach an additional agreement, such as that of 25 August 2015: 'Association/Community of Serb majority municipalities in Kosovo-general principles/main elements'(hereinafter: general principles/main elements). This section also analyzes how the clarity of the August 25th agreement has contributed towards the growth of strong resistance in the opposition bloc of political parties in Kosovo, which, by blocking its approval in the Kosovo Assembly, provoked an unprecedented institutional crisis. The effects of this crisis, apart from blocking the establishment of this entity, also brought to a complete suspension of negotiations between the parties. Later on, it is also analysed how after nearly two years, the EU and the USA urged both parties to stop their destructive behaviour between them and to return to dialogue. Particularly at the beginning of 2018, the EU began to significantly clarify its position in relation to the negotiating parties, urging them to work hard to reach a final agreement of a comprehensive and legally binding nature.

¹¹ European External Action Service, 2010, at http://europa.eu/rapid/press-release_PESC-10-213_en.htm

¹² Government of Kosovo 2016, at [http://www.kryeministri-ks.net/repository/docs/REPORT_-Brussels Agreements Pending Implementation 060717.pdf](http://www.kryeministri-ks.net/repository/docs/REPORT_-Brussels%20Agreements%20Pending%20Implementation%20060717.pdf)

¹³ This part consists of four municipalities: Mitrovica North, Leposovic, Zubin Potok and Zvecan, which are ethnically inhabited by Serb majority.

2. Conceptual framework

Creative ambiguity is a complicated challenge for conceptual operationalization. In the theoretical literature reviews, there are many and sometimes quite different definitions. However, in general terms, creative ambiguity is known as a facilitating strategy or a diplomatic tool and a component for managing conflict¹⁴. Its most pronounced feature is presented when formulating expressions in the texts of international agreements largely deriving from the negotiations. In this term, according to Munson, “an expression is ambiguous when it has more than one meaning and it is used in a situation or context in which it can be understood in at least two different ways”¹⁵. According to this definition, it is noticed that the ambiguity in the textual formulation of the agreements is done with the intention of the negotiating parties (even with the consent of the mediator) in order to allow different interpretation and, consequently, offer a considerable flexibility. Therefore, not by chance, according to Best, the uninterrupted interpretation becomes the heart of uncertainty¹⁶. However, when ambiguous language serves the so-called 'positive incentives'¹⁷, which are used to help both actors to create rules and opportunities for interaction to initially soften initial disagreements and later make a more concrete agreement, then this kind of ambiguity is termed as a creative ambiguity¹⁸. Nevertheless, Bernheim and Whinston, besides the creative ambiguity term, also use the term “strategic ambiguity”. This, to make sense of a particular practice they call “contractual incompleteness”, when, due to the uncertainties in the initial agreement, the parties are inclined to reach new additional arrangements with equally unclear provisions¹⁹.

3. Creative ambiguity as an enabler in reaching agreements

In the context of Kosovo-Serbia negotiations, the orientation to apply the creative ambiguity approach both by the EU and the negotiating parties has been done with intentional motives, though imposed by the circumstances of the time²⁰. Two main motives have pushed the EU towards applying this approach. The first is about “ability”, meaning it is related to the fact that the EU's foreign policy has become increasingly ambitious and comprehensive, thus strengthening both strategies as well as legal and institutional grounds, which potentially created the opportunity to apply such complex approach as a diplomatic means of mediation²¹. The second relates to 'liability', which means that the application of this approach results from the prior application of the neutral status approach by the EU. As Elmeheed emphasizes, the lack

¹⁴ Elmeheed, Mikael (2016): “Disambiguating the Brussels agreement: A study of ambiguity in the Serbia-Kosovo normalisation process”, Lund University, Department of Political Science, at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8512062&fileId=8566566>

¹⁵ Munson, Ronald (1976): *The Way of Words: An Informal Logic*, Massachusetts: Houghton Mifflin, 1st Edition, p.74.

¹⁶ Best, Jacqueline: “Ambiguity, Uncertainty and Risk: Rethinking Indeterminacy”, *International Political Sociology*, vol. 2, nº 3 (11 November 2008), pp. 355-374.

¹⁷ See Bergmann and Niemann, *op. cit.*, p. 957.

¹⁸ Pehar, Dražen: “Diplomatic Ambiguity: From the Power-Centric Practice To a Reasoned Theory”, *Polemos*, vol. 8, nº 15-16 (2015), p.164; “The Association of Serb Municipalities: Understanding conflicting views of Albanians and Serbs”, Policy Report, Balkans Policy Research Group, January 2017, at <http://balkansgroup.org/wp-content/uploads/2017/09/Association-of-Serb-Municipalities-Understanding-Conflicting-Views-of-Albanians-and-Serbs.pdf> (https://balkansgroup.org/storage/app/media/BPRG_Pub-02_ASM_SHQ_WEB.pdf)

¹⁹ Bernheim, B. Douglas and D. Whinston: “Incomplete Contracts and Strategic Ambiguity”, *The American Economic Review*, vol. 88, nº 4 (1998), p.903.

²⁰ Zahariadis, Nicolaod: “Ambiguity and choice in European public policy”, *Journal of European Public Policy*, vol. 15, nº 4 (2008), p. 517. Weber, Bodo (2016): “Big Deal: Awkward Juggling: Constitutional insecurity, political instability and the rule of law at risk in the Kosovo-Serbia dialogue”, *BIRN Kosovo, Internews Kosova*. Centre for Research Transparency and Accountability, pp. 14-15.

²¹ European External Action Service (2016), at https://eeas.europa.eu/headquarters/headquarters-homepage_en/5388/Shaping%20of%20a%20Common%20Security%20and%20Defence%20Policy

of a unanimous stance among the member states on the issue of Kosovo's status, made the ambiguity an appropriate mediation solution²². Thus, since the EU had to carefully balance its attitudes towards Kosovo's status (as the most antagonistic point that neither side wanted to tackle), applying an approach with a high level of ambiguity became necessary, to encourage the parties to initiate dialogue and to encourage them to reach agreements.

On the other hand, there are also two motives that have led the negotiating parties to apply an ambiguous language in the wording of agreements, particularly those that deal with politically sensitive topics. One motive has "objective" capacity, which means that the ambiguous language was seen by the parties as beneficial, in order to attain what Mitchell calls "isolate controversial issues", with the aim of temporarily resolving some disputes, thus creating conditions to advance the agenda of the dialogue towards achieving a general agreement²³. The other motive has a "subjective" capacity and consists in the fact that the parties want the textual ambiguity of the agreements to be interpreted flexibly in order to achieve two goals simultaneously. Initially, they have the opportunity to claim in front of the inner audience that they had gained more in relation to the other side, as a strategy of "face saving"; moreover, they intend to avoid accusations from internal voices that often accuse delegation leaders of treason against the state, i.e. to safeguard from local resistance.

3.1 Creative ambiguity as a starting point of dialogue

The initial elements of creative ambiguity as a positive incentive are contained in the edition of the UN General Assembly resolution of October 2010. This resolution, welcoming the readiness of the EU to mediate in the Kosovo-Serbia dialogue, emphasized "that dialogue would be to promote cooperation, to make progress on the path to the EU and to improve the lives of the people"²⁴. The most striking feature of this resolution was its textual formulation with a wording full of ambiguity. In its content, it gave the EU the mandate for mediation, but did not specify: a) on what particular topics would the dialogue focus; b) what would its layout be, and c) what the outcome would be. This ambiguity allowed the EU to take control of the dialogue process and shape it in all dimensions.

Meanwhile, having no tangible strategy, the EU started mediating with a list of essential conditions presented by High Representative for Foreign Policy, Catherine Ashton, who stressed that "the discussions are expected to resolve around three main themes-regional cooperation, freedom of movement and rule of law-all essential for the region's European perspective"²⁵. Thus, efforts to find solutions to these themes would initially give the dialogue a technical character, building some trust between the parties, while later on, they would become involved in discussing more sensitive political matters²⁶. Robert Cooper himself, HR

²² See Elmehed, *op. cit.*, p. 25.

²³ Mitchell, David: "Cooking the Fudge: Constructive Ambiguity and the Implementation of the Northern Ireland Agreement, 1998–2007", *Irish Political Studies*, vol.24, n° 3 (2009), p. 323.

²⁴ "Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo Is in Accordance with International Law" UN General Assembly Resolution, 13 October 2010, A/RES/64/298, at

<http://www.kryeministri->

[ks.net/repository/docs/Rezoluta_e_OKB_per_Dialogun_e_Brukselit_e__9_Shtator_2010.pdf](http://www.kryeministri-ks.net/repository/docs/Rezoluta_e_OKB_per_Dialogun_e_Brukselit_e__9_Shtator_2010.pdf)

²⁵ European External Action Service, 2011, at

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/119663.pdf

²⁶ "Serbia/Kosovo: The Brussels Agreements and Beyond", SEESOX, Workshop Report, January 2014, at <https://www.sant.ox.ac.uk/sites/default/files/serbiakosovoworkshopreport.pdf>

Ashton's advisor, saw this concealment of the political dimension as strength, and he named it "the European method" of seeking peace through "practical" cooperation²⁷.

3.2 Creative ambiguity as a way of 'protecting the image' and safeguarding from local resistance

The negotiating stage under the direct mediation of HR Ashton herself, "dealt with matters close to the heart of state sovereignty and power" that mainly addressed North Kosovo, "an area which provoked strong emotions on both sides"²⁸. Realistically, the North of Kosovo, since the disposition of Kosovo under the United Nations Interim Administration Mission in Kosovo (UNMIK) administration in 1999²⁹, remained a geographical area where none of the Kosovo authorities, not even those of UNMIK, could exercise effective control. Local Serbs, in the face of the international community in Kosovo, built an institutional system for self-governing with parallel structures and refused any effort to integrate them into the institutional framework of Kosovo³⁰. Since then, the North of Kosovo has become the most antagonistic point in Kosovo-Serbia disagreements. While these structures were seen as legitimate and directly supported by Serbia, Kosovo continued to consider them as illegal and encroaching for the internal constitutional order and as obstacles for the consolidation of its statehood, i.e. as a state within a state³¹. Taking these circumstances into account, the nature of the disputes between the two parties consisted of who should govern the North of Kosovo. The first ambitious approach to solving the Northern Kosovo problem happened with the "Comprehensive Proposal for the Kosovo Status Settlement" in 2007, known briefly as the Ahtisaari Plan³². This plan resulted from the Vienna negotiations on Kosovo's future status settlement 2006-2007. The Ahtisaari plan foresaw a very detailed solution and provided a platform for a broad self-government for the north within the institutions of Kosovo³³. As this plan was not implemented, disagreements regarding this part remained an open issue in the negotiations between the negotiating parties since the declaration of Kosovo's independence in 2008. In spite of its complexity, the North issue was a major challenge that should be overcome in order to talk about eventual normalization of these relations. This situation was a highly sensitive issue for discussion

²⁷ Cooper, Robert: "Sir Robert Cooper: The Philosophy of the Belgrade-Pristina Dialogue", EWB Archives, 16 July 2015, at <https://europeanwesternbalkans.com/2015/07/16/sir-robert-cooper-the-philosophy-of-the-belgrade-pristina-dialogue/>

²⁸ Cooper, Robert: "An unfair critique of Ashton", *EUobserver*, 12 December 2014, at <https://euobserver.com/opinion/126893>

²⁹ Bashota, Bardhok and Dugolli, Bujar: "Transformational Reforms fo The UN Peacekeeping System: A Genealogical Overview", *Analele Universităţii din Craiova. Istorie, Anul XXII*, vol. 1, n° 31 (Spring 2017), pp. 95-98.

³⁰ Jureković, Predrag: "Kosovo Agreement – Implementation as litmus test", Austrian national Defence Academy Vienna, July 2013, at http://www.bundesheer.at/pdf_pool/publikationen/ifk_monitor_19_int_01_kosovo_agreement_litums_test_pf_w eb.pdf

³¹ Hasselbach, Christoph: "Serbia and Kosovo sign historic agreement", *Deutsche Welle*, 20 April 2013, at <http://www.dw.com/en/serbia-and-kosovo-sign-historic-agreement/a-16758946>

³² Within this proposal was foreseen the creation of six new Serb-majority municipalities, ten seats guaranteed in the Kosovo Assembly, directing a number of ministries (Local Government and Community and Return Administration), the establishment of a Community Consultative Council in the office of the President, the creation of a public television channel allocated to minority communities (Radiotelevision of Kosovo 2), and the protection of Serbian Orthodox cultural heritage (Ahtisaari Plan, 2007: Annex 3, ARTICLE 1-14), at https://reliefweb.int/sites/reliefweb.int/files/resources/1DC6B184D02567D1852572AA00716AF7-Full_Report.pdf

³³ Bashota, Bardhok: "Doktrina e Administrimit Territorial Ndërkombëtar: Rasti i Kosovës nën UNMIK-un 1999-2008" (The Doctrine of International Territorial Administration: The Kosovo Case Under UNMIK 1999-2008), Doctoral thesis, University of Tirana, (2014), pp.174-183, at <http://www.doktoratura.unitir.edu.al/wp-content/uploads/2014/11/Doktoratura-Bardhok-Bashota-Fakulteti-i-Histori-Filologjise-Departamenti-i-Historise.pdf>

between the parties, which in itself required careful approach to treatment throughout the negotiation process.

Based on its leverage, Ashton set a short-term orientation agenda to proceed further with the dialogue process, based on the terms set by the Council at the end of December 2012 for both countries³⁴. Progress in meeting these conditions was demanded by the EEAS, calling on the parties to develop intensive dialogue towards normalizing their relations³⁵. Later, the parties were also explicitly asked to engage in reaching a comprehensive agreement for the North of Kosovo³⁶. In this term, a turning point in this context came when, on April 19, the parties reached “the First Agreement Governing the Principles for Normalisation of Relations” as the most comprehensive framework for resolving the most controversial issues between the two sides, particularly in regards to North governance. This agreement came as a result of a compromise between the parties, based on the factual situation on the ground. Thus, Serbia accepted in principle that the North of Kosovo would be integrated into the constitutional order of Kosovo, while Kosovo agreed to allow the establishment of an “Association/Community” of Serb municipalities that would provide considerable autonomy for Kosovo Serbs³⁷. The reaching of the Brussels Agreement, by Ashton herself, was considered “historic” and according to Hopkins, EEAS “won the right to claim a foreign policy success, a feather in the cap of its CSDP”³⁸. These qualities were attributed to this agreement because of its content and the objectives expected to be achieved through it. The fifteen-point agreement contains ambitious targets for normalizing relations between the two countries. Through the first six points are set the basic parameters for the future governance of the North of Kosovo and the integration of this part in political and institutional life in Kosovo. Within these points, along four northern municipalities, it is envisaged that the Association may include six other municipalities in southern Kosovo inhabited by Serb majority³⁹. Nine other points (which are not subject to treatment in this study) cover a number of other important issues regarding the governance of northern Serbs such as: The abolition of their parallel police, judicial and security structures and their integration into the respective Kosovo institutions; organizing local

³⁴In a summarized form, these conditions consisted of four issues: a) there should be tangible results in the implementation of preliminary agreements; b) there should be the dismantling of parallel structures in the North of Kosovo; c) Serbia should be transparent of the financing of these structures, and d) enhancing Serbia's co-operation with EULEX was required. On the other hand, Kosovo was also required to implement preliminary agreements and develop an extension plan in the north of Kosovo, which would address the fulfillment of specific needs for the Serb population in this part (Council of the European Union, 2012, at <https://www.scribd.com/document/116461154/EU-Council-General-Affairs>). In this context, for Serbia, the fulfillment of these conditions was related to obtaining the status of candidate country; while for Kosovo, with the start of negotiations for the Stabilization Association Agreement (Hoti, Afrim and Gërguri: “The Copenhagen Political Criteria For Joining the EU: The Case of Kosovo”, *Teoria in Praksa*, vol. 6 (2017), pp. 1012-1018.

³⁵ European External Action Service, 2013, at

https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134784.pdf

³⁶ European External Action Service, 2013, at

https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136110.pdf

³⁷See Jureković, *op.cit.* Hopkins, Valerie et al.: “Civilised Monotony?” Big Deal, *BIRN Kosovo, Internews Kosova*. Centre for Research Transparency and Accountability, (2014), p.13, at

<http://www.balkaninsight.com/en/file/show/Images/BigDeal/BIG%20DEAL%20ENG%20FINAL.pdf>

³⁸ “Opposition Protest in Belgrade over Kosovo Deal”, *Balkan Inside*, 22 April 2013, at <http://www.balkaninsight.com/en/article/opposition-to-protest-in-belgrade-over-kosovo-deal>. Hopkins, *op.cit.* p. 13.

³⁹ In addition to the four municipalities in Kosovo, Mitrovica North, Leposavić, Zubin Potok, Zvečan, in the southern part of Kosovo there are six other municipalities with Serb majority: Novo Brdo, Gračanica, Ranilug, Parteš, Štrpce and Klokot. See more at “The Association/Community of Serb-Majority Municipalities-Breaking the Impasse”, European Centre for Minority Issues Kosovo, Policy Paper, June 2016, at <http://www.ecmikosovo.org/uploads/ascm-pax-breaking-the-impasse-eng.pdf>

elections in these four municipalities. Thus, abandoning obstructive policies for mutual hindrance to EU membership⁴⁰.

Since Prime Ministers of Kosovo and Serbia, Hashim Thaci and Ivica Dačić were the main protagonists, both in the process of discussion and in the textual formulation of such a complex agreement, it was expected that they would face a strong pressure from opponent voices to dialogue in their countries. While the ink of their initials was still fresh on the agreement they signed, the first allegations against them occurred. In both capitals (Pristina and Belgrade) they were accused of national treason and violation of the territorial integrity of their countries⁴¹. Trying to protect their image, by presenting the state they represented as the victor, was one of the motives that made them use a language with ambiguity when formulating the deal. The other motive has been directed at giving flexibility to interpretation, thus making local resistance decrease. The mediators of the dialogue, Cooper and Ashton, asserted that the ambiguity of the agreement wording was deliberate⁴².

Although in a general language these provisions outline the basic framework for the establishment of this Association, yet they do not mention many other important details in this regard. Following, we can see how ambiguous language elements can be found in the textual formulation of the title of the agreement itself as well as in the first six points. Regarding the title, the expression “first agreement” gave the possibility for interpretation that it was just a kind of “pre-agreement” and that it would become clearer later on, or by reaching a similar one, or else by complementing it with an additional agreement. Basically, the agreement did not appear to be alike typical agreements between two sovereign and equal states in the contractual plan, because it lacked both the name and the state symbols. Such a wording was consistent with trailing the intention for not addressing Kosovo's status. The following are the ambiguous phrasings in the first six points of this agreement:

First, regarding the name of the joint entity to be created by Serb-majority municipalities (four from the North and six from the South of Kosovo), the same as the IBM deal, the “slash” sign saved the day. This subject would have two titles: Association/Community. This provided the opportunity for flexible but contradictory interpretations of the above, since from point to point, the order of these two expressions began with “Association/Community”, and times with “Community/Association”. Whilst the Kosovo side views the term “Association” as a Non-Governmental Organization (NGO); the Serbian side interprets the expression “Community” as part of the formal structures of Kosovo's governance, i.e. as an “entity” (Point 1);

Second, it is emphasized that, as far as the legal basis is concerned, the Community/Association will be established by statute and will have similar structure

⁴⁰ Agreed Conclusion: The First Agreement Governing the Principles for Normalization of Relations, 2013, at http://www.kryeministri-ks.net/repository/docs/FIRST_AGREEMENT_OF_PRINCIPLES_GOVERNING_THE_NORMALIZATION_OF_RELATIONS,_APRIL_19,_2013_BRUSSELS_en.pdf

⁴¹ See “Opposition Protest in Belgrade over Kosovo Deal”, *Balkan Insight*, 22 April 2013, at <http://www.balkaninsight.com/en/article/opposition-to-protest-in-belgrade-over-kosovo-deal>. “Kosovo Parliament Approves Agreement With Serbia”, *Balkan Insight*, 22 April 2013, at <http://www.balkaninsight.com/en/article/kosovo-approves-resolution-on-agreement-with-serbia>

⁴² Hopkins, Valerie: “Robert Cooper on Reaching Agreements between Kosovo and Serbia, Big Deal”, *BIRN Kosovo*, *Internews Kosova*. Centre for Research Transparency and Accountability, 5 February 2015, at <http://www.balkaninsight.com/en/blog/robert-cooper-on-reaching-agreements-between-kosovo-and-serbia>. “Partnership in Action: Serbia and Kosovo reach landmark deal”, 19 April 2013, Serbia and the EU, at https://eeas.europa.eu/headquarters/headquarters-homepage/27547/serbia-and-eu_en

to the Association of Kosovo Municipalities. The uncertainty at this point is which institution will approve this statute and what precise legal power it will have (Point 2);

Third, regarding the organizational structure of the Association/Community that would consist of the President, the Assembly and the Council, there is uncertainty regarding the powers they will have (Point 3);

Fourth, in the field of authorizations, the Community/Association is foreseen to have “full overview of the areas of economic development, education, health, urban and rural planning”. The expression “full overview” does not clarify the specific extent of the distribution of these authorizations (Point 4);

Fifth, in addition to the authorizations from the fourth point, it is foreseen that “the Association/Community will exercise other additional competences as may be delegated by the central authorities”. The term “will” does not clarify whether the central authorities have mandatory or optional delegation of additional competencies, nor does it specify what they might be specifically (Point 5);

Sixth, about representation in central authorities, it is said that “the Community/Association shall have a representative role and will have a seat in the communities consultative”. Even here, as in the fourth point, the expressions “shall have” and “will have” do not clarify whether these expressions have mandatory or optional features (See more: the First Agreement)⁴³.

As can be seen, the six-point textual articulations do not specify the time and procedures for implementation of these provisions. Their achievement is put in an ‘implicit language’ that they will eventually materialise. The only points that offer a kind of orientation are the twelfth point, which foresees the adoption of a later implementation plan with a timeframe, and the fifteenth point, which foresees the establishment of an implementation committee. A month later (May 2013), according to the “contractual incompleteness” logic proclaimed as above by Bernheim and Whinston, the parties agreed on an “Implementation Plan”, which contains six main elements presenting a platform for the implementation of the Brussels Agreement and all previous agreements reached so far⁴⁴. This plan, was considered by Ashton as a “further step forward in the EU-facilitated dialogue and it is without prejudice to the positions of the two sides on the Kosovo status”⁴⁵.

The new HR Federica Mogherini also used similar terms, such as “landmark achievement” and a “concrete step” in the process of normalizing relations between the parties as well as their advancement towards the EU⁴⁶. Mogherini, used these expressions immediately after the Prime Ministers of Serbia and Kosovo, Aleksandar Vučić and Isa Mustafa, on 25 August 2015, finalized the implementation arrangements of four key agreements: on establishment of the Association of Serb majority municipalities, energy, telecoms, as well as the Freedom of Movement/Mitrovica Bridge (the last three agreements are not subject to treatment in this study). Contrary to the Brussels Agreement and the Implementation Plan of this agreement, highlighted by ambiguous textual formulations, these four key agreements

⁴³ See Agreed Conclusion: 2013, *op. cit.*

⁴⁴ Implementation Plan (2013), at <https://s3.eu-central-1.amazonaws.com/euobs-media/0807580ad8281aefa2a89e38c49689f9.pdf>

⁴⁵ European External Action Service (2013), at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137291.pdf

⁴⁶ European External Action Service (2015), at http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/statements-eeas/2015/150825_02_en.htm

consisted of a much clearer and more specific language. Through the so-called agreement: “Association/Community of Serb majority municipalities in Kosovo—general principles/main elements” (hereinafter: general principles/main elements), a clear plan was presented on how to establish the Association foreseen by the Agreement of Brussels and what its authorizations and objectives would be. As we can see in the following, within the 22 principles of the agreement of general principles/main elements, a significant clarification of unclear expressions in the first six points of the Brussels Agreement has been made through the following scheme:

Firstly, as regards the uncertainty about the name of the entity to be established, although continued with the use of two terms Association/Community, it was specified that this subject would be a legal entity defined by its Statute (Principle 2);

Second, it was clarified that “the Statute will be adopted by a constituent assembly composed of the voted members of the assemblies of the participating municipalities” (Principle 3);

Thirdly, the specifics of authorizations for all three institutions, the Assembly, the President and the Council, became clearer (Principle 6, point a-f);

Fourthly, regarding the “full overview” application, although this expression remained the same, however, a more detailed list was compiled of where would the Association/Community apply its authority, and eleven additional words such as 'strengthen', 'adopt', 'conduct', 'coordinate', 'facilitate', 'promote', 'disseminate', 'advocate', 'asses', 'provide' and 'establish' were introduced (Principle 4, point a-m);

Fifthly, with regard to the exercise of additional authorizations, although the fifth point of the Brussels Agreement was repeated, however, a margin was allowed “within one year of the adoption of the Statute of the Association/Community, a review of its implementation shall be conducted, including with regard to Article 5 of the First Agreement” (Principle 22);

Sixthly, as far as relations with the central authorities are concerned, there are three main segments of interoperability such as: the Association/Community “will be entitled to propose amendments to the legislation and other regulations”, ...”will have the right to initiate or participate in proceedings before the competent Courts, including the Constitutional Court”,...”will have the right to nominate representatives in the competent organs/bodies of the central government, including the Consultative Community Council” (Principles 10, 11, 12).

As some authors have pointed out, this agreement, contrary to the Brussels Agreement, apart from the more specific and clear wording, has another characteristic, that is, immediately after its achievement, its details were made public for the very first time by EEAS itself⁴⁷. Therefore, in this context, an important query arises: what was the effect of the textual “clarity” of this agreement regarding the future fate of the establishment of the Association? The next session will analyse this effect in the sense that precisely this textual clarity of the agreement on the establishment of this subject, which was the key for normalization of relations between Kosovo and Serbia, became precisely the cause of the de-normalization of the already fragile relations

⁴⁷ Borgh, Chris van der at al.: “EU peacebuilding capabilities in Kosovo after 2008: an analysis of EULEX and the EU-facilitated Belgrade-Pristina Dialogue”, June 2017, WOSCAP, pp. 66-67, at http://www.woscap.eu/documents/131298403/131299900/Kosovo+report_PU+%285%29.pdf/3f0fb0f7-e81c-4e42-bdee-c43efabafed

between the negotiating parties. The problem of the founding of the Association, some called it “The Association that dissociates”⁴⁸.

4. “Side effects” of creative ambiguity

The theoretical debates about the role and effect of the creative ambiguity approach are oriented in two directions. Alongside the supporters of the positive role that the application of this approach offers, especially with regard to positive incentives, a considerable group of authors point out its dark sides, especially the “side effects” or the dangerous costs that it can produce at later stages. This feature of creative ambiguity, Rynhold calls “destructive ambiguity”, which can produce a “spiral of insecurity”⁴⁹. In similar terms, Pehar points out that by using this approach as a kind of “intellectual weaponry” by the parties in the drafting of agreements, offers serious potentials for this agreement to fail later on⁵⁰. Another negative consequence of creative ambiguity, presented by Mitchell, is the moral discrediting of an agreement or a negotiating process, to which the disobedience of the opponents is difficult to penalise⁵¹. Realistically, in the context of the Kosovo-Serbia negotiations, it can be said that all these side effects have been proven true during the process of efforts to implement these agreements, especially that of general principles/main elements. In fact, the use of the ambiguous language in the six points of the Brussels Agreement initially served as a “golden standard” for overcoming divisions and producing a consensus among the parties during its accomplishment.

Meanwhile, both sides had the opportunity to “gain stability” for a long time through the depreciation of local internal resistance thanks to the flexible interpretations made possible by such a language. By clarifying the competences that the Association would have, the opposition political parties in Kosovo: The Self-Determination Movement (Vetëvendosje!), The Alliance for the Future of Kosovo (AAK) and NISMA⁵², supported by civil society members and a large part of the general public across Kosovo, organised a strong resistance, both through massive street protests and through institutional protests against governmental partners (the Democratic Party of Kosovo and the Democratic League of Kosovo) who wanted to proceed with the establishment of this Association⁵³. All the later political developments that blocked the establishment of this Association have been destructive and with a causal nature.

The establishment of the Association as an essential condition for the normalization of relations between Kosovo and Serbia has become a “Gordian knot”⁵⁴. Even after the two negotiating parties produced three agreements for its establishment, they failed to extinguish the excessive polarization of the attitudes held by the five actors involved in the process: the Kosovo Government, the opposition political parties in Kosovo, the Government of Serbia,

⁴⁸ “The association that dissociates: on the Kosovo-Serbia Agreement”, *LeftEast*, 26 October 2015, at <http://www.criticatac.ro/lefeast/the-association-that-dissociates-on-the-kosovo-serbia-agreement/>

⁴⁹Rynhold, Jonathan: “The Failure of the Oslo Process: Inherently Flawed or Flawed Implementation?”, *Mideast Security and Policy Studies*, n° 76 (March 2008), p. 11, at <https://besacenter.org/wp-content/uploads/2008/03/MSPS76.pdf>

⁵⁰ See Pehar, *op. cit.*, p.172.

⁵¹ See Mitchell, *op. cit.*, p. 323.

⁵² In the parliamentary elections of June 2017, the political position-opposition configuration has changed. In the new government out of these elections, the former opposition parties AAK and NISMA are already in the broad governing coalition alongside the Democratic Party of Kosovo (PDK). After 2017, Vetevendosje continued to remain in opposition together with the Democratic League of Kosovo-former PDK partner in the 2014-2017 coalition.

⁵³ “The Association of Serb Municipalities: Understanding conflicting views of Albanians and Serbs”, Policy Report, Balkans Policy Research Group, January 2017, at <http://balkansgroup.org/wp-content/uploads/2017/09/Association-of-Serb-Municipalities-Understanding-Conflicting-Views-of-Albanians-and-Serbs.pdf> (https://balkansgroup.org/storage/app/media/BPRG_Pub-02_ASM_SHQ_WEB.pdf)

⁵⁴ Clark, Janine: “Kosovo's Gordian knot: the contested north and the search for a solution”, *Nationalities Papers*, vol. 42, n° 3 (4 April 2014), pp. 543.

Serbs living in Kosovo as well as the EU. The disagreements consist in the emergence of different interpretations of whether the Association will indeed have executive powers, constitute a third level of government in Kosovo (central and local), will be against the constitutional order of Kosovo, will divide Kosovo on an ethnic basis, etc.

4.1 The Pentagon of Interpretations about Association's status

The Kosovo Government, has constantly considered the Association as an “NGO” i.e. a modality of self-governing of the Serbian population for their daily needs⁵⁵. Since reaching the agreement of general principle/main elements in the internal plan, the Government estimates that the establishment of the Association would ultimately justify the dismantling of illegal parallel structures and consequently integrate the North of Kosovo legally within the constitutional order of Kosovo, keeping Serbia away from it. Internationally, the Government estimates that the establishment of the Association advances the agenda of normalization of relations with Serbia and European integrations. In addition to such an interpretation of being a benefit⁵⁶, the establishment of the Government of the Association is also linked to the fact that it is already an international obligation for it as the Brussels Agreement, now ratified by the Assembly of Kosovo as an international agreement, foresees it.

Serbia mainly sees the Association as a subject that will serve Kosovo Serbs on a practical basis. As a new legal body, the Association would be a mechanism that would accept the transfer of financial competences from Serbia and at the same time serve as a bridge for cooperation with Kosovo within the framework of the normalization of relations⁵⁷. Serbia sees the Association as a platform that enables the expansion of the rights of Serbs in Kosovo rather than a roadmap for recognizing Kosovo's state subjectivity. An assessment that Kosovo Serbs, together with Serbia, had gained a lot when they agreed with the Kosovo party on the establishment of the Association under the General Principles/Principles Agreement, came from the head of the Serbian office for Kosovo, Marko Đurić, who said Serbs won against Kosovo with “five to zero”⁵⁸. Serbia's somewhat more rational official position in this regard was directly presented by former Serbian Prime Minister Dačić, who stressed that instead of fighting “the battles that we will lose for [Kosovo] status, Serbia should go into a battle that will win the rights of Serbs in Kosovo”⁵⁹.

Unlike the official positions of the Government of Kosovo, the opposition political parties “Vetëvendosje!”, AAK and NISMA throughout the period 2015-2017, however, have considered the Association as an ethnically homogeneous “monster” and a challenge for Kosovo's statehood. The opposition block assessed the Association as a danger in the *de facto* creation of a third level of government, since according to them it would have the authority to exercise executive power. As such, it would isolate Kosovo Serbs in a ghetto and hinder their true integration into the constitutional order of Kosovo. Merely, it would turn into a kind of “legal parallelism” that would resemble the Republika Srpska in Bosnia and Herzegovina⁶⁰. Seeing the Association as a potential danger to a coherent state operation, this block obstructed the work of Assembly sessions with the intention not to proceed with any legal initiative for the

⁵⁵ Ernst, Andreas: “The April Agreement: A Step towards Normalization between Belgrade and Pristina?”, *Contemporary Southeastern Europe*, vol. 1, n°1 (2014), p.123.

⁵⁶ See Weber, *op. cit.*, p.9.

⁵⁷ See Balkans Policy Research Group, 2017, *op. cit.*, p. 7.

⁵⁸ Đurić Marko: “Srbija u Briselupobedilasa 5:0”, B92, 25 August 2015, at

https://www.b92.net/info/vesti/index.php?yyyy=2015&mm=08&dd=25&nav_category=11&nav_id=1031255B92

⁵⁹ “Serbia and Kosovo: The Path to Normalisation”, International Crisis Group, Europe Report, n° 223 (19 February 2013), p. 9, at <https://d2071andvip0wj.cloudfront.net/serbia-and-kosovo-the-path-to-normalisation.pdf>
See SEESOX 2013, *op. cit.*, p.4.

⁶⁰ See Elmehed, *op. cit.*, p.26.

establishment of the Association. This situation provoked a serious institutional crisis in Kosovo. After two months of blockade in the work of the Assembly, EU Enlargement Commissioner, Johannes Hahn, visited Kosovo and delivered a speech to the Assembly, not at all interesting for the opposition parties: “Vetëvendosje!”, AAK and NISMA. Despite his call to protect the 25 August agreements, opposition parties displayed in front of him banners with the text “Is ethnic segregation an EU value?” And “Unjust agreements will not pass!”⁶¹. The opposition considered the agreement of general principle/main elements as unconstitutional and demanded the resignation of the Government⁶².

Some studies show that Serbs living in Kosovo are very little aware of what the Association really is and what it will offer to them⁶³. Although with little information on how this Association will influence their daily lives, Kosovo Serbs continue to crave it more and more⁶⁴. These attitudes come from two directions. First, Kosovo Serbs are pro-establishing such an Association, because Serbia itself has transmitted it to Kosovo Serbs as something that will benefit them and will be a way of enabling them to preserve their lifestyle and to maintain permanent links with Serbia. This has caused them to have some sort of “passive” kindness towards the Association. On the other hand, Serbs also have an “active” kindness to the Association, as they continue to see it increasingly useful to them, whenever it becomes less desirable for most of the Kosovo Albanian population. So, their attitude towards the Association depends on reactions coming from Belgrade and Pristina.

The EU's reactions were somewhat subsequent. In line with its position of being a mediator, the EU has continued to reflect neutrality. During November, when the institutional crisis reached its peak, in addition to EU Enlargement Commissioner, Johannes Hahn, HR Mogherini issued a statement expressing support for Prime Minister Mustafa and called for the implementation of reached agreements (including the general principles/main elements) and continuation of dialogue⁶⁵. Meanwhile, HR Mogherini's spokesperson, Maja Kocijancic, said that the EU would not comment on Kosovo's judicial procedures for interpreting the agreement of general principle/main elements but that “we expect the agreement to be implemented” and that “both parties are responsible for their part of the implementation work”⁶⁶.

4.2 The crash between politics and law: destructive ambiguity

The controversial views elaborated above regarding the status of the Association, together with the opposing attitude of the opposition political parties in Kosovo, contributed to the deepening of the political and institutional crisis in the country, which in fact contested the political legitimacy of the Association and hindered the efforts for its establishment. Another blocking measure for the establishment of the Association came to an end when the Constitutional Court of Kosovo, at the request of Kosovo President, Atifete Jahjaga, on 10 November adopted a provisional suspension measure for the implementation of the principles of the agreement of general principle/main elements foreseeing the establishment of this Association. This measure, by President Jahjaga, was sought with the intention that this would contribute to the reduction of political tensions between the opposition and the government, until the Court came to a

⁶¹ “Hahn: Kosovo Opposition Must Not Block Parliament”, *Balkan Insight* 6 November 2015, at <http://www.balkaninsight.com/en/article/hahn-msa-will-not-solve-kosovo-s-internal-problems-11-06-2015>

⁶² “Kosovo Opposition Force MPs to Flee Parliament”, *Balkan Insight*, 17 November 2015, at <http://www.balkaninsight.com/en/article/with-teargas-and-pepper-spray-kosovo-opposition-clears-the-parliament-hall-11-17-2015>

⁶³ See Balkan Policy Research Group, 2017, *op. cit.*, 25.

⁶⁴ See European Centre for Minority Issues Kosovo, 2016, *op. cit.*, 8.

⁶⁵ European External Action Service, 2015, at https://eeas.europa.eu/headquarters/headquarters-homepage/3085_en

⁶⁶ “Serbia Accuses Kosovo of Mocking Brussels Deal”, *Balkan Insight*, 11 November 2015, at <http://www.balkaninsight.com/en/article/belgrade-pristina-row-over-brussels-agreement-suspension-11-11-2015>

definitive decision whether the principles of the general principle/main elements were in accordance with the spirit of the Constitution of Kosovo. However, neither this provisional measure nor the final decision issued by the Court on 23 December 2015 provided a satisfactory and clear solution as it was expected. The Court evaluated ‘chapter by chapter’ the 22 principles of the agreement on their compatibility with the spirit of the constitution, but the unclear language of the text of this verdict regarded it as highly controversial⁶⁷. The decision balanced between the finding that some of the principles of the agreement “do not fully meet the standards of the Constitution” and “raise concern”⁶⁸, and the demanding of the government of Kosovo that in the future when the legal act and the Statute of the Association was to be drafted, the government would agree with this assessment, thus making it conform to the spirit of the constitution⁶⁹. Through this neutral line⁷⁰, the Court also reiterated that the establishment of the Association is part of the constitutional order, as it is foreseen in the Brussels Agreement, which is already ratified by the Kosovo Assembly.

Based on the controversial nature of this decision, its interpretation was made in different ways both by domestic political actors in Kosovo and by external actors. Such a thing only deepened the political divide in the country. First, this decision, besides failing to persuade opposition parties to give up obstructive action, was even used by them to give legal legitimacy to their political cause. Second, for the Kosovo government, the Court's decision lifted the dilemmas and paved the way for the establishment of the Association, and that it remains committed to its establishment even within the constitutional court decision. Thirdly, for Belgrade, although it was Pristina's internal affair, they insisted that the other party should respect the agreements that lead to the establishment of this Association. Fourthly, for Kosovo Serbs, the Court's decision only created more confusion for them, as even after this decision, official Prishtina has no political will to establish the Association. In addition, even greater concern for Serbs constituted not only institutional opposition, but the civil society's too. The fact that more than 200,000 signatures were gathered against the establishment of the Association, and in January 2016 a massive protest was organized with over 60,000 protesters⁷¹ with the motto “For the Republic”, and “Zajednica (Association) does not pass”, makes them feel unwanted in Kosovo⁷². Fifth and the most important one, was the EU's reaction to this decision. In this regard, there are such estimates that the very fact that there has been little official and informal EU declarations for a long time shows that the latter quietly agreed with this Court's decision and aimed at a “smooth continuation of dialogue”⁷³. Indeed, only after six months, HR Mogherini during a speech at the Kosovo Assembly stressed that the Association “will follow the recent ruling of the Constitutional Court, which provides guidance to ensure that the Statute of the Association will reflect Kosovo's laws when it is drafted”⁷⁴. However, in some ways it has been estimated that by not addressing the uncertainty of the decision, Mogherini's statement remains as ambiguous as the decision itself⁷⁵.

⁶⁷ See Weber, 2016, *op. cit.*, pp. 5-6.

⁶⁸ Constitutional Court, 2015: n° KO 130/15, at http://gjk-ks.org/wp-content/uploads/vendimet/gjk_amicus_curiae_ki_ang.pdf

⁶⁹ *Ibid*, 189.4-6, III –IV.

⁷⁰ See Weber, *op. cit.*, p. 5-6.

⁷¹ “Kosovo Opposition Builds Resistance to Brussels Agreements”, *Balkan Insight*, 12 January 2016, at <http://www.balkaninsight.com/en/article/kosovo-opposition-swell-ranks-against-brussels-agreements-01-12-2016>

⁷² See Balkan Policy Research Group, 2017, *op. cit.*, 8.

⁷³ See Weber, 2016, *op. cit.*, pp. 6-7.

⁷⁴ European External Action Service (2016), at https://eeas.europa.eu/delegations/kosovo/5184/speech-high-representativevice-president-federica-mogherini-kosovo-assembly_en

⁷⁵ See Balkan Policy Research Group, 2017, *op. cit.*, 21.

4.3 Association between limbo and ‘pat position’

Still, after three years, there is no concrete action by the Government of Kosovo to establish the Association according to the instructions of the Constitutional Court. Such moves are nowhere to be seen, in spite of the fact that a new government emerged from the elections of June 2017. The question of when the establishment of this Association will happen, remain unanswered. Rather, since the government is now led by the AAK (directed by Kosovo's current Prime Minister, Ramush Haradinaj), one of the opposing parties opposing the establishment of the Association - made the issue drag on without any explanation of what its destiny would be. Movement for the establishment of the Association has remained in “pat position”. Both sides continue to condition each other in the move to overcome this standstill. For example, while the Serbian side states that it will not enforce any of the agreements reached in advance without the establishment of the Association by the Kosovar side.

On the other hand, the Kosovar side conditions its establishment, with the factual disintegration of parallel structures from Serbia, and with the constructive moves it needs to make concretely towards full normalization of relations with Kosovo⁷⁶. Such discourse of communication between the parties is also noted in the context of the periodic reporting they make regarding the EU notification on the state of implementation of the agreements reached. There is a mutual fault line between them regarding who is the main culprit for not implementing them. In its latest report to the EU, the Kosovo Government finds that:

“The most concerning phenomena is the Serbia’s dualism in implementation which implies that at one hand it implements the agreements and at the other hand it continuous to support its parallel structures in Kosovo, including illegal municipalities in northern and other part of Kosovo and some other areas”⁷⁷.

Serbia has also addressed clear criticisms and accusations towards Kosovo for neglect and lack of readiness for the establishment of the Association. According to the Government of Serbia:

“Priština not only failed to fulfil its commitments undertaken in Brussels, but also continued to condition the establishment of the Community/Association with the closure of the institutions it refers to as ‘parallel’, and with other, mostly everyday political issues, which were not part of any agreement”⁷⁸.

On the other hand, through its annual reports on the EU enlargement policies, as part of the overall progress evaluation for Kosovo and Serbia, the European Commission has also evaluated the normalization of relations between these two countries. In this regard, the 2018 reports emphasize with a very generalised language that:

“Implementation of the 25 August 2015 Agreements has overall been slow. Progress has been made on the Association/Community of Serb majority municipalities in Kosovo. On 4 April 2018, Kosovo has given a mandate to the Management Team to start drafting the statute of the Association/Community”⁷⁹.

⁷⁶ *Ibid.*, p.10.

⁷⁷ Brussels Agreements Implementation State of Play, Ref.no. 064/2017, Government of Kosovo, 6 July 2017.

⁷⁸ Progress Report on the Dialogue between Belgrade and Pristina, Government of Serbia, April 30, 2017–October 31, 2017.

⁷⁹ European Commission (2018), p.48 at

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

European Commission (2018), p. 51 at

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

4.4 Final phase of the dialogue

The period of 2017-2018 has been full of tensions and incidents in the bilateral relations between Kosovo and Serbia. However, all these challenges did not diminish the commitment of the EU to encourage both sides to return to the continuation of the process for normalization of relations between them⁸⁰. Within these two years there have been several meetings between Serbian President, Aleksandar Vučić, and Kosovo President, Hashim Thaci, mediated by HR Mogherini. Both sides agreed on a new and final phase of the dialogue that would lead to the attainment of a comprehensive agreement on normalization of relations.

Unlike previous periods of dialogue, at the beginning of 2018 the position of the EU appeared to become rather clearer. For the EU, the actual state of implementation of previous agreements reached in the disposition of creative ambiguity (including the establishment of the Association), is not enough. It appears that this situation has made the EEAS officials to focus their commitment in the incitement of the parties towards reaching a comprehensive agreement. One of which would resolve all the outstanding disputes between the parties. In the EU Enlargement Strategy for the Western Balkans, published by the European Commission in February 2018, the EU for the first time decisively emphasises that, an essential condition for these two countries to advance on their European path, is that both sides must reach “a comprehensive, legally-binding normalization agreement”⁸¹. This clearly shows the use of a combined approach with elements of conditional stimulation by the EU about the negotiating parties. Although it is not new to the EU, the application of this approach remains its most powerful instrument in encouraging parties towards a final agreement.

Even though the EU clarified its position in relation to the negotiating parties, emphasizing the immediate need for a comprehensive, legally-binding normalization agreement, ambiguities in the interpretation of this agreement still remain evident. Since the agreement would be “comprehensive”, it meant that its content could include addressing any issue of interest for both parties. The label “comprehensive” of this agreement, again allowed for ambiguous interpretations. Following the interpretations of this label in the first half of 2018, the two presidents Thaci and Vučić came up with an idea. At the event called “new perspectives on EU enlargement” held in Austria on August 25, 2018, they came up with a controversial idea for “border corrections” between the two countries, which would also be the key to achieving a historic peaceful settlement between Kosovo and Serbia⁸². Such encouraging terms were also used by the EU Enlargement Commissioner, Johannes Hahn, who was part of the discussion panel, when he stated: “We have just witnessed a very historic moment”⁸³. One day before the event, a strong signal for the possibility of including the issue of border corrections in discussions between the parties, came from US President Donald Trump’s National Security Advisor, John Bolton, who emphasized: “The US policy is that if the two parties can work it out between themselves and reach agreement, we don’t exclude territorial adjustments”⁸⁴. Later on, HR Mogherini made it clear that in addition to the agreement’s legally binding character, it

⁸⁰ Troncota Miruna: “Brussels Based Talks are a Dialogue of the Deaf”, Kosovo 2.0, 23 February 2017, at <https://kosovotwopointzero.com/en/brussels-based-talks-dialogue-deaf/>

⁸¹ European Commission (2018), at https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

⁸² “Serbia, Kosovo’s Presidents vow for new historic deal”, *Balkan Insight*, 26 August 2018, at <https://balkaninsight.com/2018/08/26/serbian-kosovo-presidents-vows-for-new-history-08-25-2018/>

⁸³ *Ibid.*

⁸⁴ “US Won’t Oppose Serbia-Kosovo Border Changes – Bolton”, *Balkan Insight*, 24 August 2018, at <https://balkaninsight.com/2018/08/26/serbian-kosovo-presidents-vows-for-new-history-08-25-2018/>



should also be in line with international law, thus taking into consideration all the issues that parties bring to the table⁸⁵.

The controversial idea for an eventual border correction, as one of the points of the forthcoming comprehensive agreement, provoked a vigorous debate on three levels: the international community, within Kosovo, as well as within Serbia. Indeed, the notion “border correction” was not very clear; it was not known if it meant demarcation of the borderline between two sovereign countries, division of Kosovo based on ethnicity, or exchange of territories between the parties!

Kosovo president, Hashim Thaçi stressed: “My proposal for a peaceful solution with Serbia is clear,” ... “No ethnically based divisions, but a correction of border and mutual recognition”⁸⁶. On the other hand, the Prime Minister as well as the President of the Assembly of Kosovo, as partners of the ruling coalition, also the opposition parties, were categorically against any idea that would put the issue of territorial changes on the discussion table. The Prime Minister, Ramush Haradinaj, even declared: “no one wants a change of borders except Russian President Vladimir Putin”⁸⁷. Unlike Kosovo, there is more significant support in Serbia for the border correction idea, by the ruling parties of the country. The main supporters are the Serbian Progressive Party (SNS) and its largest coalition partner, the Socialist Party of Serbia.

Nevertheless, even in Serbia, opposition parties and some politicians have described the recognition of Kosovo and any border changes as “treason”⁸⁸. Regarding the reactions of the international community, unlike the United States and Russia, who were supposed to support any agreement that Kosovo and Serbia would reach, within the EU, Germany has been categorically against the idea of a border correction or territorial exchange. Even the United Kingdom is categorically opposed to such an idea⁸⁹.

Currently, the process of dialogue between Kosovo and Serbia has been blocked. Paradoxically with the EU calls for constructive cooperation in the spirit of normalization of relations, both sides have only deepened the differences between them. Despite commitments to constructive co-operation that both sides had shown in the agreement on regional cooperation and representation reached in Brussels in 2012, Serbia has continued to hinder Kosovo's involvement in international organizations and forums. When Kosovo failed for the third consecutive year to become a member of “The International Police Agency – INTERPOL” in November 2018, Serbia perceived it as a major diplomatic victory against Kosovo. This Serbian deed urged the Kosovo government to apply a 100% customs tariff for products imported from Serbia as well as Bosnia and Herzegovina. The Kosovo government considered this action as a necessity and a reciprocal punitive measure against Serbia. A few days later, Kosovo Prime Minister, Haradinaj, conditioned the abolition of this tariff in exchange with the recognition of the state of Kosovo by Serbia⁹⁰.

⁸⁵ European External Action Service (2018), at https://eeas.europa.eu/headquarters/headquarters-homepage/50227/statement-hrvp-mogherini-following-new-round-belgrade-pristina-dialogue_en

⁸⁶ “Kosovo's President, Belgrade Willing To Consider Border Changes”, *Radio Free Europe*, 7 August 2018, at <https://www.rferl.org/a/kosovo-s-president-belgrade-willing-to-consider-border-changes/29417481.html>

⁸⁷ *Ibid.*

⁸⁸ “Serbia-Kosovo border change unlikely”, *The Economist*, 18 September 2018, at <http://country.eiu.com/article.aspx?articleid=777151461&Country=Serbia&topic=Politics>

⁸⁹ *Ibid.*

⁹⁰ “Kosovo to keep tariffs until Serbia grants recognition, insists PM”, *Euractiv*, 24 January 2019, at <https://www.euractiv.com/section/enlargement/news/kosovo-to-keep-tariffs-until-serbia-grants-recognition-insists-pm/>

On the other hand, Serbia also conditioned the return to dialogue with Kosovo only if this tariff is abolished. This move arouses strong EU reactions. Thus, HR Mogherini demanded the urgent withdrawal of this tariff⁹¹. Nevertheless, despite the increasing pressure on Prime Minister Haradinaj, by his coalition partners as well as the EU and USA, he continues to insist that this tariff will not be revoked until Serbia recognizes Kosovo, even though this decision would cost him his political career and, at the same time, he might lose the international support for Kosovo.

Another political moment, which has aggravated Serbia, was the Kosovo Assembly's decision in December 2018, to transform the Kosovo Security Force (KSF) into an Army⁹². This act was supported strongly by the US, Germany, France, and Great Britain, but was considered hasty by NATO's and EU's top officials. Serbia considered this to be a provocation and a cause for destabilization of the Balkans. On the other hand, Kosovo's official stance was that the new army will be multi-ethnic, professional, and contribute to peace, regional and global security, but as a political act, it should not be related to the process of normalization of relations with Serbia.

As a result of these developments, political discourse in Kosovo has been dominated by nationalist rhetoric. It even came to the creation of a "solidarity bloc" against border corrections which consisted of the main partners of the ruling coalition, opposition parties as well as civil society representatives. Initially, the Kosovo Assembly nominated the "Negotiation Team" in an effort to bring the Assembly back to the main role in the process of normalization of relations with Serbia⁹³. Moreover, in March 2019, the Kosovo Assembly adopted a platform as a political document through which Kosovo's official positions are presented. Its core principles are: the comprehensive agreement should guarantee Kosovo's recognition by Serbia, it must preserve the multi-ethnic character of Kosovo society, it must not violate territorial integrity, it must not allow an Association of Serb-majority municipalities with executive powers. Also, in this platform it is emphasized: "nothing will be agreed until everything is agreed [...] legally binding agreement must be clear and unambiguous". Past experience shows that resorting to the approach of constructive ambiguity has contributed to the asymmetrical implementation of agreements reached so far⁹⁴.

One of the characteristics of the recent developments in regards to the normalization of relations between these two parties is the direct involvement of the USA, although offered as a supporting role for both parties involved as well as for the EU as a facilitator of the process. Witnessing the total stagnation of the negotiating process, both the US and the EU have applied a stimulating approach to the parties, encouraging them to move forward towards reaching a final agreement. In this regard, very encouraging are considered the letters sent by the President of the United States, Donald Trump, to the two presidents Thaçi and Vučić, at the end of 2018 and early 2019. The US president has called on both sides to reach an internal consensus and to make an effort that would facilitate the process of reaching a comprehensive agreement that would contribute to peace, stability and prosperity for both countries and the entire Balkan region. President Trump has been quite decisive, making it clear to both sides that: "...Failure to capitalize on this unique opportunity would be a tragic setback, as another chance for a

⁹¹ European External Action Service (2019), at https://eeas.europa.eu/headquarters/headquarters-homepage/56256/federica-mogherini-meets-delegation-dialogue-appointed-kosovo-assembly_en

⁹² "Kosovo lawmakers approve army, as tensions with Serbia rise", *CNN*, 14 December 2018, at <https://edition.cnn.com/2018/12/14/europe/kosovo-approves-law-army-serbia-opposition-intl/index.html>

⁹³ "Kosovo negotiation team heads to Brussels", *Balkan Insight*, 8 January 2019, at <https://prishtinainsight.com/kosovo-negotiation-team-heads-to-brussels/>

⁹⁴ Assembly of Kosovo 2019, 2-5, at <https://www.new-perspektiva.com/wp-content/uploads/2019/02/Kosovos-platform.pdf>

comprehensive peace is unlikely to occur again soon”⁹⁵. ... “We see mutual recognition as the foundation of normalized relations and the basis for any comprehensive solution”⁹⁶.

The EU for its part was in a situation of weakness given its division. Germany did not accept the land swap between Kosovo and Serbia. Other countries such as Austria and Hungary were in favour, including the HR Mogherini. In April 2019, within the context of the Berlin Process, a mini-summit on the Western Balkans took place in Berlin. The context of the Conference was clear, the rising alarm in Brussels for the increasing influence in the Balkans of Russia and China. The President of France, Emmanuel Macron, and the German Chancellor, Angela Merkel, tried to promote a peace settlement between Kosovo and Serbia. Federica Mogherini only attended the talks, without any protagonism. The aim was to get the resumption of the dialogue on the normalization of bilateral relations, and burying the agreement on the land swap⁹⁷. At the same time, a message was sent to Washington and Moscow and also to Brussels that Germany and France were the ones who decided the future of Europe. However, the result was not very promising. The Franco-German statement pointed out that Serbia and Kosovo had agreed to work constructively to normalise their relations. France and Germany were unable to offer a rapid integration into the EU⁹⁸. For Kosovo, it was clear that the EU was too weak to push its negotiations with Serbia and America's involvement was necessary. For Serbia, Russia's participation in the negotiation was a guarantee in the defence of its interests.

In this situation, the Office of the President of France, on the 30th of April, published the French strategy for the Western Balkans, complementing the activities that were being developed within the framework of the Berlin Process, thus reinforcing the EU policies and presence in the Western Balkans

At present, there is no clear scenario as to how the dialogue process will proceed further. While the Serbian government makes the dialogue conditional on lifting the customs tariff; on the other hand, the government of Kosovo conditions the abolition of this tariff to obtaining formal recognition from Serbia. This political *status quo*, indeed, is the abnormality in the normalization of reciprocal relations between the two parties.

5. Conclusion

The negotiating process for the normalization of relations between Kosovo and Serbia has stagnated. Apart from some occasional meetings between the presidents of both countries, the parties have not yet given any clear signal of their readiness to reach a final agreement. In principle, managing such a complex process, for the EU itself is an adequate opportunity to test its performance of being a mediator. The complementary use of the three above-mentioned operational approaches was provisional on factual circumstances. These approaches enabled the EU a fairly balanced management to overcome divisions and to reach concrete agreements.

In this regard, the EU succeeded in identifying the common and separate interests of the parties, and by them, initiated negotiations resulting in specific agreements. This has been crucially important in reaching more complex agreements, such as the Brussels Agreement of 2013. Another characteristic has to do with the pace of the dialogue. It has been of progressive escalating nature, slipping from a “technical” to “political” dialogue. Consequently, this

⁹⁵ President of Kosovo 2018, at <https://www.president-ksgov.net/en/news/president-thaci-received-a-letter-from-the-president-of-the-usa-donald-trump>

⁹⁶ President of Kosovo 2019, at <https://www.president-ksgov.net/en/news/president-trump-congratulates-president-thaci-on-the-11th-anniversary-of-the-independence-reiterates-the-importance-of-normalisation-of-relations-with-serbia>

⁹⁷ The position of France in this regard was more ambiguous.

⁹⁸ At this time a further European Union enlargement was out of the picture, given the increasing problems for the cohesion of the Union.

escalation has also had its positive symbolic side by postulating a message that when the parties were able to reach an agreement on technical issues, they would be able in the future to reach agreements on even more complicated issues.

Regarding the effects produced by the creative ambiguity approach, some conclusions can be drawn. Ambiguity was a fundamental component in how the Brussels Agreement was formulated and presented. Initially, the use of an ambiguous language in the textual formulations helped the parties create more opportunities for flexible interpretations whenever they were faced with absolute pressure, especially from the opponents of the agreements. However, as much as the ambiguity approach served as a facilitation tool for overcoming divisions and producing a consensus between the parties in reaching the deal, it only “preserved” the profound divisions that reappeared when the parties began to read the agreements according to their interests during the implementation. This was demonstrated in concrete terms when the parties began to implement the agreement on the establishment of the Association.

Later on, the EU clarified its position in relation to the parties through the application of combined approach of incentives and conditionality. EU, made it clear to the parties that in order for them to advance their position on the road to the EU, they must reach a comprehensive and legally binding agreement. However, the EU's stance that this comprehensive agreement may include the border correction between the parties, or even territorial exchanges, was ambiguous. There was a clear division among the different EU countries. In this context, both Serbia and Kosovo already believe that the best guarantees for an arrangement are no longer in the EU. Kosovo perceives the EU as too weak and considers Washington to be the key actor in the resolution of the conflict. Serbia, for its part, considers close ties and close consultation with Russia as an alternative to the EU membership.

In an effort to make the content of this agreement more well-defined, the US has stated that mutual recognition between the parties should be its cornerstone. However, given the new alignment of Serbia and the division and increasing weakness of the EU, it is not clear what will be the outcome of such comprehensive agreement and at what timeline will this happen.

The EU did not realise the necessity to maintain a strong and a united position for dealing with the problem, offering on time a pragmatic solution and a realistic roadmap that could not be questioned by third parties or potential spoilers.



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