

Energy Charter process on “a long and winding road” - from “Trans-Atlantic Europe” to “Broader Energy Europe” towards Eurasia and beyond it, though now without some key historical ECT actors

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**Presentation at the seminar in the Higher School of Economics, Moscow,
21.02.2024 (online)**

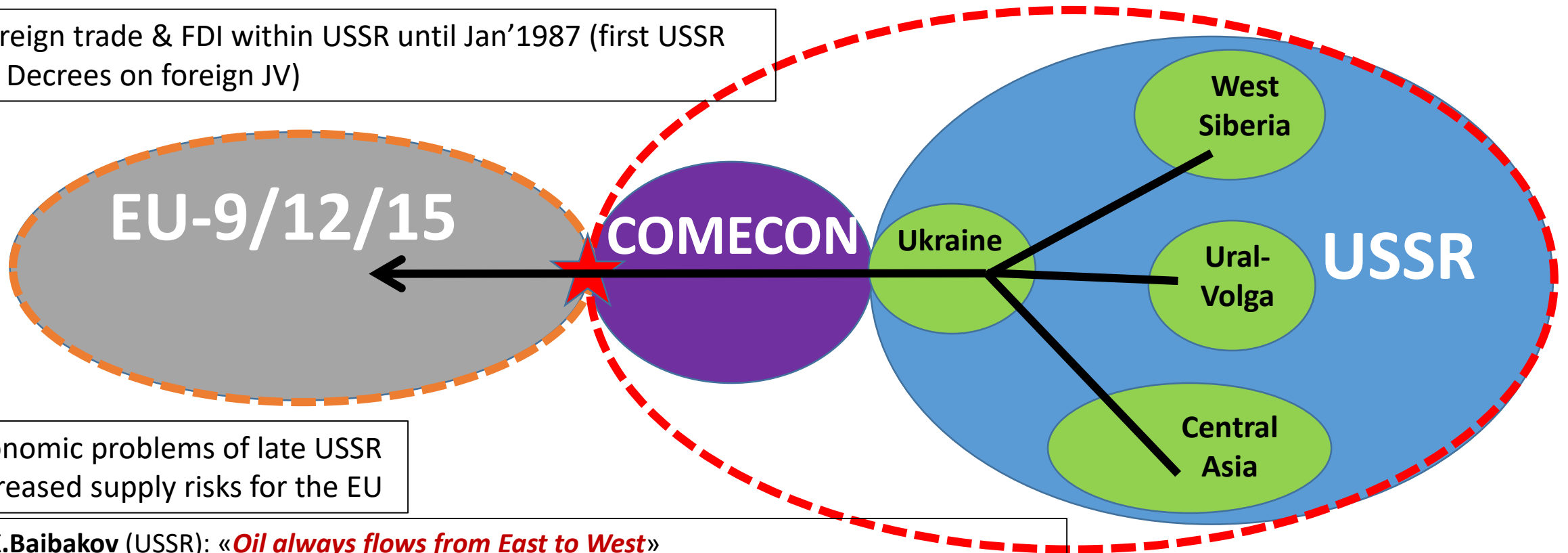
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The beginning: USSR/COMECON (1967) – USSR/EU (1968) = transportation pipeline corridors (linear structure of supplies), on-border sales COMECON-EU; EU – center of export attraction & key export market for USSR

No foreign trade & FDI within USSR until Jan'1987 (first USSR Gov'r Decrees on foreign JV)

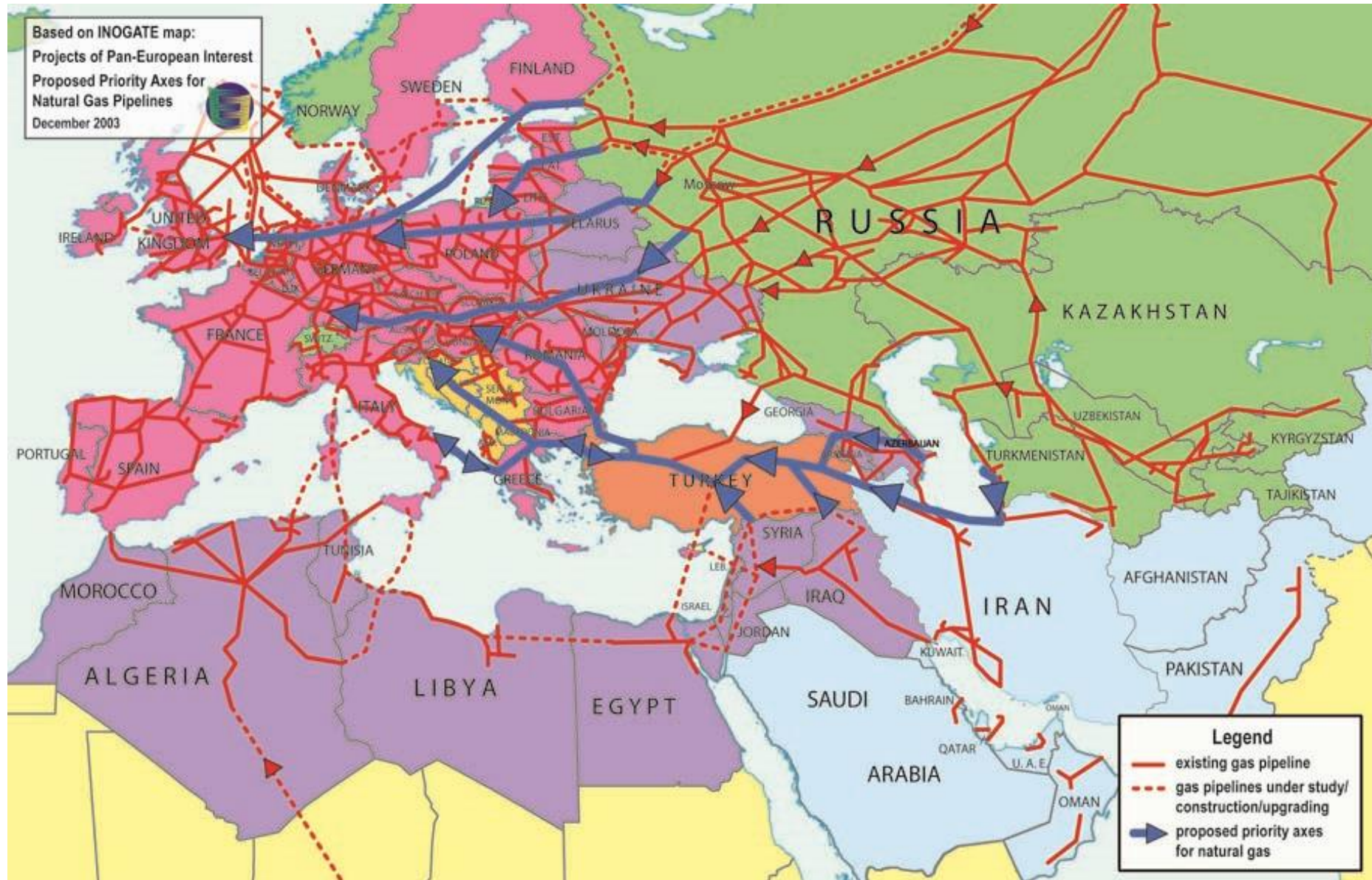


Economic problems of late USSR increased supply risks for the EU

- **N.K.Baibakov** (USSR): «*Oil always flows from East to West*»
- **USSR**: economic development logic in energy – from East (Ural-Volga, West Siberia – more & more to the East) to West (European part USSR, then COMECON, then West Europe – more & more to the West)
- In XXth century the time for Asia has not come yet (no adequate demand in Asia to support “economy of scale”) => development of new resource bases in the East of USSR/Russia was aimed at demand increase (in Europe and USSR/Russia) & on compensation of production decline at existing fields in USSR/Russia

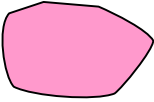
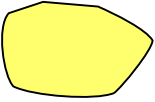
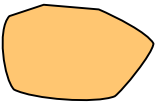
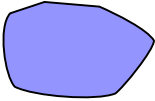
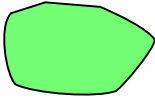
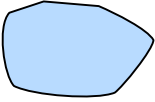


Common rules of the game in Eurasian energy & export of EU's acquis (*)

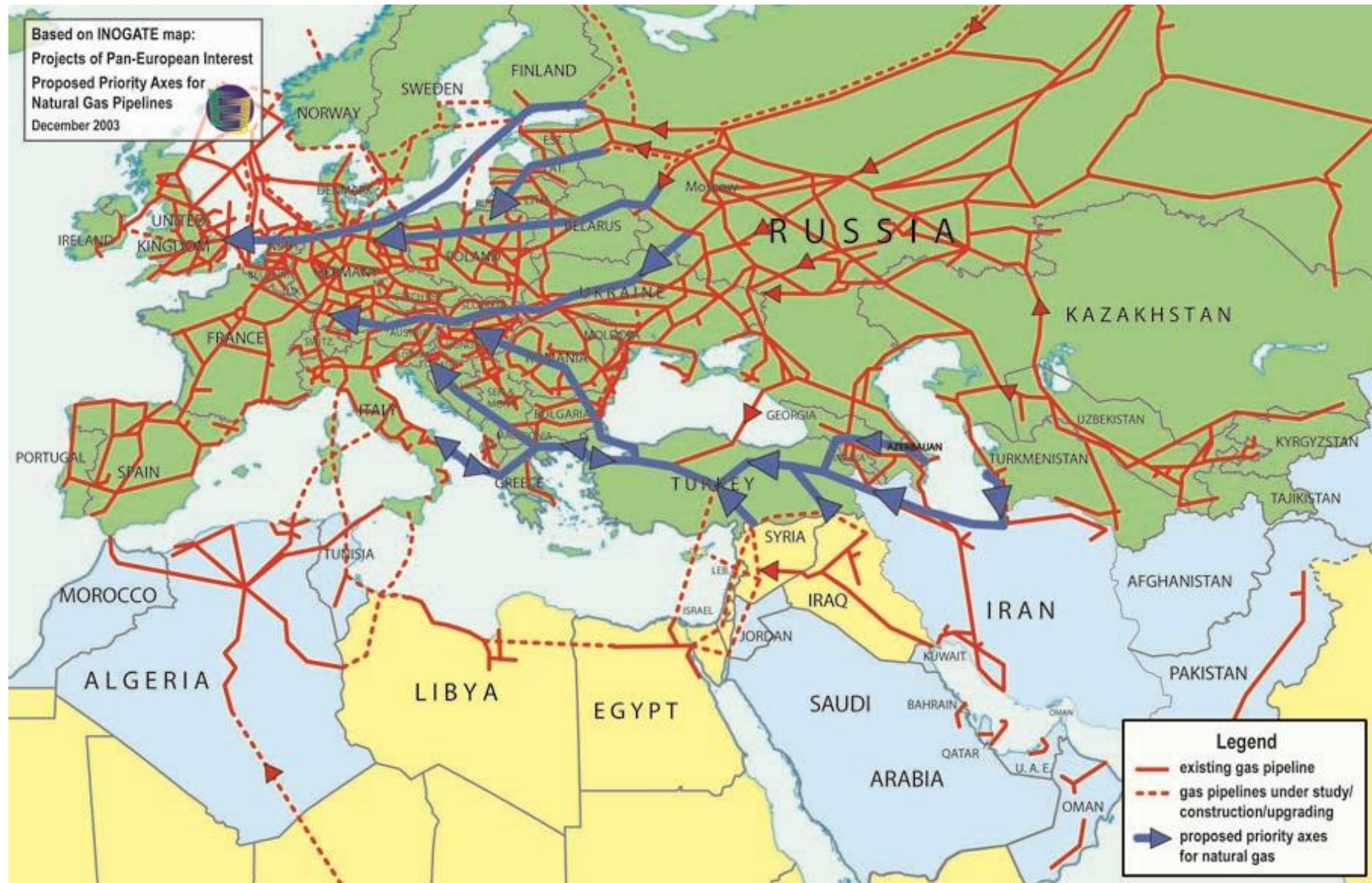


(*) illustrative
example as of
2009

Common rules of the game in Eurasian energy & export of EU's acquis ? (legend)

| Zone | States within the zone | Description |
|-------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | EU Members: 27 EU countries | EU legislation, including the energy legislation, is fully applicable |
|  | Energy Community EU-SEE Countries: Croatia, Serbia, Montenegro, Croatia, Bosnia, FYROM (Macedonia), Albania, UNMIK (Kosova); other Energy Community members are already EU members | Only EU legislation on internal electricity and gas markets is applicable |
|  | EU Candidate Countries: Turkey (Croatia is already an Energy Community member so applying the EU energy market acquis) | Still in the process of alignment to the EU legislation but full compliance not likely before membership |
|  | EU Neighbourhood Policy Countires: CIS (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine = EU Eastern Partnership) and Northern Africa (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria, Tunisia) | Enhanced energy cooperation based on National Action Plans with Ukraine and Moldova (as well as with Israel, Jordan, Morocco, the Palestinian Authority and Tunisia); partial application of EU energy policies and legislation may be possible in the future |
| | EU-Russia Strategic Partnership: EU & Russia | Based on shared principles and objectives; applicability of the EU legislation in Russia is out of question |
|  | ECT member-states: 51 states of Europe & Asia | ECT is fully applicable within the EU as minimum standard; EU went further in liberalizing its internal energy market, BUT whether EU can demand that other ECT member-states follow same model and speed of developing their domestic markets? |
|  | ECT observers: 23 states of Europe, Asia (e.g. Middle East, South-, SE- & NE-Asia), Africa, North & Latin America + 10 international organisations | Shared ECT aims & principles; did not take ECT legally binding rules; not ready to take more liberal rules of EU Acquis |

Common rules of the game in Eurasian energy & expansion of ECT (*)

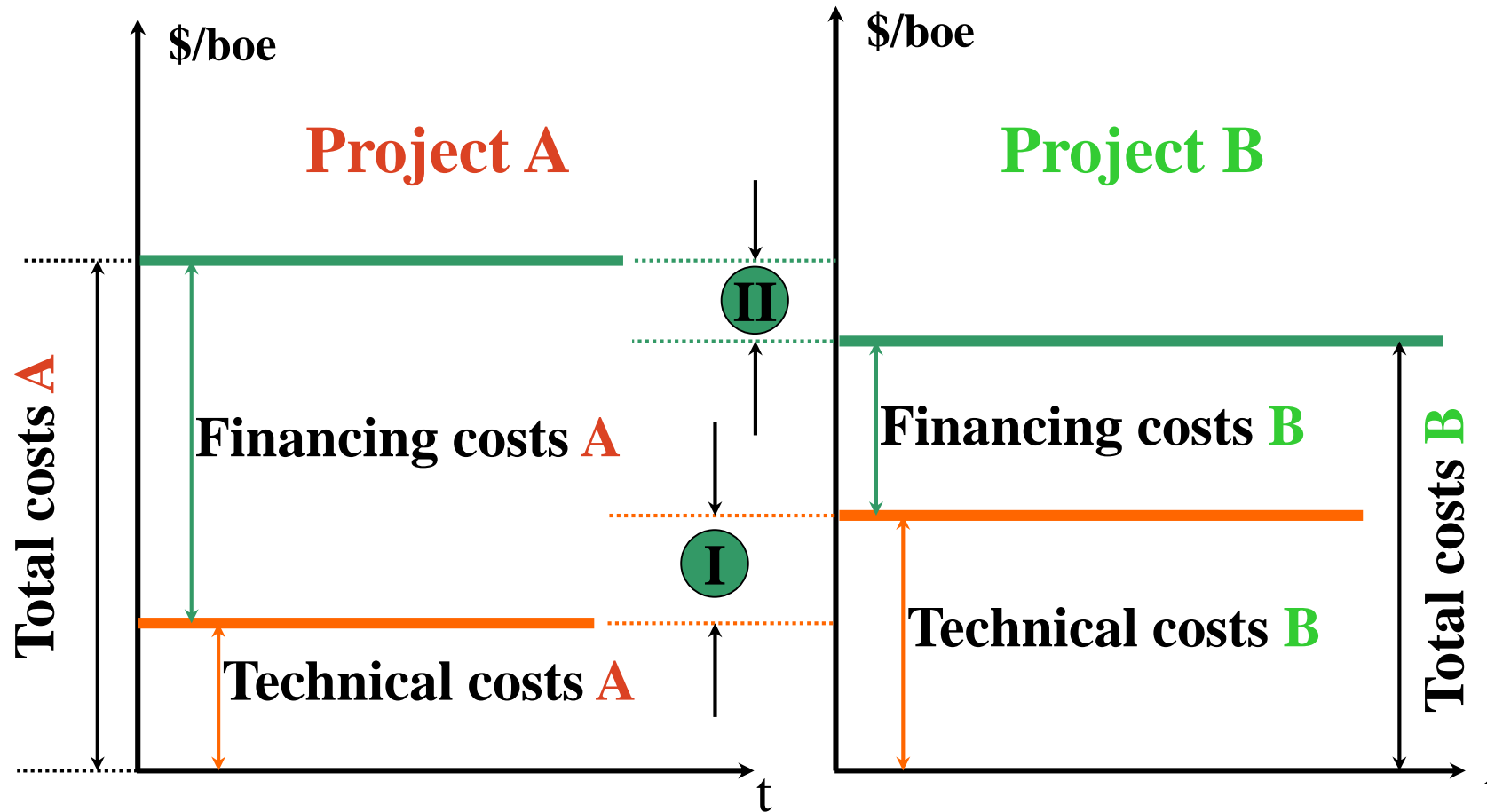


(*) illustrative
example as of
2009

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"NATURAL" VS. "FINAL" COMPETITIVE ADVANTAGES OF ENERGY PROJECTS



I

"Natural advantage" of project A over project B ($A < B$)

II

Final competitive *dis*advantage of project A over project B ($A > B$)

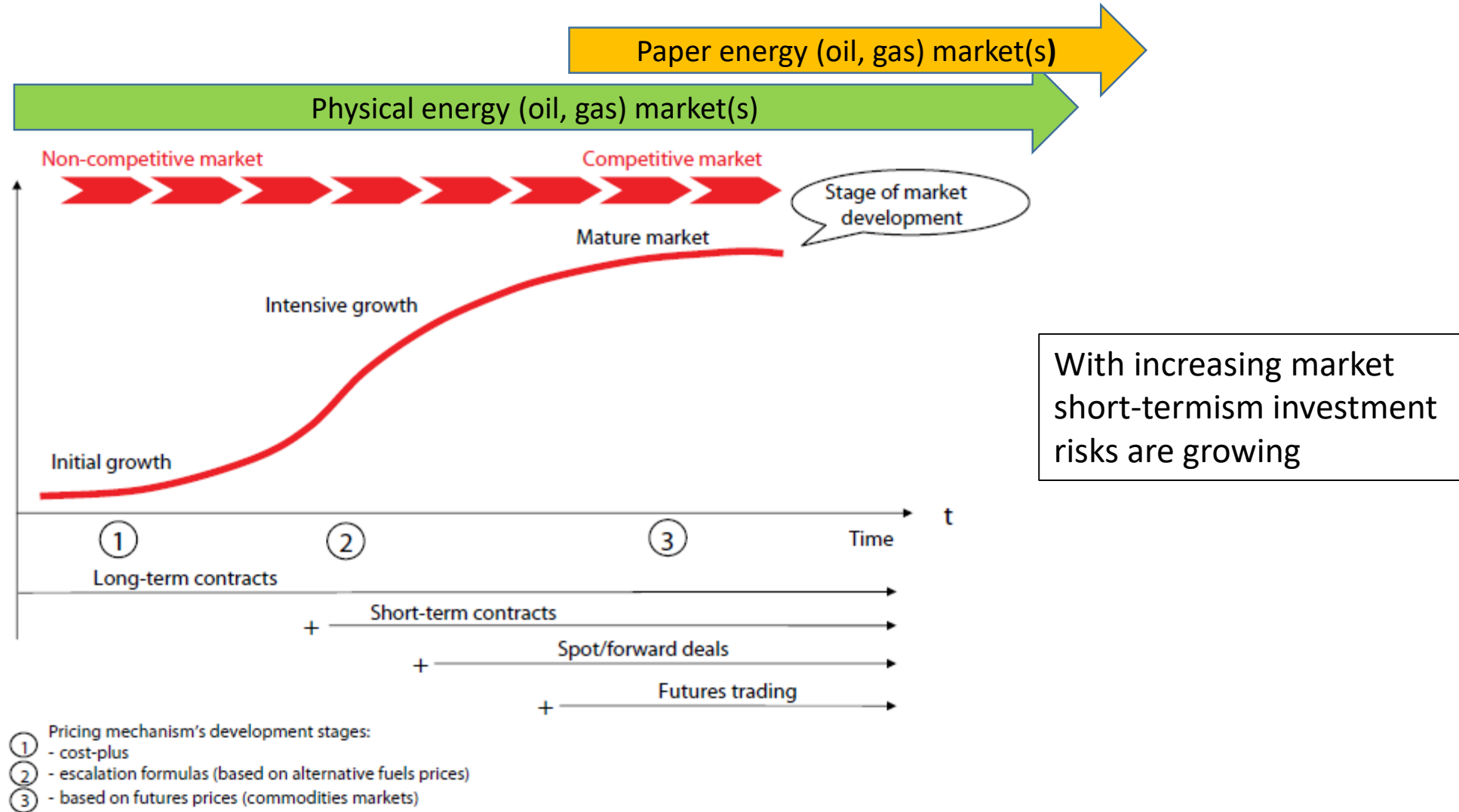
ENERGY ECONOMY: HIGHEST DEMAND FOR QUALITY OF REGULATORY FRAMEWORK

Energy/hydrocarbon projects (compared to other industries):

- Highest capital intensity (absolute & unit CAPEX per project),
- Longest project life-cycles & pay-back periods (for most effective & full reserves extraction),
- Geology risks + immobile infrastructure,
- Cross-border flows + immobile infrastructure,
- Worsening natural conditions of resources to be developed + imputed costs of initial macroeconomic infrastructure in new areas,
- Highest demand for stability & predictability of legal & tax environment,
- Role of risk management,
- State sovereignty on energy resources => Maximum extraction of resource rent (Ricardian + Hotelling rent) by state-resource owner => need for balance of interests state vs. investor
- Economics & politics in energy come together: long-term investment upstream projects life-cycle (40-50+ years) vs. short-term political/electoral cycle (4-8 years)

=> Higher/highest demand for “quality” of legal and regulatory framework compared to other industries => to diminish energy projects risks & to maximize their macroeconomic effects for the host state

Evolution of energy markets and their institutional and contractual structure



Source: based on Andrei Konoplyanik

ROLE OF LEGAL PROTECTION INSTRUMENTS FOR PROJECT FINANCING

Legislation \rightarrow \downarrow risks \rightarrow \downarrow financial costs (cost of capital) = (1) \rightarrow
 \uparrow inflow of investments (i.e. \uparrow FDI, \downarrow capital flight) \rightarrow \uparrow CAPEX \rightarrow \downarrow technical costs = (2) \rightarrow
(1) + (2) = (3) \rightarrow \uparrow pre-tax profit \rightarrow \uparrow IRR (if adequate tax system) \rightarrow \uparrow competitiveness \rightarrow
 \uparrow market share \rightarrow \uparrow sales volumes \rightarrow \uparrow revenue volumes

Legal instruments provides multiplier legal effect in diminishing risks with consequential economic results in cost reduction and increase of revenues and profits

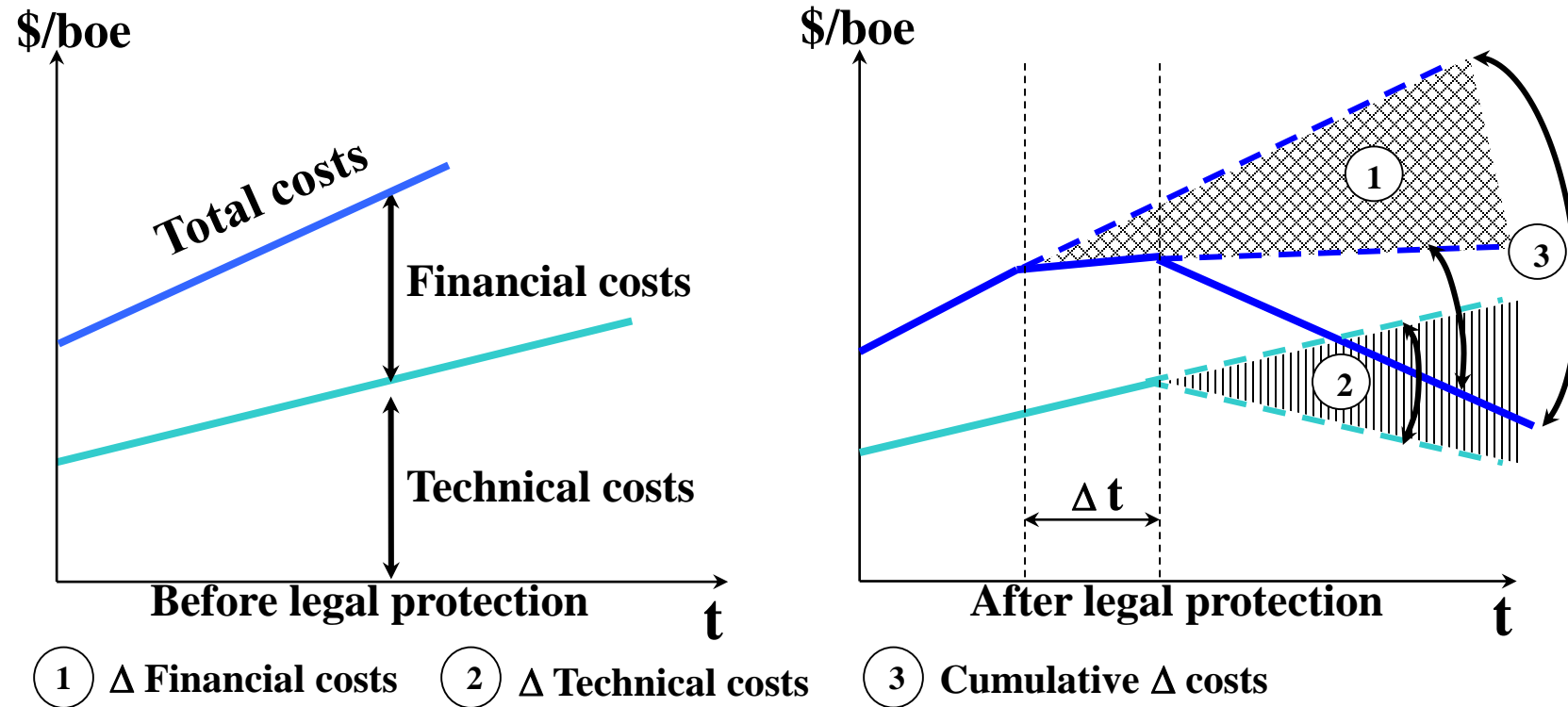
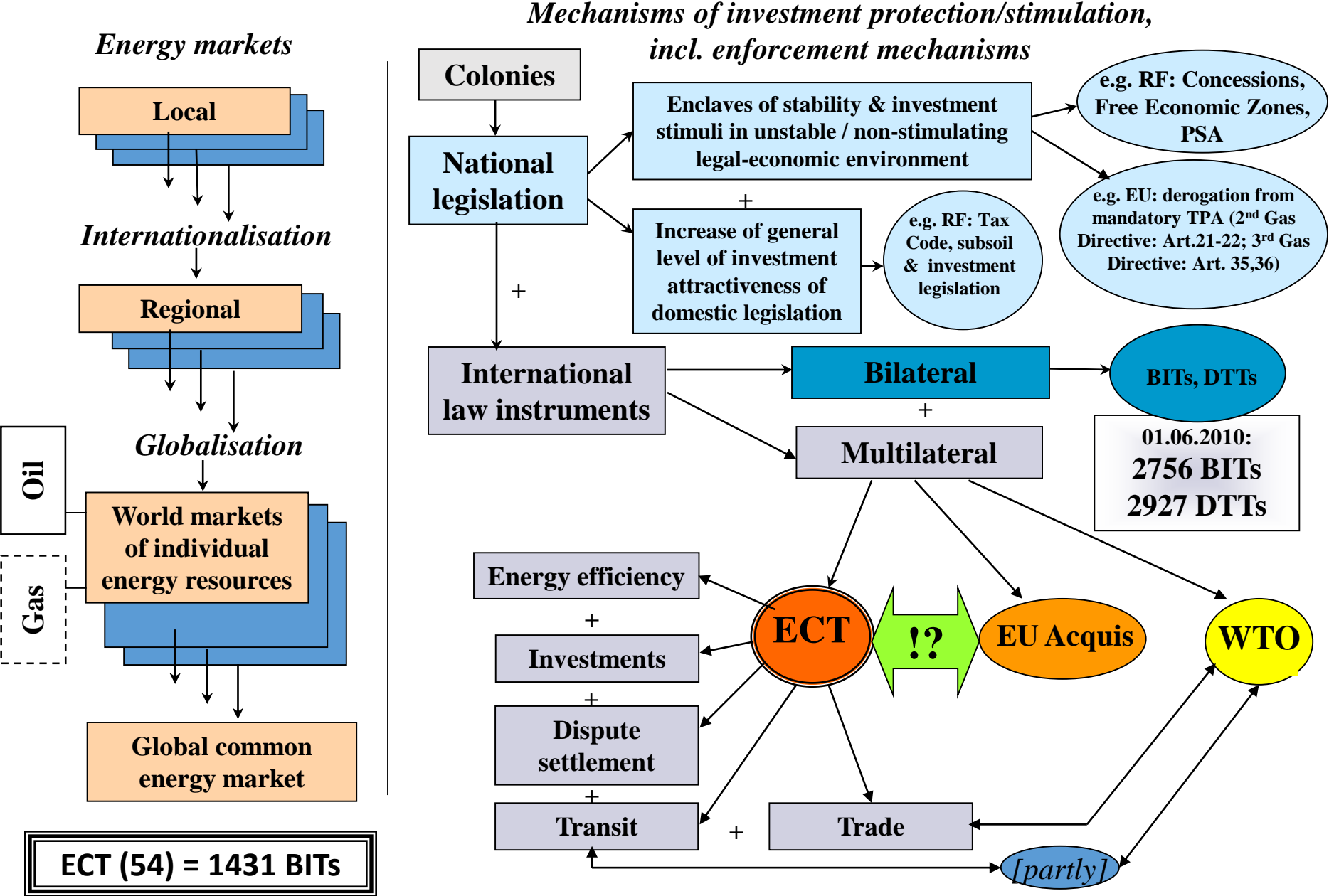


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Development of international energy markets and of mechanisms of investment and trade protection and stimulation



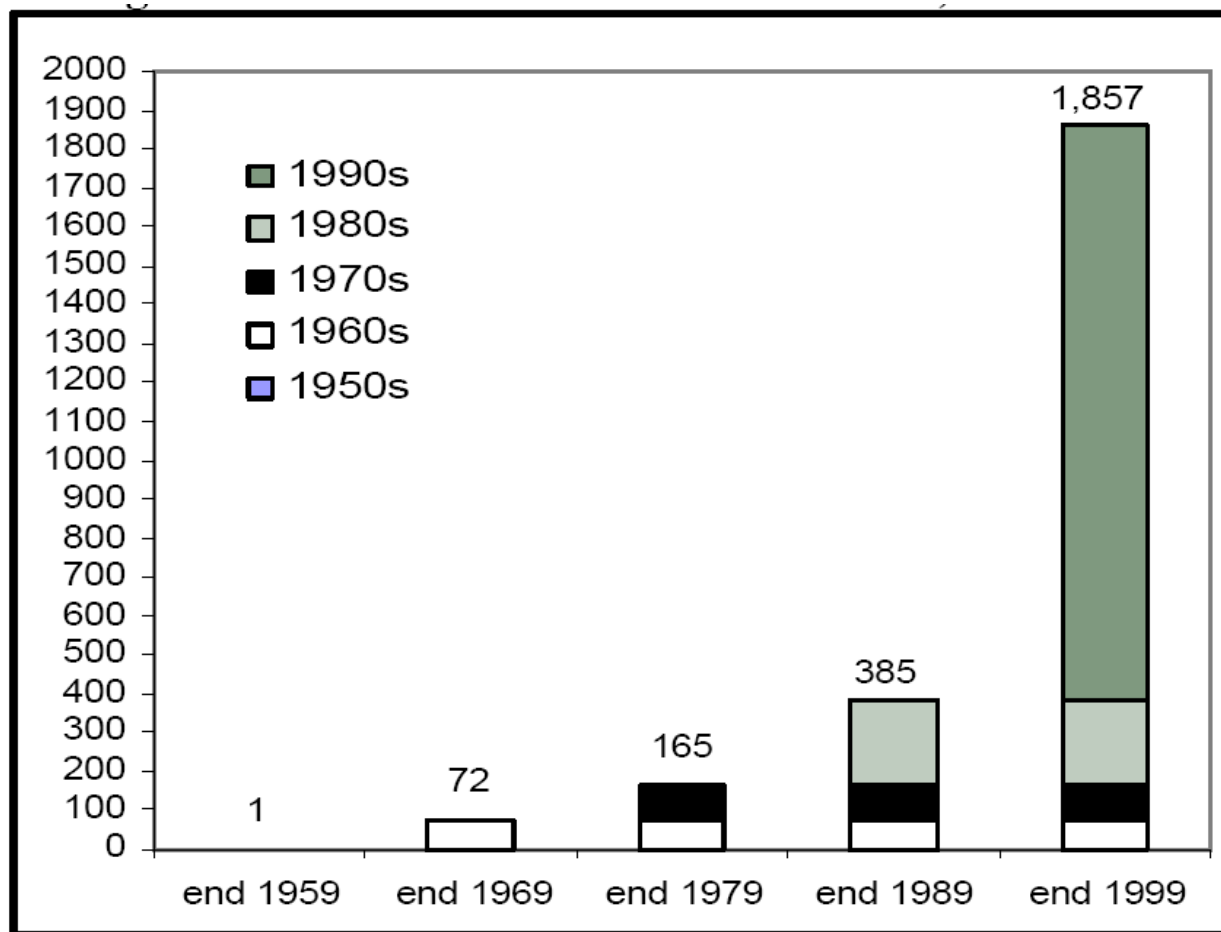
Comparative data on implementation of different types of petroleum arrangements worldwide, 2003 & 2009, according to G.Barrows

| - | 2003 | | 2009 | |
|--------------------------------------|------|----|------|-----|
| Number of states in analysis, incl.: | 180 | | 177 | |
| Oil producing states, using: | | 91 | | 104 |
| - Tax + Royalty (T+R)(*) | 113 | 45 | 111 | 55 |
| - PSA | 54 | 34 | 55 | 38 |
| - Both T+R & PSA | 13 | 12 | 11 | 11 |

(*) concessions and/or licensing regime

Source: А.Конопляник. Средство от «правового вакуума». Уровень экономического и правового развития государства определяет выбор инвестиционных режимов в недропользовании. – «Нефть России», 2012, № 8, с. 20-24; № 9, с. 26-29; № 10, с. 16-23. Based on data, kindly provided to the author personally by Gordon Barrows (Barrows Company / AIPN)

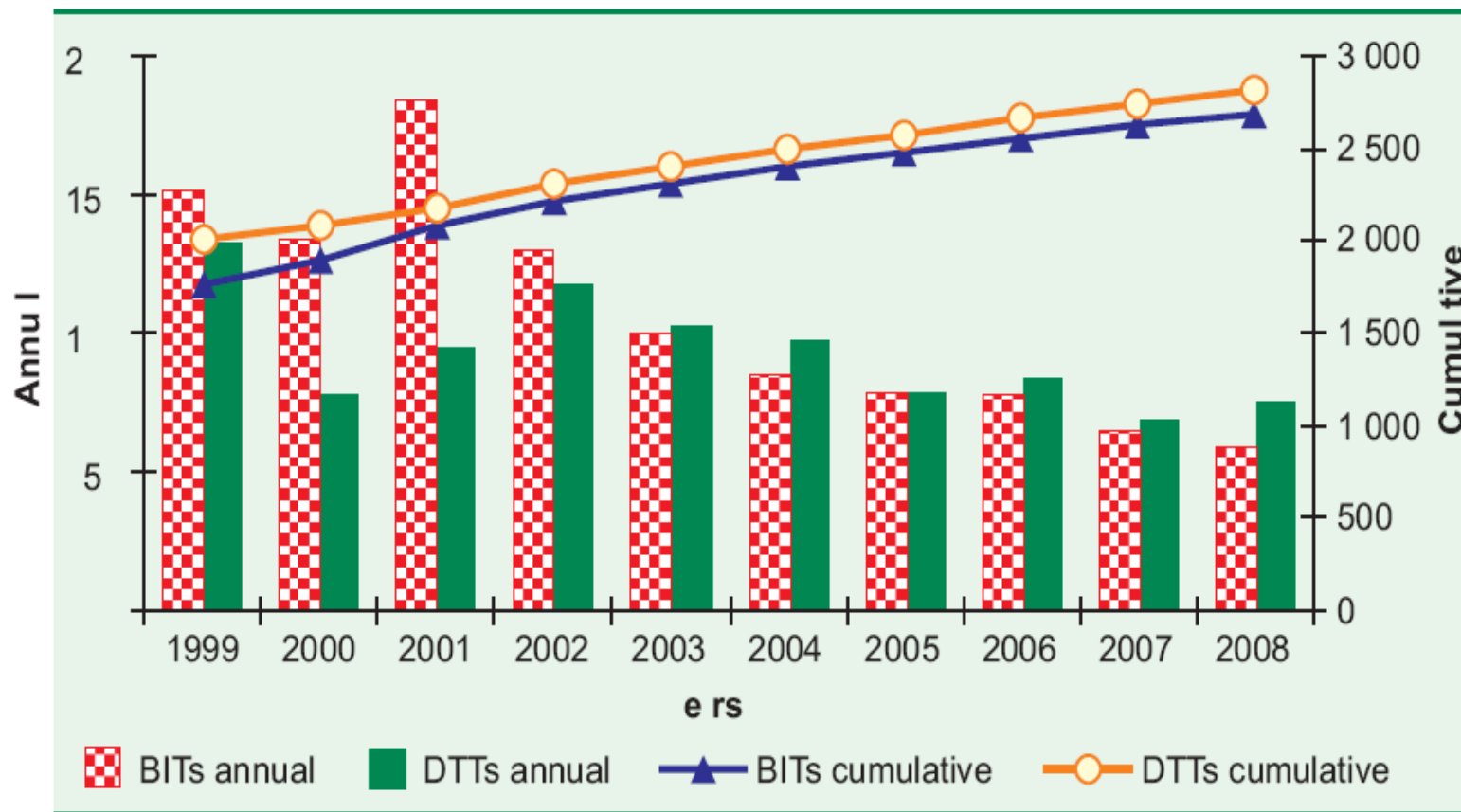
Growth of number of BITs, 1959-1999



Source: UNCTAD database on BITs.

Source: Bilateral Investment Treaties, 1959-1999. UNCTAD/ITE/IIA/2, 2000, p.1

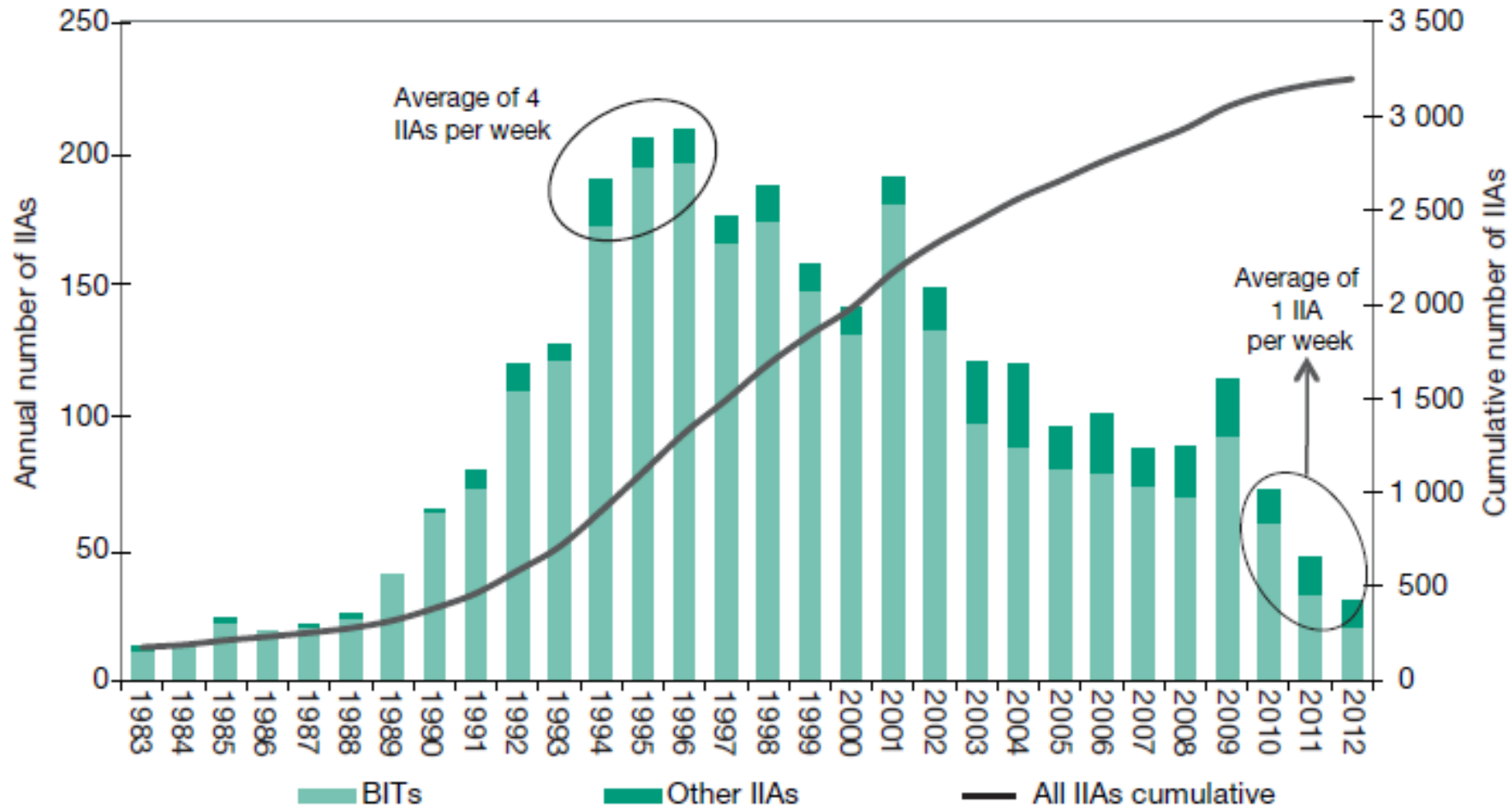
Number of BITs & DTTs concluded, annual & cumulative, 1999-2008



Source: UNCTAD (www.unctad.org/iia).

Source: World Investment Report 2009. UNCTAD, 2009, p.33

Trends in IIAs: 1983 – 2012, according to UNCTAD WIR 2013



Source: UNCTAD World Investment Report 2013. UNCTAD, NY and Geneva, 2013, p. xx.

Selected international investment-related agreements (*)

| Organisation (member-states/CPs) | Legal Status | Scope | Investment | Trade | Transit | Energy Efficiency | Dispute Settlement |
|-------------------------------------|-----------------|----------------|----------------------|------------|-----------------|----------------------|-----------------------|
| ECT (51/52) | LB | Energy | Yes | Yes | Yes | Yes | Yes |
| WTO (149) | LB | General | (Yes?) (Services) | Yes | Yes/No (***) | <i>No</i> | Yes |
| NAFTA (3) | LB | General | Yes | Yes | <i>No</i> | <i>No</i> | Yes |
| MERCOSUR (4) | LB | General | Yes | Yes | <i>No</i> | <i>No</i> | Yes |
| OECD (30) | LB | General | Yes | <i>No</i> | <i>No</i> | <i>No</i> | <i>No</i> |
| APEC (21) | <i>Non-LB</i> | General | Yes | Yes | <i>No</i> | <i>No</i> | <i>No</i> |

(*) Other multilateral energy-specific (OPEC, IEA, IEF, IAEA, ...) and/or energy-inclusive (UN ECE, ...) and/or “sub-regional” (BSEC, BASREC, ...) organisations can be mentioned; though most of them are non-LB and/or do not address investment-protection issue;

(**) LB = legally-binding;

(***) application of GATT Art.V to grid-bound transportation systems is under debate

Compiled by Dr. Joachim Karl, former Senior Expert of the Energy Charter Secretariat, Brussels, and currently Legal Affairs Officer, UNCTAD, Geneva, and has been presented with his kind permission since then by the author

Energy investment protection: complementarity of energy-related international organizations (this author's vision)

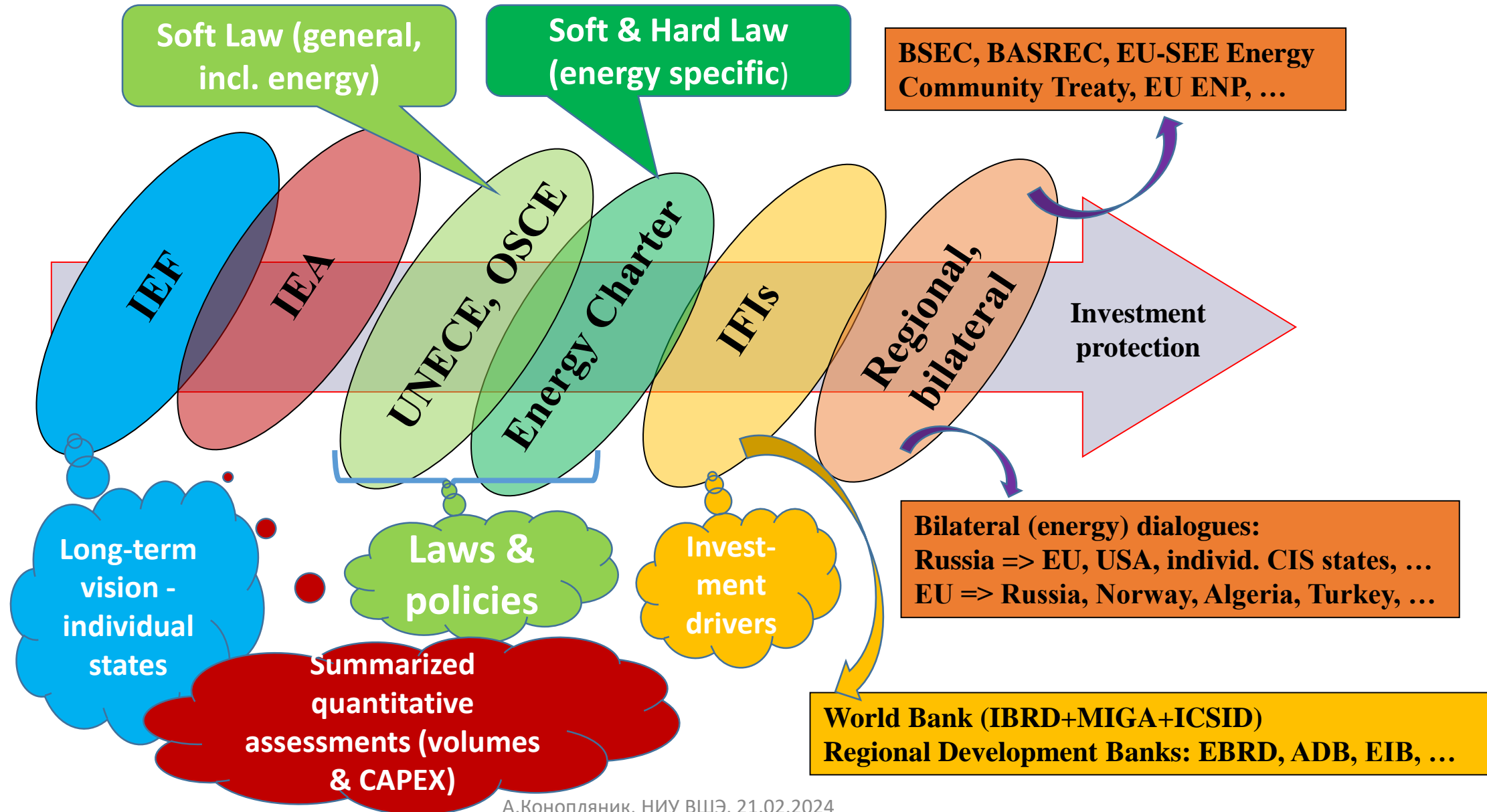
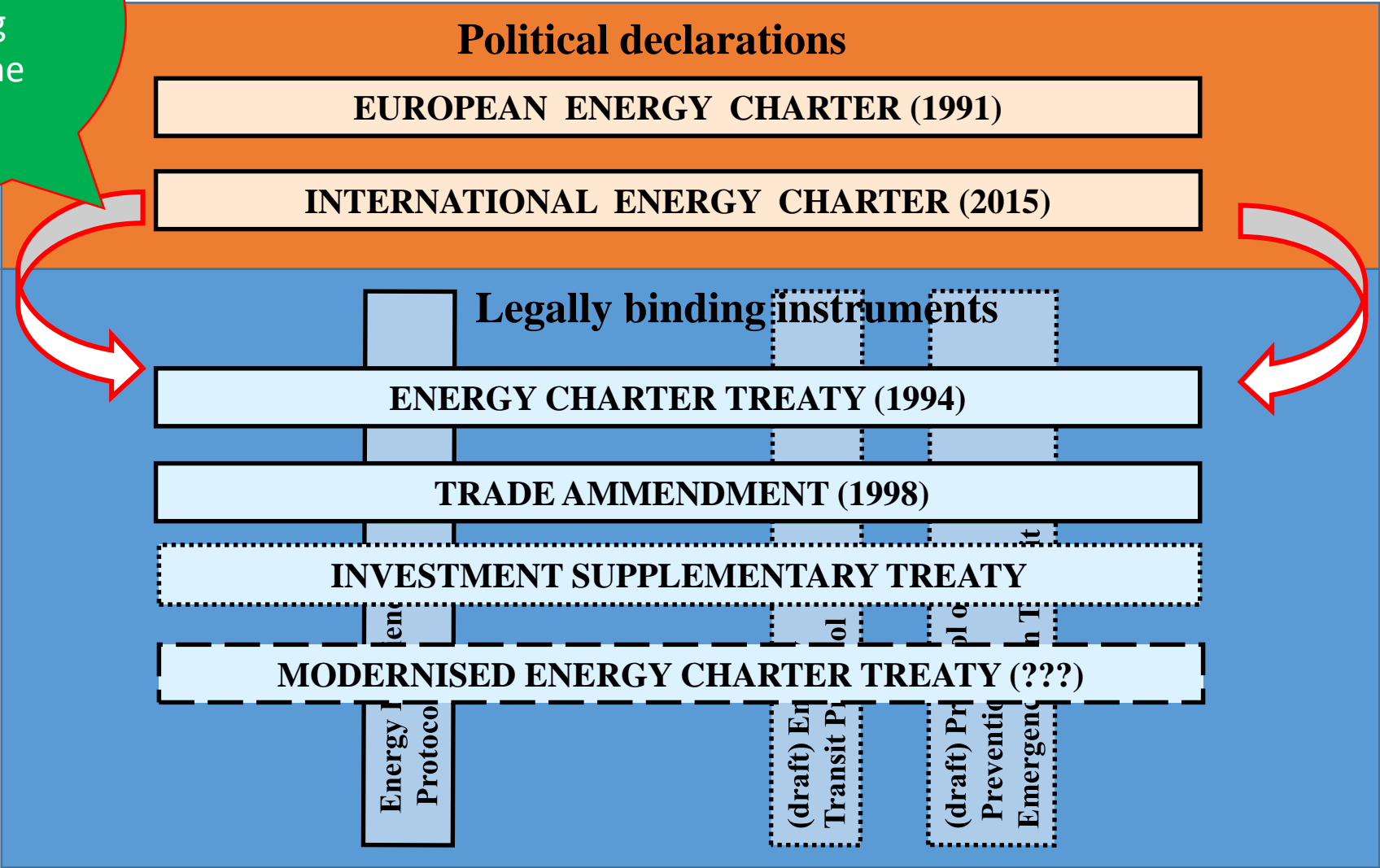


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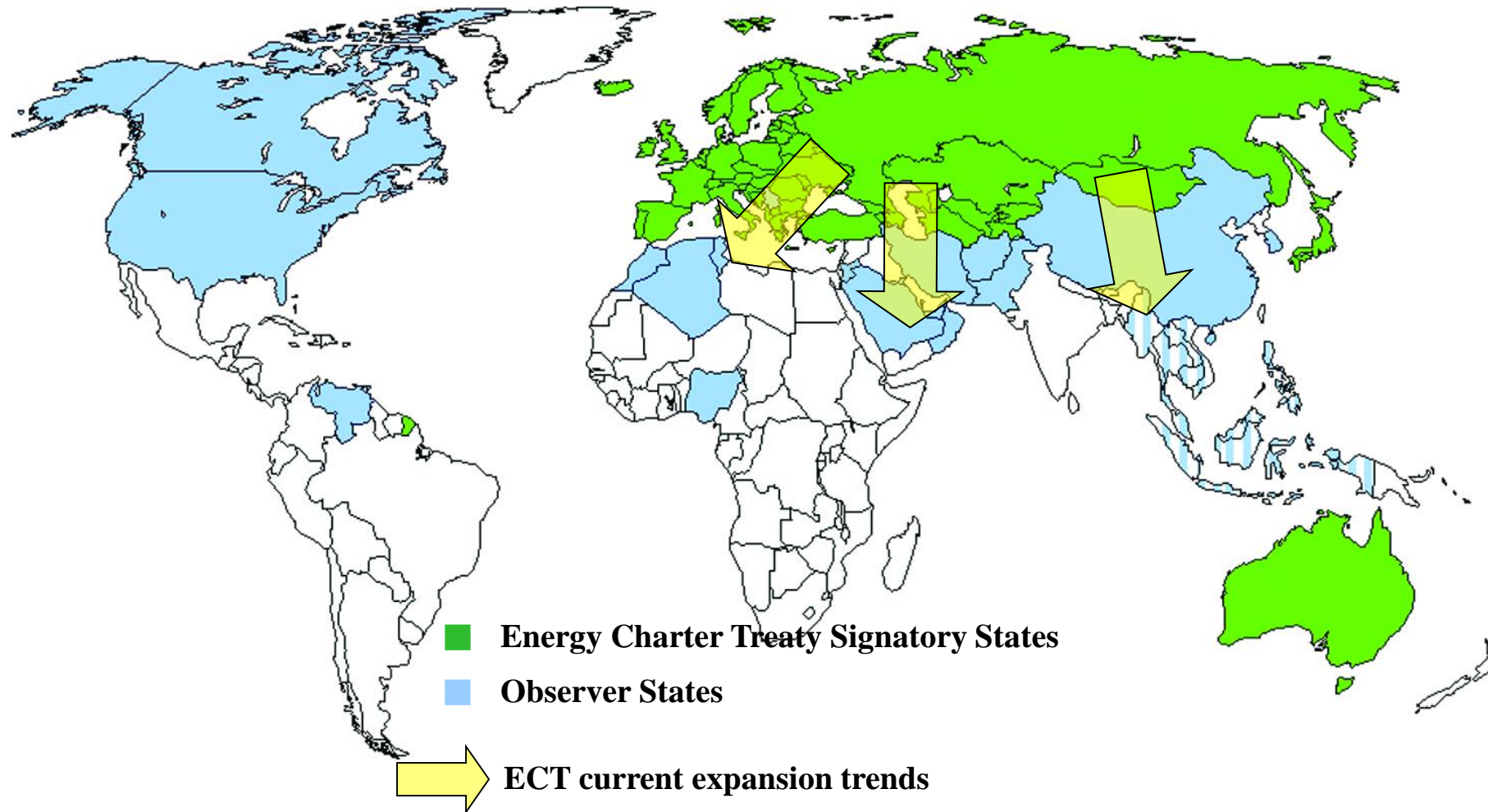
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ENERGY CHARTER AND RELATED DOCUMENTS

Energy Charter political principles incorporated into legally binding provisions of the Treaty(ies) & Protocols



ENERGY CHARTER PROCESS: GEOGRAPHICAL DEVELOPMENT (*)



1. From trans-Atlantic political declaration to broader Eurasian single energy market
2. ECT expansion - objective and logical process based on clear economic and financial reasoning

(*) as of 2009



ENERGY CHARTER SPECIFIC ROLE

- **Energy Charter *Treaty***:

- Unique coverage of different areas for *energy* cooperation:
 - investment, trade, transit, energy efficiency, dispute settlement,
 - energy materials & products + energy-related equipment,
 - 51 member-states (52 CPs) + 20 observer-states + 10 observer international organisations
- First and only one multilateral investment agreement with high standard of investment protection, incl. dispute settlement

- **Energy Charter *process***:

- *Implementation* of ECT,
- Specialized forum for “*advanced*” *discussion* of the issues of energy markets evolution that *might create new risks* for development of energy projects in ECT member-states,
- Platform for *preparation of new legally binding instruments* to diminish such risks within ECT member-states (e.g. broadening & deepening of ECT & upgrading its “minimum standard” of protection)

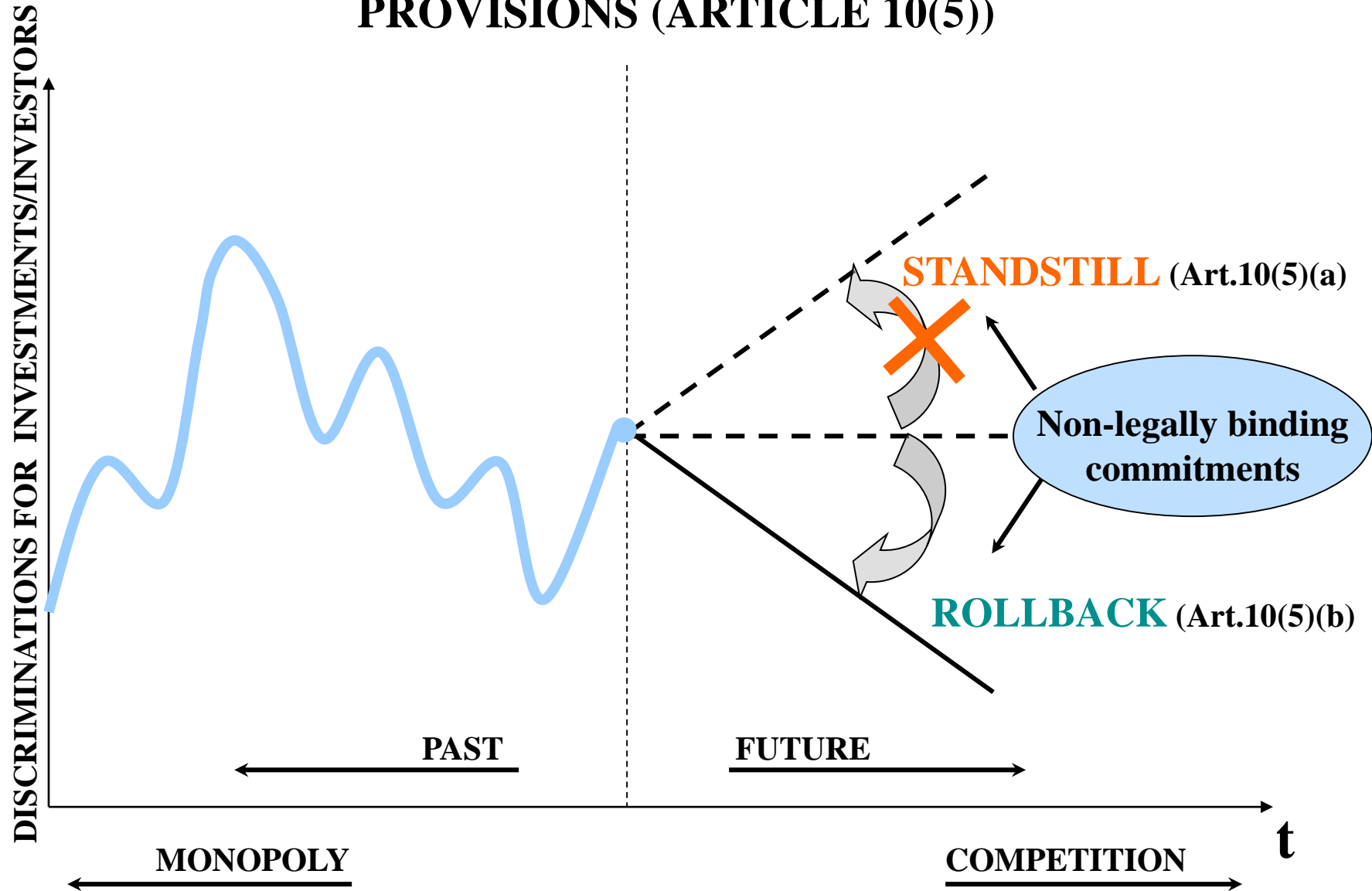
ECT = THE FIRST MULTILATERAL INVESTMENT AGREEMENT (1)

- Based on:
 - well-established practice of BITs (about 400 BITs at the beginning of the 1990's - around 2600 BITs as of today)
 - investment chapter XI of NAFTA (US, Canada, Mexico)
 - some interaction with then OECD proposed "Multilateral Agreement for Investment" (MAI – aborted in 1998)
- **Within 51 member-states ECT is equal to 1275 BITs (within 52 = 1431)**
- MFN and National Treatment for investors:
 - **hard-law** obligations (binding guarantee) of non-discriminatory treatment for **post-establishment** phase,
 - **soft-law** obligations for **pre-establishment** phase (stage of making investment)

ECT = THE FIRST MULTILATERAL INVESTMENT AGREEMENT (2)

- Protection against key political/regulatory risk:
 - o expropriation and nationalisation,
 - o breach of individual investment contracts,
 - o unjustified restrictions on transfer of funds
- Reinforced by access to binding international arbitration in case of dispute:
 - o State-to-state, and **(NOVELTY!) investor-to-state** => direct dispute settlement at investor's choice at ICSID, UNCITRAL or ICC Stockholm (*competence: appr.50% of new ICSID submissions & appr.20% of ICC cases relates to energy*),
 - o Awards:
 - ✓ final and enforceable under New York convention,
 - ✓ usually as entitlement to payment (no risk of vicious circle for retaliating measures),
 - ✓ retroactive to start of dispute, may include interest (no incentive to delay process)

ECT INVESTMENT REGIME: STANDSTILL & ROLLBACK PROVISIONS (ARTICLE 10(5))



List of topics for modernization of the Energy Charter Treaty approved by the Energy Charter Conference

| N | Item | N | Item |
|----|----------------------------------------------------------|----|--------------------------------------------------------------------------------|
| 1 | Pre-investment | 14 | Transfers related to investments |
| 2 | Definition of ‘charter’ | 15 | Frivolous claims |
| 3 | Definition of ‘economic activity in the energy sector’ | 16 | Transparency |
| 4 | Definition of investment | 17 | Security for costs |
| 5 | Definition of investor | 18 | Valuation of damages |
| 6 | Right to regulate | 19 | Third party funding |
| 7 | Definition of Fair and Equitable Treatment (FET) | 20 | Sustainable development and corporate social responsibility |
| 8 | MFN Clause | 21 | Definition of ‘transit’ |
| 9 | Clarification of ‘most constant protection and security’ | 22 | Access to infrastructure (including denial of access and available capacities) |
| 10 | Definition of indirect expropriation | 23 | Definition and principles of tariff setting |
| 11 | Compensation for losses | 24 | REIO |
| 12 | Umbrella clause | 25 | Obsolete provisions |
| 13 | Denial of benefits | | |

Source: International Energy Charter Treaty Annual Report 2018, p. 13 (https://www.energycharter.org/fileadmin/DocumentsMedia/AR/AR_2018.pdf)

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ECT & EU acquis: “minimum standard” within evolving Eurasian common energy space vs. more liberal “general standard” within evolving common European energy space

| Legal norms (key examples) | ECT | EU Acquis (1-st Gas Directives) | EU Acquis (2-nd & 3-rd Gas Directives) |
|----------------------------|-----|---------------------------------|----------------------------------------|
| Mandatory TPA | No | No | Yes |
| Unbundling | No | No | Yes |

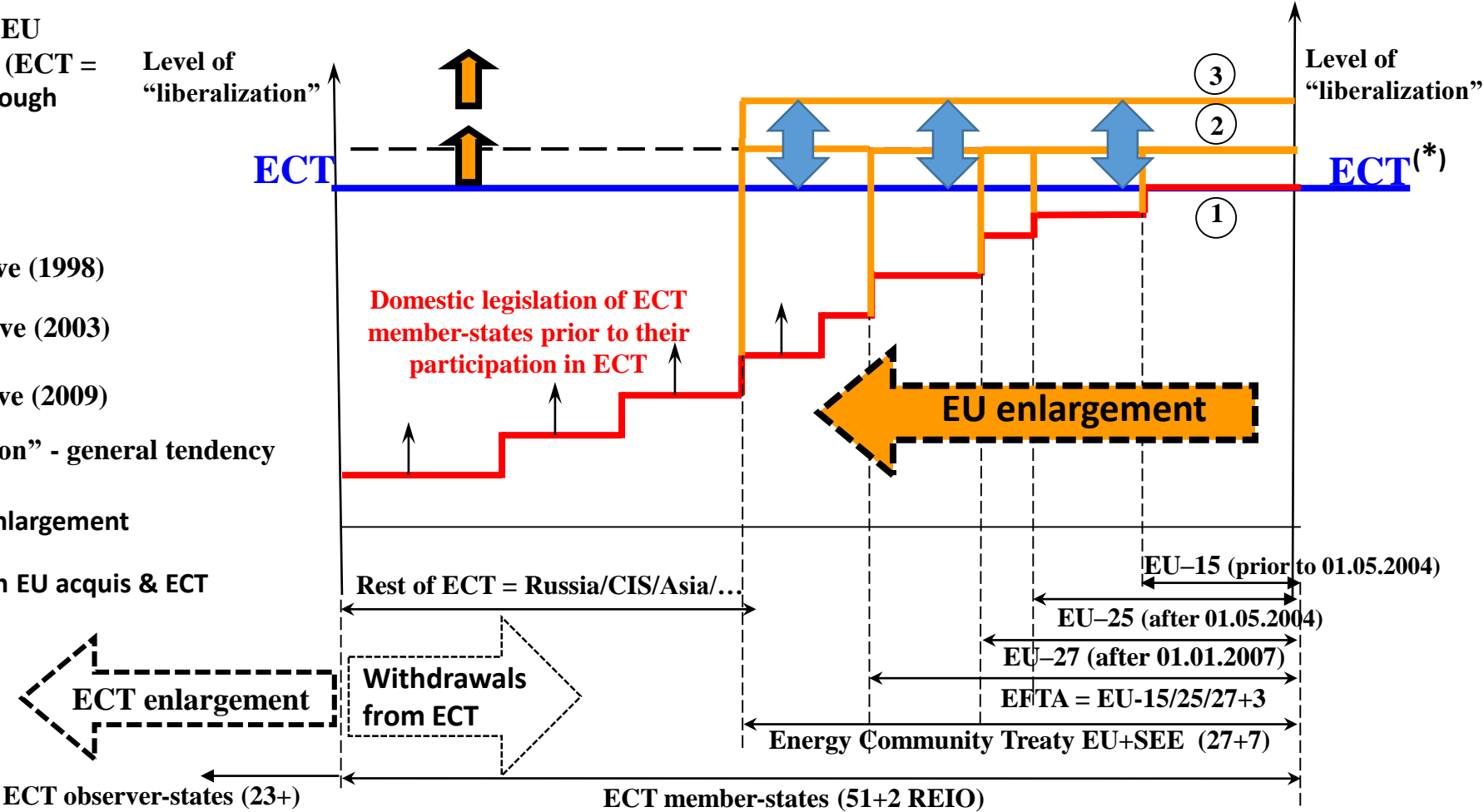
(*) ECT = integral part of EU acquis communautaire (ECT = minimum standard through stand-still & roll-back mechanisms)

- 1 1-st EU Gas Directive (1998)
- 2 2-nd EU Gas Directive (2003)
- 3 3-rd EU Gas Directive (2009)

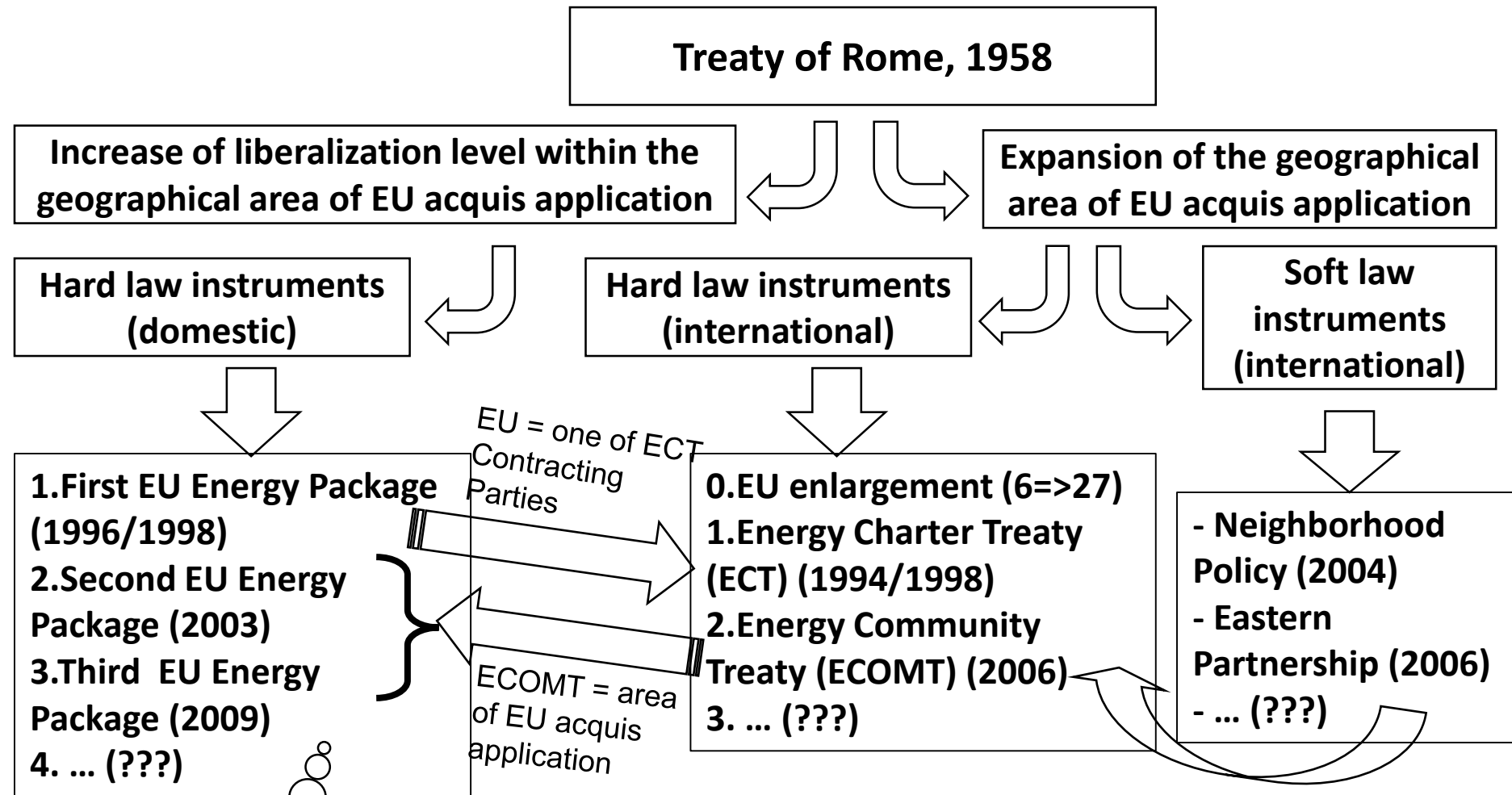
Level of “liberalization” - general tendency

EU enlargement

Growing gap between EU acquis & ECT



EU acquis' international expansion instruments (energy industry)



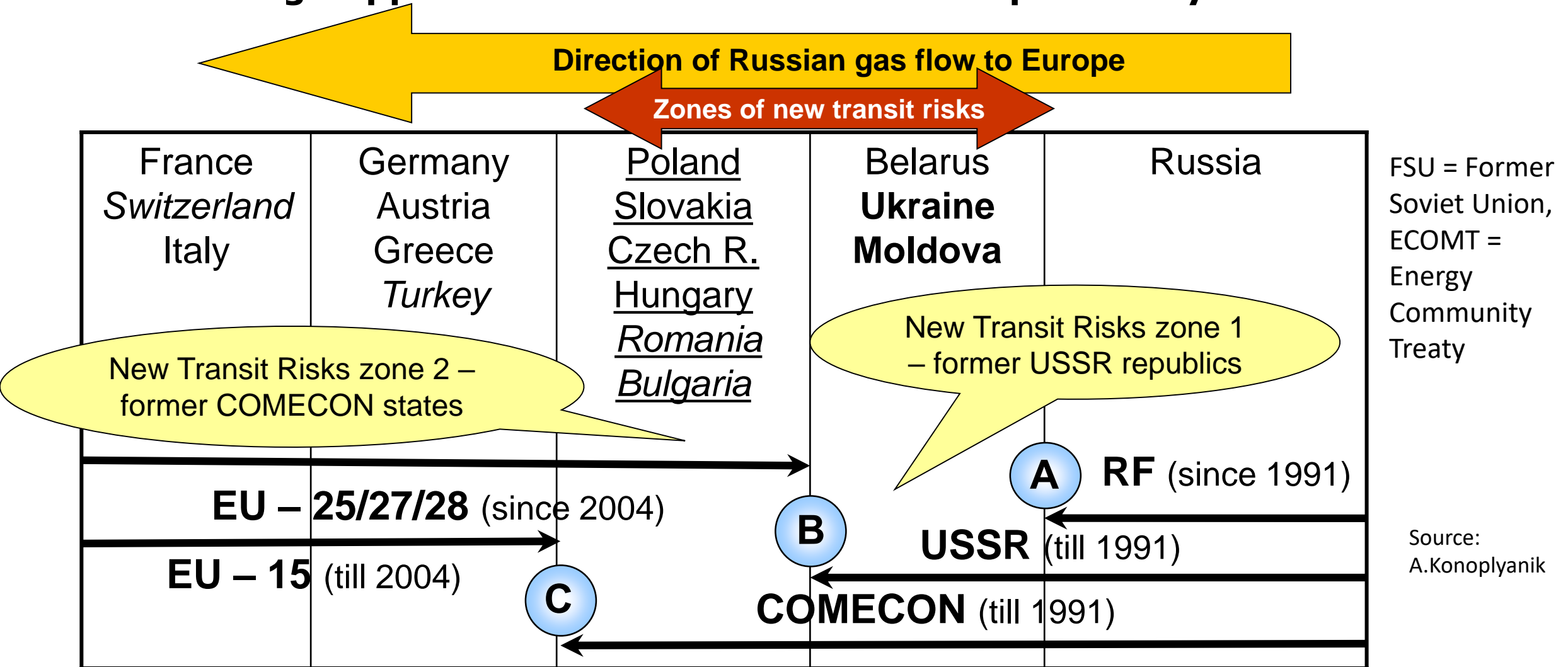
One of the factual aims of international expansion of EU acquis is to provide standards of work and investment protection for EU business abroad adequate to such standards at the internal EU markets(s) => thus diminishment of transaction costs, increase competitiveness of EU business abroad

Source:
A.Konoplyanik

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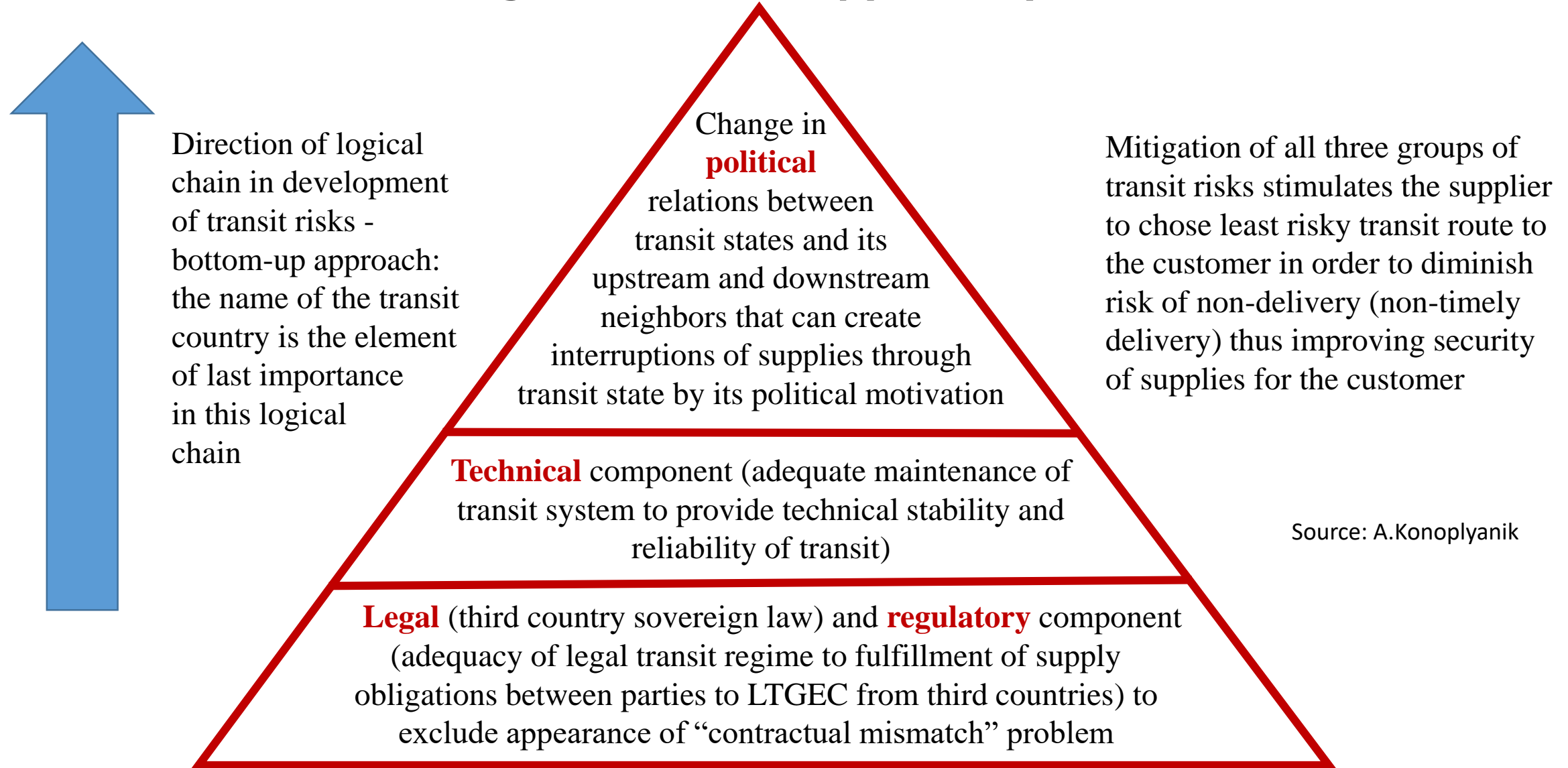
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Russian Gas Supplies to Europe: Zones of New Risks for Existing Supplies Within Russia's Area of Responsibility Under Its LTGEC

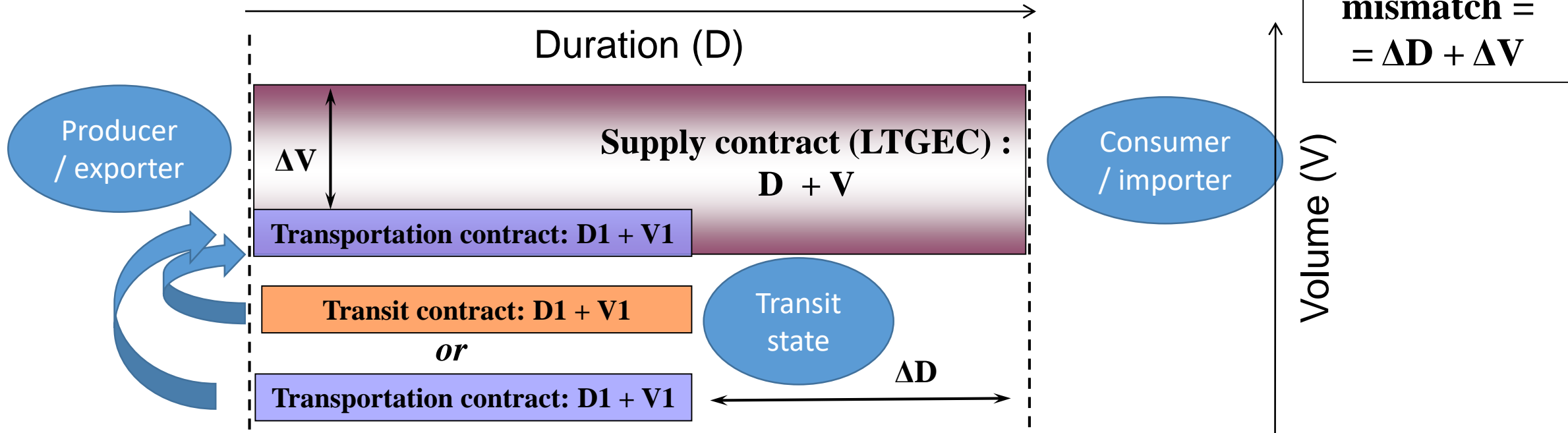


Italic – non-EU countries; New EU accession states: underlined – since 01.05.2004, underlined + italic – since 1.01.2007; **Bold** – FSU states members of ECOMT; A, B, C – points of change of ownership for Russian gas (commodity) and/or pipeline (capacity) on its way to Europe; C – historical delivery points of Soviet (now Russian) gas to the EU

This author's vision of the nature and three major components of transit risk in the cross-border gas value chain through immobile infrastructure (Konoplyanik's "gas transit risks pyramid")



"Contractual mismatch" problem

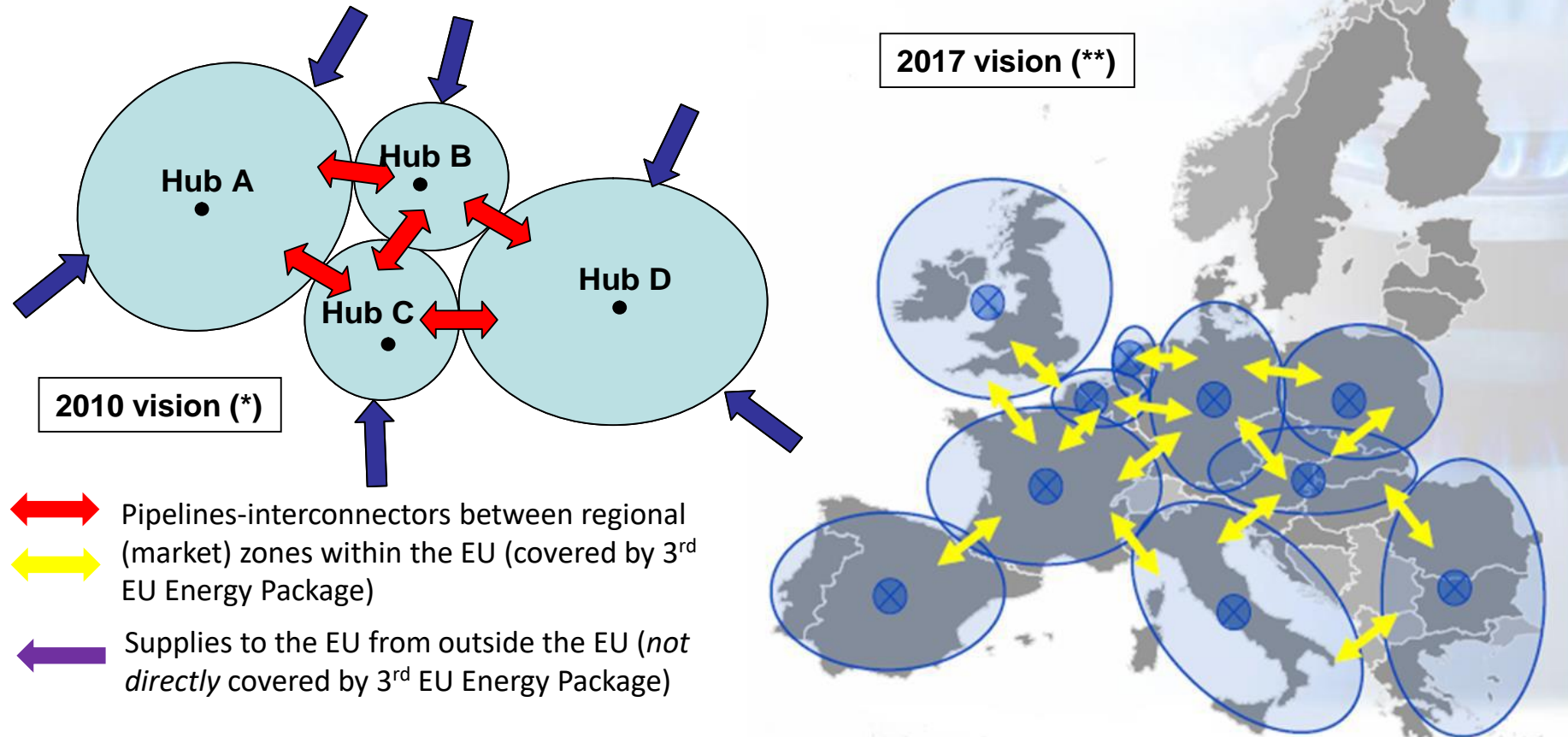


Contractual mismatch: between duration/ volumes (D/V) of (i) long term supply (delivery) contract (LTGEC) and (ii) transit/transportation contract as its integral part to fulfill the delivery contract => risk of non-renewal of transit / transportation contract => risk on non-delivery (non-timely delivery) for supply contract.

Core issue: how to guarantee access to (creation of) transportation capacity(ies) adequate to volume and duration of long term supply (delivery) contract(s) (LTGEC).

Source: A.Konoplyanik

Organization of internal domestic EU gas market according to Third EU Energy Package: cross-border gas flows within the EU between Member-States (market zones) still exist though the term “transit” is not in legal use within the EU anymore



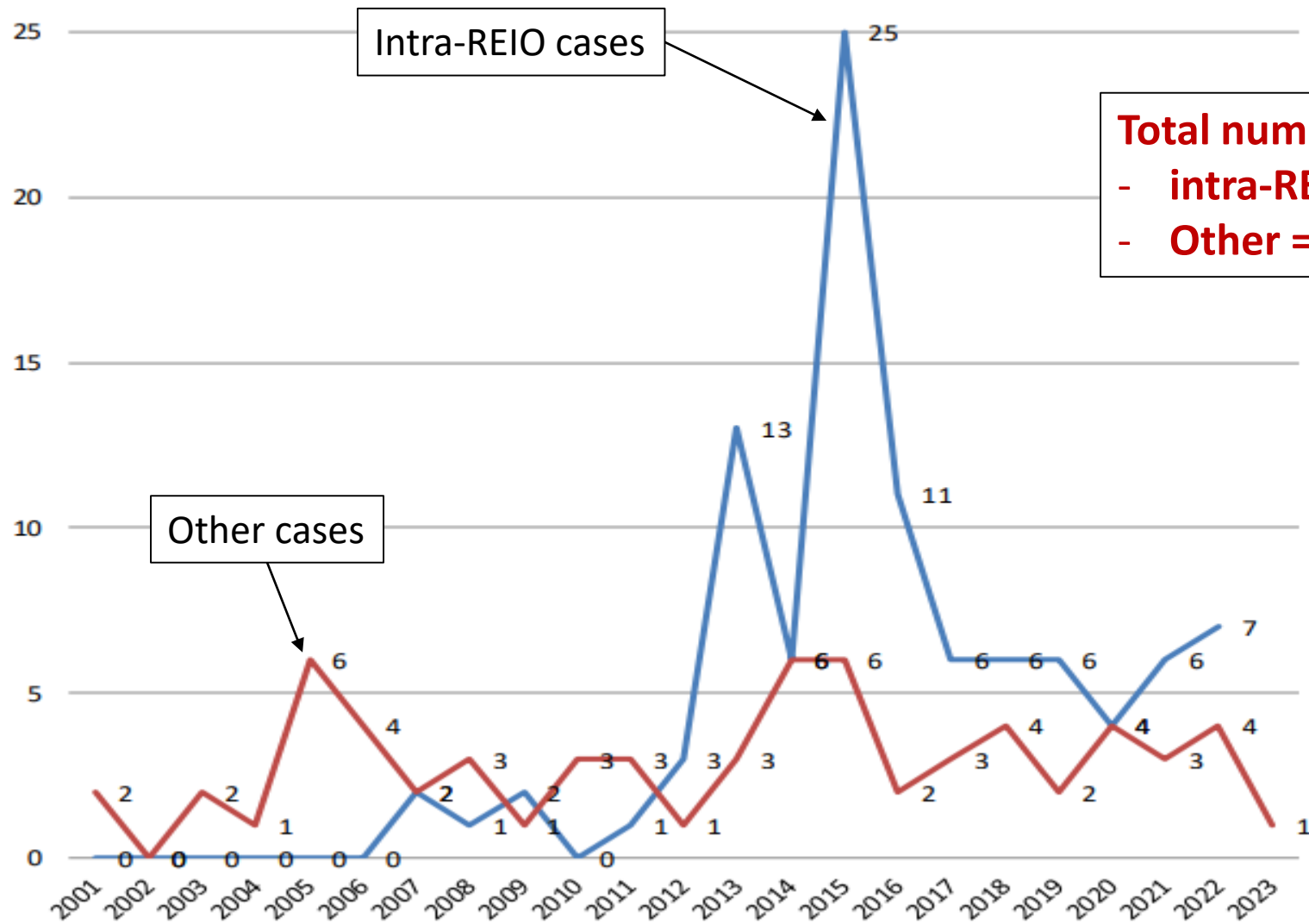
- No single internal EU gas market as homogenous economic model, but a combination of market areas
- All market areas organized as entry–exit zones with virtual (*aimed to be*) liquid hubs, uniform capacity allocation (bundled products) & gas pricing (spot- & exchange-based pricing) mechanisms

The generalized vision publicly presented immediately after introduction of the: (*) Third EU Energy package; (**) last Network Code to the Third EU Energy Package
Source: 17th Madrid Forum (January 2010); ACER Gas Target Model, 30th Madrid Forum (October 2017)

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Intra-REIO Cases and Other Cases: 158 cases (*)



Total number of cases:

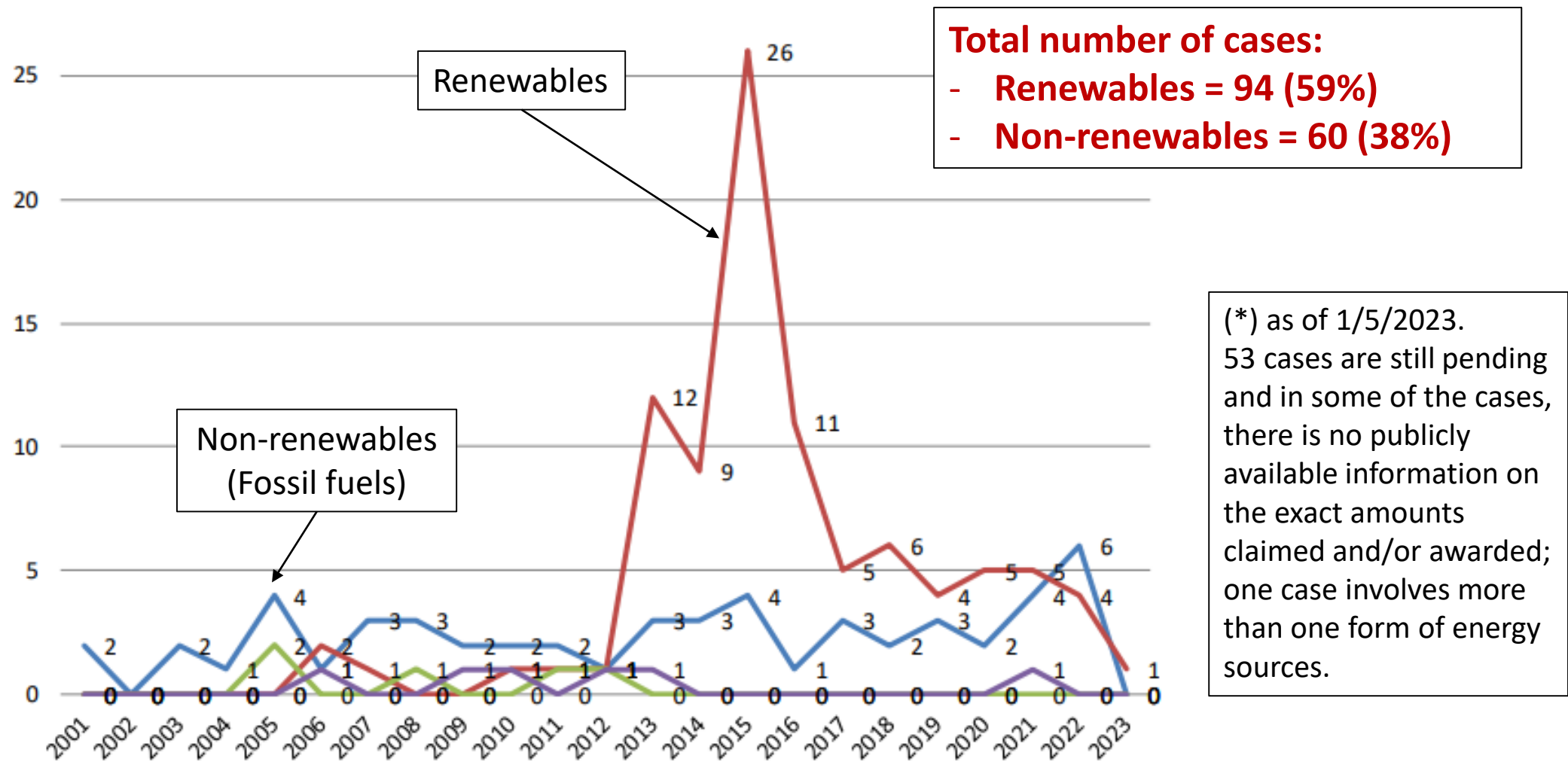
- intra-REIO = 99 cases (60%)
- Other = 66 cases (40%)

(*) as of 1/5/2023.
Cases with mixed claimants are included in both categories. Therefore, the numbers indicated may be higher than the actual number of cases instituted in a given year.

Source: Statistics of ECT Cases (as of 1/5/2023) // ECS, Brussels, 2023, p.6

([https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501 - Statistics - Cases under the Energy Charter Treaty.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501_-_Statistics_-_Cases_under_the_Energy_Charter_Treaty.pdf))

Distribution of Arbitration Cases under the ECT by Energy Sources Involved: 158 cases (*)



Source: Statistics of ECT Cases (as of 1/5/2023) // ECS, Brussels, 2023, p.2
(<https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501 - Statistics - Cases under the Energy Charter Treaty.pdf>)

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Evolution of EU attitude towards Energy Charter through 1990-2023 & four steps of EU diminishing interest in the ECT

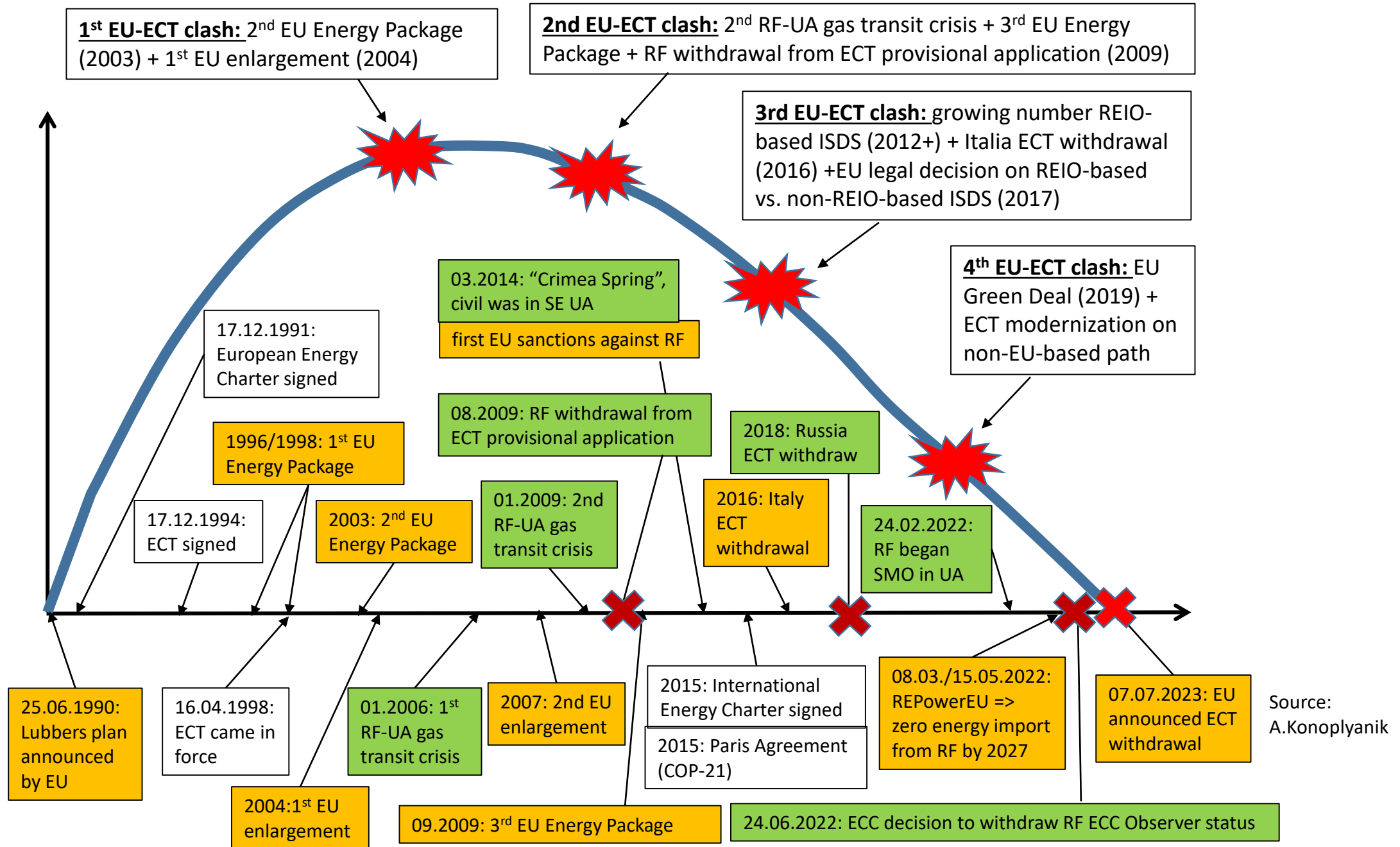
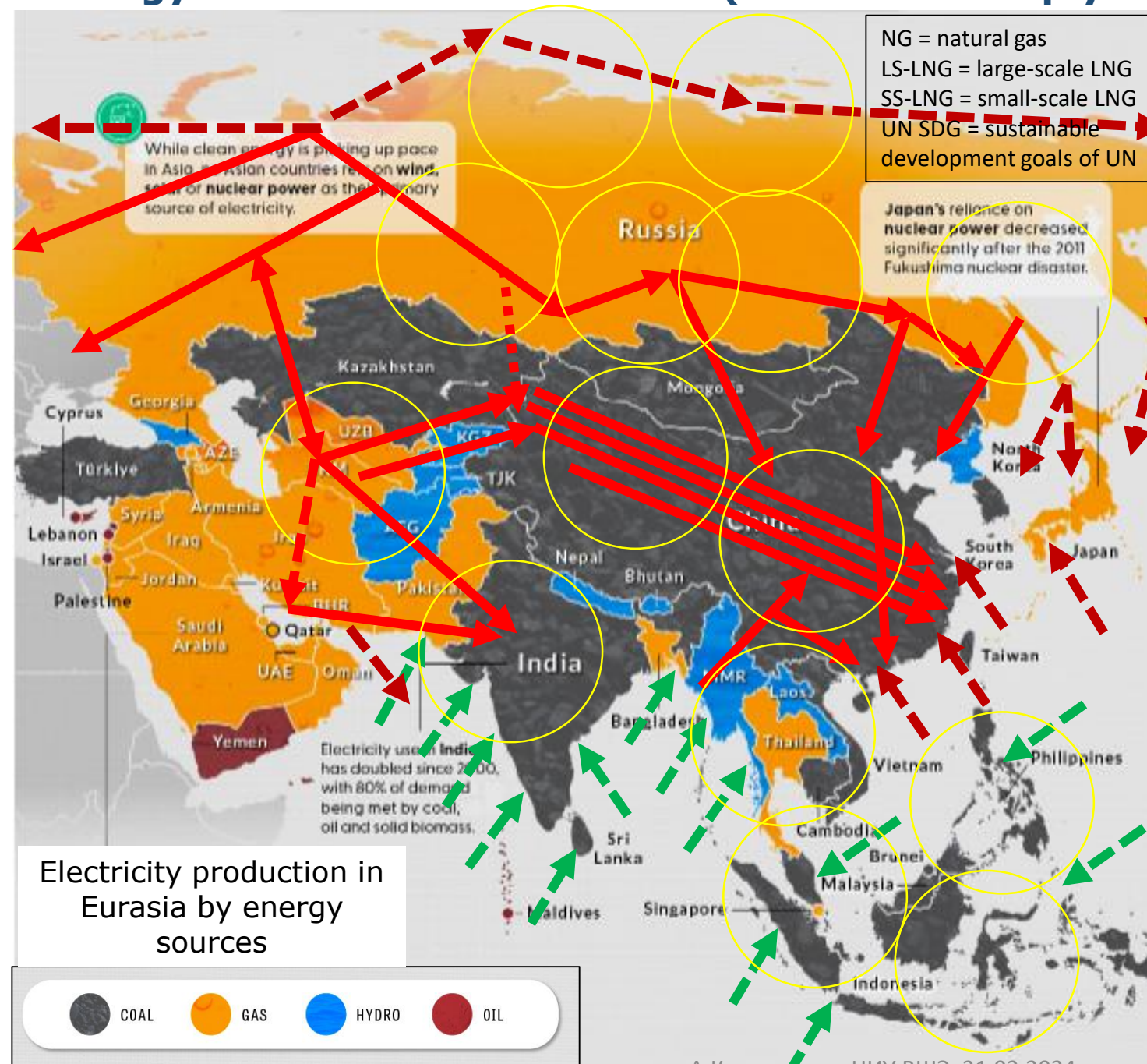


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Energy consolidation of Eurasia (acc. to A.Konoplyanik): demand for investment protection



- (1) Pipeline NG (continent => pipelines from 4 areas: Russia, Iran, Central Asia, Myanmar) +
 - (2) LS-LNG (coastal => LNG-tankers) +
 - (3) SS-LNG (coastal/continent => cargo airships from compressor stations on pipelines &/or LS-LNG Regaz terminals + modular decentralized cryogenic fuel stations/gas power stations) +
 - (4) electricity: nuclear/mini-nuclear (continent) + floating mini-nuclear (coastal) +
- (additional for those interested states):*
- (5) H2 from NG (SMR+CCS, coastal/continent) +
 - (6) H2 from NG (pyrolysis, coastal/continent) +
 - (7) electrolysis (floating mini-nuclear)
- => energy consolidation of Eurasia based on its gasification, electrification, fight with energy poverty/upgrade living standards (UN SDG 1-10, ...)**

| | 2011, % | 2021, % | |
|--------------|---------|---------|----------------------------------|
| Coal | 55 | 52 | → Pipeline gas |
| Nat.gas | 19 | 17 | → LS-LNG |
| Hydro | 12 | 14 | → LS-LNG+mini-nuclear (floating) |
| Nuclear | 5 | 5 | |
| Wind | 1 | 4 | |
| Solar | 0 | 4 | |
| Liquid fuels | 6 | 2 | |
| Biomass | 1 | 2 | |
| Total, TW-h | 9780 | 15370 | |

Area of coverage by cargo airship carrying SS-LNG in cryogenic tanks: R=1000+ km, 60+ tonnes

1000 km 1000 km

Источник карты: Mapped: Asia's Biggest Sources of Electricity by Country. // "Elements: Visual Capitalist", 06/03/2023 (<https://elements.visualcapitalist.com/asias-biggest-sources-of-electricity-by-country/>)

Thank you for your attention !

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