**JAMES O'DONOVAN**

# Just Listen: Accounting for the Public Interest in the Implementation of New Zealand's International Commitments

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***Abstract***

*This paper seeks to evaluate the extent to which the public's interests are accounted for in the implementation of international agreements. In doing so it looks first to the impact of two relatively orthodox multilateral organisations: the United Nations Security Council (UNSC) and the World Trade Organization (WTO). Their influence, New Zealand's role within them and the process through which the instruments they create are implemented are analysed. Following this, the impact of a more unorthodox organisation, IOSCO, I sand the role that the public interest plays in its application in New Zealand is examined.*

*Analysis of these organisations brings to light various issues with New Zealand's implementation processes. UNSC resolutions, applied through regulations, are needlessly devoid of public input. This problem may be solved through the adoption of a pre-publication requirement for regulations implementing international instruments. Comparatively, WTO agreements, that are subject to the treaty examination process, adequately allow for public input in light of the various constraints the agreements' nature imposes. However, while the implementation of orthodox instruments is flawed in some regards, it pales in comparison to the failure to scrutinise soft law arrangements. The growing influence of these organisations and the lack of appropriate mechanisms to examine them is cause for concern. They impact New Zealand's domestic law without giving the public an opportunity to adequately influence their application. Accordingly, this paper proposes that, just as mechanisms have been developed for dealing with binding, orthodox international agreements, the same must be done for soft law arrangements to ensure that the public's interests are accounted for.*

***Word Count***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 12,194 words.*

***Subjects and Topics***

*International Law, United Nations Security Council, World Trade Organization, Executive Treaty Action, IOSCO, Public Interest*

# *I Introduction*

The influence of international organisations on New Zealand's legislation is substantial. Between July 2015 and June 2018 alone Parliament enacted seven bills that implemented international agreements.[1] In the same period, 92 regulations that affected international obligations were created.[2] This growing influence has led preeminent scholars such as Sir Kenneth Keith to stipulate the need for greater scrutiny of how multilateral instruments are implemented into domestic law.[3] In New Zealand, decision-makers have responded to these concerns with some calling for reforms and greater scrutiny of international agreements.[4] Globally there is a growing trend of reform as both Australia and Canada have recently considered changes to their implementation process.[5]

In light of these developments, this paper seeks to expose issues with New Zealand's current system and provide possible solutions. In doing so, the capacity of international agreements' various implementation processes to hear and account for the public's interests will be considered. As international organisations influence New Zealand's domestic law, it is integral to consider the extent to which citizens may scrutinise and contribute to their implementation. Thus, the influence of a range of international organisations, their impact on New Zealand and the extent to which the public's interests are accounted for in their application will be examined.

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1 Mark Gobbi "Treaty Action and Implementation" (2016) 14 NZYIL 311 at 311; Mark Gobbi "Treaty Action and Implementation" (2017) 15 NZYIL 243 at 243; and Mark Gobbi "Treaty Action and Implementation" (2018) 16 NZYIL 389 at 389.

2 Gobbi "Treaty Action and Implementation" (2016), above n 1, at 312; Gobbi "Treaty Action and Implementation" (2017), above n 1, at 244; and Gobbi "Treaty Action and Implementation" (2018), above n 1, at 390.

3 Kenneth Keith "New Zealand" in Ben Saul and others (eds) T*he Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, London, 2019) 796 at 821.

4 International Treaties Bill 2000 (67-1).

5 "Blind agreement: reforming Australia's treaty-making process" (25 June 2015) Parliament of Australia <www.aph.gov.au/>; and "Canada Announces Policy to Table International Treaties in House of Commons" (25 January 2008) Government of Canada <www.canada.ca/en.html>.

To begin, the influence and implementation of the United Nations Security Council (UNSC) and the World Trade Organization (WTO) will be analysed. Both have had a significant contemporary impact making them ideal case studies.[6] Additionally, they are applied domestically in different ways: UNSC resolutions are implemented through regulations while WTO agreements are subject to the treaty examination process.

In examining their impact and processes, it is clear that there are deficiencies in the consideration of the public interest in the domestic application of both. UNSC resolutions are implemented by the Executive, leaving little scope for Parliamentary and public scrutiny. In a similarly problematic manner, the process for WTO agreements limits the opportunity for citizens to contribute. They are concluded prior to their examination, restricting the public's decision to a simply agreeing or disagreeing with their implementation. However, such deficiencies must be balanced with considerations of practicality. Considerations of the restraints on the decision-making process and the approaches of other jurisdictions indicate whether reforms are possible. Accordingly, this paper argues that the implementation of WTO agreements provides ample opportunity for public input. Comparatively, regulations that apply UNSC resolutions are devoid of accounts of citizens' interests, an approach that lends itself too far toward practicality. Instead, the creation of regulations that implement international instruments should be pre-published, exposing them to the public before their completion and allowing citizens to contribute.

Beyond these hard law institutions, the pluralisation of the international system means there is a plethora of multilateral organisations affecting New Zealand in a variety of ways.[7] While some like the UNSC and WTO are more orthodox, providing binding agreements that may be implemented via well-established processes, others are not. Organisations such as the International Organization of Securities Commissions (IOSCO) have had a

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6 Gobbi "Treaty Action and Implementation" (2016), above n 1, at 316 and 341; Gobbi "Treaty Action and Implementation" (2017), above n 1, at 248, 271 and 272; and Gobbi "Treaty Action and Implementation" (2018), above n 1, at 414, 415 and 435.

7 See: Martti Koskenniemi "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" (2006) 2 (Chapter XII) UNYBILC 175.

substantial effect on New Zealand's domestic law, yet are not based on any binding instruments. These unorthodox organisations are cause for concern as New Zealand lacks any systems and forums which allow for public input in their implementation. There is a desperate need for reform. The influence afforded to non-binding, soft law organisations and the lack of due process for their implementation reduces the public's ability to contribute to the laws which govern them. Accordingly, it must become common practice for Members of Parliament (MPs) to make the influence of these organisations known. They must identify what they are, where they come from and their significance in Parliamentary debates to expose them to public scrutiny.

## *II The Public Interest*

Before examining the extent to which the public interest is accounted for in the implementation of international agreements, it is important to ascertain both what the public interest is and why it is important.

The considerations of the public's interests are an integral aspect of the legitimacy of the New Zealand Government. Public input in decision-making can come in many forms and has been defined as "any form of public input that conveys the views, experiences, behaviour and knowledge of those in society who are not elected figures… in government."[8] These contributions play an important role in improving policy outcomes and enhancing democracy.[9] John Key, once Prime Minister of New Zealand, has stated that the public and the government need to work together as "we know we don't have all the answers".[10] Even where complex issues, ordinarily left to experts, are discussed the public can provide valuable insights.[11]

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8 Jennifer Lees-Marshment *The Ministry of Public Input Integrating Citizen Views into Political Leadership* (Palgrave Macmillan, London, 2015) at 5.

9 At 2.

10 At 2.

11 Janet Vinzant Denhardt and Robert Denhardt *The New Public Service: Serving, Not Steering.* (4th ed, Routledge, New York, 2015) at 50.

The public interest's importance has been set out and discussed by various academics. Denhardt and Denhardt in establishing a reformed and improved model of governance which they call the "New Public Service" believe that the public interest must play a central role.[12] They state: "the activity of establishing a vision or direction, of defining shared values, is something in which widespread public dialogue and deliberation are central."[13] Accordingly, they submit that to improve governance, the public interest and consultation with citizens are integral.[14] In a similar vein, Dennis Thompson wrote on what he called the democratic objective. He believed that to fulfil this objective it was essential to attain "rules and decisions which satisfy the interests of the greatest number of citizens."[15] These are just some of many academics who have written on the need for the centrality of the public's voice in decision-making and for their interests to be served.

This paper looks to apply these conceptions of the public interest with the view that as a representative democracy, the general public must have a voice in New Zealand's decision-making. As noted by numerous scholars, accounting for the public interest in and allowing for its influence is an integral part of a legitimate democracy.[16] To fulfil its democratic objective the rules and decisions the New Zealand Government makes must satisfy the interests of the greatest number of citizens. Thus, operations of Government that do not allow for public input beyond elections, or limit the ability for citizens to be heard are undesirable. Given the importance of considerations of the public interest, it is integral to evaluate the extent to which it is accounted for in the application of international agreements domestically. As international organisations impact the lives of New Zealanders, the public's ability to be heard is important for both improving and legitimising decisions made regarding their implementation.

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12 At 1.

13 At 66.

14 At 218.

15 Dennis Thompson *The Democratic Citizen: Social Science and Democratic Theory in the Twentieth Century* (Cambridge University Press, London, 1970) at 184.

16 Denhardt and Denhardt, above n 11, at 50.

For the purpose of this paper, a normative model of the public interest will be applied. While there are numerous academics who believe in a greater role for the public interest, there are different schools of thought on how it should be measured and applied. For example, political process theorists see the public interest as a process and are more concerned with arriving at the public interest than what it is.[17] This paper will apply a normative model, looking to the public interest as a moral and ethical standard for decision-making.[18] Under the normative model, academics such as Cassinelli have framed the public interest as a standard for goodness in decision-making.[19] Accordingly, New Zealand's approach to the implementation of international agreements will be analysed looking to how effectively it takes account of the public interest.

Addressing the role of public input in New Zealand's handling of multilateral instruments is particularly important due to the Treaty of Waitangi. In *New Zealand Māori Council v Attorney-General* the Court of Appeal stated that the Crown has an obligation of partnership with Māori.[20] As a result, the Crown must make informed decisions that require consultation.[21] To act consistently with the Treaty, the New Zealand Government must therefore take account of Māori interests and consult with them. Thus, the Government must not just account for public input to create better policy or democracy but because they have a duty under the Treaty of Waitangi to do so. Any inhibition on the Government's ability to both represent and account for Māori interests is a violation of this duty reflecting the importance of public input in New Zealand.

The Government's capacity to adequately account for and consult Māori regarding international agreements is especially important given the dissatisfaction with its efforts in other areas. Carwyn Jones has written extensively on the role of the Treaty in New Zealand. He writes that to adequately account for the kāwanatanga and tino rangatiratanga, or

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17 At 72.

18 At 70.

19 CW Cassinelli "The Public Interest in Political Ethics" in CJ Friedrich (ed) *Nomos V: The Public Interest* (Atherton Press, New York, 1962) 44 at 47.

20 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (COA) at 665.

21 At 684.

partnership, the Treaty ascribes, the principle must not be made to fit within existing constitutional arrangements.[22] Instead, he calls for recognition of Māori law, legal institutions and processes and consultation beyond input into matters of constitutional importance.[23] There is a focus in New Zealand on the need for greater consultation and recognition of the public's interests, particularly for Māori. This paper, in addressing the extent of public input in the context of the implementation of international agreements, seeks to contribute to such discourse.

## *III The UNSC*

Having established the importance of the public interest, the first case study to be addressed is the UNSC. The UNSC is a powerful body within the United Nations (UN) established with a primary role in maintaining international peace and security.[24] To do so, it has been accorded certain powers over UN members. These include the powers to: determine the existence of a threat to peace or act of aggression, call on parties to comply with provisional measures and decide what non-force measures it can request members apply.[25]Additionally, the UNSC reserves the right to take action by force,[26] under which UN members may be required to provide armed forces, assistance and facilities.[27] These actions, taken by the UNSC, are binding on UN members per Article 48 of the UN Charter giving it significant authority and law making power.[28]

New Zealand is a member of the UN, meaning decisions made within the UNSC directly impact it and its citizens. An example of this impact is the effects of Resolution 2374 of the UNSC. The resolution ordered UN members to deny the entry of individuals designated

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22 Carwyn Jones "Tāwhaki and Te Tiriti: a Principled Approach to the Constitutional Future of the Treaty of Waitangi." (October 2013) 25(4) NZULR 703 at 715.

23 At 715.

24 Charter of the United Nations, art 24.

25 Articles 39, 40 and 41.

26 Article 42.

27 Article 43.

28 Article 48.

by a sanctions committee consisting of all members of the UNSC.[29] Additionally, the assets of entities and individuals identified by the committee were to be frozen.[30] The resolution was dutifully adopted by New Zealand as the Executive Council created the United Nations Sanctions (Mali) Regulations 2018. The regulations implement the resolution, giving the Minister of Foreign Affairs the jurisdiction to interpret and apply the various exceptions provided by the UNSC.[31] However, even the application of the exceptions is subject to the approval of the UNSC.[32] Thus, New Zealand bars the entry of certain individuals and has frozen their assets through its obligations as a UN member.

Resolution 2374 is one of many resolutions that has affected New Zealand's domestic law. Between July 2015 and June 2018, UNSC resolutions led to the passing of 11 sets of regulations.[33] Accordingly, the UNSC has a significant impact on New Zealand. Beyond this, its influence is felt by New Zealanders who have faced penalties for violating the rules it sets. For example, in *New Zealand Customs Service v Pacific Aerospace Ltd* a New Zealand company was fined $74,805 for violating the United Nations Sanctions (Democratic People's Republic of Korea) Regulations 2006.[34] One of their aircraft was exported to the Democratic People's Republic of Korea and the company sent parts for its repair on three occasions.[35] The regulations which the company violated were implemented as a result of resolution 1718 of the UNSC,[36] exemplifying the impact that UNSC decisions can have on New Zealanders.

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29 *Resolution 2374* SC Res 2374 (2017), art 1.

30 Article 4.

31 United Nations Sanctions (Mali) Regulations 2018, reg 7.

32 Regulation 7(3).

33 Gobbi "Treaty Action and Implementation" (2016), above n 1, at 341; Gobbi "Treaty Action and Implementation" (2017), above n 1, at 271 and 272; and Gobbi "Treaty Action and Implementation" (2018), above n 1, at 414, 415 and 435.

34 *New Zealand Customs Service v Pacific Aerospace Ltd* [2018] NZDC 5034.

35 At [12]

36 United Nations Sanctions (Democratic People's Republic of Korea) Regulations 2006 (preamble).

Given the breadth of the powers available to the UNSC and its impact on New Zealand, it is important to ascertain first the influence afforded to New Zealand within it and secondly how the New Zealand publics' interests are accounted for.

### *A New Zealand and the UNSC*

The nature of international organisations means that states cannot always pursue their own interests. Power dynamics and institutional biases ensure that on the international stage, not all states are equal. The UNSC is no different. As this section aims to illustrate, New Zealand is often unable to influence decision-making within the UNSC. Thus, UNSC resolutions may affect New Zealanders, without their elected officials having meaningfully contributed to their content. Accordingly, the implementation process for such resolutions is vital for ensuring the interests of its citizens are accounted for.

The UNSC has a few key features regarding its composition and decision-making which diminish New Zealand's influence. It is comprised of five permanent members who each possess the right to veto any decision made by the ten other non-permanent members.[37] The latter are elected by the UN General Assembly for two year terms.[38] The non-permanent positions are attributed according to regions whereby five must be from African and Asian states, one from Eastern European states, two from Latin American States and two from Western European and other states.[39] New Zealand is a part of the latter region.[40] As such, it is not a permanent member but can be elected to the UNSC. It has been elected on four occasions, most recently for 2015-2016.[41]

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37 Charter of the United Nations, Article 27(3).

38 Article 23.

39 *Question of Equitable Representation on the Security Council and the Economic and Social Council* XVIII Un doc A/RES/1991 (17 December 1963), art 3.

40 *General Assembly official records, 69th session: 25th plenary meeting Thursday, 16 October 2014, New York* LXIX Un doc A/69/PV.25 (16 October 2014) at 3.

41 "New Zealand" (Accessed 28 May 2020) United Nations Security Council <https://www.un.org/en/>.

New Zealand's reliance on election severely limits its say in the UNSC's decision-making process. As noted, New Zealand is not one of the UNSC's five permanent members. This means that to be a part of the UNSC and have any say in the decisions to which it is subject, New Zealand must be elected. The chances of it being elected are however limited by New Zealand's regional group. Of the 29 states in the Western European and others group, only two may be elected.[42] It is, therefore, no surprise that New Zealand has been on the UNSC for only seven years[43] of the 75 years that it has operated.[44] When a state is not on the UNSC it is still afforded certain rights. For example, any member of the UN may participate in discussions in the UNSC, if the latter believes the state's interests are affected.[45] However, even then they cannot vote and are accordingly afforded little influence on the decisions the UNSC reaches.[46] Thus, as a non-permanent member, New Zealand's influence on the UNSC is minor.

Even when New Zealand is elected to the UNSC, its powers are reduced. Non-permanent members of the UNSC may vote on the issues before them, however, permanent members have the right to veto any decision.[47] As such, even when elected, New Zealand's voice is limited by those of the permanent members. This power imbalance is made worse by the functions of agenda-setting and policy where the permanent members may possess significant control. Before a resolution is even shared with the rest of the Council, the permanent members will have drafted, negotiated, and agreed on its contents.[48] In this way, while elected members have a vote, they are afforded less influence in setting the agenda. Additionally, the permanent member's rights of veto make it impossible to contravene their interests.[49] For example, during New Zealand's term on the UNSC from 1993 to 1994,

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42 "United Nations Regional Groups of Member States" (Accessed 28 May 2020) Department for General Assembly and Conference Management <https://www.un.org/en/>.

43 "New Zealand", above n 41.

44 Charter of the United Nations, art 111.

45 Article 31.

46 Article 31.

47 Article 27(3).

48 "UN Security Council Working Methods: Penholders and Chairs" (14 May 2020) Security Council Report <www.securitycouncilreport.org/>.

49 Jim Mclay "Breaking Giant Waves: New Zealand and the Security Council" (2011) 36(2) New

they called for more action to be taken in Rwanda. The UNSC's response was minimal as three of the five permanent members disagreed.[50] Overall, there is an institutionalised imbalance between the permanent and elected members on the UNSC which impacts New Zealand's influence on its decision-making.[51]

### *B Implementation of UNSC Resolutions*

Despite its minimal contributions within the UNSC, New Zealand, as a member of the UN, is required to implement all resolutions it creates.[52] However, it can wield some, limited, influence in their domestic applications as there is some scope for non-compliance. It has been argued that states have the legal right to disagree with a UNSC decision that contravenes the UN Charter or general international law.[53] This has been put into practice, for example, when 53 African states refused to apply sanctions imposed on Libya as they were thought to contravene the UN Charter and international law.[54] This is based on the idea that if the UNSC violates the UN Charter it is a breach against all UN member states enabling counteractions.[55] Additionally, if the UNSC infringes on general international law, such as the customary obligations for the protection of human rights, then the member whose rights have been breached may act.[56] This means that if New Zealand decided that the UNSC acted beyond the scope of its powers, it reserves the right to challenge the resolution's implementation.

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Zealand International Review 14 at 15.

50 At 15.

51 Jeremy Farrall, Marie-Eve Loiselle, Christopher Michaelsen, Jochen Prantl and Jeni Whalan "Elected Member Influence in the United Nations Security Council" 2020) 33(1) LJIL 101 at 102.

52 Charter of the United Nations, art 48.

53 Antonios Tzanakopoulos *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford University Press, Oxford 2011) at 174.

54 At 125–126.

55 At 185.

56 At 185.

The process of implementing UNSC resolutions domestically provides states with an opportunity to decide how the resolution should be interpreted and applied. This can have a significant influence on its domestic impact. This impact can be seen, for example, in Sweden's implementation of a UNSC resolution which ordered the assets of some Swedish nationals to be frozen.[57] Sweden complied, but in doing so continued to make welfare payments to the individuals.[58] Their interpretation of the resolution impacted how it applied domestically and arguably reduced the scope of its influence. How New Zealand chooses to implement and interpret UNSC resolutions, therefore, has the potential to affect its application.

It is worth noting that New Zealand's powers in this regard are limited. First, the UNSC's powers are substantial even without acting illegally. Secondly, in interpreting a UNSC resolution there is only limited scope for determining how it applies whilst still complying with and fulfilling New Zealand's obligations under the UN Charter. Even so, New Zealand must decide how UNSC resolutions are implemented which can influence their application.

### *C The Public's Influence*

New Zealand's lack of influence within the UNSC means decisions it makes when implementing resolutions domestically provide a rare opportunity to affect their application. The, albeit minimal, sway afforded to New Zealand in the interpretation and implementation of UNSC resolutions must, therefore, be wielded appropriately. Resolutions, created with no appreciation of the wants and needs of the New Zealand public, must not be implemented in a way that is contrary to their interests. Allowing for public input into their application can go a long way to ensuring that New Zealand's minimal powers over UNSC resolutions are wielded consistently with its citizen's interests.

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57 At 117.

58 At 117.

In New Zealand, UNSC resolutions are implemented through regulations. Section 2 of the United Nations Act 1946 grants the Governor-General, acting on the advice of the Executive Council, the authority to make all regulations which are necessary to give effect to any decision made by the UNSC.[59] This means that if the UNSC creates a resolution, the Executive Council, a part of the Executive,[60] may pass regulations to implement it.

A crucial aspect of the power to create such regulations is that it increases the powers of the Executive wing of government at the expense of Parliament. Regulations by nature involve the granting of law making power from Parliament to the Executive.[61] While Parliament retains the power to disallow any regulations made, their ability to scrutinise them is diminished.[62]

The process by which UNSC Resolution 2374 was adopted in New Zealand demonstrates the limits on Parliament's ability to examine the Executive's actions. As noted, the resolution ordered members to deny individuals and entities designated by a sanctions committee entry and freeze their assets of entities. The resolution was wholly adopted by the Executive Council through the creation of the United Nations Sanctions (Mali) Regulations 2018. Accordingly, the resolution was accepted in New Zealand without any Parliamentary input.

The creation of the regulations was brought to the attention of Parliament, under s 2(3) of the United Nations Act 1946.[63] This was done through the submission of a report which was made available to Members of Parliament.[64] However, these types of reports are not

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59 United Nations Act 1946, s 2(1).

60 "The Executive Council" (Accessed 1 June 2020) Office of the Governor General <https://gg.govt.nz/office-governor-general/>.

61 David McGee "Parliamentary Practice in New Zealand" (25 August 2017) New Zealand Parliament <www.parliament.nz/en/visit-and-learn/how-parliament-works/> at Chapter 28.

62 At Chapter 28.

63 Section 41 of the Legislation Act 2012 also stipulates that all regulations must be presented to Parliament.

64 "Journals of the House of Representatives of New Zealand" (20 March 2018) New Zealand Parliament <https://www.parliament.nz/en> at vi.

Parliamentary papers. Crucially, this means they are not presented in or published by Parliament,[65] and are less likely to be brought to Members' attention.[66] To put it into perspective, in March 2018 alone there were 68 other papers submitted to Parliament alongside the report on the regulations.[67] While they were reported to Parliament, it was done in a way that reduced Parliament's ability to scrutinise them.

The issues with this process are made especially clear when compared to the process for passing an Act. Types of Acts may be formulated by the Executive,[68] however they are put through a stringent process including several debates, readings and proposed changes in Parliament.[69] In comparison, regulations passed for the implementation of UNSC resolutions are not even raised in the House of Representatives. The process through which they are made means they are not subject to public debate or input.[70] Thus, Parliament's influence on the implementation of UNSC resolutions is minimal.

Although they are introduced through regulations, UNSC resolutions are occasionally brought up for debate within Parliament. The actions taken by New Zealand's representatives can be questioned by MPs. For example, in 2006 the Minister was questioned within Parliament on New Zealand's role in assisting the people of Darfur, a subject of debate within the UNSC at the time.[71] Additionally, the Government's stance on various UNSC resolutions has been questioned such as in 2017 when the UNSC condemned the expansion of Israeli settlements in Palestine.[72] Thus, the New Zealand Government's actions on the UNSC can be raised within Parliament allowing for public scrutiny and debate by elected representatives. The issue is that discussing UNSC resolutions within Parliament is not standard practice and there is no process through which

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65 At ii.

66 See: AIJ Campbell "Laying and Delegated Legislation" (1983) PL 43.

67 "Journals of the House of Representatives of New Zealand", above n 64, at vi.

68 "Types of bills" (4 August 2004) New Zealand Parliament <www.parliament.nz/en>.

69 "Types of bills", above n 68.

70 McGee, above n 61, at Chapter 28.

71 (10 April 2006) 3738 NZPD; See also (1 July 2015) 706 NZPD; (14 October 2015) 709 NZPD at 7201 and (23 October 2014) 70 NZPD at 206.

72 (4 May 2017) 721 NZPD 17682.

they are regularly debated. Instead, it is up to individual members to take an interest in a resolution and raise it in Parliament.

It is worth noting that regulations in New Zealand are presented to the Regulations Review Committee. The committee is tasked with examining regulations and raising any concerns in Parliament.[73] However, its powers are limited as regulations are only brought before Parliament when they satisfy one or more of the grounds listed in the Standing Orders.[74] These include the regulations not being consistent with their empowering provision, unduly trespassing on personal rights and liberties and unusual or unexpected use of the powers conferred by the empowering provision among various others.[75] These grounds place significant restraints on the committee, particularly regarding regulations implementing UNSC resolutions. Section 2 of the United Nations Act 1946, the empowering provision, is broad allowing for the creation of all regulations which are necessary to give effect to any decision made by the UNSC. Thus, the committee would be unlikely to intervene or report any issue to Parliament given the wide scope given to the Executive by s 2.

Parliament's diminished scrutiny of the implementation of UNSC resolutions impacts the public's influence. Parliament plays a significant role in New Zealand's representative democracy. While its role is undefined, it has been suggested that some of its key functions include: providing a forum for airing grievances, acting as a check on the Executive and serving as an arena for party political contest.[76] The public's voice is heard through their representatives as every member is elected.[77] These members then partake in public debate meaning their decision-making, reasoning and conclusions are open to scrutiny.[78] Additionally, when legislation is created by Parliament, it is subjected to a select committee process whereby the public may make submissions on its content and have their voice

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73 Jonathan Hunt "The Regulations Review Committee" (November 1999) 10 NZLJ 402 at 403.

74 Standing Orders of the House of Representatives 2017, SO 319(1).

75 SO 319(2).

76 Geoffrey Palmer "What Is Parliament for?" (2011) 11 NZLJ 378 at 379.

77 At 378.

78 John Burrows "Legislation: Primary, Secondary and Tertiary" (May 2011) VUWLR 42(1) 65 at 66.

heard.[79] Select committees play a key role as an accountability mechanism for law making in New Zealand.[80] This means reducing Parliament's influence weakens public input on the laws that apply to them.

When regulations are made, there is little scope for the public to influence their implementation. The regulations are drafted away from the public eye. Their contents are decided by the Executive Council, whose meetings are confidential.[81] There are some constraints within the Cabinet Office Manual, requiring Cabinet approval and mentioning the desirability of consultation, but there is no mention of any consideration of the public interest or a mechanism through which citizens can contribute.[82] Thus, because the implementation of UNSC resolutions is conducted through regulations, the process by which they are applied domestically is relatively devoid of public input.[83]

New Zealand's ability to decide whether and how UNSC resolutions are implemented is wielded in a problematic manner. The lack of influence granted to the citizens, the absence of public debate and the wide powers granted to the Executive mean that UNSC resolutions are applied with little regard for the public's interests. Given the impact of these resolutions, and New Zealand's lack of influence within the UNSC there is cause for concern. Resolutions may be implemented without proper regard for the public interest potentially creating a democratic deficit.

## *IV The WTO*

The WTO is the second multilateral institution this paper seeks to address. The WTO provides a framework for the conduct of trade relations among states.[84] In doing so, it

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79 John Frederick Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at 55.

80 Eve Bain "Too Secret to Scrutinise? Executive Accountability to Select Committees in Foreign Affairs and Defence." (2017) 15(2) NZJPIL 161 at 161.

81 Cabinet Office *Cabinet Manual 2017* at [1.49].

82 At Chapter 5.

83 McGee, above n 61, at Chapter 28.

84 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 154 (opened for

provides a forum for negotiations regarding trade matters.[85] and binds members through various agreements.[86] As part of these agreements, states agree to various undertakings. For example, the Agreement on the Application of Sanitary and Phytosanitary Measures provides rules for the setting of health and safety measures.[87] Key to the operation of the WTO, all these agreements constitute a single undertaking whereby members are bound by them all.[88] Members cannot pick and choose which they will implement, meaning New Zealand, as a member of the WTO, is a signatory to all its various agreements.[89] Overall, the WTO is a rule making and rule enforcement organisation which shapes governance relating to trade across the world.[90]

The WTO has had a substantial impact on New Zealand. The various agreements which make up the WTO, and which the WTO has created since its inception have impacted legislation, leading to the creation of various Acts to comply with their stipulations. For example, New Zealand passed the Trade Anti-dumping and Countervailing Duties) Act 1988 to implement the Agreement establishing the World Trade Organization adopted at Marrakesh on 15 April 1994.[91] Accordingly, the WTO has influenced New Zealand's domestic law ensuring the New Zealand public is affected by the agreements it produces. Among other areas, New Zealand's domestic law relating to exports and imports,[92] intellectual property[93] and regulation of goods[94] have all been affected by the WTO.

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signature 7 December 1994, entered into force 1 January 1995), art II(1).

85 Article III(2).

86 Susy Frankel "International Trade Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington 2020) 775 at 780.

87 At 781.

88 At 781.

89 Marrakesh Agreement Establishing the World Trade Organization, above n 84.

90 Tadhg Ó Laoghaire "Making Offers They Can't Refuse: Consensus and Domination in the WTO" (2018) 5(2) *Moral Philosophy and Politics* 227 at 234.

91 Trade Anti-dumping and Countervailing Duties) Act 1988, s 1A.

92 Section 1A.

93 Patents Act 2013.

94 "Regulatory Impact Statement: New regulatory regime for psychoactive substances" (Updated 11 October 2012) Ministry of Health <www.health.govt.nz/> at 26.

The policies pursued by the Government are continually influenced by the various obligations which the WTO imposes. For example, when New Zealand sought to ban the importation of psychoactive substances such as party pills and other legal highs, the WTO Agreement on Technical Barriers to Trade (TBT) had to be accounted for.[95] The legal highs had serious impacts on the health of New Zealanders,[96] yet the Government had to be careful in terms of the controls it placed on them to avoid violating the TBT.[97] Thus, the WTO has the potential to impact New Zealand and its citizens.

### *A New Zealand and the WTO*

Like the UNSC, the WTO, as an international organisation, inevitably limits the ability of states to pursue their own interests. As this section aims to establish, New Zealand plays a minimal role in the creation of at least some WTO agreements. Accordingly, its citizens' interests are not always accounted for, amplifying the importance of the implementation process.

Despite the WTO's impact on New Zealand, the nature of decision-making within it means New Zealand has limited influence on the agreements it develops. When setting and enforcing its rules, the WTO has a few key aspects of its negotiation process. The WTO provides a forum for negotiations on adjustments and additions to its agreements. These take the form of rounds of negotiations whereby members agree to discuss various issues of trade liberalisation.[98] A key feature of most WTO negotiation processes is that decisions are made through negative consensus. This means that a resolution is only adopted when no present member objects.[99] Thus, unanimity is required for most decision-making at the WTO. However, the consensus rule has affected the WTO negotiation process in that it is largely informal.[100] To ensure that decisions may pass, the negotiations at the WTO often

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95 Psychoactive Substances Bill 2013 (100-1) (explanatory note).

96 "Regulatory Impact Statement: New regulatory regime for psychoactive substances", above n 94, at 3.

97 At 26.

98 Ó Laoghaire, above n 90, at 235.

99 Marrakesh Agreement Establishing the World Trade Organization, above n 84, at fn 1.

100 Yves Bonzon *Public Participation and Legitimacy in the WTO* (Cambridge University

take place among small groups of states in Green Room meetings. The Director-General will invite those states, whose support they believe is necessary to progress an initiative, to discuss and provide solutions.[101] The resulting draft or bargain is then tabled to the WTO's wider membership who may object or raise concerns.[102]

The informal nature of the decision-making process at the WTO has implications for New Zealand. Green Room meetings are designed to obtain support from influential members and those whose national interests are at stake.[103] Ordinarily, this includes the core group of the United States, the European Union and a combination of Brazil, India and Australia.[104] Otherwise, its membership has been described as including major OECD members and emerging economies plus a small number of delegates representing specific country groups.[105] Accordingly, New Zealand may not be invited to these meetings which is a significant limit on their decision-making power. Green Room meetings create drafts that are then tabled to the other members. As such, those not present at the meetings are unable to bargain or ensure their interests are accounted for. Their role is limited to challenging the decision only after the draft has been produced whereby it will be taken back to the Green Room and renegotiated until a consensus is reached.[106] Thus, while New Zealand may have the right to stop a decision being passed, when not invited to a Green Room meeting it is difficult to influence the final solution.

There are checks in place to ensure that smaller WTO members such as New Zealand have their interests heard, but their representation is still limited. WTO members are divided into groups formed through coalitions. New Zealand is a part of groups such as the Asia Pacific

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Press, Cambridge, 2014) at 118.

101 Ó Laoghaire above n 90, at 236.

102 At 236.

103 Kent Jones and David Sapsford "Green Room Politics and the WTO's Crisis of Representation" (2009) 9(4) *Progress in Development Studies* 349 at 350.

104 At 350.

105 Bernard M. Hoekman and Petros C. Mavroidis *World Trade Organization (WTO): Law, Economics, and Politics* (Routledge, London, 2007) at 146.

106 Ó Laoghaire above n 90, at 236.

Economic Cooperation (APEC) forum and the Friends of Ambition.[107] When deciding who will be involved in Green Room meetings, it is expected that those invited will represent all the major groups.[108] As such, while New Zealand may not be present, a representative from APEC likely will. The issue with this is that there is a difference between New Zealand representing themselves, and being represented through the collective thoughts of a group of 21 countries.[109] This may represent New Zealand's interests in some manner, but it is not the equivalent of representing themselves as there are economic, cultural and political differences between the members of APEC. Accordingly, although New Zealand may occasionally attend Green Room meetings, there are times when the advocate of their interests may only be a member of their coalition.

While New Zealand retains the right to block consensus on any decision made at the WTO, this power is limited. New Zealand is not technically forced to implement any decision that they have not consented to. This is because, as noted, no agreement can be reached without the consensus of all members. However, this idea is limited in the power it gives small states such as New Zealand. When a Green Room meeting produces a draft with the backing of the WTO's most influential members, there is a social and reputational cost of New Zealand blocking consensus.[110] Additionally, blocking a proposal does not remove it. Instead, it is renegotiated meaning New Zealand could be forced to block similar proposals again and again to protect its interests.[111] In this way, while New Zealand is not forced to undertake an agreement without its consent, there are consequences for exercising this power. The nature of the WTO, its informal decision-making process and power politics can therefore limit New Zealand's ability to pursue its interests.

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107 "Groups in the negotiations by WTO member" (18 December 2017) World Trade Organization <www.wto.org/english/>.

108 "How the meeting was organized" (Accessed 2 June 2020) World Trade Organization <www.wto.org/english/>.

109 "Groups in the negotiations by WTO member", above n 107.

110 Ó Laoghaire, above n 90, at 241.

111 At 241.

### *B Implementation of WTO Agreements*

The nature of decision-making in the WTO means that New Zealand's interests are not always served within its agreements. New Zealand's lack of influence within the WTO means that like the UNSC, the agreements it produces can be contrary to its citizen's wants and needs. As noted, WTO agreements impact New Zealand's domestic legislative regime, meaning Parliament can be bound by an agreement despite New Zealand having very little say on what it provides. The Vienna Convention on the Law of Treaties stipulates that treaties must be performed by parties to them.[112] This binding nature means it is integral that the public influences their implementation in domestic law. As a democracy, it is undesirable for citizens to be bound by laws that do not satisfy their interests.

The process for implementing treaties such as WTO agreements in New Zealand allows for greater public input than that of UNSC resolutions. The procedure, known as the treaty examination process, involves checking and analysing Executive treaty actions. The Executive decides whether or not to sign an agreement after which it is presented to Parliament for its consideration.[113] The agreements are then presented alongside a National Interest Analysis (NIA) which outlines the content of the agreement, advantages and disadvantages to entering it and various other considerations.[114] After their presentation, the agreement and NIA are referred to the Foreign Affairs Defence and Trade Committee.[115] This select committee considers the agreement taking account of public submissions and advice from officials.[116] This is then reported back to Parliament. Having considered the agreement, Cabinet prepares the necessary legislation which is passed by Parliament before the agreement comes into force.[117]

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112 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 26.

113 Mark Gobbi "Factors Influencing the Content of Acts That Implement New Zealand's International Obligations." (2014) NZYIL 12 291 at 292.

114 Cabinet Office, above n 82, at [7.126].

115 Gobbi, above n 113, at 292.

116 At 292.

117 At 293.

The treaty examination process ensures that the New Zealand public can influence the implementation of WTO agreements. A key aspect of the treaty examination process is that the Executive will not bind New Zealand until the necessary legislation is prepared.[118] Accordingly, WTO agreements cannot affect New Zealand's domestic law until after they are subjected to the various checks in place that allow for public scrutiny of their contents. Although New Zealand and its citizens have minimal impact on decision-making within the WTO, the treaty examination process ensures it is not bound without appropriate, public consultation. Through the select committee, citizens can make their views known and have them reported back to Parliament. Additionally, the agreements are examined in Parliament and are subject to public debate. Elected representatives discuss the agreements in a forum where their reasoning is publically available and open to scrutiny.[119]

While the public's voice is heard throughout the process, their influence is limited. One issue with the process is the restraints on the select committee. Cabinet refrains from entering a binding agreement until the select committee has reported or for a maximum of 15 days.[120] The select committee may indicate that it needs more time to consider an agreement, but Cabinet has discretion on whether to grant this.[121] Accordingly, the time available to consider the agreement and report to Parliament is limited. Fifteen days is especially short compared to the time taken to consider an Act which normally allows six weeks for receiving public submissions alone.[122] Thus, the public is granted significantly limited time to consider WTO agreements and to make their voice heard. Given the complexities of some of the agreements, the limited time is problematic as citizens have less time to consider them and their implications. Select committees play a key role as an accountability mechanism for law making in New Zealand.[123] By limiting the time

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118 At 292-293.

119 Burrows, above n 78, at 66.

120 Cabinet Office, above n 82, at [7.129].

121 At [7.129].

122 Standing Orders Committee *Review of Standing Orders (2003)* (December 2003) at 39.

123 Bain, above n 80, at 161.

available to them to scrutinise WTO agreements, the public's ability to influence their implementation is diminished.

Another limitation on the public's influence is that citizens cannot request a change in the substance of WTO agreements. Instead, they are entitled only to agree or disagree with their application in New Zealand. This is because when a WTO agreement, for example, the Protocol Amending the TRIPS Agreement, is brought to Parliament's attention, the agreement has already proceeded beyond the negotiation stage.[124] This inability to negotiate the content of WTO agreements is a significant limitation on the public's influence. When presented with the completed agreement, citizens may agree with some parts and disagree with others. However, instead of negotiating the removal of the problematic aspect, they are forced to decide whether or not to accept the agreement as a whole. Parliamentary, and by association the New Zealand public's, power is reduced allowing greater Executive authority beyond the bounds of meaningful scrutiny and debate.

These constraints on the public's input reduce its efficacy. Having less time for submissions and limiting the public's choice to agreeing or disagreeing with the application of WTO agreements means there is less scope for citizens to express their views. Accordingly, an agreement may be implemented in New Zealand and bind its people without appropriate public scrutiny of its content.

## *V Evaluation of New Zealand's Approach*

The numerous ways in which the implementation of UNSC and WTO instruments fail to account for the public's interests raise concerns. This begs the question: should the mechanisms for the application of multilateral instruments in New Zealand's domestic law be reformed? The absence of public input is problematic but at times it may be necessary or practicable to do so. The mere absence of public influence beyond elections is not an automatic qualification for reform as other factors must be accounted for.

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124 Foreign Affairs, Defence and Trade Committee *International treaty examination of the World Trade Organization Agreement on Government Procurement* (24 March 2015) at 4.

### *A UNSC Resolutions: Room for Change?*

It is general practice in New Zealand for regulatory powers to be granted in certain situations. Per a Parliamentary report, there are several factors that are considered to make the use of regulations necessary. They include: pressure on Parliamentary time, the need for flexibility and emergency conditions requiring speedy or instant action.[125] Regulations provide a faster, more flexible alternative to the making of Acts which involves a cumbersome process. The legislative process may allow for greater public input, but the time and resources it requires make it impractical in certain circumstances. Accordingly, there are situations where the use of regulations is desirable.[126]

The implementation of UNSC resolutions is arguably one such circumstance, demanding the use of regulations. First, they are drafted and completed by the UNSC leaving little choice for signatories beyond their interpretation and application. Given this lack of discretion, there is little need for Parliament to spend time debating their inclusion in New Zealand. Second, UNSC resolutions are amended and changed relatively frequently. For example, the United Nations Sanctions (Democratic People's Republic of Korea) Regulations 2017 were amended twice in just over a year as new resolutions were introduced.[127] The ease with which regulations are made means they offer flexibility, allowing the Government to react to the UNSC's changes. Finally, related to this point, UNSC resolutions can be created relatively quickly and must be enforced by signatories to the UN Charter. While the Charter does not specify a time limit for their implementation,[128] the relatively short time in which regulations can be passed means they are well suited to executing the UNSC's demands. Accordingly, the public's influence may be reduced in the process of creating regulations, but practicality postulates their continued use.

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125 Hunt, above n 73, at 402.

126 Burrows, above n 78, at 65.

127 United Nations Sanctions (Democratic People's Republic of Korea) Amendment Regulations 2017; and United Nations Sanctions (Democratic People's Republic of Korea) Amendment Regulations 2018.

128 Charter of the United Nations, art 41.

### *1 Other Jurisdictions*

A comparison with the approaches of other jurisdictions supports New Zealand's use of regulations for the implementation of UNSC resolutions.

In Australia, UNSC resolutions are implemented through regulations in a similar manner to New Zealand. The Charter of the United Nations Act 1945 grants the Governor-General the powers to make regulations that give effect to UNSC resolutions.[129] Interestingly, unlike New Zealand, the Australian Act does not specify that the regulations must be brought before Parliament.[130] However, the regulations are tabled in Parliament.[131] Perhaps the only difference with New Zealand is that the regulations are tabled in both the House of Representatives and the Senate in Australia as, unlike New Zealand, it is bicameral.[132] Section 38 of the Legislation Act 2003 mandates that copies must be tabled before both within six days of their creation.[133] This is similar to New Zealand, where the regulations are brought before Parliament. The difference is that in Australia two separate Houses are given the opportunity to scrutinise the regulations.

Canada follows suit as UNSC resolutions are also implemented through regulations. The United Nations Act 1985 enables the Governor in Council to "make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied."[134] Like New Zealand, the regulations must be laid before Parliament.[135] However, again Canada is bicameral meaning the regulations are tabled in both the House of Representatives and the Senate. For example, the regulations implementing resolution 2374 of the UNSC were presented in both.[136]

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129 Charter of the United Nations Act 1945 (Cth), s 6.

130 Section 6.

131 James Rowland Odgers "Odgers' Australian Senate Practice" (2016) <www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures> at Chapter 15.

132 At Chapter 15.

133 Legislation Act 2003 (Cth), s38.

134 United Nations Act RS C 1985 c U-2, s 2.

135 Section 4(1).

136 "Journals of the Senate no. 260" (December 10 2017) Senate of Canada <https://sencanada.ca/en/in

The Canadian process does differ in that their regulations are subjected to greater public scrutiny. A key aspect of the creation of regulations in Canada is that, through a Cabinet Directive, draft regulations must be pre-published in the Canada Gazette before they are made.[137] Accordingly, prior to a resolution's implementation, the draft regulations along with a regulatory impact statement outlining their effect are published.[138] Canadian citizens then have 30 days to express their views on the regulations.[139] This requirement plays a central role in involving the public in decision-making and makes the process relatively transparent. [140] In New Zealand, the regulations are only made publically available after they are complete meaning the public is excluded from the decision-making process.[141]

While pre-publication is a requirement, there are ways around it. In Canada, Cabinet may exempt regulations from the pre-publication requirement.[142] Additionally, as seen in the Regulations Implementing the United Nations Resolutions on Mali 2018, regulations can be made to apply before even their final version is published in the Gazette.[143] Accordingly, some regulations are pre-published and publicly notified while others are not.[144]

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the-chamber/journals> at 4209; and "Journals No. 367" (December 7 2018) House of Commons <www.ourcommons.ca/en> at 4436.

137 "Cabinet Directive on Regulation" (2018) Government of Canada <www.canada.ca/en/treasury-board-secretariat.html> at 5.4.1.

138 "Part 1 Vol. 140, No. 20" (May 20 2006) Canada Gazette <http://gazette.gc.ca/accueil-home-eng.html> at 1258.

139 "Guide to Making Federal Acts and Regulations" (accessed 25 September 2020) Government of Canada <www.canada.ca/en.html> at 185.

140 "Guide to the Federal Regulatory Development Process" (17 April 2014) Government of Canada <www.canada.ca/en.html>.

141 Cabinet Office, above n 82, at [7.100].

142 "Cabinet Directive on Regulatory Management" (2012) Government of Canada <www.canada.ca/en/treasury-board-secretariat.html> at (A)20.

143 Regulations Implementing the United Nations Resolutions on Mali SOR/2018-203, r 13.

144 After consulting the Canada Gazette, they informed me that at least some of the regulations implementing UNSC resolutions are exempt from the pre-publication process. For example, the Regulations Implementing the United Nations Resolutions on Mali SOR/2018-203 were not pre-published.

### *2 Reforms*

Although regulations provide a more practical alternative to the normal legislative process, an approach corroborated by its consistency with practices in other jurisdictions, the nature of UNSC resolutions means the public should be afforded greater influence in the drafting of regulations which implement them. The current process means the public are unable to impact their application beyond occasional questioning by their representatives in Parliament. This is undesirable. John Burrows provides a non-exhaustive list of matters which should be subjected to the democratic process and greater public scrutiny. They include: policy which affects citizens in a significant way, policy which affects human rights and freedoms and the creation of offences, particularly ones enforceable by severe penalties.[145] UNSC resolutions fulfil these criteria. For example, as noted, resolution 2374 froze the assets of some individuals impacting their freedoms, while the regulations implementing resolution 1718 imposed penalties on New Zealand citizens leading to a New Zealand company paying a $74,805 fine. Accordingly, the current process, although practical, is flawed and should be made more democratic through a greater appreciation of the public's interests.

The tension is that interests in public input must be weighed with practical concerns and the need for New Zealand to implement UNSC resolutions in an appropriate, timely manner. Any reforms must be able to balance these conflicting concerns.

The first possible reform, as seen in both Australia and Canada, is the introduction of a bicameral system. This would allow a greater number of representatives to scrutinise regulations made for the implementation of UNSC resolutions on behalf of the public. However, such a reform is unrealistic. While there have been some calls for a bicameral system in New Zealand,[146] it is generally believed that it is impractical. New Zealand,

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145 Burrows, above n 78, at 66.

146 See: Andrew Stockley "Bicameralism in the New Zealand Context" (January 1, 1986) 16 VUWLR 377.

whose population is significantly smaller than Australia and Canada's, lacks the resources and desire for a bicameral system.[147]

Instead, a reform based in part on Canada's pre-publication approach would be better suited to New Zealand and allow for improved accommodation of the public interest. New Zealand already publishes completed regulations in the New Zealand Gazette which are made available to the public.[148] Thus, adding a requirement for the pre-publication of regulations which input UNSC resolutions is possible. Like in Canada, making the regulations open to public scrutiny before their completion would allow the public to contribute to the decision-making process. While currently the creation of regulations is problematic, leaving no room for public input, opening them to scrutiny by citizens before completion would allow the Government to make a more informed decision when implementing resolutions. This accounts for the potential impacts of UNSC resolutions which have the potential to restrict freedoms and impose penalties on citizens.

The reform is not perfect. Compared to the select committee process for example, which openly seeks public submissions, the publication of regulations before completion does not guarantee citizens' involvement. However, it is a sensible improvement. It allows for the continued use of the more practical regulations while giving the public an opportunity to contribute. This is consistent with the practical nature of regulations while making the implementation process relatively democratic.

### *3 Beyond UNSC Resolutions*

This paper has so far looked at the implementation of UNSC resolutions as an example of a multilateral institution impacting domestic legislation through regulations. The reality is that they are some of many international instruments that are applied in this way. For example, a measure agreed by the Western and Central Pacific Fisheries Commission was

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147 See: Robin Brunskill Cooke "Unicameralism in New Zealand: Some Lessons" (1999) 7(2) Canta LR 233.

148 Cabinet Office, above n 82, at [7.100].

implemented through regulations.[149] As a result, New Zealanders fishing for tuna or billfish with wire tracers could pay a fine of up to $20,000.[150] Other instruments from the Convention for the Conservation of Southern Bluefin Tuna,[151] to international conservation and management measures adopted by the Commission for the Conservation of Antarctica Marine Living Resources and many others are adopted through regulations.[152] While the nature of such agreements differs from UNSC resolutions, their possible impact on New Zealanders means they too may be problematic. Fining citizens $20,000 based on an international agreement imposes an offence with a harsh penalty postulating the need for a more democratic process. Accordingly, the issues noted with the use of regulations apply beyond the implementation of UNSC resolutions.

The above reforms could be applied to all regulations which implement international agreements. As regulations remove the ability for the public to influence the application of international instruments, their use may be practical, but as seen with UNSC resolutions, it is flawed. New Zealanders should not have offences, such as a fine for the use of wire tracers, imposed on them without some opportunity to make their views known between elections. The current system allows for practicality at the expense of an undesirable democratic deficit. Pre-publication of all regulations which implement international instruments could help to remedy this issue.

### *B Treaty Implementation: Generally Adequate*

Like the process for implementing UNSC resolutions, there are certain restrictions on the application of WTO agreements which inevitably limit the public's input. The current process reduces the time available to citizens to make select committee submissions and

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149 Fisheries (Commercial Fishing) Amendment Regulations 2015 (explanatory note).

150 Regulation 7; and Fisheries (Commercial Fishing) Regulations 2001, r 85.

151 Customs Import Prohibition (Southern Bluefin Tuna) Order 2016 (explanatory note).

152 Fisheries (High Seas Fishing Notifications – Commission for the Conservation of Antarctic Marine Living Resources) Amendment Notice 2017 (explanatory note).

limits their decision to agreeing or disagreeing. However, these constraints are practical or based on factors outside of New Zealand's control.

The nature of the WTO means that agreements are finalised before they are made available for signing. Although it limits the public's input, ultimately, New Zealand does not have an option to adjust this process. Only the WTO, with the consensus of all its members, can reform its practices. These limitations on the public's ability to provide alternatives beyond non-implementation mean the select committee process need not extend beyond 15 days. The public has fewer options and less to contribute as their choice is left to yes or no leaving the committee with less to consider. Thus, although the treaty implementation process is imperfect, its limitations are a result of constraints beyond New Zealand's control.

### *1 Other Jurisdictions*

The similarities between Australia's and New Zealand's approach to treaty implementation suggests a reasonable balance has been struck. In Australia, like New Zealand, the Executive reserves the right to into treaties,[153] while only Parliament can implement them domestically.[154] Legislation must be passed before they become part of Australian law. Australia has the Joint Standing Committee on Treaties, which is effectively their equivalent of New Zealand's Foreign Affairs Defence and Trade Committee. The Committee publically examines treaties and NIAs to determine if they are consistent with the national interest before ratification.[155] It receives public submissions and reports its findings back to Parliament.[156] Thus, like New Zealand, WTO agreements are subject to public scrutiny before their ratification. Additionally, the process is similarly constrained as the time available for Parliamentary and public scrutiny of treaties is limited to 15 days.[157] Accordingly, Australia's approach is very similar to New Zealand's.

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153 Commonwealth of Australia Constitution Act 1900 (Cth), s 61.

154 Section 51(xxix).

155 David Mason "'Deliberative Democratising' of Australian Treaty Making: Putting into Context the Significance of Online Access to the Treaty Process" (2016) 24(2) JLIS 1 at 2.

156 At 20.

157 At 20.

The merits of New Zealand's efforts to account for the public's interests when applying international instruments are highlighted when compared to the Canadian approach. In Canada, the Executive may negotiate and sign treaties on the country's behalf.[158] The Executive then tables the treaty within the House of Commons who have 21 sitting days to consider it before ratification by the Executive.[159] Unlike New Zealand, there is no permanent committee that discusses the agreement and provides a forum for public submissions. Additionally, any decision by the House of Commons relating to the treaty is not binding on the Executive.[160] Thus, the Executive may sign a WTO agreement and ratify it without public input and in the absence of the House's approval. This differs from New Zealand's approach where prior to ratification the agreement is subject to public scrutiny within a specialised committee. While New Zealand may limit the time available for citizens' contributions, these constraints are minimal compared to Canada's failure to allow for any public input.

New Zealand's approach to the implementation of WTO agreements and the manner in which it accounts for the public's interests is satisfactory. Although there are limits to the public's voice, such constraints are inevitable given the nature of the WTO and the considerations of practicality.

### *2 Beyond the WTO*

Analysis of the implementation of WTO agreements demonstrates the merits of New Zealand's to treaty examination generally. Beyond the WTO, Executive treaty actions occur frequently, with 21 multilateral agreements being signed between mid-2015 to mid-2018.[161] The process, which allows for satisfactory public input, applies to all such actions. In fact, the way it has been applied to certain agreements demonstrates its merits further.

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158 Laura Barnett "Canada's Approach to the Treaty-Making Process" (Revised 8 May 2018) Library of Parliament <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/> at [3.2].

159 At [3.31].

160 At [3.31].

161 Gobbi "Treaty Action and Implementation" (2016), above n 1, at 312; Gobbi "Treaty Action and

The way the public's views were accounted for throughout The Comprehensive and Progressive Agreement for Trans-Pacific Partnership's (CPTPP) implementation speaks to the efficacy of New Zealand's system. The CPTPP was a controversial agreement and many New Zealanders vocally opposed it, even leading to protests.[162] As a result, the treaty implementation process was extended to accommodate for the public's concerns, granting a total of five weeks for the Foreign Affairs, Defence and Trade Committee to consider public submissions on the agreement.[163] In total, the Committee received 427 submissions.[164] The Government's ability and willingness to extend the time available for submissions demonstrate the system's ability to accommodate the public's needs. The number of submissions received demonstrates the success of a process that has effectively encouraged public participation. New Zealand's decision-makers were certainly made well aware of the public's interests through the treaty examination process.

## *VI Soft Law*

Having considered and critiqued New Zealand's approach to the implementation of relatively orthodox, binding international organisations, it is important to examine a growing area in international governance, soft law institutions.

While there are clear systems in place for the application of binding international agreements, soft law is largely unregulated placing it beyond the reach of established forums and considerations of the public's interests. The pluralisation of the international system has seen an increase in both the numbers and impact of international organisations

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Implementation" (2017), above n 1, at 244; and Gobbi "Treaty Action and Implementation" (2018), above n 1, at 391.

162 "Protests planned nationwide against CPTPP signing" (3 March 2018) Newshub <www.newshub.co.nz/home.html>.

163 (20 March 2018) 728 NZPD at 2371.

164 Foreign Affairs, Defence and Trade Committee *International treaty examination of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* (May 2018) at 8.

which, unlike the UNSC or WTO, are not reliant on binding, hard law.[165] Instead, they influence states through alternative, unorthodox means. An area that has demonstrated this clearly has been the realm of financial markets regulation, in particular through a non-binding institution: IOSCO.

### *A What is IOSCO?*

IOSCO has, since 1983,[166] provided the primary international policy and cooperation forum for regulatory agencies in the financial sector.[167] Its role, according to the World Bank, has been to set standards for securities market reform with each country being "evaluated in accordance of these standards so that we get consistency and reasonable benchmarks."[168] It focusses on enforcement cooperation between market overseers.[169] The idea behind this was that as cross border transactions became increasingly frequent it led to ease of access for both markets and rogue market participants.[170] Securities regulators all over the world faced similar issues leading to a need for cooperation.[171] Thus, IOSCO was formed to provide a forum for securities regulators from all over the world to exchange information and perspectives ultimately leading to the promotion of best regulatory practice.[172] In this role, it "develops, implements and promotes adherence to internationally recognised standards for securities regulation."[173]

IOSCO's membership consists primarily of securities commissions and other similar governmental bodies.[174] As such, its members are not states, meaning it has been defined

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165 See: Koskenniemi, above n 7.

166 "About IOSCO" (Accessed 7 September 2020) OICU-IOSCO <www.iosco.org/>.

167 Monique Egli Costi "Institutional Evolution and Characteristics of the International Organization of Securities Commissions (IOSCO)" (2014) 20 NZACL Yearbook 199 at 200.

168 At 220.

169 David Zaring "Finding Legal Principle in Global Financial Regulation." (March 22 2012) 52(3) Va J Intl L 683 at 699.

170 At 689 and 695.

171 Costi, above n 167, at 200.

172 At 202.

173 "About IOSCO", above n 166.

174 Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004) at 48.

as a "non-governmental" organisation.[175] The official national securities regulators within it are known as ordinary members.[176] These bodies are responsible, within their countries, for regulating the financial sector which involves protecting investors, reducing systemic risk and ensuring markets are fair, efficient and transparent.[177] IOSCO has a wide membership, consisting of securities regulators from more than 115 jurisdictions.[178] This means its members regulate more than 95 percent of the world's securities markets.[179] In addition to ordinary members, there are also associate and affiliate members.[180] Associate members consist of other securities regulators within states that have more than one.[181] Affiliate members are other bodies with an appropriate interest in securities regulation such as securities exchanges.[182] These associate and affiliate members are a part of the discussion within IOSCO but are afforded less influence than ordinary members.[183]

Key to its operation, IOSCO is a member led organisation and the standards it creates are not binding. This means that unlike international organisations and regulators such as the United Nations or the WTO, it is not underpinned by a treaty or binding agreement.[184] However, as we shall see, this does not mean it has not been influential. It is interesting to note that due to its unusual nature, scholars disagree on how it should be characterised. Some claim it is a non-governmental organisation, others believe it occupies "a twilight legal existence".[185] Its non-binding nature and the fact it is not comprised of states makes it unorthodox, failing to fit the standard models of international organisations.[186]

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175 Geoffrey RD Underhill "Keeping Governments out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy" (1995) 21 Rev Intl Stud 251 at 253.

176 At 261.

177 "Objectives and Principles of Securities Regulation" (June 2010) OICU-IOSCO <www.iosco.org/>.

178 "About IOSCO", above n 166.

179 Costi, above n 167, at 202.

180 See Appendix 1.

181 Underhill, above n 175, at 261.

182 "About IOSCO", above n 166.

183 Costi, above n 167, at 203-204.

184 Zaring, above n 169, at 689-690.

185 Underhill, above n 175, at 253; and Kal Raustiala "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 V J Intl L 1 at 23.

186 Slaughter, above n 174, at 43.

### *1 Decision-Making and the Role of Experts*

There are a few aspects of decision-making within IOSCO.[187] Its exact structure is difficult to ascertain as they operate with minimal physical and legal infrastructure.[188] There are, however, some key decision-making bodies. Its primary body is the Presidents Committee where each ordinary member is afforded one vote.[189] The Presidents Committee meets annually to create guidelines for the IOSCO Board[190] which it elects along with IOSCO constituents.[191] Additionally, decisions can be made in four regional committees in which, again, only ordinary members may vote.[192] The membership is split between other decision-making bodies including the Growth and Emerging Markets Committee and various policy making committees which work with the support of the IOSCO Board.[193] Finally, consultative committees may be established by the IOSCO Board. These act as a forum to discuss matters of interest.[194]

In all decision-making within IOSCO, experts play an important role. As noted by Geoffrey Underhill, "IOSCO and its membership themselves portray the organization's work as an apolitical problem for technicians which governments should keep out of."[195] The securities regulators who form its membership are, for the most part, autonomous, separate from their jurisdiction's central government.[196] Additionally, the admission of affiliate members who, although they cannot vote, are party to the discussions within the various committees, allows for non-governmental organisations to impact decision-making.[197] In fact, IOSCO's aim when allowing their admission was to facilitate close dialogue between

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187 See Appendix 2.
188 Slaughter, above n 174, at 48.
189 Costi, above n 167, at 203.
190 Underhill, above n 175, at 261.
191 Costi, above n 167, at 214.
192 At 204.
193 Underhill, above n 175, at 261.
194 Costi, above n 167, at 214.
195 Underhill, above n 175, at 274.
196 At 274.
197 Costi, above n 167, at 203.

statutory regulatory authorities and international bodies.[198] This in turn would "provide for the injection of practitioner and other expertise into the deliberations of IOSCO".[199] As a result, the decisions made within IOSCO are relatively devoid of governmental influence, instead relying on experts.[200]

### *B New Zealand and IOSCO*

New Zealand's securities regulator is the Financial Markets Authority (FMA). The FMA is an ordinary member of IOSCO and is New Zealand's only representative.[201] New Zealanders have had a prominent role within IOSCO. In particular, Jane Diplock, the former head of New Zealand's Securities Commission which has since been replaced by the FMA, was the Chairman of the IOSCO Board from 2004 to 2011.[202] Additionally, the FMA is represented on three of the main working committees, as well as the Asia Pacific Regional Committee.[203] This allows it to negotiate with other jurisdictions as well as contribute to decision-making on New Zealand's behalf. As a member, decisions made within IOSCO and the standards it develops impact the FMA and therefore New Zealand.

Despite the FMA's standing, the New Zealand Government's influence within IOSCO and its decision-making is severely limited. The FMA is an independent Crown entity.[204] Crown entities are unique in that they are intended to remain separate from the government.[205] There is some connection between the government and the operation of the

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198 "Response of the Basel Committee on Banking Supervision and of the International Organization of Securities Commissions to the G-7 Heads of Government at the June 1995 Haliflax Summit" (May 1996) OICU-IOSCO <www.iosco.org/> at 75.

199 At 75.

200 Costi, above n 167, at 224.

201 "Ordinary Members of IOSCO: New Zealand" (Accessed 8 September 2020) OICU-IOSCO <www.iosco.org/>.

202 "Securities Commission Annual Report 2008" (2008) New Zealand Parliament <https://www.parliament.nz/en> at 3.

203 "Briefing for the incoming Minister of Commerce and Consumer Affairs" (2 November 2017) Financial Markets Authority <www.fma.govt.nz/about-us/governance/> at 16.

204 At 4.

205 Mai Chen "Crown Entity Act: 18 Months on (New Zealand)" (September 1 2006) 8 NZLJ 315 at 317.

FMA. For example, it must produce a Statement of Intent.[206] This includes providing information such as "explaining the nature of and scope of the entity's functions and intended operations".[207] The FMA must then act consistently with its Statement of Intent.[208] However, the FMA's connection to the Government is minimal. Its status as an independent Crown entity means it is fully independent of government policy.[209] Instead, its decision-making is determined by experts acting free from the public eye and the Government's direction. As a result, the FMA represents New Zealand at IOSCO but is not responsible to Parliament or the Executive regarding its actions. This means that, like decision-making in general at IOSCO, New Zealand's interests are decided by experts, not politicians.

### *C Impact*

Although decisions within IOSCO are not binding, it holds significant sway in the regulation of securities. IOSCO and its decisions do not constitute formal public international law.[210] Yet, without the assistance of treaties and hard law, IOSCO has caused significant structural changes in financial markets regulation.[211] Its influence has even led scholars such as David Zaring to label IOSCO as an international rule maker.[212] Its near universal membership means it has become increasingly difficult for states' securities regulators to operate without applying principles from IOSCO. The influence of the organisation means that the rules it provides look a "great deal like the sort of legal and institutional principles that are found in hard variants of international economic law."[213] This practically binding nature of IOSCO has a significant impact on states and their policy

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206 Crown Entities Act 2004, s 139.

207 Section 141.

208 Section 49.

209 Rob Laking "Crown entities - How are Crown entities governed?' (20 June 2012) Te Ara the Encyclopedia of New Zealand <https://teara.govt.nz/en>.

210 Zaring, above n 169, at 689.

211 Underhill, above n 175, at 277.

212 David Zaring "Rulemaking and Adjudication in International Law" (2008) 46 Colum J Transnat'l L 563 at 572.

213 Zaring, above n 169, at 687.

as they are pressured to adapt their practices.[214] Thus, its influence on financial regulation is substantial.

New Zealand is not immune to the authoritative nature of IOSCO. Two case studies in particular demonstrate the significant impact it has had on New Zealand: the reform of financial market regulation and the execution of the FMA's powers.

### *1 Legislative Reform*

The IOSCO Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information (MMOU) is an understanding among signatories on consultation, cooperation and exchange of information regarding securities regulation.[215] Since its creation, it has become the benchmark for enforcement related cooperation.[216] Typical of IOSCO, the MMOU is not binding.[217] Instead, it is aimed at the sharing of information and assistance among its signatories.[218] In practice, this means providing guidance on how best to assist other regulators,[219] how to use shared information,[220] confidentiality[221] and other various aspects of cooperation. Seemingly then it is difficult to see how the MMOU could impact states given it serves as a guide rather than binding members. However, the Memorandum has a key feature: ex ante screening. Before a member can become a signatory of the MMOU, its legislative framework is screened by a team of experts.[222] The applicant must demonstrate to the experts that they

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214 Underhill, above n 175, at 271.

215 Rita Cunha "The IOSCO Multilateral Memorandum of Understanding (MMoU): an International Benchmark for Securities Enforcement" (2010) 15 Unif L Rev 677 at 681.

216 "IOSCO Resolution of the Presidents Committee on the International Benchmark for Enforcement Related Cooperation and Exchange of Information" OICU-IOSCO (6 April 2005) <www.iosco.org>.

217 "IOSCO Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information" OICU-IOSCO (May 2002, revised May 2012) <www.iosco.org> at [6].

218 At [6].

219 At [7]-[9].

220 At [10].

221 At [11].

222 At [11]-[14].

are capable of complying with the provisions of the Memorandum.[223] Until all discrepancies are dealt with the applicant cannot become a signatory.

The ex ante screening process had a significant impact on New Zealand's financial regulatory regime. Speaking at an IOSCO conference, Lianne Dalziel, the then Minister of Commerce, noted that New Zealand undertook "a programme of securities law reform to increase confidence in our markets and to bring them into line with international standards."[224] One such reform was the Securities Amendment Act 2001. It incorporated changes such as new protections against insider trading and bolstering the powers of the Securities Commission (now the FMA).[225] This reform aimed to bring New Zealand in line with international standards, such as the MMOU.[226] This, combined with other changes such as the demutualisation of the NZX stock exchange, led to New Zealand being accepted as a signatory of the MMOU.[227] Thus, to become a signatory, numerous reforms were undertaken demonstrating the remarkable influence IOSCO has had on New Zealand.

### *2 The FMA*

Since New Zealand has become a signatory to the MMOU, IOSCO has continued to have a marked impact. For example, s 556 of the Financial Markets Conduct Act 2013 allows the FMA to grant exemptions to any person or transaction from some of its provisions.[228] Interestingly, when granting exemptions, the FMA sometimes takes account of whether the securities regulator of the person or transaction's jurisdiction is a signatory of the MMOU. For example, the Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice 2016 exempts some "overseas financial market conduct reporting

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223 At [11]-[14].

224 Lianne Dalziel "Speech at International Organisation of Securities Commissions function" (9 February 2006) Beehive <https://www.beehive.govt.nz/>.

225 Securities Markets and Institutions Bill 2001 (170-1) (explanatory note) at 2.

226 (5 December 2001) 597 NZPD.

227 Dalziel, above n 224.

228 Financial Markets Conduct Act 2013, s 556.

entities from certain financial reporting obligations."[229] These exemptions allow reporting entities in jurisdictions including Canada and Singapore[230] to avoid obligations such as having their financial statements audited by a qualified auditor.[231] The FMA stated that one of the reasons it allowed such an exemption was that the jurisdictions granted them are MMOU signatories.[232] Similarly, in the Financial Markets Conduct (Overseas Registered Banks and Licensed Insurers) Exemption Notice 2020, one of the conditions for granting a general exemption to all registered overseas banks and overseas licensed insurers[233] is that their home jurisdiction's securities regulator is an MMOU signatory.[234]

The FMA's consideration of the IOSCO MMOU in granting exemptions is not based on a legislative instruction. The empowering provision for allowing such exemptions, s 556 of the Financial Markets Conduct Act, does not mention the MMOU.[235] Instead, the FMA is supposed to consider the purposes of the Act as stated in ss 3 or 4. There, aspects such as promoting innovation and flexibility are provided, but again there is no mention of the MMOU, IOSCO or any other international organisation.[236] The FMA's attention to whether or not a jurisdiction's securities regulator is a signatory is therefore of its own volition. Despite the lack of legislative input, the consideration has had a significant impact. For example, banks and insurers in jurisdictions who are not granted the exemption face more stringent duties.[237] These additional responsibilities, such as auditing their financial statements,[238] can potentially raise costs and inhibit their ability to operate in New Zealand. Given the possible consequences of refusing to grant an exemption, it is interesting that the

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229 Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice 2016 (statement of reasons).

230 Schedule 2.

231 Financial Markets Conduct Act, s 461D.

232 Financial Markets Conduct (Overseas FMC Reporting Entities) Exemption Notice (statement of reasons).

233 Financial Markets Conduct (Overseas Registered Banks and Licensed Insurers) Exemption Notice 2020 (statement of reasons).

234 Clause 7(f).

235 Financial Markets Conduct Act, s 556.

236 Sections 3 and 4.

237 See: Sections 455(1)(c), 461B, 461D, and 461G.

238 Section 461D.

FMA's policy regarding their distribution is so heavily influenced by IOSCO. Again, the organisation's impact on New Zealand is clear.

### *D Significance*

As can be seen in both the legislative reform and the process by which the FMA grants exemptions, IOSCO has had a significant impact on New Zealand. This substantial influence is concerning, particularly regarding the interests of the public. As noted, a key aspect of IOSCO is its, purportedly, apolitical nature and the limited role it grants to the central governments of its members. The organisation's reliance on experts rather than governments' interests raises concerns over whether the interests of New Zealand's public are accounted for. The nature of the FMA and IOSCO means there are concerns over whether the New Zealand public's interests are sufficiently represented within the organisation's decision-making. Accordingly, to ensure the rules it influences satisfy the interests of the greatest number of citizens, it is integral that its impact on New Zealand is subject public input and scrutiny.

The legislative reforms undertaken to become a signatory of the MMOU and IOSCO's influence on the exercise of the FMA's powers are evidence of its influence on New Zealand's domestic regulatory regime. This regime plays an important role and its operation impacts the New Zealand public. For example, resulting from the legislative reform, the Securities Commission, now replaced by the FMA, was granted the powers to "require any person to produce for inspection any document kept by that person".[239] Such powers infringe on the freedoms of the public. Thus, the operation of IOSCO within New Zealand and its impacts should be subject to public input.

The nature of the MMOU meant it avoided the process through which the public may provide input on the operation of international agreements. As noted, New Zealand has a stringent treaty examination process whereby they are presented to Parliament alongside a national interest analysis and subject to a select committee process whose findings are

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239 Securities Amendment Act 2002, s 21.

reported to Parliament. The issue with the MMOU is that it subverted these checks. The treaty examination process is only invoked where an agreement requires legislation to be effective.[240] As noted, the MMOU incorporates ex ante screening whereby the required legislation must be passed before becoming a signatory. Thus, the Memorandum did not require legislation after being signed.

When the reforming legislation was passed by Parliament, it was subjected to public input. The legislative process in New Zealand inevitably involves public involvement through select committees and debate among elected representatives within Parliament.[241] Accordingly, the reforms enacted prior to signing the MMOU were not devoid of public opinion. The deficiency of public input did not occur in the passing of the legislation. Instead, the issue was that the public did not influence whether IOSCO should play a role in setting the form, agenda and content of the reforms. As noted, normally when legislation is passed to implement a multilateral agreement, the agreement itself is subject to debate and public input before it has a chance to influence domestic law. The public can make submissions on whether the agreement should be entered and whether it should impact New Zealand's legislation. However, because the MMOU subverted the treaty examination process, it impacted the reforms without the public being made aware of its influence or being able to express their opinions on its impact.

The lack of public influence on IOSCO's role in New Zealand is made especially clear when compared to the treatment of other international agreements, for example, the CPTPP. As noted, before it had any legislative impact, the CPTPP was subject to the treaty examination process whereby 427 submissions from the public were made and their findings were reported and subjected to debate among Members of Parliament. Only after it was exposed to this stringent process could the agreement have a legislative impact through the passing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018. In comparison, legislative reforms, influenced by the MMOU were made without any public input or debate on the operation of the MMOU and

240 Gobbi, above n 113, at 292.

241 McGee, above n 61, at Chapter 26.

whether it should impact New Zealand's legislative regime. The differences between the two processes demonstrate the deficiency of public input on the MMOU's influence.

### *E What Should be Done?*

While there are various checks in place for the implementation of treaties and binding agreements, IOSCO, which operates differently, is relatively devoid of scrutiny. This must change. IOSCO's role in setting the agenda for reform must be acknowledged and its application in New Zealand must be subjected to greater public scrutiny. The lack of examination it has received speaks to the deficiencies of New Zealand's treatment of relatively unorthodox international organisations.

There is an argument that given the technical nature of IOSCO's contributions, the public should be shielded from them and would have no interest in their application. However, as noted, the public interest includes the views of any of those in society who are not elected figures in government. No doubt businesses, economists, banks and the various experts involved and touched by financial market regulation would have a keen interest in IOSCO's influence. The issue currently is that decision-makers have failed to adequately draw attention to IOSCO's role, failing to debate the prospect of its influence and give the public a chance to make their interests known. How then could the process be improved?

The net for catching international agreements could be cast wider, ensuring that even non-binding instruments are considered. To constrain the treaty examination process to binding agreements is illogical given the impact of organisations such as IOSCO. IOSCO and its effects on legislation demonstrate this system's flaws as its non-binding status did little to hamper its influence.

The need for greater scrutiny must, however, be balanced. Parliament's workload and limits on its time mean a thorough examination of the impact of every international organisation is impossible. Such concerns were seen clearly in the reasons behind the International Treaties Bill 2000's failure. The bill, which sought to increase Parliamentary scrutiny of international agreements, failed to pass as MPs raised arguments based on limits

on Parliament's time and resources.[242] Thus, undergoing a full treaty examination process for every international organisation is simply infeasible.

Instead, Parliament must find a way to make the public aware of the influence of organisations like IOSCO. They must acquire and publically debate information on proposed reforms beyond stating that the current law "does not conform to international standards."[243] What these standards are, where they come from and their significance must become part of Parliamentary debate. MPs as representatives must bear the burden of informing the public of possible influences by international organisations. As the true reasoning behind legislative reform driven by organisations such as IOSCO is revealed, the public can examine their application. The influence of international organisations in the background must be accounted for, bringing their actions into the light of public scrutiny.

### *1 Beyond IOSCO*

IOSCO is only one of many non-binding multilateral organisations that impacts New Zealand's domestic law. Institutions such as the International Forum of Sovereign Wealth Funds (IFSWF) and the International Organization for Standardization (ISO) behave similarly. Each is voluntary and places no binding obligations on its members.[244] Yet, like IOSCO, they both have considerable policy implications for governments.[245] New Zealand's legislation has been influenced by both. References to ISO standards appear in numerous Acts and regulations[246] while the New Zealand Superannuation Fund, a Crown

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242 (19 February 2003) 606 NZPD 3589.

243 (5 December 2001), above n 226.

244 Naomi Roth-Arriaza "'Soft Law' in a 'Hybrid' Organization: the International Organization for Standardization" in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2003) 263 at 264; and Joseph J Norton "The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes" (September 2010) 13(3) JIEL 645 at 657.

245 Roth-Arriaza, above n 244, at 263; and Norton, above n 244, at 657.

246 See: Health Act 1956, s 69ZY; Gas (Safety and Measurement) Regulations 2010, sch 1; Health and Safety at Work (Hazardous Substances) Regulations 2017, reg 9.48.

entity,[247] annually assess their performance according to the IFSWF's Santiago Principles.[248] Thus, unorthodox institutions affect New Zealand in areas beyond financial regulation.

The breadth of the influence of these non-binding organisations is cause for concern and enhances the call for a system whereby the influence of these organisations may be brought to light. Beyond IOSCO, other unorthodox institutions must be publically identified when they are applied to allow for adequate public input and scrutiny.

## *VII Conclusion*

New Zealand's membership of international organisations varies widely. As the international system grows increasingly pluralised and the proliferation of multilateral institutions continues, an examination of the ways they impact New Zealand's domestic law must be considered. Their influence is particularly important in countries, such as New Zealand, where democratic ideals of public scrutiny and the rights of individuals have been enshrined. As seen in both the UNSC and the WTO, New Zealand cannot always pursue its interests and, unsurprisingly, agreements tabled for application domestically will likely have paid no heed to New Zealanders' interests. Thus, the public's role in the implementation of these agreements is integral. Public input must be accounted for, beyond elections, to ensure the laws international organisations contribute to and influence satisfy the interests of the greatest number of citizens.

New Zealand's decision-makers, being aware of this need have ensured that the implementation of international agreements is subject to considerable public input. The treaty examination process, as demonstrated by the application of WTO agreements, allows citizens to contribute through a select committee process. While the process is limited, such constraints are practical and an inevitable consequence of international cooperation. However, the multitude of ways in which international organisations affect New Zealand,

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247 New Zealand Superannuation and Retirement Income Act 2001, s 38(2).

248 "Santiago Principles Self Assessment" (2020) NZ Super Fund <www.nzsuperfund.nz>.

means there are flaws in the system. UNSC resolutions, implemented through regulations, have a considerable impact on citizens, imposing offences and infringing on their freedoms. Yet, their application is devoid of public input. Considerations of practicality may justify the use of regulations, but the process can be reformed to account for the need for a more democratic method. The addition of a pre-publication method would allow for the use of regulation's benefits to continue largely unhindered, whilst allowing the public to scrutinise and provide input on the laws which impact them.

The use of regulations may be problematic, but it pales in comparison to the concerns caused by the sheer lack of a process for the implementation of soft law arrangements such as IOSCO. Their non-binding nature ensures they subvert any examination in a public forum despite having a considerable impact on New Zealand's legislation as demonstrated by IOSCO's influence on financial market regulation. New Zealand may have processes for dealing with the UNSC and the WTO, but nothing allows for the scrutiny of organisations like IOSCO. This must change. Their impact must be subject to Parliamentary debate, revealing their influence to the public and allowing for input of interested parties. Such a reform would allow the public to contribute to the laws which govern them having been made fully aware of the reasoning behind them. In turn, the public interest will be considered to a greater, more desirable extent.

*Appendix 1*

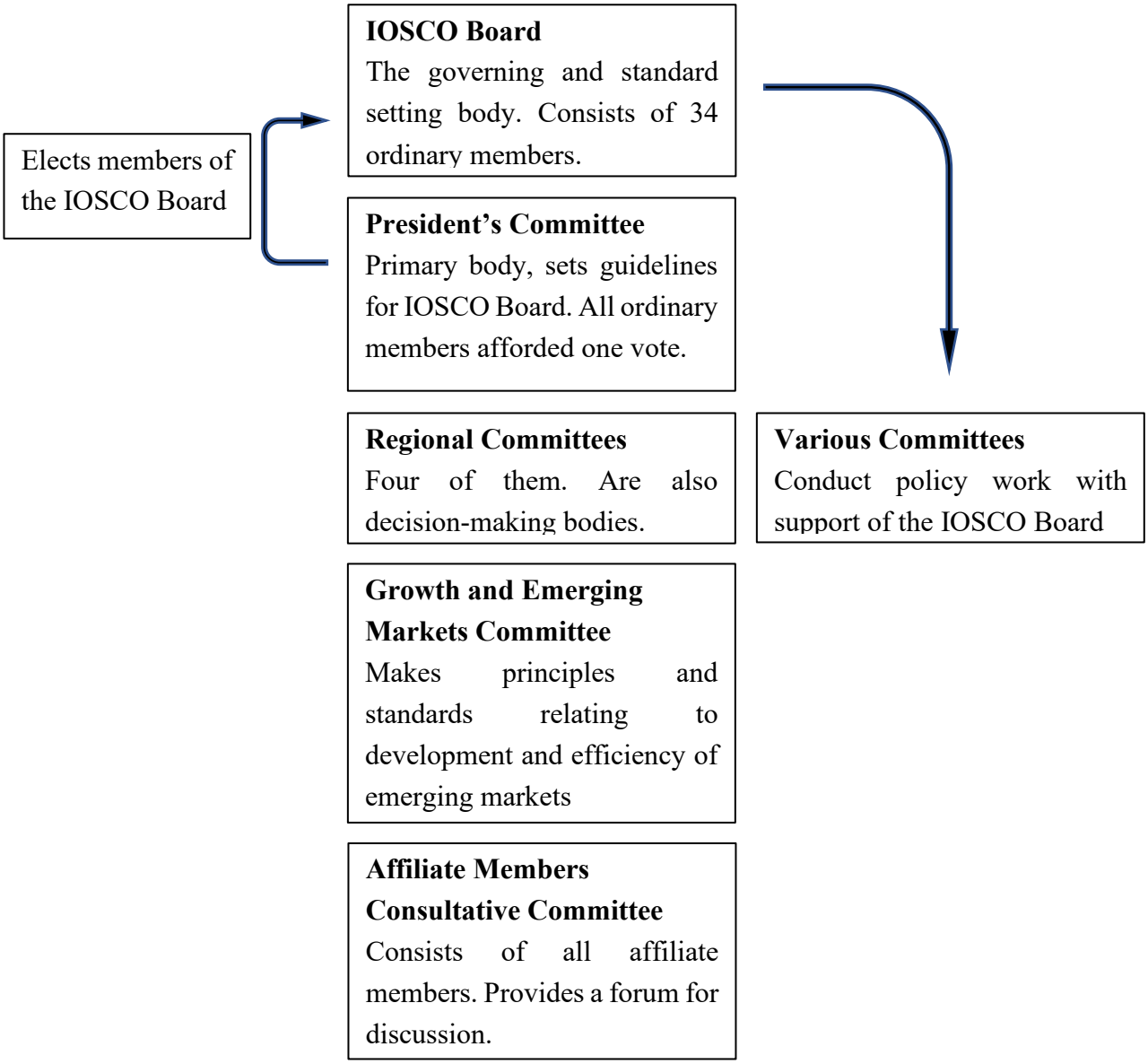
Table of IOSCO's membership types:[249]

| **Type of Member** | **What they are** | **What they do** |
|---|---|---|
| Ordinary Member | Official national securities regulators.<br>E.g. Financial Markets Authority (FMA) | Can vote, primary decision-makers. |
| Associate Member | Other securities regulators in states with more than one. | Party to discussions, can contribute. |
| Affiliate Member | Bodies with an appropriate interest in securities regulation e.g. securities exchanges. | Party to discussions, can contribute. |

[249] See: "About IOSCO", above 166; Costi, above n 167, at 203-204; and Underhill, above n 175, at 261.

*Appendix 2*

IOSCO's structure:[250]




250 See: "IOSCO Board" (Accessed 10 October 2020) OICU-IOSCO <www.iosco.org/>; "Presidents Committee" (Accessed 10 October 2020) OICU-IOSCO <www.iosco.org/>; "Growth and Emerging Markets Committee" (Accessed 10 October 2020) OICU-IOSCO <www.iosco.org/>; "Affiliate Members Consultative Committee" (Accessed 10 October 2020) OICU-IOSCO <www.iosco.org/>; Costi, above n 167, at 203, 204 and 214; and Underhill, above n 175, at 261.

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