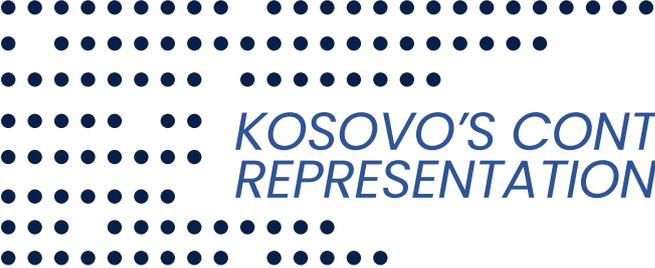




# KOSOVO'S CONTESTED REPRESENTATION IN CEFTA

*A Political and Legal Overview*



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REPRESENTATION IN CEFTA**

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## ACRONYMS

<b>BiH</b>	Bosnia and Herzegovina
<b>CEFTA</b>	Central European Free Trade Area
<b>CRM</b>	Common Regional Market
<b>ECAA</b>	European Common Aviation Area
<b>EEA</b>	European Economic Area
<b>EFTA</b>	European Free Trade Association
<b>ERISEE</b>	Reform Initiative of South Eastern Europe
<b>EU</b>	European Union
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>ICJ</b>	International Court of Justice
<b>NTM</b>	Non-Tariff Measures
<b>RCC</b>	Regional Cooperation Council
<b>SAA</b>	Stabilisation and Association Agreement
<b>SAP</b>	Stabilisation and Association Process
<b>SEE</b>	South-Eastern Europe
<b>SEFTA</b>	South-Eastern Free Trade Agreement
<b>SRSG</b>	Special Representative of the Secretary-General
<b>SWAG</b>	Social Agenda Working Group
<b>UN</b>	United Nations
<b>UNMIK</b>	United Nations Mission in Kosovo
<b>UNSC</b>	United Nations Security Council
<b>US</b>	United States
<b>WB6</b>	Western Balkans Six (Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro and Serbia)
<b>WTO</b>	World Trade Organization

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## EXECUTIVE SUMMARY

Kosovo is still represented through UNMIK in Central European Free Trade Agreement (CEFTA). CEFTA is a trade agreement between the seven countries of South Eastern Europe: Albania, Serbia, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro (Western Balkans Six) and Moldova, and serves as a driving mechanism for regional economic cooperation. Kosovo, under the representation of UNMIK, had joined CEFTA in 2007. After the declaration of independence, Kosovo intensified its resistance to the UNMIK representation by not attending the meetings where UNMIK's participation was required. In contrast, Serbia and Bosnia and Herzegovina increased their efforts to obstruct Kosovo's participation and they blocked the entry and transit of the products of Kosovo.

In the framework of the EU-led dialogue process between Kosovo and Serbia, the Agreement on Regional Representation and Cooperation (2012 Agreement) came to life. This agreement facilitates Kosovo's participation in regional organizations, enabling it to represent itself under the denomination 'Kosovo\*'. After 2012, Kosovo managed to replace UNMIK with the new denomination in some initiatives: European Common Aviation Area (ECAA) and Energy Community, but not in CEFTA. UNMIK, in fact, stopped participating in the CEFTA technical level meetings, but it continues to participate in the decision making meetings (Joint Committee meetings). Kosovo has unsuccessfully tried to open the representation issue in different settings of regional cooperation, yet the change of representation did not happen and it remains challenging up to this day. Three members of CEFTA (Serbia, Bosnia and Herzegovina and Moldova) refuse Kosovo's full representation in CEFTA, the government of Kosovo failed to proactively engage in the process, and the EU has never treated this issue with priority, although it is deeply involved in the dialogue process between Kosovo and Serbia and the regional cooperation in the Western Balkans.

The Stabilisation and Association Agreement (SAA), which marks Kosovo's first contractual agreement with the European Union, obliges the country to continue to implement the Central European Free Trade Agreement. Other initiatives under the Berlin Process, Common Regional Market (CRM) and Regional Economic Area (REA), stem from the obligations that were taken under CEFTA. But the persistent unequal treatment of Kosovo has put any new initiative built upon CEFTA's current framework at a fence. It has even led to a new proposal by Kosovo's Prime Minister, the advancement to South-Eastern Free Trade Agreement (SEFTA).

Kosovo needs to be able to represent itself in regional fora, and CEFTA is an important one. The Government must work on different fronts to mobilize support for amending the preamble, Article 1 and Article 4 of the Agreement. This would include advocacy

at international, European and regional levels, before taking concrete steps such as initiating the amendment of the Agreement; which is likely to fail on its own. Kosovo should consistently and proactively engage in the dialogue with Serbia to require the implementation of the previously reached agreements and to advance towards a final agreement on the normalisation of relations. The role of the EU is pivotal in this process. Engaging the EU is the most promising channel that Kosovo can use to successfully remove UNMIK as its designated representative in CEFTA.

*The Government of Kosovo shall develop a proactive approach with a set of concrete actions to gain support for initiating the removal of UNMIK from CEFTA. This is a lengthy and complex process, which requires the mobilization of political will and resources but also coordination, cooperation, and consistency. The Government of Kosovo must take the following steps:*

- Actively participate in all regional organizations and initiatives. Mobilise the government resources to increase Kosovo's position in regional settings.
- Proactively engage in the dialogue with Serbia – insist on the implementation of the 2012 Agreement and the conclusion of a final comprehensive agreement with Serbia.
- Appoint an envoy to deal with the change of Kosovo's representation and position in regional fora. The envoy would advocate at regional, European, and international levels, to ease Kosovo's path to initiate the change of the preamble of CEFTA.
- Mobilise the support of allies (particularly CEFTA members who recognize Kosovo: Albania, North Macedonia and Montenegro), recognizers and partners, within and outside of the EU (U.S., Norway, Switzerland, Germany, Croatia etc.), to demand UNMIK's unilateral withdrawal from CEFTA. The EU shall directly communicate with the office of the UN Secretary General to facilitate this process. In parallel, discuss with non-recognizers (Serbia, Bosnia and Herzegovina and Moldova) and seek for the implementation of the 2012 Agreement.
- The EU, at a higher level, shall demand the implementation of the 2012 Agreement and shall pressure Serbia, Bosnia and Herzegovina and Moldova to accept (and ratify) Kosovo's change of representation in CEFTA. The key EU member states, particularly Germany, France, or Austria could play a critical role in this regard.
- Along these lines, prepare and submit the request for amending the preamble, Article 1 and Article 4 of CEFTA, removing UNMIK as the designated

representative of Kosovo and replacing it with the denomination Kosovo\* (in accordance with the 2012 Agreement).

- Ratify the Additional Protocol 5 on Trade and the Additional Protocol 6 on Trade in Services and negotiate the Additional Protocol 7 on dispute settlement, as important additions to the CEFTA Agreement.

## INTRODUCTION

The Central European Free Trade Agreement (CEFTA) is a comprehensive regional free trade agreement among Kosovo (under UNMIK), Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina (BiH), and Moldova, designed as an integral part of the pre-accession agenda.<sup>1</sup> It aims to foster the economic and trade relations between the participating countries, to remove the trade barriers, and to consolidate their market economies in order to eventually ease their way towards European Union (EU) integration. The original agreement was reached between the Visegrád Countries (Hungary, Poland, Czech Republic and Slovakia) in 1992.<sup>2</sup> The founding countries, along with others (Slovenia, Romania, Bulgaria and Croatia) which adhered later, left CEFTA once they became members of the EU.<sup>3</sup> This momentum provided the Balkan Countries; who had remained outside of the EU, with the opportunity to join CEFTA. Kosovo, represented by UNMIK, joined a few other organizations in 2006: Energy Community and European Civil Aviation Association (ECAA). UNMIK, as the designated representative of Kosovo, participated and spoke in the name of Kosovo in all these initiatives.

Following the declaration of independence, Kosovo gained recognition and membership in some international organisations.<sup>4</sup> However, it could not make any progress in enhancing its participation in regional fora, primarily due to objections from Serbia and other countries which did not recognize its independence.<sup>5</sup> The situation called for a dialogue process between Kosovo and Serbia under the facilitation of the European Union. This process, among others, led to an agreement on the Regional Representation and Cooperation Agreement in 2012, which opened the path for Kosovo's participation in regional initiatives and the launch of the Berlin Process, and many other derivatives, such as the Regional European Area (REA) and the Common Regional Market (CRM).<sup>6</sup> The 2012 Agreement aimed at facilitating Kosovo's participation in regional fora on an equal footing with other countries (in

<sup>1</sup> Instrument for Pre-Accession Assistance (IPA II) 2014-2020, at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa\\_ii\\_2017\\_039-402.ii\\_mc\\_cefta.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa_ii_2017_039-402.ii_mc_cefta.pdf). For more, see Balkans Group report, *Regional Cooperation in the Western Balkans. Regional Economic Area, the "Mini-Schengen" and the Common Regional Market*, January 2021.

<sup>2</sup> Central European Free Trade Agreement, 21 December 1992, at [https://wits.worldbank.org/GPTAD/PDF/archive/CEFTA.pdf](https://wits.worldbank.org/GPTAD/PDF/archive/CEFTA.pdfhttps://wits.worldbank.org/GPTAD/PDF/archive/CEFTA.pdf).

<sup>3</sup> Hungary, Poland, Czech Republic, Slovakia and Slovenia left CEFTA in 2004, Bulgaria and Romania in 2007 and Croatia in 2013

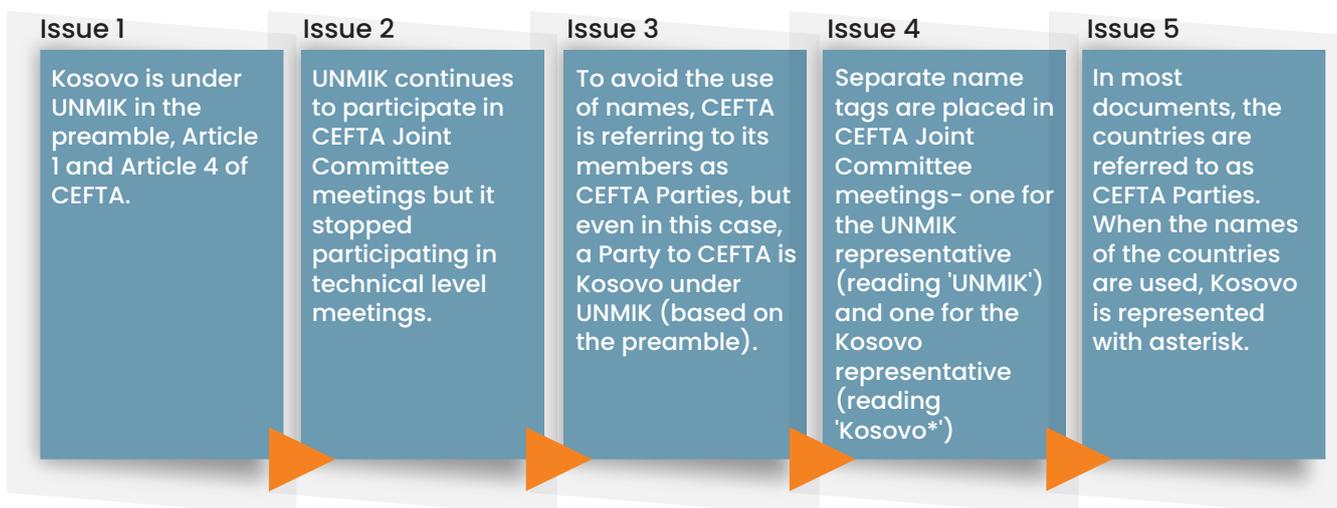
<sup>4</sup> For the list of key organisations and initiatives and Kosovo's membership and participation, see the Balkans Group report, *Regional Cooperation in the Western Balkans. Regional Economic Area, the "Mini-Schengen" and the Common Regional Market*. January 2021. pp. 35-37

<sup>5</sup> Serbia was intensifying the de-recognition campaign and blocking Kosovo's participation and membership in regional and international fora

<sup>6</sup> For more details on these initiatives, see Balkans Group report, *The Berlin Process for the Western Balkans: Gains and Challenges for Kosovo*, January 2018 and Balkans Group report, *Regional Cooperation in the Western Balkans. Regional Economic Area, the "Mini-Schengen" and the Common Regional Market*, January 2021

all of the regional initiatives as well as in ECAA or Energy Community).<sup>7</sup> However, it failed to resolve the representation in CEFTA, which remains subject to the political dispute with Serbia.

UNMIK remains the representative of Kosovo based on the preamble, Article 1 and Article 4, so it continues to consider itself a Party to CEFTA and therefore participates in decision-making meetings.<sup>8</sup> Although the Kosovo representatives are the ones to speak in the name of Kosovo, the presence of UNMIK is still required. In contrast, in technical-level meetings, UNMIK representatives stopped participating. Kosovo has unsuccessfully and insufficiently tried to raise this issue on different occasions. As a form of 'protest' against the asymmetrical position in CEFTA (compared to the other 6 countries), Kosovo has not ratified the CEFTA Protocols (Additional Protocol 5 on trade facilitation and the Additional Protocol 6 on trade in services) even though the government has negotiated them.<sup>9</sup> These protocols, in particular, are supposed to serve as a legal basis and to provide legal instruments for the effective implementation of the trade pillar of the Multi-annual Action Plan for a Regional Economic Area (MAP REA).<sup>10</sup> This has even led to the European Commission calling on Kosovo to implement the protocols and to negotiate the Additional Protocol 7 on dispute settlement, in 2019.<sup>11</sup>



<sup>7</sup> Agreed Conclusions, Arrangements Regarding Regional Representation and Cooperation, 24 February 2012.

<sup>8</sup> Balkans Group communication with UNMIK Press Office, September 2021.

<sup>9</sup> Balkans Group report, *Regional Cooperation in the Western Balkans. Regional Economic Area, the "Mini-Schengen" and the Common Regional Market*, January 2021.

<sup>10</sup> Regional Cooperation Council, Multi-annual Action Plan for a Regional Economic Area (MAP REA) in the Western Balkans, December 2020, at <https://www.rcc.int/pubs/111/multi-annual-action-plan-for-a-regional-economic-area-map-rea-in-the-western-balkans--diagnostic-report>.

<sup>11</sup> European Commission, Kosovo\* 2019 Report, 29 May 2019, at <https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/20190529-kosovo-report.pdf>.

In November 2020, under the Berlin Process, Western Balkan Six (WB6) countries agreed to establish the Common Regional Market.<sup>12</sup> This initiative aims towards the formation of a common regional market and is built upon the CEFTA Agreement.<sup>13</sup> In parallel, three CEFTA countries (Serbia, North Macedonia and Albania) are moving ahead with their own 'partial initiative', the so-called Mini Schengen, recently rebranded to Open Balkan.<sup>14</sup>

A month earlier, Kosovo's Prime Minister proposed the advancement to the South-Eastern European Free Trade Agreement (SEFTA), according to the EFTA-EEA model.<sup>15</sup> The rationale behind Prime Minister Kurti's proposition is to develop a new mechanism that treats Kosovo in an equal stance with other WB countries and creates the direct link to the EU institutions; something that other regional initiatives including Berlin process, CRM and CEFTA lack. For now, Kosovo's position in CEFTA remains unequal. This has increased doubts and insecurities among Kosovo's side about the future of cooperation through CEFTA, impeding the overall goal of regional cooperation initiatives to accelerate and prepare the Western Balkan Six (WB6) towards the EU accession.<sup>16</sup>

*Changing Kosovo's representation in CEFTA is a complex legal issue with tremendous implications. The report aims to shed light on the role of the EU and UNMIK, the insufficient efforts of Kosovo and the obstructions from Serbia.*

## CEFTA: STRUCTURE AND GOVERNANCE

The preamble of CEFTA regards the aim of eligible Parties to accede to the EU and the contribution of the Agreement to improve the readiness of the Parties for membership in the European Union (witnessed by the accession of Czech Republic, Poland, Hungary and Slovakia in 2004, the accession of Romania and Bulgaria in 2007, and the accession of Croatia in 2013).<sup>17</sup>

<sup>12</sup> Balkans Group report, *Regional Cooperation in the Western Balkans. Regional Economic Area, the "Mini-Schengen" and the Common Regional Market*, January 2021, pp. 27.

<sup>13</sup> CEFTA Secretariat, CEFTA region becomes one Market, 10 November 2020, at <https://cefta.int/news/cefta-region-becomes-one-market/>.

<sup>14</sup> Euronews, As the EU membership stalls, Balkan countries make controversial move to create their own mini-Schengen, 31 August 2021, at <https://www.euronews.com/2021/08/31/as-eu-membership-stalls-balkan-countries-make-controversial-move-to-create-their-own-mini->

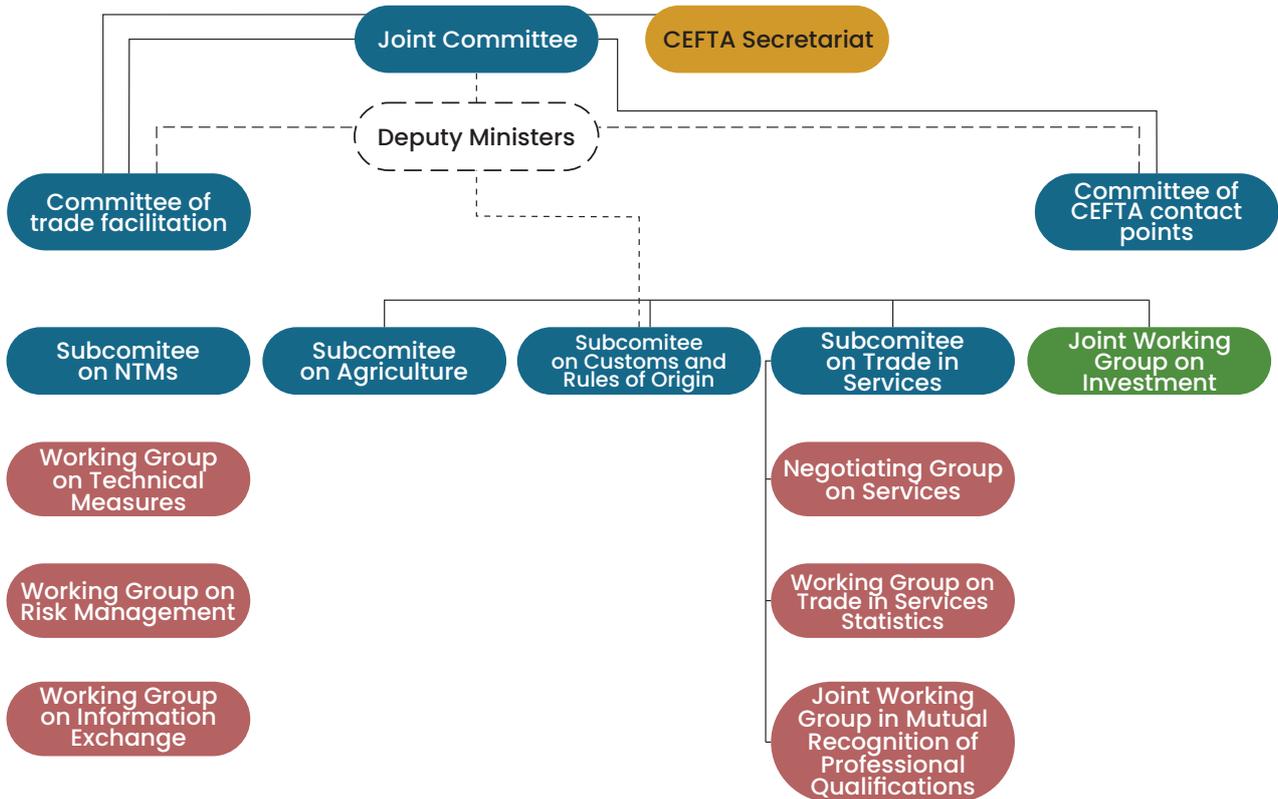
<sup>15</sup> European Free Trade Association (EFTA) is an intergovernmental organisation of Iceland, Liechtenstein, Norway and Switzerland. The European Economic Area (EEA) Agreement is an international agreement enabling, among others, the extension of parts of the EU's single market to Iceland, Liechtenstein, and Norway. The Prime Minister Office, Prime Minister Kurti's statement to the media in Brussels, 15 June 2021, at <https://kryeministri.rks-gov.net/en/prime-minister-kurti-s-statement-to-the-media-in-brussels/>.

<sup>16</sup> Ibid.

<sup>17</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, 19 December 2006, at: <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

The structure of CEFTA consists of:

- A Joint Committee;
- A Secretariat; and
- Committees, Sub-committees and Working Groups as technical bodies.



The CEFTA structures are intergovernmental bodies and the decisions taken by the Joint Committee have the power of law for its members because they stem from the Agreement.<sup>18</sup> Sustainability of CEFTA achievements is given by its modus operandi: CEFTA is an international treaty and the obligations are legally binding; the decision making process requires the consensus of all parties; the Agreement has a dispute settlement mechanism and a defined mandate of working bodies at all levels (from experts to ministers).<sup>19</sup>

The Joint Committee is composed of the representatives of the Parties and is responsible for supervising and administering the implementation of the CEFTA Agreement.<sup>20</sup>

<sup>18</sup> Instrument for Pre-Accession Assistance (IPA II) 2014-2020, at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa\\_ii\\_2017\\_039-402.ii\\_mc\\_cefta.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa_ii_2017_039-402.ii_mc_cefta.pdf).

<sup>19</sup> Instrument for Pre-Accession Assistance (IPA II) 2014-2020, at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa\\_ii\\_2017\\_039-402.ii\\_mc\\_cefta.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/ipa_ii_2017_039-402.ii_mc_cefta.pdf).

<sup>20</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, 19 December 2006, at:

### Meetings

The Joint Committee meets whenever necessary, but at least once a year. Meetings are chaired by one of the Parties, on an annual basis, in alphabetic order. Each of the participating Parties can request meetings. In the Joint Committee meetings, Parties are represented by Ministers that are responsible for Foreign Economic Relations.

### Decisions

The Decisions are taken by consensus. The Joint Committee can set up appropriate organs, such as working groups, task forces, sub-committees and other bodies to assist it in accomplishing its tasks. The Joint Committee takes decisions on the matters related to the Rules of Origin and Cooperation in Customs Administration (article 14 of the Agreement) and in other matters it can make recommendations

**The Secretariat** provides technical and administrative support to the Joint Committee and to any subcommittee, expert group or other body established by the Joint Committee. It is located in Brussels, Belgium.<sup>21</sup>

**Reporting: The Secretariat submits an Annual Report on its activities to the Joint Committee and to the Secretariat Steering Committee (which includes CEFTA parties and all donors that support activities of the Secretariat)**

BODY	ESTABLISHED	MEMBERS	FUNCTION
Joint Committee	2008	A Minister from each CEFTA Party that is responsible for Foreign Economic Relations	The main decision making body. Responsible for supervising and administering the implementation of CEFTA
Secretariat	2008	Consists of a mix of full-time and part-time staff	Provides technical and administrative support to the Joint Committee and to any subcommittee, expert group or other body
Committee of Contact Points	2015	Lead CEFTA Contact Points or their Deputies	Supports the smooth functioning of the Agreement and the fulfillment of the decisions, conclusions and recommendations of the Joint Committee
Committee of Trade Facilitation	2015	High level officials (of each CEFTA Party) from ministries responsible for Trade and the Chairs of the Subcommittees on Agriculture and Customs and Rules of Origin	Addresses the issues related to the facilitation of regional trade in CEFTA and reports to the Joint Committee

<https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

<sup>21</sup> Central European Free Trade Agreement Secretariat, 31 May 2021, at <https://cefta.int/structures/>.

Subcommittee on Non-Tariff Measures	2015	Senior civil servants (of each CEFTA Party) responsible for dealing with these issues in the Ministries for Trade	Identify non-tariff measures, review those measures and propose actions to eliminate the non-tariff measures between the Parties
Working Group on Technical Measures	2015	Government officials (of each CEFTA Party) from the authorities in charge of technical measures including technical barriers to trade, and sanitary and phytosanitary measures	Provide working level forum to address exclusively non-tariff measures stemming technical measures in particular sanitary and phytosanitary measures, and technical barriers to trade, and discuss at the expert level the methods and tools to eliminate the discriminatory measures
Working Group on Risk Management	2015	Government officials (of each CEFTA Party) in charge of customs risk management of the Customs Authorities	Propose the possibilities of taking joint actions related to the customs risk management at the regional level
Working Group on Electronic Exchange of Information	2015	Government officials (of each CEFTA Party) in charge of information technology and electronic data exchange and from other relevant units of the Customs Authorities	Develop and broaden cooperation among CEFTA Parties to address issues related to the functioning and sustainability of the existing or new IT capacities (to be created) between CEFTA parties
Subcommittee on Agriculture including Sanitary and Phytosanitary	2015	Government officials (of each CEFTA Party) in charge of information technology and electronic data exchange and from other relevant units of the Customs Authorities	The main decision making body. Responsible for supervising and administering the implementation of CEFTA
Subcommittee on Customs and Rules of Origin	2015	Deputy Directors of Customs and senior civil servants (of each CEFTA Party) responsible for these issues	Seeks to ensure the simplification and facilitation of customs procedures. Reports to Committee of Trade Facilitation
Subcommittee on Trade in Services	2014	Civil servants (of each CEFTA Party) with an official mandate to negotiate the liberalisation of trade in services	Liberalise trade in services through negotiating specific protocols and improving the overall business environment for services
Negotiating Group on Trade in Services	2014	Civil servants (of each CEFTA Party) with official mandate to negotiate the liberalization of trade in services	Ensure progressive liberalisation and mutual opening of the services markets of CEFTA Parties.
Working Group on Trade in Services Statistics	2014	Civil servants (of each CEFTA Party) responsible for dealing with these issues in respective administrations	Improve the quality of international trade in services statistics across the CEFTA Region and harmonise the statistics with those of the European Union

Joint Working Group on Mutual Recognition of Professional Qualifications	2015	Operates under the auspices of the RCC in close collaboration with the CEFTA Secretariat, Education Reform Initiative of South Eastern Europe (ERISEE) secretariat and the RCC Social Agenda Working Group (SAWG) members and consists of one government official represented in the three structures	Broaden and deepen the cooperation between the CEFTA Subcommittee on Trade in Services, ERISEE and SAWG in the area of labour mobility
Joint Working Group on Investment Policy and Promotion		Consists of SEE officers in charge of investment policies, investment promotion, and CEFTA Contact Points	Guide the identification of potential areas for greater cooperation in the field of investment. Is established under the auspices of the RCC and in cooperation with CEFTA

**Accession to the Agreement:** takes place only with the consent of all Parties. Terms and conditions are determined in the accession Agreement concluded between all Parties and the ascending party.<sup>22</sup>

**Fulfillment of the Obligations and Consultations:** the Parties are required to take all the necessary measures to fulfill their obligations under the Agreement. For any divergence with regards to the interpretation and application of the Agreement, parties are expected to make every attempt through **cooperation and consultations**, if necessary at the Joint Committee, to arrive at a mutually satisfactory resolution.<sup>23</sup>

**Conditions and Procedures for Taking Measures:** upon the failure to arrive at an acceptable solution (within 90 calendar days from the receipt of the notification) the Party concerned may take **provisional rebalancing measures**, which shall be restricted to their extent and duration, giving priority to those which least disturb the functioning of CEFTA.<sup>24</sup>

**Amendments:** the written request (for Amendment) is submitted to the Secretariat. The request is then discussed at the Joint Committee Meeting. The amendments to CEFTA must be submitted to the Parties for acceptance and require the consent of all parties, including the completion of domestic legal requirements, which leads to the ratification by national parliaments.

<sup>22</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, Article 49, 19 December 2006, at <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

<sup>23</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, Article 42, 19 December 2006, at <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

<sup>24</sup> Ibid, Article 42 and 24.

Article 48 of the Agreement sets that “Amendments to this Agreement shall enter into force on the date of the receipt of the last written notification, through diplomatic channels, by which all the Parties notify the Depositary that their domestic legal requirements for the entry into force of the Amendments have been fulfilled.”<sup>25</sup>

**Amendment Procedure**



**Dispute Settlement:** Pertaining to the disputes between the parties, the Agreement foresees that disputes between the parties, which have not been settled through direct consultations at the Joint Committee within 90 calendar days (of the receipt of the request), may be referred to **arbitration** by any Party to the dispute in the form of a written notification addressed to the other Party to the dispute. The disputes are to be solved in accordance with the provisions of this Agreement and any other applicable rules of international law (including the WTO Rules and Procedures).<sup>26</sup>

**THE ARBITRAL TRIBUNAL COMPRISES OF THREE MEMBERS**

1 member designated from the Party referring the dispute to arbitration	1 member designated from the Party to which the dispute is addressed	1 member from the two already designated members
* May be its national or a resident	* May be its national or a resident	* Cannot be a national of nor permanently reside on the territory of either Party to the dispute
		* Is appointed as the President of the Arbitral Tribunal

The agreement foresees that disputes under consultation or arbitration cannot be submitted to the WTO for dispute settlement and the award of the Arbitral Tribunal is **final and binding** upon the Parties to the dispute.<sup>27</sup> Yet, the dispute settlement mechanism, although regulated in theory, **has never been applied in practice**. As a result, CEFTA Parties have agreed to strengthen the enforcement of CEFTA rules. CEFTA Parties are negotiating the **Additional Protocol 7** on a dispute settlement

<sup>25</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, Article 48, 19 December 2006, at <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>

<sup>26</sup> Ibid, Article 43.

<sup>27</sup> Ibid, Article 43.

to make this mechanism more effective in practice.<sup>28</sup> The aim of this protocol is to develop a harmonised legislative framework for dispute settlement, which would allow the Parties to have more transparent regimes minimising the risk for the creation of new Non-Tariff Measures (NTMs).<sup>29</sup> A strong dispute settlement mechanism could, potentially, become one of the key pillars of a regional trade system as it would assure proper implementation of undertaken commitments and prevent Parties from taking measures that might be NTMs.<sup>30</sup> It must be noted that Kosovo, so far, is not willing to negotiate this protocol due to its unequal treatment in CEFTA.

ADDITIONAL PROTOCOLS	SCOPE	DATE	RATIFIED BY
Additional Protocol to the Agreement on amendment of and accession to the Central European Free Trade Agreement	Enabling the liberalization of the Agricultural Products	11 February 2011	Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia and Serbia
Additional Protocol 3	To abolish all customs duties on imports, all charges having equivalent effect, and all import duties of a fiscal nature in trade	20 November 2013	Albania and Bosnia and Herzegovina
Additional Protocol 4	To abolish all customs duties on imports, all charges having equivalent effect, and all import duties of a fiscal nature in trade of agricultural products	04 March 2015	Moldova and North Macedonia.
Additional Protocol 5	For Trade Facilitation (simplifying and harmonizing the procedures)	18 April 2018	Albania, Bosnia and Herzegovina, Montenegro, Moldova, North Macedonia and Serbia
Additional Protocol 6	For Trade in Services (enabling liberalization, guaranteed market access and treatment in key services sectors)	11 January 2021	Albania, Bosnia and Herzegovina, North Macedonia and Serbia.

**Exceptions from the application of CEFTA obligations:** the prohibition or restriction on imports, exports, or goods in transit do not apply justified on the grounds of public morality, public policy, the protection of health and life of humans, animals or plants, the protection of national treasures. A Party can take any measure which it considers necessary to prevent the disclosure of information contrary to its essential security interests and for the protection of its essential security interests

<sup>28</sup> Regional Cooperation Council and Central European Free Trade Agreement Secretariat, Annual Report on Implementation of the Multi-annual Action Plan for a Regional Economic Area in Western Balkans, July 2019.

<sup>29</sup> Instrument for Pre-Accession Assistance (IPA II) 2014-2020 Action Plan, at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/ipa\\_2020-042-350.04-mc-eu4business\\_rea-trade.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annexes/ipa_2020-042-350.04-mc-eu4business_rea-trade.pdf).

<sup>30</sup> Balkans Group interview with a trade expert, Prishtina, September 2021.

or the implementation of international obligations or domestic policies.<sup>31</sup>

## KOSOVO IN CEFTA

### BEFORE INDEPENDENCE

From 1999, UNMIK represented Kosovo in its international relations and entered into some international agreements on its behalf; with Albania, Croatia, Bosnia and Herzegovina and North Macedonia, but it did not sign a bilateral trade agreement with Serbia, Montenegro and Moldova.

Agreement	Parties	Date of Signature	Date of Entry into Force
Free Trade Agreement	United Nations Interim Administration Mission in Kosovo (UNMIK) and Republic of Albania	7 July 2003	1 October 2003
Interim Free Trade Agreement	United Nations Interim Administration Mission in Kosovo (UNMIK) and Former Yugoslav Republic of Macedonia	31 August 2005	2 February 2006
Interim Free Trade Agreement	United Nations Interim Administration Mission in Kosovo (UNMIK) and Republic of Croatia	28 September 2006	1 November 2006
Interim Free Trade Agreement	United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Ministers of Bosnia and Herzegovina	19 October 2006	

In December 2006, UNMIK signed the Agreement on Amendment and Accession to the Central European Free Trade Agreement, on Kosovo's behalf.<sup>32</sup>

<sup>31</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, Article 17 and 18, 19 December 2006, at <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

<sup>32</sup> Agreement on Amendment and Accession to the Central European Free Trade Agreement, 19 December 2006, at <https://cefta.int/legal-documents/#1463498231136-8f9d234f-15f9>.

## Article 1

### Accession

The Republic of Albania, Bosnia and Herzegovina, the Republic of Moldova, the Republic of Montenegro, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on behalf of Kosovo in accordance with United Nations Security Council Resolution 1244 hereby accede to the Central European Free Trade Agreement as amended in Article 3 of this Agreement and shall apply it in accordance with the provisions of this Agreement.

### FROM INDEPENDENCE TO ICJ'S ADVISORY OPINION (2008-2010)

With the declaration of independence, Kosovo gained international recognition: 70 countries recognized Kosovo (until 2011), and its institutions were vested with the authority to represent the country. Nevertheless, Kosovo still faced a myriad of

obstacles, in terms of membership and participation in regional organisations. Three CEFTA members, Serbia Bosnia and Herzegovina (BiH) and Moldova, did not recognize Kosovo's independence. Kosovo institutions changed their official logo and Kosovo Customs designed new stamps, changing the lettering from 'UNMIK' to 'Kosovo'.<sup>33</sup> Serbia rejected the new stamps and, simultaneously with BiH, refused any entry and transit of the products carrying a Kosovo certificate of origin, because they were treated as products originating from a non-CEFTA party.<sup>34</sup>



<sup>33</sup> Balkans Group report, *The Brussels Dialogue between Kosovo and Serbia. Achievement and Challenges*, October 2020.

<sup>34</sup> Balkans Group interview with a trade expert, Prishtina, May 2021. Kosovar businesses of exported and imported goods, transiting via the territory of Serbia and BiH are conditioned to submit Serbian national export and/or import certificates. This means that Kosovo cannot export and/or import freely. Serbia requires all transit in trade destined to Kosovo to comply with its national export and import obligations. For example, if an Austrian or Hungarian company exports to Kosovo by using the transport corridors via Serbia, it needs to comply and fulfill all the Serbian national standards, ensure certificates and pay the connected fees and charges in Serbia.

Kosovo continued to be represented through UNMIK in all CEFTA meetings under the denomination UNMIK/Kosovo.<sup>35</sup> In 2009, during the Montenegro Chairmanship, Kosovo's Minister of Trade and Industry made an official request to the Chair to call a Special Joint Committee meeting to discuss trade barriers introduced by Serbia and BiH.<sup>36</sup> The request was refused, primarily on the ground that it was not submitted by UNMIK on behalf of Kosovo. The refusal provoked vivid sentiments among the Kosovar delegation, who then did not attend the regular Joint Committee meeting in October 2009 in Podgorica, the last meeting during the chairmanship.<sup>37</sup>

### **BETWEEN THE ICJ'S ADVISORY OPINION AND THE REGIONAL REPRESENTATION AND COOPERATION AGREEMENT (2010–2012)**

In 2010, the International Court of Justice (ICJ) issued an Advisory Opinion, deeming that the declaration of independence was not in violation of the International Law.<sup>38</sup> Subsequently, Kosovo refused to attend meetings where the participation of UNMIK was required.<sup>39</sup> Serbia, on the other hand, continued to obstruct the transiting of goods from Kosovo, and persisted in blocking its exports to Serbia, clearly violating CEFTA obligations.

In 2011, the Government of Kosovo imposed reciprocity measures against Serbia and BiH; an embargo on Serbian and Bosnian goods entering Kosovo.<sup>40</sup> Serbia reacted by initiating a dispute resolution procedure, but soon after, at a CEFTA meeting, representatives from Belgrade and Pristina informed the Special Joint Committee that the issue was resolved within the framework of the EU-facilitated dialogue between Kosovo and Serbia.<sup>41</sup>

In March 2011, Kosovo and Serbia began the dialogue under the auspices of the EU. The same year, Kosovo took over the CEFTA Chairmanship, which did not bring any improvements to the bilateral dispute with Serbia. BiH, Serbia and Moldova did not attend any meeting that was held in Kosovo, so the Joint Committee meeting took

<sup>35</sup> Balkans Group interview with a trade expert, Prishtina, May 2021.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> International Court of Justice, Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 22 July 2010.

<sup>39</sup> Balkans Group interview with a trade expert, Prishtina, May 2021.

<sup>40</sup> Kosovo banned the entry of Serbian goods, with Serbian custom stamps. Kosovo imposed a 10% tax for goods from BiH, with BiH custom stamps. For more, see Ministry of Trade and Industry, Decision for the Principle of Reciprocity in Trade Relations, 20 July 2011, at <https://mint.rks-gov.net/desk/inc/media/4A154821-BACC-4163-BDBC-3E531B5BD7F3.pdf>.

<sup>41</sup> UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 31 October 2011, at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/kos%20S2011%20675.pdf>.

place in Paris, instead.<sup>42</sup>

### THE REGIONAL REPRESENTATION AND COOPERATION AGREEMENT AND THE DIALOGUE WITH SERBIA (2012–2016)

On 24 February 2012, within the EU-led dialogue, Kosovo and Serbia reached the **Agreement on Regional Representation and Cooperation**.<sup>43</sup> In a nutshell, it sets the basis for Kosovo's participation and representation in the regional fora. The 2012 Agreement, among others, granted Kosovo the right to participate on its own account and to speak for itself in all regional meetings. There was a condition however, that the name Kosovo be followed by an asterisk that reads:



*"This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the ICJ Opinion on Kosovo declaration of independence".<sup>44</sup>*

*The relevant provisions of the 2012 Agreement read as follows:*

1. To this effect 'Kosovo\*' is the only denomination to be used within the framework of regional cooperation.
2. The footnote to be applied to the asterisk in paragraph 2 above will read "This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence."
3. Kosovo\* participates on its own account and speaks for itself at all regional meetings.
4. Where new agreements are to be initialed and/or signed, a representative of 'Kosovo\*' will sign under the designation in paragraphs 2 and 3 above.
5. As concerns modifications to existing agreements signed by UNMIK, nothing in these conclusions will be interpreted as prejudicial to UNMIK's legal rights. A representative of the United Nations Mission in Kosovo (UNMIK) will be invited to meetings organized within the framework of arrangements for which it is a signatory. It is for UNMIK to decide whether to attend any particular meeting.

<sup>42</sup> Central European Free Trade Agreement Secretariat, 23 November 2011, at <https://cefta.int/structures/joint-committee/#1462970784853-68924c83-290c>.

<sup>43</sup> For more on the Regional Representation and Cooperation Agreement, see <https://dialogue-info.com/regional-representation-and-cooperation-2/>.

<sup>44</sup> Agreed Conclusions, Arrangements Regarding Regional Representation and Cooperation, 24 February 2012.

6. The EU as Facilitator will inform relevant regional organizations and entities of these arrangements for denomination, representation and signature. They should be reflected in the practical organization of regional meetings. The EU will monitor the implementation of these arrangements.

The 2012 Agreement specifically foresaw that a representative of UNMIK would be invited to meetings organized within the framework of agreements for which it is a signatory, leaving their presence or absence at UNMIK's discretion.<sup>45</sup> As of 2013, UNMIK stopped participating in the technical meetings and the invitation was only sent to Kosovo representatives. However, UNMIK representatives continued to participate in Joint Committee meetings, although they stopped speaking on Kosovo's behalf.<sup>46</sup> In most cases, individual name tags were placed for both delegations, to prevent any abrupt reactions.<sup>47</sup> It is important to note however that the 2012 Agreement does not provide any clear and precise guidance on all aspects of regional representation, particularly in terms of names and terminology to be used in official documents.<sup>48</sup> The Secretariat in fact, is refraining from the use of names of the countries and is applying a new format of referring to them as 'the Parties'. In those cases when the countries are referred to by their names, Kosovo is referred to as '**Kosovo\***'.<sup>49</sup> The imprecise language is a manifestation of the tactic of "constructive ambiguity" that the EU had to adopt for brokering agreements between Kosovo and Serbia.<sup>50</sup> As for the approval of the decisions in the Joint Committee meetings, Kosovo representatives are the ones that speak on behalf of Kosovo. According to a Trade Expert, the government has not pressured UNMIK enough to withdraw from participating in the meetings and has never discussed with them in terms of their full withdrawal from CEFTA.<sup>51</sup> Yet, according to the same expert, Serbia continues to hold the strong position that without the presence of UNMIK they will not attend meetings.<sup>52</sup>

The dialogue process yielded a handful of other technical agreements but some provisions of these agreements (Certificates for Pharmaceutical Products, Phytosanitary Certificates, IBM and the Freedom of Movement) remain

<sup>45</sup> Agreed Conclusions, Arrangements Regarding Regional Representation and Cooperation, 24 February 2012.

<sup>46</sup> Joint Committee Meetings are decision-making meetings that normally take place once a year.

<sup>47</sup> Kosovo representatives use a name tag that reads 'Kosovo\*', UNMIK representatives use a name tag that reads 'UNMIK'. Balkans Group interview with a trade expert, Prishtina, May 2021.

<sup>48</sup> Ibid.

<sup>49</sup> Balkans Group interview with a trade expert, Prishtina, September 2021

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

partially implemented.<sup>53</sup>

The issue of Kosovo's representation in CEFTA, in terms of obstacles and procedural burdens, was also raised during the Stabilization Association Agreement negotiations with the EU, but with no effect.<sup>54</sup>

### FROM ONE TRADE BARRIER TO THE OTHER (2016– 2020)

During the Paris **Western Balkans Summit** in July 2016, the participants reaffirmed the importance of fostering regional market integration, especially through CEFTA.<sup>55</sup> In November 2017, at the Joint Committee meeting, Kosovo's Minister for Trade and Industry raised the issue of amending the Agreement by removing UNMIK as the designated representative of Kosovo.<sup>56</sup> The request was immediately rejected by Serbia.<sup>57</sup>

In 2018, Kosovo took over the chairmanship again. Despite successfully managing to organize the majority of the meetings, the situation deteriorated when Kosovo introduced tariffs of 10 percent, and shortly after of 100 percent on Serbian and BiH products.<sup>58</sup> The tariffs on goods coming from Serbia and BiH came as a response to Serbia's international de-recognition campaign and against Kosovo's membership in Interpol.<sup>59</sup> The imposed tariffs were considered a violation of the agreements reached between Kosovo and Serbia as well as CEFTA obligations and created an unfavorable image for Kosovo in terms of economic and trade relations. Discussions on the matter took place on the margins of other initiatives such as REA and MAP-REA, but with no tangible results.<sup>60</sup>

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<sup>53</sup> Kosovar companies have continued to struggle cooperating with eligible Serbian companies. This is because burdens, both financial and logistical, are added to Serbian companies in terms of cooperating with Kosovar companies. The majority of Kosovo exports to Serbia are oriented to the South of Serbia- populated by Albanian population - Preshevo Valley (including Preshevo, Bujanoc and Medvegja). However, if a company is licensed by Kosovo institutions (ex. Pharmaceutical companies), on the Serbian border, Serbian authorities would not accept the license. For more, see Balkans Group report, *The Brussels Dialogue between Kosovo and Serbia. Achievement and Challenges*, October 2020, pp.28.

<sup>54</sup> Balkans Group interview with a trade and industry Expert, Prishtina, July 2021.

<sup>55</sup> Final Declaration of the Paris Western Balkans Summit, 4 July 2016. For more, see Balkans Group report, *The Berlin Process for the Western Balkans: Gains and Challenges for Kosovo*, January 2018, pp.7.

<sup>56</sup> Balkans Group interview with a trade expert, Prishtina, June 2021.

<sup>57</sup> Balkans Group interview with a legal expert, Prishtina, May 2021.

<sup>58</sup> For more, see Balkans Group report, *The Brussels Dialogue between Kosovo and Serbia. Achievement and Challenges*, October 2020. Government of the Republic of Kosovo, Decision Nr. 01/74, 6 November 2018 and Decision Nr. 01/76, 21 November 2018.

<sup>59</sup> Balkans Group report, *The Brussels Dialogue between Kosovo and Serbia. Achievement and Challenges*, October 2020, pp.12.

<sup>60</sup> Balkans Group interview with a trade and industry Expert, Prishtina, July 2021.

Under the Kosovo chairmanship, Serbia and BiH refused to participate in the Joint Committee meeting held in Kosovo, which caused more tensions.<sup>61</sup>

On 9 October 2018, the Representative of the U.S. to the United Nations submitted a request to the Secretary-General to initiate a strategic review in order to develop an exit strategy for UNMIK.<sup>62</sup>

## THE RECENT DEVELOPMENTS

In 2020, the Government of Kosovo contemplated submitting a unilateral formal statement to CEFTA, declaring that in the view of the Declaration of Independence, and with reference to the 2012 Agreement, Kosovo could represent itself within CEFTA's framework. However, the government never managed to submit such a statement.<sup>63</sup>

On 4 September 2020, Kosovo and Serbia agreed on Economic Normalization, with the mediation of the U.S. They decided to join the Mini Schengen zone and fully utilize its benefits.<sup>64</sup>

In November 2020, in Sofia, the leaders of the Western Balkans signed the Declaration on the Common Regional Market.<sup>65</sup> CRM is structured around four pillars: Regional Trade Area, Regional Investment Area, Regional Digital Area and Regional Industrial and Innovation Area, whereas the first pillar alone is built upon the four freedoms: of people, capital, services and goods (covered by CEFTA).<sup>66</sup>

In June 2021, during the WB6 Summit in Tirana, Kosovo's Prime Minister introduced a new proposal: advancing CEFTA to SEFTA, being wary of what Kosovo's standing in this Agreement would be.<sup>67</sup>

Moreover, the so-called Mini Schengen which was announced in 2019, came to the spotlight again under the new name 'Open Balkan' in July 2021.<sup>68</sup>

<sup>61</sup> Balkans Group interview with a trade expert, Prishtina, May 2021.

<sup>62</sup> The Representative of the United States of America to the United Nations, Request to Secretary-General, 8 October 2018.

<sup>63</sup> Balkans Group interview with a legal expert, Prishtina, May 2021.

<sup>64</sup> Economic Normalization Agreement, 4 September 2020, at: <https://www.new-perspektiva.com/wp-content/uploads/2020/09/Washington-Agreement-Kosovo-Serbia.pdf>. For more, see [www.dialogue-info.com](http://www.dialogue-info.com).

<sup>65</sup> Western Balkans Leaders Declaration on Common Regional Market, 10 November 2020, at: [https://www.wb6cif.eu/wp-content/uploads/2020/11/Final-Political-Declaration\\_CRM-2021-2024.pdf](https://www.wb6cif.eu/wp-content/uploads/2020/11/Final-Political-Declaration_CRM-2021-2024.pdf).

<sup>66</sup> European Western Balkans, Western Balkans Economic Integration – Why is it needed? 13 May 2021, at: <https://europeanwesternbalkans.com/2021/05/13/western-balkans-economic-integration-why-is-it-needed/>.

<sup>67</sup> Exitnews, Kosovo Proposes Free Trade Agreement for the Western Balkans, 11 June 2021 at: <https://exit.al/en/2021/06/11/comment-kosovo-proposes-free-trade-agreement-for-the-western-balkans/>.

<sup>68</sup> Radio Free Europe Radio Liberty, Serbia, North Macedonia, Albania push forward on 'Open Balkan' initiative, 29 July 2012 at: <https://www.rferl.org/a/serbia-macedonia-open-balkans/31384360.html>.

So besides the impediments from Serbia and BiH, the political instability, the broad coalition governments and the lack of coordination, consensus and a concise agenda in Kosovo, have strongly contributed to its current representation in CEFTA.

## LEGAL OVERVIEW

At the time of the signing of the CEFTA, Kosovo was administered by UNMIK pursuant to Resolution 1244.<sup>69</sup> The resolution authorized the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in order to provide an interim administration for Kosovo under which the people of Kosovo could enjoy substantial autonomy within the Federal Republic of Yugoslavia.<sup>70</sup> Kosovo was considered a separate territorial entity under international administration.

With the declaration of independence in 2008, Kosovo institutions undertook *the international obligations of Kosovo, including those concluded on its behalf by the UNMIK and other obligations of the former SFRY to which Kosovo is bound as a former constituent part.*<sup>71</sup> In addition, the Constitution of the Republic of Kosovo, adopted in April 2008, reads *'international agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force, will continue to be respected until such agreements or acts are renegotiated, withdrawn or superseded by new international agreements or acts.'*<sup>72</sup>

Yet, the United Nations continued to operate on the understanding that Resolution 1244 remained in force and that UNMIK continued to implement its mandate in the light of the evolving circumstances.<sup>73</sup> But, the UN acknowledged that the Special Representative of the Secretary General for Kosovo (SRSG) faced increasing difficulties in exercising his mandate owing to the conflict between resolution 1244 (1999) and the Constitution, which does not take UNMIK into account.<sup>74</sup> While the SRSG was still formally vested with executive authority under resolution 1244, he was unable to enforce this authority.

Under international law, UNMIK's role, with respect to Kosovo, in the context of CEFTA, was that of a territorial representation: a situation where an entity acts on behalf

<sup>69</sup> UNSC resolution 1244, adopted by the Security Council at its 4011th meeting, on 10 June 1999, Paragraph 10 (hereinafter "Resolution 1244").

<sup>70</sup> Ibid.

<sup>71</sup> The Declaration of Independence of the Republic of Kosovo, 17 February 2008.

<sup>72</sup> Constitution of the Republic of Kosovo, Article 145 (1), 9 April 2008.

<sup>73</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/354) of 12 June 2008, Paragraph 4.

<sup>74</sup> Ibid, Paragraph 21.

of another at the international level.<sup>75</sup> The UN, represented by its SRSG in Kosovo, signed CEFTA for and on behalf of Kosovo, as a separate territorial entity with an international legal personality. This implies that at the time of the signing of the CEFTA, all Parties acknowledged that Kosovo had an international legal personality and thus the capacity to enter into international agreements.

This is confirmed by the numerous other international agreements that UNMIK signed on behalf of Kosovo.<sup>76</sup> Following this logic, UNMIK as a subsidiary body of the UN Security Council acted as a temporary agent of Kosovo, which was pending a final settlement of its political status, within the authority vested in it by Resolution 1244.

When acting within its power, the agent (in this case: UNMIK) assumes no personal responsibility toward either the 'principal' or third parties; the represented entity itself becomes the party.<sup>77</sup> Therefore, the acts of agency performed by UNMIK are not attributable to the UN, but are binding for Kosovo.<sup>78</sup>

The preamble of CEFTA explicitly refers to UNMIK as the agent acting "on behalf of Kosovo". The same language is used in Article 1 as well as on the signatures' part (Article 4). This in itself is sufficient evidence to show that UNMIK has acceded to CEFTA, on Kosovo's behalf, therefore Kosovo is a party to the Agreement.

The 2012 Agreement between Kosovo and Serbia is binding between the two parties. In relation to the UN, the Agreement would only be binding with the UN's consent. Without such consent, the 2012 Agreement does not create any legal obligations for the UN (*pacta tertiis nec nocent nec prosunt*). The consent may be given by accession to the Agreement or by any other form of a declaration of will that is recognized under international law as creating legal obligations. However, in certain situations, unilateral acts may give rise to international legal obligations. In addition, legal obligations may be created by acquiescence that is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.

<sup>75</sup> B. Knoll, "From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate", 16 *European Journal of International Law* 4, p. 637 (643).

<sup>76</sup> Balkans Group interview with a legal expert, Prishtina, May 2021.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

So, it may be argued that the UN has tacitly recognized (acquiesced) the 2012 Agreement by factually complying with its provisions and that it is therefore prevented from objecting to the implementation of the 2012 Agreement, including Kosovo to speak for itself and with UNMIK only to attend relevant meetings.

UNMIK's participation in the CEFTA meetings must be interpreted as being without prejudice to Kosovo speaking for itself, given that **the primary representation role in such regional mechanisms (including CEFTA) is vested in the institutions of Kosovo**. Furthermore, it is the Kosovo government, not UNMIK, who bears the responsibility to fulfill the obligations deriving from CEFTA. With UNMIK's role being reduced to that of attending meetings, we can understand that UNMIK is excluded from speaking for and on behalf of Kosovo, yet it still considers itself a Party to CEFTA in the name of Kosovo.<sup>79</sup> Moreover, the Secretary-General reported to the Security Council that *"the 2012 Agreement has affected the conduct by UNMIK of its external representation role. Taking into account the elements of the 2012 Agreement reached, and after consultation with interested parties, UNMIK concluded that it was not necessary to attend certain meetings"*.<sup>80</sup> The fact that the UN admits that UNMIK will exercise discretion in determining which meetings it will attend proves that the UN has renounced its role as the exclusive representative of Kosovo.<sup>81</sup>

**The Secretary-General stopped reporting to the Security Council on CEFTA issues as of the conclusion of the 2012 Agreement.**<sup>82</sup>

As for the CEFTA member countries that do not recognize Kosovo, according to international law, the recognition of the 'unrecognized entity' is not implied with the conclusion of a multilateral treaty or admission to an international organization with the same entity. The representation of Kosovo by the institutions of the Republic of Kosovo will not imply the recognition of the latter.<sup>83</sup> The non-recognizing countries may also opt for recognizing the institutions of the Republic of Kosovo as a *de facto* government instead of a *de jure* government. As such, the representation of Kosovo

<sup>79</sup> Crawford, p. 149.

<sup>80</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2012/275) of 27 April 2012, Paragraph 56.

<sup>81</sup> UNMIK, even though it stopped speaking on Kosovo's behalf, continues to consider itself a Party to CEFTA in the name of Kosovo. Balkans Group communication with UNMIK Press Office, September 2021.

<sup>82</sup> Balkans Group interview with a legal expert, Prishtina, May 2021

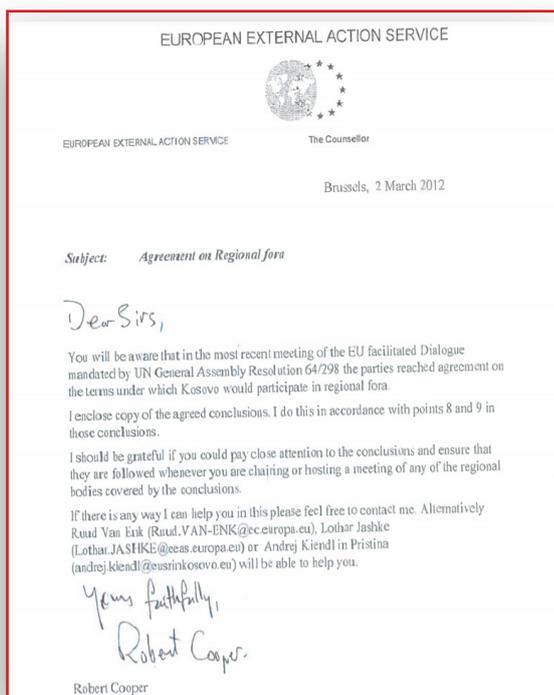
<sup>83</sup> The fact that Kosovo and other non-recognizers (i.e. Serbia, BiH and Moldova) join the same international organization or multilateral treaty (in this case CEFTA), does not mean that the non-recognizers automatically recognize the Government of Kosovo. So, the institutions of Kosovo can represent the country in CEFTA without implying recognition from the non-recognizers.

by institutions of the Republic of Kosovo would not be an obstacle within the CEFTA framework to implement the 2012 Agreement.

***The Government of Kosovo should demand from UNMIK to unilaterally withdraw from CEFTA. The government shall mobilise the support of the EU and UN member states to encourage UNMIK and the Secretary-General to undertake such action.***

## THE ROLE OF THE EUROPEAN UNION

Article 8 of the 2012 Agreement states that “*The EU as Facilitator will inform relevant regional organizations and entities of these arrangements for denomination, representation and signature. They should be reflected in the practical organization of regional meetings. The EU will monitor the implementation of these arrangements*”<sup>84</sup>. Moreover, article 9 sets that: “*Both parties and the EU will urge partners to support these agreements and to assist in their implementation*”.<sup>85</sup>



These articles call for a proactive role of the EU in safeguarding Kosovo’s representation in accordance with the modalities of the 2012 Agreement. In March 2012, the European External Action Service (EEAS) Counsellor Robert Cooper had notified 28 regional initiatives and/or organisations on the denomination.<sup>86</sup> **CEFTA was also included in the list.**

Two years later, Fernando Gentilini, Director for Western Europe, Western Balkans and Turkey in EEAS, sent another letter recalling Robert Cooper’s letter and the 2012 Agreement.<sup>87</sup> However, both letters did not help much, leaving room for more effective

efforts from the EU, at a higher level.

Kosovo insists on its right to represent itself and constantly blames CEFTA members (primary Serbia and BiH) for the obstructions, but also the EU, for failing to insist

<sup>84</sup> Agreed Conclusions, Arrangements Regarding Regional Representation and Cooperation, 24 February 2012.

<sup>85</sup> Ibid.

<sup>86</sup> European External Action Service, Letter from Robert Cooper, 2 March 2012, at [https://kryeministri-ks.net/wp-content/uploads/docs/Letter\\_from\\_Cooper\\_to\\_the\\_regional\\_organizations.pdf](https://kryeministri-ks.net/wp-content/uploads/docs/Letter_from_Cooper_to_the_regional_organizations.pdf).

<sup>87</sup> European External Action Service, Letter from Fernando Gentilini, 12 June 2014, at [https://kryeministri.rks-gov.net/wp-content/uploads/docs/Inclusive\\_Regional\\_Cooperation.pdf](https://kryeministri.rks-gov.net/wp-content/uploads/docs/Inclusive_Regional_Cooperation.pdf).

on the implementation of the 2012 Agreement. However, the EU has, recently, supported the idea of bringing this issue back to the dialogue process between Kosovo and Serbia, considering that CEFTA has its own structure, procedures and decision-making bodies, which also include other parties.<sup>88</sup> Just a month ago, the High Representative of the EU for Foreign Affairs and Security Policy Josep Borell, in response to a question from members of the European Parliament on the “lack of coherence in Kosovo’s legal representation” noted that “*The EU was informed of the interest of Kosovo to no longer be represented by UNMIK in regional fora*” and that “*Reaching a comprehensive legally-binding agreement on the normalisation of relations provides the best basis for overcoming legal representation issues*”.<sup>89</sup>

But unlike with CEFTA, in the aftermath of the 2012 Agreement, Kosovo managed to change the UNMIK representation in the Energy Community and European Common Aviation Area, both of which were signed by UNMIK on Kosovo’s behalf. **Energy**

**Community** and **ECAA**, were part of Robert Cooper’s list, same as CEFTA.

The reasons why UNMIK representation prevails in CEFTA can be identified as follows:

**Decision-making** – CEFTA has a different decision making procedure compared to the Energy Community and ECAA. An amendment to CEFTA, or more precisely the change of denomination in the preamble, article 1 and 4, requires **acceptance from all** signatory countries (the decision

making procedure at the Joint Committee is by **consensus**).<sup>90</sup>

**Composition** – While the Energy Community and ECAA include the EU member states, CEFTA includes the WB6 countries and Moldova.<sup>91</sup> The composition of ECAA and Energy Community made it easier for the EU to apply the denomination ‘Kosovo\*’ in accordance with the 2012 Agreement.<sup>92</sup>

EN  
E-003354/2021  
Answer given by High Representative/Vice-President Borrell  
on behalf of the European Commission  
(30.8.2021)

An agreement on regional representation was reached in the Belgrade-Pristina Dialogue facilitated by the EU in 2012. Since reaching this agreement, Kosovo – for the first time - participates on its own account and speaks for itself in regional fora, provided it uses the wording Kosovo\* followed by the footnote: ‘Kosovo (\*) - This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ opinion on the Kosovo declaration of independence’.

According to the agreement, for regional fora where Kosovo’s participation pre-dates the 2012 agreement, a representative of UN Interim Administration Mission in Kosovo (UNMIK) is to be invited to meetings organised within the framework of arrangements for which it is a signatory such as the Central European Free Trade Agreement (CEFTA).

The EU was informed of the interest of Kosovo to no longer be represented by UNMIK in regional fora. The EU stands ready to address this issue, including in the Dialogue on normalisation of relations between Kosovo and Serbia, while bearing in mind that organisations such as CEFTA have their own structures, procedures and decision-making bodies, which also include other parties. Reaching a comprehensive legally-binding agreement on normalisation of relations therefore provides the best basis for overcoming legal representation issues.

<sup>88</sup> Josep Borell, High Representative of the EU for Foreign Affairs and Security Policy, 30 August 2021, at: [https://www.europarl.europa.eu/doceo/document/E-9-2021-003354-ASW\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/E-9-2021-003354-ASW_EN.pdf).

<sup>89</sup> Ibid.

<sup>90</sup> Balkans Group interview with a trade expert, Prishtina, September 2021.

<sup>91</sup> Balkans Group interview with a regional cooperation expert, Prishtina, June 2021. Since the EU is not a party to CEFTA, it cannot directly intervene and/or oblige the Parties.

<sup>92</sup> Energy Community is an international organization which brings together the EU and its neighbours to create an integrated pan-European energy market. It consists of a Ministerial Council (highest decision-making body), a Permanent

**Lack of action** – Kosovo has never managed to mobilize support and initiate a procedure to amend the Agreement, although the chances of it changing the status quo have traditionally been low (Serbia, BiH and Moldova would vote against it).<sup>93</sup>

When it comes to the correlation of the EU with CEFTA, in December 2000, upon the request of the European Union, the World Trade Organisation (WTO) granted a waiver to Article I (Most Favoured Nation Clause) of General Agreement on Tariffs and Trade (GATT) allowing the European Community to apply the preferential treatment with the Western Balkans in terms of trade.<sup>94</sup> This came as a result of the launch of the **Stabilisation and Association Process** (SAP) of the EU with Western Balkans, in June 1999, which rests on four main elements: contractual relationship, trade relations, financial assistance, regional cooperation and good neighbourly relations.<sup>95</sup>

In addition, the European Union confirmed that CEFTA would be a substantial step forward for these countries, both economically and politically.<sup>96</sup> Kosovo is obliged to continue to implement the Central European Free Trade Agreement under article 16 of its SAA with the EU, which will help the country to prepare for the accession to the **EU Single Market**.<sup>97</sup>

The EU is not a member of CEFTA. The EU does not attend Joint Committee meetings, considering that the parties did not accept to have a third party involved. However, the EU representatives are always present in the technical meetings.<sup>98</sup> Normally, at this level, the representation of Kosovo is not raised so it can be one of the factors that led to the current vicious circle.

At the same time, Kosovo has never presented a clear strategy and a consistent approach for changing the representation in CEFTA. The frequent change of governments and the lack of clear political objectives in the framework of regional representation have certainly played their part. But the main problem remains the blockade from Serbia and BiH. Serbia specifically, not only obstructs Kosovo's

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High Level Group, Energy Community Regulatory Board, Energy Community Fora, Secretariat and other bodies.

European Common Aviation Area (ECAA) is a multilateral agreement which aims to integrate the EU's neighbours in South- East Europe in the EU's internal aviation market which consists of the EU Member States, Norway and Iceland. The ECAA structure consists of a Joint Committee.

<sup>93</sup> Balkans Group interview with a regional cooperation expert, Prishtina, June 2021.

<sup>94</sup> World Trade Organisation, Request for a Waiver for the Application of the EU Autonomous Preferential Treatment to the Countries of the Western Balkans, 8 December 2000, at <https://docsonline.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/380.pdf&Open=True>.

<sup>95</sup> European Commission, Stabilisation and Association Process, at [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/sap_en).

<sup>96</sup> Council of the European Union, Presidency Conclusions, 12 February 2007, at [https://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_4\\_zirveler\\_1985\\_sonrasi/2006\\_12\\_bruksel\\_zirvesi\\_baskanlik\\_sonuc\\_bildirgesi\\_en.pdf](https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_4_zirveler_1985_sonrasi/2006_12_bruksel_zirvesi_baskanlik_sonuc_bildirgesi_en.pdf).

<sup>97</sup> Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo\*, on the other part, 2 October 2015, at <https://data.consilium.europa.eu/doc/document/ST-10728-2015-REV-1/en/pdf>.

<sup>98</sup> Balkans Group interview with a trade expert, Prishtina, September 2021.

representation and participation in CEFTA (and other initiatives), but violates the obligations that derive from the bilateral agreements reached under the dialogue process between the two countries.<sup>99</sup> In this regard, the Kosovo government should raise this unequal treatment at every forum of regional cooperation and engage in the dialogue with Serbia more consistently.

A proactive approach of the EU is also critical and necessary. The EU shall engage more in the issue by demanding from Serbia to implement the 2012 Agreement, and pushing the other two countries (BiH and Moldova) to accept the removal of UNMIK from the Preamble, Article 1 and 4 (of CEFTA), as the only way to move forward with regional initiatives that aim to ease the free movement of people, services, goods and capital and to prepare the countries for the EU Single Market.

## CONCLUSION

Kosovo continues to 'depend' on UNMIK when it comes to its participation in the Central European Free Trade Agreement (CEFTA). Even with the Agreement on Regional Representation and Cooperation (in 2012) with Serbia, Kosovo did not secure full representation in the CEFTA.

UNMIK stopped speaking on Kosovo's behalf and acknowledged the fact that the institutions of Kosovo are vested with executive authority. But owing to Serbia and Bosnia and Herzegovina, UNMIK remains the designated representative of Kosovo in CEFTA. The fact that Kosovo managed to change the representation in other initiatives suggests that the 2012 Agreement provides the necessary ground to enable the country to represent itself.

The proliferation of regional initiatives in the past few years, starting from the Berlin Process MAP REA, CRM and other agendas like the Mini-Schengen (or Open Balkan), have further increased the necessity for Kosovo's equal treatment. Although Kosovo authorities could have done much more in this regard, initiating the amendment of CEFTA without the support of international and regional allies is still considered impossible. The government of Kosovo must move forward with its agenda by mobilizing support and officially initiating the change of its asymmetrical representation in CEFTA. In parallel to the dialogue with Serbia; in which Kosovo should actively participate, the government must engage more dynamically in regional cooperation in order to preempt any irritants undermining its interest rising from its status within CEFTA. The support of the EU remains necessary, considering its

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<sup>99</sup> For more, see the Agreement on Regional Representation and Cooperation, Freedom of Movement, Custom Stamps, IBM and the Mitrovica Bridge at <https://dialogue-info.com/agreements/>.

weight in the framework of cooperation in Western Balkans, but also the obligations stemming from the 2012 Agreement.

## ANNEX 1

Regional Initiatives and Organisations which Robert Cooper has notified on the modalities of 2012 Agreement:

1	Regional Cooperation Council	Bosnia and Herzegovina
2	Investment Compact	France
3	Disaster Preparedness and Prevention Initiative	Bosnia and Herzegovina
4	Task Force for Fostering and building Human Capital	Austria
5	Women's Entrepreneurs Network	Croatia
6	Regional Anti-corruption Initiative	Bosnia and Herzegovina
7	Energy Community	Austria
8	South East Europe Transport Observatory (SEETO)	Serbia
9	CEFTA and Bilateral Free Trade Agreements	Belgium
10	CEFTA and Bilateral Free Trade Agreements	Albania
11	Regional Rural Development Standing Working Group in SEE	North Macedonia
12	Regional Environmental centre for Southern and Central Europe	Hungary
13	Southeast European Prosecutors' Advisory	Romania
14	The Migration Asylum, Refugees Regional Initiative	North Macedonia
15	Adriatic Region Employers' Centre	Switzerland
16	Regional Environmental Network for Accession	Austria
17	South East European Centre for Entrepreneurial Learning	Croatia
18	International Sava River Basin Commission	Croatia
19	Centre for Security Cooperation (RACVIAC)	Croatia
20	Police Cooperation Convention (PCCSESECR)	Slovenia
21	Electronic Southeast Europe Initiative + Broadband Southeast Europe Initiative	Bosnia and Herzegovina
22	Health Network	North Macedonia
23	Centre for eGovernance Development	Slovenia
24	South East Europe Transport Observatory	Serbia
25	European Common Aviation Agreement, DG MOVE EC	Belgium
26	Regional Environmental Network for Accession, DG ENV EC	Belgium
27	ISIS Programme Secretariat	Belgium
28	Network of Associations of Local Authorities of SEE	North Macedonia

The Balkans Policy Research Group is an independent, regional think-tank based in Pristina, Kosovo. We provide timely policy analysis and recommendations on a wide array of state building issues; institutional and democratic consolidation; minority integration and good neighborly relations: European integration and policy change. We have decades of experience in policy reporting and development, strategic thinking and advocacy with governmental, international and non-governmental organizations.

Our rigorous, detailed, impartial reporting, always based on in-depth fieldwork, is the core of our work. We go beyond mainstream positions and seek to make change through creative, feasible, well-measured and forward-looking policy recommendations with the aim of helping develop strong, vibrant democracies, prosperous states and societies based on rule of law in the Western Balkans.

We engage in high-level advocacy, domestically, regionally and internationally, impacting policy discussions and options with regard to the home affairs and European policies toward the Western Balkans.

Balkans Group has developed other tools and platforms to achieve this change:

**The Policy Dialogue** promotes Kosovo's domestic dialogue, cohesion and reform-making agenda.

The Policy Forum (a Think-Tankers High-level Advocacy Forum) committed to enhancing the dialogue between the civil society and the institutions.

**The Kosovo Serbia Policy Advocacy Group** (a forum for Cross-Border Civil Society Cooperation) that aims to communicate, promote and enhance dialogue toward full normalisation between Kosovo and Serbia, and their societies.

**Women in Politics** promotes the empowerment of women and girls; their security and inclusiveness; and is committed to strengthen the Women Caucus' impact and reach throughout Kosovo.

**Youth in Politics** promotes an active participation from youth from different political parties in the institutions. This component helps in developing a culture of dialogue and cooperation, by providing capacity building trainings on key policy areas and skills and leadership.

**The Dialogue Platform** promotes the dialogue process between Kosovo and Serbia, by informing the wider public and generating debate about the agreements, benefits and challenges of the Dialogue.

**Expert Support component** provides policy support to the government and key institutions on key policy areas, peace and state-building agendas.



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