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NOTE

**EU Non-proliferation Clauses applied to certain agreements in the
EU's wider relations with third countries**

Abstract:

This Note provides information and analysis on the so-called "EU non-proliferation clause" adopted in November 2003 as part of the implementation of the EU WMD Strategy. The clause is designed to mainstream non-proliferation policies into the EU's wider relations with third countries (and across the policy areas of development, trade and foreign affairs). The introduction of non-proliferation clauses in mixed agreements with third states is an indication that the policy area is being taken seriously by the European Union in support of its new security and non-proliferation strategies. However, the challenge remains in applying the clause consistently and deciding in advance which states merit the full clause or just the essential element. This will raise questions about the European Union's standards in its relations with certain countries and not others. Nevertheless, the issue of non-proliferation is clearly becoming an important conditional element in the Unions external relations that has an impact across external relations including trade, development and foreign affairs. In this respect Iran might take some comfort in that it is not being singled out, because even without the current nuclear controversy of recent years the clause issue would have re-surfaced in the future in the context of the renewed dialogue on a Partnership and Cooperation Agreement.

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Note on EU Non-proliferation Clauses applied to certain agreements in the EU's wider relations with third countries

1. What is a "non-proliferation clause" (henceforth "the clause")

The EU non-proliferation clause was adopted in November 2003 as part of the implementation of the EU WMD Strategy and is designed to mainstream non-proliferation policies into the EU's wider relations with third countries¹. The clause has two main parts, the first constitutes an "essential element" that must be included in all third party mixed agreements and specifies that:

'The Parties consider that the proliferation of weapons of mass destruction and their means of delivery, both to state and non-state actors, represents 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.'

This element of the non-proliferation clause is a *declaratory* commitment by all parties to non-proliferation policies that they have already signed, but it does not include any verification procedures or commit a state to sign, ratify and implement through national legislation any Treaties it has not already signed e.g. India, Pakistan and Israel who are de facto nuclear states would not be obliged to sign and ratify the Nuclear Non-proliferation Treaty.

However, the second part of the clause has two further elements, which include additional commitments for a third state to:

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

The Member States have stated in the clause that these two further elements might be considered as *essential* 'on a case by case basis.' These elements clearly put additional demands upon the signatories to the agreement e.g. if such additional elements were part of a clause signed by India, Pakistan and Israel, these countries would have to sign and ratify the NPT (although this would create an immediate debate on whether they would have to give up their nuclear weapons or whether the Treaty would be modified to recognise their nuclear status along side the 5 recognised de jure nuclear states). When read in conjunction with the WMD Strategy it is expected that states agreeing to such a clause (i.e. with the further elements in the second part of the clause) would receive support, should they wish, from the European Union to set up export control and end-user licence systems. Such export control technical assistance programmes are being looked at by the European Commission under the Stability Instrument following instructions from the European Parliament to examine what specific role EU assistance programmes could play in this area (see Pilot Projects in Budgets between 2003 and 6).²

¹ Model text is set out in the Council of the EU document entitled "Mainstreaming non-proliferation policies into the EU's wider relations with third countries", 19 November 2003, Document No. 14997/03. See also the "Fight against the proliferation of weapons of mass destruction - EU strategy against proliferation of Weapons of Mass Destruction", Council of the EU, Document No. 15708/03, 10 December 2003.

² European Parliament resolution on non-proliferation of weapons of mass destruction: A role for the European Parliament (2005/2139(INI)), Strasbourg, Thursday 17 November 2005.

2. An early case study in applying the clause: the Syrian experience

Following the 1995 Barcelona Declaration, the Commission started negotiating with 12 (then since 2004 35) Euro-Mediterranean Partners towards the establishment of a Euro-Mediterranean Free Trade Area (EMFTA) by the target date of 2010. This has been pursued through individual Euro-Mediterranean Association Agreements (EMAA) with each state.³ Whilst the EMAA with Syria pre-dated the non-proliferation clause, the Syrians had shown a willingness to discuss such issues as part of discussions on the Middle East under the Barcelona process.

The Commission anticipated the adoption of the non-proliferation clause and from October 2003 had told the Syrians that it would have to be included in the EMAA. Therefore, the Syrian negotiations included language on non-proliferation before the adoption of the final clause by the Council of the European Union. The negotiations with Syria were approaching their conclusion and in December 2003 the Member States were presented with the text of the negotiators. The Member States had a mixed response with some unhappy that the language was not close enough to the final text of the non-proliferation clause. The Commission negotiators were asked to revise the text in alignment with the clause and in January 2004 they produced a new text agreed upon between the Commission and Syrian negotiators. This text was 'closer' to the clause but still some Member States felt it was not close enough. By mid June 2004, the situation remained unresolved with the Commission trying to avoid failure and to maintain contacts with the Syrians negotiators and reassure them that when they next discuss the issue there would be a text that could be approved by both sides. Subsequently the Commission has finalised in December 2004 a text with the Syrians but it remains unsigned.

3. Some early lessons learned

The Member States' difficulties in achieving a text with Syria essentially stem from the desire of some Member States to push beyond the basic statement of the first part (essential element) of the clause and towards the non-essential elements that would include a commitment by Syria to sign up to additional international non-proliferation agreements (i.e. the Chemical Weapons Convention, and where it is a signatory but not a party to the Biological and Toxin Weapons Convention) and move towards establishing export control system and an end-user licensing system. The Syrian text on non-proliferation is based upon the 'essential element' but some Member States would like to see references very similar to that on export controls in the non-essential element of the clause.

The Syrian case is an interesting early example of how the European Union and in particular the Commission has quickly moved to include non-proliferation within its relations with third states and parties as promised in the EU WMD Strategy and specified in the non-proliferation clause. Syria is also a difficult case due to its importance in the Middle East and because it is a country of concern suspected of activities on, in particular, chemical weapons development. This has made some states nervous about not demanding the adoption of a full clause with both elements. The Commission is also concerned about a) the process of dealing with the clause in the future, i.e. avoiding a repeat of disrupting and even jeopardizing negotiations as happened with Syria, and b) consistency in knowing when to expect a full clause (with all elements) and when to be satisfied with the weaker essential element.

At present there are mixed agreements (political and economic) with a clause and Community agreements (economic eg Free Trade Agreements or Trade and Cooperation Agreements) that do not require a clause. But what do you do if a country, such as Pakistan, with a sensitive proliferation track record is seeking a Community-only agreement? In such cases a non-proliferation clause is not legally required (i.e. because it is a community only agreement) but what does this do for the political force of the EU's message externally when being viewed from contexts that are less sensitive to the legal nuances/fetishes of the Union?

³ See: http://ec.europa.eu/external_relations/syria/intro/index.htm

4. Towards a Non-proliferation Clause with India?

More recently on 23 April 2007 the Council approved a mandate for the negotiation of a Free Trade Agreement (FTA) with India i.e. an agreement that does not require a clause. However, in the same decision the Council requested the Commission to engage with India in exploratory talks for the possible negotiation of a Partnership and Cooperation Agreement (PCA) which would replace the 1994 agreement. Such a PCA would notably include the so-called standard EU political clauses .i.e require a non-proliferation clause. The exploratory talks were launched on 4 September 2007. We will now have to see whether the EU decides to take the easy option of a FTA only or to apply in addition political conditionality through the clauses in a PCA.

This is a serious issue that has not been lost in some quarters of the Union including the Commission which has discussed this in the context of regular inter-service reviews looking at lessons learned from early experience with the clause (including Syria, Tajikistan and in the revised Cotonou Agreement - although not yet in force - with the African Caribbean and Pacific (ACP) states). A non-proliferation clause has been agreed with Tajikistan (which is a party to the Non-Proliferation Treaty) even though the negotiations started after those with Syria, but interestingly, the text is not exactly the model clause, because the Commission under Patten sought to have the text as a 'negotiable' part of the process.

Getting the balance right is also an important part of the successful handling of the clause, whereby conditionality on non-proliferation does not become an obstacle to the objectives of achieving development, economic or other political agreements. The Commission's regular review is a good first response to getting this balance right and in speeding up discussions on identifying which states will be subject to the more demanding or weaker clause. Such a discussion needs to be jointly conducted between the Member States, through the Council's Working Group on Non-proliferation (CONOP) and the Commission and in full transparency with the European Parliament.

The introduction of non-proliferation clauses in mixed agreements with third states is an indication that the policy area is being taken seriously by the European Union in support of its new security and non-proliferation strategies. However, the challenge remains in applying the clause consistently and deciding in advance which states merit the full clause or just the essential element. This will raise questions about the European Union's standards in its relations with certain countries and not others. Nevertheless, the issue of non-proliferation is clearly becoming an important conditional element in the Unions external relations that has an impact across external relations including economic, development and foreign policies. In this respect Iran might take some comfort in that it is not being singled out, because even without the current nuclear controversy of recent years the clause issue would have re-surfaced in the future in the context of the renewed dialogue on a Partnership and Cooperation Agreement.

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