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Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette Compacts

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Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette Compacts

Compacts are powerful legal tools that states and tribes can use to negotiate agreements. One of the most interesting examples of state-tribe compacts is the cigarette compact, which is useful in combating the illicit cigarette trade. This Note argues that tribal leaders and states can more effectively reach this goal by (1) recognizing tribal sovereignty in and (2) keeping tobacco control at the heart of compact discussions.

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I. INTRODUCTION

In 1999, Leslie Thompson, an executive of tobacco behemoth R.J. Reynolds, pled guilty to money laundering.¹ His offense: helping American smugglers gain access to the tobacco company's Canadian cigarettes through the St. Regis Mohawk Indian reservation.² Thompson, of course, was not the only individual convicted in this operation. Other individuals, including at least one Native American, had previously been convicted for their involvement in the international black-market scheme as well.³

This kind of international smuggling activity is just one example of illicit cigarette trading in the United States.⁴ Other individuals, for

1. *RJR Executive Helped Smugglers Sell Cigarettes Illegally in Canada*, WALL STREET J. (Mar. 26, 1999, 11:17 AM), <http://www.wsj.com/articles/SB92245673715819645> [hereinafter *RJR Executive*].

2. *Id.*

3. *Id.*

4. *See id.*

example, try to avoid state or federal cigarette taxes by buying cigarettes from low-cost tribes, states, or countries and then selling them to residents of high-tax locations without paying the tax differentials.⁵ Once in these higher-tax locations, these cigarettes can either be used by the purchaser or resold at lower prices than locally taxed cigarettes.⁶ Individuals can also become involved in illicit cigarette dealings by selling cigarettes to those who are not authorized to purchase them (for example, Native American retailers selling state tax-exempt cigarettes to nontribe members).⁷

With cigarette taxes higher than \$3.50 per pack in some states and lower than \$0.50 in others,⁸ vendors who sell low-tax cigarettes to residents of high-tax locations stand to pocket a significant profit. Reporter Christopher Mathias explains:

If [a New York] bodega owner were to go about [selling cigarettes] the legal way, buying a pack of cigarettes at the wholesale price of \$12.50, then retailing that pack for \$13, he [would] only make[] 50 cents profit. Each pack of cigarettes smuggled from out of state wholesales for about \$5.50. The store owner can still sell those packs for \$12.50. But suddenly, he's making a \$7 profit.⁹

Because involvement in this kind of operation can lead to jail time and heavy fines, the risk of getting caught in this lucrative trade should, in theory, be high enough to deter certain types of illicit cigarette trading.¹⁰ However, the difficulty of tracking down

5. *See id.*

6. Christopher Mathias, *Inside New York City's Dangerous, Multimillion-Dollar Cigarette Black Market*, HUFFINGTON POST (Apr. 3, 2014, 8:51 AM), http://www.huffingtonpost.com/2014/04/03/cigarette-smuggling-new-york-_n_5041823.html. *See generally* Michael F. Lovenheim, *How Far to the Border?: The Extent and Impact of Cross-Border Casual Cigarette Smuggling*, 61 NAT'L TAX J. 7, 7 (2008) (discussing cigarette tax differentials along state borders).

7. *See* NAT'L RESEARCH COUNCIL & INST. OF MED., UNDERSTANDING THE U.S. ILLICIT TOBACCO MARKET: CHARACTERISTICS, POLICY CONTEXT, AND LESSONS FROM INTERNATIONAL EXPERIENCES 55–56 (Peter Reuter & Malay Majmundar eds., 2015) [hereinafter NAT'L RESEARCH COUNCIL] (discussing the legal issues surrounding cigarette sales on tribal lands to non-Native Americans).

8. Ann Boonn, *State Cigarette Excise Tax Rates & Rankings*, CAMPAIGN FOR TOBACCO-FREE KIDS (Aug. 9, 2017), <http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf> [hereinafter Boonn, *Tax Rates*].

9. Mathias, *supra* note 6.

10. *See, e.g., Fourteen People Indicted on Charges Involving a Bootleg Cigarette Scheme*, U.S. DEP'T OF JUST. (Mar. 3, 2016), <https://www.justice.gov/usao-edmo/pr/fourteen>

bootleggers has made that risk less menacing, and consequently, illicit cigarette markets continue to exist.¹¹ According to a 2014 Tax Foundation report, over half of the cigarette market in New York and Arizona is bootlegged, as well as over a quarter of the cigarette market in twelve other states.¹²

There is a growing movement among government leaders and public health groups to end these kinds of illicit cigarette dealings, and for good reason—such dealings can cause major economic and public health problems. On the financial side, for example, it was reported in 2011 that cigarette bootleggers were pocketing \$525 million each year that were supposed to go to the state of New York.¹³ Meanwhile, selling low-cost cigarettes in high-tax areas has likely helped hook and keep vulnerable populations, like low-income adults and teenagers, addicted to smoking.¹⁴

Government officials are using a variety of techniques to deal with the illicit cigarette trade issue, many of which involve specific legislation or multi-state negotiation tactics. However, this problem must also be addressed along the borders of some Native American tribal lands: a task that has proven difficult.¹⁵ Although Native Americans do not pay state taxes on cigarettes, they can be required to force non-Native Americans—and even Native Americans who belong to other tribes—to purchase cigarettes on tribal land at state tax rates.¹⁶ However, political tensions between states and tribes are

people-indicted-charges-involving-bootleg-cigarette-scheme (“If convicted, conspiracy to traffic in contraband cigarettes and money laundering carries a maximum penalty of five years in prison, and/or a fine up to \$250,000; each count of trafficking in contraband cigarettes carries a maximum of five years in prison and/or fines up to \$250,000; each count of money laundering carries a maximum of 20 years in prison and/or fines up to \$500,000.”).

11. Mathias, *supra* note 6.

12. Joseph Bishop-Henchman & Scott Drenkard, *Cigarette Taxes and Cigarette Smuggling by State*, TAX FOUND. (Mar. 19, 2014), <http://taxfoundation.org/article/cigarette-taxes-and-cigarette-smuggling-state>.

13. Mathias, *supra* note 6.

14. See Kevin C. Davis et al., *Cigarette Trafficking in Five Northeastern US Cities*, 23 TOBACCO CONTROL e62, e66 (2014) (“We estimate that in NYC the effective price per pack would increase by as much as \$2.90 if trafficking was eliminated and would result in decreases in youth and adult smoking.”).

15. See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 7, at 56.

16. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153–59 (1980).

strong,¹⁷ and state governments have limited authority to enforce state taxes on tribal land,¹⁸ so this does not always happen. Some Native Americans smuggle low-cost cigarettes across international borders that are then sold in high-tax locations.¹⁹ Others sell cigarettes online to non-Native American residents without adding applicable state taxes.²⁰ And, in other cases, tribal retailers sell cigarettes on their land to nonresidents state-tax free.²¹

One approach to combating the illicit cigarette market is to bring state and tribal governments to the negotiating table to develop a solution that works for both parties. The result of these negotiations often comes in the form of a special intergovernmental contract known as a “compact.”²² Compacts have been used to finalize state-tribe negotiations on a variety of issues—from water rights²³ to casino rights²⁴—and compacts for cigarette taxes work in a similar manner. As a legal tool, cigarette compacts have the potential to make cigarette taxation more consistent across borders and protect economic and health interests among both Native Americans and non-Native Americans. And, in fact, evidence suggests that at least some cigarette compacts are helping curb illicit cigarette dealings on tribal land.²⁵

17. See, e.g., Catherine Thorbecke, *Tensions Mount as Native American Tribe Fights to Block Oil Pipeline*, ABC NEWS (Sept. 7, 2016, 4:44 PM), <http://abcnews.go.com/US/tensions-mount-native-american-tribe-fights-block-oil/story?id=41891717>.

18. FRANK J. CHALOUKKA ET AL., NAT’L CTR FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, PREVENTING AND REDUCING ILLICIT TOBACCO TRADE IN THE UNITED STATES 34 (2015) (“[J]urisdictional issues can make it difficult for states to enforce tax collection on nonmembers or non-Native Americans who purchase tobacco on tribal lands.”).

19. See, e.g., *RJR Executive*, *supra* note 1.

20. *Despite Law, Tribe Sells 1.7 Tons of Cigarettes Online*, N.Y. POST (Dec. 2, 2013, 10:11 AM) (quoting Nativeblend.net), <http://nypost.com/2013/12/02/despite-law-tribe-sells-1-7-tons-of-cigarettes-online/>.

21. See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 7, at 56.

22. See *Compact*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An agreement or covenant between two or more parties, esp. between governments or states.”).

23. See, e.g., Jennifer E. Pelphrey, *Oklahoma’s State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127 (2004).

24. See, e.g., Rubin Ranat, Note, *Tribal-State Compacts: Legitimate or Illegal Taxation of Indian Gaming in California?*, 26 WHITTIER L. REV. 953 (2005).

25. In one Washington State study, for example, authors concluded that: “Enforcement, tobacco control policies, and compacts with Indian tribes are among the factors that have kept illegal sales in check.” STEPHEN D. SMITH & VAN HUYNH, WASH. STATE DEP’T OF REVENUE, WASHINGTON STATE CIGARETTE CONSUMPTION REVISITED 12 (2007), <https://dor.wa.gov/>

In practice, however, these kinds of compacts are sometimes written in ways that frustrate their greater potential as legal and political instruments. Ideally, cigarette compacts bring tribes and states together as allies to curb illicit cigarette dealings. However, cigarette compacts sometimes (1) treat tribal groups as unequal partners in the negotiating process or (2) fail to dedicate cigarette tax funds to smoking prevention and control.

A recent compact between the Cherokee Nation and the State of Oklahoma²⁶ provides a good example of these two phenomena. Parts of the compact's recitals seem to show slight disrespect for tribal sovereignty.²⁷ While the compact recognizes tribal sovereignty, it also declares that the powers of the tribal government have been recognized by the federal government as merely "extant"²⁸ and asserts state authority to pull taxes from cigarettes sold on nontribal land.²⁹ There is also no mention of financial earmarking for tobacco control in the compact.³⁰

These two issues do not necessarily make cigarette compacts ineffective—just less effective than they potentially could be.³¹ It is

sites/default/files/legacy/Docs/reports/CigStudyJan11_2007.pdf. Data on the effectiveness of cigarette compacts appear to be limited.

26. Tobacco Tax Compact Between the State of Oklahoma and the Cherokee Nation (filed Nov. 19, 2013), <https://www.sos.ok.gov/documents/filelog/89635.pdf> [hereinafter Tobacco Tax Compact].

27. *See id.* art. 1, at 1–2.

28. *Id.* One of the definitions of "extant" in the Merriam-Webster Dictionary, and likely the one intended here, is "still existing: not destroyed or lost." *Extant*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/extant> (last visited Nov. 27, 2017). In the words of one author, a federal court once described tribal sovereignty as "extant unless that power is divested by Act of Congress or treaty" MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 244 (2016).

29. Tobacco Tax Compact, *supra* note 26, art. I, at 2.

30. *Id.* at 1–11.

31. It should be noted that there does not appear to be data specifically on the impact of including public health and tribal considerations in cigarette compacts on the illicit cigarette trade. The purpose of this Note is not to prove empirically that these two considerations work but that they are logical avenues for strengthening current compacts. Moreover, when a cigarette compact that happens to incorporate these two elements is shown to be associated with tribal compacting, many other factors, like the previously existing relationship between the state and tribe, other smoking interventions, and the tribe's enforcement capacity, may also be at play. Therefore, any data used to support these assertions should be interpreted with caution. However, robust data collection and future scholarship on the usefulness of adding these measures to currently existing compacts would provide welcomed valuable insight into this subject matter.

logical to assume that when tribes are treated as full allies in a cigarette compact negotiation, they are more likely to make mutually beneficial agreements and follow through on their compact obligations.³² It is also logical to assume that when funds from cigarette taxes are funneled back into effective tobacco prevention and control initiatives, the proportion of the population interested in smoking—and, by extension, in undertaxed cigarettes—will likely shrink.³³ Therefore, when a compact (1) fully considers tribal sovereignty and (2) earmarks proceeds for tobacco prevention and control, it becomes a more powerful compact, at least as far as combating the illicit cigarette trade is concerned.

The three purposes of this Note are to (1) explain in greater depth why tribal sovereignty and tobacco control are such helpful components in state-tribe cigarette compact negotiations; (2) show how these two elements have been ignored in some state-tribe cigarette compacts; and (3) suggest techniques to incorporate both elements more fully in those agreements. Part II will describe the foundations of cigarette tax law and the specific cigarette trade issues that pertain to tribal land. Part III will discuss the variety of tools states have used to address the problem, including compacts. Part IV will explain why incorporating tribal sovereignty and public health into negotiations has the potential to improve compact effectiveness and will also analyze the use of those themes in two recent Kansas compacts. Part V will make specific recommendations on how tribal sovereignty and public welfare considerations can be more effectively included in tribal compacting schemes. Part VI will conclude.

32. See, e.g., SUSAN JOHNSON ET AL., GOVERNMENT TO GOVERNMENT MODELS OF COOPERATION BETWEEN STATES AND TRIBES 4 (2009) (“State-tribal cooperation can be key to achieving improved government services.”).

33. See, e.g., David T. Levy, Frank Chaloupka & Joseph Gitchell, *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Control Scorecard*, 10 J. PUB. HEALTH MGMT. & PRAC. 338 (2004) (describing the impact of various tobacco control strategies on smoking rates in the United States). Tobacco control strategies might need to be specifically targeted to the population of smokers interested in illicit cigarettes to have this kind of impact.

II. CIGARETTE TAXES AND NATIVE AMERICAN LAND

A. Foundations of the Cigarette Tax

Between the late 1800s and early 1920s, long before the first epidemiological studies found associations between lung cancer and cigarette use in the 1930s,³⁴ at least fourteen states and Canada decided to ban cigarette sales.³⁵ The ban was not entirely rooted in health but in the perceived immorality of smoking, which, along with drinking and gambling, was considered a vice by members of the Progressive movement.³⁶

Although these restrictions were lifted in the United States during the 1920s,³⁷ the negative public perception of cigarettes was never permanently stubbed out. Starting before the Second World War and continuing through the 1960s, epidemiologists, animal researchers, cellular pathologists, and chemists started to build a consensus in global research about the detrimental health effects of smoking.³⁸ This evidence, likely coupled with the popular philosophy that goods taxation was an appropriate way to generate government income,³⁹ provided a foundation for the development of cigarette taxes in the United States in the later twentieth century.

Today, cigarette tax rates are ubiquitous in our country, although state cigarette taxes vary widely.⁴⁰ According to one recent report, North Dakota taxes its residents at \$0.44 per pack, while its neighbor

34. Robert N. Proctor, *The History of the Discovery of the Cigarette—Lung Cancer Link: Evidentiary Traditions, Corporate Denial, Global Toll*, 21 *TOBACCO CONTROL* 87, 87–88 (2012).

35. Compare FRITZ L. LAUX & STEFANIE D. BUCKSKIN, AN OKLAHOMA HISTORY OF CIGARETTE TAXATION 4 (2015) (citing MAURINE BROWN NEUBERGER, *SMOKE SCREEN: TOBACCO AND THE PUBLIC WELFARE* 52 (1963)), http://tobacconomics.org/wp-content/uploads/2015/08/Laux_OKTribal_08-24-15.pdf, with Lee J. Alston, Ruth Dupré & Tomas Nonnenmacher, *Social Reformers and Regulation: The Prohibition of Cigarettes in the United States and Canada*, 39 *EXPLORATIONS IN ECON. HIST.* 425, 426 (2002) (listing fifteen states and Canada as banning cigarettes around that time).

36. Alston, Dupré & Nonnenmacher, *supra* note 35, at 426.

37. LAUX & BUCKSKIN, *supra* note 35.

38. Proctor, *supra* note 34.

39. See, e.g., Devin A. Rheaume, *A Growing Sin-dustry: The History and Effects of Cigarette Excise Taxation and Regulation in the United States* 3–4 (unpublished honors theses, University of New Hampshire, Paper No. 263), <http://scholars.unh.edu/honors/263/>.

40. Boonn, *Tax Rates*, *supra* note 8, at 1.

to the east, Minnesota, taxes its residents at \$3.04 per pack.⁴¹ Meanwhile, the local and state combined tax rate in Chicago for a pack of cigarettes runs at a steep \$6.16.⁴² Despite this geographic variation in state tax rates, however, cigarettes on the whole have been described as some of the highest-taxed commodities in our country, along with alcohol, guns, plane tickets, and gasoline.⁴³ Currently, state taxes on cigarettes average \$1.71 per pack, while the federal government slaps on an additional \$1.01 per pack.⁴⁴

Some may argue that these cigarette taxes exist today simply to produce increased revenue for the government. However, while revenue generation is clearly a strong motivator for any type of tax, and the health burden of cigarette smoking certainly adds persuasive merit to that request for additional revenue,⁴⁵ the extremely high rate of cigarette taxes in our country suggests that there may be another powerful trigger behind these laws.

According to economists, anti-smoking advocates, and the tobacco industry itself, cigarette taxes reduce smoking rates.⁴⁶ In fact, the *higher* taxes are, the *more effective* taxes become at deterring smoking behavior. According to the Campaign for Tobacco-Free Kids, “The general consensus is that nationally, every 10 percent increase in the real price of cigarettes reduces . . . smoking among young adults by about 3.5 percent, reduces the number of kids who smoke by six or seven percent, and reduces overall cigarette consumption by approximately three to five percent.”⁴⁷

Some states take this anti-smoking incentive even further by earmarking tax revenues for anti-smoking initiatives. Under Proposition 99, for example, the State of California dedicated a

41. *Id.*

42. *Id.*

43. Helen Harvey, *What Are Some of the Highest Taxed Items?*, SAPLING (May 8, 2011), <https://www.sapling.com/8377758/highest-taxed-items>.

44. Boonn, *Tax Rates*, *supra* note 8, at 1.

45. Laura Bach, *Toll of Tobacco in the United States of America*, CAMPAIGN FOR TOBACCO-FREE KIDS 1 (Oct. 4, 2017), <https://www.tobaccofreekids.org/research/factsheets/pdf/0072.pdf>.

46. Ann Boonn, *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (and the Cigarette Companies Know It)*, CAMPAIGN FOR TOBACCO-FREE KIDS 1–2 (Jan. 18, 2017), <https://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf>.

47. *Id.* at 1.

quarter of those tax revenues to tobacco control and research.⁴⁸ Tobacco control earmarking is important for two reasons: First, it works. Research has consistently shown that tobacco control initiatives can have a powerful impact on smoking prevalence.⁴⁹ Second, when funds are earmarked for tobacco control rather than unrelated services, like roads or schools, states have an incentive to see smoking rates drop.⁵⁰

Considering the steepness of cigarette taxes in some areas of the country and the rationale behind those taxes, it is easy to understand why cigarette vendors might try to keep the industry alive by circumventing the tax system. These vendors thwart key purposes of cigarette taxes by helping new smokers become addicted to cigarettes, keeping experienced smokers addicted, and denying states needed revenue that can be used to address associated public health costs. In other words, illicit cigarette dealings prevent cigarette tax increases from supporting tobacco prevention and control efforts.

B. Illicit Cigarette Dealings on Native American Land

The tension between Native American tribes and states on cigarette tax issues must be addressed in order to combat the illicit cigarette trade. Today, 567 federally recognized tribes dot our country,⁵¹ with tribal land scattered across the majority of states.⁵²

48. Frank J. Chaloupka, Ayda Yurekli & Geoffrey T. Fong, *Tobacco Taxes as a Tobacco Control Strategy*, 21 TOBACCO CONTROL 172, 175 (2012).

49. See, e.g., Matthew C. Farrelly et al., *The Impact of Tobacco Control Programs on Adult Smoking*, 98 AM. J. PUB. HEALTH 304, 308–09 (2008) (“[There has been] extensive research demonstrating the effectiveness of state tobacco control programs [Our] findings strengthen the evidence that state tobacco control programs reduce adult smoking prevalence and have an effect that is independent of increased cigarette prices. The results also show that funding for such programs is a valuable investment. By not sufficiently funding programs at least at the CDC recommended minimum levels, states are missing an opportunity to substantially reduce smoking-related mortality, morbidity, and economic costs.”).

50. See generally Caroline May, *What Would a Smoke-Free America Cost the Government?*, DAILY CALLER (Feb. 28, 2011, 1:05 AM), <http://dailycaller.com/2011/02/28/what-would-an-america-without-smokers-cost/>.

51. *About Us*, U.S. DEP’T INTERIOR INDIAN AFFAIRS, <https://www.bia.gov/about-us> (last visited Jan. 12, 2018).

52. Hillary DeLong et al., *Common State Mechanisms Regulating Tribal Tobacco Taxation and Sales, the USA, 2015*, 25 TOBACCO CONTROL i32, i32 (2016), http://tobaccocontrol.bmj.com/content/tobaccocontrol/25/Suppl_1/i32.full.pdf.

Over centuries of legislation and litigation,⁵³ these tribal groups have established themselves as largely self-governing bodies, with some powers rivaling those of states.⁵⁴ When it comes to cigarette sales on reservations, tribe members are exempt from paying state taxes for cigarettes⁵⁵ and have authority to impose their own taxes for cigarettes sold on their land.⁵⁶ However, cigarettes sold on tribal land often cost much less than state-taxed cigarettes.⁵⁷

Of course, federal law expressly permits only *local tribe members* to purchase cigarettes free of state tax on tribal land.⁵⁸ In fact, even selling tax-free products from reservations to nontribe members online is prohibited under the Prevent All Cigarette Trafficking (PACT) Act of 2009.⁵⁹ Despite these legal restrictions, as in most black-market industries, finding and enforcing offenders under federal and state law is difficult.⁶⁰ The availability of state tax-exempt cigarettes on tribal property creates many opportunities for bootlegging. In one New York study, the percentage of smokers who reported buying cigarettes from reservations increased in the year following a state cigarette tax hike.⁶¹ Around the same time, when cigarettes on Washington tribal land cost about sixty-five percent less than those sold in the rest of the state, about one-fifth of smokers in the area reported buying

53. See generally Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45 (2009).

54. See CHALOUKKA ET AL., *supra* note 18, at 34. It should be noted that tribal sovereignty differs in some ways from state sovereignty. For example, tribal courts cannot try nontribe members for crimes committed on reservations. Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), <http://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

55. CHALOUKKA ET AL., *supra* note 18, at 34.

56. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152–54 (1980).

57. See CHALOUKKA ET AL., *supra* note 18, at 37.

58. *Confederated Tribes of Colville Indian Res.*, 447 U.S. at 160–61.

59. Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111–154, 124 Stat. 1087, 1091 (codified as amended at 15 U.S.C. § 376a(a)(3) (2012)).

60. Jon Campbell, *Smuggled, Untaxed Cigarettes Are Everywhere in New York City*, VILLAGE VOICE (Apr. 7, 2015), <http://www.villagevoice.com/news/smuggled-untaxed-cigarettes-are-everywhere-in-new-york-city-6717621>. The legality of cigarettes makes enforcement even more difficult than for other black-market industries. *Id.*

61. BRETT LOOMIS ET AL., N.Y. STATE DEP'T OF HEALTH, IMPLICATIONS OF THE JUNE 2008 \$1.25 CIGARETTE TAX INCREASE 3–4 (2010), https://www.health.ny.gov/prevention/tobacco_control/docs/2010-11-12_tax_increase_topical_report.pdf.

reservation cigarettes.⁶² Some tribal retailers have even taken to selling their products tax free online, using language like “NO STATE TAXES, NO REPORTS to anyone EVER and NO Surprise Tax Bills.”⁶³

The illicit cigarette trade has been used by some Native Americans to build financial independence.⁶⁴ Moreover, some Native American businesses feel squeezed out by federal and state taxes and other legal restrictions on cigarette sales.⁶⁵ Meanwhile, some tribes are internally conflicted about their own participation in the tobacco industry.⁶⁶ The profits from that industry are not always enjoyed equitably among tribal members.⁶⁷ Furthermore, some tribes are openly opposed to using commercial cigarettes for religious reasons,⁶⁸ some tribes are trying to diversify economically,⁶⁹ and others have concerns about tribal public health.⁷⁰

It is in this unsettled, conflicted environment that illicit cigarette sales are taking place on tribal reservations, both through the internet and in tribal retail shops. Both states and tribes stand to gain from initiatives that curb smoking and improve state-tribe relations. The next part of this Note will describe what states and tribes have been doing to address the problem of illicit cigarette dealings, including the use of stamps and compacts.

62. DeLong et al., *supra* note 52, at i32 (presenting statistical information provided by the U.S. Department of Commerce and National Cancer Institute).

63. *Despite Law, Tribe Sells 1.7 Tons of Cigarettes Online*, *supra* note 20.

64. *See id.*

65. *See id.*

66. *See* Kari A. Samuel, Kurt M. Ribisl & Rebecca S. Williams, *Internet Cigarette Sales and Native American Sovereignty: Political and Public Health Contexts*, 33 J. PUB. HEALTH POL’Y 173, 177 (2012).

67. *Id.*

68. *See* KEEP IT SACRED NAT’L NATIVE NETWORK, <http://keepitsacred.itcni.org/> (last visited Jan. 12, 2018).

69. *See, e.g.*, PRAIRIE BAND POTAWATOMI NATION, <http://www.pbpindiantribe.com> (last visited Jan. 12, 2018) (follow menu icon and click on “Business” tab for various examples of enterprises).

70. *Tribal Public Health Law*, NAT’L INDIAN HEALTH BOARD, http://www.nihb.org/public_health/tribal_public_health_law.php (last visited Jan. 12, 2018).

III. STATE TACTICS

To combat illicit cigarette dealings involving Native American retailers, states have the authority to require tribes to sell taxed cigarettes to nontribe members.⁷¹ With this goal in mind, states have primarily used two tools to enforce the sale of taxed cigarettes—(1) state laws and (2) state-tribal agreements or compacts.⁷²

A. State Cigarette Laws

More than half of states containing tribal land have their own codified laws governing tribal cigarette sales.⁷³ These laws provide tribe members with state-tax free cigarettes purchased on the reservation while ensuring that states keep their own cigarette tax revenues. Some of the most common state laws create coupon systems, cigarette quotas, tax stamps, and refunds.⁷⁴

1. Coupons

Coupon systems work by requiring tribes to import taxed cigarettes while granting tribes coupons to buy cigarettes state-tax free.⁷⁵ In Florida, for example, these coupons pass from the states to reservation cigarette retailers who then present the coupons to purchase tax-free cigarettes to wholesale dealers.⁷⁶ The program has advantages and disadvantages; for example, a coupon system may seem relatively efficient for users, but it is unclear to what extent coupons are used to benefit only tribal members.⁷⁷

71. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159 (1980) (“The State may validly require . . . the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe.”).

72. DeLong et al., *supra* note 52, at i33. Note that the statistics used here are based in part on a review of laws from 2015, and these data may have changed since then.

73. *Id.*

74. *Id.*; CHALOUPKA ET AL., *supra* note 18, at 38.

75. DeLong et al., *supra* note 52, at i33.

76. FLA. STAT. ANN. § 210.1801(2) (West 2011).

77. See CHALOUPKA ET AL., *supra* note 18, at 34–35 (criticism of the quota system that applies to use of coupons).

2. Quotas

In a quota-based system, tribes receive a certain number of tax-free cigarettes based on estimated tribal consumption and the rest are taxed.⁷⁸ On its own, the quota system is riddled with holes. There is no way to ensure that only tribal members receive tax-free products, and tribes may receive more tax-free cigarettes than they need.⁷⁹ This may be why two of the six states using a quota system at the beginning of 2015 supplemented it with coupons or vouchers.⁸⁰

3. Tax stamps

Tax stamps are a common taxed-cigarette enforcement tool that can be used either alone or in tandem with other plans. Similar to a coupon system, tax prepayment requires tribes to pay for cigarette taxes up-front and, in some cases, receive a rebate for the cigarettes that will be purchased by tribal members.⁸¹ At the beginning of 2015, twelve states used a tax prepayment system in addition to or in lieu of tax stamps.⁸² Tax stamps can also be used in a variety of ways, such as on all cigarettes,⁸³ on cigarettes sorted by tribe, or on cigarettes sorted by tax method.⁸⁴ Utah, for example, applies stamps to tobacco products sold to nontribe members.⁸⁵

78. *Id.* at 34; Philip DeCicca, Donald Kenkel & Feng Liu, *Reservation Prices: An Economic Analysis of Cigarette Purchases on Indian Reservations* 9 (Nat'l Institutes of Health, Working Paper No. 20778, 2013), http://www.appam.org/assets/1/7/Reservation_Prices_An_Economic_Analysis_of_Cigarette_Purchases_on_Indian_Reservations.pdf.

79. CHALOUPKA ET AL., *supra* note 18, at 34–35.

80. DeLong et al., *supra* note 52, at i34 tbl. 2 (see footnote under “Allotment of tax-free tribal tobacco”).

81. *Id.*

82. *Id.* at i34.

83. The Campaign for Tobacco-Free Kids recommends affixing a stamp to tax-free cigarettes as a way to provide government data on tax-free cigarettes and prevent tax-exempt cigarettes from being sold illegally. *State Options to Prevent and Reduce Cigarette Smuggling and Block Other Illegal State Tobacco Tax Evasion*, CAMPAIGN FOR TOBACCO-FREE KIDS 1, <https://www.tobaccofreekids.org/research/factsheets/pdf/0274.pdf>.

84. See, e.g., CHALOUPKA ET AL., *supra* note 18, at 38; DeLong et al., *supra* note 52, at i33–i34.

85. UTAH CODE ANN. § 59-14-204.5(2)(c)(i) (West 2017); DeLong et al., *supra* note 52, at i36.

4. Difficulties with the state and federal law systems

While these state laws have some advantages, they lack the ability to unify state and tribal governments in addressing the cigarette bootlegging problem the way state-tribal compacts can. When states assume that their own or federal law provisions like the PACT Act are sufficient to stop illicit cigarette dealings, they do so naively. States cannot enforce such laws alone, and tribes have little incentive to help states in their enforcement efforts. State and federal cigarette tax laws place a burden on tribes without tribal consent or benefit. Understandably, some Native Americans view the imposition of these state laws as an attack on their tribal right of self-governance.⁸⁶ Consequently, states are sometimes left to enforce these laws without tribal support—a situation that makes it difficult to improve state-tribal relations and stamp out the illicit cigarette trade.

The PACT Act, for example, covers online cigarette operations, but site operators can shut down their websites when discovered and create others in their place.⁸⁷ And even when an online tribal retailer is caught selling untaxed products out of state, that retailer's sales to the state may be so minimal that due process concerns in taxation and jurisdiction arise.⁸⁸ States also face an uphill battle controlling sales of untaxed cigarettes to nontribal members on tribal property. Hillary DeLong and colleagues explain, “[S]tates do not have jurisdiction on tribal lands, and are unable to use the court system to pursue back taxes. These . . . issues, coupled with a [situation] where some consumers are tax-exempt while others are not, can make state collection of taxes owed for tobacco sales to nontribal consumers difficult.”⁸⁹

Tribes may have greater awareness of cigarette sales schemes and ability to enforce cigarette laws in these situations than states do, but there is little incentive to do so when operating under a law that the

86. See generally NAT'L RESEARCH COUNCIL, *supra* note 7, at 166.

87. Brian Hickey, *The PACT ACT: Preventing Illegal Internet Sales of Cigarettes & Smokeless Tobacco*, CAMPAIGN FOR TOBACCO-FREE KIDS (Apr. 22, 2016), <https://www.tobaccofreekids.org/research/factsheets/pdf/0361.pdf>.

88. *PACT Act*, PUB. HEALTH & TOBACCO POL'Y CTR., <http://tobaccopolicycenter.org/tobacco-control/recent-cases/pact-act/> (last visited Jan. 12, 2018).

89. DeLong et al., *supra* note 52, at i32.

tribe did not help create and may not support.⁹⁰ As Kari Samuel and colleagues explain: “[A]ny successful strategy to control Native tobacco sales will probably emerge from agreements negotiated between tribal and state governments rather than external attempts to regulate such sales directly.”⁹¹

B. *Compacts*

Compacts are generally superior to state laws as tools for strengthening relations between tribes and states. These special agreements have been used to resolve issues related to casinos between tribes and states for some time.⁹² Such agreements can also prove helpful in curbing the illicit cigarette trade.

Compacts do this by placing trust in tribes as sovereign partners.⁹³ When a state engages in compact negotiations with a tribe, the state shows that it values tribal authority and that it wants to create an agreement that benefits both parties. Moreover, while state laws may include a tax revenue sharing component,⁹⁴ revenue sharing or collecting is a common feature in compacts.⁹⁵ Doing so reduces tax differentials between states and tribes and returns tax revenue to the tribal government, sometimes for health programs.⁹⁶ This type of agreement incentivizes tribes to enforce tax provisions themselves and regulate on-reservation manufactured cigarettes that cannot be enforced with quotas, stamps, or refunds.⁹⁷

90. See, e.g., Kari A. Samuel, Kurt M. Ribisl & Rebecca S. Williams, *supra* note 66, at 181 (2012) (“Public relations campaigns in 2010 by the Seneca Nation suggest the Nation viewed the PACT Act as a threat from the start.”).

91. *Id.*

92. See, e.g., *Indian Gaming Compacts*, U.S. DEP’T INT. INDIAN AFFAIRS, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm> (last visited Nov. 30, 2017). It should be noted that the implementation of gambling compacts between states and tribes has not been flawless. Recently, the California legislature was sued by a California tribe for failing to approve of a gambling contract “in good faith” when a governor-negotiated compact was never voted on by the legislature, despite the tribe’s insistence, and subsequently expired. *Estom Yumeka Maidu Tribe v. California*, 163 F. Supp. 3d 769, 771, 781 (E.D. Cal. 2016).

93. See DeLong et al., *supra* note 52, at i34–i35.

94. See, e.g., UTAH CODE ANN. § 59-14-204.5(2)(c)(ii) (West 2017).

95. DeLong et al., *supra* note 52, at i35 tbl. 3.

96. CHALOUPKA ET AL., *supra* note 18, at 38.

97. See *id.* at 35.

At the beginning of 2015, fourteen states used cigarette tax compact schemes, including Washington, Wisconsin, and Minnesota.⁹⁸ At least one other state—Kansas—has created compacts since that time.⁹⁹

IV. TRIBAL SOVEREIGNTY AND TOBACCO CONTROL IN COMPACTS

Compacts are a potentially powerful tool for curbing illicit cigarette dealings. This is because compacts bring tribal leaders to the negotiating table, a process that is surely more likely than a state law to motivate leaders to follow through on enforcement obligations. However, compacts can curb the illicit cigarette trade more effectively by ensuring that tribes receive meaningful benefits and earmarking funds for tobacco prevention and control. In this Part, I will describe two cigarette compacts and explain how compacts can be improved to better incorporate elements of tribal sovereignty and public health.

A. A Tale of Two Compacts

In 2003, the State of Kansas faced a financial problem. There was concern that four large cigarette companies would stop making payments to the state under the 1998 Master Settlement Agreement—payments that were supposed to provide \$60 million in annual funds for state children’s programs and other causes—because of cigarette tracking problems.¹⁰⁰ The state decided to fix this issue and focused particularly on cigarette sales on Native American reservation land in order to do so.¹⁰¹

The State entered into two compacts in early 2016.¹⁰² The first was entered into with the Prairie Band Potawatomi Nation on February

98. DeLong et al., *supra* note 52, at i33–i34 tbl.2; *see also* NAT’L RESEARCH COUNCIL, *supra* note 7, at 128–29 box 5-4.

99. *Compact Relating to Cigarette and Tobacco Sales and Taxation*, 35 KAN. REG. 331, 349 (2016), https://www.kssos.org/pubs/register%5C2016%5CVol_35_No_16_April_21_2016_pages_331-370.pdf.

100. *See* Melissa Hellman, *2 Tribes, State of Kansas Enter into Cigarette-Sale Compacts*, TOPEKA CAP-J. (Apr. 7, 2016, 5:20 PM), <http://cjonline.com/news/2016-04-07/2-tribes-state-kansas-enter-cigarette-sale-compacts>.

101. *See id.*

102. *See id.*

17th of that year,¹⁰³ while the second was adopted by resolution with the Iowa Tribe of Kansas and Nebraska on February 22nd.¹⁰⁴

Although the purpose of this analysis is to examine the tribal sovereignty and public health aspects of these two compacts, it will be helpful to first describe each of these tribes and the nature of the agreements that they were involved in creating.

1. The Prairie Band Potawatomi Nation

The Prairie Band Potawatomi Nation is a Kansas tribe that originated near the Great Lakes.¹⁰⁵ After their land was illegally taken from them, they were forced south to Kansas, where after twenty years of negotiations, the tribe finally settled on a small plot of land.¹⁰⁶ Today, about 5000 individuals are considered members of the tribe,¹⁰⁷ though only about 700 of those members live on the reservation.¹⁰⁸ The tribe runs several businesses, including a casino, a golf course, and a business entity devoted to diversifying the tribe's economic interests.¹⁰⁹ Nation members sell cigarettes through local convenience stores.¹¹⁰

103. Compact Relating to Cigarette and Tobacco Sales, Taxation and Escrow Collection 1, 20 (Feb. 17, 2016), <https://ag.ks.gov/docs/default-source/documents/2016-2-17-compact---prairie-band-signed.pdf?sfvrsn=2> [hereinafter Potawatomi Nation Compact] (compact between Prairie Band Potawatomi Nation and the State of Kansas).

104. Compact Relating to Cigarette and Tobacco Sales and Taxation 1, 12 (Feb. 22, 2016), <https://ag.ks.gov/docs/default-source/documents/2016-2-22-compact---iowa-tribe-signed.pdf?sfvrsn=2> [hereinafter Iowa Tribe Compact] (compact between Iowa Tribe of Kansas and Nebraska and the State of Kansas).

105. *Tribal History*, PRAIRIE BAND POTAWATOMI NATION, <http://www.pbpindiantribe.com/tribal-history> (last visited Jan. 12, 2018).

106. *See id.*

107. *Enrollment*, PRAIRIE BAND POTAWATOMI NATION, <http://www.pbpindiantribe.com/enrollment/> (last visited Jan. 12, 2018).

108. *A Vision of Accomplishment*, PRAIRIE BAND POTAWATOMI NATION, <http://www.pbpindiantribe.com/vision-of-accomplishment.aspx> [<https://web.archive.org/web/20170324012908/http://www.pbpindiantribe.com/vision-of-accomplishment.aspx>] (last visited Jan. 1, 2018).

109. *Tribal Enterprises*, PRAIRIE BAND POTAWATOMI NATION, <http://www.pbpindiantribe.com/enrollment> [<https://web.archive.org/web/20170324005727/http://www.pbpindiantribe.com/tribal-enterprises.aspx>] (last visited Jan. 12, 2018).

110. *Potawatomi Retail*, PRAIRIE BAND LLC, <http://prairiebandllc.com/Companies/PotawatomiRetail.aspx> (last visited Jan. 12, 2018).

2. *The Iowa Tribe of Kansas and Nebraska*

The Iowa Tribe of Kansas and Nebraska is one of two tribal branches stemming from the Ioway tribe.¹¹¹ The other is the Iowa Tribe of Oklahoma.¹¹² The Ioway Indians were at one time located in the upper Midwest,¹¹³ but over the course of time, travel, and dealings with the United States government,¹¹⁴ the geographic borders of the Iowa Tribe of Kansas and Nebraska became restricted to the Kansas-Nebraska border.¹¹⁵ Like the Prairie Band Potawatomi Nation, the Iowa Tribe of Kansas and Nebraska maintains a casino, but it also has a farm and a gas station.¹¹⁶ At the Grandview Oil convenience store located on the tribal lands, the tribe sells Native American manufacturer brands.¹¹⁷

Knowing the background of these two tribes provides a basic lens through which to view questions of tribal sovereignty and tobacco control in cigarette compacting. Although these two tribes share geographic ties now, they have two distinct geographical and genealogical origins, with differing traditions and cultural perspectives. This understanding will help frame some of the differences between the two agreements these tribes established with the Kansas state government in early 2016.

The remainder of this Part will examine the two cigarette compacts these tribes negotiated with the State of Kansas, specifically analyzing how these compacts treat tribal sovereignty and tobacco control.

111. See MARTHA ROYCE BLAINE, *THE IOWAY INDIANS* (1979) (giving an overview of the history and current state of the Ioway Indians).

112. *Id.*

113. *Id.* at 7.

114. *The Ioway Indians*, LEGENDS OF KANSAS, <http://www.legendsofkansas.com/iowayindians.html> (last updated Jan. 12, 2018).

115. *Id.*; *Ioway Tribe of Kansas and Nebraska*, BAXOJE, IOWAY NATION, <http://ioway.nativeweb.org/iowayksne.htm> (last visited Jan. 12, 2018).

116. IOWA TRIBE OF KAN. AND NEB., <http://iowatribeofkansasandnebraska.com/> (last visited Jan. 12, 2018) (follow “Tribal Enterprise” tab, click on each subheading for more information).

117. Megan Hart, *Gov. Sam Brownback: Changes to Reservation Tobacco Sales Needed to Keep Settlement Money*, TOPEKA CAP.-J., <http://cjonline.com/news-business-local-state/2015-02-19/gov-sam-brownback-changes-reservation-tobacco-sales-needed-keep> (last updated Feb. 20, 2015, 9:00 AM) (referencing tribal chairman, Tim Rhodd).

B. Tribal Sovereignty

Compacts are a superior tool for combating illicit cigarette dealings because they are formed only after Native American and state leaders come together to create a solution that works for both parties. In other words, compact-making, in theory, recognizes Native American tribes and their members for what they truly are—government leaders with independent, distinct powers and fellow American citizens who deserve respect. This section will discuss what tribal sovereignty is and why it matters in cigarette compacting.

Due to the complicated history between the United States and Native American tribes, Native American tribes are essentially considered quasi-distinct nations that have the right to govern themselves.¹¹⁸ Native American tribal governments existed before the United States came into being, and their systems of governance have never been entirely merged with or dissolved into the American system.¹¹⁹ Over the course of centuries, the United States' acknowledgment of Native American sovereignty has been established and re-emphasized through government treaties, court rulings, and legislation.¹²⁰ Even in the U.S. Constitution, Native American tribes are acknowledged as entities distinct from states and foreign governments.¹²¹ It is for these reasons that, as Sandra Day O'Connor once explained: "Today, in the United States, we have three types of sovereign entities—[T]he Federal government, the states, and the Indian tribes. Each of the[se] sovereigns . . . plays an important role .

118. See generally Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harv. Univ., Working Paper No. RWP04-016, 2004).

119. Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1755 (2016). See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

120. Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045, 1048–55 (2011).

121. U.S. CONST. art. I, § 8, cl. 3 (Congress's power includes the right "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

. . . in this country.”¹²² Today, Native American tribes have their own court systems, laws, and tax systems.¹²³

Unfortunately, state and federal leaders sometimes undervalue potential partnerships that they can form with peers in tribal leadership. This has been demonstrated numerous times—for example, the United States government has tried to eliminate tribal leadership by assimilating Native Americans into Western culture¹²⁴ and has sold tribal land without consent.¹²⁵ Other Native American tribes have been forcibly relocated from their homes and livelihoods for dam construction,¹²⁶ had pro-Native American laws criticized as unfair,¹²⁷ and experienced difficulties obtaining federal recognition.¹²⁸ According to one writer, the government’s micromanagement of Indian affairs has made it difficult for tribes to develop economically due to the amount of red tape involved in permitting and business development.¹²⁹ And in 2016, protesters accused the Army Corps of Engineers of failing to consult with the Standing Rock Sioux Tribe of North Dakota before permitting a nearby massive oil pipeline that threatened their water supply and sacred sites.¹³⁰

When events like these happen—i.e., when a state or federal entity attempts to regulate tribal actions or skirt around tribal policies with its own laws—government officials disrespect tribal leadership, impede

122. Clarkson & Sebenius, *supra* note 120, at 1056 (alteration in original) (quoting Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997)).

123. See Kalt & Singer, *supra* note 118, at 16–17.

124. Clarkson & Sebenius, *supra* note 120, at 1055.

125. *Id.* at 1049–50.

126. Trymaine Lee, *No Man’s Land: The Last Tribes of the Plains*, MSNBC, <http://www.msnbc.com/interactives/geography-of-poverty/nw.html> (last visited Jan. 12, 2018).

127. Howard Fischer, *Arizona Court Rules Against Tribe in Adoption Case*, ARIZ. DAILY STAR (Aug. 12, 2016), http://tucson.com/news/state-and-regional/arizona-court-rules-against-tribe-in-adoption-case/article_4726989a-e65b-5653-833f-1667c4ff3506.html.

128. Associated Press, *Judge Greenlights Tribe’s Suit Against State*, NATIVE TIMES (Oct. 28, 2016), <http://www.nativetimes.com/index.php/news/tribal/13928-judge-greenlights-tribe-s-suit-against-state-2>.

129. Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014, 6:07 AM), <http://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#1e4ec82d6cc6>.

130. Brad Plumer, *The Battle Over the Dakota Access Pipeline, Explained*, VOX (Nov. 29, 2016, 5:47 PM), <http://www.vox.com/2016/9/9/12862958/dakota-access-pipeline-fight>.

the tribe's economic and political independence, and prevent opportunities for state-tribe alliances to form.

When tribal sovereignty is respected, on the other hand, tribes can become powerful state allies. The experience of the Mashantucket Pequot Tribal Nation¹³¹ illustrates this point well. Beginning with the Pequot War in the 1630s and continuing through subsequent struggles with the government, the Nation's once-bustling community of 8000 members continually shrank.¹³² By the 1950s, the Pequots were so run down by federal and state government action that only one of its members still resided on the reservation.¹³³ However, after members started to push back and negotiate the return of stolen land, the government agreed to give that land, and some additional payment, back to the Nation.¹³⁴ As a result, members started returning to the reservation and the Nation became more prosperous.¹³⁵ Recently, the Mashantucket Pequot tribe has provided economic support to the State of Connecticut.¹³⁶ It is likely that when states more fully recognize tribal sovereignty, tribes will operate more successfully on their own and become more valuable political and economic partners.

In cigarette tax compacting, tribal sovereignty is particularly important. It is clear that, as sovereigns, tribal leaders deserve space at the negotiating table for political dealings involving their land. Moreover, tribes that are given that space are more likely to cooperate in negotiations and enforcement.¹³⁷ Furthermore, tribes that

131. Clarkson & Sebenius, *supra* note 120, at 1049; *Tribal History*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <https://www.mptn-nsn.gov/tribalhistory.aspx> (last visited Jan. 12, 2019).

132. *Tribal History*, *supra* note 131.

133. Clarkson & Sebenius, *supra* note 120, at 1049.

134. *Id.* at 1050.

135. *Id.* But see Tatiana Schlossberg, *A Connecticut Indian Tribe Faces Its Eroding Fortunes from Foxwoods*, N.Y. TIMES (Nov. 30, 2014), https://www.nytimes.com/2014/12/01/nyregion/pequot-indian-tribe-faces-its-eroding-fortunes-from-foxwoods.html?_r=0.

136. *Foxwoods Hits \$4 Billion Lifetime Contribution to CT with June Slot Revenue*, E. CONN. CHAMBER OF COM. (July 15, 2017), <http://info.chamberect.com/news/details/foxwoods-resort-casino-hits-4-billion-lifetime-contribution-to-connecticut-with-june-slot-revenue-07-15-2017>.

137. Although this may seem like a commonsense assumption, it should also be noted that some research bolsters this assumption by suggesting that hierarchical relationships impede cooperation. Katherine A. Cronin et al., *Hierarchy is Detrimental for Human Cooperation*, 5 SCI. REP. 1 (2015).

benefit from negotiations become more self-sufficient, stronger allies generally.

Some states might fear creating cigarette compacts with tribes under the assumption that the cigarette trade provides tribes with a critical source of revenue. However, the cigarette trade has not provided a perfect solution to tribal economic problems in recent years. In the Seneca Nation, where the cigarette industry is very large, one study showed that profits from cigarette sales benefited only a few members of the tribe while many remained in poverty.¹³⁸ It is because of scenarios like these that some tribes disfavor keeping the cigarette trade on tribal land.¹³⁹ Like all communities, tribes want to be economically independent and healthy, and the cigarette trade is not a long-term vehicle that will meet those needs.

It is likely that tribal leaders who are heard, respected, and benefited in compact negotiations are more likely to serve as effective allies in the fight against illicit cigarette dealings than those who are not. While states that engage in compacting generally already show respect for tribal leadership by bringing tribal leaders to the negotiating table, compacts can be improved by better protecting and promoting tribal interests. The remainder of this Part will discuss how the two Kansas compacts under review discuss tribal sovereignty and then suggest how considerations of tribal sovereignty can be bolstered even further.

It should be noted that although a tribe's treatment in a compact may not translate to a tribe's treatment in real life, the language used to describe a tribe in a compact is important because it provides a foundation for compact formation and interpretation and serves as a model for future policymaking. Therefore, this analysis will critique even the smallest details—such as the use or placement of words in these compacts—to determine how compacts treat tribal sovereignty.

1. Tribal sovereignty in the Potawatomi Nation compact

The Potawatomi Nation cigarette compact's description of tribal sovereignty is impressive. The compact's very first recital boldly addresses the subject with this statement: “[T]he [Potawatomi] Nation is a federally-recognized Indian tribe possessing and exercising

138. Samuel, Ribisl & Williams, *supra* note 66, at 177.

139. *Id.*

inherent sovereign powers of self-government, as defined and recognized by treaties, federal laws and federal court decisions, and . . . it has responsibilities and needs similar to other governments”¹⁴⁰ The second recital contains a parallel statement on the State,¹⁴¹ which effectively serves to place the Potawatomi Nation and Kansas leadership on equal ground.

The recitals on the importance of tribal leadership continue, explaining that “it is in the best interests of both the State and the Nation to prevent [cigarette-related] disputes,” paying tribute to “the financial, cultural, educational, and economic contributions” of each group, and noting that each group “supports the other’s governmental responsibilities to provide for and govern its citizens, members and territory.”¹⁴²

In the main portion of the compact, the wording and substance of the Nation’s requirements reflect the State’s respect for the Nation.¹⁴³ For example, although the compact requires the Nation to regulate cigarette sales and taxes on its own,¹⁴⁴ the State agrees not to impose any of its own taxes on cigarettes that tribal retailers sell¹⁴⁵ as long as the Potawatomi Nation maintains certain minimum cigarette tax rates.¹⁴⁶ And, in terms of auditing services, Kansas and Potawatomi Nation officials work together to contract with an independent auditor and split the auditor’s bill evenly.¹⁴⁷ These types of freedoms give the Potawatomi Nation breathing room to set its own tax rates and regulate its own sales.

2. Tribal sovereignty in the Iowa Tribe of Kansas and Nebraska compact

Interestingly, the list of recitals in the compact made between Kansas and the Iowa Nation of Kansas and Nebraska is a flipped version of the State’s compact with the Potawatomi Nation. The

140. Potawatomi Nation Compact, *supra* note 103, at 1.

141. *Id.*

142. *Id.*

143. *Id.* §§ 4.01, 5.01.

144. *Id.* § 4.01.

145. *Id.* § 5.01(a).

146. *Id.* § 5.01(b)–(d) (setting minimum requirements for sales taxes and excise taxes).

147. *Id.* § 6.02.

language is often very similar, but in a different order: this compact does not explicitly reference tribal sovereignty until the ninth recital.¹⁴⁸ Instead, the first part of the compact focuses heavily on the battle between the State of Kansas and various tobacco companies.¹⁴⁹

This recital portrays the State of Kansas as the main actor in this compact who, fighting against the abuses of the tobacco industry, must reach out to the Iowa Tribe of Kansas and Nebraska for assistance.¹⁵⁰ This portrayal places the tribe in a third-party position in the recital narrative rather than as an equal partner in a contract. The narrative further paints this picture by assuring readers that any tribal efforts to assist the State in its fight will be reimbursed.¹⁵¹

This treatment of tribal independence and power in the recital is paired, interestingly, with a brief main compact body.¹⁵² Although this compact negotiates the same type of arrangement as the Potawatomi Nation compact, it is significantly shorter.¹⁵³ The length difference is due partly to the fact that the Potawatomi compact has its own definitions section.¹⁵⁴

The Tribe seems to be treated fairly in the compact's main provisions. For example, this agreement asserts that the Tribe and State will work together to hire an auditor.¹⁵⁵ The section of the contract regarding interpretation of terms explains that “[i]t is the intent of the parties that this Compact shall be construed to reflect that the parties are of equal stature and dignity and have dealt with each other at arm's length.”¹⁵⁶ The Iowa Tribe compact also states that the Tribe has the exclusive right to tax buyers on tribal land as long as

148. Iowa Tribe Compact, *supra* note 104.

149. *Id.* art. I.

150. *Id.* art. I (“[I]t would be contrary to the policy of Kansas if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that Kansas will have an eventual source of recovery from them if they are proven to have acted culpably . . . [and] Kansas entered into a settlement agreement with certain [tobacco product manufacturers] . . .”).

151. *Id.* art. I (recitals 7–8). *But see* art. III, § 10.

152. *Id.* arts. II–III.

153. *Id.*; Potawatomi Nation Compact, *supra* note 103.

154. Iowa Tribe Compact, *supra* note 104, art. III, § 11; Potawatomi Nation Compact, *supra* note 103, art. I.

155. Iowa Tribe Compact, *supra* note 104, art. II, § 9.

156. *Id.* art. III, § 10.

those taxes exceed 17 cents per pack or \$1.70 for ten.¹⁵⁷ This contract also explicitly omits sacred tobacco from the requirements of the compact,¹⁵⁸ which accommodates and facilitates the Tribe's expression of religious beliefs. Therefore, although tribal sovereignty is not placed at the forefront of the compact's introduction, the tribe seems to have negotiated several fair terms for itself in the body of the compact.

3. Critique of tribal sovereignty in the Potawatomi Nation and Iowa Tribe of Kansas and Nebraska compacts

In a way, both the Potawatomi Nation and Iowa Tribe of Kansas and Nebraska compacts incorporate ideas of tribal sovereignty. However, despite the fact that both compacts use identical sovereignty provisions, the placement of those statements impacts their respective narratives in important ways.¹⁵⁹ The Potawatomi Nation compact begins with a powerful assertion of the rights and independent governing powers of the local tribe.¹⁶⁰ The Iowa Tribe compact leaves its discussion of tribal sovereignty to the end of the introduction, focusing primarily on the battle between Kansas and the tobacco industry.¹⁶¹ This difference in treatment may be trivial, but rhetorically it creates in the mind of the reader two opposite impressions—in one, the tribe is an important player in compact formation, but in the other, the tribe is a means to an end.

Both compacts treat tribal sovereignty appropriately on a practical level, and this is something that all cigarette compacts must do. Of course, the mere fact that the State used a compact rather than a statute to bring about cigarette tax reform signals that the State viewed these tribes as worthy of meeting at the negotiating table. In addition, these compacts are particularly impressive because both give tribes significant leeway to set their own taxes and keep those taxes for tribal use.¹⁶² These two provisions, independent tax-setting and within-tribe use of taxes, show respect for tribes as independent entities.

157. *Id.* art. II, §§ 10–13.

158. *Id.* art. II, § 3; *see also* Potawatomi Nation Compact, *supra* note 103, § 5.02(h).

159. *See supra* Sections IV.B.1–B.2.

160. *See* Potawatomi Nation Contract, *supra* note 103.

161. *See* Iowa Tribe Compact, *supra* note 104 and accompanying text.

162. *See* Potawatomi Nation Contract, *supra* note 103; Iowa Tribe Compact, *supra* note 104.

Overall, these two compacts, while differing in their narrative style, both promote tribal sovereignty to some extent. In addition, the Potawatomi Nation compact sets up the tribe as an equally important partner with the State; in so doing, the compact helps to unify both governments in the fight against cigarette bootlegging. Future compacts should assert tribal sovereignty early on and ensure that tribes are receiving adequate consideration for the help they provide to states: doing so promotes tribal economy and fosters the spirit of cooperation helpful in combating illicit cigarette dealings involving tribes.

C. Tobacco Control

Both states and tribes stand to gain by making cigarette compacts as effective as possible from a public health perspective. The staggering economic and public health burden of smoking on states is already well known,¹⁶³ and cigarette smoking is also a large problem on Native American lands. For example, Native American adults have the highest prevalence of commercial tobacco product use in the country (over forty percent in one 2013 study)¹⁶⁴ and experience high death rates from multiple related chronic diseases.¹⁶⁵ Many also live in stifling poverty,¹⁶⁶ which is likely exacerbated by the need to purchase cigarettes. With this in mind, states and tribes should be actively engaged in forming agreements that combat illicit cigarette dealings and, by implication, the population's dependence on tobacco, as effectively as possible.

163. See, e.g., *The Costs of Tobacco on NY State*, N.Y. STATE SMOKERS' QUITLINE, <https://www.nysmokefree.com/EMP/EMPSubpage.aspx?Pn=TOBACOCOSTS> (last visited Dec. 2, 2017) ("Adults who die each year in New York from their own smoking: 25,500 . . . Annual smoking-related health care costs and lost productivity in NY total \$14.2 billion[.]").

164. *American Indians/Alaska Natives and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION (citing *Results from the 2013 National Survey on Drug Use and Health: Detailed Tables*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. tbl. 2.26B, <http://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs2013/NSDUHDefTabs2013.htm#tab2.26b> (last visited Dec. 2, 2017)), <http://www.cdc.gov/tobacco/disparities/american-indians/index.htm> (last visited Dec. 2, 2017)

165. David K. Espey et al., *Leading Causes of Death and All-Cause Mortality in American Indians and Alaska Natives*, 104 AM. J. PUB. HEALTH S303, S307-09 (2014), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301798>.

166. See Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>.

Although some may assume tribes are not interested in tobacco prevention because of the use of traditional tobacco, that assumption would be misguided.¹⁶⁷ First, not all tribes use traditional tobacco¹⁶⁸ and traditional tobacco has a special religious purpose that is often considered distinct from that of commercial tobacco.¹⁶⁹ Second, while some tribes have taken to using commercial tobacco for religious ceremonies, a movement among Native Americans has grown in an effort to correct that practice.¹⁷⁰ Third, there are tribes that recognize the public health dangers of the commercial cigarette trade.¹⁷¹ Therefore, some tribes may be very much interested in earmarking cigarette revenue for tobacco control.

The two compacts analyzed here divide tax revenue and do not limit how that revenue can be spent.¹⁷² A more effective way to combat illicit cigarette dealings is to require each party to use cigarette taxes for tobacco control efforts. After all, one of the easiest ways to curb practices like bootlegging is to reduce a population's dependence on and interest in cigarettes.

If cigarette tax revenue is dedicated to anti-smoking efforts, the resulting revenue could have a significant impact on both the prevalence of smoking, and, by consequence, the incidence of illicit cigarette dealings. This type of effort is likely most effective when both parties earmark any funds coming from the compact for tobacco control. The purpose of this section is to analyze the extent to which tribal tobacco control is discussed in these two Kansas compacts.

1. Compact with the Iowa Tribe of Kansas and Nebraska

Smoking-related health plays an interesting role in the opening recitals of the Iowa Tribe compact. The main narrative of this opening

167. See, e.g., *Smoking, Race and Ethnicity: Tobacco Use and Native Americans*, TOBACCO FREE LIFE, <https://tobaccofreelife.org/resources/smoking-among-native-americans/> (last visited Dec. 2, 2017) (“With numerous ceremonial uses for tobacco and a deeply ingrained cultural tradition, . . . Native Americans have a particularly big problem with smoking and comparatively less motivation to quit.”).

168. *Traditional vs. Commercial Tobacco*, KEEP IT SACRED NATIONAL NATIVE NETWORK, <http://keepitsacred.itcni.org/tobacco-and-tradition/traditional-v-commercial/> (last visited Dec. 2, 2017).

169. See *id.*

170. See *id.* (referring to the “Keep it Sacred” Native Network itself).

171. Samuel, Ribisl & Williams, *supra* note 66, at 177.

172. See, e.g., *infra* Sections IV.C.1–C.2.

focuses on Kansas's fight against tobacco companies. Rather than emphasizing that industry payments are needed to stop smoking, the agreement specifies that Kansas needs money to deal with the *consequences* of smoking.¹⁷³ The first recital explicitly states that "it is in the best interests of the State of Kansas . . . to continue to reduce the financial burdens imposed on [it] by cigarette smoking and that said costs continue to be borne by tobacco product manufacturers,"¹⁷⁴ while the third explains that payments from tobacco companies are meant to serve as a form of pre-emptive "recovery" in case these companies are found liable for abuse.¹⁷⁵ The purpose, then, is not to prevent smoking—either on reservations or within the State—but to mitigate its effects.

The fact that tobacco control principles are avoided in this introduction is further emphasized by the compact's second recital, which contains the only explicit compact reference to public health.¹⁷⁶ The compact explains that members of the tobacco industry who are not part of the Master Settlement Agreement "pay substantial sums to Kansas . . . to fund a national foundation devoted to . . . public health; and . . . make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking."¹⁷⁷ This summary of the Master Settlement Agreement is helpful background for this compact because it shows that both public health and tobacco control are central principles behind tobacco industry payments to the State.

Unfortunately, tobacco control is not mentioned elsewhere in the compact.¹⁷⁸ No sales tax funds are explicitly earmarked for smoking

173. See Iowa Tribe Compact, *supra* note 104, art. I.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Iowa Tribe Compact, *supra* note 104. It should be noted that there are references in both the Iowa Tribe Compact and the Potawatomi Nation Compact to statutes and agreements that do talk more explicitly about public health and tobacco, such as the 2012 Term Sheet Settlement, which describes payments that tribes can use for public health generally and not for certain pro-smoking purposes. *Id.* art. II, § 14; Potawatomi Nation Compact, *supra* note 103, § 1.01 ("Secondary Settlement Agreement"); 2012 Term Sheet Settlement § 3(B)(2)(d). However, the author was not able to find any specific, proactive tobacco control funding use requirements in outside references that would be mandatory for tribes to implement.

prevention on reservation lands in the compact itself.¹⁷⁹ The omission may suggest that the compact is motivated more strongly by financial gain than by tobacco-focused public health considerations.¹⁸⁰

2. *The Potawatomi Nation compact*

Of course, if the Iowa Tribe compact can be considered minimalistic in its treatment of public health, the Potawatomi Nation compact can be as well. Both compacts share the same public health and smoking clauses.¹⁸¹ However, in the case of the Potawatomi Nation compact, the public health and smoking provisions are buried twelve recitals into the introduction,¹⁸² suggesting that its use of funds to prevent smoking is a side-goal rather than a main objective. And, as in the Iowa Tribe compact, no explicit mention of tobacco control earmarking was found elsewhere in the document.¹⁸³

3. *Critique of tobacco control in these two compacts*

These two Kansas compacts point to the ideal purpose behind cigarette taxes but could potentially do more to promote that purpose. If tobacco control is truly a motivator for cigarette taxes and compacts, those funds should be used for some kind of anti-smoking aim. Otherwise, those taxes become a source of revenue, which makes states and tribes beneficiaries of the tobacco industry. In other words, when policymakers' funded state programs rely on smoker tax revenue to continue, there is no incentive to see smokers quit.¹⁸⁴

There are several changes policymakers can make to better incorporate public health and tribal sovereignty themes into cigarette tax compacts. The next section provides these recommendations.

179. Iowa Tribe Compact, *supra* note 104.

180. *Id.*

181. Potawatomi Nation Compact, *supra* note 103, art. I.; Iowa Tribe Compact, *supra* note 104, art. I.

182. Potawatomi Nation Compact, *supra* note 103, art. I.

183. *Id.* There is also evidence that the Potawatomi Nation did not intend to use funding from the agreement exclusively for tobacco control. Hellman, *supra* note 100 (“Her tribe also will get a small tobacco payment from the Master Settlement Agreement, which Onnen said will likely go toward the tribe’s general fund or to health center operations.”).

184. *See generally* May, *supra* note 50.

V. IMPROVING COMPACTS: FOUR SUGGESTIONS

The way tribal sovereignty and public health are addressed in compacts affects their potential effectiveness in combating the illicit cigarette market. If tribes are not respected, it is unlikely that they will cooperate with state governments. If public health is not placed at the heart of compacting, neither states nor tribes will be incentivized to actively promote anti-smoking efforts.

This Part makes four recommendations to help states keep tribal sovereignty and public health at the heart of cigarette tax compacting and the fight against illicit cigarette dealings.

1. States should codify rules for compact formation.
2. Compact introductions should explicitly focus on tribal sovereignty and smoking prevention.
3. State taxes should be kept out of the reservation.
4. Both the state and the tribe should earmark tax proceeds for smoking prevention and cessation programs in compacts.

A. Codify Rules for Compact Formation

States can and should form compacts with Native American tribes whenever possible, and an effective way to ensure that state and tribal leaders work together is to mandate compact formation legislatively (either on the state or federal level). Multiple states have already done this.¹⁸⁵ At the beginning of 2015, fourteen states had legislation in place that specifically authorized the use of state-tribal cigarette compacts, including Washington, Wisconsin, and Minnesota.¹⁸⁶

Washington's compacting law¹⁸⁷ illustrates how beneficial codified compacting rules can be for state-tribe relations. Under this law, the governor is authorized to make cigarette compacts with Native American tribes.¹⁸⁸ The law also lays out some of the basic terms of those compacts,¹⁸⁹ so the governor can do the legislature's will while

185. *E.g.*, DeLong et al., *supra* note 52, at i33–i34.

186. NAT'L RESEARCH COUNCIL, *supra* note 7, at 128–29; DeLong et al., *supra* note 52, at i34 tbl 2.

187. WASH. REV. CODE ANN. § 43.06.460 (West 2009).

188. *Id.*

189. *Id.*

still retaining enough flexibility to work with individual tribes. In so doing, the legislature streamlined the process of compact formation and showed tribes that they valued state-tribe cooperation.¹⁹⁰

Of course, creating laws that regulate compact formation can be problematic if they are too loose or too restrictive, so legislators need to strike a careful balance between the two. States that choose to set rules on these kinds of compacts should make rules strong enough to meet public health goals but flexible enough to allow tribes to negotiate terms. The Washington law, for example, sets a minimum standard cigarette rate for compacts.¹⁹¹ That minimum rate may be too low to prevent bootlegging, or, in some cases, it might be considered too high to agree to. Therefore, states should create restrictions based on sound economic and public health research in order to most effectively combat bootlegging through mandated compacts.

B. Focus Compact Recitals on Tribal Sovereignty and Smoking Prevention

In the two Kansas compacts evaluated earlier, the Potawatomi Nation's recital read like an economic agreement between sovereigns, while the Iowa Tribe's recital read like a state fight against the tobacco industry that required tribal assistance.¹⁹² A clear description of the role of tribal sovereignty and smoking prevention in cigarette compacting would not have had a direct legal impact on these compacts, but they would have provided a helpful guide for compact drafters, interpreters, and other tribes interested in producing their own agreements.

One example of a hybrid purpose statement that incorporates both tribal sovereignty and public health elements is located in Washington State's law authorizing cigarette tax negotiations with the Puyallup tribe.¹⁹³ In that statute, the legislature explains its purpose is to "(a) [produce] an increase in prices through a flat tax [that] will reduce much of the competitive advantage that has historically existed due to

190. WASH. H.R. 59-5794, 1st Sess., at 2 (2005) ("This bill will end the dispute between the Puyallup Tribe and the state over cigarette taxes. It is a cooperative approach between the tribe and the Department of Revenue. It is good for the state and the tribe. It recognizes unique factors that apply to the Puyallup Tribe's situation.").

191. § 43.06.460; *see also supra* note 31.

192. *See supra* Part IV.

193. WASH. REV. CODE ANN. § 43.06.465 (West 2017).

the discrepancy in the difference between state and tribal taxes, and (b) [ensure] that . . . tribal retailers . . . remain in business under the changed circumstances.”¹⁹⁴ Although this contractual language does not explicitly mention the public health benefits of minimizing state-tribe tax differentials (through the prevention of illicit cigarette dealings), the fact that this agreement focuses on those differentials while still considering the needs of tribal retailers shows both public health considerations and tribal sovereignty can be appropriately incorporated in the same statute.

Cigarette tax compacts are agreements between two sovereign entities that should have a tobacco control motive. An ideal compact should pair a strong introduction on tribal sovereignty with an equally powerful discussion on the purpose of cigarette taxes in promoting public health.

C. Keep State Taxes at the Reservation

Even when a compact includes a firm statement of purpose, that stated purpose means nothing unless the body of the compact carries through on that compact’s mission. In terms of tribal sovereignty, this means a state should not try to reach into tribal retailer pockets to pick up taxes that the state thinks should belong to itself. Although, as previously mentioned, it is legal for states to collect taxes on cigarettes sold to nonresidents,¹⁹⁵ such a practice could also be considered overreaching. As tribal chairwoman Liana Onnen of the Potawatomi Nation explains, “We use terms like self-determination and sovereignty It’s that ability to self-govern and to self-determine how we’re going to handle our taxing and our business.”¹⁹⁶

The Kansas compacts, which keep tribal taxes on the reservation, are not the only documents that support tribal taxing independence. Washington’s law on cigarette compact formation specifies that tribes forming compacts with the State can set their own tax rates “in lieu of the state cigarette and state and local sales and use taxes.”¹⁹⁷

194. § 43.06.465(1).

195. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160 (1980).

196. *See* Hellman, *supra* note 100.

197. § 43.06.460.

*D. Mutually Earmark Tax Proceeds
for Smoking Prevention and Cessation*

Cigarette taxes have the potential to curb smoking rates, and the purpose of compacting is to prevent state users from circumventing those taxes. Tobacco prevention and control, therefore, lie at the heart of this kind of legislation, and they must remain at the heart of any related agreements if they are to have their intended effect on illicit cigarette dealings. Although state and tribal sovereignty both need to be respected, both states and tribes must acknowledge the power they have to incentivize the other to act.

In compact-making, both states and tribes should ensure that a substantial portion of tax revenue is earmarked for public health purposes in general and for smoking prevention and control in particular. This means that funds not only should be allocated specifically to that purpose but also should be prohibited from shifting back to the tobacco industry. In the case of Native American tribes, who may experience economic hardship as a result of cigarette tax increases, additional funds should also be used to spur non-tobacco-related industries.

Although both states and tribes should do this of their own accord, each group has opportunities in compacting to incentivize the other to dedicate tax proceeds to smoking control. The State of Nevada did this to some extent in legislation authorizing its own state-tribe cigarette tax compacts.¹⁹⁸ According to Nevada law, the money that tribes receive from their own state-tribe cigarette agreements must go to “public safety on the qualified tribal land of the tribe or [to] social services for tribal members, including . . . health care or education, and not [to] any function that could directly or indirectly promote or reduce the costs of cigarette production, marketing or sales.”¹⁹⁹

In the case of the Kansas compacts discussed earlier, the State needed tribal assistance in order to continue to receive funds from the tobacco industry. The Iowa Tribe of Kansas and Nebraska and the Potawatomi Nation both could have put pressure on the State to earmark state funds for tobacco prevention and control, and vice versa.

198. NEV. REV. STAT. § 370A.157 (2015).

199. *Id.*; see also TERM SHEET § III(B)(2)(d) (2012), https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/term_sheet.pdf.

Tribes and states involved in compacting should consider making mutual agreements to allocate cigarette tax funds to tobacco control.

VI. CONCLUSION

State-tribe compacting can be a powerful tool for preventing illicit cigarette dealings. However, not all compacts are created equal, and in at least some cases, tribal sovereignty and tobacco control do not seem to be playing as strong a role as they should be in compact formation. By showing respect for tribal sovereignty, tribes can become stronger allies in tobacco control enforcement efforts. By allocating compact funds to effective tobacco control programs, both parties can curb the market for illicit cigarette trading. States need to create legislation that encourages state leaders to develop compacts with Native American tribes, ideally for all state-tribal issues, but specifically for cigarette tax compacts. In those compacts, public health and tribal sovereignty should be featured prominently in compact purpose statements. And, in the main body of these compacts, states and tribes should work together to produce a system where tribes tax members and nonmembers for cigarettes and then keep all revenue. The proceeds of those taxes, in addition to the taxes from state cigarette taxes on state land, should all go toward tobacco prevention and control.

This four-part strategy should create strong state-tribal partnerships that discourage the growth of the illicit cigarette trade, keep cigarette taxes high, and discourage smoking in the population. Public health and tribal sovereignty are not enemies in cigarette tax compacting. Both tribal leadership and states can acknowledge each other's taxing power and use their own power to incentivize fund expenditure for what it should cover—tobacco prevention and control.

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