



The European Union WMD Clause: A Preliminary Assessment

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In November 2003 the Council of the European Union (EU) adopted a clause on Weapons of Mass Destruction (WMD). This clause was intended to become an essential element in all new, renewed or revised “mixed” agreements between the EU and states vis-à-vis issues of non-proliferation of WMD. However, the status of the clause in EU external agreements continues to divide the Council. Moreover, policy staff in the European Parliament have called into question the effectiveness of the clause as an instrument to promote non-proliferation. This article outlines the development of the clause and the debate on its use.

The development of the WMD clause and its position in EU agreements

The EU approach on WMD proliferation that evolved during 2003, initially in the form of the June 2003 Basic Principles¹ and an Action Plan², framed proliferation of WMD as a global threat that was becoming increasingly dangerous because of the potential link to terrorism. The approach also highlighted the need for a response to be based on strong and credible multilateral regimes and political solutions. For example, one suggested element of an EU response was the mainstreaming of non-proliferation policies into the EU’s wider relations with third countries through consideration of a “stick and carrot” policy.”³

At the same time as the development of the Basic Principles and the Action Plan, the European Security Strategy (ESS) for the EU was developed through the office of the High Representative for Common Foreign and Security Policy, Javier Solana. The aim of a common security strategy for the EU was, according to Solana, to make the EU “a more credible actor and a more influential partner”.⁴ Vis-à-vis WMD, and in comparison to the Basic Principles, the ESS gave greater prominence to the need for non-proliferation.⁵ The ESS briefly discussed ways to implement the new strategy and whereas the strategy of ‘mainstreaming’ was not discussed, the strategy of conditionality was mentioned as one potential tool at the EU’s disposal.⁶

When on 17 November 2003 the Council of the EU (hereafter referred to as the Council) subsequently agreed to mainstream non-proliferation policies into the EU’s wider relations with third countries, it was on the basis that non-proliferation of WMD “constitutes a fundamental element for the EU when it considers the decision of entering into negotiations with a third country”.⁷ However, the approach adopted went a step further than the Basic Principles and the Action Plan, by suggesting that a WMD clause⁸ should also form part of all “mixed” agreements⁹. The Council agreed on an EU standardisation

¹ Council of the EU, “Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction”, presented to the GAERC in Luxembourg on 16 June 2003, p. 2. http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76328.pdf

² Council of the EU, “Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction”, Document No. 10354/1/03, Brussels, 13 June 2003. <http://register.consilium.eu.int/pdf/en/03/st10/st10354en03.pdf>

³ Ibid. p. 6.

⁴ “The European Security Strategy: A Secure Europe in a Better World”, 20 June 2003, p. 15. http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76255.pdf

⁵ Ibid. p. 5.

⁶ Ibid. p.10.

⁷ Council of the EU, “Fight against the proliferation of weapons of mass destruction - Mainstreaming non-proliferation policies into the EU’s wider relations with third countries”, Document No. 14813/03, Brussels, 19 November 2003, p. 2. <http://www.sussex.ac.uk/Units/spru/hsp/documents/2003-1117%20Mainstreaming.pdf>

⁸ It is interesting to note that the established journal *Disarmament Diplomacy* writes that a similar clause existed in the field of human rights since the 1990s and was thought to be an effective way to influence the behaviour of partners. Portela, Clara, “The

for agreements with third countries, “as a general rule a ‘non-proliferation clause’ should be included, as an essential element clause ... in all future mixed agreements to be negotiated”.¹⁰ Thus, as part of an extensive review and reform of the EU’s efforts to enhance the effectiveness of measures to prevent the proliferation of nuclear, biological and chemical weapons as well as missile delivery systems, a clause on WMD was developed for use in EU agreements.

The agreed text of the non-proliferation clause to be included in agreements with third countries is as follows¹¹:

“The Parties consider that the proliferation of weapons of mass destruction and their means of delivery, both to state and non-state actors, represent one of the most serious threats to international stability and security.

The Parties therefore agree to co-operate and to contribute to countering the proliferation of weapons of mass destruction and their means of delivery through full compliance with and national implementation of their existing obligations under international disarmament and non-proliferation treaties and agreements and other relevant international obligations. The Parties agree that this provision constitutes an essential element of this agreement.

The Parties further agree to cooperate and to contribute to countering the proliferation of weapons of mass destruction and their means of delivery by:

- taking steps to sign, ratify, or accede to, as appropriate, and fully implement all other relevant international instruments;
- the establishment of an effective system of national export controls, controlling the export as well as transit WMD related goods, including a WMD end-use control on dual use technologies and containing effective sanctions for breaches of export controls.*

The Parties agree to establish a regular political dialogue that will accompany and consolidate these elements.

**These two elements might be considered as essential elements on a case by case basis.”*

The first part of the WMD clause is a commitment by the EU and its partners to implement all of the non-proliferation obligations entered into. This declaratory commitment does not include verification procedures or any new commitments, but as it constitutes an ‘essential element’ of the agreement, it carries an implicit threat that non-fulfilment might lead to the suspension of the agreement—and therefore the termination of trade arrangements enabled by the contract with the EU. The second section, not mandatory but considered on a case-by-case basis, anticipates the adoption of additional commitments, including accession to relevant international instruments and the implementation of effective national export controls. However, what constitutes ‘effective’ is not defined in detail. Section two introduces flexibility into negotiations with important States but agrees that any additional commitments incurred by partners arising out of steps taken as a result of the instrument could qualify for financial support and technical assistance from the EU.

EU WMD clause in Mixed Agreements 2003-2009

Official documents, such as the six-monthly Progress Reports that the EU has published since 2003 tracking the implementation of the WMD strategy, have painted a highly optimistic picture concerning the current status of the WMD clause. However, others have been more circumspect. For example, a note produced for the European Parliament in 2007 identified and highlighted obstacles to implementation that had occurred between 2003 and 2007, including how to decide which states merit both sections of the clause rather than just the essential element.¹²

EU and the NPT: Testing the European Nonproliferation Strategy”, *Disarmament Diplomacy*, Issue No. 78, July/August 2004. <http://www.acronym.org.uk/dd/dd78/78cp.htm>.

⁹ A mixed agreement is a political and economic agreement between the EU and a third State. Such an agreement covers aspects from more than one of the three pillars on which EU action rests, and so it is different from Community-only agreements that cover only commercial and trade issues—the first EU pillar—and therefore do not include political clauses.

¹⁰ Council of the EU, “Fight against the proliferation of weapons of mass destruction” *op.cit.* p. 3.

¹¹ Council of the EU, “Fight against the proliferation of weapons of mass destruction” *op.cit.* p. 4.

¹² Quille, Gerrard, “EU Non-proliferation Clauses applied to certain agreements in the EU’s wider relations with third countries”, Brussels, European Parliament, 21 September 2007, www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/sede011007exponote/_sede011007exponote_en.pdf

These obstacles seem to have been recognised, as in November 2008 the Council circulated a document on 'New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems'. The proposals included a sub-chapter entitled 'Strengthening diplomatic leverage through better use of the WMD clause', suggesting that improvements to implementation could be made.¹³ The document also outlined the need for an evaluation of the implementation of the WMD clause. It noted that a document would be produced to "propose lines of action for improving the process of negotiation of the clause", and to analyse the procedure to be followed when a prospective partner refuses the clause.¹⁴ However, as yet, no such document has been produced.

In January 2009, the Council released 'A note on the WMD clause', but this document over-emphasises the successes of the clause.¹⁵ For example, the Council has declared through its various Progress Reports that almost one hundred countries have entered into WMD clause agreements with the EU since 2003. However, there is a gap between the number of States that have signed agreements with the EU and the number of agreements that have entered into force and are being implemented. The status of three key mixed agreements signed since 2003 are summarised below.

Ongoing negotiations on agreements

Syria

The EU finalised a mixed agreement with Syria in 2004 but this document has not yet entered into force, and it remains blocked in the Council. At first the Commission found it difficult to produce a text that was approved by all EU Member States, the delay apparently caused by different views over whether to include the second (non-mandatory) section of the WMD clause in the agreement. Syria is not a party to the Chemical Weapons Convention (CWC) or the Biological and Toxin Weapon Convention (BTWC). The issue of ratification has subsequently been further complicated by the debate over Syria's supposed responsibility for the assassination of Lebanese Prime Minister Rafik Hariri. The EU-Syria agreement is now awaiting examination by the EU Member States and it may enter into force during 2009. The text includes the WMD clause without any changes from the standard clause. However, developments in Syria are being monitored carefully by the EU and additional delays might occur, for example as a result of the ongoing IAEA investigations of alleged nuclear activities by Syria¹⁶ or by events arising from the victory of the anti-Syria coalition in the June 2009 election in Lebanon.¹⁷

India

The negotiations for a Free Trade Agreement (FTA) between the EU and India are thought to be the most important single case since the adoption of the WMD clause. Moreover, in 2007, the Council requested the Commission to expand the negotiation with India to a mixed agreement.¹⁸ A mixed agreement between EU and India would potentially raise the issue of whether or not to seek conditionality as part of an attempt to persuade India to join key nuclear arms control agreements—the Non-Proliferation Treaty (NPT) and the Comprehensive Test Ban Treaty (CTBT).¹⁹ In negotiations, India not only refused the WMD clause but rejected any conditionality in a bilateral agreement. After intense discussions among the EU Member States and several EU approaches to the Indian government, the EU decided to sidestep the issue of the WMD clause in bilateral relations with India. In 2009 the decision was taken not to update the

¹³ Council of the EU, "Council Conclusions and new lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems", Document No. 17172/08, Brussels, 17 December 2008.

http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141740.pdf

¹⁴ *Ibid.* p. 22.

¹⁵ Council of the EU, 'Note on the implementation of the WMD Clause', Brussels, Document No. 5503/09, 19 January 2009. www.consilium.europa.eu/uedocs/cmsUpload/st05503.en09.pdf

¹⁶ Interview with Syria Desk Officer conducted by the author 4 February 2009.

¹⁷ The March 14 Alliance, headed by Saad Hariri, son of the former Prime Minister Rafik Harir, won 71 seats in the 128-member parliament in the elections.

¹⁸ Quille, Gerrard, "EU Non-proliferation Clauses applied to certain agreements in the EU's wider relations with third countries", *op.cit.*

¹⁹ India is one of nine Annex 2 States that need to ratify CTBT for it to enter into force.

existing legally binding Associate Agreement from 1994 but to link the FTA to the existing Partnership Cooperation Agreement—which lacks a WMD clause—instead. The EU is now discussing a purely scientific cooperation on non-proliferation with India.²⁰ The full content of the FTA is theoretically open for modification up to the point of ratification, hence the European Parliament currently continues to avoid drawing any conclusions in regard to the EU-India case.²¹

The case of the WMD clause in a finalised agreement

The 2000 agreement between the EU and the African, Caribbean and Pacific Islands (ACP) Group of States (the ACP-EC agreement, also known as the Cotonou Agreement), was revised in 2005. The updated agreement, including a WMD clause, entered into force for most of the parties in July 2008.²² The ACP-EC negotiations raised difficulties related to the WMD clause, in particular vis-à-vis the inclusion of section two as an essential element. The ACP countries also wanted to include a restriction on the manufacturing and stockpiling of WMD into the agreement.²³ The first paragraph was the same as the standard clause and included an acknowledgement by the parties of the entire clause as an essential element. However, the second paragraph included an added element by stating that the EU would support the financial and technical assistance in non-proliferation of WMD in ACP using funds from outside the budget for ACP cooperation. In other words, the EU would not divert funds from development assistance to non-proliferation, but would use the newly created Instrument for Stability (IfS) instead.²⁴ The IfS, mainly dealing with crisis response and peace-building, does not thus far fund a project dealing with non-proliferation work in the ACP, or anywhere else in the world.²⁵

Assessment of the agreement in force

Although several negotiations have taken place, and the wording of the WMD clause has been incorporated into some non-binding agreements, the ACP-EC agreement is currently the only ratified legally binding agreement with a WMD clause. Some improvements in participation in multilateral arms control within the group of ACP countries in areas directly related to the substance of section two of the EU WMD clause have taken place since June 2005. Increased participation by ACP countries in the CWC and the CTBT are particularly notable. However, many ACP signatures and ratifications are still lacking in some conventions. For example, forty-one ACP states have not yet signed the International Atomic Energy Agency (IAEA) Additional Protocol, while ten of the ACP signatories have not yet ratified the protocol. Outside of the mixed agreement, the EU has adopted eleven Joint Actions in support of major conventions since 2005. These have increased the over-all participation by States in major international conventions. Furthermore, the EU has during this time continued its work in multilateral arms control, most notably through the adoption of Joint Actions in support of major international conventions. The positive results in terms of ACP participation in CWC and CTBT are therefore not necessarily due to the WMD clause.

The decision to expand the use of EU financing to support non-proliferation initiatives in specific ACP countries might be seen as costly relative to any potential gain such assistance could have on non-proliferation and EU security. However, the approach to using the WMD clause in the ACP agreement has actually put indirect pressure on the EU to assist smaller States with legal as well as technical measures rather than increasing the pressure on partners. Rather than using national commitment to non-proliferation as a carrot for third States, the EU has inadvertently created a reverse conditionality. That is,

²⁰ Interview with India Desk Officer conducted by the author 2 February 2009.

²¹ Quille, Gerrard, “The EU’s approach to tackling the proliferation of Materials and Weapons of Mass Destruction and prospects for cooperation on the eve of a new US Administration”, Brussels, *European Parliament Working Paper*, 5 November 2008, p. 12.

²² Four countries from the ACP have not ratified the agreement. These are Equatorial Guinea, Nigeria, South Africa and Sudan. From this point on ACP will in this paper refer only to the ACP states under EU agreement.

²³ EU-ACP, Draft Joint Report ACP-CE 2104/05, Brussels, 15 February 2005, pp. 4-5.
<http://register.consilium.eu.int/pdf/en/05/st02/st02104.en05.pdf>.

²⁴ ACP-EC, “Partnership Agreement”, Article 11b, Revised in Luxembourg on 25 June 2005, pp. 11-12.

http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf.

²⁵ More information and a list of IfS projects can be found at: http://ec.europa.eu/external_relations/ifs/projects/index_en.htm

the EU would need to deliver both financial and technical assistance to the ACP if the EU wants to see improvements in the national non-proliferation capacities within many ACP countries.

No other negotiations with a WMD clause have reached ratification and entry into force and it can be argued that one country, India, has benefited from preferential treatment. This might undermine all future EU efforts to bring partners to accept and implement the WMD clause, and it might also have an impact on the ACP agreement. The ACP-EC agreement must be renewed every five years and in the next EU approach to India could raise eyebrows and create a problem in the eyes of important States such as South Africa.

Conclusion

This paper suggests that a number of questions remain to be answered concerning the continued implementation of the WMD clause. These include: the priority of the clause in EU's external relations; and in particular, whether or not the EU is willing to block the finalisation of trade deals over the issue of inclusion of the WMD clause.

Problems have arisen in negotiations with different partners who have different views - not only on whether they can accept both sections of the WMD clause, but on whether any part of the clause can be accepted if it is based on conditionality. The outcome of the EU-India negotiations shows that any conditionality from the EU side can be a barrier to any agreement. The decision to sidestep the WMD clause for India and to continue to rely on a 1994 bilateral cooperation agreement in order to avoid discussing difficult issues may be taken on board by other States in future negotiations with the EU.

The EU has to develop a strategy that covers how to deal with the WMD clause in situation where it becomes an obstacle for the achievement of other interests. The WMD clause makes a distinction between existing obligations and relevant - but unsigned - treaties and the initial thought might have been to increase the level of compliance with the global non-proliferation *acquis* in its entirety. However, if the EU is willing to work around the WMD clause in certain cases, can this objective be preserved?

It is necessary to reassess what can reasonably be expected from the use of the WMD clause. One of the difficulties around implementation is the lack of a procedure against which to judge whether or not a partner of the EU has fallen below the international standard for non-proliferation. For example, while the clause emphasizes the need for an effective system of national export controls, it is not made clear to the partner what such a system would comprise of in the eyes of the EU. At the same time, the potential consequences for not meeting the standard could be severe—and conditionality based on this implied threat of sanctions underlies the EU approach to the WMD clause.

This combination is almost certain to produce a sense of unease among partners, since even those in good faith are set a task that is hard for them to accomplish given the lack of clear criteria and the shortfall in their current capacity. In the meantime, the Council is discussing the introduction of a small arms and light weapons clause in agreements with third States.²⁶ In the light of this paper, another clause could deepen the reversed conditionality, be an obstacle to mixed agreements with particular States and further divide EU Member State coherence in dealing with non-proliferation.

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²⁶ European Council, "Council Conclusions on the inclusion of a SALW article in agreements between the EU and third countries", Document No. 17186/08, Brussels, 17 Dec 2008, p. 2