

Under this section, it would appear possible for a Canadian private party to bring an action in U.S. court for damages from air pollution, if he were able to demonstrate that a treaty binding on the United States and Canada provided such a right of action for individual Canadian citizens. (It is improbable that Canadian governmental entities, particularly the federal government, are intended to be given rights by the statute). Thus, this is merely a jurisdictional statute. It provides that if a right of action exists, federal courts have subject matter jurisdiction to hear the case. Section 1350 alone does not create any rights of action.

The right of action must arise out of a violation of the law of nations or treaty binding on the United States. The law of nations does not now appear to provide a right to make tort claims for transboundary air pollution, nor does any treaty now appear to create such a right of action.

The cases thus far decided under this statute have involved only private parties and treaties, in the domestic U.S. constitutional sense. However, a case presently under litigation involves the question of whether "torture" is prohibited by the "law of nations".

It is unlikely that executive agreements, in the domestic law sense, would be considered "treaties" for purposes of the statute, since the rights provided in them derive not from international customary or conventional (treaty) law, but rather from already existing domestic statutory authority.

In determining whether a cause of action exists, the cases have held section 1350 irrelevant. Instead, one must look to international law and, unless the treaty were intended to create a private cause of action, and the treaty were either self-executing or had been implemented by legislation, the plaintiff's claim would be dismissed for failure to state a cause of action.

4. The Clean Air Act

By far the most important U.S. statute relating to transboundary air pollution is the Clean Air Act. The Act provides the basis both for setting domestic emission standards and for their enforcement by a variety of means.

Under Section 115, upon certain findings of endangerment and reciprocity, specific provision is made for taking into account foreign concerns about U.S. - source pollution, and for directly integrating foreign interests