

# PROTECTING ACTIVISTS FROM ABUSIVE LITIGATION

SLAPPS IN THE GLOBAL SOUTH  
AND HOW TO RESPOND

# SLAPPS IN THE GLOBAL SOUTH

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Features and Policy Responses



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## I. Introduction

In 2016, fourteen migrant workers filed a complaint with the National Human Rights Commission of Thailand against Thammakaset Co. Ltd., alleging labor violations at the company's chicken farm. Thai authorities found in the workers' favor and ordered Thammakaset to pay 1.7 million baht in unpaid compensation. Thammakaset responded by filing more than a dozen cases against at least twenty defendants over the next four years. These proceedings included suits alleging civil and criminal defamation and cybercrimes by the workers and by activists and journalists who had publicized their allegations, as well as a criminal suit alleging that two of the workers committed theft by taking their timecards to the authorities. When a worker and an activist produced a documentary film about these lawsuits, Thammakaset filed additional claims against them. As of this writing, charges are still pending in several of these cases<sup>1</sup> and have resulted in at least one criminal conviction and prison sentence.<sup>2</sup>

Thammakaset's suits represent an egregious example of SLAPPs, or Strategic Lawsuits Against Public Participation: cases filed not to secure relief through the courts, but to use the risks and costs of litigation to discourage criticism or opposition. SLAPPs aim to turn the machinery of the courts against activists, journalists, and community members, using the superior resources of their filers to stamp out the exercise of fundamental freedoms by their targets. SLAPPs have long been an object of study and policy-making efforts in the Global North, with dozens of anti-SLAPP responses implemented in the U.S., Canada, and Australia. Less attention has been paid to SLAPPs in the Global South.<sup>3</sup> SLAPPs are being filed in the South, however, in ways that warrant attention from judges, policymakers, and civil society.

This report presents the first cross-regional survey of SLAPPs in the Global South,<sup>4</sup> and the first rigorous comparative analysis of anti-SLAPP policy responses undertaken in the North and the South.

Our cross-regional survey collects over 80 instances of reported SLAPPs in Southern jurisdictions. It reveals many common features shared with SLAPPs filed in the North, and some important differences. Southern SLAPPs are often brought as criminal proceedings, in contrast to SLAPPs filed as civil suits in the North.



### What are SLAPPs?

SLAPPs, which stands for Strategic Lawsuits Against Public Participation, are cases filed to use the risks and costs of litigation to discourage criticism or opposition.

These lawsuits use the machinery of the courts against activists, journalists, and community members. The filers use their superior resources to drag out legal proceedings as a way to stamp out the exercise of fundamental freedoms by their targets.

SLAPPs have long been an object of study and policy-making efforts in the Global North, with dozens of responses implemented in the U.S., Canada, and Australia. Less attention has been paid to SLAPPs in the Global South. They are being filed in the South, however, in ways that warrant attention from judges, policymakers, and civil society.

This report presents a cross-regional survey of SLAPPs in the Global South, and is the first rigorous comparative analysis of anti-SLAPP policy responses undertaken in the North and the South.

These cases overwhelmingly target activists, CSOs, journalists, publishers, and leaders and members of local communities, and seek to stifle advocacy on environmental, labor, and human rights issues. An even larger proportion of SLAPPs in the South are based on defamation claims than the already substantial proportion in the North. And the damages in these suits in the South range into the tens of millions of dollars, and in many cases result in negative rulings for those targeted.

Our analysis of anti-SLAPP policy responses identifies nine approaches that have been employed to address SLAPPs, in both the North and the South. Based on this analysis, we set forth several reform proposals for how further policy responses in the South might be designed. We would recommend that anti-SLAPP coalitions in the South seek to enact protections for public participation, including at the constitutional level. We would urge the decriminalization of defamation. And we would counsel the application of expedited dismissal procedures, cost-shifting mechanisms, damages provisions, and special penalties for SLAPP filers in defamation cases regarding matters of public interest. Similar reforms should be explored regarding other causes of action which commonly give rise to SLAPP suits.

This report proceeds by first briefly reviewing the characteristics of SLAPPs filed in the North, and then undertaking a detailed survey of reported SLAPPs in the South. We then explore policy approaches that been undertaken to address SLAPPs in the North, before turning to approaches that have been implemented in the South. We close with recommendations for further policy responses in the South.

## II. SLAPPs in the Global North

We begin by reviewing the character and features of SLAPPs in the U.S., Canada, and Australia – the Northern jurisdictions where SLAPPs have been most prominent.<sup>5</sup>

As noted above, the essence of SLAPPs is that they are suits filed not primarily to secure relief, but to use the burdens of litigation to silence criticism or opposition. Commentators have sought to define this concept more precisely, focusing either on the subject matter of the suit or its merits and motivations. Canan and Pring, who coined the term in the 1980s, followed the first approach,



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defining a “SLAPP” as “1. a civil complaint or counterclaim (for monetary damages or injunction), 2. filed against non-governmental individuals and/or groups, 3. because of their communications to a government body, official, or the electorate, 4. on an issue of some public interest or concern.”<sup>6</sup> This approach is likely over-inclusive, but may effectively identify the general class of suits raising the concerns implicated by SLAPPs. Many commentators have followed the second approach: in a 1992 case, for example, Judge Colabella of the New York Supreme Court explained that SLAPPs “are suits without substantial merit that are brought by private interests to ‘stop citizens from exercising their political rights or to punish them for having done so.’”<sup>7</sup> While this approach does a better job of capturing the salient features of SLAPPs, it turns on subjective features that are not easily verifiable.

These definitions confine SLAPPs to civil proceedings or suits brought by private interests. As we will see, many reported SLAPPs in Southern jurisdictions are brought as criminal proceedings, and in some instances initiated by government officials or agencies. We will consider below the question of whether the concept of SLAPPs in the South should be enlarged to encompass these cases.

SLAPPs have taken a variety of forms in the U.S., Canada, and Australia, often focusing on environmental issues, development projects, and corporate practices, and usually targeting activists and journalists. In a 2019 guide, the Protect the Protest coalition listed the following as typical U.S. SLAPPs:

A large company sues an environmental activist who has exposed a pollution scandal, hoping that the lawsuit will scare away other activists. A powerful business person sues a journalist for defamation after being named in a truthful, hard-hitting corruption story. A real estate developer uses the threat of a lawsuit to silence community opposition to a new building project.<sup>8</sup>

SLAPPs in Canada “often revolve around multinational corporations that want to conduct logging on lands to which particular indigenous people claim ancestral rights” or clashes between environmentalists and logging corporations “over the right to log ‘old growth’ forests”<sup>9</sup>; there have also been multiple SLAPP suits in Canada relating to land use and development.<sup>10</sup> In Australia, the Center for Media and Democracy has cataloged SLAPPs arising out of environmental issues, development projects, corporate practices, conduct of public officials, and animal rights activism, featuring “large corporates suing poor activists,” “politicians suing each other,” and “public figures suing media organisations.”<sup>11</sup>

SLAPPs in the U.S., Canada, and Australia have relied on diverse causes of action. In a sample of U.S. SLAPPs assembled by Canan and Pring in the late 1980s, the “typical legal charges” were defamation, business torts, judicial torts, conspiracy, constitutional-civil rights violations, and nuisance.<sup>12</sup> Sheldrick has suggested that invasion of privacy is a common SLAPP predicate in Canada.<sup>13</sup> The Protect the Protest coalition has noted that U.S. SLAPP suits sometimes allege copyright infringe-

ment<sup>14</sup> or trespass,<sup>15</sup> and have in recent years increasingly relied on federal racketeering laws.<sup>16</sup> In 2007, Ogle observed that a “new wave” of SLAPPs in Australia was being filed based on commercial torts and fair competition laws.<sup>17</sup>

SLAPP suits in these jurisdictions have often sought significant damages. In Canan and Pring’s sample, the relief sought averaged \$7,400,000, with claims ranging from \$10,000 to \$100 million.<sup>18</sup> Typical SLAPP claims in Canada appear to range up to CAD\$5 million,<sup>19</sup> though Tollefson reports one Canadian SLAPP filed in the early 1990s seeking CAD\$500 million in damages.<sup>20</sup> At least one prominent SLAPP filed in Australia has sought damages over AUD\$5 million.<sup>21</sup>

Commentators have noted that in the U.S., SLAPP plaintiffs “rarely prevail,”<sup>22</sup> while in Canada, SLAPPs are “almost invariably dismissed.”<sup>23</sup> This is perhaps unsurprising, given that lack of merit is a common or defining feature of SLAPPs. In Australia, in contrast, Ogle states there is “no shortage of [SLAPP] cases where the judiciary and court system have not protected the right to free speech and the right to protest.”<sup>24</sup>

Finally, **Northern commentators have noted three principal troubling consequences of SLAPPs:**

1. SLAPP targets, in defending against suits, incur financial and psychic costs that often compel them to settle the asserted claims and stop engaging in advocacy and critical speech.<sup>25</sup>
2. SLAPPs squander judicial resources and undermine public policies that rely on public participation.<sup>26</sup>
3. SLAPPs may have a chilling effect on democratic dialogue and debate, as “not only SLAPP defendants, but also those who are aware of SLAPPs and wish to avoid being sued, cease to participate in public issues.”<sup>27</sup>

### III. SLAPPs in the Global South

While SLAPPs are a longstanding phenomenon in the North, court actions targeting public participation and expression are being brought in the Global South, as well. We turn now to a survey of these actions.

#### A. INSTANCES OF REPORTED SLAPPS IN THE SOUTH

To survey SLAPPs in the Global South, we have focused on collecting prominently reported cases filed in the South which have been characterized as “SLAPPs.” The resulting set of reported SLAPPs should not be viewed as furnishing a comprehensive or representative sample of Southern SLAPPs, but rather as providing an initial picture of SLAPPs that are being filed in the South, as well as a sense for where the SLAPP phenomenon is already well-recognized and how this concept is being applied in the South.

Thailand, India, the Philippines, and South Africa have been fertile fields for Southern SLAPPs. We will first describe SLAPPs reported in these countries, and then consider other SLAPPs reported in the South.

## i. Thailand



Myriad SLAPPs have been reported in Thailand in the last decade, primarily in response to reporting and advocacy by activists and journalists relating to alleged malfeasance by Thai companies.

### **One set of reported SLAPPs by Thai companies has targeted activism regarding alleged labor violations.**

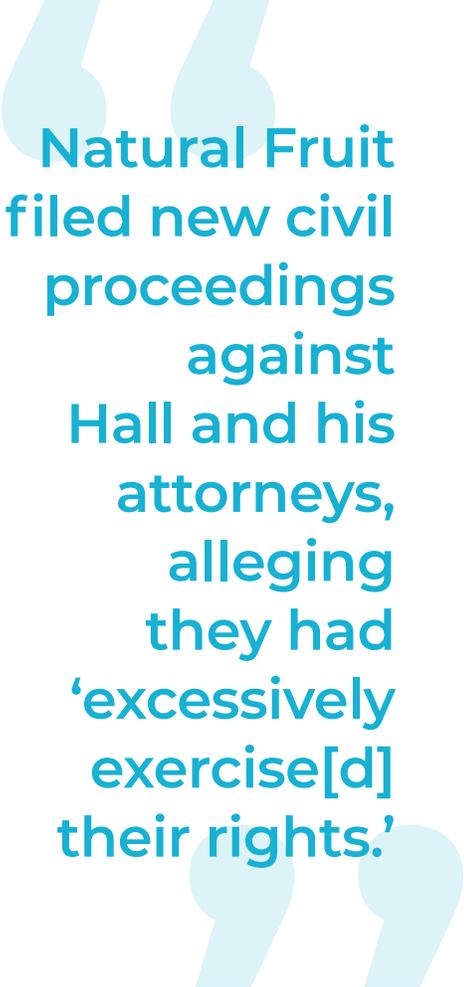
In 2016, fourteen migrants from Myanmar filed a complaint with the National Human Rights Commission of Thailand against Thammakaset Co. Ltd., owners of a Thai chicken farm, alleging labor violations at its farm. Thai courts ordered Thammakaset to provide 1.7 million baht in unpaid compensation to the workers.<sup>28</sup> Thammakaset responded with an onslaught of litigation, filing more than a dozen cases against at least twenty defendants over the next four years, including:

- A criminal complaint filed against the fourteen workers from Myanmar, alleging defamation and giving false information to public officials. A court dismissed this complaint in 2018,<sup>29</sup> but Thammakaset re-filed these charges in December 2018.<sup>30</sup>
- Theft charges filed against the workers for taking their timecards to police as evidence of long working hours. When the public prosecutor refused to pursue the case, Thammakaset filed the same case as a private criminal prosecution and included as a co-defendant a labor rights activist, Suthasinee Kaewleklai. This re-filed case was dismissed in 2018.<sup>31</sup>
- A criminal complaint against activist and researcher Andy Hall alleging defamation, libel, and violation of the Computer Crimes Act, in connection with Hall's use of social media to publicize Thammakaset's charges against the workers.<sup>32</sup> As of May 2019 this case was still pending.<sup>33</sup>
- Criminal defamation charges against Nan Win, a worker, and Sutharee Wannasiri, an activist, for participating in and sharing information about a short film on Thammakaset's suits. In a separate suit, Thammakaset is also seeking 5 million baht from Wannasiri for alleged civil defamation.<sup>34</sup>
- At least six other criminal defamation complaints against workers, activists, and journalists, including for the mere act of sharing information on social media regarding Thammakaset's alleged activities.<sup>35</sup> One of the defendants in these cases, journalist Suchanee Cloitre, was found guilty and sentenced to two years in prison in December 2019.<sup>36</sup>

The activist and researcher Hall had previously been targeted by another set of reported SLAPPs in Thailand. In 2013, Hall contributed to a report documenting alleged rights violations at the production facilities of Natural Fruit Company.<sup>37</sup> Based on this report, and on media interviews given by Hall, Natural Fruit filed two civil defamation lawsuits against Hall, claiming total damages of 400 million baht. Two sets of criminal charges were also filed against Hall, for defamation and violations of the Computer Crimes Act.<sup>38</sup> Natural Fruit itself filed at least some of the criminal charges against Hall,<sup>39</sup> and acted as a joint prosecutor in at least one of the criminal cases.<sup>40</sup> In 2018, in one civil suit, Hall was ordered to pay 10 million baht in damages,<sup>41</sup> with this judgment upheld on appeal.<sup>42</sup> In 2016, in one criminal case, Hall was found guilty of defamation and computer crimes, given a suspended jail sentence, and fined 150,000 baht;<sup>43</sup> these charges were later dismissed on appeal.<sup>44</sup> Other criminal charges filed against Hall were dismissed in 2014.<sup>45</sup> In 2017, Hall launched his own suits against Thai state prosecutors, police, and Natural Fruit, alleging unlawful prosecution and judicial harassment.<sup>46</sup> In response, Natural Fruit filed new civil proceedings against Hall and his attorneys in 2019, alleging they had “excessively exercise[d] their rights,” “intentionally damage[d] the Company’s reputation,” and “caused financial loss in their business” by pursuing the 2017 litigation against the company, and seeking 50 million baht in damages. Though the case against Hall has been withdrawn, the claims against his lawyers are still pending.<sup>47</sup>

**Another group of reported SLAPPs by Thai companies has aimed at advocacy against mining operations.**

In 2007, a community-based organization in Loei province began advocating for the closure of a gold mine operated by Tungcum Ltd., citing the mine’s alleged health and environmental impacts. As Fortify Rights has documented, a long history of violence, threats, and intimidation against those involved in this campaign then followed, including the filing of numerous criminal and civil defamation claims.<sup>48</sup> Most of these suits targeted community members and journalists for interviews, social media posts, and activism regarding the impacts of Tungcum’s activities, though Tungcum also sued two of its former employees for alleging in interviews that the company had failed to pay wages due to its workers. In most instances, these suits have been dismissed or withdrawn. The local prosecutor in one case stated that a social media post seeking investigation of Tungcum’s mining practices was “a



Natural Fruit filed new civil proceedings against Hall and his attorneys, alleging they had ‘excessively exercise[d] their rights.’

legitimate expression of opinion in good faith.” In another case, the court explained, regarding the posting of signs protesting the mine, that:

Villagers have exercised their right to complain their grievances to relevant government agencies to solve problems within their community. It is a form of expression of their opinion with honesty; therefore, it is a legitimate exercise of their rights ...

But as of October 2018, criminal charges against a 15-year-old schoolgirl and several journalists, for an interview given by the schoolgirl on youth environmental activism, were still pending.

In 2017, mining company Myanmar Phongpipat Co Ltd filed suit in 2017 against *The Nation* newspaper and one of its journalists, alleging criminal defamation and violations of the Computer Crimes Act in connection with a report published on the environmental impacts of one of its mines.<sup>49</sup>

**Not all reported SLAPPs in Thailand have been initiated by private companies**, however. In 2016, the Thai military filed a criminal complaint against three human rights activists, alleging criminal defamation and violation of the Computer Crimes Act in connection with their publication of a report documenting alleged torture by Thai security personnel.<sup>50</sup> The charges were dropped in 2017. Two criminal prosecutions of Thai academics, based on alleged violations of the Computer Crimes Act and the ruling junta’s ban on public gatherings of five or more persons, have also been characterized as SLAPPs.<sup>51</sup>

## ii. India



India has been the site of numerous reported SLAPPs filed by companies and public officials against journalists, activists, lawyers, and officials who had expressed viewpoints critical of the filers.

**Many of these cases have featured companies targeting journalists reporting on issues of public interest:**

- In 1996, United Phosphorus Limited (UPL), a pesticide manufacturer, brought criminal defamation charges against a newspaper publisher and several journalists, who had authored an article discussing UPL’s release of effluents into a heavily polluted local river. Twenty-two years later, in 2018, a court finally acquitted the defendants, finding that the article had been published after “due care and attention” in good faith in the public interest.<sup>52</sup>
- In 2009, Crop Care Federation, an association of pesticide manufacturers, brought a civil defamation suit seeking Rs 5 million in damages against the newspaper *Rajasthan Patrika* and several of its employees, arguing that an article reporting on the harmful effects of pesticide use on plant and animal life was defamatory.<sup>53</sup> The Delhi High Court dismissed the suit, noting that it

“contained all the elements” of a SLAPP suit, and that “[w]hether such use, or overuse of pesticides over a period of time, affects life, plant or human, could be a matter of discourse, but certainly not one which could be stifled through intimidatory SLAPP litigation.”<sup>54</sup>

- In 2011, the Indian Institute of Planning and Management (IIPM), a private business school, filed an Rs 500-million civil suit against *Caravan* magazine and other defendants, alleging that a cover story on IIPM’s founder had been defamatory. IIPM filed its suit in the remote Indian province of Assam, though IIPM and *Caravan*’s publisher were both located in Delhi. The court in Assam granted a preliminary injunction and enjoined *Caravan* to remove the article at issue, but the Supreme Court later transferred the proceedings to Delhi and the injunction was lifted in 2018.<sup>55</sup>
- In 2013, the Indian conglomerate Sahara India Pariwar filed a 2-billion-rupee civil defamation suit against journalist Tamal Bandyopadhyay and his publisher, based on a book describing the conglomerate’s legal battles with Indian authorities. The conglomerate withdrew its suit after the Calcutta High Court enjoined the book’s publication and the publisher agreed to include a disclaimer in the book stating that it included defamatory content.<sup>56</sup>
- In 2015, the National Stock Exchange (NSE) filed a 1-billion-rupee civil defamation claim against *Moneylife* magazine and its founders, based on publication of a whistleblower’s letter alleging the exchange had given unfair advantages to high-frequency traders. In September 2015, a court dismissed the case and ordered NSE to pay Rs 150,000 to each of the respondent journalists, along with a penalty of Rs 470,000 to be paid to local charities.<sup>57</sup>
- In 2016, Jet Airways filed defamation suits seeking Rs 10 billion against journalist Josy Joseph and HarperCollins for publishing a book alleging links between the airline and a noted gangster.<sup>58</sup>
- In 2017, Indian conglomerate Essel Group filed a criminal complaint against journalist Jay Sayta and three editors of Indian news website *The Wire*, arguing that a story alleging irregularities in the administration of a state lottery by an Essel Group subsidiary was defamatory.<sup>59</sup> Essel Group withdrew its complaint after Sayta signed an MOU agreeing not to pursue the story further.
- Journalists and publishers at *The Wire* faced another criminal complaint in 2017 from Jay Shah, son of government minister Amit Shah; the younger Shah challenged as defamatory an article reporting drastic improvement in his business fortunes after his father’s party came to power.<sup>60</sup> Shah also filed a civil defamation suit against the respondents seeking Rs 1 billion in damages.<sup>61</sup>

**Another set of reported SLAPPs has been brought by Indian corporations – including garment companies, pesticides manufacturers, and conglomerates – against activists and civil society organizations (CSOs):**

- In 2006, two Indian garment companies, Fibres & Fabrics International and Jeans Knit Pvt. Ltd., brought criminal defamation charges in Bangalore against local labor organizations that had alleged rights violations at the companies' facilities. A local court restrained the defendants from distributing the information in question.<sup>62</sup> In 2007, the companies filed suit against two European NGOs – the Clean Clothes Campaign and the India Committee of the Netherlands – which had been raising awareness about alleged labor violations at company facilities, alleging criminal defamation and cybercrime. The companies withdrew their claims in 2008, based on a settlement which included company undertakings to improve conditions at these facilities.<sup>63</sup>
- In 2006, Crop Care Federation filed a criminal defamation complaint against activists who had published a report on the impact of pesticides in Andhra Pradesh.<sup>64</sup> The complaint was quashed by the Supreme Court of India in 2010, which concluded that “the report was not intended to harm or defame any individual or manufacturers of pesticides.”<sup>65</sup>
- United Phosphorus Limited has similarly filed an Rs-50 million civil defamation claim against an NGO leader, Umendra Dutt, for publicly discussing the health effects of pesticides.<sup>66</sup>
- In 2010, TATA Sons filed suit against Greenpeace India claiming defamation and trademark infringement and seeking Rs. 100 million in damages and an injunction. Greenpeace had waged an advocacy campaign against a port project being co-developed by TATA Steel.<sup>67</sup> The Delhi High Court denied TATA's application for an injunction in 2011, but the case was listed for further proceedings at that time,<sup>68</sup> and as of 2014 TATA was still pursuing its damages claims.<sup>69</sup>
- Greenpeace was targeted by another reported SLAPP suit in India in 2014, when the conglomerate Essar Group filed a civil defamation suit seeking Rs. 5 billion and an injunction against Greenpeace India and local advocacy organization Mahan Sangharsh Samiti, which had campaigned against Essar's development of forests in Madhya Pradesh.<sup>70</sup> In 2014, the Bombay High Court granted Essar's application for an injunction, restraining the defendants from further distributing pamphlets or leaflets carrying defamatory material.<sup>71</sup>
- Essar's subsidiary Mahan Coal Limited also filed a criminal defamation complaint against three Greenpeace activists in connection with criticism relating to Essar's activities in Madhya Pradesh. In 2015, the Supreme Court

of India stayed proceedings in this suit to hear arguments from one of the defendants, Priya Pillai, challenging the validity of the criminal defamation provisions of the Indian Penal Code.<sup>72</sup> The court rejected this challenge in 2017, however.<sup>73</sup>

**A final set of reported SLAPPs in India has been wielded by powerful individuals to retaliate against sexual misconduct allegations.** In 2016, R.K. Pachauri, former Director-General of the Tata Energy Research Institute and Chairman of the Intergovernmental Panel on Climate Change, filed a civil defamation suit seeking Rs 10 million in damages against Vrinda Grover, a lawyer representing two women who had accused Pachauri of sexual harassment.<sup>74</sup> As of late 2018, these proceedings were still pending.<sup>75</sup> And in October 2018, M.J. Akbar, the Indian minister of state for external affairs, filed a criminal defamation case against journalist Priya Ramani, based on Ramani's allegations that Akbar had sexually harassed her.<sup>76</sup> Ramani's claims were echoed by more than a dozen other women, leading Akbar to resign from his position.<sup>77</sup> However, Akbar's charges against Ramani are still pending.<sup>78</sup>

### iii. Philippines



The Philippines has been the site of myriad SLAPPs over the last fifteen years. **From 2006-2007, the Philippines saw a surge of reported SLAPPs relating mainly to advocacy against mining operations:**

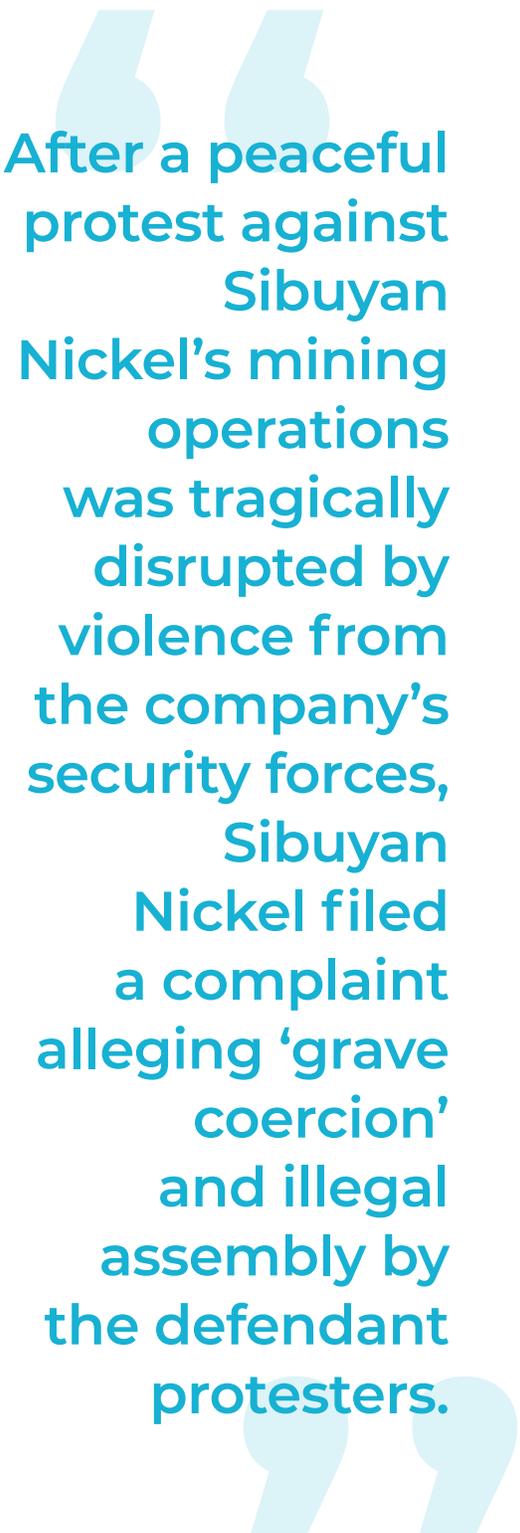
- In 2006, the Canadian firm Toronto Venture Inc. (TVI) filed criminal libel charges against several members of the clergy who had publicly opposed TVI's mining efforts in the Mindanao municipality of Siocon. Prosecutors eventually dismissed the suit for lack of merit.<sup>79</sup>
- In July 2007, Lafayette Philippines Inc., an Australian-owned mining company, brought criminal libel charges against activists at an environmental advocacy NGO which had published a report critical of Lafayette's mining operations in the island municipality of Rapu-Rapu. Lafayette sought P10 million in damages.<sup>80</sup> The charges were dismissed following the filing, by Lafayette's successor, of an "affidavit of desistance" indicating a lack of interest in pursuing the case.<sup>81</sup>
- In another suit filed in July 2007, Lapanday Agricultural and Development Corp. (Ladeco), a banana exporter, brought libel charges against Romeo and Ilang-Ilang Quijano, a toxicologist and a journalist who had reported on the health effects of pesticides used by Ladeco on its plantation.<sup>82</sup> Ladeco sought P5.5 million in damages; a regional trial court dismissed the suit and ordered Ladeco to pay the defendants P50,000 in attorneys' fees.<sup>83</sup>
- In August 2007, the mining company Oxiana Philippines Inc. and its Australian partner, RoyalCo. Ltd., filed an application to enjoin 24 indigenous

leaders from barricading roads leading to exploration operations near their villages. Though a preliminary injunction was granted that month, ordering the dismantling of the barricades,<sup>84</sup> Oxiana's petition for permanent injunction was denied by a regional trial court in October of that year.<sup>85</sup>

- In October 2007, MTL Philippines Inc., a London mining firm, filed criminal slander charges against Josie Guillao, a community leader who had opposed its local exploration operations.<sup>86</sup>
- And in November 2007, a representative of the Sibuyan Nickel Properties Development Corporation filed suit against 85 defendants who had conducted a peaceful protest near the company's mining site in Sibuyan Island. The protest had been tragically disrupted by violence from the company's security forces, resulting in the death of one protester.<sup>87</sup> The company's complaint alleged "grave coercion" and illegal assembly by the defendant protesters.<sup>88</sup>

As will be described further in Section V below, this eruption of SLAPPs led to the promulgation of new rules governing SLAPPs in the Philippines in 2010. Nonetheless, **there have been several more recent reports of SLAPP suits in the Philippines, primarily arising out of environmental advocacy:**

- In 2009, several members of the indigenous Ifugao community were charged with criminal violations of the Forestry Code by the state Department of Environment and Natural Resources, which alleged that the defendants – who had opposed a project by the Australian mining company OceanaGold – were occupying forest lands illegally. The charges were dismissed in 2011,<sup>89</sup> pursuant to a motion filed under the new rules governing SLAPPs noted above.<sup>90</sup>
- In 2012, Resorts World Sentosa (RWS), a Singaporean tourist attraction, filed suit seeking P4 million in moral and exemplary damages and legal fees against the Earth Island Institute and its regional director, after the Institute filed a petition to prevent RWS's export of dolphins to Singapore.<sup>91</sup> The defendants were found liable in August 2019 and fined USD 15,385, with the judge concluding that they "had no ground in instituting the instant petition"



After a peaceful protest against Sibuyan Nickel's mining operations was tragically disrupted by violence from the company's security forces, Sibuyan Nickel filed a complaint alleging 'grave coercion' and illegal assembly by the defendant protesters.

and “caus[ed] RWS to suffer embarrassment and besmirched reputation.”<sup>92</sup>

- In 2016, the Hinatuan Mining Corporation filed criminal “cyber-libel” charges against members of the Philippine Misereor Partnership, a faith-based NGO, based on a report alleging that a company barge had destroyed small boats protesting the company’s mining operations.<sup>93</sup>

#### iv. South Africa



A significant number of SLAPPs have been reported in South Africa.

In a first set of cases – filed from ten to fifteen years ago – **an array of companies sought to quiet efforts by local activists to oppose mining and development projects in their communities:**

- In 2006, a developer seeking to construct a petrol station near a wetland, Petro Props (Pty) Ltd, filed suit against a local resident and community association that had campaigned against the development. The developer sought an interdict against alleged unlawful harassment and infringement of its property rights, as well as R6 million in damages. The court dismissed the developer’s application, concluding that the peaceful exercise of the defendants’ right to voice concerns publicly did not infringe the plaintiff’s property rights, and that granting the plaintiff’s requested relief would cut short a public debate that should be heard.<sup>94</sup>
- That same year, the mining company Anglo Platinum sought an interdict to prevent an attorney representing communities affected by its activities from making remarks about the plaintiff in the media. The court refused the application, noting that “the more the publication concerns matters of public interest, the sooner a Court should hold that the balance of convenience lies in allowing the debate to continue, unless there is clearly no defence to the defamation.”<sup>95</sup> The plaintiff continued to pursue R3.5 million in civil defamation claims against the respondent, however.<sup>96</sup>
- In 2011, the developer Wraypex (Pty) Ltd filed suit against three conservationists who had lodged an objection to a proposed luxury development near the Cradle of Humankind. Wraypex sought damages of R40 million based on defendants’ alleged wrongful and intentional publication of false statements about the project.<sup>97</sup> A court dismissed the case and ordered Wraypex to pay R1 million in costs for “vexatious litigation,”<sup>98</sup> noting: “The litigation was purposeless from an economic point of view and if anything was more harmful to the Plaintiff than the words complained of. At the same time the four Defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them.”<sup>99</sup>
- Also in 2011, African Nickel sought an interdict barring a local resident from making media statements objecting to the grant of a prospecting li-

cense adjacent to the Cradle of Humankind, characterizing these objections as a “smear campaign.”<sup>100</sup>

**Mining companies and staff have continued filing SLAPPs in recent years,** particularly the Australian company Mineral Commodities Limited (MRC) and its subsidiary Mineral Sand Resources (MSR):

- In 2016, MRC, together with its CEO Mark Caruso, brought two defamation cases against activists who had criticized its plans to mine mineral sands on the Wild Coast of South Africa. In 2017, MSR filed another civil defamation suit against two attorneys from the Centre for Environmental Rights and a local activist, based on statements during a lecture at the University of Cape Town concerning an MSR mine in Tormin, on the West Coast of South Africa.<sup>101</sup> These three suits together seek nearly R10 million in damages and are still pending resolution.<sup>102</sup>
- In 2016, the manager of MSR’s Tormin mine, Gary Thompson, brought civil and criminal defamation charges against Tossie Beukes, a journalist at newspaper *Ons Kontrai*, and the newspaper’s publisher, seeking R100,000 for a report describing sexual assault charges against Thompson. These claims were withdrawn in 2019.<sup>103</sup>
- And in March 2019, Ikwezi Coal Mining Company instituted criminal legal proceedings alleging intimidation and assault against activist Lucky Shabalala. Shabalala had organized a protest against Ikwezi’s operations, which were occurring near the gravesites of a local community in disregard of a court order. In July 2019, the prosecutor announced withdrawal of these charges.<sup>104</sup>

## v. Other Instances of Reported SLAPPs in the South

**Indonesia** has been the scene of at least three reported SLAPPs, all filed against experts who provided environmental damages testimony in court proceedings:

- In 2017, the palm oil company PT Jatim Jaya Perkasa (JJP) sued an environmental expert, Basuki Wasis, for allegedly including a typo in documents he had presented during damages testimony in a suit against JJP relating to fires on its concession. JJP ultimately dropped its demands (for 610 billion rupiah in damages) following mediation.<sup>105</sup>
- In 2018, however, JJP filed a similar suit against another expert, Bambang Hero Saharjo, who had testified in the same underlying proceedings. JJP alleged the inadmissibility of Bambang’s testimony and sought 510 billion rupiah in damages.<sup>106</sup> This suit was later dismissed.<sup>107</sup>
- And in March 2018, the suspended governor of Southeast Sulawesi, Nur Alam – who had been charged with (and was later convicted of) abuse of

power in issuing mining licenses – filed suit against Basuki Wasis, questioning the accuracy of his damages testimony in the proceedings against Alam. Alam’s suit sought 4.47 billion rupiah in fines and damages, seizure of assets, and a prison sentence for Basuki.<sup>108</sup> In December 2018, district court judges found in favor of Basuki, ruling that his testimony as a witness could not give rise to criminal or civil charges.<sup>109</sup>

In **Malaysia**, in 2013, Raub Australian Gold Mining filed civil claims for libel and malicious slander against Hue Shieh Lee, a local activist who had publicized health problems experienced by residents living near a Raub processing facility. The Kuala Lumpur High Court dismissed these claims in 2016 and this dismissal was later affirmed on appeal,<sup>110</sup> with the Malaysia Court of Appeal noting in its decision that activists’ groups “have contributed much to the general well-being of the society at large” and that “the freedom of speech entrenched in our Constitution must be construed in that context.”<sup>111</sup>

In **Armenia**, mining company Lydian Armenia filed at least five civil defamation complaints in 2018-19 against local activists who had publicly criticized the company’s operations in the province of Amulsar.<sup>112</sup> As of May 2019 these claims were still pending, and one suit has resulted in an order barring a defendant, Ani Khachatryan, from disseminating information negatively impacting the company’s reputation.

In **Sierra Leone**, Luxembourg-registered agro-industrial group SOCFIN has filed at least two civil defamation suits against the environmental advocacy organization Green Scenery and its executive director. SOCFIN filed a first suit in 2013, seeking damages for the publication of Green Scenery reports highlighting corruption and inadequate compensation relating to SOCFIN’s development of a local palm oil plantation.<sup>113</sup> This matter was ultimately dismissed after SOCFIN failed to pursue it.<sup>114</sup> SOCFIN then filed a second complaint in 2019, based on a Green Scenery report describing the human rights implications of SOCFIN’s local activities. Proceedings in this matter are still ongoing.<sup>115</sup>

And in **Honduras**, in 2017, Desarrollo Energético S.A. (DESA) filed a civil defamation suit against Centro de Estudios de la Mujer – Honduras (CEM-H), seeking one million lempiras in compensation for allegedly false and inaccurate declarations. CEM-H’s co-director, Suyapa Martinez, had alleged that DESA was in-



The Malaysia Court of Appeal noted in its decision that activists’ groups ‘have contributed much to the general well-being of the society at large’ and that ‘the freedom of speech entrenched in our Constitution must be construed in that context.’

volved in planning the 2015 murder of human rights defender Berta Cáceres, who had campaigned against DESA's construction of a local dam. DESA's suit was dismissed in March 2017.<sup>116</sup>

## B. FEATURES OF REPORTED SLAPPS IN THE SOUTH

The sections above catalog 82 cases<sup>117</sup> filed in Southern jurisdictions in the past 25 years which have been prominently reported upon and characterized as SLAPPs. It bears repeating that this sample is neither complete nor representative. Moreover, in many instances, we have been unable to uncover relevant details regarding the underlying causes of action, relief sought, or ultimate disposition in these cases.

With these caveats in mind, we note certain features of the cases identified.

**First, of the 81 cases clearly classifiable as civil or criminal,<sup>118</sup> 41 cases, or slightly more than half, involved criminal proceedings.** As noted above, definitional approaches in the North have limited SLAPPs either to civil cases or suits brought by private interests, with these categories in many respects overlapping. In many of the Southern jurisdictions explored here, however, criminal proceedings may (and in some cases must) be initiated by complaint of the injured party. Thailand's Criminal Code, for example, requires that certain criminal cases, including defamation cases, be initiated by a complaint of the injured person,<sup>119</sup> and allows private prosecution by the injured party in most criminal cases.<sup>120</sup> The Indian legal system permits the initiation of criminal proceedings by injured parties with the filing of a complaint.<sup>121</sup> And the Indonesian criminal legal system requires that certain "complaint" offenses be initiated by complaint of the injured party.<sup>122</sup> In these cases, private actors may use the courts to target their critics through either civil or criminal proceedings. Where criminal proceedings may be initiated by private complaint, we would contend that SLAPPs should include both criminal and civil proceedings.

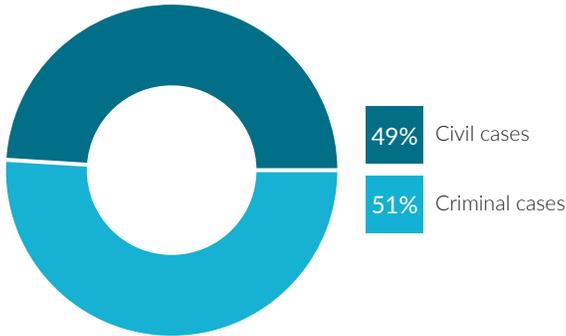
**Second – and recognizing the subjectivity and permeability of these labels – the most frequent targets of cases in our sample were activists and CSOs (38 cases, or 46%); journalists and publishers (17 cases, or 21%); and leaders and members of local communities (15 cases, or 18%).** Suits against such defendants made up 69 of our 82 cases (84%).<sup>123</sup> 44 of the cases in our sample, or 54%, arose out of environmental or environmental health advocacy, while 25 cases (30%) targeted labor and human rights advocacy.

**Third, 75 of the cases in our sample (91%) were brought by private companies or company officials, with 34 of these cases (41%) brought by mining companies and 28 cases (34%) brought by companies associated with agriculture.** Four cases (5%) were brought by government agencies and two cases (2%) were brought by government officials. Of the four cases brought by government agencies, three cases (in Thailand) targeted defendants who had criticized the government,

# SLAPPS BY THE NUMBERS

## Civil or Criminal Proceedings

Of the 81 cases clearly classifiable as civil or criminal:



## Causes of Action in SLAPPS

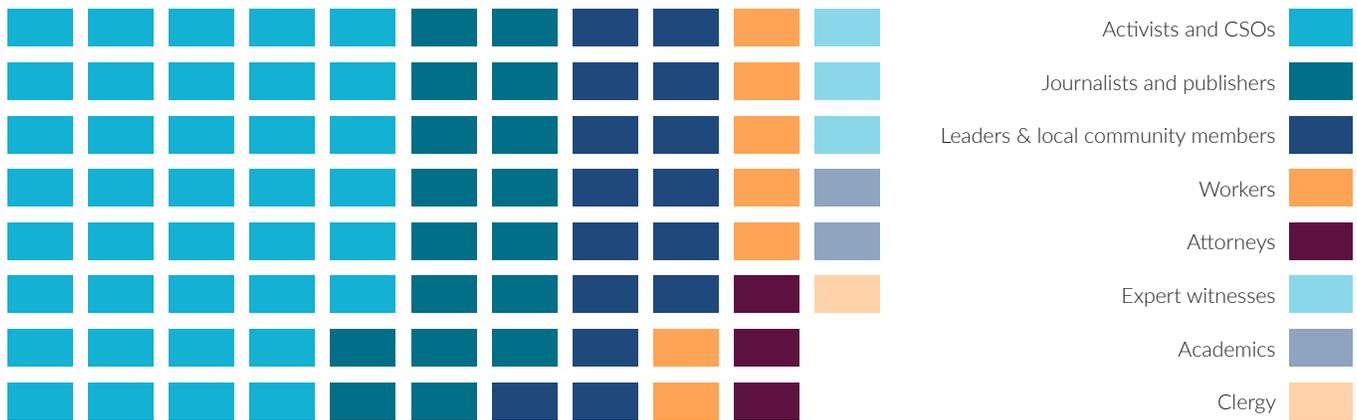
Of the 75 cases\* in which causes of action were reported:



\* Figures do not sum to 75 because some cases involved more than one cause of action.

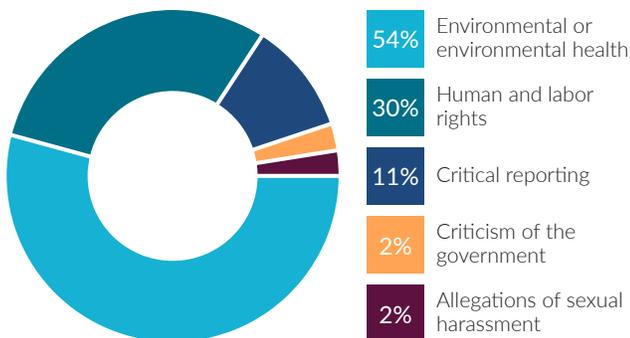
## Targets of SLAPPS

Note: Some cases targeted more than one category



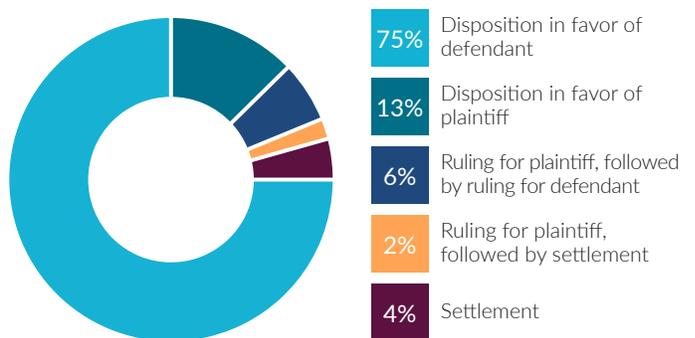
## Advocacy Targeted by SLAPPS

Of 82 cases examined:



## Outcomes in SLAPPS

Of the 48 cases in which some disposition was reported



while one case (in the Philippines) targeted defendants who had opposed private mining activities. Of the two cases brought by government officials, one case (in India) was filed against a journalist who had voiced sexual misconduct allegations against the official, and one case (in Indonesia) was filed against an expert who had testified in proceedings against the official. All six cases were brought as criminal proceedings.

In our view, these six cases may not warrant classification as SLAPPs, notwithstanding the clear threat they pose to fundamental freedoms. Extending the concept of SLAPPs to include not only criminal proceedings, but criminal proceedings instituted by government actors, risks conflating SLAPPs and other instances of governmental repression. For conceptual clarity, we would recommend maintaining a distinction between SLAPPs and repression originating with state actors, especially given that policy prescriptions for addressing these two forms of abusive conduct will likely differ significantly. With respect to criminal proceedings, at least, we would advise retaining a focus on SLAPPs as cases brought by private interests.<sup>124</sup> Where private interests work closely with government actors to suppress fundamental freedoms through criminalization of defenders, activists, and journalists, this may warrant treatment as yet a third type of repressive activity, distinct from SLAPPs and government repression.

**Fourth, where the cause of action or charge was reported, the suit was based at least in part on a defamation charge, either civil or criminal, in 66 of 75 cases (88%).** Acknowledging, once again, that our sample of reported SLAPPs is not broadly representative and that quantitative features of this sample should not be relied upon to draw conclusions about the population of Southern SLAPPs, it is nonetheless noteworthy that in an (admittedly unrepresentative) sample of U.S. SLAPPs composed by Canan and Pring in 1989, defamation cases represented only 53% of the cases.<sup>125</sup> The prevalence of defamation cases in our sample of reported SLAPPs suggests that policy responses aimed at addressing SLAPPs in the South might usefully begin by revisiting requirements applicable to civil and criminal defamation claims.

**Fifth, 7 of the 33 cases (21%) filed in Thailand relied at least in part on alleged violations of the Computer Crimes Act.** (Our sample included only one reported SLAPP filed outside Thailand – in India – predicated on a cybercrime allegation.) The high incidence of such suits in Thailand underlines the special risks to fundamental freedoms which result from broad cybercrime laws.

**Sixth, of the suits in our sample brought as civil actions, the damages sought by the plaintiffs were in most cases significant.** Our sample includes 33 cases for which damages claims were reported. The amounts of these claims ranged from 2,000 USD (in the defamation suits filed by Lydian Armenia) to 130,000,000 USD (in the suit filed by Jet Airways against Josy Joseph and HarperCollins in India), with claims in 17 cases exceeding 1 million USD and the average claim exceeding 10 million USD.<sup>126</sup>

**Seventh, though defendants prevailed in the majority of the cases gathered in our sample, a significant number of these cases resulted in negative or indeterminate outcomes for defendants.** Of the 48 cases in which some disposition has been reported, this disposition has been in favor of the defendant in 36 cases (75%). This includes instances where a request for an injunction has been denied, and cases in which claims have been withdrawn or dismissed. By way of comparison, in Canan and Pring’s sample of U.S. SLAPPs, “[f]inal legal judgments favored targets in 83 percent of the finally disposed cases.”<sup>127</sup> In seven of the cases in our sample (15%), the disposition was in favor of the plaintiff, including instances where the defendant was convicted, or where a judgment was rendered or an injunction was granted in favor of the plaintiff. In three cases (6%), the parties reached a settlement.<sup>128</sup> And in three cases (6%), courts reached initial rulings favoring plaintiffs which were later supplanted by rulings favoring defendants. In the criminal proceedings filed by Natural Fruit Company against Andy Hall, an initial guilty verdict was subsequently overturned on appeal. In the civil defamation case filed by IIPM against *Caravan* magazine, a court initially granted an injunction requiring removal of the article in question, but the Delhi High Court later lifted this injunction. And in the suit brought by Oxiana Philippines Inc. against 24 indigenous leaders in Nueva Vizcaya, a court initially granted a preliminary injunction requiring removal of barricades erected by local communities, only to later deny a request for a permanent injunction.

**Eighth, there was 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; 12 cases (15%) filed in Africa; and just one case (1%) filed in Latin America.** From our perspective, this reflects an availability bias, along with anomalies resulting from a few instances in which specific entities filed clusters of multiple cases. We attribute the bias in our sample to the language in which we conducted our search (English) and the extent to which the concept of SLAPPs has become culturally prevalent in different countries, with this prevalence itself likely a function of linguistic and legal commonalities with the common law jurisdictions of the North where SLAPPs were originally identified and studied. Consultations with local experts in Lebanon<sup>129</sup> and Cambodia<sup>130</sup> – two jurisdictions lacking reported instances of SLAPPs – has revealed an array of cases that may warrant classification as SLAPPs. Research by the Business & Human Rights Resource Center has suggested that SLAPPs may be widespread in Latin America, as well.<sup>131</sup> We expect that as the concept of SLAPPs becomes more widely known, reported instances of SLAPPs throughout the Global South will increase markedly. The cases listed here likely only scratch the surface of SLAPPs being filed in the South.

## IV. Policy Responses to SLAPPs in the Global North

As the preceding sections document, SLAPPs are a significant threat to fundamental freedoms not only in Northern jurisdictions, but also in the Global South, where they have been disproportionately mobilized against activists, CSOs, journalists, and members of local communities in order to stifle advocacy on environmental and rights issues, including through criminal proceedings. What policy responses can be deployed to address this threat? To answer this question, we turn now to an examination of policies that have been undertaken to curb SLAPPs, beginning with responses implemented in the North.

To date, Northern anti-SLAPP responses have been implemented in more than thirty U.S. states,<sup>132</sup> three Canadian provinces (Québec, Ontario, and British Columbia), and the Australian Capital Territory (ACT). Analysis of these responses reveals at least nine approaches that have been employed to manage SLAPPs:

1. Enacting protections for public participation
2. Creating expedited dismissal procedures for SLAPPs
3. Endowing courts with supplemental authorities to manage SLAPPs
4. Permitting recovery of costs by SLAPP targets
5. Authorizing government intervention in SLAPPs
6. Establishing public funds to support SLAPP defense
7. Imposing compensatory and punitive damages on SLAPP filers
8. Levying penalties on SLAPP filers
9. Reforming SLAPP causes of action

We will illustrate these approaches, and the choices, benefits, and disadvantages presented by each, with reference to anti-SLAPP measures enacted in Québec, Ontario, and British Columbia; the Australian Capital Territory; and the U.S. states of California, New York, Washington, Minnesota, and Utah.

### A. ENACTING PROTECTIONS FOR PUBLIC PARTICIPATION

Perhaps the simplest response to SLAPPs may be to immunize participation on matters of public interest.

As previously noted, SLAPPs filed in the U.S. have generally been unsuccessful on the merits, in part because the First Amendment to the U.S. Constitution guarantees freedom of speech and the right to petition.<sup>133</sup> Courts have interpreted the petition clause, in particular, as providing broad protection from civil liability for a wide variety of communications to the government or electorate.<sup>134</sup> Some U.S. anti-SLAPP

responses have supplemented this protection. Washington State’s anti-SLAPP law, for example, provides immunity from “civil liability for claims based upon [a] communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.”<sup>135</sup>

Efforts to enact anti-SLAPP responses in Canada and Australia have sought recognition of a right to public participation. While none of the legislative responses to SLAPPs enacted in these countries have to date created such a right,<sup>136</sup> the measure enacted in British Columbia in 2001 (and repealed a few months later, to be replaced with another anti-SLAPP measure in 2019) did afford “protection from liability for defamation if the defamatory communication or conduct constitutes public participation.”<sup>137</sup>

Enacting protections for public participation will not, by itself, address all the concerns generated by SLAPPs, which do not necessarily aim to prevail in court but instead seek to drain the resources of defending parties.<sup>138</sup> But such protections can have benefits. Even if SLAPP suits will often fail on the merits without such protections, providing an affirmative defense signals more clearly that SLAPPs will be subject to dismissal and thus helps relieve the emotional toll that the prospect of liability imposes on a target.<sup>139</sup> Enunciating a positive right to public participation also emphasizes that fostering such participation is a core value which warrants protection even at the cost of limiting access to the courts.<sup>140</sup>

## B. CREATING EXPEDITED DISMISSAL PROCEDURES FOR SLAPPS

The core of anti-SLAPP responses in the North has been procedures aimed at securing early dismissal of these suits. Given that SLAPPs operate by imposing high litigation costs on their targets, it is undeniably important to implement procedures aimed at truncating this litigation.<sup>141</sup> Early dismissal schemes present complicated questions of design, however, implicating issues relating to due process and access to the courts. An examination of such schemes implemented in the North reveals six key choices to be made.

**The first choice is whether the scheme should focus on suits filed with an improper purpose or suits targeting a protected class of communication and conduct.** Québec’s anti-SLAPP law, adopted in 2009, follows the first approach, providing that



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“[i]f the court notes an improper use of procedure, it may dismiss the action or other pleading.” The impropriety finding is made via a burden-shifting procedure: “If a party summarily establishes that an action or pleading may be an improper use of procedure, the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.”<sup>142</sup> Utah’s anti-SLAPP law<sup>143</sup> also provides for expedited dismissal where a case was filed for an improper purpose, as did British Columbia’s 2001 measure.<sup>144</sup>

By contrast, California’s anti-SLAPP law, enacted in 1992, follows the second approach. The law applies expedited dismissal procedures to cases “arising from any act ... in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” Once a defendant shows that a suit falls into this protected class, the case will proceed only if the plaintiff can demonstrate a probability of prevailing on their claim.<sup>145</sup> New York,<sup>146</sup> Washington,<sup>147</sup> Minnesota,<sup>148</sup> Ontario,<sup>149</sup> and British Columbia (in 2019)<sup>150</sup> have all enacted similar procedures, providing for expedited dismissal of claims based on conduct falling into a protected category, unless the filer can show the claim should proceed. The scheme enacted in Ontario, and closely followed in British Columbia (2019), actually goes further, requiring a filer to show not only that “the proceeding has substantial merit” but that “the harm likely to be or have been suffered by the [filer] as a result of the [defendant’s] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.”<sup>151</sup>

The approach to securing early dismissal of SLAPPs taken in Québec, Utah, and British Columbia (2001) has been termed the “improper purpose approach.”<sup>152</sup> This approach presents serious concerns, given the difficulty of proving a plaintiff’s intent in filing suit, especially at an early stage in proceedings.<sup>153</sup> A protected-class approach will usually be more effective in securing early dismissal of SLAPPs.

**If policymakers decide to pursue a protected-class approach, two more choices then present themselves:**

- 1. How should the protected category be drawn?** If the protected category is drawn too narrowly, it will include too few cases; if it is drawn too broadly, it will sweep in too many. New York’s scheme, which applies only to suits arising out of opposition to an application for a government permit or license,<sup>154</sup> has been criticized as too narrow.<sup>155</sup> California’s measure, in contrast, required post-enactment narrowing to exclude public interest litigation and suits concerning certain commercial speech, following “disturbing abuse” of the early-dismissal procedures.<sup>156</sup>
- 2. Should filers have to adduce specific evidence in order to proceed with their claim?** Because SLAPPs “masquerade as ordinary lawsuits,”<sup>157</sup> if a filer need only show that its claim has a basis in law, without adducing specific

facts in support of the claim, then even abusive claims will tend to survive dismissal proceedings.<sup>158</sup> But requiring filers to present evidence in order to proceed raises concerns about entrusting factual gatekeeping determinations to judges at an early stage in legal proceedings. Expedited anti-SLAPP dismissal procedures in both Washington State and Minnesota have been ruled unconstitutional by state courts as violating the right to trial by jury.<sup>159</sup>

**This suggests another policy choice common to both improper-purpose and protected-class dismissal procedures, the fourth overall in our running list: whether evidence-gathering processes such as discovery should be available before a court rules on dismissal.** On the one hand, “[d]iscovery is usually the most expensive, time-consuming and intimidating litigation stage before adjudication on the merits”;<sup>160</sup> on the other hand, in the absence of discovery, defendants may have difficulty showing that a case arises from an improper purpose and plaintiffs may be unable to show that a claim falling in a protected class should proceed. Some anti-SLAPP laws, such as those in Ontario<sup>161</sup> and British Columbia (2019),<sup>162</sup> automatically stay all proceedings once a motion to dismiss has been filed. California<sup>163</sup> and Utah<sup>164</sup> stay all proceedings unless a judge orders otherwise; Québec’s law makes suspension of proceedings discretionary, where “there appears to have been an improper use of procedure.”<sup>165</sup> And New York’s law does not stay discovery while a dismissal motion is being decided.<sup>166</sup> Wells has recommended a reasonable compromise approach: “A stay of discovery should be imposed until a hearing is conducted, but the judge should be allowed to grant limited discovery for purposes of the hearing.”<sup>167</sup>

**Fifth, policymakers must determine whether dismissal procedures should mandate expedited action by courts.** If expedited dismissal procedures do not specify a strict timeline on which motions to dismiss should be heard, these motions risk languishing, but mandating that such motions must be decided within a specific period will usually mean that other motions and cases must wait longer to be heard. Ontario’s anti-SLAPP law provides that a motion to dismiss “shall be heard no later than 60 days after notice of the motion is filed with the court,”<sup>168</sup> while California’s law mandates a hearing within 30 days of filing.<sup>169</sup> Québec’s anti-SLAPP legislation leaves to judges the schedule on which such motions should be heard.<sup>170</sup> New York’s law plots a middle course, providing only that “[t]he court shall grant preference in the hearing of” an anti-SLAPP motion to dismiss,<sup>171</sup> and laws in Utah and British Columbia (2019) similarly provide that such motions should be heard as “expeditiously as possible”<sup>172</sup> or “as soon as practicable.”<sup>173</sup>

**Finally, anti-SLAPP laws providing for expedited dismissal vary in the discretion afforded to courts to rule on dismissal.** The laws in California,<sup>174</sup> New York,<sup>175</sup> Ontario,<sup>176</sup> and British Columbia (2019)<sup>177</sup> all provide for mandatory dismissal of a case once the moving party has made the required (limited) showing, unless the filer then carries its burden (such as showing a probability of prevailing on the

claim). Utah’s law mandates dismissal “upon a finding that the primary purpose of the action is to prevent, interfere with, or chill the moving party’s proper participation in the process of government.”<sup>178</sup>

In contrast, anti-SLAPP statutes enacted in British Columbia (2001)<sup>179</sup> and Québec<sup>180</sup> have afforded to courts the discretion to determine whether dismissal is appropriate. Vesting such discretion in judges may be problematic. Discussing the case of Québec, Landry notes: “As it stands now, there is little chance that the new legislation will provide the courts with the incentive to quickly dismiss actions or proceedings that are not clearly improper. Québec has a strong legal tradition of carefulness in rejecting actions that might or could be improper; such a dismissal could interfere with the plaintiff’s right to seek redress in court.”<sup>181</sup> Scott and Tollefson expressed similar concerns regarding British Columbia’s 2001 law.<sup>182</sup>

### C. ENDOWING COURTS WITH SUPPLEMENTAL AUTHORITIES TO MANAGE SLAPPS

If expedited dismissal procedures are viewed as a method of managing the aggregate costs of SLAPPs, an alternative cost-management approach is to endow courts with additional authorities to supervise suspect cases. These approaches are not mutually exclusive; Québec’s anti-SLAPP law provides for early dismissal of “improper” pleadings or actions, and further provides courts “with an extensive set of powers to be used with discretion where it only appears that a proceeding may be improper.”<sup>183</sup> These powers include: subjecting furtherance of the action to conditions; requiring undertakings from the filing party; suspending proceedings; and imposing special case management measures.<sup>184</sup> Though these provisions arguably signal to judicial authorities that they are expected to closely monitor actions to prevent abuse,<sup>185</sup> it may not be realistic to expect courts to wield these discretionary tools to meaningfully police SLAPPs. As Sheldrick notes: “SLAPP lawsuits continue in Québec, and it appears that the existence of the law has not limited the willingness of corporations to file these sorts of cases. Even when the courts do characterize a lawsuit as a SLAPP under the terms of the legislation, cases continue to drag on.”<sup>186</sup>



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#### D. PERMITTING RECOVERY OF COSTS BY SLAPP TARGETS

Shifting the financial costs of litigation from SLAPP targets to filers, particularly through an award of costs and fees, is a frequently seen feature of anti-SLAPP responses.

In common law systems, there are two prevailing methods of allocating litigation costs and fees. Under the American rule, each party in a lawsuit must pay its own attorney's fees. The English rule, in contrast, provides that the party who loses in court pays the other party's legal costs.<sup>187</sup>

Anti-SLAPP reform efforts in the U.S. have revised application of the American rule, permitting recovery of costs by SLAPP defendants. But the burden imposed on defendants to obtain recovery varies. New York's anti-SLAPP law permits defendants to recover costs and fees, but only by "maintain[ing] an action, claim, cross claim or counterclaim" to recover costs and attorney's fees upon a showing that the action was "commenced or continued without a substantial basis in fact and law."<sup>188</sup> Even if a defendant makes this showing, whether to grant an award remains at the discretion of the court.<sup>189</sup> California, on the other hand, provides for the mandatory award of attorney's fees and costs to a defendant who prevails on a special motion to strike, though it also provides for the mandatory award of fees and costs to a plaintiff who survives such a motion if the court finds the motion "is frivolous or is solely intended to cause unnecessary delay."<sup>190</sup> It would seem preferable to make awards of fees and costs to SLAPP defendants mandatory, particularly rather than impose additional litigation burdens on defendants.

Canada follows a variant of the English rule, whereby prevailing parties are usually compensated only for costs "necessarily" required to conduct the litigation, which generally amounts to about one-third of total costs.<sup>191</sup> To fill this gap, the anti-SLAPP law enacted in British Columbia in 2001 provided that if a defendant prevailed on a motion for dismissal, the court could order the plaintiff to pay "all of the reasonable costs and expenses incurred by the defendant."<sup>192</sup> Even stronger, Ontario's anti-SLAPP law automatically awards these costs to a prevailing defendant,<sup>193</sup> as does British Columbia's 2019 law.<sup>194</sup>

One common criticism of fee-shifting provisions in anti-SLAPP laws is that they do not support a target's defense during the actual conduct of a suit.<sup>195</sup> The SLAPP statute enacted in Québec addresses this concern by giving courts discretion, in case of an improper use of procedure, to "order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case."<sup>196</sup> Both Sheldrick and Landry note that this is a discretionary provision, however, and express skepticism as to whether Québécois judges can be relied upon to grant costs to SLAPP defendants.<sup>197</sup>

## E. AUTHORIZING GOVERNMENT INTERVENTION IN SLAPPS

If fee-shifting provisions reduce costs facing SLAPP targets by allocating these costs to filers, another way of reducing these costs is to invite governments to help bear the burden of defense. Barker has argued that “[a]llowing government intervention on behalf of SLAPP defendants could significantly reduce both the chilling effect and the prohibitive expense to these defendants.”<sup>198</sup> Indeed, the prospect of facing government attorneys may by itself deter some would-be SLAPP filers. Utah’s anti-SLAPP law thus provides that “[a]ny government body to which the [defendant’s] acts were directed or the attorney general may intervene to defend or otherwise support the [defendant],”<sup>199</sup> and Washington’s law similarly permits agency intervention in suits regarding communications to that agency.<sup>200</sup>

## F. ESTABLISHING PUBLIC FUNDS TO SUPPORT SLAPP DEFENSE

Another method of defraying the costs of SLAPP defense is to provide public support for this defense. A Québécois commission reporting on SLAPPs recommended establishing a public fund to assist with defense of SLAPP suits,<sup>201</sup> though no such fund was included in the anti-SLAPP bill ultimately enacted in Québec.<sup>202</sup> We are not aware of any public funding mechanism yet established to support SLAPP targets.

## G. IMPOSING COMPENSATORY AND PUNITIVE DAMAGES ON SLAPP FILERS

Some anti-SLAPP responses have aimed to deter the filing of these lawsuits by increasing the costs facing SLAPP filers. One method of doing this, exemplified by laws in Québec and British Columbia (2001), is to permit SLAPP targets to recover compensatory and punitive damages from filers.

Quebec’s law provides that “[o]n ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.”<sup>203</sup> In an apparently unique<sup>204</sup> refinement of this approach, Québec’s law specifically provides for corporate veil-piercing in the award of these damages: “If a legal person or an administrator of the property of another resorts to an improper use of procedure, the directors and officers of the legal person who took part in the decision or the administrator may be ordered personally to pay damages.”<sup>205</sup>

The 2001 law enacted in British Columbia authorized a court, “on its own motion or on the application of the defendant, [to] award punitive or exemplary damages against the plaintiff” where a defendant satisfied the court that the conduct targeted by the suit constituted public participation and the suit had been brought for

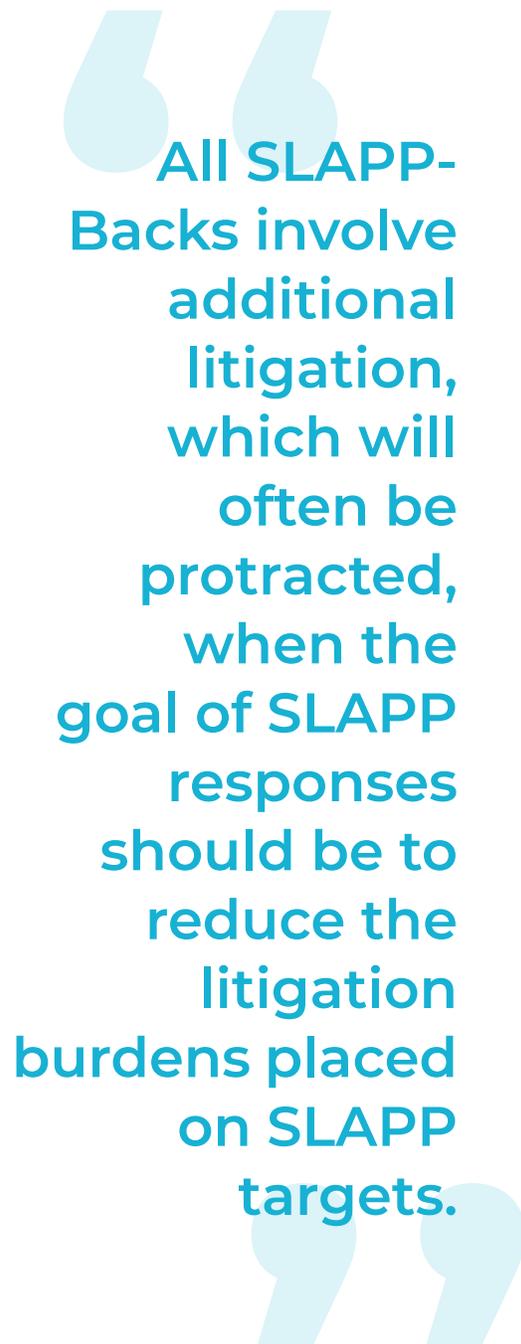
an improper purpose.<sup>206</sup> Of note, this law also provided for interim awards to be posted with the court in case a defendant were unable to make the showing above but was able to “satisf[y] the court that there is a realistic possibility” that the conditions described above were met. Specifically, courts were authorized in this case to order plaintiffs to provide, to the court, security in an amount “sufficient to provide payment to the defendant of the full amounts of the reasonable costs and expenses and punitive or exemplary damages to which the defendant may become entitled,”<sup>207</sup> thereby generating a “powerful disincentive” for plaintiffs to delay proceedings or maintain a meritless suit.<sup>208</sup>

New York,<sup>209</sup> Utah,<sup>210</sup> and California,<sup>211</sup> by contrast, do not authorize the award of damages in SLAPP suits either on motion of a target or the court’s own initiative. Instead, the vehicle for such awards is through a “SLAPP-Back” suit: “separate countersuits or counterclaims to SLAPPs, usually for abuse of process or malicious prosecution.”<sup>212</sup> SLAPP-Backs have serious limitations. The relevant causes of action often include as an element that the underlying case terminated in the target’s favor,<sup>213</sup> so that a SLAPP-back cannot be filed until the SLAPP has not only concluded but reached a disposition on the merits.<sup>214</sup> And all SLAPP-Backs involve additional litigation, which will often be protracted, when the goal of SLAPP responses should be to reduce the litigation burdens placed on SLAPP targets.<sup>215</sup>

#### H. LEVYING PENALTIES ON SLAPP FILERS

Costs may be imposed on SLAPP filers not only through damages awards, but through the levying of penalties. Anti-SLAPP legislation enacted in the ACT in Australia, for instance, provides that if a court determines that a proceeding was brought against a defendant for an improper purpose in relation to conduct constituting public participation, “[t]he court may order the plaintiff to pay to the Territory a financial penalty of not more than the amount (if any) prescribed by regulation.”<sup>216</sup> This provision has been criticized on the basis that these penalties are paid to the State, not to defendants.<sup>217</sup>

A more effective sanction to be imposed on SLAPP filers may be found in Québec’s anti-SLAPP law, which provides: “If the improper use of procedure results from a party’s quarrelsomeness, the court may, in addition, prohibit the party from instituting legal proceedings except with the authorization of and subject to



All SLAPP-Backs involve additional litigation, which will often be protracted, when the goal of SLAPP responses should be to reduce the litigation burdens placed on SLAPP targets.

the conditions determined by the chief judge or chief justice.”<sup>218</sup> The prospect of losing the ability to file suits generally would seem likely to concentrate the mind of a would-be SLAPP filer, and could also serve as a valuable tool for courts dealing with repeat filers of SLAPPs.

## I. REFORMING SLAPP CAUSES OF ACTION

A final method of countering SLAPPs, attempted in Australia and New York, is to revise the causes of action on which these suits are commonly based to make them less susceptible to abuse.

In 2006, Australian states and territories passed uniform laws aimed at replacing the prior “unworkable” system of multiple defamation laws nationwide.<sup>219</sup> Among other changes, the new laws barred defamation actions by private corporations employing ten or more employees.<sup>220</sup> New York’s anti-SLAPP statute similarly revised defamation law, providing that in all actions involving public petition and participation, a plaintiff must make the same heightened showing as would ordinarily be required if the plaintiff were a public official seeking damages for defamatory falsehoods relating to his or her official conduct.<sup>221</sup>

New York’s anti-SLAPP law, as already discussed, is narrow in scope,<sup>222</sup> making it difficult to evaluate whether its revision of the defamation standard has had an effect in discouraging SLAPPs. As for the reform of defamation laws in Australia, Ogle notes that “corporations retained plenty of other instruments through which to take legal action. ... [F]or community activists, the new defamation laws simply meant a change in the types of actions brought against them in some cases.”<sup>223</sup> This suggests a need, in revising SLAPP causes of action, to be mindful of the new forms SLAPPs may take.

## V. Policy Responses to SLAPPs in the Global South

The anti-SLAPP policy responses that have been implemented in Northern jurisdictions may be seen as attempts to reduce the financial and psychic costs of litigation suffered by SLAPP targets. By making clear that a SLAPP will likely fail, protections for public participation may relieve some of the psychic costs resulting from the prospect of liability. Creating expedited dismissal procedures for SLAPPs, and endowing courts with supplemental authorities to manage SLAPPs, help reduce the aggregate costs of litigation. Permitting recovery of costs by SLAPP targets, authorizing government intervention in SLAPPs, and establishing public funds to support SLAPP defense all reduce the litigation costs facing SLAPP targets. And imposing compensatory and punitive damages on SLAPP filers, levying penalties on SLAPP filers, and reforming SLAPP causes of action all raise the costs of pursuing SLAPPs for filers.

While fewer anti-SLAPP responses have been enacted in the Global South, notable responses have been implemented in Thailand, the Philippines, and Indonesia. We now consider these responses and how they compare to the Northern anti-SLAPP approaches already described.

## A. THAILAND

In Thailand, the National Legislative Assembly has in recent years enacted two amendments to the Criminal Procedure Code, Articles 161/1 and 165/2, aiming in part to combat SLAPPs.<sup>224</sup>

**Article 161/1**, which entered into force on March 21, 2019, provides:

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

The filing of a lawsuit in bad faith as stated in paragraph one includes incidents where the complainant intentionally violated a final court’s orders or judgments in another case without providing any appropriate reason.<sup>225</sup>

**Article 165/2**, which entered into force on February 20, 2019, 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 evidence, 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.<sup>226</sup>

Though these reform efforts have been welcomed to some extent by advocacy organizations, they have also been subject to criticism. The International Commission of Jurists (ICJ) and the Human Rights Lawyers Association (HRLA) note that Article 161/1 does not clearly define “bad faith,” does not specify that the purpose of the article is to protect the exercise of fundamental freedoms, leaves significant discretion to the court, and is limited to criminal cases filed by private complainants. The ICJ and HRLA express concern that the second paragraph of Article 161/1 may be used to curtail access to justice. And these organizations observe that Article 161/1 does

not appear to have yet been used to strike out any SLAPP cases, and that requests for courts to apply this provision have sometimes not been considered.<sup>227</sup> In an open letter to the Thai Prime Minister, 89 advocacy organizations have similarly contended that Article 161/1 is “insufficient to address SLAPP suits generally in Thailand.”<sup>228</sup>

As for Article 165/2, the ICJ and HRLA note that this amendment “can assist the court in determining where a case lacks merit,” but that it “applies only to criminal cases filed by a private complainant.”<sup>229</sup>

In response to calls to take actions responsive to SLAPPs, the Thai government has also pointed to **Section 21 of the Public Prosecution Organ and Public Prosecutors Act**, enacted in 2010, which provides:

Should a public prosecutor find that a criminal prosecution will be of no use to the general public, will affect the national safety or security, or will impair significant interest of the State, he shall refer his opinion to the Attorney-General who may then render an order of non-prosecution.

The ICJ and HRLA have suggested that public prosecutors have thus far failed to use their discretion under the law to reject meritless lawsuits early in proceedings.<sup>230</sup> The 89 organizations signing the open letter to the Prime Minister have recommended that “the public prosecutor and the Attorney General’s Office be provided with adequate resources and support to exercise their powers under Section 21.”<sup>231</sup>

These three anti-SLAPP instruments in Thailand – Articles 161/1 and 165/2 of the Criminal Procedure Code, and Section 21 of the Public Prosecution Organ and Public Prosecutors Act – echo SLAPP responses enacted in the North, with some variations. All three provisions permit the expedited dismissal of cases, which should generally function to reduce the aggregate costs of litigation. Article 161/1 permits courts to dismiss cases that appear to have been filed in bad faith. However, the mechanism set forth here relies exclusively on the *sua sponte* action of the court, as opposed to the expedited dismissal mechanisms seen in the U.S. and Canada, which depend to a greater extent on motions by defendants. Similarly, Article 165/2 provides defendants with a mechanism to show courts, at an early stage in the proceeding, that a plaintiff’s claims lack merit. However, unlike expedited dismissal schemes in the North, Article 165/2 does not appear to permit a defendant to seek dismissal based on the protected nature of their conduct or the improper intent of the plaintiff (unless such arguments are relevant to showing that a claim lacks merit). Section 21 confers discretion on public prosecutors to bring about the rejection of meritless criminal cases. This seems an extension of dismissal authorities conferred on judges in Northern jurisdictions to a context where SLAPPs may include criminal cases, as well.

A fourth anti-SLAPP reform in Thailand is also worth mentioning: in **2017, the Computer Crimes Act** was amended to bar its application to defamation offenses

already existing in the Criminal Code.<sup>232</sup> HRLA reports that use of the Act together with defamation charges has been declining since enactment of this amendment.<sup>233</sup> This amendment would thus appear to constitute an effective instance of reforming SLAPP causes of action to make them less susceptible to abuse.

## B. PHILIPPINES

In 2010, the Supreme Court of the Philippines promulgated **Rules of Procedure for Environmental Cases**.<sup>234</sup> Rules 6 and 19 address SLAPPs, defined as “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.”<sup>235</sup>

Rule 6, applicable in civil cases, provides that “[i]n a SLAPP filed against a person involved in the enforcement of environmental laws, protection of the environment, or assertion of environmental rights, the defendant may file an answer interposing as a defense that the case is a SLAPP,” where this answer “shall be supported by documents, affidavits, papers and other evidence.”<sup>236</sup> In a hearing on this defense, “[t]he party seeking the dismissal of the case must prove by substantial evidence that his acts for the enforcement of environmental law is a legitimate action for the protection, preservation and rehabilitation of the environment,” while “[t]he 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.”<sup>237</sup> Rule 6 permits a court to dismiss an action – though the Rule does not appear to make dismissal mandatory, even if the SLAPP target is able to make the requisite showing and the SLAPP filer cannot – and also permits a SLAPP target to file a counterclaim seeking damages, attorney’s fees, and costs of suit.<sup>238</sup>

Rule 19, applicable in criminal cases, provides that “[u]pon the filing of an information in court and before arraignment, the accused may file a motion to dismiss on the ground that the criminal action is a SLAPP.” In a hearing on this defense, the burdens are the same as those set forth in Rule 6, but Rule 19 additionally provides that a court shall grant the dismissal motion only if the ac-



Amendment of the Computer Crimes Act in Thailand would thus appear to constitute an effective instance of reforming SLAPP causes of action to make them less susceptible to abuse.



cused is able to establish that the “criminal case has been 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.”<sup>239</sup>

Rules 6 and 19 thus set forth expedited dismissal mechanisms, with Rule 6 making additional provision for the recovery of costs and damages by SLAPP targets. Rule 6 appears to require a SLAPP target to make some initial showing, “supported by documents, affidavits, papers and other evidence,” that the case against it was brought “with the intent to harass, vex, exert undue pressure or stifle any legal recourse” relating to environmental advocacy, whereupon the burden shifts to the filer to show that the case is not a SLAPP (provided the target can show the acts targeted are legitimately “for the protection, preservation and rehabilitation of the environment”). Rule 19 permits a SLAPP target to bring a motion to dismiss, apparently without any initial showing, but in the hearing on the motion the SLAPP target retains the burden of showing the case was brought with the intent of interfering with environmental advocacy.

Both Rules employ an “improper purpose” approach along the lines of those followed in Utah, British Columbia (2001), and Québec, albeit only with respect to a specific “protected class” of underlying conduct (acts for the enforcement of environmental law). A novel feature of these Rules is the requirement that a SLAPP target justify the legitimacy of the conduct giving rise to the SLAPP. On the one hand, this could be viewed simply as a scoping requirement which ensures that the SLAPP defense is being interposed in the context intended, *i.e.*, in a suit arising from genuine environmental advocacy. On the other hand, mandating that a SLAPP target show that its underlying conduct was “legitimate” imposes additional burdens on such targets, when the aim of anti-SLAPP responses should generally be to reduce the burdens and costs faced by these parties. This requirement also invites hearings on the SLAPP defense to focus on the merits of the target’s conduct instead of the vexatious nature of the proceedings brought by the filer. A better approach might be to permit a SLAPP target to merely plead (without adducing evidence) that the suit arises from “legitimate action for the protection, preservation and rehabilitation of the environment,” whereupon the burden would shift to the filer to show that this is not the case.

Commentators enthusiastically welcomed these Rules at the time of their promulgation.<sup>240</sup> In the years since the Rules of Procedure were issued, there does not appear to have been a review of Rule 6 or 19’s efficacy in combatting SLAPPs. However, given the significant number of SLAPPs reported in the Philippines in 2006–07 and the smaller number of reported SLAPPs uncovered by our survey after 2010, it is at least plausible that the Rules have been effective in discouraging the filing of SLAPPs. As noted above, the suit filed in 2009 by the state Department of Environment and Natural Resources against members of the indigenous Ifugao community, alleging that they had occupied forest lands illegally, was ultimately dismissed pursuant to a motion filed under Rule 19.<sup>241</sup>

The Rules of Procedure did not represent the first attempt by the Filipino legal system to respond to the threat of SLAPPs. The **Philippine Clean Air Act of 1999**, at Section 43,<sup>242</sup> and the **Ecological Solid Waste Management Act of 2000**, at Section 53,<sup>243</sup> both included identical provisions addressing SLAPPs:

**Suits and Strategic Legal Action Against Public Participation [(SLAPP)] and the Enforcement of this Act.** – Where a suit is brought against a person who filed an action as provided in Sec. 52 of this Act, or against any person, institution or government agency that implements this Act, it shall be the duty of the investigating prosecutor or the Court, as the case may be, to immediately make a determination not exceeding thirty (30) days whether said legal action has been filed to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions of this Act. Upon determination thereof, evidence warranting the same, the Court shall dismiss the case and award attorney’s fees and double damages. ...

Like anti-SLAPP measures in other jurisdictions, and the Rules of Procedure for Environmental Cases, Sections 43 and 53 create expedited dismissal mechanisms – but the specific nature of these mechanisms represents a real innovation in anti-SLAPP responses. Unlike mechanisms triggered by the filing of a motion or raising of a defense by a target, or which merely authorize courts or prosecutors to dismiss problematic litigation, Sections 43 and 53 *require* the investigating prosecutor or the court to determine whether any legal action falling within their coverage constitutes a SLAPP, and to dismiss the action and award attorney’s fees and double damages in case of an affirmative determination.<sup>244</sup> Furthermore, this determination must be made within an expedited timeframe. This approach seems well-calculated to reduce litigation burdens on SLAPP targets (which need not take affirmative action to trigger judicial or prosecutorial review) while addressing the customary reticence of courts and prosecutors to make use of dismissal authorities granted to them (inasmuch as their review is mandatory). Unfortunately, there does not appear to have yet been a general review of how well these mechanisms have worked in practice.

Sections 43 and 53 require the investigating prosecutor or the court to determine whether any legal action falling within their coverage constitutes a SLAPP.

## C. INDONESIA

In Indonesia, **Article 66 of the 2009 Environmental Protection and Management Law** provides that “Everybody struggling for a right to proper and healthy environment may not be charged with criminal or civil offense.”<sup>245</sup> Unfortunately, this provision has been interpreted to extend protection only against suits arising out of formal complaints by petitioners.<sup>246</sup> An article in the **2013 Forest Degradation Prevention and Mitigation Law** further bars suits based on the submission of a report or information relevant to the scope of the law, thus protecting expert testimony in court.<sup>247</sup> In 2018, the Indonesian Ministry of Environment and Forestry reported that it was preparing guidelines that would interpret Article 66 more broadly, to apply to environmental activism and prevent frivolous cases from being heard in court,<sup>248</sup> and make the application of existing laws more clear. These guidelines do not appear to have yet been issued, however, and environmental activists have expressed concern that a ministerial regulation would not compel law enforcers outside the Ministry to enforce anti-SLAPP articles in existing law.<sup>249</sup>

Both the 2009 and 2013 laws provide protections for public participation – by providing immunity from suit based on the filing of a complaint to vindicate environmental interests, and immunizing expert testimony in court, respectively – which should reduce the uncertainty and risk generated by SLAPPs. This was the first approach discussed in our analysis of Northern anti-SLAPP responses. It also appears that the proposed guidelines interpreting the 2009 law will provide for expedited dismissal of frivolous cases, though at the present time it is not clear how this mechanism would specifically operate.

## VI. Devising Future Responses to SLAPPs in the Global South

Clearly, SLAPPs pose a serious threat to the exercise of fundamental freedoms in the South, particularly for activists, CSOs, journalists, and community members who dare to criticize powerful entities. At the same time, there is a sizable body of experience regarding policies that can be implemented to counter SLAPPs, with responsive reforms already effected in Thailand, the Philippines, and Indonesia. What recommendations can we make regarding future responses aimed at addressing SLAPPs in the South?

**Our first recommendation would be to exhibit care in designing and advancing these responses.** Hastily constructed policy responses may be turned to ends other than those originally intended. Critics of anti-SLAPP responses in the U.S., for instance, have claimed that state anti-SLAPP statutes have been applied to civil rights and discrimination claims, as “clever lawyer[s]” have done their “best to find a way to characterize a claim as a SLAPP suit.”<sup>250</sup> Whether or not these claims are accurate, we would suggest that a basic principle in devising anti-SLAPP responses

in the South should be to “do no harm” to efforts to use courts to achieve justice and accomplish social change. Certain Southern jurisdictions, such as India<sup>251</sup> and South Africa,<sup>252</sup> already have vigorous traditions of public interest litigation, while other jurisdictions are still attempting to develop these traditions.<sup>253</sup> It is critical that such litigation not be inadvertently hampered by attempts at reform. Furthermore, any responses should account for the fact that local courts may exhibit limited independence or be subject to improper influence. In these cases it is important to consider whether expanded authorities will be wielded appropriately by courts.

**A second recommendation would be to focus initial anti-SLAPP efforts on bolstering protections for public participation.** Enshrining such a right at the constitutional level provides a basis on which to defend against SLAPP suits, while also making the priority of this right clear to the judiciary. It may also be advisable to enact specific immunity for conduct constituting participation in official proceedings, such as bringing suits or giving testimony. These steps are unlikely, by themselves, to address all the negative effects of SLAPPs, but they will help ensure that SLAPPs are ultimately subject to dismissal while also generating opportunities to convene anti-SLAPP coalitions around advocacy on this issue.

**A third recommendation would be to reform defamation laws, especially laws regarding criminal defamation.** As prominent advocacy organizations, including Amnesty International, Article 19, Forum Asia, Human Rights Watch, and the International Commission of Jurists, have noted in an open letter:

Under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR) ... imprisonment for acts of defamation is inherently disproportionate and therefore can never be an appropriate sanction. The UN Human Rights Committee, the body tasked with overseeing the implementation of the ICCPR, has recommended that States decriminalize defamation, and has clarified that defamation laws must ensure they do not serve, in practice, to contravene the rights to freedom of expression and information protected under article 19 of the Covenant.<sup>254</sup>

The African Commission on Human and Peoples’ Rights has sim-



## Summary of Recommendations

### RECOMMENDATION ONE

Exhibit care in designing and advancing these responses.

### RECOMMENDATION TWO

Focus initial anti-SLAPP efforts on bolstering protections for public participation.

### RECOMMENDATION THREE

Reform defamation laws, especially laws regarding criminal defamation.

### RECOMMENDATION FOUR

Implement expedited dismissal procedures, cost-shifting, and damages provisions in defamation cases.

### RECOMMENDATION FIVE

For defamation claims filed for purposes of harassment, the court should have the authority to impose additional penalties on filers.

### RECOMMENDATION SIX

Reforms should be accomplished by legislative act or presidential or prime ministerial decree.

### RECOMMENDATION SEVEN

Studies should further assess the prevalence and nature of SLAPPs in Southern jurisdictions.

### RECOMMENDATION EIGHT

Authorities and activists should explore novel policy responses tailored to local contexts.

ilarly called on “States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech.”<sup>255</sup>

Defamation laws should be reformed to make defamation an exclusively civil claim, and to provide that on matters of public interest or involving public participation, liability may be found only where the complained-of communication was made with knowledge of falsity or reckless disregard as to the truth the communication. To the extent abolition of criminal liability for defamation is not feasible, procedures should be reformed to provide that criminal defamation proceedings may be initiated solely by public prosecutors, or to mandate expedited review of criminal defamation complaints by prosecutors, with immediate dismissal of cases found to be without merit or to have been filed for purposes of harassment.

**A fourth recommendation would be to implement expedited dismissal procedures, cost-shifting mechanisms, and damages provisions in defamation cases arising out of non-commercial communications on matters of public interest.** Such procedures should have several key features:

- Defendants, courts, and prosecutors should each have the ability to initiate expedited dismissal procedures. These procedures should be automatically triggered in especially sensitive proceedings (such as suits brought in response to efforts to enforce laws).
- Procedures should provide for mandatory dismissal, on a specified timetable, upon a pleading that a defamation claim arises out of communications on a matter of public interest – unless the filer can show specific cause that the case should proceed. This specific cause should include a showing that the claim does not arise out of covered communications.
- Limited evidence-gathering procedures should be available, but only upon order of the court.
- Courts should automatically award the full costs of participating in a suit to a defendant upon dismissal. Where a defendant shows financial hardship preventing effective defense of a case, moreover, a court should be authorized to order that a plaintiff advance costs to the defendant.
- A court should be authorized to award damages, upon application of the defendant and without further proceedings, where the court determines that a claim was filed for purposes of harassment.

**Fifth, where a court or prosecutor finds a defamation claim was filed for purposes of harassment, the court should have the authority to impose damages directly upon the organizational officers responsible for the decision to file suit, where the claim was filed by a legal person.** Furthermore, in these cases, the filer should be barred from filing additional claims arising out of the communications giving rise to suit, or related communications by other actors. A filer should

be able to overcome this bar only by demonstrating that the new claims advanced are not being filed for an improper purpose.

**Sixth, reforms should be accomplished by legislative act or presidential or prime ministerial decree, as opposed to ministerial action, to make clear that they apply to all cases and not just those within a specific ministry's purview.**

The application of these changes to all proceedings before all tribunals should be made clear in the implementing instrument, and the government should inform police officers, prosecutors, and judicial officials at the central and provincial level regarding the effect of these changes.

**Seventh, further study should be undertaken to assess the prevalence of SLAPPs in Southern jurisdictions, and to identify other causes of action which should be subject to reforms similar to those outlined in the third, fourth, fifth, and sixth recommendations above.**

The other causes of action should be those which present a high risk of being used to discourage the exercise of fundamental freedoms. Cybercrime laws will constitute a particularly likely candidate for reform in some jurisdictions. Furthermore, where SLAPPs are generally prevalent in a jurisdiction and are being brought based on a variety of causes of action, broader reforms not linked to specific causes of action may be warranted.

**Finally, authorities and activists should explore novel policy responses which address deficits and gaps in the approaches implemented to date in the North and South, or which better respond to the specific characteristics of SLAPPs in local contexts.**

In some jurisdictions, for example, it may be advisable to establish objective criteria for damages claims in cases, such as those based on defamation or cyber-crime, where the non-material character of the harm alleged makes exorbitant claims more likely. In other contexts, it may be appropriate to set out features by which judges or prosecutors might recognize SLAPPs, in order to facilitate their early dismissal. Thus, authorities might be instructed to consider dismissal where suits seek excessive damages in the context of extreme asymmetry between the resources available to the filers and targets, or where legal proceedings form part of a broader public campaign to smear or intimidate the targets of the suit. As Southern jurisdictions pursue innovative approaches in their efforts to respond to SLAPPs, the opportunities for inter-jurisdictional learning will only increase – thus increasing the likelihood of devising and implementing effective responses to SLAPPs.

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- 2 Committee to Protect Journalists (CPJ), "Thai court sentences journalist Suchanee Cloitre to 2 years in jail for defamation," 3 January 2020, <https://cpj.org/2020/01/thai-court-sentences-journalist-suchanee-cloitre-t.php>.
- 3 This deficit is beginning to be addressed, including through the recent publication by the Business and Human Rights Resource Center (BHRRC) of a report on SLAPPs in Southeast Asia. See *Corporate Legal Accountability Annual Briefing - Defending Defenders: Challenging Malicious Lawsuits in Southeast Asia* (April 2020), <https://www.business-humanrights.org/en/defending-defenders-challenging-malicious-lawsuits-in-southeast-asia>.
- 4 BHRRC is currently working to develop a publicly-accessible database that gathers existing and new data about SLAPPs from all regions of the world, which will add greatly to our understanding of SLAPPs filed in jurisdictions across the Global North and South. *Id.*, 10.
- 5 SLAPPs have certainly been filed in Europe, such as the famous "McLibel" case, in which McDonald's filed libel charges in the United Kingdom against activists who had circulated a pamphlet critical of its commercial practices. See Fiona Donson, "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs," *RECIEL* 19, no. 1 (2010): 84-85. More recently, it has been publicized that at the time of her murder in October 2017, the Maltese journalist Daphne Caruana Galizia was "fighting 47 civil and criminal defamation lawsuits from an array of business people and politicians." Juliette Garside, "Murdered Maltese reporter faced threat of libel action in UK," *The Guardian*, 1 June 2018, <https://www.theguardian.com/world/2018/jun/01/murdered-maltese-reporter-faced-threat-of-libel-action-in-uk>. Attention has also been drawn to the more than twenty lawsuits filed, in France and elsewhere, by the Bolloré Group and its affiliates against NGOs and journalists which had engaged in reporting critical of the companies' actions. Monitor Tracking Civic Space, Civicus, "SLAPP Lawsuits threaten critical voices in France," 9 March 2018, <https://monitor.civus.org/newsfeed/2018/03/09/slapp-lawsuits-threaten-critical-voices-france/>. However, SLAPPs have attracted less attention in Europe than in the U.S., Canada, and Australia, see Donson, "Libel Cases," 83, and anti-SLAPP measures have not yet been implemented in Europe – though a group of European MEPs has been calling since February 2018 for an EU directive which would "give investigative journalists and media groups the power to request to rapidly dismiss 'vexatious lawsuits'" and create a fund to support the defense of media groups facing such suits. Sofia Verza, Resource Centre on Media Freedom in Europe, "SLAPPs' 5 W's: a background of the Strategic Lawsuits Against Public Participation," 28 June 2018, <https://www.rcmediafreedom.eu/Tools/Legal-Resources/SLAPPs-5-W-s-a-background-of-the-Strategic-Lawsuits-Against-Public-Participation>. Greenpeace International is currently working with the University of Amsterdam to conduct a mapping of European SLAPPs, which will assist in understanding the scope of this phenomenon and possible responses.
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- 8 Protect the Protest (PTP), *An Activist's Guide* (2019): 3, <http://www.protecttheprotest.org/wp-content/uploads/2019/03/Protect-the-Protest-Activists-Guide-to-SLAPPs-March2019.pdf>.
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- 10 See, e.g., Chris Tollefson, "Strategic Lawsuits against Public Participation: Developing a Canadian Response," *The Canadian Bar Review* 73 (1994): 202 n.6 ("Many of the other suits [in British Columbia] which have been characterized as SLAPPs have arisen in the context of municipal land use controversies."); Michaelin Scott & Chris Tollefson, "Strategic Lawsuits Against Public Participation: The British Columbia Experience," *RECIEL* 19, no. 1 (2010): 48 (describing suit filed in British Columbia arising out of local opposition to property redevelopment)
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- 115 Kemo Cham, "Sierra Leone environmentalist fights contempt charges in High Court," *Politico SL*, 9 November 2019, <http://politicosl.com/articles/sierra-leone-environmentalist-fights-contempt-charges-high-court>; FIAN International, "New SLAPP of the agro-industrial group SOCFIN," 8 December 2019, <https://www.fian.org/en/press-release/article/new-slapp-of-the-agro-industrial-group-socfin-2258>.
- 116 Frontline Defenders, "Complaint against Centro de Estudios de La Mujer - Honduras," accessed 27 May 2020, <https://www.frontlinedefenders.org/en/case/complaint-against-centro-de-estudios-de-la-mujer-%E2%80%93-honduras>; Elodie Aba, BHRRC, "Lawsuits by companies seek to silence accountability advocates," accessed 27 May 2020, <https://www.business-humanrights.org/en/lawsuits-by-companies-seek-to-silence-accountability-advocates>.
- 117 Where a suit has been dismissed and re-filed, or where multiple suits have been consolidated into a single set of proceedings by the courts, we have treated each set of proceedings as a single suit for purposes of our accounting.
- 118 We were not able to determine whether the injunction application filed by Oxiana Philippines Inc. and RoyalCo, Ltd. against 24 indigenous leaders was presented as a civil or criminal claim.

119 Michael Ramirez & Poomjai Kudidthalert, Tilleke & Gibbins, *Business Crime 2011*, Ch. 6, Sec. 6, <https://www.tilleke.com/sites/default/files/ICLG-Business-Crime2011.pdf> ("In a criminal offence, initial investigations are started by an inquiry official, but in the case of a compoundable offence, the inquiry will begin when a regular complaint has been made."); Thailand Criminal Code, Sec. 333, <http://library.siam-legal.com/thai-law/criminal-code-defamation-sections-326-333/> ("The offences in this Chapter [Defamation] are compoundable offences. If the injured person in the defamation dies before making a complaint, the father, mother, spouse or child of the deceased may make a complaint, and it shall be deemed that such person is the injured person.").

120 Somjai Kesornsiricharoen, "The Role and Function of Public Prosecutors in Thailand" (1997): 284, [https://www.unafei.or.jp/publications/pdf/RS\\_No53/No53\\_28PA\\_Kesornsiricharoen.pdf](https://www.unafei.or.jp/publications/pdf/RS_No53/No53_28PA_Kesornsiricharoen.pdf) ("[T]he CPC also allows private prosecution by the victim or injured party in most types of cases except the cases where the state is the sole injured party such as offenses against the state security or against the Monarchy, etc.").

121 See Indian Code of Criminal Procedure, 1973, Sec. 190.

122 See Indonesia Penal Code, Book I, Ch. VII, Art. 74; Book II, Ch. XVI, Art. 319, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814438.pdf>; HG.org, "Defamation and Privacy Law in Indonesia," accessed 27 May 2020, <https://www.hg.org/legal-articles/defamation-and-privacy-law-in-indonesia-5913>.

123 We coded one of these cases, a criminal defamation suit filed by Thammakaset against two workers, two staff of the Migrant Workers Rights Network, and a journalist, as having been filed both against activists and journalists.

124 In the North, civil suits filed by government agencies or government officials have in many cases been treated as SLAPPs. Pring noted in 1989, for instance, that SLAPPs are commonly filed "by police, teachers, and other public officials against their critics, Pring, "SLAPPs," 15, and Florida's anti-SLAPP law extends its coverage to suits filed "by a governmental entity," 2019 Florida Statutes, Title XLV, Section 768.295, <http://www.leg.state.fl.us/Statutes/>.

125 Pring, "SLAPPs," 9.

126 Note that these USD amounts were calculated using current conversion rates, as opposed to the rates applicable at the time these suits were filed, and that the amounts sought have not been converted into 2019 dollars.

127 Canan & Pring, "Strategic Lawsuits Against Public Participation," 514.

128 In one of these cases – the civil defamation suit filed by Sahara India Pariwar against Tamal Bandyopadhyay – this settlement was reached after the court granted initial relief (an order barring publication of the book in question) in favor of the plaintiff. In two of these cases – the suit filed by Sahara India Pariwar and the criminal defamation complaint filed by Essel Group against Jay Sayta and three editors of *The Wire* – the reported provisions of the settlement included terms plainly favorable to the plaintiff (publication of a disclaimer attesting to the defamatory nature of the materials in dispute, agreement not to pursue further reporting on the matter in question). In one case – the criminal suit filed by Fibres & Fabrics International and Jeans Knit Pvt. Ltd. against the Clean Clothes Campaign and the India Committee of the Netherlands – the settlement appeared to include terms favorable to the defendant (commitment to improve working conditions at plaintiffs' facilities). Given the court order favoring the plaintiff in the suit filed by Sahara India Pariwar, we have coded this case as both resulting in a disposition favorable to the plaintiff and as resulting in settlement, but we have not coded the other two cases as resulting in a disposition favorable to the plaintiff or defendant, notwithstanding the tilt of the reported settlement terms.

129 See, e.g., Maharat Foundation, "Engineer Riad El Assad ... Release after Deleting the Post," 16 July 2019, <http://maharatfoundation.org/en/riadassad>; Muhal Observatory for Freedom of Expression, "Rabih El-Amine," accessed 27 May 2020, <https://muhal.org/en/cases/recfsjhzeul4itwqg/>; Timour Azhari, "Lebanon ramps up interrogations of online activists," *Global Voices*, 13 August 2018, <https://globalvoices.org/2018/08/13/lebanon-ramps-up-interrogations-of-online-activists/>; Habib Battah, "A minister on trial," *Beirut Report*, 2 November 2013, <http://www.beirutreport.com/2013/11/a-minister-on-trial.html>.

130 See, e.g., Khorn Savi, "Koh Kong villagers locked in land dispute grilled in defamation case," *Phnom Penh Post*, 19 September 2019; Long Kimmarita, "Court upholds sentences of Mother Nature activists," *Phnom Penh Post*, 26 August 2019.

131 BHRRC, "Summary of the II Latin American Regional Workshop on Business and Human Rights," 12 November 2019, <https://www.business-humanrights.org/en/summary-of-the-ii-latin-american-regional-workshop-on-business-and-human-rights>.

132 According to the Public Participation Project, anti-SLAPP laws have been enacted in 32 U.S. states and the District of Columbia. In West Virginia, judges have developed anti-SLAPP responses through the courts. See Public Participation Project, "State Anti-SLAPP Laws," accessed 27 May 2020, <https://anti-slapp.org/your-states-free-speech-protection/>.

133 U.S. Const. am. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

134 See Tollefson, "Strategic Lawsuits Against Public Participation," 205; Pring, "SLAPPs," 9. See also Canan & Pring, "Strategic Lawsuits Against Public Participation," 514 (in sample of SLAPPs, "raising the Petition Clause defense almost

doubled targets' chances of ultimately winning").

135 Revised Code of Washington (RCW) 4.24.510, <https://app.leg.wa.gov/rcw/default.aspx?cite=4.24.510>.

136 Canada's Charter does not guarantee a right to public participation, and its courts have indicated that protections enshrined in the Charter do not apply to civil disputes between private parties. Tollefson, "Strategic Lawsuits Against Public Participation," 221-23. *See also* Ogle, "Anti-SLAPP Law Reform," 43 ("Australia has no Bill of Rights and no constitutional provisions protecting basic civil and political rights, although statutes of rights exist in the ACT and the State of Victoria.").

The first anti-SLAPP bill considered by an assembly in Canada – a private member's bill in New Brunswick in 1997 which ultimately died on the order paper – would have created a "right of participation." Landry, "From the Streets," 59. The initial version of the anti-SLAPP bill which was ultimately enacted in British Columbia in 2001 contained a statutory right to public participation, which was shed from the bill in the course of the consultation process. Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 53. Similarly, the anti-SLAPP bill introduced in the Australian Capital Territory (ACT) (which became the Protection of Public Participation Act 2008) would have established a right to public participation, though this right was omitted from the law that eventually passed. Ogle, "Anti-SLAPP Law Reform," 40-41.

137 Protection of Public Participation Act, 2001 (British Columbia), Sec. 2(a)(v), <http://www.bclaws.ca/civix/document/id/complete/statreg/1120369480>.

138 *See, e.g.*, Victor J. Cosentino, "Strategic Lawsuits Against Public Participation: An Analysis of the Solutions," *California Western Law Review* 27 (1991): 413 ("A defense on the merits is not expeditious because it requires the long delays and emotional strain associated with litigating a civil case.").

139 *See* Tollefson, "Strategic Lawsuits Against Public Participation," 207 ("Quite apart from the cost of mounting a legal defence, the prospect of incurring personal liability, even if extremely remote as is usually the case, can exact a heavy toll on SLAPP targets.").

140 *See, e.g.*, Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 53 ("[S]tatutory recognition of the right to public participation provides a means of determining how the balance will be struck between the competing public and private interests that typically collide in SLAPP litigation.").

141 *See, e.g.*, Shapiro, "SLAPPs," 14 ("The main purpose of anti-SLAPP legislation must be to facilitate the early dismissal of unfounded lawsuits targeting publicly important communications."); Tollefson, "Strategic Lawsuits Against Public Participation," 229 ("One of the key reasons that SLAPP filers are able to use the legal system to punish and deter public participation is the high cost of civil litigation which, win or lose, they are better able to absorb. To be effective, therefore, anti-SLAPP legislation must facilitate early dismissal of SLAPPs.").

142 Bill 9, 2009 (Quebec), An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate, Arts. 54.2-54.3, <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C12A.PDF>. The Bill explains, at Art. 54.1: "The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate."

143 Utah Code § 78B-6-1403, 1404, <https://le.utah.gov/xcode/Title78B/Chapter6/78B-6-P14.html>.

144 Protection of Public Participation Act, 2001 (British Columbia), Secs. 4-5.

145 California Code of Civil Procedure, Sec. 425.16(b)(1), <http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/>. To show this probability, the plaintiff must show that they have "stated and substantiated a legally sufficient claim." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 412 (Cal. 1996).

146 New York Consolidated Laws, Civil Practice Law and Rules, Rule 3211(g), <https://codes.findlaw.com/ny/civil-practice-law-and-rules/cvpny-cplr-rule-3211.html>.

147 RCW 4.24.525(4).

148 Minnesota Statutes § 554.02, <https://www.revisor.mn.gov/statutes/cite/554.02>.

149 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.1(3)-(4), <https://www.ontario.ca/laws/statute/S15023>.

150 Protection of Public Participation Act, 2019 (British Columbia), Sec. 4, <http://www.bclaws.ca/civix/document/id/complete/statreg/19003>.

151 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.1(4)(b). *See also* Protection of Public Participation Act, 2019 (British Columbia), Sec. 4(2)(b).

152 Nadarajah & Griffin, "The Failure of Defamation Law," 75.

153 *Id.* In fact, documents relevant to such intent will often be subject to privilege, and in the absence of clear evidence of improper intent, judges will tend to let even unreasonable claims proceed, imposing significant costs on

defendants. Ogle, "Anti-SLAPP Law Reform," 41.

154 New York Consolidated Laws, Civil Rights Law 76-a(1)(a), <https://codes.findlaw.com/ny/civil-rights-law/cvr-sect-76-a.html>.

155 See Shapiro, "SLAPPs," 20; Sheldrick, *Blocking Public Participation*, 101.

156 California Code of Civil Procedure Sec. 425.17(a)-(c), <http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-17/>.

157 Pring, "SLAPPs," 8.

158 Barker, "Common-Law and Statutory Solutions," 412-13 ("Court review of suits initially believed to be SLAPPs will necessarily entail some close factual analysis, as SLAPP claims are almost always *legally* coherent.") (emphasis in original).

159 *Davis v. Cox*, slip op. at 2-3 (Wash. 2015), <https://www.courts.wa.gov/opinions/pdf/902330.pdf>; *Leidendecker v. AWUM*, slip op. at 2 (Minn. 2017), <https://cases.justia.com/minnesota/supreme-court/2017-a16-0360.pdf?ts=1495639953>.

160 Barker, "Common-Law and Statutory Solutions," 408.

161 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.1(5).

162 Protection of Public Participation Act, 2019 (British Columbia), Sec. 5(1).

163 California Code of Civil Procedure Sec. 425.16(g).

164 Utah Code § 78B-6-1404(1)(a).

165 Bill 9, 2009 (Quebec), Sec. 54.3(3).

166 See DMLP, "Anti-SLAPP Law in New York," accessed 27 May 2020, <http://www.dmlp.org/legal-guide/anti-slapp-law-new-york> ("Note that, unlike in many states, New York's anti-SLAPP motion does not halt discovery."); New York State Assembly Memorandum, Bill No. A9005, accessed 27 May 2020, [https://nyassembly.gov/leg/?default\\_fld=&bn=A9005&term=2013&Memo=Y](https://nyassembly.gov/leg/?default_fld=&bn=A9005&term=2013&Memo=Y) ("New York's anti-SLAPP protections do not halt discovery which [sic] one is trying to dismiss the suit!").

167 Wells (1998) at 485.

168 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.2(2).

169 California Code of Civil Procedure, Sec. 425.16(f).

170 Landry, "From the Streets," 67-68.

171 New York Consolidated Laws, Civil Practice Law and Rules, Rule 3211(g).

172 Utah Code § 78B-6-1404(1)(b).

173 Protection of Public Participation Act, 2019 (British Columbia), Sec. 9(3).

174 California Code of Civil Procedure, Sec. 425.16(b)(1).

175 New York Consolidated Laws, Civil Practice Law and Rules, Rule 3211(g).

176 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.1(3)-(4).

177 Protection of Public Participation Act, 2019 (British Columbia), Sec. 4(2).

178 Utah Code § 78B-6-1404(2).

179 Protection of Public Participation Act, 2001 (British Columbia), Sec. 5. See also Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 52.

180 Bill 9, 2009 (Quebec), Sec.54.3 ("If the court notes an improper use of procedure, it may dismiss the action or other pleading.").

181 Landry, "From the Streets," 67.

182 Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 52 ("[T]he discretionary nature of the judicial powers set out in the PPPA combined with various onuses imposed on a defendant as a prerequisite to qualifying for relief raise some serious questions as to whether the PPPA, on balance, provided a robust enough framework for the protection of public participation.").

183 Landry, "From the Streets," 66.

184 Bill 9, 2009 (Quebec), Sec.54.3.

- 185 Landry, "From the Streets," 68.
- 186 Sheldrick, *Blocking Public Participation*, 113.
- 187 See Barker, "Common-Law and Statutory Solutions," 445.
- 188 New York Consolidated Laws, Civil Rights Law § 70-a(1)(a), <https://codes.findlaw.com/ny/civil-rights-law/cvr-sect-70-a.html>
- 189 See DMLP, "Anti-SLAPP Law in New York."
- 190 California Code of Civil Procedure, Sec. 425.16(c)(1).
- 191 See Sheldrick, *Blocking Public Participation*, 96-97.
- 192 Protection of Public Participation Act, 2011 (British Columbia), Sec. 5. See also Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 55.
- 193 Protection of Public Participation Act, 2015 (Ontario), Sec. 137.1(7).
- 194 Protection of Public Participation Act, 2019 (British Columbia), Sec. 7(1).
- 195 See, e.g., Tollefson, "Strategic Lawsuits Against Public Participation," 231 ("[T]he prospect of an award of costs at the end of the proceeding does little to relieve the more immediate day to day hardship felt by SLAPP targets.").
- 196 Bill 9, 2009 (Quebec), Sec.54.3(5).
- 197 See Sheldrick, *Blocking Public Participation*, 112 ("However, this again is a discretionary provision rather than a mandatory requirement, and it requires judges to overcome their historical tendency to be conservative in SLAPP cases."); Landry, "From the Streets," 68 ("Québécois and other Canadian courts have been reluctant in the past to grant defending parties a provision for costs and have applied strict principles that ought to justify its attribution. While the Minister of Justice was clear that the law was to send a message to the courts that they would need to depart from this restrictive approach, it remains to be seen if the judicial authorities will apply other, less restrictive guidelines.").
- 198 Barker, "Common-Law and Statutory Solutions," 414.
- 199 Utah Code § 78B-6-1404(3).
- 200 RCW 4.24.520.
- 201 Sheldrick, *Blocking Public Participation*, 112.
- 202 Landry, "From the Streets," 64-65.
- 203 Bill 9, 2009 (Quebec), Sec.54.4.
- 204 See Landry, "From the Streets," 67 (noting that Sec. 54.6 "appears to be unique to Quebec's legislation").
- 205 Bill 9, 2009 (Quebec), Sec.54.6.
- 206 Protection of Public Participation Act, 2011 (British Columbia), Sec. 5(1)-(2).
- 207 *Id.*, Sec. 5(3)-(4). The anti-SLAPP law enacted in British Columbia in 2019 authorizes a court to award damages against a filer in a proceeding brought in bad faith or for an improper purpose, but omits the provisions respecting posting of security. Protection of Public Participation Act, 2019 (British Columbia), Sec. 7(2).
- 208 Scott & Tollefson, "Strategic Lawsuits Against Public Participation," 55.
- 209 New York Consolidated Laws, Civil Rights Law § 70-a(1)(b)-(c).
- 210 Utah Code § 78B-6-1405.
- 211 California Code of Civil Procedure, Sec. 425.18, <http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-18/>.
- 212 Barker, "Common-Law and Statutory Solutions," 431.
- 213 *Id.*, 432.
- 214 *But see* New York Consolidated Laws, Civil Rights Law § 70-a(1)(b)-(c) (permitting a SLAPP defendant to file an action or claim seeking compensatory or punitive damages if "action involving public petition and participation was commenced or continued" for proscribed purposes, thus enabling a simultaneous counterclaim).
- 215 See, e.g., California Anti-SLAPP Project, "Slapping Back," accessed 27 May 2020, <http://www.casp.net/sued-for-freedom-of-speech-california/defending-against-slapp/slappback-awards/> ("[T]he decision to initiate SLAPPback litigation should not be entered into lightly. A SLAPPback, like the original lawsuit, can take years to reach a final resolution.").
- 216 Protection of Public Participation Act, 2008 (Australian Capital Territory), Sec. 9.

- 217 See Ogle, "Anti-SLAPP Law Reform," 41.
- 218 Bill 9, 2009 (Quebec), Sec.54.5.
- 219 Michaela Whitbourn, "Ambitious 18-month timetable unveiled for defamation law reform," *The Sydney Morning Herald*, 31 January 2019, <https://www.smh.com.au/national/nsw/ambitious-18-month-timetable-unveiled-for-defamation-law-reform-20190130-p50ukf.html>.
- 220 Ogle, "Anti-SLAPP Law Reform," 37.
- 221 See New York Consolidated Laws, Civil Rights Law § 76-a(2). See also *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (announcing defamation standard applicable to statements concerning public officials).
- 222 NYSBA, *Memorandum in Support of Media Law #1*, A. 856 (Jan. 3, 2013), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26165> (noting that "the application of the statute is so exceedingly narrow that only about a dozen cases have been held to fit within the statutory definition of a SLAPP suit in the two decades since the law's enactment").
- 223 Ogle, "Anti-SLAPP Law Reform," 37.
- 224 *Thailand's response to the joint communication from HRC Special Procedures, No. AL THA 3/2018 dated 10 May 2018 and AL THA 1/2019 dated 30 January 2019*.
- 225 International Commission of Jurists (ICJ) & Human Rights Lawyers Association (HRLA), *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)* (20 March 2020): 4, <https://www.icj.org/wp-content/uploads/2020/03/Thailand-SLAPP-Lawsuits-Letter-2020-ENG.pdf>.
- 226 *Id.*, 4.
- 227 *Id.*, 6-7.
- 228 HRW et al., *Letter to Thailand Prime Minister Prayut Chan-o-cha* (14 February 2019): 4, [https://www.hrw.org/sites/default/files/supporting\\_resources/thammakaset\\_cases\\_letter\\_feb\\_2019.pdf](https://www.hrw.org/sites/default/files/supporting_resources/thammakaset_cases_letter_feb_2019.pdf).
- 229 ICJ & HRLA, *Re: Concerns on the existing legal frameworks that are designated to prevent strategic lawsuit against public participation (SLAPP lawsuits)*, 5.
- 230 *Id.*, 8.
- 231 HRW et al., *Letter to Thailand Prime Minister Prayut Chan-o-cha*, 4.
- 232 *Thailand's response to the joint communication from HRC Special Procedures, No. AL THA 3/2018 dated 10 May 2018 and AL THA 1/2019 dated 30 January 2019*.
- 233 HRLA, *Recommendations on the Protection of Those who Exercise Their Rights and Freedoms from Strategic Lawsuits Against Public Participations* (October 2019): 13, [https://th.boell.org/sites/default/files/2020-04/Final\\_TRANS-report-SLAPP\\_A5.pdf](https://th.boell.org/sites/default/files/2020-04/Final_TRANS-report-SLAPP_A5.pdf).
- 234 Promulgation of these rules followed stakeholder consultations and a review of U.S. SLAPP responses. See *Third ASEAN Chief Justices' Roundtable on Environment* (2014): 38, <https://www.adb.org/sites/default/files/publication/42866/3rd-asean-chief-justices-roundtable-environment.pdf>; *Rationale to the Rules of Procedure for Environmental Cases*, A.M. No. 09-6-8-SC (2010): 87-96, [http://philja.judiciary.gov.ph/files/learning\\_materials/A.m.No.09-6-8-SC\\_rationale.pdf](http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_rationale.pdf).
- 235 *Rules of Procedure for Environmental Cases*, A.M. No. 09-6-8-SC, Rule 1, Sec. 4(g), [https://www.lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](https://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html).
- 236 *Id.*, A.M. No. 09-6-8-SC, Rule 6, Sec. 2.
- 237 *Id.*, A.M. No. 09-6-8-SC, Rule 6, Sec. 3.
- 238 *Id.*, A.M. No. 09-6-8-SC, Rule 6, Secs. 2, 4.
- 239 *Id.*, A.M. No. 09-6-8-SC, Rule 19.
- 240 See, e.g., Gloria Estenzo Ramos, "Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering in a Golden Era for Environmental Rights Protection," *IUCN Academy of Environmental Law e-Journal* no. 1 (2011): 189.
- 241 Gera, "Examining the Resilience of Public Participation Structures," 223.
- 242 Philippine Clean Air Act of 1999, Sec. 43, <http://www.chanrobles.com/philippinecleanairact.htm#.XcLXfzNKiUk>.
- 243 Ecological Solid Waste Act Management Act of 2000, Sec. 53, <http://extwprlegs1.fao.org/docs/pdf/phi45260.pdf>.
- 244 House Bill No. 3593, introduced in the Philippine Congress in 2010, and Senate Bill No. 3080, introduced in 2011, would establish a similar mandatory anti-SLAPP judicial or prosecutorial review and dismissal mechanism in

all civil and criminal cases, while additionally permitting defendants to file motions to dismiss such cases as SLAPPs. House Bill No. 3593 (Nov. 8, 2010), <https://www.scribd.com/document/70192736/Hb-3593-Anti-slapp-Bill>; S.B. No. 3080 (Nov. 29, 2011), <http://www.senate.gov.ph/lisdata/1254310602!.pdf>. As of this writing, neither of these bills appears to have been enacted. *See also* Gera, "Examining the Resilience," 223.

245 Indonesian Law No. 32/2009, Environmental Protection and Management (October 3, 2009), Art. 66, <http://extwprlegs1.fao.org/docs/pdf/ins97643.pdf>.

246 Jong, "Environmental defenders fear backlash," 26 April 2018. At the Third ASEAN Chief Justices' Roundtable on Environment, Judge Andriani Nurdin of Indonesia clarified that anyone, not just those seeking to enforce environmental laws, could invoke this defense. *Third ASEAN Chief Justices' Roundtable on Environment*, 41.

247 Jong, "Second environmental expert sued over testimony against palm oil firm."

248 Jong, "Environmental defenders fear backlash as defendant sues expert over testimony."

249 Jong, "Second environmental expert sued over testimony against palm oil firm."

250 Committee on the Judiciary, U.S. House of Representatives, "Examining H.R. 2304, The 'SPEAK FREE Act'" (22 June 2016): 55 (testimony of Alexander A. Reinert).

251 *See, e.g.*, Surya Deva, "Public Interest Litigation in India: A Critical Review," *Civil Justice Quarterly* 28 (2009): 19-40.

252 *See, e.g.*, Eric Christiansen, "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice," *The Journal of Gender, Race & Justice* 13 (2010): 575-614.

253 *See, e.g.*, Duncan McCargo, "Competing Notions of Judicialization in Thailand," *Contemporary SE Asia* 36, no. 3 (2014): 417-441.

254 "Joint Statement on Strategic Litigation Against Public Participation (SLAPP)," December 3, 2018, [https://www.hrw.org/sites/default/files/supporting\\_resources/jointstatement\\_slapp\\_05122018.pdf](https://www.hrw.org/sites/default/files/supporting_resources/jointstatement_slapp_05122018.pdf).

255 African Commission on Human and People's Rights, "Resolution on Repealing Criminal Defamation Laws in Africa," Res. 169 (XLVIII) 10, 24 November 2010, <https://www.achpr.org/sessions/resolutions?id=343>.

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