The Shifting Pendulum: Foreign Investors' Liability Under Canada's Common Law for Breaches of Customary International Law

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Abstract

In February 2020, the Supreme Court of Canada rendered a decision—*Nevsun Resources Ltd. v. Araya, 2020 SCC 5*—that can properly be described as revolutionary. In Nevsun, the court found that a Canadian corporation operating in a host state, Eretria, could be liable under Canadian domestic law for human rights abuses committed in Eritrea under customary international law, as incorporated into Canadian domestic law. The decision merits special attention because it is likely to fundamentally change the relationship between foreign investors, host states and the residents of host states adversely affected by investors' unlawful conduct which amount to modern slavery.

Keywords: Human rights, forced labour, slavery, servitude, Nevsun v. Araya, foreign investor

Résumé

En février 2020, la Cour suprême du Canada a rendu une décision – Nevsun Resources Ltd. c. Araya, 2020 CSC 5 – qui peut, à juste titre, être qualifiée de révolutionnaire. Plus précisément, dans l'arrêt Nevsun, le tribunal a conclu qu'une entreprise canadienne opérant dans un État hôte, soit l'Érythrée, pouvait être tenue responsable des violations des droits de l'homme commises en Érythrée en vertu du droit international coutumier, tel que présent dans le droit domestique canadien. Cette décision mérite une attention particulière puisqu'elle est susceptible de modifier les relations entre les investisseurs étrangers et les États hôtes ainsi que les résidents de ces États hôtes qui sont lésés par les comportements illégaux des investisseurs étrangers (comportements qui s'apparenteraient à de l'esclavage moderne).

Mots-clés: Droits de l'homme, travail forcé, esclavage, servitude, droit international coutumier, Nevsun contre Araya, investisseur étranger

I. Introduction

The *Nevsun* decision is of fundamental importance to the international investment community because, although not decided by an international arbitral tribunal, it arguably has the effect of rebalancing the traditionally uneven relationship between

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2021, Volume 36, no. 3, pp. 447–465. doi:10.1017/cls.2021.11

foreign investors and host states[1] in circumstances where investors commit unlawful conduct amounting to modern slavery in host states. More pointedly, because the extant investor-state system of dispute settlement does not contemplate a host state initiating a claim against a foreign investor before an arbitral tribunal for a breach of human rights norms committed in the host state, the *Nevsun* decision provides a possible avenue through which aggrieved nationals of a host state may seek to enforce customary international law obligations in Canada's domestic legal order, an arguably exciting development that has the potential to augment the efficacy of the hotly contested international system of dispute settlement.

Traditionally, host states and third world scholars have vehemently complained that foreign investors enjoy a system of investor-state dispute settlement that is asymmetrical in its approach, principally because a sizeable percentage (29%) of all cases decided between 1987 and 2018 and 61% of cases[2] based on their merit (which excludes cases dismissed on jurisdictional grounds) were decided in favour of investors.[3] It has been repeatedly argued that this investor-centric approach[4] has failed to discourage unlawful conduct committed by foreign investors in host states, especially developing and transition economies, that in some cases adversely affects the civil liberties of nationals living and working in these states.

While some arbitral tribunals have been prepared to deny jurisdiction where investors breach a fundamental rule of international public policy,[5] or make an award of costs against the impugned investor for unlawful conduct engaged in by the investor,[6] or, in some cases, reduce the amount of damages that they award on account of contributory negligence,[7] there remains a pervading view that this does not do nearly enough to rebalance the uneven relationship between foreign investors, especially investors from wealthy countries making investments in developing countries.[8] This is particularly the case where nationals of host states are adversely affected by the unlawful acts or omissions of the investor, which may be exacerbated where the national investment law (if enacted), bilateral investment treaty, or regional trade agreement do not impose direct obligations on investors aimed at constraining their unlawful conduct. This may be symptomatic, however, of the asymmetrical nature of the international investment framework; investment treaties, trade agreements and most domestic investment laws do not provide

1 M. Sattorova, *The Impact of Investment Treaty Law on Host States Enabling Good Governance?* (Oxford: Hart Publishing, 2018).
2 United Nations Conference on Trade and Development, IA Issues Note: Fact Sheet on Investor-State Dispute Settlement Cases in 2018, Issue 2, 2018.
3 J. Haynes, "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns—The Case for Regulatory Rebalancing," *The Journal of World Investment & Trade* 14, no. 1 (2013): 114–46.
4 O. Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration," *Virginia Journal of International Law* 47 (2006): 953–75.
5 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.
6 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3.
7 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227.
8 A. Hippolyte, "Reevaluating the Role of Foreign Investment in Economic Development: Investment Protection and the Subordinate Role of Developing Countries' Interests in Investor-State Arbitration," *Journal of International Economics* 75 (2019): 76–90.

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protection to host states or people in them, but only afford remedies to foreign investors. Indeed, this is why *Nevsun* is so important.

While there has been an evolving narrative over the years that these corporations should be held responsible for conduct which adversely affects nationals of host states,[9] and which, by extension, offends international public policy, international human rights law has not formally recognized the direct liability of these corporations.[10] This reality is further complicated by the fact that rules on corporate liability often restrict domestic courts' ability to lift the proverbial corporate veil; the state action doctrine may be invoked in circumstances where investors' and host states' unlawful conduct are inextricably bundled up; and where the home state habitually does very little by way of chiding its investor for unlawful conduct engaged in overseas. While this unlawful conduct may generally involve ordinary breaches of domestic law, there have been a few cases in which a violation of international human rights norms has been alleged.[11] In the majority of these cases, however, tribunals have repeatedly held that because the rules of international law are directly binding on states, but not on private parties, a ruling on human rights violations is outside the scope of their jurisdiction. Such a ruling was arrived at in *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, as well as *Urbaser v. Argentina.*[12] In the latter case, the tribunal rejected Argentina's counterclaim that the claimant's failure to make investments that were essential to ensure the provision of drinking water and sewage services was a breach of the investor's international human rights obligation. Having considered the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, the tribunal concluded that:

> While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have

[9] S. Hall, "Multinational Corporations' Post-Unocal Liabilities for Violations of International Law," *George Washington International Law Review* 34 (2002): 401–34.

[10] United Nations General Assembly's Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/4/035, February 9, 2007; J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 630.

[11] *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15. Note that the tribunal, on the evidence, did not find the illegality alleged was made out, namely, the investor abusing its authority, deceiving and threatening community members, and condoning the rape of women from the community. In *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investment Centre and the Government of Ghana*, Awards of October 27, 1989, and June 30, 1990, Yearbook Commercial Arbitration XIX (1994) p. 11 (CUL-207), the tribunal held that a ruling on human rights violations was outside the scope of its jurisdiction.

[12] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

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> such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.[13]

The latter part of the foregoing excerpt intimates that if the *Urbaser v. Argentina* case had raised similar facts to *Nevsun,* the tribunal might have been prepared to rule that there was a violation of international human rights norms by the investor. The tribunal, in fact, intimated that if the situation were akin to that which arose for consideration in *Nevsun*, it might have been convinced by the respondents on the United States Court of Appeal case of *Filártiga v. Peña-Irala.*[14] In *Filártiga,* the Court considered that it had jurisdiction to punish non-American citizens for tortious acts committed outside the United States that were in violation of public international law or any treaties to which the United States is a party. *Filártiga* applied the United States' Alien Tort Act,[15] which represents a notable exception to the general lax approach on the part of home states to impugning the tortious conduct of their investors who operate internationally. In some respects, also, one may argue that the United Kingdom, through its *Modern Slavery Act*,[16] and California, through its *Transparency in Supply Chains Act*,[17] are taking reasonable efforts to prevent human rights abuses committed by their corporations while investing abroad,[18] albeit that both of these Acts are limited to specified human rights abuses, namely modern slavery offences. It is clear, however, that, apart from these exceptions, not enough is generally being done by home states to prevent companies constituted under their laws that invest abroad from engaging in unlawful actions that breach international human rights law norms.

This lax approach might, however, be gradually changing,[19] particularly in light of the recent Canadian Supreme Court decision of *Nevsun*, which, although not

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13 Ibid. [1210].

14 U.S. Court of Appeal, 2nd Circuit, 630 F.2d 876, June 30, 1980 (ALRA 307).

15 G. Tzeutschler, "Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad," *Columbia Human Rights Law Review* 30 (1998): 359–420.

16 *Modern Slavery Act* 2015, c. 30,

17 *California Transparency in Supply Chains Act of 2010* (SB 657).

18 Jason Haynes, "The Modern Slavery Act (2015): A Legislative Commentary," *Statute Law Review* 37, no. 1 (2016): 33.

19 Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law," *The Modern Law Review* 70, no. 4 (2007): 598; Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law," *Journal of Business Ethics* 87, no. 2 (2009): 385; Beth Stephens, "Corporate Liability: Enforcing Human Rights through Domestic Litigation," *Hastings International and Comparative Law Review* 24 (2000): 401; Anita Bernstein, "Conjoining International Human Rights Law with Enterprise Liability for Accidents," *Washburn Law Journal* 40 (2000): 382; Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges," *Northwestern Journal of Human Rights* 6 (2007): 222.

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concerned with the question of how Canada treats companies generally, nonetheless provides meaningful insights into how Canadian courts react, through the use of the common law, to alleged harms already committed by Canadian companies operating abroad. In this connection, Anna Aseeva, writing in the *Harvard International Law Journal*, has rightly asserted that *Nevsun* goes further than the tribunal's ruling in *Urbaser*, discussed above, because it concludes that there is "no reason for customary international law (with no distinction between positive and negative obligations) to not directly apply to corporations for violations of obligatory, definable, and universal norms of international law,"[20] while the tribunal in *Urbaser* had only viewed the liability of private corporations as arising where a negative obligation imposed by customary international law had been breached. More than that, as argued by Aseeva, had the tribunal in *Urbaser* followed Nevsun's interpretation, "the investor would have clearly been in violation of its duty to perform—a positive obligation to ensure citizens' international human right to water. Nevsun's logic would make it a direct obligation under international law instead of a mere contractual obligation."[21]

II. The Factual Background

The *Nevsun* case concerned the construction of the Bisha mine in Eritrea, which produces gold, copper, and zinc, and which is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which was 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly held corporation incorporated under British Columbia's Business Corporations Act.[22]

The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company, which was owned by Eritrea's only political party, the People's Front for Democracy and Justice.[23]

Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program. The National Service Program requires that all Eritreans, when they reached the age of eighteen, complete six months of military training followed by twelve months of "military development service."[24] Conscripts are assigned to direct military service and/or to assist in the construction of public projects that are in the national interest. In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were

[20] Anna Aseeva, "UK and Canada Domestic Courts' Game-changing Rulings and International Custom: A Dress Rehearsal for Global Sustainability Law?" *Harvard International Law Journal* 1 (2020): 1 https://harvardilj.org/2020/06/uk-and-canada-domestic-courts-game-changing-rulings-and-international-custom/ (accessed 12 October 2020).
[21] Ibid.
[22] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [7].
[23] Ibid. [8].
[24] Ibid. [9].

https://doi.org/10.1017/cls.2021.11 Published online by Cambridge University Press

forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.[25] For those conscripted to the Bisha mine, the tenure was indefinite. The workers were allegedly forced to provide labour in harsh and dangerous conditions for years and, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments was used, including ordering workers to roll in the hot sand while being beaten with sticks until losing consciousness and the "helicopter," which consisted of tying the workers' arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour. The workers alleged that when they became ill, they had their pay docked if they failed to return to work after five days.[26] When not working, the Eritrean workers were allegedly confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families.[27]

The applicants, who were all refugees and former Eritrean nationals, sought damages for breaches of domestic torts including conversion, battery, false imprisonment, conspiracy, and negligence. More significantly for the purposes of this discussion, however, they also sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity.

Nevsun, in response, brought a motion to strike the pleadings on the basis of the "act of state doctrine," which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submitted, included Eritrea's National Service Program. Its position was also that the claims based on customary international law should be struck because they had no reasonable prospect of success.

III. The Foreign Investor's "Investment" in Eritrea

The Supreme Court affirmed, first, that, because Nevsun controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. This operational control was such that Nevsun was involved in all aspects of Bisha's operations, including exploration, development, extraction, processing, and reclamation.[28]

IV. Forum Non Conveniens

The doctrine of *forum non conveniens* has traditionally been a significant barrier for plaintiffs in cases like *Nevsun*. The contours of the doctrine arose for consideration in the case of *Amchem Products Inc. v. British Columbia Worker's Compensation Board*,[29] a case in which it was held that a Canadian court will strike out a claim for *forum non conveniens* where there is another forum that is clearly more appropriate

[25] Ibid. [10].
[26] Ibid. [12].
[27] Ibid. [12].
[28] Ibid. [17].
[29] [1993] 1 S.C.R. 897.

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than the domestic forum. If the forums are both to be equally convenient, the domestic forum will always win out. The question of convenience is a multi-dimensional one, necessitating the court's consideration of a number of factors, including the connection between the plaintiff's claim and the forum, the connection between the defendant and the forum, unfairness to the defendant by choosing the forum, unfairness to the plaintiff in not choosing the forum, involvement of other parties to the suit (i.e., location of witnesses), and issues of comity such as reciprocity and standard of adjudication.

In the instant case, Nevsun brought a series of applications seeking a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*). The Chambers Judge, Abrioux J, however, denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favoured Eritrea as the appropriate forum. Abrioux J also considered that there was a real risk of an unfair trial occurring in Eritrea.[30] On appeal, Nevsun argued that Abrioux J erred in refusing to decline jurisdiction on the *forum non conveniens* application. Writing for a unanimous court, Newbury JA upheld Abrioux J's rulings on the *forum non conveniens* point.[31] Her Ladyship found that the case could proceed in British Columbia, despite several practical challenges—including the location of plaintiffs and evidence in Africa, poor telecommunications and internet in Eritrea, and language barriers. More pointedly, Newbury JA considered that there was a "real risk" that the plaintiffs would not receive a fair trial in Eritrea.[32] This reason proved persuasive to the Court of Appeal, which favoured the jurisdiction in which the plaintiffs can assert their claims in a fair and impartial proceeding over a jurisdiction in which justice seems unlikely to be done.

Before the Supreme Court, Nevsun did not challenge the Court of Appeal's decision on *forum non conveniens.* As a result, at the level of the Supreme Court, there was no dispute that if the act of state doctrine, discussed below, did not bar the matter from proceeding, British Columbia courts would be the appropriate forum for resolving the claims.[33]

Although, ultimately, the Supreme Court found that a British Columbian court was the most appropriate forum for the resolution of the dispute at hand, it is submitted that this conclusion may have little precedential value in the vast majority of cases in future because it was based on the unique factual matrix presented by this case, which allowed the Court to relatively easily conclude that Eritrea was not a convenient forum for the claim. In other cases where the parties and witnesses are located abroad, it is not costly to transfer the case to another jurisdiction, the transfer will not affect the conduct of the litigation, and there are problems related to the recognition and enforcement of the judgment rendered in Canada in respect of parties located abroad, Canadian courts will likely refuse to hear the proceedings on the basis of *forum non conveniens.*

30 Nevsun Resources Ltd. v. Araya, 2020 SCC 5 [18].
31 Ibid. [21].
32 Ibid. [18].
33 Ibid. [26].

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In the final analysis, it is to be noted that the *forum non conveniens* argument was not appealed by Nevsun.

V. The Act of State Doctrine

While there are multiple ways in which the act of state doctrine has been characterized, the majority in *Nevsun* adopted Lord Millett's description that "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state."[34]

In the instant case, Nevsun argued that the entire claim should be struck because the act of state doctrine made it non-justiciable. In answer to this contention, the Supreme Court in *Nevsun* traced the development of the doctrine and considered that Canadian law has developed its own approach to addressing the issue of acts committed by a foreign state, namely in *Buttes Gas*,[35] which recognized the doctrines of conflict of laws and judicial restraint. In Canada, therefore, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

The majority ruling in *Nevsun* makes it clear that, in Canada, conflict of laws rules and judicial restraint will not prevent a Canadian court from examining a foreign state's conduct that offends against some fundamental morality or public policy.[36] That said, Canadian courts will exercise judicial restraint when considering foreign law questions such that they will refrain from making findings which purport to be legally binding on foreign states. However, they are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.[37]

The dissenting judgment on the question of the application of the act of state doctrine, delivered by Côté J, challenged the majority's ruling that the act of state doctrine did not apply on the facts of the *Nevsun* case. In Côté J's view, because the issue of the legality of Eritrea's acts under international law was central to the respondents' claims, the act of state doctrine should prevent the matter from being disposed of by a Canadian court. Her Ladyship considered that the respondents were simply using Nevsun Resources Ltd. as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada.[38] She explained that, in her view, the respondents' central allegation was that Eritrea's National Service Program is an illegal system of forced labour and constitutes a crime against humanity, matters which are non-justiciable before Canadian courts. This was not a case, in her estimation, where the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim. She

[34] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [29], citing *R. v. Bow Street Metropolitan Stipendiary Magistrate*, Ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.), p. 269.

[35] Buttes Gas & Oil Co., 331 F. Supp. 92 (CD. Cal. 1971).

[36] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [281], citing *Laane and Baltser v. Estonian State Cargo & Passenger Line*, 1949 CanLII 37 (SCC), [1949] S.C.R. 530.

[37] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [47], citing *Hunt v. T&N plc* [1993] 4 S.C.R. 289. The decision in Hunt confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally," pp. 309.

[38] Nevsun Resources Ltd. v. Araya, 2020 SCC 5 [310].

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found it particularly concerning that, to obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun's part.[39] In short, Nevsun could only be found liable if Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct, matters which, in her view, are non-justiciable.

While a fair-minded observer can fully appreciate Côté J's contention based on the facts of this case, it is submitted that the weakness in her analysis lies in the fact that she did not meaningfully engage with the question of whether the public policy exception would apply in a case of this nature, such that the act of state doctrine is circumvented. In view of both Canadian and foreign jurisprudence, which recognize this exception to the act of state doctrine,[40] it is submitted that Côté J's view on this point, while seemingly logical, does not fully address the nuances of the issue at hand, namely the evolving nature of international public policy as an exception to act of state doctrine.

VI. Customary International Law as Common Law

On the facts, because the issue here did not concern the acts of a foreign state, but rather a Canadian investor allegedly engaging in unlawful conduct in Eretria, the Supreme Court focused most of its attention on the important question as to whether the customary international law prohibitions against forced labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity could ground a claim for damages under Canadian law, a truly novel question.

The majority, Wagner CJ and Abella, Karakatsanis, Gascon, and Martin JJ, held that customary international law is part of the municipal law of Canada and, as a result, a breach of customary international law norms is actionable at common law. In this respect, the striking-out application sought by the applicant was refused because the customary international law claims in question had a reasonable likelihood of success.[41]

Relying upon the infamous English case of *Trendtex Trading Corp. v. Central Bank of Nigeria*,[42] and the Canadian case of *R. v. Hape*,[43] the majority in *Nevsun* accepted that customary international law is automatically adopted into Canadian domestic law without any need for legislative action. To buttress this proposition, the majority in *Nevsun* cited, with approval, LeBel J in *Hape*, who had held that:

> following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international

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39 Ibid. [312].

40 *Blad v. Bamfield* (1674) 3 Swans 604; *Duke of Brunswick v. King of Hanover* (1848) 2 HLC. 1; *Oppenheimer v. Cattermole* [1976] AC249; *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos. 4 and 5)* [2002] UKHL 19; *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2012] EWCA Civ 855; *Belhaj* [2014] EWCA Civ 1394; *Moti v. The Queen* [2011] HCA 50.

41 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [69].

42 [1977] 1 Q.B. 529 (Eng. C.A.).

43 (2007) SCC 26.

https://doi.org/10.1017/cls.2021.11 Published online by Cambridge University Press

> law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.[44]

The notion of adoption, or incorporation, of customary international law is not new to common law jurisdictions, as superior courts as far as the Caribbean have accepted this doctrine.[45]

The majority in *Nevsun* then examined the allegations raised by the Eritrean workers, finding compelling evidence that crimes against humanity are the least controversial examples of violations of *jus cogens*; the prohibition against slavery, too, is a peremptory norm of international law; the prohibition against forced labour has attained the status of *jus cogens*; and the prohibition against cruel, inhuman, and degrading treatment is an absolute right, where no social goal or emergency can limit it.[46]

The majority then dealt with Nevsun's objection that, even if customary international law norms such as those relied on by the Eritrean workers formed part of the common law through the doctrine of adoption, it was immune from their application because it is a corporation.[47]

To this, the majority, quite controversially, responded by noting that "Nevsun's position, with respect, misconceives modern international law."[48] It then considered the dicta of Lord Denning in *Trendtex Trading Corp*, noting that international law "does move."[49] In this connection, they considered that "the past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights."[50]

On the premise of there having been a revolutionary shift in international law, from a state-centric to a human-centric conception of global order, the majority considered that "there is no reason, in principle, why 'private actors' excludes corporations."[51]

Quite instructively, the majority reminded itself that one of the sources of international law, pursuant to Article 38 of the Statute of the International Court of Justice (ICJ), is the writings of highly qualified publicists and, accordingly, sought to rely upon numerous academic commentaries, citing, in particular, Professor Koh, who, in his writings, observed that non-state actors like corporations can be held responsible for violations of international criminal law.[52] The majority accepted

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44 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [90] citing *R. v. Hape* (2007) SCC 26 [36], [39].
45 *Attorney General v. Joseph* [2006] CCJ 1 (AJ).
46 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [100] – [103].
47 Ibid. [104].
48 Ibid. [105].
49 Ibid. [106].
50 Ibid. [107].
51 Ibid. [11].
52 H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation," *Journal of International Economic Law* no. 2 (2004): 263–74.

https://doi.org/10.1017/cls.2021.11 Published online by Cambridge University Press

Professor Koh's view that the idea that domestic courts cannot hold corporations civilly liable for violations of international law was a "myth." It further considered that, if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals act through corporations.[53]

For the foregoing reasons, the majority in *Nevsun* felt convinced that:

> it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law," or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" …. However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.[54]

Ultimately, then, the majority noted that "it [was] enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun."[55] Having arrived at this conclusion, the Court explained that in the absence of any contrary law, the customary international law norms raised by the Eritrean workers formed part of the Canadian common law and potentially apply to Nevsun.[56]

Turning to the question of civil remedies available at common law should there be a breach of customary international law norms, the court considered that "recognizing the possibility of a remedy for the breach of norms already forming part of the common law is … a necessary development."[57]

The majority accepted that, in keeping with Article 2 of the International Covenant on Civil and Political Rights, Canada has international obligations to ensure an effective remedy to victims of violations of their rights. Thus, in the circumstances of this case, where there was a right recognized by the court, it noted that "there must be a remedy for its violation."[58] Given that there was, in the majority's view, no procedural bar such as the State Immunity Act, which only applies to actions against state officials, the time had come to countenance "a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law,"[59] as "it is not "plain and obvious" that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law."[60]

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53 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [130] – [132].
54 Ibid. [113].
55 Ibid.
56 Ibid. [116].
57 Ibid. [118].
58 Ibid. [120].
59 Ibid. [122].
60 Ibid.

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In addressing the specific remedies available to the workers, the majority rejected the view that the harms caused by the alleged breaches of customary international law could be adequately addressed by the recognized torts of conversion, battery, unlawful confinement, conspiracy, and negligence. In this connection, it stated that it was at least arguable that the Eritrean workers' allegations encompassed conduct not captured by these existing domestic torts. In justifying this radical approach, the majority considered that customary international law norms, like those the Eritrean workers alleged were violated, are inherently different from existing domestic torts; their character is of a more public nature than existing domestic private torts since the violation of these norms "shocks the conscience of humanity."[61] Accordingly, "refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct."[62]

More pointedly, the majority's view was that while punitive damages are available to address these serious harms, this approach may be inadequate when it comes to the violation of the norms prohibiting forced labour, slavery, cruel, inhuman, or degrading treatment, or crimes against humanity. It noted that the profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts "in the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment."[63] On this premise, the majority felt that reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm."[64]

Interestingly, when it came to finetuning the mechanism for how these claims should proceed, the majority adopted a seemingly cowardly approach, finding that this was a novel question that must be left to the trial judge. It however envisaged that the claims may well be allowed to proceed based on the recognition of new nominate torts but felt that "a compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law."[65]

Despite the foregoing, the majority remained cautious in their recommendation to the trial judge, considering that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed since these claims were based on norms that already form part of Canadian common law. Interestingly, and perhaps even controversially, the Court moved between expressing high hopes of a new cause of action to cautiously noting that,

61 Ibid. [124].
62 Ibid. [125].
63 Ibid. [126].
64 Ibid.
65 Ibid. [127].

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"requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application."[66]

As if unsure about what precisely should be the approach of the trial judge, the majority oscillated between an approach of judicial restraint to a progressive one, noting that "effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical 'private law action in the nature of a tort claim,'"[67] and that "a good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches."[68]

VII. Commentary

The majority judgment in *Nevsun* is, in many respects, revolutionary, and certainly can be regarded as a landmark ruling on the likely treatment of foreign investors who engage in conduct that breaches customary international law norms, as incorporated into Canada's domestic law. Apart from potentially providing the impetus for foreign investors to be more mindful of the terms and conditions under which their workers in host states are engaged, the majority judgment strongly suggests Canadian domestic law could, albeit to a limited extent, address one of the serious defects of the investment regime, namely the lack of proper accountability mechanisms in investment treaties to ensure investors' compliance with laws.

If, indeed, this approach were to be adopted by other jurisdictions, we may very well see a rebalancing of the international investment regime, which has, for a long time, been skewed in favour of foreign investors. It will empower workers in host states to demand more from foreign investors, create greater transparency in the relationship between the foreign investor and the host state, and provide a justiciable catalogue of rights which can be enforced by those adversely affected by an investor's actions in the host state, even if the litigants are not residents of the home state.

Although it is yet too early to speculate on how future courts may operationalize this newfound cause of action alluded to by the court in *Nevsun*, it is certainly an exciting prospect that a new cause of action with associated remedies may very well be on the horizon for persons injured by a foreign investor's unlawful conduct in host states. Based on the majority's implicit suggestion that a *sui generis* domestic cause of action, informed by customary international law principles, may be on the horizon, it may very well be that the amount of damages awarded in cases of this nature by a domestic court would be akin to those awarded by international courts and tribunals, albeit that these courts and tribunals do not award punitive

[66] Ibid. [128].
[67] Ibid. [129].
[68] Ibid.

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damages.[69] On the assumption that the measure of damages is based on customary international law principles, this may have several knock-on effects. First, these damages, particularly if they incorporate a punitive element, may sufficiently vindicate the rights and interests of those who suffer harm at the hands of foreign investors in a manner which fully and meaningfully recognizes the gravity of the harm suffered. Second, it will serve as a deterrent to foreign investors, who will no longer only be accountable before the host state's domestic court and arbitral tribunals, but also before their home state's courts. Third, and, perhaps more fundamentally, foreign investors, especially parent companies, which operate in foreign jurisdictions, will likely become more risk averse, and therefore arguably more attune with developments and projects engaged in by their subsidiaries in an effort to ensure that they do not fall afoul of this newfound cause of action. Overall, it is submitted that this approach will likely bring greater transparency and accountability to investors' dealings in host states and will likely shift the pendulum more in the direction of an even distribution of rights, obligations, and risks as among foreign investors, host states, and the nationals of host states.

There is one caveat, however, to the foregoing; it is not clear from the *Nevsun* ruling whether damages for breach of customary international law awarded would be calculated based on international law or domestic law rules by a Canadian court in future. The most logical view in this context is that, either way, damages are likely to be based on compensation for loss actually suffered. In this respect, it might not necessarily follow that the amount of damages awarded would be large. On the other hand, if punitive damages are awarded by Canadian courts for breach of customary international law, this might be a reason for domestic law damages likely being greater than those awarded in cases involving ordinary breaches of domestic law.

The weaknesses in the majority's reasoning revealed by Brown and Rowe JJ may limit the uptake of the *Nevsun* reasoning in other jurisdictions. Brown and Rowe JJ, who, while agreeing with the majority that the dismissal of Nevsun's application should be upheld in so far as the foreign act of state doctrine was concerned, nonetheless argued that Nevsun's appeal should have been allowed on the matter of the use of customary international law in creating domestic tort liability.

In their view, as a matter of law, corporations cannot be liable at customary international law. In this context, they chide the majority's reliance on Professor Koh's article that suggested that corporations can now be held liable under international law, noting that "this proposition is a single law review essay by Professor Harold Koh …. It cites no cases where a corporation has been held civilly

[69] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. In international investment law, causation is a requirement for establishing liability, and damages flow from a breach of an international obligation. The damages are intended to put the injured party back in the position they would have been had the wrongful act not been committed: *Factory at Chorzow (Germ. v. Pol.),* 1927 P.C.I.J. (ser. A) No. 9 (July 26). The quantum of damages in investor–state dispute resolution is usually a lot more significant that those awarded under domestic law: *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* ICSID Case No. ARB/06/11; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, supra note 7.

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liable for breaches of customary international law anywhere in the world, and we do not know of any."[70]

Justices Brown and Rowe also rejected the reliance of the majority on a book by Simon Baughen[71] and an article by Andrew Clapham,[72] finding, in particular, that Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abettors is specific to the provision in the United States Code now commonly known as the Alien Tort Statute, while Clapham's article concerns the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules.

Their Lordships were emphatic in finding it "plain and obvious" that corporations are excluded from direct liability, citing the 2007 United Nations General Assembly's Report of the Special Representative of the Secretary-General (SRSG) on the issue of *human rights and transnational corporations and other business enterprise*s, which accepted that there is no uniform and consistent state practice establishing corporate responsibilities under customary international law.

They cited, with agreement, Judge Crawford, who has repeatedly expressed that, at present, no international processes, including customary international law, exist that require private persons or businesses to protect human rights, as decisions of international tribunals focus on states' responsibility for preventing human rights abuses by those within their jurisdiction.[73] In short, in the minority's view, the most that can be said at this point is that the proposition that corporate liability under customary international law has been recognized is equivocal. However, because customary international law is, by its very nature, unequivocal, the proposition that corporations are bound by customary international law is not binding law. For this reason, they felt that the workers' claim should fail.

While the minority's view makes good sense, and is arguably theoretically supported by the extant literature on international law, it is submitted that both the majority and minority misconstrued the nature of the customary international obligations they were addressing in the judgment. Both majority and minority disposed of the liability of corporations on the basis of customary international law without recognizing that they, as Canadian Supreme Court Judges, were constitutionally constrained to definitively pronounce on domestic law, and not international law. In this connection, both sides failed to appreciate that once an international obligation is "adopted" or "incorporated" into domestic law, its nature changes such that we are no longer dealing with an international obligation in a domestic court, but a domestic obligation (albeit an international obligation prior to incorporation) in a domestic court. If this view is adopted, the majority's view becomes somewhat defensible, as the narrative is no longer whether a corporation can be liable under customary international law but whether domestic

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70 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [188].

71 S. Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (London: Edward Elgar Publishing, 2015).

72 A. Clapham, "On complicity," in *Le droit pénal à l'épreuve de l'internationalisation,* ed. Marc Henzelin and Robert Roth (Paris: Librairie générale de droit et de jurisprudence, 2002), 241–65.

73 Crawford, *Brownlie's Principles*, 630.

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law, which is comprised of elements of customary international law, recognizes the ability of corporations to be sued, which it seemingly does.

A related concern expressed by Browne J and Rowe J is the fact that the majority's approach is tantamount to introducing the doctrine of "horizontal effect" of human rights law into Canadian jurisprudence. Direct horizontal effect, which is not at present recognized by international law, entails the direct application of customary international law norms between non-state actors; that is, a non-state actor may not at present bring an international law claim against another non-state actor for not complying with human rights standards.[74] By contrast, under indirect horizontal effect, states are typically held internationally responsible for the conduct of non-state actors that interfere with the enjoyment of citizens' human rights.[75] This is possible because states' international obligation to protect human rights often requires them to place direct obligations (or at least standards of behaviour) on non-state actors at the national level.[76] It can be argued, then, that non-state actors are required, by international human rights law, to conduct themselves in a human rights-compliant manner (resulting in indirect horizontal effect).[77]

Browne J and Rowe J in *Nevsun* chided the majority's seeming Europeanization of the question of justiciability of a suit between private entities, finding that while Canadian law has traditionally accepted "vertical effect," it has not accepted the horizontal effect of human rights law.[78] Their view was that "it would be astonishing were customary international law to have horizontal effect where the [Canadian] Charter does not. One wonders if the majority's view of the adoption of customary international law would amount to a new Bill of Horizontal Rights; conceptually, these are very deep waters."[79] Similarly, the minority were concerned that the majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law which would be "similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law."[80]

The minority then engaged in a cross-jurisdictional analysis, ultimately finding that when the English courts sought to give horizontal effect to an international instrument, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms, they did so pursuant to a statute, Human Rights Act 1998, which made it unlawful for a public authority to act in a way which is

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74 L. Lane, "The Horizontal Effect of International Human Rights Law," *Groningen Journal of International Law* (2018) https://grojil.org/2018/08/01/the-horizontal-effect-of-international-human-rights-law/#:~:text=Direct%20horizontal%20effect%20entails%20the,not%20complying%20with%20human%20rights (accessed 12 October 2020).

75 Ibid.

76 Ibid.

77 Ibid.

78 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [210].

79 Ibid.

80 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [211]. See also, *Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, 9.

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incompatible with a Convention right.[81] In short, in the minority's view, while legislative endorsement is not required for there to be vertical effect in the common law of a mandatory or prohibitive norm of customary international law, there is no such tradition of horizontal effect in the common law (that is, an effect on the relations between private parties) without legislative action. Further, and to the extent such an effect is even possible, their view was that it should be addressed by the democratically elected parliament, and not the courts. In effect, then, for the minority, "absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained."[82] To do otherwise, in their view, would "set the law on an unknown course whose ramifications cannot be accurately gauged."[83] In other words, "if Parliament wishes to create an action for a breach of customary international law, that is a decision for Parliament itself to take … it is not one for this Court to take on Parliament's behalf."[84]

Finally, while the minority accepted that, in Canadian law, there must be a remedy where there is a right, they noted that the right to a remedy does not necessarily mean a right to a particular form or kind of remedy. In their view, that the majority felt compelled to rule that a civil remedy is to be made available for a breach of customary international law norm mischaracterizes what is required of the state to secure compliance with international law. They rejected the majority's view that a mere difference of damages as between a cause of action in tort law and customary international law should suffice for the creation of a new tort, though they recognized that a more profound degree of harm may, however, be an appropriate remedy for crafting a different criminal remedy.

In the minority's view, then, the tort system has its own, built-in way to adapt to breaches of rights that are grave or that need to be deterred, namely by awarding increased damages or "punitive" damages. Furthermore, they noted that Canadian courts recognize the tort of battery, which could capture the breaches complained of, and that, in any event, a court can express its condemnation of the conduct through its reasons. In short, their view was that the better conclusion is that a remedy in criminal law is appropriate to address the alleged breaches, while a remedy in tort law (established by the courts, rather than the legislature) is not. More fundamentally, they feared that "the majority's approach in this regard would put Canada out of step with other states."[85]

Meanwhile, the minority felt constrained to argue that it would be unlikely that the common law would recognize four new nominate torts inspired by international law, namely use of forced labour; slavery; cruel, inhuman, or degrading treatment; and crimes against humanity. In their view, for these proposed nominate torts to be recognized by the courts, at a minimum, they must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial

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81 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [210], citing G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" *Modern Law Review* 62 (1999): 824–49.

82 *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 [225].

83 Ibid. [228].

84 Ibid. [229].

85 Ibid. [222].

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consideration. Regarding the proposed torts of cruel, inhuman, or degrading treatment, and crimes against humanity, the court felt that both fail this test. They noted that the proposed tort of cruel, inhuman, or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress, while the proposed tort of crimes against humanity also fails because it is too multifarious a category to be the proper subject of a nominate tort. That said, the minority considered that it is possible the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort. More pointedly, recognizing each of these torts may, in the majority's view, prove to be necessary, in that each may capture conduct not independently captured in torts such as battery, intentional infliction of emotional distress, negligence, or forcible confinement.

Conclusion

The *Nevsun* case raises an important question of international law which must not go unnoticed. It brings into the twenty-first century an age-old debate as to how home states should respond to their corporations which, while investing abroad in a host state, engage in breaches of customary international law norms. The majority ruling is clearly progressive and arguably revolutionary, as it acknowledges what some would describe as a heresy—the horizontal effect of human rights law in respect of a foreign investor who causes injury to a person in a host state in the course of a breach of customary international law. More than anything else, the majority ruling opens the door for increased litigation by persons adversely affected by investors' unlawful conduct in host states, thereby possibly leading to a rebalancing of the uneven landscape that characterizes the international investment arena. If followed by other domestic courts, it is submitted that the majority ruling will radically transform how investors do business as part of their internationalization mandate and will likely generate greater oversight by parent companies over their subsidiaries. That said, it appears, if only from the dissenting judgment, that many aspects of the majority's ruling will not sit well within the broader context of international law, as it seeks to displace age-old assumptions and narratives about the nature of international human rights law, the relevance and impact of customary international law in domestic law, and the role of courts vis-à-vis parliament in the creation of new causes of action that affect private corporations. While it is yet too soon to fully problematize the likely overall impact of the majority's decision on the international investment landscape, it certainly can be argued that the pendulum in investor-host–state-nationals relationship is shifting in the right direction.

In the final analysis, however, it must be remembered that the Supreme Court's decision was on a motion by Nevsun to strike the plaintiff's statement of claim on the basis that it was plain and obvious that the plaintiff's claim had no reasonable prospect of success. To this end, the extent to which this kind of decision leaves more room for a lower court hearing the case on the merits to decline to hold Nevsun and others liable is a real possibility. That said, Anna Aseeva has somewhat optimistically argued that the *Nevsun* "decision opens the door for more cases to be brought in Canadian courts for violations of human rights or failure to engage with

https://doi.org/10.1017/cls.2021.11 Published online by Cambridge University Press

environmental due diligence against Canadian extractive corporations operating transnationally."[86]

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[86] Aseeva, "UK and Canada Domestic Courts."

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