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Bond and the Vienna Rules

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Introduction

The Supreme Court has never followed the international approach to treaty interpretation. In the over forty years since the Vienna Convention on the Law of Treaties[1] was signed, the Supreme Court has not relied on its interpretive methodology on a single occasion. This is despite the fact that the Vienna Convention's interpretive approach (the Vienna Rules) reflected the common practice at the time it was adopted, and now reflects customary international law. This is also despite the fact that the United States views the Vienna Convention as the authoritative guide to treaty law and practice.

This is not to suggest that the Supreme Court does not utilize the same interpretive tools as the Vienna Rules. Indeed, at one time or another the Court has used every single interpretive tool reflected in the Vienna Rules.[2] It supports reliance on the ordinary meaning of the terms of a treaty. It recognizes that a treaty should be construed to give effect to its purposes. It agrees that a treaty should be read in the context in which the written words are used. It interprets terms in light of subsequent practice and agreements. It supports recourse to supplementary means of interpretation such as the negotiating history. It follows general rules of interpretation such as presumptions and constructions that follow ordinary logic and reason. Although the Court has never systematically followed the holistic, unitary approach of the Vienna Rules, it consistently relies on the same interpretive tools.[3]

Bond marks an important moment in this history of Supreme Court treaty interpretation. It is the first time that the Supreme Court has analyzed a treaty using the same methodology as the Vienna Rules. That is, the Court interpreted the treaty "in good faith in accordance with the ordinary mean-

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1 Vienna Convention on the Law of Treaties art. 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

2 *See infra* Part III.

3 *See infra* Part III.

ing to be given to the terms of the treaty in their context and in the light of its object and purpose."[4] Because the terms of the treaty were ambiguous and could lead to manifestly absurd and unreasonable results, the Court also applied supplementary means of interpretation, including the negotiating history and presumptions.[5]

Bond raises the possibility that the Court's interpretive approach could more closely align with the international standard. There already are existing canons of construction that support a greater reliance on the Vienna Rules. Among them is the general rule that treaties are contracts between nations that should be interpreted according to a shared understanding. If the shared expectations of the contracting parties is that treaty terms should be interpreted according to the Vienna Rules, then it follows that the Court could apply that canon not only to interpret the meaning of specific treaty terms, but also to its interpretive methodology. Another canon of construction is that the Court should give deference to the executive branch's interpretation of treaties. If the executive branch recognizes that the Vienna Rules are the authoritative guide to treaty interpretation, then the Court should give great weight to that conclusion.

In *Bond,* treaty interpretation saved a constitutional crisis. In the future courts will likewise avoid the constitutional question of the scope of the treaty power. That is because treaties are formed with federalism in mind. Sometimes that concern is express, either in the text of the treaty or according to the reservations of Senate ratification. At other times, that concern is implicit as a general rule of international law. Treaty interpretation of those federalism limitations typically will lead courts to find that the federal government has not encroached on the inherent powers of the several states when adopting treaties.

This Article briefly outlines the Court's holding in *Bond*, and the general framework of interpretation set forth in the Vienna Rules. It then looks at Supreme Court jurisprudence that is consonant with the Vienna Rules. The Article then analyzes *Bond*'s interpretive approach using the Vienna Rules methodology. It concludes with reflections on the future of Supreme Court treaty interpretation and how that interpretation could avoid reaching the constitutional question of the scope of the treaty power.

I. *BOND V. UNITED STATES*

In *Bond v. United States*[6] the Supreme Court addressed the question of whether legislation implementing a treaty prohibiting the use of chemical weapons should be interpreted to reach "a purely local crime."[7] If it did, the Court would revisit *Missouri v. Holland*[8] and address the constitutional ques-

4 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31.

5 *Id.* art. 32.

6 134 S. Ct. 2077 (2014).

7 *Id.* at 2083.

8 252 U.S. 416 (1920).

tion of the scope of the treaty power. The Court never reached the second question, finding that the statute implementing the Chemical Weapons Convention did not cover Bond's conduct.[9]

The operative language of the Chemical Weapons Convention provides that "[e]ach State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; [or] (b) To use chemical weapons."[10] The treaty defines "[c]hemical [w]eapons" as "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention."[11] In turn, a "[t]oxic [c]hemical" is defined as "[a]ny chemical which . . . can cause death, temporary incapacitation or permanent harm to humans or animals."[12] Purposes that are not prohibited include "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes."[13] Congress implemented the treaty by statute imposing the same prohibitions and using the same definitions set forth in the treaty.[14]

The *Bond* majority held that the statute implementing the treaty should be read consistent with federalism, and applying that background principle, Congress did not clearly intend to intrude on the police power of the states by reaching purely local crimes.[15] The Court analyzed the ordinary meaning of a "chemical weapon" in its context and in light of the object and purpose of the treaty.[16] The boundless and expansive reach of a broad definition of "chemical weapon" rendered the term ambiguous, and required the Court to consider the context from which the statute arose—a treaty about chemical warfare and terrorism.[17] "[T]he global need to prevent chemical warfare," the Court concluded, "does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon."[18]

Concurring in the judgment, Justice Scalia interpreted a "chemical weapon" solely on the basis of a textual analysis of the statutory definition.[19] That definition defines a chemical weapon as a "toxic chemical" used for any

9 *Bond*, 134 S. Ct. at 2086–94.

10 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) [hereinafter CWC].

11 *Id.* art. II(1)(a).

12 *Id.* art. II(2).

13 *Id.* art. II(9)(a).

14 *See* Chemical Weapons Convention Implementation Act, 18 U.S.C. §§ 229–229F (2012).

15 Bond v. United States, 134 S. Ct. 2077, 2087–90 (2014).

16 *Id.* at 2087–94.

17 *Id.* at 2090.

18 *Id.* at 2093.

19 *Id.* at 2094 (Scalia, J., concurring in the judgment).

manner other than "a purpose not prohibited."[20] A "toxic chemical is any chemical which . . . can cause . . . permanent harm to humans or animals" and a "purpose not prohibited" is "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity."[21] For Justice Scalia, the meaning of the statute was plain and applying it was uncomplicated: "Bond possessed and used 'chemical[s] which . . . can cause . . . permanent harm.' Thus, she possessed 'toxic chemicals.' And, because they were not possessed or used only for a 'purpose not prohibited,' . . . they were 'chemical weapons.' Ergo, Bond violated the Act."[22]

Justice Scalia dismissed the Court's other interpretive devices as "unintelligible."[23] Ordinary meaning is irrelevant when the statutory definition is utterly clear.[24] No court or commentator since Aristotle has ever suggested otherwise.[25] And interpreting the statute in light of the concerns driving the treaty—acts of war, assassination, and terrorism—is simply an "illogical embellishment" that will render it more difficult to apply.[26]

As usual, absent from the Court's or concurring opinion's discussion on treaties was the definitive international standard for treaty interpretation. The Court has never relied on the Vienna Convention on the Law of Treaties to interpret treaties, and it did not do so in *Bond*. Unlike in the past, however, the Court's methodology was coextensive with the international standard for treaty interpretation.

II. THE VIENNA RULES

The Vienna Convention on the Law of Treaties provides the accepted international law framework for interpreting treaty provisions. The Vienna Convention's rules on interpretation have become "the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation."[27]

Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[28]

"Context" is defined, among other things, as "the text, including its preamble and annexes."[29] Context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and "[a]ny instrument which was made by one or more

20 *Id.* at 2094 (quoting 18 U.S.C. § 229F(1)(A) (2012)).

21 *Id.* (alteration in original) (internal quotation marks omitted) (quoting 18 U.S.C. § 229F(1)(A), (8)(A)).

22 *Id.* (alteration in original) (citations omitted).

23 *Id.* at 2097.

24 *Id.* at 2096.

25 *Id.*

26 *Id.* at 2097.

27 Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Supplement, 2006: Part Three*, 77 BRIT. Y.B. INT'L L. 1, 19 (2006).

28 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(1).

29 *Id.* art. 31(2).

parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[30]

Supplementary means of interpretation, such as review of the *travaux préparatoire*[31] (negotiation history), are also permitted for limited purposes.

Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.[32]

The fundamental idea behind these Vienna Rules is that the act of interpretation is analysis in pursuit of understanding. Only a holistic process that combines numerous ingredients can achieve the correct result. Every term in a treaty has a history, an intention, a location, and a goal. Terms have an etymology of their own, and an origin as part of a negotiated instrument. Terms are the tools that give expression to the parties' intentions. Terms are subunits of a much larger framework that includes, among other things, the instrument, the section, the paragraph, and the sentence. Terms reflect the parties' teleology, and are the means to achieve the desired ends. Proper interpretation requires analysis of each facet of the term.

The Vienna Rules could more aptly be described as the "Vienna Rule" because "the process of interpretation is a unity" and Articles 31 and 32 "form a single, closely integrated rule."[33] The heading of Article 31—*General Rule of Interpretation*—was deliberately written in the singular "rule" rather than plural the "rules" to capture this intention.[34] The idea is that the sum is greater than the parts, and that a proper analysis of any text includes, inter alia, context and purpose.

The Vienna Rules attempted to "codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties."[35] This does not mean, however, that other maxims or methods of interpretation are inappropriate. The drafters understood the importance of other principles such as *contra proferentum* or *eiusdem generes* in certain circumstances and authorized their use as "supplementary means" of interpretation to confirm or determine the meaning of treaty terms.[36]

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30 *Id.*

31 *See* Mora v. New York, 524 F.3d 183, 207 (2d Cir. 2008) (describing the Latin term *travaux préparatoire* as "the interpretive effect of the negotiating and drafting history of a treaty").

32 Vienna Convention on the Law of Treaties, *supra* note 1, art. 32.

33 2 United Nations, Yearbook of the International Law Commission 220 (1966) [hereinafter 1966 ILC Yearbook].

34 *See id.* at 219.

35 *Id.* at 218–19.

36 *Id.* at 219; *see* Richard K. Gardiner, Treaty Interpretation 311–12, 349–50 (2008).

III. The Supreme Court and the Vienna Rules

The United States has never ratified the Vienna Convention, but it recognizes the treaty as "the authoritative guide to current treaty law and practice."[37] On rare occasion, lower courts have expressly relied on the Vienna Rules to interpret the terms of a treaty,[38] but the Supreme Court has never done so. Instead, the Court employs the same tools of treaty interpretation as the Vienna Rules without invoking those rules. Indeed, the Court has utilized every single Vienna Rule at one time or another.

Consistent with Article 31(1),[39] the Court on numerous occasions has interpreted terms of a treaty according to their "ordinary meaning."[40] In *Santovincenzo v. Egan*, the Court held that "[a]s treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'"[41] In *Medellín v. Texas*, the Court interpreted Article 94 of the U.N. Charter, under which "[e]ach Member of the United Nations undertakes to comply with the decision of the [International Court of Justice] in any case to which it is a party," as a commitment of the political branches to comply rather than an automatic and binding directive directly applicable in domestic courts.[42] Applying a "time-honored textual approach," the Court found that the failure to use binding language such as "shall" or "must" suggested the undertaking was a political rather than a judicial commitment.[43]

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37 S. Exec. Doc. No. 92-1, at 1 (1971); *see* Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008); Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005).

38 *See* Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 432–33 (2d Cir. 2001); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308–09 (2d Cir. 2000); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 327–54 (1988). The International Court of Justice (ICJ) also has described the Vienna Rules of Interpretation as reflecting customary international law. *See* Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 37 (Mar. 31); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 (July 9).

39 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

40 *See, e.g.*, Alaska v. United States, 545 U.S. 75, 92–96, (2005) (interpreting treaty term "bay" according to the ordinary meaning mariners apply to that term); Olympic Airways v. Husain, 540 U.S. 644, 655 (2004) (interpreting treaty terms "under the ordinary and usual definitions of these terms"); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" (quoting Maximov v. United States, 373 U.S. 49, 54 (1963))).

41 284 U.S. 30, 40 (1931) (quoting Geofroy v. Riggs, 133 U.S. 258, 271 (1890)).

42 552 U.S. 491, 508–509 (2008) (quoting U.N. Charter art. 94, para. 1).

43 *Id.* at 508, 514.

Consistent with Article 31(1),[44] the Court routinely interprets treaty terms in light of the treaty's object and purpose.[45] The Court recognizes the interpretive principle that "a treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it.'"[46] In *Société Nationale Industrielle Aérospatiale v. United States District Court*, the Court focused on the purpose of the Hague Evidence Convention to "'facilitate the transmission and execution of Letters of Request' and to 'improve mutual judicial cooperation in civil or commercial matters.'"[47] Such a purpose evinces no intent, the Court concluded, to exclude all other transnational discovery procedures.[48]

Consistent with Article 31(1),[49] the Court frequently invokes context as a tool of interpretation, particularly by reading a term in light of other treaty provisions.[50] "When interpreting a treaty, we 'begin with the text of the treaty and the context in which the written words are used.'"[51] For example, in *Hamdan v. Rumsfeld*, the Court interpreted Common Article 3 of the Geneva Convention in light of other provisions of that Convention and concluded that the phrase "conflict not of an international character" is to be

44 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

45 El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 169 (1999) (discussing the purpose of the Warsaw Convention); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) ("It would also be out of keeping with the objects of the Convention for the courts of this country to interpret COGSA to disparage the authority or competence of international forums . . . ."); Vella v. Ford Motor Co., 421 U.S. 1, 5 (1975) (discussing the aim of the Shipowners' Liability Convention).

46 United States v. Stuart, 489 U.S. 353, 368 (1989) (quoting Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940)); *see* Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933); Nielsen v. Johnson, 279 U.S. 47, 52 (1929); Rocca v. Thompson, 223 U.S. 317, 331–32 (1912).

47 482 U.S. 522, 534–35 (1987) (quoting Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, T.I.A.S. No. 7444, 23 U.S.T. 2555).

48 *Id.*

49 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

50 Medellín v. Texas, 552 U.S. 491, 509 (2008) (interpreting Article 94(1) of the U.N. Charter in light of Article 94(2)); Olympic Airways v. Husain, 540 U.S. 644, 650 (2004) (interpreting term "accident" in one treaty provision in light of the use of the term "occurrence" in another treaty provision); *El Al Israel*, 525 U.S. at 169 (examining treaty provision in light of comprehensive scheme of liability created by the treaty); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 224 (1996); O'Connor v. United States, 479 U.S. 27, 31 (1986) (interpreting one section of the Panama Canal Treaty in light of other sections of that treaty).

51 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (quoting *Société Nationale*, 482 U.S. at 534).

interpreted in contradistinction to a conflict between nations.[52] As such, Common Article 3 encompasses not only civil wars, but also conflicts with nonstate actors such as al Qaeda.

Consistent with Article 31(3)(a),[53] the Court has considered subsequent agreements between the parties as an interpretive aid.[54] In *INS v. Cardoza-Fonseca*, the Court interpreted the term "refugee" in light of the definition of that term in two different treaties adopted over a period of fifteen years.[55] The Court interpreted the term "refugee" in the 1951 United Nations Convention Relating to the Status of Refugees in light of the 1967 United Nations Protocol Relating to the Status of Refugees, and found that a refugee included any person who had a reasonable basis to fear persecution, rather than a person who was more likely than not to be persecuted.[56]

Consistent with Article 31(3)(b),[57] the Court has relied on the subsequent treaty practice of the parties to help establish the parties' agreement as to its meaning.[58] In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, the Court interpreted the liability limits of the Warsaw Convention in light of the parties' subsequent practice, finding that "[t]he conduct of the contracting parties in implementing [the Convention] in the first 50 years of its operation cannot be ignored."[59] Likewise, in *Medellín*, the Court looked to the "'post-ratification understanding' of signatory nations" and found that the absence

52 Hamdan v. Rumsfeld, 548 U.S. 557, 628–31 (2006) (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

53 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(3)(a) ("There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . .").

54 Air Fr. v. Saks, 470 U.S. 392, 405–08 (1985) (interpreting the Warsaw Convention in light of the Montreal Agreement and Convention on Civil Aviation); Weinberger v. Rossi, 456 U.S. 25, 27–29 (1982) (comparing treaty provisions in 1947 and 1968 military base agreements, as well as a dozen other such agreements that provided for preferential hiring of local nationals on U.S. military bases located overseas).

55 480 U.S. 421, 436–40 (1987).

56 *Id.* at 429–41.

57 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(3) ("There shall be taken into account, together with the context . . . (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.").

58 El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) ("[W]e have traditionally considered as aids to [a treaty's] interpretation . . . the postratification understanding of the contracting parties." (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996))); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) ("[W]e decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue."); Clark v. Allen, 331 U.S. 503, 516 (1947) (refusing to change the construction of treaty terms that had been consistently interpreted since 1860); Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943) ("[W]e may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

59 Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 260 (1984).

of evidence that "any other country would treat [the International Court of Justice's] judgments as directly enforceable as a matter of its domestic law strongly suggests that the treaty should not be so viewed in our courts."[60]

Consistent with Article 31(3)(c),[61] the Court has relied on relevant rules of international law applicable in the relations between the parties.[62] In *Breard v. Greene*, the Court interpreted a treaty obligation in light of a background international law norm recognizing that treaties are implemented according to the procedural rules of the forum state.[63] It also has refused to apply international law norms that it viewed as inapplicable or irrelevant. In *United States v. Alvarez-Machain* the Court analyzed customary international law to interpret a bilateral extradition treaty and concluded that the norms on which respondent relied do not relate "to the practice of nations in relation to extradition treaties."[64]

Consistent with Article 31(4),[65] the Court has recognized that departures from the ordinary meaning are appropriate if the parties so intended.[66] In *Sumitomo Shoji America, Inc. v. Avagliano*, the Court held that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"[67]

Consistent with Article 32(a),[68] the Court often considers the negotiating history when treaty terms are ambiguous.[69] In *Air France v. Saks*, the

60 Medellín v. Texas, 552 U.S. 491, 516–17 (2008) (quoting *Zicherman*, 516 U.S. at 226).

61 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(3) ("There shall be taken into account, together with the context . . . (c) Any relevant rules of international law applicable in the relations between the parties.").

62 Weinberger v. Rossi, 456 U.S. 25, 29 (1982) (applying "principles of international law" to interpret what constitutes a treaty); Vella v. Ford Motor Co., 421 U.S. 1, 6 (1975) (stating that a treaty obligation is "declaratory of a longstanding tradition respecting the scope of the shipowner's duty to furnish injured seamen maintenance and cure").

63 Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

64 United States v. Alvarez-Machain, 504 U.S. 655, 666–69 (1992).

65 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

66 Maximov v. United States, 373 U.S. 49, 54 (1963) ("[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a . . . treaty . . . when . . . there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.").

67 457 U.S. 176, 180 (1982) (quoting *Maximov*, 373 U.S. at 54).

68 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . when the interpretation according to article 31 . . . [l]eaves the meaning ambiguous or obscure . . . .").

69 El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) ("'[W]e have traditionally considered as aids to [a treaty's] interpretation the negotiating and drafting history (*travaux préparatoires*) . . . .'" (quoting Zicherman v. Korean Airlines Co., 516 U.S. 217, 226 (1996)); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (stating that negotiation history may be "consulted to elucidate a text that is ambiguous"); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) ("'Treaties are construed

Court noted that "[i]n interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation. . . . In part because the '*travaux préparatoires*' of the [treaty] are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text."[70] Likewise, in *United States v. Alvarez-Machain*, the Court relied on the treaty's negotiating history to interpret whether a bilateral extradition treaty was the exclusive means for gaining custody of a foreign national.[71]

Consistent with Article 32(b),[72] occasionally the Court has refused to interpret terms based on their plain meaning where doing so would lead to an absurd or unreasonable result.[73] In *Zicherman v. Korean Air Lines Co.*,[74] the Court refused to interpret the term "harm" based on the plain meaning of that term because it would expose airlines to "tort liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated 'harm.'"[75]

In sum, the Supreme Court jurisprudence suggests that there is no inconsistency between the Vienna Rules and the Court's canons of treaty interpretation. These cases, read together, support the proposition that the Supreme Court has had recourse to all the interpretive tools employed by the Vienna Rules. Even so, until *Bond* the Court has never engaged in the unitary approach anticipated by the drafters of the Vienna Rules that treats the interpretive task as a single, comprehensive process.

IV. *BOND* AND THE VIENNA RULES

Bond is unique in that it is the only important example of a specific case where the Supreme Court followed the Vienna methodology in its entirety. Although it did not cite the Vienna Rules, the Court interpreted the Chemical Weapons Convention in "good faith in accordance with the ordinary

more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" (quoting Air Fr. v. Saks, 470 U.S. 392, 396 (1985)); INS v. Stevic, 467 U.S. 407, 416–17 (1984) (discussing negotiating history of the United Nations Protocol Relating to the Status of Refugees); Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (discussing the negotiating history of a treaty); Factor v. Laubenheimer, 290 U.S. 276, 294 (1933) ("In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties."); Cook v. United States, 288 U.S. 102, 112 (1933) ("In construing the Treaty its history should be consulted.").

70 470 U.S. 392, 400 (1985) (emphasis added) (citations omitted).

71 504 U.S. 655, 665–66 (1992).

72 *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . when the interpretation according to article 31 . . . (b) [l]eads to a result which is manifestly absurd or unreasonable.").

73 O'Connor v. United States, 479 U.S. 27, 30–31 (1986) (rejecting petitioners' "utterly implausible" interpretation of the treaty).

74 516 U.S. at 222–25.

75 *Id.* at 222.

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[76] It also used "supplementary means of interpretation"—including the *travaux préparatoire* and common principles of construction—to confirm the meaning of ambiguous treaty terms that otherwise could be interpreted to lead to absurd results.[77]

The Court had to overcome significant obstacles in reaching the conclusion that it did. Read literally, the statutory definition clearly appeared to embrace Bond's conduct. As Justice Scalia concluded in concurrence, Bond did not have peaceful purposes in mind when she used a toxic chemical to harm her husband's mistress.[78] She used a "chemical which . . . can cause death, temporary incapacitation or permanent harm to humans or animals."[79] Her purpose in using it was not peaceful and did not relate to "industrial, agricultural, research, medical, or pharmaceutical activit[ies]."[80] Thus, a straightforward reading of the prohibition would encompass her conduct. For Justice Scalia, such a reading was "simple," "[u]navoidable," and "clear beyond doubt."[81]

For the Court, such a reading was too broad to accept. It could not imagine that the treaty was intended to have an effect so boundless that kitchen cabinets were chemical weapons caches.[82] Therefore, it resorted to other interpretive aids, all of which were embodied in the Vienna Rules. The Court followed the same reasoning as the drafters of the Vienna Rules, that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[83]

The ordinary meaning of the term "chemical weapon" was central to the Court's analysis. "[A]s a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a 'chemical weapon.'"[84] The natural meaning of that term accounts for both the type of chemical used and the circumstances in which they were used. No ordinary person would consider that the chemical Bond used was a deadly toxin of the type the Convention was designed to address. The ordinary meaning of a "weapon" is "'[a]n instrument of offensive or defensive combat.'"[85] Using

76 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(1).

77 *Id.* art. 32.

78 Bond v. United States, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment); *see id.* at 2102 (Thomas, J., concurring in the judgment) ("By its clear terms, the statute at issue in this case regulates local criminal conduct that is subject to the powers reserved to the States.").

79 18 U.S.C. § 229F(8)(A) (2012); CWC, *supra* note 10, art. II(2).

80 18 U.S.C. § 229F(7)(A).

81 *Bond*, 134 S. Ct. at 2094–95 (Scalia, J., concurring in the judgment).

82 *Id.* at 2093 (majority opinion).

83 1966 ILC YEARBOOK, *supra* note 33, at 219.

84 *Bond*, 134 S. Ct. at 2090.

85 *Id.* (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2589 (2002)).

natural parlance, Bond's behavior was not combat. Interpreting "chemical weapon" to include Bond's crime "would give the [implementing] statute a reach exceeding [its] ordinary meaning."[86] Reliance on the ordinary meaning of "chemical weapon" plays a "limiting role" on the scope of the prohibition, and avoids transforming "a statute passed to implement the [I]nternational Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish."[87]

The Court extensively discussed the object and purpose of the Convention. It began with an image of the ravages of chemical warfare during the First World War as the impetus behind the overwhelming consensus that toxic chemicals should never be used as weapons of war.[88] It cited the bold aspirations expressed in the Convention's Preamble—the complete elimination of all types of weapons of mass destruction used by state and nonstate actors in times of war and peace.[89] These purposes were critical to the Court's interpretation. "[T]he Convention's drafters intended for it to be a comprehensive ban on chemical weapons . . . [and] we have doubts that a treaty about *chemical weapons* has anything to do with Bond's conduct."[90] Given the purpose of the Convention to address "war crimes and acts of terrorism," the Court concluded that "[t]here is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault."[91] It found that Bond's chemical of choice—an arsenic-based compound that causes minor irritation when touched[92]—bore "little resemblance to the deadly toxins that are of particular danger to the objectives of the Convention."[93] The "purely local crime"[94] that Bond committed "could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran-Iraq war that form the core concerns of [the] treaty."[95] Accordingly, the United States and the community of nations have no interest in seeing Bond imprisoned for violating the ban on chemical weapons.[96] The purpose behind the Convention served to underscore the limited scope of the prohibition. "[T]he global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen

86 *Id.* at 2091.

87 *Id.*

88 *Id.* at 2083.

89 *Id.* at 2083–84.

90 *Id.* at 2087.

91 *Id.*

92 *Id.* at 2085.

93 *Id.* at 2090 (quoting Ian Kenyon, *Why We Need a Chemical Weapons Convention and an OPCW, in* THE CREATION OF THE ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS 17 (Ian Kenyon & Daniel Feakes eds., 2007) [hereinafter THE CREATION OF THE ORGANIZATION]) (internal quotation marks omitted).

94 *Id.* at 2083.

95 *Id.* at 2093.

96 *Id.*

cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon."[97]

The Court also repeatedly cited context as an interpretive aid. It concluded that "the context from which the [implementing] statute arose demonstrates a much more limited prohibition was intended" by the ban on chemical weapons.[98] Rather than rely solely on the statutory definition, the Court concluded that "the improbably broad reach of the key statutory definition" was rendered ambiguous by "the context from which the statute arose—a treaty about chemical warfare and terrorism."[99] The Court interpreted the term "chemical weapon" in light of the entire Convention, including the Preamble, other treaty provisions, and the Annex on Chemicals.[100] These provisions illuminated the purpose and structure of the ban on chemical weapons and the nature of the banned chemicals.

Most importantly, the Court twice cited Article VII, which provides that "'[e]ach State Party shall, *in accordance with its constitutional processes,* adopt the necessary measures to implement its obligations under this Convention.'"[101] These provisions illuminated the purpose and structure of the ban on chemical weapons, and the nature of the banned chemicals.

When the Court again quoted Article VII saying that "'[e]ach State Party shall, *in accordance with its constitutional processes,* adopt the necessary measures to implement its obligations under this Convention,"[102] it cited this provision as contextual support for a federalism presumption. The "constitutional process in our 'compound republic' keeps power 'divided between two distinct governments.'"[103] Faithful to federalism and other constitutional concerns, the Convention only required that "necessary measures" be adopted, leaving to the states how they would be adopted within their constitutional system.[104] This context permitted the Court to interpret the treaty obligation consistent with a federalism presumption, a presumption that has a longstanding history within the Court's jurisprudence.[105]

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97 *Id.*

98 *Id.*

99 *Id.* at 2090.

100 *Id.* at 2083–84, 2090 (discussing the Preamble, Articles I, II, VII, VIII, IX, and the Annex on Chemicals).

101 *Id.* at 2084, 2087 (quoting CWC, *supra* note 10, art. VII(1)) (alteration in original).

102 *Id.*; *see also id.* at 2093.

103 *Id.* at 2093 (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

104 *Id.* at 2087–88 (citing Lisa Tabassi, *National Implementation: Article VII*, *in* THE CREATION OF THE ORGANIZATION, *supra* note 93, at 207).

105 *See, e.g.*, United States v. Pink, 315 U.S. 203, 230 (1942) ("[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." (citing Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938)); Todok v. Union State Bank, 281 U.S. 449, 455–56 (1930) (interpreting treaty to avoid inconsistency with state homestead law).

The Court also relied upon subsequent practice. In particular, the Court noted that the United States had "identified only a handful of prosecutions that have been brought" under the statute, and they have almost invariably focused on "assassination, terrorism, and acts with the potential to [create] mass suffering."[106] This subsequent practice underscored the nature of the offense and limited its reach to purely local crimes. Consistent with the Vienna Rules, this practice illuminated the meaning of the chemical weapons ban.

Finally, with respect to supplementary means of interpretation, the Court recognized that the definition for a "chemical weapon" was ambiguous and that a broad reading would be absurd. The Court found that ambiguity exists because of the "improbably broad reach" of the statutory definition and "the deeply serious consequences of adopting . . . a boundless reading."[107] It is absurd to read a definition of chemical weapon so broadly that "[a]ny parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar."[108] That, however, was the "inescapable conclusion" of a literal reading of the statutory definition.[109] To avoid a reading that would turn every kitchen cupboard into a chemical weapons cache, the Court concluded that one should employ other interpretive devices.

The two most important supplementary means of interpretation the Court used were the treaty's negotiating history and a federalism presumption. With respect to the Convention's history, the Court traced its origins to the 1925 Geneva Protocol and the desire "to expand the prohibition on chemical weapons beyond state actors in wartime."[110] This history led the Court to doubt that "chemical weapons" have anything to do with Bond's conduct. "The Convention, a product of years of worldwide study, analysis, and multinational negotiation, arose in response to war crimes and acts of terrorism. There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault."[111] The negotiating history confirmed that the object and purpose of the treaty was not to punish purely local crimes.

The federalism presumption was the final and most important means of supplementary interpretation. The Court described the federalism presumption as a principle embedded within the treaty itself, which authorized the adoption of national measures "in accordance with its constitutional processes."[112] As the Court put it, "[t]he Convention . . . is agnostic between

106 *Bond*, 134 S. Ct. at 2092.

107 *Id.* at 2090.

108 *Id.* at 2091.

109 *Id.*

110 *Id.* at 2084.

111 *Id.* at 2087 (citation omitted).

112 *Id.* (quoting CWC, *supra* note 10, art. VII (1)).

enforcement at the state versus federal level."[113] "Congress legislates against the backdrop of certain unexpressed presumptions,"[114] among them the presumption that, absent a clear statement to the contrary, Congress did not authorize "a stark intrusion into traditional state authority" such as dealing with local criminal activity.[115] The Court purported to apply the federalism presumption only to the implementing legislation,[116] but it then interpreted both the treaty and the statute to exclude purely local crimes. The reason it did so was because the statute was designed to give effect to the treaty and did so using the same provisions and key definitions set forth in the treaty.

For the first time in history, the Court in *Bond* relied on all of the interpretive tools set forth in the Vienna Rules. *Bond* raises the possibility that Supreme Court practice in interpreting treaties could more frequently conform to the international standard.

V. The Vienna Rules Following *Bond*

The parallels between the Vienna Rules and the Court's interpretive approach in *Bond* are striking. Had the Court expressly referenced the Vienna Rules and applied its methodology, the reasoning or result would not have been different. In one sense this is not surprising because the Vienna Rules simply codify maxims that for the most part are "principles of logic and good sense."[117] If the goal of every interpretive endeavor is to give effect to the intention of the parties, it is only reasonable to account for the factors enumerated in the Vienna Rules. Looking at ordinary meaning of treaty terms in their context and in light of the object and purpose is precisely what one would expect a court to do even in the absence of the Vienna Rules.[118]

But, in another sense, it is truly remarkable that *Bond* represents the rare case in which the Supreme Court has systematically examined the ordinary

113 *Id.* The Vienna Rules assume that supplementary rules of interpretation include general principles of treaty interpretation such as presumptions. *See* Vienna Convention on the Law of Treaties, *supra* note 1, art. 32.

114 *Id.* at 2088 (quoting EEOC v. Arabian Am. Oil Co., 449 U.S. 244, 248 (1991)).

115 *Id.* at 2094.

116 *Id.* at 2088 ("[W]e have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.").

117 1966 ILC Yearbook, *supra* note 33, at 218.

118 That is precisely what the ICJ and Permanent Court of International Justice did for decades prior to the adoption of the Vienna Rules. *See, e.g.*, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."); Competence of the ILO to Regulate Agricultural Labour, Advisory Opinion, 1922 P.C.I.J. (ser. B) Nos. 2–3, at 23 (Aug. 12) ("[I]t is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.").

meaning of the terms of the treaty in their context and in light of the treaty's object and purpose. More commonly, the Court has articulated its interpretive task as beginning with the text and then considering the negotiating history and post-ratification practice.[119]

Bond may represent a watershed moment in which the Court's interpretive approach closely aligns with the international standard. There is nothing in Supreme Court jurisprudence that would prevent such an alignment. Indeed, fundamental canons of interpretation support the notion that the Supreme Court could align its interpretation approach with the international standard.

One such principle is the idea that the Court recognizes that treaties are "contract[s] between nations"[120] that should be interpreted according to "shared expectations."[121] In *Lozano v. Montoya Alvarez*, the Court recognized that "[a] treaty is in its nature a contract between . . . nations, not a legislative act."[122] Therefore, "[i]t is our 'responsibility to read the treaty in a manner consistent with the shared expectations of the contracting parties.'"[123] In *Abbott v. Abbott*, the Court held that "[i]n interpreting any treaty, '[t]he opinions of our sister signatories . . . are entitled to considerable weight.'"[124] In *Aérospatiale*, the Court stated that "[i]n interpreting an international treaty, we are mindful that it is in the nature of a contract between nations to which general rules of construction apply."[125] Historically, the Court seeks to understand the "shared expectations" of the contracting parties when interpreting specific terms of the treaty. But it also could employ this canon to the methodology of interpretation itself.

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119 *See* Medellín v. Texas, 552 U.S. 491, 506–07 (2008); Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996); United States v. Stuart, 489 U.S. 353, 365–66 (1989); Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943).

120 Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984).

121 *See* United States v. Alvarez-Machain, 504 U.S. 655, 672 n.4 (1992) (Stevens, J., dissenting) (quoting Air Fr. v. Saks, 470 U.S. 392, 299 (1985)); E. Airlines, Inc. v. Floyd, 499 U.S. 530, 536 (1991) (citing *Saks*, 470 U.S. at 399); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 533 (1987); *Trans World Airlines*, 466 U.S. at 254, 260; Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (citing Geofroy v. Riggs, 133 U.S. 258, 271 (1890)).

122 134 S. Ct. 1224, 1232–33 (2014) (alteration in original) (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

123 *Id.* at 1233 (quoting Olympic Airways v. Husain, 540 U.S. 644, 650 (2004)); *see Saks*, 470 U.S. at 399; *see also* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1903 (2005) ("Indeed, a declaration of fidelity to shared expectations has become near boilerplate in modern Supreme Court treaty opinions.").

124 560 U.S. at 16 (alteration in original) (quoting El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999) (internal quotation marks omitted)).

125 482 U.S. at 533 (quoting *Trans World Airlines*, 466 U.S. at 253 (internal quotation marks omitted)).

The Vienna Rules now reflect the rules of customary international law applicable to all treaties.[126] In this sense every treaty includes an agreement on interpretation. In some cases this agreement is explicit, such as the United States-Chile Free Trade Agreement, which obligates the parties to "interpret and apply provisions of this Agreement . . . in accordance with applicable rules of international law."[127] Likewise, the United States bilateral investment treaties require arbitral tribunals "[to] decide the issues in dispute in accordance with this Treaty and applicable rules of international law."[128] If the "shared expectations" of the parties is that the treaty should be interpreted pursuant to the Vienna Rules, then the Supreme Court should recognize the Vienna Rules under its existing jurisprudence. It would not do so because the United States has ratified the Vienna Convention or because the Vienna Rules are otherwise part of U.S. law. Rather, the Court would rely on them because with every treaty the contracting parties have the expectation that the treaty terms will be interpreted using the Vienna Rules.

Another canon of construction that could support reliance on the Vienna Rules is the deference the Court gives to the executive branch's interpretation of treaties.[129] In *Abbott*, the Court held "[i]t is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight."[130] In *Avagliano*, the Court found that "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[131] In *El Al*

126 *See* GARDINER, *supra* note 36, at 7 ("The International Court of Justice . . . has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties.").

127 The United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, State Dept. No. 04-35 (2003); *see* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (noting that the Members recognize that the WTO's dispute settlement system shall interpret the WTO agreements "in accordance with customary rules of interpretation of public international law"); North American Free Trade Agreement art. 1131, Dec. 17, 1992, 32 I.L.M. 645 (1993) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

128 *See* U.S. Department of State, 2012 U.S. Model Bilateral Investment Treaty, art. 30, *available at* www.state.gov/documents/organization/188371.pdf.

129 For commentary on the Court's deference to executive interpretations of treaties, see Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007); Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927 (2003); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007); Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777 (2008); Joshua Weiss, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592 (2011).

130 560 U.S. 1, 15 (2010) (quoting Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184 n.10 (1982) (internal quotation marks omitted)).

131 *Avagliano*, 457 U.S. at 184–85 (citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)); *see* Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

Israel Airlines, Ltd. v. Tsui Yuan Tseng, the Court stated that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."[132]

Ordinarily, this deference applies to the executive branch's interpretation of specific treaty terms. But it could also support the executive branch's support for the Vienna Rules as the authoritative guide to treaty interpretation.[133] The *Foreign Affairs Manual* recognizes the Vienna Convention as an authoritative legal basis for negotiating and concluding treaties.[134] The United States routinely relies on the Vienna Rules in litigation before national and international tribunals, including in briefs before the Supreme Court.[135] In one such brief, the United States recently informed the Court that "[a]lthough the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation."[136] If the United States views the Vienna Rules as the authoritative guide to treaty interpretation, and the Supreme Court accords great deference to the executive branch's interpretation of treaties, then the Court could rely on the Vienna Rules in deference to the executive branch.

Traditionally these canons are viewed as in tension with one another, with the former understood as an "internationalist" perspective and the latter a "nationalist" perspective.[137] But if the executive branch and the shared expectation of the contracting parties all recognize that the Vienna Rules are the accepted framework for treaty interpretation, then the two canons support one another.

VI. THE VIENNA RULES AND THE TREATY POWER

Treaty interpretation saved a constitutional crisis. Had the Court addressed the Treaty Power, there was much fear and trepidation that it

132 525 U.S. 155, 168 (1999).

133 *See* S. EXEC. DOC. NO. 92-1, *supra* note 37, at 1; *see also* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. note, at 144–45 (1987) (discussing Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention by the United States).

134 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 712 (2014).

135 Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 17, BG Group PLC, v. Republic of Arg., 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4737184, at *17; Brief for the United States as Amicus Curiae Supporting Petitioner at 9 n.6, *Abbott*, 560 U.S. 1 (No. 08-645), 2009 WL 3043970, at *9 n.6; Brief for the United States as Amicus Curiae Supporting Respondents at 24, Sanchez-Llamas v. Johnson, 548 U.S. 331 (2006) (Nos. 05-51, 04-10566), 2006 WL 271823, at *24. For examples of U.S. reliance on the Vienna Rules before international tribunals, see GARDINER, *supra* note 36, at 17.

136 Brief for the United States as Amicus Curiae Supporting Petitioner at 9 n.6, *Abbott*, 560 U.S. 1 (No. 08-645), 2009 WL 3043970, at *9 n.6.

137 David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 504, 524 (David Sloss ed., 2009) ("The canon of deference to the executive branch is the nationalist counterpoint to the transnationalist canon of good faith.").

would have limited the federal government's power to adopt treaties that encroached on the reserved powers of the several states. Three Justices writing in concurrence reached that question, and concluded that the treaty power had federalism limitations.[138]

Henceforth, the Court likely will avoid the constitutional question in other treaty contexts as well because most treaties could be interpreted either expressly or implicitly to embrace federalism limitations.[139] If *Bond* counsels courts to undertake a treaty analysis before reaching the constitutional question,[140] and treaties typically expressly or implicitly recognize federalism limitations, then courts will rarely need to opine on the scope of the treaty power.

Only national governments are entitled to enter into treaties, but in the United States, like many federal systems, only sub-federal units are capable of implementing key treaty obligations that address traditional state functions.[141] Accordingly, signatories in federal systems adopt treaties consistent with constitutional limitations. The process of treaty formation routinely addresses federalism concerns. One could say that it is an established principle of international law that states are permitted to adopt and implement treaties subject to federalism limitations. Consistent with the Vienna Rules, the Supreme Court could invoke this principle of international law, either as part of the context,[142] as a "relevant rule[ ] of international law,"[143] or as a "supplementary means of interpretation."[144]

The most common way for federalism limitations to be reflected in treaty formation is through reservations, understandings, and declarations (RUDs). Ordinarily the United States accomplishes the federalism limitation entirely through RUDs. The Senate routinely includes federalism and constitutional RUDs when ratifying a treaty.[145] For example, the Senate under-

138 Bond v. United States, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment); *id.* at 2102 (Thomas, J., concurring in the judgment); *id.* at 2111 (Alito, J., concurring in the judgment).

139 For examples of treaties that do not seek to accommodate federalism concerns, see Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power,* 79 S. CAL. L. REV. 1327, 1371–72 (2006). With such treaties, federalism is "simply not an issue" or they relate to "foreign persons or transnational conduct." *Id.* at 1371.

140 *Bond*, 134 S. Ct. at 2087 ("[I]t is a 'well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984))).

141 Syméon Karagiannis, *The Territorial Application of Treaties, in* THE OXFORD GUIDE TO TREATIES 305, 313–14 (Duncan Hollis ed., 2012) ("[M]any federal States' constitutions entitle their federal sub-federal governmental units . . . to implement . . . the measures necessary for the federal State to comply with a treaty.").

142 Assuming, for example, there was a treaty clause addressing federalism concerns as was the case in *Bond.*

143 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(3).

144 *Id.* art. 32.

145 *See, e.g.*, S. Res. of Advice and Consent to Ratification of the U.N. Convention Against Transnational Organized Crime, 151 Cong. Rec. S11,334 (daily ed. Oct. 7, 2005);

standing included in the International Covenant on Civil and Political Rights provided that "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[146] Under the Vienna Rules, a RUD is part of the treaty context, as an "instrument which was made by one or more parties in connexion with the conclusion of the treaty."[147]

A federalism RUD was not an option in the Chemical Weapons Convention context because the treaty prohibited the use of reservations.[148] Consequently the treaty included a clause that addressed federalism concerns. Article VII filled the role that a federalism reservation would otherwise play by authorizing signatories to implement the treaty in a manner consistent with their constitutional obligations.[149] The Court described the treaty as "agnostic" as to whether the treaty was enforced at the state or federal level.[150] That agnosticism was quite intentional.

The Chemical Weapons Convention is an example of a treaty that explicitly incorporated constitutional concerns. Other treaties go further and reference not only constitutional concerns but also explicitly incorporate federalism into the treaty. "Federal state clauses" avoid the "strains created by the confrontation between international and federal national law."[151] They do so by obligating the national government to take action to the extent national law grants legislative jurisdiction to the federal government, but then the treaty obligates the federal government to recommend sub-federal entities to take such measures at the state and local levels. Examples of treaties with a "federal state clause" include The New York Convention, the Constitution of the International Labour Organization, the Tobacco Conven-

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S. Res. of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634 (daily ed. June 24, 1994); S. Res. of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4783 (daily ed. Apr. 2, 1992); S. Res. of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17491 (daily ed. Oct. 27, 1990).

146 S. Res. of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992).

147 Vienna Convention on the Law of Treaties, *supra* note 1, art. 31(2)(b).

148 CWC, *supra* note 10, art. XXII.

149 Compliance with constitutional obligations was addressed during this and other arms control treaty negotiations. In particular, the constitutional concerns of warrantless searches of weapons of mass destruction was raised during the negotiations and served as an impetus for the drafters to include the language on "constitutional processes" set forth in Article VII. *The Constitutionality of the Chemical Weapons Convention: Prepared Testimony Before the Subcomm. on Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 104th Cong. 33–41 (1996) (Statement of Barry Kellman, Professor, Depaul University College of Law); David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 297–335 (1988).

150 Bond v. United States, 134 S. Ct. 2077, 2087 (2014).

151 Karagiannis, *supra* note 141, at 315.

tion, and the Convention on Cybercrime.[152] With such treaties, courts will not face the constitutional question of whether the federal government exceeded the treaty power because express provisions of the treaty will be interpreted to avoid the federalism concerns.

The political branches' concerns for federalism are reflected in treaty formation. Treaties are drafted consistent with federalism limitations. In *Bond,* seven former legal advisers for the U.S. State Department noted that "[t]he executive and legislative branches already undertake great efforts to account for domestic laws and policies—including federalism—throughout the treaty-making and implementation process."[153] The Senate ratifies treaties with federalism RUDs. Treaties are implemented in light of federalism concerns. Therefore, when courts interpret treaties, they do so presuming that the prerogatives of state powers will be preserved. As in *Bond*, this presumption should avoid the need to address the constitutional issue of the scope of the treaty power.

Conclusion

The Supreme Court has long ignored the Vienna Rules. *Bond* does not change that fact, but it does give support for courts to rely on the interpretive tools that form the basis for the Vienna Rules. The Court has always accepted the tools of interpretation reflected in the Vienna Rules. It now has accepted those tools as part of a holistic, unitary approach. The Vienna Rules are hidden behind the veil of *Bond*'s interpretative methodology. Consistent with accepted canons of construction, the Court could rely on the Vienna Rules more explicitly. The Court could also rely on the Vienna Rules to avoid constitutional questions. As in *Bond*, interpreting treaties as incorporating federalism limitations will often avoid the constitutional question of the scope of the treaty power.

152 The Oxford Guide to Treaties, *supra* note 141, at 719–23; Hollis, *supra* note 139, at 1377.

153 Brief of Former State Department Legal Advisers as Amici Curiae in Support of Respondent at 20, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 4518602, at *20.