

Silencing the Critics

How big polluters try to paralyse environmental and human rights advocacy through the courts

Between 2015 and 2018:

 **24**
LAWSUITS

 **71**
DEFENDERS

 **US\$ 904M**
TOTAL DAMAGES SOUGHT

 **45 years**
OF PROCEEDINGS IN
3 CALENDAR YEARS

 **15 years**
YOUNGEST DEFENDANT

What are SLAPPs?

Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits filed by a private party with the intention to silence or intimidate another private party engaging in public participation, including criticism or opposition.

Local communities and human rights and environmental advocates are closest to businesses' impact on people and the planet. They can raise an alarm early about damaging business practices, increasing public awareness of the risks and of actual harm. They provide critical and practical information for companies, authorities and investors.

Attacking peaceful public advocacy for human rights using SLAPPs undermines these efforts, is an abuse of judicial systems, and can result in serious harm to defenders and civil society groups, including prison sentences.

To generate long-term returns, and act in line with their responsibility under the [United Nations Guiding Principles on Business and Human Rights \(UNGPs\)](#) and the [Organisation for Economic Co-operation and Development \(OECD\) Guidelines](#), an increasing number of investors are factoring environmental, social and governance (ESG) issues into investment decisions to ensure their portfolio companies respect human rights. Human rights and environmental defenders play a vital monitoring and reporting role, alerting companies and investors to potentially destructive business practices and the associated environmental, social, and financial risks. However, the space to do this work safely and without intimidation is under threat.

Since 2015, Business & Human Rights Resource Centre has [tracked](#) 1,852 killings, beatings, threats and other forms of intimidation against indigenous and community leaders, farmers, workers, unions, journalists and civil society groups focused on business-related issues. Increasingly, companies turn to the courts to bring lawsuits against such defenders with the aim of silencing or intimidating them and stopping their work. These lawsuits are commonly referred to as Strategic Lawsuits Against Public Participation (SLAPPs).

This snapshot looks at [24 SLAPPs](#) brought by 12 carbon majors - active fossil fuel producers that are the largest corporate contributors to greenhouse gas (GHG) emissions - and other mining companies, and one industry association, between 2015 and 2018¹ in Asia, Latin America, North America, and Africa, and how investors can use their leverage to ensure portfolio companies do not engage in such practices.

Checklist: How to identify SLAPPs

SLAPPs typically meet a combination of the following six criteria, developed by the University of Amsterdam Information Law Clinic and Greenpeace International:

1. The remedies sought are unusually aggressive or disproportionate to the conduct targeted by the lawsuit
2. The corporate plaintiff is engaged in procedural manoeuvres that appear intended to drag out the case or drive up costs, such as pursuing appeals with little prospect of success
3. The corporate plaintiff appears to be trying to exploit its economic advantage and put pressure on the defendant
4. The lawsuit targets individuals as well as the organizations they work on behalf of
5. The lawsuit appears to be part of a wider public relations offence designed to bully or intimidate critics
6. The corporate plaintiff has a history of SLAPPs and/or legal intimidation (e.g. threats of legal action designed to scare critics into silence)

¹ This is not a comprehensive list of SLAPPs brought by carbon major and mining companies between 2015 and 2018. The Resource Centre has analysed cases, identified through desk-based research, brought by carbon majors, as identified in "The Carbon Majors Database - CDP Carbon Majors Report 2017", between 2015 and 2018. We have also included major SLAPPs brought by other mining companies during this period (beyond coal mining companies identified in the Carbon Majors report). Full data is available [here](#).

Our research illustrates how SLAPPs by carbon majors and mining companies have negative human rights impacts on environmental and human rights defenders:

Companies seek disproportionate remedies and sanctions can be severe: For example, in November 2016, Peter Kolbenschlag left a comment on Facebook about oil and gas extraction on federal lands near his home in western Colorado's North Fork Valley, criticising the company for allegedly rigging the bidding process. Shortly after his comment, [SGI sued him for libel](#), initiating a protracted legal battle. Kolbenschlag said: *"I haven't done anything unusual in my activism, but I have been successful in mobilizing people in the community - things that should be lauded in a democracy, not harassed by hardball tactics."* In June 2019, the Colorado Court of Appeals rejected a petition by SGI to have the full court consider the complaint against him and dismissed the complaint as "frivolous".

Severity of sanctions is even more obviously disproportionate in countries where the most common legal theories used in SLAPPs, such as defamation and libel, can lead to criminal charges. In five out of seven countries² where we identified SLAPPs by carbon majors and mining companies, defamation and libel are a crime with prison sentences as potential punishment.

Proceedings can last for years: Length of proceedings among cases analysed ranged from one month to four years, draining the defenders' time and resources.

Companies often seek high monetary damages, exploiting their economic advantage: Sought damages ranged from USD 374 to USD 900 million. In defamation [lawsuits](#) filed in South Africa by Mineral Commodities and its subsidiary Mineral Sands Resources against two Centre for Environmental Rights lawyers and four other defenders the total requested damages were USD 662,000 – 2,890 times what a minimum wage worker would make in a month in South Africa. Mineral Commodities Limited, which controls Mineral Sands Resources — the company that sued the lawyers — [reported](#) a total revenue of USD 55.4 million in its latest annual report and an additional USD 14.5 million in generated cash flow from operations.

Companies target individuals and the organizations they work for: For example, in 2017, Energy Transfer Partners (ETP) [filed a lawsuit](#) against Greenpeace International and Greenpeace USA over the organizations' campaigning against Energy Transfer's controversial Dakota Access Pipeline, claiming that their activities amounted to [racketeering](#). The company also sued Charles Brown, a new Greenpeace USA employee. The case was dismissed in February 2019.

Companies can burden defenders with multiple SLAPPs: Thai mining company Tungkum Ltd [filed](#) at least six lawsuits against 30 environmental defenders between 2015 and 2018 over alleged reputational damage. In one of them, Tungkum Ltd sued a 15-year-old schoolgirl, Thai Public Broadcasting Service (PBS), and four local journalists alleging reputational damages, after a TV report in which the schoolgirl commented on environmental impacts of the company's operations. The lawsuit was initially dismissed on lack of merit, before the appeals court decided there was sufficient evidence to proceed. The journalists face up to two years in prison or a fine of up to USD 5,600 if they are convicted.

Lawsuits are often accompanied by other types of attacks against defenders: Armenian mining company Lydian Armenia CJSC (part of Lydian International) [initiated defamation suits](#) against several defenders, journalists, and lawyers in connection with the Amulsar mining project. One case was against Tehmine Yonokyan, a community member and journalist. In April 2019, Tehmine Yonokyan brought a criminal case that [revealed](#) Lydian Armenia was spying on her and running fake social media profiles to disseminate false information and discredit the environmentalist's campaigns. In its [response](#) to the allegations, Lydian Armenia stated that "the investigation concluded that there was no criminal act in neither taking the pictures, nor distributing those...The Criminal case was dropped by the investigators in February 2019, and the charges against all involved parties were withdrawn".

Rate of acquittal is high, indicating frivolous lawsuits

Our research shows that in just one of the 24 cases the defendant was formally charged; in nine of the cases the charges were dropped or the lawsuit was dismissed. Fourteen cases are still ongoing, but they have been denounced as "SLAPPs" or as frivolous by civil society organizations. The high rate of acquittal suggests that the lawsuits are frivolous. The plaintiff's motive is not necessarily to win the case but rather to pressure defendants to abandon their criticism or opposition, draining defenders' resources in the process.

² The seven countries in our research are: Armenia, India, Nicaragua, Panama, the Philippines, South Africa, Thailand and the US.

Why SLAPPs matter for investors

Investors aiming to integrate ESG issues, including combatting climate change and respecting human rights, benefit from a strong civil society with the freedom to raise concerns about business operations and with the means to ensure that such concerns are addressed. SLAPPs have a chilling effect on this vital work as they impose financial and livelihood strains on defenders and create fear.

SLAPPs by their nature are expensive, time consuming and increase legal, reputational and operational risks for companies. While it is difficult to estimate the exact amounts, one example of how costly unconstructive engagement with defenders, including through attacks and filing of SLAPPs, can be is the finding that the cost of the Dakota Access Pipeline (DAPL) [nearly doubled](#) because of the social pressure against DAPL and ETP's responses to it. The project was originally estimated at USD 3.8 billion, but the total cost of DAPL is likely closer to USD 7.5 billion. These are material concerns for investors.

In addition, international standards such as the UNGPs and the OECD Guidelines for Multinational Enterprises recognise that businesses have a responsibility to respect human rights and should not restrict, impair or otherwise interfere with the legitimate work of human rights defenders. This responsibility also applies to investors.

“ Companies must respect human rights and... should not be allowed to infringe on those rights — by bringing a lawsuit for defamation against someone who criticises it, for example.”

— Dutch bank [ABN AMRO](#)

What should investors do?

Prior to investment:

Investors should undertake rigorous due diligence and review potential investments for their history of SLAPPs or other legal intimidation tactics and avoid investment in companies with a track record of SLAPPs. As part of their enhanced due diligence, investors should also engage in discussions regarding public policy on this topic, whenever this is appropriate and supported by local civil society. This includes raising the importance of anti-SLAPP legislation with government bodies.

During investment:

Investors should communicate that they expect investee companies will not bring lawsuits with the intention of silencing critics and continuously monitor their use.

To prevent and detect the use of SLAPPs, key questions for investors to ask portfolio companies are:

- Policy:** Do your codes of conduct mention interaction with defenders and other stakeholders raising concerns on ESG factors about your business and value chains? Do you have a stand-alone policy on defenders?
- Grievance mechanisms:** What grievance mechanisms do you have in place and how do you use them when concerns about projects are raised?
- Governance:** If/when a lawsuit is filed against a defender or civil society group, is it the last resort? How is an engagement escalated? What are the steps taken prior to resorting to a lawsuit? If a lawsuit is filed, is there senior level oversight?
- Due diligence:** How do you ensure that the lawsuit does not pose reputational, operational, or financial risk to the business and does not harm the individual or organization (refer to the [checklist](#))?
- Lawsuits:** Which lawsuits have you brought against individuals / organizations raising ESG-related concerns in the last six months, in which jurisdiction, and in relation to which projects? Are you engaging with this person / organization? Do you have any history of engagement with them? What is the legal theory used in the lawsuit (e.g. defamation, cyber libel)? What type of monetary damages are you seeking?

When investors find out about a lawsuit brought by a company they are invested in, they should apply the criteria from the checklist on page 2 to determine whether it may be a SLAPP suit. If so, they should urge the company to drop the suit and provide an appropriate remedy in consultation with a defender.

Investors should be particularly alert to groups of lawsuits around one project or business area, such as when Lydian Armenia brought several lawsuits around the same time against various individuals and organizations related to the [Amulsar](#) mine project, or when [Tungkum](#) sued a large number of individuals from the same village. This could indicate a concerted campaign of intimidation and that there are serious environmental, social and governance issues to be addressed.

Investors should also encourage companies to engage with peers and policy makers, especially through multi-stakeholder initiatives that could increase their understanding of the importance of human rights defenders' work, and of industry best practice. They should encourage them not to be part of organizations and lobby groups that target or otherwise undermine civil society organizations and individual defenders.