

Energy Charter and issues related to Russia's engagement with international law in the area of energy

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Questions from the Chairman

1) Russia, EU & ECT

2) ECT & Yukos case

Question 1 from the Chairman:

- 1) One of the original purposes behind the Energy Charter Treaty was to bring Russia into closer accord with the EU on energy issues. Since Russia never ratified the treaty and has now officially withdrawn from it (corr.: from ECT provisional application – A.K.), has the Energy Charter Treaty failed in one of its principal goals? What other modes of cooperation on energy issues exist between Russia and the EU?

ENERGY CHARTER – MAJOR PAST STAKEHOLDERS / DRIVERS (early 1990's negotiations on ECT)

- **European Union**

- To protect existing East-West energy flows and to-be-expected West-East investment flows by international law
- To bring the rule of law into former USSR-COMECON states => to create “common denominator” as broad as achievable
- To export acquis eastward (BUT: based on First EU Energy Directives => First EU Directives corresponds to ECT), etc.

- **Russian Federation**

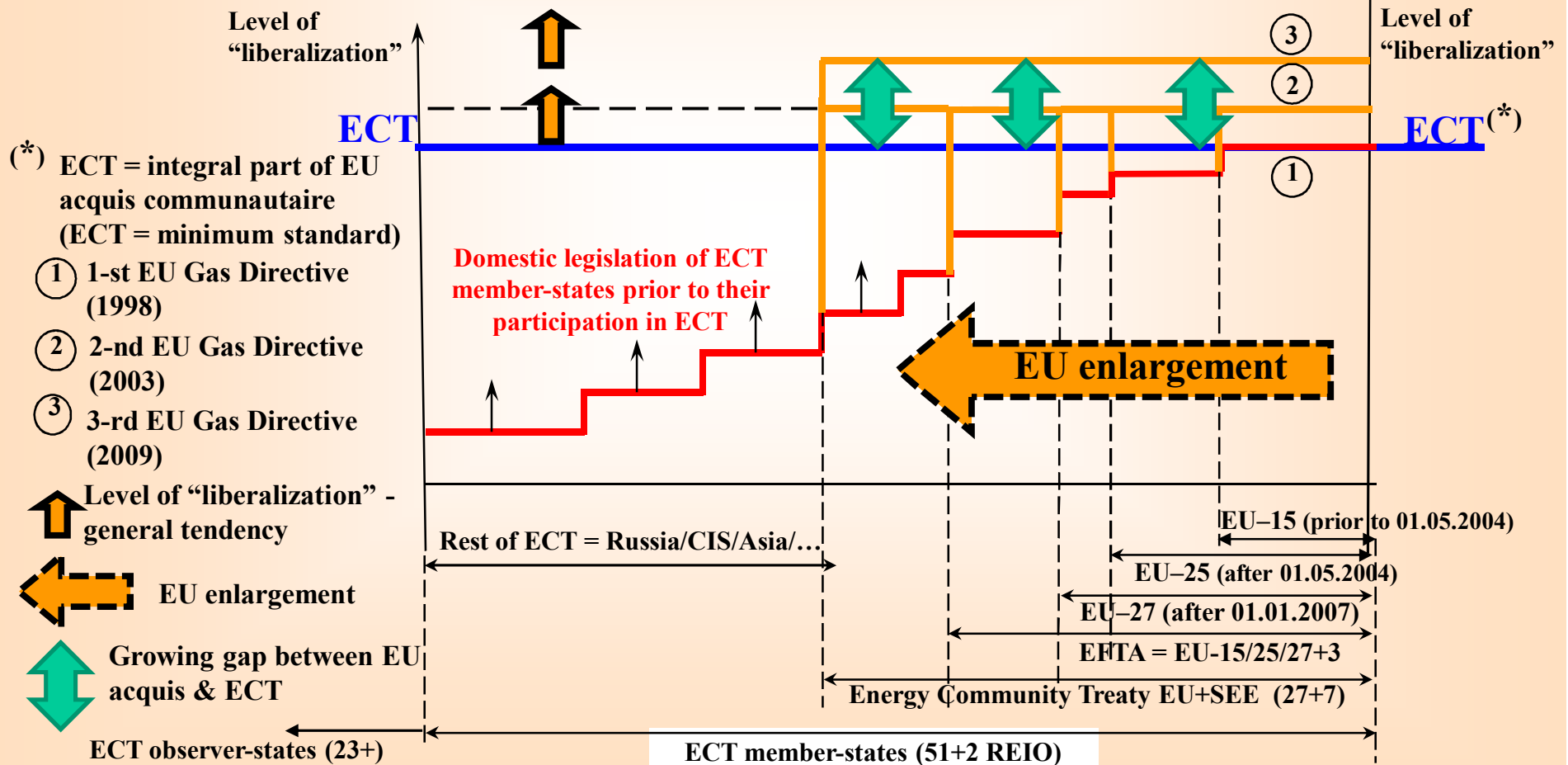
- To adopt best available international rules in investment & trade, etc., to compensate lack of adequate domestic legislation at the early days of the transition from socialism to capitalism
- To stipulate inflow of foreign energy investments, etc.

- **Energy Charter Secretariat (Working team & temporary ECS)**

- Highly professional leadership (Rutten - Chairman, Jones – SG, Ervik – key negotiator) – effective use of political window of opportunities with strong support of all the parties involved

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



ENERGY CHARTER – MAJOR (SHOULD BE) CURRENT STAKEHOLDERS / DRIVERS

- **European Union**

- Energy Charter = the only available set of rules to which both Russia & EU are parties; ECT = piece of international law (1998) & part of the EU acquis => ECT brings Russia as close to EU rules as practical to expect
- To help Russia ratify ECT = to address Russia's valid concerns (not to press politically) => ECT= legal basis for common Russia-EU space in energy (no go for “export of acquis”/EU & “new treaty”/RF)

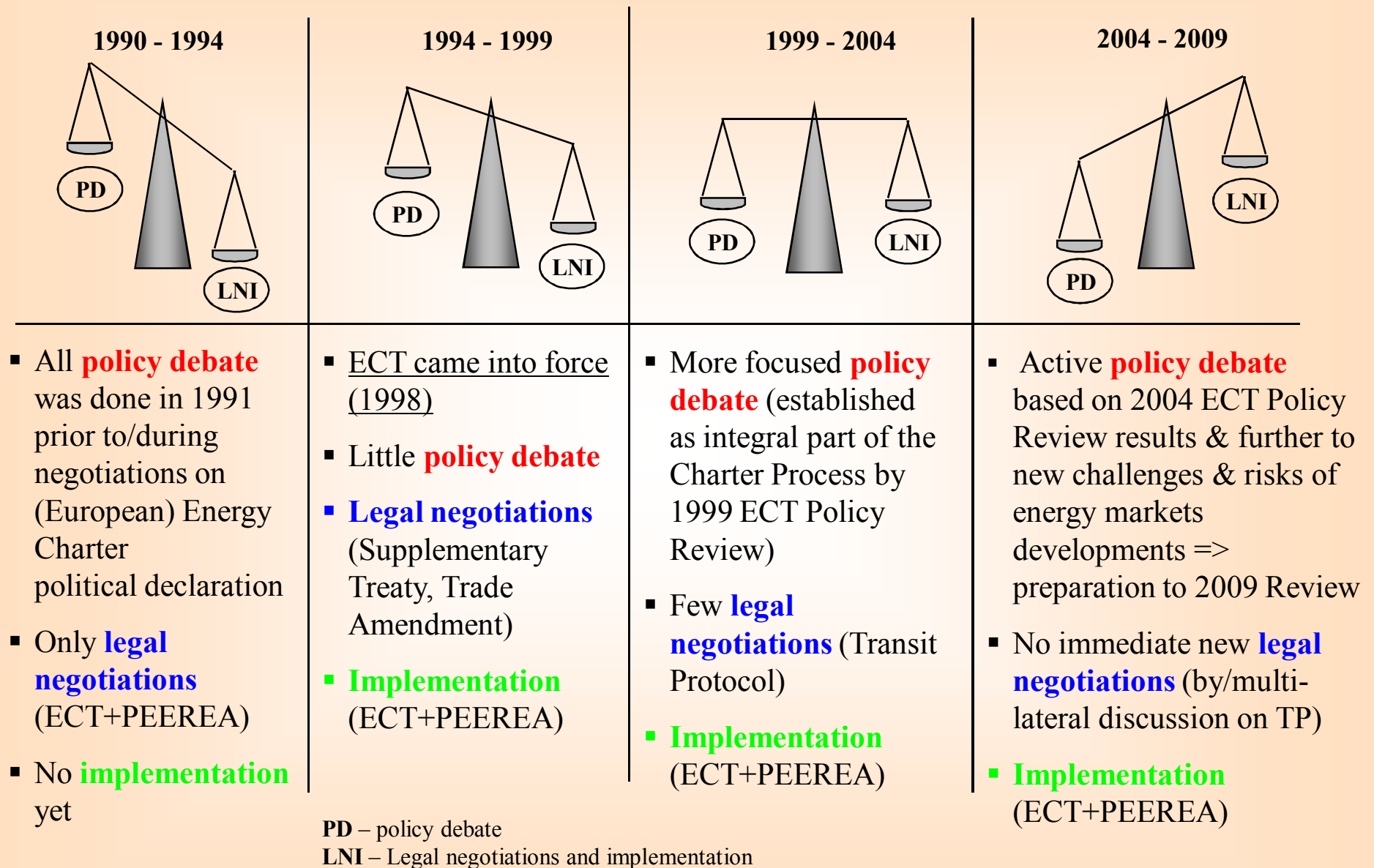
- **Russian Federation**

- Without Russia Energy Charter have half-value => leading role of Russia in the ECT process at its current stage (policy debate)
- ECT = minimum standard => it protects Russia from excessive EU liberalization (ECT as international treaty dominates over EU energy acquis?)
- ECT = the only practical way to implement D.Medvedev's initiative of 21.04.2009 (de facto based, as 2006 G8 SPb Summit, on ECT)

- **Energy Charter Secretariat**

- Should have taken the driver's seat bringing Russia & EU closer together in long-term adaptation of Energy Charter process (via Ad Hoc/Permanent Energy Charter Strategy group)

ENERGY CHARTER: EVOLVING BALANCE OF ACTIVITIES



Current role of EU, RF & ECS

- EU need to have an interest to discuss (how to balance gap between EU acquis & ECT)
- RF need to have ability to discuss (non-presence due to lack of interest due to clear & negative signals from the top)
- ECS need to have professional capabilities to organize discussion (lack of professionalism of the current ECS political leadership)

ENERGY CHARTER – WHO NOWADAYS OBSTRUCT MOST FURTHER PROGRESS

• European Union :

- Long-time monopolisation of participation in Energy Charter process by DG TREN at low level with no/lack of adequate coordination with Member States
- Absolutization of norms of *acquis communautaire* => Non-willingness to discuss crucial issue of correlation between *acquis* (domestic legislation for the EU as a whole) and ECT & related instruments (as an international treaty for the EU) => how to balance the gap between *acquis* (2nd & 3rd EU Directives) & ECT ? => “REIO clause” is still open issue in TP preventing ratification of ECT by Russia
- Attempts to use ECT as a subordinated instrument of EU external policy
- Diminished interest to Energy Charter Treaty in favour of Energy Community Treaty

• Russian Federation :

- Non-appearance of regular team (& sometime of any team) at the meetings => nobody will deal with “REIO clause” issue in the absence of Russian team
- Long-time lack of formal internal organisation & coordination between state agencies regarding participation in Energy Charter process
- Negative attitude towards (*political leadership of*) *Secretariat* after January 2009 was extrapolated towards the whole *Treaty & process*

• Energy Charter Secretariat :

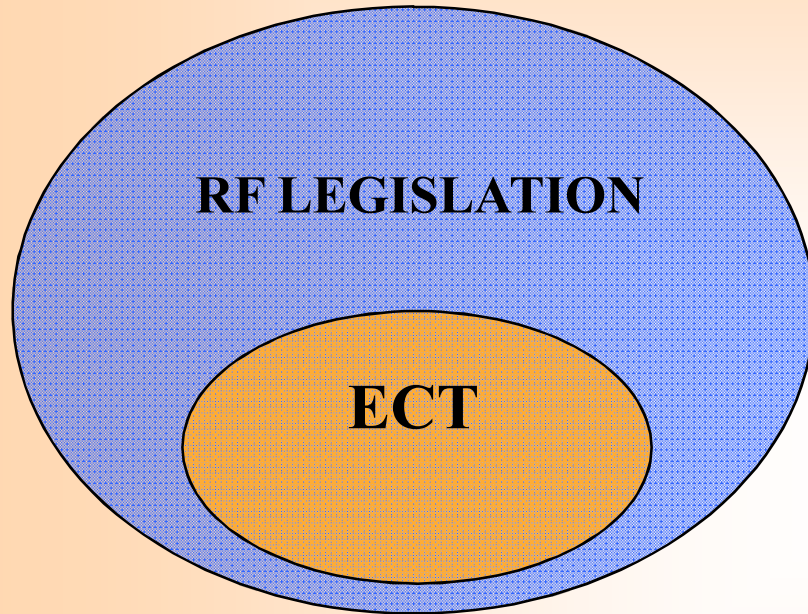
- Inaction prior to Russia-Ukraine January 2009 gas crisis => stipulated negative reaction of Russia towards the whole multi-facet Energy Charter process
- Informal multilateral consultations on Transit Protocol upgraded to the status of formal negotiations (with the aim to finalize them ASAP) => at the same moment SG closed the contracts of key ECS staff-members (drivers & participants of Russia-EU bilateral and then multilateral consultations on TP)

Question 2 from the Chairman:

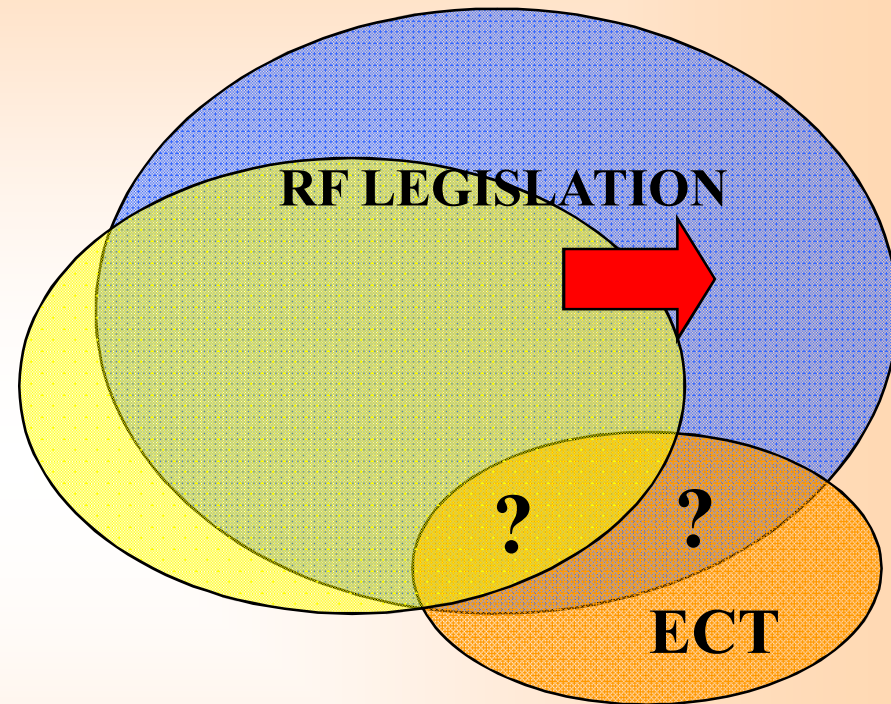
- 2) The recent jurisdictional decision in the Yukos ECT cases has received widespread (and largely positive) publicity in the international arbitration community, but has been all-but ignored in the Russian press. How important is the decision in doctrinal, economic, and political terms? Ultimately does it matter if Russia loses the case but refuses to pay the award?

SCOPE OF APPLICATION OF "YUKOS AGAINST RUSSIA" CLAIM UNDER ECT (1)

(a) After ECT ratification by Russia



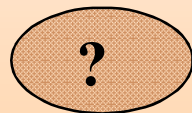
(b) Before ECT ratification by Russia (ECT provisional application in Russia – Article 45)



RF legislation development process since 1994 (ECT is signed by Russia) till nowadays

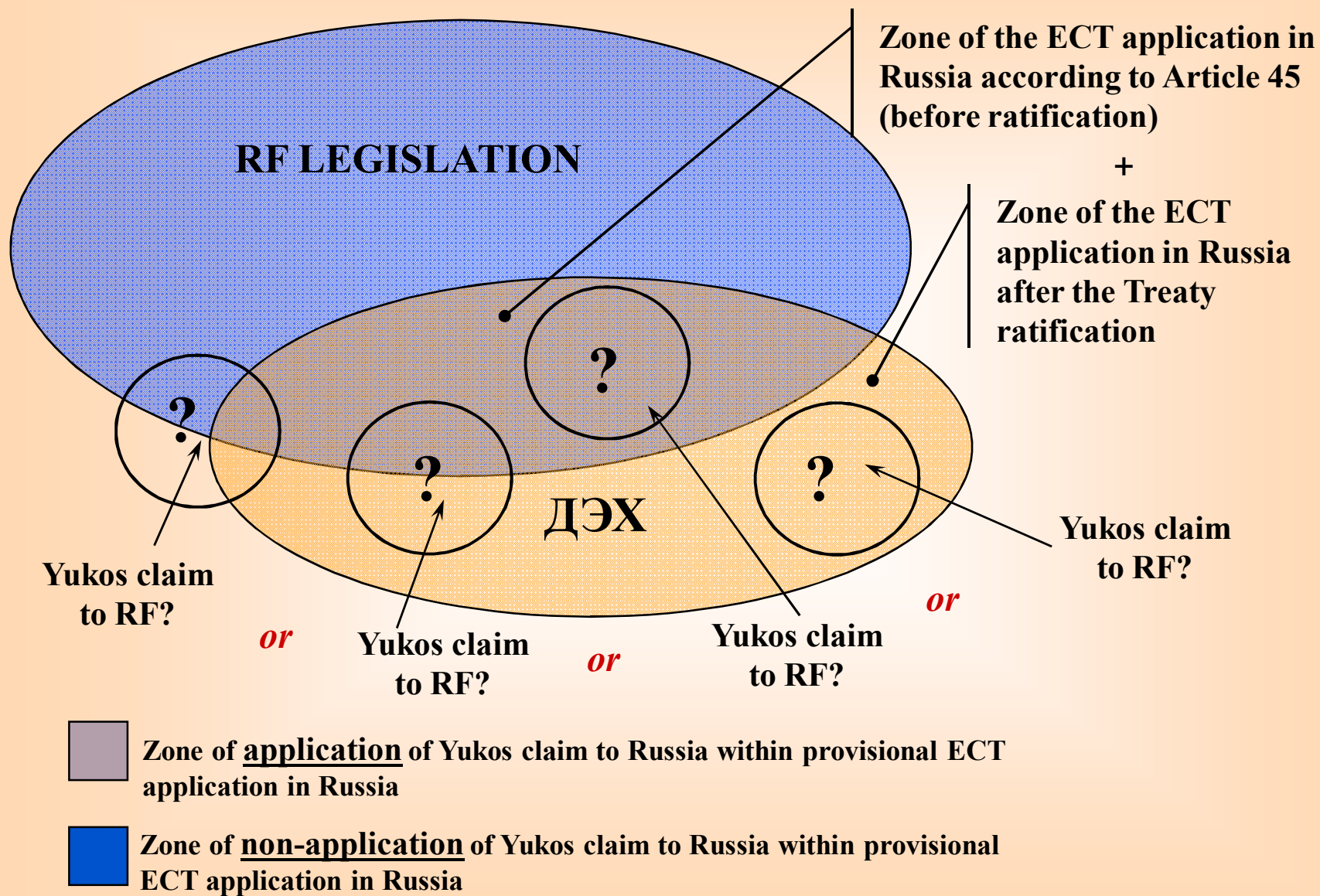


or +



Zone of ECT provisional application in Russia (Article 45)

SCOPE OF APPLICATION OF "YUKOS AGAINST RUSSIA" CLAIM UNDER ECT (2)



**Thank you for your
attention !**

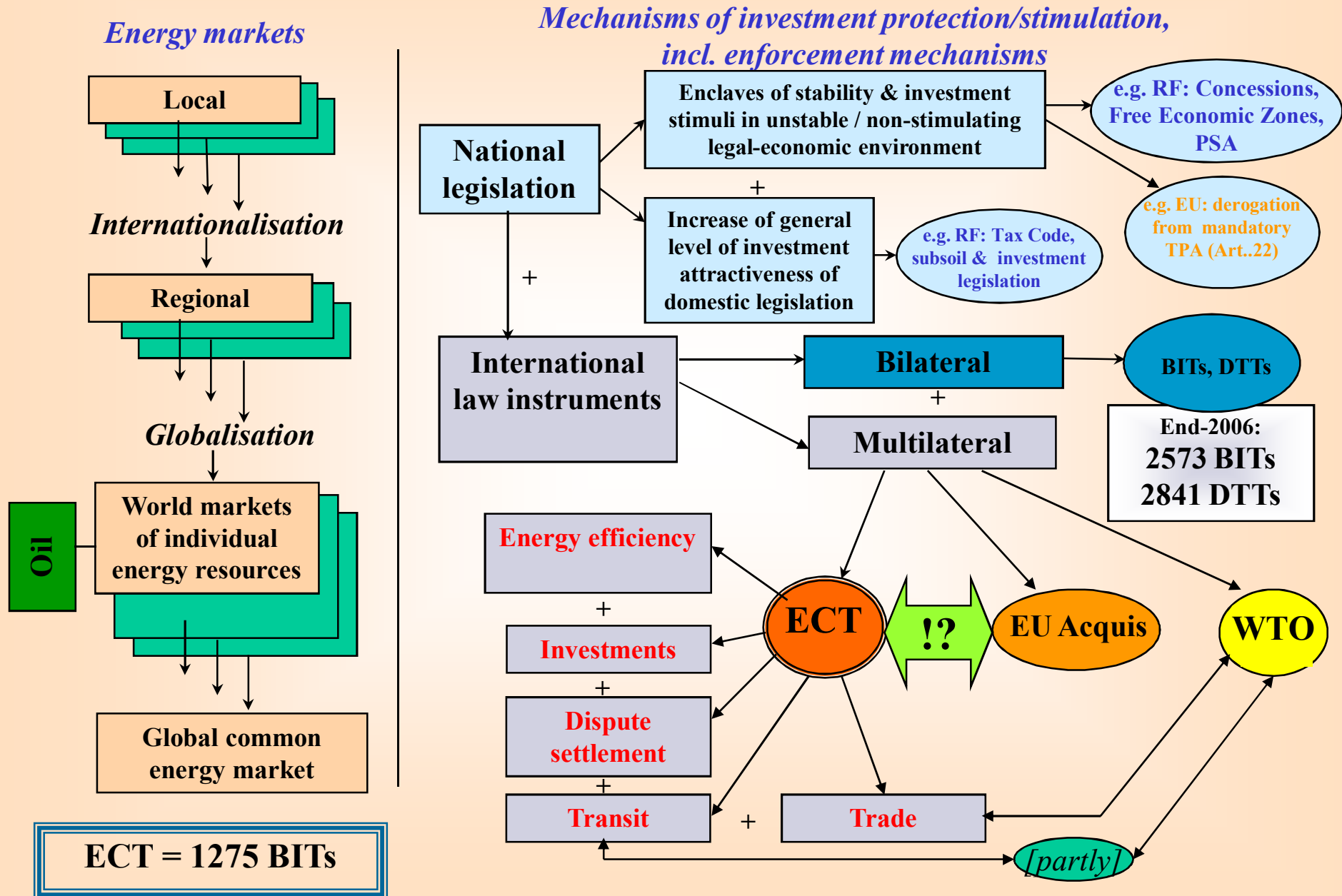
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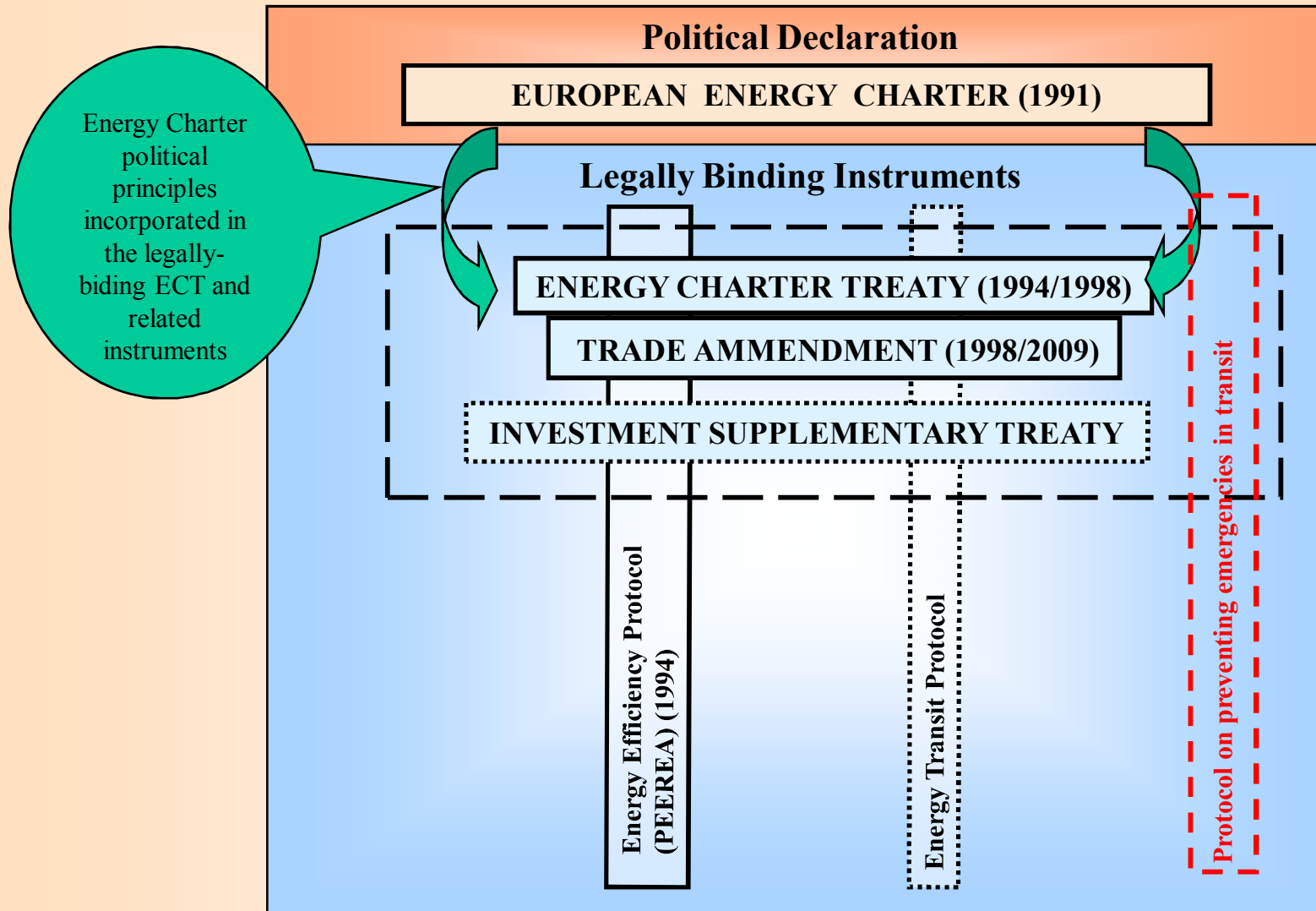
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DEVELOPMENT OF INTERNATIONAL ENERGY MARKETS & MECHANISMS OF INVESTMENT PROTECTION/STIMULATION & IMPROVING ENERGY SECURITY



ENERGY CHARTER AND RELATED DOCUMENTS



- in force
- negotiations not finished yet
- new Protocol which can be proposed by Russia

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**
- 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:
 - expropriation and nationalisation,
 - breach of individual investment contracts,
 - unjustified restrictions on transfer of funds
- Reinforced by access to binding international arbitration in case of dispute:
 - 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*),
 - 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)

National regulatory changes, 1992-2008

Table I.14. National regulatory changes, 1992-2008

Item	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of countries that introduced changes	43	56	49	63	66	76	60	65	70	71	72	82	103	92	91	58	55
Number of regulatory changes	77	100	110	112	114	150	145	139	150	207	246	242	270	203	177	98	110
More favourable	77	99	108	106	98	134	136	130	147	193	234	218	234	162	142	74	85
Less favourable	0	1	2	6	16	16	9	9	3	14	12	24	36	41	35	24	25

Source: UNCTAD database on national laws and regulations.

Source: World Investment Report 2009. UNCTAD, 2009, p.31

ECT ARTICLE 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.

ENERGY CHARTER TREATY

MFN or NT
(non-legally binding – best efforts clause – Art.10(2), (3) + Art.10(5))

The better of MFN or NT
(legally binding – Art.10(7))



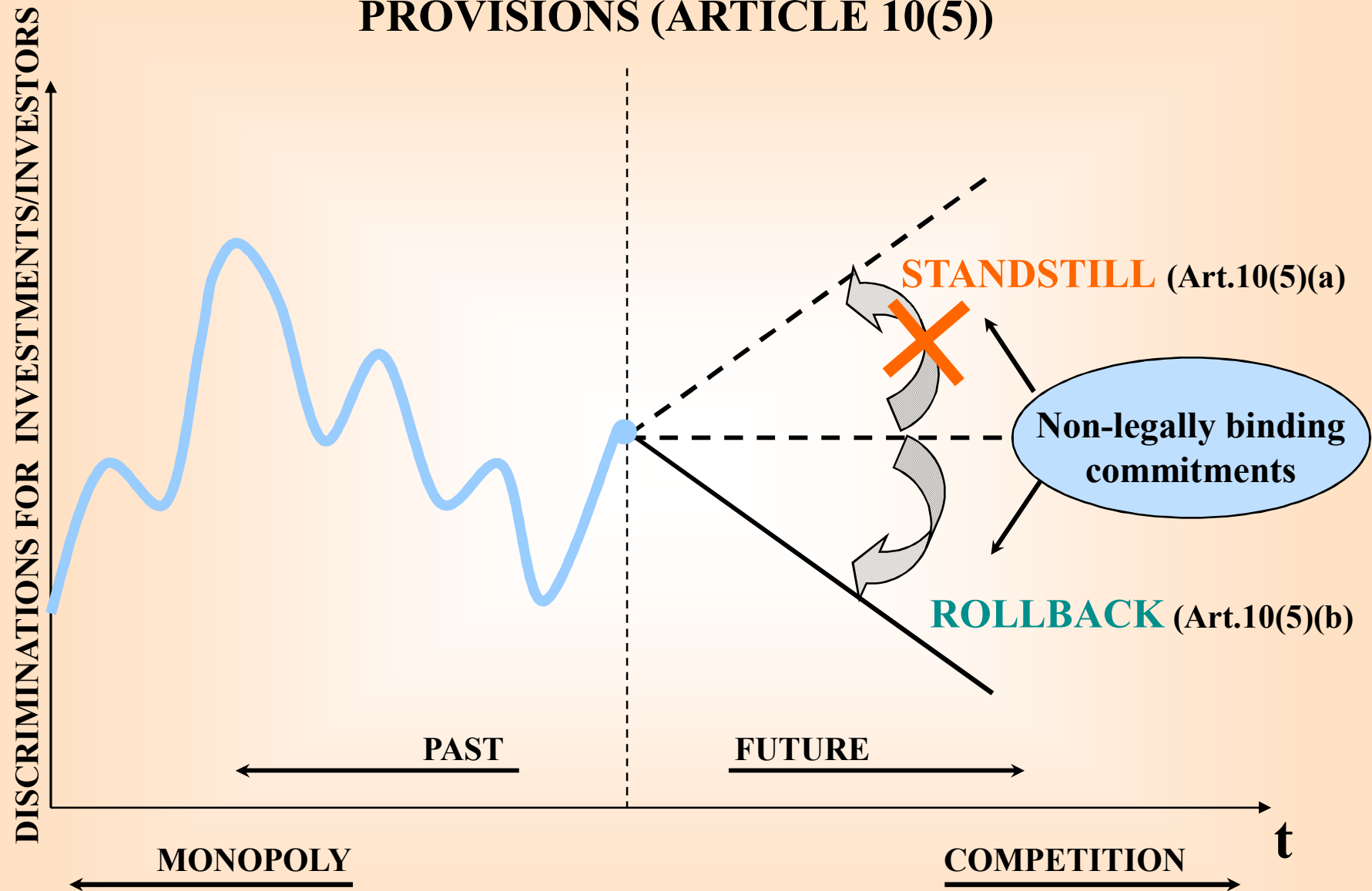
The better of MFN or NT *(legally binding – draft Art.2(1))*

INVESTMENT

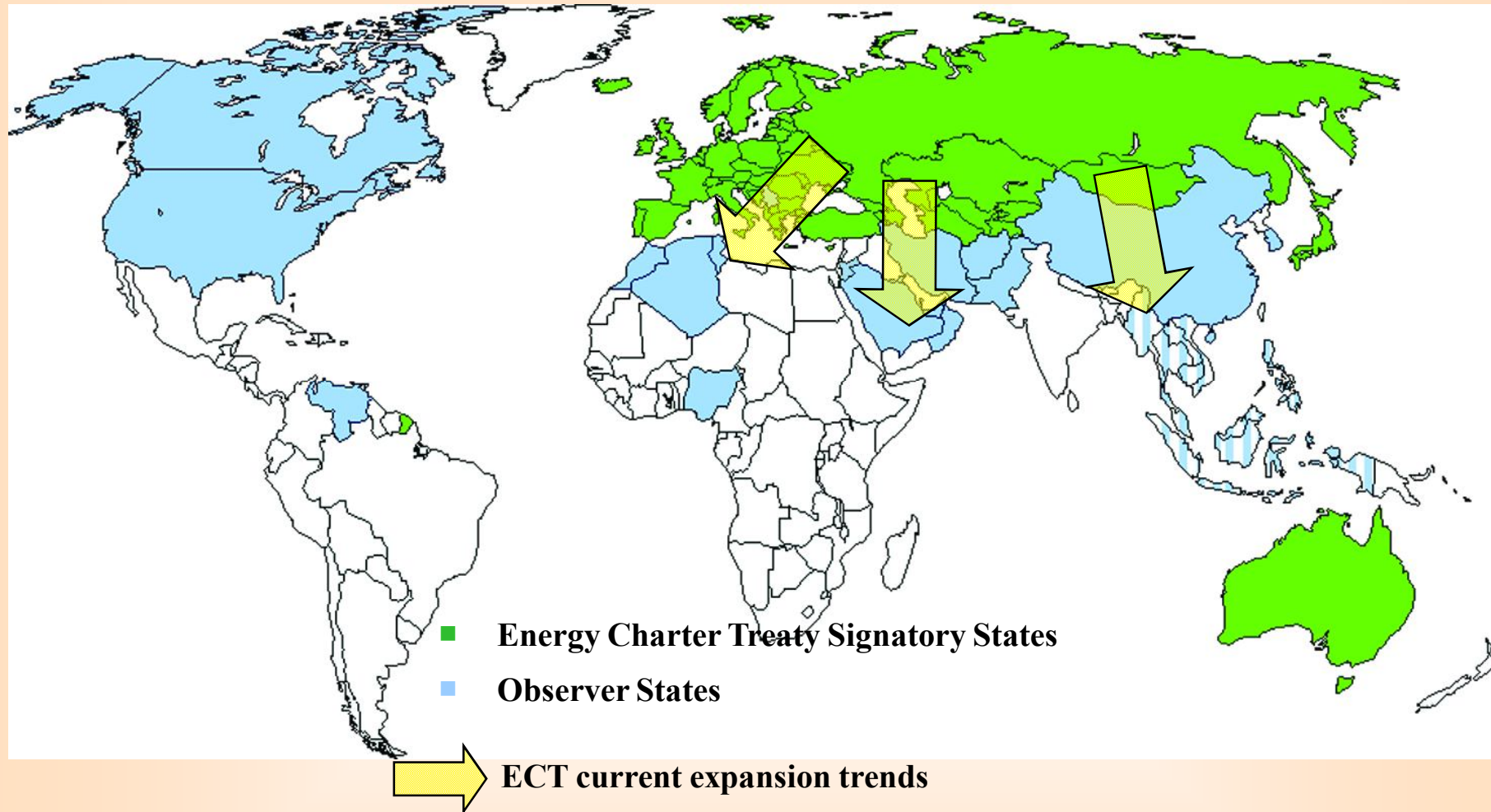
SUPPLEMENTARY TREATY

MFN = Most favored nation treatment
NT = National treatment

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

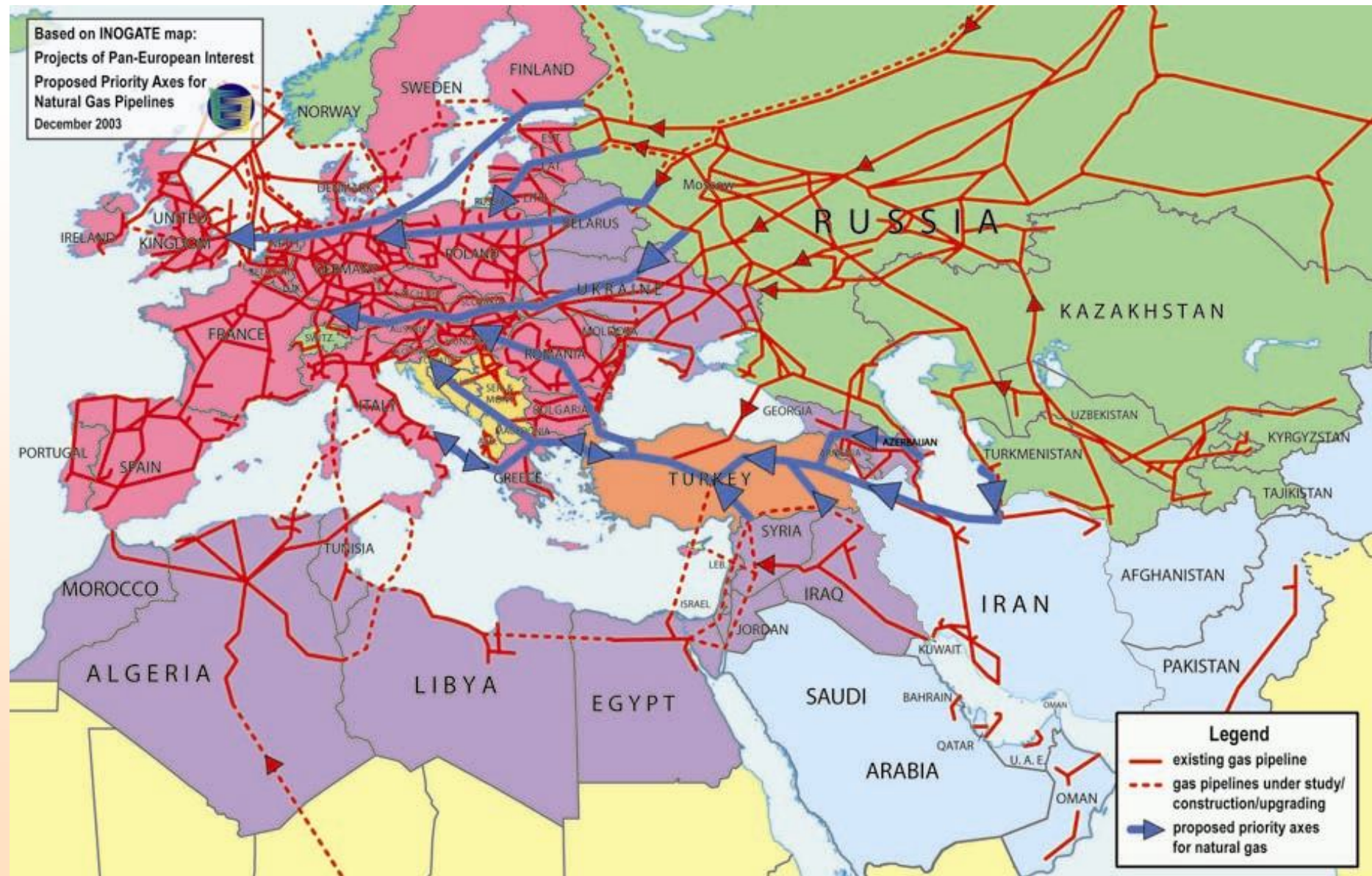


ENERGY CHARTER PROCESS: GEOGRAPHICAL DEVELOPMENT

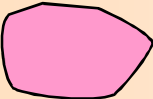
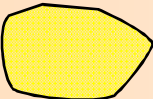
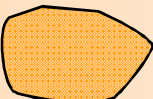
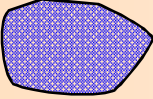
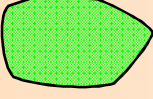
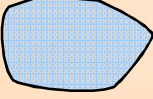


1. From trans-Atlantic political declaration to broader Eurasian single energy market
2. ECT expansion - objective and logical process based on clear economic and financial reasoning

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



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 Countries: 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

