

## THE ROAD TO *SONG MAO*: TRANSNATIONAL LITIGATION FROM SOUTHEAST ASIA TO THE UNITED KINGDOM

By Mahdev Mohan\*

Anxieties about the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> should not eclipse the fact that redress can, and at times should, be secured elsewhere. A major effect of *Kiobel* is to adjust the aperture of transnational corporate accountability away from the United States—which generally has been the default venue—and toward regional and foreign jurisdictions where violations occur or where responsible beneficiaries of the wrongdoings reside or conduct their businesses.

This article examines one example of such transnational human rights litigation outside the United States, a case regarding land evictions in Cambodia that has been accepted for adjudication by the United Kingdom High Court.<sup>2</sup> That case, *Song Mao v. Tate & Lyle Industries Ltd.*, I argue, reinforces and refines three crucial precepts for the post-*Kiobel* environment. First, plausible domestic and regional processes should be the initial juridical focus when seeking redress for business-related human rights abuses. Second, once such processes are exhausted or prove ineffective, recourse can be sought through transnational human rights litigation against transnational corporations and before foreign courts that have a nexus to the claim. Third, transnational human rights litigation should be premised on a cause of action appropriate to the court and legal system seized, however pedestrian that cause of action may seem. Garden-variety tort claims may be more effective at a liminal stage than torts rooted in *jus cogens* norms as foreign courts may find the latter to be nonactionable in the forum or incompatible with comity, especially without statutes akin to the Alien Tort Statute (ATS).<sup>3</sup>

### *Song Mao's Procedural History*

In August 2006, the Cambodian government granted economic land concessions in the province of Koh Kong to two Cambodian sugar companies, Koh Kong Sugar Industry Co. Ltd. (KKS) and Koh Kong Plantation Co. Ltd. (KKP)—the two plots of land amounting to about

\* Assistant Professor of Law, Singapore Management University; Executive Director, Singapore Society of International Law. I am very grateful to the Rockefeller Foundation's Bellagio Center, where this article was written and first presented, and to the other Bellagio Fellows for their valuable comments. I am also grateful to my colleague Professor Locknie Hsu for her insightful comments.

<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>2</sup> Statement of Claim, *Song Mao v. Tate & Lyle Indus. Ltd.*, Claim No. 2013, Folio 451 (EWHC (Comm), Mar. 28, 2013) (QB), available at <http://www.business-humanrights.org/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf> [hereinafter *Song Mao* SoC].

<sup>3</sup> 28 U.S.C. §1350.

thirty thousand acres (collectively “Land”).<sup>4</sup> Both companies are now jointly owned by a Thai company, KSL Group (KSL) (70 percent); and a Taiwanese company, Ve Wong Corporation (30 percent).<sup>5</sup> Previously, the companies were also partially owned by an influential Cambodian senator, Ly Yong Phat.<sup>6</sup> Villagers claim that they were not consulted prior to the grant and were violently evicted from their lands by armed military police who were acting on behalf of the Koh Kong companies and/or the Cambodian government to make room for sugarcane plantations.<sup>7</sup> In 2009, KKS and KKP entered into a five-year contract with a UK-headquartered company, Tate & Lyle Industries and its subsidiaries (T&L), to sell raw sugar derived from the plantations. It is estimated that the annual yield from the raw sugar capable of being produced from the Land exceeds US\$2 million.<sup>8</sup>

In March 2013, lawyers for two hundred Cambodian villagers commenced the *Song Mao* case before the UK High Court against T&L. They allege that T&L purchased sugar from sugarcane grown upon the villagers’ land. The plaintiffs maintain that they remain the legal owners of the land (and thus crops grown upon it) and claim that T&L is liable to pay damages for selling the raw sugar.<sup>9</sup> The defendants argue that they do not have knowledge of the facts asserted and seek to be declared the rightful owners of the sugar purchased from KKS and KKP.<sup>10</sup>

The claimants have succeeded in persuading the UK High Court to assert its jurisdiction and hear the claim in October 2014.<sup>11</sup> This outcome is not because the UK courts are any more inclined than the *Kiobel* Court to set human rights standards for corporate conduct in other states.<sup>12</sup> In the absence of a UK equivalent of the ATS, UK courts are wary about circumstances in which they will adjudge corporate human rights abuses beyond UK borders. In a recent ruling, the UK High Court stated that it had no jurisdiction over claims that had been filed against Anglo American South Africa Ltd. by South African miners who contracted the deadly lung disease silicosis due to excessive dust in these mines.<sup>13</sup> The High Court held that the miners could pursue their claim in South Africa as “the English court is not obliged to assume jurisdiction over claims that have little if anything to do with this country.”<sup>14</sup>

<sup>4</sup> *Song Mao* SoC, *supra* note 2, para. 11.

<sup>5</sup> Kuch Naren, *Thai Representative Meets with Koh Kong ‘Blood Sugar’ Families*, CAMBODIA DAILY, Feb. 28, 2013, at <http://www.cambodiadaily.com/archive/thai-representative-meets-with-koh-kong-blood-sugar-families-11884>.

<sup>6</sup> *Song Mao* SoC, *supra* note 2, para. 6.

<sup>7</sup> *Id.*, para. 8; see also David Pred, *Bridges Across Borders Cambodia, Bittersweet: A Briefing Paper on Industrial Sugar Production, Trade and Human Rights in Cambodia 2* (Briefing Paper, Sept. 2010), available at <http://bab.cambodia.org/developmentwatch/cleansugarcampaign/bittersweet.pdf>.

<sup>8</sup> *Song Mao* SoC, *supra* note 2, para. 30.

<sup>9</sup> *Id.*, paras. 1, 23–27, 32–33.

<sup>10</sup> Defence & Counterclaim of the First and Second Defendants, *Song Mao v. Tate & Lyle Indus. Ltd.*, Claim No. 2013, Folio 451 (EWHC (Comm), May 2, 2013) (QB), available at <http://www.business-humanrights.org/media/documents/tate-lyle-defence-counterclaim-2-may-2013.pdf>.

<sup>11</sup> Joel Brinkley, *Private Property, Public Greed in Cambodia*, POLITICO, May 6, 2013, at <http://www.politico.com/story/2013/05/lawyer-works-to-put-end-to-cambodia-land-grabbing-90985.html>.

<sup>12</sup> “No nation has ever yet pretended to be the *custos morum* of the whole world.” *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1668, 1674 (2013) (quoting *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)).

<sup>13</sup> *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC 2131 (QB), available at <http://www.bailii.org/ew/cases/EWHC/QB/2013/2131.html>.

<sup>14</sup> *Id.*, para. 76 (concluding statement in decision by Justice Andrew Smith).

In considering the success of the *Song Mao* claimants in having their case heard in the United Kingdom, it is obviously important that the defendant and the sugar are in the United Kingdom. Also notable, however, was the strategy of the claimants in drawing on and utilizing normative frameworks and judicial processes in Cambodia and the region before embarking on transnational human rights litigation elsewhere.<sup>15</sup> Whether or not the UK High Court realized it, its actions were consistent with emerging human rights standards in the Southeast Asian region.

### *Backdrop: ASEAN's Regional Human Rights Standard Setting*

The Association of Southeast Asian Nations (ASEAN), whose members include Cambodia and Thailand, has often been criticized for failing to adequately protect human rights due to its long-standing policy of noninterference in member states' internal affairs. However, in 2009, ASEAN's ten member states designed a "roadmap," which envisions the creation of "a rules-based Community of shared values and norms."<sup>16</sup> Human rights discourse has become an established part of ASEAN's plans for integration by the year 2015. After all, the setting of regional human rights standards responds to indigenous conditions and challenges and opens up "new possibilities for a more inclusive human rights corpus."<sup>17</sup> Furthermore, the UN high commissioner for human rights has observed that ASEAN's 2011 Human Rights Declaration (AHRD) "may set the tone for the emerging ASEAN human rights system."<sup>18</sup>

Of particular pertinence for these claimants was Article 5 of the AHRD, which provides that under domestic law "[e]very person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law."<sup>19</sup> This provision accords with international standards codified in several significant international and regional human rights conventions.<sup>20</sup> Importantly, it sets the stage for corporate legal accountability as the rule of effective remedy has its origins in the doctrine of state responsibility and corporations that are not exempt by the AHRD or any treaty or customary rule from the duty to provide effective remedies.<sup>21</sup>

<sup>15</sup> Several leading Cambodian civil society organizations (CSOs), including Equitable Cambodia, Cambodian Human Rights and Development Association (ADHOC), Cambodian League of the Promotion and Defense of Human Rights (LICADHO), Citizens Commission on Human Rights (CCHR), and Community Legal Education Center (CLEC), have worked in concert with villagers to document human rights abuses related to the Land, and these organizations advocate for corporate accountability.

<sup>16</sup> ASEAN Secretariat, ASEAN Political-Security Community Blueprint (Mar. 1, 2009), available at <http://www.asean.org/communities/asean-political-security-community>.

<sup>17</sup> Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547, 587 (2007).

<sup>18</sup> Press Release, Office of the High Commissioner for Human Rights, Next Two Years Key to Human Rights Development in ASEAN Region—UN Human Rights Chief (Nov. 28, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11649&LangID=E>.

<sup>19</sup> ASEAN Human Rights Declaration, princ. 5 (Nov. 18, 2012), available at <http://aichr.org/documents>.

<sup>20</sup> See Universal Declaration of Human Rights, Art. 8, GA Res. 217A(III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948), available at <http://www.un.org/en/documents/udhr>; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13, Nov. 4, 1950, ETS No. 5, 213 UNTS 221 (as amended by Protocol No. 11, Nov. 1, 1998, ETS No. 155); American Convention on Human Rights, Arts. 25, 63, Nov. 22, 1969, 1144 UNTS 123; Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women in Africa, Art. 25, July 11, 2003, OAU Doc. CAB/LEG/66.6.

<sup>21</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, Annex, UN Doc. A/RES/60/147 (Dec. 16, 2005), available at <http://www.ohchr.org/EN/Professional>

*Cambodia, Thailand, and the United Kingdom—Crossing the Jurisdictional Threshold*

The filing of the *Song Mao* claim in the United Kingdom in 2013 was a culmination of concerted civil-society responses to alleged corporate misconduct related to the sugar concessions. Tracing the road to *Song Mao* is thus instructive for the evolution of transnational human rights litigation and should be seen in connection with lessons offered by *Kiobel* and in conjunction with the above-mentioned ASEAN developments.

First, civil society organizations (CSOs)—representing the villagers affected by the economic land concessions—exhausted domestic remedies before national courts and commissions, reflecting the same sensibility as Justice Stephen Breyer’s concurrence in *Kiobel* that exhaustion of such remedies is a requirement for ATS litigation.<sup>22</sup> Consistent with Article 5 of the AHRD, the CSOs identified the villagers’ right to an effective remedy for breaches of Cambodian land law as a right reflecting emerging ASEAN standards and settled international law measures. According to the CSOs, the transfer and use of the Land was illegal as it contravened the following obligations:

- (1) provisions against the arbitrary expropriation of private property;<sup>23</sup>
- (2) the right to fair and just compensation for land acquisition of registered state-private land;<sup>24</sup>
- (3) the prohibition against concessions of state-private land of more than ten thousand hectares to the same person or company;<sup>25</sup> and
- (4) the requirement that environmental and social impact assessments must be carried out, that public consultations be held with potentially affected communities, and that solutions for voluntary resettlement be reached before economic land concessions are granted.<sup>26</sup>

First, in February 2007, the CSOs filed a complaint against KKS and KKP in Koh Kong Provincial Court, seeking cancellation of the concession agreement on the above-mentioned grounds.<sup>27</sup> In September 2012, that court ruled that it did not have the power to hear the dispute and transferred the case to the Cadastral Survey Commission, a Cambodian alternative dispute resolution body, to take action. To date, no action has been taken by this commission or relevant authorities.<sup>28</sup>

Second, the CSOs sought recourse beyond Cambodia but within ASEAN. On January 6, 2010, they filed a complaint before the accredited National Human Rights Commission of Thailand (Thai Commission) alleging that KSL, a Thai company, through its subsidiaries KKP

Interest/Pages/RemedyAndReparation.aspx; see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 63–69 (2006).

<sup>22</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1671 (2013) (Breyer, J., concurring).

<sup>23</sup> CONST. OF CAMBODIA, Art. 44 (2004), available at <http://www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=/law/en/Constitution-Of-The-Kingdom-Of-Cambodia-E.pdf>.

<sup>24</sup> Kingdom of Cambodia, Land Law, Art. 5 (2001), available at <http://www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=/law/en/Law-on-Land-2001-E.pdf> [hereinafter Land Law].

<sup>25</sup> *Id.*, Arts. 58, 59.

<sup>26</sup> Kingdom of Cambodia, Economic Land Concessions, Sub-Decree No.146 ANK/BK (Dec. 27, 2005), available at [http://www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions\\_051227.html](http://www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions_051227.html).

<sup>27</sup> *Song Mao* SoC, *supra* note 2, para. 14.2.

<sup>28</sup> *Id.*

and KKS, had obtained the land concession illegally. The CSOs based their claim for jurisdiction of the Thai Commission on KSL's substantial ownership of KKP and KKS, its control over operations in Cambodia, and its duty to respect human rights wherever it operates.<sup>29</sup> The Thai Commission accepted jurisdiction and investigated the claim. It found evidence that "human rights principles and instruments were breached in this case, and that [KSL] is involved in the operations of its subsidiaries in Koh Kong, where these breaches took place."<sup>30</sup> The UN special rapporteur for Cambodia has observed that the Thai Commission's decision represented, within limits, "success in transboundary human rights promotion and protection" and ASEAN standard-setting, and was "a landmark case for international advocacy in Cambodia."<sup>31</sup>

Third, having traced the sugar trail from sugarcane harvested and processed in Cambodia by KKS and KKP and further processed in Thailand by KSL, the villagers commenced *Song Mao*, through UK lawyers, against T&L in the United Kingdom, where the sugar had been imported.<sup>32</sup> Instead of selecting the court of a state that had no nexus to the defendants' nationality, as the plaintiffs in *Kiobel* had done, the claimants in *Song Mao* selected the UK High Court as the forum because T&L is domiciled in the United Kingdom. Further, according to the claimants, T&L's liability arises from its acts or omissions as, inter alia, it knew or ought to have known that the villagers were the owners of the Land and the sugarcane grown upon it.<sup>33</sup> The claimants further asserted that T&L deprived the villagers of the "fruits resulting from cultivation of land," contrary to Cambodian law.<sup>34</sup> The claim thus crossed the jurisdictional threshold.

Fourth, while the *Song Mao* claim alleges multiple instances of human rights abuses attributable to T&L, the claim is not premised on a *jus cogens* human rights cause of action. Unlike ATS cases that limit U.S. federal courts to recognize causes of action only for alleged violations of international law norms that are "specific, universal, and obligatory,"<sup>35</sup> other civil actions are not similarly limited. The claimants apparently recognized this actuality and, consistent with comity concerns arising from the adjudication of torts committed abroad, chose the run-of-the-mill tort of "conversion."<sup>36</sup> Their claim alleges that T&L acquired raw sugar through

<sup>29</sup> KSL owns 70% of the Cambodian subsidiary companies and has effective control over operations in Cambodia and receives 100% of the processed sugar from the two Cambodian land concessions. See CLEC Press Statement, International Sugar Companies Implicated in Cambodian Land Grabbing (July 24, 2012), available at <http://terra0nullius.wordpress.com/resources/2012-resources/2012-07-cambodia-ngo-statement-on-koh-kong-trial>.

<sup>30</sup> National Human Rights Commission of Thailand, Findings of the Subcommittee on Civil and Political Rights of the National Human Rights Commission of Thailand on the Koh Kong Sugar Cane Plantation Case in Cambodia, at 3 (July 25, 2012), available at <http://www.business-humanrights.org/Links/Repository/1013888>.

<sup>31</sup> Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, A Human Rights Analysis of Economic and Other Land Concessions in Cambodia, para. 195, UN Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

<sup>32</sup> The claimants are represented by Stephen Brown of Jones Day and barristers at Fountain Court. All are acting pro bono. See <http://www.fountaincourt.co.uk/news/detail/song-mao-and-others-v-1-tate-lyle-sugar-industries-and-2-t-l-sugars-limited>.

<sup>33</sup> See *Song Mao SoC*, *supra* note 2, para. 17 (stating that T&L has been put on notice of the claimants' allegations since July 2010).

<sup>34</sup> Land Law, *supra* note 24, Art. 95; see also *Song Mao SoC*, *supra* note 2, paras. 7, 23–33.

<sup>35</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1665 (2013) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

<sup>36</sup> *Song Mao SoC*, *supra* note 2, paras. 26–27, 33.

illegal contracts that wrongfully deprived the plaintiffs of the ownership, use, and possession of the sugar and that T&L had converted the same to its own use.<sup>37</sup>

Finally, the CSOs have pursued nonjudicial and quasi-judicial transnational avenues in parallel with transnational human rights litigation. They have approached institutional and industrial stakeholders in the realm of trade regulation. In particular, they lodged a complaint<sup>38</sup> with European Union Trade Commissioner Karel De Gucht regarding the human rights implications of its “Everything but Arms” (EBA) initiative, a European preferential trade scheme that allows companies to export sugar and other goods to the European Union without import duties or quotas and with a guaranteed minimum price.<sup>39</sup> The complaint involved an appeal to the European Commission to take action pursuant to its obligation under the EBA scheme, requesting consultations and a thorough investigation of the alleged human rights abuses associated with the industry and, if appropriate, suspension of EBA benefits.<sup>40</sup>

Similarly, the CSOs filed a complaint with the U.S. national contact point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises<sup>41</sup> in relation to the alleged role that American Sugar Refiners Inc. (ASR) has played in the purchase of sugar produced from the Land.<sup>42</sup> In June 2013, the U.S. national contact point concluded that the issues raised by the CSOs “pertain to matters addressed in the human rights chapter of the Guidelines and in the UN Guiding Principles on Business and Human Rights.”<sup>43</sup> Among other conclusions, the national contact point recommended that “ASR evaluate the issues raised by the NGOs and consider how to address them . . . [and that] ASR conduct a corporate human rights policy review process . . . .”<sup>44</sup> The CSOs also filed a complaint in June 2013 with the London-based trade association Better Sugar Cane Initiative Ltd. (Bonsucro), which holds its members to a set of principles including maintaining human rights standards. On July 8, 2013, Bonsucro reportedly suspended T&L’s membership, thus evincing the efficacy of the CSOs’ strategic advocacy.<sup>45</sup>

<sup>37</sup> *Id.*, paras. 28–33.

<sup>38</sup> A copy of the letter of complaint submitted by a group of ten Cambodian and international CSOs is available online at <http://www.equitablecambodia.org/newsarchives/open-letter.php> [hereinafter Complaint Letter].

<sup>39</sup> See European Union Generalized System of Preferences, Council Regulation (EC) No. 732/2008, 2008 O.J. (L 211) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF>.

<sup>40</sup> *Id.*, Art. 17; see also Complaint Letter, *supra* note 38; Report of the Special Rapporteur, *supra* note 31, para. 194. The EU trade commissioner and the EU high representative for foreign affairs and security policy have reportedly replied to the complaint, *inter alia*, as follows: “If the legal conditions for the activation of withdrawal procedures set out in the GSP regulation are met, the Commission will be ready to take action if this appears to be the case.” Zsombor Peter, *EU Won’t Investigate Land Concessions*, *CAMBODIA DAILY*, May 20, 2013, at <http://www.cambodiadaily.com/archive/eu-wont-investigate-land-concessions-for-now-25194> (quoting joint response of the trade commissioner and high representative).

<sup>41</sup> See Organisation for Economic Co-Operation and Development, Guidelines for Multinational Enterprises (2011), available at <http://mneguidelines.oecd.org/text>.

<sup>42</sup> See U.S. Dep’t of State, Bureau of Econ. & Bus. Affairs, Press Release, Community Legal Education Center of Cambodia (CLEC)/EarthRights International (ERI) and American Sugar Refining Inc. (ASR) (June 20, 2013), available at <http://www.state.gov/e/eb/oced/usncp/links/rls/210970.htm>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Sean Teehan, *Sugar Industry Monitor Drops UK’s Tate & Lyle amid Koh Kong Charges*, *PHNOM PENH POST*, July 18, 2013, at 5, available at <http://www.phnompenhpost.com/national/sugar-industry-monitor-drops-uk-tate-lyle-amid-koh-kong-charges>.

### *Conclusion*

The *Song Mao* case demonstrates that transnational human rights litigation, if carefully calibrated, vigorously pursued, and made to comport with regional human rights standards and commitments—even if unconnected with the ATS—can remain a powerful tool for legal advocacy. More specifically, in response to advocacy campaigns by the CSOs, Ve Wong Corporation said in July 2012 that KKS and KKP “have promised that if there is any evidence proving that [KKS and KKP] illegally acquired the land from residents, the companies are willing to return [the Land] and compensate all relocation costs of all affected families.”<sup>46</sup> In April 2013, a KSL manager met with the villagers and announced that the company will consider returning some of the disputed Land to villagers to resolve the villagers’ grievances.<sup>47</sup>

Such litigation need not be rooted in jurisdictional statutes, such as the ATS, which are confined to narrow grounds. Claims should be commenced in the courts of a state with a connection to the corporation and should be used for torts routinely actionable in that jurisdiction. Transnational human rights litigation should be reinforced by regional and UN human rights institutions and procedures. As appealing as an ATS-based fundamental human rights cause of action may seem, in domestic courts a more pedestrian cause of action may be more attractive to courts concerned with respecting international comity, avoid act of state complications, and provide injured parties with an effective remedy.