

Proactive Release

Date: 7 September 2021

The following Cabinet paper and related Cabinet minute has been proactively released by the Minister of Foreign Affairs:

Title

Continuing the prohibition on the export and import of strategic goods

Reference

CAB-21-SUB-0218

CAB-21-MIN-0218



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Economic Development Committee: Period Ended 11 June 2021

On 14 June 2021, Cabinet made the following decisions on the work of the Cabinet Economic Development Committee for the period ended 11 June 2021:

DEV-21-MIN-0128

Continuing the Prohibition on the Export and Import of Strategic Goods

Portfolio: Foreign Affairs

CONFIRMED

Michael Webster
Secretary of the Cabinet

Proactively Release by the
Minister of Foreign Affairs



Cabinet Economic Development Committee

Minute of Decision

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Continuing the Prohibition on the Export and Import of Strategic Goods

Portfolio **Foreign Affairs**

On 9 June 2021, the Cabinet Economic Development Committee:

- 1 **noted** that:
 - 1.1 the prohibition on the export of strategic goods is given effect under the Customs and Excise Act 1996, by way of the Customs Export Prohibition Order 2017 (the Order);
 - 1.2 the Order expires on 30 September 2021;
- 2 **agreed** that it is necessary in the public interest for the prohibition on the export of strategic goods to continue by way of Order in Council made under the Customs and Excise Act 2018;
- 3 **agreed** to continue the prohibition of the export of strategic goods on an indefinite basis through an Order in Council under the Customs and Excise Act 2018;
- 4 **invited** the Minister of Customs to issue drafting instructions to the Parliamentary Counsel Office to draft an Order in Council under the Customs and Excise Act 2018 to give effect to the continued export prohibition agreed above;
- 5 **authorised** the Minister of Foreign Affairs and the Minister of Customs to make final decisions on detail, and to make changes, consistent with the policy intent outlined in the paper under DEV-21-SUB-0128, on any issues that arise during the drafting process;
- 6 **agreed** that a Customs Import Prohibition Order is not required to give effect to the Chemical Weapons (Prohibition) Act 1996, on the basis of the existing mechanism in place to control imports of chemicals and their precursors that are associated with chemical weapons.

Janine Harvey
Committee Secretary

Present: (see over)

Present:

Hon Grant Robertson (Chair)
Hon Carmel Sepuloni
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Dr David Clark
Hon Dr Ayesha Verrall
Hon Meka Whaitiri
Hon Phil Twyford
Rino Tirikatene, MP
Dr Deborah Russell, MP

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

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Office of the Minister of Foreign Affairs

Chair, Cabinet Economic Development Committee

Continuing the prohibition on the export and import of strategic goods

Proposal

1. This paper seeks Cabinet's agreement to continue the prohibition on the export of strategic goods, which would otherwise expire on 30 September 2021.

Relation to government priorities

2. This is a routine operational adjustment that requires Cabinet approval.

Background

3. The Ministry of Foreign Affairs and Trade regulates the export and import of strategic goods.

Exports

4. Since 1996, the prohibition on the export of strategic goods has been made by an Order in Council under the Customs and Excise Act 1996. Such orders have had a statutory maximum length of three years.
5. The current prohibition is contained in the Customs Export Prohibition Order 2017 (the CEPO) and expires on 30 September 2021. The prohibition was originally due to expire on 30 September 2020, but was extended by one year under the COVID-19 Response (Further Management Measures) Legislation Act 2020.
6. The 1996 Act and the CEPO provide the authority to the Secretary of Foreign Affairs and Trade to determine what constitute goods subject to prohibitions and to operate a licensing system to regulate their export.
7. The current CEPO regulates relevant goods in two ways:
 - List-based controls covering goods (military goods and dual-use items) published in the New Zealand Strategic Goods List¹ because they have or may have a strategic use; and
 - Catch-all controls based on end-use which applies to any goods and technologies **not** on the Strategic Goods List which may be destined for use in a weapons of mass destruction programme in any country or a military end-use in a country under a UN arms embargo.

¹ The 2018 Act requires the Secretary of Foreign Affairs and Trade to maintain an up-to-date list of all goods and classes of goods whose exportation is prohibited (the New Zealand Strategic Goods List).

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8. The 1996 Act has now been replaced with the Customs and Excise Act 2018 (the 2018 Act) and amends the regulatory regime for these goods.
9. The 2018 Act explicitly delegates authority for the operation of catch-all controls to the Secretary of Foreign Affairs and Trade. With respect to these controls the Secretary is able to prohibit, by notice in the Gazette, the export of goods described by any use to which they may be put, if the Secretary considers that prohibition of certain categories of goods is necessary in the public interest. A Gazette notice for catch-all controls came into effect on 9 October 2020.
10. The legislation continues to enable the Governor-General, on recommendation of the Minister of Customs, to prohibit the export of “any specified goods” or “any specified class of goods” (i.e. list based goods) by way of Order in Council, providing it is considered necessary in the public interest to do so.
11. Procedurally, this necessitates the Minister of Customs issuing instructions to the Parliamentary Counsel Office to draft an Order in Council which will continue the export prohibition for approval by the Cabinet Legislation Committee. The Minister of Customs will recommend the making of an Order in Council to regulate an import or export restriction once Cabinet has agreed that the policy is necessary in the public interest.
12. As policy on this issue is part of the Minister of Foreign Affairs portfolio, I now seek Cabinet’s approval to continue the prohibition.

Imports

13. The 2018 Act also enables prohibition of the import of “any specified goods” or “any specified class of goods”, via an Order if the Minister of Customs considers it “necessary in the public interest.”
14. There is currently no Customs Import Prohibition Order (CIPO) in place to control the import of toxic chemicals and their precursors which could be used for the production of, chemical weapons as defined under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993 (the CWC).
15. Instead, the import of these chemicals is controlled under the Chemical Weapons (Prohibition) Act 1996 (the CW Act). The CW Act specifies the chemicals and their precursors which are controlled and prohibits their import (and export) without the consent of the Secretary of Foreign Affairs and Trade. Exports of these chemicals, along with other various chemicals, are regulated via the CEPO. Approval for the import of these chemicals is given via the New Zealand export controls regime administered by MFAT (and which also gives effect to the CEPO).
16. I recommend that a CIPO is not required given the existing mechanism in place to control imports of chemicals and their precursors which are associated with chemical weapons.

Analysis

Public interest

17. New Zealand's system of export controls on strategic goods and technology (our export control regime), is designed to ensure that such trade is consistent with our wider foreign and security policy. The system is an essential element of New Zealand's non-proliferation, arms control and disarmament policies, and of our commitment to being a responsible exporter.
18. In particular, New Zealand's export control system is a significant thread in its commitment to restricting the ability of countries or terrorist groups to develop weapons of mass destruction, and to prevent the transfer of conventional weapons, equipment and military and dual-use technology for undesirable purposes.
19. There is a strong public interest in continuing the export prohibition on strategic goods to ensure that the trade in these goods does not pose risks to the security of New Zealand and its close international partners. Specifically, that it does not: contribute to the commission of genocide, war crimes or human rights violations; and avoids political and reputational risks to New Zealand, such as would arise from, or would be contrary to, the letter or spirit of New Zealand's international obligations and commitments (including its human rights and disarmament obligations, and commitments under international export control regimes). The export permitting process (which includes assessment against the legal test of public interest) serves to define more precisely the application of the controls in specific cases.
20. There is also strong public opposition to terrorism and abhorrence of terrorist acts. This is reflected in our treaty commitments to prevent and outlaw terrorism, which are implemented in domestic legislation. There would be strong public opposition to any New Zealand exports which assisted in the commission of a terrorist act.
21. Continuing the current policy is consistent with the Trade for All agenda principle, agreed by Cabinet, of using trade policy to "maximise opportunities and minimise risks associated with global issues".
22. On this basis I recommend the continuation of the prohibition.

Indefinite continuation of the prohibition

23. The 1996 Act mandated three-yearly renewals of the CEPO. Under the 2018 Act, there is no statutory maximum duration. Prohibitions are permanent by default, unless the Order contains explicit expiry provisions. New Zealand's export controls regime has been in place for over 25 years and the rationale for it, as described above, will remain for the foreseeable future.
24. On balance, I recommend the prohibition should continue on an indefinite basis, but with a provision which allows for review when necessary.

25. Continuation will have no implications for Customs' operations. Nor will it preclude updating in future. On 16 September 2019 Cabinet agreed that officials explore the feasibility of legislative options to modernise New Zealand's export controls regime, including standalone legislation (CAB-19-MIN-0467 refers). Should the regime be modernised as a result, then the CEPO may need to be reviewed at that time.

Financial Implications

26. There are no financial implications arising from this paper.

Legislative Implications

27. The proposal in this paper will require making an Order in Council under section 96 of the Customs and Excise Act 2018 to prohibit the export of strategic goods.

Impact Analysis

Regulatory Impact Statement

28. The Regulatory Impact Analysis Team at the Treasury has determined that the proposal to continue the prohibition on the export of strategic goods is exempt from Cabinet's Regulatory Impact Analysis requirements on the ground that this proposal is necessary to comply with existing international obligations that are binding on New Zealand.

Climate Implications of Policy Assessment

29. There are no climate implications from the proposal in this paper.

Population Implications

30. There are no population implications from the proposal in this paper.

Human Rights

31. There are no inconsistencies between the proposal in this paper and the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. There are no gender or disability perspective implications from the proposal in this paper.

Consultation

32. The New Zealand Customs Service and The Treasury have been consulted on this paper.

Communications

33. There is no planned publicity for the matter addressed in this paper.

Proactive Release

34. The Ministry of Foreign Affairs and Trade will proactively publish a copy of this paper on its website.

Recommendations

The Minister of Foreign Affairs and Trade recommends that the Committee:

1. **note** that the prohibition on the export of strategic goods, given effect under the Customs and Excise Act 1996, by way of the Customs Export Prohibition Order 2017, expires on 30 September 2021;
2. **agree** that it is necessary in the public interest for the prohibition on the export of strategic goods to continue by way of Order in Council made under the Customs and Excise Act 2018;
3. **agree** to continue the prohibition of the export of strategic goods on an indefinite basis through an Order in Council under the Customs and Excise Act 2018;
4. **invite** the Minister of Customs to issue drafting instructions to the Parliamentary Counsel Office to draft an Order in Council under the Customs and Excise Act 2018 to give effect to the continued export prohibition agreed above;
5. **authorise** the Ministers of Foreign Affairs and Customs to make final decisions on detail, and to make changes, consistent with the policy intent outlined in this paper, on any issues that arise during drafting of the Order in Council;
6. **agree** that a Customs Import Prohibition Order is not required to give effect to the Chemical Weapons (Prohibition) Act 1996 on the basis of the existing mechanism in place to control imports of chemicals and their precursors which are associated with chemical weapons.

Authorised for lodgement

Hon Nanaia Mahuta
Minister of Foreign Affairs