



05-12-2013

---

CONFERENCIA MINISTERIAL DE LA CARTA DE LA ENERGÍA:  
PROPUESTA INTERVENCIÓN EMBAJADORA

---

Initial greetings: Minister LAKKOTRYPIS, Mr. SARSENOV (Vice-chairman of the Conference), Ambassador Rusnák (Secretary General), Ministers, Honorable Delegates:

First of all, let me thank the Energy Charter Secretariat for its admirable work in the organization of this Ministerial Conference and of course, the Cyprus Government, for the excellent reception given to all delegates. It is an honor to participate in this Conference as the representative of the Spanish Government.

Successful investments in the energy sector provide the backbone for the prosperity of industry and business. This is a fact. On the other hand, it is also a reality that their large scale and long term commitments require careful planning and strong relationships across both public and private sectors, especially in times of economic crisis. If we also consider that ensuring adequate energy supply in today's global landscape requires significant and timely investment, the topic we discuss today is even more relevant.

What does investment mean for investors? It means putting money or resources into an asset with the expectation of income. What does investment mean for States? It means to receive necessary resources to put into practice their commitments seeking the public interest and the common good, which are at the heart of development. In theory, it seems to be an ideal combination of mutual interests. Regrettably, investments imply a risk for both, investors and States. It is not that easy to find a perfect balance between the right of investors to meet their profit expectations and the right of States to regulate and to develop its energy policies. In the absence of this balance dispute settlement mechanisms arise.

The provisions of the Energy Charter Treaty regarding foreign investments are considered to be the cornerstone of the Treaty.



The aim of the foreign investment regime is to create a 'level playing field' for investments in the energy sector and to minimize the non-commercial risks associated with such investments. The right to arbitration is only one of the different dispute resolution mechanisms of the Treaty, but arguably the most significant.

Arbitration should allow that investment disputes be depoliticized by creating a system that would offer investors a stable and predictable investment environment which ensures that their legitimate and reasonable expectations are met before a neutral and qualified arbitral tribunal. Considering that investor claims relate to the exercise of powers by States, taking these disputes out of the national jurisdictional scope of the concerned State requires a fair process for both the investor and for the sovereign State.

The right to a stable and predictable investment environment should include guarantees for both, the investor and the State, by increasing resort to the so-called alternative dispute resolution mechanism ensuring impartiality in the appointment of arbitrators, and including a mechanism for an early discharge of frivolous claims. These measures would avoid wasting resources on full-length and uncertain proceedings.

A broad review of the system would include key issues, namely those related to improve transparency, in the widest sense. Transparency means that the rules for protecting investments are clearly defined and do not leave room for interpretative ambiguity. This is especially important where it concerns the State's right to regulate for public policy objectives and arbitrator's right to work according to a clear set of procedures that ensures a fair and clear process.

Transparency also means to establish precedent and appellate mechanisms. The absence of a doctrine of precedent in international investment law causes inconsistencies among awards relating to similar or identical factual situations. This implies that neither States nor investors have certainty that arbitral tribunals will follow an interpretative approach that adequately protects their respective rights.



Transparency means that States from the Energy Charter Constituency have the possibility of sharing information and experiences regarding current or potential arbitration processes, within the scope of the Charter. Spain would be ready to actively support any initiative along these lines.

Transparency means that arbitrators themselves are above reproach and that arbitral tribunals offer the highest degree of qualification and impartiality.

In this sense, the possibility of establishing a permanent and standing arbitral tribunal under the umbrella of the Energy Charter Treaty should be seriously taken into consideration.

Ladies and gentlemen, after a somewhat slow start for the investment protection regime of the Energy Charter Treaty, many investors have now started to discover the Treaty and, as a result, we will probably see a continued steady stream of cases in the coming years. This is an essential reason for taking the necessary steps to ensure that we can play this game with transparent, stable, fair and equitable rules for both, investors and States.

A new starting point paves the way for new commitments aiming at improving the implementation of a renovated investor-State dispute settlement, which would result in the interest of both, investors and States and which would ensure, without compromising the exercise of sovereignty by the States, a proper and predictable dispute settlement system.

Thank you very much for your kind attention.