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Amsterdam, 23 July 2024
Our ref. D20231474/EJ/ej
Your ref.
Email: ejurjens@prakkendoliveira.nl

Re: Notice of liability Greenpeace International – Energy Transfer et al.

Dear Sir or Madam,

On behalf of my client Stichting Greenpeace Council, also known as Greenpeace International (hereafter: "**GPI**"), established in Amsterdam, the Netherlands, I inform you as follows.

This case revolves around one of the most egregious Strategic Lawsuits Against Public Participation ("**SLAPP**") that is currently pending worldwide. GPI is a key target in this lawsuit.

In 2016, along with more than 500 other organisations, GPI signed an open letter about a public interest issue, namely the construction of an oil pipeline extending from North Dakota to Illinois, USA. As a result, Energy Transfer LP, Energy Transfer Operating, LP and (more recently) Dakota Access LLC (collectively "**ET**"), who are involved in this oil pipeline, have been suing GPI in the United States for what it claims are false and defamatory statements and other causes of action. In these cases, ET has been demanding payment of at least 300 million dollars and up US $ 900 million of 'damages' (as will be detailed further below).

GPI has not harmed ET in any way and has only exercised its right to participate in public debate. However, ET has publicly stated that its aim with these lawsuits is primarily to "send a message" and

say "you can't do this in the United States".[1] It has also baselessly accused GPI of being a criminal enterprise.[2]

GPI is sure it was and is free to exercise its right to freedom of speech in the United States in the way it has done. Unfortunately, legal proceedings in the United States are extremely costly, as ET is well aware. The lawsuits against GPI have resulted in significant costs for GPI, including costs for legal representation, and damage to its reputation as a result of ET's serious and entirely unfounded public accusations.

In the European Union, there is growing awareness of the threat posed by SLAPPs, including SLAPPs in countries outside the EU. Recently, the Anti-SLAPP Directive entered into effect. In this Directive, it is confirmed that parties established in a EU Member State can claim all damage and costs they have suffered as a result of a SLAPP suit against them in a country outside of the EU before the courts of the country where they are established. GPI intends to do so, and for this purpose I am sending you this letter.

The actions of ET against GPI that are described in this letter are unlawful vis-à-vis GPI under (in any case) Dutch law and through this letter, GPI holds ET liable for all damage it has incurred and will incur (including costs it is incurring and continues to incur) as a result of ET's actions.

As set out in more detail below, GPI demands that ET (i) immediately withdraw its pending court case against GPI, and (ii) fully accept liability and responsibility for payment of all damage (including costs) GPI has suffered as a result of ET's actions.

1. Facts: actions ET against GPI and others

GPI is the coordinating body of 25 independent national and regional Greenpeace organisations around the world. These organisations independently develop and carry out their national and/or regional campaign projects, which may fit within a strategic level campaign programme outlined by GPI.[3] GPI is a Netherlands-formed non-profit foundation. It is distinct from the two other Greenpeace entities which are defendants in the court cases brought by ET - Greenpeace, Inc. and Greenpeace Fund, Inc. Both entities are located in the United States.

ET owns the largest liquid petroleum and natural gas pipeline system by volume in the United States, spanning nearly 72,000 miles. ET was/is responsible for the development, permitting, construction and operation of the controversial 1,172 mile long Dakota Access oil Pipeline ("**DAPL**"). In 2016-2017, an Indigenous-led movement protested against the permitting and construction of DAPL.[4]

GPI had nothing to do with these protests. Its engagement in the public debate about the construction of DAPL was signing an open letter to various banks, written by the NGO BankTrack, urging the banks to "halt all further disbursements of the loan and require the project sponsor to stop construction

[1] Greenpeace USA 18 June 2018 "Too Far, Too Often", https://www.greenpeace.org/usa/reports/too-far-too-often/, see reference in footnote 77.

[2] See for instance the amended complaint in one of the lawsuits: https://www.greenpeace.org/usa/wp-content/uploads/2018/08/ec7208cc-20180806-etp-amended-complaint.pdf.

[3] See in more detail about GPI's work: https://www.greenpeace.org/international/about/structure/.

[4] The letter has been published by BankTrack and remains available via: https://www.banktrack.org/download/letter_from_500_organisations_to_17_banks_on_financing_dapl/161130_final_letter_all_dapl_banks_2.pdf

work until all outstanding issues are resolved to the full satisfaction of the Standing Rock Sioux Tribe."[5] This letter, sent on 30 November 2016, was signed by more than 500 organizations, including GPI.

In 2017, ET filed an extremely aggressive and clearly unfounded court case against GPI and several other defendants (including Greenpeace, Inc. and the Greenpeace Fund, Inc) in the federal District Court for the District of North Dakota (the "**Federal Lawsuit**").[6] In the Federal Lawsuit, ET demanded damages of "no less than $ 300 million", which it demanded to be "trebled" and paid "together with interest, costs and attorney's fees".[7] It alleged, without any factual basis, that GPI and the other defendants were part of a criminal enterprise which purposely aimed to damage ET, as a way to raise funds.

In its publicity campaign about the court case, Energy Transfer accused GPI and the other defendants of "manufactur[ing] and disseminat[ing] false and misleading information", "fraudulently inducing donations", "incit[ing], fund[ing] and facilitat[ing] crimes and acts of terrorism" and called GPI and the other defendants "rogue environmental groups (…) who employ a pattern of criminal activity and a campaign of misinformation for purposes of increasing donations and advancing their political or business agendas".[8] To be sure: there is no basis in fact for these far-reaching allegations. The sum total of evidence against GPI is that it joined more than 500 other organisations in signing the BankTrack open letter to a number of financial institutions - a letter which caused no proven harm whatsoever to ET.

Kelcy Warren is the founder and former CEO of Energy Transfer LP and current Executive Chairman of that company. He is one of the 500 richest people in the world, with an estimated personal fortune of between 6 and 7 billion dollars.[9] On 25 August 2017, Kelcy Warren was interviewed on CNBC as CEO of Energy Transfer about the claims in the Federal Lawsuit. The banner accompanying the interview stated: "ENERGY TRANSFER SUES GREENPEACE". In the interview, Warren referred to Greenpeace and others as "these people" and said "I am not afraid of these people at all". "Everybody's afraid of these environmental groups and the fear that it may look wrong if you fight back (...) but what they did to us is wrong, and they're going to pay for it (…) They're going to pay for this, they're going to pay for this".[10] He explicitly said that "this can't be allowed to happen" and implied that the Federal Lawsuit was aimed against all acts of public participation by GPI and other groups in the United States. In September 2017, Warren was interviewed by Chris Berg at Valley News Live. In this interview, Warren

[5] BankTrack 30 November 2016, "Global call on banks to halt loan to Dakota Access Pipeline," available at: https://www.banktrack.org/article/global_call_on_banks_to_halt_loan_to_dakota_access_pipeline.

[6] The entity Dakota Access LLC was not a plaintiff in the Federal Lawsuit.

[7] Energy Transfer Equity, L.P. and Energy Transfer Partners, L.P. v Greenpeace International *et al*, First Amended Complaint Jury Trial Demand, Case No: 1:17-cv-00173.

[8] Press release Energy Transfer 22 August 2017, "ENERGY TRANSFER FILES FEDERAL LAWSUIT AGAINST GREENPEACE INTERNATIONAL, GREENPEACE INC., GREENPEACE FUND, INC., BANKTRACK AND EARTH FIRST! FOR VIOLATION OF FEDERAL AND STATE RACKETEERING STATUTES", https://ir.energytransfer.com/news-releases/news-release-details/energy-transfer-files-federal-lawsuit-against-greenpeace/.

[9] In early June, Bloomberg listed Warren as the 399th richest person in the world; Forbes ranked him as the 483rd at the same time. See https://www.bloomberg.com/billionaires/profiles/kelcy-l-warren/ and https://www.bloomberg.com/billionaires/profiles/kelcy-l-warren/.

[10] CNBC Power Lunch 25 August 2017, "We were greatly harmed, lost millions of dollars: Energy Transfer Partners CEO", https://www.cnbc.com/video/2017/08/25/we-were-greatly-harmed-lost-millions-of-dollars-energy-transfer-partners-ceo.html.

acknowledged that ET started the lawsuit against Greenpeace to "send a message", and not primarily to obtain damages:[11]

> We've created this kind of tolerance where, oh my gosh, you can't challenge these people in fear that someone is going to say you're not a friend of the environment. That's nonsense. (...) Could we get some monetary damages out of this thing, and probably will we? Yeah, sure. Is that my primary objective? Absolutely not. It's to send a message, you can't do this, this is unlawful and it's not going to be tolerated in the United States.

Later in the interview, Berg asked Warren: "are you trying to cease funding for organisations like Greenpeace?" Warren answered: "Absolutely".

On 14 February 2019, the judge presiding over the Federal Lawsuit threw out ET's case against GPI and others based on a motion to dismiss.[12] The court found the facts advanced by the plaintiffs fell "far short of what is needed" to establish the defendants had formed a criminal enterprise. It dismissed the federal claims alleged, with prejudice, and declined to exercise jurisdiction over the state law claims.[13]

Only a week later (on 21 February 2019) ET filed another case against GPI and others, this time in state court in North Dakota (the "**State Lawsuit**"). ET's operative complaint asserts a long series of claims—including defamation, tortious interference, and a variety of property torts—against the non-profit Greenpeace defendants (including GPI) in connection with ET's development and operation of the oil pipeline in North Dakota. In this case, ET seeks close to three hundred million dollars in damages, including alleged reputational damage, and in addition demands for exemplary damages (which can be double the amount of actual damages awarded) and attorney's fees. There were and are still no grounds whatsoever for any of ET's claims. However, in North Dakota state law there is no anti-SLAPP statute, and North Dakota has been described as "favorable terrain for these sorts of defamation lawsuits" for that reason.[14]

The State Lawsuit has been ongoing before the Morton County District Court over the past five years and is scheduled to go to jury trial in February-March 2025. ET has not been able, and will not ever be able to, show evidence of any tort committed by GPI. However, as ET has also publicly stated, that is not the point of its lawsuits against GPI. The State Lawsuit, like the Federal Lawsuit before it, is a strategic lawsuit aimed against acts of public participation:

> When it comes to SLAPP suits like this one, the process itself is the punishment. The burden of time and money to defend constitutionally protected activities from such mischaracterizations

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[11] Valley News Live 1 September 2017, "Energy Transfer Partners CEO, Kelcy Warren, says DAPL was about a money raise", https://www.valleynewslive.com/content/misc/Energy-Transfer-Partners-CEO-Kelcy-Warren-says-DAPL-was-about-a-money-raise-442409553.html. At the moment of writing, this video appeared to be (possibly temporarily) unavailable to stream.

[12] United States District Court of North Dakota 14 February 2019, Case 1:17-cv-00173-BRW-CRH.

[13] The full dismissal is available here: https://www.greenpeace.org/usa/wp-content/uploads/2019/02/ETP.pdf.

[14] Texas Observer 25 March 2022, "Kelcy Warren's Defamation Suit has Beto O'Rourke Spoiling For a Fight", https://www.texasobserver.org/kelcy-warrens-defamation-suit-has-beto-orourke-spoiling-for-a-fight/. This article relates to a SLAPP case Warren filed against politician Beto O'Rourke, which was unsuccessful as the Texas courts found O'Rourke's statements "non-actionable opinions". Court of Appeals Texas, Austin 9 June 2023, NO. 03-22-00416-CV (*Warren/Rourke*); confirmed by the Supreme Court of Texas.

> is far too high for ordinary citizens and community organizations. As a result, many will decide to keep quiet rather than risk a ruinous judgment.[15]

GPI notes that while this letter is specifically concerned with its position, it is of the view that the State Lawsuit clearly qualifies as a SLAPP suit against all defendants, including the other Greenpeace entities that are defendants in the State Lawsuit.

2. Legal protection against SLAPP suits in the Netherlands and Europe

The acts against GPI by ET as set out above are unlawful and qualify as an abuse of rights under Dutch civil law (Articles 6:162 and 3:13 of the Dutch Civil Code or ("**DCC**")), read in conjunction with Articles 8 and 10 of the European Convention of Human Rights ("**ECHR**"), EU Directive 2024/1069 on protecting targets of SLAPPS, and Article 11 of the EU Charter of Fundamental Rights ("**Charter**"), as well as various Recommendations set out below). GPI therefore has a cause of action before the courts of the Netherlands.

GPI is established in the Netherlands, which is part of the European Union and the Council of Europe. Freedom of expression, which includes the right of the public to receive information, is guaranteed by *inter alia* Article 10 ECHR and Article 11 of the Charter. Article 8 ECHR guarantees the right to reputation, which can come into play for targets of SLAPP cases. The State of the Netherlands has a positive obligation to secure the enjoyment of the rights enshrined in (amongst others) Article 8 and 10 ECHR to everyone within its jurisdiction, and to protect this right from any infringement, including by private parties.[16]

Dutch civil law furthermore prohibits unlawful acts, meaning "an infringement of a right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct" (Article 6:162(1) and (2) DCC). In addition, Dutch law prohibits parties from abusing their rights, including (but not limited to) by exercising a right with the sole aim of harming another party (Article 3:13 DCC).

Over the past years, SLAPPs have been recognized within the European Union as a significant threat to freedom of expression and – by extension – to democracy.[17] The European Commission underlined in a Recommendation that SLAPPs can be aimed at "exhaust[ing] (…) financial and other resources" of journalists, NGOs and human rights defenders and noted: "The length of procedures, the financial pressure and the threat of criminal sanctions constitute powerful tools to intimidate and silence critical voices" (considerations, under 12).[18] It recommended Member States to ensure targets of SLAPPs should be able to obtain compensation for all damage and costs incurred as a result of the SLAPP.

The European Parliament noted with concern in 2021 that SLAPPs "may also be brought against watchdogs within the Union by actors in third countries and before courts in third countries" – 'third

[15] Greenpeace USA 6 June 2024, "The Story of Energy Transfer's $300 Million Lawsuit, and Why It Matters", https://www.greenpeace.org/usa/energy-transfer-lawsuit-story/.

[16] Human Rights Comment by the Council of Europe Commissioner for Human Rights 27 October 2020, "Time to take action against SLAPPs" (Strategic Lawsuits against Public Participation).

[17] See for instance ECtHR 15 March 2022, 2840/10 (*OOO Memo/Russia*), par. 43 and 23.

[18] Commission Recommendation of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation").

countries' meaning countries which are not EU Member States.[19] The Committee of Ministers of the Council of Europe in early April 2024 reiterated this. It recommended Member States to provide rules to ensure that SLAPP targets domiciled within a Council of Europe country are able to obtain compensation of damages and costs incurred in connection with a SLAPP in a third country before the court of the place where they are domiciled.[20]

On 11 April 2024 Directive 2024/1069 on protecting targets of SLAPPs (the "**Directive**") came into effect.[21] The Directive aims to provide safeguards to journalists, human rights defenders and other persons engaged in public participation against SLAPPs, which are defined in the Directive as "manifestly unfounded claims or abusive court proceedings in civil matters with cross-border implications brought against natural and legal persons on account of their engagement in public participation" (art. 1 Directive).

Whether a court case qualifies as a SLAPP will depend on the facts and circumstances of the case, and the Directive expressly does not provide an exhaustive list of criteria, which must be satisfied for a court case to qualify as a SLAPP. Rather, it provides a non-exhaustive list of indications that a court case could be qualified as a SLAPP, including but not limited to the following indications (drawn from the recitals of the Directive):

1. The case is "initiated by powerful entities, for example (…) corporations (…) in an attempt to silence public debate".
2. The case involves "an imbalance of power between the parties, with the claimant having a more powerful financial or political position than the defendants".
3. If an imbalance of power is present, this "significantly increases the harmful effects as well as the chilling effect of court proceedings against public participation".
4. There are "litigation tactics deployed by the claimant and used in bad faith, such as tactics relating to the choice of jurisdiction, relying on one or more fully or partially unfounded claims, making excessive claims, the use of delaying tactics or deciding to discontinue cases at a later stage of the proceedings, initiating multiple proceedings on similar matters, and incurring disproportionate costs for the defendant in the proceedings."
5. In that context, "[t]he past conduct of the claimant and, in particular, any history of legal intimidation should also be considered when determining whether the court proceedings are abusive in nature. Those litigation tactics, which are often combined with various forms of intimidation, harassment or threats before or during the proceedings, are used by the claimant for purposes other than gaining access to justice or genuinely exercising a right and are aimed at achieving a chilling effect on public participation in relation to the matter at stake".

[19] European Parliament resolution of 11 November 2021 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)).

[20] Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs) – regardless of the domicile of the party which filed the SLAPP suit.

[21] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').

The Directive expressly recognizes the special threat posed by third-country SLAPPs, meaning cases brought against defendants in the European Union in a jurisdiction outside of the European Union, and the need for protection against such cases (considerations Directive, 43):

> In the cross-border context, it is also important to recognise the threat of SLAPPs in third-countries targeting journalists, human rights defenders and other persons engaged in public participation who are domiciled in the Union. SLAPPs in third-countries may involve excessive damages being awarded against persons engaged in public participation. Court proceedings in third-countries are more complex and costly for the targets of SLAPPs. To protect democracy and the right to freedom of expression and information in the Union and to avoid the safeguards provided by this Directive being undermined by recourse to court proceedings in other jurisdictions, it is important to provide protection against manifestly unfounded claims and abusive court proceedings against public participation in third-countries.

One form of such protection is that Member States are obliged under the Directive to "ensure that the recognition and enforcement of a third-country judgment in court proceedings against public participation by a natural or legal person domiciled in a Member State is refused, if those proceedings are considered manifestly unfounded or abusive under the law of the Member State in which such recognition or enforcement is sought".

In addition, Article 17 of the Directive establishes the right of SLAPP targets to seek compensation for all damage and costs they have incurred as a result of third-country SLAPPs before the courts or tribunals of their domicile. It provides that when a SLAPP has been brought by "a claimant domiciled outside the Union", "in a court or tribunal of a third-country", "against a legal person domiciled in a Member State", that legal person may seek, in the courts or tribunals of the place where it is domiciled, compensation for the damage and the costs incurred in connection with the proceedings before the court or tribunal of the third country. Under the facts here, GPI has the right to demand such compensation before the competent court in the Netherlands.

This right exists irrespective of whether a decision has been rendered in the case pending in the third country (recital 44 of the Directive, emphasis added):

> This Directive creates a new special ground of jurisdiction in order to ensure that targets of SLAPPs domiciled in the Union have an efficient remedy available in the Union against abusive court proceedings against public participation brought in a court or tribunal of a third-country by a claimant domiciled outside the Union. It should apply irrespective of a decision having been rendered or of a decision being final, as targets of SLAPPs can suffer damage and incur costs from the start of court proceedings and possibly even without any decision being rendered, such as in the case of a withdrawal of the claim.

ET's acts against GPI as set out above are unlawful and qualify as an abuse of rights under Dutch civil law (Articles 6:162 and 3:13 DCC, read in conjunction with Articles 8 and 10 ECHR, the Directive and Article 11 of the Charter). GPI has a cause of action against ET before the courts of the Netherlands.

3. Notice of Liability

Under reference to the criteria set out in the Directive and other sources of law, it is beyond doubt that the lawsuits ET has pursued against GPI qualify as SLAPPs:

1. The cases were initiated by ET in an attempt to silence public debate and public participation. There is objective evidence for this aim in light of the public comments of Warren, who has

stated the aim of the case is to 'make Greenpeace pay' including by aiming to 'cease its funding'. Additionally, he stated that the 'primary objective' of the case is: "to send a message, you can't do this, this is unlawful and it's not going to be tolerated in the United States". In relation to GPI, this means signing a letter in the context of public debate should apparently 'not be tolerated in the United States'.

2. There is an imbalance of power between the parties, as ET has considerably greater financial resources than GPI. This imbalance of power increases the harm and creates a chilling effect on public participation.
3. ET has deployed unjustified litigation tactics, *inter alia* by relying on entirely unfounded claims (as shown by the dismissal of the Federal Lawsuit), repeatedly starting court cases against GPI despite a lack of credible evidence against it, doing so in a jurisdiction that lacks an anti-SLAPP law, as well as making excessive claims for damages (hundreds of millions of dollars). As a result of these litigation tactics GPI has incurred disproportionate costs, which is very likely to be the aim of ET.
4. In addition to starting the Federal Lawsuit and the State Lawsuit against GPI, ET has engaged in a very aggressive PR campaign against GPI in which it has accused GPI, without any factual basis, of serious criminal misconduct. This has harmed the reputation of GPI, which is protected by Article 8 ECHR.

As a result of these acts, GPI has suffered and continues to suffer significant damage in its domicile of Amsterdam, the Netherlands. This damage includes but is not limited to:

1. significant legal fees that GPI has been forced to incur as a result of having to defend the successive lawsuits in the United States;
2. various other costs directly linked to the cases in the United States, including but not limited to travel, lodging, consultancies and employment costs for current and former GPI employees;
3. the significant amount of time that some GPI employees have had to invest in dealing with this case over the years while not campaigning for a "green and peaceful future", which is GPI's core mission; [22]
4. reputational damage as a result of the clearly unfounded, publicly stated allegations of ET against GPI of *inter alia* involvement in 'terrorism' and 'criminal activity'.

In addition, GPI continues to suffer significant damage as a result of ET's actions, in particular because ET chooses to continue the State Lawsuit (a clear example of a SLAPP case) against GPI.

By way of this letter GPI provides notice that it holds each of the ET entities jointly and severally liable for all damage it suffers as a result of their actions described herein. Insofar as relevant, this letter interrupts any applicable statute of limitations.

The ET entities are bound to, and still can, limit this damage. Therefore, I hereby summon the ET entities to confirm to me in writing by 14 August 2024 that they shall:

I. **immediately withdraw all demands against GPI** in the State Lawsuit, and take no further legal actions against GPI;
II. **unreservedly accept liability and responsibility for payment of all damage (including costs)** GPI has suffered as a result of ET's actions.

[22] Greenpeace International "About Us", https://www.greenpeace.org/international/about/?.

If all ET entities unreservedly and timely agree with these demands, GPI is willing to enter into negotiations on the amount of damages ET must pay GPI and the modalities of such payments.

GPI reserves all rights.

Kind regards,

Emiel Jurjens