



Business & Human Rights
Resource Centre

Defending Defenders: Challenging Malicious Lawsuits in Southeast Asia

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Executive Summary

The work of [human rights defenders](#) (HRDs) to expose harm by companies around the world has never been more important. In the face of the existential challenges of a global pandemic such as COVID-19, climate crisis, shifts in the future of work, and increased migration, HRDs speak up for fairness and sustainability in business operations and global markets. Tragically, some companies think otherwise. Rather than listen and act on the information HRDs share, a growing number of unscrupulous companies turn to the courts to bring lawsuits meant to harass and silence HRDs who criticise them. Over the last five years we have tracked an average increase of 48% per year in judicial harassment of HRDs looking at business activities.

Strategic Lawsuits Against Public Participation (SLAPPs) are frequently deployed by companies. SLAPPs seek to manipulate the judicial system by masquerading as legitimate legal claims, abusing laws (e.g. on libel / defamation) to target valid and protected speech or protest. SLAPPs can be effective in gagging critics: they take advantage of the prohibitive costs and time that it takes to litigate a case, and can result in prison sentences and other harmful physical, financial and psychological impacts on defenders. As importantly, they have a chilling effect on free expression, disrupt legitimate collective action to defend the rights of workers and communities. SLAPPs summarised in this briefing include:

- A community member who faced criminal charges over a Facebook post questioning the legality of a company's mining operation
- A journalist arrested for hate speech after writing about a dispute between a local community and a company developing a palm oil plantation.
- A labour rights leader fined USD 2.4 million after publishing blog posts about working conditions for migrant workers.

These retaliatory lawsuits take place in a broader context of judicial harassment by both companies and governments including criminalisation, abusive subpoenas, arbitrary detention and arrest, and unfair

trials. Roughly 40% of the 2,152 attacks against HRDs around the globe [recorded](#) by the Business & Human Rights Resource Centre between 2015 and 2019 constitute judicial harassment.

This Annual Briefing focuses on **Southeast Asia**. The region has become a global hotspot for SLAPPs and other judicial harassment against HRDs. There is much to learn globally from the strategies of harassment and defense of HRDs here. We recorded 127 cases of judicial harassment against HRDs in Southeast Asia between 2015 and 2019. Of all attacks on HRDs in Southeast Asia that we tracked in this period (290), nearly half (44%) involved judicial harassment. Judicial harassment appears to be the tactic of choice deployed by businesses operating in Southeast Asia to punish or silence defenders. At least 30 of these instances involved filing a SLAPP suit, in some cases "[for as little as one social media post](#)".

The COVID-19 pandemic has seen governments in Southeast Asia move to control the flow of information, and protests by workers fired without compensation or not given personal protective equipment. This is creating a situation ripe for further judicial harassment of HRDs in the region. Meanwhile, trials and hearings have been suspended and courts closed, leaving HRDs in legal limbo. These developments suggest COVID-19 means protection of HRDs from judicial harassment is more important than ever.

Lawyers have built different legal defences to protect HRDs against SLAPPs, with some notable successes in courtrooms around Southeast Asia. For example, lawyers successfully invoked constitutional norms to assert the defendants' rights to freedom of expression; and to freedom of speech, as a legal defence against SLAPPs brought in Thailand and Malaysia respectively. Counter-claims against companies to expose the frivolous nature of SLAPPs and to seek damages for the harm suffered has also proven effective; and in cases brought against journalists, lawyers have invoked fair comment and *qualified privilege* as a successful defence against SLAPPs. Courts in the region have played a critical role in protecting HRDs

from SLAPPs by affirming their constitutional rights and acknowledging the importance of their work for the public interest; and in some cases, by criticising the companies involved.

Despite encouraging legal developments in the region to protect against SLAPPs, such as in Thailand, the Philippines and Indonesia, lawyers have made only limited use of these laws and procedures. The lack of anti-SLAPP legal frameworks around the world and the restricted use of these laws where they do exist, means that lawyers have limited tools at their disposal to fight SLAPPs in the courts. This undermines their ability to get SLAPPs dismissed in their own right, to highlight their frivolous nature, and to expose companies' judicial harassment. Meanwhile, most courts have few avenues to dismiss SLAPPs before proceeding to a

full-fledged trial, which is typically lengthy and costly. The high costs imposed on the defendant to litigate the case for years, the stress of being in litigation and the invasiveness of having to go through discovery can be enough to silence HRDs even if the case against them is ultimately dismissed.

In order to effectively fight SLAPPs – both in Southeast Asia and globally – we need robust legal frameworks and policies that prevent companies from filing SLAPPs in the first place and allow courts to identify, call out and dismiss them as soon as they are filed. To make this happen governments, businesses and investors, alongside defenders and civil society (and the lawyers who defend them) need to act decisively for the protection of civic freedoms and HRDs in the face of this growing threat.

Recommendations

Legal Advocates & Civil Society should use constitutional norms on freedom of expression, association, and peaceful assembly to defend against SLAPPs where anti-SLAPP provisions don't exist. They should also consider filing counter-lawsuits against companies to redress harm and carry out training and awareness building for lawyers and judges to inform them about SLAPPs tactics. Finally, they should raise awareness about SLAPPs at the local, regional and international levels and work together in coalitions to amplify advocacy efforts.

Governments should enact anti-SLAPPs legislation, which defines SLAPPs, allows for an early dismissal (with an award of costs) of such suits and penalises abuse. They should protect and facilitate the rights to freedom of expression, assembly and association of HRDs, provide them with support, and ensure that the judiciary is aware of SLAPPs and empowered to take action to dismiss them.

Bar Associations should update ethics codes to ensure that SLAPPs are a sanctionable offence, and sanction / penalise lawyers who use these abusive tactics.

Companies should refrain from and commit to not using SLAPPs or other forms of judicial harassment to shut down public participation and critical advocacy, and commit to a clear policy of non-retaliation against HRDs and adopt a zero-tolerance approach on reprisals and attacks on HRDs. They should also implement due diligence procedures for the prevention of harm and human rights abuse of individuals, communities and the environment, which explicitly recognises the risks to HRDs. Global brands and national companies can also act collectively to press rogue companies to drop their abusive SLAPPs that bring their whole sector into international disrepute.

Investors should undertake rigorous due diligence. They should review companies' history of SLAPPs and avoid investment in companies with a track record of SLAPPs; and communicate that they expect investee companies will not bring lawsuits with the intention of silencing critics, continuously monitor their use, and act consistently on their findings. They should also encourage companies not to be part of organisations that target or otherwise undermine civil society organisations and individual defenders.

Introduction

Companies have enormous power in society which can result in both positive and negative impacts on people's lives. One of the more pernicious ways some companies have wielded this power is by retaliating against people who criticise them; such as community groups protecting their water from mining operations, worker groups demanding fair pay from their employers, NGOs, journalists, and other [human rights defenders](#) (HRDs)¹ who expose corporate human rights abuses or demand accountability. This happens through violence, such as killings and physical attacks. But it is also happening through predatory legal tactics. Strategic Lawsuits Against Public Participation, or SLAPPs, are one such tactic being used to silence HRDs.

These retaliatory lawsuits are especially difficult to combat because they masquerade as legitimate legal claims. SLAPPs abuse libel or other defamation laws to target valid and protected speech or protest. This strategy is used by unscrupulous companies around the globe to exploit their economic advantage and put pressure on their critics by bringing frivolous complaints in court, knowing that defendants do not have the resources to fight back. In order to effectively fight SLAPPs we need governments, businesses and investors, alongside defenders and civil society (and the lawyers who defend them), to act decisively for the protection of civic freedoms and HRDs.

I SLAPPs Defined

For the purpose of this briefing, **SLAPPs** are lawsuits filed or initiated by a private party with the intent to intimidate and harass HRDs who are engaged in acts of public participation, including criticism or opposition concerning business activities. This includes civil cases brought by companies, as well as criminal cases when and if the company has initiated the criminal complaint. In criminal prosecutions – which are typically brought by the state – it can be challenging to demonstrate the company's involvement, making it harder to identify these cases as a SLAPP. This is particularly true if a company has not admitted to initiating legal proceedings and/or when the company's involvement has not been adequately documented. In many countries in the Global South, there is a close relationship between businesses and state actors, and civil society groups often believe that criminal cases brought by prosecutors are actually initiated by companies. The lack of publicly available documentation of these relationships and original intent makes it harder to expose these cases as SLAPPs.

SLAPPs take place in a broader context of **judicial harassment**, which is the use of the legal and/or judicial system to silence and intimidate critics, including via lawsuits, criminal prosecutions, and other types of legal tactics such as abusive subpoenas,² arbitrary detention and arrest, and unfair trials by both public (i.e. government) and private actors (i.e. companies).

Impact of SLAPPs

Human rights defenders (HRDs), workers and communities are most attuned to businesses' impact on people and the planet, and provide critical and actionable information for companies, authorities and investors.³ Attacking peaceful public advocacy for human rights using SLAPPs undermines these efforts, abuses the judicial system, and prevents HRDs from promptly raising the alarm about damaging business practices and increasing public awareness both of risks and of actual harm. These lawsuits have a chilling effect on free expression, disrupt collective action, and can result in prison sentences and other harmful physical and psychological impacts.

SLAPPs drain the resources of those they target, often causing acute financial and psychological stress. Lawsuits can last for years, and the lingering threat of losing your savings or your home can be devastating. As HRDs are diverted to deal with the threat of SLAPPs, the impact of their work is undermined. Companies often accompany SLAPPs with smear campaigns that destroy the reputations of HRDs and judge them guilty in the "court of public opinion", while making the HRD's colleagues afraid to associate with them for fear of being targeted. SLAPPs also put a significant strain on public resources, forcing national courts to waste their time and resources on superfluous legal processes.

SLAPPs can be effective even if the plaintiff ultimately loses. The mere act of being dragged through litigation can be enough to silence the defendant, as well as others who might have dared to speak up. This makes SLAPPs a particularly powerful and dangerous tool to silence critics.

“Human rights defenders are the ones doing this work on the ground level, they are the ones giving the valuable information about the current situation. Of course we have monitoring systems, but we need other systems. They are the ones working there – so it comes back to where I started: if they can't raise questions, then how can anyone in the society?”

– Lea Rankinen,
Senior Vice President,
Sustainability and Corporate
Responsibility at S Group
(2017 Interview)

This Report

Judicial harassment of HRDs is an alarming global trend. Our research shows that 40% of all attacks against defenders working on business-related activities are carried out by using the legal or judicial system (including SLAPPs and other lawsuits, arbitrary detention and arrest and unfair trials). In 2019 alone, the Business & Human Rights Resource Centre recorded 294 instances of judicial harassment around the world (up 84% on the year before and a five-year high) compared to 86 in 2015, revealing an average annual increase rate of 48%.

Southeast Asia has become a global hotspot for the use of SLAPPs and other judicial harassment against HRDs. We recorded 127 cases of judicial harassment against HRDs in Southeast Asia between 2015 and 2019, making Southeast Asia one of the most dangerous regions in the world for HRDs facing such threats.⁴ Courts in Southeast Asia are the battleground for high profile SLAPPs cases, such as those brought by Natural Fruit against labour activist Andy Hall or by Thai poultry company Thammakaset against more than a dozen defenders (see pages 17-18). Of all attacks on HRDs in Southeast Asia in this period (290), nearly half (44%) involved judicial harassment. Judicial harassment appears to be the tactic of choice deployed by businesses operating in Southeast Asia to punish or silence defenders.

It is against this backdrop that law- and policy-makers have introduced regulations, policies and debates to address this pervasive practice. For example, the Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment has considered efforts to defend against SLAPPs since 2013,⁵ and critical moves towards addressing the problem via regulation are underway in countries like the Philippines, Thailand and Indonesia.

This report takes a close look at SLAPPs in Southeast Asia, where HRDs are particularly vulnerable to judicial harassment and where critical legal defence tactics, broad solidarity, and demands for better legal protections have emerged. The purpose of this briefing is to provide a resource for HRDs to defend themselves against SLAPPs at a time where their vulnerability is intensified as a result of the COVID-19 pandemic and to engender wider and more purposeful concern among the legal community to enhance action to prevent the spread of SLAPPs. Specifically, the report seeks to equip HRDs and the legal advocates who defend them against SLAPPs with the evidence, arguments, and strategies they need, while also offering recommendations and strategies to influence government action that will prevent companies from using SLAPPs, especially in the context of the increasing human rights implications of COVID-19.

COVID-19, Human Rights Defenders & Judicial Harassment

The continued spread of the viral disease COVID-19 (Coronavirus) – which the World Health Organization [classified](#) as a pandemic on 11 March 2020 – has important health and other human rights implications for workers around the world. Mass [layoffs in and shutdowns of supply chain factories](#), increased government [surveillance and censorship](#), and increasing fears of [unemployment](#), underemployment and working poverty are just a few examples of the harm reported in our dedicated [portal on the impact of COVID-19 on business and human rights](#).

This makes the work of defenders who shine a light on human rights abuses more important than ever. Sadly, the climate for HRDs and other critics is increasingly hostile, as they are increasingly subjected to judicial harassment.



"The uncertainty created by a delay in legal proceedings around the case has made the lawsuit even more frustrating. The way the COVID-19 pandemic has disrupted not only the courts' schedule, but also other business operations, has left migrant workers facing the increasing challenges of maintaining their immigration status and work permits."

– Human rights defender Sutharee Wannasiri (in relation to the SLAPP suit brought against her and migrant workers by Thai poultry company Thammakaset).

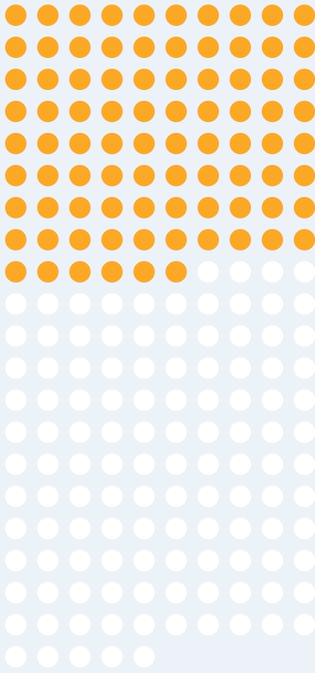
Authorities in several countries are also using the pandemic to censor free speech. In Cambodia, at least [17 people have been arrested](#) for sharing information about the virus. In Malaysia, several [journalists were arrested](#), facing prison sentences of up to six-years and high monetary fines. In Thailand, authorities are [using “anti-fake news” laws](#) under emergency decrees to prosecute people critical of the government’s response to the pandemic, including [lawsuits](#) against whistle-blowers in the public health sector and journalists.

The pandemic has also seen delays to legal proceedings against HRDs who have been SLAPPED as courts across Southeast Asia and beyond are postponing or suspending trials and hearings (e.g. in [Malaysia](#)), physically closing courtrooms and allowing online contact with judges only in “urgent matters” ([Philippines](#)), and otherwise adjusting their operations in the context of pandemic-related lockdowns (e.g. in [Singapore](#), [Indonesia](#) and [Brunei](#)). Meanwhile, HRDs who are in pre-trial detention may be subjected to prolonged deprivation of their liberty, and to protracted physical, psychological and economic impacts.

For updates on how COVID-19 is impacting judicial harassment of HRDs visit our [portal on COVID-19](#).

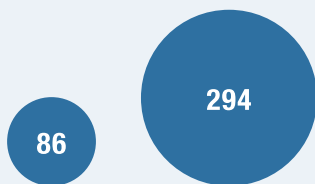
40% (857/2,152)

attacks committed against HRDs globally constitute judicial harassment



44% (127/290)

attacks perpetrated in Southeast Asia constitute judicial harassment



294 instances of judicial harassment around the globe in 2019, compared to **86** in 2015, reflecting an annual average **growth rate of 48%**

I: Global Context

Human rights defenders and civil society play a vital monitoring and reporting role, alerting companies and investors to potentially destructive business practices and associated environmental, social, and financial risks. However, the space to do this work safely and without intimidation is [under threat](#). Between 2015 and 2019, the Business & Human Rights Resource Centre [recorded 2,152 attacks](#) around the world against community leaders, farmers, workers, unions, journalists, civil society groups and other HRDs after they raised concerns about businesses.⁶ These attacks include beatings, threats and various intimidation tactics, and judicial harassment, including through SLAPPs.

I Judicial Harassment per Region

The Resource Centre has recorded a total of 857 instances of judicial harassment between 2015 and 2019 globally. In other words, roughly 40% of the total 2,152 attacks recorded were carried out using legal or judicial systems, including SLAPPs and other lawsuits (both civil and criminal), arbitrary detention and arrest, as well as unfair trials. The majority of these incidents of judicial harassment were perpetrated in the Americas (314 cases)⁷ followed by Asia (231 cases).⁸ Judicial harassment is also widespread in other regions of the world, including in Europe (180 cases),⁹ Africa (78 cases),¹⁰ and the Middle East and North Africa (54 cases).

Central America has the highest number of judicial harassment cases (193), followed by Eastern Europe & Russia (160) and Southeast Asia (127). However, the actual numbers of attacks are likely much higher than those recorded in our database. While different civil society efforts are underway to capture comprehensive numbers globally (as outlined in the next section), such data does not currently exist. Through our research to date, we can see that the number of instances of judicial harassment has increased each year since the Resource Centre started tracking attacks against HRDs in 2015, by an average annual percentage growth rate of 48%.

Global Fight against SLAPPs

While incidents of judicial harassment continue to increase, there are encouraging legislative and procedural developments (as outlined below),¹¹ as well as a growing number of civil society efforts around the globe, to push back against SLAPPs being used to silence HRDs. This includes [Protect the Protest](#), a coalition of non-profit organisations working to protect the free speech of public interest advocates in the United States by providing legal support, campaigning, and building resilience among civil society actors; Greenpeace International's research on SLAPPs against journalists and watchdogs in Europe; the Centre for Environmental Rights's "[Asina Loyiko: United Against Corporate Bullying](#)" campaign in South Africa; and the "[On ne se taira pas](#)"/"We will not be silent" campaign in France. In 2019 the Business & Human Rights Resource Centre published [Silencing the Critics: How big polluters try to paralyse environmental and human rights advocacy through the courts](#); and is currently conducting broader research on the global trend of SLAPPs, which will include developing a publicly-accessible database that centralises existing and new data about SLAPPs from all regions of the world.

It is also important to highlight the positive role responsible business has played in relation to HRDs. A case in point is Finnish retailer, S Group, which [publicly supported](#) the work of HRD Andy Hall, who was subjected to a SLAPP suit by Natural Fruit. S Group, which used to purchase pineapples from Natural Fruit, testified in courts, and engaged the supplier, Members of the European Parliament and the Thai government in support of Mr. Hall. Other businesses have taken steps to ensure they are better at identifying, preventing and mitigating human rights risks to HRDs. For example, since 2016 several companies, multi-stakeholder initiatives, industry associations, private investors, financial institutions and their accountability mechanisms have clarified their [stances](#) on HRDs and civic freedoms.

Importantly, bar associations are becoming increasingly aware of companies causing, contributing to or being linked directly to harms related to HRDs. The American Bar Association unanimously [endorsed](#) the [Guidance for Companies on Civic Freedoms and Human Rights Defenders](#) commissioned by the Resource Centre and its partners.¹²

UN Guiding Principles

The United Nations [Guiding Principles on Business and Human Rights](#) (UNGPs) represent a global consensus on the responsibility of "all enterprises regardless of their size, sector, operational context, ownership and structure"¹³ to respect human rights and to address their human rights impacts. Companies must avoid infringing on the rights of others (UNGP 11) and when abuses occur, they must provide for, or participate in, effective remedy (UNGP 22). In its mandate to promote the UNGPs, the UN Working Group on Business and Human Rights has repeatedly [stressed](#) the critical importance of HRDs in the context of business-related impacts, and [affirmed](#) that businesses must identify, prevent and mitigate human rights risks for HRDs. Silencing and harassing HRDs through SLAPPs and other forms of judicial harassment infringes upon their internationally-recognised rights to freedom of expression, association and peaceful assembly, as stipulated in the [International Covenant on Civil and Political Rights](#).¹⁴ By filing SLAPP suits companies not only fail to live up to their responsibility under the UNGPs to respect human rights, but they proactively undermine these rights.

II: Snapshot Southeast Asia

This section provides information about SLAPPs brought in Southeast Asia¹⁵ and an in-depth study of nine SLAPP cases from the region. It explains the legal framework in which these cases are brought, exposes the aggressive tactics used by companies who brought them, and identifies the legal defences that lawyers have invoked to successfully defend HRDs, while highlighting the role that courts have played in this context.

Facts & Figures

Between 2015 and 2019 the Resource Centre recorded 290 attacks against HRDs working on business-related human rights abuses in Southeast Asia, almost half of which were perpetrated using the judicial or legal systems. The use of laws and the courts to silence dissent takes various forms in the region, including the overbroad use of laws on defamation, or the use of laws widely viewed as tools of state control, such as peaceful demonstration laws or union laws.

Of the 127 instances of judicial harassment recorded in Southeast Asia, at least 30 were SLAPPs,¹⁶ some of which were filed “[for as little as one social media post](#)”. We also recorded other forms of judicial harassment perpetrated by state actors, such as arbitrary detention and arrests (39 cases) and lawsuits and criminal prosecutions (58 cases). In addition to judicial harassment, HRDs are also subject to other forms of intimidation and attacks, which include but are not limited to barriers to registration for organisations, monitoring and surveillance of their work and staff, restrictions on resources (including through the freezing of bank accounts), and so called “[red-tagging](#)”: harassment or persecution because of (alleged or actual) association with a communist party or communist principles.



Legal Landscape

Southeast Asian countries on the whole suffer from a lack of a definition of SLAPPs and of prohibition of such conduct. With the exception of the Philippines, there is no law in any Southeast Asian country that defines SLAPPs. In Indonesia [there are laws](#) that protect against lawsuits brought on those exercising their right to a healthy environment, and movement towards defining SLAPPs. Given this lack of recognition, allegations against HRDs are analysed in isolation of their broader context. This makes it hard for HRDs to raise the protection of the public interest and human rights as effective defences in SLAPPs cases, and for judges, prosecutors, and other actors to clearly recognise the harassment of HRDs.

Except for Brunei, all constitutions of Southeast Asian countries guarantee the rights to freedom of expression, peaceful assembly, and association. Ideally, by recognising these rights in their constitutions, these states should also prohibit acts that violate them. However, most Southeast Asian countries have no laws specifically prohibiting SLAPPs. And because SLAPPs masquerade as legitimate legal claims, courts are often not equipped to identify them and prevent them from moving forward.

Anti-SLAPPs Regulation

Only three out of the 11 countries that make up Southeast Asia¹⁷ have relevant pieces of legislation to guard against lawsuits that may restrict the work of HRDs: Thailand, Philippines and Indonesia.



In the Philippines, the Supreme Court [Rules of Procedure for Environmental Cases](#), which took effect in April 2010, contain explicit anti-SLAPPs protections which allow courts to dismiss SLAPPs in a summary hearing before proceeding to a full trial, which is typically lengthy and costly. These provisions allow persons involved in the assertion of environmental rights to raise the defence that a case filed against them is a SLAPP.¹⁸ This defence triggers a time-bound process whereby the plaintiff needs to provide evidence that the case is not a SLAPP within a non-extendable period of five days, and an immediate summary hearing that has to be resolved in 30 days. The party seeking the dismissal of the case must prove by substantial evidence that their act for the enforcement of environmental law is a legitimate action for the protection, preservation and rehabilitation of the environment. The party filing the action assailed as a SLAPP must prove by preponderance of evidence that the action is not a SLAPP and is a valid claim.

These anti-SLAPP provisions under the environmental rules form part of the court's recognition that upholding the constitutional right to a balanced and healthful ecology¹⁹ should take into consideration real obstacles to enforcement.²⁰ The provisions are the distillation of existing laws, international agreements, best practice, and innovations; and link the right to a balanced and healthful ecology to constitutional rights to freedom of speech and assembly, and the right to petition the government for redress of grievances.²¹ The lack of jurisprudence on this anti-SLAPP provision has made it difficult for lawyers to successfully invoke the rule.



In Thailand, the Criminal Procedure Code was amended in 2019 to include a section on the protection of defenders' rights to freedom of expression against SLAPPs. The new section 161/1 allows the Court of Justice to dismiss any criminal case at the filing stage of the lawsuit (i.e. before proceeding to a full trial) if the court determines that the cause of action stems from "ill intention (1) to harass (2) to take advantage over a person (3) to gain any unlawful benefits or (4) to achieve any corrupt underlying objectives".²² That same year, the [Thai government, in its response to the joint communication](#) of the UN Human Rights Council's Special Procedures, clarified that "on all criminal proceedings, the law requires all criminal cases initiated by a private plaintiff to be proved as a *prima facie* case at a preliminary hearing before the case's admission to trial. This condition will help screen out any frivolous or bad-faith lawsuits".²³



In Indonesia, national laws provide some provisions that protect HRDs against judicial harassment, including the Indonesian Law No. 32/2009 on Environmental Protection and Management (Article 66) and Law No. 18/2013 on the Prevention and Eradication of Forest Destruction (Article 78 (1)). These rules prohibit the filing of criminal or civil cases against persons "struggling for a right to proper and healthy environment", and against reporters and informants who provide information under the law on the Prevention and Eradication of Forest Destruction. Furthermore, the 2013 Chief Justice of the Supreme Court's Decree No. 36 on the Implementation of Guidelines for Handling Environmental Cases²⁴ recognises Article 66 of Law No. 32/2009 as anti-SLAPP provision and as protection for environmental defenders, because it allows defendants in environmental cases to object to the legal proceeding brought against him/her, in case of a SLAPP suit.

However, none of these rules provide a definition for SLAPPs and are limited to environmental cases. Further, these rules have yet to be used because they are relatively new regulations. And even with these new regulations, HRDs can still be hit with abusive defamation/libel lawsuits. Additional regulation is being contemplated by the Indonesian Ministry of Environment and Forestry. The Ministry is currently considering a draft ministerial decree (submitted in 2019) titled "The Protection of Actions to Ensure the Right to A Good and Healthy Environment" which would prevent acts of retaliation in the form of criminal sanctions, civil lawsuits, and/or other acts of retaliation against individuals, groups of people, and/or environmental organisations working to protect the environment and prevent actions that undermine the community's right to play a role in environmental protection.²⁵

Case Studies

This section explores nine SLAPP suits brought by companies against HRDs in Southeast Asia. Rather than providing a comprehensive overview of all SLAPP cases that the Resource Centre has recorded in Southeast Asia, we present this sample of emblematic / representative cases, chosen based on the strategic lessons they teach, including the kinds of legal defences that have been successful.

1. Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee (Malaysia)

In September 2013, mining company Raub Australian Gold Mining (RAGM) filed a case for libel and malicious falsehood at the High Court in Kuala Lumpur against Hue Shieh Lee, the then Vice-President of Pahang Bau Cyanide in Gold Mining Action Committee (BCAC), a Malaysian activist group. Seeking damages amounting to RM 4,500,000 (approx. USD 1.07 million),²⁶ the lawsuit alleges that Hue Shieh defamed the company by criticising its employment policies and by making statements, published by local newspapers in 2013, about cyanide spills from RAGM's facility in Bukit Koman Pahang – spills which damaged the health of local community members.

In May 2016, the Kuala Lumpur High Court dismissed the suit, ruling that the company failed to prove that Hue Shieh Lee in fact made those statements and that her statements did not amount to defamation. RAGM appealed twice. First, to the Court of Appeal (later that year), which dismissed the appeal and endorsed the lower court's reasoning and conclusions. The Court of Appeal ruled that Hue Shieh Lee "exercised her rights as an activist" and that the right to freedom of speech must be construed in light of the fact that "we now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives". The court also applied the "reasonable person" test to determine whether the statements were defamatory considering the specific circumstances in which the impugned words were published".²⁷

In October 2017, RAGM appealed before the Federal Court of Appeal, Malaysia's highest jurisdiction. In February 2019, the court upheld the ruling of the Court of Appeal, unanimously dismissed the appeal and affirmed that the defendant "was protecting the welfare of the residents". The court further noted that the company could have corrected any inaccuracy in a press release and ordered the company to pay RM 60,000 (USD14,276) in legal costs.²⁸

2. Asahi Kosei Sdn Bhd v Charles Hector Fernandez (Malaysia)

In February 2011, Asahi Kosei, the Malaysian subsidiary of a Japanese machine parts manufacturer, sued labour rights activist Charles Hector Fernandez for defamation in the High Court of Selangor, Malaysia. The HRD had published several blog posts in 2011 about the working conditions of 31 migrant workers from Myanmar who worked at the company's factory and who allegedly were not paid their full wages. The company sought RM 10 million (USD 3.3 million) in damages, in addition to a public apology, arguing that they were not responsible for the 31 Burmese workers, who had been sent/employed by an "outsourcing agent".

Meanwhile, the HRD invoked his right to speech, protected by Article 10(1) of the Federal Constitution of Malaysia. While the case was pending, the court granted the company an *ex-parte* interim injunction, ordering Hernandez to delete all blog posts mentioning the company and to refrain from posting any similar statements in the future.

Fernandez appealed the decision. Both the High Court and Court of Appeal upheld the injunction order, arguing that the blogs had the potential to continuously damage the company's reputation due to the attention they had generated among 81 international and domestic organisations which called on the company and its suppliers to respect human rights. In May 2011 the High Court ordered the defendant to pay an exorbitant cost of 10 million Malaysian Ringgit (USD 2.4 million) to the company. Later that year, parties settled and agreed that Fernandez would pay 1 RM (USD 0.25) in costs and the same amount in damages to the company. In addition, the defender had to issue a costly public apology in a local newspaper (the costs for which are reported to be between USD 5,000 – 7,000).²⁹ The defendant complied with the terms of the settlement.

3. PDZ Holdings Bhd v The Edge Communications Sdn Bhd & Others (Malaysia)

In 2018, Malaysian investment holding company PDZ Holdings brought a defamation lawsuit in front of the High Court of Kuala Lumpur against media company The Edge Communications, and two of its journalists (the defendants) in relation to three articles they published between May and July 2017. PDZ Holdings argued that it had been defamed by the media outlet and that the articles contained false statements based on rumours and unverified sources. In response, the defendants used the defence of *qualified privilege*, according to which they had the right and/or moral or legal duty to make that statement. The journalists argued that the transactions of a publicly listed company are a matter of public interest; and that they, as journalists, have a duty to report on this by giving informed opinions on the matter; and that the publication of the articles was based on true facts and was not malicious.

The High Court Judge ruled in favour of the defendants, acknowledging their *qualified privilege* and defence of fair comment, which can be invoked when the defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest as opposed to a statement of fact, and that the comment is based on true facts.

4. Peerapol Mining Co. Ltd v Khao Khuha Community Rights Network (Thailand)

Members of the Khao Khuha Community Rights Network (KKCRN) [“defendants”] protested against the operations of Peerapol Mining Company in the Khao Khuha area in Thailand, alleging that these operations had resulted in excessive dust and other environmental harms for their community. The community also sent a letter to the Prime Minister requesting the suspension of the company’s concession/permit and filed cases against public officials before the Office of the Ombudsman.

As a result, in 2011, Peerapol Mining Co. filed defamation charges in front of the local court under the Tort Act against nine members of the KKCRN, seeking 64,000,000 Thai Baht (over USD 2 million) in damages. The company withdrew their case before it could go to trial. The community members subsequently filed and won a countersuit against the company in front of the Supreme Court, seeking damages for harms to their reputation and dignity. The Supreme Court ruled in favour of the members of the KKCRN, affirming their right to protest and to file official complaints against the company. The court further noted that the residents were merely exercising their rights, and that the lawsuit brought by Peerapol Mining was damaging behaviour, not carried out in good faith, and ordered the company to pay for reputational injury caused, as well as for health and “mental damages”.

5. Tungcum Ltd. v Surapun Rujichaiyavat and five others (Thailand)

In May 2015, Thai-owned gold-mining company Tungcum Ltd. brought a civil defamation lawsuit in front of Loei Provincial Court against six members of community-based Khon Rak Ban Kerd Group (KRBKG) for protesting against the company’s operations. The HRDs had posted signs at the entrance gate to and along the road in Na Nong Bong village, calling for the closure of the gold mine and rehabilitation of the environment. The company argued that this form of protest damaged the company’s reputation and credibility, with negative implications for its valuations on the stock market, and sought 50 million Thai Baht (approx. USD 1.6 million) in damages. The defendants argued that they were exercising their constitutionally protected right to freedom of expression.

In March 2016, the court dismissed the lawsuit and ruled that erecting signs saying the company was not welcome in their community was a legitimate form of expression and as such a legitimate exercise of their constitutionally guaranteed rights.³⁰ The court also ordered the company to pay compensation to the affected families and take full responsibility for cleaning up all contamination caused and for restoring the environment to a liveable condition.

The company appealed the decision and lost. In February 2017, the Appeal Court Region IV upheld the decision of Loei Provincial Court affirming that the right to freedom of opinion – exercised in good faith and in a peaceful manner - is guaranteed under the law; and ordered the company to compensate the defendants for harms caused. The company has since filed for bankruptcy and has halted all its operations. To date, the respondents have not been compensated. In addition to the civil defamation lawsuit, the company [reportedly also filed a criminal complaint](#) against one of the villagers, Surapun Rujichaiyavat, who had been accused of harming the company’s reputation by posting on Facebook, (demanding an investigation into the legality of the mining concession and transport of ore from the mine site). The company later dropped the complaint, which could have resulted in a prison sentence of up to six years in addition to monetary fines.³¹

6. Watson Co. vs Eight local villagers from Mae Sai District (Thailand)

Watson Co. filed a tort case in the Provincial Court against members of Mae Sai Environment Protection, a community group of local villagers from the Mae Sai district in Thailand.³² The villagers had protested against the company's announced construction of a water treatment facility, which they feared would pollute a local river that was vital for their daily water needs and for agriculture. They also raised concerns regarding the company's compliance with the contract bidding process.

Watson Co. argued that the protest interrupted its company operations, leading to its failure to complete a contracted project, and sought compensation of 58,772,597.48 Thai Baht (approx. USD 1.9 million). The Provincial Court ruled in favour of the villagers, ruling that the protests were part of their right to freedom of expression, which was protected under the interim constitution (section 4) and which they had exercised in good faith because of the project's potential damage to the environment and to their health. The court noted that the actions of the villagers did not, in any way, cause harm to the company's officials or employees. Watson Co. appealed the ruling in 2018 but the appeal was dismissed because of the company's failure to pay the filing fees on time.

7. Thammakaset (Thailand)

Thai poultry company Thammakaset has filed [at least 17 SLAPPs](#) against its workers,³³ advocates and other HRDs.

One such example is the criminal defamation complaint Thammakaset filed in October 2016 with the Don Mueang Kwaeng Court in Bangkok against 14 migrant workers from Myanmar, who were former employees of the company ("the defendants"). The defendants had previously filed a complaint with the National Human Rights Commission of Thailand alleging that the company failed to pay workers minimum wage and overtime wages and had confiscated their identity documents. In July 2018, the court ruled that the defendants were not guilty of criminal defamation as they filed the complaint in good faith and without false information.

In separate investigations, the Lopburi Province Department of Labour Protection and Welfare (DLPW) and the Commission both found evidence of labour rights abuses in a Thammakaset farm. In August 2016, DLPW ordered Thammakaset to pay 1.7 million Thai Baht (approx. USD 56,000) in compensation and damages. In January 2019, the Supreme Court of Thailand upheld said order. As a result of the ruling, Thammakaset filed a flurry of lawsuits and complaints with the police, the Criminal Court and the Civil Court against over 20 individuals, including HRDs, workers and journalists for allegedly defaming the company.

Another example is the [criminal and civil defamation complaints](#) brought in 2018 by the company against HRDs Nan Win and Sutharee Wannasiri for bringing attention via social media to labour rights abuses at a Thammakaset-owned chicken farm in Thailand;³⁴ and the [criminal defamation complaints](#) against Puttanee Kangkun and other HRDs.³⁵ Puttanee faces up to 28 years' imprisonment and/or 2.8 million Thai Baht (USD 93,300) in fines for alleged violations under Thailand's Criminal Code (sections 326 and 328).



"It is also the responsibility of international brands that buy from Thailand to make sure the companies they are sourcing from are not engaged in judicial harassment that creates a chilling effect on whistleblowers and other defenders. They should establish mechanisms that allow workers and defenders to communicate with the brands directly and ensure that they are protected from any retaliation from suppliers during the investigation. The results should be made public and bring accountability for the abuses."

– Sutharee Wannasiri ([2019 Interview](#))

8. Natural Fruit Company v Andy Hall (Thailand)

In February 2013, Natural Fruit Company filed the first of several lawsuits against migrant rights activist Andy Hall, alleging criminal and civil defamation, as well as violation of Thailand's computer crimes laws ([Natural Fruit Company lawsuit \(re defamation suits against Andy Hall, Thailand\)](#)). Natural Fruit's allegations are based on Mr. Hall's contribution to a Finnwatch report titled "Cheap has a High Price". This report claimed that a number of Natural Fruit's employment practices violated the human rights of its workers, including confiscating workers' passports and identity papers, paying wages below the legal minimum wage, requiring employees to work excessive hours without adequate pay, and physical abuse from superiors. Natural Fruit rejected Finnwatch's findings, and claimed it suffered reputational harm in Thailand and abroad.

In July 2013, Natural Fruit filed another set of criminal and civil lawsuits against Mr. Hall for allegedly defaming the company during an interview he gave to Al Jazeera in June 2013 while in Myanmar. Natural Fruit acted as a joint prosecutor in the criminal case against Mr. Hall. In 2018, the court dismissed the criminal defamation lawsuit, accepting that the Finnwatch report contained information that should be made public. The company appealed and the appeals court allowed the civil defamation claims to proceed. The court ordered Mr. Hall to pay 10 million Thai Baht (USD 313,000) in damages.

Mr. Hall filed counter-lawsuits against state prosecutors and a police officer for wrongful and malicious conduct in their investigation relating to the Al Jazeera interview; and against three Natural Fruit executives and an attorney working at the company for allegedly filing a false criminal defamation claim related to the Al Jazeera interview. In this context it is important to highlight the positive role of Finnish retailer S Group (a former buyer of Natural Fruit), which [testified in support](#) of Mr. Hall in 2016, and took a range of other actions to support him. (Our interviews with Andy Hall and Lea Rankinen from S Group are available [here](#)).

9. PT Multi Sarana Agro Mandiri (MSAM) v. Muhammad Yusuf (Indonesia)

Another [case was brought in Indonesia](#) in 2018 against local journalist Muhammad Yusuf, who reported on a dispute between local residents and PT Multi Sarana Agro Mandiri (MSAM), a company which bulldozed their land to make way for the development of a massive palm oil plantation in Indonesia. After MSAM reported the journalist to the police, he was arrested on charges of hate speech and defamation (for which he could face up to six years in prison and a 1 billion rupiah (USD 72,000) fine). He died of a heart attack while awaiting trial for five weeks in police custody.

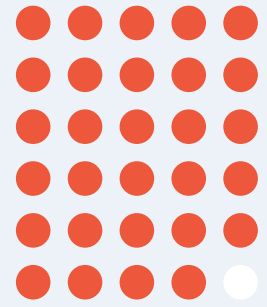
I Aggressive Company Tactics

The above case studies reveal a range of common and particularly aggressive SLAPP tactics employed by companies against HRDs. Companies typically seek disproportionate remedies and sanctions can be severe. They often seek high monetary damages, exploiting their economic advantage. The cases brought by Tungkum (50 million Thai Baht, approx. USD 1.6 million) and Watson (58,772,597.48 Thai Baht, approx. USD 1.9 million) illustrate this. The damages sought by the companies in this case are equivalent to 156,250 and 186,580 days of work for a minimum wage earner, respectively, based on prevailing provincial [minimum wage levels](#).

Companies also regularly appeal court decisions that are not in their favour. While companies have the right to appeal court decisions to higher courts, the systematic nature of this approach further illustrates the inequality of wealth and resources between companies and HRDs. These appeals further drag out lengthy legal proceedings which exhaust the resources of HRDs. In most of the above-mentioned case studies that made it to trial, the company appealed at least once (such as in the lawsuits filed by Watson, Tungkum and Natural Fruit),³⁶ often twice or more (such as in the lawsuit brought by Raub Australia Gold Mining in Malaysia). Further, companies often burden defenders with multiple SLAPPs, as evidenced in the cases of Natural Fruit and Thammakaset.

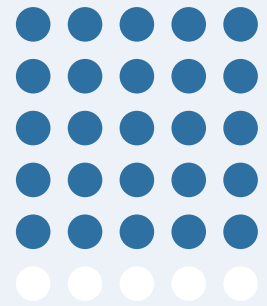
Lawsuits are often accompanied by other types of attacks against defenders, such as intimidation, threats, smear campaigns, and various forms of judicial harassment, which include both civil and criminal legal action. Out of the 30 SLAPPs we have recorded in Southeast Asia, at least 29 included criminal complaints in addition to civil lawsuits. The majority of these lawsuits were brought by companies in the agriculture and mining sectors (19 and six respectively).³⁷

The case studies also show that companies abuse existing laws, especially on libel and other types of defamation, to silence critics. At least 25 were brought using such legislation. Other allegations typically include racketeering, conspiracy, invasion of privacy/privacy rights and others. In some cases, companies weaponised international civil society solidarity efforts, treating them as aggravating the alleged acts of defamation. In the case of the SLAPP brought by Asahi Kosei against Charles Hector Fernandez in Malaysia,³⁸ the company argued that the 81 international and domestic organizations which called on the company to respect the human rights of its workers - in response to the defenders' reporting - had damaged the company's reputation.



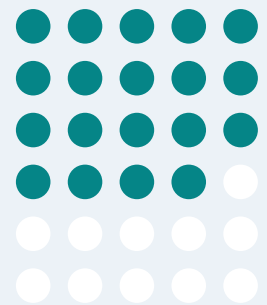
29/30

cases involved filing a **criminal complaint** in addition to a civil lawsuit



25/30

cases are based on libel and other defamation laws



19/30

cases are brought by companies working in the **agriculture sector**

The court ruled in favour of the company even before making a final determination as to whether Mr. Fernandez intended to defame the plaintiff.

Finally, companies target a wide range of dissenting voices to stifle all kinds of criticism. They bring SLAPPs not only against human rights activists or communities, but also target the lawyers who defend them, the NGOs which advocate on their behalf, the journalists who report on their advocacy, and even expert witnesses who share their views.³⁹ Often companies target both individuals and the organisations they work for, such as in the above example of PDZ holdings, which sued the journalists as well as the media outlet they work for.

I Legal Defence against SLAPPs

Given the absence of anti-SLAPPs legislation in most countries in Southeast Asia, lawyers have used strategies that are firmly based on existing legal frameworks and principles to successfully defend HRDs in courts.

While all of these defences can ultimately help to get the case dismissed, it is important to note that they do not address the immediate effects of a SLAPP (including the high costs imposed on the defendant to litigate the case for years; the stress of being in litigation and the invasiveness of having to go through discovery). The act of being dragged through litigation can be enough to silence HRDs, even if the case against them is ultimately dismissed.

Constitutional Rights

The most commonly-used legal defence in the region is based on constitutional rights such as freedom of expression, peaceful assembly and/or association. In Thailand, where constitutional norms can be invoked directly to claim rights (in the absence of specific legislation) Section 4 of the country's 2014 Constitution proved to be a useful defence in both the Watson and the Tungkom cases to assert the defendants' rights to freedom of expression. In Malaysia, lawyers successfully used freedom of speech as a legal defence in the SLAPP brought by Raub Australian Mining.

Qualified Privilege

In addition to constitutional rights, invoking fair comment and *qualified privilege* can be an effective defence against SLAPPs, in particular in the case of statements made by journalists. In the case of PDZ Holdings Bhd v The Edge Communications & Others, defendants successfully relied on a 2018 judgement which affirmed that fair comment can be invoked “[i]f a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact”, and that “everyone is entitled to make fair comment” in “a matter of public interest”.⁴⁰ According to the ruling, “whenever a matter is such as to affect people at large, so that they may be legitimately

interested in, or concerned by, what is going on or what may happen to them or to others, then it is a matter of public interest”.⁴¹ The judgement further clarified that “the comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the Defendant to prove that the underlying facts are true”.⁴²

With that said, it is at the discretion of the courts to determine whether a statement or action meets the public interest test, e.g. whether it affects the people at large. Lawyers have raised concerns that using public interest arguments in cases relating to particularly small minority groups or communities might be challenging. Given the court’s discretion in cases of *qualified privilege*, it is up to the court to determine whether issues that affect only a small number of people can be considered matters of public interest.

Anti-SLAPPs procedures

Despite the above-mentioned successful defence strategies, the lack of legislation specifically designed to protect HRDs against SLAPPs means that lawyers have limited means to immediately seek dismissal of these cases in most countries in the region. This undermines their ability to get SLAPPs dismissed in their own right, to highlight their frivolous nature and to expose companies’ judicial harassment.

In the few countries where anti-SLAPPs legislation or procedures do exist (such as Indonesia, Thailand and the Philippines),⁴³ our research has not found many examples in which they have been used as part of as legal defence. This may be because they are too recent to have been tested (as is the case in Thailand) and/or because lawyers revert to constitutional rights as illustrated above. However, we have not been able to find any conclusive evidence to support this hypothesis.

In the Philippines, where anti-SLAPP provisions were introduced in court-mandated environmental rules, lawyers we spoke to found that judges’ training and the existence of jurisprudence are just as important as getting the rules in place.

In one case in the Philippines involving a long drawn out legal battle to shield a protected watershed area from the impacts of mining activities, a mining company filed a series of civil, criminal and administrative suits against the town mayor, and against leaders of local organisations working to protect the watershed.⁴⁴ According to the lawyer of some of the local organisations, they struggled to get judges to recognise the new anti-SLAPPs rules due to the lack of precedent on how they should be applied, with some judges recusing themselves from the case. One trial court judge asserted that the rules applied only to environmental courts, and not regular courts (there is no such restriction under the rules). The SLAPP defence was not recognised by the lower court, thus allowing the case to continue. The case was elevated to the Court of Appeals, where the environmental advocates eventually got the dismissal they sought, but only six years after the SLAPP cases were filed. As a result, a number of the environmental litigants and witnesses ended up withdrawing their participation from the case, some of them for fear of further attacks by the company.

Counter Lawsuits

To expose the frivolous nature of SLAPPs and seek damages for the harm suffered, HRDs across Southeast Asia have successfully brought counter-lawsuits on several occasions. For example, in response to the SLAPP brought by Peerapol Mining against members of Khao Khuha Community Rights Network, the latter filed and won a lawsuit against the company in front of the Thai Supreme Court, who ordered Peerapol Mining to pay for reputational injury caused, as well as for health and mental damages.

The [countersuits](#) filed by HRD Andy Hall in response to the SLAPPs brought against him by Natural Fruit are still pending.

| The Courts as a Rights Champion

In some cases, the courts across Southeast Asia have exacerbated the judicial harassment of HRDs by ruling in line with abusive allegations made by companies. A case in point is the SLAPP brought by Asahi Kosei against Charles Hector Fernandez, in which both the High Court and the Court of Appeal upheld the injunction order requesting that the defender take down his blog posts. The courts reasoned that these statements had the potential to continuously damage the company's reputation.

However, in many of the cases examined, the courts have played a critical role in protecting HRDs from SLAPPs by affirming their constitutional rights, and acknowledging the importance of their work for the public interest; and in some cases, by criticising the companies involved, as outlined below.

Constitutional Rights

In the case of Raub Australian Gold Mining in Malaysia, the court ruled in favor of the defendants, recognising that activists have contributed much to the general wellbeing of society. The court noted that transparency and accountability are part of a "liberal society" and that the constitutional right to freedom of speech must be "construed in that context." In the SLAPP brought by Tungcum, the court ruled that by protesting and putting up signs the defendants were asserting their constitutional right to a healthy environment. In the Watson case, the court affirmed the defendants' constitutional right to freedom of expression under the Thai constitution.

Harm & Good Faith

In several of the case studies courts dismissed libel and other defamation cases, ruling that the companies failed to provide evidence to demonstrate actual harm caused by the defendants (e.g. in the Tungcum case) and affirmed that the defendants were acting in good faith (e.g. both the Tungcum and Watson cases).

Condemning Company Tactics

In some cases, courts have gone beyond determining the legal facts and have criticised the company for bringing a SLAPP suit against the defenders. This was the case in the counter-lawsuit filed by the members of the Khao Khuha Community Rights Network (KKCRN) in response to the SLAPP by Peerapol Mining Co. In this lawsuit, the court upheld the rights of the community to protest and file official complaints against the company. Without explicitly referring to the lawsuit as a SLAPP, the court affirmed that the company's act of suing residents who were merely exercising their rights constituted damaging behaviour that was not carried out in good faith.

In the case of Tungcum, the court affirmed the constitutional rights of community members to protect their natural resources as well as their right to protest and seek remedy and rehabilitation when their environment is damaged. The court ordered the company to pay compensation to the affected families and take full responsibility for cleaning up all contamination caused and for restoring the environment to a livable condition.

In the counter-lawsuit brought by members of the KKCRN in response to the SLAPP filed against them by Peerapol Mining, the Supreme Court affirmed that the KKCRN members were merely exercising their right to protest. The court further noted that the lawsuit brought by Peerapol Mining against the residents constituted damaging behaviour carried out in bad faith and ordered the company to pay for reputational injury caused, as well as for health and mental damages.

III: Key Takeaways & Recommendations

SLAPPs are an expression of the profound inequality of power and wealth between companies on the one hand, and communities and workers on the other. Rather than addressing endemic human rights abuses in their operations and supply chains, unscrupulous companies seek to silence those who expose and work to protect against such abuse. SLAPPs constitute a powerful weapon to silence by forcing defendants into a costly fight for their freedom of expression and their organisations' existence. Companies target a wide range of dissenting voices to stifle all kinds of criticism.

SLAPPs are an abuse of the law, not a legitimate use of the law. Unscrupulous companies in Southeast Asia and beyond abuse existing legal frameworks and laws, such as those on libel and other types of defamation, to pursue expensive and demoralising legal proceedings. Companies typically exploit their economic advantage and seek high monetary damages, file more than one SLAPP and appeal any court decisions that are not in their favour, further prolonging lengthy and costly court proceedings. SLAPPs are often accompanied by other types of attacks against defenders, in some cases perpetrated by the state, such as intimidation, threats and various forms of judicial harassment, including both civil and criminal legal action.

On the other hand, it is important to recognise the role responsible business can and does play in creating a safe environment for defenders to raise issues and even to defend them when they are being harassed. There have also been some encouraging legal developments in the region, such as in Thailand, the Philippines and Indonesia. However, to date lawyers have made only limited use of these laws and procedures and have reverted to using traditional legal strategies built around constitutional rights.

As this study has shown, lawyers across the region have referred to the rights of freedoms of expression, including speech and protest, along with other constitutional rights, to protect HRDs against SLAPPs. This has proven to be a successful strategy in several cases. Other successes were based on invoking legal principles such as *qualified privilege* and by filing counter lawsuits to seek damage for the harms suffered. Moreover, courts have played a critical role in protecting HRDs from SLAPPs in Southeast Asia. While courts did not use the terminology of SLAPPs in any of the cases examined, they did affirm that human rights are central to the claims brought, repeatedly affirmed defenders' constitutional rights, and acknowledged the importance of their work for the public interest. In some cases, courts have gone beyond determining the legal facts and have criticised the company for bringing a SLAPP against the defenders.

These successes notwithstanding, the research has also demonstrated that weak or non-existent legal frameworks perpetuate companies' judicial harassment with impunity. The lack of anti-SLAPP frameworks around the world, and the limited use of these laws where they do exist, means that lawyers have limited tools at their disposal to fight SLAPPs in the courts. This undermines their ability to get SLAPPs dismissed in their own right, to highlight their frivolous nature and to expose companies' judicial harassment. Meanwhile, courts have limited avenues to dismiss SLAPPs before proceeding to a full-fledged trial, which is typically lengthy and costly. This gap in legal protection enables companies to manipulate the judicial system by taking advantage of the high costs and time that it takes to litigate a case, thus exhausting defenders' human and financial resources without fearing any financial or legal

consequences. In countries where businesses and the state are very closely linked, companies may also abuse this relationship to pressure the state to bring criminal charges against defenders.

In order to effectively fight SLAPPs – both in Southeast Asia and globally – we need robust legal frameworks and policies that prevent companies from filing SLAPPs in the first place and allow courts to identify, call out and dismiss them as soon as they are filed. To make this happen, governments, businesses and investors, alongside defenders and civil society (and the lawyers who defend them), need to act decisively for the protection of civic freedoms and human rights defenders.

Recommendations:

Legal Advocates & Civil Society should

- Where specific anti-SLAPP provisions do not exist use existing legal and constitutional norms on freedom of expression, association, and peaceful assembly to defend against SLAPPs.
- Where anti-SLAPP provisions exist, familiarise themselves with their implications in cases where fundamental rights are impacted.
- Consider filing counter-lawsuits against companies to redress harm caused by SLAPPs and to organise communities and encourage them to assert their rights through legal action.
- Demonstrate company practice that might indicate bad faith (such as previous SLAPPs filed by the company), whenever relevant and feasible.
- Raise awareness about SLAPPs at the local, regional and international levels.
- Work together in coalitions to let companies know that SLAPPs will unite (rather than divide) civil society and amplify (and not silence) advocacy.
- Carry out training and awareness building for lawyers and judges to inform them about SLAPPs tactics.

Governments should

- Protect and facilitate the rights to freedom of expression, assembly and association, including of HRDs and the journalists who report on these rights.
- Enact anti-SLAPPs legislation, which provides definitions for SLAPPs and HRDs and which allows an early dismissal (with an award of costs) of such suits and the use of measures to penalise abuse.
- Ensure the protection and immunity of expert witnesses who are required to testify in courts.
- Ensure that the judiciary is aware of SLAPPs and empowered to take action to dismiss them.
- Provide support to HRDs who are facing SLAPPs and consult them on anti-SLAPPs efforts.

Companies should

- Refrain from and commit to not using SLAPPs or other forms of judicial harassment to shut down public participation and critical advocacy.
- Communicate that they expect their business partners not to bring SLAPPs with the intention of silencing critics, continuously monitor their use and act consistently on their findings.
- Commit to a clear policy of non-retaliation against HRDs or organisations that raise concerns about the company and its business practices and adopt a zero-tolerance approach on reprisals and attacks on HRDs not only in their operations but also when they are linked to such attacks through their value chain and business relationships.
- Implement due diligence procedures for the prevention of harm and human rights abuse of individuals, communities and the environment, which explicitly recognises the risks to HRDs. Companies that invest or work in districts and/or sectors with high levels of attack need to prioritise the risks to HRDs in their human rights due diligence and act consistently on their findings.
- Insurance (and other companies) should commit not to finance SLAPP litigation.
- Law firms should undertake rigorous due diligence to ensure that the cases they take on are not SLAPPs and refrain from representing companies in SLAPP suits against HRDs

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.
- 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.
- Communicate that they expect investee companies will not bring lawsuits with the intention of silencing critics, continuously monitor their use, and act consistently on their findings.
- Encourage companies to (1) engage with peers and policy makers, especially through multi-stakeholder initiatives that could increase their understanding of the importance of HRDs' work, and of industry best practice; and (2) not to be part of organisations and lobby groups that target or otherwise undermine civil society organisations and individual defenders.

Bar Associations should

- Update ethics codes to ensure that SLAPPs are a sanctionable offence, stipulating that lawyers who use these abusive tactics face sanctions and penalties.

References

- 1 The UN Office for the High Commissioner for Human Rights defines human rights defenders as “people who, individually or with others, act to promote or protect human rights. Human rights defenders are identified above all by what they do and it is through a description of their actions (...) and of some of the contexts in which they work (...)”. Additional details on the terminology of human rights defenders, are available [here](#).
- 2 For example, in some cases companies file a legitimate lawsuit, but then bring an abusive subpoena to intimidate the human rights defender. This also has a chilling effect, because subpoenas can require the defendant to turn over her/his internal communications, bank records, and other information.
- 3 For more information, see [Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders – Guidance for Companies](#), Business & Human Rights Resource Centre and International Service for Human Rights, August 2018.
- 4 The only sub-regions with more cases of judicial harassment were Central America, Mexico and the Caribbean with 193, and Eastern Europe & Russia with 160.
- 5 ASEAN Chief Justices’ Roundtable on Environment: [Third Roundtable](#) (2013), [Fourth Roundtable](#) (2014) and [Fifth Roundtable](#) (2015).
- 6 Our searchable and downloadable database compiles cases of HRDs working on business-related human rights issues who were attacked, harassed and killed from 2015 onwards. For more information on how we identify, select and categorize cases and how we define HRDs, click [here](#).
- 7 The Resource Centre recorded 314 instances of judicial harassment between 2015 -2019 in the Americas, including 193 in Central America, Mexico & Caribbean; 101 in South America; and 20 in North America.
- 8 The Resource Centre recorded 231 instances of judicial harassment between 2015 -2019 in Asia, including 127 in Southeast Asia; and 104 in Asia & Pacific.
- 9 Including 160 in Eastern Europe & Russia and 20 in Western & Central Europe.
- 10 Including 22 in Eastern Africa, 31 in Francophone Africa, 2 in Lusophone Africa, 21 in Southern & West Africa and 2 in other parts of Africa.
- 11 See pages 12-13.
- 12 [Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies](#), Business & Human Rights Resource Centre, Business Network on Civic Freedoms and Human Rights Defenders & International Service for Human Rights, 2018.
- 13 [Guiding Principles on Business and Human Rights](#), Principle 14.
- 14 [International Covenant on Civil and Political Right, Articles 19](#) (freedom of expression), 21 (freedom of peaceful assembly) and 22 (freedom of association).
- 15 Southeast Asia comprises the following countries: Brunei; Myanmar; Cambodia; Timor-Leste (East Timor); Indonesia; Laos; Malaysia; Philippines; Singapore; Thailand; and Vietnam.
- 16 For more information on the rise of SLAPPs in Thailand, see “[Recommendations on the Protection of Those who Exercise Their Rights and Freedoms from Strategic Lawsuits Against Public Participations](#),” Human Rights Lawyers Association, 2019.
- 17 For a list of countries that make up Southeast Asia, see supra note 15.
- 18 See [Rules of Procedure for Environmental Cases](#), Rule 6, Sections 3 and 4. Section 3 on Summary Hearing states “The hearing on the defense of a SLAPP shall be summary in nature. The parties must submit all available evidence in support of their respective positions. The party seeking the dismissal of the case must prove by substantial evidence that his act for the enforcement of environmental law is a legitimate action for the protection, preservation and rehabilitation of the environment. The party filing the action assailed as a SLAPP shall prove by preponderance of evidence that the action is not a SLAPP and is a valid claim.” Section 4 on Resolution of the defense of a SLAPP states “The affirmative defense of a SLAPP shall be resolved within thirty (30) days after the summary hearing. If the court dismisses the action, the court may award damages, attorney’s fees and costs of suit under a counterclaim if such has been filed. The dismissal shall be with prejudice. If the court rejects the defense of a SLAPP, the evidence adduced during the summary hearing shall be treated as evidence of the parties on the merits of the case. The action shall proceed in accordance with the Rules of Court.

- 19 Section 16, State Policies, Philippine Constitution.
- 20 See [Rationale to the Rules of Procedure for Environmental Cases](#).
- 21 See [Annotation to the Rules of Procedure for Environmental Cases](#).
- 22 It is worth noting that these rules only apply to cases filed by private parties; the amendment does not seem to regulate any legal action taken by the state.
- 23 [Thailand's response to the joint communication of the UN Human Right's Council's Special Procedures](#), Section III, paragraph 4 (page 5).
- 24 Chief Justice of the Supreme Court's Decree Number 36/KMA/SK/II/2013.
- 25 Retaliation as referred to in Article 7 includes, but is not limited to physical or psychological threats; counter-reporting of alleged criminal offenses; complaint of administrative violation; civil lawsuit; subpoena, and/or other actions allegedly aimed at stopping the efforts and/or actions to realize the right to a good and healthy environment.
- 26 This and all subsequent conversion rates reflect dates current at the time of the writing of this report (March 2020).
- 27 The "reasonable-man-test" considers whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would "tend to lower the plaintiff in the estimation of right-thinking members of society generally" as noted by Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240.
- 28 RAGM is no longer operating in Bukit Koman and is under liquidation. Local activists are now demanding that the government orders RAGM to clean up the operation zone and to rehabilitate the old mine.
- 29 According to [one source](#) the total cost for two half-page advertisements together amounts to RM 22,000 (USD 5,235), while [another source](#) indicated US 7,000.
- 30 The court referenced section 4 of Thailand's 2014 Constitution, which protects "human dignity, rights, liberties, and equality".
- 31 If convicted, Surapun Rujichaiyavat would have faced up to one-year imprisonment or a fine of up to 20,000 Thai Baht (USD 5,600) under Section 326 of the Thai Criminal Code as well as up to five years' imprisonment or a fine of up to 100,000 Thai Baht (USD 2,810) under the Computer Crime Act (see [here](#) for details).
- 32 The exact date this lawsuit was filed is unknown. According to our research and local sources it was filed some time between 2016-2017.
- 33 According to local sources this number is likely higher. Estimates range up to 23 cases.
- 34 16 national and international human rights organizations have called on the [Thai government to intervene](#).
- 35 These criminal complaints were filed in the Bangkok Southern Criminal Court in December 2018.
- 36 Appeal: In February 2017, the Appeal Court Region IV upheld the decision of Loei Provincial Court, stating that "[R]ights to freedom of opinion in good faith and peaceful manner are guaranteed under the law". The Appeal Court also adopted the rulings and observations of the Provincial Court and ordered the company to compensate the respondents for harms done.
- 37 30 SLAPPs divided by sector: Agriculture: 19; Mining: 6; Fertiliser: 2; Clothing: 1; Food & Beverage: 1; Candy: 1.
- 38 See case study 2 on page 15.
- 39 Even expert witnesses in trials have been subjected to judicial harassment. In one infamous example in 2018, former Indonesian governor Nur Alam [sued environmental expert Basuki Wasis](#) over an expert testimony he gave on the value of environmental degradation caused by the operations of PT. Anugerah Harisma Barakah, a company for which Nur Alam had illegally issued mining exploration permit. In this case, the court sided with the defendant and ruled that expert testimonies must be immune from suit. Importantly, this case fuelled calls for Indonesia to adopt robust anti-SLAPP regulation.
- 40 Dato' Sri Dr. Mohamad Salleh bin Ismail & 1 Anor v Nurul Izzah binti Anwar & 1 Anor [2018] 1 LNS 171. Judgment by Abang Iskandar JCA (para 58).
- 41 Ibid.
- 42 Ibid.
- 43 See Part 2, Legal Landscape Section (pages 12-13) for details.
- 44 Hotchkiss, et. al. vs. Hon. Ridgway Tanjili, CA-G.R. SP NO. 05386-MIN; related interviews on file.

About this Report

As an organisation dedicated to advancing human rights in business, the Business & Human Rights Resource Centre seeks to end corporate impunity for human rights abuses. Our Corporate Legal Accountability (CLA) programme, which highlights significant lawsuits related to business and human rights across the world, is one of our tools for achieving this goal. We view lawsuits both as a means through which communities and workers assert their power, and as a key driver of positive change in corporate behaviour.

A vital part of our corporate legal accountability work is tracking lawsuits that challenge companies' human rights abuses. Every year, we publish an Annual Briefing that highlights the work of our allies in the legal practice. By analysing their experiences and findings, we aim to spark discussion, debate and, ultimately, further action by other advocates and practitioners. This year's Briefing focuses on Strategic Lawsuits Against Public Participation (SLAPPs) brought by companies against HRDs in Southeast Asia with a view to silencing and intimidating them.

This report provides an in-depth analysis of nine emblematic case studies from the region, and outlines the legal framework in which these lawsuits are brought, including emerging anti-SLAPPs regulation. The briefing also examines the legal and other tactics companies have used to silence HRDs; and analyses the legal strategies that lawyers have employed to successfully defend against SLAPPs while highlighting the role that courts have played in the region in either allowing or dismissing SLAPPs. Finally, the briefing provides recommendations and strategies that will (1) empower human rights defenders and the lawyers and advocates who represent them to better defend against SLAPPs and (2) influence action by governments that will discourage companies from using SLAPPs.

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Annex:

List of SLAPPs resources

- **Business and Human Rights Resource Centre:** [Silencing the Critics: How big polluters try to paralyse environmental and human rights advocacy through the courts.](#)
- **Protect the Protest:** [An Activist's Guide: Reducing Exposure to SLAPP Lawsuits.](#)
- **Center for Environmental Rights and others:** [Asina Loyiko: Activists unite against corporate censorship and bullying campaign.](#)
- **Human Rights Lawyers Association:** [Recommendations on the Protection of Those who Exercise Their Rights and Freedoms from SLAPPs.](#)
- Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association of United Nations: Info Note: SLAPPs and FoAA Rights.
- **Campaign:** ['On ne se taira pas' / 'We will not be silent'.](#)