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FACULTY COMMENT

THE ULTIMATE NIGHTMARE:

WHAT IF TERRORISTS GO NUCLEAR? .... *Robert A. Friedlander* 1

Professor Friedlander discusses "the possible global consequences" of how international nuclear proliferation and the phenomenon of an international arms race have created opportunities for terrorists to utilize nuclear weaponry. Focusing upon several nuclear terrorist attacks which have taken place over recent years, the author notes that "the basic question relating to the nuclear threat is no longer *if*, but *when* an episode of mass destruction will occur." Professor Friedlander observes that "[T]errorists emulate states," and then concludes that the international legal system has not provided remedies which deal with the threat of nuclear terrorism. This is so because a sizeable number of nation-states have voiced their support for terrorist activities, thus splitting the ranks of any international legal order. However, international safeguards may potentially include sanctions against those nations who sponsor terrorist groups as well as direct counterforce response to individual nuclear terrorist attacks. In closing, Professor Friedlander notes that because the world community has failed to develop strong and effective means of controlling terrorists and their mastery of nuclear weapons, nations are "on a collision course with scientific catastrophe."

ARTICLES

RESOLVING CONFLICTS WITH FOREIGN NONDISCLOSURE LAWS:
AN ANALYSIS OF THE *Vetco* CASE .... *David K. Pansius* 13

This article focuses upon the dilemma which exists in United States courts when U.S. discovery law and foreign nondisclosure law conflict. This situation, it is noted, most commonly arises in the international context when a foreign nation forbids a litigant to disclose those documents which are demanded and required under U.S. discovery law in order for a United States court to resolve the case at hand. Mr. Pansius chooses to highlight the conflict by means of a discussion of the *Vetco* case which was recently decided by the Ninth Circuit. The Court's decision to enforce a subpoena which had been issued by the IRS to a Swiss company was correct, the author concludes, but the reasoning which was employed may lead to considerable confusion and a different outcome if re-litigated in the future. This is so because the Court employed the "balancing test" of section 40 of the *Restatement (Second) of the Law of Foreign Relations* without any showing

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Professor Ved P. Nanda, Director
International Legal Studies Program
University of Denver College of Law
200 West 14th Avenue
Denver, Colorado 80204 USA
Telephone (303) 753-3427

by Vetco that "a genuine conflict between U.S. discovery procedures and foreign nondisclosure laws" existed. By reaching its decision in the manner in which it did, the Ninth Circuit implied that treaty procedures which deal with discovery rules are not exclusive, and that in fact, the IRS has the power to subordinate treaty provisions to its own procedures. The relationship of the balancing test and treaties which deal with discovery are given a thorough treatment in a discussion of various cases which have employed both procedures. The conclusion which Mr. Pansius reaches requires that "the existence of a treaty weighs against U.S. disclosure rules that are contrary to the reasonable expectations of the other signatory to the treaty." The express or implied provisions of the treaty must take precedence "[w]here the [public] policies of the two countries are . . . in direct conflict." It is only in those instances in which the competing interests are not in balance where "the balancing test applies in favor of that sovereign whose public policy is unambiguously involved."

ON LIVING TOGETHER IN NORTH AMERICA: CANADA, THE UNITED STATES AND INTERNATIONAL ENVIRONMENTAL RELATIONS .... *John E. Carroll* and *Newell B. Mack* 35

The traditional means for resolving disputes between the United States and Canada has been through negotiation and ad hoc accommodations. However, the authors contend in their article that the recent problem of transboundary pollution has rendered the ad hoc approach inadequate, mainly because of the absence of predictability. Observing that there is a need for some form of "rules" which will govern future decision-making between the two countries, the author's offer several different options which the countries might choose. First, options are proposed in order to choose an agreement which establishes the rules, and second, alternatives which utilize the rules and actually resolve the conflicts are examined. The option which the authors propose as being the most practical is one in which an arbitral tribunal would be established and composed of citizens from each country, and given broad binding authority. In this way, "a satisfactory balance between authority and advice could eventually be reached." The actual implementation of such a tribunal would require the support of constituencies consisting of corporations, environmentalists, and local governments, and such support may prove to be a substantial obstacle. However, the authors conclude that such a mechanism, using agreed-upon rules, may be the only way in which environmental relations between the U.S. and Canada may consistently improve and eventually reach a state of mutual satisfaction.

STUDENT COMMENT

WHO'LL STOP THE RAIN?: RESOLUTION MECHANISMS FOR U.S.-CANADIAN TRANSBOUNDARY POLLUTION DISPUTES .... *John Pickering* and *Gina L. Swets* 51

This Comment addresses the problem of transboundary pollution between the United States and Canada, and it examines selected mechanisms for the resolution of environmental disputes which arise between the two countries. The authors select four areas in which potential resolution mechanisms exist, with particular regard to the problem areas of acid rain and

water pollution. These legal mechanisms consist of: 1) limited territorial sovereignty as a basis for liability in transboundary pollution disputes; 2) a remedy to the acid rain dispute under section 115 of the U.S. Clean Air Act; 3) the effectiveness of current mechanisms for resolving disputes over the Poplar River and Garrison Diversion projects; and 4) the draft treaties proposed by a Joint Working Group of the American and Canadian Bar Associations dealing exclusively with the resolution of disputes between the United States and Canada. After a thorough discussion of the means by which each mechanism may be employed to successfully resolve transboundary environmental disputes wholly on the legal merits, the authors conclude that the willingness of either government to utilize any such mechanism is not likely. Rather, the traditional ad hoc means of settlement through diplomatic channels appears to be favored by Canada and the U.S. because of its emphasis upon a variety of approaches in dispute settlement as opposed to the strict legalistic approach which is endorsed in the four dispute settlement mechanisms.

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