

Democratising Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan

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Abstract

Treaties are agreements between States negotiated by government executives. They are primarily meant to govern the relationship between States, but may have implications for the economic, political, and fundamental rights of citizens. This article primarily argues that Parliamentary oversight of treaties is necessary for their democratic legitimacy because treaties create binding legal obligations for States enforceable under international law. It analyses the Ratification of Foreign Agreements by Parliament Bill ('Bill') which is currently being debated in the Senate of Pakistan. Offering critical overview of the existing treaty making procedures in Pakistan, the article evaluates several aspects of the Bill including its definition of foreign agreements and the proposed treaty ratification procedures in comparison with international law of treaties and relevant laws of the United Kingdom, Australia, and Kenya. Based on the comparative examination of the Bill, the article makes proposals for changes in the Bill's substantive provisions and suggests further provisions that should be included in the Bill, such as guiding principles on treaty negotiations and procedure for treaty withdrawals. The article concludes by giving a comprehensive package of practical recommendations for further development of the Bill's provisions on treaty ratification in accordance with international best practices.

Keywords: Treaties, Ratification, Democratic Legitimacy, Parliamentary Oversight

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Introduction

A memorandum submitted to the United Nations by the Government of Pakistan in 1951 stated that there are no laws, regulations, decrees or judicial decisions regarding the negotiation and conclusion of treaties in

Pakistan and the matter is governed by custom and usage.¹ Over the span of 68 years, little has changed about this in Pakistan. Recently, Senator Mr. Mian Raza Rabbani introduced a Private Bill titled “Ratification of Foreign Agreements by Parliament Bill, 2018” (the ‘Bill’) proposing legislation in this vital area of public governance.² Senator Rabbani introduced the same Bill in the Senate in 2007³ and Dr Shireen Mazari proposed a similar legislation in the National Assembly in 2013,⁴ but both these proposals failed supposedly due to a lack of broader understanding on the significance of governance in this area of law.⁵ These proposals highlight both the difficulty and importance of legislation on this delicate aspect of foreign policy.

The Bill’s primary objective is to ensure Parliamentary oversight of treaties, including economic and other foreign agreements, signed by the Government of Pakistan, as some of these treaties have serious consequences for the economic, political and fundamental rights of Pakistani citizens.⁶ Certainly, the Bill’s objectives deal with a significant matter of public interest requiring legislation. Although treaty ratification powers in many countries are typically exercised by the executive authority of governments, several countries have taken steps to ensure some kind of Parliamentary oversight of the treaty making process. Australia, for example, has created a Parliamentary Joint Standing

¹ See ‘*Laws and Practices Concerning the Conclusion of Treaties with a Select Bibliography on the Law of Treaties*’ United Nations Legislative Series (ST/LEG/SER.B/3 December 1952). Pakistan’s submission of 28 December 1951, 92.

² The Private Bill was presented in the Senate of Pakistan on November 12, 2018 at its 284th Session (hereinafter referred to as “the Bill”).

³ Introduced on August 20, 2007.

⁴ The Bill was titled as the ‘Ratification of International Treaties Act, 2013’. See the Gazette of Pakistan, Extraordinary, 13 November 2013, 3749.

⁵ The Senate of Pakistan Debates, Official Report - Hansard, 284th Session (12 November 2018) X (02), 13 (hereinafter referred to as “the Hansard”).

⁶ (n 2) 3.

Committee on Treaties.⁷ Similarly, Kenya has enacted a detailed legislation that not only requires Parliamentary approval before ratification of treaties but also makes ratification without Parliamentary approval a criminal offence.⁸ Likewise, the United Kingdom (UK) has enacted a law requiring Parliamentary approval of treaties before their ratification by the government executives.⁹ This article will analyse the similarities and differences in the approaches taken by these countries to ensure Parliamentary oversight of treaties with a view to derive any inferences for the Bill pending before the Senate of Pakistan.

There are several reasons in favour of the Parliamentary oversight of treaties. Treaties are agreements between countries and form an important part of a government's foreign policy. They are key instruments for governments to create, strengthen or redirect their relations with other countries. They are also a means to create legally binding commitments between countries, enforceable under international law. In addition to this, treaties may impose positive legal obligations on a country requiring it to take certain actions.

Another significant aspect of treaties is that they may contain provisions ousting jurisdiction of national courts in favour of international arbitration, which Pakistani courts have considered as a means to indirectly avoid accountability of public officials before national courts.¹⁰ As the Bill's objectives highlight, treaties as international agreements may create rights and obligations for citizens or impose conditions on domestic legal and constitutional settings. Therefore, parliamentary oversight of the government's power to conclude treaties gives democratic legitimacy to

⁷ See <<https://www.aph.gov.au/jsct>> accessed 03 June 2019.

⁸ See, The Republic of Kenya, Treaty Making and Ratification Act, No. 45 of 2012, s. 12 (hereinafter 'Kenyan Law on Treaty Ratification').

⁹ See Part 2 of the Constitutional Reform and Governance Act 2010 (hereinafter the 'The UK Law on Treaty Ratification').

¹⁰ For example, Pakistani courts in several cases have refused to enforce the terms of a treaty ousting jurisdiction on national courts in favour of international arbitration. The representative cases include *The Hub Power Company Limited (Hubco) v Pakistan WAPDA* PLD 2000 Supreme Court 841; *Société Générale de Surveillance S.A. v Pakistan* 2002 SCMR 1694; *Lakhra Power Generation Company Limited (LPGCL) v Karadeniz Powership Kaya Bey* 2014 CLD 337; and more recently the *Tethyan* case reported as *Maulana Abdul Haque Baloch v Government of Balochistan* PLD 2013 SC 641 and 2012 SCMR 402.

such agreements. It also enables national executives and judicial institutions to make necessary readjustments for the proper implementation of treaties while operating within the national constitutional and legal frameworks.

Like most countries, successive Pakistani governments have concluded numerous international agreements. It is difficult to capture the significance of each treaty signed by Pakistan; however, an indicative categorisation of treaties sufficiently demonstrates their economic, political and fundamental rights implications. On broader political objectives, Pakistan has concluded many international agreements including the Tashkent Declaration,¹¹ Simla Agreement,¹² Indus Waters Treaty,¹³ and China–Pakistan Boundary Agreement.¹⁴ Likewise, Pakistan is also a party to many international treaties and conventions concerning fundamental rights mostly framed under the auspices of the United Nations, including the International Covenant on Civil and Political Rights,¹⁵ and the International Covenant on Economic, Social and Cultural Rights.¹⁶ Free Trade Agreements (FTAs) or Preferential Trade Agreements (PTAs),¹⁷ Bilateral Investment Treaties (BITs),¹⁸ and Double

¹¹ Signed between India and Pakistan in Tashkent, Uzbekistan, on January 10, 1966 to restore peaceful relations post 1965 war.

¹² Signed between India and Pakistan in Simla (now called Shimla), India, on 2nd July 1972 was much more than a peace treaty seeking to reverse the consequences of the 1971 war (i.e. to bring about withdrawals of troops and an exchange of Prisoners of Wars).

¹³ Indus Water Treaty was signed between India and Pakistan in 1960 on a crucial issue of distribution and use of water in the Indus System of Rivers.

¹⁴ The text of the China–Pakistan Boundary Agreement was signed on 2 March 1963. The Agreement formally delimited boundary between China’s Sinkiang and Pakistan’s Kashmir.

¹⁵ Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Pakistan signed the agreement on 17 April 2008 and it entered into force for Pakistan on 23 June 2010.

¹⁶ Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. Pakistan signed the Convention on 3 Nov 2004 and it entered into force for Pakistan on 17 April 2008.

¹⁷ See <<http://www.commerce.gov.pk/about-us/trade-agreements/>> accessed 03 June 2019. According the Asian Development Bank, Pakistan has concluded total 18 FTAs.

¹⁸ According to the Pakistan Board of Investment website, Pakistan is a party to 48 Bilateral Investment Treaties.

Taxation Treaties,¹⁹ are a few examples of major international economic agreements that Pakistan has concluded.

More recently, the Government of Pakistan has concluded several international agreements, for example, with Russia on training of military personnel,²⁰ with ten different countries on cooperation to bring back “the looted money of the nation”,²¹ with China on transfer of sentenced persons,²² and with England on swap of prisoners.²³ These are in addition to several other agreements with China under the framework of China-Pakistan Economic Corridor (CPEC) in multiple areas including economy, agriculture, law enforcement, and technology.²⁴ Pakistan has also been negotiating with the International Monetary Fund (IMF) on a possible loan agreement,²⁵ which falls within the Bill’s definition of a ‘foreign agreement’.²⁶

All these foreign agreements have different political, economic, and fundamental rights significance. Many of the earlier agreements between China and Pakistan have been widely criticised for lack of

¹⁹ See <<https://www.fbr.gov.pk/docs/income-tax-international-taxation-bilateral-treaties/329>> accessed 03 June 2019.

²⁰ The ‘Contract on Admission of Service Members of Pakistan in RF’s (Russian Federation) Training Institutes’ was signed on August 8, 2018. See, for example, Baqir Sajjad Syed, ‘Accord with Russia Signed for Training of Pakistani Troops’ *Dawn* (Islamabad, 8 August 2018) <<https://www.dawn.com/news/1425673>> accessed 03 June 2019.

²¹ ‘Agreements Signed with 10 Countries to Bring ‘Looted Money’ Back: PM’s Special Assistant’ *Dawn* (Pakistan, 22 November 2018) <<https://www.dawn.com/news/1447002>> accessed 03 June 2019.

²² ‘China, Pakistan Sign Treaty for Transfer of Prisoners’ *Dawn* (Beijing, 9 November 2018) <<https://www.dawn.com/news/1444458>> accessed 03 June 2019.

²³ ‘UK, Pakistan Sign Prisoner Swap Treaty’ *The Express Tribune* (8 November 2018) <<https://tribune.com.pk/story/1875764/1-uk-pakistan-sign-prisoner-swap-treaty/>> accessed 03 June 2019.

²⁴ ‘Pakistan, China Sign Agreements to Deepen Ties in Economic, Social Sectors’ *The News* (Islamabad, 21 November 2018) <<https://www.thenews.com.pk/latest/389193-pakistan-china-sign-agreements-to-deepen-ties-in-economic-social-sectors>> accessed 03 June 2019.

²⁵ See the IMF Press Release No. 18/433 on 20 November 2018.

²⁶ (n 2) s. 2(1) of the Bill.

transparency and public engagement in their negotiation and conclusion.²⁷ There have been repeated calls to subject the government's negotiations, agreements, and relations with other countries to the democratic process by an open discussion in the Parliament.²⁸

The Bill, therefore, proposes an important piece of legislation that lays down the requirement of, and provides the procedures for, Parliamentary oversight of treaty ratification. However, several aspects of the Bill including its ambitious approach to regulate the ratification of all types of treaties and foreign agreements through a single uniform procedure needs careful scrutiny. The broader questions for analysis can be framed as follows: Do all types of formal and informal foreign agreements need Parliamentary oversight and in the same manner? If yes, does the Bill achieve a balance between democratic legitimacy and transparency on one hand, and practical difficulties that may arise from presenting before the Parliament treaties of highly technical, urgent, or confidential nature on the other? Pakistan is traditionally a 'dualist' State where treaties do not automatically become part of national law enforceable in national courts unless a specific implementing legislation is passed by the Parliament. Will ratification by the Parliament make a treaty enforceable in domestic courts without a separate legislation implementing it? Considering these challenges, how can the Parliament's role in the making of foreign agreements be increased without disrupting an effective foreign policy and friendly relations with other countries?

This paper addresses the above questions from practical, analytical and critical perspectives. While considering various aspects of the Bill, the existing treaty making law and practice and the constitutional requirements in Pakistan are assessed in comparison with the rules of international law and the laws of other countries that similarly seek to achieve Parliamentary oversight of treaties. Part 2 examines whether the Bill's definition of 'foreign agreement' is comprehensive, follows the right

²⁷ Faran Mahmood, 'Bumpy Ride on CPEC Road as People Cry for Transparency' *The Express Tribune* (Islamabad, 12 March 2018) <<https://tribune.com.pk/story/1657399/2-unearting-scandals-bumpy-ride-cpec-road-people-cry-transparency/>> accessed 03 June 2019.

²⁸ See, the Point of Public Importance raised by Senator Mian Raza Rabbani regarding the dialogue between USA and Taliban, The Senate of Pakistan, Official Report – Hansard, 285th Session (19 December 2018) XI (04) 74.

approach, and is in accordance with international standards and practices. Part 3 explains the constitutional requirements and the existing practice of treaty making and ratification in Pakistan. Part 4 analyses the Bill's proposed ratification procedure and the difficulties that this procedure may entail. Part 5 discusses the Bill's implications for withdrawal from treaties, and part 6 assesses whether the Bill's scope should be extended to treaty negotiations as well. Finally, part 7 gives a summary of the analytical outcomes.

The Bill's Definition of Foreign Agreement

The Bill uses the term '*foreign agreement*' instead of 'treaty'. The Vienna Convention on the Law of Treaties (VCLT),²⁹ which provides the rules of international law on the making, interpretation and enforcement of treaties, uses the term 'treaty' to refer to all types of international agreements between States if they are made in writing and intended to be governed by international law, regardless of any other title given by the party States.³⁰ Following the same approach, the recent legislation in Kenya dealing with ratification of treaties has used the generic term 'treaty' to refer to all types of international agreements.³¹ Distinctively, the Bill's definition of '*foreign agreements*' means and includes "*all Agreements, Treaties, Contracts and Trade Protocols signed with foreign Governments or Banks or Donor or Lending agencies by the Government of Pakistan*".³² The Bill's definition of '*foreign agreement*' is obviously broader than the narrow expression of 'treaty' used in the VCLT in two significant ways. Firstly, concerning parties to such agreements, the Bill's definition covers agreements between the Government of Pakistan and any other foreign government, bank, donor, or lending agency, whereas the VCLT definition of treaty covers only agreements between States. Secondly, the VCLT definition covers only those agreements that are firstly, in a written form, and secondly, governed by international law. However, the Bill's definition does not contain any of these two

²⁹ The Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969. Pakistan signed the VCLT on 29 April 1970 but has not yet ratified.

³⁰ VCLT, art. 2(1) (a).

³¹ (n 8).

³² (n 2) s. 2(i) of the Bill.

conditions. It is controversial if oral agreements are binding in international law.³³

However, States frequently conclude non-binding agreements both orally and in writing, and although such agreements do not create obligations enforceable under international law or the VCLT rules, they may have greater political significance and may impose conditions on party States. Non-binding commitments can influence a State's behaviour both nationally and internationally,³⁴ and their non-compliance can result in political consequences including loss of credibility and repute in international relations, as well as reprisals by partner States.³⁵ The importance of such non-binding commitments is obvious, for example, from a point of public importance raised by Senator Rabbani in a Senate session regarding the Pakistani government's failure to allow Parliamentary scrutiny of its involvement in the ongoing dialogue between USA and the Taliban.³⁶ Similar concerns have been raised, for example, regarding conditions included in the financial support agreement between Pakistan and Saudi Arabia concluded in October 2018.³⁷

The significance of such informal, unwritten and legally non-binding foreign agreements is undeniable, and there is a clear need for Parliamentary oversight of these important foreign policy matters. However, such foreign agreements are primarily political decisions and it is unlikely that any government would be willing to present all such agreements before the Parliament for open discussion and approval. Hence, such agreements are unlikely to be effectively regulated by any single legislation such as the Bill under discussion. Unless they are formally written and concluded by way of legally binding treaties, it will

³³ See, for example, Kelvin Widdows, 'On the Form and Distinctive Nature of International Agreements' (1976-1977) 7 *AustYBIL* 114, 115.

³⁴ See, for example, Daniel Bodansky, 'Legally Binding versus Non-Legally Binding Instruments' in Scott Barrett *et al* (ed) *Towards a Workable and Effective Climate Regime* (VoxEU eBook (CEPR and FERDI) 2015).

³⁵ See, for example, Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99(3) *AJIL* 581.

³⁶ (n 28).

³⁷ See, for example, Suddaf Chaudry, 'Despite PR Duress, Saudi \$6bn to Pakistan Comes with Strings' *Asia Times* (Pakistan, 28 October 2018) <<https://www.asiatimes.com/2018/10/article/despite-pr-duress-saudi-6bn-to-pakistan-comes-with-strings/>> accessed 3 June 2019.

be practically impossible for any government to present all such agreements before the Parliament for formal approval or ratification.

Some of these agreements may also contain sensitive information precluding disclosure or public debate. However, some kind of Parliamentary oversight over such agreements is in the interest of democracy as it will strengthen the role of Parliament and give those agreements democratic legitimacy. It will also develop political consensus on important aspects of foreign policy, and successive governments will have the desire and responsibility to maintain the agreements resulting in sustained relations with partner States. The creation of an Australian style 'Joint Standing Committee on Foreign Affairs, Defence and Trade' consisting of elected representatives of all political parties is a plausible way forward to ensure Parliamentary oversight of such foreign agreements. Although similar Foreign Affairs Committees have been created at both Houses of the Pakistani Parliament,³⁸ they can be made more effective to play a proactive role in the formulation and scrutiny of governments' informal foreign agreements.

There are other potential problems with the Bill's definition of foreign agreements. If the reference to 'agreements, treaties and contracts' is meant to cover all types of legally binding international commitments, then the Bill's definition should also include 'conventions' in the list. Although conventions are also treaties in a general sense, there are subtle differences that require attention due to the Bill's approach to catalogue these instruments separately in the form of a list. In international law, generic terms 'treaty' and 'convention' can be used synonymously. Similarly, in accordance with the VCLT,³⁹ the term '*treaty*' can be used for all other types of international agreements and contracts. Although the Bill's approach to provide a list of the covered instruments works better for its own aims and objectives as compared to the VCLT, the Bill's distinct breakdown of foreign agreements into only agreements, treaties and contracts gives the impression that it does not apply to conventions.

³⁸ See the Standing Committees on Foreign Affairs of National Assembly and Senate <<http://www.na.gov.pk/foreignaffairs/>> accessed 03 June 2019, <<http://www.senate.gov.pk/en/standingcommitties.php?type=6>> accessed 03 June 2019.

³⁹ (n 30).

In the 20th century, the term ‘convention’ was regularly used for ‘bilateral’ (between two States) or ‘plurilateral’ (between certain States) treaties and agreements too. However, it is now generally used for formal ‘multilateral’ instruments negotiated under the auspices of international organisations, most commonly the United Nations (UN), which are open for participation, signature and accession by the entire international community of States and are often ratified by a large number of States.⁴⁰

On the other hand, an international treaty, contract or agreement is usually the result of bilateral or plurilateral negotiations aimed at reaching a common ground between negotiating States. As international conventions adopted by the UN are meant to codify international norms and standards,⁴¹ and are not individually negotiated deals by governments on bilateral or plurilateral levels, it can be argued that the Bill’s breakdown list approach is intended to exclude conventions from its application. If the Bill is supposed to apply to all sorts of foreign agreements including conventions, it should include conventions in its list of covered instruments. On the other hand, if conventions are meant to be excluded from the Bill’s purview, the Bill should include a clean exception clause to this effect to prevent a possible expansive interpretation going against its intended scope.

The Bill’s definition of foreign agreements also includes trade protocols.⁴² However, there is no precise meaning of the generic term ‘protocol’ in international law and can be used to refer to any of the following instruments. Firstly, a protocol is sometimes referred to as an understanding that representatives of negotiating States have reached to provide a basis for further negotiations on the formal international agreement. In this sense, a protocol is somewhat similar to a memorandum

⁴⁰ For example, the Convention on the Rights of the Child adopted by the United Nations General Assembly of in 1989.

⁴¹ Encouraging the development of international law as a way to regulate international relations has been a major objective of the United Nations since its inception as it was created to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” (Preamble of the United Nations Charter).

⁴² S. 2(i) (a) of the Bill.

of understanding (MOU).⁴³ Secondly, in the context of treaties having wider political significance, a protocol may be a political declaration that negotiating States have agreed to announce before the finalisation of a formal legal text of the intended international agreement. A recent example of this type of protocol is the ‘Northern Irish Protocol’ in the recent Brexit negotiations between the UK and the European Union (EU) where the protocol has been announced as an alternative arrangement to avoid the possibility of a hard border between the Republic of Ireland and Northern Ireland, which is part of the UK, in the event that negotiating parties fail to confirm the Draft Withdrawal Agreement of November 2018.⁴⁴ Thirdly, a protocol may also be an additional legal instrument that complements or adds to an existing treaty.⁴⁵ In this sense, a protocol may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, or address a new concern, or add a procedure for the operation and enforcement of treaty, such as adding an individual complaints procedure. A protocol of this type is ‘optional’ in its nature as it is not automatically binding on States that have already ratified the original treaty, and States must ratify or accede to the protocol separately in order to be bound by its contents. Finally, a treaty that has already been finalised and formally signed may also sometimes be named or titled as a protocol.⁴⁶

The reference to ‘trade protocols’ in the Bill’s definition of foreign agreements appears to include the protocols signed as part of the World Trade Organisation (WTO) negotiations. The most important trade

⁴³ For example, the MOU and Protocol between the United Kingdom government and devolved administrations on avoidance of disputes of 2001 and 2009.

⁴⁴ See <<https://www.instituteforgovernment.org.uk/explainers/northern-ireland-ireland-protocol-brexite>> accessed 03 June 2019.

⁴⁵ For example, the ‘optional protocols’ to the Convention on the Rights of the Child concerning the involvement of children in armed conflict and the sale of children, child prostitution and child pornography. The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 in accordance with its Article 49, whereas the Protocol was adopted on 25 May 2000, and came into force on 12 February 2002.

⁴⁶ For example, the Geneva Protocol of 1925 prohibiting the use of poisonous gases in war or the Montreal Protocol, finalised in 1987, as a ‘global agreement’ to protect the stratospheric ozone layer by phasing out the production and consumption of ozone-depleting substances (ODS).

protocol to which Pakistan is a party is the Protocol on Trade Negotiations (PTN),⁴⁷ which is a Preferential Trade Agreement (PTA), concluded within the framework of the General Agreement on Tariffs and Trade (GATT)/WTO to increase trade between developing countries.⁴⁸ Although PTN is now a formal treaty binding on its party States independently of the WTO, it is still called a protocol because it was concluded under the auspices of the WTO. The WTO, as an international organisation, has also concluded Accession Protocols with individual States to define conditions for their membership of the WTO.⁴⁹ Likewise, the Additional Agreements attached to the General Agreement on Trade in Services (GATS),⁵⁰ which have resulted from the subsequent negotiations among the WTO Member States, are also called protocols.⁵¹

Similarly, the WTO Members have agreed on a host of other matters related to trade subsequent to the conclusion of original GATT/WTO. These agreements are open for acceptance by the WTO Members and are referred to as ‘multilateral instruments’, although they are formally titled as protocols.⁵² Pakistan is also an ‘observer’ to the WTO Agreement on Government Procurement (GPA).⁵³ Additionally,

⁴⁷ Signed on 9 December 1971, entered into force on 11 February 1973 and notification sent to the World Trade Organisation (WTO) on 9 November 1971.

⁴⁸ The GATT was signed by 23 nations in Geneva on 30 October 1947 and took effect on 1 January 1948. It remained in effect until the signature by 123 nations in Marrakesh on 14 April 1994, of the Uruguay Round Agreements, which established the World Trade Organization (WTO) on 1 January 1995. The WTO is a successor to GATT, and the original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994.

⁴⁹ For example, Protocol on the Accession of Cape Verde (Geneva 23 July 2008) and Protocol on the Accession of Ukraine (Geneva 16 May 2008).

⁵⁰ The General Agreement on Trade and Services (GATS) is a treaty of the World Trade Organization (WTO) that entered into force in January 1995 as a result of the Uruguay Round negotiations.

⁵¹ A list of the GATT additional protocols is available here: <https://www.wto.org/english/tratop_e/serv_e/s_negs_posturuguay_e.htm> accessed 03 June 2019.

⁵² For example, Pakistan has accepted the 2005 Protocol Amending the TRIPS Agreement (accepted on 8 February 2010) and 2014 Protocol concerning the Trade Facilitation Agreement (accepted on 27 October 2015).

⁵³ The ‘Observer’ status to Pakistan was accorded on 11 February 2015.

Pakistan has concluded bilateral PTAs⁵⁴ and Regional Trade Agreements (RTAs) on a plurilateral basis or with established regional trade organisations.⁵⁵ More recently, Pakistan has actively engaged with China by concluding several MOUs and agreements between the two countries under the auspices of the China-Pakistan Economic Corridor.

The Bill's generic reference to 'trade protocols' is, therefore, unclear at best. Does the term 'trade protocol' include all subsequent and additional agreements and instruments at the WTO? Does it also include WTO agreements where Pakistan has been accorded an 'observer' status? Does it include trade agreements and MOUs signed with individual countries, such as China, on a bilateral basis? A logical assumption is that the Bill intends to include all these types of instruments within its purview and application. If this assumption is true, then the Bill's definition of 'foreign agreements' needs to be expansive enough to encompass all such trade related instruments. It is proposed that a new sub-clause or an explanation should be added to the Bill's definition of 'foreign agreement' explicitly clarifying the Bill's application to all types of trade instruments concluded within and outside the WTO.

The Bill's definition of 'foreign agreements' further adds "signed with foreign Governments or Banks or Donor or Lending agencies".⁵⁶ This part of the definition should also include 'organisations, associations and group of States' to further clarify that the Bill applies to, for example, any agreements with the European Union (EU), or the Organisation of Islamic Conference (OIC), or other regional associations such as the South Asian Association for Regional Cooperation (SAARC). The revised text may read as "signed with foreign Governments or Organisations or Associations or Groups of States, or Banks, or Donor or Lending Agencies".

⁵⁴ Important Pakistani PTAs are listed here: <http://ptadb.wto.org/Country.aspx?code=586> accessed 03 June 2019.

⁵⁵ Important Pakistani RTAs are listed here: <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=586&lang=1&redirect=1> accessed 03 June 2019.

⁵⁶ (n 2) s. 2(i) (a) of the Bill.

Ratification of Foreign Agreements under the Existing Law

Within the frameworks of all three successive Constitutions implemented in Pakistan since its creation as an independent State, treaty making powers have been traditionally exercised by the Government of Pakistan.⁵⁷ This practice remained unchanged in the two repealed Constitutions of 1956 and 1962, and the present Constitution of 1973. The 1956 Constitution empowered the Parliament to make laws for the implementation of any “treaty, agreement or convention between Pakistan and any other country, or any decision taken at any international body”,⁵⁸ but the power to make treaties remained an executive power of the government. Similarly, the Third Schedule of the 1962 Constitution empowered the central legislature to make laws on external affairs, including relations and dealings of all kinds with other countries, international organisations and bodies, and the implementation of their decisions, and the making and implementation of treaties, conventions and agreements with other countries.⁵⁹

Likewise, the 1973 Constitution places external affairs within the Federal Legislative List, which includes all matters pertaining to “the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to governments outside Pakistan”.⁶⁰ The Federal Legislative List also includes “international treaties, conventions and agreements and international arbitration”.⁶¹ A legislative proposal (such as the Bill) with respect to “any matter” in the Federal Legislative List may originate in either House of the Parliament.⁶² The combined effect of these provisions is that the Parliament has powers to both ‘make’ and ‘implement’ foreign agreements. Furthermore, Article 141 of the 1973 Constitution states that the Parliament may make laws “including laws having extra-territorial operation” for the whole or any part of Pakistan. It is logical to conclude that the broader law-making

⁵⁷ (n 1); See, Pakistan’s submission of 28 December 1951.

⁵⁸ The Constitution of Pakistan 1956, art. 108.

⁵⁹ The Constitution of Pakistan 1962, Third Schedule, Item 2(a), 2(b), and 2(c).

⁶⁰ The Constitution of Pakistan 1973, Fourth Schedule, Part 1, Item 3.

⁶¹ *Ibid*, Item 32.

⁶² The Constitution of Pakistan 1973, art 70.

powers of the Parliament are wide enough to encompass legislation on treaty making as well as its implementation.⁶³

The 1973 Constitution provides that the executive authority of the Federal Government extends to matters with respect to which the Parliament has power to make laws.⁶⁴ As the Parliament has not made law regulating the treaty making and ratification, the Federal Government should be able to exercise executive authority concerning both these aspects. With regards to the exercise of treaty making powers, the Rules of Business 1973⁶⁵ authorise various Divisions of the Federal Government to negotiate treaties in their respective business areas.⁶⁶ However, there is no precise rule in the Rules of Business 1973 that empowers the Cabinet to ratify treaties. Rule 43 (1) empowers the Cabinet to ‘approve’ official resolutions on treaties presented to it by the concerned Division,⁶⁷ and also appears to deal with official resolutions that are meant “to be moved in the Assembly, the Senate or the joint sitting”, but the wording is imprecise and leaves the matter of Parliamentary approval of treaties to the Cabinet’s discretion. The actual practice is that treaties are either ratified by the Cabinet or by the concerned Division after Cabinet’s approval.⁶⁸ It can be argued that the Bill’s objectives of Parliamentary oversight of foreign

⁶³ This position was recently confirmed by the Supreme Court of Pakistan in *Sui Southern Gas Company Ltd. v Federation of Pakistan* 2018 SCMR 802.

⁶⁴ The Constitution of Pakistan 1973, art 97.

⁶⁵ As amended up to 11th January 2019. The Rules of Business 1973 are made under the 1973 Constitution art. 90 (Exercise of executive authority of the Federation) and 99 (conduct of business by Federal Government) and can be amended anytime by the Cabinet.

⁶⁶ See Schedule II [Rule 3 (3)] on Distribution of Business among the Divisions. All Divisions are generally empowered to conduct ‘international aspects’ of their business, which presumably include powers to negotiate treaties. Some Divisions are specifically authorised to make treaties and international agreements, see for example, Schedule II, Items 4(7); 5(1)(i); 7(6) and (28); 9(11), (14), (16), and (21); 12(27); 13(2); 14A (3); 18 (1); 21 (4); 22 (1) (3); 25 (1); 34 (18); 36 (9).

⁶⁷ A ‘Note’ has been added at the end of Rule 43(1) to clarify that an official resolution may be for the ratification of an international convention, among other matters.

⁶⁸ A ‘Treaty Implementation Cell’ (TIC) has also been created by the Prime Minister within the Cabinet Division to supervise and coordinate the implementation of 27 UN Conventions and Protocols to which Pakistan is a signatory. The TIC’s role is, however, limited to the implementation of the 27 UN Conventions and Protocols and does not include monitoring of implementation of any other treaties signed and ratified by the government.

agreements can be achieved simply by amending the Rules of Business, 1973. However, since the Rules of Business can be amended by the Cabinet, a permanent and legally binding mechanism on treaty ratification can be created only through an Act of Parliament.

Ratification of a treaty by the Cabinet does not give it the status of law enforceable in domestic courts. The law making powers belong to the Parliament only, and Pakistani courts have consistently held that treaties do not automatically become enforceable in domestic courts regardless of their ratification by the Cabinet.⁶⁹ Therefore, although negotiation, signing and ratification of treaties lack mandatory Parliamentary oversight and fall within the executive domain of Pakistani Government, the Parliament has a role in the ‘implementation’ of treaties through legislation, making the ratified treaties enforceable under national law. In this sense, Pakistan is a so called ‘dualist’ State,⁷⁰ where treaties are already under a degree of Parliamentary scrutiny although the Parliament is not required to be consulted at the stage of negotiation, signing or ratification of treaties.

It can be questioned as to why should the Parliament have oversight at different stages of negotiation, signing and ratification of treaties when they can be implemented only by an Act of Parliament? Undoubtedly, treaty negotiations can be a long and technical process, and it can be argued that Parliamentary oversight is not required at this stage.⁷¹ Even though the Parliamentary involvement in the negotiation process may not be feasible, ratification of treaties without Parliamentary oversight raises questions about the democratic legitimacy of treaties in various ways. Firstly, although treaties do not become enforceable in Pakistani domestic law simply by ratification, their ratification by government creates long lasting and legally binding obligations on the State of Pakistan that are enforceable under international law. Secondly,

⁶⁹ A recent affirmation to this was given by the Supreme Court in *Societe Generale De Surveillance S.A. v Pakistan* 2002 SCMR 1694.

⁷⁰ With regards to treaties, ‘dualist’ States are those that have put in place some kind of Parliamentary oversight before treaties signed by their governments become enforceable in domestic law. This is in contrast with ‘monist’ States (for example, the Netherlands) where the act of ratifying an international treaty can automatically incorporate it into domestic law. See, for example, Arabella Lang, ‘Parliament’s role in ratifying treaties’ House of Commons (UK) Library Briefing Paper No 5855, 17 February 2017.

⁷¹ (n 5) 16.

treaties may influence the way in which the present and future governments are required to behave both internationally and nationally and may define the scope of or impose conditions on the State action at domestic level. Thirdly, governments may ratify treaties to further their own political objectives undermining national interest and sovereignty, domestic constitutional values, or national legal order and institutions.⁷² Parliamentary assent before ratification of treaties is therefore in the interest of their democratic legitimacy and transparency in the Government's foreign affairs.

Although ratification procedures significantly vary depending upon the country's parliamentary and constitutional system, the laws of most countries in the world require some kind of Parliamentary oversight for ratification of treaties.⁷³ Yet, there are countries, such as India, where treaty making is purely an executive act not requiring Parliamentary oversight.⁷⁴ However, the increased demands of globalisation in recent years have made countries exceedingly active in their international relations, which has resulted in the production of various types of treaties and international agreements. Countries are increasingly seeking to strengthen their international relations by taking up legally binding commitments that are not only enforceable under international law but also have significant implications at a national level. Such avid use and varied implications of treaties require Parliamentary oversight for their democratic legitimacy and for accountability of negotiating Government executives.⁷⁵ A system of Parliamentary approval of treaties will in fact have several advantages.⁷⁶ Firstly, it would reduce the ability of the executive to assume international obligations through treaties without the

⁷² (n 10).

⁷³ For treaty ratification procedures in the UK, see Arabella Lang (n 70); in the United States of America, see Stephen P. Mulligan, 'International Law and Agreements: Their Effect upon U.S. Law' Congressional Research Service, RL32528, Version 18, Updated September 19, 2018; in the Member States of the European Union, see Kristina Grosek and Giulio Sabbati, 'Ratification of International Agreements by EU Member States' European Parliament Briefing, November 2016, PE 593.513.

⁷⁴ See 'Guidelines/SoP on the conclusion of International Treaties in India' Legal & Treaties Division, Indian Ministry of External Affairs (SoP 16-01-2018).

⁷⁵ Glen Cranwell, 'The Case for Parliamentary Approval of Treaties in Australia' (2001) 8(4) *MU eLaw Journal* 25.

⁷⁶ *Ibid.*

assent of Parliament that may bind the country into long term, unnecessary and burdensome international obligations or require changes to national law. Secondly, it will save the country from the breach of its international obligations if its Parliament refuses to pass amendments to domestic law or fails to make an implementing legislation.

The above-mentioned concerns are central to the Bill's objectives. In his first response to the Bill, the Leader of Opposition Senator Raja Muhammad Zafar-ul-Haq noted that the Bill's proposed law has become imminent due to increasing political risks involved in the long-term commitments taken by Governments in international agreements.⁷⁷ Using the example of political crisis of 2018 in Sri Lanka that, in his view, was caused by the Sri Lankan Government's international agreements, Senator Zafar-ul-Haq emphasised the need for this law to build a wider awareness and understanding before such long-term and difficult to change commitments are made.

Ratification of Foreign Agreements under the Bill

For the ratification of foreign agreements, the Bill requires a simple majority of each House of Parliament.⁷⁸ Section 4(2) of the Bill states that: "Both the Houses [of Parliament] shall pass the Foreign Agreement within fifteen days each or make a recommendation to the concerned Division about an amendment in the Foreign Agreement." If either of the two Houses of Parliament has made a recommendation for amendment, the Government or its concerned Division will "approach the other Party to the Foreign Agreement to incorporate the same",⁷⁹ and place a detailed report of the renegotiation proceedings before the Parliament. Once this report is presented, it will be deemed that the Parliament has ratified the foreign agreement.⁸⁰ However, the revised draft of foreign agreement can be rejected by a resolution withholding ratification passed by 55% of the members of each House.⁸¹ This is a fairly clear procedure; however, the logic of 55% majority required by each house to pass a withholding

⁷⁷ (n 5) 17.

⁷⁸ s. 2(i)(b) of the Bill.

⁷⁹ s. 4(3) of the Bill.

⁸⁰ s. 4(4) of the Bill.

⁸¹ Proviso to the s. 4(4) of the Bill.

resolution is not fully justified. Why can a foreign agreement be passed by a simple majority but cannot be failed by the same?

The Bill's ratification procedure is a modified version of the so called 'Ponsonby Rule' in the UK,⁸² which is a constitutional convention requiring treaties to be tabled in the House of Commons between the stages of its signature and ratification. According to the Ponsonby Rule, a treaty may be ratified if the Parliament does not pass a motion disapproving ratification within 21 days. In the UK, the Ponsonby Rule was given statutory form by the Constitutional Reform and Governance Act (2010).⁸³ The Bill's ratification procedure deviate from this UK law in important ways. The UK law requires draft treaties to be presented before Parliament after signature and before ratification. Although ratification requires prior Parliamentary assent, the negotiation, signature and ratification are carried out by the government. On the other hand, the Bill requires ratification by the Parliament itself either 'passively' by not passing a withholding resolution, or 'actively' by approving the draft treaty through simple majority. The ratification of treaties in the UK primarily remains within the government's executive power and Parliament does not oversee treaty negotiations or ratify treaties itself, but has a supervisory control over the ratification process. In fact, there is no other country in the world that requires ratification of treaties by the Parliament itself although countries have made laws requiring Parliamentary approval before their ratification by government executives. In accordance with international best practices, the Bill's requirement of 'ratification' by the Parliament should be changed to 'approval' by the Parliament before a treaty is ratified by the government.

However, UK's position on allowing executives to sign treaties before Parliamentary assent is unsuitable for Pakistan. Section 3 of the Bill requires every foreign agreement to "be laid before Parliament within fifteen days of the finalisation with the other party i.e., before it is signed by the parties." This provision differentiates the two phases, namely,

⁸² Named after Mr Arthur Ponsonby, Under-Secretary of State for Foreign Affairs in Ramsay MacDonald's first Labour Government in the United Kingdom. See, <<https://publications.Parliament.uk/pa/ld200506/ldselect/ldconst/236/23612.htm#note186>> accessed 03 June 2019.

⁸³ Constitutional Reform and Governance Act (2010), ch 25, part 2.

finalisation and signature of foreign agreements. In international law, ‘signature’ of a treaty is usually considered as an act by which a State provides a preliminary endorsement of the instrument. Signing does not automatically create a binding legal obligation but demonstrates a State’s intent to examine the treaty domestically and consider its ratification. However, signing a treaty does give rise to some obligations under international law. For example, under the VCLT rules, a treaty may itself provide that signature by a State amounts to its consent to be bound by the treaty.⁸⁴ Furthermore, a signatory state has an obligation not to defeat the object and purpose of the treaty prior to its ratification and entry into force.⁸⁵ Therefore, the Bill’s requirement to place a draft treaty for Parliamentary assent before signatures better serves the purpose of a comprehensive Parliamentary oversight before any legally binding commitments are taken by the Government.

There are other areas where the Bill can indeed benefit from the approach taken by the UK. First, the UK law takes into account the heterogeneous nature and objectives of treaties, and excludes certain types of treaties, such as treaties related to taxation and the European Union, from the requirement of Parliamentary approval.⁸⁶ On the other hand, the Bill does not exclude any types of treaties from the requirement of Parliamentary approval and proposes the same ratification procedure for all types of treaties or foreign agreements, which can be both unnecessary and problematic.

Foreign agreements can be of various types. Some are bilateral and others are plurilateral or multilateral. Some have a global reach and significance in the development of international norms and others are restricted to specific regions or blocks of States. Some are made with international organisations and the others with States. Some agreements set out long-term goals or programme requirements and others are meant to achieve one-off objectives or resolve an existing dispute. Some are highly technical in nature and content and others are composed of standard terms and conditions. Some deal with sensitive information and others may require confidentiality for security reasons. Some are ‘hybrid in

⁸⁴ (n 29); VCLT, art. 12.

⁸⁵ *Ibid*, art. 18.

⁸⁶ The UK Law on Treaty Ratification (n 9) s. 23.

nature, i.e., they create rights and obligations for both States parties to the agreement as well as their citizens, and others are ‘regular’ treaties between two States that do not have any direct implications on the rights and obligations of citizens. Some have high political, regional or global significance, and others are less significant and narrow in their reach and objectives. Some oust the jurisdiction of national institutions or courts and have serious sovereignty implications and others require development of new rules and procedures at national levels. Some are meant to create binding and enforceable legal obligations and others provide broader guidelines or ‘soft law’.

Keeping in view several types, objectives and various legal implications of foreign agreements, it can be argued that any regulation and procedure requiring their Parliamentary oversight should vary according to their ‘design element’.⁸⁷ It can also be argued that the requirement of Parliamentary assent for all types of foreign agreements will make the process very difficult and time consuming. Certain types of agreements, such as those of non-political character or minor importance, do not require Parliamentary oversight and should be entrusted to the executive authority of government. Thus, for instance, the Director-General of Posts and Telegraphs of Pakistan can enter into bilateral agreements concerning postal and telecommunication matters for which no subsequent ratification should be necessary.⁸⁸

In this regard, the Bill’s procedure is quite flexible where the relevant Division is required to place agreements before the Parliament and the Parliament may take up a treaty for discussion, but is not required to do so for every treaty.⁸⁹ If the Parliament does take up a treaty for discussion, it is required to pass the same or make recommendations for amendment within 15 days.⁹⁰ However, to further clarify the ratification procedure, a further subsection should be added to Section 4 of the Bill stating that “in case the Parliament does not make recommendations for amendment within 15 days, the foreign agreement shall be considered

⁸⁷ Andrew T. Guzman, ‘The Design of International Agreements’ (2005) 16(4) *EJIL* 579.

⁸⁸ (n 1).

⁸⁹ s. 4(1) of the Bill.

⁹⁰ s. 4(2) of the Bill.

ratified”.⁹¹ This will be particularly useful for treaties of minor importance that Parliament may choose not to take up for discussion.

It will also be useful to exclude the requirement of Parliamentary approval for agreements that are bilateral in nature and based on a ‘model’ or ‘template’ already approved by the Parliament. Examples of such agreements include Bilateral Investment Treaties and other standardised agreements such as Double Taxation Treaties. These pre-approved templates will provide satisfaction to signatory States who will sign these agreements with conviction. It will also give freedom and authority to the government executives to negotiate and conclude treaties on the pre-approved terms and conditions and save Parliament’s precious time.

Another significant question in this regard is as to whether the ratification of a treaty in accordance with the Bill’s procedure means that no further legislation is required for domestic implementation and enforcement of treaties? Obviously, not all treaties require domestic implementation, and ratification by Parliament should be sufficient for their enforcement in national courts. However, the Bill should include a specific provision that in case the proposed treaty requires legislation for implementation, the relevant Division should also present a draft implementing legislation along with the draft treaty. In such cases, the Parliament should follow the normal legislative procedures instead of working on the 15-day deadline for making amendment recommendations.

Additionally, the UK law allows that, in exceptional cases, a treaty can be ratified by a Minister without Parliamentary approval.⁹² It is not clearly established in the UK law as to what constitutes those exceptional cases. If a similar provision is included in the Bill where the decision as to what is and what is not an exceptional case remains with the Cabinet, it will undermine the Bill’s objectives, leaving the requirement of Parliamentary oversight on the discretion of Cabinet. Therefore, such a clause is not advisable to be included in the Bill.

It is also noteworthy that both the UK and Kenyan laws do not require 55% majority to oppose a treaty. The Bill’s rationale of 55% majority required to defeat a treaty must be explained. This explanation is required

⁹¹ s. 4 of the Bill.

⁹² (n 9) s. 22.

particularly because the 1973 Constitution requires a simple majority for a legislation to be passed by the Parliament,⁹³ and any proposed legislation that does not earn the assent of a simple majority is legally considered to have failed.

Should a Decision to Withdrawal from a Treaty also Require Parliamentary Approval?

The Bill does not deal with the situation where the government would like to withdraw from an existing and ratified treaty. It is quite logical that withdrawal from a treaty should equally require Parliamentary approval for the same reasons as ratification of treaties. In the UK, for example, the law on treaty ratification does not specifically require Parliamentary approval for treaty withdrawals. The recent UK Supreme Court's judgment in the *Miller* case took up this issue in the context of the UK's notification of withdrawal from the EU Treaties.⁹⁴ The majority judgment in this case explained the key features of UK's constitutional arrangements regarding the executive's treaty making powers that are relevant to any dualist country such as Pakistan. The Court held that ministers are not normally entitled to exercise any power they might otherwise have (e.g. ratification or withdrawal from treaties) if it results in a change in UK domestic law unless a statute, i.e., an Act of Parliament, so provides.⁹⁵

With regards to the Bill, although it can be argued based on the decision in *Miller* case that withdrawal from treaties will also require Parliamentary approval, it is advisable to have a specific provision in the Bill to settle the law on this issue rather than leaving it open to interpretation by national courts. The Kenyan law, for example, has a specific provision requiring the same procedure of Parliamentary approval for withdrawals or denunciation as the ratification of treaties.⁹⁶

Guiding Principles for Negotiation of Treaties

The Bill's provisions do not propose any change to the existing procedures on negotiation of treaties. Treaty negotiation will remain within the

⁹³ The Constitution of Pakistan 1973, art. 70.

⁹⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁹⁵ *Ibid*, para 5.

⁹⁶ (n 8) s. 17.

executive domain although the Bill has introduced procedure for Parliamentary approval before a treaty is signed by the government executives. Hence, the relevant Ministries/Divisions or the Cabinet will continue to exercise powers to decide the initiation of treaty making process, determination of aims and objectives of treaties, negotiating positions, and parameters within which the government delegation can operate.

Although the Bill's proposed ratification procedure does not require Parliamentary intervention or involvement in the negotiation process, it introduces necessary checks and balances through recommendations to the concerned Division for amendment in the draft treaties laid before the Parliament. The procedure does not undermine the efficiency and certainty of the treaty making process and the government executives can negotiate with their overseas counterparts with authority and credibility. Whereas the Bill does not restrict executive discretion and power to negotiate, it could have taken a step further to define general guiding principles for negotiating treaties. The Kenyan law, for example, provides that while negotiating treaties the government executives shall be bound by the 'values and principles of the constitution' and consider the 'regulatory impact' of any proposed treaty.⁹⁷ These are very important guiding principles that should be included in the Bill.

Furthermore, the Bill should include a provision requiring the relevant Division presenting a draft treaty before the Parliament to give reasons as to how the treaty serves relevant national interests. This 'national interest analysis' is required by some countries, such as Australia, where executives are required to explain the nature and extent of treaty obligations; its economic, environmental, social and cultural effects; the process and cost of its implementation; and consultations that have occurred with national stakeholders, industry and community groups.⁹⁸ The Kenyan law also includes a detailed 'national interest' provision,⁹⁹ and a similar provision should be included in the Bill. Another useful

⁹⁷ Ibid, s. 6.

⁹⁸ Ann Capling and Kim Richard Nossal, 'Parliament and the Democratization of Foreign Policy: The Case of Australia's Joint Standing Committee on Treaties' (2003) 36(4) *CJPS* 835, 852.

⁹⁹ (n 8) s. 5(2).

example from Kenyan law that the Bill should follow is the creation of an office of ‘Registrar of Treaties’, having responsibility to maintain a record of all treaties ratified by the Parliament.¹⁰⁰

Conclusion

A comparison between the VCLT and the Bill reveals that the Bill’s definition of ‘foreign agreement’ is broader than the narrow definition of ‘treaty’ used in the VCLT. The Bill’s definition of ‘foreign agreement’ covers agreements between the Government of Pakistan and any other foreign government, bank, donor or lending agency; whereas the VCLT’s narrow definition of treaty covers agreements between States only. The Bill’s definition covers a range of counterparties which is more suitable for a country like Pakistan.

The VCLT definition covers only agreements in written form governed by international law; whereas the Bill’s definition does not contain either of these two conditions. Although the Bill does not specifically limit its application to formal and written foreign agreements that create legally binding obligations enforceable in international law, its application to informal oral agreements and political commitments given by the government is likely to be problematic. Parliamentary oversight of the latter type of agreements can be achieved through empowering and assigning a proactive role to the existing Standing Committees on Foreign Affairs at both Houses of the Parliament.

The Bill’s list of covered instruments does not include ‘conventions’. Although the terms ‘convention’ and ‘treaty’ can be used interchangeably, the emerging concept of conventions is different from treaties as conventions refer to multilateral agreements that aim to codify international norms and standards for the global community of States. As such, conventions can be considered different from ordinary treaties and are highly important international instruments that create binding legal obligations on Party States; the Bill’s definition of foreign agreements should be revised to include convention in the list of covered instruments.

The Bill’s generic reference to ‘trade protocols’ should be revised. The technical meaning of trade protocols implies WTO protocols and

¹⁰⁰ Ibid, s. 14.

agreements, which is unnecessarily restrictive. The definition of foreign agreement needs to be expansive enough to cover all types of trade related instruments agreed by the Government of Pakistan. It is proposed that a new sub-clause or an explanation should be added to the Bill's definition of foreign agreements explicitly clarifying that the law applies to all types of trade instruments concluded within and outside the WTO.

The expression "signed with foreign Governments or Banks or Donor or Lending agencies" in the Bill's definition is a quite comprehensive statement as it covers agreements not only with foreign governments but also with foreign banks, both national and international, and agencies. Further addition of 'organisations, associations and groups of States' to this part of the definition will clarify the ambit of Bill's application to agreements with, for example, the EU, OIC, SAARC etc.

The government Ministries and Divisions currently exercise treaty making and ratification powers under the existing Rules of Business, 1973 with little to no role of the Parliament. The Rules of Business, 1973 can be amended to require Parliamentary approval of foreign agreements. Since the Rules of Business can be amended by the Cabinet, an Act of Parliament is required for a permanent and legally binding procedure for Parliamentary oversight of foreign agreements.

Under the existing law, the government is not required to consult the Parliament before making or ratifying foreign agreements, however, such agreements require an implementing legislation through normal Parliamentary procedures to become part of the national law if it is to be enforceable in courts. The treaty making powers under the 1973 Constitution can only be exercised by the Federal Government through its Ministries and Divisions. However, the legislative mandate given to Parliament under the Constitution includes law-making on all stages of foreign agreements including negotiation, signing, ratification, and domestic implementation.

The Bill takes the powers of ratification of foreign agreements and treaties away from the government executives and gives it to the Parliament through a simple majority. The Bill's procedure is unique as the law and practice in many other countries seeking Parliamentary oversight of treaties require Parliamentary approval whereas the actual act of 'ratification' is performed by the government executives. The Bill's

objectives can be achieved by requiring draft foreign agreements to be presented before the Parliament prior to signature and ratification by the government. Replacing the term ‘ratification’ with ‘approval’ will bring the Bill in line with international standards and best practices.

The flexibility in Section 4 that the Parliament may or may not take up a draft agreement for discussion, and the deadline of 15 days within which the Parliament is required to make its recommendations for revision, are useful for treaties of minor importance that may not be taken up for discussion. However, to clarify the procedure further, a subsection should be added to Section 4 of the Bill stating that “in case the parliament does not make recommendations for amendments within 15 days, the foreign agreement shall be considered ratified”.

It will also be useful to exclude the requirement of Parliamentary ratification for agreements that are bilateral in nature and based on a standard ‘model’ or ‘template’ that has already been approved by the Parliament, such as Bilateral Investment Treaties. This will work as a notice and provide satisfaction to negotiating States that templates have Parliamentary approval. It will also give authority to the government executives to negotiate and conclude treaties on pre-approved terms and conditions, saving the Parliament’s precious time. The Bill’s requirement of 55% majority to oppose a treaty is not in accordance with international best practices and should be reconsidered. Logically, if simple majority is required to pass a treaty, it should also fail with simple majority.

Pakistan is a ‘dualist’ State where treaties do not automatically become part of the domestic law. Although some treaties, such as Bilateral Investment Treaties, may not require domestic implementation due to the supra-national nature of their subject matter and the scope of their application, or because of the nature of rights and obligations they create for party States, the ratification of treaties in accordance with the Bill’s procedures should be considered sufficient for their enforcement in national courts. However, in order to settle law on this point, the Bill should include a specific provision that in case the proposed treaty requires legislation for implementation, the concerned Division should lay a draft implementing legislation before the Parliament along with the draft agreement. In such cases, the parliament should follow the normal legislative procedure instead of working on the 15-day deadline for making recommendations regarding amendments.

The Bill has no provision on withdrawal or exiting from treaties. To settle the law on this issue, it is advisable to include a specific provision in the Bill stating that withdrawal will require the same procedure as ratification. The Bill does not seek to regulate the negotiation of foreign agreements. However, the Bill should give guiding principles to be followed by the government while negotiating treaties and foreign agreements. These guiding principles should include the protection of constitutional values and national interests and consideration of domestic regulatory impact and implications from the proposed treaties. Lastly, the Bill should also consider the creation of an office of Registrar of Treaties having responsibility to maintain record of treaties ratified by the Parliament.