SIPRI Background Paper
November 2009

THE EU NON-PROLIFERATION CLAUSE: A PRELIMINARY ASSESSMENT

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SUMMARY

● The policy of the European Union (EU) since 2003 has been to make cooperation with non-EU countries conditional on satisfactory behaviour in the area of non-proliferation of weapons of mass destruction (WMD). It has sought to do this by inserting a WMD clause in all new and revised mixed agreements that makes non-proliferation an essential element of cooperation between the EU and its partners.

The implementation record of the WMD clause has been patchy, with most agreements imposing conditionality only on the fulfilment of existing non-proliferation obligations. The principle of inserting the clause in all agreements has apparently been abandoned in negotiations for a free trade agreement with India, arguably a country of proliferation concern.

The impact and the implementation of the WMD clause to date suggest that it is falling short of expectations. The EU should reconsider and clarify matters such as how to deal with countries that resist the type of conditionality implied by the clause, what compromises are acceptable regarding the form of the clause in different agreements, and whether the EU can allow its trade interests to override non-proliferation concerns.

I. Introduction

In November 2003 the Council of the European Union (the Council) adopted the non-proliferation clause, also known as the weapons of mass destruction (WMD) clause, as a means to promote non-proliferation through its external relations. It was intended that the clause should be included as an essential element clause in all new, renewed or revised 'mixed agreements' between the European Union (EU) and non-EU states (referred to by the EU as 'third countries'). In the six years since the WMD clause's adoption, many negotiations have taken place towards such agreements. The WMD clause has now been inserted into several agreements that are either in force, signed and awaiting ratification, or under negotiation. However, in talks with certain partners the status of the clause has at times divided the EU member states in the Council. Moreover, experts in the European Parliament have called into question how effective the clause is as a means of promoting non-proliferation.

This Policy Brief describes the origins and aims of the WMD clause (section II). It then examines the implementation of the clause to date, surveying the negotiations towards mixed agreements since the WMD clause's introduction in 2003 (section III) and the progress towards non-proliferation made by third countries currently bound by a WMD clause (section IV). Section V offers conclusions.

II. Origins of the non-proliferation clause

The WMD clause developed as part of an extensive reform of the EU's efforts to promote the non-proliferation of nuclear, biological, radiological and chemical (NBRC) weapons and their delivery systems. The EU had already carried out some initiatives in this field, including Cooperative Threat Reduction (CTR) activities in Russia and support to the Korean Peninsula Energy Development Organization (KEDO). Moreover, by 2003, the EU member states were at times coordinating their political statements and positions on non-proliferation in conferences and international meetings. However, the EU still lacked a coherent and integrated approach to non-proliferation.[1]

[1] Portela, C., 'The EU and the NPT: testing the European nonproliferation strategy', Disarmament Diplomacy, no. 78 (July/Aug. 2004), <http://www.acronym.org.uk/dd/dd78/78cp.htm>.

* The author wishes to thank Ian Anthony, Sibylle Bauer, Ivana Micic, Gerard Quille and Caspar Trimmer for their assistance in the preparation of this background paper.

A number of developments catalysed the creation of an EU non-proliferation strategy in 2003. At the time, the EU was under pressure to respond to the possibility of non-state actors carrying out mass-impact terrorist attacks, including attacks using WMD. It was also developing the first European Security Strategy. In this process, the proliferation of WMD, especially their acquisition by non-state actors, was treated as potentially the most serious threat to European security.

Another reason for developing a more coherent approach to non-proliferation at that time was the imminent enlargement of the EU to include 10 new members. A framework was needed that could accommodate new states with different security capabilities, traditions and routines. Finally, the invasion of Iraq in March 2003, ostensibly intended to eliminate a proliferation threat, underscored policy differences both within the EU and between the EU and the United States. Positive steps were needed to close the gaps.[2]

The establishment of a common EU approach to the threat of WMD proliferation was first proposed by Sweden.[3] Building on this concept, the Council Secretariat and the Commission produced two documents in mid-2003: 'Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction' and an 'Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction'. These framed WMD proliferation as a global threat that was becoming increasingly dangerous because of the potential link to terrorism. They highlighted the need for strong and credible multilateral regimes and favoured political solutions to the 'problems, fears and ambitions' that could lead countries and non-state actors to seek WMD capabilities.[4] The Basic Principles and the Action Plan were adopted at the EU General Affairs and External Relations Council (GAERC) meeting in June 2003.

Under the heading 'Mainstreaming non-proliferation policies into the EU's wider relations with third countries', the Action Plan included the following text.

> The EU will consider the introduction of an effective stick and carrot policy linked to non-proliferation commitments in its relations with third countries. This will be done in particular in the context of co-operation agreements or assistance programmes. Relevant working groups will be tasked to review EU policy towards particular countries. In this context combined sessions of regional working groups and the working group on non-proliferation could be organised to promote cross-fertilisation of regional and non-proliferation policies.[5]

[2] Spear, J., 'The emergence of a European "strategic personality"', *Arms Control Today*, vol. 33, Nov 2003, p. 1.

[3] Bailes, A. J. K., *The European Security Strategy: An Evolutionary History*, SIPRI Policy Paper no. 10 (SIPRI: Stockholm, 2005), p. 10. In Apr. 2003 the foreign ministers of Sweden and Greece, Anna Lindh and Giorgiós Papandréou, outlined a proposal for a new strategy to combat the proliferation of WMD within the EU in an editorial in a Swedish newspaper. Lindh, A. and Papandréou, G., 'Så undviker vi ett nytt Irak' [How to avoid a new Iraq], *Dagens Nyheter*, 10 Apr. 2003.

[4] Council of the European Union, Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction, 10352/03, 10 June 2003, p. 3.

[5] Council of the European Union, Action Plan for the Implementation of the Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction, 10354/1/03, 13 June 2003, p. 6. The Basic Principles and Action Plan can be accessed at <archives.sipri.org/contents/expcon/eu_wmd_ap.pdf>.

Also in the June 2003 GAERC meeting, Javier Solana, the High Representative for the EU's Common Foreign and Security Policy (CFSP) and Secretary-General of the Council, presented a draft for the European Security Strategy. The aim of having a common security strategy for the EU was, according to Solana, to make the EU 'a more credible actor and a more influential partner' in transatlantic relations.[6] Solana's draft, entitled 'A Secure Europe in a Better World', did not go into detail about how to accomplish the mainstreaming of non-proliferation policies into the EU's external relations, as suggested by the Action Plan, but it set out a general framework in which the EU's trade and development policies could become 'powerful tools' to promote governance reform in third countries, by means of 'assistance programmes, conditionality and targeted trade measures'.[7]

The model non-proliferation clause

When the GAERC subsequently adopted as policy the concept of mainstreaming non-proliferation into the EU's wider relations with third countries in November 2003, it was on the basis that non-proliferation 'constitutes a fundamental element for the EU when it considers the decision of entering into negotiations with a third country or assesses the advisability of progressing towards a contractual relationship'.[8] The Council's policy note on the issue developed the ideas set out in the Basic Principles and the Action Plan, suggesting that a non-proliferation clause should in future be included in all of the EU's mixed agreements.

Mixed agreements are agreements between the EU and a third country that include a combination of economic and political elements. They cover both matters that fall under the Community area of EU competence and political matters that fall under other areas of EU competence, such as security and defence. By inserting the WMD clause in mixed agreements it is theoretically possible to make trade, development assistance and other elements of cooperation that are under Community competence directly conditional on fulfilment of commitments in the area of non-proliferation, which is under CFSP competence. Unlike Community-only agreements, which can be adopted by the Council (usually by qualified majority vote), mixed agreements require a consensus vote in the Council and must also be signed and ratified by all EU member states before they enter into force, because of their political content.

The WMD clause was modelled on the EU human rights clause introduced by the EU in the 1990s for inclusion in its agreements with third countries. The human rights clause makes respect for human rights an essential element of bilateral relations: if one party deems the other party to have failed in this regard it can, if political dialogue fails, take 'appropriate measures'

[6] Solana, J., 'A secure Europe in a better world', European Security Strategy, Draft presented to the Thessaloniki European Council, 20 June 2003, <http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/reports/76255.pdf>, p. 15. Solana first presented the draft strategy, along with the Basic Principles (note 4) and WMD Action Plan (note 5), to the GAERC on 16 June 2003.

[7] Solana (note 6), p. 10.

[8] Council of the European Union, 'Fight against the proliferation of weapons of mass destruction: mainstreaming non-proliferation policies into the EU's wider relations with third countries', Council Note, 14997/03, 19 Nov. 2003, <http://www.consilium.europa.eu/showPage.aspx?id=718>, p. 2.

including, in the last resort, suspension of the agreement. Thus, the provision of development aid, for example, is conditional on the EU and its partner respecting human rights. The clause was seen as an effective way to influence the behaviour of partners.[9]

The November 2003 Council policy note on mainstreaming stated that in future, '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] The policy note further suggested that the WMD clause could be included in political agreements parallel to certain Community-only agreements. These agreements would be with states lacking a mixed agreement with the EU and with which the Council did not envisage concluding a mixed agreement.[11] In practice, however, the legal division of EU and Community competences could make it difficult to impose conditionality on a Community-only agreement by means of a parallel political agreement.[12] The policy on mainstreaming non-proliferation policies in external relations was included in the new EU WMD Strategy adopted in December 2003.[13]

The text of the WMD clause in the November policy note was as follows.

> 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 furthermore 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 of 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.[14]

The first part of the clause is a commitment by the EU and its partner to fulfil all of their existing non-proliferation obligations. This is declaratory in force and does not include verification procedures or any new obligations,

[9] Portela (note 1).

[10] Council of the European Union, 14997/03 (note 8), p. 3.

[11] Council of the European Union, 14997/03 (note 8), p. 3.

[12] Article 47 of the Treaty on European Union states that nothing in the EU Treaty can affect the treaties establishing the European Communities. After amendment by the Lisbon Treaty, the EU Treaty would maintain a similar division of competences in its article 25b.

[13] Council of the European Union, 'Fight against the proliferation of weapons of mass destruction', EU Strategy against Proliferation of Weapons of Mass Destruction, 15708/03, 10 Dec. The EU WMD Strategy was adopted by the Brussels European Council on 12 Dec. 2003. The final version can be accessed at <http://www.consilium.europa.eu/showPage.aspx?id=718>.

[14] Council of the European Union, 14997/03 (note 8), p. 4.

but as an essential element clause it carries the implicit threat that non-fulfilment might lead to suspension of the agreement and thus of the benefits it offers in terms of political and economic cooperation with the EU.

The second part anticipates additional commitments: ratification of or accession to relevant international instruments and the implementation of effective national export controls (although 'effective' is not defined in this context). As the provisions in the second part 'might be considered as essential elements on a case by case basis', the the EU is given a degree of flexibility in negotiations with third countries. However, the policy note does not give any indication as to how to decide when these provisions should be given essential element status.

If the policy note is read in conjunction with the WMD Strategy, states taking on additional commitments such as those mentioned in the second part of the WMD clause could expect to qualify for financial support and technical assistance from the EU.[15] Therefore, the document includes both the stick and the carrot called for by Solana.

III. The non-proliferation clause in mixed agreements

In 2007 Gerrard Quille, a policy adviser to the European Parliament, identified several obstacles to the implementation of the WMD clause that had been encountered since 2003. Quille raised some important questions, including how to decide what forms the clause should take in agreements with different third countries and how to deal with resistance to the clause from countries of proliferation concern.[16]

Quille's analysis contrasts with the highly optimistic picture of the clause's implementation painted by documents such as the six-monthly progress reports on the WMD strategy that the Council has published since 2003.[17] There could be several reasons for this. First, the progress reports cover agreements under negotiation, not just agreements in force, which vastly increases the number of potential 'successes'. Second the progress reports measure the success of the clause by the number of times it is inserted into agreements, not by any concrete policy changes by the third country partner. Moreover, the progress reports count as successes all cases when the WMD clause is inserted in some form, and do not qualify this according to differences in the language of the clause or whether the provisions in the first or both sections have essential element status.

In December 2008 the General Secretariat of the Council (GSC) circulated 'New Lines for Action by the European Union in Combating the Proliferation of Weapons of Mass Destruction and their Delivery Systems'. One section was entitled 'Strengthening diplomatic leverage through better use of the WMD clause'—an acknowledgement that the implementation of the clause

[15] Quille, G., 'EU non-proliferation clauses applied to certain agreements in the EU's wider relations with third countries', European Parliament Note, DGExPo/B/PolDep/Note/2007_172, 21 Sep. 2007, <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/sede011007exponote_/sede011007exponote_en.pdf>; and Council of the European Union, 15708/03 (note 13), pp. 8, 10–11.

[16] Quille (note 15).

[17] The Council's 6-monthly progress reports on implementation of the EU WMD Strategy can be accessed at <http://www.consilium.europa.eu/showPage.aspx?id=718>.

could be improved.[18] The document also included an instruction from the Council for the GSC, in liaison with the European Commission, to draw up a document assessing the clause's implementation. This document should 'propose lines of action for improving the process of negotiation of the clause'.[19] However, no such document has yet been produced. The Council published, in 2009, a short note on the implementation of the WMD clause, but this document does not provide a critical assessment or make the proposals or analysis called for in the New Lines for Action.[20]

According to the Council's WMD strategy progress reports, the EU has concluded negotiations with almost 100 countries for agreements that include a clause 'compatible with the spirit and the content of the WMD standard clause'.[21] However, only two mixed agreements that incorporate the clause have so far entered into force.[22] The clause's inclusion has reportedly met resistance from third countries in most negotiations.[23] Both of the agreements in force and most of the current draft agreements and signed agreements not yet in force include both sections of the WMD clause, but with only the fulfilment of existing obligations—in the first part—given essential element status. The rest of this section summarizes the status regarding inclusion of the WMD clause in all mixed agreements signed or under negotiation since 2003.

Agreements not yet in force

EU–Tajikistan Partnership and Cooperation Agreement

The EU–Tajikistan Partnership and Cooperation Agreement (PCA) was the first EU mixed agreement to include the WMD clause. It was signed in October 2004 and included both sections of the model WMD clause in full and almost verbatim, with only the fulfilment of existing obligations as an essential element.[24] Ratification of the agreement by the last EU member state, Greece, took place at the end of July 2009. The European Parliament gave its assent to the agreement on 17 September and the agreement will enter into force shortly.[25]

[18] Council of the European Union, 'Council conclusions and new lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems', 17172/08, 17 Dec. 2008, <http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141740.pdf>, p 22.

[19] Council of the European Union, 17172/08 (note 18), p. 22.

[20] Council of the European Union, Note on the implementation of the WMD clause, 5503/09, 19 Jan. 2009, <http://www.consilium.europa.eu/uedocs/cmsUpload/st05503.en09.pdf>.

[21] Council of the European Union, Six-monthly progress report on the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2009/I), 11490/09, 26 June 2009, p. 36.

[22] The WMD clause has also been included in action plans drawn up in the context of the European Neighbourhood Policy, but these are not considered in this paper as they are indicative documents and not legally binding. Council of the European Union, 11490/09 (note 21), p. 14.

[23] European Commission official, Interview, 1 Oct. 2009.

[24] The Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, for the one part, and the Republic of Tajikistan, of the other part was signed at Luxembourg on 11 Oct. 2004. The WMD clause is included in Article 4. The full text of the agreement is available at <http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0521en01.pdf>.

[25] European Commission official, Interview, 17 Feb. 2009; and Vogel, T., 'Greek ratification paves way for EU–Tajikistan partnership', *European Voice*, 30 July 2009.

EU–Syria Association Agreement

The Commission concluded negotiations for an association agreement with Syria in 2004, but it has not yet been signed or ratified. The Commission initially found it difficult to produce a text that was acceptable to all EU member states, due in part to differing positions on how far to push Syria over the WMD clause. Syria—which is not a party to the Chemical Weapons Convention (CWC) or the Biological and Toxin Weapon Convention (BTWC)—had particular reservations over the second section of the clause. Eventually it was agreed that the full standard WMD clause should be included, with minor alterations, but with only the fulfilment of existing obligations (and, in a variation from the model WMD clause, compliance with relevant Security Council resolutions) having essential element status.[26] Progress towards signature was delayed following the assassination of former Lebanese Prime Minister Rafik Hariri.[27] However, the EU member states and Syria are expected to sign the agreement in the near future.[28]

EU–Gulf Cooperation Council free trade agreement

The European Commission received a new mandate to negotiate a free trade agreement (FTA) with the Gulf Cooperation Council in 2003. The current intention is to conclude a mixed agreement consisting of an FTA with some political clauses, including the WMD clause. The GCC has currently suspended the negotiations, but its objections relate only to trade issues.[29]

EU–China Partnership and Cooperation Agreement

According to the June 2009 WMD Strategy progress report, China has agreed to the inclusion of a WMD clause in a PCA that has been under negotiation with the EU since 2005.[30] It remains to be seen how closely the clause will reflect the model clause and whether the provisions in the second section will be made essential elements. If they are, it will, among other things, put pressure on China to ratify the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT). China is among the remaining nine 'Annex 2' states that must ratify the treaty in order for it to enter into force.[31] The EU and

[26] European Commission, Proposal for a Council decision on the signature on behalf of the European Community and provisional application of certain provisions of a Euro-Mediterranean Association Agreement between the European Community and its Member States and the Syrian Arab Republic and Proposal for a Council decision on the conclusion of a Euro-Mediterranean Association Agreement between the European Community and its Member States of the one part, and the Syrian Arab Republic, of the other part, COM(2004) 808 final, 17 Dec. 2008, <http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=COM:2004:0808:FIN:EN:PDF>, pp. 2, 15.

[27] Reuters, 'Britain hails EU association deal with Syria', World Bulletin, 5 Aug. 2009, <http://www.worldbulletin.net/news_detail.php?id=45684>. Hariri was assassinated on 14 Feb. 2005. An independent investigation found evidence that the Syrian Government was complicit in his death. See Mehlis, D., United Nations, Report of the International Independent Investigation Commission established pursuant to Security Council Resolution 1595 (2005), S/2005/662, Beirut, 19 Oct. 2005.

[28] European Commission official, Interview, 4 Feb. 2009.

[29] European Commission official, Interview, 2 Oct. 2009.

[30] Council of the European Union 11490/09 (note 21), p. 36.

[31] Annex 2 of the CTBT lists 44 states the must ratify the treaty in order for it to enter into force.

China have yet to agree on the inclusion of the human rights clause, and this major obstacle in the negotiations is unlikely to be resolved soon.[32]

EU–Iraq trade and cooperation agreement

The EU started negotiations for a mixed agreement with Iraq in 2006. Although the negotiations are believed to have made substantial progress, very little information is publicly available at the time of writing.[33]

EU–South Africa revised Trade, Development and Cooperation Agreement

South Africa is a contracting party to the 2000 Cotonou Agreement between the EU and most of the African, Caribbean and Pacific (ACP) Group of States and to the Cotonou Agreement's 2005 revision (see below), but not all Cotonou provisions apply to EU–South Africa cooperation.[34] A separate Trade and Development Cooperation Agreement (TDCA) was signed between the European Communities and South Africa in 1999, which included no political clauses. Although the political clauses of the 2005 revised Cotonou Agreement apply to South Africa,[35] the Commission proposed in 2008 that political clauses also be included in a revision of the TDCA, which would become a mixed agreement.[36]

Following the Commission's recommendation, the Council decided that the WMD clause should be included with all provisions as essential elements.[37] The revision agreement was signed in September 2009, making it the first signed EU mixed agreement to include the provisions on export controls and accession to additional non-proliferation and disarmament instruments as essential elements.[38] The agreement must be ratified by the parties before it enters into force.

In contrast to the difficulty that the EU has had in persuading most third countries to accept even the basic WMD clause, the decision to make all sections essential elements was reportedly based on a request from South Africa.[39] The reasons why South Africa made this request are not publicly

[32] Council of the European Union official, Interview, 12 Oct. 2009.

[33] Council of the European Union official, Interview, 12 Oct. 2009.

[34] The Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, was signed in Cotonou on 23 June 2000 and revised in Luxembourg on 25 June 2005. The text of the revised Cotonou Agreement is included in European Commission, *Partnership Agreement ACP–EC*, Document no. DE-132 (European Commission: Directorate-General for Development and Relations with African, Caribbean and Pacific States: Luxembourg, Sep. 2006), <http://ec.europa.eu/development/icenter/repository/Cotonou_ EN_2006_en.pdf>.

[35] Revised Cotonou Agreement (note 34), Protocol 3 on South Africa, Article 8.

[36] European Commission, Proposal for a Council Decision on the signing of an Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, amending the Agreement on Trade, Development and Cooperation, 4 Feb. 2008, <http://www.eusa.org.za/en/PDFdownload/Agreements/Proposal Council Decision TDCA Amendment 2008.pdf>, pp. 15–16.

[37] Council Decision on the signing of an Agreement between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, amending the Agreement on Trade, Development and Cooperation, 7437/08, 1 Apr. 2008, p. 26.

[38] Council of the European Union, 'Second South Africa–European Union Summit', Joint Statement, 13231/09 (Presse 266), Kleinmond, 11 Sep. 2009, p. 2.

[39] Council of the European Union official, Interview, 12 Oct. 2009.

recorded, but several possible motives suggest themselves. For example, South Africa has in the past had a reputation as a proliferation risk.[40] It now hopes to become an important player in the international civilian nuclear industry. It may see committing to a strengthened WMD clause as one way to demonstrate to the international community that it is a responsible actor, improving the chances that it will be allowed access to the necessary technologies from Europe and elsewhere. In the same vein, South Africa worked very closely with the International Atomic Energy Agency (IAEA) and with the USA to ensure full transparency in dismantling its secret nuclear weapon programme and compliance with international safeguards. It also participates in most of the international non-proliferation instruments and, in the early 1990s, made fundamental changes to its export control laws to tighten control over items with a potential weapon use.[41]

EU–ASEAN partnership and cooperation agreements

Since 2007 the EU has been conducting or planning negotiations for PCAs with all members of the Association of Southeast Asian Nations (ASEAN) except for Cambodia, Laos and Myanmar.[42] The process has reached different stages with the different ASEAN members. Although none of the agreements has been signed, negotiations with Indonesia were finalized in July 2009 and signature is expected to take place soon. It is anticipated that all of the agreements will include the full WMD clause, with only the fulfilment of existing obligations as an essential element. At the beginning of the process there was discussion of whether the agreements should be mixed agreements or Community-only agreements with parallel political agreements. It was decided to pursue mixed agreements partly because of the difficulty of imposing conditionality by means of parallel agrements.[43]

EU–Central America Association Agreement

Negotiations were launched in June 2007 for an association agreement between the EU and the Central American states Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua (Panama has so far only been an observer in the talks). The agreement will build on the 2003 EU–Central

[40] South Africa secretly conducted a secret nuclear weapon programme during the 1970s and 1980s, which it dismantled in the early 1990s. In 2004 South African police interrupted an attempt by a South African company to illegally supply parts for a uranium-enrichment centrifuge to Libya. Those responsible were operating as part of the nuclear trafficking networks managed by Pakistani nuclear scientist A. Q. Khan. Albright, D. and Hinderstein, C., 'Unraveling the A. Q. Khan and future proliferation networks', *Washington Quarterly*, vol. 2008, no. 2 (2008), pp. 117–18. Also in 2004, an Israeli citizen based in South Africa was arrested in the USA for arranging the transshipment through South Africa to Pakistan of items with a potential use in the detonators of nuclear weapons. Blackford, J., 'Asher Karni case shows weakness in nuclear export controls', Institute for Science and International Security (ISIS) Analysis, 18 Sep. 2004, <http://isis-online.org/publications/southafrica/asherkarni.html>.

[41] The Non-proliferation of Weapons of Mass Destruction Act 87 of 1993 was assented to on 23 June 1993 and entered into force on 16 Aug. 1993. On the act and other aspects of South Africa's export control and non-proliferation regime see the website of the South African Council for the Non-Proliferation of Weapons of Mass Destruction, <http://www.thedti.gov.za/nonproliferation/>.

[42] The ASEAN member states are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

[43] European Commission official, Interview, 1 Oct. 2009.

America Political Dialogue and Co-operation Agreement, which included the EU human rights clause as an essential element.[44] Although the Council's June 2009 WMD Strategy progress report indicates that the new agreement will include a WMD clause, it seems that the discussions to date have focused on other areas.[45] The negotiations are currently inactive due to the political situation in Honduras.

EU–India free trade agreement

Negotiations for an FTA between the EU and India, ongoing since 2007 following lengthy preliminary discussions, are widely considered the most important single case since the adoption of the WMD clause. Inevitably, the question of whether to include the WMD clause and to use conditionality to persuade India to join key nuclear arms control agreements has been a topic of considerable debate.

India has nuclear weapons but is not a party to the 1968 Non-Proliferation Treaty (NPT). It is also, like China, one of the nine remaining states that must ratify the CTBT for it to enter into force. Furthermore, India's stated positions on aspects of the international non-proliferation regime, its proliferation record, its probably limited capacity to enforce export controls on nuclear materials and technologies—along with its 2005 deal with the USA on civil nuclear cooperation and its recent special exemption from rules of the Nuclear Suppliers Group (NSG)—make it a controversial and high-profile case from the point of view of non-proliferation.[46]

The course of Indian FTA negotiations has given rise to speculation that the EU has, in the interests of trade, abandoned its principle of including the WMD clause in all new agreements when faced with its first difficult case

Understandably, there have been intensive discussions among the EU member states since the FTA deal was first proposed and several approaches have been made by the EU to the Indian Government with regards to non-proliferation.[47] Based on a request from India, the Council authorized the Commission in 2007 to negotiate an FTA.[48] The FTA is currently envisaged as a Community-only agreement and the June 2009 WMD Strategy implementation progress report confirms that it will not include a WMD clause.[49] The 2007 negotiating mandate also authorized the Commission to negotiate the renewal or replacement of the existing

[44] Political dialogue and cooperation agreement between the European Community and its member states, on the one part, and the republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, signed at Brussels, 2 Oct. 2003, Article 1. The text of the agreement is available at <http://ec.europa.eu/external_relations/ca/docs/agreement.pdf>.

[45] On the progress of the negotiations see European Commission, 'The EU–Central America negotiations', <http://ec.europa.eu/external_relations/ca/eu_ca_negotiations_en.htm>.

[46] On India's exemption from NSG guidelines see Anthony, I. and Bauer, S., 'Controls on security-related international transfers', *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2009), pp. 467–71. On the NSG see Anthony, I., Ahlström, C. and Fedchenko, V., *Reforming Nuclear Export Controls: The Future of the Nuclear Suppliers Group*, SIPRI Research Report no. 22 (Oxford University Press: Oxford, 2007); and the NSG website, <http://www.nuclearsuppliersgroup.org>.

[47] European Commission official, Interview, 2 Feb. 2009.

[48] Council of the European Union, 'Main results of the Council', Press Release 8425/07 (Presse 80) on the 2795th and 2796th Council meetings, General Affairs and External Relations, Luxembourg, 23–24 Apr. 2007, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/93798.pdf>, p. 36

[49] Council of the European Union, 11490/09 (note 21), p. 38.

framework agreement that governs EU cooperation with India, which dates from 1994, inserting into it political clauses such as the WMD clause. The EU's idea was to create legal links between the FTA and the renewed framework agreement, such that non-fulfilment of the essential elements in the framework agreement might trigger, in the last resort, the suspension of the FTA. However, India has refused such an arrangement. Currently the FTA negotiations are proceeding but negotiations on the framework agreement have not started.[50]

The course of the FTA negotiations with India has given rise to speculation that the EU has, in the interests of trade, abandoned its principle that all new cooperation arrangements with third countries must be tied to non-proliferation commitments when dealing with its first difficult case. As the negotiation mandate was being finalized in early 2007, Annalisa Giannella, the Personal Representative on non-proliferation appointed by Javier Solana, publicly stated that allowing the WMD clause to be left out, as some member states were urging in the Council, would create a 'terrible double standard' and that 'If we were to adopt for India an approach different from the approach we adopt with other countries, I think we would abandon altogether the idea of having a WMD clause with third countries.'[51]

The full content of the FTA is theoretically not fixed until the point of signature, hence the European Parliament has avoided drawing any conclusions from the EU–India case.[52]

EU–South Korea framework agreement

As in the case of India, the Council in 2007 gave the Commission a mandate to negotiate two separate agreements with South Korea: one FTA and one framework agreement.[53] The framework agreement will include the WMD clause. Once again, the EU's ambition is to create a firm legal link between the two agreements in order to 'bridge' their content and thus create a degree of conditionality. Unlike the case of India, however, progress in the FTA negotiations depends on progress in the framework agreement, and the two agreements will be finalized simultaneously.[54]

EU–Ukraine 'new enhanced' agreement

A 'new enhanced' agreement is currently under negotiation between the EU and Ukraine to replace a PCA dating from 1998. Ukraine has high significance from a non-proliferation perspective and thus could be another important test case for implementation of the WMD clause. However, the text of the agreement, including the wording adopted for the second section of the clause, will not be made public until the point of signature.[55] Sweden

[50] Council of the European Union official, Interview, 12 Oct. 2009.

[51] 'EU aide worried by calls to drop India WMD clause', Reuters, 2 Mar. 2007,

[52] Quille (note 15); and Quille, G., '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', Working paper, European Parliament Directorate-General for External Policies of the Union, DGExPo/B/PolDep/Working Paper/2008_218, Brussels, 5 Nov 2008, p. 12.

[53] Council of the European Union, 8425/07 (note 48), p. 36.

[54] Council of the European Union official, Interview, 12 Oct. 2009

[55] European Commission official, Communication with the author, 3 Feb. 2009.

identified the finalization of the agreement as a priority during the Swedish EU presidency (July–December 2009) but it has so far not taken place.

EU–Russia framework agreement

Negotiations for a mixed agreement between the EU and Russia were launched in July 2008. The parties are currently preparing for the sixth round of negotiations, which are scheduled for late 2009, and the agreement is unlikely to be finalized before the end of 2010. The most challenging areas in the negotiation are economic, particularly the provisions on trade and investment and on energy, largely because of their scope. Discussions over the essential element clauses will take place at a later stage; thus it is not possible to say for certain whether the WMD clause will be included or what form it will take.[56]

EU–Libya framework agreement

Negotiations for a new framework mixed agreement between the EU and Libya, which would include an FTA, started in November 2008. Finalizing the text is expected to take another two years. Libya currently accepts the inclusion of the WMD clause in its standard form and there is no evidence to suggest that member states will raise objections to the agreement on the basis of proliferation concerns.[57]

EU stabilization and association agreements

The EU concludes mixed stabilization and association agreements with all potential candidates for EU membership. Four have been signed since 2003: with Albania (signed in June 2006), Bosnia and Herzegovina (signed in June 2008), Montenegro (November 2007) and Serbia (April 2008). Only the agreement with Albania is so far in force. All contain the WMD clause with only the fulfilment of existing obligations as an essential element.

Agreements in force

Revised Cotonou Agreement

The 2000 Cotonou Agreement between the EU and most of the ACP Group of States was revised in 2005.[58] The new version was signed in June 2005 and the revisions, including a WMD clause, entered into force for most parties in July 2008. The negotiations for the revisions threw up difficulties related to the WMD clause, in particular on whether the provisions in the second section should be made essential elements.[59] The ACP states also wanted to include a restriction on the manufacture and stockpiling of WMD.[60]

[56] European Commission official, Interview, 14 Aug. 2009.

[57] European Commission official, Interview, 2 Feb. 2009.

[58] The ACP Group was created by the 1975 Georgetown Agreement. It currently includes 79 African, Caribbean and Pacific states. See the ACP Group website, <http://www.acpsec.org>.

[59] On the separate agreement with South Africa, which is an ACP member, see above.

[60] African, Caribbean and Pacific Group of States and European Union, Draft joint report on the revision of the Cotonou Agreement, prepared for ministerial negotiating session, 23 Feb. 2005,

The first section of the WMD clause in the revised Cotonou Agreement (Article 11b) follows the model clause with no significant variations. However, the clause in the Cotonou Agreement includes a novel element: an assurance from the EU that financial and technical assistance for cooperation in non-proliferation in the ACP states will be 'financed by specific instruments other than those intended for the financing of ACP–EC cooperation'.[61] In other words, the EU will not divert funds from development assistance to non-proliferation, which was apparently a concern of the ACP during negotiations. Instead, the EU negotiators assured their ACP counterparts that any future EU technical or financial assistance in the area of non-proliferation would be financed from the newly created Instrument for Stability (IFS).[62] Non-proliferation work under the IFS aims to implement the EU WMD Strategy and is coordinated with EU member states, Council initiatives and the activities of international donors. The IFS programme for 2009–11 does not refer to the revised Cotonou Agreement. However, it does mention expert and political visits to 'potential beneficiary countries in Africa and the Caribbean' and calls for the expansion of certain non-proliferation activities under the IFS into parts of Africa.[63]

In the revised Cotonou Agreement neither of the provisions in the second section of the WMD clause is given essential element status and the non-execution provisions included in paragraph 4 of Article 11b only set out procedures and appropriate measures to be used in case of failure by parties to meet existing obligations (as revealed, in particular, by reports of the IAEA and other bodies). Thus, no formal conditionality is attached to the signatory countries' progress in developing their national export controls or ratifying additional non-proliferation instruments.

The revised Cotonou Agreement was, until April 2009, the only legally binding agreement in force containing the WMD clause. Four ACP countries have not ratified the revised agreement: Cuba (which did not join the first Cotonou Agreement), Equatorial Guinea, South Africa (see above) and Sudan. The deadline for ratification was 29 June 2009. From this point forward, 'ACP countries' refers only to the 76 ACP states that have ratified.[64]

The EU–Albania Stabilization and Association Agreement

The EU–Albania Stabilization and Association Agreement (see above), including the WMD clause with the fulfilment of existing obligations as an essential element, was signed in 2006 and entered into force on 1 April 2009.[65] On 28 April, Albania submitted its application for EU membership.

ACP-CE 2104/05, Brussels, 15 Feb. 2005, <http://register.consilium.eu.int/pdf/en/05/st02/st02104.en05.pdf>, pp. 4–5.

[61] Revised Cotonou Agreement (note 34), Article 11b.

[62] African, Caribbean and Pacific Group of States and European Union (note 60), p. 4. The IFS supports projects dealing with non-proliferation; other trans-regional threats such as terrorism and arms and drugs trafficking; and crisis response and peacebuilding.

[63] European Commission, 'Multi-annual indicative programme 2009–2011 of the Instrument for Stability', 8 Apr. 2009, <http://ec.europa.eu/external_relations/ifs/docs/mip_2009_2011_en.pdf>, pp. 5, 7–9.

[64] Revised Cotonou Agreement (note 34), Article 93.3. The agreement required ratification by the EC, all EU member states and two-thirds of the ACP members to enter into force.

[65] The Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part was signed at

Table 1. Changes in the status of participation in selected international disarmament and non-proliferation instruments by members of the African, Caribbean and Pacific Group of States and the rest of the world, July 2008–September 2009, and current status, September 2009

	Additional Protocol		BTWC		CWC		CTBT	
	ACP	Rest of the world	ACP	Rest of the world	ACP	Rest of the world	ACP	Rest of the world
New signatures	2	4	0	0	0	0	2	1
New ratifications[a]	1[b]	4	1	0	2	2	4	1
Remaining non-signatories	45	28	17	2	2	3	7	7
Remaining signatories that have not ratified	12	20	9	4	0	2	17	15

ACP = African, Caribbean and Pacific Group of States; Additional Protocol = Additional Protocol to the 1968 Non-Proliferation Treaty; BTWC = 1972 Biological and Toxin Weapons Convention; CWC = 1993 Chemical Weapons Convention; CTBT = 1996 Comprehensive Nuclear-Test-Ban Treaty

Note: The status of the 4 ACP states that have not ratified the 2005 revision of the Partnership Agreement between the Members of the ACP and the European Community and its Member States is as follows. Additional Protocol: ratified by South Africa in 2002 and Cuba in 2004, not yet signed by Equatorial Guinea or Sudan. BTWC: ratified by all 4 prior to 2005. CWC: ratified by all 4 prior to 2005. CTBT: ratified by South Africa and Sudan prior to 2005; Signed by Equatorial Guinea in 1996 but not ratified. Cuba has not signed. These 4 countries are counted as 'Rest of the world' in the table.

[a] States that both signed and ratified the relevant treaty during the period are included in the 'new ratifiers' figures.

[b] Additional Protocols enter into force either on signature by representatives of the IAEA and the relevant state or when the IAEA receives notification that the state has fulfilled all domestic legal measures necessary for entry into force, depending on the state's requirement. The figures given for 'New ratifications' are those states where Additional Protocols entered into force in the period; the figures give for 'Remaining signatories that have not ratified' represent those states that have signed Additional Protocols but where the instruments have not yet entered into force.

Sources: International Atomic Energy Agency, 'Strengthened safeguards system: status of Additional Protocols', <http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html>; UN Office at Geneva, 'Membership of the Biological Weapons Convention', <http://www.unog.ch/>; UN Office for Disarmament Affairs, 'Status of multilateral arms regulation and disarmament agreements', <http://disarmament.un.org/TreatyStatus.nsf>; Organisation for the Prohibition of Chemical Weapons, 'OPCW member states', <http://www.opcw.org/about-opcw/member-states/>; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, 'Status of signature and ratification', <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/>. All figures as of 8 Sep. 2009.

IV. The non-proliferation clause and progress by third country partners

The African, Pacific and Caribbean states

A survey of several major international disarmament and non-proliferation treaty regimes shows that there have been some tangible improvements in participation by the ACP states since the entry into force of the revised Cotonou Agreement in July 2008. Table 1 sets out the changes in the participation of ACP countries in selected disarmament and non-proliferation instruments between July 2008 and September 2009. The four instruments selected cover areas directly related to the substance of the second section of the WMD clause.

Luxembourg on 12 June 2006. The WMD clause is included in Article 8. The full text of the agreement is available at <http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf>.

As table 1 shows, ACP states accounted for half of the new ratifications and signatures of the four instruments during the period, despite representing less than 40 per cent of the world's states. However, there are still significant gaps in their participation, particularly in the adoption of Additional Protocols and ratification of the CTBT.

As part of its non-proliferation work, the EU supports steps to promote and improve implementation of the major non-proliferation instruments. Some of this is achieved through support to organizations like the IAEA and the Organisation for the Prohibition of Chemical Weapons (OPCW). The EU also supports states directly offering, among other things, help with adapting their national legislation in line with their international commitments. While participation in international non-proliferation instruments is one indicator of progress, how states implement their non-proliferation commitments at national level is equally important—and more directly tied to the conditionality implicit in the first section of the WMD clause.

The rest of this section describes progress made by the EU's third country partners regarding accession to and national implementation of five major international non-proliferation instruments since the entry into force of agreements with the EU that include a WMD clause. Many factors influence states' policies towards these instruments and non-proliferation generally and it would thus be unrealistic to draw too strong a causal link to the clause.

Additional Protocols

Since 2004 the EU has both supported the IAEA with significant financial resources and adopted several 'joint actions'—time-limited projects involving coordination between the member states—intended to promote the conclusion of Additional Protocols and relevant adaptations to national legislation and regulatory frameworks.[66]

In April 2008 a new joint action was adopted to support the IAEA that included among its aims 'achieving progress towards the universalization of international non-proliferation and nuclear security instruments, including comprehensive safeguards agreements and the Additional Protocol'.[67] Table 1 shows that there has been some progress in terms of signatures and entry into force of Additional Protocols among the ACP states. However, the number of ACP states that have not signed Additional Protocols far exceeds the number of non-signatories in the rest of the world. Information about how countries have adapted their national legislation as part of the process of implementing Additional Protocols is difficult to obtain.

Biological and Toxin Weapons Convention

The Council adopted its first joint action in support of the BTWC in 2006. This initiative reportedly 'achieved substantial results in terms of universal-

[66] Council of the European Union, Six-monthly progress report on the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2008/II), 17 Dec 2008, p. 10.

[67] Council Joint Action 2008/314/CFSP of 14 Apr. 2008, on support for IAEA activities in the areas of nuclear security and verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, *Official Journal of the European Union*, L212, 7 Aug. 2008, <http://eur-lex.europa.eu/JOIndex.do>, pp. 6–14.

ity and national implementation'.[68] When the EU adopted a new joint action in 2008, its aims again included promoting the universalization of the BTWC and providing support for national BTWC implementation.[69] The only state to ratify the BTWC between July 2008 and September 2009—the Cook Islands—is an ACP member. However, ACP states still make up the bulk of non-signatories. Furthermore, very few ACP states are covered in the information on national implementation legislation provided by the BTWC Implementation Support Unit under the UN Office for Disarmament Affairs, and it appears that none has adopted laws in this field since July 2008.[70]

Chemical Weapons Convention

Of the four states that have ratified the CWC since July 2008, two are in the ACP.[71] The EU adopted its third joint action in support of the OPCW in March 2007.[72] According to the Council's WMD Strategy progress reports, these have both contributed to an increase in the number of CWC participants and enhanced national implementation.

Twenty-seven ACP states had brought at least part of the required national legislation into force by November 2008, leaving almost two-thirds of the ACP members behind in their obligations.[73] Another 13 ACP states reported that the introduction of some aspect of their CWC implementing legislation was stalled. The reasons offered included political turbulence, a lack of proper financing, changes in the government personnel responsible for drafting legislation, low parliamentary support and higher priority being given to other issues. Another 40 reported that their national implementation legislation was progressing, but often slowly. This was mainly due to the long drafting processes in some countries and a backlog of legislation awaiting passage in others. Some other states reported technical and material difficulties. For example, draft legislation existed only in handwritten form in the Central African Republic.[74]

Comprehensive Nuclear-Test-Ban Treaty

The Council adopted its third joint action in support of the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) in July 2008.[75] Since the

[68] Council Joint Action 2008/858/CFSP of 10 Nov. 2008, in support of the Biological and Toxin Weapons Convention (BTWC), in the framework of the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction, *Official Journal of the European Union*, L302, 13 Nov. 2008, pp. 29–36.

[69] Council Joint Action 2008/858/CFSP (note 68).

[70] See the Implementation Support Unit pages at <http://www.onug.ch/>.

[71] Of the ACP countries, the Bahamas and the Dominican Republic both ratified the CWC in 2009. Iraq deposited its instrument of accession in 2009 and Lebanon in 2008.

[72] Council Joint Action 2007/185/CFSP of 19 Mar. 2007, on support for OPCW activities in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction Joint Action, *Official Journal of the European Union*, L85, 27 Mar. 2007, pp. 10–21

[73] Organisation for the Prohibition of Chemical Weapons (OPCW), Note by the Director-General: Report to the Conference of the States Parties at its thirteenth session on the status of the implementation of article VII of the chemical weapons convention as at 15 Sep. 2008, C-13/DG.6, 11 Nov. 2008, <http://www.opcw.org/documents-reports/>.

[74] Organisation for the Prohibition of Chemical Weapons (note 73).

[75] Council Joint Action 2008/588/CFSP of 15 July 2008 on support for activities of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO) in order to

entry into force of the revised Cotonou Agreement, six ACP states and only two non-ACP states have signed or ratified the CTBT.[76] Both of the ACP states listed in CTBT Annex 2 (see above) have now ratified the treaty.[77] Table 1 also shows that equal numbers of ACP and non-ACP states are non-signatories of the CTBT, but the number of ACP states that have signed but not yet ratified the CTBT is larger than in the rest of the world.

Resolution 1540

UN Security Council Resolution 1540 of April 2004 includes a requirement for states to strengthen domestic controls to prevent the proliferation of WMD.[78] Although Resolution 1540 is mainly concerned with preventing WMD proliferation among non-state actors, it has come to be seen as an important international non-proliferation instrument. The resolution calls on states to 'adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'. Among other things, states are called on to 'establish, develop, review and maintain appropriate effective national export and trans-shipment controls' that include civil or criminal sanctions for violations. The resolution also invites states 'in a position to do so' to assist states that lack the resources to take the necessary implementing measures. The EU adopted a joint action in May 2008 to further support the implementation of Resolution 1540, including funding a series of thematic workshops in targeted subregions.[79]

Only one ACP country—Cameroon—submitted its national report to the UN Security Council's 1540 Committee between July 2008 and September 2009, setting out how the country had complied with the resolution.[80] Cameroon reported that draft legislation had been prepared criminalizing the possession of chemical and nuclear weapons and the manufacture, stockpiling, holding, import, export, helping to transport and dealing in the commercialization 'of such chemicals'.[81]

Only six ACP states in total have so far reported that they are planning or implementing additional measures in relation to Resolution 1540 (for comparison, 68 non-ACP states have made such reports). In each of the six ACP cases, the change has been regarding the criminalization of activities related

strengthen its monitoring and verification capabilities and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, *Official Journal of the European Union*, L189, 17 July 2008, pp. 28–35.

[76] Of the ACP states, Burundi, Liberia, Malawi and Mozambique ratified and Timor-Leste and Trinidad and Tobago signed but did not ratify the CTBT between July 2008 and Sep. 2009. Iraq signed in Aug. 2008 and Lebanon ratified in Nov. 2008.

[77] The Democratic Republic of the Congo signed and ratified the CTBT in 2004 and South Africa ratified it in 1999.

[78] UN Security Council Resolution 1540, 28 Apr. 2004, operative paragraph 3.

[79] Council Joint Action 2008/368/CFSP of 14 May 2008, in support of the implementation of United Nations Security Council Resolution 1540 (2004) and in the framework of the implementation of the EU strategy against the proliferation of weapons of mass destruction, *Official Journal of the European Union*, L127, 15 June 2008, pp. 78–83.

[80] United Nations Security Council, Report to the Committee established pursuant to Security Council Resolution 1540, S/2008/493, 8 July 2008, pp. 33–35.

[81] United Nations Security Council 1540 Committee, Report of Cameroon on the implementation of Security Council Resolution 1540 (2004) to the 1540 Committee, S/AC.44/2004/(02)/150, 17 Mar. 2009, p. 3.

to WMD proliferation. Some other ACP states have explained in their reports that they are taking no action because they consider their existing legislation to be sufficient, while others argue that they need not adopt new laws because they see a very low risk that proliferation will occur from their territories. A few states report that they still lack the political structures to produce any national report on Resolution 1540.[82]

Albania

Albania had already signed and ratified the BTWC, the CTBT and the CWC prior to the signature of its EU Stabilization and Association Agreement in 2006. It signed an Additional Protocol in 2004, but that has not yet entered into force. Albania submitted a national Resolution 1540 implementation report in June 2004. In it, Albania claimed to have adopted 'appropriate legislative measures in order to prevent the proliferation of WMD'. According to the Albanian Constitution, all international conventions and agreements, once ratified by the Albanian Parliament, take on the force of domestic legislation and override any existing domestic legislation.[83] Since the signing of the Stabilization and Association Agreement in 2006 Albania has adopted a new law on export controls on dual-use goods.[84] Albania has also benefitted since 2007 from EU support for activities aimed at improving its capacities in export controls and prevention of illicit trafficking of CBRN materials.[85] Nevertheless, this assistance started before the entry into force of the Stabilization and Association Agreement and the adoption of export control legislation is a condition of EU membership, so it is unclear how far the WMD clause has affected Albania's non-proliferation efforts.

V. Conclusions

A number of questions remain concerning the future implementation of the WMD clause. These include whether or not the member states do actually have the same interest regarding non-proliferation, especially relative to other strategic, political and trade interests, in their external relations. The questions of whether to include the second section of the model WMD clause in agreements and whether and when to give them essential element status are likely to continue to divide the member states. Whether the EU is willing to block the finalization of trade deals over the issue of inclusion of the WMD clause is a matter of central concern where clarification would be valuable. Certainly the decision to push ahead with an FTA with India when there are strong indications that it is unwilling to accept a WMD clause in a contractual

[82] See the 1540 Committee's database of national legislation related to activities addressed in Resolution 1540, <http://www.un.org/sc/1540/legisdatabase.shtml>.

[83] UN Security Council 1540 Committee, Republic of Albania: Implementation report called for in paragraph 4 of Security Council Resolution 1540, Annex to the note verbale dated 28 Oct. 2004 from the Permanent Mission of the Republic of Albania to the United Nations addressed to the Chairman of the Committee, S/AC.44/2004/(02)/38, 4 Nov. 2004, p. 2.

[84] The Law on State Import–Export Control of Military Goods and Dual-use Goods and Technologies was adopted on 5 Apr. 2007 and entered into force on 1 June 2007. A translation of the law is available at <http://www.mie.gov.al/?fq=brenda&m=shfaqart&aid=397&gj=gj1>.

[85] European Commission, 'Annual report from the European Commission on the Instrument for Stability in 2008', COM(2009) 341 final, 9 July 2009, <http://ec.europa.eu/external_relations/ifs/docs/com09_341_en.pdf>, p. 9.

agreement and any such conditionality in bilateral relations will be noted by other third countries negotiating agreements with the EU in the future.

The limited evidence available suggests that the EU has had some success with regards to inclusion of the first section of the WMD clause but has, with one exception, failed to impose conditionality on its third country partners' accession to new non-proliferation instruments or improvements in their export controls. Furthermore, the agreements that have been finalized so far are unlikely to have much impact on national policies as they are with mostly poor states of little significance from a non-proliferation perspective and one richer state—South Africa—that already participates in all the major non-proliferation regimes and has other reasons to burnish its non-proliferation credentials. In contrast, India—a major trade partner for the EU and a country of some proliferation concern—has made it clear that it will not accept any attempt by the EU to influence its national policies by means of the WMD clause.

'The EU must develop a clear and explicit strategy that covers how to deal with the WMD clause in situations where it becomes an obstacle to promoting other interests.'

The EU must develop a clear and explicit strategy that covers how to deal with the WMD clause in situations where it becomes an obstacle to promoting other interests. It may have to reassess the priority it gives to non-proliferation in its external relations because, for the clause to work over the long term, it needs to be approached in a more uniform way.

Another difficulty around implementation of the WMD clause is the lack of criteria, in most agreements to date, for judging whether or not a partner of the EU has fallen below international standards for various aspects of non-proliferation. This is almost certain to make third country partners uneasy, especially those with, for example, weak export control capacity.

It is also necessary to reassess what can reasonably be expected from the WMD clause. The Council has committed the EU to include only one non-proliferation-related essential element into every mixed agreement: fulfilment of states' existing commitments. While this might give states some incentive to comply with their commitments (or at least to avoid serious breaches), it offers little in the way of sticks or carrots to induce third countries to further develop their national non-proliferation policies in line with the EU. The initial intention behind the optional essential element in the second section of the WMD clause regarding accession to additional non-proliferation instruments may have been to increase participation at the global scale. However, if the EU remains willing to compromise on the second section of the WMD clause, what contribution can it make to the achievement of this objective?

The record so far suggests that the role the EU is playing is more limited than the ambitious one envisaged in the 2003 WMD Strategy and is more in line with the Basic Principles and Action Plan. Strengthening the implementation of non-proliferation instruments used by the EU to govern its own actions along with the provision of assistance to partners that want to improve their own performance might be the limit of what can currently be achieved.

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LINA GRIP

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