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MARYLAND AND SUPREME COURT TREATY INTERPRETATION

Paradox and Dilemma

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The increase in the quantity of litigation involving issues of international law in the federal and state courts and before administrative bodies has been very great. This has been a consequence of many varied factors—increased foreign expropriations of U.S. owned foreign property; greater foreign direct investments in the United States. With the advent of investment liberalization in Japan, the expansion of the European Common Market, and the trade expansion by the United States with both the Soviet Union and the People's Republic of China, an increase in litigation involving international law issues in the courts and the administrative agencies in the United States is inevitable.[1]

I. *Introduction—A Dilemma and a Paradox.*

For the Maryland practitioner, treaty law is a field not well known, but of rapidly growing significance. The development in Baltimore of modernized port facilities, rapidly developing international departments of banking, insurance and industrial concerns, solicitation of European and foreign direct investment in the State, and proposed state legislation to parallel the new federal Domestic International Sales Corporation as well as the scheduled completion of the new Maryland World Trade Center, warrants an analysis of treaty law.

The most common rule of treaty law enunciated by the United States Supreme Court is that treaties are to be broadly construed. What is known as the "broad rule" of treaty interpretation is stated as follows: when a treaty provision remains ambiguous after the application of all other rules of interpretation it is to be broadly construed. This rule is distinct from the "*ordinary and natural meaning rule*" that requires terms to be construed in the *ordinary and natural*

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1. Malawer, Book Review, 1 U. BALT. L. REV. 114 (1971).

meaning. When the ordinary meaning of a term is not clear, then one applies the broad rule of construction. In this sense the latter rule is a residual rule of interpretation. This article is a comparative jurisprudential analysis of the highest court of the State of Maryland and the United States Supreme Court.

A case study of interpretation in Maryland indicates that while declaring to follow a broad rule of treaty construction, Maryland follows a restrictive rule. This raises doubts not only as to the existence of a broad rule of treaty interpretation in customary international law, but serious Constitutional law dilemmas in the context of federal-state judicial relations.

Under Constitutional law, interpretation of treaties is a federal question. State courts are not free to interpret a treaty different from the Supreme Court. A corollary of this rule is that state courts are to use the same means on rules of treaty interpretation as declared by the Supreme Court.[2] Treaty interpretation is not considered to fall within *Erie R.R. v. Tompkins.*[3]

The analysis of the Supreme Court Jurisprudence indicates that the treaty interpretation cases proclaim a need to adhere to a broad rule of treaty interpretations, as first enunciated in *Shanks v. Dupont.*[4] However, a dual paradox exists. First, the rule is not clearly formulated: in some cases the Court referred to the broad interpretation of ambiguous treaty provisions to effectuate private rights: other cases refer to upholding State equality and national sovereignty. Second, regardless of the lack of a clear statement of the rule, the Court never exclusively relied upon the rule to determine a case.

Two additional observations are as follows. The cases decided by the Supreme Court treated essentially nominal issues in the sphere of interstate relations of estate succession, Indian treaties or extradition. Again, the Court has not in fact construed provisions in the broadest sense. The Court looked at other treaties and preparatory work to arrive at the ordinary meaning of treaty provisions.

II. *Maryland Jurisprudence—Restrictive Interpretation—A Dilemma.*

Chryssikos v. DeMarco (1919)[5] involved the interpretation of the

2. Where the Constitution does not vest exclusive jurisdiction in the Federal Government, and where Congress has not acted to "occupy the field," a state may prescribe and enforce rules of law involving matters of significant concern to foreign relations.... However, the rules of the foreign relations law of the United States [are] ... matters as to which state law either is constitutionally required to conform to Federal law ... or conforms to it in practice.... RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 2, comment *d* at 7-8 (1965) [Hereinafter cited as RESTATEMENT].
3. 304 U.S. 64 (1938). In relation to the act of state doctrine, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964), stated, "It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins.*" It can similarly be argued that questions of treaty interpretation were not in mind when the Court decided *Erie.*
4. 28 U.S. (3 Pet.) 150 (1830).
5. 134 Md. 533, 107 A. 358 (1919).

Consular Convention of 1903 between Greece and the United States.[6] The plaintiff, a representative of the Consulate of Greece, was appealing an order of the Orphan's Court of Baltimore City. The appeal asked the court to appoint the Counsul as administrator.

The intestate, a Greek citizen, died in Baltimore where he resided, leaving $1,800 in a Baltimore City bank. The deceased left, as survivors in Greece, his parents, sisters, and a brother. Application for the letters of administration was made by defendant (not a relative) to the Orphan's Court and the letters were issued. The Consul, in pursuance of the existing treaty between the United States and Greece, asserted that he was entitled to the letters of administration.

The court declared that it was not required to give a strained interpretation to the treaty:

> We are not required, however, to give a strained construction to the language of a treaty, or place an unreasonable interpretation upon it, for the purposes of securing to foreigners privileges which are denied citizens of this country.[7]

Article XI of the Treaty contained a most-favored nation clause:

> Article XI. In the case of the death of any citizen of the United States in Greece, or of a Greek subject in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall give information of the circumstance to the consular officers of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to the parties interested. In all that relates to the administration and settlement of estates, the consular officers of the high contracting parties shall have the same rights and privileges as those accorded in the United States of America and Greece, respectively, to the consular officers of the *most favored nation.*[8] (Emphasis added).

The foreign consul asserted that because of the most-favored-nation clause in the Greece-U.S. Treaty, Article 14 of the U.S.-Swedish Treaty[9] is applicable:

> In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul general, or vice-consul of the nation to which the deceased may belong, or, in his absence the representative of such consul-general, consul, vice-consul general, or vice-consul, shall, *so far*

6. Nov. 19, 1902, 33 Stat. 2122 (1903-05), T.S. No. 424.
7. 134 Md. at 535, 107 A. at 359.
8. 33 Stat. 2122, 2129 (1903-05).
9. Consular Convention with Sweden, June 1, 1910, 37 Stat. 1479 (1912), T.S. No. 557.

> *as the laws of each country will permit*, and pending the appointment of an administrator and until letters of administration have been granted, *take charge of the property* left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed *as administrator* of such estate.[10] (Emphasis added).

The court thus interpreted the term, "so far as the laws of each country will permit", in a restrictive manner.

> That language was inserted to enable the Consul-General or other persons named, to take possession before he was appointed administrator, but only "so far as the laws of each country will permit.[11]

The court refused to revoke the letters of administration and to extend them to the consular officer of Greece:

> To permit a representative of a foreign government to set aside the provisions of testamentary laws, and take from the probate courts, orphans' courts, or by whatever name they be known, the power to determine who shall administer upon estates, when otherwise it would be in the discretion of the courts, would be conferring broad powers on him, and yet if the contention of the appellant is sustained that is what it amounts to.[12]

The court suggested a restrictive interpretation was necessary, for if the Nations intended to entitle the administration of the estates of citizens of one country dying in another exclusively to the consul of the foreign nation, they would have explicitly stated it.

> It would not be just to *assume* that in making a treaty with a foreign country laws of the different States were intended to be repealed or ignored, in the *absence* of express language (emphasis added) or clear implication showing such intent, especially such as testamentary laws, which are necessary and exist in every State, although they differ in some particulars.[13]

The Maryland court required all treaty rights as they related to individuals to be explicitly granted in the treaty.

> So, although courts are bound by treaties and must not place a construction on them which would alter, add to, take from or in any way change them, or be controlled by the mere inconvenience of the provisions, *if clear and unambiguous*, they

10. *Id.* at 1487-88.
11. 134 Md. at 544, 107 A. at 362.
12. *Id.* at 539, 107 A. at 360.
13. *Id.*

> can, in seeking to ascertain the meaning of provisions which are not free from doubt, take into consideration the results which would follow a construction urged upon them.[14] (Emphasis added).

The court did not consider these contested provisions to be free from doubt. The court held that the treaty provisions providing for the appointment of the consul to take charge of the property of the intestate did not include the appointment of the consul as an administrator. The court argued that the law of the country was ambiguous.[15] Therefore, the courts did not want to give ambiguous treaty provisions a strained construction or unreasonable interpretation.[16]

The court clearly construed the ambiguous treaty provisions restrictively. While the Supreme Court had never decided a case entirely on the basis of either a broad or restrictive theory of treaty interpretation, the Maryland Court of Appeals decided this case on the basis of the restrictive rule of treaty interpretation. It never cited any of the language of the Supreme Court as to the need for liberal construction of treaties.

In *Schneider v. Hawkins* (1940)[17] the Maryland courts once again adhered to a restrictive rule of interpretation. The plaintiff, a German Consul, appealed from an order of the Orphans' Court of Baltimore County. The court refused his application for letters of administration for the estate of a German national who had died intestate. The plaintiff argued that he was entitled to the letters by virtue of his office under the terms of the Treaty of Friendship, Commerce and Consular Rights between the U.S. and Germany.[18] The consul claimed that he had a paramount right to administration by virtue of the clause of the treaty which provided the following:

> Article XXIV . . . . In case of the death of a national of either of the High Contracting Parties without will or testament, in the territory of the other High Contracting Party, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of death, shall, *so far as the laws of the country permit* and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same. Such consular officer shall have the right to be appointed as administrator within the discretion of a tribunal or other agency controlling the

14. *Id.* at 539-40, 107 A. at 360-61.
15. *Id.* at 540, 107 A. at 361.
16. *Id.* at 539-40, 107 A. at 360-61.
17. 179 Md. 21, 16 A.2d 861 (1940).
18. Dec. 8, 1923, 44 Stat. 2132 (1925-27), T.S. No. 725.

> administration of estates provided the laws of the place where the estate is administered so permit.[19] (Emphasis added).

The court made reference to *Chryssikos* and applied the same restrictive interpretation to the phrase, "so far as the laws of each country will permit."[20] It refused to reverse the Orphans' Court ruling, which denied the consular officer possession of deceased's letter.[21] The court argued that the treaty provision required discretion and did not mandate states to issue letters of administration automatically to foreign consul.[22]

> When applied to public officials, "discretion" is the power conferred upon them by law to act officially under certain circumstances according to the dictates of their own judgment and conscience, and uncontrolled by the judgment or conscience of others.[23]

The court also stated:

> The prevailing view is that the provisions of the treaties are "not so mandatory as to require that state laws regarding the administration of estates should be superseded."[24]

As in the previous case, the court clearly adhered to a restrictive rule of interpreting the ambiguous treaty provisions.

III. *Supreme Court Jurisprudence—Broad Rule of Treaty Interpretation—A Paradox*

A. From Shanks to Miller (1830-1968).

Shanks v. Dupont (1830)[25] involved the claim of a British subject to lands in the United States owned by her father, a British citizen who had died intestate in South Carolina. South Carolina law prohibited foreign nationals from holding title or interest in realty. The plaintiff asserted she was entitled to claim the property under Article 9 of the 1794 Jay Treaty (U.S. and Great Britain).[26] Article 9 stated:

> British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the

19. *Id.* at 2153.
20. Chryssikos v. DeMarco, 134 Md. 533, 540, 107 A. 358, 361 (1919).
21. Schneider v. Hawkins, 179 Md. 21, 29, 16 A.2d 861, 865 (1940).
22. *Id.* at 25, 16 A.2d at 864.
23. *Id.*
24. *Id.* at 27, 16 A.2d at 865. The court quoted from 100 A.L.R. 1531 (1936).
25. 28 U.S. (3 Pet.) 150 (1830).
26. Treaty with Great Britain on Amity, Commerce and Navigation, Nov. 19, 1794, 8 Stat. 116 (1855), T.S. No. 105.

> dominion of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; . . . and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens.[27]

The defendant argued that since the plaintiff's mother was a U.S. citizen and the plaintiff was born in the U.S., the plaintiff should be considered a citizen of the U.S. and not a "British subject" under the terms of Article 9. Thus, she should be bound by the laws of the State and the treaty should have no effect. The plaintiff argued that since her father was a British citizen and she was living in Great Britain, she ought to be considered a "British subject" under the treaty.

The Court in holding for the plaintiff declared that the terms of the treaty should be construed within the spirit and intent of the treaty, and it was the intent of Great Britain to protect the rights of all British subjects holding land in America from the disability of alienage in respect to descent and sale of property. The Court stated:

> If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude *private rights;* why should not the most liberal exposition be adopted?[28]

However, it went on to state its conclusion:

> It seems to us, then, that all British born subjects, whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, *as they certainly are within the words,* of the treaty of 1794.[29] (Emphasis added).

The Court considered that the terms in question were clear, thus precluding resort to the broad rule of treaty construction. The Court considered the broad or liberal rule of treaty construction as either

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27. *Id.* at 122.
28. 28 U.S. (3 Pet.) at 155.
29. *Id.* at 156. The Court's specific conclusion follows:
> The object of the British government must have been, to protect all her subjects holding lands in America, from the disability of alienage, in respect to descents and sales. The class of American loyalists could, at least, in her eyes, have been in as much favor as any other; there is nothing in our public policy which is more unfavorable to them than to other British subjects. After the peace of 1783, we had no right or interest in future confiscation; and the effect of alienage was the same in respect to us, whether the British subject was a native of Great Britain or of the colonies. This part of the stipulation, then, being for the benefit of British subjects who became aliens by the events of the war; there is no reason why all persons should not be embraced in it, who sustained the character of British subjects, although we might also have treated them as American citizens.

Id. at 155.

expanding or restricting the rights of the individuals, rather than the sovereignty of the nation-states. The Court by its formulation of the rule emphasized the protection of the rights of individuals rather than of states. This analysis illustrates the broad rule of treaty construction as a rule that encroaches upon the sovereignty of a state. The rule is utilized to interpret ambiguous provisions against the objecting state, by extending its obligations further than what were clearly and unambiguously stated. The Court's statement of the rule in this case might not fall within this definition. The Court's statement is most correctly characterized as a misstatement in the terms of how it has been developed by subsequent jurisprudence.

Hauenstein v. Lynham (1879)[30] illustrates the Court's use of the broad rule of interpretation merely as dictum, since it was not necessary to involve the rule at all. The intestate died in Virginia in 1861. His property was sold under the State's escheat laws. The heir of the intestate, a national of Switzerland, filed a petition for the proceeds of the sale relying on Article V of the U.S.-Swiss Confederation Treaty of 1850.[31] Article V stated:

> The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.
> But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty *at all times* to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated.[32] (Emphasis added).

The State argued that " . . . the State, having fixed no time within which this must be done, it cannot be done at all, and that the entire provision thus becomes a nullity, and is as if it were not."[33] The Court states, "The terms of the limitation imply clearly that *some time*, and not that *none*, was to be allowed."[34]

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30. 100 U.S. 483 (1879).
31. Treaty with Swiss Confederation on Commerce, Friendship, Establishments, and Surrender of Criminals, Nov. 25, 1850, 11 Stat. 587 (1855-59), T.S. No. 353.
32. *Id.* at 590-91.
33. 100 U.S. at 487. This is the argument of the State as understood by the Court.
34. *Id.*

> Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.[35]

The Court clearly never reached the application of the broad rule of treaty construction. The ordinary meaning of "at all times" was "some time" and it could not be interpreted in any other manner; this again illustrates that one of the earliest cases did not rely exclusively upon the broad rule to decide the merits of the dispute.

Geofrey v. Riggs (1890)[36] involved the right of a French citizen to take land in the District of Columbia by descent from a citizen of the U.S. The question presented was whether the District of Columbia was one of the "States of the Union" within the meaning of that term as used in Article 7 of the Consular Convention with France of 1853.[37] The Court held that the French citizen was entitled to the land, thus declaring the District of Columbia to be a state of the U.S. within the meaning of the treaty. The Court called attention to the accepted rule of interpretation and stated the following:

> It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties *to secure equality and reciprocity between them.* As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.[38] (Emphasis added).

In this case, the Court emphasized the necessity to interpret treaties liberally in order to "secure the equality and reciprocity between (the parties)."[39] The Court redefined the rule of restrictive interpretation by emphasizing the protection of the States, rather than of the individuals.[40] On the merits the Court stated:

> To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by "States of the Union" is meant all the political communities exercising legislative powers in the

35. *Id.*
36. 133 U.S. 258 (1890).
37. Feb. 23, 1853, 10 Stat. 992 (1851-55), T.S. No. 92.
38. 133 U.S. at 271-72.
39. *Id.* at 271.
40. *Id.*

> country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia.[41]

The Court apparently decided the case according to the ordinary meaning of the term "States of the Union" with no meaningful analysis of the impact on the sovereignty of the foreign state. Clearly, defining the disputed term to include the District of Columbia had no significant consequences on the obligations assumed by France.

Tucker v. Alexandroff (1902)[42] involved the interpretation of Article Nine of the Treaty of Navigation and Commerce of 1832 between the United States and Russia.[43] The Court had to determine whether the petitioner was subject to extradition under the treaty as a deserter. Article Nine of the Treaty read as follows:

> The said Consuls, Vice Consuls and Commercial Agents, are authorized to require the assistance of the local authorities, for the search, arrest, detention and imprisonment of the *deserters* from the *ships of war* and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall, in writing, demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and, this reclamation being thus substantiated, the surrender shall not be refused.[44] (Emphasis added).

The petitioner argued that the "ship of war" was not present in this case because the ship was still under construction and outfitting in the United States.[45] The Court rejected this plea by interpreting 'ships of war' as being those ships in their final stages of construction and outfitting, which included the transfer of title and launch of the ship.[46] Even though the Court merely relied upon the ordinary meaning of the contested provisions after analyzing other treaties, it referred to the broad rule of treaty construction.[47]

> The treaty should be liberally interpreted in this particular to carry out the intent of the parties, since if a foreign government may not send details of men to take possession of vessels built here, without danger of losing their entire command by desertion, we must either cease building them or foreign

41. *Id.*
42. 183 U.S. 424 (1902).
43. Dec. 18, 1832, 8 Stat. 444 (1855), T.S. No. 299.
44. *Id.* at 448.
45. 183 U.S. at 437-38.
46. *Id.* at 439.
47. *Id.* at 437.

> governments must send special ships of their own with crews ordered to take possession of them.[48]

Justices Gray, Fuller, Harlan and White, dissenting, clearly emphasized that the majority decision was in restriction of the right of the petitioner. The decision itself never discussed the broad or restrictive rule *in the context of expanding or limiting the obligations* of either of the parties to the treaty. The decision increased the obligations owed to Russia without significant detriment to the United States. The dissenting opinion had stated the following:

> It was argued, however, at the bar, if this case did not come within the treaty or the statute, the United States were bound, by the comity of nations, to take active steps for the arrest of Alexandroff, and for his surrender to the Russian authorities. But this position cannot be maintained.
>
> The treaties of the United States with Russia and with most of the nations of the world must be considered as defining and limiting the authority of the government of the United States to take active steps for the arrest and surrender of deserting seamen.
>
> These treaties must be construed so as to carry out, in the utmost good faith, the stipulations therein made with foreign nations. But neither the executive nor the judiciary of the United States has authority to take affirmative action, beyond the fair scope of the provisions of the treaty, *to subject persons* within the territory of the United States to the jurisdiction of another nation.[49] (Emphasis added).

In the often cited and well known *Asakura v. Seattle* (1924)[50] the Court ruled that a Japanese national who had been admitted to the U.S. could participate in the business of pawnbroking,[51] as this business constituted "trade" within the meaning of the 1911 treaty between the U.S. and Japan..[52] The treaty is considered to override an inconsistent and subsequent municipal ordinance. The Court, in an explanation of its decision, stated:

> Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it, and the other favorable to them the latter is to be preferred.[53]

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48. *Id.* at 446.
49. *Id.* at 466-67.
50. 265 U.S. 332 (1924).
51. *Id.* at 343.
52. Treaty with Japan on Commerce and Navigation, Feb. 21, 1911, 37 Stat. 1504 (1912), T.S. No. 558.
53. 265 U.S. at 342.

The relevant treaty provision stated the following:

> The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other *to carry on trade*, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.
> The citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security for their persons and property. . . .[54] (Emphasis added).

The Court interpreted the contested treaty provision by claiming it is not to be restrictively interpreted.[55] The Court argued that treaties are to be broadly construed in providing for private rights. When considered with the prior case[56] it is clear that the Court discussed the protection of private rights, and sometimes, the protection of sovereign rights as being upheld by a broad rule of treaty interpretation. The Court has not been clear even on its formulation of the broad rule of treaty interpretation.[57]

The Court, nevertheless, construed the term "trade" to include pawnbroking, as within the ordinary definition of trade. The Court had no trouble in reaching such a conclusion.

Jordan v. Tashiro (1928)[58] also involved the 1911 Treaty between the United States and Japan.[59] The Court held that Japanese nationals in California were entitled to form a corporation to construct and operate a hospital.[60] The Court referred to Article I of the treaty, which stated:

> The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease

54. 37 Stat. 1504 (1912).
55. The language of the treaty is comprehensive. The phrase "to carry on trade" is broad. That it is not to be given a restricted meaning is plain. The clauses "to own or lease . . . shops, . . . to lease land for . . . commercial purposes, and generally to do anything incident to or necessary for trade," and "shall receive . . . the most constant protection and security for their . . . property . . ." all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word "trade" as used in the treaty.
265 U.S. at 342.
56. Tucker v. Alexandroff, 183 U.S. 424 (1902).
57. Asakura v. Seattle, 265 U.S. 332, 342 (1924).
58. 278 U.S. 123 (1928).
59. Feb. 21, 1911, 37 Stat. 1504 (1912), T.S. No. 558.
60. 278 U.S. at 129.

> and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, *to lease land for* residential and commercial purposes, and generally do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.[61] (Emphasis added).

The Court stated that the "obligations should be liberally construed."[62] Indicating that the obligations between nations are to be construed in good faith, the Court remarked:

> The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require *that their obligations should be liberally construed* so as to effect the apparent intention of the parties to secure equality and reciprocity between them. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.[63]

The Court went on to state:

> Moreover, a construction which concedes the authority of Japanese subjects to operate a hospital but would deny to them an appropriate means of controlling so much of the earth's surface as is indispensable to its operation, does not comport with a reasonable, to say nothing of a liberal, construction.[64]

The Court argued its interpretation was reasonable and never had to reach the doctrine of liberal treaty interpretation.

Nielsen v. Johnson (1929)[65] involved a Danish national who died intestate in Iowa. He left his mother, a Danish national resident in Denmark, as his sole heir. According to a statute of the State of Iowa, a ten percent inheritance tax was to be imposed on any estate passing to a nonresident alien. The Danish national contended that Article 7 of the treaty of 1826 with Denmark prevented this discriminating tax against the estate.[66]

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61. 37 Stat. 1504 (1912).
62. 278 U.S. at 127.
63. *Id.*
64. *Id.* at 129.
    > The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise. Especially would this be the case where the granted privileges relate to trade and commerce and the use of land for commercial purposes.

    Id. at 130.
65. 279 U.S. 47 (1929).
66. General Convention of Friendship, Commerce and Navigation with Denmark, April 26, 1826, 8 Stat. 340 (1855), T.S. No. 65, *renewed*, Convention with Denmark, April 11, 1867, 11 Stat. 719, 720 (1855–59), T.S. No. 67.

> The United States and his Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively.[67]

The Supreme Court held that this treaty prevented the Danish national from being subject to such a discriminating tax. The Court also stated:

> The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible is not consonant with the principles which are controlling in the interpretation of treaties.[68]

The Court clearly considered that the provision in question was clear after resorting to its history. The Court never had to rely upon the broad rule of construction for its holding.

> The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs . . . .[69]

Todok v. Union State Bank (1930)[70] involved the interpretation of Article Six of the 1783 Treaty between the United States and Norway.[71]

> The subjects of the contracting parties in the respective states, may freely dispose *of their goods and effects* (emphasis added) either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession even *ab intes-*

67. 8 Stat. 340, 342 (1855).
68. 279 U.S. at 51.
69. *Id.* at 52.
70. 281 U.S. 449 (1930).
71. Treaty of Amity and Commerce with Sweden, April 3, 1783, 8 Stat. 60 (1855), T.S. No. 346, *renewed*, Treaty with Sweden, Sept. 4, 1816, 8 Stat. 232, 240 (1855), T.S. No. 347, *renewed*, Treaty with Sweden and Norway, July 4, 1827, 8 Stat. 346, 354 (1855), T.S. No. 348.

> *tato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called "*droit de détraction*" on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper.[72]

A citizen of Norway willed his property to a grantee who subsequently conveyed it to the defendant. It was the plaintiff's contention that the grantor did not have the right to will the property, and thus, the property should pass accordingly to the intestate succession laws of Norway. The defendant based his claim to the property on Article 6.

The court declared that the question presented was one of construction and hence concluded that the phrase, "*fonds et bien*" (goods and effects) encompassed more in the French language than it did in English, thus finding that the term included real estate. The court stated:

> "Treaties should receive a liberal interpretation to give effect to their apparent purpose." [73]

The Court considered the contested term 'goods and effects' to comprehend not only chattels but realty. It considered the French text determinative of the definition, since civil law clearly permitted that interpretation.[74] The Court relied upon the other text of the treaty to be determinative of the issue when the English text was not clear. The Court never had to rely upon the broad rule of interpretation for its holding.

Factor v. Laubenheimer (1933)[75] involved the interpretation of an extradition treaty. It considered the broad rule of treaty interpretation in the context of obligations between states.

> In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided

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72. 8 Stat. 60, 64 (1855).
73. 281 U.S. at 454.
74. The Court quoted J. STORY, CONFLICT OF LAWS 12 n.2 (7th ed. 1872): "The term '*biens*' in the sense of the civilians and continental jurists, comprehends not merely goods and chattels as in the common law, but real estate". *Id.*
75. 290 U.S. 276 (1933).

> as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.[76]

Bacardi Corp. v. Domenech (1940)[77] relied upon the clear meaning of the treaty provisions involved while merely restating the all too often repeated general statements as to liberal interpretation of treaties.

> According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.[78]

Kolovrat v. Oregon (1961)[79] involved two residents of Oregon who died intestate leaving personal property *they owned in that State.* Their only heirs and next of kin were residents and nationals of Yugoslavia. The State claimed that the Yugoslavian relatives were ineligible to inherit. It argued the property should be declared escheated to the State. The Court held that the citizens of Yugoslavia were lawfully entitled to inherit the personal property in Oregon under the terms of the 1881 Treaty between the U.S. and Serbia (which is now part of Yugoslavia).[80] The Court stated the following:

> This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.[81]

The Court did not rely upon the broad rule when reaching its conclusion. The problem was to determine whether or not Yugoslavia

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76. *Id.* at 293–94.
77. 311 U.S. 150 (1940). *See also,* Valentine v. Neidecker, 299 U.S. 5 (1936), in which the Court argued that it adhered to a broad rule of interpretation but interpreted the contested treaty provisions restrictively in order to protect the rights of U.S. citizens.
78. 311 U.S. at 163.
79. 366 U.S. 187 (1961).
80. Treaty of Commerce with Serbia, Oct. 14, 1881, 22 Stat. 963 (1881–82), T.S. No. 319. Officially recognized as still in effect at Agreement with Yugoslavia, July 19, 1948, 62 Stat. 2658, 2660 (1948), T.I.A.S. No. 1803, Art. 5.
81. 366 U.S. at 193.

was providing reciprocity. The Court concluded it was so doing,[82] in view of Yugoslavia's adherence to the Bretton Woods Agreement.[83]

Zschernig v. Miller (1968)[84] concerned itself with the typical intestate problem involving the taking of precedence of a treaty over state law. It involved the disposition of the proceeds of the estate of an Oregon resident who died intestate in 1962. The heirs were residents of East Germany. The Court held that the 1923 Treaty of Friendship, Commerce and Consular Rights[85] took precedence over state law, and accordingly the heirs were entitled to inherit.[86] The Court reached this decision again while citing the usual dictum of broad treaty construction, but concluding the ordinary meaning of the treaty provisions were to be followed. Justice Harlan stated in his concurring opinion:

> This course of history, coupled with the general principle that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred," leads in my opinion to the conclusion that Article IV of the 1923 treaty should be construed as guaranteeing to citizens of the contracting parties the right to inherit personal property from a decedent who dies in his own country.[87]

The Court concluding by stating:

> The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.[88]

IV. Conclusion—Paradox and Dilemma.

The analysis of Supreme Court jurisprudence and Maryland jurisprudence leads to the following conclusions. One, the Supreme Court on the level of a rather loose formulation of a rule proclaims a broad rule of treaty interpretation but never exclusively relies upon it to decide a case.[89] Two, Maryland Court of Appeals jurisprudence

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82. *Id.* at 198.
83. International Monetary Fund Agreement, Dec. 27, 1945, 60 Stat. 1401 (1946), T.I.A.S. No. 1501.
84. 389 U.S. 429 (1968).
85. Dec. 8, 1923, 44 Stat. 2132 (1925-27), T.S. No. 725.
86. 389 U.S. at 441.
87. *Id.* at 456-57. The Court distinguished earlier cases that it thought were too restrictive in that they were tainted by the 'Cold War'. *Id.* at 435.
88. *Id.* at 441.
89. The RESTATEMENT argues that the distinction between broad or liberal rules of construction is not useful. It is argued here that the Supreme Court *says* it adheres to a broad rule of construction.

> *Liberal and strict construction.* Statements are encountered in treatises, international adjudications, and decisions of national courts (including those of the United States) that international agreements should be interpreted liberally in the light of their objectives. Other statements support "strict construction" for

adheres to a restrictive rule of treaty interpretation and very rarely mentions the Supreme Court doctrine. Three, in the context of customary international law, United States jurisprudence does not clearly favor a broad rule of treaty interpretation. Four, under United States Constitutional law, there exists a serious issue that needs corrective measures to be taken. Action is required by the legislature of Maryland or by either the Congress or the Supreme Court to set firm

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certain types of treaties, such as those ceding sovereignty or territory, or involving possible conflicts with preexisting national law. This distinction is not useful in the process of interpretation, since it either suggests a canon of exclusionary application or merely states a conclusion without directing attention to the factors involved in reaching it.

RESTATEMENT § 147, comment *b* at 452.

The RESTATEMENT rejects the value of canons of construction, not their existence. It is argued that different courts adhere to different canons of construction as to broad or restrictive rule of interpretation. The existence of customary international law is not explicit as to the acceptance of either rule. RESTATEMENT § 147, Reporters' Notes 1 at 454-55.

The Supreme Court has decided a line of cases concerning the interpretation, and to some measure the validity, of treaties concluded with the American Indians. An analysis of them very strongly supports the following propositions. One, the Supreme Court often adheres to a restrictive rule of treaty interpretation to uphold the sovereignty of the State, when proclaiming the necessity of broad treaty interpretation. Two, these cases are the closest the Supreme Court has come to discussing the juridical nature and validity of duress on a treaty power. Since the Court never specifically heard the argument, one must conclude that parties before the Court and the Court itself considered the argument invalid. Malawer, *A New Concept of Consent and World Public Order: 'Coerced Treaties' and the Convention on the Law of Treaties*, 4 VAND. J. OF TRANSNATIONAL L. 1 (1970) and Malawer, *The Withdrawal of UNEF*, 4 CORNELL INT'L L. J. 25 (1970). The following quotes are instructive.

> Under the Constitution the treaty-making power resides in the President and the Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress.

United States v. Minnesota, 270 U.S. 181, 201 (1926).

> While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean.

Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179 (1947).

> [I]n interpreting treaties and agreements with the Indians [,] they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." [citing cases]. But even Indian treties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Choctaw Nations of Indians v. United States, 318 U.S. 423, 432 (1943).

> "The language used in treaties with the Indians should never be construed to their prejudice." But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945).

> The treaty is therefore a law made by the proper authority, and the courts of

guidelines on treaty interpretation. Action is needed to solve the paradox of the Supreme Court jurisprudence on treaty interpretation and to alleviate the dilemma that exists in federal-state judiciary relations.

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justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.

. . . .

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain.

Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

Dr. Kleiner has stated the following:

Hundreds of treaties were entered into between the United States and the various Indian nations during the nineteenth century. Nearly a third were treaties of peace; the rest were treaties for land cession. Treaties did not seem to hinder Federal legislative competence with respect to Indians. In 1871 Congress unilaterally changed its method of dealing with Indian tribes from treaty to statute.

Kleiner, *United States Laws on American Indians*, 77 CASE AND COMMENTS No. 4, at 3, 5 (1972).

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