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CHAPTER 10

The Non-proliferation Policy of the European Union

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I. Introduction

The profile of the European Union (EU) in non-proliferation has become higher in the light of its involvement with Iran.¹ However, the Union became interested in pursuing non-proliferation policies as soon as it started shaping its international role. After all, the Common Foreign and Security Policy (CFSP) covers 'all areas of foreign and security policy' (Article 24 TEU), and its objectives include 'to strengthen international security' (Article 21(2)(c) TEU). This became clearer by the Thessaloniki European Council of June 2003 which adopted a Declaration on Non-Proliferation of Weapons of Mass Destruction where non-proliferation is identified as 'a central element in the EU external action, including the common foreign and security policy'.²

It was the events of 11 September 2001 which gave the EU non-proliferation policy a sense of urgency and momentum. Meeting ten days later at an extraordinary meeting, the European Council set out a plan of action for the fight against terrorism, the latter defined as 'a priority objective for the European Union'.³ Shortly afterwards, the Council elaborated on the implications of the terrorist threat on the non-proliferation, disarmament and arms control policy of the Union.⁴ This document became the starting point for the gradual development of the EU's non proliferation policy. In the host of documents and initiatives shaping this policy (European Council Declarations, Council Conclusions, Presidency Reports, Reports endorsed by the Council, and a number of measures adopted and proposed under the Community legal order as well as the second and third pillars), two have been central: the 2003 Strategy against proliferation of weapons of mass destruction (WMD Strategy),⁵ and the Strategy to combat illicit accumulation and trafficking of Small Arm and Light Weapons (SALW) and their ammunition (SALW Strategy).⁶

An exhaustive analysis of this landscape is beyond the confines of this Chapter. Instead, this aims to identify the threads which bring these initiatives together, the

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¹ For an earlier account, see E Denza, 'Non-Proliferation of Nuclear Weapons: The European Union and Iran', (2005) 10 *European Foreign Affairs Review* 289.

² Thessaloniki European Council, 19 and 20 June 2003, Presidency Conclusions, Annex II, 37.

³ Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 1.

⁴ Council Conclusions, Brussels, 29 November 2001, 14732/01.

⁵ Doc. 15708/03 EU Strategy Against Proliferation of Weapons of Mass Destruction (Brussels, 10 December 2003).

⁶ Doc. 5319/06 (Brussels, 13 January 2006). Its provisions supplement the existing framework as set out in CFSP measures: Joint Action 1999/34/CFSP on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons [1999] OJ L 9/1, repealed by Joint Action 2002/589/CFSP [2002] OJ L 191/1.

ways in which they relate to international legal developments, and the light they shed on the role of the EU as an international actor.

II. Horizontal principles governing EU non-proliferation policy

The Union's various non-proliferation initiatives are characterised by a number of principles.

A. Commitment to effective multilateralism

This is a constant theme in the EU initiatives. The WMD Strategy states the Union's 'conviction that a multilateralist approach to security, including disarmament and non-proliferation, provides the best way to maintain international order and hence our commitment to uphold, implement and strengthen the multilateral disarmament and non-proliferation treaties and agreements'.⁷ Indeed, effective multilateralism is viewed as 'the cornerstone of the European strategy for combating proliferations of WMD'.⁸ Similarly, the starting point for the SALW Strategy is the United Nations Programme of Action to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects, which stresses the need for complementarity at global, regional and national levels in its implementation.⁹

This commitment is consistent with the clear focus on effective multilateralism which underpins the EU external relations and which is expressed more distinctly in recent years,¹⁰ not least in the Lisbon Treaty which refers to it as an objective to be pursued by the entire range of EU external policies.¹¹

In relation to non-proliferation in particular, the commitment to effective multilateralism takes various forms some of which are outlined below. .

(i) Universalisation of relevant international treaties

Political efforts to ensure universal adherence to international instruments relating to WMD and their means of delivery are central to the Union's policy. This has become apparent by the adoption of Common Position 2003/905/CFSP specifically dealing with the universalisation and reinforcement of multilateral agreements in the area.¹² Drawing on previous commitments to this effect,¹³ its aim is to 'serve as a yardstick in the negotiations of EU positions in international forums'.¹⁴

This instrument refers to five specific international sets of rules: the Non-Proliferation Treaty and Safeguards Agreements (NPT), the Additional Protocols with the

⁷ N5 above, 5.

⁸ Ibid, 6.

⁹ UN Document A/CONF.192/15 (20 July 2001).

¹⁰ See COM (2003) 526 fin 'The European Union and the United Nations: The choice of multilateralism and European Security Strategy', 9 et seq.

¹¹ Art. 21(2)(h) TEU Lisbon.

¹² Common Position 2003/805/CFSP [2003] OJ L 302/34.

¹³ See, for instance, the WMD Strategy, n4 above, 9, as well as the Declaration on Non-Proliferation of Weapons of Mass Destruction (Thessaloniki European Council, Presidency Conclusions, Annex II, 37).

¹⁴ N 12 above, recital (3) of Preamble.

International Atomic Energy Agency (IAEA Additional Protocols), the Chemical Weapons Convention (CWC), the Biological and Toxin Weapons Convention (BTWC), the Hague Code of Conduct against Ballistic Missile Proliferation. It sets out two objectives: to promote the universal ratification of and adherence to these instruments, and to reinforce their provisions, including by ensuring compliance. In addition, the Common Position aims to promote the early entry into force of the Comprehensive Nuclear Test-Ban Treaty (CTBTO). This commitment of the Union and its Member States have been articulated and set out in detail in relation to specific Treaties individually.¹⁵

(ii) Reinforcement of the role of the United Nations

This has been central to the EU's policy since its inception. The Thessaloniki Declaration states that the EU 'will focus in particular on [amongst others] fostering the role of the UN Security Council (UNSC), and enhancing its expertise in meeting the challenge of proliferation'.¹⁶ In this vein, the WMD Strategy states that, once political and diplomatic preventative measures have failed and coercive measures under Chapter VII of the UN Charter are envisaged, 'the role of the UN Security Council, as the final arbiter on the consequences of non-compliance – as foreseen in multilateral regimes – needs to be effectively strengthened'.¹⁷ This also underpins Common Position 2003/805/CFSP which refers to the need to strengthen the role of UNSC as it has the primary responsibility for the maintenance of international peace and security,¹⁸ as well as the SALW Strategy.

A specific illustration of the UN-EU interaction is provided by UNSC Resolution 1540 (2004). Adopted in April 2004 under Chapter VII of the UN Charter, it deals with Non-Proliferation of Weapons of Mass Destruction and, in effect, requires that states prevent WMD materials or technology falling into the hands of terrorists. It forbids states from supporting non-state actors involved in terrorism, obliges them to enact and enforce the necessary laws to prevent proliferation activities on their territories, and requires them to monitor and control sensitive technologies, materials and equipment that exist in, are manufactured by, or transit their territories.¹⁹

The European Council welcomed the adoption of the Resolution and invited the Council 'to review the appropriate political and legal instruments, including possible actions within the framework of Justice and Home Affairs, that would further the adoption of concrete steps towards this objective'.²⁰

¹⁵ See Common Position 2005/329/CFSP on 2005 NPT Review Conference [2005] OJ L 106/32, Common Position 2006/242/CFSP on the 2006 BTWC Review Conference [2006] OJ L 88/65, Common Position 2007/469/CFSP on the 2008 CWC Review Conference [2007] OJ L 176/39.

¹⁶ N 2 above, 38.

¹⁷ N 5 above, para. 17. To that effect, there is provision for enabling it 'to benefit from independent expertise and a pool of readily available competence, on order to carry out the verification of proliferating activities that are a potential threat to international peace and security'.

¹⁸ N 12 above, Art. 2. See also Art. 8 which mentions the need strengthen the links between the Hague Code against Ballistic Missile Proliferation and the EU system.

¹⁹ Art. 3.

²⁰ Doc. 10774/04, Declaration by the European Council on Criminal Sanctions (Brussels, 13 June 2004), 2.

In the Union's initiatives in this area, grand policy statements coexist with practical, bottom-up, specific measures. An example is provided by the Union's efforts to support compliance with UNSC Resolution 1540 (2004). The latter requires that the States submit a Report on a Security Council Committee on steps they have taken in order to comply with its provisions. In addition to individual reports submitted by its Member States, the EU presented a Report drawn up by the Netherlands Presidency assisted by the High Representative for the Common Foreign and Security Policy, and in full association with the Commission.²¹ Furthermore, it has relied upon its legal panoply in order to encourage actively third States to comply with their duties and submit a report: it carried out demarches and organised and funded programmes in three areas identified by the Committee 1540 (Africa, Latin America and Caribbean, Asia-Pacific) which aimed to raise awareness of requirements and obligations under the Resolution, to strengthen national capacities in drafting national reports on its implementation, and share experience from the adoption of national measures required for the implementation of the Resolution.²²

Later on, when the Committee 1540 suggested that the focus shift to implementation of the Resolution and the practical steps which some states in certain areas find difficult to take, the EU responded by drawing road maps tied in with the provision of technical assistance. It targeted border, customs and regulatory officials within six regions (Africa, Central America, Mercosur, the Middle East and Gulf Regions, Pacific Islands and South-East Asia). It, then, organised six workshops covering the main elements of an export control process including applicable laws (including national and international legal aspects), regulatory controls (including licensing provisions, end-user verification and awareness-raising programmes) and enforcement (including commodity identification, risk-assessment and detection methods).²³

(iii) Provision of financial and technical support for specific projects carried out in the context of international non-proliferation treaties aiming to enhance compliance

The universalisation of international non-proliferation treaty mechanisms has been supported by the EU pursuant to a range of specific measures. For instance, the Union has provided financial support for activities of the Organisation for the Prohibition of Chemical Weapons (OPCW) – these include measures promoting the universalisation of CWP (by the organisation of workshops on CWP for States which are not parties in areas such as the Caribbean, Africa, and the Middle East), the effective implementation of CWP (by the organisation of assistance meetings and seminars), and international cooperation in the field of chemical activities (by providing equipment support and laboratory assistance).²⁴ Similar measures were also funded in support of the Biological and Toxin Weapons Convention (BTWC),²⁵ in relation to

²¹ Brussels, October 2004.

²² Joint Action 2006/419/CFSP [2006] OJ L 165/30.

²³ Joint Action 2008/368/CFSP [2008] OJ L 127/78.

²⁴ Joint Action 2004/797/CFSP [2004] OJ L349/63. This was followed up by Joint Action 2005/913/CFSP [2005] OJ L 331/34, and Joint Action 2007/185/CFSP [2007] OJ L 85/10 (the latter points out that 'since the beginning of the implementation of the EU Joint Actions in support of the OPCW in 2005, 14 countries have signed and ratified the CWC, bringing the number of OPCW Member States up to 181' (recital 4).

²⁵ Joint Action 2006/184/CFSP [2006] OJ L 65/51, followed up by Joint Action 2008/858/CFSP [2008] OJ L 302/29.

which the EU also introduced projects in support of activities carried out by World Health Organisation in the area of laboratory bio-safety and biosecurity.²⁶

Financial support is also provided to the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO), provisionally responsible for the effective implementation of the CTBTO, to support its activities in the area of training and capacity building for verification (in particular the development of a computer-based training programme).²⁷ Finally, the EU has funded IAEA activities under its Nuclear Security Programme²⁸

(iv) Export controls

The regulation and management of export controls are central to the non-proliferation policy of the EU. The WMD Strategy outlines the objective of ‘making the EU a leading cooperative player in the export control regimes’.²⁹ The means to achieve this vary, and include coordination of EU positions within the different regimes, support of the membership of acceding countries, promotion of a catch-all clause in export controls regimes, and strengthening information exchange. Similarly, the SALW Strategy, in its action plan, commits to support the strengthening of export controls and assist third countries in the process of drafting relevant legislation.

There are various such regimes and the link of the EU with them varies. The European Commission is an observer in the Zangger Committee (dealing with the interpretation of the Nuclear Non Proliferation Treaty whose 37 members include all the nuclear weapon states) and the Nuclear Suppliers Group (a group of nuclear supplier countries with 45 members). It participates in the Australia Group (a group of 41 suppliers and/or trans-shippers of chemicals, biological agents and/or production equipment which could be used in chemical and/or biological weapons programmes). It does not participate in the Missile Technology Control Regime (aiming to non-proliferation of unmanned delivery systems for weapons of mass destruction) and the Wassenaar Arrangement on export controls for conventional arms and dual-use goods and technologies.

In terms of their regulation and management, export controls of military equipment and dual-use goods have given rise to different issues: the former has been viewed as falling beyond the scope of Community legal order, whereas the regulation of the latter, covering products which may be of both civil and military application, has given rise to considerable controversy between the EU institutions and the Member States.

(a) Armaments

²⁶ Joint Action 2008/307/CFSP [2008] OJ L 106/17.

²⁷ Joint Action 2006/243/CFSP [2006] OJ L 88/68. This was followed up by financial assistance on other matters under Joint Action 2007/468/CFSP OJ L 176/31, and Joint Action 2008/588/CFSP [2008] OJ L 189/28.

²⁸ Joint Action 2004/495/CFSP [2004] OJ L 182/46, followed up by Joint Action 2005/574/CFSP [2005] OJ L 193/44, Joint Action 2006/418/CFSP [2006] OJ L 165/20, Joint Action 2007/185/CFSP [2007] OJ L 85/10.

²⁹ N 5 above, 10.

The EU rules on exports of military technology and equipment are laid down in Common Position 2008/944/CFSP.³⁰ Formalising an earlier Code of Conduct³¹ whose scope was defined in 2000³² and whose provisions are updated regularly³³ and assessed by the Council annually,³⁴ this set of rules puts forward eight criteria on the basis of which national authorities are to assess the export licence applications they receive for items included in the EU Common Military List. These criteria include the following: respect for the international obligations and commitments of Member States; respect for human rights in the country of final destination as well as respect by that country of international humanitarian law; internal situation in the country of final destination; preservation of regional peace, security and stability; national security of the Member States, as well as that of friendly and allied countries; behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law; existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions; compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country.

As for its material scope, the Common Position applies to exports, brokering, transit or transshipment, as well as any intangible transfer of software and technology. It also provides for a consultation procedure (following circulation of details of exports denied) in confidence.³⁵

The Union's commitment to effective multilateralism and the role of the UN is illustrated clearly by the content of the criteria set out in the Common Position. Compliance with sanctions regimes adopted by the UN Security Council is expressly mentioned in the context of the criteria which national authorities must observe, along with the commitments of Member States to enforce UN and OSCE arms embargoes. Similarly, reference is made to the rules and guidelines of the various international export control regimes. In this vein, national authorities are required to exercise special caution and vigilance in issuing licences to countries where serious violations of human rights have been established by the competent bodies of the UN.

The Union has taken steps to promote respect for the criteria set out in the Code (and, one would presume, the Common Position too) beyond its own borders. It has funded and organised workshops aiming to provide technical assistance to targeted third countries (in South Eastern Europe, North African and Mediterranean partners and Eastern European Caucasian partners of ENP, Turkey and Ukraine).³⁶ These are organised by the Presidency and run by the Council Secretariat.

³⁰ Common Position 2008/944/CFSP [2008] OJ L 335/99.

³¹ Doc. 8675/2/98 (Brussels, 5 June 1998).

³² Common Military List of the European Union [2000] OJ C 191/1.

³³ For the most recent amendment, see [2008] OJ C 98/1.

³⁴ For the most recent report, see [2008] OJ C 300/1.

³⁵ The Council Working Party on Conventional Arms Exports produced a User's Guide to the EU Code of Conduct on Arms Exports (last updated on 29 February 2008: <http://register.consilium.europa.eu/pdf/en/08/st07/st07486.en08.pdf>). Under Art. 13 of Common Position 2008/944/CFSP, this serves as guidance for its implementation.

³⁶ See Joint Action 2008/230/CFSP [2008] OJ L 75/81.

In relation to arms brokering in particular, the EU adopted a specific measure requiring that Member States apply a licence or written authorisation system for arms brokering Member States and establish a system for exchange of information on brokering activities among themselves as well as with third countries.³⁷ Again, this measure is underpinned by the Union's commitment to effective multilateralism, as its objective is to control arms brokering in order, amongst others, to avoid circumvention of, amongst others, UN and OSCE embargoes on arms exports.

(b) Dual-use Goods

The legal regulation of exports of dual-use goods provides some quite interesting insight in both the interaction between the international legal order and the Community legal order, as well as the various forces which shape the development of the latter. Exports of dual-use goods have been a central part of any export controls regime. The Thessaloniki Action Plan provided for a process of peer review of the export control rules of all Member States (as well as the acceding countries). In December 2004, the Council endorsed the recommendations which formed the outcome of this process (as formulated by a Task Force which assisted the EU institution in the conduct of the process).³⁸ One of the recommendations was to reach agreement on best practices for the enforcement of controls. This process gave rise to work in the Council bodies³⁹ and then a proposal by the Commission on the review of the EC rules in December 2006.⁴⁰ This was accompanied by a legislative proposal⁴¹ which led to the adoption of the current rules, laid down in Council Regulation 428/2009.⁴²

The very starting point of this instrument is the international framework: '[a]n effective common system of export controls on dual-use items is necessary to ensure that the international commitments and responsibilities of the Member States, especially regarding non-proliferation, and of the European Union ..., are complied with'.⁴³ Council Regulation 428/2009 establishes a system of authorisations for exports which are granted by national authorities and are recognised as valid throughout the Community.

A detailed analysis of this system falls beyond the scope of this Chapter.⁴⁴ For the purposes of this analysis, suffice it to point out the constitutionally charged and

³⁷ Common Position 2003/468/CFSP [2003] OJ L 156/79.

³⁸ Council Statement of 13 December 2004 further to the first stage of the Peer Review of Member States' Export Control Systems for Dual Use Goods conducted in the framework of the EU Strategy against Proliferation of Weapons of Mass Destruction (Doc. 16069/04, Brussels 13 December 2004).

³⁹ The Council Working Group on Dual-Use Goods worked on these: see Report on progress made during 2005 to implement the recommendations of the Peer Review of Member States' export control systems for dual use goods (Council Doc. 15826/05, Brussels 15 December 2005) and Implementation of the recommendations of the Peer Review of Member States' export control systems for dual use goods - Report on progress made in 2006 noted by Council on 11 December 2006 (Council Doc. 16507/06, Brussels 12 December 2006).

⁴⁰ COM(2006) 828 fin (Brussels, 18 December 2006).

⁴¹ COM(2006) 829 fin (Brussels, 18 December 2006).

⁴² [2009] OJ L 134/1, third recital.

⁴³ Ibid, third recital. This is also stressed in relation to the material scope of the measure, that is the common list of items subject to export controls and the process of their update: see sixth recital.

⁴⁴ See the overview of its precursor, see P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing 2006), 419 et seq.

politically sensitive background against which EU rules on exports of dual-use items are adopted: in the light of the dual-use nature of such products and technologies, the Union first adopted a set of rules which was based on both the EC legal framework and the Common Foreign and Security Policy,⁴⁵ and it was only following the case-law of the Court of Justice that this approach was viewed as unsustainable and was duly amended by a single EC instrument.⁴⁶ This context is significant, for it suggests that the process of the transposition of the international commitments of the Member States and the Union into EU law is subject to the constitutional idiosyncrasies of the Union legal order which may well have an impact on the intensity of the ensuing legal framework.

The issue of sanctions illustrates the above. According to the precursor to the current regime, it is for the Member States to provide for sanctions for infringements of its rules, provided that these are effective, proportionate and dissuasive.⁴⁷ In its proposal, the Commission suggested that the Member States be required to introduce criminal penalties at least for serious infringements.⁴⁸

This proposal was noteworthy for a number of reasons. First, as criminal law is an area widely viewed as traditionally falling within the powers of the Member States, the proposal entered politically sensitive territory. Second, there was a clear international context within which the Commission justified its proposal. It is recalled that UNSC Resolution 1540, a reference point for EU initiatives in the area, refers to criminal sanctions expressly.⁴⁹ It is also recalled that the establishment of criminal sanctions for violations of export control rules is also mentioned in a number of EU policy documents, such as the WMD and SALW Strategies. In a Declaration on Criminal Sanctions, the European Council welcomed the adoption of Resolution 1540 and invited the Council to take concrete measures in order to achieve its objectives.⁵⁰

Third, in 2005, that is fifteen months prior to the Commission's proposal, the Court of Justice rendered its judgment in the *Environmental Crimes* case where it held that Member States may be required to impose effective, proportionate and dissuasive criminal penalties for serious environmental offences when this is necessary in order to ensure the full effectiveness of the relevant rules.⁵¹ This judgment was followed up by the *Maritime Pollution* judgment, where the Court confirmed the broad application of the principle, albeit whilst tampering with its scope.⁵² It is interesting that neither the Commission's Communication on the review of the relevant rules, nor its proposal

⁴⁵ Council Reg 3381/94 [1994] OJ L 367/1 and Dec 94/942/CFSP [1994] OJ L 367/8.

⁴⁶ This was the precursor to Reg. 429/2009, namely Council Reg 1334/2000 [2000] L 159/1, last amended by Council Reg 1167/2008 [2008] OJ L 325/1. For an analysis, see P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford, Hart Publishing 2001) Chs 5-6.

⁴⁷ *Ibid*, Art. 19 of Reg. 1334/2000.

⁴⁸ These would include an intentional export intended for use in a programme for the development or manufacture of chemical, biological, nuclear weapons or of missiles capable of their delivery without the authorisation required under this Regulation, or the falsification or omission of information with a view to obtaining an authorisation that would otherwise have been denied.

⁴⁹ Para. 3(d).

⁵⁰ Annex to Council Doc. 1077/04 (Brussels 23 June 2004) where reference is made 'in particular [to] the measures to be taken in order to more effectively prevent the spread of sensitive goods and technologies' (at 2).

⁵¹ C-176/03 *Commission v Council* [2005] ECR –I-7879, para 48.

⁵² Case C-440/05 *Commission v Council* [2007] ECR I-9097. See S Peers, 'The European Community's criminal law competence: the plot thickens', (2008) 33 *European Law Review* 399.

for a recast Regulation include a reference to this case-law; what makes this even more curious is the fact that the current legal regime, as the preamble to Regulation 1334/2000 indicated, largely owes its existence to the case-law of the Court.⁵³

The proposal about criminal penalties has not taken up by the Council and, in Article 24, Regulation 428/2009 merely duplicates the general provision about effective, proportionate and dissuasive measures laid down in Article 19 of Regulation 1334/2000. Instead, there is now an express reference to UNSC Resolution 1540 (albeit in order to substantiate the application of the new rules to related materials), and a long recital in the preamble about the benefits of greater convergence and harmonisation of the application of the relevant rules by the competence authorities.⁵⁴

This episode illustrates how the interactions between the EU legal order and the international community, whilst dynamic and direct, are subject to the legal and political constraints which surround the Union's idiosyncratic constitutional landscape; these inform the practical manifestations of these interactions and determine both their pace and direction. This is a point which will be made, in a different context, further below.

(v) Other measures

A recent example of promotion of effective multilateralism is the initiative to support a legally binding International Arms Trade Treaty. Originating in United Nations General Assembly Resolution 61/89,⁵⁵ a process was initiated where a Group of Governmental Experts suggested step-by-step work within the UN context and which culminated to the adoption by the First Committee of the UN General Assembly of a Resolution entitled 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms'.⁵⁶

All EU Member States support this process. The EU is organising a number of activities aiming to increase awareness amongst national and regional actors, UN Members, civil society and industry of the discussions about the Treaty, and promote an exchange of views between these actors.⁵⁷

B. Broad Construction of Security

The Union's approach is based on a broad understanding of security. Both the WMD and SALW Strategies use the European Security Strategy (ESS) as a point of reference.⁵⁸ Adopted by the European Council in December 2003, this document set out the global challenges facing the EU (terrorism, proliferation of weapons of mass destruction, regional conflicts, State failure, organised crime) and the ways the EU

⁵³ For a different view, see A Dashwood, 'Dual-use Goods: (Mis)Understanding *Werner and Leifer*' in A Arnall, P Eeckhout, and T Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford, Oxford University Press 2008) 354.

⁵⁴ N 42 above, eighteenth recital.

⁵⁵ Entitled 'Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms' and adopted in December 2006.

⁵⁶ Adopted in October 2008.

⁵⁷ Council Decision 2009/42/CFSP [2009] OJ L 17/39.

⁵⁸ *A secure Europe in a better world – European Security Strategy* (Brussels, 12 December 2003).

must meet them. An analysis of the European Security Strategy falls beyond the scope of this Chapter.⁵⁹ However, its broad definition of security is relevant to our discussion. The document stresses the link between security and development, as well as energy, and points out that, ‘in contrast to the massive visible threat in the Cold War, none of the new threats is purely military’ nor can any be tackled by purely military means. Each requires a mixture of instruments’.⁶⁰

The SALW Strategy refers to the ESS time and again. It starts off by mentioning a point made in the latter, namely that the post-Cold War environment is one of increasingly open borders in which the internal and external aspects of security are indissolubly linked.

This close relationship between the ESS, on the one hand, and the WMD and SALW Strategies, on the other hand, is also illustrated by the common principles which govern their understanding of the prevailing international environment. The commitment to an international order based on effective multilateralism, for instance, is also drawn upon in the ESS. Therefore, the adoption of the WMD and SALW initiatives against the background of the ESS suggests a tangible impact of the ESS on, potentially, the entire range of EU policies.

C. Cross-pillar

Following from the above, the initiatives adopted by the EU both in the area of WMD and SALW are comprehensive in scope, covering the Community legal order as well as the second (Common Foreign and Security Policy) and third (Area of Freedom, Security and Justice) pillars. The WMD Strategy points out in its introduction that the ‘EU must act with resolve, using all instruments and policies at its disposal’ and, then, sets out ‘a broad approach covering a wide spectrum of actions’ whereby ‘non-proliferation should be mainstreamed in our overall policies drawing upon all resources and instruments available to the Union’.⁶¹ To that effect, it provides for multilateral treaties and verification mechanisms, political initiatives, export controls, regulations on dual-use good, common policies related to criminal sanctions, integration of WMD non-proliferation concerns into the EU’s political, diplomatic and economic activities.

Similarly, and in addition to the existing CFSP measures, the SALW Strategy sets out to ‘develop a comprehensive and coherent approach which harnesses all forms of leverage at the European Union’s disposal and is based on the recognition, formulated in the ESS, that human security and human development are interdependent’ and to ‘develop new facets of the Union’s action to cover all the dimensions of the phenomenon, preventive and reactive’.⁶² Its objectives are achieved through a cross pillar approach too, including CFSP and ESDP instruments, partnership and cooperation agreements on political, development and trade areas, and coordination mechanisms, such as Europol and Eurojust. In fact, the SALW Strategy identifies three levels of means of cooperation: the EU and EC resources, the resources of the

⁵⁹ See, amongst others, S Biscop and J J Andersson (eds), *The EU and the European Security Strategy* (London, Routledge 2008).

⁶⁰ N 58 above, 7.

⁶¹ N 5 above, 2 and 5 respectively.

⁶² N 6 above, 7.

Member States, and those of the various multilateral players with which the EU has forged cooperation ties.

This broad approach becomes apparent in the action plan which the SALW Strategy sets out. Consistent with the theme of effective multilateralism, it sets out a range of initiatives at international, regional, and EU levels. Of these, the regional and EU are particularly interesting. In relation to the former, it suggests the provision of financial and technical support for regional and national organisations such as the Economic Community of West African States (ECOWAS) Moratorium and for transforming them into legally binding regional Conventions. It also mentions the provision of support to the African Union and African regional organisations with the means to ensure the effective application of UN embargoes, as well as support for the OCSE action. On EU level, it provides for the inclusion of brokering and illicit transfers of SALW on the agenda for all the EU's structured political dialogues with countries which export them and include it in the political dialogue with third countries and international, regional or sub-regional organisations. It also suggests an integrated approach to agreements with third countries, in particular envisaging the possibility of inserting a clause or an undertaking to cooperate in combating the illicit trade in SALW and their ammunitions in all agreements with third countries.⁶³

There is clear merit in the emphasis on the interconnections between the different facets of the Union's external relations policies. On the one hand, it reflects the increasingly interdependent relations between security, development, foreign policy, and economic progress – this is recognised on the international plane and is illustrated by the work undertaken under the aegis of the United Nations. On the other hand, it reflects the very genesis of European integration: the establishment of a common market and the various developments which stemmed from it gave the impetus for a gradual expansion of the activities covered by European integration, albeit at a different pace and pursuant to varied institutional and procedural arrangements. It is only appropriate that, in construing its international role, the Union integrates the very core of its development into the wider framework of its external relations.

However, this raises a number of questions, which will be addressed below: how is this ambitious construction of security, in general, and non-proliferation in particular, accommodated within the Union's idiosyncratic constitutional framework? How are the different functions of the Union's institutions be managed in a way which would ensure the effectiveness of the Union's policy? And to what extent would that be in compliance with the distinct normative characteristics of the different sets of rules involved?

D. The Union's Understanding of Its Own Role

⁶³ In terms of tackling the problems raised by the availability of existing stocks, the Strategy also covers measures as diverse as the promotion of a commitment by all countries only to import and retain small arms to meet their legitimate security needs, financial assistance under older programmes such as Disarmament, Demobilisation and Reintegration operations, financial and technical assistance for measures such as the keeping of regional small arms registers and the regular exchange of available information on exports, imports, the production and holding of small arms legislation, and appropriate measures to deal with the causes and consequences for human development of the illicit spread of SALW.

The principles outlined so far illustrate how the EU understands its overall role in the world. This appears to be based on two interrelated notions. The first is about 'responsibility' in international affairs which the Union is convinced it must assume. The WMD Strategy, for instance, states that 'all the States of the Union and the EU institutions have a collective responsibility for preventing these risks by actively contributing to the fight against proliferation'.⁶⁴ And the SALW Strategy refers to the 'EU's compelling obligation to act'.⁶⁵

This understanding of the EU's international responsibility draws upon the thread which brings together different strands of the EU's external relations. For instance, the ESS is based on the idea that 'Europe should be ready to share in the responsibility for global security and in building a better world'.⁶⁶ And the Laeken Declaration on the Future of European Union, the European Council wondered: '[d]oes Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a stabilising role worldwide and to point the way ahead for many countries and peoples?'.⁶⁷ And the then President of the Commission, Romano Prodi, stated on the day of signing that Treaty that 'today, Europe is reaffirming the unique nature of its political organization in order to respond to the challenges of globalisation, and to promote its values and play its rightful role on the international scene'.⁶⁸

The second tenet of the Union's understanding of its international role in the area is its unique nature. The WMD Strategy states that the 'European Union has special strengths and experience to bring to this collective effort'.⁶⁹ This follows from the cross-pillar approach and the range of instruments into which the EU may tap which is set out as the Union's distinct advantage: the SALW points out that the 'European Union has unique assets for responding to this threat. With its capacity to use a full spectrum of civilian and military instruments for managing crises and post-conflict situations and to contribute to reconstruction, the Union is well placed to provide a comprehensive response'.⁷⁰

Again, this is a notion which is apparent in other areas of EU external relations too. The ESS points out that the 'European Union is particularly well equipped to respond to such multi-faceted situations'.⁷¹ And in relation to the civilian aspects of crisis management, the Report of the Portuguese Presidency, adopted by the Feira European Council in June 2000, pointed out that 'particular attention could be paid to those areas where the international community so far has demonstrated weaknesses. It would provide 'added value' as it would improve the Union's capacity to react as well as the Union's capability to meet the requests of the other lead organisations ... This would ... increase the Union's visibility'.⁷²

⁶⁴ N 5 above, para 12.

⁶⁵ N 6 above, 6.

⁶⁶ N 58 above, 2.

⁶⁷ 14-15 December 2001.

⁶⁸ Speech delivered in Rome at the ceremony on the signing of the Constitutional Treaty (www.europa.eu.int/constitution/speeches_en.htm)

⁶⁹ N 5 above, para. 29.

⁷⁰ N 6 above, para. 18

⁷¹ N 58 above, 7.

⁷² Feira European council, 18-20 June 2000, Presidency Conclusions, Annex I, Appendix 3, Part A.

III. Vertical principles governing EU non-proliferation policy

In addition to the above, there are some principles which characterise the specific measures which flesh out the WMD and SALW strategies.

A. Mainstreaming, and the case of non-proliferation clauses

The WMD Strategy provides for the mainstreaming of non-proliferation policies in the EU's international relations, and refers, in particular, to the introduction of a non-proliferation clause in agreements with third countries. Similarly, the SALW Strategy refers to the need to include the brokering and illicit transfer of SALW on the agenda of all the EU's structured political dialogue with third countries; it refers in particular to countries in Eastern Europe and South-Eastern Europe (which hold surplus stocks of SALW left over from the Cold War), as well as Ukraine and Moldova in the context of the European Neighbourhood Policy (ENP). It also refers to the possibility of including a clause or an undertaking to cooperate in combating the illicit trade in SALW and their ammunition in all agreements with third countries.

In an agreement reached in November 2003 as to the content and the scope of its application,⁷³ the Council decided that the WMD clause should have two elements. The first provides for full compliance with and national implementation of the parties' existing obligations under international disarmament and non-proliferation treaties and agreements and other relevant international obligations. This provision constitutes an essential part of the agreement. It is noteworthy that this provision does not commit a state to sign, ratify and implement any agreements which it has not already signed.⁷⁴ The second part of the WMD clause provides for cooperation between the parties by fully implementing all other relevant international instruments and by establishing an effective system of national export controls – this provision may be considered as essential element on an *ad hoc* basis.⁷⁵

In 2009, five years following the introduction of this practice, the Council revisited the issue.⁷⁶ This provides a positive assessment of the EU's practice. It refers to agreements with almost 100 countries in which non-proliferation clauses have been inserted (in new or renewed mixed agreements and agreements concluded under Article 24 TEU). It also refers to additional text occasionally included in preambles or other relevant provisions of treaties in order to respond to specific concerns of EU's partners, in particular regarding conventional weapons and SALW. Finally, it refers to a non-legally binding non-proliferation section inserted in several political documents adopted in the context of ENP.

⁷³ Council Conclusions 17 December 2003, Doc. 14997/03 Brussels 19 November 2003.

⁷⁴ Note, for instance, that India, Pakistan and Israel have not signed the Nuclear Non-proliferation Treaty.

⁷⁵ As for its scope of application, the WMD clause was envisaged to be inserted in future mixed agreements, existing mixed agreements (on any occasion of renewal or revision, or even the suggestion by the EU for an amendment, or, if the above fails, by the negotiation of a separate legally binding instrument between the Parties which may include a link to the overall agreement), pure Community agreements (through the conclusion of a parallel instrument establishing a link with the EC agreement).

⁷⁶ See Doc. 5503/09 Note on the implementation of the WMD Clause, (Brussels, 19 January 2009).

So far, such a clause has been inserted in the agreement with the ACP countries,⁷⁷ the Stabilisation and Association Agreement with Albania,⁷⁸ the Partnership and Cooperation Agreement with Tajikistan,⁷⁹ the Gulf Cooperation Council, and Syria. This covers nearly one hundred states.⁸⁰ It is interesting, though, that the EU should not feel bound to follow the wording of the standard clause to the letter. Instead, it 'ensur[es] that respective WMD clauses were compatible with the spirit and the content of the WMD standard clause'.⁸¹

In practical terms, the EU's record in the area has not been uncontroversial.⁸² In the case of India, there is currently only a vague reference to non-proliferation in the EU-India Joint Action Plan⁸³ which becomes even briefer in its 2008 reviewed version.⁸⁴ The Commission also decided to propose the negotiation of a trade and investment agreement without a non-proliferation clause. The EU envisages an upgrading of the current 1994 EU-India Framework Agreement or the negotiation of a new EU-India partnership and cooperation agreement which would include a non-proliferation clause.⁸⁵ There is a Free Trade Agreement currently negotiated with India which is limited to trade and investment issues and which is envisaged by the Commission to be linked clearly in legal and institutional terms with the Framework Agreement.

The inclusion of a WMD clause in the Association Agreement with Syria (finalised in December 2004, but only initialled in December 2008) was also controversial as its wording was changed a number of times in order to make it acceptable to the Syrian Government whilst satisfying the demands of the Member States. The negotiation of the clause threatened to derail the negotiation of the Agreement.

B. Proceduralisation and Institutionalisation

The implementation of the initiatives undertaken by the EU in the area of non-proliferation relies upon an intense web of subsidiary bodies and the heavy interaction (both formal and informal) amongst them and between them and the EU institutions. A number of layers of institutional interaction may be identified.

⁷⁷ See also, separately, the Agreement between the EC and its Member States, of the one part, and South Africa, of the other part, amending the Agreement on Trade, Development and Cooperation: COM(2010) 220 fin (Brussels, 7 May 2010).

⁷⁸ Art. 8(3): see Council Doc. 8164/06 (Brussels 22 May 2006) – this includes the two additional provisions mentioned in relation to the Agreement with Tajikistan.

⁷⁹ Art. 4 subparas 2 and 3: see COM(2004) 521 fin (Brussels 26 July 2004). This duplicates the model WMD clause save for two additions: a reference to the first part of the clause as part of the political dialogue that will accompany and consolidate the elements referred to therein, and a statement in relation to export controls that such dialogue may take place on a regional basis.

⁸⁰ See Six-monthly Progress Report on the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2008/II), Council Doc. 17184/08 (Brussels, 17 December 2008), p29.

⁸¹ *Ibid.*

⁸² See the account in L Grip, 'The EU Non-Proliferation Clause: A Preliminary Assessment (SIPRI Background Paper, November 2009).

⁸³ EU Strategic Plan – Joint Action Plan (New Delhi, 7 September 2005).

⁸⁴ 'Global partners for global challenges: The EU-India Joint Action Plan (JAP)' (Marseille, 29 September 2008).

⁸⁵ See Written Question E-3607/2007 by A. Beer to the Commission.

The first layer involves the main actors in the area, namely the Council, the Commission, and the CFSP High Representative.⁸⁶ The CFSP High Representative appointed a Personal Representative on non-proliferation and WMD, who is also responsible for the SALW Strategy.⁸⁷ Her appointment was envisaged to give sharper focus to these issues in the dialogue with third countries. She assists EU Member States in their efforts to coordinate policies in the area of conventional arms exports controls.

There is also a Council CFSP Working Group on global arms control and disarmament (CODUN), and one on non-proliferation (CONOP), the latter dealing mainly with the nuclear Non-Proliferation Treaty (NPT), other non-proliferation and export control regimes, and assistance to Russia for chemical weapons destruction. Both Groups consist of senior disarmament and non-proliferation officials from Member States, as well as personnel from the non-proliferation and disarmament section of the Council's General Secretariat and an official from the Commission's security policy unit, and meet once a month in Brussels. There is also a Working Group on export of arms (COARM) which reviews the application of the Code of Conduct, provides support for the negotiations of an International Arms Trade Treaty, oversees the implementation of the Common Position of 2003 on brokering, and deals with issue of end-use controls, as well as the organisation of outreach activities with third countries (in particular Ukraine, Norway).

There is another layer, consisting of the WMD Monitoring Centre (WMD-MC) which is envisaged to oversee the implementation and development of the WMD Strategy, create synergy between efforts by various EU actors involved, and support the EU's contacts with third countries and organisations.⁸⁸ The same applies to the SALW Policy where practical measures are envisaged to strengthen the synergy between the various actors.⁸⁹

Finally, there are other external relations bodies involved such as the Political and Security Committee whose role is set out in Article 25 TEU. Made up by the political directors of the Member States' foreign ministries, it is responsible for monitoring the international situation in the CFSP area, contributing to the definition of policies, and monitoring the implementation of the Council's decisions.

Against this background of intense institutional activity, the policies provide for their regular monitoring. For instance, the SALW Policy is regularly reviewed and updated every six months by means of an interim report by the Presidency on its implementation.⁹⁰ This heavily structured and proceduralised framework with its multiple institutional layers need to be understood in the light of the broad range of activities which the Union's cross-pillar approach entails and the ensuing quest for coherence.

⁸⁶ For the role of the European Parliament, see EP Resolution on non-proliferation of weapons of mass destruction: A role for the European Parliament [2006] OJ C 280E/453 at 462.

⁸⁷ She is Annalisa Giannella and was appointed in October 2003.

⁸⁸ Council Doc. 6694/06 EU Strategy against the proliferation of WMD: Monitoring and enhancing consistent implementation (Brussels, 12 December 2006) at p4 *et seq.*

⁸⁹ The EU Strategy refers to the Council Secretariat which is to work closely with the Situation Centre to promote the collection and circulation of information and intelligence from the Member States p15).

⁹⁰ N 6 above, 9.

C. The Quest for Coherence

The broad understanding of security, the consolidation of the various legal instruments available to the Union's panoply, the cross-pillar dimension of the relevant activities, all suggest that the coherence of the EU's action is of paramount importance. This is entirely consistent with the central role that the requirement of coherence has assumed in the conduct of EU external relations.⁹¹ In normative terms, Article 3 TEU refers to the 'consistency and the continuity of the activities carried out [by the Union] in order to achieve its objectives', as well as the requirement of 'consistency of its external activities as a whole in the context of its external relations, security, economic and development policies'.

Furthermore, the coherence of the EU external action has also been at the very centre of the group therapy process which the EU has undergone since the drafting of the Constitutional Treaty and which is still underway, pending the outcome of the second referendum on the Lisbon Treaty in Ireland. This is illustrated by the mandate of the 2007 Intergovernmental Conference which mentions it in the very first paragraph.⁹²

In terms of policy, the increasing emphasis on the requirement of coherence is also illustrated by the concerted effort of EU institutions and the Member States to address it, at least as a matter of principle, in the EU external relations activities where it seems to matter the most, such as development⁹³ and humanitarian aid, where the Council, the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission adopted policy documents where they stress the multifarious dimensions of development and humanitarian aid policies, set out common principles and good practice, and underline the need for coherence, complementarity and effectiveness as a matter of policy.⁹⁴ Non-proliferation features prominently in these efforts. The *European Consensus on Development*, for instance, having acknowledged the complementarity between security and development policies within the context of the EU, goes on to state the following:⁹⁵

'The EU, within the respective competences of the Community and the Member States, will strengthen the control of its arms exports, with the aim of avoiding that EU-manufactured weaponry be used against civilian populations or aggravate existing tensions or conflicts in developing countries, and take concrete steps to limit the uncontrolled proliferation of small

⁹¹ See M Cremona, 'Coherence in EU Foreign Relations Law' in P Koutrakos (ed.), *European Foreign Policy - Legal and Political Perspectives* (Oxford: Hart Publishing 2010) (forthcoming).

⁹² See IGC 2007 Mandate, Council SG/11218/07, POLGEN74, para.1: 'The IGC is asked to draw up a Treaty (hereinafter called the "Reform Treaty") amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action'.

⁹³ See, for instance, the Council's Resolution on Coherence Between the Community Development Cooperation and its Other Policies (Annex to Development Council meeting of June 5, 1997), the Parliament's Resolution on the coherence of the various policies with development policy (Doc. B5-0117/2000 [2000] OJ C 339/208), and the Commission's COM (2005) 134 fin. *Policy Coherence for Development*.

⁹⁴ See *The European Consensus on Development* [2006] OJ C 46/1, and *The European Consensus on Humanitarian Aid* [2008] OJ C 25/1.

⁹⁵ Ibid, para 37.

arms and light weapons, in line with the European strategy against the illicit traffic of small arms and light weapons and their ammunitions’.

In practical terms, the quest for coherence renders the issue of management of the EU’s activities of vital importance. The SALW Strategy notes the need to ‘ensure consistency and complementarity between Council decisions in the CFSP framework and actions implemented by the Commission in the field of development aid in order to promote a consistent approach for all EU activities in the SALW area’.⁹⁶

The Union’s approach to ensuring coordination appears to have certain common features. First, it targets specific areas in relation to which it develops a structured and integrated policy approach. This is illustrated by the EU’s approach to Africa. In 2005, the EU adopted the *EU Strategy for Africa*⁹⁷ in which non-proliferation of weapons of mass destructions features as a specific area where the EU is to step up its efforts to promote peace and security by improving overall coordination and cooperation to ensure full compliance with relevant international obligations and export control regimes. In addition, special emphasis is paid on the promotion of an integrated approach to address the proliferation of SALW and landmines.⁹⁸ The EU, then, along with the African Union, adopted the Joint Africa-EU Strategy.⁹⁹ One of the four objectives of this long-term partnership is to address global challenges and common concerns, amongst which feature the proliferation of Weapons of Mass Destruction and the illicit trafficking of Small Arms and Light Weapons.¹⁰⁰

Second, the Union focuses on the development of a distinct procedural dimension aiming to enhance the management and coordination of the relevant actors and their outputs: for instance, the Joint Progress Report on the implementation of the Africa-EU Joint Strategy, drawn up following the Africa-EU Ministerial Troika meeting in Addis Ababa in November 2008, refers to ‘the holding of the first ever meeting between the AU Peace and Security Council and the EU Political and Security Committee, the regular consultations and exchange of information between the AU Commission, on the one hand, the European Commission and the Council’s General Secretariat, on the other’.¹⁰¹

Third, there is a distinct focus on enhancing capacity-building, networking, cooperation and exchange of information. For instance, in relation to SALW, Explosive Remnants of War, Anti-Personnel Landmines, and the fight against illicit trafficking, the specific measures envisaged include work towards the development of an African Small Arms and Light Weapons Strategy by December 2009, the development of modalities to engage African experts in the implementation of the EC funded project in support of RPCCO’s activities in the field of SALW by the end of June 2009), and the organisation of a joint workshop on the eradication of ERW in 2009.¹⁰²

⁹⁶ N 6 above, 15.

⁹⁷ COM (2005) 489 fin *EU Strategy for Africa - Towards a Euro-African pact to accelerate Africa’s Development* (Brussels 12 October 2005).

⁹⁸ Ibid, 22.

⁹⁹ Lisbon Summit, December 2007.

¹⁰⁰ Ibid, 2-3.

¹⁰¹ P4

¹⁰² P5.

Fourth, there is the multiplicity of administrative layers and institutional actors mentioned above. In relation to the Union's policy towards Africa, for instance, the CFSP High Representative appointed a Special Representative to the area.¹⁰³ The Joint Action setting out his mandate makes it clear that he is responsible for the CFSP/ESDP aspects of the policy objectives set out in the EU Africa Strategy. However, as these objectives are intrinsically linked, his coexistence with other relevant EU actors becomes of paramount significance. Article 12 of Joint Action 2008/898/CFSP is entitled 'coordination' and reads as follows:

The EUSR shall promote overall EU political coordination. He shall help to ensure that all EU instruments in the field are engaged coherently to attain the EU's policy objectives. The activities of the EUSR shall be coordinated with those of the Presidency and the Commission, as well as those of other EUSRs active in the region as appropriate. The EUSR shall provide Member States' missions and Commission's delegations with regular briefings.

In the field, close liaison shall be maintained with the Presidency, Commission and Member States' Heads of Mission who shall make best efforts to assist the EUSR in the implementation of the mandate. The EUSR shall also liaise with other international and regional actors in the field.

What is interesting is that the Special Representative was also appointed as the European Commission Head of Delegation. This double-hatting is seen as improving the coherence of the EU's approach.¹⁰⁴ However, this 'managerial', inward-looking and structure-focused approach risks making the effectiveness of the Union's policies hostage to the complex internal dynamics of the relationship between the various Union's bodies and institutions involved.

IV. Inter-Institutional Tensions and Judicialisation

The broad understanding of security by the EU actors, the ever-wider range of activities which non-proliferation policies underpin, and the multiplicity of legal rules and procedures governing them have created a significant degree of interinstitutional tension. Whilst by no means unique in this area,¹⁰⁵ this phenomenon has manifested itself in a controversial manner in the process of the Union's efforts to combat SALW proliferation. In *ECOWAS*,¹⁰⁶ the Commission challenged the adoption by the Council of Decision 2004/833/CFSP implementing Joint Action 2002/589/CFSP on an EU contribution to the Economic Community of West African States (ECOWAS).¹⁰⁷ This measure had been adopted in order to provide for a financial contribution and technical assistance in order to set up the Light Weapons Unit within the ECOWAS structure and to convert the Moratorium on SALW into a Convention between the

¹⁰³ Joint Action 2007/805/CFSP [2007] OJ L 323/45, extended by Joint Action 2008/898/CFSP [2008] OJ L 322/50.

¹⁰⁴ In a statement, Solana stated that 'The joint appointment of Mr Vervaeke is a reflection of our common will to combine all the instruments of the European Union and thereby ensure a coherent approach towards Africa at all levels' (6 December 2007, S355/07).

¹⁰⁵ In the area of EU external relations generally, see P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B de Witte (eds), *EU Foreign Relations Law* (Oxford, Hart Publishing 2008) 171

¹⁰⁶ Case C-91/05 *Commission v Council* [2008] ECR I-3651.

¹⁰⁷ [2004] O L 359/65.

ECOWAS Member States. The Commission argued that such action fell within the scope of development policy and, as such, ought to have been adopted under EC law.

The Court annulled the Council Decision and held that ‘a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of ex Article 47 TEU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competence’.¹⁰⁸

The *ECOWAS* judgment must be understood in the light of the clear interinstitutional tension which underpins the conduct of EU external relations in general and its non-proliferation policies in particular. This sets the background against which substantive policy choices are made. It becomes very clear that the rhetoric of coherence, when assessed in the light of the interinstitutional interactions, tells us a story distinctly more nuanced than that emerging from the Union’s policy documents. This, in turn, brings the Court of Justice at the very centre of the external relations arena.

In *ECOWAS*, the Court concludes that a dual-legal basis involving both EC and CFSP rules is ‘impossible’ where a measure carries out both security and development cooperation functions.¹⁰⁹ It also suggests that a CFSP measure may also contribute to EC objectives if it has the implementation of the CFSP as its main purpose. However, this is precisely what the problem is: this assessment is heavily dependent upon finely balanced views as to the proper objective of a measure and its content. Such an assessment is extremely difficult to make, and the willingness of the EU institutions to question each other’s assessment before the Court, as well as the latter’s controversial approach, are bound to fuel inter-institutional tensions and challenge any effort to b

In the context of non-proliferation, for instance, Regulation 1717/2006 establishing an Instrument for Stability deals with assistance in response to situations of crisis or emerging crisis. Its aim is ‘to contribute to stability by providing an effective response to help preserve, establish or re-establish the conditions essential to the proper implementation of the Community’s development and cooperation policies’.¹¹⁰ In this context, it refers to technical and financial assistance regarding the impact on the civilian population of the illicit use of and access to firearms and covers survey activities, victim assistance, raising public awareness and the development of legal and administrative expertise and good practice. In terms of principle, assistance is purported to ‘be provided only to the extent necessary to re-establish the conditions for social and economic development of the populations concerned, in a situation of crisis or emerging crisis’ and is intended ‘not [to] include support for measures to combat the proliferation of arms’.¹¹¹

¹⁰⁸ N 106 above, para. 60. See the annotation by C Hillion and R Wessel, ‘Competence distribution in EU external relations after *Ecawas*: Clarification or continued fuzziness?’ (2009) 46 *Common Market Law Review* 551 and the criticism in Editorial, ‘Development and foreign policy: where to draw the line between the pillars’, (2008) 33 *ELRev* 289. For another recent judgment on the relationship between EC and CFSP rules, see Case C-403/05 *Parliament v Commission (re: Philippines borders)* [2007] ECR I-19045, and the annotation by M Cremona in (2008) 45 *Common Market Law Review* 1727.

¹⁰⁹ N 106 above, para 76.

¹¹⁰ [2006] OJ L 327/1, Art. 1(2)(a). The Commission has proposed its amendment to reflect the *ECOWAS* judgment: see COM(2009) 195 fin.

¹¹¹ *Ibid*, Art. 3(2)(i).

In practical terms, the intense interdependence between different activities and the multiplicity of actors and administrative bodies involved in the conduct of the overall policy would entail a difficult balancing exercise with unclear repercussions for the effectiveness and timing of the specific policy initiatives. All this makes the role of the Court increasingly prominent and important. This, in itself, is not surprising – after all, the genesis of the Community’s external relations policies and their development owe a considerable debt to its contribution.¹¹² However, viewed against the background of the increasingly interdependent policies pronounced by the Union and the bitter interinstitutional disputes to which these give rise, it is regrettable that the Court has neither produced principles clear and consistent in their application, nor avoided the danger of rendering its role increasingly politicised.¹¹³

Against this background, the Court’s approach to ex Article 47 TEU in *ECOWAS* may have various implications. First, it may encourage further inter-institutional disputes and, therefore, is likely to hinder the already difficult exercise of achieving coherence in the EU’s external relations policy. Second, it may make the Member States more reluctant to establish express links between different sets of rules in instruments adopted in related areas but within different legal frameworks. Third, it does not contribute to the addressing the difficulties of achieving coherence. This latter point may be seen as the other side of the coin: to stress the interdependence between the Union’s security, non-proliferation, development, and economic policies is a commendable political imperative – but its corollary is that standards of coherence are set which are extremely difficult to achieve in the Union’s multidimensional, idiosyncratic constitutional order. And the Union’s way of dealing with this problem, is thinking both broadly and narrowly: that is, by introducing instruments which straddle legal frameworks and by creating layers of administrative structures entrusted with the coordination of the various activities and the management of their implications. The practice of these gives rise to disputes which gives rise to legal proceedings creating, therefore, a vicious circle which appears to govern the Union’s international role.

V. Conclusion

This Chapter set out to examine the interactions between the EU and the rest of the world in the area of non-proliferation. It suggested that the Union not only acknowledges the significance of non-proliferation in the current geopolitical environment, but it also engages actively and directly with the international community in ways which have an impact across the range of the activities it pursues. However, the picture of the actor which it emerges is one of considerable ambidexterity: grand statements coexist with small-scale projects aimed to produce tangible effects; direct interactions with third countries and international organisations multiply, and yet they are subject to administrative and institutional layers of considerable density; the politically sensitive implications of the policy are addressed

¹¹² This is illustrated by the introduction of the principle of implied competence, the construction of the Community’s exclusive competence in the area of CCP as well as the broad construction of the scope of the latter in the 1970s: see P Koutrakos, n 44 above, Chs 1-3.

¹¹³ See M Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* (EUI Working Papers, Law No 206/22) n 51, and P Koutrakos, n 105 above, 176-185.

whilst Europe's judges are gradually dragged into the regulation and management of the ensuing initiatives. As it is linked to the constitutionally idiosyncratic nature of the EU's legal order, this characteristic and the complex web of actors, policies and interests in which it originates would be difficult to remove. The challenge for the Union is to manage it - and this is a challenge which law cannot meet on its own.¹¹⁴

¹¹⁴ For the limited effects that the Lisbon amendments of the EU primary rules may have, see P Koutrakos, P. 'Primary law and policy in EU external relations-moving away from the big picture', 33 *European Law Review* 666.