

1984

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Recommended Citation

Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 Fordham L. Rev. 315 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol53/iss2/5>

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Cover Page Footnote

The author wishes to acknowledge with special appreciation the help of Gregory Buesing, formerly associated with the Boston Indian Council, who provided her with much of the original information concerning the issues discussed herein.

THE MEDICINE LINE: A BORDER DIVIDING TRIBAL SOVEREIGNTY, ECONOMIES AND FAMILIES

SHARON O'BRIEN*

INTRODUCTION

AGAIN and again Blackfeet warriors fleeing northward after a raiding attack watched with growing amazement as the pursuing troops of the United States Army came to a sudden, almost magical stop. Again and again, fleeing southward, they saw the same thing happen as the Canadian Mounties reined to an abrupt halt. The tribes of the Blackfeet Confederacy living along what is now the United States-Canadian border came to refer to that potent but invisible demarcation as the "Medicine Line." It seemed to them almost a supernatural manifestation. The Confederacy members had hunted, roamed, prayed and allied with tribes from northern Alberta and Saskatchewan all the way down to Yellowstone. For these Indian Nations, the "Medicine Line" was nearly impossible to comprehend: Man did not divide a land; rather, rivers and mountains interrupted the land's unity.¹

American Indian nations currently face serious problems caused by a geopolitical border not of their making. This border is an arbitrary barrier to their sovereignty and a sunderer of their political institutions, tribal membership and even family cohesion. It thus seriously impedes tribal political, economic, and social development.² More than thirty

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1. See Letter from Vicky Santana, Blackfoot Attorney, to U.S. Customs Service (Aug. 8, 1978) (re: Blackfeet Border Problems) (available in files of *Fordham Law Review*) [hereinafter cited as Santana Letter].

2. When crossing the border, Indian people frequently have to deal with any of twenty different Canadian and American law enforcement agencies, each with differing policies and procedures. See *infra* notes 34-51, 58-105. On behalf of member tribes, the National Congress of American Indians (NCAI) and the National Indian Brotherhood (NIB) have initiated and forwarded to government agencies numerous resolutions asking for assistance in settling border difficulties. See, e.g., N.C.A.I. Res. 81-9-IR (1980) (urging contact with Canadian and United States governments, and the appointment of liaison officials to deal with the Indian people in solving border problems); N.I.B. Res. 17, 18, 27, 29 (1977) (passed at Eighth Annual General Assembly) (establishing a joint NCAI/NIB committee to seek assistance in welfare, education, employment, housing and other problems facing border tribes). During the late 1970's, NCAI and NIB held several meetings to work out cooperative proposals and resolutions to their mutual problems. The Blood Tribe established a border committee in the early 1980's and has been negotiating with the Canadian government for legislation to permit the import and export of certain tariff-free goods. See Notice of Establishment of a Border Committee Pursuant to an Agreement Between the Minister of Indian Affairs and the Blood Tribe

tribes on the northern border are affected, including members of the Wabanaki and Iroquois Confederacies, the Ojibwe, Ottawa, Lakota, Salish, Colville, several tribes of western Washington, and the Haida, Tlingit, and Tsimshian of Alaska and Canada.³

The United States and England have signed more than twenty treaties defining the United States-Canadian boundary. Among the more important are the Treaty of Paris,⁴ the Jay Treaty,⁵ the Treaty of Ghent,⁶ the Webster-Ashburton Treaty,⁷ the Oregon Treaty,⁸ and the treaty establishing the Canadian-Alaskan line.⁹ Indian nations, which in many instances still held control of the relevant border area when these treaties were signed, are mentioned in only the Jay Treaty and the Treaty of Ghent.

This Article reviews the tribal rights guaranteed in the Jay Treaty and Treaty of Ghent. It then examines the political, economic and cultural problems faced by border tribes and analyzes the United States' and Canada's positions on tribal border rights. Finally, it explores possible solutions to the border problems.

I. THE JAY TREATY AND THE TREATY OF GHENT

The English and the rebelling colonists each courted the allegiance and assistance of Indian Nations during the War of Independence. Tribes fought on each side as equals, playing a visible and important role.¹⁰ At

(available in files of *Fordham Law Review*) [hereinafter cited as Notice of Establishment of a Border Committee].

3. Similar problems are experienced by the southern tribes such as the Yaquis and Kickapoo whose members reside in Arizona and Sonora and other areas which straddle the United States-Mexico border. See Federal Agencies Task Force—Dep't of the Interior, American Indian Religious Freedom Act Report on Pub. L. No. 95-341, at 74 (1979) (dealing with problems of the Yaquis) [hereinafter cited as Religious Freedom Report]; Starr and Loshbaum, *The Tribe Without a Country*, Newsweek, Mar. 22, 1982, at 39 (dealing with problems of the Kickapoo); N. Y. Times, Jan. 14, 1985, at A2, col. 1 (same).

4. Treaty of Paris, Sept. 3, 1783, United States-Great Britain, 8 Stat. 80, T.S. No. 104 [hereinafter cited as Treaty of Paris].

5. Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105 [hereinafter cited as Jay Treaty].

6. Treaty of Peace and Amity, Dec. 24, 1814, United States-Great Britain, 8 Stat. 218, T.S. No. 109 [hereinafter cited as Treaty of Ghent].

7. Treaty of Boundaries, Slave Trade, Extradition, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

8. Treaty of Boundaries, June 15, 1846, United States-Great Britain, 9 Stat. 869, T.S. No. 120.

9. Convention of Boundaries: Alaska and Canada, Jan. 24, 1903, United States-Great Britain, 32 Stat. 1961, T.S. No. 419. For a collection of all the treaties between the United States and Great Britain, see 12 C. Bevens, *Treaties and Other International Agreements of the United States of America 1776-1949* (1974).

10. With a few important exceptions the majority of the Indian nations sided with the British. See V. Vogel, *This Country was Ours: A Documentary History of the American Indian* (1975). The colonists were able to win the support of two of the six Iroquois Confederacy Nations, the Oneida and Tuscarora. See W. Washburn, *The Indian in*

the war's end, the Indian Nations fully expected a recognition of their efforts and the protection of their rights.

In the Treaty of Paris, which ended the war, England ceded title and sovereignty over the thirteen colonies to the new United States.¹¹ The western boundary of the new nation was the Mississippi River. The northern boundary ran roughly along the forty-fifth parallel, a line which bisected the homeland of several tribes. Much to the ire of Britain's Indian allies, and to a lesser extent of the British press and public, the treaty failed to mention Indian status or rights.¹² The Six Nations of the Iroquois Confederacy were particularly affected and outraged.¹³ King George had personally promised Joseph Brant, leader of the Mohawks, the continued possession of the Mohawk Valley in what is now New York State. Sir William Johnson, who had served as the Crown's ambassador to the Six Nations, assured them: "You are not to believe or even think that by the line which has been described it was meant to deprive you of an extent of your country which the right of the soil which belongs to you and is in yourselves as sole proprietors."¹⁴ Despite this reassurance, the Six Nations' concern proved correct.¹⁵

The Treaty of Paris did not end all hostility and mistrust between Britain and the United States. The rights of the Indian nations, the evacuation of British forts and issues of commercial relations caused continued friction between the two countries.¹⁶ Further fighting between England

America 149 (1975). By splitting the large forces of the Iroquois Confederacy, *see id.*, the colonists may have guaranteed their eventual victory in the Revolutionary War.

11. *See* Treaty of Paris, *supra* note 4, 8 Stat. at 81.

12. "Twenty-five nations of Indians made over to the United States [and in return] not even that solitary stipulation which our honour should have made us insist upon, . . . a place of refuge for those miserable persons . . . some haven for those shattered barks to have been laid up in quiet." J. Combs, *The Jay Treaty* 4 (1970) (quoting Speech of Earl of Carlisle in the House of Lords, XXIII *The Parliamentary History of England* 377 (1806-1820)) (ellipses in original).

13. Leaders of the Iroquois Confederacy defiantly told General Maclean, British commander at Niagara, that the King "had no right Whatever to grant away to the States of America, their Rights or properties without a manifest breach of all justice and Equity, and they would not submit to it." B. Graymont, *The Iroquois in the American Revolution* 260 (1972).

14. W. Mohr, *Federal Indian Relations 1774-1788*, 118 (1933). In 1791, the Governor General of British North America again gave assurance:

But Brothers, this line, which the King then marked out between him and the States . . . could never have prejudiced your rights. Brothers, the King's rights with respect to your territory were against the nations of Europe; these he resigned to the States. But the King never had any rights against you, but to such parts of the country as had been fairly ceded by yourselves with your own free consent, by public convention and sale. How then can it be said that he gave away your Lands?

S. Bemis, *Jay's Treaty 158-59* (2d ed. 1975) (quoting Governor General of British North America Lord Dorchester's speech to a Deputation of the Confederated Indian Nations, Quebec (August 15, 1791)).

15. This, of course, is the focus of this Article. *See infra* notes 36-185 and accompanying text.

16. *See* S. Bemis, *supra* note 14, at 1-20.

and the United States appeared imminent until France declared war on England in 1792.¹⁷ Then, because of its concern with France, England moved to neutralize the American threat by offering to negotiate another treaty with her former colonies.¹⁸

On November 19, 1794, the United States and Great Britain signed the Treaty of Amity, Commerce, and Navigation—the Jay Treaty—which established a Joint Commission to settle boundary disputes, re-established American trade with the West Indies, guaranteed British evacuation of forts in the old Northwest and recognized tribal rights vis-a-vis the border.¹⁹ Article three, which pursuant to article twenty-eight was to be permanent,²⁰ affirmed that the border was to be nonexistent for the Indian nations:

It is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America . . . and freely to carry on trade and commerce with each other.

. . . [N]or shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.²¹

The rights of free passage guaranteed in the Jay Treaty were reaffirmed between the two countries two years later.²² In 1795, however, the United States and several tribes, including but not limited to the Wyandot, Delaware, Shawnee, Chippewa and Miami,²³ concluded a treaty that stipulated that all traders residing at any Indian town or hunting camp had to hold a license issued by the United States.²⁴ Great Britain considered this treaty an infringement on article three of the Jay Treaty, be-

17. See *id.* at 135-60, 181-82, 184.

18. See *id.* at 221.

19. See Jay Treaty, *supra* note 5.

20. *Id.* art. XXVIII, 8 Stat. at 129. Article 28, the last article of the Jay Treaty, stipulated that "the first ten articles of this treaty shall be permanent," *id.*, while the remaining articles (except the twelfth) were to continue in force for twelve years, *id.*

21. *Id.* art. III, 8 Stat. at 117-18.

22. Explanatory Article to the Third Article of the Jay Treaty, May 4, 1796, United States-Great Britain, 8 Stat. 130, T.S. No. 106 [hereinafter cited as Explanatory Article].

23. See Treaty with the Wyandots, and other Indian Tribes, Aug. 3, 1795, United States-Wyandot, Delawares and Other Indian Tribes, 7 Stat. 49.

24.

Trade shall be opened with the said Indian tribes; . . . but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendant of the department north-west of the Ohio . . . and if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendant or his deputy, to be dealt with according to law.

Id. art. VIII, 7 Stat. at 52.

cause it interfered with the British-Indian fur trade.²⁵ Therefore, in 1796 the United States and Great Britain concluded an Explanatory Article that repeated the stipulations of article three of the Jay Treaty.²⁶

The Jay Treaty and the Explanatory Article did not end the suspicion and competition between the two nations. During the War of 1812 both sides again relied on Indian allies: Thus many of the negotiating points established by the British at the outset of the peace talks concluding the war concerned the rights of the Indian nations.²⁷ Fearful of an American expansion into Canada, the British demanded that the United States recognize an independent Indian buffer state in the old Northwest.²⁸ The British argued that the United States had previously recognized the existence of such a state de facto by making treaties with the Indian nations.²⁹ Negotiations stalled for months over this point. The American delega-

25. These British doubts are evidenced by the 1796 signing of an Explanatory Article reasserting free trade rights. See Explanatory Article, *supra* note 22, 8 Stat. at 130-31 (Explanatory Article signed to alleviate doubts created by treaty between United States and Indian tribes); S. O'Brien, *The Application of International Law to the Legal Status of American Indians* 49 (1978) (unpublished Ph.D. dissertation in political science, University of Oregon) (Explanatory Article was necessary to indicate that the Jay Treaty was not abrogated by subsequent treaty between the United States and Indian tribes) (available in files of *Fordham Law Review*).

26. The Explanatory Article stated:

That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

Explanatory Article, *supra* note 22, 8 Stat. at 130-31.

A year after the Jay Treaty was signed, British Deputy Superintendent General of Indian Affairs, Alexander McKee explained Article Three to the Ojibway Potawatomi, Huron and Ottawa on Nations Aug. 30, 1795 at the Chenail Escarte, Ontario:

[The King] has . . . taken the greatest care of the rights and independence of all the Indian nations who by the last Treaty with America, are to be perfectly free and unmolested in their trade and hunting grounds and to pass and repass freely undisturbed to trade with whom they please.

Atkey, *Three Nations Three Views*, Ontario Indian 14, 16-17 (1983) (quoting Public Archives of Canada, R.G. 10) (available in files of *Fordham Law Review*).

27. See N. Atcheson, *A Compressed View of the Points to be Discussed in Treating with the United States of America* 5 (1814).

28. The ceded country was inhabited by numerous tribes and nations of Indians, *who were independent* both of us and of the Americans. They were the real proprietors of the land, and we had no right to transfer to others what did not belong to ourselves. This injustice was greatly aggravated by the consideration, that those aboriginal nations had been our faithful allies during the whole of the contest, and yet no stipulation was made in their favour.

Id. (emphasis in original).

29. See S. Bemis, *supra* note 14, at 160; S. O'Brien, *supra* note 25, at 48-49.

tion, headed by John Quincy Adams, refused to concede. The British finally yielded, but only after the United States agreed in article nine of the Treaty of Ghent to restore tribal rights to the 1811 status quo:

The United States of America engage . . . to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities . . . And His Britannic majesty engages . . . to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled, to in one thousand eight hundred and eleven, previous to such hostilities.³⁰

As promised in article nine, the United States negotiated a separate treaty in 1815 with the Indian nations involved in the war.³¹ Article two of the Treaty of Spring Well restored to the Chippewa, Ottawa, and Potawatimie tribes "all the possessions, rights and privileges, which they enjoyed, or were entitled to, in the year one thousand eight hundred and eleven, prior to the commencement of the late war with Great Britain."³² Article three pardoned the hostilities of the Wyandot, Delaware, Seneca, Shawanoe and Miami tribes and agreed "to permit the chiefs of their respective tribes to restore them to the stations and property which they

30. Treaty of Ghent, *supra* note 6, art. IX, 8 Stat. at 222-23. At a council meeting held April 24, 1815 at Burlington, Ontario, with representatives of, among others, the Hurons, Delawares, Chippewas, Sauks, Creeks, Moravians, and Six Nations, British Deputy Superintendent General of Indian Affairs William Claus explained article nine of the Treaty of Ghent:

I am further instructed to inform you that in making peace with the Government of the United States of America, your interests were not neglected nor would Peace have been made with them had they not consented to include you in the Treaty which they at first refused to listen to. I will now repeat to you one of the Articles of the Treaty of Peace which secures you the Peaceable possession of all the country which you possessed before the late War, and the Road is now open and free for you to pass and repass it without interruption.

Atkey, *supra* note 26, at 17.

In a letter to the Passamaquoddies from the Chiefs at Caughnawaga in 1870, the Mohawks sent a wampum which described the guarantees given to all the tribes in the Treaty of Ghent:

In answer also to the Wampum which you have sent to us in return therefore we send to you ours, specifying our treaty which took place A.D. 1810 [sic]. Therefore, all nations and tribes of Indians from the East and West and from the North and South wherein our Chiefs from every nation and tribe were present, therefore we should bind the good-doing of our ancestors in this treaty of peace. The English and American generals were present having freed all the Indians of Wars incurring between them, and no Boundary line should exist between us Indian Brethren, not any duties, taxes or customs should be levied on us.

Letter from the Chiefs at Caughwanaga to the Passamaquoddies, Nov. 27, 1870, reprinted in *The Circle* (Aug. 1977) (available in files of *Fordham Law Review*).

31. See Treaty of Spring Wells, September 8, 1815, United States—Wyandot, and other Tribes of Indian, 7 Stat. 131.

32. *Id.*, art. II, 7 Stat. at 131.

held previously to the war."³³

The United States and Canada were at first willing to leave tribes free to travel and govern themselves. By the 1820's, however, the United States began instituting laws and policies to bring tribes under federal control.³⁴ The guarantees of the Jay Treaty, the 1796 Explanatory Article, the 1815 Treaty of Ghent and the 1815 Treaty of Spring Well, and the assurance of the British negotiators to the various tribes were soon forgotten. Today, Indian nations are split by the border, living under diverse laws and holding different rights. The dissimilar nature and nonreciprocity of these laws have created major political and economic problems for border tribes. As will be seen in the next part of this Article, today's border divides tribal governments, lands and families, and impedes freedom of movement and economic development. The St. Regis Mohawk reservation, which straddles the border, offers the most graphic example.

II. MODERN POLITICAL, CULTURAL AND ECONOMIC PROBLEMS CAUSED BY THE MEDICINE LINE

The 1783 Treaty of Paris fixed the international boundary through the heart of the Mohawk Nation's homeland.³⁵ On May 31, 1796, the Seven Nations, a confederation of Christianized tribes composed mainly of Mohawk bands, ceded most of their New York lands to the state while retaining possession of only approximately 14,000 acres around their village of St. Regis.³⁶ Today this area is known as the St. Regis Reservation. The Mohawk Nation also holds 24,000 acres on the Canadian side, known as the Caughnawaga Reserve. The Canadian side is comprised partly of two islands, making it necessary for some residents of the Canadian side to cross through the United States to reach other Canadian areas. The Canadian reserve lies both in Ontario and Quebec, thereby creating further jurisdictional problems.

The Mohawks had always governed themselves and their land free from outside interference. Today three competing governments rule over the 7,000 members: The St. Regis Mohawk Tribal Council, established in 1824, administers the American side;³⁷ the Band Council, organized under the Canadian Act in 1888, controls the Canadian portion,³⁸ and the traditional Council of Chiefs, through which the Mohawks function as the Keepers of the Eastern Door of the Iroquois Longhouse or the

33. *Id.*, art. III, 7 Stat. at 131.

34. See A. Gibson, *The American Indian* 534 (1980).

35. See Treaty of Paris, *supra* note 4, art. II, 8 Stat. at 81-82.

36. See Treaty with the Seven Nations of Canada, May 31, 1796, United States-Seven Nations of Canada, 7 Stat. 55 [hereinafter cited as Treaty with the Seven Nations].

37. See J. Frisch, *Revitalization, Nativism and Tribalism Among the St. Regis Mohawk* 84-85 (1970) (unpublished Ph.D. dissertation in Anthropology, Indiana University) (available in files of *Fordham Law Review*).

38. See *id.* at 91-92.

Confederacy of the Houdensaunee, continues to operate.³⁹ Thus, cohesive economic development, intrareserve business transactions, planning, cost sharing and social service delivery is virtually impossible.

A. Tribal Customs and Membership

The problems experienced by the American Blackfeet and Canadian Bloods are similar to those of the Mohawks. Originally members of the same Confederacy, the American Blackfeet settled on the Blackfeet reservation in northern Montana in the mid-1800's. The Bloods, made "Canadian" Indians by the boundary, were promised a reserve contiguous to that of the Blackfeet. The Canadian government, however, fearful of an alliance, established the reserve ten miles north of the border.⁴⁰ Today there is considerable intermarriage and contact through social, recreational and religious events such as sports tournaments, rodeos, giveaways and the Sun Dance. These gatherings form the center of tribal cultural and religious life. Tribal members often trade animals, meat, berries, roots, herbs, handmade goods and medicine bundles at these events. Canadian and American customs laws, however, forbid the import and export of certain plants and animals that are significant in ceremonial life.⁴¹ In addition, these laws require a search of all goods, thereby inhibiting the exercise of tribal culture and religion.⁴² For example, for many tribes the medicine bundle is the most sacred of all articles. Its search and mishandling by outsiders destroys its spiritual and ceremonial use.⁴³

The situation is further complicated by differing tribal membership criteria. Indians in the United States determine membership according to tribal law.⁴⁴ The "American" Mohawks, for example, follow the traditional matriarchal systems; that is, children of enrolled mothers are eligi-

39. *See id.*

40. Santana Letter, *supra* note 1.

41. *See* Religious Freedom Report, *supra* note 3, at 73-75.

42. *See id.*

43. *See id.* at 73. For a discussion of the importance of the medicine bundle, see VII E. Stone, *Clio Medica: Medicine Among the American Indians* 12-13 (1962); V. Vogel, *American Indian Medicine* 27-28 (1970). The American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. 1996 (1982)), instructed federal agencies to review their practices to ensure that they did not conflict with Indian religious rights. The U.S. Customs Service, however, still maintains that it is required by law to search all articles passing the border. This was asserted in a telephone conversation in early April, 1983, between the author and Mr. Stuart Seidel, Assistant Chief Counsel of the U.S. Customs Service. *Cf.* Letter from Sharon O'Brien, consultant to the NCAI, to Stuart Seidel (April 18, 1983) (follow-up letter to the aforementioned conversation) (available in files of *Fordham Law Review*).

44. Tribes in the United States generally determine tribal membership by blood quantum, descendency from a tribal roll, succession to the membership status of the mother or father (depending upon tradition), residency or a combination of these criteria. S. O'Brien, *Tribal Governments: The Road From Freedom to Paternalism to Self-Determination* 240-41 (1984) (unpublished book manuscript currently under review for publication) (available in files of *Fordham Law Review*).

ble for membership.⁴⁵ On the Canadian side, however, federal and not tribal law determines band membership. According to the Canadian Indian Act, women and children assume the status of their mates and fathers respectively.⁴⁶ This means that a non-Indian woman who marries an Indian becomes Indian in the eyes of the Canadian government. Conversely, an Indian woman who marries a non-Indian, a nonstatus Indian, or a non-Canadian Indian loses her status and rights as an Indian under Canadian law.⁴⁷ Consequently, Canada's interference in the Mohawk Nation's right to determine its own membership means that the child of a full blooded Mohawk woman from the Canadian side and a full blooded Mohawk man from the American side is ineligible for membership in either "branch" of the Mohawk nation.

A similar membership dilemma is faced by all border tribes. The border of Washington and British Columbia divides the 5,000 members of the Okanagon bands. Approximately half live on the Canadian Okanagon Reserve. The remainder live 110 miles to the south on the Colville reservation in Washington. If an Okanagon or other Colville tribal woman marries a Canadian Indian man, she and her children, according to Canadian law, are enrolled in her husband's band.⁴⁸ She and her children, however, are automatically disenfranchised from her tribe, because most tribes on the American side forbid dual enrollment.⁴⁹ Thus, the interjection of the Canadian government into the determination of tribal membership has disenfranchised many deserving Indian individuals.

45. See J. Frisch, *supra* note 37, at 89.

46. See Indian Act, Can. Rev. Stat., ch. I-6, § 12(1)(b) (1970).

47. In practice, such women and their children lose the right to vote in reserve matters, own property on the reserve, obtain a free education, claim a tax-free exemption and be buried on the reserve. In 1977, Sandra Lovelace, a Maliseet Indian from the Tobique Reserve in northern New Brunswick, filed a complaint against Canada with the Human Rights Committee of the United Nations under the Optional Protocol to the International Covenant on Civil and Political Rights, International Bill of Rights (1981) [hereinafter cited as Int'l Bill of Rights]. In her complaint she charged that section 12(1)(b) of the Indian Act, Can. Rev. Stat. ch. I-6, § 12(1)(b) (1970), violated the International Covenant on Civil and Political Rights, which Canada had signed. Section 12(1)(b) states that "[t]he following persons are not entitled to be registered, namely: . . . (b) a woman who married a person who is not an Indian . . ." *Id.* In 1981, the Human Rights Committee ruled that the Indian Act violated article 27 of the Covenant, which reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Int'l Bill of Rights, *supra*, art. 27; see *In re Sandra Lovelace*, Decision of the Human Rights Committee of the United Nations, G/SO 215/51 CANA (8) R.6/24, at 162-64 (July 30, 1981) (available in files of *Fordham Law Review*).

48. See *supra* note 46 and accompanying text.

49. See, e.g., Rev. Const. of the Apache Tribe of the Mescalero Reservation art. IV, § 2 (1964) (no person is eligible for membership if enrolled as a member of another tribe); Rev. Const. and Bylaws of the Minnesota Chippewa Tribe art. II, § 2 (1936) (same); Const. of the Paiute Indian Tribe of Utah art. II, § 3 (1934) (same); Const. of the Seminole Nation of Oklahoma art. II (1969) (same); Const. of the Zuni Tribe of New Mexico art. II, § 5 (1934) (same).

B. Tribal Recognition

One of the most serious and fundamental problems generated by the border has to do with recognition of tribes. The situation of the Micmac, Maliseet and Abenaki offer prime examples of this problem. These three tribes, along with the Penobscot and Passamaquoddy, were members of the Wabanaki Confederacy, an alliance that existed between the seventeenth and nineteenth centuries.⁵⁰ The aboriginal homelands of these five tribes extend from Cape Breton, Nova Scotia to Vermont. The Wabanaki Confederacy sided with the United States during the Revolutionary War, concluding treaties with Massachusetts in 1776⁵¹ and 1794⁵² and an unratified treaty with the United States in 1777.⁵³ Today, approximately 11,500 members of the Micmac and Maliseet Nations are enrolled in one of the 34 Canadian reserves set aside for their use. The remaining members of the Micmac and Maliseet tribes were born in the United States. Despite earlier treaties with these tribes, the United States recognizes only the Houlton Band of the Maliseets.⁵⁴ The remaining United States-born members have no federal status, rights or protected land base.⁵⁵ The Abenakis are in a similar predicament. Canadian law

50. See Walker, Conkling and Buesing, *A Chronological Account of the Wabanaki Confederacy*, in *Political Organization of Native North Americans* 41-77 (E. Schusky ed. 1980). In 1978 the Micmacs, Maliseets, Passamaquoddies and Penobscots resurrected the traditions of the Wabanaki Confederacy. For the first time in over 100 years the tribes met at a joint council at the Penobscot reservation at Indian Island, Maine to discuss solutions to mutual problems. See *id.* at 78-79. A primary focus of this and successive meetings has been the discussion and passage of several resolutions dealing with border issues. See NCAI and World Assembly of First Nations, *Resolutions Submitted by the Wabanaki Conference* (July 16, 1982) (available in files of *Fordham Law Review*).

51. Treaty of Watertown, Mass., July 1776, State of Massachusetts Bay-St. John's and Mickmac tribes of Indians, *reprinted in Federal Regional Council of New England Report to the American Indian Policy Review Commission* app. 1 (Feb. 19, 1976) [hereinafter cited as *Regional Council Report*].

52. See *Regional Council Report*, *supra* note 51, at 2-3.

53. See *Description of the Treaty of Aukpaque*, July 1977, *Regional Council Report*, *supra* note 51, at app. 3 (original destroyed).

54. See *Maine Indian Claims Settlement Act of 1980*, Pub. L. No. 96-420, §§ 2(a)(5), 3(a), 94 Stat. 1785, 1785-86 (codified at 25 U.S.C. §§ 1721(a)(5), 1722(a) (1982)). Between 1969 and 1980 the Micmacs and the Maliseets were united in the Association of Aroostook Indians. Following the Federal recognition of the Maliseets in 1980, the Micmacs organized a separate Aroostook Band of Micmacs in 1982. Composed of approximately 600 Micmacs, this group is now petitioning for federal recognition. See *U.S. Micmacs: United for Federal Recognition*, Vol. 11, No. 13 *Micmac News*, September (A), 1982, at 4, 8.

55. Despite the lack of federal recognition, both Massachusetts and Maine recognize their treaty relationships with the entire Micmac and Maliseet nations. Since the early 1970s, Maine has provided scholarships and free hunting and fishing licenses to Micmacs and Maliseets living in the state, regardless of citizenship status. See *Me. Rev. Stat. Ann. tit. 20-A, §§ 12401-06* (1983); National Advisory Council on Indian Education, *Report on Scholarship Eligibility* 2 (June 12, 1978). In 1976, before a joint task force hearing of the American Indian Policy Review Commission, Lt. Governor Thomas P. O'Neill III emphasized Massachusetts' commitment to tribal people on both sides of the border:

Many native people in Massachusetts have a special relationship not only with the United States but also with Canada The relationship between the

recognizes and protects the rights of the Abenakis on the Odanak and Becancour Reserves,⁵⁶ but the United States does not recognize the Abenakis of Vermont, a tribe that thus possesses no federal tribal benefits and is barred by Canadian law from sharing in the tribal benefits on the Canadian side of the border.⁵⁷ Consequently, members of the same Indian nation possess vastly different land and government rights and receive vastly different social services.

C. *Indian Land Claims*

A related situation involves the withholding from Canadian Indians of award payments for lands taken in the United States. Most Indian land claims today are settled in the United States Claims Court,⁵⁸ and are limited to claims by Indians "residing within the territorial limits of the United States or Alaska."⁵⁹ Therefore, "Canadian" Indians belonging to tribes—such as the Haida, the Six Nations or the Maliseet—whose aboriginal lands extend into the United States, are cheated out of their lands.

This problem is vividly illustrated by the case of the Lakota. Follow-

tribes and the Commonwealth is of longer duration than that of the United States, and we recognize an obligation to these native people. It is our intent to meet this obligation. . . . [We propose that] an international conference be convened to clarify and fix the responsibility of each government for the members of these tribes.

Federal Regional Council of New England: Indians and the Northern Border—Testimony for The Select Commission on Immigration and Refugee Policy Hearing, addendum 1a (Nov. 19, 1979) (ellipsis in original) [hereinafter cited as *Indians and the Border*]. In 1976 Massachusetts Governor Dukakis issued an Executive Order recognizing the state's treaty obligations to *all* Maliseet and Micmac tribal members living in the state. *See id.* This includes many of the approximately 7,000 to 10,000 Canadian-born members of these tribes who live in the Northwest.

56. *See* Can. Dep't of Indian and Northern Affairs, Schedule of Indian Bands and Reserves (Dec. 1978).

57. The Abenakis do have a treaty relationship with the United States because they were a party to the Seven Nations Treaty of 1796. *See* Treaty with the Seven Nations, *supra* note 36. Congress, however, has never recognized them as such. On August 20, 1976, the Band Council of the Canadian Abenaki Reserves resolved:

That we, the Abenakis of Odanak and Becancour, recognize the Abenakis of the State of Vermont as our BROTHERS and request that:

1. The State of Vermont recognize the Indians of that State as Aborigines of the North American Continent.
2. To be treated and provided for by the State Government and the U.S. Federal Government (B.I.A.).
3. That their land claims be recognized.
4. That their hunting and fishing rights be recognized.

Abenakis of Odanak and Becancour, Band Council Res. (Aug. 20, 1976) (available in files of *Fordham Law Review*).

58. *See* 28 U.S.C. § 1505 (1982) (providing for Claims Court jurisdiction over certain Indian claims against the United States). Prior to 1978, Indian claims accruing before August 13, 1946 were heard before the Indian Claims Commission. *See* Indian Claims Commission Act of 1946, ch. 959, § 1, 60 Stat. 1049, 1049 (*amended* by Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990 (dissolving Commission)).

59. 28 U.S.C. § 1505 (1982).

ing the Powder River War in the 1870's, Lakota from the camps of Crazy Horse and Sitting Bull fled to Canada, where they settled on reserves in Saskatchewan.⁶⁰ In 1980, the United States Supreme Court ruled that the federal government owed the Lakota Nation \$102 million for the illegal taking of the Black Hills.⁶¹ Although their ancestors were also direct victims of the Black Hills land grab and the ensuing wars, the "Canadian" Sioux are ineligible for payment.⁶²

D. *Artificial Barriers to Social and Economic Movement*

Still another serious problem encountered by some tribal members is the denial of their aboriginal rights to move freely within their homelands. As discussed above, the Jay Treaty, the Explanatory Article, the Treaty of Ghent and the Treaty of Spring Wells purported to recognize and affirm the right of Indian Nations to pass the border freely,⁶³ but the mandate of those documents has not been fulfilled.

1. A Barrier to the Natural Movement of Indian Peoples

Until 1924, United States Immigration officials recognized the right of Canadian-born Indians to enter freely and remain in the United States without being classified as aliens.⁶⁴ According to the provisions of the 1924 Immigration Act, however, no alien ineligible for citizenship was to be admitted as an immigrant.⁶⁵ At the same time the Citizenship Act of 1924 extended citizenship to "all noncitizen Indians born within the territorial limits of the United States."⁶⁶ The two acts taken together meant that Canadian-born Indians were ineligible for admittance as immigrants.

In 1928, Paul Diabo successfully challenged this interpretation in *Mc-*

60. See A. Debo, *A History of the Indians of the United States* 240-41 (1979); J. Howard, *The Canadian Sioux* 33-35 (1984).

61. *United States v. Sioux Nation*, 448 U.S. 371 (1980). For the amount recovered, see *Sioux Nation v. United States*, 601 F.2d 1157, 1159 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980).

62. See 28 U.S.C. § 1505 (1982) (claims can only be made "in favor of . . . American Indians residing within the territorial limits of the United States or Alaska"). The Canadian Sioux bands, which live on four reserves, have organized the National Sioux Association to negotiate with Canada, the United States, and the "American" Sioux.

63. See *supra* notes 11-34 and accompanying text.

64. See *Indians and the Border*, *supra* note 55, at 6.

65. The Immigration Act of 1924, ch. 190, § 13(c), 43 Stat. 153, 162, *repealed*, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 403, 66 Stat. 163, 279, stated:

c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

66. Citizenship Act of 1924, ch. 233, 43 Stat. 253 (*replaced by* 8 U.S.C. § 1401(b) (1982)) (Indians born in the United States are citizens).

Candless v. United States ex rel. Diabo.⁶⁷ Diabo, a full-blooded Indian from the Caughnawaga Mohawk Reserve, Quebec, had for the previous thirteen years worked intermittently as an iron worker in the United States.⁶⁸ In 1925, Immigration officials arrested and deported him for failure to comply with United States immigration laws.⁶⁹ He petitioned for a writ of habeas corpus on the ground that as a member of a North American Indian tribe he was exempt from immigration laws as guaranteed under article three of the Jay Treaty.⁷⁰ The court agreed, finding that the right to pass the border freely was an inherent aboriginal right, a right recognized and affirmed but not created by article three of the Jay Treaty.⁷¹ As the district court had stated, "[f]rom the Indian[s]'s] viewpoint, he crosses no boundary line. For him this [boundary line] does not exist."⁷² In response to the *McCandless* decision, in 1928 Congress passed legislation exempting Indians from the Immigration Act of 1924.⁷³

In *United States ex rel. Goodwin v. Karnuth*,⁷⁴ the court's task was to determine who was an Indian for the purposes of exercising the Jay Treaty's free entry right. The practice of the Immigration and Naturalization Service (INS) was to interpret the treaty rights as being political rather than racial in nature.⁷⁵ It may have been that the rights recognized in the Jay Treaty and restored by the Treaty of Ghent were political,⁷⁶ because they were limited to "tribes or nations of Indians."⁷⁷ The court, however, reasoned that the latter passage of section 226a of the Immigration Act, which referred to "American Indians born in Ca-

67. 25 F.2d 71 (3d Cir. 1928).

68. *Id.* at 71.

69. *Id.*

70. *Id.* at 71-72.

71. *Id.* at 72. The court stated:

Evidently that article did not create the right of the Indian to pass over land actually in their possession, for, subject to the general dominant right of sovereignty claimed by all European nations based on discovery, the right of the Indian to possess the soil until he surrendered his right by sale or treaty has been recognized.

. . . [I]t would seem clear that [this] was not a temporary stipulation as to trade, commerce, mutual rights, and the like, but was in the nature of a *modus vivendi*, to be thereafter observed in the future by Canada and the United States in reference to the Indians.

Id.

72. *United States ex rel. Diabo v. McCandless*, 18 F.2d 282, 283 (E.D. Pa. 1927), *aff'd*, 25 F.2d 71 (3d Cir. 1928).

73. The Act of April 2, 1928, ch. 308, 45 Stat. 401 (*replaced by* 8 U.S.C. 1359 (1982)) states:

That the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.

74. 74 F. Supp. 660 (W.D.N.Y. 1947).

75. *Id.* at 663.

76. *See id.* at 662.

77. *See id.*; Treaty of Ghent, *supra* note 6, art. IX, 8 Stat. at 222.

nada,"⁷⁸ now defined the focus of these rights.⁷⁹ The court found that this statutory language was racially based and broader in its connotation than the language of the treaty.⁸⁰ In the case of a conflict between an act of Congress and a treaty, the one last in date prevails.⁸¹ Hence, the court concluded that the Jay Treaty rights were now racial rather than political in nature. This holding thus limited the enjoyment of Jay Treaty rights to Indians by birth, excluding those adopted into Indian tribes or families.⁸² This was consistent with Congress' passage of the Immigration and Nationality Act of 1952, which defined an American Indian as a person of at least fifty percent Indian blood quantum.⁸³

The rationale behind Congress' decision to deny free entry rights to Indians of less than fifty percent is unclear. It is possible that the Congress sought to restrict border rights by bringing the statute in line with the 1934 Indian Reorganization Act, which limits Bureau of Indian Affairs services to Indians of fifty percent blood quantum if they are members of federally unrecognized tribes.⁸⁴ Whatever the reason, the limitation of free entry rights to Canadian-born Indians of fifty percent or more blood quantum reduced the number of those potentially eligible

78. Act of April 2, 1928, ch. 308, 45 Stat. 401 (1928) (*replaced by* 8 U.S.C. § 1359 (1982)).

79. *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp. 660, 662 (W.D.N.Y. 1947).

80. *Id.* at 663. The court examined other statutes employing the term "American Indian" and found that "Indian" had been racially defined; for example, in section 206 of title 48 Indians are defined as "Natives of one-half or more Indian blood." *Id.* at 661 (quoting 48 U.S.C.A. § 206, *superseded*, 48 U.S.C. §§ 191-212 (1982) (admitting Alaska to Union)).

81. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

82. *See Goodwin*, 74 F. Supp. at 663.

83. Immigration and Nationality Act of 1952, ch. 477, § 289, 66 Stat. 163, 234 (1952) (codified at 8 U.S.C. § 1359 (1982)).

Nothing in this subchapter [dealing with admission of aliens, deportation, and alien registration] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Id. The law as it now reads is impossible to apply because Canada does not keep blood quantum records. For exemption purposes, the Immigration Department recognizes a band card issued by the reserve's band council or the Department of Indian Affairs in Ottawa, birth or baptism records, an affidavit from a tribal official, or identification from a recognized Indian provincial or territorial organization. *See* Office of the Indian Task Force, Federal Regional Council of New England, *United States Legal Rights of Native Americans Born in Canada 3* (1978) [hereinafter cited as *Indian Task Force Report*].

84. Wheeler-Howard (Indian Reorganization) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1982)). The Wheeler-Howard Act was originally drafted to identify people with 25% or more Indian blood as Indians. *See* 78 Cong. Rec. 11725-26 (1934). It was feared that this would include many people not heretofore members of Indian tribes and would thus confer government benefits on too many people at too great a cost. *See id.* at 11732. It was also felt that this 25% proposal would weaken the structure of existing tribes by including people not then sharing in tribal property, lands, money or government. *Id.* at 11734. Thus, Congress decided to adopt the 50% standard, and thereafter logically adopted it for purposes of the Immigration Act as well.

under the treaty rights guaranteed in 1815.⁸⁵

For those members meeting the statutory requirement, the American courts currently hold that the right to pass the border freely includes the right to visit, live and work in the United States, and to obtain social services and public benefits such as unemployment compensation and food stamps.⁸⁶ Tribal members cannot be deported, do not have to register at the Post Office as aliens and do not have to obtain work permits or alien ("green") cards.⁸⁷ But despite these legally recognized and defined rights, Canadian-born Indians frequently find that officials of the INS

85. See *supra* notes 30-34 and accompanying text.

86. See Indian Task Force Report, *supra* note 83, at 1-4; Correspondence from the Dep't of Human Services to Food Stamp Managers (Sept. 13, 1978) (re: Eligibility of Canadian Indians) (available in files of *Fordham Law Review*). Since the 1970's, a few federal and state agencies have altered their definition of Indian to allow the inclusion of Canadian-born Indians. This eligibility stems partly from the recognition that these Indians are members of tribes that possess a treaty relationship with the United States or a state, and partly from recognition that these Indians possess the Jay Treaty rights. See *Indians and the Border, supra* note 55, at addenda 1a-2a (regulations of Office of Native American Programs in Health and Human Services, the Department of Labor Employment and Training Administration and the Bureau of Indian Affairs (BIA) Federal Acknowledgement Program).

87. See Indian Task Force Report, *supra* note 83, at 1-8. Until 1978, questions remained as to the extent of the rights guaranteed under section 1359 of the Immigration and Nationalization Act of 1952, especially with regard to registration and deportation. The Immigration and Naturalization Service (INS) interpreted the section as exempting Canadian-born Indians from the pre-entry alien registration and visa requirements of the Act, 8 U.S.C. § 1301 (1982), but not from the post-entry alien registration and notification requirements, *id.* §§ 1302-1305, if their stay exceeded 30 days, *id.* §1302(a); see *Yellowquill*, 16 I. & N. Dec. 576, 578 (1978). In 1974, eight members of the Micmac, Maliseet, Penobscot and Passamaquoddy Indian tribes successfully challenged the INS's requirements for alien registration. In *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974), the court ruled that to interpret the term "to pass" in 8 U.S.C. § 1359 only in its technical sense, that is to mean that Indians may only cross the borders without obtaining visas as a condition of entry, was an improper limitation on their border crossing rights. 380 F. Supp. at 1221. Citing *McCandless v. United States ex rel. Diabo*, 25 F.2d 71 (3d Cir. 1928), the court reiterated that the right to pass was "an aboriginal right of . . . Indians to move freely within their own territory without regard to the International Boundary and free of the restrictions imposed by the immigration laws." *Akins*, 380 F. Supp. at 1220. Furthermore, the court ruled that to read the Jay Treaty rights in such a restrictive manner violated two cardinal principles of statutory construction: The language of treaties and statutes affecting Indians must be construed as the Indians themselves would have understood them, and "ambiguities in statutes and treaties conferring benefits on Indians [must] be resolved in favor of the Indians." *Id.* at 1221.

In 1943, the INS successfully recommended the deportation of a full-blooded American Indian on the grounds that he had become a public charge within five years of entry, from causes that arose prior thereto. See *A—*, 1 I. & N. Dec. 600, 604-05 (1943) (respondent had a syphilitic condition and suffered from arthritis prior to entry). *But cf. D—*, 3 I. & N. Dec. 300, 302-03 (1948) (Board of Immigration Appeals canceled order of deportation for respondent convicted of grand larceny, a crime committed after original entry). In *Yellowquill*, 16 I. & N. Dec. 576, 578 (1978), the Board overturned its previous decision in *A—*. Following the reasoning of *Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974), the Board held that "American Indians born in Canada who are within the protection of section 289 of the [Immigration and Nationality] Act [of 1952] are not subject to deportation on any ground." *Yellowquill*, 16 I. & N. Dec. at 578.

and other federal agencies are grossly underinformed about Indian rights.⁸⁸ For example, Canadian-born Indians are often pressured into obtaining alien registration cards in what is their own homeland, or are denied services because they do not hold such cards.⁸⁹

While entry rights are now limited to Indians of fifty percent blood quantum on the American side,⁹⁰ Canada does not recognize at all the right of Indians to pass the border freely or to carry personal goods across the border free of customs duties.⁹¹ The Canadian position is that implementing legislation is necessary to make the Jay Treaty and Treaty of Ghent effective domestically and that no such legislation exists.⁹² The United States Customs Department, unlike the State Department and the INS, agrees with the Canadian position. Because the Customs Department, which controls the import and export of goods, argues that the Treaty of Ghent is not self-executing and that the implementing legislation allowing the free import of personal Indian goods has lapsed,⁹³ serious economic problems are present even where Indians are permitted to cross the border freely.

2. The Border as an Economic Barrier

Tribes on both sides of the border possess one of the lowest per capita incomes of any minority group residing in either country.⁹⁴ The border exacerbates this problem by forcing additional expenses on tribal members and inhibiting economic development among tribes. For some tribes

88. See *Indians and the Border*, *supra* note 55, at 11; Indian Task Force Report, *supra* note 83, at 1-6.

89. See *Indians and the Border*, *supra* note 55, at 11; Indian Task Force Report, *supra* note 83, at 1-6.

90. See *supra* notes 83-85 and accompanying text.

91. Canada's immigration law provides that a person who is registered as an Indian in Canada shall have the same rights to enter Canada as a citizen. Immigration Act, 1976 [1976-77] Can. Stat. ch. 52, § 4(3). However, the Canadian Department of External Affairs has stated: "Our conclusion is that the following articles of the Jay Treaty . . . may still be in force for Canada: Article 3 (so far as it relates to the right of Indians to pass the border), Article 9 and Article 10. The remaining articles have been terminated or fulfilled." Letter from W. H. Montgomery, Director, Legal Advisory Division, to Joyce Green, Researcher, Native American Studies, University of Lethbridge (September 7, 1978) (available in files of *Fordham Law Review*). This should, of course give Canadian Indians much greater access to border crossings than other Canadian citizens.

92. See *Francis v. The Queen*, 3 D.L.R.2d 641, 643 (Can. 1956).

93. See *Akins v. United States*, 551 F.2d 1222, 1225-26 (C.C.P.A. 1977); *United States v. Garrow*, 88 F.2d 318, 323 (C.C.P.A.), *cert. denied*, 302 U.S. 695 (1937).

94. See Bureau of the Census, 1980 Census of Population: General Social and Economic Characteristics 1-143 to -168 (a comparison of per capita incomes of the various ethnic groups in the United States) [hereinafter cited as 1980 Census]; Statistics Canada, 1980 Census of Canada: Canada's Native People, Table 6, Chart 10 (overall average income of Indians was less than two-thirds of the income of non-Indians). In Canada rural Indians "have particularly low incomes," *id.* at Chart 10, and in the continental United States only one ethnic group, the Vietnamese, has a lower per capita income than rural Indians. See 1980 Census, at 1-161. Most border Indians logically fall into the category of rural Indians.

the nearest shopping areas are across the border, yet to avoid taxation tribal members must often drive fifty miles to the nearest store on their side of the border. In addition, many tribal members still support themselves through the sale of traditional craft items. These craftsmen must often pay tariffs on hides, beads, feathers, shells and other necessary raw materials, and then must pay an additional tariff if the finished product is bought and sold across the border.

The border also inhibits tribal economic development. In the early 1970's, the Blackfeet Nation Tribal Housing Authority (situated in the United States) bought more than fifty prefabricated houses from the Blood Tribal Enterprise (situated in Canada).⁹⁵ Future purchases were considered economically unfeasible, however, because of the import tax required by United States law.⁹⁶ The payment of these "foreign" taxes on items traveling from one part of their homeland to another is, for many Indians, both a historically and economically odious imposition.

In 1779, Congress statutorily affirmed the right of Indians to transport personal goods freely across the border.⁹⁷ The statute was on the books until the Tariff Act of 1897,⁹⁸ when the provision was inexplicably omitted. It has never been reinstated.⁹⁹ As discussed above,¹⁰⁰ the *McCandless* decision stated that article three referred to aboriginal and not granted rights, thus making the existence of implementing legislation irrelevant.¹⁰¹ Legislation concerning article three rights would therefore be an affirmation and not the source of the rights. In 1929, however, the Supreme Court decided a case which ultimately resulted in the negation of tribal members' rights to carry their goods across the border freely.¹⁰²

95. See Santana Letter, *supra* note 1.

96. See *id.*

97. The Act of March 2, 1799, ch. 22, §105, 1 Stat. 627, 702 (repealed in part at 42 Stat. 989, 990 (1922)), states:

[N]o duty shall be levied or collected on the importation of peltries brought into the territories of the United States, nor on the proper goods and effects of whatever nature, of Indians passing, or repassing the boundary lines aforesaid, unless the same be goods in bales or other large packages unusual among Indians, which shall not be considered as goods belonging bona fide to Indians, nor be entitled to the exemption from duty aforesaid.

98. See Tariff Act Revision of 1897, ch. 11, 30 Stat. 151.

99. See *Akins v. United States*, 551 F.2d 1222, 1224, 1229 (C.C.P.A. 1977). The 1897 legislative hearings do not mention why the Indian goods provision was deleted from the Tariff Act Revision. There was apparently no direct testimony or debate concerning ending the Indian exemption. Indeed, Congress may have been totally unaware that it was passing legislation that violated treaty commitments. It is doubtful that the provision was deleted for monetary purposes. The expected revenue from duty collection on Indian goods was less than \$450. See *Indians and the Border*, *supra* note 55, at 6; Letter from Gregory Buesing, Coordinator of Indian Task Force, to Albert Bergessen, Regional Commissioner of Customs 5 (Aug. 22, 1979) (available in files of *Fordham Law Review*).

100. See *supra* notes 67-72 and accompanying text.

101. See *supra* notes 61-65 and accompanying text.

102. See *Karnuth v. United States ex rel. Albro*, 279 U.S. 231 (1929).

3. Judicial Interpretation of Indian Border Rights: An Inconsistent Approach

*Karnuth v. United States ex rel. Albro*¹⁰³ involved the detention of two non-Indian Canadian residents who had crossed into the United States without registering as aliens.¹⁰⁴ They petitioned for a writ of habeas corpus, arguing that article three of the Jay Treaty granted them the right to pass the border freely.¹⁰⁵ The Supreme Court ruled that these rights were "promissory and prospective," and not vested in nature.¹⁰⁶ Furthermore, article twenty-eight, which made the article three rights "permanent," did not mean that these rights were "perpetual"; rather they were limited to an unspecified period,¹⁰⁷ which would last only as long as good relations between the signatories existed.¹⁰⁸ Thus, the Court ruled that the War of 1812 had abrogated the relevant rights granted by article three of the Jay Treaty.¹⁰⁹

Because these rights were given to subjects or citizens of either state, it indeed would have been inconsistent to maintain them under the hostile conditions of the War of 1812.¹¹⁰ Article three, however, mentions Indians separately, and thus differentiates them from the subjects and citizens of the two nations.¹¹¹ To state that Indians are also subjects or citizens of either state would strip the clause referring to the Indians of all meaning.¹¹² Clearly, the Indians were to be considered a third group of people, whose passage across the artificial border under hostile conditions did not open the door "for treasonable intercourse."¹¹³ *Karnuth* dealt only with the rights of United States and Canadian citizens and subjects, and did not mention article nine of the Treaty of Ghent which deals solely with the reinstatement of Indian rights.¹¹⁴ Thus, *McCandless* is neither overruled by, nor inconsistent with *Karnuth*.

Eight years later, the Court of Customs and Patent Appeals (CCPA) considered a case brought before it by Anne Garrow, a full blooded Mohawk of the Canadian St. Regis Tribe of the Iroquois Nation.¹¹⁵ Customs officials had assessed an import duty on her twenty-four handmade

103. *Id.*

104. *Id.* at 234.

105. *Id.* at 235.

106. *Id.* at 239.

107. *Id.* at 242.

108. *See id.* at 241-42.

109. *Id.* at 241.

110. *Id.* at 239.

111. *See Jay Treaty, supra* note 5, art. III, 8 Stat. at 117 ("It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the . . . boundary line, freely to pass and repass . . .").

112. *See infra* text accompanying note 161.

113. *See Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 239 (1929).

114. *See Treaty of Ghent, supra* note 6, art. IX, 8 Stat. at 222-23.

115. *United States v. Garrow*, 88 F.2d 318, 318 (C.C.P.A.), *cert. denied*, 302 U.S. 695 (1937).

baskets. The tariff, she argued, violated her rights as guaranteed by the duty clause of article three of the Jay Treaty¹¹⁶ and by the Treaty of Ghent.¹¹⁷ The court ignored the *McCandless* decision and adopted the Supreme Court reasoning in the *Karnuth* case: The War of 1812 had abrogated the Jay Treaty's rights, and the nonself-executing Treaty of Ghent had not restored them because no implementing legislation was ever enacted.¹¹⁸ The fact that in *Karnuth* the Supreme Court discussed only the rights of subjects or citizens without mentioning the Treaty of Ghent, was not considered relevant by the *Garrow* court.¹¹⁹ Thus, the *Garrow* court's application of *Karnuth* to a case involving an Indian plaintiff was illogical, especially because the Supreme Court in *Karnuth* omitted the article three language referring to Indians and instead discussed only "citizens or subjects."¹²⁰

Subsequently, however, in *United States ex rel. Goodwin v. Karnuth*,¹²¹ the CCPA seemed to recognize that the Supreme Court's decision in *Karnuth* did not apply to Indians.¹²² The *Goodwin* court adopted the *McCandless* reasoning, and stated that the Treaty of Ghent "recognized and restored the Indian status of the Jay Treaty."¹²³ Although the court's final decision was based on the statute that succeeded the relevant sections of the two treaties,¹²⁴ the *Goodwin* court never even considered that the Treaty of Ghent might not be effective for lack of implementing legislation. It makes sense that no implementing legislation would be needed to enforce the vested and aboriginal rights of Indians in a land to which they are indiginous.¹²⁵

In *Akins v. Saxbe*¹²⁶ the federal District Court for Maine specifically indicated that the congressional purpose in using the Jay Treaty language when it passed legislation exempting Indians from the immigration laws

116. See Jay Treaty, *supra* note 5, art. III, 8 Stat. at 118.

117. Treaty of Ghent, *supra* note 6, art. IX, 8 Stat. at 222-23; see *Garrow*, 88 F.2d at 318.

118. *Garrow*, 88 F.2d at 323. The court did not address the important and fundamental question whether the tribal Jay Treaty rights were aboriginal in source, that is appurtenant to Indians as such, and hence separate from the rights of Canadian citizens. The court simply stated that it found no authority on which to make a distinction between Indians and non-Indians, "especially as to Indians domiciled in a foreign country." *Id.* In 1977, the Court of Customs and Patent Appeals again considered the question of duty-free goods. *Akins v. United States*, 551 F.2d 1222 (C.C.P.A. 1977). The court again distinguished the conflicting *McCandless* ruling and held that the War of 1812 had abrogated the Jay Treaty rights and that they were never reinstated. *Id.* at 1228-30.

119. See *Garrow*, 88 F.2d at 323.

120. See *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 239 (1929).

121. 74 F. Supp. 660 (W.D.N.Y. 1947).

122. *Id.* at 662.

123. *Id.* (quoting *McCandless v United States ex rel. Diabo*, 25 F.2d 71, 73 (3d Cir. 1928)).

124. See *supra* notes 74-83 and accompanying text.

125. See *McCandless ex rel. Diabo*, 25 F.2d 71, 73 (3d Cir. 1928); *Goodwin*, 74 F. Supp. at 661; see also 69 Cong. Rec. 5582 (1928) (some Congressmen felt that Indian rights of passage were so obvious that no legislation was necessary).

126. 380 F. Supp. 1210 (D. Me. 1974).

"was to recognize and secure the right of free passage as it had been guaranteed by that Treaty and delineated by the district court decision in *McCandless*."¹²⁷ Although some thought this legislation unnecessary because the Indians' right to cross seemed obvious,¹²⁸ it was passed in part because the Department of Labor neither acceded to admission of Indians born in Canada, nor recognized the *McCandless* decision.¹²⁹ Thus, Congress itself recognized that the rights guaranteed by the Jay Treaty were aboriginal and not created by the treaty.

Yet in *Akins v. United States*¹³⁰ the CCPA again ignored the facts that shaped the Supreme Court's decision in *Karnuth* and applied the reasoning of that case to Indians, using language from *Garrow*.¹³¹ Thus, it considered article three rights as "promissory and prospective" and as abrogated by the War of 1812, rather than as aboriginal in source.¹³² The court only mentioned the Treaty of Ghent in passing, stating that a conflict existed regarding whether the treaty was self-executing.¹³³ Thus, in failing to address the effect of the Treaty of Ghent on Jay Treaty rights the court failed to resolve the issue fully. Rather, its decision to deny duty-free rights to the plaintiff was based solely on Congress' omission of duty-free rights from the 1897 Tariff Act revision.¹³⁴

Canada's position regarding the need for implementing legislation under the Treaty of Ghent is similar to that of the United States Customs Department. In 1956, the Supreme Court of Canada heard an appeal from Louis Francis, a member of the Caunawaga Reserve.¹³⁵ Francis, who had never left Mohawk land, was charged an import tax on a used washing machine, refrigerator and oil heater that he had bought from a relative on the American side, a few hundred yards from his home.¹³⁶ The Supreme Court of Canada unanimously dismissed the appeal, with the plurality opinion finding a lack of implementing legislation.¹³⁷ Ruling

127. *Id.* at 1221; see 69 Cong. Rec. 5582 (1928).

128. See 69 Cong. Rec. 5582 (1928) ("Mr. Carss: They [the Indians] were the original inhabitants of [this land]. . . . Mr. Celler: Does not the gentleman think this act is absolutely unnecessary? Mr. McGregor: I think so myself, but the Department of Labor will not admit them.") Representative McGregor introduced the Act exempting Indians from the immigration laws. See *id.* at 5581.

129. *Id.* at 5582.

130. 551 F.2d 1222 (C.C.P.A. 1977).

131. See *id.* at 1228-30.

132. See *id.*

133. See *id.* at 1225 & nn. 9-10.

134. See *id.* at 1229. See *supra* notes 97-99 and accompanying text.

135. *Francis v. The Queen*, 3 D.L.R.2d 641 (Can. 1956).

136. See *id.* at 644.

137. "The Jay Treaty was not a treaty of peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation." *Id.* at 643. Two Justices found that legislation giving effect to the Indian customs exemption had been passed in both Upper and Lower Canada shortly after the signing of the Jay Treaty, but that it had lapsed and had never been reinstated. See *id.* at 648-50 (Rand, J., writing for himself and Cartwright, J.).

Although the *Francis* decision ruled that the Jay Treaty was invalid and unenforceable

that the treaty rights "are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation,"¹³⁸ this court declared that Indians currently possessed no duty-free rights and, by extension, no border-crossing rights.¹³⁹

Today American case law is split on the status of the Jay Treaty and Treaty of Ghent. The *McCandless v. United States ex rel. Diabo*,¹⁴⁰ *United States ex rel. Goodwin v. Karnuth*¹⁴¹ and *Akins v. Saxbe*¹⁴² cases consider the rights in article three to be aboriginal in source and merely reaffirmed by the Jay Treaty and Treaty of Ghent. The State Department and the INS accept and follow the reasoning of the *McCandless* decision.¹⁴³ The State Department lists articles nine and ten of the Jay Treaty as being in force between the United States and Canada, and it notes that article three, so far as it relates to the rights of Indians to cross the border, is also regarded as in force.¹⁴⁴

The United States Customs Service has consistently opposed the position of the State Department and the INS. It follows the *United States v. Garrow*¹⁴⁵ and *Akins v. United States*¹⁴⁶ decisions, maintaining that the rights recognized in article three of the Jay Treaty are not aboriginal but rather were granted in source. It thus follows *Karnuth v. United States*

under Canadian law, the Canadian Federal government in fact did not impose regular duties on Indian goods until the late 1960's. In 1968, St. Regis Indians protested collection of tariffs by forming a human wall and blockading the International Bridge connecting Cornwall and New York State. See *New York Times*, December 19, 1968, at A16, col. 4; *id.* Dec. 20, 1968, at A15, col. 1; *id.* Dec. 21, 1968, at 47, col. 1; *id.* Dec. 29, 1968, § IV, at 13, col. 3. In 1980 the Maliseet and Micmac Indians again protested against the denial of their border crossing rights. See *Bangor Daily News*, April 21, 1980, at 17, col. 1; *id.* April 24, 1980, at 31, col. 1.

138. *Francis v. The Queen*, 3 D.L.R.2d 641, 643 (Can. 1956).

139. See *id.* at 643-44.

140. 25 F.2d 71 (3d Cir. 1928).

141. 74 F. Supp. 660 (W.D.N.Y. 1947).

142. 380 F. Supp. 1210 (D. Me. 1974).

143. See *supra* notes 67-72, 87 and accompanying text.

144. See *United States Dep't of State, Treaties in Force Jan. 1, 1984*, at 22 ("Only article 3 so far as it relates to the right of Indians to pass across the border, and articles 9 and 10 appear to remain in force. But see *Akins v. U. S.*, 551 F.2d 1222 (1977). Articles I-XVII and XXXIV-XLII have been executed; articles XVIII-XXV, XXX, and XXXII terminated July 1, 1885; articles XXVIII and XXIX not considered in force.") (footnotes omitted) [hereinafter cited as *Treaties in Force*]. Also, note that *Treaties in Force, supra*, lists the "Explanatory article to article 3 of the November 19, 1794 Treaty" as in force. See *id.*

In the recent INS memorandum to the Board of Immigration Appeals in regard to *Yellowquill*, 16 I. & N. Dec. 576 (1978), the INS stated:

We believe that the court in *Akins* correctly read the legislative intent of the 1928 legislation as a reaffirmation of the traditional right of American Indians born in Canada to be free of all immigration restrictions, a right which does not depend upon whether or not the Jay Treaty is still in effect.

Memorandum from David Crosland, Gen. Counsel of INS, to David Milhollan, Chmn. BIA 4 (June 23, 1978).

145. 88 F.2d 318 (C.C.P.A.), *cert. denied*, 302 U.S. 695 (1937).

146. 551 F.2d 1222 (C.C.P.A. 1977).

ex rel. Albro,¹⁴⁷ which was never meant to apply to Indians, and contends that those rights were abrogated by the War of 1812 and have not been reinstated by the Treaty of Ghent because no implementing legislation has been enacted.¹⁴⁸ Canada's position is also that lack of implementing legislation negates the applicability of the Treaty of Ghent.¹⁴⁹ These views perpetuate the unnatural division of tribes and families by the United States-Canada border. As will be discussed in the following section, this result was clearly not intended by the signatories of the Jay Treaty and the Treaty of Ghent.

III. INTERNATIONAL LAW AND THE INDIAN TREATIES

At this point a crucial issue must be raised. *Pacta sunt servanda*—treaties must be upheld—is the most fundamental principle of international law.¹⁵⁰ Without an honorable and voluntary commitment on the part of nations to uphold their treaty obligations, international law would become anarchistic, if not nonexistent, and dealings between and among

147. 279 U.S. 231 (1929).

148. See *supra* notes 115-18 and accompanying text.

149. See *supra* notes 135-39 and accompanying text.

150. The most authoritative statement on the interpretation and validity of treaties is the 1969 Vienna Convention on Treaties, signed (but not yet ratified) by the United States on April 24, 1970 and signed by Canada on May 23, 1969 and ratified October 14, 1970. Article 26 states the rule of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." 1969 Vienna Convention on the Law of Treaties, art. 26 [hereinafter cited as 1969 Vienna Convention], reprinted in 8 Int'l Legal Materials 679, 690 (1969). In addition, the Preamble to the Convention states that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized." *Id.*, reprinted in 8 Int'l Legal Materials at 680.

The Commentary of the International Law Commission on article 23 of the 1966 draft law of treaties prepared by the Commission read:

(1) *Pacta sunt servanda*—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations. As to the Charter itself, paragraph 2 of Article 2 expressly provides that Members are to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."

U. N. Reports of the Int'l Law Comm'n, *Draft Articles on the Law of Treaties*, 61 Am. J. Int'l L. 263, 334 (1967); see 5 G. Hackworth, *Digest of International Law* § 486, at 164-65 (1943); C. Hyde, *International Law* 1369, 1454 (2d ed. 1945); 14 M. Whiteman, *Digest of International Law* 353-410 (1970); Kunz, *Meaning and Range of the Norm "Pacta Sunt Servanda"*, 39 Am. J. Int'l. L. 180 (1945); Research in International Law, *Law of Treaties*, 29 Am. J. Int'l. L. Supp. 653, 977-92 (1935) [hereinafter cited as *Law of Treaties*].

On April 17, 1935, the League of Nations Council, with reference to the German Government's repudiation of disarmament provisions of the Treaty of Versailles (Military Law of March 16, 1935), stated:

[T]he scrupulous respect of all treaty obligations is a fundamental principle of international life and an essential condition of the maintenance of peace; . . . [I]t is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof unless with the consent of the other contracting parties.

5 League of Nations Off. J. 551 (1935), reprinted in 5 G. Hackworth, *supra*, at 165.

nations would suffer from confusion. The following section examines whether the United States and Canada, by refusing to uphold the provisions of the Jay Treaty and Treaty of Ghent, are violating the inviolable principle of *pacta sunt servanda*. The answer hinges on two questions. First, are the tribal rights in article three of the Jay Treaty aboriginal in source or bestowed by England and the United States? Second, are Canada and the United States relieved of their treaty obligations under international law because of a failure to pass implementing legislation, or are they violating the Jay Treaty and the spirit of tribal sovereignty by imposing citizenship and racial requirements on the rights of and services extended to the border tribes?

A. *Aboriginal or Bestowed Rights*

Whether the tribal right to pass and carry goods across the border freely is granted or aboriginal in source, and whether it was intended to exist indefinitely, are matters of treaty interpretation.¹⁵¹ International law has devised several rules for interpreting treaties. The first rule is that treaties must be analyzed in context: They are to be interpreted in light of the surrounding circumstances.¹⁵² International law further stipulates that treaties should be analyzed so that their basic purpose is served and their operation is consistent with good faith.¹⁵³ In order to

151. In most instances . . . interpretation involves *giving* a meaning to a text—not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve. This is obviously a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case.

14 M. Whiteman, *supra* note 150, at 356 (quoting *Law of Treaties, supra* note 150, at 946).

152. The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in the light of all relevant factors. Restatement (Second) of Foreign Relations Law of the United States § 146 (1965).

153. See 1969 Vienna Convention, *supra* note 150, art. 26, reprinted in 8 Int'l Legal Materials, at 690. The Draft Convention on the Law of Treaties prepared at Harvard includes a provision in article 19(a) that "[a] treaty is to be interpreted in the light of the general purpose which it is intended to serve." *Law of Treaties, supra* note 150, at 661. The Commentary on this provision stated:

It is practically self-evident that the terms of a treaty cannot be thoroughly comprehended unless read in the light of the design which prompted its conclusion, and likewise that that interpretation of a treaty is to be favored which will harmonize with and tend to effectuate the purpose which it was intended to serve.

Id. at 948. More recently it has been stated that "[t]he whole of the treaty must be taken into consideration, if the meaning of any one of its provisions is doubtful; and not only the wording of the treaty, but also its purpose, the motives which led to its conclusion, and the conditions prevailing at the time," 1 H. Lauterpacht, Oppenheim's International

understand the context and purpose of the Jay Treaty, and thereby resolve whether the rights in article three are granted or aboriginal in source, it is necessary to understand the territorial rights of the Indian nations and the tribes' status and relationship with the colonizing powers at the time of the signing of the treaty.

Great Britain at that time recognized and dealt with the Indian nations as international sovereigns, regulating her relationship with the tribes through more than five hundred treaties.¹⁵⁴ Treaties were used to secure important Indian alliances of peace and trade. The tribes were quite adept at political diplomacy, frequently playing one power off against another. For instance, the Creek nation in the 1780's and 1790's maintained treaty relations with Spain and the United States while the latter two nations were both trade and territorial competitors.¹⁵⁵

The United States and Canada adopted the Crown's practice. The United States concluded its first treaty with the Delaware nation in 1778.¹⁵⁶ The treaty, negotiated during the Revolutionary War, established a mutual alliance of peace and friendship and included a provision that stipulated that each party would assist the other in this "just and necessary war."¹⁵⁷ More than 370 treaties remain in force today between the United States and the Indian nations.¹⁵⁸ Canada has concluded eleven treaties with tribes, all of which remain in force.¹⁵⁹ As Chief Justice John Marshall explained in *Worcester v. Georgia*,¹⁶⁰ the use of treaties signified recognition and respect for tribal sovereignty on the part of the European powers and the United States:

The words "treaty" and "nation," are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied

Law 953 (8th ed. 1955), and that "[a]ll treaties must be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith." *id.* at 956.

154. For a list of treaties between various American Indian tribes and Great Britain, see H. DePuy, *A Bibliography of the English Colonial Treaties with the American Indians: Including a Synopsis of Each Treaty* (1917).

155. The Spanish governor was reportedly displeased with the Creeks' conclusion of a treaty with the United States, yet conceded he was powerless to change the situation because the Creeks were an independent nation and could make treaties with whomever they pleased. Holmes, *Spanish Treaties with West Florida Indians, 1784-1802*, 48 Fla. Historical Soc'y 140, 146-47 (1969).

156. See Treaty with the Delaware Nation, Sept. 17, 1778, United States-Delaware Nation, 7 Stat. 13.

157. *Id.* at 13.

158. See generally Institute for the Development of Indian Law, *Treaties and Agreements Made by Indian Tribes With the United States* (1973) (compilation of treaties between the United States and various Indian tribes); C. Kappler, *Indian Affairs: Laws and Treaties* vols. 1-5 (1903-41) (same with annotations).

159. See R. Savard & J. Proulx, *Canada: Derriere L'Epopée, Les Autochtones* (1982). It is ironic in light of modern Canadian tribal relations to consider that the Indian nations had the capacity to conclude treaties long before Canada received that authority in 1931 under the Statute of Westminster, 1931, 22 Geo. 5, ch.4, § 7, reprinted in 6 Halsbury's Statutes of England 197 (1969).

160. 31 U.S. (6 Pet.) 515 (1832).

them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.¹⁶¹

At the time of the Jay Treaty's signing, the United States and Great Britain respected tribal rights to tribal lands. Tribal lands were regarded as separate, and neither Great Britain nor the United States claimed jurisdiction over them.¹⁶² In 1831, Chief Justice Marshall wrote: "[T]he Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government"¹⁶³ The following year, the Supreme Court reiterated that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries."¹⁶⁴ The United States' conclusion of treaties with several Indian nations whose populations and lands lay partly in Canada is further evidence that the United States did not consider that border to be a division of tribal sovereignty and lands.¹⁶⁵

Thus, given the status and territorial rights of the Indian nations at the time of the Jay Treaty, it is impossible to conclude that the rights to pass and carry goods freely across the border were bestowed rights. As a result, the court's finding in *United States v. Garrow*¹⁶⁶ seems clearly in

161. *Id.* at 559-60.

162. See *supra* part I.

163. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

164. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

165. According to international law, treaties are concluded between sovereigns. It is not possible to conclude a treaty with only a portion of a nation. See generally J. Jones, *Full Powers and Ratification* 134-57 (1949) (sovereigns must be endowed with the powers of the nation to conclude valid treaties). The United States' treaties with the Blackfoot Indians Confederacy, Treaty with the Blackfeet and other tribes, October 17, 1855, *United States-Blackfeet and Other Indian Tribes*, 11 Stat. 657, the Seven Nations, Treaty with the Seven Nations, *supra* note 36, and several with the Six Nations and the Wabanaki Confederacy, see *supra* notes 23, 26, 30-33, 36, give evidence of the United States' acceptance of this stipulation, as all of these tribes contain Canadian segments.

Following the conclusion of a treaty with the Penobscot and Passamaquoddis of the United States and Canada, see *Description of the Treaty of Aukpaque*, July 1977, *Regional Council Report*, *supra* note 51, app. 3 (unratified treaty), Col. John Allan, the Federal Superintendent of Indian Affairs in New England, explained the government's policy in a letter to Samuel Adams:

It has been observed by some, that we have no right to negotiate with Indians, that do not live within the Jurisdiction of the States. . . . But this sentiment I never heard advanced before, either by the French, English or any other nation. Indians are not subject to, or amenable to any power; they have been always viewed as a distinct Body govern'd by their own customs & manners, nor will they ever tamely submit to any authority different from their own. . . . Their mode of life leads them thro' the Territory of different nations. . . . I presume that at every treaty & conference with the United States a large proportion live upon lands, to which our Government have no claim, & I know this to have been the case with the French & English.

F. Kidder, *Military Operations in Eastern Maine and Nova Scotia During the Revolution*, 317-18 (1867).

166. 88 F.2d 318, 322-23 (C.C.P.A.), *cert. denied*, 302 U.S. 695 (1937).

error. When the treaty was signed, neither Great Britain nor the United States possessed jurisdictional control over the tribes, their movements or their lands. Article three of the Jay Treaty was a simple but necessary acknowledgement of the rights then possessed and exercised by the tribes.¹⁶⁷ The United States and England could not grant what they did not possess.¹⁶⁸

It is also possible to regard the tribal rights guaranteed in the Jay Treaty and the Treaty of Ghent as servitudes—rights belonging to third parties.¹⁶⁹ Servitudes are restrictions on a state's territory or jurisdiction¹⁷⁰ that may be created by prescription or by treaty.¹⁷¹ International law indicates that third party rights and servitudes should not be altered without the approval of the parties concerned.¹⁷² As a rule, servitudes are not extinguished by war or conquest and are obligatory upon any succeeding or annexing state.¹⁷³ The rights of Indians to pass and conduct trade across the border is an aboriginal right of prescription or immemorial usage recognized and confirmed in several treaties. Thus it could not have been extinguished by the war of 1812 or by lack of implementing legislation.

B. *Effectuating the Purposes of the Treaty*

A standard mandate of statutory interpretation as applied by international law stipulates that a treaty be interpreted in such a way as to lend

167. See *supra* notes 154-66 and accompanying text.

168. Great Britain's original negotiating goal was to obtain the recognition of an independent Indian state. See J. Combs, *supra* note 12, at 96-97. It is clear, then, that at a minimum Great Britain's reason for insisting on article three was to ensure that tribal sovereignty and lands remained intact. Thus, it is irrelevant that this may have been motivated by fear of an ever-expanding United States rather than by a moral commitment to a former ally.

169. See *McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 72 (3d Cir. 1928) ("But it will be observed that we are not here dealing with the rights and obligations of the two signatories to [the Jay Treaty] to and from each other, but with the rights of a third party created by the joint action of the signatories.")

170. See H. Taylor, *International Public Law* 299-300 (1901). Servitudes may be positive—permitting an action such as the right of transit—or negative—prohibiting an action such as fortification of an area. *Id.*

171. A. Hershey, *The Essentials of International Public Law and Organization* 272 (1929) ("They are based either on express convention or upon a tacit agreement resulting from immemorial usage, and are in the nature of real and permanent rights rather than of ordinary rights and obligations."); see H. Taylor, *supra* note 170, at 299-300 ("[I]n respect to their origin, (they) are contractual or customary. The last named, resting on immemorial prescription.")

172. 1969 Vienna Convention, *supra* note 150, art. 37(2), *reprinted in* 8 Int'l Legal Materials, at 694 ("When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.")

173. 1 H. Lauterpacht, *supra* note 153, at 542-43; 2 M. Whiteman, *supra* note 150, at 1182; Potter, *The Doctrine of Servitudes in International Law*, 9 Am. J. Int'l L. 627, 639 (1915); see *McCandless v. United States ex rel. Diabo*, 25 F.2d 71, 73 (3d Cir. 1928).

it effect, and thus give meaning to all its phrases and words.¹⁷⁴ A natural and ordinary meaning must be given to words used in a treaty.¹⁷⁵ Thus, the Supreme Court's interpretation of the term "permanent" in article twenty-eight of the Jay Treaty to mean merely "not limited to a specific period of time,"¹⁷⁶ and not to mean "'perpetual' or, everlasting"¹⁷⁷ violates these canons of interpretation. The treaty does not state that these rights were to continue for twenty-five or 100 years; rather, it explicitly indicates that they are permanent.¹⁷⁸ The natural and ordinary meaning of "permanent" is "continuing or designed to continue indefinitely without change; abiding; lasting; enduring. Opposed to temporary."¹⁷⁹ To read the word to mean anything else is to void it of meaning.

International law permits the parties' subsequent conduct to be taken

174. See Restatement (Second) of Foreign Relations Law of the United States § 147 (1965). To the United States' argument in *Cayuga Indians (Great Britain) v. United States*, 6 R. Int'l Arb. Awards 173 (1926), that article nine of the Treaty of Ghent "was only a 'nominal' provision, not intended to have any definite application," the Court responded:

We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do.

Id. at 184.

175. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." 1969 Vienna Convention, *supra* note 150, art. 31(1), reprinted in 8 Int'l Legal Materials, at 691-92; see Restatement (Second) of Foreign Relations Law of the United States § 147 (1965). The International Court of Justice has stated:

[t]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8; see Article 4 of the Charter of the United Nations, 1947-49 I.C.J. 57, 63 ("To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established."); *Polish Postal Service in Danzig*, 1922-30 P.C.I.J., ser. B., No. 11, at 39 (1925) ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.")

In similar manner the International Court of Justice has favored a meaning which it has referred to as "literal", *In re Factory at Chorzow*, 1923-27 P.C.I.J., ser. A, No.9, at 24 (1927); "ordinary", *Danzig*, *supra*, at 37; or "normal", *id.*; see M. Hudson, *The Permanent Court of International Justice* § 569, at 645-46 (1943); *Law of Treaties*, *supra* note 150, at 942-48.

176. *Karnuth v. United States ex rel. Albro*, 279 U.S. 231, 242 (1929).

177. *Id.*

178. See Jay Treaty, *supra* note 5, art. XXVIII, 8 Stat. at 129.

179. VII Oxford English Dictionary 710 (1933); see Webster's New Universal Unabridged Dictionary 1336 (2d ed. 1983). Webster's dictionary gives an alternative definition of permanent as "lasting a relatively long time," *id.*, but this seems to apply only to physical and scientific conditions which never prevail for an infinite amount of time, for example a permanent magnet or a permanent wave, *id.*

into account in interpreting a treaty's purpose or meaning.¹⁸⁰ The conduct of England and the United States lends further proof of the intention of both nations that these rights be permanent. The 1796 Explanatory Article,¹⁸¹ the 1815 Treaty of Spring Wells¹⁸² and the 1815 Treaty of Ghent¹⁸³ reaffirm the Jay Treaty rights.¹⁸⁴ In none of these documents, to which the United States remains bound, is there any indication that these rights were of a transitory nature.

The United States courts have also developed a number of guidelines for interpreting tribal rights in treaties and statutes. Indian treaties are to be interpreted as the Indians themselves would have understood them.¹⁸⁵ Furthermore, statutes and treaties conferring benefits on Indians should be resolved in favor of the Indians.¹⁸⁶ There is little doubt from the historical evidence that the Indians were led to believe that these guarantees were perpetual.¹⁸⁷ The courts have also held in several cases that tribal rights secured by treaty will not be deemed to have been abrogated or modified absent a clear expression of congressional purpose, for the "intention to abrogate or modify a treaty is not to be lightly

180. See 1969 Vienna Convention, *supra* note 150, art. 31(3), *reprinted in* 8 Int'l Legal Materials, at 692 ("[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . ."). It has been stated that when there is doubt as to the meaning of a treaty provision "the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion." A. McNair, *Law of Treaties* 424, 427 (1961); see *International Status of South-West Africa*, 1950 I.C.J. 128, 135-36; *Corfu Channel Case*, 1947-49 I.C.J. 15-25 (1948); I H. Lauterpacht, *supra* note 153, at 957; H. Lauterpacht, *The Development of International Law* 170-72 (1958).

181. Explanatory Article, *supra* note 22.

182. Treaty of Spring Wells, Sept. 8, 1815, United States-Wyandot and Other Indian Tribes, 7 Stat. 131.

183. *Treaty of Ghent*, *supra* note 6.

184. See *supra* notes 22-34, 153-63 and accompanying text.

185. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

186. See *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174-75 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Menominee Tribe v. United States*, 391 U.S. 404, 406 & n.2 (1968); *Peoria Tribe v. United States*, 390 U.S. 468, 472-73 (1968); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *United States v. Payne*, 264 U.S. 446, 448-49 (1924); *Winters v. United States*, 207 U.S. 564, 576 (1908); *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); see also *Squire v. Capoeman*, 351 U.S. 1, 6-8 (1956) (statutory construction); *Waldron v. United States*, 143 F. 413, 418-19 (C.C.D.S.D. 1905) (same).

187. See *supra* notes 19-34 and accompanying text.

imputed to the Congress.'¹⁸⁸ Congress' probably unintentional failure to reinstitute the legislation freeing Indian goods from tariffs hardly qualifies as an express intention.

C. *Pacta Sunt Servanda and International Responsibilities*

Whether or not the Jay Treaty was abrogated by the War of 1812 is irrelevant,¹⁸⁹ because in 1814 the Treaty of Ghent clearly reaffirmed the rights defined in article three of the Jay Treaty.¹⁹⁰ The fact that Congress has altered or failed to pass implementing legislation does not diminish the international law obligations of the United States and Canada to uphold the provisions of these treaties: Domestic laws and procedures do not relieve a nation of its international obligations.¹⁹¹

188. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (quoting *Pigeon River Improvement Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)); see Wilkin-son & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Calif. L. Rev. 601, 660-61 (1975).

189. Assuming that the rights to cross and carry goods across the border are aboriginal and permanent in nature, they would not be terminated by war:

"There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war"

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts"

If, therefore, the independence of the United States and the fixing of its boundaries as provided by treaty was not affected by its subsequent entry into war, on how much stronger ground and reason can it be contended that the independence of the Indian to pass the boundary line passing through his own tribal territory was not affected when Great Britain and America entered into the War of 1812.

McCandless v. United States ex rel. Diabo, 25 F.2d 71, 73 (3d Cir. 1928) (quoting *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 206, 219 (1823)).

190. See *supra* notes 30-34, 169-73 and accompanying text.

191. "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." 1969 Vienna Convention, *supra* note 150, art. 27, reprinted in 8 Int'l Legal Materials, at 690. Neither the Jay Treaty nor the Treaty of Ghent stipulate that the signatories need to enact implementing legislation for the two treaties to be effective and binding, however, as the Permanent Court of International Justice has stated: "Ratified treaties give rise to international responsibility even though they remain unimplemented and inoperative internally. Once a treaty comes into force, it is incumbent upon the parties to carry out its provisions and this requires implementation; then a failure to implement it amounts to a breach of the treaty." R. S-Mehta, *The Jay Treaty as it Affects North American Indians* 15 (1972) (referring to dicta in *Danzig Court*, 1928 P.C.I.J., ser. B, No. 15 at 17-18 (Judgment of Mar. 3, 1928)).

Unless the particular treaty contains a specific provision to the contrary, a treaty properly signed and ratified becomes a binding international obligation at the time fixed by its own terms. The failure of the Congress to enact the neces-

Great Britain was legally bound by the Jay Treaty and the Treaty of Ghent at the time of their signings.¹⁹² Canada's accession with the passage of the 1931 Statute of Westminster¹⁹³ to full self-governing status within the British Commonwealth did not invalidate her obligation to fulfill treaties made on her behalf by Great Britain prior to independence.¹⁹⁴ Canada was thus bound by both treaties. Although Canadian law does require that treaties become effective domestically only by express acts of Parliament,¹⁹⁵ under international law a failure to implement a treaty does not relieve Canada of her obligation to fulfill the

sary legislation to make possible the performance of a treaty which is not self-executing does not relieve the Government of its international obligation thereunder.

14 M. Whiteman, *supra* note 150, at 308-09 (citing Memorandum from Attorney Advisor Diven to Legal Advisor Gross, Department of State, "Definition of 'Self-Executing Treaty'" (April 22, 1948) (MS. Dept. of State, file 711.009/4-2248)).

It must be clear that while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing in no way lessens the contractual obligation of the United States with respect to the other party or parties to the agreement. The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States. As then Secretary of State Charles Evans Hughes declared in 1922:

It is, of course, true that a Nation may by its Constitution and laws override treaties, but by such domestic acts, however sanctioned nationally, it cannot escape its international duties and obligations. The fact that a Nation exerts its power through its organs of government to commit a breach of a treaty engagement in no way permits it to avoid the international consequences of such a breach.

Communication from the Secretary of State to the Charge d'Affaires in Mexico, April 15, 1922, 1922 Foreign Relations of the United States 646, 650 (1938); *see* Restatement (Second) of Foreign Relations Law of the United States § 140, at 430 (1965) ("The duty of a state to give effect to the terms of an international agreement to which it is a party . . . is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement."). For a summary of opinions of the Permanent Court of International Justice which have expressed this canon, *see* H. Briggs, *The Law of Nations* 60-63 (1952); I. G. Schwarzenberger, *International Law* 68-70 (3rd ed. 1957).

192. This is because, unlike the United States, Britain requires no ratification by Parliament in order for a treaty to be effective.

193. *See* The Statute of Westminster, 1931, 22 Geo. 5 ch.4, *reprinted in* 6 Halsbury's Statutes of England 193 (1948).

194. *See Ex Parte O'Dell and Griffen*, [1953] 3 D.L.R. 207, 210 (Ont. H. Ct.) ("Had it been intended that the *Ashburton Treaty* or any other convention which had been entered into or any other statute which had been enacted by the Imperial Government or Parliament prior to this time, affecting Canada or any of its Provinces, should cease to have validity, one would expect to find express provision for it in the *Statute of Westminster* or in some other statute.") (italics in original).

195. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law Once [the obligations undertaken in treaties] are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law Cases and Materials* 162 (1980) (quoting Attor-

treaty's provisions.¹⁹⁶

The Permanent Court of International Justice in 1926 clearly upheld the United States' obligations under article nine of the Treaty of Ghent in *Cayuga Indians (Great Britain) v. United States*.¹⁹⁷ Following the Revolutionary War, the bulk of the Cayuga Nation, which had sided with Great Britain, relocated to a reserve on the Canadian side. In a series of treaties following this move, the State of New York agreed to pay a perpetual annuity of \$1,800 to the Cayuga Nation to be paid at Canandaigua, Ontario County, Canada.¹⁹⁸ After 1810 New York paid the annuities only to those Cayugas living in the United States.¹⁹⁹ Great Britain, on behalf of the Cayugas, sought the payment of back annuities. The court ruled that New York had made a covenant with the tribe and posterity, and that the Canadian Cayugas did not by their emigration surrender all claims or interests in annuity and property in New York.²⁰⁰ Based on the principles of international law and equity and on "the covenant in article IX of the Treaty of Ghent [which] must be construed as a promise to restore the Cayugas in Canada who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war,"²⁰¹ the court ordered the payment of funds to the Cayugas.²⁰² This demonstrates that the international community holds the United States and Canada to the obligations created by their treaties with the American Indians. It is therefore clear that when either nation does not abide by the terms of those treaties, it is violating *pacta sunt servanda* and thus international law.

IV. CITIZENSHIP AND RACE: RESTRICTIONS ON THE SOVEREIGNTY OF THE BORDER TRIBES

Time and legal maneuvers have ended the United States' recognition of tribes as international sovereigns possessing exclusive jurisdiction over their lands.²⁰³ Today tribes are regarded as domestic dependent nations

ney-General for Canada v. Attorney-General for Ontario and Others, [1937] A.C. 326, 347 (P.C.)).

196. See *supra* notes 151-73 and accompanying text.

197. 6 R. Int'l Arb. Awards 173, 188-89 (1926).

198. *Id.* at 175.

199. *Id.* at 175-76.

200. *Id.* at 178.

201. *Id.* at 184.

202. *Id.* at 190.

203. See 78 Cong. Rec. 11122-39, 11724-44 (1934). One view of the relationship between recognized nations and aboriginal natives of a land was stated in the Island of Palmas Case, 2 R. Int'l Arb. Awards 829 (1928):

As regards *contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of

with quasi-sovereign powers.²⁰⁴ Their relationship with the United States is political, based on their status as separate and sovereign political units for purposes of self-government.²⁰⁵

In 1974 the Supreme Court affirmed the political nature of the tribal-United States relationship in *Morton v. Mancari*.²⁰⁶ Two non-Indian Bureau of Indian Affairs employees filed suit charging that the Indian preference provision of the Indian Reorganization Act²⁰⁷ was racially based and therefore violated the due process clause of the fifth amendment.²⁰⁸ The Court ruled against the plaintiffs. The Justices found that the special preference and other benefits and programs provided to Indians by Congress were in fulfillment of the government's political relationship with tribes.²⁰⁹ Individual Indians received these benefits not because they were racially Indian, but because of their membership in politically constituted and federally recognized tribes.²¹⁰ Any rights accruing to the tribe as a political entity thus belong to tribal members because of their membership in the polity. Defining who is a tribal member therefore becomes a very important issue. The United States has long recognized the importance of tribal membership and the rights of the tribes to define their own membership.²¹¹ In 1978 the Supreme Court in *Santa Clara Pueblo v. Martinez*²¹² upheld the right of tribes to determine their own

this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account.

Id. at 858 (italics in original); see *Cayuga Indians (Great Britain) v. United States*, 6 R. Int'l Arb. Awards 173, 187-90 (1926).

204. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (suits against the tribe barred by its sovereign immunity); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (tribes have the power to enforce their criminal laws against tribe members); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (Congress may delegate to tribe regulation of alcoholic beverages); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175 (1973) (Indians on reservation exempt from state income tax); *Williams v. Lee*, 358 U.S. 217, 219-20, 223 (1959) (tribal tribunal has jurisdiction over contract claims); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (fifth amendment not applicable to Indian criminal legislation); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Indian nations had always been considered independent communities).

205. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

206. 417 U.S. 535 (1974).

207. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 986 (codified at 25 U.S.C. § 472 (1982)).

208. *Morton*, 417 U.S. at 537.

209. *Id.* at 555.

210. *Id.* at 554. But see *United States ex rel. Goodwin v. Karnuth*, 74 F. Supp 660, 663 (W.D.N.Y. 1947) (statute construed to have a racial connotation).

211. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53-54 (1978). In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Supreme Court decided that Indians were not made citizens by the fourteenth amendment to the Constitution. The Court stated: "The Indian tribes . . . were alien nations, distinct political communities, with whom the United States might and habitually did deal . . . through treaties . . . The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States." *Id.* at 99.

212. 436 U.S. 49, 53-54 (1978).

memberships.

Taken together, the *Mancari* and *Santa Clara Pueblo* decisions form the premise that because tribal rights belong to the tribe as a political unit, and because tribes possess the authority to determine membership, those tribes logically possess the right to determine who shall share in the political, cultural and economic benefits of that membership—whether they be hunting, fishing, property, education or voting rights. The United States, however, especially in the case of border tribes, has diluted tribal sovereignty and diminished the number of those eligible for tribal benefits.

In 1924, for example, the United States extended citizenship to tribal members and appeared to guarantee that the acquisition of American citizenship would not result in a denial of tribal rights.²¹³ But, as already discussed, the border and its corollary, citizenship, do limit the rights of Canadian- and United States-born Indians to receive award money, exercise hunting and fishing rights, and obtain services in territories on the opposite side of the border but within their homeland.²¹⁴

The Jay Treaty rights are political rights, belonging to, as stated in the

213. Act of June 2, 1924, ch. 233, 43 Stat. 253. The United States Code presently defines citizens using substantially the same language as the 1924 Act. See 8 U.S.C. § 1401 (1982) ("The following shall be nationals and citizens of the United States at birth: . . . (b) a person born in the United States to a member of an Indian . . . tribe: *Provided*, That the granting of citizenship . . . shall not in any manner impair or otherwise affect the right of such person to tribal or other property. . . .").

Five years previously Congress had extended citizenship to the more than 15,000 Indian men who had served in World War I. See A. Gibson, *supra* note 34, at 534. It took another twenty four years before all the states recognized and extended to Indians the right of state citizenship. What seemed to many Americans a grant of a long overdue right, see *id.* at 534-35, was to many Indians an interference with tribal sovereignty. These critics argued that United States citizenship contradicted tribal citizenship, that it was impossible to be a citizen of two sovereigns, and that Congress had imposed citizenship on the tribes without their consent. See, e.g., *Ex parte Green*, 123 F.2d 862, 863 (2d Cir. 1941) (objections raised over subjecting Indians to military draft); *United States v. Neptune*, 337 F. Supp. 1028, 1030 (D. Conn. 1972) (same); *Totus v. United States*, 39 F. Supp. 7, 11 (E.D. Wash. 1941) (same). Interestingly, while the federal courts have refused to accept the arguments of individual Indians refusing American citizenship and thus induction into the United States military, international law and the United States Department of State support the position that "no State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomsoever it pleases. The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." 1929-1 League of Nations Conference for the Codification of International Law, League of Nations Doc. C.73. M.38., Rule 19.5.1, at 16 (1929); see Research in International Law, Harvard Law School, *Law of Nationality*, 23 Am. J. Int'l L. 11, art. 2, at 13 (Supp. 1929) ("[u]nder international law the power of a state to confer its nationality is not unlimited"); V G. Hackworth, *supra* note 150, at 814 ("international law imposes certain limits on the conferring of nationality without the consent of the persons concerned") (quoting A. Feller, Mexican Claims Commissions 100 (1938)); 8 M. Whiteman, *supra* note 150, at 32-33 (the power of a state to confer nationality is not unlimited).

214. See *supra* notes 40-102 and accompanying text.

Treaty of Ghent, "tribes or nations of Indians."²¹⁵ An individual's right to travel across the boundaries of his or her aboriginal homeland is a right possessed by virtue of his or her tribal membership, not because of his or her identity as an Indian. By denying entry to tribal members of less than fifty percent blood the United States is unilaterally and illegally altering an international treaty.²¹⁶ The fifty percent blood quantum requirement also conflicts with the *Mancari* holding that tribal property rights are politically and not racially based.²¹⁷ Finally, as with the citizenship requirement, the blood quantification statute²¹⁸ interferes with the sovereign authority of tribal governments to disperse their rights to their memberships. Thus, although tribes are recognized as sovereign for the purposes of local self-government, the legislation of the United States government severely limits even that sovereignty.

V. REDRESSING THE INJUSTICES

The problems encountered by the border tribes are not insoluble. Both internationally negotiated and legislative solutions are available. At the international level exists the International Joint Commission (IJC). Established by a 1909 treaty, the IJC's purpose is to settle boundary disputes between Canada and the United States.²¹⁹ Although it is designed mainly as a body to facilitate the coordinated and cooperative use of boundary waters between the two nations, the IJC is empowered to examine any "other questions or matters of difference arising between [Canada and the United States] involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontiers."²²⁰

Composed of six arbitrators, three appointed by each government, the IJC is both a quasi-judicial and an investigative body authorized to make independent recommendations exclusively upon the request of either state.²²¹ One disadvantage of this forum is that Indian nations have no

215. Treaty of Ghent, *supra* note 6, art. IX, 8 Stat. at 222; see United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp 660, 662 (W.D.N.Y. 1947).

216. See *supra* note 83-91 and accompanying text.

217. See *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974).

218. 8 U.S.C. § 1359 (1982). See *supra* note 83. As discussed *supra* notes 50-55 and accompanying text, the United States does not extend federal recognition to all tribes. This is frequently an accident of history; in other words, the federal government failed to negotiate, did not ratify or lost a negotiated treaty with the tribes. Thus, recognizing the inequitable nature of the situation, in 1978 the government enacted Procedures For Establishing that an American Indian Group Exists as an Indian Tribe. The procedures allow unrecognized tribes to petition the government for recognition. See 25 C.F.R. §§ 81.1-.11 (1984); see also 43 Fed. Reg. 39361-62 (1978) (purposes behind the Procedures). The recognition process is long and time consuming, but it is a step in the right direction toward eliminating this inequity among tribes.

219. See Agreement Relating to Boundary Waters, Jan. 11, 1909, United States-Canada (Great Britain), art. VIII, 36 Stat. 2448, 2451, T.S. No. 548 [hereinafter cited as Treaty of Boundary Waters].

220. *Id.*, art. IX, 36 Stat. at 2452.

221. The Treaty of Boundary Waters further states that problems:

standing under international law²²² and private citizens have no right to bring claims before the IJC.²²³ It is necessary for either Canada or the United States to bring the border question before the tribunal. However, the IJC does have the advantage that, like international boards of arbitration, it is an adjudicative rather than a negotiating body that utilizes international legal principles to arrive at its findings.²²⁴ Thus, as noted above, the only recommendation possible is that the United States and Canada uphold their responsibilities under the Jay Treaty and the Treaty of Ghent.²²⁵

Two avenues of redress exist at the national level. Tribes and representative tribal organizations on both sides of the border could press for comprehensive or piecemeal legislation.²²⁶ A comprehensive Indian Border Act could include provisions for border-crossing rights, tariff-free goods, reciprocal agreements concerning eligibility for and payment of medical costs, education, social assistance, legal aid award payments and the exercise of hunting and fishing rights.

From the Canadian perspective an effort to attain legislative redress is particularly timely. The Canadian government is currently negotiating with tribes to resolve a number of issues raised by the passage of the new Canadian Constitution and Bill of Rights.²²⁷ Article 35(1) of the Constitution Act recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada."²²⁸ A discussion and definition of border rights should be integrated into the ongoing talks.

Given the difficulty of procuring a comprehensive act, however, tribes may find it more feasible to negotiate directly with their respective immi-

shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Id.

222. See *Cayuga Indians (Great Britain) v. United States*, 6 R. Int'l Arb. Awards 173, 176 (1926); W. Bishop, Jr., *International Law Cases and Materials* 315 (1971); G. von Glahn, *Law Among Nations* 87 (1981).

223. See *Treaty of Boundary Waters*, *supra* note 219, art. IX, 36 Stat. at 2452.

224. See *id.*, art. X, 36 Stat. at 2453. The IJC has been highly successful in handling difficult issues, especially those relating to water use and development. See Willoughby, *Expectations and Experience 1909-1979*, in *The International Joint Commission Seventy Years On 25-38* (1981). Such a Commission is an ideal method for dealing with Indian issues, because it seems relatively immune to nationalist interests, but considers each issue on its own merits and at the location in question. See *id.* at 31, 39.

225. See *supra* notes 151-63 and accompanying text.

226. See *Notice of Establishment of a Border Committee*, *supra* note 2.

227. See Sanders, *The Rights of the Aboriginal Peoples of Canada*, 61 *The Canadian Bar Rev.* 314, 314-18, 338 (1983).

228. *Can. Const. part II, § 35(1)* (1982).

gration and customs services to find solutions. The respective Canadian and United States agencies in each of these areas hold periodic joint meetings to discuss matters of mutual concern.²²⁹ They could negotiate similar regulations that would allow for entry and customs rights.

There are few practical reasons for Canada and the United States not to recognize the rights of Indians to transport goods freely across the border. The boost of added revenue to the small tribal economies and thus to the economies of the particular localities, as well as the benefits of bringing national practices into line with international obligations, more than outweigh the loss of the few tariff dollars currently collected on Indian goods.²³⁰ In addition, Congress has both a legal obligation to protect tribal resources and a stated moral commitment to foster tribal economic development.²³¹ The historical and logical trading partners of border tribes are other border tribes. Imposing tariffs on these tribes and Indian individuals thus hinders tribal development and vitiates attempts at attaining self-sufficiency. Furthermore, the passage of legislation by the United States and Canada to solve recognition, membership, crossing, trade, and hunting and fishing problems encountered by border tribes would demonstrate these governments' commitment both to the Indian people residing within their territories and to their international treaties.

CONCLUSION

This Article does not purport to resolve the problems caused by centuries of abuse of North American Indians. Rather, it proposes a more consistent and equitable approach that may eventually resolve some of the problems unique to the tribes inhabiting the areas along the United States-Canadian border. Initially these two nations recognized the aboriginal basis of Indian rights; however, this recognition was lost in subsequent decades. Whatever the reasons for this change, these rights must once again be recognized for justice to be done to the original inhabitants of the North American continent.

229. See *supra* note 2.

230. See *supra* note 91.

231. See *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Menominee Tribe v. United States*, 101 Ct. Cl. 22, 39-41 (1944).