

Song Mao: Litigating Cambodian ‘blood sugar’ in the English courts

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1. Introduction

The *Song Mao* litigation² is, in many respects, an ordinary case. It involves a claim brought against English domiciled defendants, Tate & Lyle Industries Limited and T&L Sugars Limited,³ in the English courts, for the tort of conversion. The fact that the claimants are foreign, in this case Cambodian, is not, in itself, a notable feature of the litigation. Cross-border disputes are an increasingly common feature of global economic and social relations, and indeed the significant majority of cases heard in the English commercial courts involve at least one foreign party. The fact that the dispute concerns questions and events which are very remote – geographically and culturally – from the practiced formalities of the English bar is also not, in itself, remarkable. The disconnection of global dispute resolution from the location of the events giving rise to the claim is also a common feature of the legal dimension of global governance. With the growing influence of party autonomy in private international law,⁴ multinational parties are themselves repeat consumers in a globalised law market, choosing for example between different systems of contract law, and between litigation in London, arbitration in Paris, or hybridised commercial courts in market disruptors such as Singapore.⁵ The commencement of English proceedings against English domiciled defendants, even by foreign parties and relating to foreign acts, seems entirely unremarkable in the midst of such globalised legal activity.

There are, however, a number of reasons why this case is undoubtedly deserving of note, which are discussed in turn below. The first is that it raises some interesting questions of private international law, both in relation to choice of law, and as an illustration of certain peculiar features of the rules of jurisdiction applicable in the English courts pursuant to the EU Brussels I Regulation. These are points of technical debate among private international law scholars and in the courtrooms of the EU, but also raise important policy questions concerning the distribution of regulatory competence in cross-border disputes. The second is that the case is, at its heart, concerned with Cambodian land rights, and questions concerning title to immoveable property have generally been exempted from the globalisation of dispute resolution, as they have been considered an aspect of the territorial

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² *Song Mao v Tate & Lyle Industries Limited*, EWHC (QB) Claim No 2013 Folio 451 (*‘Song Mao Case’*).

³ T & L Sugars purchased the sugar refining business of Tate & Lyle Industries in 2010, just after the shipment of sugar which formed the basis of the claim was delivered in London. The two defendants have since been involved in further litigation against each other over the terms of sale: see eg *T & L Sugars Ltd v Tate & Lyle Industries Ltd* [2015] EWHC 2696 (Comm).

⁴ See generally eg Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, forthcoming 2018); Horatia Muir Watt, “‘Party Autonomy’ in international contracts: from the makings of a myth to the requirements of global governance’ (2010) 6 *European Review of Contract Law* 250.

⁵ Note eg the new Singapore International Commercial Court, <https://www.sicc.gov.sg/>.

sovereignty of the state. The third is the relationship between the case and the underlying supply chain which connects the Cambodian claimants with the English defendants. While supply chains exemplify the distance and the disconnections between the source and the ultimate consumer of goods, the case provides a striking illustration of the way in which supply chains also offer a relatively under-explored (but increasingly recognised) regulatory potential. The fourth is the curious lack of information surrounding the proceedings and their outcome – an element of mystery which suggests the potential of private litigation as a strategic regulatory technique, but also raises questions about its desirability.

2. Questions of private international law

Any cross-border dispute involving parties or events which occur in different jurisdictions raises issues of private international law. These include both questions of jurisdiction, regarding which court(s) or tribunal(s) may resolve the dispute, and questions of applicable law, determining which substantive law(s) will be applied.

The question of jurisdiction in this case depended on the Brussels I Regulation 2001,⁶ as proceedings were commenced in 2013, prior to the 2015 commencement of the Recast Brussels I Regulation 2012.⁷ The basic rule of jurisdiction in both versions of the Brussels I Regulation is that a defendant should be sued in the courts of their Member State of domicile, and there is no doubt that both defendants were English domiciled companies. The Tate & Lyle sugar refinery on the banks of the Thames, operational since 1878 and one of the largest in the world, is indeed a London landmark, particularly to frequenters of neighbouring London City Airport. A question might be raised, however, concerning whether the English courts were really the best forum in which to resolve this dispute. None of the facts or events in England appear to be contested in the case – it was accepted that the defendants took delivery of sugar in London, applying that sugar to their own use. It was contested, however, whether the sugar had derived from the land to which the claimants asserted title, or (even if it had) whether the claimants had any property interest in the sugar. Although (as discussed below) certain legal issues in the case were likely governed by English law, the factual questions which would require determination to resolve the claim were thus not English, but rather Cambodian.

Traditionally, the English courts would have dealt with this issue – whether the English courts were the appropriate forum to resolve the claim – through the exercise of their discretion to stay proceedings (or to refuse permission to commence them), under the doctrine of *forum non conveniens* (or *forum conveniens*).⁸ The Court of Justice of the European Union has, however, held

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001.

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012.

⁸ See eg Paul Torremans *et al*, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press, 2017), pp.351ff and 392ff.

that this discretion is not available under the Brussels I Regulation.⁹ Proceedings brought against English domiciled companies in the English courts must be heard by those courts, absent certain exceptions under the Regulation itself which are discussed in the next section. The Regulation, at least as interpreted by the CJEU, has prioritised the certainty and uniform application of its rules over the question of which forum is most appropriate to hear disputes. This creates a potential opportunity to commence proceedings in EU Member States against local companies in relation to their foreign activities, as explored further in other chapters of this book. The *Song Mao* litigation may thus in part be understood as an illustration of the potential of the Brussels I Regulation to open up avenues for holding EU corporate actors responsible for their worldwide activities – a perhaps unintended side-effect of the effort to create greater legal certainty in the functioning of the internal market. It should be noted, however, that this could also be read as having neo-colonialist undertones, as EU Member State courts assert regulatory competence over local companies regardless of where in the world their activities have taken place, and are unable to defer to a more closely connected foreign court which might resolve the dispute more efficiently and more closely to the affected community. On the other hand, a Cambodian NGO assisting some of the claimants has suggested that “We are using international mechanism because the Cambodian judicial system is not independent”.¹⁰ Even if the possibility of staying proceedings on *forum non conveniens* grounds were available, there is thus an argument that the English courts should nevertheless hear the case, on the well-recognised basis that the claimants would be denied justice if denied access to the English courts.¹¹

The question of the applicable law in this case would, perhaps surprisingly, also raise some difficult questions. The first difficulty is that the common law tort of conversion is relatively unusual in that civil law systems generally deal with equivalent claims through the law of property.¹² This raises a potentially difficult problem in terms of characterising or classifying the cause of action for choice of law purposes. In EU Member States, the Rome II Regulation¹³ deals with choice of law in non-contractual obligations, including torts, but it is unclear whether conversion would be classified as a ‘tort’ (or otherwise part of the law of obligations) for the purposes of the Regulation. If not, the choice of law question would fall back on national rules. One candidate would be the Private International Law (Miscellaneous Provisions) Act 1995, although that would also require the classification of the action as a ‘tort’ for the purposes of that Act, which is again unclear.¹⁴ Alternatively, the claim could be characterised as one in property, with the choice of law question governed by the common law. It is therefore possible that the choice of law question could be

⁹ Case C-281/02 *Owusu v Jackson* EU:C:2005:120; see further eg Richard Fentiman, ‘Civil Jurisdiction and Third States: *Owusu* and After’ (2006) 43 *Common Market Law Review* 705.

¹⁰ <https://www.foodnavigator-asia.com/Article/2014/06/24/Questions-to-answer-for-Tate-Lyle-in-Cambodian-land-grabbing-action>.

¹¹ See generally eg *The Spiliada* [1987] AC 460; *The Vishva Ajay* [1989] 2 Lloyd’s Rep 558; *Connelly v. RTZ* [1998] AC 854.

¹² See *Torremans et al* (2017), p.808ff; but see Lawrence Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell, 2012), para 34-021.

¹³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007.

¹⁴ The 1995 Act offers, in Article 9(2), only the following somewhat delphic guidance: “The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.”

governed by the Rome II Regulation, the 1995 Act, or perhaps even by the common law choice of law rules in property.

Under each of these rules, it is likely that the applicable law would be English law, as it was by the Thames that the alleged interference with property rights and thus damage occurred. Under the Rome II Regulation or 1995 Act a flexible exception is available where the tort is considered to be more closely connected to another country, but would be unlikely to apply here because the events constituting the alleged tort occurred in England and both defendants are English. This still does not, however, quite resolve the complexity of the choice of law issues. For the tort of conversion to be established, the claimants would have to establish a property interest in the sugar. This arises as a subsidiary or incidental choice of law question, which would be governed by the law of the place of the property at the time the claimed acquisition of title arose.¹⁵ This would undoubtedly be the law of Cambodia, as the claimants were claiming ownership in the sugar, derived from their asserted ownership of the land, from the time the sugar was harvested. Thus even if the claim were viewed as a tort governed by English law, the subsidiary question of ownership of the land would require application of Cambodian land law. The case thus provides an interesting illustration of both the complexity of questions of characterisation for choice of law purposes, as well as the potential application of multiple laws to a single claim through the incidental question doctrine.

3. Foreign land and sovereignty

A further feature of the *Song Mao* case which raises difficult legal issues is that it is at least partially concerned with foreign land title. Disputes concerning land have traditionally been considered matters which should be resolved solely by the territorial courts. This is because land title has been viewed as an aspect of state sovereignty, and also because – as Oona Le Meur demonstrates in her chapter – questions of land title may involve complex historical and cultural issues, which may best be decided by a local tribunal. If the English courts were to address these issues, they would need to engage with disputing claims of title to land – in this case, under different systems of land title which appear to co-exist in Cambodian law, which would present an undoubted forensic challenge. The proof of foreign law for the purposes of English proceedings is a complex enough task when the law is documented in formal sources, let alone when competing customary norms are relied on. The proof of customary law has long raised particularly difficult questions for the adaptation of the common law in India and in African commonwealth countries. The general approach has been that customary law has to be ascertained as a matter of fact¹⁶ – although this has been controversial in many instances (as prioritising English law over ‘native’ law),¹⁷ this would not be the case where the ascertainment of customary law arises as part of foreign law, as all foreign law must be determined as a matter of fact under the common law.¹⁸

¹⁵ See eg Collins (ed) (2012), para 34-022.

¹⁶ See eg *Angu v. Attah* [1916] Gold Coast PC 43; AN Allott, ‘The Judicial Ascertainment of Customary Law in British Africa’ (1957) 20 *Modern Law Review* 244.

¹⁷ See eg Australian Law Reform Commission Report 31, *Recognition of Aboriginal Customary Laws* (1986).

¹⁸ See generally eg Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998).

But should the English courts engage in such a task at all? The Brussels I Regulation includes, in Article 24, various grounds of exclusive subject matter jurisdiction – categories of claim considered to be so closely connected to a single legal order that only one court should be able to hear them. One such category, in Article 24(1), is disputes concerning title to immovable property located in a Member State. Infamously, however, the Brussels I Regulation does not include any rule dealing with cases which have equivalent connections to non-Member States, such as a dispute concerning title to Cambodian land. This is an aspect of the general problem that the Regulation, in its focus on improving the functioning of the internal market, does not deal adequately with ‘external’ effects, as it fails to take into consideration the connections which cases may have to non-Member States.¹⁹ Many academics and national court decisions have supported the application of a doctrine of reflexive effect, under which Article 24 should have some (probably discretionary) effect in relation to equivalent non-Member State connections.²⁰ The difficulty with this argument is that it requires a strong purposive interpretation of the Brussels I Regulation, unsupported by the text. The argument has become more difficult under the Recast Brussels I Regulation 2012, because certain provisions of the Regulation (dealing with prior foreign proceedings)²¹ have been given a reflexive effect directly in the Regulation.²² Not only does this arguably imply that other similar effects should not arise implicitly, but the Regulation allows for exclusive jurisdictional connections to be taken into consideration in exercising the discretion to stay Member State proceedings where there are prior non-Member State proceedings.²³ This rule would appear to be redundant if indeed the rules on exclusive jurisdiction could be given reflexive effect. The consequence of all this is that, somewhat problematically, Member State courts may be *required* to hear claims against locally domiciled parties concerning title to non-Member State land, at least if they are first seised, regardless of the great difficulties which this presents.

Whether the *Song Mao* case should actually be considered to concern title to land is, however, a further difficult question. Clearly, a central issue in the case concerns the ownership of the Cambodian land from which the sugar was harvested. The form of the claim, however, was based on the tort of conversion, and the issue of land ownership arose only as an incidental question. Further, perhaps inadvisedly, the defendants disputed whether the sugar had actually come from the land in question.²⁴ This meant that there were other contentious central issues which did not concern land title, and the courts have shown a willingness to hear cases in which issues which would ordinarily be matters of foreign exclusive jurisdiction arise as subsidiary questions, to ensure that all issues are resolved efficiently in a single set of proceedings.²⁵

¹⁹ See generally eg Alex Mills, ‘Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?’ (2016) 65 *International and Comparative Law Quarterly* 541.

²⁰ See generally eg Peter De Verneuil Smith, Ben Lasserson and Ross Rymkiewicz, ‘Reflections on *Owusu*: The Radical Decision in *Ferrexpo*’ (2012) 8 *Journal of Private International Law* 389; *Ferrexpo AG v. Gilson Investments Ltd* [2012] EWHC 721 (Comm).

²¹ Articles 29 and 30.

²² Under Articles 33 and 34.

²³ Recital 24.

²⁴ *Song Mao Case*, Defence and Counterclaim, [18.2].

²⁵ See eg (by analogy) Case C-144/10 *BVG v. JPMorgan*, EU:C:2011:300.

Common law courts have traditionally applied a further doctrine under which disputes concerning title to foreign land are considered to be 'non-justiciable'.²⁶ The status of this doctrine is somewhat unclear – although expressed as a 'pre-jurisdictional' rule relating to the subject-matter authority of the court, it is perhaps best understood simply as a rule of 'preclusive jurisdiction', equivalent in effect to Article 24(1) of the Brussels I Regulation.²⁷ As such, in the English courts there should arguably be no place for non-justiciability in cases commenced pursuant to the Regulation, as it would (like *forum non conveniens*) affect the legal certainty and consistent application of the Regulation.²⁸ However, the defendants in the *Song Mao* case suggested in their defence an intention to rely on the doctrine.²⁹ The case thus raises a difficult question of the interaction between common law non-justiciability and European Union rules of jurisdiction, although in any case, once again, there would be an argument in this context that the issue of title to foreign land was only raised incidentally, and should not be covered by the common law doctrine.³⁰

The *Song Mao* case thus illustrates some fractures which have emerged in the idea that disputes concerning title to land should be decided by the territorial court. First, the Brussels I Regulation may have inadvertently undermined the traditional deference to foreign sovereigns in respect of questions of title to their land, in respect of non-Member States. Second, courts have shown a willingness to examine such questions where they arise incidentally, prioritising efficient dispute resolution over sovereignty concerns. The fact that the English courts suggested a willingness to hear the *Song Mao* case exemplifies these trends, perhaps reflecting a tendency to emphasise the private dimension of property disputes, rather than their public territorial sovereignty dimension.

4. The regulatory potential of the supply chain

A third aspect of the *Song Mao* case which is particularly notable is its reliance on the underlying supply chain which connects the Cambodian claimants with the English defendants. The supply chain is one of the defining architectural features of the modern global economy. It provides a powerful metaphorical image of the flow of material goods from origin to destination – from a mine or farm, via processors, manufacturers, assemblers, distributors, retailers and various other possible intermediary parties, through to the sale of goods to a consumer. The supply chain does not only show the links between these parties, however, but also their distance and separation. A consumer may purchase goods from a party who was not involved in any way in the initial stages of production, such as the extraction of raw materials or their processing and refinement. This distancing presents a regulatory challenge. Resource extraction in the developing world frequently raises concerns as to human rights compliance, environmental impact, and (as in the *Song Mao* case) questions as to the competing rights of local populations and foreign investors. Governance issues and economic pressures mean that these concerns are, however, often not met by local regulation. The final product of the supply chain frequently ends up purchased in the developed world, which

²⁶ See eg *British South Africa Co v Companhia de Mozambique* [1893] AC 602; *Belhaj v. Straw* [2017] UKSC 3; *Torremans et al* (2017), p.484ff.

²⁷ But see eg *Lucasfilm Ltd v. Ainsworth* [2009] EWCA Civ 1328 (overturned on other grounds at [2011] UKSC 39).

²⁸ See eg *Torremans et al* (2017), p.494.

²⁹ *Song Mao Case*, Defence and Counterclaim, [8.5].

³⁰ See eg *Hamed v. Stevens* [2013] EWCA Civ 911.

may offer greater regulatory capacity, but is remote from these concerns. The remoteness is not merely geographical, although this remains undoubtedly relevant because of the territorial character of state regulatory power, but also cultural, as a polished retail experience may reveal little of the supply chain's story. The power differentials involved across the supply chain also raise distributive concerns, as little of the profit generated from sales of consumer goods may find its way back down the chain to developing world farmers, miners, or factory workers.

It has been increasingly recognised, however, that the supply chain presents not only a regulatory challenge but also a regulatory opportunity. This is because pressure at the end of a supply chain may potentially be relied on to produce change along the line back to its origin. This prospect has arisen in a variety of forms, which need not be legal in character. If a publicity campaign or social media movement questions the ethics of the processes through which goods have been sourced and produced, consumers may simply boycott purchasing those goods, potentially leading to changes in production practices. To demonstrate compliance with ethical standards, companies may adopt private certification processes, such as the 'fair trade' movement, or the labelling of 'responsibly sourced' food or timber products. These market-driven processes are not themselves legal in character, although they may be supported by the law. For example, in the UK section 54 of the Modern Slavery Act 2015 requires certain commercial organisations carrying on business in the UK to prepare a "slavery and human trafficking statement", providing information on the policies and procedures they have adopted to ensure that slavery and human trafficking have not been used in their supply chains anywhere in the world.³¹ The statement must be published on an organisation's web site, with a prominent link on its homepage. This provision of the Act thus does not directly seek to regulate the conduct of corporations extraterritorially, but facilitates the possibility of market-based responses to organisations which fail to adopt sufficiently robust policies or procedures.

In other cases, the law may intervene more directly to affect the importation of raw materials sourced contrary to specified standards. The EU Conflict Minerals Regulation,³² due to come into effect in 2021, requires EU importers of tin, tantalum, tungsten and gold to carry out due diligence on their supply chains to ensure that the resources they import have been mined and processed responsibly. The EU is thus relying on a form of territorial regulation to project its regulatory goals extraterritorially, to affect practices at the origin of these supply chains, although this is in the form of relatively weak due diligence and reporting obligations. Similarly but more generally, the EU has adopted non-financial disclosure requirements, under which:

certain large undertakings should prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. ... The non-financial statement should also include information on the due diligence processes implemented by the undertaking,

³¹ See further <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>.

³² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017.

also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.³³

The *Song Mao* litigation represents a different regulatory approach, but with a similar objective. It seeks to leverage the power of private law and private international law to pressure Tate & Lyle, with the hope that in turn this will have an impact on the Cambodian sugar producers. Exactly what form this impact might take is somewhat unclear. The particulars of claim frame the action as a claim for damages, and if it were successful the litigation could lead to financial compensation for the lost productive value of the land. There is, however, evidently a bigger picture. The litigation might also seek to affect the viability of the Cambodian sugar production business based on the land whose ownership is contested by the claimants. The risk of litigation against prospective purchasers may affect the market value of the sugar produced on the disputed land, decreasing or even eliminating the profitability of the business. This could lead to the acceptance of a more general legally binding settlement agreement by the sugar producers who have control over the territory. The private law form of the cause of action in the English courts is thus mirrored in the potential for a contractual solution to the asserted dispossession of the claimants. However the desired outcome is framed, the mechanism is clear – the use of private litigation against third party recipients of produce from contested land, as a means of indirectly challenging the position of those who claim ownership of the land, reasserting the primacy of a frustrated customary title. As in other contexts, the possibility of disrupting a supply chain raises the potential for extraterritorial projection of regulation. In this case, Cambodian villagers seek to invoke English tort law in the English courts as a mechanism for addressing their local concerns – they are themselves acting extraterritorially as claimants in seeking to invoke a projection of regulation back in their own territory, using what might perhaps be described as a ‘regulatory boomerang’ technique.

5. Prospects and limitations of ‘private’ litigation

A final aspect of the *Song Mao* litigation which is deserving of notice is the curious scarcity of information concerning the case, also noted by Oona Le Meur in her chapter. Proceedings were commenced in the High Court in London in 2013, and the Particulars of Claim filed by the claimants and the Defence and Counter-claim filed by the defendants are matters of public record and readily available online.³⁴ After initially receiving a mild flurry of academic note,³⁵ the case has since gone rather quiet. “Did the Cambodian sugar case settle?”, asked one human rights blog in 2015, reporting that inquiries to the Commercial Court revealed that the case had been removed from its listings.³⁶ Settlement negotiations have undoubtedly been at least attempted, including not only the parties to the English proceedings but also the Cambodian sugar producing company, but these have also proven highly controversial (as some parties have claimed that their acceptance of a settlement

³³ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, Recital 6.

³⁴ See eg <https://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia>.

³⁵ See eg Mahdev Mohan, ‘The Road to *Songmao*: Transnational Litigation from Southeast Asia to the United Kingdom’ (2014) 107 AJIL Unbound e-30.

³⁶ <https://corporatewartcrimes.com/2015/05/01/did-the-cambodian-sugar-case-settle/>.

was under duress).³⁷ It is typical of settlement negotiations and settlement agreements that they impose confidentiality obligations on the parties, and this is the most likely reason for the relative lack of publicity of the action here.³⁸ This fact in itself raises a potential concern with the *Song Mao* regulatory technique – as a private law action, it is possible for the negotiations of a settlement of the proceedings to be carried out in secret and to remain secret. The characterisation of the action as ‘private’ thus carries a double-meaning. For the parties to the proceedings, this may be potentially beneficial. For the defendants, it may enable them to take the litigation off the public agenda, reducing the risk that they will be subject to market-based activism. For the claimants, the possibility of entering into a confidentiality obligation provides them with leverage to increase the likelihood of a settlement of the dispute. The danger here is evidently that the broader public interest is left behind, in a way which would be less likely for other forms of legal or non-legal supply chain regulation. The wider issue may disappear – if the simile can be forgiven, dissolving from view like sugar in an English cup of tea.

As a counter-point, however, it must be noted that this litigation did have a short term impact on publicity surrounding the more general issue of Cambodian land rights, and as part of a broader campaigning strategy (centred around the concept of ‘blood sugar’)³⁹ it has potentially had a number of further indirect impacts. One such notable consequence is the 2013 suspension⁴⁰ of Tate & Lyle’s membership of ‘Bonsucro’, a sugar industry organisation which seeks to advance and promote responsible production.⁴¹ Tate & Lyle subsequently resigned its membership in 2014, citing the UK litigation as a reason why it was “not able to play an active role in Bonsucro”.⁴² On the one hand this may be cited as a failure of industry self-regulation procedures, which frequently prove to have no enforcement ‘teeth’ against breaches of the soft-law standards they promote. On the other hand, the wide reporting of this suspension and resignation is likely to have had at least some negative publicity impact for Tate & Lyle, and the threat of suspension alone may thus positively affect the practices of other members of Bonsucro.

A further counter-point to note is that private litigation need not suggest a broader confidentiality, because it can form a complementary part of the arsenal of legal and non-legal techniques which might be relied on to improve the human rights or environmental compliance of a supply chain. In the case of Cambodia’s contested land issues and the sugar industry, this included, for example, complaints brought to the National Human Rights Commission of Thailand (based on the nationality

³⁷ See eg <http://www.phnompenhpost.com/national/sugar-companys-compensation-deals-leave-families-bitter-kampong-speu>; <https://www.cambodiadaily.com/archives/evictees-reject-latest-settlement-offer-from-uk-sugar-firm-60869/>; <https://business-humanrights.org/en/cambodia-evictees-in-land-dispute-claim-thai-company-made-them-sign-compensation-agreements-they-cant-read-%E2%80%99t-read-%E2%80%93-includes-company-comments>; <https://www.cambodiadaily.com/archives/evictees-sign-payout-deal-they-cant-read-without-lawyers-70997/>.

³⁸ See eg <https://business-humanrights.org/sites/default/files/documents/Tate-%26-Lyle-14-July-2014-response.pdf> (“Tate & Lyle Sugars responded with the following: ‘It has been agreed by all parties that these discussions should remain confidential, and it would therefore be inappropriate for us to say anything further at this time.’”).

³⁹ See eg <http://www.boycottbloodsugar.net/>.

⁴⁰ See eg <https://www.cambodiadaily.com/archives/ethical-sugar-group-suspends-tate-lyle-over-plantations-35438/>.

⁴¹ See further <https://www.bonsucro.com>.

⁴² See eg <https://business-humanrights.org/en/cambodia-tate-lyle-resigns-from-bonsucro-company-claims-pending-uk-lawsuit-makes-them-unable-to-%E2%80%9Cplay-an-active-role%E2%80%9D-in-the-initiative>.

of one of the parent companies of the Cambodian sugar production company). The Commission upheld the complaints in 2015, finding that human rights violations had indeed been committed.⁴³ A further avenue of legal complaint was the 2014 Communication to the International Criminal Court alleging that the land dealings in Cambodia constituted crimes against humanity.⁴⁴ This led to an announcement by the ICC in 2016 that it was broadening its scope of activity to include prioritisation of crimes based on, inter alia, dispossession of land.⁴⁵ The possibility of a formal ICC investigation or even prosecution is likely to place further pressure on the sugar producers or government officials involved in their land grants to seek a fair settlement of the dispute. Finally, it may be noted that sugar imported from Cambodia to the European Union is given preferential treatment under the EU's 'Everything But Arms' initiative, which favours produce from 'Least Developed Countries'. However, this preferential status is subject to Cambodia demonstrating respect for human rights. In 2014 the EU launched an initiative jointly with the Cambodian government to investigate claims of forced displacement in the sugar industry, and to ensure redress for those affected.⁴⁶ Doubts have been expressed as to the progress which has been made on implementing this process,⁴⁷ although meetings continue.⁴⁸ The possibility for the EU to withdraw privileged trading status for Cambodian sugar remains a further potential (public law) mechanism by which the supply chain to the EU may be leveraged to address human rights concerns in Cambodia, and the issue remains on the agenda of the EU.⁴⁹

6. Conclusions

The *Song Mao* litigation raises a range of complex legal questions. These include questions of private international law, including particularly the challenge the case presents to the traditional view that jurisdiction over disputes concerning title to land should be exercised exclusively by the territorial courts. An added difficulty in this case is that there is an underlying dispute between different systems of Cambodian land title, which multiplies the complexity of pleading and proving the content of foreign law. The potential for litigating these issues in the English courts arises in part because the case invokes a distinctive territorial regulatory claim – it seeks to regulate the source of the supply chain, but does so through regulating an English party further down the chain. The case

⁴³ See eg <https://earthrights.org/media/human-rights-violations-in-koh-kong-sugar-plantation-confirmed-by-thai-human-rights-commission/> (with an unofficial English translation of the Report).

⁴⁴ <https://business-humanrights.org/en/cambodian-villagers%E2%80%99-intl-criminal-court-complaint-re-land-grabbing>; <https://www.reuters.com/article/us-icc-cambodia-landrights/landless-cambodian-farmers-look-to-international-criminal-court-for-justice-idUSKBN13H1J9>.

⁴⁵ See eg <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>; https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

⁴⁶ <https://www.theguardian.com/world/2014/dec/10/european-union-cambodia-sugar-industry-human-rights>.

⁴⁷ <https://www.cambodiadaily.com/morenews/three-years-on-govt-eu-still-at-odds-over-sugar-evictions-124903/>.

⁴⁸ <http://www.phnompenhpost.com/national/un-eu-reps-meet-officials-over-land-row>.

⁴⁹ European Commission Report on the Generalised Scheme of Preferences covering the period 2016-2017, Brussels, 19.1.2018, COM(2018) 36 final, p.6 ("The EU is engaging with Cambodia to address human rights issues related to land disputes arising from sugarcane concessions and labour rights issues, in particular freedom of association. The EU needs to see real and sustained improvements, if further steps are to be avoided.").

therefore exemplifies the way that the supply chain presents a regulatory challenge, but also offers regulatory potential. The chain through which raw materials are assembled, generally from the developing to the developed world, may also be a device for the counter-flow of norms. This has been increasingly recognised in the context of non-legal and public law initiatives – the *Song Mao* case adds to the potential range of techniques the possibility of pursuing private litigation as a further mechanism of projecting regulation back along the supply chain. This approach has significant potential, because the power to initiate the proceedings lies with private parties, although it also raises questions concerning the legitimacy of its distribution of regulatory authority and whether the public interest will be sufficiently accommodated. These concerns may also be reflected in the apparent disappearance of the *Song Mao* litigation from discussion in the public domain. Although in many respects the *Song Mao* litigation was (or is?) an ordinary case, it provides a striking and undoubtedly notable illustration of the complex interactions of public and private interests in the legal regulation of globalised commercial activity.