Houses of the Oireachtas, Joint Committee on Environment and Climate Action
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Opening Statement of Dr Kyla Tienhaara

Good afternoon. My name is Kyla Tienhaara, and I am a Canada Research Chair in Economy and Environment and an Assistant Professor in Environmental Studies and Global Development Studies at Queen's University in Kingston, Ontario. Thank you for the opportunity to speak to you today.

My main areas of expertise are environmental governance and investor-state dispute settlement. My opening remarks will focus on my concerns about the Energy Charter Treaty and the obstacles that it potentially poses to government action on climate change.

My remarks are premised on the notion that if we are going to keep within 1.5-2 degrees C of warming, as is the ambition of the Paris Agreement, governments will have to take measures to keep a certain portion of known fossil fuel reserves in the ground. There is increasingly an understanding that demand-side policies such as carbon-pricing are not moving us toward "net-zero" emissions quickly enough. As representatives from Costa Rica and Denmark, who are leading the new Beyond Oil and Gas Alliance (BOGA) noted – "we need to cut with both hands of the scissors, addressing demand and supply simultaneously".

In 2015, two researchers Christophe McGlade and Paul Ekins estimated that to meet the 2 degree temperature goal – which is the upper end of the Paris Agreement temperature range and is now generally considered too high – we would have to leave 82% of known coal reserves in the ground, 49% of gas reserves, and 33% of oil reserves. These numbers were just very recently updated for a 1.5 degree goal in an article in *Nature* by Welsby et al. - the amount that needs to be left in the ground rises to 89% for coal, 59% for gas and 58% for oil.

How does this relate to the Energy Charter Treaty (ECT)? My concern is that government measures that have direct impacts on foreign investors in the fossil fuel sector, such as measures to limit extraction, transportation and combustion of coal, oil and gas, are very likely to be challenged in investor-state dispute settlement (ISDS).

One contemporary example is the cancellation of the Keystone XL pipeline – a project that would have transported oil from the Canadian tar sands through the United States. It was cancelled by President Biden earlier this year and is now the subject of an ISDS case with the company seeking US$15 billion in compensation.

This may seem to be a very large sum for compensation for a pipeline that hasn't been built. However, it is important to note that under the ECT and other investment treaties, investors can seek not only compensation for their sunk costs, but also for so-called "lost future profits". For example, when Italy banned offshore oil off its coastline, UK company Rockhopper launched an ISDS case under the ECT. The company is reportedly claiming damages of US$200-300 million which is many times more than what it had spent on its project prior to the ban.

There are many problems with the lost future profits model of compensation. Leaving aside the question of whether fossil fuel companies should be compensated when governments strand their assets, there are practical difficulties with calculating the amount that is owed. Oil prices, for example, are highly volatile and predicting what the value of a reserve is going to be next year, let alone 20 or 30 years in the future, is far from straightforward. There is also an important question about whether investment arbitrators are going to factor in how government action to combat climate change will impact the price of oil and other fossil fuels. Thus far, they have awarded compensation with the assumption that prices and profits will continue to rise indefinitely.

Bringing this all back to how it could impact climate governance, there are two main issues that I would like to discuss.

The first is what is known as regulatory chill. This is the idea that governments when threatened with an ISDS case will reverse course or at least delay action because they are concerned about the cost of defending their policy in arbitration and the possibility of having to pay an investor a large award. Importantly, due to the nature of climate change as a global issue, regulatory chill can also occur across borders. For example, a government can look at what is happening in the Netherlands, where the government is being sued over the phase out of coal power and decide that a rapid phase out of coal could result in them facing similar ISDS cases. The government may then decide to wait to see what the outcome of an ISDS case is before developing legislation. This is exactly what occurred in the area of tobacco labelling in New Zealand – the government saw that Philip Morris had brought a very large claim against Australia for mandating the plain packaging of cigarettes and decided to delay the introduction of similar legislation. We cannot afford these kinds of delays in the climate policy realm.

The second concern I have is that when governments do follow through with fossil fuel phase out policies, they will end up compensating investors more than they otherwise would have, either because they are forced to so by an arbitral tribunal or because they are negotiating with investors under the shadow of ISDS. There has been some speculation that concerns about ISDS influenced the very generous compensation package that Germany provided coal investors in its phase out plan. When compensation is higher, we have a diversion of public money to fossil fuel investors that should have been spent on ensuring a clean and just energy transition for everyone.

Thank you very much for your attention, I welcome your questions.