



Environmental rule of law and human rights in Asia Pacific: Strategic litigation against public participation (SLAPPs)

Summary for Decision Makers

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Overview

This Summary for Decision-makers is based on the United Nations Environment Programme (UNEP) Working Paper, *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders*.¹ It presents trends in the application of the environmental rule of law and human rights, with a particular focus on the use of strategic lawsuits against public participation (SLAPPs or SLAPP suits) against environmental human rights defenders (EHRDs).

The realization of human rights and the environmental rule of law is recognised in this *Summary* as being essential for the achievement of the Sustainable Development Goals (SDGs), and especially SDG 16. Realisation of the SDGs depends on governments upholding the rule of law, ensuring access to justice for all, and developing effective, accountable and transparent institutions, ultimately leading to the realization of gender equality and human rights for all.

The valuable role of EHRDs in advancing the environmental rule of law and contributing to the achievement of SDGs is also recognised here. This is especially so for SDG 16 and several of its indicators



that are specifically applicable to EHRDs, notably: Target 16.3, which seeks to “Promote the rule of law at the national and international levels and ensure equal access to justice for all”, and Target 16.10, which seeks to “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”.

This *Summary* recognises that SLAPPs contravene fundamental freedoms and rights, impede access to justice, threaten environmental rule of law and undermine States’ ability to realise sustainable development. SLAPPs also undermine the legitimacy of national legal systems and institutions, and breach States’ duties to protect rights and rights holders, especially EHRDs.

Key messages

- **Environmental rule of law is critical** for the protection of the environment, the promotion of the right to live in a healthy environment, and the achievement of sustainable development.
- **Environmental human rights defenders (EHRDs)** are individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna. EHRDs play an important role in the achievement of environmental rule of law and sustainable development.
- **SLAPPs are a form of judicial harassment commonly used against EHRDs;** meritless litigation used by powerful State and non-state actors for the purpose of silencing EHRDs’ legitimate challenges and critiques of their actions and decisions.
- **SLAPPs are an abuse of process and laws;** they contravene fundamental freedoms and rights, especially the rights to freedom of expression, access to justice, public participation, traditional lands and territories, a clean, healthy and sustainable environment, and equality in terms of enjoyment of rights and before the law.
- **The use of SLAPPs is increasing globally, with the Asia Pacific region having one of the highest incidence rates of SLAPPs.** Commonly occurring types of SLAPPs are business, defamation, and environment-linked SLAPPs.
- **Anti-SLAPP legal protections for EHRDs requires urgent attention throughout the Asia Pacific region.** Anti-SLAPPs measures are also needed across Asia-Pacific to support States’ realization of the environmental rule of law and prevent the undermining of sustainable development and related economic advantages.
- **Anti-SLAPP legislative mechanisms introduced by several Asia Pacific states provide examples of good practices in the region.** Of note are the procedural safeguards against environmental-linked SLAPPs expressly provided for in the Philippines Supreme Court Rules. These could be followed by other States.
- **Other strategies and mechanisms, such as invoking constitutional norms, counterclaims and qualified privilege to achieve the same purposes, offer examples of other good practices that can be supported across the Asia Pacific region.**

¹ United Nations Environment Programme (UNEP) (2023). *Environmental Rule of Law and Human Rights in Asia Pacific*:

Supporting the Protection of Environmental Human Rights Defenders. Working Paper.

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Summary outline

- **Part I** provides an overview of what constitutes a SLAPP. The common purpose of SLAPPs and principal impacts of this kind of judicial harassment are also set out in this initial discussion.
- **Part II** sets out current trends in the use of SLAPPs globally and throughout Asia Pacific.
- **Part III** explores the common features of SLAPPs, including the key distinguishing criteria, and common types, users, targets, and impacts of this type of judicial harassment. This discussion considers the use of SLAPPs to prevent EHRDs from exercising their environmental rights, e.g., access to justice, freedom of expression, a healthy environment, public participation, and Indigenous peoples and local communities' rights over their traditional lands, territories, and natural resources.
- **Part IV** identifies key impacts of SLAPPs, with specific focus on EHRDs and the duties of States and non-state actors.
- **Part V** reviews good practice responses to the rising use of SLAPPs, with a focus on existing anti-SLAPP legislative measures in several Asia Pacific states. Other examples of anti-SLAPP good practices are also identified. This discussion highlights existing legislative and other practical pathways for countering the rising use of SLAPPs in Asia Pacific.
- **Recommendations** for anti-SLAPP legal and policy reforms in the Asia Pacific region are set out at the end of this summary.

Introduction

Deliberate misuse of legal systems, courts and tribunals lies at the heart of strategic lawsuits against public participation (SLAPPs or SLAPP suits). Rather than seeking a genuine legal remedy, the risks and high costs of litigation provide a convenient way to impede or stop public criticism and debate. SLAPPs are used by powerful actors to discourage or prevent EHRDs from challenging or criticising their environmentally harmful decisions and activities.

States and other powerful actors are deliberately engaging in meritless litigation to stifle public debate, free speech, protest against major developments and natural resources exploitation, and more generally to reduce civic space² and “repress dissenting voices”.³ Intentional, calculated misuse of legal systems, courts and judicial officers in this way typically constitutes an abuse of laws and procedures.

A growing body of evidence suggests that judicial harassment of this kind is fast becoming commonplace throughout many regions of the world, with Asia Pacific having one of the highest incidence rates of SLAPPs.⁴ SLAPPs are seen by the UN Special Rapporteur on the situation of human rights defenders as “a staple in the manipulation of the judicial system”.⁵

A key impact of SLAPPs is the ability of powerful actors to redirect the focus of their actions away from the public space by redirecting them into the complexities of the legal system and the courts. As civic space

continues to shrink in many parts of the region, increased use of “chilling” SLAPP suits poses a significant risk for informed public discourse and participation. Environmental rule of law, the international and national standing of States, legitimacy of human rights and other legal institutions, and sustainable development are thus all coming under increasing pressure.

The rising global incidence of SLAPPs is being met by a trending rise in the introduction of anti-SLAPP measures aimed at combating the improper use of courts valuable time and often constrained resources.⁶ In addition to long-standing anti-SLAPP laws in the USA and Canada, several States in Asia Pacific have introduced anti-SLAPP measures, e.g., Australia, Indonesia, the Philippines, and Thailand. Some other jurisdictions are in the process of introducing anti-SLAPP legislative measures to counter the growing use of this form of judicial harassment, e.g., the EU and UK.

Adoption of robust anti-SLAPP laws can directly counter the unproductive and vexatious use of litigation and the improper co-opting of courts by SLAPP suit users. These laws are essential to safeguarding and upholding the environmental rule of law and environmental rights. In turn, such measures are critical enablers of the capacity of States to realise sustainable development and support economic prosperity throughout Asia Pacific.

² Business & Human Rights Resource Centre (BHRRC) (2021).

³ International Center for Not-for-Profit Law (2020), 18.

⁴ For examples of SLAPPs from around the world, see BHRRC's *SLAPP Database*.

⁵ BHRRC (2021), **Error! Bookmark not defined.** 4, quoting UN Special Rapporteur on the situation of human rights defenders (UN SRHRDs) (M Lawlor).

⁶ See e.g., discussion in Centre for Free Expression (2023).

The UNEP *Working Paper*⁷ sets out essential background to this discussion of SLAPPs. In addition to the growing recognition of the linkages between human rights and the environment, the *Working Paper* also provides an overview of environmental rights, especially right to a clean, healthy and sustainable environment, and the important role of EHRDs' contributions to States' achievement of environmental rule of law and sustainable development.

I. What are SLAPPs?

Generally speaking, SLAPPs are a particular type of judicial harassment that enables powerful public and private actors to make improper use of legal systems and the courts and tribunals to discourage or prevent legitimate public criticism of their decisions and activities. As stated in UNEP *Working Paper Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders (UNEP Working Paper)* the term judicial harassment does not refer directly to the actions of courts and decisions of judges, but to government, private sector and other entities that use the court system to harass EHRDs.⁸

Originating in the USA in the 1980s,⁹ SLAPPs were initially described as "civil lawsuits that are filed against non-governmental organisations or individuals who have communicated their views to a government body or official on an issue of some public interest".¹⁰ Nowadays, as a particular form of judicial harassment, SLAPPs are used in both criminal and civil cases. SLAPPs are regularly "threatened or brought in defamation law", as well as used increasingly through the misuse of "data protection and privacy law" against free speech.¹¹

In 2021, as part of a capacity building and knowledge sharing event with international organisations and experts from Indonesia, Malaysia, the Philippines, and Thailand, SLAPPs and their impacts were defined in the following terms:

"SLAPP" refers to lawsuits undertaken with the principal objective of curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action, including in the human rights area.

SLAPP lawsuits typically have a "chilling effect" on the exercise of freedom of opinion and expression;

freedom of peaceful assembly; and the right to take part in the conduct of public affairs.¹²

According to other recent commentary, SLAPPs are "meritless or vexatious lawsuits and other forms of legal action initiated by state organs, business corporations and individuals in power against weaker parties – journalists, civil society organisations, human rights defenders [HRDs], and others – who express an opinion or convey information on a public matter that is perceived as unfavourable or otherwise uncomfortable to the powerful".¹³

Other descriptive examples of SLAPPs include:

A form of retaliatory lawsuit intended to deter freedom of expression on matters of public interest.¹⁴

Lawsuits undertaken with the principal objective of curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action, including in the human rights area.¹⁵

Groundless or abusive lawsuits, disguised as defamation actions or alleged constitutional and/or civil rights violations that are initiated against journalists or activists because they exercise their political rights and/or their freedom of expression and information regarding matters of public interest or social significance.¹⁶

An abuse of law and procedure as their principal objective is stifling public debate, rather than the pursuit of a legal remedy.¹⁷

[L]egal claims that are typically initiated by a powerful actor (a state body/official, high-profile individual or firm) to intimidate and silence weaker parties who criticise or disseminate public interest messages unfavourable to them.¹⁸

II. Trending use of SLAPPs

1. Global growth in SLAPPS

According to recent reports and responses by various States, supranational institutions such as the United Nations and European Union, and organisations such as the International Commission of Jurists, Business and Human Rights Research Centre, SLAPPs are routinely being used throughout the world in both civil

⁷ UNEP (2023).

⁸ *Ibid*, 13.

⁹ Canan and Pring (1988).

¹⁰ Pring and Canan (1996); Canan and Pring (1988).

¹¹ United Kingdom Ministry of Justice (2022).

¹² International Commission of Jurists (2021).

¹³ Bayer *et al* (2021). See also: Bárd *et al* (2020); Canan and Pring (1988).

¹⁴ Borg-Barthet *et al* (2021).

¹⁵ International Commission of Jurists (2021).

¹⁶ European Parliament (2022).

¹⁷ United Kingdom Ministry of Justice (2022).

¹⁸ UNESCO (2022).

and criminal contexts. For example, in a 2021 Report on the global use of SLAPPs identified more than 3000 recorded “attacks worldwide against community leaders, farmers, workers, unions, journalists, civil society groups, and other defenders who have raised concerns about irresponsible business practices”.¹⁹ Key findings of the 2021 study reported the incidence of SLAPPs – numbers and locations – between 2015 and 2021, observing that during this six-year period:

- “355 cases” were identified in this study as: (i) bearing the “hallmarks of SLAPPs”; and (ii) “brought or initiated by business actors against individuals and groups related to their defence of human rights and/or the environment”.²⁰
- More than 60% of cases “involved criminal charges, the majority libel or other defamation charges”.²¹
- Over 80% of SLAPPs were brought against individuals.²²
- More than 60% of “individuals and groups facing SLAPPs” had “raised concerns about projects in four sectors”: (i) mining; (ii) agriculture and livestock; (iii) logging and lumber; and (iv) palm oil.²³
- “Many of the lawsuits include aggressive and disproportionate remedies, such as an excessive amount of damages, a hallmark of SLAPP cases”, e.g., damages sought by SLAPP users - in only 82 of the 355 SLAPP cases identified in this study - amounted to “more than US\$1.5 billion”.²⁴

2. Use of SLAPPs in Asia Pacific

Recent studies have confirmed the growing use of SLAPPs across the Asia Pacific region. For example, a 2020 study reported the emergence of “a clear geographic concentration of reported SLAPPs in our sample, with 69 cases (84%) filed in Asia, including 33 cases (40%) in Thailand, 18 cases (22%) in India, and 9 cases (11%) in the Philippines”.²⁵ In 2021, the Asia Pacific region was reported as the second highest incidence of SLAPPs globally (see Figure 1 above).²⁶ In December 2021, the International Commission of Jurists confirmed this trend, noting a “worrisome proliferation of SLAPP and related defamation lawsuits used against journalists, human rights defenders, activists, and expert witnesses in Indonesia, Malaysia, Thailand and the Philippines”.²⁷

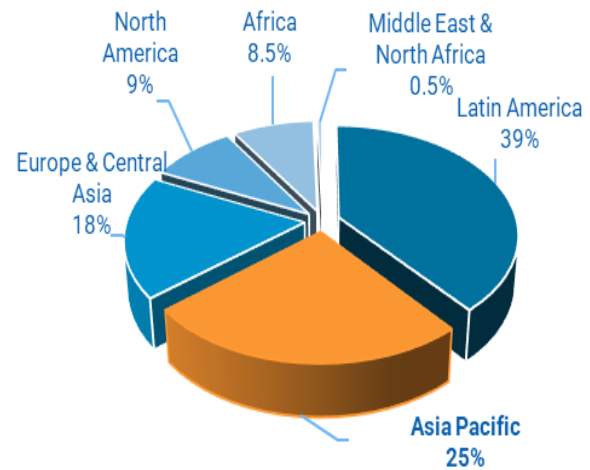


Figure 1 Global and regional incidence of SLAPPs²⁸

A 2022 *Briefing* on human rights defenders confirmed the ongoing nature of this disturbing trend of abuse, reporting that:

- Nearly 70% of attacks recorded in the region were against land, environmental, and climate rights defenders, and almost three in 10 attacks were against women HRDs.²⁹
- Many attacks in Southeast Asia followed HRDs’ legitimate participation in peaceful protests ... or were linked to denial of freedoms of expression ... and association....³⁰
- Judicial harassment - including arbitrary detention, criminalisation, and SLAPPs - is the most common type of attack against HRDs in Asia-Pacific, as it is globally. Judicial harassment comprised three in five attacks recorded in the region between January 2015 and December 2021. Over 100 of these attacks were lawsuits bearing the hallmarks of SLAPPs.³¹

As with global trends in SLAPP users, this legal tactic is regularly being used by powerful public and private actors associated with the mining, agribusiness, and logging sectors in Asia Pacific.³² Public actors in some parts of the region are also engaging in the use of SLAPPs. On the one hand, in light of the paucity of legal definitions of SLAPPs and lack of anti-SLAPP legislative instruments throughout Asia Pacific, it is not surprising that the use of this legal tactic is on the rise. However, it is concerning that this trend is occurring in a region where the majority of States are parties to the key international human rights treaties, notably the

¹⁹ BHRRC (2021), 8.

²⁰ Ibid, 7, 8.

²¹ Ibid, 12.

²² Ibid, 7.

²³ Ibid, 7.

²⁴ Ibid, 13.

²⁵ BHRRC (2020a).

²⁶ Ibid.

²⁷ International Commission of Jurists (2021).

²⁸ BHRRC (2021), 7.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid, 2-3.

³² BHRRC (2021).

International Covenant on Civil and Political Rights (ICCPR)³³ and International Covenant on Economic, Social, and Cultural Rights (ICESCR),³⁴ and have constitutional provisions that expressly recognise the rights of access to justice and a fair trial, and rights to freedom of expression, peaceful assembly, and association.³⁵ Some States also recognise the right to a healthy environment and/or corresponding environmental duties.³⁶

3. Rising use of criminal defamation-linked SLAPPs: A global and Asia Pacific trend

According to a recent UNESCO report, entitled *The 'misuse' of the judicial system to attack freedom of expression: trends, challenges and responses*, a concerning development in the context of SLAPPs is the global rise in the “use of criminal defamation offences to restrict online expression”.³⁷ UNESCO also draws attention to a corresponding growth in the use of criminal defamation laws in Asia Pacific.³⁸

As explained further in Box 1 (below),³⁹ this type of SLAPP largely stems from the use of national laws containing “insult provisions that increase protection for public officials or that grant similar safeguards to State institutions”.⁴⁰ Such provisions are being used “by powerful actors to silence criticism, limit public discussion and protect interests, rather than to legitimately ensure respect for the right of reputation”.⁴¹

Despite repeated calls from the Human Rights Council, UN Special Rapporteurs, and other international bodies seeking the abolition of criminal defamation and libel laws, a number of States “have harshened or reintroduced provisions on libel, defamation and insult by stating new laws intending to address cybersecurity, “fake news” and “hate speech”, all of which has “a chilling effect on freedom of expression and journalists’ work”. More specifically, UNESCO notes the increase in “abusive practices such as “forum shopping” and SLAPPs by powerful actors that want to “silence critical voices and undermine scrutiny”.⁴²

Box 1 Criminal Defamation-linked SLAPPs in Asia Pacific

In Asia and the Pacific, 38 out of 44 UNESCO Member States retain criminal defamation, 6 having repealed it and an additional one having advanced a partial repeal.¹ There has been instances of back-and-forth in a number of countries. In most States in South, South East and East Asia, defamation can be handled via the civil and/or criminal route and criteria to determine when a case can be considered a criminal offence is often unclear, which is conducive to abuse. The introduction of defamation legislation in this sub-region is sometimes motivated by political retaliation.

The rise in the application of defamation and related provisions to online speech, including through the adoption of new laws, has also caused international alarm. A group of UN Special Procedures have recently expressed concern about the increase of *lèse-majesté* prosecutions and the harshening of related prison sentences in a country, the enforcement of which has become stricter as activists shifted to online advocacy since the start of the COVID-19 pandemic.

1. New Zealand (1992), Sri Lanka (2002), Niue (2007), Timor-Leste (2009), Kyrgyzstan (2015) and Maldives (2018) have abolished criminal defamation. Kazakhstan decriminalized defamation but not insult (2020).

III. Common features of SLAPPs

Regardless of where in the world and Asia Pacific SLAPPs are being used, this type of judicial harassment has several features that distinguish SLAPPs from other types of litigation. These common features, or “hallmarks” as they are sometimes referred to, fall into several groupings, namely:

1. Distinguishing criteria;
2. Common types of SLAPPs;
3. Common SLAPP users and disguised intentions;
4. Common SLAPP targets.

³³ *International Covenant on Civil and Political Rights* (1966) (ICCPR).

³⁴ *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).

³⁵ Specifically, ten member states of ASEAN have agreed to the *ASEAN Human Rights Declaration* (2012), which recognizes these rights.

³⁶ See e.g., Boer (2015), 135, 152–6.

³⁷ UNESCO (2022), 2.

³⁸ *Ibid.* 9.

³⁹ The information set in Box 12 is from UNESCO (2022), 9.

⁴⁰ *Ibid.*, 8.

⁴¹ *Ibid.*

⁴² *Ibid.*

1. Distinguishing criteria of SLAPPs

Although there is no universal or comprehensive definition of what constitutes a SLAPP or SLAPP suit, there are a number of distinguishing common features, or “hallmarks” of this type of judicial harassment. Drawing on these common features the Business and Human Rights Resource Centre and Greenpeace International have established a list of key criteria for identifying SLAPPs. This list provides that SLAPP suits (in summary):⁴³

- Target “acts of public participation related (but not limited) to human rights, social justice, and environmental protection, including public criticism or opposition campaigns. Public participation can encompass a range of activities, from peaceful protest to writing blogs – assuming the latter is in the public interest”.
- Often appear “to be part of a wider public relations offense designed to retaliate against, bully or intimidate critics”.
- Are used by power private and public actors who often have “a history of SLAPPs and/or legal intimidation”, “engage in procedural manoeuvres that appear intended to drag out the case”, rely on “factually or legally baseless” claims, and exploit their economic or other advantage to pressure the SLAPP target/s.
- Frequently target individuals, but can also target organisations and the individuals who work for them.
- Are commenced after the SLAPP target (individual and/or organisation) challenged or expressly criticised the SLAPP user’s “activities by publishing a report, posting on social media, participating in an event or interview, launching a campaign, organizing a demonstration, and/or another peaceful means”.
- Involve power private and public actors who seek remedies that “are aggressive or disproportionate to the conduct targeted by the lawsuit” or severe sanctions, e.g., “large of amount of monetary damages or long prison sentences”.

2. Common types of SLAPPs

As the use of SLAPPs has grown, several types of form of judicial harassment have emerged:

1. Business-linked SLAPPs
2. Civil and criminal defamation-linked SLAPPs, and
3. Environment-linked SLAPPs.

For the purposes of this Summary, each of these types of SLAPP are considered separately in the following parts. Before turning to that discussion, it is important to note that in practical terms, SLAPPs can have one or all of these attributes. For example, a powerful private actor – an international corporation or national business – may commence a defamation-linked SLAPP suit against EHRDs who are publicly criticising their environmentally harmful business activities. Such a business-linked SLAPP is also a defamation and environment-linked SLAPP. Moreover, SLAPPs are not limited to these categories and can take many other forms. For example, a powerful public actor may commence litigation involving claims of taxation evasion or other illegal activities by EHRDs – individuals or organisations – who are publicly challenging environmental decision making and/or environmental harm.

2.1. Business-linked SLAPPs

The growing misuse of courts and laws by businesses aligns with the global rise in the use of SLAPPs. According to the Business & Human Rights Resource Centre, “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 and criminal cases”.⁴⁴ Business-linked SLAPPs are “one tactic used by unscrupulous business actors to stop people raising concerns about their practices. SLAPPs can take the form of criminal or civil lawsuits brought to intimidate, bankrupt and silence critics. They are an abuse of the legal system by powerful actors”.⁴⁵ The following description of a *business-linked SLAPP* sets out common characteristics of this kind of unmeritorious legal case:

- Can be a civil, criminal, or administrative lawsuit.
- Is filed against an EHRD exercising his/her freedoms of expression, association, and/or peaceful assembly to speak about and/or act on matters related to business operations.
- Has the intention of silencing or intimidating the EHRD from further engaging in criticism, opposition, public participation, and similar activities.⁴⁶

2.2. Civil and criminal defamation-linked SLAPPs

Court proceedings involving claims of civil or criminal defamation are another way in which abuse of laws and procedures can occur. SLAPPs involving criminal defamation claims are often described in terms of restricting freedom of expression by journalists, HRDS,

⁴³ See BHRRC (2021), 29; Greenpeace International (2020).

⁴⁴ BHRRC (2020a).

⁴⁵ BHRRC (2021), 5.

⁴⁶ BHRRC (2020b).

EHRDS, “academics and other actors seeking to reveal issues pertaining to corruption, environmental damages, crime, consumer protection issues, etc”.⁴⁷ Abusive legal practices such as criminal defamation-linked SLAPPs are primarily aimed at restricting freedom of expression and the dissemination of public interest information unfavourable to the party initiating the litigation. States and businesses commonly employ SLAPPs of this kind to stop or “deter journalists from advancing their work, preventing the publication of certain content or causing its removal, and discouraging others from covering the same issues”.⁴⁸ SLAPPs of this kind facilitate “the privatization of State-driven suppression of journalism where members of government share interests with private sector actors”.⁴⁹ Similarly, a growing trend in the use of business-linked SLAPPs against EHRDs draws on defamation law to strategically stifle public participation in environmental matters and impede the legitimate exercise of environmental and human rights. Moreover, such SLAPPs can also have a cross-border element that raises the risks and impacts for SLAPP targets:

SLAPPs can take the form of civil or criminal defamation claims, which can be domestic or also have a transnational dimension – involving for instance multiple claims in courts across a same country, or in one/several foreign jurisdictions. They can be very complex, as well as financially and psychologically draining for a defendant.⁵⁰

2.3. Environment-linked in SLAPPs

To date, the Philippines is the only country in Asia Pacific with legal rules that expressly recognise environmental SLAPPs. Rule 6.1 of the Philippines’ *Supreme Court Rules of Procedure for Environmental Cases* defines a SLAPP in civil litigation as:

A legal action filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.⁵¹

Rule 19.3 of the Philippines *Supreme Court Rules of Procedure for Environmental Cases* recognises the use of environment-linked SLAPPs in criminal litigation. Other parts of Rules 6 and 19 set down procedural safeguards for SLAPP targets parties. These guide parties and judicial decision-makers when dealing with SLAPPs of these kinds. These provisions are discussed further in Part V below.

3. Common SLAPP users

3.1. Powerful public and private actors

More often than not, SLAPPs are utilised by “powerful entities whose resources vastly exceed those whom they seek to silence, resulting in public interest reporting being withdrawn pre-emptively to avoid expensive confrontation”.⁵² Common SLAPP users include State governments, public authorities, and private businesses - deliberately misusing the legal system and the judiciary to silence, harass, and intimidate public critics. The most prevalent users of SLAPPs are international and local businesses from the mining, agriculture, timber and logging, and palm oil sectors. The hydroelectric power, energy, and poultry sectors in Asia Pacific are also recognised users of these legal tactics.⁵³

National and sub-national governments and public authorities are also regular SLAPP users. Judicial harassment of this type may involve direct involvement of the State, e.g., SLAPP suits against EHRDs and/or environmental organisations are prosecuted by public authorities. Alternatively, public actors may provide indirect support for SLAPPs and/or key SLAPP users’ activities. For example, SLAPPs may be enabled through the establishment of legislation criminalising certain activities or behaviour, or States’ purposively electing not to introduce anti-SLAPP legislation and other measures to protect against rights abuses of this kind.

Even though powerful private actors – corporations and businesses - have certainly been active instigators of SLAPPs, it is worth noting that criminal cases can only be launched by the State in most legal systems. This can make it difficult, or sometimes impossible, to discern whether a SLAPP suit is being brought by the State itself, or results from complicity between State actors and private companies.

Another way in which States may be complicit in the use of SLAPPs is where the instigator is an international corporation “owned” or “controlled” by another State, e.g., State-owned corporations or entities frequently engage in natural resources extractive and exploitation activities in other countries.

3.2. Disguised common intentions SLAPP users

The commonality between the various descriptions of SLAPPs set out earlier in Part I is the “hidden”, underlying purpose driving this type of judicial harassment. Rather than seeking a genuine remedy, the disguised motivation of the SLAPP user is the

⁴⁷ UNESCO (2022), 2.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid, 12.

⁵¹ Supreme Court of the Philippines, *Rules of Procedure for Environmental Cases* 2010.

⁵² United Kingdom Ministry of Justice (2022), 6.

⁵³ BHRRRC (2021), 7.

avoidance of accountability and responsibility for rights abuses and/or environmental harm. SLAPP suits achieve these ends by enabling SLAPP users to intimidate and discourage or prevent SLAPP targets “from expressing their critical views”⁵⁴ and exploit the legal system to “deplete the resources” of SLAPP targets.⁵⁵

In practical terms, SLAPP users underlying motivations are closely linked with the main impacts of this form of judicial harassment on SLAPP targets. As UNESCO observes, SLAPP users’ “real objective is not to win the case, but to overwhelm the defendant through protracted legal proceedings, excessive costs – even at the risk of bankruptcy – and the related psychological burden”.⁵⁶ These impacts are considered further below (Section 5).

4. Common SLAPP Targets

SLAPPs are not a special mechanism designed for application to a particular individual or group. There is no exhaustive list of the targets of SLAPPs. On the contrary, everyone and anyone can be subjected to a SLAPP suit. Individuals, groups, communities, environmental human rights defenders (EHRDs), representatives of Indigenous peoples and local communities, journalists and independent media networks, academics, civil society and a range of environmental and human rights NGOs (members of the public) are increasingly being subjected to criminalization and judicial harassment through the use of SLAPP suits. EHRDs for example, are frequently targeted by SLAPPs users, who seek to prevent them from safeguarding the environmental rule of law, ensuring the fulfilment of environmental rights, and protecting rights-holders.

The trending uptick in the use of SLAPPs discussed earlier in this *Summary* suggests that more often than not, this form of judicial harassment is being aimed specifically at environmental human rights defenders (EHRDs) seeking to protect their environmental rights, especially those relating to lands and natural resources. Common targets of business and environmental-linked SLAPPs are “indigenous leaders or community members protecting their land and territories from large-scale projects, such as mining or logging, or even journalists covering companies harmful activities”.⁵⁷ In its 2021 report on SLAPPs, the Business and Human Rights Resource Centre observed that nearly two thirds of individuals and groups targets with a SLAPP suit had “raised concerns about projects in four sectors: mining, agriculture and

livestock, logging and lumber, and palm oil, revealing vexatious litigation in relation to sectors heavily dependent a natural resources”.⁵⁸

4.1. Environmental SLAPP Targets: EHRDs and Environmental Rights

SLAPPs violate a range of fundamental human rights and freedoms, including environmental rights. These are considered here, together with the legitimate role and activities of EHRDs. Recalling UNEP *Working Paper*, the UN defines EHRDs as:

Individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna.⁵⁹

EHRDs can be everyone and anyone; they can be individuals and groups. EHRDs can be journalists, academics, lawyers, judges, students, Indigenous Peoples, and Local communities. EHRDs can also be non-government organisations, international organisations, government officials, public bodies, corporations and businesses.

According to the UN, environmental rights consist of “any proclamation of a human right to environmental conditions of a specified quality”.⁶⁰ Environmental rights include the right of all persons to participate in public life, especially the rights to freedom of expression, assembly and association, access to information, public participation, access to justice and equality before the law, and a right to a healthy environment.⁶¹ Thus, all people, including EHRDs, individually and collectively have the right “to promote and protect a safe, clean, healthy and sustainable environment, necessary for the enjoyment of a vast range of human rights”.⁶² As the UN Special Rapporteur on human rights and the environment explains:

All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.⁶³

They also have the “right to a healthy environment itself, which is recognized in regional agreements and most national constitutions”.⁶⁴ At the same time, the UN also recognises that the protection and “exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the

⁵⁴ BHRRC (2021), 6. See also e.g. P. Canan and G.W. Pring (1988).

⁵⁵ *Ibid.*

⁵⁶ UNESCO (2022), 12.

⁵⁷ BHRRC (2021), 9.

⁵⁸ *Ibid.*, 13.

⁵⁹ UN SR HRD (Forst) (2016), para 7.

⁶⁰ UNEP. What are environmental rights?

⁶¹ See further discussion at UNEP, *ibid.*

⁶² UN SR HRD (Forst) (2016), para 3.

⁶³ United Nations Special Rapporteur on Human Rights and the Environment (UN SRHRE). *Sustainable Environment as a Human Right*.

⁶⁴ UN SRHRE (2018), para 4.

protection of the environment”,⁶⁵ and further, that “sustainable environmental governance cannot exist without the establishment of and respect for human rights”.⁶⁶

4.2. Common acts of “environmental” public participation and SLAPPs

As a matter of course, through the peaceful exercise of one of more of their fundamental environmental rights and freedoms recognised in key international law instruments,⁶⁷ State constitutions, and national laws, ERHDs - individuals, groups, communities, associations and non-governmental organisations - can legitimately criticise, question, and challenge the actions of powerful public and private actors - States (governments and public authorities), State-owned enterprises and international and local businesses - on public interest matters relating to the environment. EHRDs and others can legitimately and peacefully engage in many commonplace acts of public participation. In general terms, these include acts relating to environmental conservation and protection, ensuring respect for and protection of environmental rights, holding perpetrators of violations of environmental rights to account, and preventing further violations. More specific examples of such acts include:

- Questioning or criticising the actions of State actors and/or businesses on environmental public interest matters;
- Writing of complaints to local authorities;
- Organising petitions;
- Engaging in protests;
- Attending public meetings and participating in public hearings;
- Educating/informing people about their environmental rights; and
- Using media outlets and online platforms for discussions, awareness raising, and critiques of business operations.
- Other common acts of legitimate public participation include challenging environmental decision-making by public authorities, such as:
 - The granting of permits/licences for polluting activities;
 - Inadequate or non-existent environmental impact statements; and
 - The failure to obtain the free, prior and informed consent of Indigenous Peoples and local communities.

Such acts usually manifest through EHRDs’ exercise of fundamental rights, including freedom of expression, freedom of assembly and/or association, access to information, public participation in environmental decision making, and access to justice, in respect of “violations of the environmental rights of communities and individuals”.⁶⁸ According to UNEP, these acts of public participation by EHRDs and others concerning matters of environmental public interest are partly explained by greater competition for natural resources, with “more and more ordinary people ... finding themselves on the frontline of the battle to defend their environmental rights from violations by corporate or state actors, and from unsustainable exploitation”.⁶⁹

However, although the wide variety of valid acts of public participation available to ERHDs can be beneficial, this can also be detrimental. On the one hand, EHRDs have many ways and means to make valuable contributions to States’ achievement of environment rule of law and sustainable development. On the other, despite the well-recognised legitimacy of EHRDs’ acts such as those mentioned here, challenging and/or criticising the actions of powerful public and private actors means that EHRDs are often the target of SLAPPs. EHRDs are increasingly targeted by SLAPP users, for the primary purpose of silencing public dialogue and criticism on environmental decisions and/or environmentally polluting and harmful activities.

IV. Impacts of SLAPPs

Key harmful impacts of SLAPPs include:

- Perversion of justice;
- Waste of courts’ time and resources;
- Use of power and resources to silence critics;
- Financial damage and imprisonment
- Acute financial and psychological stress;
- Reputational damage; and
- Distracting individuals and/or organisations from legitimate action.

These are set out with short explanatory discussion in Table 1 below.

⁶⁵ Ibid.

⁶⁶ UNEP. What are environmental rights?

⁶⁷ See e.g., *Universal Declaration of Human Rights* (1948); ICCPR, arts 3, 14, 16, 21-22, 25-26; *ASEAN Human Rights Declaration* (2012), arts 23-25.

⁶⁸ UNEP (2018) Defenders Policy.

⁶⁹ Ibid.

Table 1 Key Impacts of SLAPPs

<i>Perversion of justice</i>	By “masquerading as legitimate legal claims, abusing laws (e.g. on libel/defamation) to target valid and protected speech or protest”, SLAPPs are used to manipulate and pervert the legitimacy of judicial decision making, ⁷⁰ preventing legitimate acts of public participation concerning public interest matters such as the full realisation of environmental rights and environmental decision making that impacts upon these rights.
<i>Waste of courts’ time and resources</i>	SLAPPs “also put a significant strain on public resources, forcing national courts to waste their time and resources on superfluous legal processes”. ⁷¹
<i>Use of power and resources to silence critics</i>	Globally, SLAPPs are an increasingly common strategy for companies to attempt to silence activists, journalists, EHRDs, and civil society organizations who expose wrongdoing and voice criticism. ⁷²
<i>Financial damage and Imprisonment</i>	Users of SLAPPs often seek to “take advantage of the prohibitive costs and time that it takes to litigate a case”, draining the financial and other resources of the SLAPP target/s, as well as the threat of prison sentences to be imposed in some instances. ⁷³
<i>Acute financial and psychological stress</i>	SLAPP suits are “often characterised by a great imbalance of power between the claimant and the defendant, where one has the resources and ability to effectively silence the other through litigation techniques that amplify the psychological and economic burden of protracted proceedings”. ⁷⁴
<i>Reputational Damage</i>	SLAPPs can be used to harm by destroying reputations and ostracising the SLAPP target/s from their colleagues and communities. ⁷⁵
<i>Distracting SLAPP targets from legitimate action</i>	Individuals and/or organisations targeted by judicial harassment are forced to address the SLAPP suit, rather than focusing their time, money, and efforts on their rights and protection work.

1. Impacts of SLAPPs on EHRDs

SLAPPs are increasingly being used against EHRDs seeking to safeguard the environmental rule of law and ensure the protection and fulfilment of environmental rights and rights-holders. SLAPPs enable judicial harassment of members of the public – individuals, groups, communities, environmental human rights defenders (EHRDs), NGOs and so on. Although EHRDs are often personally targeted through malicious, baseless SLAPP suits, it is their acts of public participation, discussed earlier, that are the core drivers of such attempts to misuse the courts and legal systems to hinder or put a stop to public criticism and debate. Through such means, the key impacts of SLAPPs are generally aligned with SLAPP users’ ulterior motivations, namely:

- Silencing or discouraging targeted EHRDs from speaking out about environmentally harmful activities of businesses and others;

When human rights defenders are afraid to question reports about wrongdoing and deficits they observe, it affects the entire society. Strategic lawsuits against public participation (SLAPPs) have exactly that effect: they can impose sometimes significant fines and criminal sanctions, and thus intimidate human rights defenders and stop them from shedding light on critical issues. It is our shared responsibility to prevent SLAPPs from undermining everyone’s right to know.

Former UN High Commissioner for Human Rights (M Bachelet) BHRRC (2021), 3.

- Preventing or discouraging targeted EHRDs from challenging environmental decision-making by governments or other public actors; and
- Redirecting the focus of the questioning of SLAPP users actions away from the public space by coercing targeted EHRDs – individuals and/or organisations - into the complexities of the legal system and the courts.

⁷⁰ BHRRC, *SLAPPs Key Resources*.

⁷¹ BHRRC (2020a), 6.

⁷² Manser Fonds (ICCA Consortium Member) (2022).

⁷³ BHRRC (2020a), 3.

⁷⁴ BHRRC (2020b).

⁷⁵ Ibid.

More specifically, the impacts of SLAPPs on targeting EHRDs includes intimidating EHRDs into silence through threats to their physical safety, reputation, and psychological well-being. In addition to severely constraining freedom of expression and disrupting “collective action”, SLAPPs can involve the threat of “prison sentences and other harmful physical and psychological impacts”.⁷⁶ Other threats and impacts include:

- Draining the targeted EHRDs of their financial and other resources through timely and expensive legal proceedings;
- Causing “acute financial and psychological stress” to targeted EHRDs;⁷⁷
- Forcing targeted EHRDs to address the SLAPP suit, rather than focusing their time, money, and efforts on their peaceful engagement in environmental public interest matters.

Destroying reputations and ostracising EHRDs from their colleagues and communities is another way in which SLAPPs can be used to harm EHRDs. For example, governments and companies use of SLAPPs together with measures, such as “red tagging” and other smear campaigns, that seek to destroy the reputations of EHRDs, have them judged “guilty in the “court of public opinion”, and cause their colleagues and others to distance association with them out of fear of also being targeted”.⁷⁸

SLAPPs also impact the full realisation of one of more fundamental rights and freedoms of targeted EHRDs. This includes violation of the rights to freedom of expression, public participation, a healthy environment, the rights of access to justice and equality before the law, and Indigenous and local communities; rights over their traditional lands, territories and natural resources. As the UN observes, the right of access to justice is “much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable”.⁷⁹ SLAPPs – especially environment-linked SLAPPs – can involve violations of EHRDs’ right of access to justice in all of these aspects. SLAPPs can also be aimed at preventing EHRDs from exercising other environmental rights, inter alia, the rights to a healthy environment⁸⁰ and public participation in environmental matters.⁸¹

2. Broader Impacts of SLAPPs

SLAPPs have a broader public impact, placing “significant strain on public resources forcing national courts to waste their time and resource is on superfluous legal processes”.⁸² The growing incidence of SLAPPs discussed previously (see Part II) also shows by discouraging EHRDs from “expressing their critical views”,⁸³ the ultimate impact of SLAPPs extends well “beyond the individual case and undermines the building up of a healthy and pluralistic civic space in which citizens can actively participate”.⁸⁴ Indeed, “a single successful SLAPP can have far-reaching consequences”⁸⁵ by suppressing public participation in matters of environmental public interest by preventing or constraining the ability of individuals, groups, communities to exercise their human and environmental rights.

The shrinking of civic space through the use of SLAPPs also undermines environmental governance, environmental rule of law, international and national standing of States, legitimacy of human rights and other legal institutions, and the realisation of sustainable development. Examples of specific EHRD and broader impacts of SLAPPs are set out in Figure 2 (below).

3. Impacts of SLAPPs on States and others

3.1. Duties of States

States are legally obliged to protect, promote, and implement all human rights and fundamental freedoms. According to the UN, this prime responsibility of a State obliges it to take all necessary steps to, inter alia, “ensure all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice”.⁸⁶ This includes “legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms are effectively guaranteed in domestic settings”.⁸⁷

A State’s assumption of obligations and duties under international law also means that States must refrain from interfering with or curtailing the enjoyment of rights. These obligations extend to environmental

⁷⁶ BHRRC (2020a) 6

⁷⁷ Ibid, 6.

⁷⁸ Ibid.

⁷⁹ United Nations Development Programme (2015), 6.

⁸⁰ See e.g., UNGA (2022); UN HRC (2021); ASEAN Declaration on Human Rights (2012).

⁸¹ See e.g., Aarhus Convention (1998), arts 5-9; Escazú Agreement (2018), arts 5-8; Rio Declaration on Environment and Development (1992), Principle 10. See also UN HRC (2021).

⁸² BHRRC (2020a) 6

⁸³ Bayer et al (2021), 12.

⁸⁴ European Parliament (2022), 1.

⁸⁵ United Kingdom Ministry of Justice (2022), 6.

⁸⁶ UN Declaration on Human Rights Defenders (1998), arts 2(1), 2(2) and 3.

⁸⁷ Ibid, arts 2(2) and 3.

rights and EHRDs. This includes a duty to protect, promote and implement all environmental rights, as well as protecting EHRDs - individuals and groups - against environmental rights abuses.⁸⁸ As the UN Special Rapporteur on Human Rights Defenders explains: "It is the duty of the State to respect the right of everyone to promote and protect a safe, clean, healthy and sustainable environment, necessary for the enjoyment of a vast range of human rights."⁸⁹ In addition to being party to the principal international human rights treaties, many Asia Pacific States have constitutional provisions that recognise the rights of freedom of expression, assembly and association, environmental protection, and the right to a healthy environment.



Figure 2 Impacts of SLAPPs on EHRDs and shrinking of civic space

⁸⁸ Ibid, arts 5-13. See also: United Nations HRC (2018). *General Comment No. 36. Article 6: the right to life* (3 September 2018) CCPR/C/GC/36, paras 26 and 62.

⁸⁹ UN SR HRD (Forst) (2016).

3.2. States' duties relating to businesses

The responsibility and duties of States to protect rights and rights-holders "extends to the actions of non-State actors as well as States themselves".⁹⁰ More specifically, States have "a parallel duty to protect environmental human rights defenders from violations committed by both State and non-State actors".⁹¹ According to the *UN Guiding Principles on Business and Human Rights*, States also have specific duty to protect against business-related human rights abuses.⁹²

3.3. Supporting and Facilitating SLAPPs

The use or sanctioning of SLAPPs by public actors – States, governments, public authorities - constitutes a breach of one or more of a State's responsibilities and duties. For example, the intimidatory and other impacts on targeted EHRDs constitute a practical failure to protect and ensure the enjoyment of their environmental rights and freedoms. Likewise, the absence of anti-SLAPP law constitutes a breach of the obligation to take necessary legislative steps to ensure environmental rights are protected and guarantee the enjoyment of such rights in domestic settings.

In practical terms, the trending use of SLAPPs discussed earlier (Part II) suggests that, despite States' clear obligations, there is an alarming level of complicity – active or passive – by States in the violation of environmental rights and judicial harassment of EHRDs. The main ways this occurs include:

- Using existing laws to judicially harass EHRDs, in particular subjecting them to criminal trials for financial fraud and tax evasion;
- Criminalising the acts of public participation of EHRDs, in particular the use of criminal defamation provisions;
- Failing to protect EHRDs against business related environmental rights abuses, including business-linked SLAPPs; and
- Failing to establish anti-SLAPP laws and other measures to safeguard and protect EHRDs from being targeted by SLAPP users.

Nevertheless, several Asia Pacific States have introduced anti-SLAPP legislative measures. These and other important anti-SLAPP measures are considered subsequently in Part V.

⁹⁰ UN SR HRD (M Forst) (2016), para 3. See also: UNGA (1998) art 12(2).

⁹¹ Ibid,

⁹² United Nations Human Rights Office of the High Commissioner (UN OHCHR) (2011).

3.4. Duties of Businesses

The *Guiding Principles on Business and Human Rights* also impose duties on business to refrain from human rights abuses. According to UN Special Rapporteur, “international human rights law makes it clear that business enterprises, the media and other non-State actors” are themselves “obliged to respect human rights obligations and refrain from contributing to or committing violations”.⁹³

More recently, the UN Special Rapporteur on Human Rights Defenders has gone further, specifically articulating a State’s duty, as well as those of businesses, to protect EHRDs in the context of SLAPPs:

States have a duty to protect environmental human rights defenders against SLAPPs and should pass anti-SLAPP legislation in order to facilitate a safe and enabling environment where criticism is part of a healthy debate. Business actors also have the responsibility to commit to a clear public policy of zero tolerance to attacks on defenders and refrain from using this tactic to stop public participation. Space for defenders to carry out their work must be free from any interference or attack.⁹⁴

V. Anti-SLAPP Good Practices

1. Global experiences

A recent evaluation of anti-SLAPP laws in 37 jurisdictions concluded that the “strongest anti-SLAPP laws share” the following common elements:

- **A broad scope:** Effective anti-SLAPP laws apply broadly to any lawsuit involving expression on an issue of public interest. Conversely, the weakest laws are narrow in scope, applying only to a single issue, or only to communications made before specified government bodies.
- **Staying proceedings:** Effective anti-SLAPP laws stay all proceedings between parties – including discovery – as soon as a motion to dismiss the suit is filed. Without such a provision, discovery and other proceedings can continue thereby imposing potentially substantial costs on the defendant before the SLAPP is dismissed.
- **Onus:** Effective anti-SLAPP laws impose a limited obligation on the defendant to show the suit involves a matter of public interest. At that point, it shifts the onus to the plaintiff to show that the

action has substantial merit, and the defendant has no reasonable defence.

- **Expedited hearing:** Effective anti-SLAPP laws require the courts to schedule a hearing of an anti-SLAPP motion within an expedited timeframe after filing.
- **Provision for costs:** Effective anti-SLAPP laws require the courts to fully indemnify prevailing defendants for the costs of the motion, while insulating the defendant from costs if the motion is denied.
- **Right to an immediate appeal:** Effective anti-SLAPP laws allow a defendant to appeal a denial of an anti-SLAPP motion as of right and on an expedited basis.⁹⁵

These elements offer useful insights into possible matters to guide the development of effective anti-SLAPP laws, within regional and national considerations and circumstances.

2. Asia Pacific Experiences

The legal systems of States in the Asia-Pacific are characterised by a “lack of a definition of SLAPPs and of prohibition of such conduct”.⁹⁶ The absence of anti-SLAPP laws has not prevented this issue from being considered. For example, “the Association of Southeast Asian Nations (ASEAN) Chief Justices Roundtable on Environment has considered efforts to defend against SLAPPs since 2013”.⁹⁷

Three States in Asia-Pacific have legal provisions that seek to address the issue of SLAPPs: the Philippines, Indonesia, and Thailand. As the following discussion demonstrates, these represent three different legal approaches.

2.1. Anti-SLAPP laws of the Philippines

Anti-SLAPPs provisions are set out in the Philippines Supreme Court’s *Rules of Procedure for Environmental Cases* (the Rules).⁹⁸ Specifically: Rule 1(g) sets out the general definition of a SLAPP; Rule 6 sets out the procedural rules governing SLAPPs in civil proceedings; and Rule 19 sets out additional rules relating to SLAPPs in criminal proceedings. These specific SLAPP rules operate within a broader procedural context set down by the Philippines Supreme Court and articulated in the objectives of the Rules, *inter alia*:

- (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology;

⁹³ Ibid.

⁹⁴ BHRRC (2021), 4.

⁹⁵ Center for Free Expression (2023), 5-6.

⁹⁶ BHRRC (2020a), 12.

⁹⁷ Ibid, 7.

⁹⁸ *Supreme Court of the Philippines Rules of Procedure for Environmental Cases 2010* (the Rules).

(b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution,⁹⁹ existing laws, rules and regulations, and international agreements; ...¹⁰⁰

According to the *Annotation to the Rules of Procedure for Environmental Cases (Annotation to the Rules)* these objectives are not intended to be an exhaustive list, but rather, are intended to set out, inter alia, the basic principles and objectives animating the rules in board terms and acknowledge the Court's recognition of environmental rights.¹⁰¹ The *Annotation to the Rules* recognises further that:

[F]ormidable legal challenges may be mounted against those who seek to enforce environmental law, or to assert environmental rights. These legal challenges may be pre-emptive in character and may be done in order to "chill" the latter. In light of this, the Rules make available a formidable defense in these provisions. ... The constitutional rights to freedom of speech, expression and assembly (and in certain cases, the right to petition the government for redress of grievances) in relation to the right to a balanced and healthful ecology are affected by a SLAPP.¹⁰²

2.1.1. General Definition of a SLAPP

Rule 1 (g) sets out the general definition of a SLAPP under these rules:

Strategic lawsuit against public participation (SLAPP) refers to an action whether civil, criminal or administrative, brought against any person, institution or any government agency or local government unit or its officials and employees, with the intent to harass, vex, exert undue pressure or stifle any legal recourse that such person, institution or government agency has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights.

2.1.2. SLAPP definitions and procedural safeguards in civil and criminal environmental cases

Rule 6 - *Strategic Lawsuit Against Public Participation* – sets out the procedural requirements relating to civil case. Specifically, Rule 6.1 defines a SLAPP in civil cases to be:

A legal action filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of

environmental rights shall be treated as a SLAPP and shall be governed by these Rules.

Rule 19 - *Strategic Lawsuit Against Public Participation in Criminal Cases* - lays down similar provisions as they relate to criminal environmental cases. Rule 19.3 applies the same definition to criminal cases. Figure 3 (below) illustrates the steps set out in Rule 6 and the key procedural safeguards for SLAPP targeted ERHDs.

Like Rule 6, Rule 19 provides an accused -targeted EHRD - in a criminal trial with procedural safeguards to protect them against a criminal SLAPP, including:

Motion to dismiss: a targeted EHRD can file a motion to dismiss the case on the grounds that it is a SLAPP (Rule 19.1);

Summary Hearing: a quick resolution of the case through a pre-trial hearing of a targeted EHRD's motion to dismiss a criminal SLAPP, during which both parties must "submit all the available evidence in support of their respective positions" (Rule 19.2);

Court's decision: A court will grant the targeted EHRD's motion to dismiss the case as a criminal-linked SLAPP, where the targeted EHRD establishes that the case was "filed with intent to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights" (Rule 19.3).

2.2. Anti-SLAPP laws of Thailand

Articles 326-333 of Thailand's *Criminal Procedure Code* establishes the crime of defamation. In late 2018, the National Legislative Assembly of Thailand agreed to amend the *Criminal Procedure Code* with the inclusion of two anti-SLAPP provisions that can be "used to dismiss criminal cases against those acting in the public interest",¹⁰³ thereby offering protection of defenders' rights to freedom of expression against SLAPPs: Article 161/1 (entered into force on 20 February 2019) and Article 165/2 (entered into force on 21 March 2019). These are set out and briefly discussed below.¹⁰⁴

2.2.1. Criminal Procedure Code: Article 161/1

Article 161/1 of Thailand's *Criminal Procedure Code* states that:

In a case filed by a private complainant, if it appears to the court—or through examination of evidence called at trial—that the complainant has filed the lawsuit in *bad faith or distorted facts in order to harass or take undue advantage of a defendant, or to procure any advantage to which the complainant is*

⁹⁹ Constitution of the Philippines, Art 2(16) provides: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

¹⁰⁰ See further explanation of the Rules, see Supreme Court of the Philippines. (2017) *Annotation to the Rules*.

¹⁰¹ Ibid, 101.

¹⁰² Ibid, 130.

¹⁰³ Article 19 (2020).

¹⁰⁴ See discussion eg, International Commission of Jurists (2020).

not rightfully entitled, the court shall order dismissal of the case, and forbid the complainant to refile such case again. (emphasis added)

The filing of a lawsuit in bad faith includes incidents where the complainant intentionally violated a final court’s orders or judgments in another criminal case without providing any appropriate reason.¹⁰⁵ As noted in the emphasised words above, section 161/1 implicitly recognises the use of SLAPPs. In such cases, the Court that has been given the power to dismiss a criminal case at the outset if it determines that the litigation is a SLAPP. However, it has been noted that this provision faces some considerable challenges in practical terms. This includes:

- An absence of a definition of “bad faith”;
- The nature of the judicial discretion provided by the qualification “if it appears to the court”, which may result in neither party having the “right to make submissions to provide evidence in support of their argument before the court”, and
- The inability for this provision to “curtail SLAPP lawsuits which are civil suits or criminal suits brought by public prosecutors”.¹⁰⁶

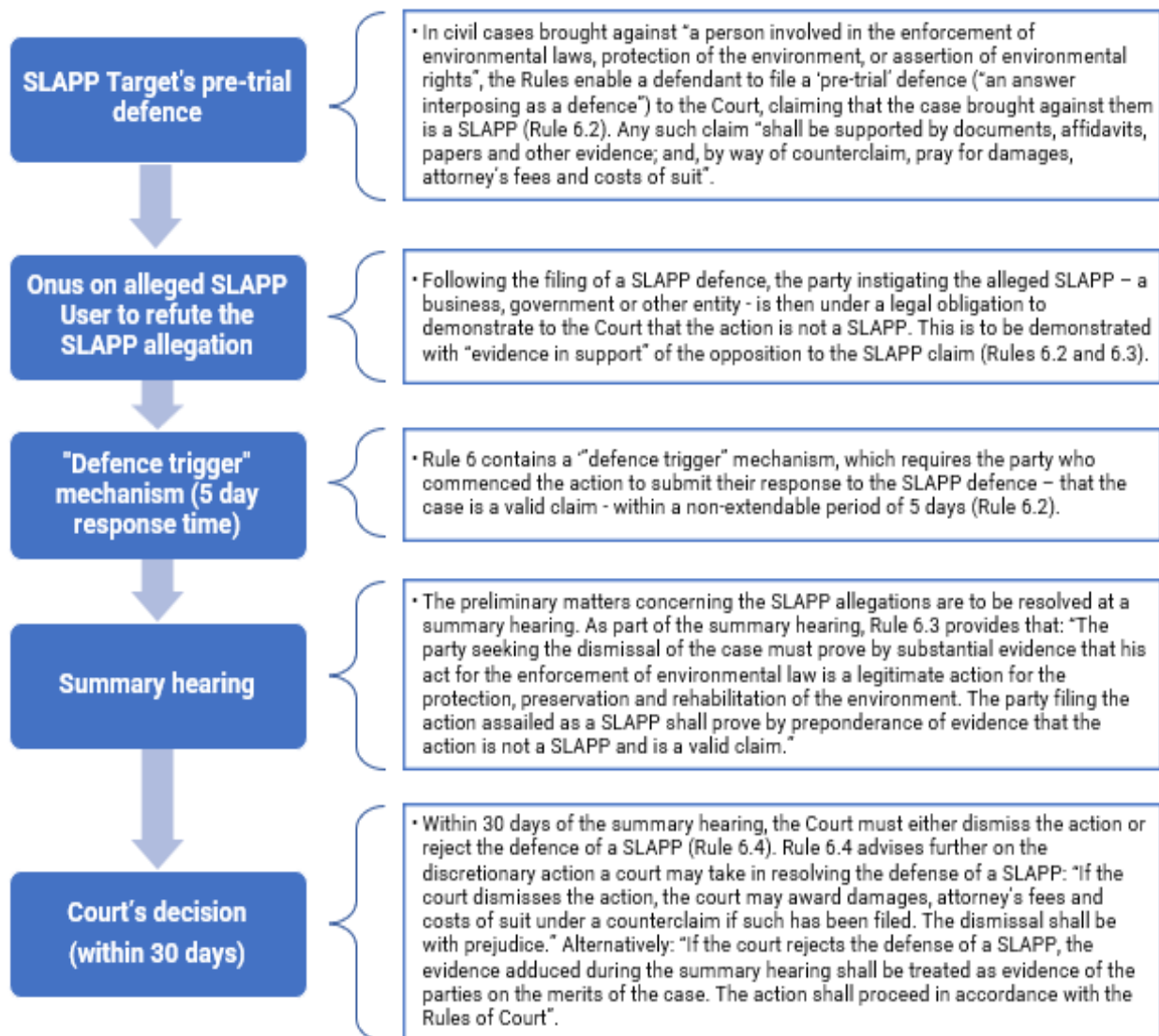


Figure 3 Rule 6 - Procedural guarantees in alleged SLAPPs

¹⁰⁵ International Commission of Jurists and Human Rights Lawyers Association (2019), para 12.

¹⁰⁶ Ibid, paras 14-17.

2.2.2. Criminal Procedure Code: Article 165/1

Article 165/2 provides the defendant with the opportunity to challenge the legitimacy of a SLAPP and show the Court the case is without merit. This provision states:

During the preliminary hearing, the defendant may submit to the court a significant fact or law which may bring the court to the conclusion that the case before it lacks merit, and may include in the submission as persons, documents or materials to substantiate the defendant's claims provided in the submission. In such case, the court may call such persons, documents or materials to provide evidence in its deliberation of the case as necessary and appropriate, and the complainant and the defendant may examine this evidence with the consent of the court.¹⁰⁷

The addition of this provision to Thailand's criminal procedure code has been commended for its protection of access to justice on the one hand, and noted for its limitations on the other, which include:

The limited application of Article 165/1 to "criminal cases filed by a private complainant" and, "where the court thinks fit, criminal cases filed by public prosecutors, which amount to SLAPP".

Article 165/2 "only mandatorily applies to the preliminary hearing stage, which will only be held if the case is a prosecution charge sought by a private individual or entity; such a preliminary hearing is not necessary in cases filed by public prosecutors."¹⁰⁸

2.2.3. Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) bill

In early 2022, Thailand's Cabinet gave in principle approval to the National Anti-Corruption Commission's (NACC) proposed anti-SLAPP law, the *Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) bill*.¹⁰⁹ This proposed anti-SLAPP defines what a SLAPP is, how such cases are used, provides guidelines for police and public prosecutors, and "require officials to consult further with the NACC at any whistle-blower's request". The law is also intended to "make officials, politicians and corporate entities think twice before using the law in dubious ways", by enabling a range of penalties to be applied to those using SLAPPs. This includes:

- Disciplinary probes for employees of state agencies, with the risk of being expelled from their jobs if found to have used legal intimidation to muzzle whistleblowers; and
- Jail terms of up to 10 years and/or fines up to 200,000 baht, with high-ranking officials to face double penalties.¹¹⁰

As yet, this law has not yet entered into force.

2.3. Anti-SLAPP laws of Indonesia

Although there is, as yet no anti-SLAPP law in Indonesia, several provisions in national laws offer some degree of protection for EHRDs against judicial harassment.

2.3.1. Environmental Protection and Management law: Article 66

Article 66 of *Law No. 32/2009 on Environmental Protection and Management* provides a general protection for all EHRDs against litigation as follows:

Everybody struggling for a right to proper and healthy environment may not be charged with criminal or civil offense.

Despite the absence of express anti-SLAPP language in this provision, the 2013 *Chief Justice of the Supreme Court's Decree No. 36 on the Implementation of Guidelines for Handling Environmental Cases*¹¹¹ recognises that Article 66 is an anti-SLAPP provision. More specifically, this provision offers protection for environmental defenders as it allows defendants in environmental cases to object to the legal proceeding brought against him/her, in case of a SLAPP suit. Even so, a key limitation of this provision is the absence of a specific SLAPP definition.¹¹²

2.3.2. Prevention and Eradication of Forest Destruction Law: Article 78

Article 78 of *Law No. 18/2013 on the Prevention and Eradication of Forest Destruction* provides that:

(1) Reporters and informants cannot be sued legally, either by the penal code or civil code, for the reports and testimonies they will provide, are providing or have provided.

(2) Legal protection does not apply to reporters and informants providing information without good intention.

Article 78(1) therefore, prohibits a party from filing of criminal or civil cases against reporters and informants who provide information under this law. The qualification in the second paragraph of "good intention" is, however, unclear. Also, similar to Article 66 above, this law does not contain a definition of a SLAPP.

2.3.3. Prospective Anti-SLAPP Law

A 2020 Report noted several limitations of both Article 66 and Article 78 considered above. In particular, it was observed that "these rules have yet to be used because they are relatively new regulation"; and that even with these new regulations, EHRDs "can still be hit with

¹⁰⁷ Ibid, para 21 .

¹⁰⁸ Ibid, para 23.

¹⁰⁹ Bangkok Post Editorial (2022).

¹¹⁰ Ibid.

¹¹¹ Supreme Court of Indonesia (2013).

¹¹² BHRR (2020a) 13.

abusive defamation/libel lawsuits”.¹¹³ On a more positive note, the same report drew attention to the possibility of an anti-SLAPP law for Indonesia:

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.¹¹⁴

3. Other anti-SLAPP Good Practices in Asia Pacific

While these laws provide a degree of protection against certain SLAPP lawsuits, they are not the complete answer to the problem. For example, anti-SLAPP provisions in Indonesia only provide protection against SLAPPs for environmental issues, which may leave rights advocates in other areas vulnerable to SLAPPs. Similarly, anti-SLAPP provisions in Thailand are limited to criminal cases filed by a private complainant, – e.g., an individual or private entity, – but not civil cases or criminal cases filed by a public prosecutor. Of these three countries, only the Philippines has rules defining what a SLAPP is.

Even so, several other good practices have been identified. These include various legal defences that lawyers have called on to successfully protect and defend EHRDs and other HRDs against SLAPPs “in courtrooms around Southeast Asia”¹¹⁵ including:

- Invoking constitutional rights and norms to assert a defendant’s right to freedom of expression, peaceful assembly and/or association;
- Relying on fair comment and qualified privilege as an effective defence against a SLAPP; and
- Using counter lawsuits to expose the vexatious nature of SLAPPs and seek damages for harm suffered.¹¹⁶

In summary, these good practices are explained as follows:

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. Counterclaims 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.¹¹⁷

The success of these measures has been facilitated by the active engagement of the courts and judiciary “in the region [who] 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.”¹¹⁸

Non-legislative measures are also gaining traction. For example, in addition to guidelines for legal practitioners and judicial officers, guiding rights-based approaches and principles for businesses, companies are increasingly recognising the broader risks associated SLAPPs.¹¹⁹ For example, group of “progressive companies” recently “adopted a zero-tolerance approach to violence against defenders and understand offenders critiques as important early warnings of abuse or risks in their operations and supply chains”.¹²⁰ As noted in the *Investor Alliance for Human Rights Statement on Strategic Lawsuits Against Public Participation (SLAPPs)*:

44 institutions with US\$270 billion of combined assets have called on companies to take broad, systemic action to protect human rights defenders, and immediate action to ensure that they do not use or support strategic lawsuits against public participation (SLAPPs) against individuals, organizations, or communities who peacefully promote or protect human rights and the environment.¹²¹

A range of good practices against SLAPPs have been identified, an overview is set out in Figure 4 below. Although legal good practices will differ in response to the national laws where SLAPP suits are filed, this list sets out a range of good practices that are useful for EHRDs.

¹¹³ BHRRC (2020a) 14.

¹¹⁴ Ibid.

¹¹⁵ These examples are all discussed in BHRRC (2020a). See also further discussion in BHRRC (2020b).

¹¹⁶ Examples of good practices are discussed further in BHRRC (2020a).

¹¹⁷ BHRRC (2022a), 4.

¹¹⁸ Ibid, 5.

¹¹⁹ See e.g., discussion in BHRRC (2021), 6. See also BHRRC, *Guidance on business, human rights defenders & civic freedoms*.

¹²⁰ BHRRC (2021) 6, where Adidas’ human rights defender policy is noted as including a requirement that the company and its partners must not ‘inhibit the lawful actions of a human rights defender or restrict their freedoms of expression, freedom of association, or right to peaceful assembly’.

¹²¹ BHRRC (2021) 16. For the full statement see, Investor Alliance for Human Rights.

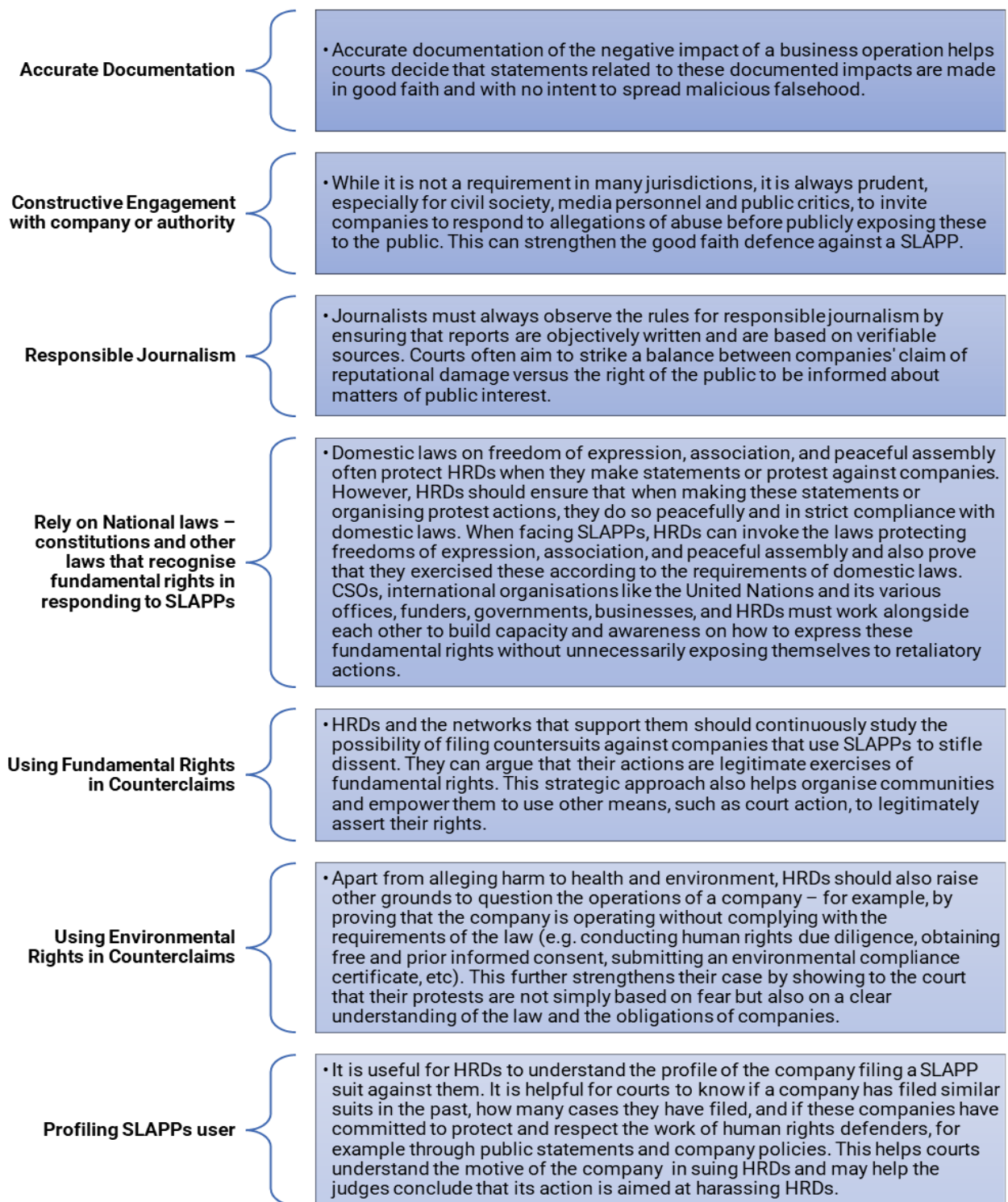


Figure 4 Examples of Good Practices against SLAPPs¹²²

¹²² This Table is based on the information provided in BHRRC (2020b).

Recommendations

1. Compliance with international legal obligations and norms

States should take all steps necessary to:

- Ensure alignment and compliance of existing laws with their international responsibilities and duties under international human rights and other legal norms;
- Fulfil their responsibilities and duties relating to the promotion, respect and fulfilment of environmental rights, including the rights to freedom of expression, to public participation in environmental decision making, access to environmental justice and equality before the law, the right to a clean, healthy and sustainable environment, and the rights of Indigenous peoples and/or local communities over their land, territories and natural resources; and
- Decriminalise defamation laws and, where necessary, replace such laws with civil defamation laws that are fully aligned with international standards, including proper defences, proportional remedies, and procedural safeguards against defamation-linked SLAPPs.

2. Amend existing anti-SLAPP legislative provisions.

In those States with existing anti-SLAPP laws, take all steps necessary to ensure the efficacy of such provisions, including identifying any gaps and amending existing anti-SLAPP measures. Such steps should include:

- Decriminalising defamation and reforming other individual causes of action that are regularly utilised by SLAPPs litigants.
- Amending existing anti-SLAPP measures to include provisions on damages that are intended to act as a disincentive to pursuing SLAPPs.

3. Introduce effective anti-SLAPP laws

In those States where there is an absence of anti-SLAPP measures, all necessary steps should be taken to implement effective anti-SLAPP laws, with the following features:

- Broad application to any legal action involving public interest matters, acts of public participation, and violation of environmental rights.
- Minimise financial and other adverse impacts of potential SLAPP on targeted EHRDs with an express provision enabling a stay of proceedings once a motion to dismiss is filed
- Defence trigger mechanism that shifts onus onto alleged SLAPP instigator to show that its action is not a SLAPP within a non-extendable, short timeframe.

- Summary hearing and expedited timeframe that accelerates the Court's consideration of the pre-trial defence or motion to dismiss.
- Full costs indemnification for the targeted EHRDs, regardless of court's decision to dismiss the case as a SLAPP, or permit it to proceed; and
- Where the Court decides the case in question is not a SLAPP, ensure that the targeted ERHDs have an immediate right of appeal, again with an expedited timeframe.
- States should draw on effective existing legislative measures such as the provisions set out in the Philippines Supreme Court's Rules of Procedure in Environmental Cases.

4. Introduce robust anti-SLAPP legal frameworks and policies

In those States where there is an absence of anti-SLAPP measures, introduce legal frameworks and policies that incorporate the following:

- Legal barriers to SLAPPs, e.g., legally recognised mandates that prohibit the filing of SLAPPs at the inception of the litigation process.
- Statutory provisions that set out a clear definition and criteria that aid in the identification of what is SLAPPs.

5. Develop and promote training on SLAPPs and anti-SLAPP good practices for Judicial officers and other public officials

States should promote, support and provide appropriate training on SLAPPs and anti-SLAPP good practices for all members of the judiciary, tribunal members, and other public official engaged in environmental decision making. Such training should be specifically focused to equip judicial officers and other key decision makers with a a greater understanding of:

- What types of cases constitute SLAPPs and procedures that assist with distinguishing a SLAPP from genuine claims, e.g., providing targets EHRD litigants with the opportunity to explain to the court why their particular case is not a SLAPP suit.
- Processes that assist with consequential decision making, e.g., ability to make orders to strike out SLAPP claims, impose civil restraints and award costs against SLAPP users, minimise cost impacts on SLAPP targets.
- The broader impact of Court decisions, espically in terms of providing potential litigants with greater certainty and clarity of the risks for SLAPP instigators; and opportunities for ongoing policy and legal framework reforms to counter evolving legal evasive responses to anti-SLAPP laws and other measures.

6. Draft guidelines for a regional anti-SLAPP Framework

Promote Asia Pacific States' engagement in collaborative dialogue and drafting of a "model anti-SLAPP framework", with a view to making such model laws freely available for adoption, with or without modification, by States in the region.

Existing models, such as those for Asia Pacific discussed in this Summary, as well as those existing or emerging in other jurisdictions may be of benefit to such a process.

7. Develop Practice Guidelines/Rules for Legal Practitioners and Judicial Officers

Where full prohibitions are not considered desirable, develop legislative provisions or litigation practice rules/guidelines for legal practitioners and judicial officers that include:

- SLAPPs assessment criteria for public officials and judicial officers to enable the early identification of SLAPPs;

- Guidelines for legal practitioners and judicial officers that advise on how to best handle and proceed with a SLAPP suit;
- Discussion of the range of options open to a decision maker faced with a SLAPP suit, e.g., model orders for striking out claims, civil restraints, costs awards etc.;
- Directions to legal practitioners on the financial risk implications for their clients who wish to engage in SLAPPs.

8. Established non-legal anti-SLAPP good practices

States should support and facilitate regular interaction, engagement between judicial officers and legal practitioners to share experiences on combating SLAPPs. This should include judicial training, knowledge building, and awareness-raising on existing anti-SLAPP measures that can be drawn from national laws, for example, constitutional provisions, other procedural mechanisms (e.g., processes used to support early dismissal of vexatious or malicious litigation), compliance with international legal obligations and norms, as well as internal training that provides insights and guidance on how to discretion may be exercised when dealing with SLAPPs.

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