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## Judicializing Foreign Affairs: The Canada-Saudi Arms Deal and the Implications of Transnational Tort Litigation

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[See table of contents](#)

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### Article abstract

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## Judicializing Foreign Affairs: The Canada-Saudi Arms Deal and the Implications of Transnational Tort Litigation

Hassan M. Ahmad\*

*In the recent past, the ability to challenge Canadian government action with foreign relations elements has spilled over from administrative law into tort law. At the same time, tort actions against multinational corporations for human rights violations abroad have also seen a surge in Canadian courts, culminating in the Supreme Court's recent decision in *Nevsun Resources Ltd. v. Araya*. This article addresses some doctrinal elements of a potential transnational tort claim against the Canadian government and a Canadian arms manufacturer pursuant to human rights violations arising from the 2014 Canada-Saudi Arms Deal [CSAD]. It also explores consequential effects that Canada's burgeoning transnational tort laws can have on Canada-Saudi relations as well as the Canadian defence industry. Overall, this article uses the CSAD as one real-life scenario in which private law litigation can have broader effects on a country's foreign relations and domestic economy. In this instance, the judiciary's power to exact extra-judicial consequences illustrates how tort litigation can curtail the behaviour of governmental and commercial actors.*

*Récemment, la capacité de contester une mesure du gouvernement canadien comportant des éléments de relations étrangères a débordé du droit administratif pour rejoindre le droit de la responsabilité délictuelle. Par ailleurs, les tribunaux canadiens ont constaté une forte augmentation du nombre d'actions en responsabilité délictuelle intentées contre des multinationales pour des violations de droits de la personne à l'étranger, laquelle augmentation a culminé avec la décision récente de la Cour suprême dans l'arrêt *Nevsun Resources Ltd. c. Araya*. Le présent article traite de certains éléments doctrinaux d'une éventuelle réclamation en responsabilité délictuelle transnationale contre le gouvernement canadien et un fabricant d'armements canadien par suite de violations de droits de la personne découlant du contrat d'armements conclu en 2014 entre le Canada et l'Arabie saoudite [CSAD]. Il examine également les répercussions que les lois canadiennes émergentes sur la responsabilité délictuelle transnationale peuvent avoir sur les relations entre le Canada et l'Arabie saoudite et sur l'industrie canadienne de la défense. De façon générale, le présent article utilise le CSAD comme un scénario réel dans lequel un litige privé peut avoir des effets plus larges sur les relations étrangères et l'économie nationale d'un pays. En pareil cas, le pouvoir de la magistrature d'imposer des conséquences*

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\* SJD Candidate, University of Toronto, Faculty of Law. The author appreciates feedback from participants of the "Canada and Saudi Arabia: Legal Frameworks and Policy Options" workshop held at the University of Windsor, Faculty of Law in May 2019. Thank you as well to the participants of the University of Toronto, Faculty of Law, SJD seminar for their comments on an earlier draft of this article. A special thanks to Anitra Nickel for her research assistance.

*extrajudiciaires illustre comment les litiges délictuels peuvent atténuer le comportement des acteurs gouvernementaux et commerciaux.*

In 2014, the Harper administration entered into the \$15 billion CAD Canada-Saudi Arms Deal [CSAD], an agreement subsequently upheld by the Trudeau administration. Touted as the largest export contract in Canadian history, the CSAD was negotiated by the two countries' governments (specifically the crown entity Canadian Commercial Corporation [CCC]) and concerns an undisclosed number of light armoured vehicles [LAVs] as well as associated parts and equipment.<sup>1</sup> To specify manufacturing details, CCC entered into a subcontract with the London, Ontario-based arms manufacturer General Dynamics Land Systems Canada [GDLS-C], a subsidiary of the American parent company General Dynamics Corporation.<sup>2</sup>

Commentary on the CSAD has honed in on its foreign policy and political economy elements.<sup>3</sup> I embark from that literature to tackle one intersectional area that finds its roots in American legal circles, but remains nascent in Canada. Private tort claims can serve as a basis for redress for individuals who have experienced fundamental human rights harms. When those claims relate to lucrative arms exports that impugn powerful government and corporate actors, they can have broader implications for a country's economy and foreign relations.<sup>4</sup> In this article, I explore consequential effects that Canada's burgeoning transnational tort laws can have on Canada-Saudi relations as well as the Canadian defence industry—a phenomenon Alter and others refer to as litigation's "tools of influence" over political matters.<sup>5</sup> Explicitly, CSAD-related litigation can permeate beyond the courtroom.

In the recent past, the ability to challenge Canadian government action with foreign relations elements has spilled over from administrative law into tort law. Likewise, tort actions against multinational corporations (MNCs) for violations abroad have seen a surge in Canadian courts, culminating in the Supreme Court's recent decision in *Nevsun Resources Ltd. v. Araya*.<sup>6</sup> These developments provide ample fodder for a putative claim that concerns human rights abuses tied to the CSAD. Below, I describe the

<sup>1</sup> Redacted details about the CSAD are available in a document made public by Canadian Commercial Corporation. See Canadian Commercial Corporation, CCC201600219. [On file with author] Also, see Canada, Global Affairs, "Memorandum for Action: Export of light armoured vehicles and weapon systems to Saudi Arabia", BPTS: 00013-2016 (21 March 2016), online: [https://www.international.gc.ca/controls-controles/assets/pdfs/documents/Memorandum\\_for\\_Action-eng.pdf](https://www.international.gc.ca/controls-controles/assets/pdfs/documents/Memorandum_for_Action-eng.pdf), ["Memorandum of Action"].

<sup>2</sup> "Memorandum for Action", *ibid* at para 2; see also paras 3 and 4 for a history of GDLS-C's arms exports to Saudi Arabia.

<sup>3</sup> Srdjan Vucetic, "A nation of feminist arms dealers? Canada and military exports" (2017) 72 *Intl J Can J Glob Pol'y Analysis* 503 at 516 (successive Canadian administrations have cited "economic and strategic considerations as paramount" in past arms deals); Ellen Gutterman & Andrea Lane, "Beyond LAVs: Corruption, Commercialization and the Canadian Defence Industry" (2017) 23 *Can Foreign Pol'y J* 77 at 79 (CSAD consistent with "a panopoly of political and economic incentives").

<sup>4</sup> For American commentary, see Karen J Alter, Emilie M Hafner-Burton & Laurence R Helfer, "Theorizing the Judicialization of International Relations" (2019) 63 *Int Stud Q* 449; Richard A Falk, "The Role of Domestic Courts in the International Legal Order" (1964) 39:3 *Ind LJ* 18; Paul Schiff Berman, "Judges as Cosmopolitan Transnational Actors" (2005) 12 *Tulsa J Comp & Int L* 109; Jeffrey K Staton & Will H Moore, "Judicial Power in Domestic and International Politics" (2011) 65 *Int Organ* 553; Christopher A Whytock, "Domestic Courts and Global Governance" (2009) 84 *Tul L Rev* 67; Christopher A Whytock, "Transnational Judicial Governance" (2012) 2 *St John's J Intl Comp L* 55.

<sup>5</sup> Alter, Hafner-Burton, and Helfer, *ibid* at 458.

<sup>6</sup> 2020 SCC 5 [*Nevsun*].

possible contours of a transnational tort claim against the Canadian government and/or GDLS-C pursuant to a link between Canadian-manufactured LAVs and human rights violations in Yemen.

This discussion comes at an exciting time for those interested in issues related to transnational law, private international law, business and human rights, and even proponents of the Third World Approaches to International Law [TWAIL].<sup>7</sup> Whereas legal scholars previously unearthed the inability of domestic courts to compensate victims harmed in the course of transnational commerce,<sup>8</sup> recent judicial decisions portend a doctrinal shift with the ability to modify government and corporate behaviour when human rights violations occur in the Third World.<sup>9</sup> In short, the 'transnational shadow' of tort law may be able to shape foreign relations and the domestic economy in a seminal way.<sup>10</sup>

Throughout the following discussion, what must be kept in mind is that there remains a cloak of secrecy around the CSAD as well as the use of Canadian-manufactured arms in Yemen. Although a report by the Arab Reporters for Investigative Journalism found ample circumstantial evidence to conclude that arms exported by Western powers have been deployed in Yemen,<sup>11</sup> it remains ambiguous whether the CSAD's combat LAVs and other equipment have been used to harm innocent civilians. Here, I simply assess Canadian tort doctrine and its implications accepting that lacuna. Proceeding in this way allows for a focus on the law's broader political and economic consequences rather than attempting to piece together currently unascertainable information that may take years to manifest.

## I. THE CONTOURS OF A CSAD-RELATED TORT CLAIM

As this article's central claim is that CSAD-related litigation can elicit broader political economy and foreign relations consequences, in this part I present the facts underlying that potential litigation and, more generally, the burgeoning use of tort law in Canada to address transnational human rights disputes. I then present and assess doctrinal considerations that may arise if a CSAD-related tort claim were to be commenced in a Canadian court. This part sheds light on the factual and legal contours of a CSAD-related claim in order to then delve into the wider political and economic consequences of such a claim.

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<sup>7</sup> See e.g. Gustavo Mauricio Bastien Olvera, "Non-State Actors and Human Rights: The Case of Arms Manufacturers, 3 Amsterdam Law Forum" (2011) 114 (addressing human rights responsibilities of arms manufacturers within business and human rights instruments at the international level). For a background on TWAIL, see Makau Mutua & Antony Anghie, "What Is TWAIL?" (2000) 94 Proc Ann Meet Am Soc Int Law 31; Also, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UK: Cambridge University Press, 2007).

<sup>8</sup> Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive industries, human rights and the home state advantage* (Routledge, 2014); Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge UK: Cambridge University Press, 2018).

<sup>9</sup> Mutua & Anghie, *supra* note 7 at 32 ("But the Third World is real. It not only exists in what some in the West regard as the vacuous minds of Third World scholars and political leaders, but in the lives of those who live its daily cruelties.").

<sup>10</sup> Christopher A. Whytock, "Litigation, Arbitration, and the Transnational Shadow of the Law" (2008) 18 Duke J Comp & Int'l L 449, 453 (explaining transnational litigation's shadow).

<sup>11</sup> See Mohamed Abo-Elgheit, "The End User: How did western weapons end up in the hands of ISIS" Arab Reporters for Investigative Journalism (28 February 2019) at 2, online: <<https://en.arij.net/investigation/the-end-user-how-did-western-weapons-end-up-in-the-hands-of-isis-and-aqap-in-yemen/>>.

### A. Underlying Facts

In 2015, the Saudis alongside their Sunni Arab allies from Egypt, Qatar, and the United Arab Emirates launched a military incursion along the Saudi-Yemen border to combat Houthi rebels responsible for ousting former Yemeni president Abdrabbuh Mansur Hadi.<sup>12</sup> What may seem like border skirmishes in the Arab world's poorest nation have broader geopolitical consequences as the conflict endures in the midst of a struggle for regional supremacy between Saudi Arabia and Iran. Characterized as a proxy war, each regional power has provided military and financial support to combatant groups.<sup>13</sup> As armed conflict has escalated, both sides have been implicated in human rights violations against Yemeni citizens. A report by the United Nations Human Rights Council described Yemen as the "world's worst humanitarian crisis."<sup>14</sup>

Canada began delivering arms to Saudi Arabia shortly after the conflict commenced in Yemen. Under policy guidelines approved by Cabinet in 1986, the Canadian government is required to closely control military exports to countries whose governments have a persistent record of serious human rights violations against their citizens, unless it can be demonstrated there is no reasonable risk that exported arms would be used against the civilian population.<sup>15</sup> Despite a memorandum for action that outlined the CSAD's potential human rights implications,<sup>16</sup> Foreign Affairs Minister Stéphane Dion approved an initial batch of export permits in 2016 under the *Export and Import Permits Act* [EIPA],<sup>17</sup> concluding there was no reasonable risk of improper use.

In September 2019, the *Arms Trade Treaty* came into force in Canada. That treaty amended the EIPA's rules for permitting arms exports.<sup>18</sup> Under the EIPA's amended rules, the Canadian government is now required to assess whether potential exports would undermine international peace and security or, otherwise, be used in committing or facilitating serious violations of international humanitarian law or international human rights law.<sup>19</sup> In the instance of a substantial risk of those consequences, the EIPA mandates that the Foreign Affairs Minister refuse export permits.<sup>20</sup> With that said, an assessment under the amended EIPA again concluded there was no substantial risk the LAVs yet to be delivered would be used for any of the above-noted prohibited purposes.<sup>21</sup>

<sup>12</sup> For a background on Saudi's incursion into Yemen, see Abdullah Al Dosari & Mary George, "Yemen War: An Overview of the Armed Conflict and Role of Belligerents" (2020), 13 J Politics & L 53.

<sup>13</sup> *Ibid.*

<sup>14</sup> United Nations, Human Rights Council, *Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights*, A/HRC/42/17, 9 August 2019 at 4.

<sup>15</sup> Canada, Global Affairs, *Report on Exports of Military Goods from Canada - 2016*, online: <<https://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng>>.

<sup>16</sup> "Memorandum for Action", *supra* note 1.

<sup>17</sup> RSC 1985, c E-19 [EIPA].

<sup>18</sup> See Can T S 2019 No 24, Entered into force 24 December 2014, accession by Canada 17 Sep 2019; *An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)*, SC, 2018, c 26.

<sup>19</sup> EIPA, *supra* note 17 at s 7.3.

<sup>20</sup> *Ibid* at s 7.4.

<sup>21</sup> Canada, Global Affairs, *Final Report: Review of Export Permits to Canada*, (last modified 16 April 2020), online: <<https://www.international.gc.ca/trade-commerce/controls-controles/memo/annex-a-ksa.aspx?lang=eng>>.

## B. Redressing Human Rights Violations Through Tort Law

The CSAD has been challenged in Federal Court via judicial review applications that alleged the government did not adequately evaluate the likelihood that Canadian-manufactured arms would result in fundamental human rights harms. Reliant upon administrative law principles couched in reasonableness and deference to the executive branch, the Court has rejected multiple such applications.<sup>22</sup> And whereas judicial reviews remain a tenuous avenue by which to alter the CSAD's course, the transposition of human rights norms into domestic tort laws that can exact civil liability and order compensatory awards may be a better way to affect future decisions by government and corporate actors.

In common law countries, tort doctrine initially evolved around topics of personal injury related to motor vehicle accidents, defective products, and social hosts.<sup>23</sup> Although it may still be a burgeoning approach, tort law has provided the most realistic avenue to redress human rights violations with extraterritorial elements against government and corporate actors subject to censure from domestic courts.<sup>24</sup> Working within discursive approaches common among critical legal theorists, Scott and Wai have explored the migration of international human rights norms into the realm of private transnational litigation. In a 2004 publication, they presented instances of transnational litigation against corporate actors in Canadian, American, and South African legal systems to indicate this migration has commenced, even if courts have missed opportunities to expand traditionally narrow doctrinal interpretations.<sup>25</sup> Forcese has likewise found that tort claims are a viable basis by which to seek redress for transnational human rights abuses related to 'militarized commerce' where a corporate actor was complicit in abuses perpetrated by a foreign government.<sup>26</sup>

Although the crux of past litigation and academic commentary has focused on the use of tort doctrine to remedy corporate human rights violations, in the Canadian context torts can equally be applied to government liability. The *Crown Liability and Proceedings Act* [CLPA] forms a basis to craft a human rights claim under tort principles.<sup>27</sup> Its provisions have been invoked in a number of class proceedings on behalf of marginalized indigenous communities and in instances of institutional abuse related to, for instance, prisons, long-term care facilities, and the military.<sup>28</sup> The CLPA has been a prominent conduit to

<sup>22</sup> See *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 [Turp, FCA]; *Turp v Canada (Foreign Affairs)*, 2018 FC 12; *Turp v Minister (Foreign Affairs)*, 2017 FC 84.

<sup>23</sup> See e.g. *Donoghue v Stevenson*, [1932] UKHL 100; *Arnold v Teno*, [1978] 2 SCR 287; *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, which have informed the development of Canadian tort law.

<sup>24</sup> In the American context, see e.g. *In Re Union Carbide Corp Gas Plant Disaster*, 634 F Supp 842, 847 (SDNY 1986). For empirical work on transnational tort claims in various industries and pursuant to distinct types of harm, see Tonya L Putnam, *Courts without Borders: Law, Politics, and U.S. Extraterritoriality* (Cambridge, UK: Cambridge University Press, 2016).

<sup>25</sup> Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism*, (Oxford, UK: Hart Publishing, 2004) [highlighting that states may change past behaviour when faced with reputational concerns over corporate human rights violations].

<sup>26</sup> Craig Forcese, "Deterring Militarized Commerce: The Prospect of Liability for Privatized Human Rights Abuses" (1999) 31 *Ottawa L Rev* 171 (1999).

<sup>27</sup> *Crown Liability and Proceedings Act*, RSC 1985, c C-50 at s 3(b).

<sup>28</sup> See e.g. *Merlo et al v. Her Majesty the Queen*, 2017 FC 533; *Brazeau v Attorney General (Canada)*, 2019 ONSC 3426; *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ON CA).

seek recompense and, as time passes, may prove to be an effective avenue to change government behaviour. To date, the CLPA has not been invoked by foreign plaintiffs for the government's role in human rights violations abroad in the course of transnational commerce.<sup>29</sup>

### C. Transnational Tort Law in Canada

The short history of tort law in Canada related to commercial activities that span across state borders can be divided into an era of proto-doctrine<sup>30</sup> and a present nascent era in which doctrinal principles appear to be broadening to allow for claims to advance beyond early phases of litigation. In both eras, tort claims have been brought predominantly against Canadian oil and mining companies that undertake extractive activities in developing parts of Africa, Asia, and Latin America. In the initial era, claims were dismissed on jurisdictional grounds as foreign plaintiffs were unable to convince judges there was a sufficient connection between Canadian courts and the *situs* of where the extraterritorial harms took place.<sup>31</sup> During that time, judges also exercised deference by accepting *forum non conveniens* [FNC] arguments to conclude that foreign courts were better placed to adjudicate human rights violations that took place on their territory, even if those violations involved a Canadian actor.<sup>32</sup>

The recent era likely began with an Ontario court's decision in *Choc v. Hudbay Minerals*, a transnational tort claim brought on behalf of Guatemalans who alleged they or their relatives were victims of shooting, killings, and gang-rapes by a Canadian mining company. Rejecting an attempt to dismiss the case on jurisdictional grounds, the Ontario Superior Court of Justice found it was possible the defendant corporation's foreign subsidiary was acting as its agent abroad thus forming the basis to argue that the Canadian company owed the Guatemalan plaintiffs a duty of care.<sup>33</sup> Likewise, in a 2017 decision related to a separate transnational tort claim, the British Columbia Court of Appeal departed from preceding cases by rejecting an FNC argument that Guatemalan courts would be a more convenient forum to adjudicate claims brought by protesters opposing a mine owned and operated by a Canadian company and its foreign subsidiary.<sup>34</sup>

The recent era has been punctuated by the Supreme Court's decision in *Nevsun*. There, Eritrean plaintiffs alleged that a B.C.-based company was liable for acts of slavery, forced labour, and cruel treatment in the course of mining operations jointly managed by the corporation and Eritrea's government. Although the Court did not *per se* endorse the international law bases upon which the transnational claim was brought, it held that it was not 'plain and obvious' the torts upon which the claim rested were bound to fail—a determination that allowed the claim to proceed and potentially settle or, otherwise, be adjudicated on the merits. *Nevsun* has opened the door for a transnational claim related to the CSAD as it

<sup>29</sup> But see e.g. *Khadr v Her Majesty the Queen in Right of Canada*, 2014 FC 1001 and *Almalki v Canada*, 2012 ONSC 3023 where allegations of extraterritorial human rights violations have resulted in *Charter* claims on behalf of Canadian citizens and permanent residents seeking damage awards from the government. It is likely that a CLPA claim for human rights violations related to transnational commerce would be accompanied by *Charter* claims against the Canadian government.

<sup>30</sup> I borrow this title from Craig M Scott, "Transnational Law" as Proto-Concept: Three Conceptions" (2009) 10 German LJ 859.

<sup>31</sup> See e.g. *Anvil Mining Ltd c Association Canadienne contre l'impunité*, 2012 QCCA 117.

<sup>32</sup> *Recherches internationales Québec v Cambior Inc*, 1998 CanLII 9780; *Bil'In (Village Council) c Green Park International Inc.*, 2009 QCCS 4151 (CanLII).

<sup>33</sup> See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.

<sup>34</sup> *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39.

involved a Canadian corporation and a foreign government implicated abroad in human rights violations against innocent civilians.

#### D. Doctrinal Considerations

The viability of a CSAD-related tort claim such that it can proceed to the point of a compensatory award or settlement will depend on how a Canadian court would interpret existing jurisdictional doctrines that have, in the past, impeded similar claims. Also, like judicial reviews, a Canadian court would be tasked with testing the boundaries of its adjudicative ability for a matter that implicates foreign relations. Judicial restraint would be a central issue in light of the Crown's prerogative to undertake a discretionary decision under the EIPA to export arms with the potential to undermine international peace and security. I discuss both hurdles, starting with perhaps the more robust argument for Canadian courts to approach the CSAD with restraint given foreign relations concerns. The doctrinal considerations enumerated in this section inform the strength of a potential CSAD-related claim and, in turn, would contribute to how government and corporate actors implicated in the litigation would react.

##### 1. Judicial restraint

Canadian courts have faced the intersection of their adjudicative jurisdiction and executive action since Justice Rand's statement in *Roncarelli* that "there is no such thing as absolute and untrammelled discretion."<sup>35</sup> Sossin has argued that statement remains an "unfinished project" as courts continue to be unduly restrained in matters that touch upon foreign relations.<sup>36</sup> Citing a number of cases where foreign relations were at issue, he found the Crown's prerogative continues to be adjudged as "high policy" immune from the courts.<sup>37</sup> The CSAD was negotiated by a Crown corporation and approved by the Minister of Foreign Affairs in accordance with the criteria set forth in the EIPA. According to information presented to the Minister, exports were meant to be used by the Saudi government for peaceful means and to 'counter instability' in Yemen.<sup>38</sup> A court hearing a CSAD-related tort claim would have to determine if exports under the agreement fall within the Crown's prerogative to conduct trade with a foreign ally.

Academic and judicial authorities have challenged the idea that Crown prerogative is non-justiciable when fundamental rights are stake. Tracing the history of the Supreme Court's decisions for Canada's security policies post 9/11, MacFarlane argues that deference makes little institutional sense in the face of human rights violations.<sup>39</sup> For him, in matters implicating *Charter* rights, "the Supreme Court has often

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<sup>35</sup> *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR. (2d) 689.

<sup>36</sup> Lorne Sossin, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55 McGill LJ 661.

<sup>37</sup> *Ibid*, (citing *Copello v. Canada [Minister of Foreign Affairs]*, 2001 FCT 1350, [2002] 3 FC 24, 213 FTR 272; *Ganis v Canada [Minister of Justice]*, 2006 BCCA 543 BCAC 243, 216 CCC [3d] 337; *Turp v Canada (Prime Minister)*, 2003 FCT 301, 237 FTR 248, 111 CRR (2d) 184).

<sup>38</sup> "Memorandum for Action", *supra* note 1 at para. 12.

<sup>39</sup> Emmett Macfarlane, "Failing to Walk the Rights Talk - Post-9/11 Security Policy and the Supreme Court of Canada" (2012) 16 Rev Const Stud 159; Also, see at 171 (since the Court's decision in *Operational Dismantle*, prerogative decisions concerning individual rights fall within the scope of judicial review).



avoided establishing strong precedents that explicitly favour deference based on the notion that some issues fall outside of the Court's purview."<sup>40</sup>

Although it did not concern human rights violations, the Federal Court of Appeal's decision in *Paradis Honey* may provide some insight into how a court would grapple with the Crown's prerogative powers pursuant to the CSAD.<sup>41</sup> That case involved a prohibition on importing packaged bees from the United States. The Federal Court held that regulatory decisions by the executive branch are part of government policy shielded from adjudication. However, the Court of Appeal indicated a progression beyond the traditional policy/operational divide that has previously rendered some government decisions beyond a court's jurisdiction.<sup>42</sup> Citing the Supreme Court in *Imperial Tobacco*, the Court of Appeal concluded there is no "hard-and-fast rule that decisions made under a general public duty, government policy or core policy are protected from a negligence claim."<sup>43</sup> It accepted a novel cause of action for monetary relief for public law negligence and held that the threshold to establish that claim would be governed by judicial review principles of unacceptability and indefensibility.<sup>44</sup>

Restraint may equally be invoked in light of the fact that CSAD arms exports overlap with Saudi Arabia's sovereign decisions. In *Nevsun*, the Supreme Court rejected that argument. It held that unlike its common law counterparts Canada has not developed an 'act of state' doctrine, which shelters corporate actors from liability for complicity in official acts of a foreign government. And in line with MacFarlane's reasoning, the Court in *Nevsun* concluded there is no reason to exercise judicial restraint for claims that concern fundamental human rights violating peremptory norms of international law.<sup>45</sup>

## 2. Jurisdictional Doctrines

Whereas Canada has a stronger basis than GDLS-C to argue for judicial restraint in a CSAD-related claim, it is safe to assume GDLS-C would assert that a Canadian court is incapable of adjudicating the transnational matter as it is insufficiently connected to the alleged perpetrators and violations abroad. The corporate veil, discussed below, is a jurisdictional defence invoked in past transnational tort claims brought before a Canadian court.<sup>46</sup> Otherwise, even if a court agreed to assert jurisdiction over a claim involving human rights violations abroad, it can still choose to defer its adjudicative power under the FNC doctrine.

<sup>40</sup> *Ibid.* at 170. But see, Kent Roach, "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases" (2010) 28 NJCL 115 (arguing the 2010 decision in *Khadr* inserts an unfamiliar "mini-political question doctrine" akin to that in the U.S.).

<sup>41</sup> See *Paradis Honey Ltd v Canada*, 2015 FCA 89 (CanLII), [2016] 1 FCR 446.

<sup>42</sup> See cases cited at *ibid* at para 124.

<sup>43</sup> *Ibid.* at para 104. Also, see *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42.

<sup>44</sup> *Ibid* at para 139 ("This framework – the unacceptability or indefensibility in the administrative law sense of the public authority's conduct and the court's exercise of remedial discretion – should govern whether monetary relief in public law may be had by way of action.").

<sup>45</sup> *Nevsun*, *supra* note 6 at para 50, citing *R v Hape*, [2007] 2 SCR 292 at para 52; *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1047; *Canada (Justice) v Khadr*, [2008] 2 SCR 125 at paras 18 and 26; *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 at para 16.

<sup>46</sup> See e.g. *Association canadienne contre l'impunité v Anvil Mining Limited*, 2012 QCCA 117; *Das v George Weston Limited*, 2018 ONCA 1053.

### a. Corporate Veil

Distinct from governments that cannot fragment their organizational structures among a number of legal entities that operate in separate states, MNCs such as GDLS-C are comprised of several individual corporations, each of which operate in the sovereign state that grants them legal personality.<sup>47</sup> ‘Corporate veil’ arguments based on the premise that each corporation has limited liability even though it is part of a larger multinational conglomerate have been a mainstay in corporate litigation, but have been particularly effective in transnational tort claims.<sup>48</sup>

GDLS-C would presumably argue its manufacturing operations on Canadian territory are distinct from human rights violations in Yemen that may implicate GDLS-C’s Saudi subsidiary. Under the CSAD, GDLS-C’s Saudi subsidiary controls and maintains LAVs after they have been turned over to the Saudi government. As long as GDLS-C does not exert complete control over its Saudi subsidiary or the subsidiary is not an overseas agent, the Canadian company would maintain that the subsidiary was most proximate and thus *sine qua non* to the harm incurred abroad. And since the subsidiary would be unlikely to fall within a Canadian court’s jurisdiction, a successful ‘corporate veil’ defence would vitiate the ability of foreign plaintiffs to seek compensation from the arms manufacturer.

### b. Forum Non Conveniens

FNC is a common law doctrine that allows a domestic court to defer jurisdiction if another forum would be substantially more convenient or appropriate.<sup>49</sup> If pleaded by the impugned defendants, this defence would almost certainly fail. Although harm incurred from Canadian-manufactured arms could be tied back to Saudi territory with the relevant evidence (*i.e.* witnesses and documents), in theory, easier to adduce in a Saudi court, a Canadian court would likely have difficulty deferring the matter given legitimate concerns about the independence of the Saudi judiciary. Despite improvements to the rule of law made under the *de facto* reign of Crown Prince Mohammad bin Salman, the Saudi judiciary’s independent ability to rule

<sup>47</sup> For literature on corporate fragmentation as a jurisdictional defence, see Phillip I Blumberg, "Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems" (2002) 50 Am J Comp L 493; Hannah L Buxbaum, "The Viability of Enterprise Jurisdiction: A Case Study of the Big Four Accounting Firms" (2014) 48 UC Davis L Rev 1769; Peter Muchlinski, "Corporations In International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases" (2001) 50 Int Comp LQ 1. For corporate fragmentation in the Canadian context, see Jason MacLean, "The Political Reality of Corporate Law: *Yaiguaje v. Chevron Corporation*" (2020) 63 Can Bus LJ.

<sup>48</sup> Empirical work in the U.S. has supported this notion, but, in theory, applies just as well to Canada since the corporate veil is a common law doctrine that has followed a similar trajectory in both countries. See Robert B Thompson, "Piercing the Corporate Veil: An Empirical Study" (1991) 76 Cornell L Rev 1036 at 1062, n. 135 (finding that among approximately 1600 corporate veil cases, U.S. courts pierced the veil only 20% of the time where there was a foreign subsidiary involved compared to 40% overall). Also, see John H Matheson, "The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context" (2009) 87 NCL Rev 1091 (finding that courts are more likely to pierce the veil in i) contract disputes, ii] when the defendants are shareholders as opposed to wholly-owned corporations; and iii) when plaintiffs are companies and not individuals.]. The characteristics in Matheson’s study are seldom present in transnational human rights claims brought in tort law by individual plaintiffs against corporate defendants.

<sup>49</sup> For commentary on the doctrine’s application in Canada, see Ronald A Brand & Scott R Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford: Oxford University Press, 2007) at ch 4; Stephen GA Pitel, "Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada" (2018) 55 Osgoode Hall LJ 63; Chilenye Nwapi, "Re-Evaluating the Doctrine of Forum Non Conveniens in Canada" (2013) 34 Windsor Rev Legal Soc Issues 59.

on a matter that implicates the government's national security and regional interests in Yemen and elsewhere remains suspect.<sup>50</sup>

## II. POLITICAL AND ECONOMIC IMPLICATIONS OF A CSAD-RELATED TORT CLAIM

If a Canadian court were to reject the jurisdictional and restraint arguments, noted above, and allow a transnational claim against the Canadian government and/or GDLS-C to proceed, tort litigation could have consequential effects beyond the litigants to such a dispute. The potential for a liability finding and compensatory award could derivatively implicate a myriad of institutional and individual actors in Canada and abroad whose personal, economic, and political interests are inextricably linked to the CSAD. In particular, a CSAD-related tort claim has the potential for ripple effects to the Canadian economy and future Canada-Saudi bilateral relations.

For scholars working at the intersection of Canadian law and politics, greater insight is required on the 'judicialization' of private law claims, being the "process by which courts and judges increasingly dominate politics and policy-making."<sup>51</sup> In the U.S., Posner has decried the spectre of activist judges transgressing their boundaries to adjudicate matters within the realm of the political branches of government.<sup>52</sup> Schiff Berman, an ardent proponent of a cosmopolitan approach to judicial reasoning, has offered a relatively permissive space for private litigation in foreign relations matters. He cautions against legal imperialism but maintains that judges rightfully have the ability to shape transnational norms.<sup>53</sup>

A private law claim seeking redress for CSAD-related harms abroad can be a tool for behavioural modification and an avenue to effect policy changes in the absence of *proprio motu* executive or legislative action. Even though transnational torts remain nascent in Canada, a claim against government and corporate actors has the ability to alter government policy in the direction of an export chill. Staton and Moore have characterized this aspect of adjudicative jurisdiction as "judicial power", a combination of judicial autonomy and judicial effectiveness—the former being courts' decision-making abilities independent of the other branches of government; the latter the extent to which courts can compel state actors to comply with adverse decisions.<sup>54</sup>

<sup>50</sup> For an overview of judicial independence in Saudi Arabia, see Freedom House, *Saudi Arabia* (2020), online: <<https://freedomhouse.org/country/saudi-arabia/freedom-world/2020>> ["The judiciary has very little independence in practice. Judges are appointed by the king and overseen by the Supreme Judicial Council, whose chairman is also the justice minister."] at F1.

<sup>51</sup> Alter, Hafner-Burton & Helfer, *supra* note 4 at 449. Although that article focuses on international courts and tribunals, see Falk, *supra* note 4 for a discussion on the judicializing prospects of domestic courts. Also, see Scott & Wai, *supra* note 25 in the Canadian literature. Those authors characterize Risse's works as a form of 'discursive dynamism' where "the language of critique intersects with the material power vulnerabilities and the psychological needs of governing elites." *Ibid* at 295.

<sup>52</sup> Eric Posner, "Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations" (2004) 12 *Tul J Comp & Intl L* 23. Also see, Eric Posner & Daniel Abebe, "Foreign Affairs Legalism: A Critique" Public Law Legal Theory Working Paper No 291.

<sup>53</sup> See Schiff Berman, *supra* note 4. For an elaboration on Schiff Berman's cosmopolitanism, see Paul Schiff Berman, *Global Legal Pluralism* (Cambridge UK: Cambridge University Press, 2012).

<sup>54</sup> Staton & Moore, *supra* note 4 at 559. For an elaboration of autonomy and effectiveness, see Lewis A Kornhauser, "Is Judicial Independence a Useful Concept?" in Stephen Burbank & Barry Friedman, eds, *Judicial Independence at the*

Also, for Canada and GDLS-C, defending a protracted tort claim with the potential for a public trial, summary judgment hearing or a confidential settlement would again bring the human rights violations in Yemen to the forefront of public opinion. As rational actors, Canada and GDLS-C would each make decisions that prioritize their respective interests.<sup>55</sup> Those decisions could, in turn, undermine or fortify the Canadian defence industry as well as Canada-Saudi relations. Tort litigation could also inform how the Saudi monarchy chooses to approach Canada in the future as a reliable arms supplier. I tackle these implications from each of the three perspectives.

#### A. Canada: A Balance Between Human Rights, Foreign Relations, and Political Economy

To determine whether to continue exporting arms to Saudi Arabia given the prospect of and amidst a tort claim, Canada will have to balance a number of interwoven domestic and international considerations.<sup>56</sup> On the one hand, the governing Liberals will want to avoid a diminution of their domestic approval ratings such that they can succeed in the next election. To do so, they will want to minimize public scrutiny over the use of Canadian-manufactured arms to commit human rights violations abroad. Tort litigation would certainly spoil that motif. On the other hand, the administration has two overarching considerations that militate in favour of continuing arms exports unabated. For one, it would want to maintain strong bilateral relations with Saudi Arabia that have taken decades to establish. At times, those relations have been perturbed by even the slightest of missteps.<sup>57</sup> Second, Canada has a desire to sustain its defence industry, including manufacturing facilities and jobs associated with GDLS-C.

After India, Saudi Arabia ranks second in arms imports globally. It has established itself as a regional power—particularly among Sunni states after the Arab spring—and has the world's second largest depository of crude oil reserves. Moreover, according to the United Nations COMTRADE database on international trade, in 2019 it exported \$2.48 billion USD of goods to Canada.<sup>58</sup> These are all significant reasons for Canada to maintain economic and political ties. The importance of Canada-Saudi bilateral relations is exacerbated by the fact that the Canadian government has already attenuated its connection with the region's other two major players. Presently, it has no diplomatic ties with Iran (partly attributable to a concerted policy of kowtowing to Saudi Arabia) and has a flimsy relationship with Turkey.

Saudi Arabia continues to supply oil to Canada in large sums and sends thousands of students annually to Canadian universities.<sup>59</sup> Moreover, Saudi Arabia serves as a conduit to strengthen Canada's relations with other Middle Eastern countries, such as the UAE and Egypt. Canada's trading relationship with Saudi

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*Crossroads: An Interdisciplinary Approach*, 1st ed (London: Sage, 2002); Laurence R Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale LJ 273.

<sup>55</sup> For an argument that states are rational actors concerned foremost with their own interests, see Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2007).

<sup>56</sup> See generally, Staton and Moore, *supra* note 4 (judicial power functions across domestic and international realms in the same way).

<sup>57</sup> See *infra* on controversy caused by 2014 Freeland tweets.

<sup>58</sup> Government of Canada, "Crude Oil Facts" (last modified 6 October 2020), online: <<https://www.nrcan.gc.ca/science-data/data-analysis/energy-data-analysis/crude-oil-facts/20064>>. For more details on Saudi Arabia's exports to Canada, see Trading Economics, "Canada Imports from Saudi Arabia" (last modified 1 June 2021), online: <<https://tradingeconomics.com/canada/imports/saudi-arabia>>.

<sup>59</sup> See Lauren Vogel, "Saudi medical trainees may keep posts in Canada" *Can Medical Assn J* (17 September. 2018), online: <<http://www.cmaj.ca/content/190/37/E1120>>.

Arabia also appeases the U.S. whose own bilateral relations have over the decades centred on oil and arms. Between 2011 and 2015, Saudi Arabia was the top purchaser of U.S.-manufactured arms.<sup>60</sup> And in 2017, the Trump administration announced a massive arms deal slated to be upwards of \$300 billion USD.<sup>61</sup> That deal only further solidifies the close relationship between Washington D.C. and Riyadh that Canada will not want to jeopardize.

Furthermore, Canada has a vested interest in maintaining and even enhancing its defence industry. As of 2016, the industry brought in \$10 billion CAD in annual revenue and was composed of 700 companies and 63,000 jobs.<sup>62</sup> Approximately half that revenue came from arms exports, which create thousands of jobs and keep companies afloat.<sup>63</sup> The CSAD alone was predicted to create or support more than 147,000 Canadian jobs over the life of the contract.<sup>64</sup> In 2018, after the initial batch of CSAD arms was approved, Canada's export of 'ground vehicles and components', which include LAVs, amounted to \$1.489 billion CAD—approximately 67.79% of the total value of arms exports that year.<sup>65</sup> Over 60% of all arms exports that year (\$1.282 billion) went to Saudi Arabia.<sup>66</sup> Belgium—the next highest importing country—only accounted for 7.44% of all Canadian exports (approximately \$154 million CAD).<sup>67</sup> Put another way, Canadian exports of combat goods and technology to Saudi Arabia more than doubled the value of exports to the next nine highest importing countries combined.<sup>68</sup>

Subjecting that substantial proportion of trade to judicial scrutiny with the potential for a large compensatory payout may force Canada to curtail or even cancel exports under the CSAD. Past settlements pursuant to mass tort claims against the government have ranged from tens of millions to billions of dollars.<sup>69</sup> Although those settlements were for claims brought on behalf of Canadian citizens or permanent residents, there is nothing to suggest that a mass transnational tort claim on behalf of Yemeni plaintiffs harmed by Canadian-manufactured arms would warrant anything less. Moral and political considerations aside, to avoid compensatory claims ending in large payouts, Canada may decide to cut its losses and stop arming Saudi Arabia in its proxy war.

<sup>60</sup> Thomas Juneau, , "Canada and Saudi Arabia: A Deeply Flawed but necessary partnership" (July 2016) online: *Canadian Global Affairs Institute* <[https://www.cgai.ca/canada\\_and\\_saudi\\_arabia](https://www.cgai.ca/canada_and_saudi_arabia) [https://www.cgai.ca/canada\\_and\\_saudi\\_arabia](https://www.cgai.ca/canada_and_saudi_arabia)> at 1.

<sup>61</sup> Mythilli Sampathkumar, "Donald Trump to announce \$350 bn arms deal with Saudi Arabia – one of the largest in history," *The Independent* (17 May 2017), online: <<https://www.independent.co.uk/news/world/americas/us-politics/trump-saudi-arabia-arms-deal-sale-arab-nato-gulf-states-a7741836.html>>.

<sup>62</sup> Canadian Association of Defence and Security Industries, "New Report Highlights Critical Economic Impact of Canada's Defence Industry" (28 March 2017), online: <<https://www.defenceandsecurity.ca/media/article&id=302&t=c>>.

<sup>63</sup> KPMG, "Economic Impact of the Defence and Security Industry in Canada" (May 2012), online: CADSI <<http://www.defenceandsecurity.ca/UserFiles/File/IE/KPMG.pdf>>.

<sup>64</sup> Canadian Commercial Corporation, *supra* note 1.

<sup>65</sup> Global Affairs Canada, "Exports of Military Goods: 2018" (2019), online: <[https://www.international.gc.ca/trade-commerce/assets/pdfs/controls-controles/reports-rapports/military\\_goods-2018-marchandises\\_militaires-eng.pdf](https://www.international.gc.ca/trade-commerce/assets/pdfs/controls-controles/reports-rapports/military_goods-2018-marchandises_militaires-eng.pdf)> at 26.

<sup>66</sup> *Ibid* at 4.

<sup>67</sup> *Ibid* at 6.

<sup>68</sup> *Ibid* at Table 3 ("Canada's Top Ten Non-U.S. Destinations for Military Goods and Technology").

<sup>69</sup> See "Federal Government to pay \$900M settlement in lawsuits over sexual misconduct in military" *National Post* (18 July 2018), online: <<https://nationalpost.com/news/politics/900-million-settlement-reached-in-class-action-on-sexual-misconduct-in-military>>. See also "Indian Residential Schools settlement" online: <[http://www.residentialschoolsettlement.ca/detailed\\_notice.pdf](http://www.residentialschoolsettlement.ca/detailed_notice.pdf)>.

As noted, the CSAD has been a boon for the Canadian defence industry in its creation and support of tens of thousands of jobs. For an administration already digging into its coffers to support the economy during the COVID-19 pandemic, financial and political considerations would arise from any decision to deplete the CSAD or the defence industry generally. At present, the Canadian government has cited domestic manufacturing jobs as an impetus to press forward with the agreement, irrespective of human rights considerations. For GDLS-C alone, the CSAD was expected to create and sustain approximately 3,000 jobs for a period of 14 years.<sup>70</sup> Those 3,000 jobs support thousands of families in Southwestern Ontario's 'rust belt', already hurt badly by a steady decline in the region's manufacturing sector.

A decision on the part of the administration with derivative effects upon the defence industry would dually implicate key federal ridings in London and surrounding areas. In the 2015 election, it is widely thought that the third place Liberals were able to wrestle away two London ridings from the incumbent Conservatives on the basis that they would uphold LAV exports from the city's GDLS-C plant.<sup>71</sup> Reversing course close enough to the next election may further wither away the already tenuous hold the party has on Canada's parliament.

On the other side of the economic figures and the political calculus to perpetuate the CSAD, Canada will have to appease an electorate generally opposed to exporting arms that can be used against innocents abroad. In a June 2016 poll after arms exports were first approved under the EIPA, 73% of respondents opposed the CSAD.<sup>72</sup> Public backlash—especially as the next federal election approaches—may become even more fervent if a tort claim were to bring Canada's role in international human rights violations back into the spotlight. Since 2015, the Trudeau administration has presented itself as a champion of human rights, especially for those in the Middle East. Its policy of welcoming Syrian refugees fleeing that country's civil war and standing up for women's rights in a relatively conservative part of the world has been lauded across the globe.<sup>73</sup> And yet, its decision to continue exporting LAVs and related equipment has belied its otherwise progressive image.

Lastly, there are broader geopolitical considerations on whether to continue the CSAD if a tort claim were to link human rights violations in Yemen with Canadian-manufactured arms. Byers has written that the decision to enter into the CSAD was a "terrible mistake" that will damage Canada's international reputation and influence in foreign affairs.<sup>74</sup> It is conceivable the agreement hurt Canada's bid for a seat on the United Nations Security Council, which the Trudeau administration lobbied for vigorously. To re-forge its reputation as an international peacekeeper, Canada may have to reverse the CSAD's trajectory and consequentially eschew arguably myopic economic interests.

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<sup>70</sup> Gutterman & Lane, *supra* note 3 at 81.

<sup>71</sup> *Ibid.*

<sup>72</sup> See Steven Chase, "Most Canadians reject military sales to repressive countries" *The Globe and Mail* (12 July 2016), online: <<https://www.theglobeandmail.com/news/politics/majority-of-canadians-oppose-selling-military-goods-to-countries-with-poor-human-rights-recordspoll/article30889264/>>.

<sup>73</sup> See e.g. Ian Austen, "In Canada, Justin Trudeau Says Refugees Are Welcome", *New York Times* (28 January 2017), online: <<https://www.nytimes.com/2017/01/28/world/canada/justin-trudeau-trump-refugee-ban.html>>.

<sup>74</sup> Michael Byers, "Saudi arms sale: Still time to reverse a terrible mistake", *The Globe and Mail* (11 May 2016), online: <<https://www.theglobeandmail.com/opinion/saudi-arms-sale-still-time-to-reverse-a-terrible-mistake/article29983723/>>.

## B. GDLS-C: Staying Afloat Amid a Tort Claim

Whereas GDLS-C may not directly have the same foreign relations and political economy considerations that inform Canada's decision on whether and how to continue with the CSAD, the company would still bear the respective financial and reputational impacts of defending a tort claim and being implicated in human rights violations abroad. Diminished profits—if significant enough—could inform a decision on GDLS-C's part to pull back from its manufacturing commitments, leaving the CSAD in uncertain terrain and hindering Canada's overall relationship with Saudi Arabia.

GDLS-C employs 1,700 'high-skilled' workers with another 12,000 employees working for the company's suppliers. In London alone, there are more than 240 companies supplying parts for CSAD exports.<sup>75</sup> Given that the agreement is an integral part of its manufacturing operations, the company would need to determine whether continuing to manufacture LAVs would be the most financially prudent option given the prospect of a hefty compensation settlement or award resulting from tort litigation. Even though GDLS-C executives may not be oblivious to human rights violations abroad, any decision about the company's continued involvement with the CSAD would centre heavily on maximizing profits and retaining employees. For corporate human rights claims related to foreign trade and investment, Joseph has written that "civil suits can potentially result in huge damages awards, directly harming [the] financial bottom line, a language [corporations] can understand and follow."<sup>76</sup>

Some MNCs, including those with ties to military operations abroad, have been vehement in their opposition to transnational tort claims.<sup>77</sup> Steinitz has noted the high costs of defending mass tort claims, citing a number of expenses that companies incur including lawyers' fees and vast amounts paid to external vendors such as discovery providers, service processors, and the like. In transnational litigation, there are the added costs of paying for forum shopping procedures such as FNC motions and potential parallel litigation where a company would have to defend claims in multiple jurisdictions.<sup>78</sup> All of these costs severely decrease profits and initiate discussions within a company about whether to pursue less risky projects that are not as likely to result in harmful consequences and protracted litigation. Not only that, the reality (or even the prospect) of entering into high profile litigation could hamper GDLS-C's relationship with lenders and suppliers thereby increasing the cost of business, if not halting it altogether.<sup>79</sup> If GDLS-C chooses to oppose a transnational tort claim concerning human rights abuses abroad, it would likely continue manufacturing LAVs and reaping the associated profits. However, to compensate for the costs associated with a claim, the company may be forced to cut or reduce manufacturing streams unrelated to the CSAD, which would inevitably harm business and potentially result in job losses. And in a worst case scenario, the company could face a judicial decision ordering it to pay hundreds of millions or billions of dollars to a victims fund. That scenario would likely lead to further stages of appeals, only increasing litigation costs and further depleting GDLS-C's bottom line and sully its reputation. An

<sup>75</sup> Jackie Northam, "For Saudi Military Vehicle Deal, Canada Weighs Jobs and Human Rights", National Public Radio (18 June 2019), online: <https://www.npr.org/2019/06/18/732414876/for-saudi-military-vehicle-deal-canada-weighs-jobs-and-human-rights>.

<sup>76</sup> Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, 1st ed (London: Hart, 2004) at 14 [internal citations omitted].

<sup>77</sup> Zennie Abraham, "Texaco/Chevron lawsuits (re Ecuador)", (7 May 2003), online: Business & Human Rights Resource Centre <<https://www.business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>>.

<sup>78</sup> Steinitz, *supra* note 8 at 111.

<sup>79</sup> *Ibid* at 114.

adverse decision could likewise result in GDLS-C becoming insolvent such that it is not viable for the company to continue business. That same scenario manifested recently when a Quebec court ordered a major Canadian tobacco company to pay over \$15 billion CAD to consumers for its part in adverse health consequences from cigarette sales.<sup>80</sup>

### C. Saudi Arabia's Penchant for Backlash

Transnational tort litigation in Canada around the CSAD can spark backlash from the Saudi government in two respects. First, the monarchy may not react well to its human rights record being adjudicated in a Canadian court. And second, litigation may signal that Canada will again halt LAV exports as it did in 2018, indicating it can no longer be considered a trusted trading partner.<sup>81</sup> Each of these scenarios would attenuate Canada-Saudi relations.

#### 1. Reputational Concerns

Under Canadian law, a tort claim likely cannot proceed against the Saudi government itself. Such a claim would fail under the *Foreign Sovereign Immunity Act*, which formed the basis for the Supreme Court of Canada in *Kazemi* to dismiss a claim against the Iranian government after the family of an Iranian-Canadian journalist sued for damages following her torture and killing in the country's infamous Evin Prison.<sup>82</sup> Knowing it cannot be implicated under Canadian tort law for human rights violations committed in the course of its proxy war may be one reason for the Saudi government to suppress any anger or need for reprisal.

Conversely, the mere fact that its human rights record would be at issue in a Canadian court could alter Saudi Arabia's future bilateral relations with Canada. If that appears unsubstantiated, recall that former Foreign Affairs Minister Chrystia Freeland sparked outrage when she tweeted her opposition to the Saudi government's decision to arrest peaceful activists. Only hours after tweets went out from the Minister's account in August 2018, the Saudi government announced "it was expelling Canada's ambassador, and it would sell off Canadian assets, cease flights to Canada, stop buying Canadian wheat and barley and suspend student exchange programs."<sup>83</sup> If that did not suffice to express the monarchy's dismay, it rebuked Canada for its poor human rights record regarding Indigenous peoples and demanded a public apology.

That history makes it plausible to envision how Saudi Arabia could respond if its human rights record was the subject of a tort claim, not simply an off-the-cuff set of tweets. Even though it would not be party to any suit, the Saudi government could perceive that its reputation and even legitimacy as a regional

<sup>80</sup> See "Imperial Tobacco Canada Obtains Creditor Protection" (12 March 2019), online: Cision Newswire <<https://www.newswire.ca/news-releases/imperial-tobacco-obtains-creditor-protection-812178315.html>>; *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358.

<sup>81</sup> Murray Brewster, "Canada's arms deal with Saudi Arabia is shrinking" (10 September 2018), online: <<https://www.cbc.ca/news/politics/saudi-arabia-arms-canada-1.4815571>>. Canada re-commenced CSAD exports in April 2020. See David Moscrop, "Canada will sell weapons to Saudi Arabia again, trading job for its principles" *Washington Post* (10 April 2020), online: <<https://www.washingtonpost.com/opinions/2020/04/10/weapons-sales-saudi-arabia-reveal-that-canada-is-willing-trade-jobs-its-principles/>>.

<sup>82</sup> *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

<sup>83</sup> Jacques Marcoux & Caroline Barghout, "How events unfolded after foreign affairs minister sent tweets rebuking Saudi Arabia", *CBC News* (7 December 2018), online: <<https://www.cbc.ca/news/canada/how-events-unfolded-after-foreign-affairs-minister-sent-tweet-rebuking-saudi-arabia-1.4935735>>.



power is being impugned. It would not respond kindly to such a suggestion. An analogy of how domestic litigation has had a chilling effect on foreign relations between Canada and a fragile trading partner is currently playing out in the British Columbia courts with the extradition litigation of Huawei executive Meng Wanzhou. Meng was arrested at the request of U.S. authorities after allegations Huawei had violated American law by conducting business with Iran in the midst of economic sanctions. Her detention by Canadian authorities until it is determined whether she should be extradited to the U.S. has been a foreign relations nightmare for a Trudeau administration that has pressed hard to maintain close ties with the world's second largest economy.

## 2. Trade Concerns

The 2017 U.S.-Saudi deal aside, the monarchy has relied on imports from, among others, the U.K., France, The Netherlands, and Belgium to promulgate a policy of military suppression—both against its own citizens and to secure its regional interests in the Arabian Gulf.<sup>84</sup> For Canada, the CSAD follows a long history of arms exports to Saudi Arabia. GDLS-C and CCC have been selling LAVs to Saudi Arabia since the 1990s under the U.S. Foreign Military Sales program.<sup>85</sup> Between 1993 and 2015, Canada exported more than 2900 LAVs representing 90% of the value of Canadian military exports to Saudi Arabia over that period. Those exports alone totalled approximately \$2.5 billion CAD.<sup>86</sup> The \$15 billion CSAD added to those already impressive amounts and further established Canada as a reliable commercial partner for a Saudi government unflinching in its desire to bolster its military apparatus.

Stability in maintaining contractual obligations is a touchstone for parties interested in further agreements. If Canada is perceived as an unstable partner that may again cease exports—this time to quell domestic repercussions from private litigation—Saudi Arabia may be inclined to look elsewhere for combat vehicles and equipment needed to sustain its regional war in Yemen. With a number of potential suppliers in Europe and Asia that would want to reap the financial benefits of a multi-billion export agreement, finding another partner may not be difficult for a regime willing to pay inordinate sums to manifest its military might both domestically and in the surrounding region. Relatedly, if Canada becomes known as a mercurial arms manufacturer, it may be exiled from future deals with other countries, depriving it of the economic benefits tied to a lucrative global arms market.

## III. CONCLUSION

This article has focused on the consequential effects of a transnational tort claim in a Canadian court related to alleged international human rights violations from CSAD exports. It has sought to introduce doctrinal elements inherent and, in some ways, unique to such a claim and then analyzed the broader impact of a tort claim on relevant government, corporate, and individual actors. The intention here has not necessarily been to opine on whether a CSAD-related claim would be robust enough to proceed beyond jurisdictional phases of litigation and garner a liability decision or out-of-court settlement. Rather, I have

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<sup>84</sup> See e.g. Human Rights Watch, “Saudi Arabia: Security Forces Seal Off Eastern Town” (13 August 2017), online: <<https://www.hrw.org/news/2017/08/13/saudi-arabia-security-forces-seal-eastern-town>> for background on the Saudi government's use of Canadian-made Terradyne gurkhas against its own citizens.

<sup>85</sup> Canadian Commercial Corporation, *supra* note 1.

<sup>86</sup> See *Turp*, FCA, *supra* note 22 at para 38.

used the CSAD as one real-life scenario in which private law litigation can have broader effects on a country's foreign relations and domestic economy.

The independence of the Canadian judiciary means that a court can assess a CSAD-related claim within its existing doctrinal frameworks and in accordance with the separations of powers without interference from elected branches of government. As Canada retains its place in a proliferating global economy, the judiciary's power to exact extra-judicial consequences on non-litigants is real. In turn, that power illustrates how the law curtails behaviour—whether that be in the realm of private commercial or public governmental conduct.