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Essay

*1011 REVIEW OF THE HISTORY OF THE APRIL 1997 TRADE AND COMMERCE AGREEMENT AMONG THE TRADITIONAL HAUDENOSAUNEE COUNCILS OF CHIEFS AND NEW YORK STATE AND THE IMPACT THEREOF ON HAUDENOSAUNEE SOVEREIGNTY

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INTRODUCTION

The first six months of 1997 were an eventful and important part of the history of New York State's attempts to collect sales and excise taxes on the sales of tobacco *1012 products and gasoline on the territories of the various Indian [FN1] nations within New York's boundaries. This struggle was created by the conflict between the Haudenosaunee [FN2] and New York State. The Haudenosaunee claim that New York's laws, particularly its tax laws, do not apply on their territories because the Haudenosaunee are aboriginal sovereign governments, while New York State claims that 25 U.S.C. § 233 and various United States Supreme Court and lower federal court decisions authorize the collection of state taxes on sales of products to nonnative buyers even when such sales occur on Haudenosaunee territories. [FN3]

This long conflict came to a head on February 12, 1996. Through a letter from the Commissioner of Taxation and Finance to the leaders of the native nations, New York State announced that in sixty days the state would begin to collect certain excise and sales taxes on all sales to nonnatives unless the native governments negotiated and *1013 signed written agreements with the state providing for some other arrangement. The various responses to this state-created ultimatum among the native peoples within New York's borders, as well as some of the historical events of the Spring of 1997, will be reviewed in this Essay.

The Haudenosaunee entered into extensive and intensive negotiations with state representatives and eventually reached a tentative agreement. An interim agreement was implemented on April 1, 1997. As negotiations continued, the interim agreement was extended into May, and a proposed "final" agreement was reached in early May 1997. On May 22, 1997, with approval of the Haudenosaunee Grand Council still pending, New York Governor George Pataki unilaterally, and without notice, canceled these agreements and announced that New York would suspend its efforts at collecting these taxes on any sales on native territories. [FN4]

When the Haudenosaunee evaluated the governor's February 12 ultimatum, they decided that they should attempt to resolve this potentially explosive conflict through the Haudenosaunee's historic process of diplomatic government-to-government negotiations. Before entering these negotiations, the Haudenosaunee set certain fundamental principles in the Trade and Commerce Agreements and adhered to them throughout the negotiations.

The first principle sought preservation of the Haudenosaunee nations' sovereignty and the recognition of this sovereignty by the State of New York. The second principle called

for the state to recognize that this sovereignty afforded each nation the right to control and regulate all trade and commerce on its territory. The third principle stressed that no state tax could be collected from any sale to any person when that sale took place on Haudenosaunee territory. The final principle called for preservation of the economic base that native retail stores provided for the nations. All four principles were fully embodied and preserved in the Trade and Commerce Agreements reached with the state.

The Haudenosaunee has never consented to the ***1014*** jurisdictional authority of New York State, and has never agreed to allow New York State to impose its laws, including its tax laws, upon the Haudenosaunee people or on any transactions conducted within the territorial boundaries of its member nations.

The interim and proposed final Trade and Commerce Agreements contained these major provisions:

No state taxes, either excise or sales, would be collected on any sales of cigarettes and/or tobacco products which occurred on Haudenosaunee territories;

The state re-affirmed its recognition of the sovereignty of the Haudenosaunee and its member nations; and

The state affirmed its recognition that one aspect of the sovereignty of the Haudenosaunee nations was their governments' rights to control and regulate all trade and commerce within their territories.

As a corollary, all stores on Haudenosaunee territories were to be licensed by their native governments and to pay the nation government a nation cigarette fee. The fees varied but were generally less than half of what the state taxes were. This fee arrangement still left native stores at a remarkably competitive advantage over non-native stores, as non-native stores had to pay state taxes. Under the interim agreement, Haudenosaunee stores could sell cartons of cigarettes for about four dollars less than their non-native competitors, a difference of approximately twenty percent.

The interim and final agreements represented a win-win situation for both the nations and the individual native store owners. The nations would have a steady source of revenue to fund their governmental operations and social programs. The businesses could continue to make steady and healthy profits on these tax-exempt sales--sales whose tax-exempt status was secured by the nations' sovereignty. Further, the agreements would end uncertainties regarding whether native stores could continue their competitive tax-exempt status. For over ten years prior to the trade and commerce agreements, native stores and the nations' economies lived under a cloud of uncertainty concerning when and how the state would impose its taxes on their stores' sales. The proposed agreements would remove this cloud.

Recognizing these benefits, one wonders why the native store owners and their supporters vehemently opposed the ***1015*** trade and commerce agreements. From the Haudenosaunee perspective, the answer was clear. The owners' greed and desire for maximum individual profits strongly outweighed any concern the store owners had for the sovereignty of their own traditional governments. These owners refused to recognize that all Haudenosaunee citizens should share in the benefits of the stores' tax-exempt sales.

This Essay will explore the general provisions and some of the details of the tax and commerce agreements, the business owners' responses to the proposed agreements and the state court cases which resulted. Part I of this Essay will review the history prior to 1997 which set the framework for these negotiations. Part II will review the 1996 and 1997 negotiations between the Haudenosaunee and New York and the provisions of the interim and final Trade and Commerce Agreements. Part III of this Essay will review two of the responses by native business owners to the interim and final Trade and Commerce Agreements. Part III will also discuss some of the state court cases of April and May of 1997 which attempted to halt the state's implementation of its taxing structure. Finally, Part III will review the impact of all of these events on the Haudenosaunee's continued struggle to preserve its sovereignty and its sovereign right to govern its own territory.

I. THE HISTORY LEADING TO THE 1997 TRADE AND COMMERCE AGREEMENTS

A. Background and General State Taxation Scheme

New York State imposes an excise tax on cigarettes, tobacco products and motor fuel that are imported, manufactured or sold in the state. [FN5] State and local governments also impose a sales tax on cigarettes and motor fuel that are imported, manufactured or sold in the state. [FN6] Prior to 1985, these taxes were collected when the products were sold for the first time by a distributor or a nondistributor.

This taxing scheme left open at least two major loopholes. The New York State Department of Taxation and Finance (hereinafter the Tax Department) claimed that the ***1016** loopholes resulted in millions of dollars of uncollected excise and sales taxes. The first loophole allowed distributors to sell these aforementioned products to native stores and gas stations without collecting the state taxes. The second loophole emanated from the fact that transfers between distributors were tax-free. Some distributors transferred the same products among themselves several times in one day by merely noting the transfer on paper. Distributors frequently engaged in "daisy-chain" schemes, [FN7] concealing certain transfers, transferring products to insolvent or nonexistent parties or falsely reporting that the taxes had been paid. The Tax Department claimed a documented annual loss of $90 million from the evasion of the excise and sales taxes. Industry experts estimated that the combined state and local revenue loss could have been as high as $200 million. [FN8] It is important to note, however, that the Haudenosaunee has always felt that the state and the lobbyists for convenience store and gas stations owners inflated these losses.

B. The 1985 and 1986 Tax Law and Regulations Amendments

In an effort to end the alleged revenue losses, the New York State Legislature enacted a new enforcement procedure which went into effect on June 1, 1985. [FN9] Under this new procedure, excise and sales taxes would be collected upon the initial importation, sale or delivery of these products to the state-registered dealers. This new enforcement procedure was designed to eliminate the tax-free transfers between distributors and to terminate the availability of untaxed products for native stores and stations. Additionally, the Legislature established a registration process for distributors with strict standards requiring store owners to file a security bond or other acceptable security to cover their liability for the excise and sales taxes. [FN10]

The ultimate tax burden remained with the consumer. ***1017** Distributors were authorized to shift the tax burden to their transferees, and the final seller was required to collect a tax based on the actual selling price and to pay the net tax due or to claim a credit for any difference between the amount of tax collected and the tax paid on the sale to the first registered distributor. [FN11]

This new tax-collecting scheme resulted in the requirement that all native store and station owners collect state excise and sales taxes for all sales. Since these taxes had already been imposed on the distributor, there would be no legal source of tax-free products for native stores. Had this taxing scheme been fully implemented, native stores would have been faced with the dilemma of either selling at a fully-taxed final price and somehow absorbing the full amount of the excise and sales taxes in order to continue to sell at a non-taxed price or obtaining "contraband" product upon which the state taxes had not yet been collected.

Because sales to natives were still supposed to be tax-exempt, a mechanism was created whereby the native stores could apply to the state for a refund of all state taxes for sales to "qualified Indian consumers." [FN12] However, this required elaborate bookkeeping and the use of coupons, and such sales would have been limited by a state-set quota. [FN13] Further, the definition of "qualified Indian consumers" was much too narrow from the native perspective. [FN14]

Additionally, in the following year the New York State Legislature authorized physical seizure and forfeiture as part of the enforcement scheme to curb the evasion of excise and sales taxes, [FN15] and required the operator of every motor vehicle transporting motor fuel within the state to maintain a manifest indicating, inter alia, the name and

address of every person to whom the fuel is delivered, the place of the delivery and, if the fuel is imported into the state, the name of the distributor importing the fuel. [FN16] The same seizure provisions and manifest requirements had been created for ***1018** cigarettes and tobacco products in the previous year. [FN17]

In recognition of the controversy surrounding the state's attempts to collect its taxes on sales in Indian territory, the 1986 regulations created an "opting out" provision, under which an Indian nation could enter into an agreement with the state "to regulate, license or control the sale and distribution" of cigarettes on its territory and thereby circumvent this taxing scheme. [FN18] Many other states have similar opting out agreements, and the practice in those states had been for the Indian nations to collect a mutually agreed-upon percentage of the state excise tax and turn these tax revenues over to the state. The Cuomo administration had a similar formula in mind when it included the opting out agreement provision in the 1986 changes.

In order to fully understand the excise tax struggles since 1986, and the events of 1997 in particular, it is important to comprehend the effects which would have resulted if the Attea regulations had been implemented. First, there would have been no legal supply of untaxed cigarettes or motor fuel available to native retailers. The excise and sales taxes would have been fully paid on all legal products reaching these native retailers. Second, if they complied with the elaborate bookkeeping, quota and coupon requirements, the retailers could have applied to the state for a refund of state taxes which had been precollected on products sold to qualified Indian consumers. Third, all Indian motor fuel retailers would have been required to be licensed by the state and to fully comply with the state tax laws and regulations. [FN19] This scenario could have been avoided only if the native government reached an opting out agreement with the state.

Once it understood its options under the proposed Attea regulations, the Haudenosaunee decided that the most responsible course of action to fight this imposition of state jurisdiction and taxes was to engage in diplomatic, government-***1019** to-government negotiations with the state. Court challenges were evaluated and rejected as a means of preventing implementation of the state tax and regulatory scheme because the history of state and federal courts in this area was solidly against the natives and fully in favor of absolute recognition of the state's right to impose its laws and taxes on these sales. The Haudenosaunee determined that a court challenge might negatively impact national sovereignty.

C. The History and Impact of the Attea Court Challenges

While the long-term chances of success of litigation to challenge this taxing scheme were very slim, the short-term benefits of such litigation for non-native cigarette distributors were very profitable. The costs of litigation, while substantial, constituted a mere fraction of the profits that could be preserved by preventing implementation of the 1985 and 1986 regulatory changes. This phenomenon was exemplified in the now well-known Attea litigation.

Milhelm Attea and Brothers, Inc. is a cigarette distributor located near Buffalo, New York who sells at least seventy-five percent of all of its cigarette sales to retailers on Indian nations. [FN20] In 1989, Attea brought an action in state Supreme Court challenging its new taxing and enforcement scheme, by seeking to enjoin enforcement of the tax regulations concerning cigarettes sold on native territories. [FN21] The Appellate Division, Third Department affirmed a lower court decision granting an injunction. [FN22] The New York Court of Appeals dismissed the state's appeal of the Appellate Division's affirmation. [FN23] On further appeal, the United States Supreme Court granted certiorari and remanded the case to New York State's Appellate ***1020** Division. [FN24] On remand, the Third Department reversed its earlier ruling, holding that the original injunction was not proper. [FN25] Attea appealed to the New York State Court of Appeals, which reversed the Appellate Division decision and re-instated the injunction against the tax regulations. [FN26]

Thereafter, the state appealed this ruling by its highest court prohibiting the implementation of these regulations and its scheme to collect its excise taxes on sales of

cigarettes on native territories. The United States Supreme Court again granted certiorari. [FN27] This long "roller coaster ride" of litigation finally ended on June 13, 1994, when the United States Supreme Court, in an opinion by Justice Stevens, held: (1) the federal statute conferring on the Commissioner of Indian Affairs the authority to make rules and regulations with respect to the sale of goods to Indians on reservations did not preempt state regulation that was reasonably necessary to the collection of lawful state taxes; (2) the scheme under which a quota was imposed on the number of tax-exempt cigarettes that wholesalers could sell for resale on reservations to qualified Indian consumers and record keeping requirements were established did not impose an excessive burden on Indian traders or retailers; and (3) the requirement that retailers obtain state tax exemption certificates (coupons) did not impose an excessive burden on Indian traders or retailers. [FN28] In so holding the Supreme Court categorically stated: "[R]eservation sales to persons other than reservation Indians, however, are legitimately subject to state taxation." [FN29] This ruling was not unexpected, given earlier Supreme Court decisions which recognized other states' rights to tax sales to non-natives. [FN30]
***1021** At least two aspects of the Attea litigation should be stressed here. First, although Attea eventually lost in the Supreme Court, the company managed to delay the implementation of the New York State regulations and taxing scheme for over five years. This enabled Attea to continue to do business and make substantial profits. For this non-native cigarette distributor, the profits it enjoyed for that five year period were probably much more important than the eventual ruling which imposed state jurisdiction and taxes on native territories within New York. As it turns out, at the time of the writing of this essay, more than four years after the Supreme Court decision, the taxing scheme had not yet been implemented by the state, despite the Pataki administration's substantial efforts to do so in 1997. These efforts, though abruptly abandoned, will be reviewed below.
Second, none of the Indian nations within New York's boundaries actively participated in the Attea litigation. [FN31] Many natives believe that the result would have been different if an Indian nation had participated, but most lawyers and legal scholars familiar with these issues do not believe that would have substantially affected the outcome.

D. The Aftermath of Attea and the Events Leading Up To 1997
With such a clear ruling by the Supreme Court, it was the common knowledge in 1994 that the end of the era of tax-free cigarette sales by Indian retailers may be just around the corner. However, 1994 was a gubernatorial election year, and Governor Mario Cuomo was not about to enter the mine field by attempting to collect state excise taxes for sales on native territories at least until after the November election. Negotiations ensued between the Haudenosaunee and the Cuomo administration during the Summer and Fall of 1994, but it soon became evident that the State was only willing to proceed with the negotiations in a very slow manner, and no real results would be ***1022** achieved until after the election.
Within one week of the election, the Haudenosaunee started their official and unofficial attempts to meet with Governor-elect Pataki and his transition team. These unsuccessful attempts were renewed in January 1995, after Pataki's inauguration. Despite letters from the Haudenosaunee to the Pataki administration requesting a meeting to discuss a wide variety of issues in need of resolution, no such meeting occurred until early February 1996.

II. THE 1996 AND 1997 NEGOTIATIONS AND THE PROPOSED TRADE AND COMMERCE AGREEMENTS

A. The Governmental Complexity of New York's Indian Nations in the Spring of 1997
Although there are traditional governments for each of the six member nations of the Haudenosaunee (Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora), only four of these nations (Onondaga, Cayuga, Tonawanda Seneca and Tuscarora) are currently recognized by the federal government. New York State followed the lead of the federal

government officially recognizing only those same four traditional governments.
1. The Mohawk Nation. The elected Saint Regis government in the Mohawk Nation is a system of three chiefs created by state law. [FN32] However, the actual governmental structure of the Mohawk territory at Akwesasne is much more complicated. A large part of this complexity is created by the fact that the geographic territory of Akwesasne lies on both sides of the United States and Canadian border, with the St. Lawrence River generally being recognized by non- natives as the international border. The state-created elected government receives massive amounts of federal money from the Bureau of Indian Affairs. [FN33]
In the past ten years this elected government has ***1023** repeatedly been at the center of controversy, due in part to numerous allegations of corruption. The most recent evidence of this corruption was in 1997 when a fifty-four page criminal indictment was filed in the United States District Court for the Northern District of New York. Twenty-one people were indicted for over $687 million in alleged smuggling over the St. Lawrence border. [FN34] One of the specific allegations in this indictment was that one of the former elected chiefs, L. David Jacobs, had used his official position to promote these smuggling operations, had received bribes for this assistance and promotion and had run the elected government as a criminal racketeering enterprise through a pattern of bribery and extortion. [FN35] When considered along with earlier allegations that the elected government had been complicit in illegal gaming operations in the late 1980s and the tragic deaths of the two Mohawks by gunfire during armed activities of the warriors in 1990, these events led to the repeated introduction of bills in the New York State legislature to repeal Article 8 [FN36] and the dissolution of the elected government.
On October 6, 1998, former elected chief L. David Jacobs entered a plea of guilty in district court. Jacobs admitted that, while chief, he conducted the elected St. Regis government as a criminal racketeering enterprise. In addition, Jacobs admitted that he received substantial bribes in the late 1980s from a convicted gambler in order to protect Jacobs' illegal gambling casino and that he took bribes from three other gambling operatives in the early 1990s. [FN37]
The governmental picture at Akwesasne is further complicated by the existence of another elected government on the Canadian side of the territory and the existence of the traditional Mohawk Nation Council of Chiefs, a governing body recognized and followed by Mohawk People ***1024** on both sides of the international border. In the Mohawk land claim, all three governments are parties and all three have actively participated in the litigation and negotiations.
Since cigarette and gas businesses generate millions of dollars in revenue, their influence on tribal elections under the elected systems can be pervasive. When only a few hundred or a few thousand votes are cast in such elections, money has been the dominant factor. This phenomenon has prevented elected governments from being able to control or regulate their businesses. Business-dominated governments led the state-created elected Mohawk and Seneca governments to fight hard against resolution of long-standing tax dispute in the Spring of 1997.
2. The Seneca Nation. In 1848, the state attempted to replace the traditional Seneca government with an elected one. However, the traditional Seneca government was preserved on the Tonawanda Seneca territory, and it still exists today in its ancient form. This traditional government is recognized by both the state and federal governments. The state-created elected Seneca government is also federally recognized as governing the larger Cattaraugus and Allegany territories. Many traditional Senecas live on these territories. This elected Seneca government consists of a president who is elected for a two year term, with a one term limit; a tribal council, whose members are also elected on a rotating basis; and a judiciary, known as the Seneca Peacemakers Court. [FN38]
This elected Seneca government has been at the center of controversy in the recent past. In 1994, an internal dispute between the President and the business-dominated Tribal Council led to the filing of a lawsuit in state Supreme Court by the lawyer for the Seneca Nation, acting on the direction of the Tribal Council. The Tribunal Council sought an injunction to challenge the actions of the then president, Dennis Bowen, and the

decisions of the Seneca Peacemakers Court. [FN39] After the state court issued the injunction, based upon the state court's assertion that it had proper jurisdiction to intervene in the internal governmental decisions of the elected Seneca government, President Bowen filed an action in federal court in the Western *1025 District of New York in Buffalo. [FN40] The federal court overruled the state court, vacated the injunction and ruled that state court was without jurisdiction to intervene in such an internal matter. This governmental crisis which developed from an early gambling controversy as well as the controversy over the control of businesses, had a tragic outcome when in 1995 three Senecas were killed in an attempted armed assault upon one of the government buildings by pro-gaming supporters. [FN41] In the 1996 Seneca election, Michael Schindler was elected president when he ran on an anti-gambling platform. However, the tribal council has recently mandated that yet another vote be taken on the issue of gaming in the Seneca Nation.

3. The Oneida Nation. The Oneida Nation of New York has developed a hybrid government which is neither traditional nor elected. This government is essentially ruled by one man, Ray Halbritter, the Nation Representative and the Chief Executive Officer of the Nation's casino and other businesses. He is supported by a "Men's Council" which his critics say is hand-picked, merely a rubber stamp to his ultimate rulings. The traditional people of Oneida unsuccessfully challenged Halbritter's hybrid government in the Northern District of New York. [FN42] The District Court's dismissal of this challenge was affirmed by the Second Circuit. [FN43]

This governmental picture seems complex because it is. When the State set unrealistically short deadlines in the Spring of 1996 it compounded difficulties already in existence within the nations. A further complication was created by the state's insistence that all negotiations towards any non-tax agreements be kept absolutely secret. This secrecy was very problematic for the traditional Haudenosaunee governments because of their tradition of *1026 direct democracy in their Longhouses, which mandates that all major decisions be fully open to all members of their communities and debated by all interested citizens until consensus is reached.

From February 1996 to May 1997, the state representatives were engaged in separate negotiations with: (1) the Haudenosaunee leadership, (2) the elected Mohawk government, (3) the elected Seneca government, (4) the Halbritter government and (5) the non-federally recognized Indian nations of Long Island.

B. The 1996 and 1997 Negotiations

This first meeting between the Haudenosaunee leadership and Governor Pataki administration occurred on February 10, 1996. I attended this meeting as the only attorney for the Haudenosaunee. The meeting was cordial, but very little substance was covered. However, a tentative agenda of issues such as land claims, taxation, jurisdiction and hunting and fishing was identified for future work. Within days of this meeting, on February 12, 1996, the Pataki administration announced that the Attea regulations, which had been very slightly amended in November 1995, would be implemented with sixty days unless Indian nations reached agreements to the contrary with the state within that time frame. This meant that, absent some action by the native governments, the legal supply of tax-free cigarettes to native retailers would be shut off and all native retailers would need state-issued licenses and to collect full state excise and sales taxes for their sales. This taxing scheme would be backed up by the seizure and forfeiture provisions mentioned above. [FN44]

Therefore, in February 1996, the Haudenosaunee and other native governments had to respond to this state-created deadline and make decisions as to which of the possible choices of action they should take. The choice selected by the Haudenosaunee was to peacefully resolve this jurisdictional and taxation dispute via diplomacy using face-to-face negotiations with the state officials to determine if an opting out agreement could be reached. The second possibility of a direct state or federal court challenge to the state's jurisdiction and taxing scheme was rejected by *1027 the Haudenosaunee once evaluated. A third alternative, that of direct confrontation through road closures or other

means, as occurred on the Cattaraugus and Allegany Seneca territories, was evaluated and reserved for possible later use if the negotiations were not successful. A fourth alternative, not doing anything, was rejected as not responsive to the short- or long-term needs of the Haudenosaunee people.

Before entering these negotiations, the Haudenosaunee had invoked Article VII of the 1794 Treaty of Canandaigua [FN45] and written to the President of the United States concerning this developing crisis. The response indicated that the President designated the Office of Tribal Justice of the United States Justice Department as his representative in this matter. A meeting was held with Tribal Justice in Washington, D.C., in the Spring of 1996, and the Haudenosaunee were told that as members of the United States Justice Department, the Tribal Justice lawyers were bound by the Supreme Court's decision in Attea that such state taxation of sales to non-natives was legal. The Tribal Justice lawyers advised the Haudenosaunee that they should proceed with their negotiations with the state. Subsequently, a lawyer from Tribal Justice was present at most to the Haudenosaunee-state negotiation sessions as a federal representative.

Throughout these negotiations, the state was represented by two attorneys from the Governor's staff, a lawyer from the Attorney General's office and two lawyers from the state Department of Taxation and Finance. From time to time, other members of the Department of Taxation and Finance attended the meetings, as their expertise in such matters as enforcement and cigarette stamping was needed.

These negotiations continued from March 1996 until May 1997, however, there were many periods when no talks were held due to other commitments on the part of one side or the other. On the state side, the predominance of state budget negotiations was a major cause of delay. In both 1996 and 1997, the state budget was not resolved among the governor's office, the state Senate and the Assembly until July, despite the April 1 deadline. Additionally, after August, the state government essentially shuts down for an ***1028** extended period, with lawmakers returning to their home districts. On the Haudenosaunee side, their traditional religious ceremonies mandate that they are not able to meet for extended periods.

However, meetings continued on a somewhat regular basis. The state-set deadlines were extended several times due to the good faith bargaining of the Haudenosaunee leadership. The most intense period of negotiations occurred in the Spring 1997, with at least one meeting every week and frequent exchanges of written drafts.

Since there is a strong possibility that these negotiations could resume in the near future, given that the tax issue is not resolved, it does not seem wise to go into too much detail regarding the positions of either side. It would be safe to say, however, that the sides were very far apart at the start of this process. The state was armed with the Supreme Court Attea decision and, therefore, insisted that its jurisdiction and "right" to impose its taxes on such sales was very strong. The Haudenosaunee maintained that their sovereignty, as recognized by the late eighteenth century treaties with the federal government, protected them from any interference from state law or taxes.

When the role of other forces was added to this mix, the likelihood of ever reaching an agreement seemed even more remote. On the non-native side, the well organized convenience store and gas station owners exerted great influence. Their position was, and continues to be, that they were entitled to a "level playing field," meaning that all state taxes must be collected on all sales regardless where the sales occurred. They introduced the demand that the governor collect one hundred percent of the state taxes. It was no secret that these groups and their well-funded lobbying organizations had been major contributors to the Pataki election campaign. They were also very vocal in the media, and they have sued the Pataki administration to attempt to force the full collection of all state taxes on these sales on native territory. [FN46]

***1029** On the native side, the individual business owners and their warrior supporters were adamant that sovereignty was an individual matter which entitled them to conduct any business they chose with no regulation or control by any government, even their own native governments. They maintained that the state had no right to impose these taxes (a view fully shared by the Haudenosaunee leadership) and that no talks with the state

should take place. They also became quite organized during this period, forming an organization known at different times as the Native American Business League and the First Nation Business Association. Throughout the period, threats emanated from the warrior faction that any native leader who negotiated with the state would be considered a traitor and dealt with accordingly. In April 1997 the home of Tuscarora traditional Chief Leo Henry was firebombed and destroyed. A few weeks later, an abandoned house owned by the family of Onondaga traditional Chief Alson Gibson was also destroyed by arson. Additionally, many documents threatened the lives and homes of the traditional chiefs. Another problematic factor was the media release in July 1996 that at some early stage of the Pataki administration a plan entitled "Operation Gallant Piper" had been explored. It called for the combined use of state police and National Guard planes, armored personnel carriers and armed forces to invade the Akwesasne, Onondaga and Seneca territories to quell any resistance to the imposition of state taxes. While this plan was later denounced by the Pataki administration, the very fact that it ever existed was a major cause for alarm.
Against this complex and potentially dangerous background, the negotiations quietly continued with major efforts on both sides to work towards resolution.

C. The April 1, 1997 Proposed Interim Trade and Commerce Agreement
On March 30, 1997, the final details of a proposed Interim Trade and Commerce Agreement were hammered ***1030*** out. An interim agreement went into effect on April 1, 1997, [FN47] a final deadline which had been set by the state. Without any agreement, no tax-exempt cigarettes would have been available after April 1 for any native retailers. Further, all native stores would have been required to obtain a state license. Without an agreement, retailers would not have been able to continue to sell tax-exempt products legally. The imposition of state jurisdiction and tax laws would have trampled on the sovereignty of the Haudenosaunee nations.
The state was fully prepared to stop all shipments of product to stores on native territories which were made without full compliance with its laws. In fact, in April, a number of these shipments were seized in the western part of New York State and forfeiture procedures were instituted in state court. [FN48]
The major provisions of the Interim Agreement were: (1) the sovereignty of the Haudenosaunee was recognized and reaffirmed by the state, (2) the state recognized the eighteenth century treaties between the Haudenosaunee and the United States government, (3) the state recognized the traditional Haudenosaunee governments' right to regulate trade and commerce on its territories, and (4) no state taxes would be collected on sales of cigarettes at stores on Haudenosaunee territories. [FN49]
The Interim Agreement also provided that all stores on Haudenosaunee territories would be licensed by their native governments. This avoided the state's mandate that all native stores obtain state licenses and fully comply with all state laws and regulations. Under the Interim Agreement, a minimum sale price was established for cartons of cigarettes sold at native stores. [FN50] This minimum price varied according to the geographic location of the territories with respect to major cities, so that more rural territories had a lower sale price (inducing non-native customers to travel farther to reach them). These minimum prices would be maintained by the use of a nation cigarette ***1031*** fee which the stores paid to their nation government. When combined, the minimum price and nation fee still afforded each store the opportunity to enjoy substantial sales and profits. The nation fee remained with the nation and became general revenue for the native governments. On Onondaga, the fee is the only revenue source for dozens of social programs which are funded by the traditional government, including, but not limited to, language programs, home repair programs, annual heat subsidies for each household, repairs of community buildings, clean up and landscaping of the territory and sports programs for all ages.
The Interim Agreement specifically provided that it would only last thirty days, until such time as a final agreement could be reached. [FN51] As it turned out, the Interim Agreement was extended by mutual agreement into May while final details were

negotiated.
From the Haudenosaunee perspective, the period between the Interim Agreement and the final proposal was used for community review and full discussions. Community review was in process when the Governor unilaterally canceled the Agreement on May 22, 1998. [FN52] During community review, it was determined that there were some unacceptable provisions in the Interim Agreement. After negotiations between the Haudenosaunee and the state in April and May, the state agreed to amend the unacceptable provisions.

D. The Proposed Final Trade and Commerce Agreement
In early May, the negotiations produced what each side hoped would be a final agreement. The proposed Final Trade and Commerce Agreement was essentially the same as the Interim Agreement, with some revisions that had been suggested during the Haudenosaunee community review process. Thousands of copies of this proposed Final Trade and Commerce Agreement were printed by the Haudenosaunee and were hand delivered to the mail boxes of all of the Haudenosaunee territories. Nothing was secret ***1032** about this proposed Final Agreement. The Haudenosaunee had carefully informed the state that the Final Agreement had to be approved in each Haudenosaunee nation and then by the Haudenosaunee Grand Council. The approval procedure was in process when Governor Pataki unilaterally canceled the agreement. [FN53]
Like the Interim Agreement, the proposed Final Agreement contained the following major provisions: (1) the sovereignty of the Haudenosaunee was recognized and reaffirmed by the state, (2) the state recognized the eighteenth century treaties between the Haudenosaunee and the United States government, (3) the state recognized the traditional Haudenosaunee governments' right to regulate trade and commerce on its territories, and (4) no state taxes would be collected on sales of cigarettes at stores on Haudenosaunee territories. [FN54]
The title of the proposed Final Agreement, "Trade and Commerce Agreement with the State of New York," is significant because the state initially focused on obtaining a "tax compact." The Haudenosaunee were successful in getting the state to agree to a "Trade and Commerce Agreement." This is significant because the agreement was not merely a tax agreement. Rather the state agreed both that state taxes would not be collected and that the Haudenosaunee were a sovereign group who possessed right to regulate trade and commerce on their territories.
The Preamble of the proposed Final Agreement demonstrates how the proposals are more that simple "tax compacts."
In the spirit of the 1794 Treaty of Canandaigua, the Haudenosaunee and the State of New York do hereby enter into this Agreement for their mutual benefit, in order to reaffirm and further the mutual respect, peace and friendship that exists between them, and to promote trade and commerce among our people.
This Agreement affirms the sovereign status of the Haudenosaunee Nations ... and represents a binding commitment on the part of the State of New York and these Nations of the Haudenosaunee. Inherent in that commitment is a recognition by ***1033** the State of New York of the sovereign status of these Haudenosaunee Nations to engage in trade and commerce within their territories. This Agreement also recognizes the inherent right of these Haudenosaunee Nations to regulate, monitor and exercise control over trade and commerce within their territories ...
Nothing in this Agreement shall be deemed to constitute a waiver of sovereign immunity .... In this Agreement, as in Article I of the Canandaigua Treaty, the peace and friendship of the aforesaid parties is firmly established, and shall be perpetual between them. [FN55]
The proposed Final Agreement also specified that no state excise or sales taxes would be collected on any sales of cigarettes in native stores on the territories of the traditional Haudenosaunee.

III. RESPONSES OF CERTAIN NATIVE BUSINESS OWNERS TO THE PROPOSED INTERIM AND

FINAL TRADE AND COMMERCE AGREEMENTS

A. The Necessity to Regulate and Control These Businesses

Given the clear strengthening of Haudenosaunee sovereignty and the agreement not to collect state taxes, the reader might wonder why these Trade and Commerce Agreements were not universally accepted by all of the native business owners. I would submit that the reasons for some of their negative reactions to the Agreements were at least twofold. First, some native business owners refused to recognize their own traditional governments' right to regulate and control their businesses, and, second, some native business owners wanted to continue to keep all of the profits from these tax-free sales for themselves rather than sharing them with their communities.

It is important to stress that these businesses were able to reap millions of dollars in profits from tax-free sales. Tax-free sales existed solely because of the sovereignty of their nations. This national sovereignty prevented the application of state jurisdiction and taxes to their businesses. ***1034** However, I would argue that a common misconception has developed among some native business owners that they are individually sovereign and that no law should apply to them or their businesses. This misconception led to their position that they have a "right" to operate any business they choose, without regulation or control by their own native governments. Many of these businesses have used their accumulated wealth to hire attorneys and public relations firms to fight their own traditional governments and to ignore the laws and customs of their own nations. [FN56]

In the past five years, businesses from various native territories around the state have formed organizational structures to push their pro- business, anti-regulation agenda. One organization repeatedly changed its name; some of its titles have been the Native Business Association, the Iroquois Businessperson Association, the First Nation Business League and the League of First Nations. This last name, the League of First Nations, is an indication that these business owners' agenda includes governmental concerns. These organizations have consistently attracted the same business owners and used their accumulated profits to fight their own native governments.

One of the clearest examples of the negative impact of the misconception of individual sovereignty is the case of Oliver Hill, a former Onondaga who ran an unlicensed business on the Onondaga Nation from 1987 until the Nation shut it down in 1993. [FN57] At first, Hill had an oral agreement with the Council of Chiefs which permitted him to sell cigarettes as long as he agreed to pay the then very low nation cigarette fee. The oral agreement was made in 1983, on the basis of a hand shake and Hill's promise. After sporadically paying the fee, Hill stopped paying altogether in 1988. [FN58] Hill's most egregious actions occurred in the mid-1980s, when he opened a gas station with no permission ***1035** from the Nation and in total violation of the Nation's Business Rules and Regulations. The Council became concerned about the safety of Hill's underground gasoline storage tanks and the piping which fed his gas pumps. Numerous letters about the underground tanks were written to Hill and his attorney by the Council and by myself, as the Nation's attorney. The letters were all ignored. Hill's refusal to keep his promise to pay the Nation's cigarette fee and his refusal to account for his gasoline system resulted in the April 1, 1993 decision by the people of Onondaga to close Hill's illegal businesses. This closure, although resisted physically and with court challenges by Hill, was effectuated by the citizens of Onondaga through the leadership of the Onondaga women. [FN59]

However, despite the closure, the physical infrastructure of Hill's businesses was left intact. In early October of 1993, another Onondaga citizen across the road from Hill's closed business while attempting to dig a well was nearly overcome with gasoline fumes. This event led to the discovery that Hill's underground gasoline storage and piping system had leaked an estimated ten thousand gallons of gasoline into the ground, thereby poisoning an underground aquifer and three of his neighbors' wells. Hill has not done anything to assist his former neighbors for his poisoning of their wells.

The Hill situation is an example of the need for governmental regulation and control of all businesses and commerce on the Haudenosaunee nations. Unregulated individual

business owners have repeatedly proven that their individual desire for profits have been given preference over any concern for the nation and its citizens.
One aspect of sovereignty is that a sovereign government has the right and the duty to regulate trade and commerce, including activities such as Hill's. This duty is owed to their citizens and to their non-native neighbors. The nations are sovereign, given their aboriginal existence as recognized by the eighteenth century treaties, and this national sovereignty precludes the imposition of state jurisdiction and taxes. [FN60]

***1036** B. The Responses of Certain Native Businesses to the Trade and Commerce Agreements
1. Joseph "Smokin' Joe" Anderson. When the Interim Trade and Commerce Agreement was implemented on April 1, 1997, it did not affect all of the native territories within New York's borders. Since the elected Seneca government at Cattaraugus and Allegany, and the elected Mohawk government at Akwesasne are not members of the Haudenosaunee confederacy, the Agreement did not protect the native retailers on these territories. The elected Mohawk and Seneca governments did not reach any agreements with the state, and thereby left their stores unprotected from the state laws and regulations. Most of the cigarette stores on the Tuscarora nation are owned either directly or indirectly by Joseph "Smokin' Joe" Anderson, who refuses to recognize the authority of the traditional Tuscarora Council of Chiefs to regulate the businesses on that territory. [FN61]
The state instituted a new era of enforcement to support the Interim Agreement and began to seize shipments of cigarettes and motor fuel which were being shipped to stores not covered by the Interim Agreement. [FN62] Unless Anderson agreed to regulation by the traditional Tuscarora government and to pay the nation fee, which was less than half of the state taxes, there was no longer a legal supply of tax-exempt products available to Anderson's stores. Given his strong opposition to his own native government, Anderson rejected this regulation and, instead, elected to fully pay all state taxes thereby insuring an uninterrupted supply of product for his stores. This was not the best business decision because it was more costly. Therefore, it must be seen as a political decision.
Despite Anderson's full payment of state taxes, the Department of Taxation and Finance nevertheless seized some shipments of gasoline destined for Anderson's stores. Two ***1037** gasoline distributors filed an action on May 7, 1997 in New York State Supreme Court by for the return of their seized product. [FN63] On May 15 1997, Anderson filed an affidavit is support of the Plaintiff's Motion for a Preliminary Injunction, wherein he stated:
My businesses are licensed and registered by the Federal Government to the extent required.... [M]y businesses annually pay millions of dollars in federal excise, federal withholding taxes, federal social security and Medicaid taxes, unemployment taxes, workers' compensation taxes, and disability taxes.... After April 1, 1997, I ordered shipments of fully taxed (both state and federal) motor fuel ... for delivery to my businesses. [FN64]
On May 16, 1997, Supreme Court Justice Pigott granted the motion for a preliminary injunction and ordered the Tax Department to return the seized shipments.
[The] Department of Taxation and Finance and the Commissioner of Taxation of New York State, and their respective officers, agents and employees, are preliminarily enjoined and restrained during the pendency of this action from interdicting, seizing or otherwise interfering with shipments or deliveries of motor fuel and diesel motor fuel upon which all applicable New York Article 12-A excise taxes and Article 28 sales taxes have been paid. [FN65]
As a result of Justice Pigott's opinion, Anderson was able to receive product even though he had to pay all state taxes to do so. His blanket acceptance and payment of all state taxes for his sales on Tuscarora territory was hardly an act that strengthened the sovereignty of the Tuscarora Nation. Rather, it was the opposite, a clear example of a native business owner putting his continued business operation and his personal profits before the interests of the nation and its sovereign right to regulate trade and commerce the territory. Rather than fight the state's attempt to impose its jurisdiction and taxes on

sovereign Tuscarora territory, Anderson elected to fight the interests of his own traditional government.

2. Seneca Hawk and Triple J's. The elected Seneca *1038 government at Cattaraugus and Allegany decided not to make an opting out agreement with the state. Many traditional Haudenosaunee are of the opinion that this decision was dictated by the tribal council, which was dominated by business owners and their supporters. Due to the failure to reach such an agreement, there was no longer a legal supply of untaxed product for the stores on these territories by April 1, 1997.

On April 4, 1997 peace officers employed by the Tax Department stopped and seized a tractor and tanker trailer with 8506 gallons of unleaded motor fuel destined for Triple J's, a gasoline retailer on the Cattaraugus territory of the Seneca Nation. [FN66] Allegedly, the truck's driver was not carrying the state required manifest because the state taxes had not been paid on the product.

Two days later, a second tanker with 8538 gallons of unleaded motor fuel, destined for Seneca Hawk, another gasoline retailer on the Cattaraugus territory, was stopped and seized. [FN67] Pursuant to Tax Law § 1848, the Tax Department moved in New York Supreme Court to confirm these seizures. This action was opposed by Triple J's, Seneca Hawk, the drivers of the trucks and the distributor.

On May 14, 1997, Supreme Court Justice Sconiers denied the Tax Department's action for confirmation and ruled that the motor fuel seizures amounted to unequal, selective and unjust enforcement of laws, in violation of the equal protection clause. [FN68] Justice Sconiers further ruled that the Interim Agreements were "found to be an unlawful usurpation [sic] of legislative power, illegal and unenforceable." [FN69] The ruling was surprising since not all of the parties to the Interim Agreement were before the Court.

The legal impact of Justice Sconiers' decision was relatively short-lived because the Appellate Division, Fourth Department agreed to hear the appeal on an expedited basis. On July 25, 1997 the Fourth Department resoundingly reversed Judge Sconiers. [FN70] The Fourth Department ruled *1039 that the seizures were perfectly legal and should have been confirmed by the Supreme Court [FN71] and that there had been no selective enforcement. [FN72] The Appellate Division clearly ruled that the Interim Agreements were valid:

> The court further erred in finding that the interim agreements reached between the Department and certain Indian Nations and tribes constitute "an unlawful usurpation [sic] of legislative power" and that the agreements are illegal and unenforceable. No respondent raised that issue, ... the Indian Nations and tribes that entered into those interim agreements were not parties to the motions to confirm and the Department was deprived of the opportunity to respond. Under the circumstances, it was improper for the court to grant that sweeping relief. [FN73]

The most damaging aspect of this litigation from the perspective of native sovereignty was the clear ruling by the Fourth Department that the Seneca Nation sovereignty did not preclude the state's taxation of these sales.

> Further, the sovereign rights of the Seneca Nation do not prohibit application of the State's tax laws to sales on the Seneca Nation's reservations to non-Indians .... State taxation of sales of cigarettes and other products to non-Indians on reservations and other taxes directed toward the activity of non-Indians on reservations have been sustained notwithstanding Indian claims of sovereignty. [FN74]

Given the Attea decision, this ruling was not unexpected. [FN75]

The short-term gain of individual native stores was traded against the long term loss of national sovereignty, with the anti-sovereignty ruling by the Fourth Department, whose geographic jurisdiction covers five of the six Nations of the Haudenosaunee. It is clear to see that these legal challenges to these seizures by Triple J's and Seneca Hawk was done solely to keep their businesses operating on the short run, while the long term result was a severe blow to the sovereignty of all native Nations within New York's borders.

*1040 CONCLUSION

The record of the events during the first six months of 1997 clearly outlines the three courses of action selected to fight the imposition of New York law over the Haudenosaunee Nations. The Haudenosaunee's approach of employing diplomatic, government-to-government negotiations resulted in the state's renewed recognition of the sovereignty of the Haudenosaunee and agreements that it would not collect taxes from the Haudenosaunee.
Smokin' Joe Anderson's approach was payment of all state taxes, which undermined his own traditional government by effectively saying that it lacked the right to regulate his businesses. Anderson also agreed that state jurisdiction and taxes were valid on sovereign Tuscarora territory. This was a victory for his pocketbook and a defeat for national sovereignty.
Finally, Triple J's and Seneca Hawk's court fight resulted in a confirmation of the state's jurisdiction and taxation authority on native territory and a direct rejection of the Seneca Nation's sovereignty by the Appellate Division, Fourth Department.
In light of the result achieved by the approach adopted by Anderson, Triple J's and Seneca Hawk's, it is clear that the Haudenosaunee's diplomatic, government-to-government tactics are the best method to preserve native sovereignty and maintain tax-exempt status for native retailers.

[FNb1]. General Counsel to the Onondaga Nation, the central fire keeper of the Haudenosaunee Confederacy. During the negotiations with New York State during 1996 and the first half of 1997, I was the only attorney on the Haudenosaunee side of the table and I represented all of the Traditional Councils of Chiefs in the talks which resulted in this proposed Trade and Commerce Agreement. Adjunct Assistant Professor of Law, Syracuse University, 1982; Adjunct Professor, SUNY at Oswego, 1982-1983. A.B., Syracuse University, 1968; J.D., SUNY at Buffalo, 1974.
This Essay was originally presented as a speech on March 21, 1998, at the Symposium on Law, Sovereignty and Tribal Governance: The Iroquois Confederacy sponsored by the Buffalo Law Review. The views expressed herein are the personal views of the author and do not represent in any way official positions of the Onondaga Nation. In addition, I take full responsibility for all unsupported assertions in this Essay, as they are based on my personal observations. I would like to thank the editors of the Buffalo Law Review for their invitation to speak at their symposium and for their offer to publish this Essay.

[FN1]. There is no correct English word to collectively describe the indigenous people of what is now New York State. Indian is a noun or adjective which relates back to the fact that Columbus thought that he had "discovered" India when his ships landed in the Western Hemisphere. This Essay will use the terms Indian, native and indigenous interchangeably. The more substantive terms nation and people will be used collectively in their international law sense, rather than the pejorative term tribe.

[FN2]. "Haudenosaunee" is the English translation of the term used by the native peoples themselves to collectively describe the Iroquois Confederacy. "Haudenosaunee" roughly translates to mean the people of the Longhouse. The English, and later the Americans, referred to the Haudenosaunee as the "Six Nations" or the "Six Nation Confederacy." The French referred to the Haudenosaunee as the "Iroquois." In the past 25 years, as they have struggled to reaffirm their sovereign status, the Haudenosaunee have endeavored to reject these colonial or imperialist terms and strongly prefer to be called the Haudenosaunee.
The Haudenosaunee consists of the traditional governments of the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora nations. Each of these nations has preserved their aboriginal clan and nations systems of government with varying degrees of success. The Haudenosaunee Grand Council consists of the fifty (50) Chiefs of the six Haudenosaunee nations, who still meet and governs the collective affairs of the confederacy, while each Haudenosaunee nation still governs it own internal affairs. Each Haudenosaunee nation has preserved and still speaks its native languages and conducts

its government as was done before European imperial intervention. Further, the Haudenosaunee religion, which is shared by all six nations, has been preserved and is still actively practiced in the Longhouses.

[FN3]. See New York Assoc. of Convenience Stores v. Urbach, 699 N.E.2d 904 (N.Y. 1998) (discussing New York's position).

[FN4]. See Robert L. Smith, Governor Pulls Plug on Indian Tax Collections: Standoff's End Stuns All Sides: A State Agreement With the Iroquois is Suddenly Cancelled, POST-STANDARD (Syracuse), May 23, 1997, at A1.

[FN5]. See N.Y. TAX LAW §§ 284, 471, 471-c (McKinney 1998).

[FN6]. See N.Y. TAX LAW §§ 1102, 1103 (McKinney 1998).

[FN7]. See Motor Fuel Taxes, Memorandum of State Executive Department, 1985 N.Y. Laws 2959.

[FN8]. Id. at 2955.

[FN9]. Id. at 2960.

[FN10]. See N.Y. TAX LAW § 283 (McKinney 1998).

[FN11]. See Motor Fuels Taxes, Memorandum of State Executive Dep't, 1985 N.Y. Laws 2960.

[FN12]. See N.Y. COMP. CODES R. & REGS. tit. 20, §§ 336.6(a), 336.7(e) (repealed 1998).

[FN13]. See N.Y. COMP. CODES R. & REGS. tit. 20, §§ 336.7(c) (repealed 1998).

[FN14]. See N.Y. COMP. CODES R. & REGS. tit. 20, § 336.6(b)(1)(ii) (defining qualified Indian consumer).

[FN15]. See N.Y. TAX LAW § 1848 (McKinney 1998).

[FN16]. N.Y. TAX LAW § 286-b(1) (McKinney 1998).

[FN17]. N.Y. TAX LAW §§ 1846-47 (McKinney 1998). Through out the remainder of this Essay, I will refer to these regulations as the Attea regulations, because these were the regulations which were challenged by Milhelm Attea & Brothers, Inc. in a series of state court rulings and then finally in the United States Supreme Court. This litigation is discussed in the next section.

[FN18]. See N.Y. COMP. CODES R. & REGS. tit. 20, § 336.7(g) (repealed 1998).

[FN19]. See N.Y. COMP. CODES R. & REGS. tit. 20, §§ 414.6(b)(4), 414.7 (repealed 1998).

[FN20]. Milhelm Attea & Bros., Inc. v. N.Y. Dep't of Tax. and Fin., 564 N.Y.S.2d 491, 492 (N.Y. App. Div. 1990).

[FN21]. The Haudenosaunee reject the use of the term "reservations" to describe their aboriginal territories. This is because they were never conquered and herded onto land designated for their use by non-natives. For instance the Onondaga Nation territory south

of Syracuse has always been fully controlled and "owned" by the Onondagas; it was never reserved for their use. It has never been under the jurisdiction of the state of federal governments, and it is not held in trust for them.

[FN22]. Attea, 564 N.Y.S.2d at 491.

[FN23]. Milhelm Attea & Bros., Inc. v. N.Y. Dep't of Tax & Fin., 575 N.E.2d 400 (N.Y. 1991).

[FN24]. New York Dep't of Tax. and Fin. v. Milhelm Attea & Bros., Inc., 502 U.S. 1053 (1992).

[FN25]. Milhelm Attea & Bros., Inc. v. N.Y. Dep't of Tax & Fin., 585 N.Y.S.2d 847 (N.Y. App. Div. 1992).

[FN26]. Milhelm Attea & Bros., Inc. v. N.Y. Dep't of Tax & Fin., 615 N.E.2d 994, 999 (N.Y. 1993).

[FN27]. New York Dep't of Tax & Fin. v. Milhelm Attea & Bros., Inc., 510 U.S. 943 (1993).

[FN28]. New York Dep't of Tax & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).

[FN29]. Id. at 64.

[FN30]. See Moe v. Confederated Salish & Kootenai Tribes of Flathead, 425 U.S. 463 (1976); Confederated Tribes of the Colville Indian Reservation v. Washington, 447 U.S. 134 (1980).

[FN31]. The Seneca Nation filed an amicus curiae brief on behalf of Attea in the Supreme Court. This brief argued that New York State's cigarette tax laws and regulations violated the treaty the Seneca Nation had with the United States insofar as the regulations allowed New York to tax any transaction occurring on Seneca Nation territory. This argument was not addressed by the Supreme Court. See Attea, 512 U.S. at 77 n.11.

[FN32]. See N.Y. INDIAN LAW §§ 100-14 (McKinney 1998).

[FN33]. No traditional Haudenosaunee government accepts one cent of federal funds from the Bureau of Indian Affairs. This would violate their fundamental belief that they are separate, pre-existing sovereign governments.

[FN34]. See John O'Brien, Feds Crack $687 Million Border Smuggling Ring: Twenty-One People are Charged With Conspiring to Defraud U.S. and Canadian Governments: "This is Bigger than Al Capone," said Agent, POST-STANDARD (Syracuse), June 24, 1997, at A1.

[FN35]. Id.

[FN36]. See A-708, 220th N.Y. Leg. Sess. (1997).

[FN37]. See John O'Brien, Ex-Chief Admits Bribery, Extortion, POST-STANDARD (Syracuse), Oct. 7, 1998, at B2 ("L. David Jacobs, a chief at Akwesasne from 1988 to 1994, pleaded guilty last week in U.S. District Court to conducting the tribe's affairs through a pattern of racketeering.").

[FN38]. See N.Y. INDIAN LAW §§ 40-46, 70-74 (McKinney 1998).

[FN39]. John v. Bowen, No. 1994/12582 (Erie Co. Sup. Ct. Dec. 22, 1994).

[FN40]. See Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995).

[FN41]. See John Kifner, Tribal Shootout: Rival Factions Behind Conflict, N.Y. TIMES, Apr. 3, 1995, at B1.

[FN42]. See Shenandoah v. Dep't of Interior, No. 96-CV-258(RSP/GJD), 1997 WL 214947 (N.D.N.Y. Apr. 14, 1997).

[FN43]. See Shenandoah v. Dep't of Interior, No. 97-6142, 1998 WL 741842 (2d Cir. Oct. 6, 1998).

[FN44]. See supra note 15 and accompanying text.

[FN45]. See Treaty With the Six Nations, Nov. 11, 1794, 7 Stat. 44 [[[hereinafter Treaty of Canandaigua].

[FN46]. See New York Assoc. of Convenience Stores v. Urbach, 648 N.Y.S.2d 890 (Albany Co. Sup. Ct. 1996), aff'd as modified by 658 N.Y.S.2d 468 (N.Y. App. Div. 1997), rev'd 669 N.E.2d 904 (N.Y. 1998) (rejecting the convenience stores' argument that the Tax Department's policy of failure to enforce the state's tax laws for on-reservation sales did not constitute a form of race based discrimination). The Court of Appeals based its decision on a series of Supreme Court opinions which authorize separate policies for Indians because of their unique historical and "quasi-sovereign" status. See Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479- 80 (1976); U.S. v. Mazurie, 419 U.S. 544, 557 (1975); Morton v. Mancari, 417 U.S. 535, 554 (1974).

[FN47]. See Trade and Commerce Agreement Between the Sate of New York and the Haudenosaunee and the State of New York, DAYBREAK, Apr. 1, 1997, at 11.

[FN48]. See infra Section III.C.

[FN49]. See Trade and Commerce Agreement Between the Sate of New York and the Haudenosaunee and the State of New York, supra note 47.

[FN50]. Id.

[FN51]. See id.

[FN52]. See Robert L. Smith, Governor Pulls Plug on Indian Tax Collections: Standoff's End Stuns All Sides: A State Agreement With the Iroquois is Suddenly Cancelled, POST-STANDARD (Syracuse), May 23, 1997, at A1.

[FN53]. See id.

[FN54]. See Trade and Commerce Agreement Between the Sate of New York and the Haudenosaunee and the State of New York, supra note 47.

[FN55]. See Trade and Commerce Agreement Between the Sate of New York and the Haudenosaunee and the State of New York, supra note 47.

[FN56]. See, e.g., Judge: State Can't Block Gas Tankers: The Shipments Were Headed for the Seneca Nation: The State Plans to Appeal, POST-STANDARD (Syracuse), May 16,

1997, at A4.

[FN57]. Patrick Lakamp & Brian Carr, DA Says Hunt Loan Broke Law if $37,500 Isn't Repaid Monday Hunt Could Face Charges, POST-STANDARD (Syracuse), Nov. 6, 1994, at A1; and Mark Weiner, Business Owners: Banishment Was Illegal They Say Onondaga Chiefs Violated Great Law of Iroquois, POST-STANDARD (Syracuse), June 19, 1994, at E1.

[FN58]. Lakamp & Carr, supra note 57, at A1.

[FN59]. Robert L. Smith, Blockaded Smoke Shop Burns. The Blaze Follows. An Increase in Pressure Put on Merchants by Supporters of Traditional Chiefs, POST-STANDARD (Syracuse), June 8, 1994, at A1.

[FN60]. See, e.g., Treaty With the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty at Fort Harmar, Jan. 9, 1789, 7 Stat. 33; Treaty With the Six Nations at Canandaigua, Nov. 11, 1794.

[FN61]. Agnes Palazzetti, Indian-Made Gasohol, Cigarettes at Issue, BUFF. NEWS, May 1, 1997, at B1.

[FN62]. See Judge: State Can't Block Gas Tankers. The Shipments Were Headed for the Seneca Nation. The State Plans to Appeal, POST-STANDARD (Syracuse), May, 16, 1997, at A4.

[FN63]. See Jimerson v. Urbach, No. 1997/4015 (Erie Co. Sup. Ct. 1997)

[FN64]. See Affidavit of Joseph M. Anderson, Jimerson v. Urbach, No. 1997/4015 (Erie Co. Sup. Ct. May 15, 1997).

[FN65]. See Justice Pigott's May 16, 1997 Order.

[FN66]. Tax Law Seizure to Enforce Tax Law on Reservation Upheld, N.Y. L.J., Oct. 8, 1997, at 25.

[FN67]. New York Dep't of Tax. & Fin. v. Bramhall, 667 N.Y.S.2d 141, 145 (N.Y. App. Div. 1997).

[FN68]. New York Dep't of Tax. & Fin. v. Bramhall, 660 N.Y.S.2d 329 (Sup. Ct. 1997)

[FN69]. Id. at 333.

[FN70]. See Bramhall, 667 N.Y.S.2d at 148.

[FN71]. See id. at 145.

[FN72]. See id. at 146.

[FN73]. Id. at 147.

[FN74]. Id. at 148.

[FN75]. See supra note 20 and accompanying text discussing Attea.
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