Mixed Agreements in European Union Law

Avrupa Birliği Hukukunda Karma Anlaşmalar

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Abstract

The features of the Mixed Agreements, which are one of the fundamental international agreements of the European Union, are the requirement of the conclusion and ratification of the agreements not only by the European Union but also by the Member States by virtue of the subject matter of the agreements is about the shared competence of the European Union and the Member States. Although the complexity of the delimitation of competences in the European Union and the different ratification system of the Member States which cause the delay of the finalisation of the Mixed Agreements can be evaluated as negative aspects, the Mixed Agreements still play an important role since there is joint liability of the European Union and the Member States and in case of dispute, third countries may have more than one applicant (party) to sue and also Mixed Agreements provide coordination of cooperation between the European Union and the Member States as positive aspects. For these reasons, the Mixed Agreements deserve to be examined in a detailed way.

Keywords

Mixed Agreements, European Union, External Relations, Shared Competence, Ratification of Mixed Agreements.

Özet

Avrupa Birliği dış ilişkilerinin temelini oluşturan uluslararası anlaşmalardan olan Karma Anlaşmaların özelliği, anlaşma konusunun Avrupa Birliği ile üye ülkelerin paylaşımlı yetki kullandıkları alanlar ile ilgili olması sebebiyle hem Avrupa Birliği'nin hem de üye ülkelerin sözleşmeye taraf olması ve bu sözleşmeyi kendi prosedürlerine göre onaylamasının gerekli olmasıdır. Avrupa Birliği'nde yetki paylaşımı konusunun karmaşıklığı ve üye ülkelerin farklı sözleşme onaylama mekanizması bulunmasının Karma Anlaşmaların daha uzun sürede sonuçlandırılmasına sebep olması gibi olumsuz yönleri olsa da Karma Anlaşmalar, Avrupa Birliği ve üye ülkelerin ortak sorumluluğunu öngörmesi ile uyuşmazlık halinde sözleşme tarafı üçüncü ülkelere birden çok muhatap sağlaması ve Avrupa Birliği'nin uluslararası alanda üye devletler ile işbirliği içinde hareket etmesine aracı olması açısından önem arz etmektedir. Tüm bu sebeplerden dolayı Karma Anlaşmalar detaylı incelemeyi gerektirmektedir.

Anahtar Kelimeler

Karma Anlaşma, Avrupa Birliği, Dış İlişkiler, Paylaşımlı Yetki, Karma Anlaşmaların Onaylanması.

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I. INTRODUCTION

Concluding agreements with third parties is one of the main objects and aspects of the external relations of the European Union (hereinafter referred to as "**EU**"). Since the EU has legal personality in accordance with Article 47 of the Treaty on the European Union (hereinafter referred to as "**TEU**")[1], it shall sign and enter into force of binding agreements within the limits of its competences conferred upon by the Member States (hereinafter referred to as "**MS**") in the Treaties[2].

Regarding the subject matter of international agreements of the EU, they would be divided into two categories (i) agreements fall in the exclusive competence of the EU which are so called "*Union-Only Agreements*", and (ii) agreements fall in the shared competence of the EU which are so called "*Mixed Agreements*".

In line with this division, it is obvious that concluding international agreements by the EU is related to the competence issue which is based on principles of conferral[3], subsidiarity[4] and proportionality[5].

Last two principles are especially crucial for determination of shared competence areas so that for analysis of the Mixed Agreements. Considering the complexity of competence issue and vagueness provisions of the Treaties and variable resolutions of the European Court of Justice (hereinafter referred to as "**CJEU**") about shared competence, it shall be difficult to decide whether the agreement should be concluded as a Mixed Agreement or not. As for the relation between the division of powers and the types of international agreements of the EU, McGoldrick points out that "*each international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and the Member States, and the nature of that competence*"[6]

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1 Consolidated version of the Treaty on European Union ("**TEU**") Official Journal C 326, 26/10/2012 P. 0001 - 0390.

2 Ibıd, Consolidated version of the Treaty on the Functioning of the European Union ("**TFEU**"), Official Journal C 326, 26/10/2012 P. 0001 - 0390.

3 Conferral principle which defines the existence of competence and provides that the EU has to act only within the limits of the competences conferred upon it by the MS in the Treaties is embodied under Article 5/II of TEU.

4 In accordance with Article 5/III of TEU, "*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level subsidiarity principle lays down the limits of using the competence*" Thus this principle lays down the limits of using the competence.

5 In accordance with 5/IV of TEU *"under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."* Thus this principle specifies the limits of how to exercise the competence.

6 Dominic McGoldrick, "*International Relations Law of the European Union*", 1997 Addison Wesley Longman Ltd, Page 78-79.

The aim of this paper is to examine the features of the Mixed Agreements by showing legal basis, types, benefits and drawbacks of these agreements and as well as their application process.

II. WHAT IS MIXED AGREEMENT?

(i) Definition of Mixed Agreements

There are several definitions which demonstrate the features of the Mixed Agreements in scholars that point out the same conditions in order to refer the agreement as a mixed one. Some of the definitions are quoted as follows;

"Mixed agreements are agreements to which both the EU and the MS are contracting parties on the basis that their joint participation is required, because not all matters covered by the agreement fall exclusively within EU competence or exclusively within MS competence."[7]

Within the scope of delimitation of competences, Mixed Agreements stem from shared competence area where the MS and the EU both have competences. For this reason the EU cannot act as a sole contracting party on the shared external stage.

"An international agreement which is the result of the Community having exercised its external powers in conjunction with the Member States is a "mixed agreement" in the broadest sense of the term."[8]

On the other hand, in order to consider an agreement as a Mixed Agreement, it is commonly pointed out that; (i) "The European Community and one or more of the Member States are parties to it." (ii) "The European Community and the Member States share competence in relation to it, even if only Member States can be parties." (iii) "Requirements relating to its financing or relating to its provisions on voting".[9] (iv) "the expression mixed agreement more accurately describes agreements where the European Community and the Member States genuinely share competence"[10]

In line with these features, Mixed Agreements shall be defined as the agreements whose subjects are about shared competence area such as environment, energy, transportation and other areas stated in Article 4/II of TFEU, thus the MS and the EU have to participate to the agreement jointly.

7 Paul Craig, Grainne De Burca, "*Eu Law-Text, Cases, and Material*", Third Edition Oxford University Press, Page 352.

8 McGoldrick, Page 29.

9 Ibıd, Page 78.

10 Ibıd, Page 79.

(ii) Legal Basis of Mixed Agreements

Mixed Agreements were not envisaged in the Treaty Establishing the European Community which is so called the Rome Treaty.[11] It was the Article 102 of the Treaty Establishing the European Atomic Energy Community[12] (hereinafter referred to as "**TEUAEC**") that mixed agreements are introduced as follows;

> *"Article 102 of TEUAEC*
>
> *Agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws."*

Furthermore, in Article 8 of the TEU, it is mentioned that the EU may conclude specific agreements. Even though this article is not as clear as Article 102 of the TEUAEC, it is also pointed out different types of agreements signed with third countries.[13]

Besides these provisions of the Treaties, the CJEU also referred to some agreements which are required to be concluded not only by the EU but also by the MS which is the main feature of the Mixed Agreements in accordance with its Ruling 1/78, Opinion 2/91 and Opinion 1/94.[14],[15]

The CJEU also have resolved by the cases that Mixed Agreements have the same legal status as the Union-Only Agreements and it is also described the Mixed Agreements by referring the contracting party structure which consists of the EU, the MS and non-member countries.[16] The CJEU recognized the Association Agreements as Mixed Agreements as well and gave Ankara Agreement[17] which is signed between the EU, the MS as one side and on the other side Turkey as a non-member country[18] as an example of the Mixed Agreements.

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[11] Consolidated version of Treaty Establishing the European Community Official Journal C 340, 10/11/1997 P. 0173.

[12] Consolidated version of Treaty Establishing the European Atomic Energy Community Official Journal 2010/C 84/01.

[13] Art.4: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016E004.

[14] Ruling 1/78 [1978] ECR 2151; Opinion 1/78 [1979] ECR 2871; Opinion 2/91, [1993] ECR I-1061 at para. 5; and Opinion 1/94 [1995] 1 CMLR 205.

[15] Rafael Leal-Arcas, "*The European Community and Mixed Agreements*", European Foreign Affairs Review 6: 483-513, 2001, 2001 Kluwer Law International, Page 486, footnote 22.

[16] Case C-239/03 Commission v France (Étang de Berre) at para 25.

[17] Ankara Agreement, 12.09.1963 (Official Journal L 217, 29.12.1964).

[18] Case 12/86, *Demirel v. Stadt Schwaebisch Gmuend* [1987] ECR 3719 at 3751, paragraph 8.

In addition to these legal bases the Mixed Agreements are also admitted by the doctrine. Macleod, Hendry and Hyett[19] pointed out that there is no doubt about the existence and legal validity of the concept of the Mixed Agreements.[20]

III. HOW DO MIXED AGREEMENTS WORK?

Since the Mixed Agreements are related to the shared competence area, it is required to not only the cooperation between the MS and the EU, but also be concluded and ratified by both sides. "Mixed agreements will be entered into not only where the Treaty provides but also where the substance of the agreement falls partly within the competence of the Union and partly within the competence of the Member States."[21]

Even though the EU and the MS are represented as different contracting parties at the Mixed Agreements it does not change the supremacy of the EU or division of powers in the internal process.[22]

Within the scope of the Mixed Agreements "the Community would be competent to conclude the main substantive parts of the agreement, while Member State participation would be deemed necessary because of the nature of its obligations relating to the implementation and enforcement of those substantive parts".[23] For instance in Ruling 1/78[24], regarding the penalty and extradition closes which need to be enforced by the MS and are related to the MS competence, the agreement requires to the MS participation. However it should be bear in mind that, being executed or implemented by the MS does not categorize the agreement as a mixed one.

Mixed Agreements also provide not only balance between the competences of the EU and the MS but also the close cooperation between each other in order to fulfil obligations arising out of the agreement.

Considering the subject matters of Mixed Agreements it shall be said that the EU does not want to be sole contracting party on the international areas which are also closely connected to the MS sovereignty, on the basis of the political, economic and social reasons.

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19 I. Macleod, I. Hendry & S. Hyett, "*The External Relations of the European Communities"* (Claredon Press, Oxford, 1996), Page 144.

20 Arcas, Page 486.

21 Damian Chalmers, Gareth Davies, Giorgio Monti, "*European Union Law Cases and Materials*", Second Edition, Cambridge University Press, Page 648.

22 Arcas, Page 488.

23 A. Rosas, '*Mixed Union-Mixed Agreements' in M. Koskenniemi (ed.), International Law Aspects of the European Union* (Kluwer Law International, 1998), Page 130.

24 Ruling 1/78 [1978] ECR 2151, at 2180 (paragraph 36).

IV. TYPES OF MIXED AGREEMENTS

(i) Obligatory Mixed Agreements (Obligatory Mixity)

If it is compulsory for both the EU and the MS to participate due to the speciality of the topic, such as Law of the Sea Convention[25] where it is difficult to get one voice from the EU, this type of Mixed Agreement is called obligatory mixity and it has subordination clauses which is kind of condition that the EU shall be the part of the agreement as long as one or some of the MS participate the agreement as well.[26]

(ii) Facultative Mixed Agreements (Facultative Mixity)

If the subject matter of the agreement is not in the exclusive area of neither the EU nor the MS, then making a Mixed Agreement is considered as an optional. For instance Environmental Agreements.[27]

(iii) Complete/Incomplete Mixed Agreements

This division is offered by Lena Granvik[28] considering that whether the all or some or one of the MS is part of the agreement or not ?. If the all MS participate with the EU as a contracting party, it is admitted as Complete Mixed Agreements, whereas if one or some of the MS participate while others are excluded then this type of agreement is called as an Incomplete Mixed Agreement.[29]

V. RESPONSIBILITIES / LIABILITIES ARISING FROM MIXED AGREEMENTS

First of all, regardless of the number of the participating MS, Mixed Agreements are binding for rest of the MS as well, since they have to cooperate with the EU and fulfil the obligations arising out of membership of the EU such as implementation of the international agreements.

Secondly, both the EU and the MS are responsible for especially which parts fall in their competence areas. The liability issue is evaluated by Advocate General Jacobs in Case C - 316/91[30] and it is clearly said that unless otherwise agreed by the parties of the Mixed Agreement, the EU and the MS are jointly liable.[31]

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[25] United Nation Conventions on the Law of the Sea.

[26] Arcas, Page 494.

[27] Ibıd.

[28] L. Granvik, '*Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness' in M. Koskenniemi (ed.), International Law Aspects of the European Union* (Kluwer Law International, 1998), Page. 255.

[29] Arcas, Page 495, 496.

[30] 1994 ECR I-625, at para. 69.

[31] Arcas, Page 497.

Moreover, joint liability is much more convenient for the third parties who desire to find at least someone as an addressee and have difficulty to decide which kind of competences shall be required by the agreement since making this competence division is not easy for either the EU or the MS. This joint liability has been emphasised as "requirement of unity in the external representation of the EU"[32] by the CJEU.

The EU is also liable to third countries that are not able to know whether the subject matter of the international agreement falls in the competence area of the EU or the MS. The CJEU decided that although the EU does not have competence to conclude an agreement with third countries, this kind of agreements are binding and the good faith of the third country is protected unless it is manifestly obvious also for third country that the other party of the agreement does not have competence. The approach of the CJEU about this issue shall be reviewed in Case C-327/91 France v. Commission[33] where the Commission concluded an agreement with the United States about the competition issues. It was found that the Commission did not have such a competence to conclude an agreement. However it was underlined by the CJEU that incompetence of the Commission does not have a negative effect on the validity of the agreement considering that the third country cannot assume that the EU does not have power to do so. It is also stated that "In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level"[34].

In addition, Macleod, Hendry, Hyett[35] suggested that from the international law aspects, breach of the internal rules of the EU Law by concluding an agreement does not affect the validity of the agreement, hence it is binding for the EU vis a vis third countries. For this reason the institutions of the EU and the MS have to respect the rights of the third countries arisen from the Mixed Agreements.[36]

One of the reasons behind this kind of responsibility would be that by transferring the some sovereignty rights to the EU, the MS give permission to the EU in order to be a party of the agreements. Thus it is accepted that the MS would have envisaged the consequences of this power transfer so that it could be said that there is a preliminary acceptance of the responsibilities. Another reason would be that joint liability eases the lawsuit process for third countries in case of the violation of Mixed Agreements where the third countries have more than one addressee.

32 Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg* [1982] ECR 3641, at paras. 13 and 14.

33 Case C-327/91 France v Commission [1994] ECR I-3641, at para. 25.

34 Ibıd.

35 Macleod, Hendry, Hyett, Page 132.

36 Arcas, Page 502.

VI. RATIFICATION PROCESS OF MIXED AGREEMENTS

Ratification is a process which the MS declare that they are willing to be bound by the agreements and make the agreements as a part of their legal systems. For this reason ratification process is crucial especially for Mixed Agreements where the ratification is required not only by the EU but also by the MS side. This double ratification which prolongs the process is considered as a disadvantage of Mixed Agreements. Another drawback of ratification process is that there is no uniformity within the MS, thus it varies from one MS to the other one. This non uniformity is seen not only in the procedural issues such as; who should ratify first or should it be simultaneous, how long should it take etc. it is also seen in the substantive issue for instance which agreements should be ratified.[37]

Moreover, by referring to Costa v ENEL Case[38] which ensures that the MS are bound by the EU Law, it has been disputed that, if the EU ratification process is completed, then the waiting for the ratification by the MS is unneeded.[39] However there are also some counter arguments which support to the importance and necessities of the MS ratification on the grounds that; by being a part of the Mixed Agreements, the MS show their specific will and consent to be bound by these agreements and undertake the responsibilities. Additionally, in order to enforce the agreement, the MS have to ratify it.

On the other hand, in some particular issues such as the Law of the Sea Convention[40], the ratification of certain number of the MS is necessary in order to accept an international organisation as a contracting party.[41] It is also argued that ratification by all of the MS will ensure its status within the Community legal order without need for pointing to a specific legitimising basis.[42]

Ratification of Mixed Agreements is completed in accordance with the own process of the EU and the other MS. For this reason ratification process can take long time which lowers the speed of finalisation of Mixed Agreements. For instance in Netherlands ratification could include referendum, in Belgium completing the ratification requires approval of all federal states.[43] However taking

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[37] Francis Svılans, "*Ratification of Mixed agreements - the quest for a coordinated procedure, Rigas Juridiska*" Augstskola Rıga Graduate School of Law, RGSL Working Papers No. 11, Riga 2003, Page 5.

[38] Costa v ENEL Case 6/64, [1964] ECR 585.

[39] Svılans, Page 9.

[40] United Nation Conventions on the Law of the Sea, Annex IX.

[41] Svılans, Page 10.

[42] Ibıd.

[43] Clıfford Chance, Briefing Note 28 December 2016, The EU - Singapore FTA: a mixed agreement? available at https://www.cliffordchance.com/briefings/2016/12/the_eu-singaporef taamixedagreement.html (online 24.03.2017).

account the practise of Mixed Agreements such as the EU - South Korea[44] trade deal or lastly the EU - Canada[45] trade deal that their provisions were applied or likely to be applied before the ratification process is completed.

Ratification is especially crucial for Mixed Agreements since the MS can allege that they do not have any responsibility on the grounds that they have not ratified the agreement yet, whereas they can benefit from the same agreement via the EU Law.[46] For this reason sharing the responsibilities and deciding who is responsible for what and when, are the main problems with the framework of ratification of Mixed Agreements.[47]

VII. CLOSE RELATIONSHIP BETWEEN MIXED AGREEMETS AND THE PRINCIPLE OF DUTY OF COOPERATION

Since the Mixed Agreements are arisen from the shared competence area where both the MS and the EU have competence and interest, it is important to have sole voice about the issues and to be in close cooperation with each other in order to well represent the community on the international stage. Importance of close cooperation in the process of negotiation, conclusion and enforcement of the agreement is also emphasized by the CJEU in Opinion 1/9430 and Ruling 1/7833[48].

According to Tridimas[49] the principle of cooperation particularly serves for Mixed Agreements and WTO Agreement and it is also arisen from the demand of unity in order to represent the EU internationally.[50]

The cooperation duty requires to the MS not only coordinate their policies but also reach a mutual, common position which should be declared as a sole voice of the EU.[51]

The importance and the significant role of the duty of cooperation for Mixed Agreements are admitted by many scholars.[52] Moreover CJEU also

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44 EU - South Korea Trade Deal was signed in October 2009 and provisionally applied from July 2011 eventhough ratification process was completed on 13 December 2015.

45 EU - Canada Trade Deal, the EU Parliament voted in favor of this deal on 15 February 2017.

46 Opinion 1/94, note 30.

47 Svılans, Page 17.

48 Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of nuclear Materials, Facilities and Transports, para 32.

49 Takis Tridimas, Paolisa Nebbia, *“European Union Law for Twenty-FirstCentury Rethinking the New Legal Order Volume 1 Constitutional and Public Law External Relations”* Hart Publishing, 2004, Page 328.

50 Ibıd.

51 MacLeod, Hendry, Hyett, Page 148.

52 Christophe Hillion, Mixity and coherence in EU external relations: The significance of the ‘duty of cooperation’ CLEER WORKING PAPERS 2009/2 Page 34.

refers to this increasingly significant principle by stating that the MS and the EU should support each other in order to fulfil the tasks undertaken by the Mixed Agreement as well as respecting their duties arisen from the agreement.[53]

The duty of cooperation is crucial for external relation aspect of the EU regarding the complexity of the competence area and especially for shared competence area which is required cooperation and close coordination and settlement between the EU and the MS. In this respect this principle can be used as a tool, an instrument in order to prepare suitable response based on the internal allocation of the powers in case of the dispute arising from the Mixed Agreements.[54]

From this perspective it would be considered that principle of duty of cooperation is kind of a road map where the parties can find the procedural solution in order to systemise the participation and enforcement of Mixed Agreements.

VIII. WHAT WOULD HAPPEN TO MIXED AGREEMENTS WHEN ONE OF THE MEMBER STATES DEMANDS TO WITHDRAW FROM THE EU?

Mixed Agreements became a current issue after the UK's wish to cease its membership from the EU which is so called "Brexit". One of the consequences of leaving the EU is to determine the status of Mixed Agreements concluded as a MS with the third countries alongside the EU.

It is suggested that the UK would terminate the Union-Only elements of Mixed Agreements or if the other contracting parties and the UK itself wanted to bind by the mixed elements of the agreements, it could remain to be bound since it concluded and ratified such agreements voluntarily and for its own national sake and rights.[55]

On the other hand, these suggestions are not seemed practical. First of all, with respect to complexity of delimitation of competences, it is not easy to make a division between the provisions of agreement as an exclusive competence or shared competence area provisions. Actually it is the EU Law preference not to show obviously the categories of competences in the Mi-

53 Hillion, Page 35.

54 Working Paper No. 156 - March 2015 CHARTING THE LEGAL LANDSCAPE OF EU EXTERNAL RELATIONS POST-LISBON Thomas Ramopoulos Jan Wouters, Leuven Centre for Global Governance Studies Page 28.

55 Guillaume Van der Loo and Steven Blockmans, "*The Impact of Brexit on the EU's International Agreements*", CEPS Commentary Series, 15 July 2016, Centre for European Policy Studies, available at https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements (online on 24.03.2017).

xed Agreements.[56] Secondly, the other contracting parties' perspectives and their willingness to continue to the agreement with new conditions should be considered. Since the early conditions were changed, other contracting parties would not want to proceed the agreement at all or it would demand the revision of the agreement.

As consequences of these suggestions, the UK has to pay attention of the termination or suspension clauses of the Mixed Agreements and make necessary notifications to the relevant third parties within the prescribed time limit alongside with the EU that will inform the relevant third parties not to apply Union- Only elements of agreements to the UK.

Regarding the nature of the agreements which have financial, political, social consequences, making an additional protocol is strongly recommended in order to amend the Mixed Agreements and revise the conditions in case of not only withdrawal of the UK but also deciding to maintain the Mixed Agreements.

However it is argued that maintaining the Mixed Agreements would be useful for the UK regarding the difficulty and complexity of signing a bilateral contract as a sole country without the EU's power. Moreover third countries would not be willing to sign a contract with the UK considering the vagueness market assumption after the Brexit.[57]

IX. CONCLUSION

Mixed Agreements which require not only the EU but also the MS as a contracting party of the international agreements concluded with third countries are one of the important external aspects of the EU. Since the subject matter of the Mixed Agreements stems from the shared competence area, it is not always easy to decide which part of the agreement is related to the EU competence or the MS's. Within this case, the EU has a tendency to conclude the agreement as a mixed one in order to share the responsibilities in terms of political, economic and social.

Both parties' participation and ratification are essential features of Mixed Agreements. Another aspect of concluding a Mixed Agreement is that it requires coordination and cooperation between the EU and the MS in order to fulfil the obligations arising from the Mixed Agreements and to represent the EU as a sole voice at the international stage. For this reason the principle of duty of cooperation plays main role in Mixed Agreements.

[56] Ibıd.

[57] Ibıd.

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