Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response*

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I. INTRODUCTION

The Berlin Wall, as if a great degenerate iceberg, disappeared in the warmth of goodwill released by the end of the Cold War. Faced with seemingly relentless and implacable rivals, democratic nations around the world had invested considerable resources in defending and promoting the virtue of their governmental systems. These Herculean efforts may have provided the foundation for the renewed interest in increasing public participation in governmental decision-making.[1]

The treaty-making process, due largely to the growing influence of international law on the content of domestic law, is not immune to this development. Smaller countries also face the challenge of international pressure to conform to international norms. In an effort to satisfy both trends, New Zealand has taken a tentative step to augment the legitimacy of its international agreements by enhancing parliamentary participation in its treaty-making process.

This Article assesses New Zealand's constitutional response. Part II outlines the philosophical principles underpinning the calls for greater participation in decision-making and discusses the pressures that led New Zealand to implement trial changes to its treaty-making process. Part III describes New Zealand's treaty-making process in the context of its governmental system and English origins. Part IV presents the changes

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1. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46-47 (1992); *see also Happy 21st Century, Voters! A Survey of Democracy*, THE ECONOMIST, Dec. 21, 1996, at 1-14 (special section); Brian Beedham, *A Better Way to Vote*, THE ECONOMIST, Sept. 11, 1993, at 5 (special supplement).

made to New Zealand's treaty-making process and evaluates them in terms of enhancing public participation. This Article concludes that New Zealand's tentative reform increases the scope for public debate regarding the acceptance of treaties.

II. PRESSURE FOR GREATER PUBLIC PARTICIPATION

New Zealand's governmental culture is essentially pragmatic. Theory has its place, but constitutional change generally occurs as a result of practical considerations. Its decision to alter its treaty-making process can, therefore, simply be characterized as a product of *real politik*. However, in this case, it can also be explained in terms of the public participation principles at issue in democratic theory.

A. *Theory*

In most representative democracies, the legitimacy of the governmental system is predicated on the doctrine of the consent of the governed. According to Thomas Cronin, people initially gathered together for mutual protection.[2] Once life and limb were relatively safe, they formed governments to secure and enhance their natural rights, which implies that people are paramount to their government.[3] In its nascent form, the doctrine stipulated that a government's worth depended largely on "how it improved the well-being and protected the natural rights of its citizens."[4]

Giovanni Sartori takes this idea further by arguing that democracy exists "when the relation between the governed and the government abides by the principle that the state is at the service of the citizens and not the citizens of the state, that the government exists for the people, and not vice versa."[5] Sartori's shift in emphasis implies that governments should be accountable and responsive to their citizens, not merely responsible for them. This view, which underpins contemporary calls for greater public participation in the treaty-making process, is also evident in representational theory. Ultimately, it is a question of legitimacy.

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2. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 12 (1989). Sartori argues that democracy exists "when the relation between the governed and the government abides by the principle that the state is at the service of the citizens and not the citizens of the state, that the government exists for the people, and not vice versa." G. SARTORI, THE THEORY OF DEMOCRACY REVISITED 34 (1987).
3. *See* CRONIN, *supra* note 2.
4. *Id.*
5. SARTORI, *supra* note 2, at 34.

1. Burkeian Representation

Edmund Burke has greatly influenced the theory of representative democracy.[6] After being safely elected to the English Parliament as the representative of Bristol in 1774,[7] he delivered a speech calculated to justify acting contrary to the desires of the constituents in his electorate.[8] Essentially, Burke declared that elected representatives are not delegates charged with the task of presenting the views of their electorate, but independent Members of Parliament (MPs) with the freedom and duty to exercise their judgement in the interests of the nation as a whole.[9]

Although it is a persistent view, particularly among elected representatives, Burke's conception of representation is not without its critics.[10] Robert Dixon, for example, argued that, given a choice between an independent legislator and a delegate, the delegate must be chosen; otherwise, there is no representative function and, therefore, no democracy.[11] Geoffrey de Q. Walker also pointed out that Burke's disregard for his electorate's views generated so much criticism from them that he decided not to stand for re-election.[12]

In addition, Burke's view overlooks the modern reality of political party discipline in many countries, a phenomenon unknown to him.[13] As Vernon Bogdanor pointed out, the right to vote in Burke's time "was on the whole restricted to a comparatively small number of male property owners."[14] Since it was humanly possible to develop a close relationship with constituents, Burke's speech appeared to be designed to free him from the burden of doing so. Today, however, the main threat to a representative's independent judgment comes from his or her party, not his or her constituents. This threat results from the nominating process that is intended to select those who will represent the interests of the party, or more accurately, those who control the party.[15] The typical representative, in Burkeian terms, is, arguably, no more than a delegate of the

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6. *See generally* V. Bogdanor, *Introduction* to REPRESENTATIVES OF THE PEOPLE? 4 (V. Bogdanor ed., 1985).
7. *See* GEOFFREY DE Q. WALKER, INITIATIVE AND REFERENDUM: THE PEOPLE'S LAW 31 (1987).
8. *See id.*
9. For a reprint of Burke's speech, see MAI CHEN & SIR GEOFFREY PALMER, PUBLIC LAW IN NEW ZEALAND: CASES, MATERIALS, COMMENTARY AND QUESTIONS 604-05 (1993).
10. *See, e.g.*, R. DIXON JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 31 (1968); GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 31-40 (1988) [hereinafter RULE OF LAW].
11. *See* DIXON, *supra* note 10, at 31.
12. *See* WALKER, *supra* note 7, at 31.
13. *See* Bogdanor, *supra* note 6, at 3-4.
14. *Id.* at 4.
15. *See id.* at 4.

party, who is paraded into a legislative chamber to vote as the party whips direct.[16]

2. Madisonian Representation

James Madison refined Burke's theory by linking it with the idea of protecting minority rights. He believed that the purpose of representation was:

> to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.[17]

Since Madison believed that direct democracy was feasible only in small communities, as in the ancient city-states where citizens voted and simple majority rule held sway, he rejected it as inapplicable to a country as vast as the United States.[18] More importantly, as Adrienne Koch summarized, Madison believed that simple majority rule would be:

> pernicious wherever it might be applied because of its failure to provide protection for the rights of minorities. He distrusted this simple or direct democracy for its *minimal* use of deliberative judgment, exercised in a favoring atmosphere of limited powers with opportunities for debating, rethinking, and reasonably deciding intricate issues of moment. At the mercy of this type of simple direct democracy were especially the propertied few (compared to the propertyless many) and wise and honest leaders who would tend to be cast aside in favor of demagogues who would be prepared, at the first opportunity, to emerge in the true colors of despots.[19]

3. Jeffersonian Democracy

The logical extension of Madisonian representation is that the so-called common citizen should never be allowed to participate in the exercise of governmental power. Jefferson anticipated this consequence in a letter he wrote to Madison from Paris in 1787, in which he warned against granting government too great a role in determining the affairs of

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16. *See* Helen Clark, *No to PR, Yes to Parliamentary Reform*, EVENING POST (Wellington), Jan. 6, 1992, at 5; Address by Michael Laws, Member of Parliament for Hawke's Bay, Commonwealth Press Editors' Conference, Wellington (June 6, 1991); Mark W. Gobbi, *The Trial of Socrates: A Matter of Conscience*, N.Z.L.J., Dec. 1988, at 451-52.

17. THE FEDERALIST No. 10 (John Madison).

18. *See* Koch, *Introduction* to NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON xix (A. Koch ed., 2d rev. ed., 1985).

19. *Id.*

the people, as it would be oppressive.[20] As Cronin has written, Jefferson, like Jean-Jacques Rousseau before him,[21] believed that:

> the will of the people is the only legitimate foundation of any government; even a deficient popular government was preferable to the most glorious autocratic one. Of course, people who rule themselves may commit errors, but they have means of correcting them. He had enormous confidence in the common sense of mankind in general. As long as citizens were informed, they could be trusted with their own governance.[22]

Jefferson, unlike most of his associates, was more willing to trust in the wisdom of the people.[23] His deep suspicion of government lent support to his position.[24] Fundamentally, he believed that people had the capacity to govern themselves.[25] This idea has become the philosophical basis upon which most arguments for greater public participation are based, particularly as developed later by Andrew Jackson, the Populists, the Progressives, and finally the latter-day participatory democrats.[26] Essentially, faith in Madisonian representation as a bulwark against "the tyranny of majority factionalism" appears to have waned in the face of a "consequent impatience with all forms of indirect or attenuated representation,"[27] especially as people have become more informed and technology has rendered their participation easier.[28]

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20. *See* CRONIN, *supra* note 2, at 40.

21. Rousseau disapproved of nations that delegated their sovereignty to representatives:

> By dint of laziness and money, they finally have soldiers to enslave the country and representatives to sell it. . . . The English people think it is free. It greatly deceives itself; it is free only during the election of the members of Parliament. As soon as they are elected, it is a slave, it is nothing. Given the use made of these brief moments of freedom, the people certainly deserve to lose it.

JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY 102 (Roger D. Masters ed. & Judith R. Masters trans., 1978); *see also* ELLIS PAXSON OBERHOLTZER, THE REFERENDUM IN AMERICA 2-3 (1900).

22. CRONIN, *supra* note 2, at 40.

23. *See id.* at 37, 40.

24. *See id.* at 40.

25. *See* DIXON, *supra* note 10, at 42.

26. *See* CRONIN, *supra* note 2, at 37; DIXON, *supra* note 10, at 42; *see also* DANIEL C. KRAMER, PARTICIPATORY DEMOCRACY: DEVELOPING IDEALS OF THE POLITICAL LEFT (1972); LAURA TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS(1977); BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); PATRICK B. MCGUIGAN, THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISION MAKING (1985).

27. DIXON, *supra* note 10, at 42.

28. Bernard Robertson has argued that information technology has solved many of the practical problems which required the selection of representatives; therefore, citizens are now obliged to take a more active part in decision-making. Bernard Robertson, Book Review, N.Z.L.J., June 1993, at 213-14 (reviewing PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND (1993)).

4. Legitimacy

If the coercive authority of government is derived from the consent of the governed, then, as Sartori concluded, "power is legitimate only if it is actually bestowed from below, only if it is an emanation of the popular will, and only if it rests on some expressed, basic consensus."[29] Although influential in the formation of the Swiss and American constitutional systems, this principle was slowly incorporated into Westminster constitutional systems such as New Zealand's. In its unadulterated form, it still sits somewhat uneasily with the concept of the Crown prerogative and, despite its decreasing importance, the theory of parliamentary sovereignty.[30]

The history of Crown prerogative spans over 1,000 years. In the Middle Ages, the English King was an autocrat who ruled with absolute power. This power was not based on statute, but was considered inherent in the Crown and recognized as a legal reality by the courts. Revolution, parliamentary encroachment, judicial decision, and neglect are responsible for the gradual transfer of a great deal of power from royal hands to those of Parliament, the latter eventually establishing the rule of law in place of arbitrary Crown rule. In New Zealand, the small collection of rights and powers remaining with the Crown are, as a matter of constitutional convention, exercised by the Executive. This includes the exclusive power to negotiate, conclude, and enter into treaties.[31]

The theory of parliamentary sovereignty, as restated by Albert Venn Dicey in 1885, insists that "a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment."[32] Legal scholars have interpreted this to mean that

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29. SARTORI, *supra* note 2, at 34.

30. *See generally* Mark W. Gobbi, The Quest for Legitimacy: A Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand (1994) (unpublished LL.M. Thesis, Victoria University of Wellington) (on file with Victoria University of Wellington's central and law libraries) [hereinafter Quest for Legitimacy].

31. *See* PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 560-63 (1993); *see also* A.V. Dicey, *Ought the Referendum to be Introduced into England?* 57 CONTEMP. R. 489, 498 (1890) (viewing British constitutional history as a record of transactions by which the prerogatives of the Crown had been transformed into the privileges of the electors, who had become the true political sovereign).

32. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 68 n.1 (10th ed. 1965). In his text, Dicey quotes from TODD, PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES 192 (1880), as follows:

> a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare.

DICEY, *supra*, at 67-68.

Parliament, as the legal sovereign, cannot impose substantive, as opposed to procedural, restrictions on future parliaments.[33] However, this would occur if the Executive were to enter into treaties that require legislation to have effect. In fear of placing the nation in breach of its international obligations, Parliament is all but forced to enact the requisite enabling legislation. Subsequent parliaments are unlikely to repeal this legislation for the same reason.

To avoid impinging on parliamentary sovereignty in this way, New Zealand generally follows the practice of enacting enabling legislation prior to executing treaties that require it. However, this practice does not assist future parliaments that, fearing international condemnation, are unlikely to repeal enabling legislation enacted by previous parliaments. It also fails to relieve Parliament of the pressure to preserve New Zealand's status as a good world citizen, which it would put at risk if it were to refuse passing the requisite enabling legislation, particularly if the Executive played a substantial role in the negotiation and conclusion of the treaty in question.

In this sense, the power of elected representatives to exercise their own judgment, or to vote in accordance with the views of their electorate, may be fettered. If their consent is not freely given, then logically the legitimacy of their decision must be at issue. However, Parliament, if it so chose, could usurp the Executive's role in the treaty-making process at any time by simply enacting legislation to that effect. Parliament has not so acted, and it is arguable that the consent is implied. After all, the New Zealand Cabinet, the organ of government that directs and exercises executive power, is composed of individuals democratically elected to Parliament. Conceivably, the requirements of democracy were met when they were elected and given a mandate to exercise the Executive's treaty-making power.

David Butler and Austin Ranney have articulated a conception of legitimacy that is more applicable to New Zealand's governmental system than Sartori's. In their view, legitimacy consists of two components: (1) the people's conviction that the institutions and processes by which political decisions are made are, by law, custom, and moral principle, the right and proper ways to make such decisions; and (2) their conviction that these decisions do not go beyond acceptable limits of fairness and

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33. *See, e.g.*, JOSEPH, *supra* note 31, at 12, 458; Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 463 (1991); F.M. Brookfield, *Referendums: Constitutional and Legal Aspects*, *in* REFERENDUMS: CONSTITUTIONAL AND POLITICAL PERSPECTIVES 16-17 (A. Simpson ed., 1992) [hereinafter REFERENDUMS]; B.V. Harris, *Parliamentary Sovereignty and Interim Injunctions: Factortame and New Zealand*, 15 N.Z. U. L. REV. 55, 58-59 (1992).

decency in awarding benefits to, or imposing burdens on, any part of the population.[34]

Essentially, the exercise of governmental power is legitimate if it creates generally accepted obligations rather than a set of prescriptive norms that require force to ensure widespread compliance. In a pure representative democracy, this acceptance is expressed in periodic elections that allow the electors, in a generalized form, to provide some indication of their approval or disapproval of the exercise of governmental power. However, enhancing public participation entails providing the electors with the means to voice their approval or disapproval more frequently and with greater precision.

If either of the convictions identified by Butler and Ranney are undermined, the legitimacy of the constitutional system and its crucial role in maintaining the rule of law are undermined.[35] Broadly speaking, two important consequences are possible. First, if the means of creating and enforcing law are widely perceived as illegitimate, people, by and large, will lose their inner impulse to obey the law.[36] Second, a growing distrust of legislative bodies, coupled with a growing suspicion that privileged interests exert a disproportionate influence, will produce a demand for more democracy.[37] Those in power are likely to yield to demands for greater public participation if necessary to avoid the consequences of undermining the rule of law.

5. Democratic Deficit

Essentially, the legitimacy of governmental decisions is now no less important than their quality. Given this theoretical backdrop, it is not surprising that a diverse range of commentators should call New Zealand's treaty-making process into question and advance proposals to overcome its perceived "democratic deficit."[38] Most of these proposals

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34. *See* David Butler & Austin Ranney, *Theory*, *in* REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 24 (D. Butler & A. Ranney eds., 1978). Butler and Ranney have also noted that all political decisions should be as legitimate as possible and that the highest degree of legitimacy is achieved by decisions made by the direct, unmediated vote of the people, which leads them to equate referendums with greater legitimacy. *See id.*; *see also* WALKER, *supra* note 7, at 195 (stating that direct democracy has proved to be a source of new legitimacy for enacted law and a bulwark against extremism).

35. For an analysis of the rule of law and its importance to constitutional democracy, see RULE OF LAW, *supra* note 10.

36. *See* GEOFFREY DE Q. WALKER, THE PEOPLE'S LAW: INITIATIVE AND REFERENDUM: UNIVERSITY OF QUEENSLAND INAUGURAL LECTURE 2 (1988).

37. *See* CRONIN, *supra* note 2, at 10.

38. *See, e.g.*, McGee, *Treaties—A Role for Parliament*, 20(1) Public Sector 2 (1997); REPORT OF THE STANDING ORDERS COMMITTEE ON THE REVIEW OF THE OPERATION OF THE NEW STANDING ORDERS, 1994-96 Appendix to the Journal of the House of Representatives, I. 18B,

can be traced to Ponsonby, a British parliamentarian who served as the Under Secretary of State for Foreign Affairs. He attributed the cause of World War I to the existence of secret treaties.[39] Ponsonby published a book in 1915 entitled *Democracy and Diplomacy: A Plea for Popular Control of Foreign Policy*, in which he argued that the existing treaty-making process was far less democratic than it should be.[40] In his view, a lack of participation, consultation, and accountability is institutionalized in the Executive's exclusive role in the negotiation and ratification of treaties.[41]

In terms of constitutional theory, Ponsonby's democratic deficit concern can be characterized as an impoverishment of the separation of powers doctrine. Treaty-making in New Zealand is considered an executive power handed down from the time of kings and is exercised as a prerogative. This power is, however, subject to the sovereign will of Parliament should it choose to exercise its will by legislating. Parliament, as the legislative branch of government, has simply chosen not to exercise its power to check or balance the executive's treaty-making activities.

In practical terms, the dominance of both the executive and the legislative branches of government by a party or coalition, until recently, has ensured that this independent exercise of parliamentary will would not occur. However, New Zealand's new mixed-member, proportional-representation electoral system (MMP) has created a political environment that could usher in a more proactive Parliament and citizenry. This possibility has fuelled the calls for enhancing participation in the treaty-making process.

Annex D [hereinafter REPORT]; New Zealand Law Commission, *The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration* (revised draft, June 1995) [hereinafter Law Commission]; *see also* K. Keith, *A New Zealand Perspective on Globalisation*, *in* TREATY-MAKING AND AUSTRALIA: GLOBALISATION VERSUS SOVEREIGNTY (P. Alston & M. Chaim eds. 1995); J. Kaye, Treaties: Legislative Techniques of Incorporation into Statute, and the Effect on Statutory Interpretation (1991) (unpublished LL.M. Paper, Victoria University of Wellington) (on file with Victoria University of Wellington's law library). For similar Australian discussions, see Stephen, *Making Rules for the World*, 30(2) Austl. Law. 14 (1995); Stephen Donaghue, *Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia*, 17 ADEL. L. REV. 213, 231 (1995); PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, TRICK OR TREATY? COMMONWEALTH POWER TO MAKE AND IMPLEMENT TREATIES (1995) [hereinafter TRICK OR TREATY].

39. *See* A. PONSONBY, DEMOCRACY AND DIPLOMACY: A PLEA FOR POPULAR CONTROL OF FOREIGN POLICY 10 (1915).

40. *See generally id*. Ponsonby's proposals are set out in the text at Part IV.A.

41. *See id.* at 45-70.

B. Practical Considerations

Since 1984, New Zealand has evolved from one of the world's most regulated to least regulated states. The economic and social changes ushered in a host of constitutional reforms, including the measures altering the treaty-making process. These measures, however, can also be seen as a response to a perception that the New Zealand judiciary is relying increasingly on international law to resolve domestic legal disputes.

1. 1984 Onwards

According to Philip A. Joseph, from 1975 to 1989 the approval rating of parliamentarians in New Zealand slid from thirty-three percent to four percent.[42] Public admiration for parliamentarians began to decline under what Laurie Barber characterizes as the "belligerent and divisive leadership style" of Robert Muldoon,[43] Prime Minister of the National Government from 1975 to 1984. Incidentally, during this period, serious proposals regarding the introduction of Swiss-style direct democracy devices began to surface in New Zealand.[44]

As both Barber and Keith Sinclair noted,[45] the Fourth Labour Government (1984-1990) was ill-placed to alleviate this trend. It was all but forced to embark on a sustained program to deregulate the New Zealand economy in an effort to deal with the budget and trade deficits caused by Muldoon's unsustainable economic and fiscal policies, particularly his generous superannuation programme and his "Think Big" projects.[46] Its approach, which was generally continued by the subsequent National Government (1990-1996), included reducing benefits through the introduction of means testing and the imposition of user charges, reforming taxation and the public service, privatising state-owned assets, and liberalizing financial markets.

These structural changes proved bewildering to many, particularly as they created levels of unemployment comparable to those experienced in New Zealand during the Great Depression, and fuelled a speculative stock-market boom that, following developments in overseas markets, crashed in October 1987. The crash caused many companies to fold and thousands of people to lose money and jobs. These circumstances gave

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42. *See* JOSEPH, *supra* note 31, at 285; *see also* KEITH JACKSON, THE DILEMMA OF PARLIAMENT 42 (1987).

43. LAURIE BARBER, NEW ZEALAND: A SHORT HISTORY 203 (1989).

44. *See* Quest for Legitimacy, *supra* note 30, at 205-07.

45. *See* Keith Sinclair, *Hard Times (1972-1989)*, *in* OXFORD ILLUSTRATED HISTORY OF NEW ZEALAND 361-64 (Keith Sinclair ed., 1990); BARBER, *supra* note 26, at 68, 208-11.

46. *See* BARBER, *supra* note 43, at 193-94, 201.

rise to the classic pre-conditions for constitutional reform—the coincidence of a sustained period of economic stress and a prolonged period of profound disillusionment with representative democracy.[47] This period produced a deluge of proposals for constitutional reform, including proposals for various direct democracy devices and proportional representation.[48]

The subsequent National Government (1990-1996) took account of this development. Prior to winning the 1990 election, it pledged to introduce a system that would allow the electors to initiate advisory referendums,[49] a promise that resulted in the Citizens Initiated Referenda Act 1993. It also pledged to hold a referendum on whether it should introduce proportional representation,[50] a promise that resulted in MMP as embodied in the Electoral Act 1993. Both promises were fulfilled on the eve of the National Government's narrow re-election in 1993. Its much-criticized decision, due to fiscal constraints, not to honor its celebrated and well-publicized pledge to abolish the Fourth Labour Government's surtax (means testing) on superannuation, virtually foreclosed any possibility of not acting on these promises.[51]

In Joseph's view, the actions of the Fourth Labour Government, and the subsequent National Government, blunted "the symbolism of representative government" and generated "much of the scepticism held about New Zealand's governmental institutions."[52] A nationwide crisis of confidence in Parliament, the most important governmental institution in the country, could only help the cause of constitutional reform because it

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47. *See* Quest for Legitimacy, *supra* note 30, at 3-4, 350.

48. The proposals included calls for the reduction in the size of Cabinet, loosening of the Whip system, establishment of a second chamber, and the introduction of proportional representation, as well as for various forms of direct democracy. *See, e.g.*, Clark, *supra* note 16, at 5 (Cabinet and whip system); REPORT OF THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM 208-82 (1986) (second chamber and proportional representation); P.J. Downey, *A Second Chamber*, N.Z.L.J., Dec. 1990, at 421 (same); Colin Clark, *Proportional Representation Abolishes 'Elected Dictators*,*'* EVENING POST (Wellington), Jan. 16, 1992, at 7 (proportional representation); *Peters Wants Poll Reform by 1993*, DOMINION (Wellington), June 1, 1991, at 2; REFERENDUMS, *supra* note 33 (discussing various direct democracy proposals).

49. *See* National Party, *Improving New Zealand's Democracy*, National's Policy on Electoral Reform (Sept. 11, 1990).

50. *See id.*

51. Prior to the election, Jim Bolger, then Leader of the National Party, promised to remove the Fourth Labour Government's unpopular surtax on superannuation. As Prime Minister, however, Bolger "claimed that fiscal restraints required his government to increase rather than remove the surcharge." JOSEPH, *supra* note 29, at 451.

52. JOSEPH, *supra* note 31, at 285; *see also* J.L. Caldwell, *Election Manifesto Promises: The Law and Politics*, N.Z.L.J., Mar. 1989, at 108, 111 (concluding that electors who feel aggrieved by any subsequent departure from announced policies have little prospect of legal redress).

threw "into question Parliament's ability to discharge its bedrock function of legitimising representative government."[53]

In these circumstances, expecting the New Zealand electors to continue embracing the Burkeian ideal of abdicating all responsibility for their welfare to their representatives became less tenable. The publication of Walker's timely and influential book, *Initiative and Referendum: The People's Law*,[54] assisted in this regard as it encouraged greater public participation in governmental decision-making. These events gave rise to the political climate necessary to bring about change in New Zealand's treaty-making process.

2. Perceived Judicial Activism

The impetus for change, however, appears attributable to a perception that the courts increasingly rely on international law to resolve domestic legal disputes. As discussed in Part III.B.3 below, the judiciary's role in the treaty-making process is in transition. This is a reflection of international pressures to conform to treaties, the trend towards the internationalization of human rights jurisprudence, and the view that the Executive has not secured implementation of all the treaties that have been executed in domestic law.

The judiciary has taken a more active role in the process due to globalization. Improvements in transportation and communication have dramatically increased the interaction of people throughout the world and, as a result, international trade in goods and services. In addition, international law, through the vehicle of human rights treaties, has provided a framework that many countries employ to promote fundamental rights and freedoms and to meet the needs of disadvantaged groups.[55] These developments have led to the increasing internationalization of national economies and political systems and the legal regimes that support them. Essentially, domestic law has changed and grown in complexity to keep pace with the rapid growth in international activity and global concerns.

New Zealand is especially sensitive to overseas legal developments because of its size and because of its history. As a small nation, the number of transactions that require regulation or lead to formal dispute resolution in the courts is small compared to those that take place in the United Kingdom, the United States, Canada, or Australia. If a novel legal problem arises, legal scholars and practitioners do not hesitate to consult

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53. JOSEPH, *supra* note 31, at 285.
54. *See generally* WALKER, *supra* note 7.
55. *See* TRICK OR TREATY, *supra* note 38, ¶¶ 11.10-11.12, at 178.

overseas legal authorities and precedents. In this respect, New Zealand can be characterized as a haven for comparative law specialists.

In addition, New Zealand is a relatively young state. Many of its founders came from Great Britain and its former dominions. Many of its current crop of legal educators and governmental advisers are from overseas, particularly Canada, Australia, the United Kingdom, and the United States. Their perspectives have influenced New Zealand's legal culture. For example, the New Zealand Bill of Rights Act 1990, which affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, is based on the Canadian Charter of Rights and Freedoms. As a consequence, New Zealand lawyers and government advisors draw heavily upon Canadian case law to resolve bill-of-rights issues.

Furthermore, in the absence of a clear expression of parliamentary will, the courts have no recourse but to rely on the common law to resolve the disputes that are before them. Increasingly, due to the internationalization of society, the courts are finding it necessary to look to international law to determine the common law. In these circumstances (as discussed in Part III.B.3 below), the judiciary appears to be flirting with the suggestion that it gives ratified, but-as-yet unimplemented, treaties the force of law. In the absence of a parliamentary response, this move is likely to increase the importance of the judiciary in the treaty-making process at the expense of parliamentary sovereignty, as the judiciary, rather than Parliament, would be incorporating treaties into domestic law. From a constitutional perspective, this possibility provides the driving force for change.

III. NEW ZEALAND'S TREATY-MAKING PROCESS

New Zealand's treaty-making process is best understood with reference to New Zealand's governmental system. Bringing the role of the various branches of government in the treaty-making process into sharper focus provides the basis for concluding that public participation is most valuable before the text of a treaty is settled.

A. *Constitutional Milieu*

New Zealand is a "sovereign independent unitary State with a constitutional monarchy, responsible Government and a unicameral legislature."[56] It does not have a written constitution embodying the

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56. RAYMOND MULHOLLAND, INTRODUCTION TO THE NEW ZEALAND LEGAL SYSTEM 17 (7th ed. 1990); *see also* JOSEPH, *supra* note 31, at 7, 11. For a collection of New Zealand's basic

supreme law of the land[57] or "based on or expressive of popular sovereignty."[58] Its constitutional system is:

> embedded in the statutes of the British and New Zealand Parliaments, the common law, constitutional convention, the law and custom of Parliament, the great legal commentaries (such as those of Blackstone and Dicey), and an impressive heritage devolving from British constitutional history. New Zealand is a constitutional monarchy deriving from the oldest of all temporal sovereignties, the British Crown, whose lineage reaches beyond the Norman Conquest to Saxon times. New Zealand has the closest adaptation of the Westminster system in the British Commonwealth.[59]

In theory, the New Zealand constitutional system is whatever Parliament proclaims it to be.[60] Parliament is sovereign. Its legislative enactments are the supreme law of the land. The courts do not have the power to declare an Act of Parliament unconstitutional,[61] nor do they have the power to force Parliament to follow its own long established conventions.[62] The role of the courts is simply to determine what Parliament intended and to enforce that intention.[63] Essentially, "[Parliament's] powers of legislation know no legal limitation."[64] Consequently, "[a]ny statute which empowers governmental action has constitutional significance."[65]

In practice, parliamentary sovereignty is constrained by constitutional conventions, public opinion, pressure groups, the doctrine of mandate, election promises, treaty obligations, international law, and pragmatism.[66] For example, New Zealand ratified the International

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constitutional documents, see JOSEPH, *supra* note 31, at 875-931; *see also generally* CHEN & PALMER, *supra* note 9.

57. MULHOLLAND, *supra* note 56, at 17; *see also* JACKSON, *supra* note 42, at 1.

58. F.M. Brookfield, *A New Zealand Republic?*, 8 LEGIS. STUD. 5, 10 (1994).

59. JOSEPH, *supra* note 31, at 1.

60. *See, e.g.*, Constitutional Act (N.Z.) 1986 [hereinafter N.Z. CONST.]. This Act is now the central document in the New Zealand Constitution. However, the Act is not a written constitution in itself but merely a constitutional document. *See* MULHOLLAND, *supra* note 56, at 18. According to Palmer, who was the Act's principal architect, the Act is merely a "basic guide to the composition and powers of the institutions with which it deals." GEOFFREY PALMER, UNBRIDLED POWER: AN INTERPRETATION OF NEW ZEALAND'S CONSTITUTION & GOVERNMENT 3 (2d ed. 1987). The Act was prompted by Muldoon's reluctance to hand over power after his government was defeated in the 1984 general election. Among other things, the Act clarifies the rules regarding the transfer of power from one government to another. *See* MULHOLLAND, *supra* note 56, at 19.

61. *See* JOSEPH, *supra* note 31, at 9.

62. *See id.* at 239; PALMER, *supra* note 61, at 1.

63. *See* JOSEPH, *supra* note 31, at 104.

64. *Id.* at 12.

65. *Id.* at 16; *see also* JACKSON, *supra* note 42, at 13 (noting that the New Zealand Parliament derives its structure from statute, unlike the British Parliament which has evolved over centuries).

66. *See* JOSEPH, *supra* note 31, at 446-53.

Covenant on Civil and Political Rights and affirmed its commitment to the Covenant in the New Zealand Bill of Rights Act 1990.[67] New Zealand also ratified the First Optional Protocol to the Covenant that provides its citizens with a right of petition to the United Nations Human Rights Committee for alleged violations of the Covenant. According to Joseph, "[t]hese instruments [have] injected new content into the rule of law by laying down minimum standards for national legal systems."[68] In addition, the "rule of law supplements the principle of legality by imposing minimum standards of justice."[69]

However, these standards are not easy to ascertain.[70] More importantly, they have not provided the courts with the power to declare an Act of Parliament unconstitutional. Section 4 of the New Zealand Bill of Rights Act 1990 specifically states that the courts cannot use its provisions to override any conflicting enactment.[71] If the Act had given the courts this power, Parliament would still have had the legal power to repeal the grant, as the Act is ordinary unentrenched legislation. Consequently, Parliament has the legal power to quash any of the rights guaranteed under the New Zealand Bill of Rights Act 1990. In short, as Keith Jackson noted, "constitutional safeguards in New Zealand are minimal."[72] In his view:

> There is a tendency to equate the will of the majority party with parliament and to assume that whatever the majority says goes, thereby pushing to one side the whole question of constitutionality. It is partly because this lack of institutional restraint that Lijphart was able to regard New Zealand as an exemplar of the majoritarian model.[73]

MMP has not changed this equation. The October 1996 election, the first under MMP, produced a coalition government. However, it has not altered the essential majoritarian nature of Parliament as it does not create any external institutional mechanism by which to check Parliament's

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67. *See* New Zealand Bill of Rights Act 1990 [hereinafter Bill of Rights].

68. *See* JOSEPH, *supra* note 31, at 197-98; *see also* Sir Ivor Richardson, *Public Law and Constitutional Issues*, N.Z.L.J., June 1993, at 198, 199 (stating that "the development of public law in New Zealand is likely to be increasingly influenced by appeals to international norms"); Legal Division, Commonwealth Secretariat, *The Application of International Human Rights Standards in Domestic Law*, 22 VICTORIA U. WELLINGTON L. REV. 1 (1992); Jerome B. Elkind, *The Optional Protocol and the Covenant on Civil and Political Rights*, N.Z.L.J., Nov. 1991, at 409; Jerome B. Elkind, *International Obligations and the Bill of Rights*, N.Z.L.J., June 1986, at 205.

69. JOSEPH, *supra* note 31, at 196.

70. *See id.*

71. *See* Bill of Rights, *supra* note 67, § 4.

72. JACKSON, *supra* note 42, at 13.

73. *Id.*

legislative power. Furthermore, calls for a written constitution have generated little interest among political parties.[74] Joseph has argued that:

> [o]pposition to an entrenched Constitution (or a Bill of Rights) may stem from party politicians imbued with the spirit of majority rule in a unicameral Parliament. They may find it repugnant that their powers may be limited when in office. Their organised and systematic opposition is part of the reason, some contend, why the Constitution should be entrenched.[75]

Although Joseph suggested that New Zealand's high degree of political consensus has made a formal constitution unnecessary,[76] he points out that:

> consensus does not necessarily replace an effective constitutional framework; the only real sanction remaining in the country is that of triennial elections based upon the simple plurality system. Given rising racial consciousness and the passing of the economic security it enjoyed as a colony, it may be that New Zealand's crude majoritarianism is now dated. Certainly the degree to which the actions of New Zealand governments are unhindered by constitutional considerations is unique. No other country in the world, claiming to be democratic, has gone so far.[77]

The move to MMP has not undermined this pre-MMP assessment. Although the triennial electoral sanction shifted from one based on plurality (as in the United Kingdom) to one based on proportionality (as in Germany), the new system does not establish any new legal limits on Parliament's power. The increased likelihood of coalition government invites the possibility of political compromise, but it does not guarantee individual rights, as no institution rivals the power of Parliament. In this milieu, the Executive's exclusive control over the treaty-making process seems peculiar.

New Zealand's constitutional system is based on an informal, rather than formal, separation of powers.[78] As Geoffrey Palmer observed, the political party (or parties) that controls Parliament "effectively controls both the legislative and executive branches."[79] However, Joseph argued that "the distinctions between the primary functions of law-making, law-executing, and law-adjudicating cannot be abandoned, for their separability is a function of the concept of law itself."[80] Palmer conceded

74. *See* JOSEPH, *supra* note 31, at 111.
75. *Id.*
76. *See id.* at 103.
77. *Id.*; *see also* JACKSON, *supra* note 42, at 21-22.
78. *See* JOSEPH, *supra* note 31, at 228, 237.
79. PALMER, *supra* note 60, at 6.
80. JOSEPH, *supra* note 31, at 237.

this point by stating that "the theory of the separation of powers provides a useful touchstone against which to find the location of powers in the New Zealand Government and judge the propriety of the arrangement."[81]

Joseph outlines the division of governmental power among the legislative, executive, and judicial branches as follows:

> The executive embraces the administrative powers and functions of central government and includes all the government departments under ministerial control. Cabinet Ministers elected to power as "the government" are the political executive. Since historically it is His or Her Majesty's Government, "the Crown" is often used as the legal representation of executive government. The legislature is the Parliament of New Zealand and exercises the functions of law-making and holding to account the political executive. The third organ of government exercises powers for adjudicating disputes according to law, including disputes between individuals and the state. The judiciary is comprised of a hierarchy of courts—the Judicial Committee of the Privy Council, the Court of Appeal, the High Court and District Courts.[82]

This outline provides the basis for examining the New Zealand constitutional system in more detail and, in turn, provides the basis for understanding New Zealand's treaty-making process.

1. Parliament (Legislature)

Parliament maintains full power to make laws.[83] Section 14 of the Constitution Act 1986 defines Parliament as consisting of the Sovereign and the House of Representatives.[84]

a. The Governor-General

The Sovereign, who happens to be the English monarch,[85] is the Head of State of New Zealand and is represented by the Governor-General.[86] The Governor-General is appointed by the Sovereign on advice from Ministers of the Crown. As a general rule, Ministers of the Crown are senior MPs from the party or parties that have a working

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81. PALMER, *supra* note 60, at 5.

82. JOSEPH, *supra* note 31, at 5. For discussions of "the Crown," see Philip A. Joseph, *The Crown as a Legal Concept (I)*, N.Z.L.J., Apr. 1993, at 126; F.M. Brookfield, *The Monarchy and the Constitution Today: A New Zealand Perspective*, N.Z.L.J., Dec. 1992, at 438; D.L. Mathieson, *Does the Crown have Human Powers?*, 15 N.Z. U. L. REV. 117 (1992); N.J. Jamieson, *The Demise of the Crown*, N.Z.L.J., Sept. 1989, at 329.

83. *See* N.Z. CONST., *supra* note 60, § 15.

84. *See id.* § 14.

85. *See* PALMER, *supra* note 60, at 24.

86. *See* N.Z. CONST., *supra* note 60, §§ 2-3; *see also* F.M. Brookfield, *The Reconstituted Office of Governor-General*, N.Z.L.J., Nov. 1985, at 256, 258.

majority in the House. The Governor-General's most important task is to confer royal assent on bills passed by the House. As David McGee, the Clerk of the House of Representatives,[87] notes, the Governor-General's assent to a bill is essential to transmute it from a bill into an Act of Parliament and, therefore, law.[88]

When presented with a bill, the Governor-General has three options. He or she can assent to it, refuse assent, or return the Bill to the House with proposed amendments. However, according to McGee, "[n]o bill presented to a . . . Governor-General has ever been refused the Royal assent in New Zealand. . . ."[89] This can largely be attributed to the constitutional convention that the Governor-General generally acts only on the advice of Ministers except in the most extraordinary circumstances.[90] According to Palmer, the Governor-General can act on his or her own in only three cases that include: the appointment of a Prime Minister, the dismissal of a Prime Minister, and the refusal of a request to dissolve Parliament for the purpose of holding a general election.[91] Although these "reserve powers" have "never been used in modern times,"[92] they are likely to be used under MMP, particularly if coalition governments become the norm. The Governor-General could regularly be confronted with would-be or existing Prime Ministers unable to form or hold together coalition governments.

b. The House of Representatives

Members of the House of Representatives are called Members of Parliament (MPs).[93] They are elected for the term of Parliament, which cannot exceed three years in length.[94] Prior to the advent of MMP, the House of Representatives consisted of ninety-seven constituency representatives, who were elected to Parliament under a plurality system—that is, the candidate in each constituency with the most votes was elected. Although the majority of MPs generally received more than fifty percent of the vote in their constituencies, no party that won control

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87. The Clerk of the House of Representatives is the chief administrative officer of the House of Representatives. *See* Clerk of the House of Representatives Act 1988 § 3; *see also* DAVID MCGEE, PARLIAMENTARY PRACTICE IN NEW ZEALAND 43-44 (2d ed. 1994).
88. *See* MCGEE, *supra* note 87, at 328.
89. *Id.* at 329.
90. *See id.*
91. *See* PALMER, *supra* note 60, at 29.
92. *See id.*
93. *See* N.Z. CONST., *supra* note 60, § 10.
94. *See id.* § 17.

of Parliament had received fifty percent or more of the national vote since 1954 under this electoral system.[95]

In 1993, the electorate, concerned largely by the unrepresentative and unresponsive nature of Parliament,[96] voted in a government-controlled referendum to change the system by which to elect MPs. Under MMP, electors have two votes: one for the constituency candidate of their choice and one for the party of their choice. The number of MPs is currently 120, a figure that can be adjusted upward to achieve proportionality among the political parties receiving more than five percent of the party vote in accordance with the number of votes each of these parties has received. MPs are elected for three-year terms in one of three ways: (1) as a general constituency candidate, of which there are currently sixty; (2) as a Maori constituency candidate,[97] of which there are currently five; or (3) as a party list candidate, of which there are currently fifty-five.[98]

As a general rule, each MP belongs to a party to which he or she owes allegiance. According to Jackson, political parties in New Zealand have been:

> classically majoritarian, being heavily programmatic, by inference class conscience, acting as parties of social integration rather than individual representation, and therefore highly disciplined. The development of a pluralist pressure groups system has consequently placed heavy demands upon them and over the years they have intensified this self-discipline in the face of such diverse activity.[99]

This programmatic orientation is reflected in the Coalition Agreement that underpins the National and New Zealand First Coalition, the first Government elected under MMP. For example, Cabinet requires every paper submitted to Cabinet for a decision to include a statement indicating whether or not it advances any of the policies set out in the

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95. *See generally* C. NORTON, NEW ZEALAND PARLIAMENTARY ELECTION RESULTS, 1946-1987 (1988); THE GENERAL ELECTION 1990: ENROLMENT AND VOTING STATISTICS FROM THE GENERAL ELECTION HELD ON 27 OCTOBER 1990 (1990) Appendix to the Journal of the House of Representatives, E.9; THE GENERAL ELECTION AND ELECTORAL REFERENDUM 1993 (1994) Appendix to the Journal of the House of Representatives, E.9.

96. *See supra* notes 31-52 and accompanying text.

97. According to section 3 of the Electoral Act 1993, "Maori" refers to a "person of the Maori race of New Zealand and includes any descendant of such a person." *Id.* § 3. Electors who are Maori can choose to be on the electoral roll for a Maori electoral district (i.e., to vote for a Maori constituency candidate), or on the electoral roll for a general electoral district (i.e., to vote for a general constituency candidate). *See id.* § 76.

98. *See* Electoral Act 1993 §§ 35(3)(a), 35(3)(c), 45(3)(a), 191(7)-(8).

99. JACKSON, *supra* note 42, at 58.

Coalition Agreement.[100] As Jackson noted, "the scale of ethics in parliamentary democracy today is roughly that your conscience comes last, your constituency second, and your party requirements come first."[101] This phenomenon is at odds with Burke's theory of representation.[102]

2. Cabinet (Executive)

Although Part II of the Constitution Act 1986 is nominally concerned with the executive branch, it does not describe the Cabinet system of government or how it works.[103] The Cabinet is a cardinal feature of the New Zealand constitutional system, yet the law takes no account of it.[104] Rather, it is largely the product of convention.[105] Nevertheless, the Cabinet is the supreme decision-making body in New Zealand.[106] As Mulholland noted, "[a]ll vital governmental decisions are either ratified by Cabinet or emanate from it."[107] Cabinet decisions are recorded and become the source of authority for governmental action.[108]

The Cabinet is comprised of Ministers of the Crown. Only MPs can be Ministers, which is the essence of responsible government, as it connects the popularly elected legislature to the Executive.[109] As a general rule, Ministers are senior members of the party or parties that won control of the House of Representatives in the last election.[110] The

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100. The formal requirements for Cabinet papers are set out in the Cabinet Office Manual, which was published before the Coalition Government came into being. *See* CABINET OFFICE MANUAL 41-46 (Aug. 1996) [hereinafter MANUAL]. The Coalition Government established the Coalition-Agreement-reference practice shortly after it took office.

101. JACKSON, *supra* note 43, at 60.

102. *See supra* notes 6-16.

103. *See generally* N.Z. CONST., *supra* note 60.

104. *See* JOSEPH, *supra* note 31, at 238.

105. *See* MULHOLLAND, *supra* note 56, at 30; JOSEPH, *supra* note 31, at 633. Cabinet is coincidental with the Executive Council, which is a legal body set up under Royal Prerogative, and derives much of its authority from that identity. Cabinet decisions requiring legal authentication, such as regulations, are promulgated by the Governor-General on the advice of the Council and gazetted as Orders-in-Council. As Joseph has noted:

> The Executive Council has the same membership as Cabinet but discharges different functions. Whereas Cabinet is an informal, deliberative body for formulating policy, government Ministers tender advice to the Governor-General in Executive Council for promulgating their decisions by Order, Proclamation, regulation, or other instrument as may be required by law. . . . Orders in Council are second only to Acts of Parliament for implementing government decisions which require the force of law.

JOSEPH, *supra* note 31, at 641; *see also generally* MANUAL, *supra* note 100.

106. *See* MULHOLLAND, *supra* note 56, at 31; JOSEPH, *supra* note 31, at 633; PALMER, *supra* note 60, at 10.

107. MULHOLLAND, *supra* note 56, at 30-31; *see also* PALMER, *supra* note 60, at 34.

108. *See* PALMER, *supra* note 60, at 40.

109. *See id.* at 34.

110. *See* MULHOLLAND, *supra* note 56, at 30; JOSEPH, *supra* note 31, at 625.

Governor-General appoints Ministers on the recommendation of the Prime Minister.[111] The Prime Minister is also appointed by the Governor-General.[112] The Governor-General selects a person to be Prime Minister based on his or her ability to form a government and to command majority support in the House. Prior to the introduction of MMP, the person chosen was generally the leader of the party that obtained a majority of the seats in the House.[113] Under MMP, with its tendency to produce coalition governments, the person chosen will generally be the leader of one of the two or more parties that have decided to work together.

The Prime Minister wields more power than his or her parliamentary colleagues, including those in Cabinet. He or she serves as the chairperson of Cabinet. According to Palmer, "[h]is or her opinion will carry weight on all issues, whereas individual Ministers will tend to be regarded at their most authoritative in dealing with matters inside their own portfolios."[114] As was demonstrated during the Muldoon period (1975 to 1984), the Prime Minister can possess an overwhelming concentration of power if he or she is also Minister of Finance.[115] Palmer is convinced that this combination should "never be permitted to happen again" because it renders the conduct of modern Cabinet Government, as it ought to function, impossible.[116] There must be safeguards and checks in any decision-making system. For one person to hold both positions reduces the safeguards substantially and condemns other Ministers to a subordinate and somewhat inconsequential role.

Cabinet meets and deliberates in secret.[117] In addition, as Joseph noted, "[m]inisters reach decisions collectively under the mantle of joint responsibility."[118] Accordingly, the Cabinet's "decisions are notionally unanimous and not open to public scrutiny."[119] The practice is meant to encourage free debate and to allow the government of the day to present a common front to its critics and to the electorate at large. However, its isolation also renders the Cabinet's decision-making process virtually impossible to assess.[120] Furthermore, the doctrine of collective ministerial responsibility serves to mute public dissent that would otherwise come

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111. *See* MCGEE, *supra* note 87, at 66.
112. *See id.*
113. *See* JOSEPH, *supra* note 31, at 596-98; MCGEE, *supra* note 87, at 66.
114. PALMER, *supra* note 60, at 66.
115. *See id.* at 66-67.
116. *Id.* at 67.
117. *See* MULHOLLAND, *supra* note 56, at 30.
118. JOSEPH, *supra* note 31, at 626.
119. *Id.* at 634.
120. *See* JOSEPH, *supra* note 31, at 634.

from individual Ministers. According to this doctrine, Ministers who wish to disagree publicly with a decision taken by Cabinet must resign to do so. In Palmer's words, "Cabinet must speak with one voice."[121] Joseph offers the following explanation:

> Although the Queen in right of New Zealand is the head of state, enjoying vast statutory and common law powers, there must always be a government capable of acting, of advising the Crown and of accepting responsibility for that advice. The persons who are appointed as the Crown's advisers (the "government") are chosen from persons elected by the people, and who have the confidence of the House of Representatives. Under the party political system, the leader of the political party with the most members returned or elected at a general election is asked to form the government. The lynchpin is the convention of ministerial responsibility which requires a government to retain the support of the House, and to resign if defeated on a no-confidence motion.[122]

However, as Joseph also notes, "[i]n modern times, party discipline in the House virtually forecloses the possibility of governments being defeated on a confidence issue."[123] As Jackson points out:

> New Zealand has developed the most highly disciplined (albeit self-disciplined) parliamentary parties of any 'democratic' country. . . . Further, with the level of cohesion in New Zealand's political parties today, it may be argued that the most important debates which do take place are not made public, while the debates on the floor of the House become largely ritualistic. . . . It is too readily assumed that what is good for the political party must automatically be good for the country.[124]

This party discipline, when coupled with the doctrine of collective ministerial responsibility, ensures the dominance of the Executive over the legislative branch of government.[125] As Palmer observed, "Parliament is highly unlikely to pass legislation or approve measures which are unacceptable to the Cabinet,"[126] particularly as the government of the day controls the legislative agenda as well as the policy underlying most of the legislation it enacts.[127]

The Executive in New Zealand can usually be sure that its proposals will become law free of alterations by compromise in the legislative

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121. PALMER, *supra* note 60, at 45.
122. *Id.* at 5-6.
123. *Id.* at 6.
124. JACKSON, *supra* note 42, at 68.
125. *See* JOSEPH, *supra* note 31, at 281.
126. PALMER, *supra* note 60, at 8.
127. *See* JOSEPH, *supra* note 31, at 281.

process.[128] This process serves more to perfect the legislative form of government policy than to resolve competing political considerations. As a general rule, real give and take is confined to the policy formation process prior to Cabinet directive. For example, Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General, when a new bill is introduced, to report to the House of Representatives if the bill contains any breaches of the rights and freedoms provided for in the Act.[129] The analysis is carried out by the Legal Services Group in the Ministry of Justice, which vets all bills prior to introduction for compliance with the Bill of Rights Act, except those prepared by the Ministry (which are examined by the Bill of Rights Team in the Crown Law Office). Generally, government ministers or their officials agree to remove or alter any offending provisions prior to introduction. Reported breaches, which are relatively rare, are usually remedied by the select committee studying the bill. By and large, however, once the Cabinet decides to legislate, it is unusual for the final enactment to deviate from the policy underlying the decision.

3. Courts (Judiciary)

The New Zealand judicial structure consists of the following four levels: the District Court, the High Court, the Court of Appeal, and the Judicial Committee of the Privy Council. It is augmented by the Family Court and approximately 130 miscellaneous tribunals, ranging from the Disputes Tribunal, which covers small claims up to $3,000, to the Treaty of Waitangi Tribunal, which hears grievances regarding alleged violations of Treaty rights.[130]

Most of the judicial activity takes place in the District Court. District Court judges preside individually over most of the criminal cases and, with certain exceptions, civil cases that do not exceed $50,000. They are appointed by the Governor-General and generally serve until they retire.[131] The High Court has virtually unlimited jurisdiction. Essentially, any case outside the jurisdiction of the District Court can be commenced in the High Court. The High Court also hears appeals from the District Court as well as from many of the tribunals and specialist courts. The

128. *See* PALMER, *supra* note 60, at 139; *see also* JOSEPH, *supra* note 31, at 288. *But see* Robertson, *supra* note 28, at 216-17 (claiming, in a review of Joseph's book, *Constitutional and Administrative Law in New Zealand*, that the Fourth Labour Government restored Parliament to its rightful place where the important issues facing the nation are debated and that government backbenchers are influential in shaping government policy).

129. *See* Bill of Rights, *supra* note 67, § 7.

130. *See* Treaty of Waitangi, Feb. 6, 1840, U.K.-Maori.

131. *See* MULHOLLAND, *supra* note 56, at 42-44, 47-49.

Governor-General appoints High Court judges, including the Chief Justice, who must retire upon turning sixty-eight years of age.[132] High Court judges can only be removed on the grounds of misbehavior or incapacity.[133]

For the great majority of criminal and civil cases, the Court of Appeal is the final court of appeal. It does not have any original jurisdiction. It consists of six judges: the Chief Justice *ex officio*, one High Court judge who is appointed President of the Court of Appeal, and four other High Court judges who are appointed as judges of the Court of Appeal. The quorum for the Court of Appeal is three judges. However, only two judges need to be present for the delivery of judgments or for hearings regarding leave to appeal to the Privy Council.[134]

The Judicial Committee of Privy Council, which sits in London, is the final court of appeal. In civil cases involving amounts over $5,000, litigants have an open right of appeal. If the amount is less, they must obtain leave of the Court of Appeal. Appeals in all criminal actions also require leave of the Court of Appeal. The Privy Council usually handles no more than two or three cases a year from New Zealand. Since 1983, when the Minister of Justice suggested that this appeal was no longer required, constitutional lawyers have debated the suggestion.[135] Although both Palmer and Raymond Mulholland appear to agree that abolishment of the right of appeal is inevitable, largely as a natural consequence of national sovereignty,[136] it could amount to the elimination of a check on arbitrary Executive action. As Mulholland observed: "New Zealand has no written constitution, nor second chamber to its parliamentary system, nor Bill of Rights. The Privy Council could be seen, at least to some extent, in substitution for these institutions and assisting in upholding the rights of the individual against arbitrary conduct by the Government."[137]

Although Parliament enacted the New Zealand Bill of Rights Act 1990 a few months after Mulholland published his observation, his

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132. *See id.* at 45-47.

133. *See* N.Z. CONST., *supra* note 60, § 23. Furthermore, the salary of High Court judges cannot be reduced while in office. *See id.* § 24. These rules, which are designed to ensure judicial independence, also apply to the Court of Appeal. *See* PALMER, *supra* note 60, at 183. Judicial independence is augmented by a convention that the government of the day should not exert any form of pressure on judges to make decisions in a particular way. As a corollary, judges are expected to refrain from participating in political partisan activity. PALMER, *supra* note 59, at 184, 186. In addition, the courts maintain powerful contempt powers that they can use to punish people who make scandalous statements about judges or make public statements calculated to influence the outcome of a trial. *See* PALMER, *supra* note 60, at 186.

134. *See* MULHOLLAND, *supra* note 56, at 49.

135. *See id.* at 49-52.

136. *See id.* at 50-51; PALMER, *supra* note 60, at 181.

137. MULHOLLAND, *supra* note 56, at 51.

assessment is unlikely to change as section 4 of that Act expressly denies the courts the power to strike down legislation that conflicts with the Act's provisions.[138] As Jackson noted, the courts "lack any capacity to declare an [A]ct unconstitutional or beyond the scope of Parliament's powers; [they] will not question the validity of what purports to be an [A]ct of Parliament."[139]

Nevertheless, the New Zealand Bill of Rights Act 1990 has given the courts an additional tool by which to interpret and enforce parliamentary enactments. Section 6 of the Act requires and empowers the courts to give meaning to enactments that are, as far as possible, consistent with the rights and freedoms contained in the Bill of Rights.[140] This requirement is similar to the approach the courts take regarding New Zealand's international obligations. As Joseph noted, they apply:

> a presumption of interpretation that Parliament does not intend legislating in breach of international law or specific treaty obligations. If a statute may reasonably bear more than one meaning, a court will prefer the meaning that is consonant with international law. International comity obliges courts to take notice of an international treaty when construing a statute for implementing its terms. That obligation enures even if a statute omits to state that it is for implementing a treaty.[141]

Aside from determining the meaning of parliamentary enactments, the courts have the power to declare subordinate legislation invalid if it is outside the scope of the authority granted by the applicable parliamentary enactment.[142] Furthermore, by-laws, which are generally enacted by local bodies, can be struck down on the grounds that they are unreasonable.[143] This power is significant as Parliament has conferred upon the Executive "wide discretionary powers in many different areas of activity."[144] As Palmer stated: "numerous tribunals exist to decide specialized questions of licensing and registration. When Ministers, public servants, local

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138. *See* Bill of Rights Act 1990 § 4.

139. JACKSON, *supra* note 42, at 23-24; *see also* JOSEPH, *supra* note 31, at 166; PALMER, *supra* note 60, at 186, 194, 214.

140. *See* Bill of Rights, *supra* note 67, § 6.

141. JOSEPH, *supra* note 31, at 453; *see also* Police v. Hicks [1974] 1 N.Z.L.R. 763, 766; Salomon v. Commissioners of Customs and Excise, [1967] 2 Q.B. 116, 144.

142. *See* PALMER, *supra* note 100, at 147, 194; JACKSON, *supra* note 42, at 23-24; *see also* G.D.S. Taylor, *Judicial Review* (Butterworths, Wellington, 1991); G.D.S. Taylor, *The Limits of Judicial Review*, 12 N.Z. U. L. REV. 178 (1986); Rodney Harrison, *Judicial Review of Administrative Action: Some Recent Developments and Trends*, N.Z.L.J., June 1992, at 200 (explaining Regina v. Environment Secretary, *Ex parte* Hammersmith LBC [1990] 3 W.L.R. 898 (H.L.), Hawkins v. Minister of Justice [1991] 2 N.Z.L.R. 530, and Petrocorp Exploration Ltd. v. Minister of Energy [1991] 1 N.Z.L.R. 641); John G. Fogarty, *Judicial Review: A Review Article*, N.Z.L.J., Mar. 1992, at 88.

143. *See* PALMER, *supra* note 60, at 147, 196.

144. *Id.* at 190.

authorities or tribunals act in a manner which is illegal or unfair their decision can be quashed by a Court."[145]

However, Parliament can enact legislation that expressly limits the courts ability to review executive action.[146] Parliament can also pass legislation that alters or reverses the law as determined in judicial decisions.[147] Although parliamentary action in this respect is rarely retroactive, it can be.[148]

The Treaty of Waitangi, which is an agreement between the Maori and the English Crown that provides the Crown with the right to govern in New Zealand in exchange for protecting the rights accorded to the Maori, also has served as a constraint on the government of the day.[149] Palmer believes that:

> The legitimacy of the system of government we have in New Zealand owes much to the Treaty of Waitangi entered into between the Crown and the Maori in 1840. The Treaty is a short document but it symbolizes the rights of the Maori and the undertakings which were given to them when the Crown assumed authority. In one sense New Zealand's right as a nation to make laws, to govern and to dispense justice can be said to spring from the compact between the Crown and the Maori in 1840.[150]

The Treaty of Waitangi Act 1975 set up a tribunal to hear grievances arising under the Treaty and to make recommendations to the government of the day regarding their resolution. Palmer contends that governments have generally accepted the Waitangi Tribunal's recommendations.[151] In practice, the Tribunal's recommendations are studied and analyzed by the Office of Treaty Settlements, which is affiliated with the Ministry of Justice, which then advises the government of the day as to the

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145. *Id.* Palmer asserts that the courts have a duty to ensure that executive action is consistent with the principles of natural justice and in accordance with the rule of law as interpreted and applied correctly. *See id.* at 194.

146. *See id.* at 192.

147. *See id.* at 196, 200.

148. *See e.g.*, Clutha Development (Clyde Dam) Empowering Act, 1982 (N.Z.) (nullifying a decision regarding water rights reached via Gilmore v. National Water and Soil Conservation Authority and Minister of Energy [1982] 8 N.Z.T.P.A. 298 (Casey, J.); Annan v. National Water and Soil Conservation Authority and Minister of Energy [1980] 7 N.Z.T.P.A. 417, [1982] 8 N.Z.T.P.A. 396); *see also* Annan v. National Water and Soil Conservation Authority and Minister of Energy (No.2) [1982] 8 N.Z.T.P.A. 369 (Planning Authority); *see also* Brookfield, *High Courts, High Dam, High Policy*, N.Z. RECENT L. REV. 62 (1983).

149. *See* Treaty of Waitangi, Feb. 6, 1840, U.K.-Maori.

150. PALMER, *supra* note 60, at 19; *see also* Pita Rikys, *Trick or Treaty*, N.Z.L.J., Oct. 1991, at 370. Joseph has argued that claims that the Treaty is a founding or basic document are insufficient to elevate it to the status of supreme law or law simpliciter as it lacks entrenchment or statutory adoption and lacks any judicial recognition as fundamental law. *See* JOSEPH, *supra* note 31, at 13.

151. *See* PALMER, *supra* note 60, at 20.

appropriate response given the realities of resource constraints and competing political considerations.

B. *Stages of the Treaty-Making Process*

The New Zealand treaty-making process consists of three stages. Essentially, the Executive negotiates and enters into treaties. Parliament incorporates some of these treaties into domestic law, and the judiciary uses these treaties to resolve domestic legal disputes. What this formulation does not reveal is the extent of public participation involved at each stage. Understanding the extent of public participation requires a closer look at each stage of the treaty-making process (i.e., the executive, the legislative, and the judicial stages).

1. The Executive Stage of the Process

In negotiating treaties, government agencies and the Cabinet work in tandem to strike a balance between administrative convenience and the development of sound negotiating positions. The tension between these competing concerns has led the Executive over the years to develop a practice of forming negotiating positions that involve domestic consultation. The leading governmental agency in this consultative process is the Ministry of Foreign Affairs and Trade (MFAT).

Once the Cabinet has approved New Zealand's negotiating position, MFAT takes responsibility for organizing the delegation for the negotiations and for overseeing the negotiation. Once the negotiations are completed and executive approval granted, the text of a treaty is affixed with the signature of the highest ranked official in the New Zealand delegation. This is done to ensure the treaty's authenticity and to demonstrate New Zealand's intention to ratify and be bound by its provisions. Signature may also, when specified by New Zealand's representatives, be an act of ratification. However, ratification is generally a separate and subsequent step. In either case, Cabinet approval is required.

Ratification, which requires Cabinet's prior consent, takes place when New Zealand sends an instrument of ratification to the depository for the treaty. This is usually a signed copy of the text, accompanied by a cover letter expressing the intention to ratify. If neither the Prime Minister nor the Minister of Foreign Affairs and Trade is available to sign a ratification, then another appropriate Minister or the senior embassy official will be granted full power to do so.

Once ratified, New Zealand becomes a party to the treaty and is bound by its terms. With certain exceptions, mostly involving bilateral

treaties that do not affect the rights and duties of individuals, Parliament is then generally obliged to implement the treaty, thereby incorporating it into domestic law. The failure to do so could result in placing New Zealand in breach of its international obligations. To avoid this imposition on parliamentary sovereignty, the Executive generally secures the passage of the necessary legislation prior to ratifying the treaty.

Many of the international forums in which treaties are negotiated are public, and almost all are at least partially public. This is particularly the case with multilateral treaties. Nongovernmental organizations (NGOs) that can afford to do so frequently attend as observers. Media comment on the progress of negotiations, particularly regarding important multilateral negotiations that have the potential to affect the rights and duties of private citizens, often balances official statements with the views of NGOs interested in the outcome of the negotiations. Although the processes followed by these forums vary, they generally have consultation time incorporated into them. In some cases, typically with respect to bilateral treaties that do not affect the rights and duties of individuals, some elements of the negotiations are arguably best handled confidentially (e.g., when commercially sensitive information is required to conclude the treaty text).[152]

Although time-consuming, consultation is seen to facilitate the negotiation process and assist in producing better treaties.[153] In addition, practice demonstrates that consultation is possible, provides benefits such as enhancing the democratic character of New Zealand's negotiating position, and must occur early in the negotiation process to be effective. This is especially the case for small countries without the power or resources to reopen negotiations at a later date. Once the treaty text is settled, little opportunity exists for meaningful consultation since the treaty text is unlikely to be open for alteration.[154]

2. The Legislative Stage of the Process

Parliament's main role in the treaty-making process is to incorporate treaties into domestic law. It does this in one of four ways.[155] For the sake of convenience, these methods of incorporation are named as follows: (1) the formula method, (2) the wording method, (3) the substance method, and (4) the subordination method.

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152. *See* Law Commission, *supra* note 38, at 2.

153. *See id.* at 3.

154. *See id.* at 2.

155. *See* NEW ZEALAND LAW COMMISSION, A NEW ZEALAND GUIDE TO INTERNATIONAL LAW AND ITS SOURCES 14-22 (1996) [hereinafter GUIDE]; *see also* Law Commission, *supra* note 38, at 14-22.

a. Formula Method of Incorporation

Many statutes in the Commonwealth set out either the full or partial text of a treaty and use a formula to proclaim it to have the force of law domestically. The most common way for this direct empowering of a treaty in legislation is to append the treaty text to the statute in a schedule. The treaty is left to speak for itself. This method has the advantage of applying treaty provisions in domestic law without an overlay of complicating domestic legislation. In most cases, however, treaty provisions tend to be expressed in general terms and require translation into a more specific form to accommodate the peculiarities of the legal regime in which it is to be implemented. For this reason, the following methods are more commonly used in New Zealand to incorporate treaties affecting the rights and duties of individuals into domestic law.

b. Wording Method of Incorporation

In many cases, the wording of the treaty is incorporated into the body of a statutory enactment. This is generally facilitated in a conspicuous manner. The Act will state the treaty, usually in the long title, that it seeks to implement, or specific parts of the Act will reflect the provisions of the treaty. Most of the statutes that New Zealand has enacted to honor its commitments under treaties dealing with international crime or regulatory matters employ this method.

c. Substance Method of Incorporation

In some cases, the substance of a treaty is already incorporated into the body of an existing statute. This generally occurs when the Executive comes to the conclusion, after a general review of existing statutes, that the domestic law is consistent with the treaty thereby obviating the need to change the law. The substance method provides no way of telling what international law, if any, is a part of a given piece of legislation. Human rights treaties implemented in this manner can be particularly difficult to link to domestic legislation because they are generally not confined to a specific topic. The commitments arising under these treaties are generally implemented through a variety of Acts that do not make specific reference to the treaty provisions that they implement. This method obscures the link between domestic legislation and the treaties they implement. Appending identifying information in schedules to the relevant Acts could solve this problem.

d. Subordination Method of Incorporation

Parliament can also authorize the making of subordinate legislation (regulations or rules) to give effect to particular treaties. In this case, Parliament delegates authority to implement the treaty to the Executive. This method is employed predominately for technical or regulatory treaties. Examples of treaties implemented in whole or in part via this fashion are the General Agreement on Trade and Tariffs (GATT) and World Trade Organization (WTO) agreements,[156] and the Convention on International Civil Aviation.[157] As a general rule, these treaties provide for ongoing technical changes that justify delegation to the Executive. Parliament settles the general policy position in the empowering legislation and leaves any changes in the details to the Executive.

e. Treaties Not Requiring Legislation

Legislation is not required if a treaty operates solely at the international level between states and creates rights and obligations only for governments, as opposed to citizens. Parliament need not change domestic law because this kind of treaty does not alter the rights and duties of New Zealand residents. Examples of this type of treaty are the Convention on International Liability for Damage Caused by Space Objects[158] and the Vienna Convention on the Law of Treaties.[159] The majority of New Zealand's treaty commitments take this form, and most of these are bilateral. Although technically self-executing, the courts generally do not exercise a role in enforcing such agreements. Disputes are typically dealt with through diplomatic channels or by reference to the appropriate international body.

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156. *See generally* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1143 (1994) (whereby signatories agreed "to submit, as appropriate, the WTO Agreement for the consideration of their respective competent authorities with a view to seeking approval . . . and . . . to adopt the Ministerial Declarations and Decisions"); Uruguay Round Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1143 (entered into force Jan. 1, 1995).

157. *See generally* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 1187-88, T.I.A.S. No. 1591.

158. *See generally* Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187.

159. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (1969) (entered into force on Jan. 27, 1980).

f. Parliament Can Augment its Role

Under current practice, the Executive does not require parliamentary approval to negotiate, conclude, or ratify treaties.[160] However, the theory of parliamentary sovereignty suggests that Parliament can exercise a decisive role in the treaty-making process if it chose to do so. Parliament could accomplish this in several ways:

- enact legislation that requires the Executive to seek parliamentary approval for negotiating positions, and to negotiate, conclude, and ratify treaties;
- establish the convention that it will not implement a treaty unless it results from negotiating positions or decisions to ratify that it has approved; or
- refuse to implement treaties or particular provisions of treaties, especially if they affect private rights or conflict with existing common law or statutes.

Given the current constitutional arrangements, however, Parliament can only play a decisive role in the treaty-making process if the Executive provides it with the opportunity to do so. This is largely due to the dominance of both the executive and the legislative branches of government by a party or coalition that generally ensures that Parliament's will is the Cabinet's will. Nevertheless, the opportunity for greater parliamentary involvement can arise in the current treaty-making process if:

- the Executive were to execute a treaty containing a provision that the treaty shall only take effect upon Parliament's approval; or
- the Government decides to seek Parliament's approval prior to ratifying a treaty.

Whether the Government's failure to win parliamentary support in these cases would be treated as a confidence issue would depend on the prevailing political circumstances. Given the current constitutional arrangements, this risk appears to be small.

The Executive has, on occasion, involved the legislature in the treaty-making process. Based on these precedents, Keith suggested that the Executive may need to seek parliamentary approval before it can ratify a treaty if it involves the cession of territory or is considered "sufficiently important" (e.g., defence and peace treaties).[161]

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160. *See* S.A. DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 140-41 (6th ed. 1989).

161. *See* K.J. Keith, *New Zealand Treaty Practice: The Executive and the Legislature*, 1 N.Z. U. L. REV. 272, 278-79 (1964).

Recent debate suggests, however, that Parliament has no role in the treaty-making process other than to implement its provisions once they have been ratified (i.e., incorporate them into domestic law). No written requirement in the Standing Orders of the House of Representatives (its procedural rules) provides for international treaties to be submitted to Parliament for approval, nor does any evidence exist of a constitutional convention to that effect. In a paper submitted to the Standing Orders Committee in 1996, David McGee, the Clerk of the House of Representatives, stated the following about Parliament's role in the treaty-making process:

> At present the House of Representatives has no role at all in the making of treaties and has only a limited, and then usually *ex post facto*, role in respect of their incorporation or implementation as part of New Zealand's domestic law. Instead, the Government (in the exercise of the Crown's prerogative powers), without any need for approval from or even consultation with the House, may enter into treaties. Furthermore, and increasingly, treaty obligations are being incorporated indirectly by the courts. Parliament is being by-passed in respect of a large amount of what is effectively law-making activity.[162]

Under current practice, the Executive rarely ratifies treaties that require legislation prior to the adoption of enabling legislation. MacKay stated that under this practice "Parliament can constrain the Executive's power by refusing to pass any necessary legislation."[163] In McGee's view, however, Parliament has virtually no role in the treaty-making process and should, because of its importance, sanction the execution of treaties.[164] Instituting a formal parliamentary approval process, as MacKay noted, could tempt the courts to treat approved treaties as self-executing.[165] Parliament, however, would still have the power to pass subsequent legislation to provide the necessary support, remedial measures, and administrative structures that may be necessary to give life to a treaty expressed in general diplomatic language. In addition, this outcome may be avoided if the House of Representatives alone granted approval rather than Parliament as a whole (i.e., without the participation of the Governor-General).

At the legislative stage of the treaty-making process, the public has an opportunity to make oral and written submissions on the legislation to implement the treaty obligations. For example, Parliament enacted the

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162. REPORT, *supra* note 39, Annex D.

163. MacKay, *Treaties—A Greater Role for Parliament*, 20(1) Public Sector 6 (Mar. 1997).

164. *See* McGee, *supra* note 87, at 2.

165. *See* MacKay, *supra* note 163, at 8.

Copyright Act 1994 and the Layout Designs Act 1994 to ensure that New Zealand law conformed with the TRIPS requirements of the GATT (Uruguay Round) Agreement[166] before the Cabinet authorized the Executive to enter into the Agreement. The select committee analyzing this legislation received hundreds of submissions and held several weeks of hearings. Invariably, however, the select committee processing the submissions, usually on the advice of governmental officials representing the interests of the Executive, does not adopt submissions that are contrary to the treaty text as settled.

3. The Judicial Stage of the Process

In effect, Parliament's traditional role in the treaty-making process is to instruct the courts, through its enactments, that a particular treaty or part of a treaty has the force of law. However, recent judicial decisions have provided some indication that the courts, for the reasons outlined in Part II.B.2 above, may be willing to apply ratified but-as-yet unincorporated treaties in certain cases. As also noted in Part II.B.2 above, the New Zealand judiciary regularly relies on overseas case law to resolve domestic legal issues and to develop New Zealand's common law.

a. Traditional Common Law Approach to Treaties

Lord Atkin, speaking for the Privy Council, initially articulated the traditional approach in 1937 in *Attorney-General for Canada v. Attorney-General for Ontario*.[167] Lord Denning succinctly summarized the approach in his 1971 judgment in *Blackburn v. Attorney-General*[168] when he stated: "Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in the laws enacted by Parliament, and then only to the extent that Parliament tells us."[169]

The English courts still subscribe to the traditional approach. In *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry,*[170] for example, Lord Oliver stated: "Quite simply, a treaty is not part of English

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166. *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994).

167. Attorney-General for Canada v. Attorney-General for Ontario, 1937 App. Cas. 326 (P.C.) (appeal taken from Can.).

168. Blackburn v. Attorney-General, 1 W.L.R. 1037 (C.A. 1971).

169. *Id.* at 1039.

170. Maclaine Watson & Co. Ltd. v. Department of Trade and Industry, 3 All E.R. 523, 544-45 (H.L. 1989); *see also* J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry, 3 W.L.R. 969, 980 (H.L. 1989).

law unless and until it has been incorporated into the law by legislation."[171]

The position was the same in Australia prior to the 1995 decision in *Minister of State for Immigration and Ethnic Affairs v. Teoh*.[172] In *Dietrich v. The Queen*,[173] for example, Chief Justice Mason and Justice McHugh considered the place of international law in Australia's legal system. The decision included this clear acceptance of the traditional view: "Ratification of the I.C.C.P.R. as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the I.C.C.P.R. are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions."[174]

Until recently, New Zealand courts also followed the traditional approach regarding the applicability of treaties in domestic law, as reflected in *Ashby v. Minister of Immigration*.[175] Judges, therefore, did not apply treaties as a matter of law, but attempted to interpret domestic law in a manner consistent with them.[176] As a consequence, treaties are not considered a source of directly enforceable rights or duties. They do not form part of the domestic law until they have been expressly incorporated into domestic legislation. This approach is based on the principle that the Executive cannot change or make domestic law by entering into a treaty.[177]

Nevertheless, the traditional approach allowed the courts to take treaties into consideration if they were a foundation of the constitution, relevant to the determination of the common law, declaratory of customary international law, evidence of public policy, or relevant to the interpretation of a statute.[178]

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171. *Id.* at 523, 544-45.

172. Minister for Immigration and Ethnic Affairs v. Teoh (1995) 128 A.L.R. 353.

173. Dietrich v. The Queen (1992) 177 C.L.R. 292.

174. *Id.* at 305. For other examples of this rule, see New South Wales v. Commonwealth of Australia (1975) 135 C.L.R. 337, 450-51; Simsek v. MacPhee (1982) 148 C.L.R. 636, 641; Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168, 192-93, 211-12, 225, 253; Kioa v. West (1985) 159 C.L.R. 550, 570-71; Minister for Foreign Affairs and Trade v. Magno (1992) 37 F.C.R. 298, 303.

175. Ashby v. Minister of Immigration [1981] 1 N.Z.L.R. 222 (holding that where the statutory criteria are met, the Minister's discretion to grant or refuse a temporary permit is not expressly fettered in any way).

176. *See* Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 461, 470 (1991).

177. *See* GUIDE, *supra* note 155, ¶ 65, at 23.

178. *See id.* Beyond the Treaty of Waitangi, New Zealand is party to several treaties that give it the power to legislate for several pacific island nations or so-called "mandated territories." *See id.* ¶ 66.

For New Zealand, the most important treaty in the constitution foundation category is the Treaty of Waitangi.[179] As discussed in Part III.A.3 above, Palmer considers the Treaty of Waitangi to be an instrument legitimizing the authority of the Crown in New Zealand. It also sets out the Crown's obligations to Maori. Since 1984, a number of statutes directly affecting Maori interests have expressly stated that they shall be applied in accordance with the Treaty of Waitangi.[180] In litigation between the Crown and Maori, the courts generally have recourse to the Treaty of Waitangi even though Parliament has not incorporated it into domestic law.[181]

The courts can also use treaties to determine the common law. In *Derbyshire County Council v. Times Newspapers Ltd.*,[182] the English Court of Appeal held that it could rely on the European Convention for the Protection of Human Rights and Fundamental Freedoms because the common law was uncertain and no relevant precedent existed.[183] The principle that the Executive will not enter into an international agreement until the common law reflects the obligations in the agreement supports the case for using relevant treaties as interpretative aids in the courts.

In addition, the New Zealand courts can use treaties to divine customary international law.[184] The courts accept that customary international law is part of domestic law (i.e., a specialized aspect of the common law).[185] Often the best evidence of customary international law

179. *See* Treaty of Waitangi, Feb. 6, 1840, U.K. - Maori; *see also id.* ¶ 66 (noting that the broadness of the terms in the Treaty of Waitangi raise issues about the Treaty's self-executing or justiciable characteristics).

180. *See, e.g.*, State-Owned Enterprises Act (N.Z.) 1986 § 9 (stating that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."); Conservation Act (N.Z.) 1987 § 4 (stating that "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."); Crown Minerals Act 1991 (N.Z.) § 4 (stating that "All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).").

181. *See, e.g.*, New Zealand Maori Council v. Attorney-General [1996] 3 N.Z.L.R. 140, 169; Ngai Tahu Maori Trust Board v. Director-General of Conservation [1995] 3 N.Z.L.R. 553, 557-58; Television New Zealand Ltd. v. Attorney-General [1995] 2 N.Z.L.R. 641.

182. Derbyshire County Council v. Times Newspapers Ltd., 1993 App. Cas. 534 (appeal taken from the Court of Appeal).

183. *See id.*

184. Customary international law is law created by the general and consistent practice of states that is followed by them from a sense of legal obligation. *See* TRICK OR TREATY, *supra* note 38, ¶¶ 3.31-3.32, at 37. Customary law is law evidenced by its acceptance as general practice by a great majority of States, in the presence of evidence indicating that the practice is accepted as a matter of legal right or obligation. *See id.* ¶ 3.31. Also, the provisions in a treaty may become customary international law, and as such, may bind countries that are not originally signatories. *See id.* ¶ 3.32.

185. *See* GUIDE, *supra* note 157, ¶ 69, at 24.

is the international agreement that codifies it. Courts will often consider international obligations in this way.[186]

The courts have accepted treaties as evidence of public policy as well. For example, in *Van Gorkom v. Attorney-General*,[187] the court recognized that treaties could be used to demonstrate the Executive's policy objectives to clarify the meaning of subordinate legislation.[188] Treaties can demonstrate the Executive's policy objectives because the Executive alone negotiates and enters into treaties.

Courts also may take international agreements into account when interpreting legislation.[189] This is especially relevant to constitutional documents such as the New Zealand Bill of Rights Act 1990 and other human rights legislation.[190] These types of documents are supported by a number of international and regional agreements that are now considered relevant to the interpretation of New Zealand's domestic statutes.[191]

The situations in which the courts refer to treaties raise complicated questions of interpretation that are unresolved. For example, questions often arise as to whether a relevant statutory provision is sufficiently ambiguous to warrant reference to a treaty. The courts are bound to give effect to clear expressions of Parliament's will, even if that effect contradicts the terms of a treaty. Whether the statute must merely be ambiguous or capable of an unreasonable or absurd interpretation is unclear.[192] If the relevant legislation makes no reference to a treaty, questions arise as to whether the courts are able to or must reference particular treaties. In these cases, the courts appear willing to consider treaties if the argument to do so is sound.[193]

b. The New Approach to Treaties

In the last six years, these interpretation questions have given rise in New Zealand and Australia to a break away from the traditional approach. With the decision in *Mabo v. Queensland*,[194] Australia began to consider questions of international law with more flexibility. This led to the

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186. *See id.*
187. Van Gorkom v. Attorney-General [1977] 1 N.Z.L.R. 535, *aff'd*, [1978] 2 N.Z.L.R. 387.
188. *See id.*; GUIDE, *supra* note 155, ¶ 70, at 25.
189. *See* GUIDE*, supra* note 143 ¶ 71.; Simpson v. Attorney-General (Baigent's Case) [1994] 3 N.Z.L.R. 667.
190. *E.g.*, Human Rights Act (N.Z.) 1993; Abolition of the Death Penalty Act (N.Z.) 1989.
191. *See* GUIDE, *supra* note 155, ¶ 71, at 25.
192. *Compare, e.g.*, Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind [1991] 1 App. Cas. 696, [1991] L.R.C. (Const.) *with* Regina v. Keegstra [1991] L.R.C. (Const.) 333 (S.C.C.).
193. *See* GUIDE, *supra* note 155, ¶ 72, at 25.
194. Mabo v. Queensland (1992) 175 C.L.R. 1.

Teoh[195] decision that, in turn, created the legitimate expectations doctrine. The Howard Government may reverse this doctrine by legislation).[196] In *Teoh*, the Court held that the Executive can be expected to abide by the treaties it has executed even if Parliament has not incorporated them into domestic law.[197]

New Zealand has also begun to distance itself from the traditional approach. As discussed below, the New Zealand judiciary recently demonstrated a willingness to give wider effect to unincorporated international obligations. The courts are particularly averse to "window dressing" by the Executive, that is, a situation in which the Executive enters into a treaty but does not, for whatever reason, secure its full implementation.[198] Traditionally, the courts construed ambiguous legislation with reference to relevant international obligations, based on the assumption that the Executive would not secure the passage of legislation in breach of international law.[199]

However, this was no more than a presumption that, given the theory of parliamentary sovereignty, must give way to any clear statutory indication to the contrary. The courts can employ treaties as an aid to statutory interpretation if the statute empowers a treaty, if the statute is ambiguous,[200] or if the treaty is relevant to the legislative policy concerned.[201] However, the flexibility for statutory interpretation is still subordinate to clear legislative intent. This conflict gives rise to "window dressing" situations.

The leading window dressing case in New Zealand is *Simpson v. Attorney-General* (*Baigent's Case*).[202] In *Baigent's Case*, the Court of Appeal reasoned that treaties that have not been incorporated into

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195. Minister for Immigration and Ethnic Affairs v. Teoh (1995) 128 A.L.R. 353.

196. *See id.* at 363-65; *see also* MacKay, *supra* note 163, at 7.

197. *See* Minister for Immigration and Ethnic Affairs v. Teoh (1995) 128 A.L.R. 353, 365.

198. *See, e.g.*, Simpson v. Attorney-General (Baigent's Case) [1994] 3 N.Z.L.R. 667.

199. This is the legal presumption with which the New Zealand judiciary approaches ambiguous legislation. This presumption is demonstrated in the following cases: Salomon v. Commissioner of Customs and Excise, [1967] 2 Q.B. 116, 143-44; Regina v. Secretary of State for the Home Dep't, *Ex parte* Bhajan Singh, [1976] Q.B. 198, 207 (Eng. C.A.); Garland v. British Rail Eng'g Ltd., [1983] 2 App. Cas. 751; Huakina Dev. Trust v. Waikato Valley Auth. [1987] 2 N.Z.L.R. 188, 217; Lim v. Minister for Immigration, Local Gov't and Ethnic Affairs (1992) 176 C.L.R. 1; Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 747-48; Simpson v. Attorney-General (Baigent's Case) [1994] 3 N.Z.L.R. 667.

200. *See, e.g.*, King-Ansell v. Police [1979] 2 N.Z.L.R. 531; Fothergill v. Monarch Airlines Ltd., 1981 App. Cas. 251.

201. *See, e.g.*, Regina v. Secretary of State for the Home Dep't, *Ex parte* Brind, [1991] 1 App. Cas. 696, 711, 751, 758-59; Van Gorkom v. Attorney-General [1977] 1 N.Z.L.R. 535, *aff'd*, [1978] 2 N.Z.L.R. 387; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Indus., [1990] 2 App. Cas. 418; Rantzen v. Mirror Group Newspapers Ltd., 1994 Q.B. 670, 690-91 (Eng. C.A.).

202. Simpson v. Attorney-General (Baigent's Case) [1994] 3 N.Z.L.R. 667.

domestic law may still have a substantive and direct effect on domestic law.[203] The case concerned an appeal of an action for damages for an unlawful police search that was allegedly in breach of section 21 of the New Zealand Bill of Rights Act 1990, which the lower courts dismissed on the grounds of immunity.[204] The Court decided that while the Act contained no remedy provisions, it was meant to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).[205] In affirming this commitment, the Court took the view that Parliament intended to comply with the provisions of the ICCPR.[206] Its provisions contained remedies for breaches of rights and freedoms and, as such, the usual remedies were available to the courts. The Court reasoned that to rule otherwise would be to declare that New Zealand's commitment to the ICCPR was nothing more than "lip service to human rights in high-sounding language,"[207] "legislative window-dressing, of no practical consequence,"[208] "an empty statement,"[209] and "a pious declaration of so called rights which could be infringed with impunity."[210]

In *Tavita v. Minister of Immigration*,[211] the Executive argued that it was not obligated to take unimplemented treaties into account in its decision-making processes. This argument previously found support in *Ashby v. Minister of Immigration*.[212] In *Tavita*, however, the Court of Appeal reasoned that legitimate criticism could be leveled against both the judiciary and the Executive if the argument that the Executive is free to ignore its treaty obligations was upheld.[213]

As a judicial response to the problem of window-dressing, the New Zealand judiciary now imputes Parliament with an intention to comply in its enactments with New Zealand's treaty obligations.[214] As a result, legislation, especially any Acts containing human rights elements, is construed in a particularly proactive way, giving weight to the relevant treaties. Furthermore, treaties, especially those relating to deportation

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203. *See id*. at 676, 691, 702, 718.
204. *See id*. at 668, 673-75, 685-90, 697-98.
205. *See id*. at 676, 691, 702, 718.
206. *See id*.
207. *Id*. at 676.
208. *Id*. at 691.
209. *Id*. at 702.
210. *Id*. at 718. Subsequently, the Court of Appeal noted that *Baigent's Case* stands for the proposition that "a person whose rights under the New Zealand Bill of Rights Act 1990 had been breached might, in appropriate cases, be entitled to an award of compensation." *See* Wellington Dist. Legal Servs. Comm. v. Tangiora, CA 33/97, 10 Sept. 1997, at 6.
211. Tavita v. Minister of Immigration [1994] 2 N.Z.L.R. 257.
212. Ashby v. Minister of Immigration [1981] 1 N.Z.L.R. 222.
213. *See* Tavita v. Minister of Immigration [1994] 2 N.Z.L.R. 257, 266.
214. *See* GUIDE, *supra* note 155, ¶ 72, at 25.

proceedings, are expected to influence the Executive's decision-making processes regardless of their incorporation into domestic law.[215] The Court of Appeal's decision in *Puli'uvea v. Removal Review Authority*[216] indicates that the Executive's reference to the relevant treaties in its decision-making processes may suffice. The Court, however, has left open the question of whether it would invalidate executive decisions based on erroneous applications of unimplemented treaties.

The New Zealand judiciary, like its Australian counterpart, has expressed a willingness to consider a broader range of information and material in its review of executive decisions than it did previously.[217] The Court of Appeal's decision in *Rajan v. Minister of Immigration*[218] offers an example of the reasoning that the judiciary may use in determining the relevance of treaty obligations. The Court advanced four arguments supporting reference to treaties in its review of executive decisions.[219] The first is a presumption of statutory interpretation, where the wording of legislation should be read, so far as is possible, in a way that is consistent with New Zealand's treaty obligations. Second, if a government minister is able to exercise discretion, such discretion must extend to treaty obligations. The third argument is that humanitarian considerations, which are often embodied in human rights treaties, can be considered almost mandatory for administrative decisions. Fourth, the existence of an appeal on humanitarian grounds can be interpreted as implying an initial expectation that the decision-maker will have regard to treaty obligations.

However, the Court also presented four arguments against reference to treaties in its review of executive decisions.[220] The first is that when discretion is made available in a statute, the notion that the discretion carries with it any mandatory requirements, such as exercising discretion in harmony with international obligations does not necessarily follow. Second, where humanitarian grounds are already required for consideration in an Act, there may be no need to consider treaty obligations specifically as they would form a part of the overall humanitarian picture. Third, such a reference appears unnecessary in cases in which the decision is rendered by an independent body that is best equipped to examine the issues as it relates to treaty obligations (i.e.,

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215. *See, e.g.*, Tavita v. Minister of Immigration [1994] 2 N.Z.L.R. 257; *see also* Puli'uvea v. Removal Review Auth. [1996] 3 N.Z.L.R. 538; Rajan v. Minister of Immigration [1996] 3 N.Z.L.R. 543.

216. Puli'uvea v. Removal Review Auth. [1996] 3 N.Z.L.R. 538.

217. *See* GUIDE, *supra* note 155, ¶ 73, at 25.

218. Rajan v. Minister of Immigration [1996] 3 N.Z.L.R. 543.

219. *See id.* at 551.

220. *See id.*

has commission-of-inquiry-type powers and responsibilities). Finally, the Act itself may have been amended in such a way that may no longer obligate government ministers to consider humanitarian grounds as such a task may fall exclusively within the power of an independent body.

Barring prohibiting legislation, Australian legal developments suggest that this new approach may gain significance. As Justice Brennan pointed out in *Mabo*, the influence of the ICCPR will inevitably become more relevant for what the courts perceive the common law to be and require.[221] He stated:

> [I]t is both inevitable and right that Australian courts, in today's world, should fill the gap, or resolve the ambiguity, by reference to any applicable international rule. Better that the judge should do this than rely upon personal, idiosyncratic values or upon distant analogies. This is simply the next natural phase in the development of the Australian common law as it adapts to the world of internationalism. Fortunately, our system of law has a never-ending capacity to respond to new problems and to adopt sensible solutions from new sources.[222]

As the treaty-making process is constituted, the judiciary has a vast opportunity to develop the law. The Executive's general practice of not entering into treaties until it is satisfied that New Zealand's domestic law complies with treaty terms presents the courts with an invitation to re-examine and re-interpret the law whenever it is presented with an apparent conflict between a treaty provision and a statutory provision. This use of treaties by the judiciary to change the law may not be limited to infrequent instances where ambiguity is found in the law. The ambiguity constraint is of little comfort if the courts subscribe to the *Teoh* view that "there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail."[223]

The Ministry of Foreign Affairs and Trade (MFAT) has acknowledged that the New Zealand judiciary has taken a more liberal approach to the application of New Zealand's international obligations in domestic law.[224] However, it maintains that the judiciary has not yet gone as far as its Australian counterpart.[225] Indeed, the Court of Appeal's recent decision in its combined *New Zealand Air Line Pilot's Association*

221. *See* Mabo v. Queensland (1992) 175 C.L.R. 1, 42.
222. I.A. Shearer, *International Legal Notes*, 69 AUSTL. L.J. 404, 405 (1995).
223. Minister for Immigration and Ethnic Affairs v. Teoh (1995) 128 A.L.R. 353, 362.
224. *See* MacKay, *supra* note 163, at 7.
225. *See id.*

Inc. v. Attorney-General and *New Zealand Air Line Pilot's Association Inc v. Transport Accident Investigation Commission*[226] judgment has the appearance of reasserting the traditional approach.[227] In this case, the Air Line Pilot's Association tried to use a provision in Annex 13 of the Chicago Convention on International Civil Aviation to disallow a search warrant, granted to the police under section 198 of the Summary Proceedings Act 1957, to search a cockpit voice recorder recovered from a crash site, and the transcript taken from the recorder. The Court of Appeal upheld the search warrant by finding that Parliament had not made the Convention, as a whole, part of the law of New Zealand[228] and that it had not incorporated Annex 13 into domestic law.[229] However, the judgment turns on the conclusion that the relevant treaty provision was not a binding obligation.[230] The question of how far the judiciary might go if confronted with a binding obligation in similar circumstances remains unanswered.

The Court of Appeal's subsequent decision in *Wellington District Legal Services Committee v. Tangiora*[231] does not address this issue. In *Tangiora*, the plaintiff had successfully sued in the High Court for civil legal aid to present a case to the United Nations Human Rights Committee.[232] The Court of Appeal reversed the decision on the grounds that the phrase "any administrative tribunal or judicial authority" in section 19(1) of the Legal Services Act 1991, given the absence of an expressed statutory statement to the contrary, only included "courts, tribunals and related bodies which are established under New Zealand law, by or with the authority of Parliament, and which Parliament in a careful way lists or indicates."[233]

In reaching its decision, the Court affirmed the statements it made in the *New Zealand Air Line Pilot's* case regarding the role of treaty provisions in the interpretation of legislation:

> The first states "the presumption of statutory interpretation that so far as it wording allows legislation should be read in a way which is consistent with

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226. New Zealand Air Line Pilot's Ass'n Inc. v. Attorney-General: New Zealand Air Line Pilot's Ass'n Inc. v. Transport Accident Investigation Comm'n, CA 300/96 & CA 301/96, 15 June 1997.

227. For example, the Court states: "It is well established that while the making of a treaty is an executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the executive do not, by virtue of the treaty alone, have the force of law." *Id.* at 16.

228. *See id.* at 25.

229. *See id.* at 29.

230. *See id.* at 16, 25, 29-30.

231. Wellington Dist. Legal Servs. Comm. v. Tangiora, CA 33/97, 10 Sept. 1997.

232. *See id.* at 2.

233. *Id.* at 21-22.

> New Zealand's international obligations, e.g. *Rajan* v. *Minister of Immigration* [1996] 3 NZLR 543, 551. That presumption may apply whether or not the legislation was enacted for the purpose of implementing the relevant text (*New Zealand Air Line Pilot's Association Inc.* v. *Attorney-General* CA 300/96, CA 301/96, judgment of 16 June 1997, 30)."

The Court then pointed out that the statutory language in issue in that case could be read in the context of the relevant international text. There was, the Court said, no legislative provision that stood in the way of that contextual use of the international provisions. That use of the international provisions to assist the reading of the national text does not expressly depend on the existence of relevant international obligations.[234]

Regarding the first statement, the Court concluded "that there is no relevant international obligation by reference to which the Legal Services Act is to be interpreted in this case."[235] Regarding the second, the Court noted that "in some circumstances the legislature might go further than New Zealand's international obligations require and draw on international standards which do not have obligatory force" that "may also be relevant to the interpretative process as it was for instance in *Van Gorkom v. Attorney-General*."[236] The Court reached its decision without reference to any such international standards.[237] *Tangiora* suggests that mere ambiguity is sufficient to allow the Court to reference treaties. However, the exact legal effect of executed but-as-yet unincorporated treaties remains unsettled.

Until recently, the distinction between self-executing and non-self-executing treaties had been unimportant. Under the traditional approach, the courts generally restricted their attention to treaties that Parliament had incorporated into domestic law. However, the emerging approach suggests that the distinction may no longer be irrelevant, particularly in situations in which the courts are asked to rule on the Executive's compliance with New Zealand's treaty obligations.

In the absence of legislation on this point, the courts could, conceivably, decide that a treaty is self-executing.[238] If this decision were reached, Parliament's role in the treaty-making process would be circumvented, which would concern those who subscribe to the theory of parliamentary sovereignty.

The opportunity for public participation in the judicial stage in the treaty-making process is limited. Such participation requires the

234. *Id.* at 12.
235. *Id.* at 14.
236. *Id.* at 15.
237. *See generally id.*
238. *See* Donaghue, *supra* note 38, at 243-44.

possession of two indispensable elements: a legitimate cause of action to bring before the courts and the resources to litigate it. Although winning a favorable interpretation or application of a treaty provision may be possible, no opportunity exists to alter or renegotiate the text of the treaty. At this stage, public participation is far too late.

IV. ASSESSMENT OF CHANGES TO THE PROCESS

New Zealand's changes to its treaty-making process were made in response to a number of proposals advanced to enhance participation in that process. To provide a better understanding of this response, these proposals and the response are examined in terms of enhancing public participation in the treaty-making process.

A. *Ponsonby's Proposals*

Arthur Ponsonby enjoyed a long and distinguished public service and parliamentary career in which he served in the United Kingdom Foreign Office. He also served as Under-Secretary of State for Foreign Affairs and as Parliamentary Under-Secretary for Dominions. In 1915, he published a book entitled *Democracy and Diplomacy: A Plea for Popular Control of Foreign Policy*, in which he advanced the following proposals for reforming the United Kingdom treaty-making process:

- The Foreign Office Vote should be discussed annually in the House of Commons as a matter of regular procedure. The discussion should occupy at least two days. On the first day, the Foreign Secretary would make a statement of policy and give a broad survey of the whole field. The second day would be devoted to detailed points and special question of current interest.
- No treaty should be drawn up with any foreign country without parliamentary sanction being given to its clauses in particular as well as to its formal ratification.
- No agreement, alliance, or commitment with any foreign Power should be entered upon without the express consent of Parliament.
- War should not be declared without the consent of Parliament.
- It should be the recognised duty of a Foreign Secretary to make periodical pronouncements in the country on foreign affairs, more especially when parliament is not sitting. The people should be taken into his confidence and should be instructed, instead of, as at present, being kept in ignorance, and mystified by Secretary's silence.
- A standing Foreign Affairs Parliamentary Select Committee should be appointed and maintained to promote information sharing and

dissemination. It would also lead parliamentary debate and provide the basis for executive accountability in the Parliament.[239]

As outlined below, the principal proposals advanced in New Zealand echo most of these ideas. New Zealand more or less follows the first recommendation. Every year, the House of Representatives debates the Government's annual budget, including the revenue allocated to MFAT.[240] It also has the capacity to probe foreign policy issues, which it does occasionally.[241]

The second recommendation would increase participation in the treaty-making process, as it would offer all elected representatives an opportunity to participate in the formulation of New Zealand's negotiating position. If the existing select committee process were employed, it would also give the public an opportunity to make formal oral and written submissions that could be used to formulate New Zealand's negotiating position. The third recommendation (i.e., parliamentary approval of treaties) would indirectly enhance public participation in the treaty-making process, as the Executive, to ensure approval, would likely strengthen and expand its current consultative practices before the treaty text is negotiated and settled.

The fourth recommendation does not directly concern the treaty-making process, albeit the power to declare war is a Crown prerogative in New Zealand that is exercised by the Minister of Foreign Affairs and Trade.[242] The fifth recommendation, as matter of individual style, is more or less followed in New Zealand. The current Minister of Foreign Affairs and Trade, Don McKinnon, has been particularly active in this regard.[243] Under his leadership, MFAT officials have taken steps to increase public awareness of New Zealand's international obligations and the importance

239. *See* A. PONSONBY, *supra* note 39, at 71, 74, 77, 78, 80, 83-92.

240. *See, e.g.*, *Vote Foreign Affairs and Trade*, *in* THE ESTIMATES OF APPROPRIATIONS FOR THE GOVERNMENT OF NEW ZEALAND FOR THE YEAR ENDING 30 JUNE 1998, B.5 Vol. I, 781-22 (1997).

241. For examples of questions asked of and answered by the Minister of Foreign Affairs and Trade on the negotiations regarding Multilateral Agreement on Investment, see PARLIAMENTARY DEBATES (HANSARD), HANSARD SUPPLEMENT 10, 18 Aug. to 26 Sept. 1997, 3560; PARLIAMENTARY DEBATES (HANSARD), HANSARD SUPPLEMENT 8, 26 May to 4 July 1997, 2534, 2535, 2638; PARLIAMENTARY DEBATES (HANSARD), HANSARD SUPPLEMENT 7, 21 April to 23 May 1997, 2385, 2430, 2437.

242. JOSEPH, *supra* note 30, at 560-61.

243. *See, e.g.*, Don McKinnon, *New Zealand Sovereignty in an Interdependent World*, *in* STATE AND SOVEREIGNTY: IS THE STATE IN RETREAT? PAPERS FROM THE THIRTY-FIRST FOREIGN POLICY SCHOOL, 1996, at 7 (G. Wood & L. Leland Jr. eds., 1996); The Honorable Don McKinnon, Address at the Launch of the New Treaty List (Dec. 17, 1997) (transcript available in the New Zealand Executive Government Speech Archive) (visited Feb. 12, 1998) http://www.executive.govt.nz [hereinafter Launch of the New Treaty List].

of international law with, for example, the publication of treaty lists[244] and the creation of a website dedicated to foreign affairs.[245] Dissemination of this information is crucial to informed and constructive public participation.

Regarding the sixth recommendation, New Zealand maintains a parliamentary select committee, referred to as the Foreign Affairs, Defence, and Trade Committee. It scrutinizes the Executive's foreign affairs function, and generally leads parliamentary debate in this area. Its recommendations, for example, led to the recent changes to the treaty-making process outlined in Part IV.E below. However, it has not yet assumed a systematic role in analysing the treaties that the Executive has executed. It also does not assist with the negotiation and conclusion of treaties.

B. *Law Commission's Draft Proposals*

In July 1995, the President of the New Zealand Law Commission, Sir Kenneth Keith (who is now a member of the Court of Appeal and the principal author of the *Puli'uvea*, *Rajan*, and *Air Line Pilot's* decisions discussed in Part III.B.3(b) above) released for comment a draft paper entitled *The Making, Acceptance and Implementation of Treaties: Three Issues for Consideration*. The paper contained the following proposed changes to New Zealand's treaty-making process:

- "... the need for and practices of notification and consultation at the negotiating stage [should] be assessed with the purpose of deciding whether those practices require further development; one issue would be whether, as appropriate, legislative consultation requirements should be imposed."[246]
- "... consideration be given to the introduction of a practice of the timely tabling of treaties subject to ratification, accession or acceptance, so that members and committees of the House can determine whether they wish to consider the Government's proposed action."[247]
- "... when appropriate, and so far as possible, legislation implementing treaties or other international texts give direct effect to those texts, and

244. *See* NEW ZEALAND CONSOLIDATED TREATY LIST AS AT 31 DECEMBER 1996, PART I (MULTILATERAL TREATIES), New Zealand Treaty Series 1997, No. 1, Appendix to the Journal of the House of Representatives, A.263 (1997); NEW ZEALAND CONSOLIDATED TREATY LIST AS AT 31 DECEMBER 1996, PART II (BILATERAL TREATIES), New Zealand Treaty Series 1997, No. 2, Appendix to the Journal of the House of Representatives, A.265 (1997).

245. The address for this website is <http://www.mft.govt.nz>.

246. Law Commission, *supra* note 38, at 6.

247. *Id.* at 12.

that when that is not done, the legislation indicate in some convenient way its treaty or other international origins."[248]

The first recommendation would directly enhance public participation in the treaty-making process, as it would afford the public a better opportunity to participate in the formulation of New Zealand's negotiating position. Formalizing the process via legislation would assist in publicizing and clarifying the process.

The second recommendation is based on the Ponsonby rule, which has existed in the United Kingdom since 1924, and which appears to have been the main response to his proposals (outlined in Part IV.A above). The Ponsonby rule requires most treaties to be tabled in both Houses of the English Parliament twenty-one sitting days before the Executive can enter into them.[249] Australia has recently adopted a fifteen-sitting day rule. This procedure gives elected representatives an opportunity to debate the merits of entering into a treaty. The final decision, however, remains with the Executive. The opportunity for public participation is indirect. To ensure approval, the Executive would likely strengthen and expand its current consultative practices earlier in the treaty-making process.

The final recommendation, although it does not affect public participation in the treaty-making process, is of great practical value to legal practitioners and government advisors, as it would assist them in determining whether international law is applicable to a given issue.

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248. *Id.* at 21. Subsequent to the Government's Response, which is discussed in Part IV.E, the Law Commission published its final report. *See* NEW ZEALAND LAW COMMISSION, THE TREATY MAKING PROCESS: REFORM AND THE ROLE OF PARLIAMENT (1997). It made the following recommendations: (1) "That the value of notification and consultation with Parliament and interested or affected groups at the negotiating stage of the treaty making process be recognised, with the purpose of developing and formalising such practices." *Id.* at 3, 58. (2) "That consideration be given to the establishment of a Treaty Committee of Parliament." *Id.* at 3, 60. (3) "That consideration be given to the introduction of a practice of timely tabling of treaties so that the members of the House of Representatives can determine whether they wish to consider the government's proposed action." *Id.* at 3, 65. (4) "That consideration be given to the preparation of a treaty impact statement for all treaties to which New Zealand proposes to become a party." *Id.* at 4, 71. (5) "That, so far as practicable, legislation implementing treaties or other international instruments give direct effect to the texts (that is, use the original wording of the treaties), and that when that is not possible, the legislation indicate in some convenient way its treaty or other international origins." *Id.* at 4, 76.

249. The exception pertains to double taxation agreements and agreements that do not require formal ratification. *See* REPORT OF THE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, INQUIRY INTO PARLIAMENT'S ROLE IN THE INTERNATIONAL TREATY PROCESS, Appendix to the Journal of the House of Representatives, I.41, at 12 (1997) [hereinafter REPORT OF THE COMMITTEE].

C. Clerk of the House of Representatives' Proposals

Interest in the treaty-making process became more focused shortly after the Clerk of the House of Representatives, David McGee, submitted a paper in June 1996 to the Standing Orders Committee entitled *Treaties and the House of Representatives*.[250] The Clerk drew on the Law Commission's work and recommendations made by the Australia Senate Committee that had examined the Australian treaty-making process (see Annex I).[251] The paper advanced the following proposals:

- "Before the Government ratifies any treaty, it should be necessary for the House to approve the making of that treaty."
- "Prior parliamentary approval to ratify a treaty may be given by a simple resolution of the House."
- "For the purpose of considering whether to approve a treaty, the treaty should be tabled in the House in draft."
- "After being tabled, the draft treaty would be referred to the appropriate subject select committee for consideration."
- "A time limit within which the committee must report the draft treaty back to the House would be imposed (say, 15 sitting days)."
- "Any legislation to implement a treaty should, in its title, its preamble, or in a purpose clause, make it explicit that it is being promoted for the purpose of permitting New Zealand to ratify the treaty."
- "The Foreign Affairs and Defence Committee should be at the centre of the treaty approval process by allocating treaties to individual committees for scrutiny and keeping the overall process under review."
- "In the case of a treaty certified by the Government to be of an urgent nature, the treaty could be entered into and then tabled in the House at the first opportunity. The House would have 15 sitting days to examine the treaty and determine whether to disallow it."
- "The House should only be able to approve or reject a draft treaty (although the select committee could in its report recommend amendments or reservations if it saw fit)."
- "If the Government decides to enter a reservation to a treaty after the treaty has been entered into, that reservation should be presented for parliamentary approval before being entered. Similarly, any amendment to the treaty proposed to be made by the parties to it should be approved by the House before New Zealand ratifies the amendment."

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250. Clerk of the House of Representatives, Treaties and the House of Representatives (paper prepared for the Standing Orders Committee, June 1996); *see also* REPORT, *supra* note 37, Annex D (setting out the Clerk's paper in full).

251. *See* REPORT, *supra* note 38, Annex D; *see also generally* TRICK OR TREATY, *supra* note 38; GUIDE, *supra* note 155.

- "The requirement of mandatory parliamentary approval should be backed by legislation but the process by which this is obtained should be set out in the Standing Orders."[252]

Essentially, the Clerk proposed strengthening Parliament's role in the treaty-making process by requiring the Executive to seek parliamentary approval for all the treaties that it planned to execute. This change, if adopted, would constitute a fundamental alteration of New Zealand's treaty-making process. Although the change would provide elected representatives with a more decisive role, public participation would only be enhanced indirectly. In theory, the Executive would be likely to augment its consultation procedures during the negotiation and conclusion phases of the treaty-making process to build the political support it would need to secure parliamentary approval. In practice, however, the extent to which the Executive would be required to make this adjustment would depend on the extent to which it exercises control over Parliament. If its control is reasonably secure, then parliamentary approval could be little more than a *pro forma* exercise.

D. Foreign Affairs, Defence and Trade Committee's Proposals

In March 1997, the Right Honourable Mike Moore MP, Labour's Spokesperson for Foreign Affairs and Trade, circulated a paper entitled *Memorandum on Foreign Policy, Trade, and Other Treaty Issues* to all MPs and to members of the Foreign Affairs, Defence and Trade Select Committee.[253] Among other suggestions, the memorandum recommended that the Committee examine ideas intended to enhance and advance Parliament's role in the treaty-making process.[254] The Committee decided to take up the matter and tabled the following recommendations in the House of Representatives in November 1997 in a report entitled *Inquiry into Parliament's Role in the International Treaty Process*:

- "For a trial period of 12 months, all treaties which are subject to ratification, accession, acceptance or approval (which for the most part will be multilateral treaties) should be tabled in the House prior to ratification, accession, acceptance or approval and be subject to the following procedure."
- "A document along the lines of a 'National Interest Analysis' would be prepared for each treaty and tabled in the House at the same time."

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252. *See* REPORT, *supra* note 38, Annex D, at 34-35.
253. Memorandum from Mike Moore MP to All MPs and Members of Foreign Affairs Select Committee re Foreign Policy, Trade & Other Treaties (5 Mar. 1997).
254. *See id.*

- "Both the treaty and accompanying 'National Interest Analysis' would be referred to the Foreign Affairs, Defence and Trade Committee upon tabling. This committee could retain the treaty documents for itself, or refer them to a more appropriate select committee, for inquiry and report back to the House, if the relevant committee considers an inquiry necessary, within 15 sitting days of tabling in the House."
- "If requested by members, the House should provide an opportunity for members to debate any select committee reports on treaties in the House (in addition to the existing opportunities and the proposal in recommendation 1)."
- "The Government will not ratify, accede to, accept or approve any treaty until after a select committee reports on its inquiry into a treaty or 15 sitting days elapses from the date the treaty is tabled, whichever occurs first."
- "In the event that the Government needs to take urgent action in the national interest in ratifying, acceding to, accepting or approving a treaty, and it is not possible to table it beforehand, it will be tabled as soon as possible after such action has been taken together with an explanation to the House."[255]

The Committee suggested that the National Interest Analysis contain the following information:

- "Reasons for New Zealand becoming party to a treaty;
- Any advantages and disadvantages to New Zealand of the treaty entering into force for New Zealand;
- Any obligations which would be imposed on New Zealand by the treaty, and the position in respect of reservations to a treaty;
- Any economic, social, cultural, and environmental effects of the treaty entering into force for New Zealand, and of the treaty not entering into force for New Zealand;
- The cost to New Zealand of compliance with the treaty;
- The possibility of any subsequent protocols (or other amendments) to the treaty, and of their likely effects;
- Measures which could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation;
- A statement setting out the consultations which have been undertaken or are proposed with the community and interested parties in respect of the treaty; and
- Whether the treaty provides for withdrawal or denunciation."[256]

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255. REPORT OF THE COMMITTEE, *supra* note 249, at 8-9.
256. *Id.* at 12.

Essentially, the Committee recommended a twelve-month trial of an improved version of the Ponsonby rule (discussed in Part IV.B above). The recommendation provides elected representatives an opportunity to debate whether entering into the treaty is wise, though the final decision remains with the Executive.

The opportunity for public participation is indirect. To ensure approval, the Executive would likely strengthen and expand its current consultative practices earlier in the treaty-making process. The National Interest Analysis could also be useful in promoting public participation by disseminating fundamental information about treaties that the Executive plans to execute. Such analysis might also prove useful in guiding individuals and organizations currently participating or considering participating in the earlier stages of the treaty-making process.

E. *Government's Response*

In December 1997, the Minister of Foreign Affairs and Trade, Don McKinnon, announced the Cabinet's decision to act on the Foreign Affairs, Defence and Trade Committee's recommendations.[257] The Cabinet agreed to the recommendations, effective February 1998, with the following changes:

- The trial period changed from one year to the balance of the current parliamentary term (approximately two years if the Government does not call an early election);
- The length of time a select committee has to report back to House will be thirty-five days ordinarily, but extended to forty-five days if a treaty is tabled after the fifteenth day of December;
- The Minister of Foreign Affairs and Trade may table major bilateral treaties of particular significance, which would not otherwise be subject to the Committee's proposed process, on a case-by-case basis, and after consultation with the relevant portfolio Minister.[258]

If the Government does not call an early election, the first change has the potential of doubling the trial period, which should provide the House an opportunity to review approximately twenty to twenty-five treaties under the new procedure. The second change ensures that the treaties tabled in the House under the new procedure are not delayed simply because Parliament is not sitting or has adjourned for the Christmas holidays. The third change is valuable in that it extends the application of the procedure to important bilateral treaties.

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257. *See* Launch of the New Treaty List, *supra* note 243.
258. *See id.*

As discussed in Part IV.D above, the procedure provides elected representatives a better opportunity to debate the merits of a particular treaty. The final decision, however, remains with the Executive. The procedure also affords an indirect opportunity for public participation.

To avoid negative select committee reports (and the publicity that might ensue), the Executive may choose to augment its consultation procedures earlier in the treaty-making process to ensure the requisite political support. Although the Executive is generally well-placed to ensure the final outcome of a parliamentary vote, it does not have the same degree of control over the reports produced by Parliament's select committees, as those committees are composed of non-government as well as government MPs.

V. CONCLUSION

Democracy is evolutionary. Social, political, economic, and technological changes have generated pressure for greater participation in governmental decision-making. As a result of the growing influence of international law on the content of domestic law, the treaty-making process is not immune to this development. In response to this pressure, New Zealand has taken a tentative step to address concerns regarding participation in the process of reaching international agreements by enhancing parliamentary participation in its treaty-making process.

Essentially, the New Zealand Executive has authorized a two-year trial of an improved version of the United Kingdom's Ponsonby rule. As discussed in Part IV.D-E above, the new procedure requires the Executive to table all multilateral and important bilateral treaties in the House of Representatives and to refrain from executing them for at least thirty-five days.

This procedure is consistent with New Zealand's pre-existing constitutional arrangements. In legal terms, it leaves the Executive's exclusive role in the treaty-making process unaltered. In political terms, however, it may lead the Executive to augment its processes for consulting interested individuals and groups during the negotiation and conclusion phases of the treaty-making process. As the new procedure provides elected representatives the opportunity to comment on important treaties before they are executed, New Zealand's constitutional response has expanded the scope for public debate regarding the acceptance of treaties.

ANNEX I: PROPOSALS TO REFORM THE AUSTRALIAN TREATY-MAKING PROCESS

The Australian Senate has reviewed the Australian treaty-making process. The Senate made the following recommendations:

- The Government should conduct an audit of treaties to provide the following information:
  - a list of treaties to which Australia is currently a party;
  - a list of which Departments administer the treaties to which Australia is currently a party; and
  - the manner in which treaties have been implemented in Australia, i.e., whether they have been implemented by executive action or by legislation, and if implemented by legislation, which legislation.
- Legislation should be enacted requiring that the Government report to Parliament annually on actions taken in the course of the previous year to implement treaties to which Australia is a party.
- The Department of Foreign Affairs and Trade should prepare a special publication that provides information on the treaties under consideration by the Government and make it available, free of charge, to all public libraries in Australia.
- The Government should fund a project for the establishment of a treaties database, which would include:
  - the full text of all multilateral treaties included in the Department of Foreign Affairs and Trade's publication *Select Documents on International Affairs*;
  - any available explanatory material on these treaties; and
  - decisions of international bodies which interpret these treaties, such as the United Nations Human Rights Committee and the complaints bodies of the International Labor Organisation.
- The treaties database should be made available, free of charge, on the Internet (so that Commonwealth, State and local governments, universities, schools, libraries and the general public may access it) and should also be accessible through Commonwealth Government bookshops, in the same manner as the SCALE database, which is maintained by the Attorney-General's Department.
- Funding should be provided to the Department of Foreign Affairs and Trade, and the Attorney-General's Department, for a joint project to publish information on the meaning and interpretation of treaties, including collections of interpretative decisions and the *travaux preparatoires* (records of the negotiation proceedings) of treaties.

- The Government should increase its efforts to identify and consult the groups that may be affected by a treaty which Australia proposes entering into, and groups with expertise on the subject matter of the treaty or its likely application in Australia.
- The existing Commonwealth-State Standing Committee on Treaties should be abolished and replaced with a Treaties Council that is, preferably, established by legislation. The Treaties Council should comprise members appointed by both the Government and the Opposition of each of the Parliaments of the States and Territories and the Government, Opposition and minor parties of the Commonwealth Parliament. The role of the Treaties Council should be to consider the potential impact of treaties on State, Territory and Commonwealth laws, and the method of implementing treaties. The Council should provide public reports that could be tabled in the Parliaments of the States, Territories, and the Commonwealth.
- Legislation should be enacted which requires the tabling of treaties in both Houses of the Commonwealth Parliament at least fifteen sitting days prior to Australia entering into them (whether by signature or ratification). This should be subject to an exception for urgent and sensitive treaties, in circumstances where it is not possible or not in the national interest to table them before Australia becomes a party to them. In such cases, the treaty must be tabled as soon as practicable after Australia has become a party to it, accompanied by a statement explaining the reason why it could not be tabled before Australia became a party to it.
- Legislation should be enacted to establish a Joint Parliamentary Committee on Treaties. The functions and powers of the Committee should include:
    - the function of inquiring into, and reporting on, any proposals by Australia to ratify or accede to any treaty, proposed treaty, or other international instrument or proposed international instrument, including whether Australia should become a party to the treaty or instrument;
    - the function of inquiring into, and reporting on, whether Australia should make any reservations or declarations upon ratification or accession to any treaty;
    - the function of inquiring into, and reporting on, any other proposed treaty action, such as the removal of a reservation, or the making of a declaration which subjects Australia to additional obligations under a treaty;

  - the function of inquiring into, and reporting on, treaties to which Australia is already a party, including the method of their implementation and how they should be addressed in the future;
  - the function of scrutinising treaty impact statements;
  - the power to hold public hearings and hold hearings in camera;
  - the power to call for documents and witnesses; and
  - the power to commence an inquiry into a treaty, proposed treaty, international instrument, proposed international instrument, or any other treaty action, at any time, regardless of whether it relates to a document that has been tabled in Parliament.
- The legislation establishing the Joint Parliamentary Committee on Treaties should require that treaty impact statements be prepared on each treaty tabled in Parliament. The impact statements should address the following matters:
  - reasons for Australia being a party to the treaty;
  - advantages and disadvantages to Australia of the treaty entering into force in respect of Australia;
  - obligations which would be imposed on Australia by the treaty;
  - economic, social, cultural and environmental effects of the treaty entering in force in respect of Australia, and of the treaty not entering in force in respect of Australia;
  - the costs to Australia of compliance with the treaty;
  - the likely effects of any subsequent protocols to the treaty;
  - measures which could or should be adopted to implement the treaty, and the intentions of the government in relation to such measures, including legislation;
  - the impact on the Federal-State balance of the implementation of the treaty;
  - a statement setting out the consultations which have occurred between the Commonwealth, the States and the Territories, and with community and interested parties, in respect of the treaty; and
  - whether the treaty provides for withdrawal or denunciation.
- The issue of what legislation, if any, should be introduced to require the parliamentary approval of treaties should be referred to the proposed Treaties Committee for further investigation and consideration.[259]

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259. *See* TRICK OR TREATY, *supra* note 38, at 8-11, 13, 15-17, 19.

In May 1996, Mr. Alexander Downer, the Australian Minister for Foreign Affairs, announced that the Howard Government had decided to implement many of these recommendations. He stated that:

- treaties will be tabled in Parliament at least fifteen sitting days before the Government takes binding action;
- treaties will be tabled in Parliament with a National Interest Analysis which will note the reasons why Australia should become a party to the treaty;
- the Government will propose the establishment of joint parliamentary committee on treaties to consider tabled treaties and the national interest analyses;
- the Commonwealth Government will support the creation of a Treaties Council as an adjunct to the Council of Australian Governments; and
- a database is to be established to provide individuals and groups free access to information on treaties.[260]

MFAT has indicated that these measures have been implemented.[261] The Australian Department of Foreign Affairs' work, to date, to produce an accessible database can be seen on the Internet at *www.austlii.edu.au/au/other/dfat*.

260. *See* HOUSE MAGAZINE (May 8, 1996) 5 (N.Z.).
261. *See* MacKay, *supra* note 163, at 8.