

Export Controls regime – Assessment Criteria

Explanatory Note to the Assessment Criteria-as-a-whole

The Export Controls regime Assessment Criteria set the parameters considered by the Ministry of Foreign Affairs and Trade (the Ministry) when assessing an application for a permit to export strategic or military end-use goods under the Customs and Excise Act 2018. They reflect the government's commitment to making responsible decisions around the export of such goods. Taken together, the six Assessment Criteria outline the basis for the assessment of the risks posed by the export of goods covered by the Export Controls regime, ensuring decisions are taken using a consistent approach.

By providing succinct information on the factors the Ministry takes into account when considering applications to export controlled goods, the Assessment Criteria and accompanying guidance seek to reduce uncertainty for exporters. They assist exporters to determine whether an application to export goods would have a reasonable prospect of being approved. Nevertheless, exporters and potential exporters are encouraged to contact the Ministry to discuss what the Assessment Criteria mean in terms of particular exports they may be contemplating.

There is some overlap between the individual Assessment Criteria. For example, some of Aotearoa New Zealand's international obligations and policies apply to more than one Criterion. The Arms Trade Treaty (2014), for example, is relevant to both Criterion 1 (which covers disarmament, arms control and non-proliferation obligations), and to Criterion 2 (which covers the fundamental principles of international law, international human rights law and international humanitarian law).

Taken together, the six Assessment Criteria cover all matters to be considered in determining whether to approve or decline an application for a permit. Criteria 1, 2 and 3 are largely definitive in nature. They deal with the potential impact of the proposed export on Aotearoa New Zealand's legal obligations, commitments and policies. Applications to export goods in violation of Aotearoa New Zealand's legal obligations will be declined.

Where approval of an application would not put Aotearoa New Zealand at risk of violating obligations and commitments outlined Criteria 1, 2, and 3, the application would then be considered against Criteria 4, 5 and 6. This involves the weighing up of diverse factors, some positive and some negative, in order to arrive at a final determination. Potential positive impacts of an export may be considered under Criteria 4, 5 and 6 but these will not override a negative assessment under Criteria 1, 2 or 3.

Assessments of applications to export goods are undertaken on the basis of technical expertise and multiple data inputs. All assessments are peer reviewed internally. Complex assessments undergo additional scrutiny at senior levels within the Ministry. Ministers may also be consulted before the Secretary of Foreign Affairs and Trade makes a final decision.

The Ministry welcomes contact from exporters who wish to discuss whether their proposed export falls within the Export Controls regime and how to navigate the application process, including how to self-assess whether your goods may be controlled. Supporting materials can be found at www.mfat.govt.nz

Criterion 1. Consistency with Aotearoa New Zealand's disarmament, arms control and non-proliferation obligations, commitments and policies

Guidance on Criterion 1

Under Criterion 1, an export will be assessed against both the legal obligations and non-legally binding commitments Aotearoa New Zealand has undertaken in respect of disarmament, arms control and non-proliferation. Relevant policies will also be taken into account to ensure that the export would be consistent with Aotearoa New Zealand's broader approach to these issues.

Legal obligations

Legal obligations relevant for Criterion 1 include the international disarmament and non-proliferation treaties Aotearoa New Zealand is party to, related domestic legislative or regulatory requirements, and obligations contained in resolutions of the United Nations Security Council (UNSC). They include obligations relating to weapons of mass destruction as well as conventional weapons.

An assessment under Criterion 1 will consider whether the item for export is prohibited, regulated or illegal in Aotearoa New Zealand under domestic legislation such as:

- New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987
- Chemical Weapons (Prohibition) Act 1996
- Anti-Personnel Mines Prohibition Act 1998
- Cluster Munitions Prohibition Act 2009
- Arms Act 1983

Assessment will also include determining whether the export would be consistent with Aotearoa New Zealand's obligations under treaties to which Aotearoa New Zealand is a party but which are not the subject of specific implementing legislation. These include:

- Arms Trade Treaty (2014)
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons) (1980) and its Protocols

Assessment of Aotearoa New Zealand's international obligations under Criterion 1 may also engage other binding international obligations such as international humanitarian law, although international humanitarian law considerations are primarily addressed under Criterion 2.

Non-legally binding commitments

Aotearoa New Zealand has signed up to a number of non-legally binding commitments in the field of disarmament, arms control and non-proliferation which will be taken into account in the assessment of any proposed export. These include the guidelines and best practices adopted at meetings of states party to the Arms Trade Treaty and by members of the international control regimes set up under the Wassenaar Arrangement, Missile Technology Control Regime, Australia Group and Nuclear Suppliers Group.

Commitments also include those made in international political declarations and national or joint statements on arms control, disarmament or non-proliferation, which may have implications for the assessment of the proposed export item, its end user and/or its potential end-use. For example, the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas (2022) is a non-legally binding commitment.

Relevant policy

Assessments will also consider whether the proposed export is consistent with Aotearoa New Zealand's broader policies on disarmament, arms control and non-proliferation. For example, the position taken by the government on autonomous weapons systems will be taken into account as a relevant policy. Relevant policies can be found on the disarmament section of the Ministry website at mfat.govt.nz/peace-rights-and-security/disarmament

Criterion 2. Consistency with Aotearoa New Zealand's obligations, commitments and policies regarding fundamental principles of international law, as well as international human rights law and international humanitarian law

Guidance on Criterion 2

Under Criterion 2, an export and its intended use is assessed against Aotearoa New Zealand's obligations and commitments regarding fundamental principles of international law, international human rights law and international humanitarian law. Relevant policies will also be taken into account to confirm an export or intended use is consistent with Aotearoa New Zealand's policy positions to these issues.

Legal obligations

Legal obligations relevant to Criterion 2 include a wide range of international legal instruments that Aotearoa New Zealand is party to, principles of customary international law; related domestic legislative or regulatory requirements; and obligations contained in resolutions of the United Nations Security Council. They include obligations covered by the broad framework of international law, as well as international human rights law and international humanitarian law (which establishes rules around the conduct of war to limit the effects of armed conflict).

Assessment under Criterion 2 can include the country or public authority's stability, and where relevant, the success of any previous mitigation efforts applied by Aotearoa New Zealand or close international partners when cooperating with the country or authority.

An assessment under Criterion 2 will consider whether a proposed export would, or would be likely to, be used in the commission of breaches of Aotearoa New Zealand's primary obligations under general international law. It will also consider whether it is lawful or appropriate to provide support to the end user (regardless of what the proposed export is). This criterion will also assess secondary obligations which place Aotearoa New Zealand at risk of being complicit in other states' internationally wrongful acts or breaches of international law. This assessment can include the state or end user's stability and human rights record.

Difference between primary and secondary legal obligations

Aotearoa New Zealand, like all states, has primary legal obligations which derive from signing up to treaties or through customary international law (general practice accepted as law). These obligations apply directly to Aotearoa New Zealand. They can range in nature from requiring action, to prohibiting conduct or recognising rights. Primary legal obligations are vital to ensuring consistency with international law, as all states, not just Aotearoa New Zealand, are expected to comply with and fulfil their international legal obligations in good faith.

Secondary legal obligations are intended to reinforce primary legal obligations by ensuring that states do not aid or assist another state to breach its primary international legal obligations. In the context of export controls, the concern as it is sometimes expressed is whether a state, by permitting an export, could be in breach of its international obligations because the ultimate recipient of that export may engage in unlawful acts. The allegation is sometimes put that a state is "complicit" in that unlawful act. Complicity is a very serious allegation. In order to be complicit, a state must have:

- Done something (e.g. issued a permit) which materially facilitated the unlawful act by the other state; and
- Done so with the intention to materially facilitate that act, or knowledge to a virtual certainty that issuing the permit would materially facilitate the unlawful act.

Examples of primary and secondary legal obligations in the export controls space

Primary legal obligations

- Aotearoa New Zealand has primary legal obligations under United Nations Security Council resolutions not to export goods in breach of sanctions, or deal with particular entities or states in certain ways. Contravening these sanctions would be a breach of Aotearoa New Zealand's primary obligations under international law.
- The prohibition on genocide is what is known as a peremptory norm of international law, and so is binding on all states whether or not they are parties to the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) (1948). This status means that states must:
 - Cooperate to bring to an end through lawful means any serious breach of the prohibition; and
 - Not recognise as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. This prohibition places a primary legal obligation on Aotearoa New Zealand to act as outlined, even if Aotearoa New Zealand is not the state engaging the prohibition.
- International humanitarian law, also known as the law of armed conflict, regulates the conduct of parties engaged in an armed conflict. Under international humanitarian law, there is a range of obligations that apply to states involved in an armed conflict, including that parties to the conflict must take all feasible precautions to minimise harm to civilians and must not carry out indiscriminate attacks. Aotearoa New Zealand would be in breach of international humanitarian law by knowingly issuing a permit for an export where this would be encouraging, aiding or assisting in violations of international humanitarian law by a party to a conflict.

Secondary legal obligations

- The International Covenant on Civil and Political Rights (ICCPR) (1966) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Aotearoa New Zealand would likely be complicit and in breach of its secondary legal obligations by issuing a permit for an export where:
 - This would materially facilitate the unlawful act by the other state; and
 - There was an intention to materially facilitate a foreign state breaching its obligations under the ICCPR or CAT.

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- Aotearoa New Zealand has a range of international obligations in respect of gender equality and women's empowerment, and in respect of the prohibition of sexual and gender-based violence in armed conflict¹, Aotearoa New Zealand would likely be in breach of its secondary legal obligations by issuing a permit for an export where:
 - This would materially facilitate an unlawful act by the other state; and
 - There was an intention to materially facilitate a foreign state breaching its obligations in these areas.

Sources and instruments of international law

Relevant sources and instruments of international law in relation to this criterion include, but are not limited to, the following:

General international law

- Customary international law
- United Nations Charter (1945) (including basis for United Nations Security Council Resolutions)
- International Law Commission, Draft Articles on State Responsibility (2001)

International human rights law

- International Covenant on Civil and Political Rights (ICCPR) (1966)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Convention on the Rights of the Child (CRC) (1989)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
- Convention on the Rights of Persons with Disabilities (CRPD) (2006)
- Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) (1948)
- Optional protocols to the above treaties that have been adopted by Aotearoa New Zealand

• ¹This includes United Nations Security Council, Resolution 1325 on women, peace and security (2000) – the landmark resolution which recognises the disproportionate and unique impact of armed conflict on women and girls.

International humanitarian law

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (1949)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (1949)
- Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (1949)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977)
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (2005)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (1972)
- Convention on Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980)
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Hague Protocol for the Protection of Cultural Property) (1954)
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999)
- Convention on Cluster Munitions (2008)
- Rome Statute of the International Criminal Court (1998)
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989)

The Arms Trade Treaty (2014) discussed in the Guidance to Criterion 1 is also relevant to the assessment of consistency with international human rights law and international humanitarian law under Criterion 2.

Non-legally binding commitments

Aotearoa New Zealand has signed up to a number of non-legally binding commitments in the field of international human rights. These include:

- Universal Declaration of Human Rights (1948)
- United Nations Declaration on the Rights of Indigenous Peoples (2007)
- Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008)

Policy considerations

Assessments under Criterion 2 will consider whether the proposed export is consistent with Aotearoa New Zealand's broader policies and commitment to promoting and protecting human rights.

For example, Aotearoa New Zealand's position is that the death penalty is the ultimate form of cruel, inhuman and degrading treatment. Aotearoa New Zealand has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment, including the death penalty, in all cases and under all circumstances, including in response to threats to national security. This reflects Aotearoa New Zealand's position that the use of torture, cruel, inhuman and degrading treatment and punishment is prohibited under the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

The New Zealand International Human Rights Action Plan 2019-2023: Advocacy Priorities sets out our international human rights engagement priorities. An assessment under Criterion 2 will consider whether a proposed export would be consistent with Aotearoa New Zealand's commitment to these human rights priorities. The United Nations Guiding Principles on Business and Human Rights recognise that businesses have a responsibility to respect human rights and should work with states to ensure they comply with international human rights principles in the course of their business activities. An assessment under Criterion 2 will consider whether a proposed export would be consistent with Aotearoa New Zealand's commitment to ensuring businesses and other private sector actors promote and respect human rights.

Relevant policy documents, include but are not limited to, the following:

- New Zealand International Human Rights Action Plan 2019 – 2023²
- United Nations Guiding Principles on Business and Human Rights³

² Ministry of Foreign Affairs and Trade New Zealand International Human Rights Action Plan 2019-2023: Advocacy Priorities, (2019).

³ United Nations Human Rights Council United Nations Guiding Principles on Business and Human Rights, 1 January 2012.

Criterion 3. Consistency with Aotearoa New Zealand's other international obligations, commitments and policies

Guidance on Criterion 3

Under Criterion 3, an export will be assessed against a wide range of other international obligations and commitments applying to Aotearoa New Zealand (not including those covered in Criteria 1 and 2). These obligations and commitments engage a range of specific and thematic considerations which may be relevant to particular or specialised exports. Relevant policies will also be taken into account to ensure that the export would be consistent with Aotearoa New Zealand's broader approach to these issues.

Legal obligations

Legal obligations relevant to Criterion 3 include a number of international legal instruments that Aotearoa New Zealand is party to, and related domestic legislative or regulatory requirements.

As with Criterion 2, assessments under Criterion 3 require consideration of both primary and secondary international legal obligations. Aotearoa New Zealand has a wide range of primary legal obligations arising from relevant conventions covering:

- Use of Force
- Terrorism and transnational organised crime
- Environmental law
- Law of the sea
- Maritime law
- Space
- Antarctica
- Labour conventions
- International trade

Of particular note is the large number of legal obligations arising in respect of hazardous substances and waste. Exports of these products are highly regulated.

In addition to the above, the United Nations Charter outlines a wide-ranging prohibition against the use of force, requiring that all states refrain from both the threat of and use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Secondary legal obligations may also be invoked where a proposed export would place Aotearoa New Zealand at risk of being complicit in other states' internationally wrongful acts or breaches of international law (see Guidance on Criterion 2).

Instruments of international law

Relevant instruments of international law in relation to Criterion 3 include, but are not limited to, the following:

Use of Force

- United Nations Charter (1945)

Terrorism and transnational organised crime

- United Nations Security Council resolutions imposing sanctions
- United Nations Convention against Transnational and Organized Crime (2000)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)
- International Convention against the Taking of Hostages (1979)
- International Convention for the Suppression of the Financing of Terrorism (1999)
- International Convention for the Suppression of Terrorist Bombings (1997)
- Convention on the Physical Protection of Nuclear Material (1979)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
- International Convention on the Suppression of Acts of Nuclear Terrorism (The Nuclear Terrorism Convention) (2005)
- Convention for the Suppression of Unlawful Seizure of Aircraft (1970)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)

Environmental law

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)
- Cartagena Protocol on Biosafety (2000)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)
- Convention on the Law of the Non-Navigational Uses of International Watercourses (1973)
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1997)
- Convention on Biological Diversity (1992)
- United Nations Framework Convention on Climate Change (1992)
- International Convention for the Regulation of Whaling (1946)
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1992)

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- Montreal Protocol on Substances that Deplete the Ozone Layer (and protocols) (1987)
- Paris Agreement (2015)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
- Stockholm Convention on Persistent Organic Pollutants (2001)
- Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention) (1995)
- Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat (1971)
- United Nations Convention to Combat Desertification (1994)

Law of the sea

- United Nations Convention on the Law of the Sea (UNCLOS) (1982)
- United Nations Fish Stocks Agreement (1995)
- Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994)

Maritime law

- International Convention for the Prevention of Pollution from Ships (MARPOL) (1973)
- Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (London Convention) (1972)
- International Convention for the Safety of Life at Sea (SOLAS) (1965)
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978)
- Maritime Labour Convention (2006)

Space

- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) (1967)
- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement) (1968)
- Convention on International Liability for Damage Caused by Space Objects (Liability Convention) (1972)
- Convention on Registration of Objects Launched into Outer Space (Registration Convention) (1974)

Antarctica

- Antarctic Treaty (1959)
- Protocol on Environmental Protection to the Antarctic Treaty (1991)
- Convention for the Conservation of Antarctic Marine Living Resources (1982)
- Agreed Measures for the Conservation of Antarctic Fauna and Flora (1964)
- Convention for the Conservation of Antarctic Seals (1972)

Labour Conventions

- International Labour Organization (ILO) conventions to which Aotearoa New Zealand is a party

International trade

- General Agreement on Tariffs and Trade (GATT) (1947)
- General Agreement on Trade in Services (GATS) (1995)
- Trade Related Aspects of Intellectual Property Rights Agreement (1994)
- Agreement on Government Procurement (1979)
- Information Technology Agreement (1996)
- Individual free trade agreements to which Aotearoa New Zealand is a party

Non-legally binding commitments and relevant policy

Aotearoa New Zealand has signed up to a number of non-legally binding international political or regional commitments in these areas. These include commitments made in international political declarations and national or joint statements in the international sphere, which may have implications for the assessment of the proposed export item, its end user and its potential end-use. More information about particular areas can be found on relevant sections of the Ministry's website: www.mfat.govt.nz

Criterion 4. Whether the export may compromise Aotearoa New Zealand's national interests including, without limitation: security, international relationships and international reputation; and whether it may compromise the Government's obligations under the principles of the Treaty of Waitangi/Te Tiriti o Waitangi

Guidance on Criterion 4

Under Criterion 4, consideration will be given to the impact an export may have on Aotearoa New Zealand's security and national interests.

This will include consideration of whether an export may directly or indirectly challenge the security of Aotearoa New Zealand, for example, by contributing to capabilities that might be used against us, or to the conduct of transnational organised crime that targets or affects us. Consideration will also be given to whether the proposed export is consistent with Aotearoa New Zealand's broader national interests, including in preserving and strengthening the international rules-based order. For example, where relevant, an assessment may consider whether a proposed export contributes to Aotearoa New Zealand's interest in supporting maritime security and the freedom of navigation under the law of the sea.

The extent to which the proposed export may affect, directly or indirectly, Aotearoa New Zealand's international relationships is a further consideration under Criterion 4. This might include, for example whether the decision to approve or deny an export might prejudice our relationship with a third country. Such an assessment could include consideration of whether permitting an export would be consistent with decisions made by like-minded partners (for example, partners that are also members of the multilateral export controls regimes), or whether it would undercut decisions made by them to deny similar exports. Sanctions applied by other countries may be a relevant factor taken into account as part of the assessment process.

Consideration of whether a proposed export may compromise Aotearoa New Zealand's international reputation also comes within Criterion 4. This reputation affects Aotearoa New Zealand's ability to maintain international relationships, and to pursue and achieve national interests in multilateral settings. Protecting it is important. Even if a proposed export does not breach international law or directly contribute to a gross violation of human rights, it may be that a denial is still appropriate to avoid a negative impact on Aotearoa New Zealand's international reputation. Any such assessment will include consideration of Aotearoa New Zealand's interest in making consistent, rules-based decisions that do not unnecessarily hinder trade and that are understandable for exporters and their offshore consumers.

Where appropriate, assessment under Criterion 4 should also include consideration of the Māori interests engaged by the regime in respect of any particular export and consideration of whether or not any such interest or interests are protected under the principles of the Treaty of Waitangi/Te Tiriti o Waitangi.

Criterion 5. The impact the export is expected to have on peace, security and stability

Guidance on Criterion 5

While assessment under Criterion 4 will focus on the impact an export may have on the security or national interests of Aotearoa New Zealand, Criterion 5 will consider its potential impact on peace, security and stability elsewhere, including in relation to our security interests. In some circumstances, that impact may have been the subject of existing scrutiny or assessment. For example, in some situations the United Nations Security Council (UNSC) may have already mandated an arms and equipment embargo on relevant exports to a particular destination or end-user. (Such mandates would also be considered under Criterion 2 if relevant to the export in question.)

Not all situations of conflict, insecurity or instability are the subject of UNSC resolutions, however. As a result, the assessment under Criterion 5 has an important role to play in ensuring that the impact of any controlled export on peace, security and stability is taken into account.

Whether the government has a policy against exporting controlled items to the destination in question, or has expressed concern about the actions of a destination state or end-user that are relevant to the export in question will be considered under Criterion 5. The government's decision in 2022 to sanction Russia, and its position on the provision of assistance to Ukraine, are examples of policies relevant to the application of this Criterion.

For states not subject to a specific government policy, assessment under Criterion 5 will still include a range of factors. For example, whether the export destination or end-user is involved in an inter- or intra-state conflict, is known or suspected to sponsor terrorism, or has threatened the security of another state or group of states will be relevant considerations.

In addition, the assessment may consider whether the proposed export would help support a state's ability to defend itself in accordance with the United Nations Charter, or to legitimately ensure its security (for example, by strengthening its ability to monitor and patrol its maritime environment or to communicate securely). Consideration may also be given to whether the export may introduce, contribute to, or exacerbate a destabilising imbalance in the capabilities of two potential adversaries, or address an existing imbalance.

Criterion 6. Whether the export may undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter of strategic and military end-use goods

Guidance on Criterion 6

An assessment will take into account the risk of harm, if any, from an export. This includes risks of harm that fall short of the threshold applicable under other Criteria. Criteria 2 and 3, for example, cover international obligations and commitments to avoid a range of harms, some of which have a very high threshold for non-compliance. For some exports, however, even though the potential harm (or the degree of certainty about whether a harm may eventuate) does not meet the relevant thresholds under Criteria 2 and 3, assessors may determine that a decision to approve the export would nevertheless undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter. The determination would be discretionary but would require more than a purely theoretical link between the potential harm and the export.

Under Criterion 6 the question of whether there is reputational risk by association – in other words, reputational risk resulting not from the export itself but from other behaviours of the end user – will also be considered. This is particularly relevant to questions of human rights abuses and repression (behaviours relating to peace, stability and security would be considered under Criterion 5). Under Criterion 6, a determination may be made to decline an export which, for example, in the Secretary of Foreign Affairs and Trade's view, would be to a disreputable end-user even where the specific export itself may not be problematic. In conducting this assessment, consideration will be given to any parent organisation or other associated organisations of the end-user and, where relevant, to the state itself. The assessment would include consideration of whether the concerning behaviour consists of isolated incidents or is systemic; whether procedures are in place or being put in place to prevent occurrences and to undertake investigation and enforcement of alleged abuses or repression; and whether the behaviour appears to be 'endorsed' by the state (for example, through legislation or through a demonstrated lack of will to address it).

If the degree of reputational risk by association is determined to be low, it is unlikely to lead to a permit denial in the absence of other factors of concern. Where reputational risk is assessed as medium, there may be occasions where it is offset by positive factors under other criteria such as Criterion 5. As an illustration, an export to a maritime entity associated with an armed force that presents reputational risk and is also part of a repressive regime, may be offset by the contribution of the export to the ability of that entity to counter transnational organised crime including piracy, drugs and people smuggling. In circumstances where these positive factors outweigh the reputational risk, the export permit would be likely to be approved.