

Administrative proceedings The question of capacity to participate in administrative proceedings is somewhat different. Usually, a hearing which is open to the public will, as a practical matter, be open to the participation of concerned Canadian parties, both private and public. Also, federal agencies will readily make available to Canadian citizens and agencies documentation on policies, projects and other actions which the federal agencies are required to offer to the American public. Thus, there is generally no difficulty with Canadian interests becoming informed and making their views known in comment and rule-making procedures.

However, in this connection it is important to note that the extent to which a federal agency may make decisions based on comments (from anyone) is a separate question. In making a decision, the U.S. agency is limited to considering only those matters which are identified by law as being relevant criteria. If a comment urged a U.S. decision-maker to consider a matter that the relevant statute and regulations did not encompass, the decisionmaker could not legally take that matter into account. For him to do so would jeopardize the legality of the decision.

A more difficult question arises when a foreign party wishes to make use of federal laws designed to guarantee the procedural rights of U.S. citizens. The terms of the Administrative Procedure Act apply to "any person ... adversely affected or aggrieved ... within the meaning of any relevant statute"; one must therefore refer to the principal substantive statute to determine whether a particular person was intended to be protected by its provisions. If a Canadian party may not invoke procedural guarantees under a specific statute such as the Clean Air Act, the Administrative Procedure Act would seem to offer no greater protection.

Common Law and Related Actions. The federal common law of nuisance may serve as a basis for a suit by a private party to recover monetary compensation for damage suffered from transboundary air pollution. The suit would be a common law tort action for nuisance against the source allegedly responsible for causing the plaintiff's injury.

The federal question statute, 28 U.S.C. 1331, would afford a basis for federal district court jurisdiction, at least in cases involving interstate pollution and possibly in all cases involving transboundary pollution. Here, however, as noted above, serious questions would have to be answered with respect to standing of a non-resident alien to sue in U.S. courts; answering these questions would be particularly difficult where no