NOTE

From: Relex Counsellors
To: PSC/Coreper
Subject: Fight against the proliferation of weapons of mass destruction - RELEX Report

Delegations will find attached a report by the Relex Counsellors Working Group on the fight against the proliferation of weapons of mass destruction.
Fight against the proliferation of Weapons of Mass Destruction – RELEX Report

REVISED PRESIDENCY PROPOSAL

1. On the 16th of June, the Council discussed the issue of proliferation of Weapons of Mass Destruction and gave its endorsement to the document entitled "Basic principles for an EU strategy against proliferation of Weapons of Mass Destruction" as a living document. The Council also approved the "Action plan for the implementation of the basic principles for an EU strategy against the proliferation of Weapons of Mass Destruction" and asked the PSC and other Council bodies, in co-operation with the SG/HR and the Commission, to begin work immediately on the implementation of the Action Plan.

2. The Political and Security Committee, at its meeting on the 1st of July, asked the RELEX Counsellors Working Group (COREU SEC/1589/03) to carry forward work on:
   
   - "Mainstreaming non-proliferation policies into the EU's wider relations with third countries, in particular on the possible legal options available for the EU;
   
   - Common policies related to criminal sanctions for illegal export or brokering of WMD - related material";

3. Subsequently, in its meeting on the 8th of July, the PSC asked the RELEX Counsellors Working Group (COREU SEC/1649/03) to carry forward work on:

   "- modalities of EU financial support for the IAEA safeguards budget"

Mainstreaming non proliferation policies in the EU's relations with third countries

4. The Group noted that mainstreaming non-proliferation policies in the EU's relations with third countries could be accomplished by several means. A complementary approach could include a number of measures, among which would be the inclusion of a "non-proliferation clause" in agreements with third countries, with a view to furthering EU policies in the field of non-proliferation of WMD. This should form part of a broader strategy spanning all three EU pillars,
which could include measures such as sanctions and trade restrictions, as well as technical assistance.

5. Complementary political measures to such a "non proliferation clause" will need to be further discussed. In the past, the EU has already contributed to "universalising" WMD non-proliferation and disarmament agreements in a number of ways. One instance is the past use of common strategies to promote the signature and ratification by the concerned country(ies) of all non-proliferation instruments, including the NPT, the IAEA safeguards agreements, the IAEA Additional Protocol, CWC, BWC and CTBT. The Council is examining a Common Position on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery. WMD related issues should also be the subject of a regular political dialogue with third countries in order to foster ongoing cooperation and to contribute to prosperity, stability and security. Such political dialogue and cooperation should aim to enhance mutual security and stability by affirming the necessity of compliance with the commitments under international legal instruments on disarmament and non-proliferation.

6. The Group focussed in particular on three aspects:

- negotiation of the agreements;
- implementation of the agreements and their possible suspension;
- wider EU conditionality, including European assistance programmes as appropriate;

I. **Negotiation of the agreements**

7. When negotiating new agreements as well as in the periodic renegotiations of existing ones, the EU could link progress in negotiations with third countries to their engagements as regards non-proliferation (this should clearly be specified in the mandate conferred to the negotiator). The Council would evaluate the third country’s respect of its commitments throughout the negotiation.

8. The EU should in any event maintain the necessary flexibility as regards conditionality, in order to cover two different situations:

- states currently presenting little apparent risk of proliferation, but not expressing sufficient political interest in these questions;

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- states engaged in proliferating programmes, and/or not having concluded one or more of the basic international conventions on non-proliferation (NPT, CTBT, CWC, BTWC), and/or, being used as basis for transit of WMD-related material.

9. In the first case, covering most countries with which the EU has concluded agreements, conditionality would be employed as a means for advancing the universalisation of the main relevant international legal instruments (the four referred to above, plus the IAEA Safeguards agreements, the IAEA Additional Protocol and the HCOC). Pursuing universalisation would also increase the isolation of proliferating countries, providing a means of additional political pressure on them.

10. In the second case, the aim would be the advancement on a case-by-case basis of non-proliferation engagements, taking into account the actual threat represented by the country in question, its role in international proliferation, and the regional context. Universal adherence and full compliance remain fundamental political goals to be achieved to ensure a truly global character of non-proliferation norms. While this would remain the long term objective, the EU approach would concentrate on achievable short and medium term goals in specific fields of non-proliferation. It would encourage progress on specific fields of non-proliferation, defined beforehand by the Council (e.g. convince countries suspected of undertaking clandestine nuclear weapons programmes to sign the additional protocol to the IAEA).

II. Implementation of the agreements and their possible suspension

A  NATURE OF THE CLAUSE

11. As stated by the European Council in Thessaloniki, the fight against the proliferation of the WMD and of their means of delivery is a central element of the EU external action, including the CFSP. As such it should be reflected in the European Union's external relations as an essential element of the EU-Third Country relationship.

12. Relex Counsellors therefore recommended that the EU should, during negotiations with third countries for new agreements, insist on a clause which would include two main parts:

a) general provisions: recognition that the proliferation of the WMD and their means of delivery constitutes a threat to international stability and security; general commitment to cooperate in this field, and to make progress towards signature, ratification and implementation of the relevant international instruments; general commitment to strengthening export control provisions and their implementation. All such elements would be the subject of specific provisions concerning political dialogue;
b) more specific and binding provisions, and namely an engagement to the strict compliance and domestic implementation:

- of the existing obligations under the international treaties and agreements (applicable to the parties),

- of other existing international obligations (e.g. UNSC resolutions).

13. In all cases, the EU should make clear that failure to honour the commitments set out in the clause would have direct impact on other aspects of the third country's relationship with the EU. Such conditionality should be undertaken in a manner consistent with the Union's objectives. Actual suspension/termination of agreements would be foreseen once other relevant options had been exhausted. Such suspension/termination would be the result of an EU judgement which would take account, as appropriate, of any statements from relevant organizations (such as the IAEA or the OPCW), or UN Security Council decisions.

14. Such a clause could take several forms:

(i) **Inclusion within the text of the new agreement itself.**

   This could be done in three ways:

   - inclusion as an essential clause in the agreement. Non-respect of the commitments undertaken with the clause by one of the Parties to the agreement could lead to the suspension of the whole agreement;

   - inclusion in the agreement, but not as an essential clause. Non-respect of the commitments undertaken with the clause by one of the Parties to the agreement would not necessarily lead to the suspension of the whole agreement;

   - a “dual” clause, which would combine both essential and non-essential elements.

(ii) **A separate legally binding instrument**

   Such an instrument could be treated as an essential element of the EU – Third country relationship, in which case a link would need to be established between the new instrument and the existing agreement. The establishment of such a link raises a number of issues both under international and EU law\(^1\). A joint declaration with the country concerned could be negotiated stating that the new instrument and the main agreement constitute an indissociable whole. Alternatively, it could be treated as a non-essential element of the EU – Third country relationship, in which case it would stand on its own and not have a direct effect on the agreement.

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\(^1\) Some delegations proposed that this be done through an Article 24 Agreement. It is however questionable whether such an agreement can establish a legal link with a Community-only agreement. One delegation proposed a tripartite agreement EU – EC- Third Country. This is however untreaded water, raising various legal questions.
A specific provision would spell out the consequences of non respect of this clause by any of the Parties.

(iii) **A political declaration**

This would not be legally binding, but would demonstrate political commitment to the principles cited.

### B MODALITIES OF THE INSERTION OF THE CLAUSE

(I) **"MIXED" AGREEMENTS (Community + Member States)**

15. Relex Counsellors recommended that the clause should be an essential clause of all future mixed agreements\(^1\). This would allow provisions on suspension/termination of the agreement as a whole to be directly applicable to the WMD clause. The agreement could include a strengthened dialogue procedure, in order to allow all other options to be explored.

16. Relex Counsellors also recommended that existing mixed agreements with third countries could also be examined, on a case by case basis, with a view to negotiation of such a clause. In such cases, negotiations could lead to:

- renegotiation of the agreement in question (which could also include negotiation of a separate protocol); or

- a separate legally binding instrument between the Parties;

(II) **COMMUNITY-ONLY AGREEMENTS (e.g. on trade)**

17. Given insufficient Community competence in the non-proliferation field, it would not be possible to include a WMD clause in a Community-only agreement Without changing the nature of the agreement. Relex Counsellors therefore recommended that the normal solution in such instances should be to negotiate a separate instrument, under Article 24 TEU, in parallel with negotiations for the Community-only agreements. The EU would stress to the third country concerned that the fight against proliferation of WMD constituted an essential element of that country's overall relationship with the EU. A Joint Declaration could be envisaged between both sides, stating that the two agreements constituted an indissociable whole.

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\(^1\) The Commission stated that the issue of defining the clause as an essential element of the agreement is a political decision to be made by COREPER. Two Member States supported this position.
18. Relex Counsellors also recommended that existing Community agreements could also be reviewed on a case-by-case basis, as for mixed agreements\(^1\). Alternatively, it might be possible in certain cases of specific concern to convert an EC-only agreement into a mixed agreement, to which Member States were also parties. This would allow the WMD clause to be included in the main agreement itself. However, this could lead to delay in the formal conclusion of the agreement.

19. One Member State suggested that agreements could be concluded under dual legal bases of Article 300 TEC and Article 24 TEU. Other delegations had difficulties with such an approach.

**C  WORDING OF THE CLAUSE**

20. In order to facilitate the negotiation and a wider acceptance of such a clause by the parties, and to emphasise the high political priority placed by the EU on non-proliferation matters, Relex Counsellors recommended that the wording of the essential clause should be as much as possible a "standard clause". If the clause were to be included in a separate instrument, then the essential nature of the clause could be reaffirmed by means of a Joint Declaration (see above).

21. The wording, which might need to be adapted in cases other than mixed agreements, could be as follows:

*Countering proliferation of weapons of mass destruction*

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;
- 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 of goods contained in the control lists of the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and Wassenaar Arrangement, including a WMD end-use control on dual use technology 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.

\(^1\) The Commission stated that the issue of defining the clause as an essential element of the agreement is a political decision to be made by COREPER. Two Member States supported this position.
III. Wider EU conditionality, including EU assistance programmes

22. The Group agreed on the importance of ensuring a coherent EU policy on non-proliferation of WMD covering all three pillars. It noted that technical and financial EC assistance to certain countries should take account of security concerns linked to the proliferation of WMD. To that end the Council could, when appropriate, decide to establish a link between the non-compliance by a given country with its engagements as regards non-proliferation and suspension of Community assistance. The Group recommended that this question be taken forward as part of the annual GAERC debate on the coherence of the EU external action.

23. The instruments referred to above (negotiation of agreements, possibility of suspension of the agreement, European assistance, sanctions) should be used and implemented by the Union in a flexible way, and adapted to the context taking into account established EU policy in different areas: the Union has to pursue a gradual, tailored approach with respect to each country and with respect to each region. Third countries' co-operation in countering the proliferation of WMD and their means of delivery as set out in the WMD clause in an agreement, could then be measured against the benchmarks laid out in the Annex, as appropriate.

Common policies related to criminal sanctions for illegal export or brokering of WMD - related material

24. The present situation with regard to EU and national legislation on export control with respect to criminal sanctions is under study. Member States and acceding countries are providing replies to a questionnaire circulated by the Secretariat concerning sanctions in domestic law in relation to the regulation (EC) 1334/2000 (Dual use regulation), Joint Action 2000/401/CFSP (Control of technical assistance), Common Position 2003/468/CFSP (Control of arms brokering), as well as National arms export controls (Military list). Once all replies have been collected, the Secretariat will, in co-operation with the Commission, appraise the situation with a view to making proposals to the Group on how to fill up possible legal loopholes in this field.

Financial support for IAEA safeguards activities

25. The Group agreed that, once a political decision is taken, and subject to the eligibility of financing in light of budgetary remarks and rules applicable to EC budget, EU financial support could be given through a contribution to IAEA safeguards activities through a Joint Action financed from the CFSP Budget (Budget line B-8)\(^1\). The CONOP Working Group will need to be fully involved in defining this issue. The Group highlighted the limited resources on the B-8 budget line and the need for prioritisation of activities financed on the line.

\(^1\) In particular, running costs of the IAEA are not eligible for financing from the CFSP budget. The support, if granted, would have to be in the form of extra-budgetary support for clearly defined projects/activities of the IAEA.
26. Any contribution from the CFSP budget to the IAEA safeguards activities should be over and above the individual contributions for EU Member States.

27. Another solution for supporting the IAEA safeguards activities could consist of voluntary contributions by Member States.

**Recommendations**

28. COREPER is invited to consider the document, in particular paragraphs from 4 to 23 and their implications, and mandate the relevant Council Working Groups accordingly;

29. The PSC is invited to consider the document.
**ANNEX**

**Benchmarks**

1. Compliance with and full national implementation of xxx's obligations under international treaties and agreements (i.a. NPT, CTBT, CWC, BTWC, IAEA Comprehensive Safeguards Agreement including an Additional Protocol).

2. Conclusion, entry into force and full national implementation of a Comprehensive Safeguards Agreement with the IAEA, including agreement on terms of an Additional Protocol with the IAEA, followed by its signature, entry into force and implementation.

3. Accession to and full national implementation of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC), and signature, ratification and full national implementation of the Comprehensive Nuclear Test-Ban Treaty (CTBT).

4. Subscription to, and full implementation of, the Hague Code of Conduct against Ballistic Missile Proliferation (HCOC).

5. The establishment of an effective system of export controls, controlling export as well as transit and transfers of related technology of goods contained in the lists of the Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and Wassenaar Arrangement, including an end-use control on dual-use technologies, and containing effective sanctions for breaches of export control.

**Indicators**

Indicators could include the existence of an increasingly open public and political debate on the issues in question, the tabling and passage of relevant bills in the national legislative body, the active and constructive engagement of the government in bilateral and multilateral fora where such issues are discussed, public declarations of willingness and actions to address international concerns.