

Proactive Release

Date: 1 October 2019

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Widening Catch-all Export Controls (ERS-19-MIN-0023 refers)

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- 6(a): to avoid prejudicing the international relations of the New Zealand Government;
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Cabinet External Relations and Security Committee

Minute of Decision

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Widening Catch-all Export Controls

Portfolio **Foreign Affairs**

On 10 September 2019, the Cabinet External Relations and Security Committee (ERS):

- 1 **noted** that the Customs and Excise Act 2018 provides authority for the government to block the export of goods and technologies that are not on the New Zealand Strategic Goods List ('catch-all controls') for military end-use in a State under a United Nations arms embargo;
- 2 **noted** that:
 - 2.1 the international scope of catch-all controls is limited to a small number of countries under a United Nations arms embargo, meaning that firms and research entities can undertake transfers for military end-use in other States;
 - 2.2 in some cases, this can create security, political or reputational risks for New Zealand;
- 3 **noted** the proposal to widen the current scope of catch-all controls to include all countries, but to provide exemptions for businesses and research entities from needing to seek approval for transfers involving low risk destinations and products;
- 4 **agreed** that the Ministry of Foreign Affairs and Trade should consult with business, research and civil society stakeholders on the proposed changes;
- 5 **invited** the Minister of Foreign Affairs to report back to ERS with final recommendations in early 2020.

Janine Harvey
Committee Secretary

Hard-copy distribution: (see over)

Present:

Rt Hon Jacinda Ardern (Chair)
Hon Grant Robertson
Hon Andrew Little
Hon David Parker
Hon Stuart Nash
Hon Ron Mark

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Ministry of Foreign Affairs
Ministry of Defence

Hard-copy distribution:

Minister of Foreign Affairs

Proactively released by the
Minister of Foreign Affairs

Widening Catch-all Export Controls

Proposal

1. This paper seeks agreement for the Ministry of Foreign Affairs and Trade (MFAT) to conduct a public consultation on proposals to widen the application of export controls on goods and technologies with a military end-use.

Executive Summary

2. The New Zealand Government controls the export of strategic goods¹ through the Customs and Excise Act. Controls are implemented primarily on items on the New Zealand Strategic Goods List. In addition, the Act provides authority for controls on any item not on the List that has a military end-use (so-called “catch-all” controls).² Under the Act, applications to export listed and non-listed items will be declined by the Secretary of Foreign Affairs and Trade if the transfer does not meet the Assessment Criteria, for example if it would violate our international obligations, or create security, political or reputational risk for New Zealand.
3. At present the application of catch-all controls for items with a military end-use is very narrow, as they can only be applied to states which are under a UN arms embargo (currently there are 10 such states). The government does not have the legal authority to prevent the export of items for military end-use in other countries that are not on the Strategic Goods List. This exposes us to some security, political and reputational risk, for example if goods are supplied to military forces engaged in human rights violations, or where exports of technology could potentially be diverted to military use.
4. To mitigate these risks, it is proposed that the application of catch-all controls be widened to allow the Secretary of Foreign Affairs and Trade to block the export of unlisted goods and technologies for military end-use to any country if the transfer would be inconsistent with the Assessment Criteria that are currently used for listed goods and technology. Exporters would be required to seek a permit for goods or technology destined for a military end-user. To focus on areas of risk, however, applications would not be required for goods or destinations which pose little or no risk. This would enable an efficient system which focused on areas of significant risk, while minimising any unnecessary impacts on business.
5. It is proposed that MFAT consult stakeholders before final recommendations are provided to Cabinet.

1 Strategic goods include military items and “dual-use” components and technologies that could be used in nuclear, chemical and biological weapons, missiles and conventional arms.

2 An example would be the export of s9(2)(b)(ii) as these items are not on the Strategic Goods List but have a military customer.

Background

7. The Customs and Excise Act provides two mechanisms to control the export of strategic goods and technologies:³
- (i) *List-based controls (section 96)* covering items appearing on the New Zealand Strategic Goods List. The List comprises military goods and dual-use items and technology. A permit from the Secretary of Foreign Affairs and Trade is required for all goods/technologies to all destinations. The List is currently the main mechanism for controlling exports of strategic goods.
 - (ii) *Controls based on end-use (section 97)*. These (catch-all controls) apply to any goods and technologies which are not on the Strategic Goods List but are destined for a military end-use⁴ in a country under a UN arms embargo.⁵ A permit from the Secretary of Foreign Affairs and Trade is required for such exports. However, because few countries are covered by a UN arms embargo, military end-use controls are rarely able to be used.⁶

Exports for military end-use pose growing risks

8. It has become clear in recent years that New Zealand companies are exporting civilian goods and technologies not on the Strategic Goods List to countries where:
- there is a risk that they will contribute to conflict and human rights violations by military and police forces, and could be seen as supporting repressive regimes; and/or
 - they could be diverted to military uses and help to increase the military capabilities of states which are challenging the security interests of New Zealand and like-minded partners.
9. Examples of recent proposals for such exports which have come to MFAT's attention include s9(2)(b)(ii)

3 "Technology" in this context is defined in terms of "tangible technology" to include written materials and electronic information. There is no provision under the Act to control "intangible technology" such as knowledge or training.

4 The Act defines "military" use to include use by paramilitaries, militia and police.

5 Central African Republic, Democratic Republic of Congo, Eritrea, Iran, Lebanon, Libya, North Korea, Somalia, Sudan, South Sudan and Yemen.

6 End-use controls also apply to any goods or technologies for use in a nuclear, chemical or biological weapons programme in any country. These controls are rarely used and no changes are proposed to them.

10. These sorts of exports can create security, political and reputational risk for New Zealand. For example, New Zealand would face domestic and international scrutiny if goods exported from here were used by a foreign military to inflict human rights abuses. There are particular risks involving the export of sensitive technologies s6(a)
11. The limited coverage of military end-use controls (i.e. applying only to states under a UN arms embargo) is no longer sufficient to manage the risks we face. Deadlock in the UN Security Council means it is unable to place arms embargoes on states of significant concern, e.g. Syria. Even if the Council were more functional, its arms embargoes would never extend to the full list of countries of potential concern to New Zealand s6(a)
12. Currently the only tool available to prevent the export of goods and technologies not on the Strategic Goods List to destinations not covered by a UN arms embargo has been for officials, when they become aware of an export, to attempt to dissuade the exporter. s6(a)

There is no legal means to prevent such an export if the exporter chooses to proceed with it.

Proposed widening of current controls

13. To mitigate the risks outlined above, it is proposed that military end-use controls under the Customs and Excise Act be extended to all countries. This would give the Secretary of Foreign Affairs and Trade authority to block exports for military end-use to any destination in cases which would result in a denial when assessed against the Assessment Criteria (which have been agreed by the Minister of Foreign Affairs).
14. It is also proposed that businesses or research entities could apply to export non-listed items for military end-use using the application procedures currently in place for listed goods. However, it is necessary to consider whether the additional burden on New Zealand businesses and research organisations would be commensurate with the risk.
15. Given the low risk associated with some goods and destinations, it is proposed that exporters would not be required to seek approval in the following cases:
 - (i) Exports to the following likeminded countries, where the risk of misuse in a military programme is negligible: Australia, Canada, EU members, Iceland, Japan, Norway, South Korea, Switzerland, the US, and the UK (when it leaves the EU).⁷

⁷ Like New Zealand, these countries also belong to the major international export control regimes: the Nuclear Suppliers Group, the Australia Group (chemical weapons), the Missile Technology Control Regime, and the Wassenaar Arrangement (conventional weapons).

- (ii) Exports of animals, food and beverage, medical, health and sanitary products to any destination, since these pose a general low security and reputational risk.
- (iii) Exports as part of an official assistance programme provided by the New Zealand government, for example to support Pacific armed forces.

While the Secretary of Foreign Affairs and Trade's approval would not be needed in these cases, the Secretary would still have the authority to block any such exports, should cases of concern emerge.

Options for widening of catch-all controls

16. The pros and cons of three options - (i) maintaining the status quo, (ii) widening the controls with limited exemptions for some products and countries; and (iii) widening the controls without exemptions are set out below.

Option	Advantage	Disadvantage
1 - Status quo Military end-use controls apply only to countries under UN arms embargo	No change required	Exposes New Zealand to some security, political and reputational risk
2 - Limited application Military end-use controls apply to all countries, but there are exemptions for companies/entities needing to seek approval for transfers involving low-risk goods and destinations	Focuses on more risky business transactions Exemptions for low risk transactions reduces burden on business MFAT still able to block any transaction	There may be differing views on what country/ product exemptions are justified
3 - Full application Military end-use controls apply to all countries. Companies/entities need approval for transfers of all goods for military end-use to all countries	Security, political and reputational risk to New Zealand is minimised as all military end-use transactions are covered	Imposes burdens which businesses will consider excessive and which is not commensurate with the risk being managed

17. Option 2 is recommended as providing the best balance between risk management and the burden on exporters. However, the exact formulation for exemptions will need to be considered further in light of consultation with stakeholders^{s6(a)}

^{s6(a)}

Impact on business and research

19. The amount of current business and research collaboration that would be covered by the proposed changes with the exemptions proposed under Option 2 is relatively small. Most export effort by firms and research entities seeking military or police customers appears to be concentrated in developed country markets that will be covered by exemptions. (See Annex for further details.) The proposed new controls will encourage exporters to focus on markets and products which do not pose a risk.
20. To facilitate legitimate business, MFAT operates a streamlined process for exporters to apply to export strategic goods and technology, which is fast for standard items and involves no cost to exporters.
21. It is proposed that MFAT consult businesses on transitional measures that would ensure that current contracts are not unduly affected by wider catch-all controls. This could include lead-in times for applying new rules, and a presumption of approval for parts supplied under past contracts. MFAT will also publicise the new measures widely in advance and will assist firms and research organisations to implement them.
22. Nevertheless there will be a small number of firms and research entities which will need to apply for a permit in future. Affected businesses and researchers have an opportunity to provide their views through the consultation process.

International aspects

23. These proposed measures would be developed in a manner that is consistent with New Zealand's obligations under the World Trade Organisation Agreement and our bilateral free trade agreements.
24. Other countries implement catch-all controls with varying degrees of rigor. Our current controls place us in the middle range, s6(a)
The changes proposed here would place us among the most effective regimes, s6(a)

Public consultation

25. It is recommend that there be a public consultation on these proposed changes. This would allow:
 - Stakeholders to provide views that will help to refine the final form of the changes (especially in regard to the scope of exemptions and transitional arrangements) to ensure they are not unnecessarily burdensome on business.
 - Stakeholders to provide information on current business that could be affected, so that there are no unintended impacts from the proposed changes.

- MFAT to alert exporters to changes likely to be announced in the future so they can start to prepare in advance.
26. If Cabinet approval is forthcoming, a consultation document will be made publicly available through the MFAT website. Business, research and civil society stakeholders will be invited to provide views.
27. Stakeholder comments will be summarised in a further report to Cabinet providing final recommendations.

Consultation

28. The Ministry of Business, Innovation and Employment and the New Zealand Customs Service have been consulted in the preparation of this paper and agree with its conclusions.

Financial Implications

29. The proposed stakeholder consultation can be managed within existing departmental resources.
30. The financial implications of strengthening catch-all controls will be addressed when final policy decisions are sought from Cabinet, however it is assessed that the preferred option can be implemented within current departmental resources.

Legislative Implications

31. When finalised, the changes will be effected through a Gazette Notice replacing Section 6 of the Customs Export Prohibition Order 2017. No change to legislation is required.

Impact Analysis

32. A full Regulatory Impact Analysis will be submitted when final policy decisions are sought.

Human Rights

33. There are no human rights issues arising from proposals in this paper. However, strengthened catch-all controls will help to ensure that New Zealand's exports of goods and technology are not used in the infringement of human rights in other countries.

Publicity

34. This paper proposes the release of a public consultation document. s9(2)(g)(i)

Proactive Release

35. I propose to release this paper, with redactions consistent with the Official Information Act, at the time the public consultation document is released.

Recommendations

The Minister of Foreign Affairs recommends that the Committee:

1. **note** that the Customs and Excise Act provides authority for the government to block the export of goods and technologies which are not on the New Zealand Strategic Goods List ("catch-all controls") for military end-use in a state under a UN arms embargo;
2. **note** that the international scope of catch-all controls is limited to a small number of countries under a UN arms embargo, meaning that firms and research entities can undertake transfers for military end-use in other states, which can in some cases create security, political or reputational risks for New Zealand;
3. **note** the proposal to widen the current scope of catch-all controls to include all countries, but to provide exemptions for businesses and research entities from needing to seek approval for transfers involving low risk destinations and products;
4. **agree** that the Ministry of Foreign Affairs and Trade should consult with business, research and civil society stakeholders on the proposed changes; and
5. **note** that the Minister of Foreign Affairs will report back to Cabinet with final recommendations early next year.

Authorised for lodgement

Rt Hon Winston Peters

Minister of Foreign Affairs

ANNEX: Examples of current exports of items not on the Strategic Goods List for military use in countries which would fall within the proposed scope of new catch-all controls

Item	Markets with military customers	Exemption status
Marine and aerospace components for military use	Wide range of countries	Application not required for low-risk markets ⁸ Applications required for other markets
IT and communications applications for defence and security sector use	Focused on developed country markets	Applications not required for low-risk markets Applications required for other markets
High technology research with potential military applications	Focused on developed countries, but some business with other markets	Applications not required for low-risk markets Applications required for other markets
Heath management and technology for military hospitals	Focused on developing country markets	Covered by exemption
Food and beverage for military customers	Wide range of countries	Covered by exemption

⁸ It is proposed that these be Australia, Canada, EU members, Iceland, Japan, Norway, South Korea, Switzerland, the US, and the UK (when it leaves the EU).