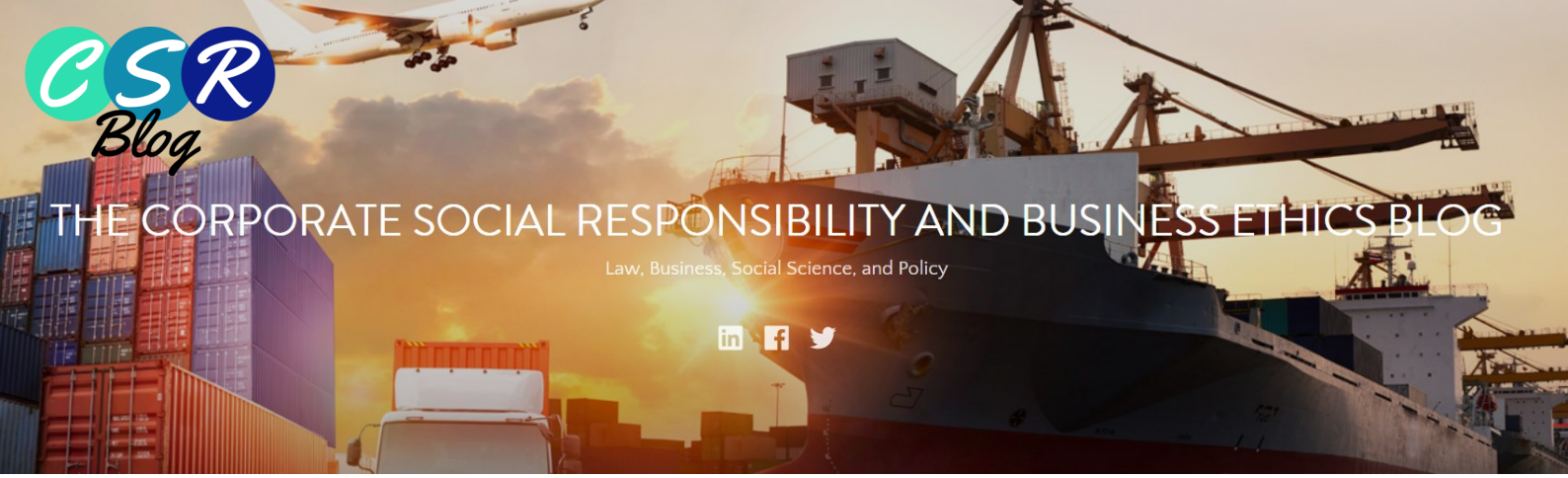

The Nevsun case and the piercing of the corporate veil: A Canadian Revolution?

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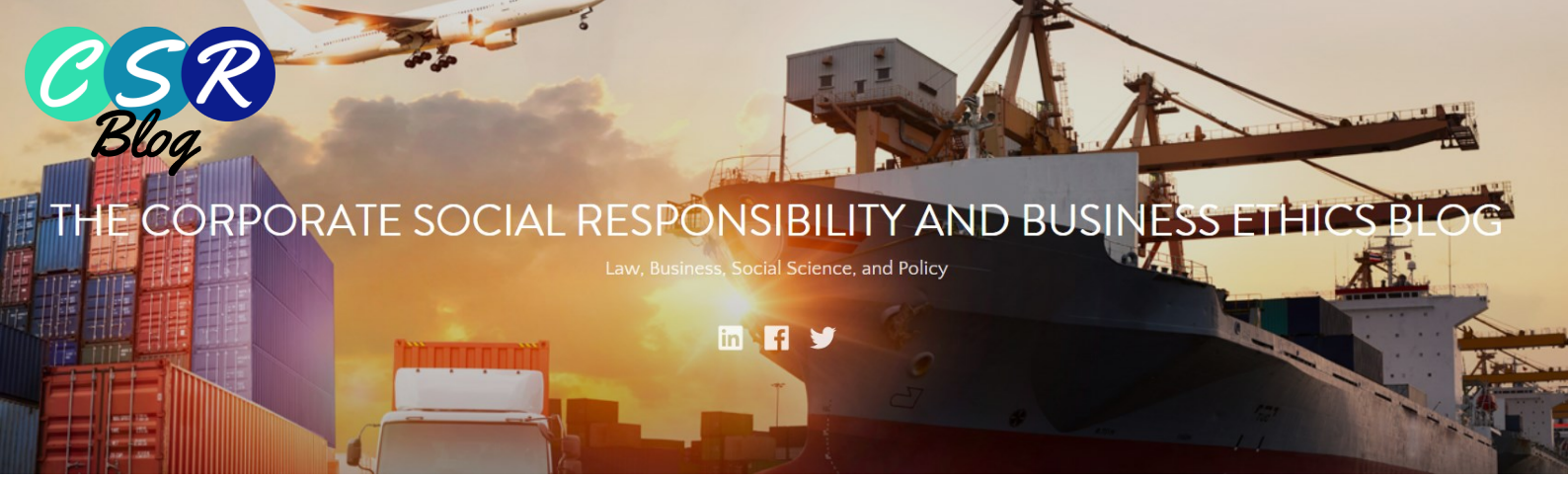
The landmark case, *Nevsun Resources Ltd. v. Araya*, was held on the 28th of February 2020 and introduced three crucial points of law for Canadian civil law. The three points are: the act of state doctrine is not a part of Canadian law, customary international law automatically becomes part of Canadian law via the doctrine of adoption, and companies are also bound by customary international law. This case is similar to an American statute, the Alien Torts Statute 28 U.S.C. § 1350 (ATS) of 1789 in that it allows for aliens to bring action against "pirates" for violations of the law of nations or a treaty of the United States. Thus, there is now precedent which can be used to hold Canadian multinational companies responsible for the torts they commit in other jurisdictions.



Introduction

There has been a difficulty in bringing to justice corporations which have their subsidiary's commit breaches of the law. For many years, there was no practical possibility to make multinational corporations accountable for the illicit conducts perpetrated abroad by their subsidiaries. This stems from the existence of the so-called "corporate veil," which is a legal term used to describe the idea that a company's managers or shareholders are not legally responsible for the actions of the company. Going as far back as *Salomon v A. Salomon & Co. Ltd.*, the corporate veil has made attaching civil liability to a company difficult. Specifically, it complicates the relationships between a parent company and its subsidiary companies in that each company in the corporate group is *prima facie* treated as a separate legal entity. In another article published on this blog and focused on Shell cases in UK and Netherlands, some of the difficulties of this still-developing body of law with the focus on UK-headquartered multinational corporations had already been covered. As a result, this article will explore jurisdictions outside of the UK.

This article will expand on the potential for the developing jurisprudence which has been occurring within the United States as well as Canada. In doing so it will attempt to shine the spotlight of "[w]hether there is a well-defined international-law consensus that corporations are subject to liability for violations of the law of nations.

The Alien Tort Statute: A Glimmer of Light

A sort of miracle happened when some lawyers dusted an old and apparently forgotten piece of legislation in the U.S. – the Alien Tort Statute 28 U.S.C. § 1350 (ATS) of 1789. The ATS provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." There is little surviving legislative history regarding the ATS, so the original purpose of the statute remains open for debate.

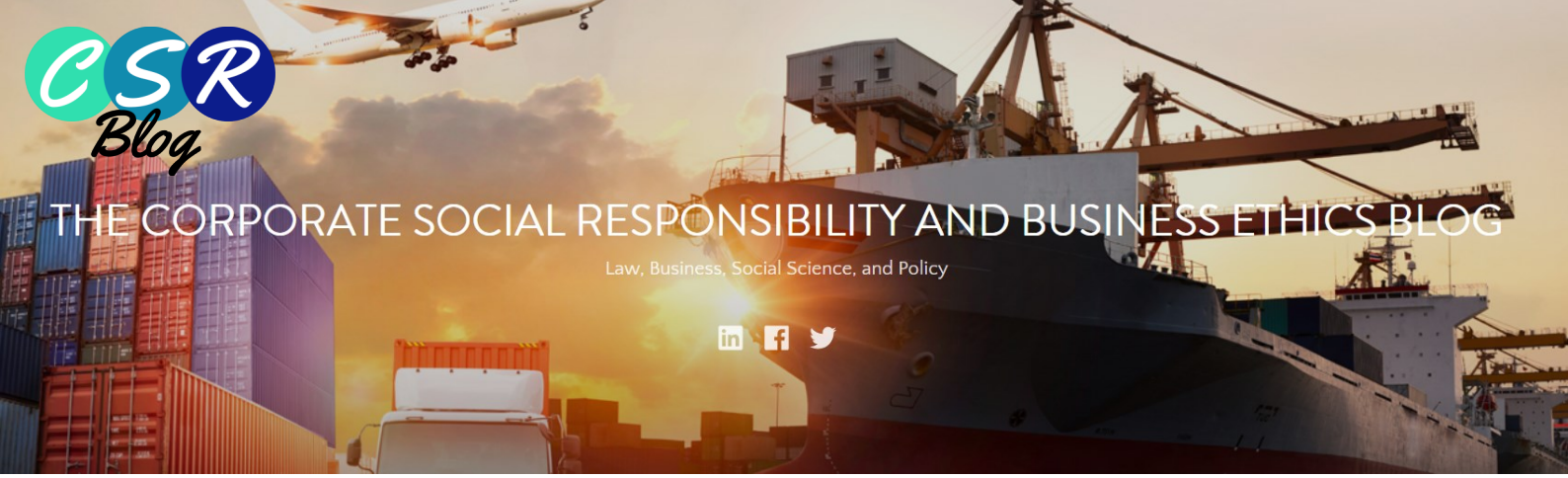
Through a literal analysis of the wording of the ATS appears to give American federal courts extraterritorial jurisdiction over any tortious acts wherever they have been perpetrated so long as they breach public international law or any treaties that the United States are party to. The ATS was successfully used in 1980 for the first time in *Filártiga v. Peña-Irala*.

The facts of the case are as follows:

Joelito Filártiga was captured, tortured, and killed by Américo Norberto Peña-Irala in Paraguay because of his father's dissent of the government. Dolly Filártiga was then invited to see Joelito Filártiga's corpse as a scare tactic to silence her father's opposition of the government. Later on, both parties moved to the United States, Dolly Filártiga applied for political asylum and Peña-Irala overstayed his visitor visa to illegally work in the States. After finding out that Américo was present in the United States, Dolly Filártiga lodges a civil complaint about Joelito's death by torture. Initially, the district court dismissed the case, citing that "the law of nations" as described in ATS was to be construed narrowly. Dolly Filártiga then appealed the case.

The U.S. Circuit Court held that Filártiga could proceed with the case on the basis that torture is a clear violation of the laws of nations [page 4]. The court also held that this case would be allowed on the basis that both parties were residents of the United States at the time, effectively overruling Peña's argument that this case should be held in Paraguay, as a U.S. Court would be *forum non conveniens*. As per Irving R. Kaufman, "Thus, whenever an alleged torturer isfound and served with process by an alien within our borders, s 1350 provides federaljurisdiction" [page 2].

This decision made this judgment a landmark case in America because it opened the way for other cases to be brought to American courts irrespective of where the violation occurred and of the nationality of the perpetrators provided that the conduct violated "the law of nations or a treaty of the United States." In particular, the ATS appears to have a very wide scope for use.



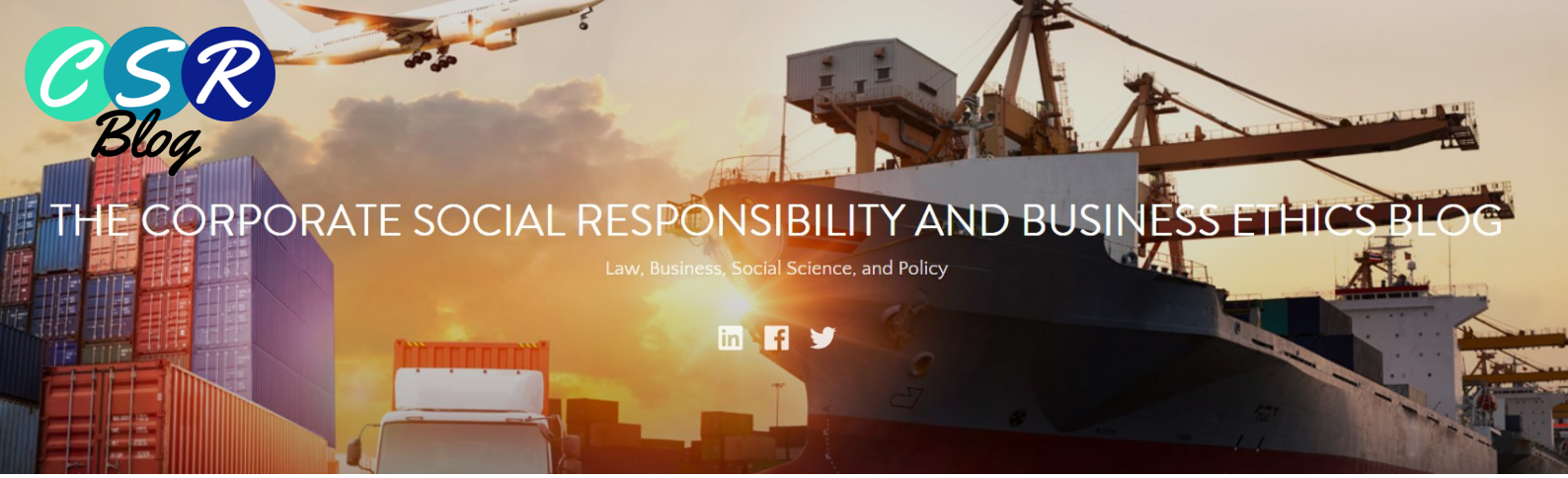
The ATS started as a sort of revolution breaking the impenetrable jurisdictional wall of territoriality. In Filártega it was used as a case to underline the importance of human rights law and used the ATS in a way that could bring attention to human rights. If it was brought to court, it was made public knowledge and could help eventually remediate those abuses.

Since Filártega, the ATS has been pushed through to also hold multinational corporations accountable for their actions abroad. This happens out of the logical effects of the ATS, companies committing tortious acts do fall into the broad definition which the ATS set out. Provided that the tortious action breaches an international law or treaty.

However, concerns have mounted within the U.S. that the ATS would be used too widely to hear any tortious acts which did not concern the U.S. at all. The push towards bringing actions under the ATS against multinational companies does two things: it logically follows from the plain, descriptive interpretation of the ATS, and secondly, there is a need for such legislation to exist in the present day, especially with the ethical abandon such as in the cases mentioned above.

The application of the ATS has become controversial in the eyes of the U.S. Supreme Court, *Sosa v. Alvarez-Machain* stressed that ATS jurisdiction will be reserved only to "furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." Per Justice Souter.

As a result of the push back, *Kiobel v. Royal Dutch Petroleum Co* further emphasized that the Alien Torts would not presumptively apply extraterritorially: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Per Chief Justice Roberts. I.e., there is a presumption against the extraterritorial application of U.S. law applies to the ATS. These decisions reduce the jurisdictional scope of the ATS and cause international civil justice cases within the U.S. to become more difficult to proceed as a result. Though there may be hope for extraterritorial tort cases in a recent Canadian Court case.

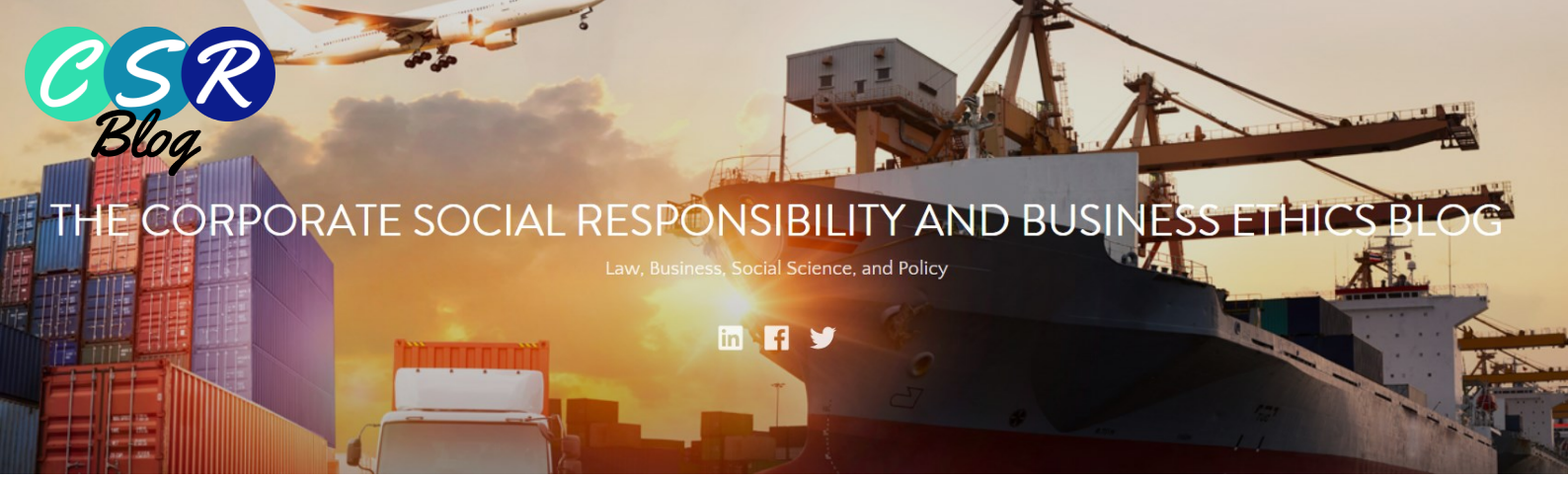


A Canadian Revolution?

On 28 February 2020, the case of *Nevsun Resources Ltd. v. Araya* was heard in the Supreme Court of Canada by nine judges, which is the maximum number of judges. The fact that this case was presided by nine judges is indicative of the importance of this case.

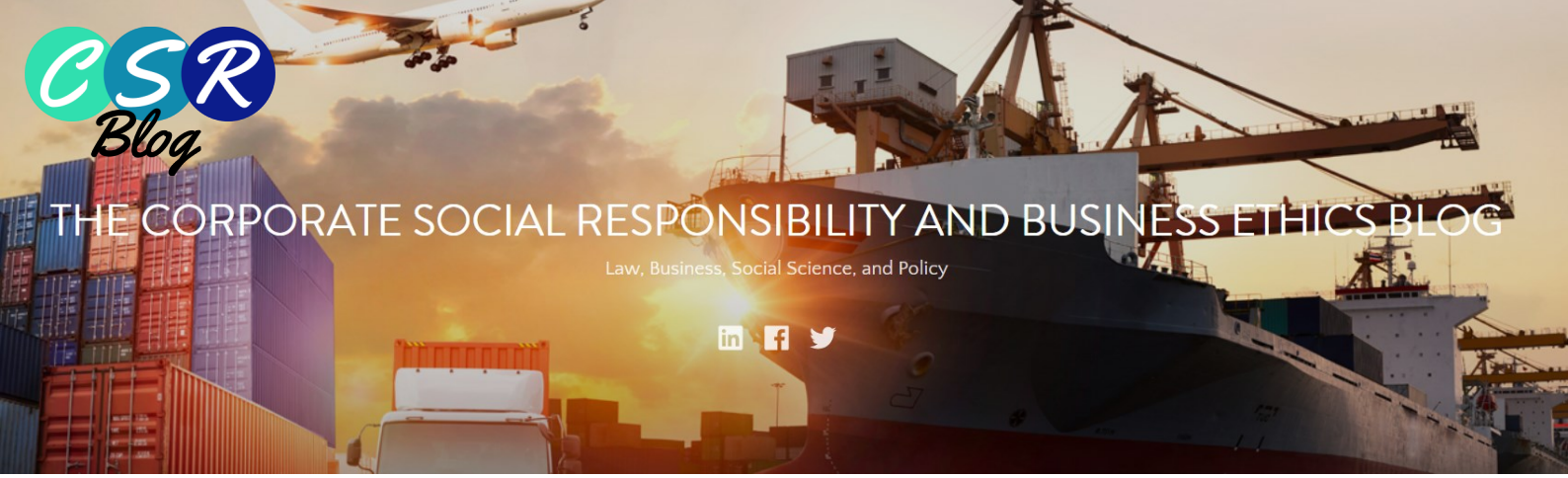
The case was against a Canadian company's subsidiary, Nevsun Resources Ltd., which was accused of violations of customary international law in Eritrea. In particular, the facts of the case are as follows: three Eritrean workers were drafted into the Eritrean "National Service Program" but were forced to work at a mine owned by Bisha Mining Company. Bisha Mining Share Company is owned by Nevsun Ltd.; Nevsun was a mining company, however, it was acquired by Zijin Mining Group Company Limited in 2018. At the time of the case, Nevsun was based in British Columbia. The workers sued Nevsun, seeking damages for breaches of customary international law prohibitions against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. Nevsun argued against this by claiming immunity due to "acts of state doctrine." Per Browne and Rowe JJ. An act of state doctrine dictates that courts of one nation are not allowed to rule on what another nation does. Nevsun also took the position that "the claims based on customary international law should be struck because they have no reasonable prospect of success." The act of state doctrine has not historically been recognized in Canadian cases; instead, Canadian courts have elected to use the following two principles instead: conflict of laws and judicial restraint [para 44].

The Supreme Court of Canada held 5-4 that a private corporation be liable for breaches of customary international law that are not committed in Canada. The Supreme Court made no ruling based on the lawsuit itself regarding how Nevsun's actions have breached customary international law; the Supreme Court merely held that the workers' case could go forwards. The majority in the Supreme Court asserted three things as written by Justice Rosalie Abella: the act of state doctrine is not a part of Canadian law, customary international law automatically becomes part of Canadian law via the doctrine of adoption, and companies are also bound by customary international law.



"Because customary international law is part of Canadian law, courts could, in the right cases, find Canadian companies responsible for violating it." This case is the first time in Canadian legal history that the Supreme Court of Canada has held the body of customary international law to be part of Canadian common law. Previously in Canada, Customary international law was seen as only applying to state actors. Nevsun now expands the scope of customary international law to apply specific private actors such as corporations.

The judges that dissented in part pointed out how Canada does not have a similar law to the ATS. They argued that no instrument within the Canadian legal framework would automatically create civil liabilities from international law and dissented how the majority extended the scope of customary international law. This partial dissent differentiates the doctrine of adoption from the ATS principle, where civil liability is automatically applied to American civil law. *Nevsun Resources Ltd. v. Araya* will now allow Canadian courts to hear cases that will also concern tortious acts or breaches of customary international law but require some form of connection to Canadian law. The meaning is quite clear, the defendant must be Canadian: "Because customary international law is part of Canadian law, courts could, in the right cases, find Canadian companies responsible for violating it." Another way to frame the case is that "Canadian courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law." The structure in which customary international law exists is that there exists a select number of laws that cannot be derogated from. These laws are considered *jus cogens.* Per Article 53 of the Vienna Convention on the Law of Treaties: "[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Being a peremptory norm within customary international law, the Supreme Court said that Nevsun was in violation of the aforementioned public international law, and these peremptory norms were automatically a part of Canadian law by default since Canada has historically followed the conventional doctrine of adoption for customary international laws [Nevsun para 86].



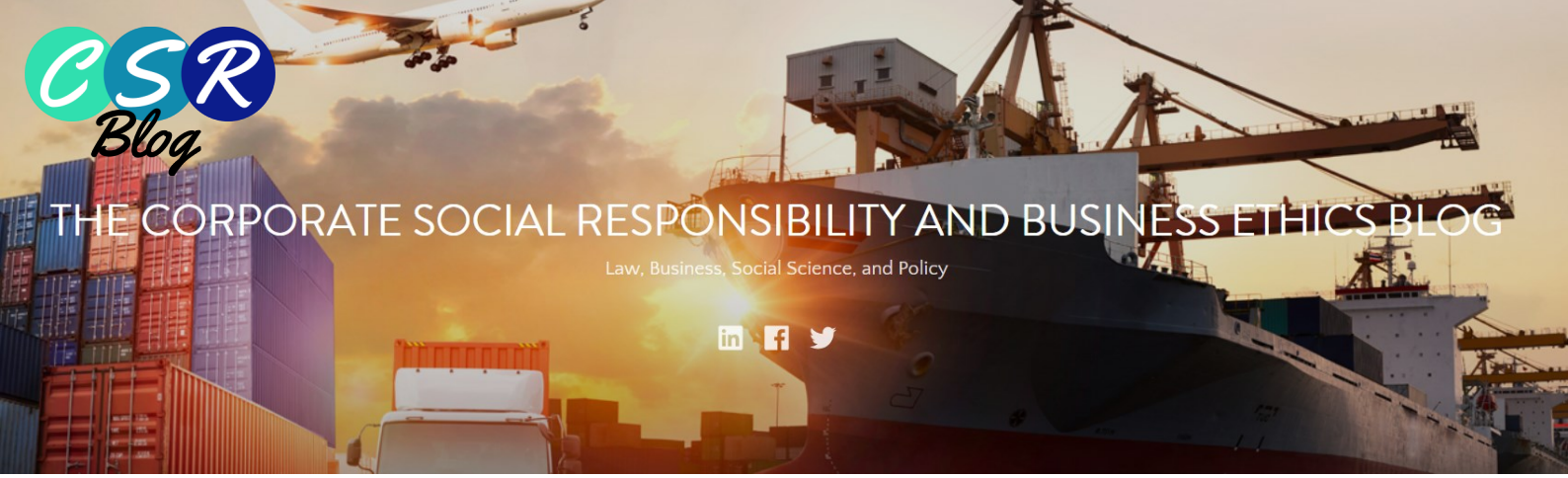
As a result, there is no reason to believe that a Canadian company should not be subject to tortious breaches domestically.

Conclusions

There has been difficulty in finding the balance between holding companies and their subsidiaries accountable and respecting the corporate veil. This issue is further complicated when torts are being committed by companies in a foreign country. What we have seen are two different approaches to prevent multinational companies from using their subsidiaries in different countries incorrectly. In the U.S.A. the ATS was used in a crucial case, *Filártiga v. Peña-Irala*, and the case brought up how this statute could be used to combat human rights torts. In subsequent cases, the ATS has been pushed to be applied towards commercial tort cases, with varying degrees of success. The U.S. Supreme Court has reined in the extraterritoriality element for the ATS in cases such as *Sosa v. Alvarez-Machain* and *Kiobel v. Royal Dutch Petroleum Co.* As a result, it has become difficult to find a proper court to host for the tortious acts committed by companies. However, there is no reason to believe that the ATS, with its *prima facie* wording, should not be able to also apply to tortious acts committed by multinational companies.

It is still possible for other countries to adopt a similar approach to the ATS, but there would need to be properly established guidelines that would have to explicitly allow such legislation to permit trying multinational companies and their subsidiaries abroad for tortious acts.

Nevsun promises to be a potentially different instrument, although perhaps only for Canadian companies. This presents opportunities for other countries to follow suit, though the initial cases which attempt to use Nevsun will be cases used to further develop the case law. Other jurisdictions which also follow the doctrine of adoption for customary international law are strongly recommended to consider the *Nevsun* case as *obiter dicta*. Nevsun uses the doctrine of adoption with customary international law to create a compelling argument for ensuring that domestic companies should be held accountable.



Select Bibliography

Case Law:

Filártiga v. Peña-Irala 630 F.2d 876 (2d Cir. 1980)
Nevsun Resources Ltd. v. Araya, 2020 SCC 5
Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22
Sosa v. Alvarez-Machain (03-339) 542 U.S. 692 (2004)

Other Sources:

Baughen, Simon 'The Alien Tort Statute on its deathbed? SCOTUS grants certiorari in two aiding and abetting cases.' (International Maritime and Commercial Law, 10 July 2020).

Benat, Eden 'Towards a socially responsible approach to the duty of care? A comparative approach to the Shell cases in UK and Netherlands' (The Corporate Social Responsibility and Business Ethics Blog, 30 April 2020)

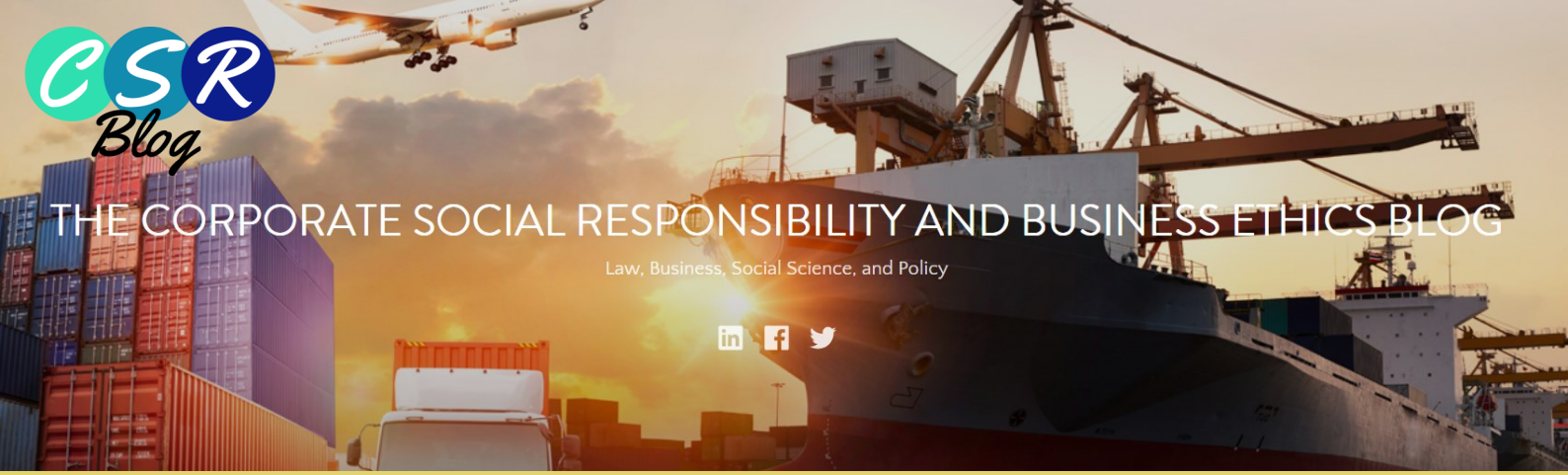
Cornell Law School, '28 U.S. Code § 1350 - Alien's action for tort' (Cornell Law School Legal Information Institute) accessed 1 July 2021

Cowley, Ruth and Stuart Neely, 'When can a company be liable for the actions of its subsidiary?' (Norton Rose Fulbright, March 2018).

Cura, Kimberly and Jacob Damstra, 'Canadian Corporations May be Held Liable for Breaches of Public International Law' (LERNx, 3 March 2020) accessed 27 June 2021

Harvard Law School Youtube Channel, 'The Alien Tort Statute: In Pursuit of Corporate Accountability' (Youtube.com, May 16 2014)

Supreme Court of Canada, 'Case in Brief: Nevsun Resources Ltd. v. Araya' (Supreme Court of Canada, 28 February 2020).



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