CHAPTER 3

INDIAN TREATIES

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SECTION 1. THE LEGAL FORCE OF INDIAN TREATIES

*One who attempts to survey the legal problems raised by Indian treaties must at the outset dispose of the objection that such-treaties are somehow of inferior validity or are of purely antiquarian interest. These objections apparently spring from the belief that when the treaty method of dealing with the natives was abandoned in the Indian Appropriation Act of 1871 the force of treaties in existence at that time also disappeared. Such an assumption is unfounded. Although treaty making itself is a thing of the past, treaty enforcement continues. As a matter of fact, the act in question expressly provides that there shall be no lessening of obligations already incurred. The reciprocal obligations assumed by the Federal Government and by the Indian tribes during a period of almost a hundred years constitute a chief source of present-day Indian law. As one legal commentator has pointed out:*

**• • •**

The chief foundation of federal power over Indian affairs appears to have been the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made.

**• • •**

And by a broad reading of these treaties the national government obtained from the Indians themselves authority to legislate for them to carry out the purpose of the treaties.*

That treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view which has been repeat-

*See Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78, 80–81. See also Chapter 5, sec. 1.

Justice Baldwin, in the case of Cherokee Nation v. Georgia, 5 Pet. 1 (1831), gives an interesting account of the negotiation of treaties by the Continental Congress with the Indians:

The proceedings of the old congress will be found in 1 Laws U. S. 867, commencing 1st June 1775, and ending 1st September 1788, of which some extracts will be given. 30th June 1775: "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians; as the Indians depend on the colonists for arms, ammunition and clothing which are become necessary for their subsistence." "That the commissioners have power to treat with the Indians" "to take to their assistance gentlemen of influence among the Indians." "To preserve the confidence and friendship of the Indians and prevent their suffering for want of the necessaries of life, 40,000l. sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians without a license," "traders shall sell their goods at reasonable prices: allow them to the Indians (for their skins, and take no advantage of their distress and intemperance," the trade to be only at posts designated by the commissioners. *Specimen of the kind of intercourse between the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion." (P. 34.)
edly confirmed by the federal courts and never successfully challenged. As late as 1828 Attorney General William Wirt, in an opinion to the President on Georgia and the Treaty of Indian Springs, found it necessary to answer the contention that treaties with Indians were not effective because they were not treaties with an independent nation, and because, even if independent, the Indians were uncivilized. In discussing the first objection the Attorney General said, in part:

If it be meant to say, that, although capable of treating, their vessels not to be considered like vessels of nations absolutely independent, no reason is discerned for this distinction 'in the circumstance that their independence is of a limited character. If they are independent to the purpose of treating, they have all the independence that is necessary to the argument. The point, then, once conceded, that the Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation.

Nor can it be conceded that their independence as nations absolutely independent, like all other independent nations, they are governed solely by their own laws. Like all other independent nations, they have the absolute power of war and peace. Like all other independent nations, their territory is inviolable, by any other power, and the possession of any other nation. It is clear that the Constitution recognized as part of the supreme law of the land treaties made with Indian tribes prior to 1852).

As late as 1871 the policy was pursued of liberating the Cherokee nation by means of treaties, and, of course, treaties are of inferior legal validity. The point in controversy, was, whether a treaty is to be regarded as having been annulled by the Government, becomes the supreme law of the land, and the courts can no more contravene a treaty, the Supreme Court of the United States. 17 Wall. 211. 242-243 (1872)

It is argued that it was not in the power of the United States and the Cherokee nation by a treaty of 1804, to abridge, in any degree the treaty line of Holston, so as to affect private rights, or the rights of North Carolina. The answer to this is, that the Treaty of 1804 was not a treaty with the Cherokee nation, but a treaty with the Cherokee Indians. As a treaty, it is liable to be set aside by the courts to this extent, that the parties to it, and the courts that act under it, are independent and free. They are entirely self-governed—self-directed. They treat, or refuse to treat, at their pleasure: and there is no authority which can rightfully control them in the exercise of their discretion in this respect. In their treaties, in all their contracts with regard to their property, they are as free, sovereign, and independent as any other nation. And being bound, on their own part, to the full extent of their contracts, they are surely entitled, on every principle of reason, justice, and equity, to a construction which will not, in any case, work a fraud, or injustice, to either of the parties.

The Circuit Court for the Michigan District said:

It is clear that the Constitution recognized as part of the treaty law the Indian tribes by means of treaties prior to its ratification. The Supreme Court said with reference to the provisions of an Indian treaty:

7 Worcester v. Georgia. 6 Pet. 515. 559 (1832). Examples of such treaties are found in the opinion of the Supreme Court in Cherokee Nation v. Georgia, 6 Pet. 1. 12-38 (1831).
course, a moral obligation rested upon Congress to act in
good faith in performing the stipulations entered into on
its behalf. But, as with treaties made with foreign na-
tions, Chinese Exclusion Case, 130 U. S. 351, 600, the legis-
lative power might pass laws in conflict with treaties made
with the Indians. Thomas v. Gay, 169 U. S. 284, 270; Ward
v. Race Horse, 163 11. 501, 511; Spalding v. Chand-
der, 180 U. S. 394, 405; Missouri, Kansas & Texas Ry. Co.
v. Fort Worth, 192 U. S. 114, 117; The Cherokee Tobacco, 11
Wall. 616.

The power exists to abrogate the provisions of an Indian
treaty, though presumably such power will be exercised
only when circumstances arise which will not only not
the government in disregarding, the stipulations of the
international law, but may demand, in the interest of the country
and the Indians themselves, that it should do so. When, there-
fore, treaties were entered into between the United States
and a tribe of Indians it was never doubted that the power
of the United States to abrogate existed in Congress, and that in a
contingency such power might be availed of from considerations
of governmental policy, particularly if consistent with
perfect good faith towards the Indians. * * *
The Attorney General has ruled: 24

By the 6th article of the Constitution, treaties as well as
statutes are the laws of the land. There is nothing in the Con-
titution which distinguishes different classes of treaties
from statutes. The Constitution itself is of higher rank than
either by the very structure of the Government. A statute
not inconsistent with it, and a treaty not inconsistent with it,
relating to subjects within the scope of the treaty-making
power, though presumably such power will be exercised
upon the same level, to be of

The doctrine has been qualified by some cases. In the case of
Jones v. Yeehan 25 if was held that title to land granted to an
Indian by treaty cannot be divested by any subsequent action
of the lessor, Congress or the Executive department.

The construction of treaties is the peculiar province of
the judiciary, and, except in cases purely political, Con-
gress has no power whatever to settle the rights under a
treaty, or to affect titles already granted by the treaty
itself. Wilson v. Wall, 6 Wall. 83, 89; Reichard v. Felps
6 Wall. 160; Smith v. Stevens, 10 Wall. 321, 327; Holden v.
Joy, 17 Wall. 211, 247 (P. 322).

Thus the issuance of a patent by the General Land Office upon
lands reserved by a treaty with Indian tribes is void. 26

The Supreme Court has often coupled a statement about
the absolute power of Congress to supersede a treaty obligation
with a discussion of the moral obligation of the Government to
redress such a violation. In holding that an act of Congress extended
revenue laws over the Indian Territory, despite a prior treaty
exempting tobacco raised on reservations, the Court wrote:

A treaty may supersede a prior act of Congress, 27 and an
act of Congress may supersede a prior treaty. 28 In the
cases referred to these principles were applied to treaties
with foreign nations. U. S. v. Mille\n(1926). or dis-

By many statutes and occasionally by treaties, the Court of
Claims has been authorized to determine many claims for treaty
violations.

In construing a jurisdictional act, 29 the Supreme Court dis-
cribed the liability of the United States for a violation of a

order which purports to restore to the public domain land granted
by treaty to Indians is imperative. 18 Op. A. G. 141 (1885).

The power exists to abrogate the provisions of an Indian
treaty to Indians is in

24 OP. A. G. 354 (1870). 25 An example of a treaty superseding a prior act of Congress is in
Mangal v. Morton, 2 Curtis 454: The Clinton Bridge, 1
Walworth, 175


28 The moral obligation to perform treaties faithfully was recognized in the preamble to the Treaty of August 9, 1814, with the Creek Nation. 7 Stat. 120, which referred to the fulfillment "with punctuality and good faith" of treaties with the United States of former treaties with the Creeks up to the time of their waging war against the United States. Also see Chapter 2
sec 2, fn. 41.

An example of a treaty superseding a statute is noted in Choctaw Indians, 18 Op. A. G. 354 (1870). See Chapter 14, sec. 6, and Chapter 19, sec. 3; Ray A. Brown, The

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Mangal v. Morton, 2 Curtis 454: The Clinton Bridge, 1
Walworth, 175
Treaties sometimes provided saving clauses in the event of rejection of some of the articles. For example, article 7 of the Treaty of August 5, 1826, with the Chippewas, provides among other things:

* * * But it is expressly understood and agreed, that the fourth, fifth, and sixth articles, or either of them, may be rejected by the President and Senate, without affecting the validity of the other articles of the treaty.

Future contingencies sometimes provided for included violation by a chief of an essential part of the treaty or repletion by chiefs of land reserved by treaty, nonratification, nonremoval of the Indians, abandonment of land and insufficiency of "good tilled land" ceded to the tribe.

The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only a small part of the signatory tribes. The Federal Government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent states, or white people, from violating treaty rights of the Indians.
A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians. For example, a proviso in an Indian treaty which exempts lands from "levy, safe, and forfeiture" is not, in the absence of expressions so limiting it, confined to the levy and sale under ordinary judicial proceedings, but also includes the levy and sale by county officers for the payment of taxes.

An agreement embodied in an act of Congress which in terms "ceded, granted, and relinquished" to the United States all of their "right, title, and interest," did not make the lands public lands in the sense of being subject to sale or other disposition under the general land laws, but only in the manner provided for in the special agreement with the Indians. The best interests of the Indians, however, do not necessarily coincide with a grant to them of the broadest-power over lands. The Supreme Court has held that the best interests of the Indians do not require that they should be allotted lands in fee rather than lands held in trust by the government for their use.

While trying to 'serve the Indians' best interests, the courts have indicated that they will not dispense with any of the conditions or requirements of the treaties upon any notion of equity or general convenience or substantial justice. Justice Harlan, in the case of United States v. Orthodox Nation, said:

But in no case has it been adjudged that the courts could by mere interpretation or In deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. What was said in The Amiable Isabella, 6 Wheat. 1, 71, 72, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: "In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to take, and not to construe a treaty. Neither can this court supply a casus omisus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it so far as it goes and to stop where that stops—whatever may be the consequences or difficulties which it leaves behind. ** In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to use by which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals."

So, too, it has been held that the reservation of a privilege to sh and hunt on lands transferred by a contract ratified by a treaty does not prevent the prosecution of tribal Indians violating a conservation law on such lands, since the transfer does not expressly or impliedly limit the right of the state to exact conservation measures.

A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording of treaties was assigned to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a nontechnical way as the Indians would have understood the language.

**Kennedy v. Becker, 241 U.S. 556 (1916).** The clause "Also, excepting and reserving to them * * * the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed" (Treaty of September 15, 1707, with the Seneca Nation, 7 Stat. 601, 620) was interpreted as

- * * * reservation of a privilege of fishing and hunting upon the granted lands in Chowchilla and others to which the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileges, which inhere in the sovereign right over the lands where the privilege was exercised. (Pp. 563-564.)

Interpretations of other clauses are noted in sec. 4 of this Chapter and page 6 Chapter sec. 38, and Chapter 14, sec. 7.

**Pleming v. McCarfain, 214 U.S. 56, 60 (1909);** Chapter 8, sec. 91. See Worcester v. Georgia, 6 Pet. 515, 551-553 (1832). In commenting on frequent mistakes one writer said:

-- As the Indians had no written language and few of the chieftains even had a knowledge of English, the negotiations were carried on generally through interpreters, many of whom were incompetent. The descriptions of the lands ceded were also a source of misunderstanding. In the region east of the Mississippi, the geography was fairly well known, and it was possible to describe areas with a fair degree of accuracy by reference to the streams and rivers; the area west of the Mississippi, however, was little known when many of the treaties were made, and the descriptions were of the most indefinite character. The method of making the treaties varied according to the character of the commissioners negotiating for them. Some were manifestly fraudulent; notably the treaty with the Creeks made in 1825. Others were made practically under duress. For instance, George C. Sibley, factor at Fort Osage, gave the following account of the negotiations with that tribe in 1808:

- * * *

On the 6th of November, 1808, Peter Chouteau, the French agent for the Osages, arrived at Fort Clark. On the 10th the party assembled the Chiefs and warriors of the Great and Little Osages in council, and proceeded to state to them the substance of a treaty, which he said, Governor Lewis had desired him to offer the Osages, and to execute with them. Having briefly explained, and delivered to them the principles upon which they had acted in this effect, in my hearing, and very nearly in the following words: 'We have heard by the hands of those who now come forward and sign it, shall be considered friends of the United
The Supreme Court in the case of Jones v. Mechan,* said:

In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by interpreters employed by themselves; that these words are drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose oral knowledge of the terms by which the treaty is framed is imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which it would naturally be understood by the Indians. (Pp. 10-11.)

These principles received many applications in decisions interpreting terms derived from private conveyances which were often used in treaties with the Indians. For example, the

* Treaties already made were recognized by the Constitution. Cherokee Nation v. Georgia, 5 Pet. 1 (1831); Worcester v. Georgia, 6 Pet. 616 (1832).

States, and treated accordingly. Those who refuse to come forward and sign it shall be considered enemies of the United-States, and treated accordingly. The Osages replied in substance, 'that their great American father wanted a part of their land which he must have, that he was strong and powerful, they were poor and pitiful, but in consideration of the cession of the land, which the tribes are permitted to offer them something in return for it. They had no choice, all being either the sign the treaty or be declared enemies of the United States.' Schmeckebier, The Office of Indian Affairs, Its History, Activities, and Organization (1915). See supra, pp. 669, 670.

In discussing the status of Indian tribes during the Civil War, one writer stated:

Moreover, the Indians fought as solicited allies, some as nations, diplomatically approached. Treaties were made with them as with foreign powers and not in the farcical, fraudulent way that had been customary in times past. Abel, The American Indians—Their History, Their Status, Their Treasures (1927). See supra, p. 17.

175 U. S. 1. (1899).

In Ayres v. United States, 44 C. C. 48, 85, 95 (1908), the Circuit Court stated as follows:

"The President was given power to make treaties, with the advice and consent of the Senate, provided, "that so far as the treaty stipulates to pay money to the Indians or their representatives, the payment shall be made to the individuals designated in such treaty, or their heirs or assigns. "See Fish v. United States, 62 F. 2d 544 (C. A. 10, 1931), cert. den. 282 U. S. 903 (1931), in which the court declined to permit the testimony of interested witnesses 30 years after its execution to thwart the object of an agreement as interpreted by the courts. Hicks v. Rutledge, 12 Fed. Cas. No. 6458 (C. C. Kan. 1878). Also see Ayres v. United States, supra, In. 58, and see Chapter 6, sec. 7.

SECTION 3. THE SCOPE OF TREATIES

In the Constitution the President was given power to make treaties, with the advice and consent of the Senate, provided, two-thirds, of the Senators present concur.: The Supreme Court, in interpreting this provision, said:

* * * inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States; (Holmes v. Jennison et al., 14 Peters, 569; 1 Kent, 168; 2 Story on the Constitution, § 1508; 7 Hamilton's Works, 591; Duerr's Jurisprudence, 229.)

Again, the scope of this power was described by the Supreme Court in the case of United States v. Forty-three Gallons of Whiskey.*

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. * * * (P. 197.)

During the last period of treaty making, amendments by the Senate were frequent. A special limitation of the treaty-making power is that it cannot appropriate money. Referring to this fact, the Circuit Court for the District of Michigan said that a treaty

* * * cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required. (P. 346.)

163 (1904). * * * 616 (1832).

* Art. 2, sec. 2, cl. 2. An amendment to a treaty adopted by the Senate which did not receive Presidential approval and was not embodied in his proclamation cannot be regarded as part of the treaty. New York Indians v. United States, 170 U. S. 1, 23 (1898); Professor Willoughby writes of the early practice

During the first years under the Constitution the relations between the President and the Senate were especially close. In 1795 General Washington notified the Senate that he would confer with them with reference to a treaty with certain of the Indian tribes for, on the next day, and again two days later, written a communication to the Senate, asking their advice as to the terms of a treaty that he intended to make with the Cherokee. Willoughby, The Constitutional Law of the United States, Vol. I, p. 521.


95 U. S. 188 (1876). Also see Gary v. Riga, 133 U. S. 258, 266 (1890).

* * * See, for example, Treaty of February 18, 1807, with Sac and Fox Indians. 15 Stat. 405; Treaty of February 23, 1867, with the Senecas, and others, Art. 40, 15 Stat. 615, 623.


however, as Boyd has pointed out: 66

Although in regard to treaties calling for appropriations Congress has seemed reluctant to act without making it plain that there was a discretionary right vested in Congress in the premises, such appropriations have always been forthcoming.

Apart from this limitation, treaties may contain provisions which could not constitutionally be included in acts of Congress. Within the broad scope of "all the usual subjects of diplomacy," the Federal Government and the Indian tribes adopted treaties covering not only all aspects of intercourse between Indians and whites but also some of the internal affairs of the tribes themselves. Among the most important of the subjects covered were: 67

A. The international status of the tribe.
1. War and peace.
2. Boundaries.
3. Passports.
4. Extraterritoriality.
5. Relations with third powers.

B. Dependence of tribes on the United States.
1. Protection.
2. Exclusive trade relations.
3. Representation in Congress.
4. Congressional power.
5. Administrative power.
6. Termination of treaty-making.

C. Commercial relations.
1. Cessions of land.
2. Reserved rights in ceded land.
3. Payments and services to tribes.

D. Jurisdiction.
1. Criminal jurisdiction.
2. Civil jurisdiction.
3. Jurisdiction concerning the tract of land.

E. Control of tribal affairs.

A. THE INTERNATIONAL STATUS OF THE TRIBE

Until the last decade of the treaty-making period, terms familiar to modern international diplomacy were used in the Indian treaties.

The United States sometimes guaranteed the integrity of the territory of a nation; on the other hand, unpromised war was justice and honorable warfare, that the eighteenth century.

Many provisions show the international status of the Indians: tribes through clauses relating to war, boundaries, passports, extraterritoriality, and foreign relations.

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68 For discussion of removal provisions see sec. 4E of this Chapter Relevant treaty provisions are discussed in other chapters.
69 Treaty of September 17, 1787, with the Delaware, Art. 6, 7 Stat. 13 15; treaty of August 9, 1814, with the Creeks, Art. 2, 7 Stat. 120.121.
70 Preamble to Treaty of August 9, 1814, with the Creeks, 7 Stat. 120.
71 Ibid.
72 Treaty of August 24, 1835, with the Comanche and others, Art. 9, 7 Stat. 474, 475.
73 Also see Chapter 14, sec. 7.
2. **Boundaries.** Nations are usually separated by frontiers. Many treaties fixed the boundaries between the United States and Indian tribes and between Indian tribes. Old boundaries were, sometimes altered, and during the removal period, treaties generally described the new territory granted to the Indians.

Frequently treaties prohibited the trespass or settlement of American citizens on Indian territory, unless licensed to trade.

Such provisions were supplemented by statutes.

3. **Passports.** Additional evidence of the national character of the Indian tribes appears in the provisions requiring passports for citizens or inhabitants of the United States to enter the "domain" of an Indian tribe. The Treaty of August 7, 1790, with the Creek Nation provided in Part:

* * * Nor shall any such citizen or inhabitant go into the Creek country without a passport first obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding on the military post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same.

Such provisions were supplemented by statutes which required citizens of the United States, as well as foreigners, to secure passports before entering the Indian country, this statutory requirement being later waived in the case of citizens.

4. **Extradition.** The surrender of fugitives from justice by one nation to another is usually covered by treaty; similarly with the Indians and the United States.

Some treaties required the Indian tribes to deliver up persons committing crimes who were on their land, to be punished by the United States. A few treaties provided for the extradition of such persons for punishment by the states, or by the "states or territory of the United States northwest of the Ohio." Few early treaties provided for the punishment of United States citizens in the presence of the Indians. A particularly broad provision in regard to extradition was contained in the Treaty of June 19, 1855, with the Sioux, which requires the extradition of violators of treaties, laws, and regulations of the United States, or of the laws of the State of Minnesota. Other treaties provided that the Indians shall prevent fugitive slaves from taking shelter among them and shall deliver such fugitives to the Indian agent.

5. **Relations with third powers.** During the first few decades of the Republic, the political relations of many of the Indian tribes were not confined to the United States. As late as 1835 the "friendly relations" existing between some Indian tribes and the Republic of Mexico, the Republic of Texas, and among the several Indian tribes were formally recognized by the United States.

**B. DEPENDENCE OF TRIBES ON THE UNITED STATES**

While the national character of Indian tribes has been frequently recognized in treaties and statutes, numerous treaty provisions establish their status as dependent nations.

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1. **Treaty of June 16, 1802,** with the Creek Nation, Art. 3, 7 Stat. 68.
5. **Treaty of August 19, 1825,** with the Sioux and Chippewas, Sacs and Foxes, and the **Towans.**
7. **Treaty of July 17, 1802,** with the Choctaws, Art. 3, 7 Stat. 73.
8. **See sec. 40, infra.** Also see Treaty of December 29, 1835, with the Cherokees, Art. 16, 7 Stat. 478, providing for removal in 2 years. Article 5 of the Treaty of January 19, 1832, with a band of the Wyandots, 7 Stat. 364, provides that the band may remove to Canada, or to the river Huron in Michigan, where they own a reservation of land, or to any place they may obtain a right or privilege from other Indians to go.
9. **See sec. 40, infra; and see Chapter 15, sec. 6.**
10. **Article 3 of the Treaty of May 24, 1834,** with the Chickasaws, 7 Stat. 450, provides that the agent of the United States, upon the application of the chiefs of the nation, will resort to every legal civil remedy, to prevent intrusions upon the ceded country.
11. **Article 7 of the Treaty of March 6, 1861,** with the Sacs and others, 12 Stat. 1071, provided that no nonmember of a tribe, except Government employees or persons connected with Government services, shall go on the reservation except with the permission of the agent or the Superintendent of Indian Affairs.
12. **Treaty of January 21, 1785,** with the Wyandots and others, Art. 5, 7 Stat. 16; also see Art. 7 of Treaty of July 2, 1791, with the Cherokee Nation, Art. 8. See Art. 7. Also see sec. 4C, **infra.**
13. **See Chapter 16.**
15. **Art. 7, 7 Stat. 35, 37.** See also Treaty of July 2, 1791, with the Cherokees, Art. 9, 7 Stat. 39.
16. **See Chapter 4, sec. 6.**
1. Protection.—For example, article 2 of the Treaty of August 13, 1803, with the Kaskaskias^4^ provides that—

   The United States will take the Kaskaskin tribe under their immediate care and patronage, and will afford them a protection as effectual against the other Indian tribes and against all other persons whatever as is enjoyed by their own citizens. And the said Kaskaskia tribe do hereby engage to refrain from making war or giving any insult or offence to any other Indian tribe or to any foreign power, or to citizens of the United States or of the State of Illinois, without first obtaining the approbation and consent of the United States. (P. 78.)

Similar provisions are contained in other treaties^4^.

In construing a similar provision, the Supreme Court said: ^14^ * * * By this treaty [Treaty of Hopewell] the Cherokee were recognized as one people, composing one tribe or nation, but subject, however, to the jurisdiction and authority of the Government of the United States, which could regulate their trade and manage all their affairs. (P. 295.)

Treaties with many of the other tribes left no doubt of the protectorate of the United States over them. ^14^

In many respects this relationship is similar to that established in a great variety of cases between great powers and small, weak or backward states. Thus the limitations upon Indian law making and upon jurisdiction which appear in some treaties, may be likened to the limitations imposed upon the jurisdiction of certain oriental states, such as China, over the nationals of western countries residing within their territories.

The practical inequality of the parties must be borne in mind in reading 'Indian treaties. It explains the presence of many clauses and the frequency with which similar or identical provisions appear in many Indian treaties during certain periods. ^14^ 2. Exclusive trade relations. ^14^ The political dependence of the Indian tribes upon the Federal Government implied, and was implied by, their economic dependence. This economic dependence found expression in agreements by the tribes not to sell real or personal property or otherwise have commercial dealings with other sovereignties than the Federal Government or with their citizens or even with citizens of the United States not authorized by the Federal Government to engage in such transactions.

In some cases, these undertakings were explicit, as in Article 10 of the Treaty of November 10, 1808,^11^ whereby the Osages disclaimed all right to

   • • • cede, sell or in any manner transfer their lands to any foreign power, or to citizens of the United States or inhabitants of Louisiana, unless duly authorized by the President of the United States to make the said purchase or accept the said cession on behalf of the government.

In other cases, the exclusiveness of economic relations with the Federal Government was implicit in agreements that the United States "shall have the sole and exclusive right of regulating the trade with the Indians." ^19^ Occasionally a tribe was given power to regulate trade and intercourse, "so far as may be compatible with the constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indians," ^20^ or was empowered to veto the granting of a trading-license to trade within certain areas. ^21^

Some treaties provided for the appointment of an agent to trade with the Indians, ^22^ and established trading posts or designated places for trade. ^23^ Occasionally Indians were prohibited from trading outside the limits of the United States, ^24^ or were required to apprehend foreigners or other unauthorized persons coming "into their district of country, for the purposes of trade or other views," and to deliver them to federal officials. ^25^

Also see Treaty of January 3, 1876, with the Choctaw Nation, Arts. 8, 9, 7 Stat. 21.

Sometimes this power was granted for mutual considerations. Treaty of July 8, 1825, with the Chippewa Tribe, Art. 4, 7 Stat. 255; Treaty of July 30, 1825, with the Belanda-etoa or Minnetaree Tribe, Art. 5, 7 Stat. 261.

The Treaty of December 30, 1849, Arts. 1 and 4, 9 Stat. 984, provided for exclusive jurisdiction of the United States over the Indian territory to be ceded to it by the Osage Tribe and of the United States and extending to these Indians the trade and intercourse laws already applicable to other tribes. Also see Treaty of September 9, 1849, with the Navajos, Art. 3, 9 Stat. 974. Some of the treaties did not contain such sweeping provisions, but merely provided that "the United States agree to admit and license traders to hold intercourse with said tribe [the Chippewa tribe], under mild and equitable regulations." Treaty of June 9, 1825, with the Ponca Tribe, Art. 4, 7 Stat. 247. For similar provisions see Treaty of June 22, 1825, with the Cheyennes and Yankton and Yankton tribes of the Sisseton. Art. 4, 7 Stat. 250; and Treaty of July 22, 1825, with the Siouan and Ogalalla Tribes of Sioux, Art. 7, 7 Stat. 232. at


Treaty of September 17, 1778, with the Delaware, Art. 5, 1 Stat. 47.


Treaty of September 17, 1778, with the Delaware, Art. 5, 1 Stat. 47.

Treaty of July 5, 1825, with the Siouan and Ogalalla Tribes, Art. 3, 7 Stat. 255; Treaty of July 6, 1825, with the Chippewa Tribe, Art. 4, 7 Stat. 252; Treaty of January 9, 1879, with the Waunakes, Art. 7, 8 Stat. 8; Treaty of August 3, 1879, with the Waunakes and other tribes, Art. 8, 7 Stat. 49.

Treaty of December 26, 1854, with the Nez peppers and other tribes, Art. 12, 10 Stat. 1132.

Treaty of December 26, 1854, with the Ottowa and Missouri Tribe, Art. 4, 7 Stat. 277; Treaty of September 30, 1825, with the Pawnees, Art. 4, 7 Stat. 27.

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^11^ 7 Stat. 70. ^14^ The Treaty of August 7, 1790, with the Creek Nation, Art. 2, 7 Stat. 35, provides that:

   The undersigned Kings, Chiefs, and warriors, for themselves and all the Creek Nation, to be considered as part of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the protection of the United States, and of no other sovereign whatsoever; and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State. (P. 285.)

The Treaty of November 17, 1807, with the Ottoways and others, Art. 7, 7 Stat. 105, provides that:

   The said nations of Indians acknowledge themselves to be under the protection of the United States, and to no other Power, and will prove by their conduct that they are worthy of so great a blessing.

Compare the following excerpt from the first section of the law passed by the Georgia legislature on October 31, 1787, quoted in 2 Op. A. G. 110, 124 (1828):

   • • • That from and immediately after the passing of this act, the Creek Indians shall be considered as out of the protection of this State; and it shall be lawful for the government and people of the Creek Nation to be put to death or capture the said Indians whenever they may be found within the limits of the State. • • •. (P. 124-125)


E. D. Dickinson, The Equality of States in International Law (1920), P. 114.

For example Treaty of September 26, 1825, with the Ottowa and Missourias, 7 Stat. 277, and Treaty of September 30, 1825, with the Pawnees, 7 Stat. 279; Treaty of October 28, 1867, with the Chippewa-Arapaho Tribes, Art. 11, 15 Stat. 593, and Treaty of April 29, et seq., 1868, with the Sioux, Art. 11, 16 Stat. 635. Also see Chapter 8, sec. 18.

Of, Chapter 18.
3. Representation in Congress.—Further light on the relations between the tribes and the Federal Government may be found in treaties which provided for the sending of Indian delegates to Congress. This practice was explained in the report of the House Committee on Indian Affairs on the Trade and Intercourse Act of 1834.

The proposition for allowing Indians a delegate is not now for the first time brought forward. It was first suggested in 1778, and in the first treaty ever formed by the United States with an Indian tribe. The treaty with the Delawares of the 17th September, 1778, contains the following article: “And it is further agreed on, by the contracting parties, (should it, for the future, be found conducive to the interests of both parties,) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress: Provided, Nothing contained in this article is to be considered as conclusive until it meets with the approbation of Congress.”

In the treaty of Hopewell, of 1785, is the following article: “Article 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.”

In the treaty with the Choctaws, of September, 1830, they requested the privilege of having a delegate in the House of Representatives; and the treaty states that “the commissioners do not feel that they can, under a treaty stipulation, accede to the request, but at their desire present it in the treaty, that Congress may consider of and decide the application.”

The proposition is now presented to Congress, with the decided opinion of the committee that it ought to receive a favorable consideration. (Pp. 21-22)

This recommendation was never effectuated.

4. Congressional power.—The extent to which Indian treaties conferred or confirmed congressional power to legislate over Indian affairs is the subject of a separate inquiry. For the present it is sufficient to note that federal statutes have been extended over Indian country by the mere force of a treaty, and that treaties sometimes provided for the creation of United States courts in the Indian country. Thus, for example, Article 2 of the Treaty of October 4, 1842, with the Chippewa Indians provides in part:

The Indians stipulate * * * that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until other wise ordered by Congress.

Article 7 of the Treaty of October 2, 1865, with the Chippewa Indians reads:

* * * The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States.

The Treaty of February 27, 1855, with the Winnebago Indians provided:

The laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes, shall continue and be in force within the country herein provided to be selected as the future permanent home of the Winnebago Indians, and those portions of said laws which prohibit the introduction, manufacture, use, or traffic in, ardent spirits, in the Indian country, shall continue and be in force within the country herein ceded to the United States, until otherwise provided by Congress.

5. Administrative power.—The President was frequently granted considerable power by treaties. He was authorized to establish trading posts; to designate places for trade; to appoint agents; to arbitrate claims of whites against Indians and Indians against whites; to arbitrate territorial and other difficulties between tribes; to prescribe the time of the removal and settlement of Indians; to determine whether grants of land to certain Indians shall be conveyed; to dispose of certain reserved lands as he sees fit; to give reservations to the headmen of a tribe, or cattle, or agricultural aid; to extend to an Indian tribe “from time to time, such benefits and acts of kindness as may be convenient, and seem just and proper” to him; to decrease the amount of annuities in proportion to any annual decrease of the Poncas, and stop the payment of annuities in the event that satisfactory efforts to advance and improve their condition were not made; to approve attorneys chosen by the chiefs and headmen; to invest tribal money in stocks; to make payments to the relations and friends of Indians; and to receive complaints of injuries done by individuals to the Indians and use such prudent means “as shall be necessary to preserve the said peace and friendship” with an Indian tribe. Article 7 of the Treaty of September 30, 1809, with the Delawares and others provided in part:

* * * when any theft or other depredation shall be committed by any individual or individuals of one of the tribes above mentioned, upon the property of any individual or individuals of another tribe, the chiefs of the party injured shall make application to the agent of the United States, until otherwise provided by treaty or law:

See sec. 4B. infra.

See Chapter 5. sec. 2.


Treaty of July 10, 1866, with the Cherokees, Art. 7, 14 Stat. 799.

Pres. 7 Stat. 591.


Art. 8. 10 Stat. 1172.