

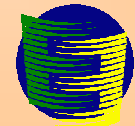
**Energy Charter Treaty and its Transit Protocol:
assessing the legal framework for setting transit rules and
the implications for Russia**

**Dr.A.Konoplianik
Deputy Secretary General
The Energy Charter Secretariat**

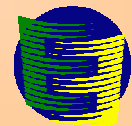
**Flame 10th Anniversary Conference
2-5 March 2004, Amsterdam**

CONTENTS

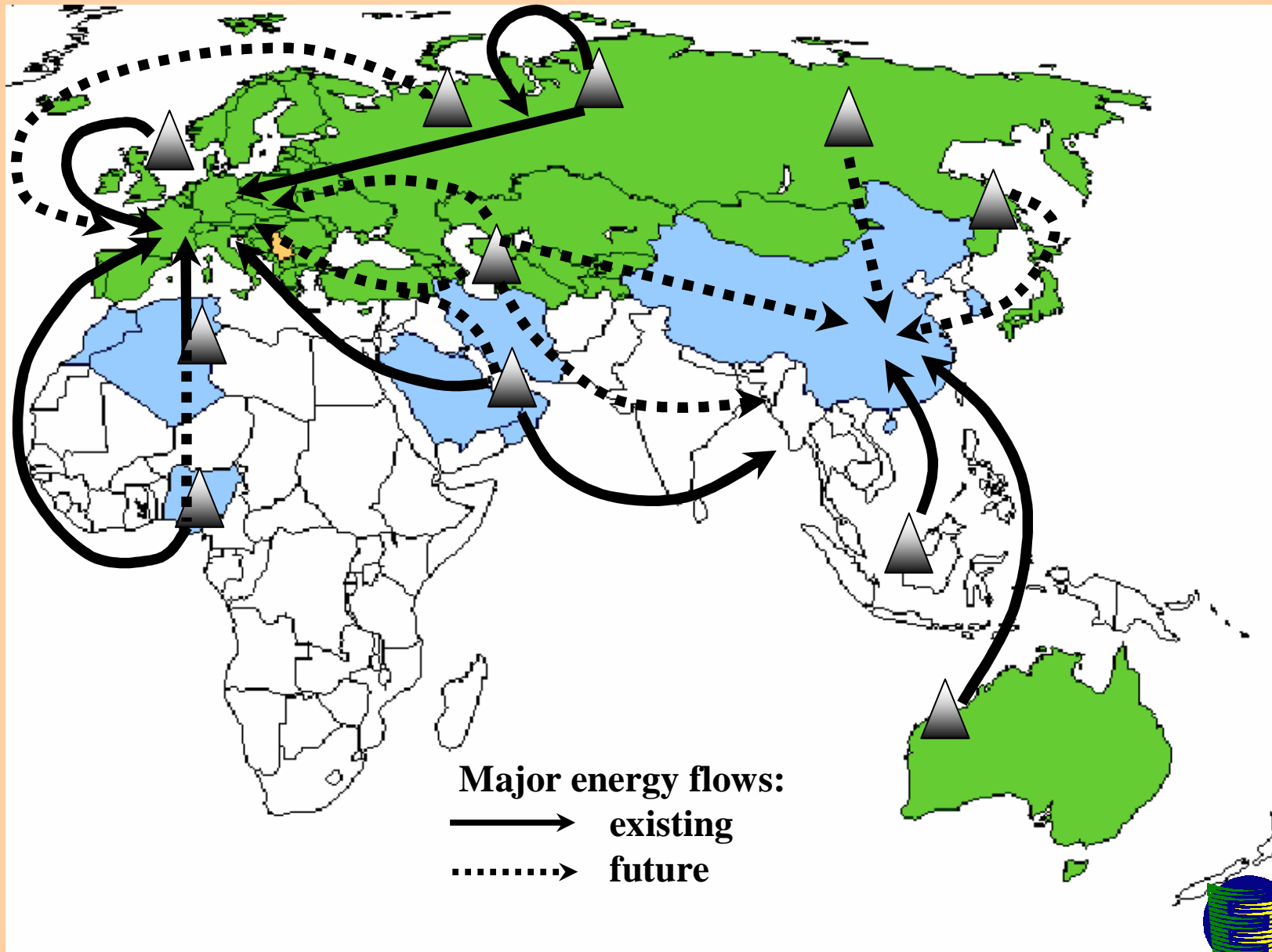
- 1. Growing role of energy transit**
- 2. Transit issues in the Energy Charter process**
- 3. Major Russia's concerns on ECT relates to transit**
- 4. Definition of Transit in the Energy Charter Treaty**
- 5. Major Energy Charter Transit issues, incl.:**
 - a. Available Capacity,**
 - b. REIO clause,**
 - c. Right of First Refusal**
- 6. Transit Protocol finalisation prospects
(incl. Russia-EU ECT-WTO debate)**



1. Growing role of energy transit

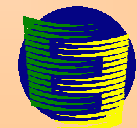


ENERGY CHARTER WORLD AND MAJOR ENERGY FLOWS IN THE EASTERN HEMISPHERE

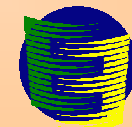
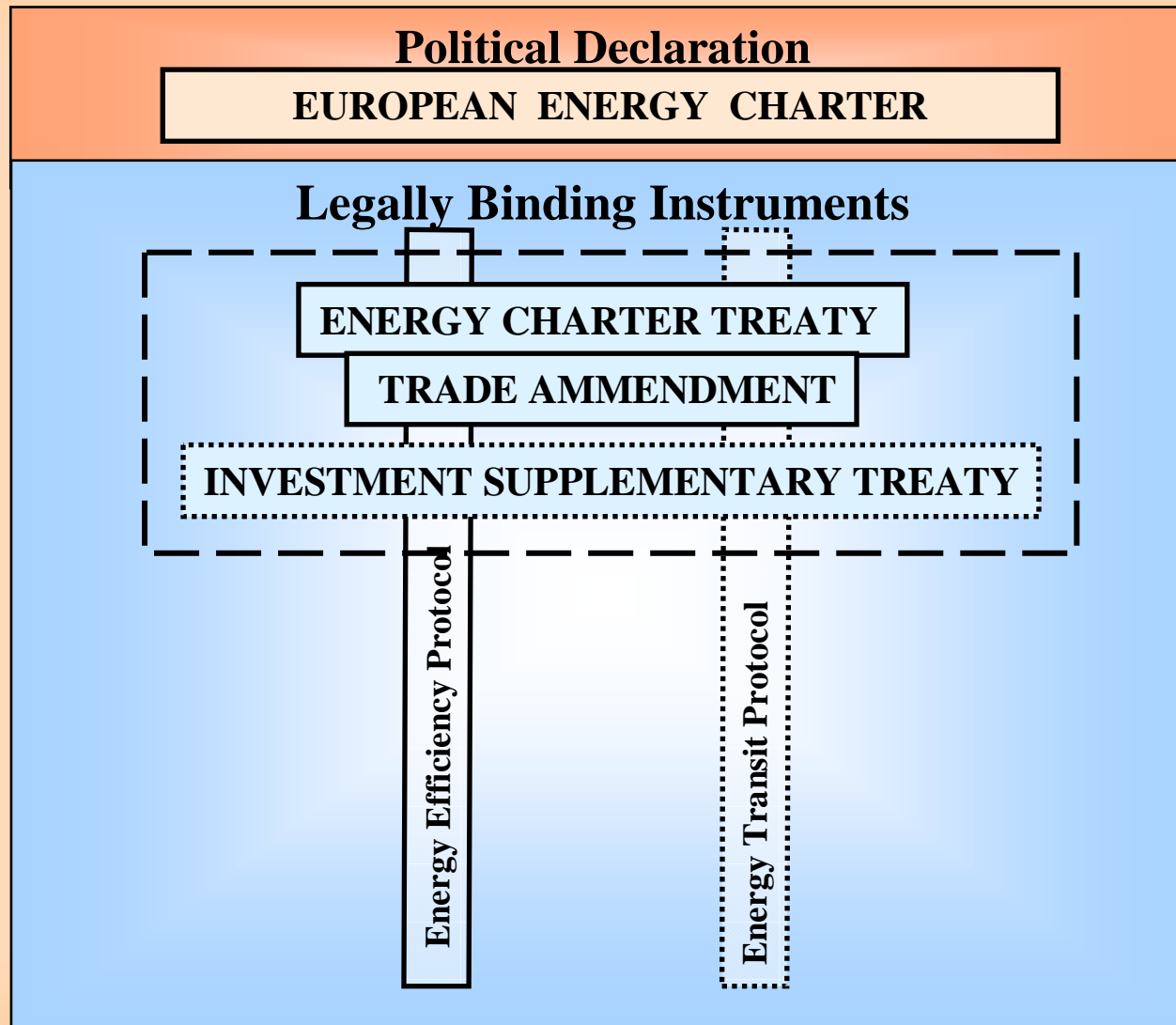


Dr. A. Konoplianiuk, Flame Conference, 2-5.03.2004, Amsterdam - Figure 1

2. Transit issues in the Energy Charter process



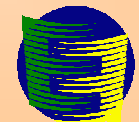
ENERGY CHARTER AND RELATED DOCUMENTS



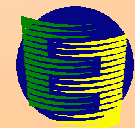
ENERGY CHARTER HISTORY

June 25, 1990	Lubbers' initiative on common broader European energy space presented to the European Council
December 17, 1991	European Energy Charter signed
December 17, 1994	Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed
16 April, 1998	ECT enters into force and became an integral part of international law
As of today	<ul style="list-style-type: none"> • ECT signed by 51 states + European Communities = 52 ECT signatories • ECT ratified by 46 states + EC (excl. 5 countries: Russia, Belarus, Iceland, Australia, Norway) • Russia and Belarus : provisional application of ECT

RF 3rd Duma (Jan'2001): Russia will ratify ECT, but not yet (depending on Transit Protocol)

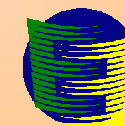


3. Major Russia's concerns on ECT relates to transit



ROLE OF GAS TRANSIT FOR ITS MAIN EXISTING EXPORTERS TO EUROPE (1999)

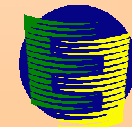
Country-exporter	Direct supplies, % of volume of exports	Transit through the territory of: % of volume of exports			
		one country	two countries	three countries	four countries
EXISTING EXPORTERS					
Netherlands	76,2	13,8	10,0	-	-
Norway	67,7	7,5	21,4	3,4	-
Algeria	44,9	14,8	9,6	24,3	6,4
Russia	39,5	9,4	11,4	28,1	11,6



ECT MAJOR OPPONENTS IN RUSSIA AND THEIR ARGUMENTS

Arguments against ECT ratification	Comments
<p><u>Gazprom:</u></p> <ol style="list-style-type: none"> 1) ECT demands mandatory TPA to Gazprom's pipelines for cheap gas from Central Asia 2) Obligation to transit Central Asian gas at low (subsidised) domestic transportation tariffs 3) ECT will "kill" LTCs 	<p>No such obligation. ECT excludes mandatory TPA (ECT Understanding IV.1(b)(i)).</p> <p>No such obligation (ECT Article 7(3)). Transit and transportation are different in non-EU.</p> <p>Not true. ECT documents do not deal with LTC at all. Economic niche for LTCs will become more narrow due to objective reasons, but they will continue to exist as a major instrument of financing greenfield gas projects.</p>
<p><u>Ministry of Nuclear:</u></p> <ol style="list-style-type: none"> 1) Bilateral RF-EU trade in nuclear materials is not regulated by ECT 	<p>Prior to ECT signing in 1994, RF and EU has agreed to regulate nuclear trade bilaterally (P&CA).</p>

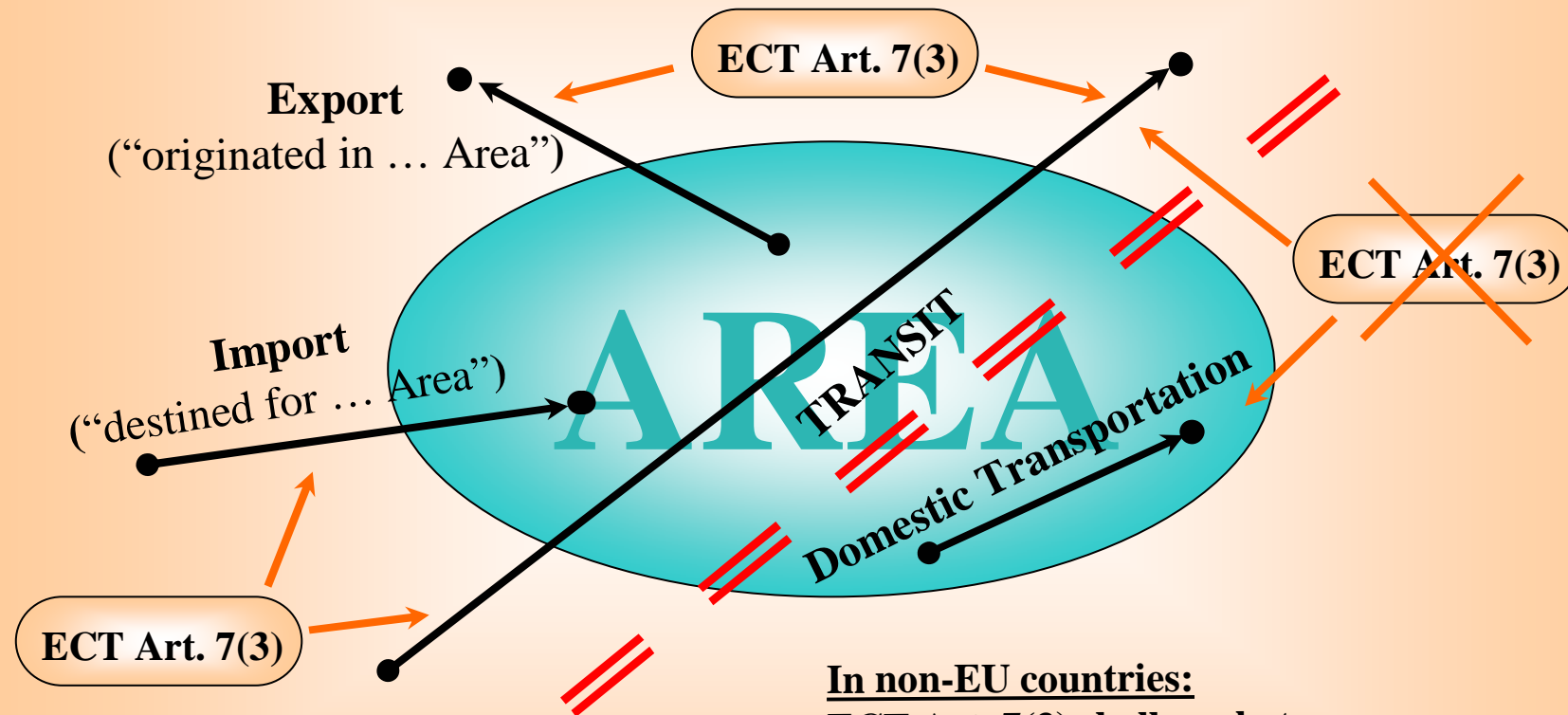
Major Russia's concern regarding ECT ratification relates to **gas transit** issues



ARE THERE ANY BENEFITS FOR RUSSIA IN REIO CLAUSE?

ECT Article 7(3):

“Each Contracting Party ... shall treat Energy Materials and Products in Transit in no less favourable manner than its provisions treat such materials and products originating in or destined for its own Area ...”



In EU countries (with or without REIO):
ECT Art. 7(3) shall apply to all means of transportation (free movement of goods)

In non-EU countries:

ECT Art. 7(3) shall apply to:

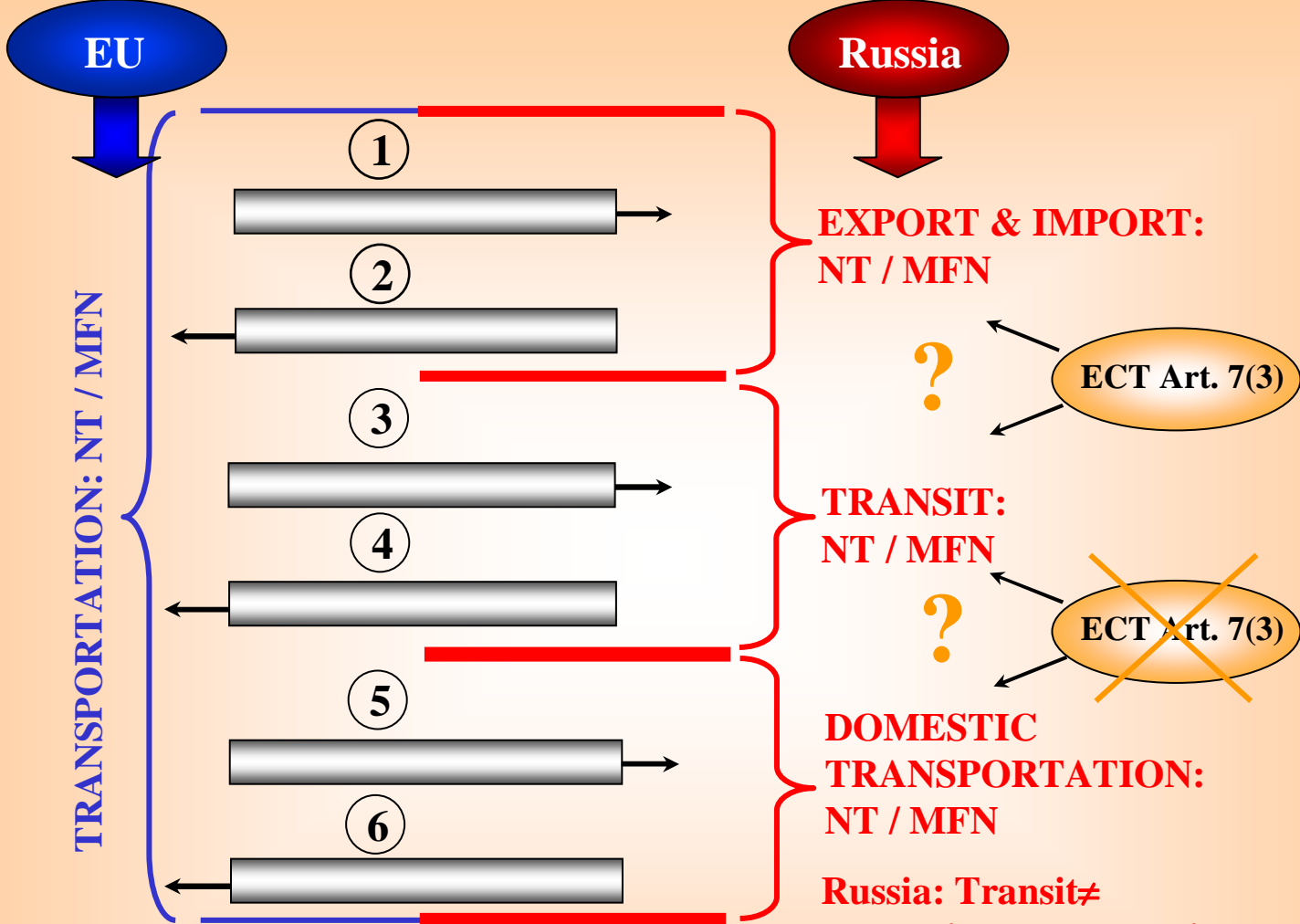
- transit vs. export / import

ECT Art. 7(3) shall NOT apply to:

- transit vs. domestic transportation

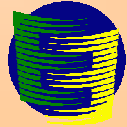


REIO CLAUSE: TRANSIT VS. TRANSPORTATION (EU/non-EU)

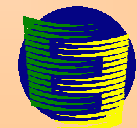


EU: Transit= Domestic Transportation=
Export & Import= Transportation=
Free Movement

Russia: Transit≠
Domestic Transportation ≠
Export & Import ≠ Free Movement



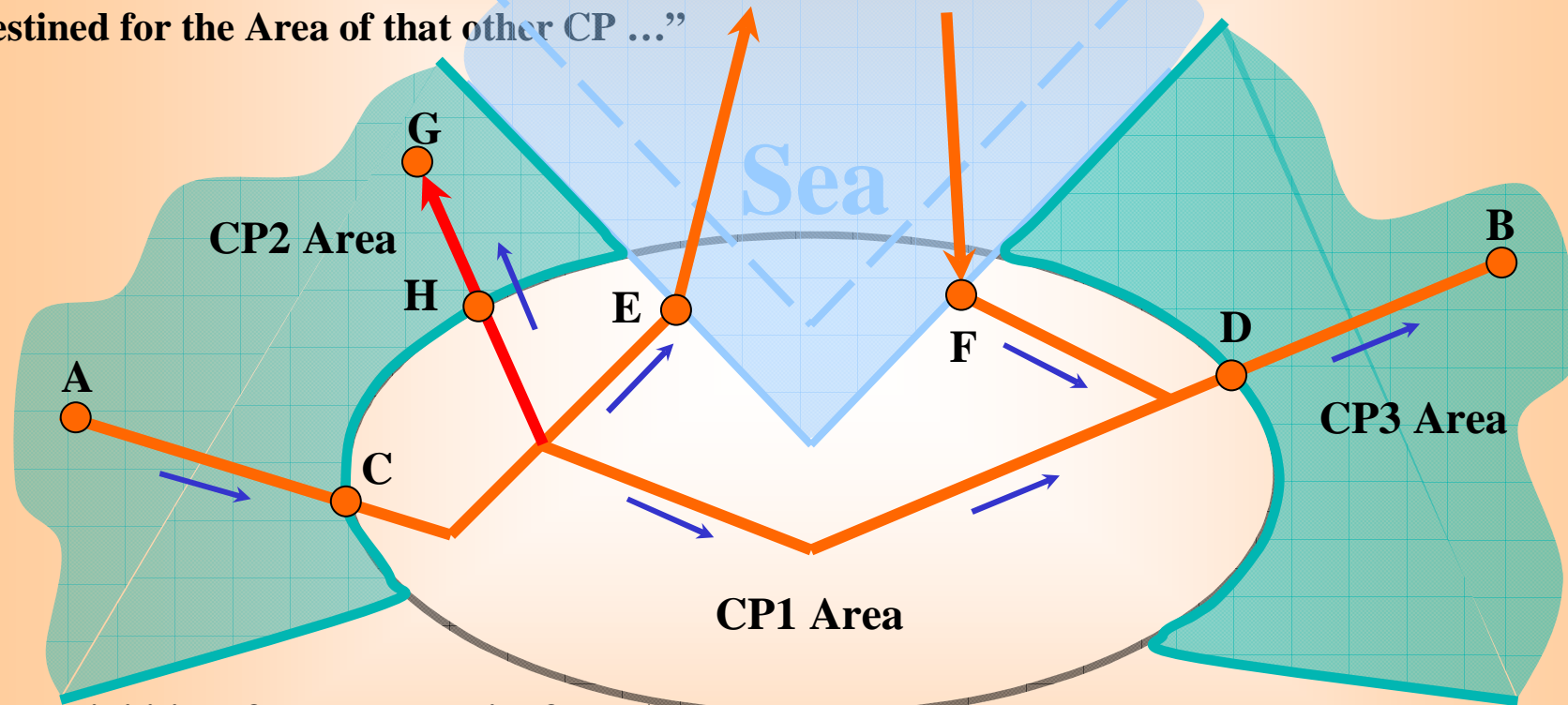
4. Definition of Transit in the Energy Charter Treaty



DEFINITION OF TRANSIT (Art. 7(10) ECT)

“... (a) Transit means:

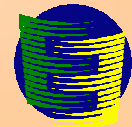
- (i) the carriage through the Area of a CP, or to or from port facilities in its Area for loading or unloading, of EMP originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a CP; or
- (ii) the carriage through the Area of a CP of EMP originating in the Area of another CP and destined for the Area of that other CP ...”



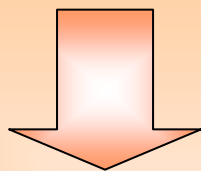
3 possibilities of energy supplies from A to B:

No transit (on-boarder sales at C, D): RUF-EU, Turkm-RUF, Kaz-RUF, Alger-Italy, Alger-Spain

- Transit:
- through the pipe owned/leased by shipper: Fra-Germ, Norw-Fra; planned RUF-CIS/EE
 - through the pipe not owned by shipper

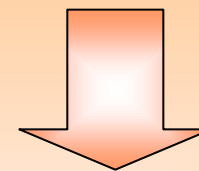


TWO SCENARIOS OF RUSSIAN GAS EXPANSION FURTHER IN EUROPE



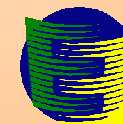
1) Gazprom = owner of pipeline
(construction of new pipeline capacities, purchase of pipeline companies shares)

- More expensive
- Decreasing rights of pipeline owners on decisions for transit/ transportation conditions according to EC legislation



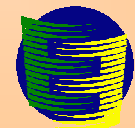
1) Gazprom = shipper (from gas sales at the border to wholesale buyers/resellers – to sales to final consumers inside the country)

- Less expensive
- Increasing rights of transporters on decisions... according to EC legislation



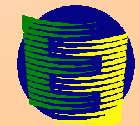
5. Major Energy Charter Transit issues, incl.:

- a. Available Capacity,**
- b. REIO clause,**
- c. Right of First Refusal**

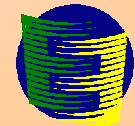


ECT TRANSIT PROTOCOL: MAJOR ISSUES ADDRESSED

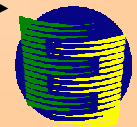
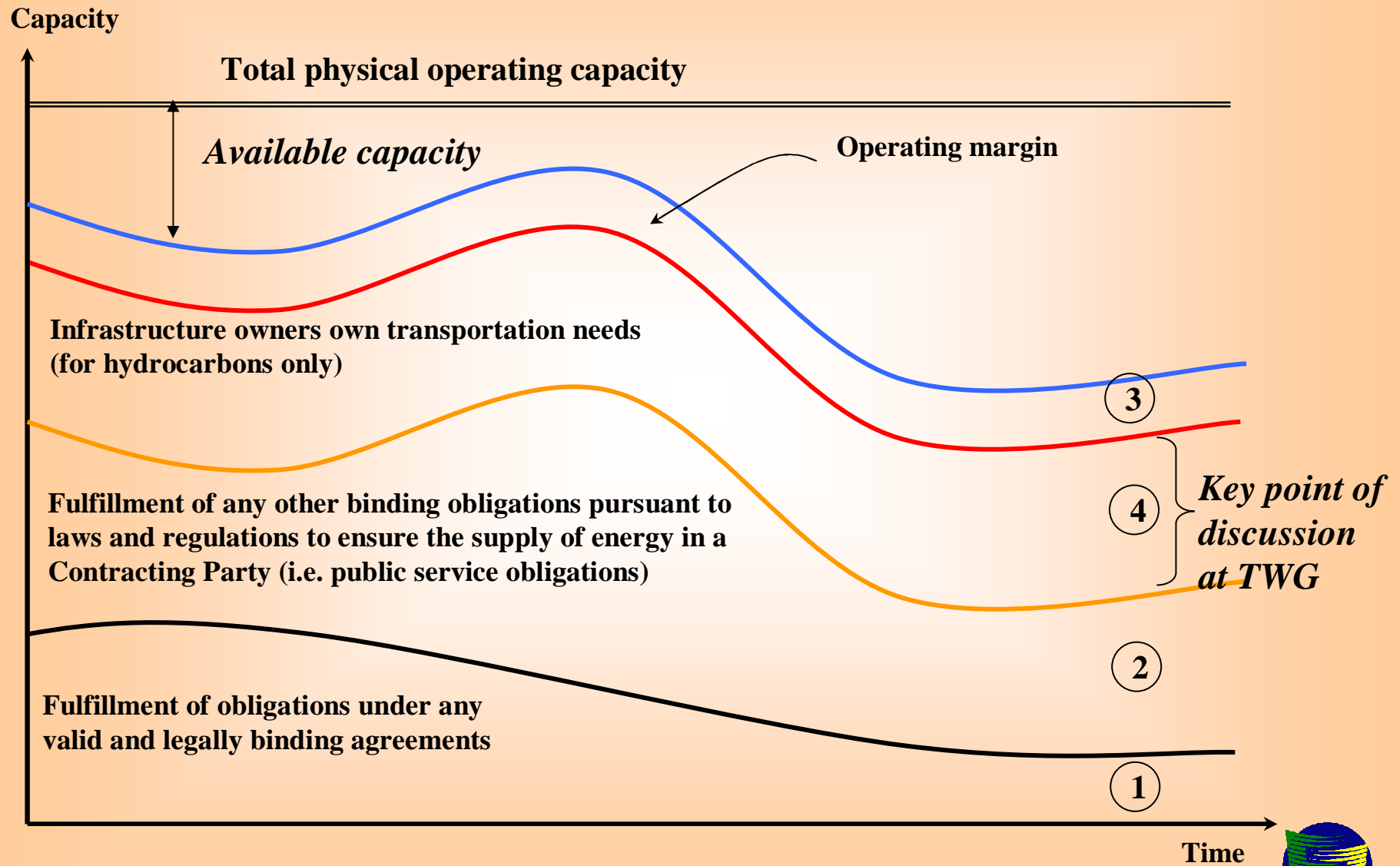
- 1. Obligation to observe Transit Agreements**
- 2. Prohibition of unauthorized taking of EMP in Transit**
- 3. Definition of Available Capacity in Energy Transport Facilities used for Transit**
- 4. Negotiated access of third parties to Available Capacity (mandatory access is excluded)**
- 5. Facilitation of construction, expansion or operation of Energy Transport Facilities used for Transit**
- 6. Transit Tariffs shall be non-discriminating, objective, reasonable and transparent, not affected by market distortions, and cost-based incl. reasonable ROR**
- 7. Technical and accounting standards harmonized by use of internationally accepted standards**
- 8. Energy metering and measuring strengthened at international borders**
- 9. Co-ordination in the event of accidental interruption, reduction or stoppage of Transit**
- 10. Protection of International Energy Swap Agreements**
- 11. Implementation and compliance**
- 12. Dispute settlement**



5-a. Major Energy Charter Transit issues:
- Available Capacity

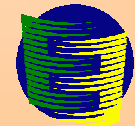


DEFINITION OF AVAILABLE CAPACITY

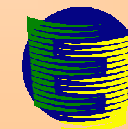
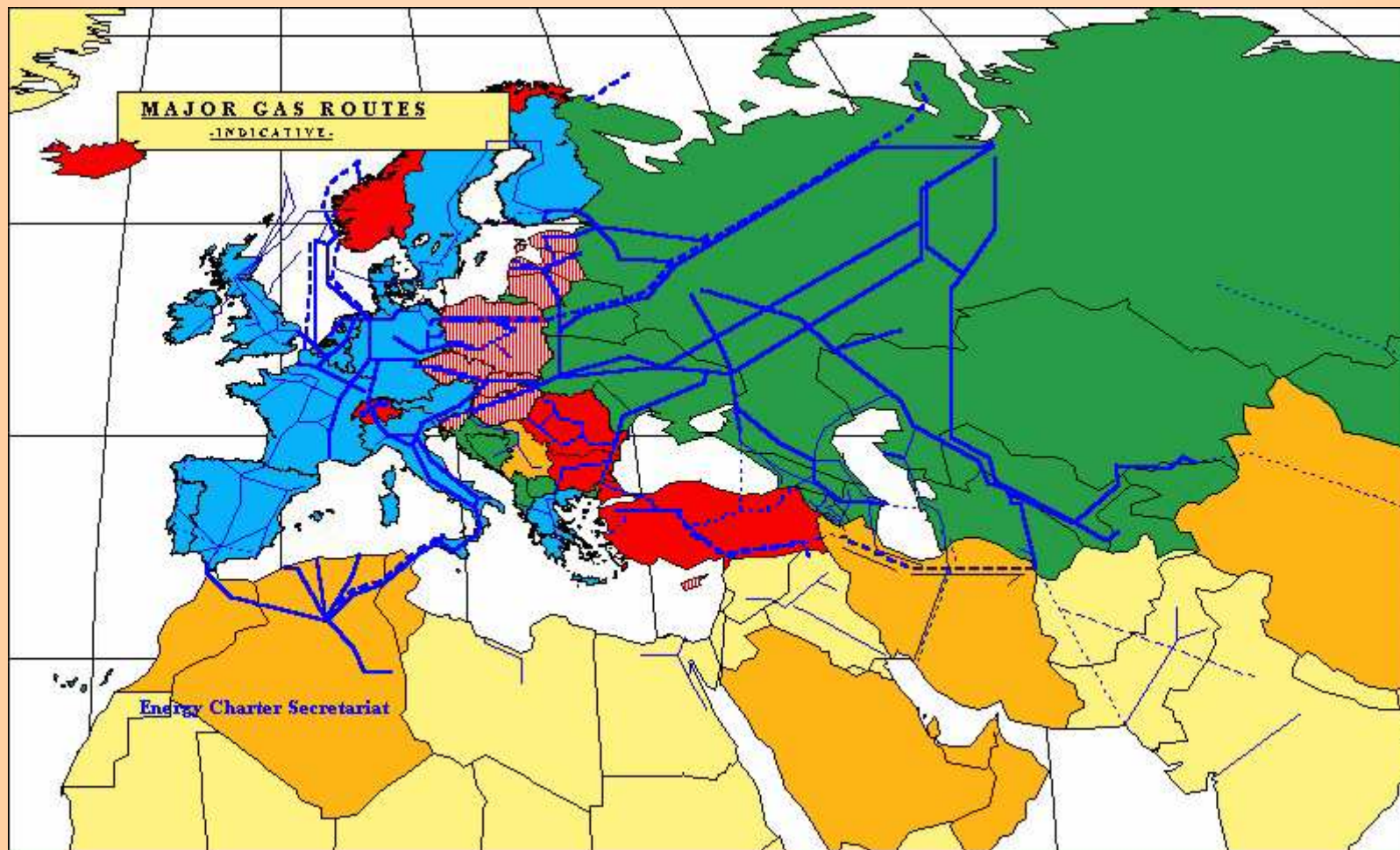


5-b. Major Energy Charter Transit issues:

- REIO clause**

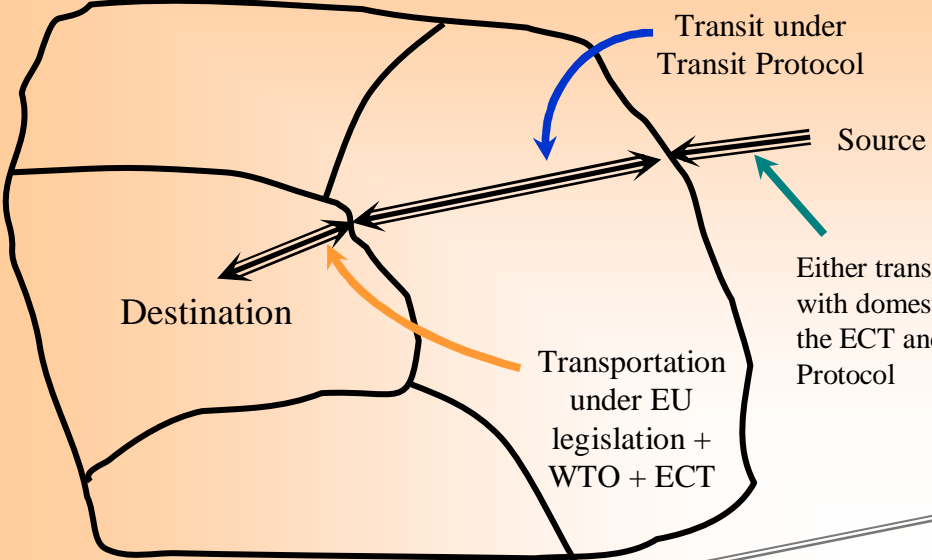


REIO CLAUSE: GEOGRAPHICAL ASPECTS



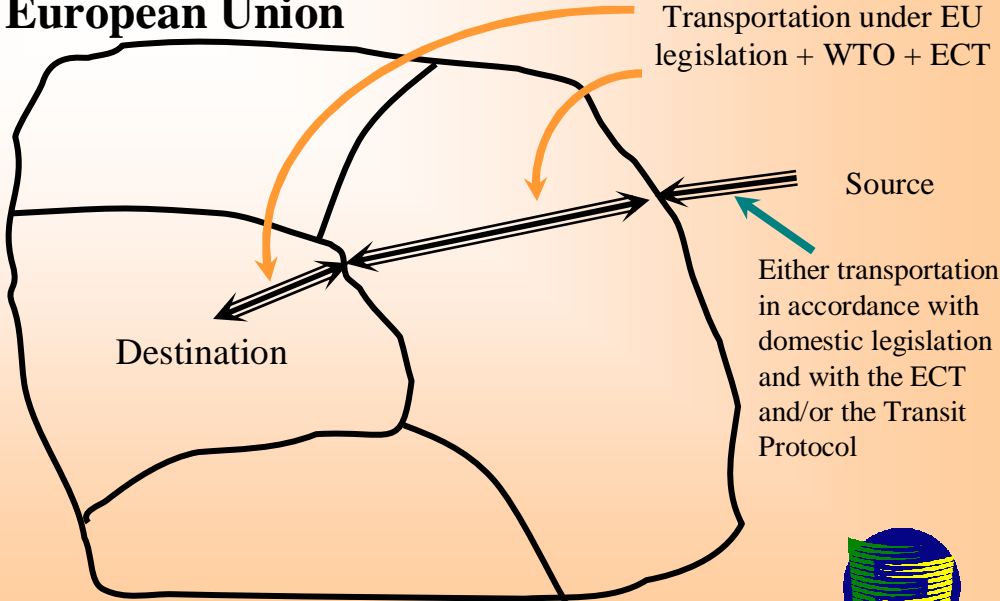
REIO CLAUSE: LEGAL ASPECTS

European Union

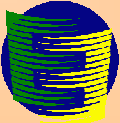


(a) Before REIO:

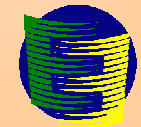
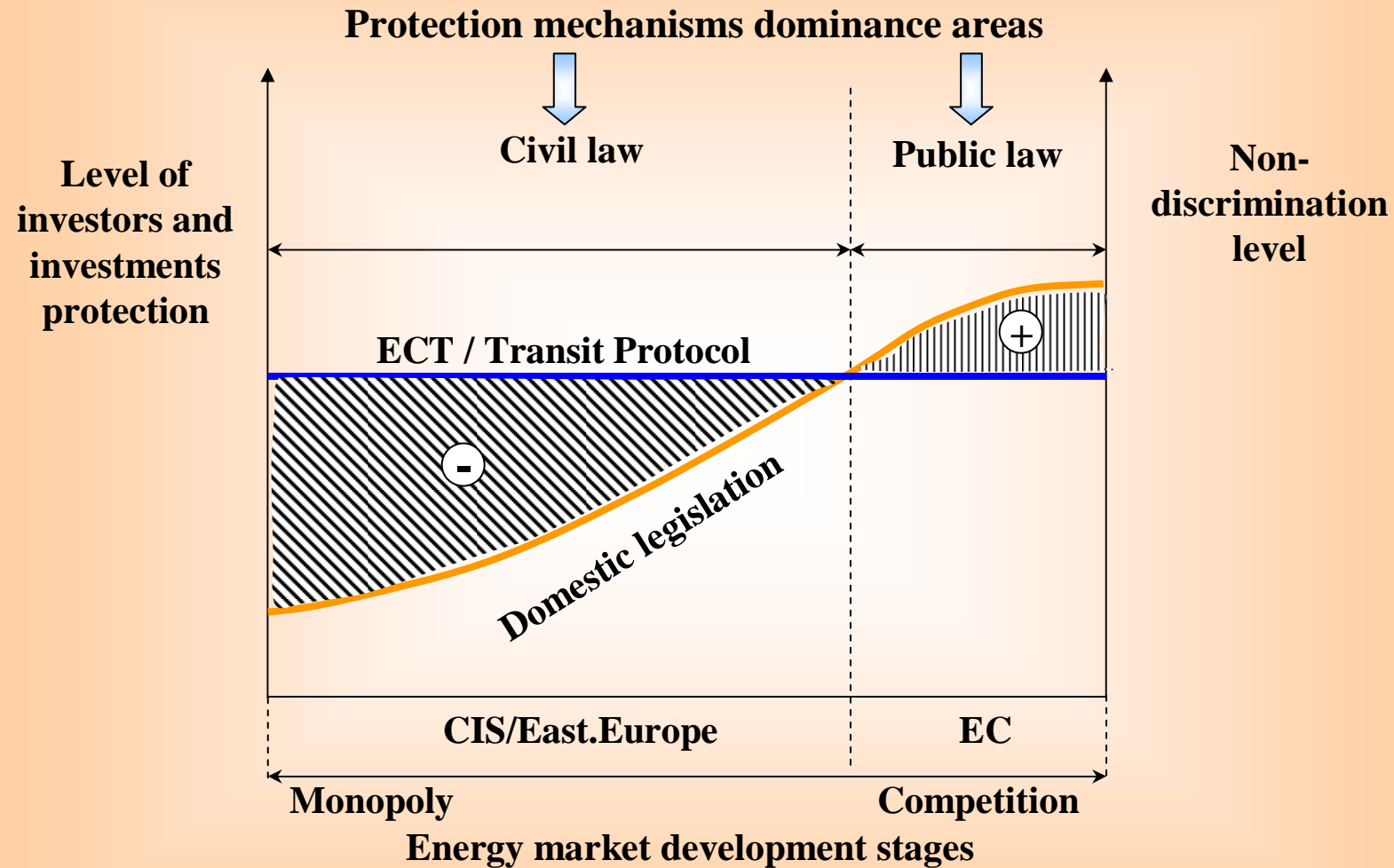
European Union



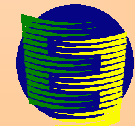
(b) After REIO:



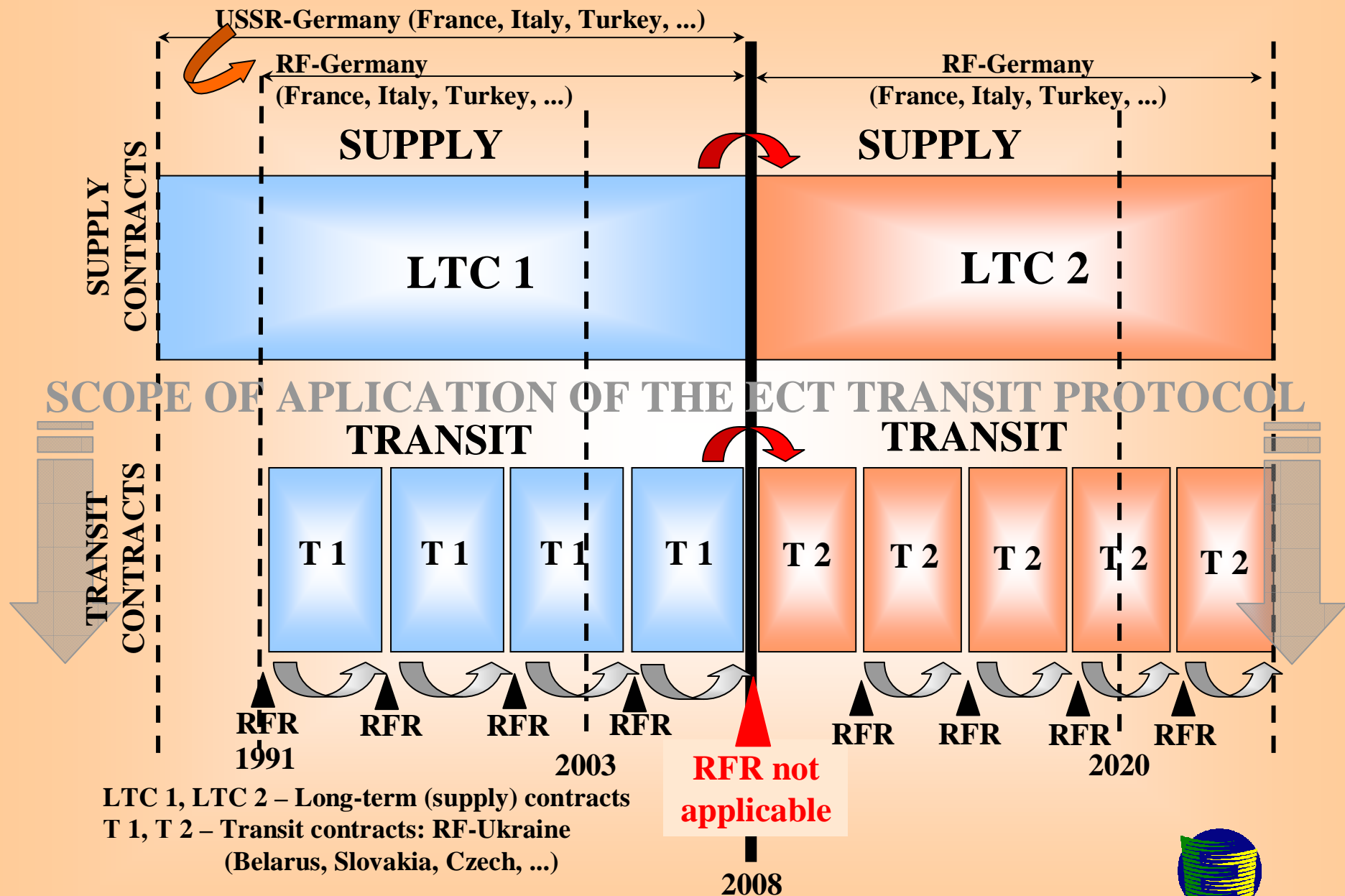
TRANSIT PROTOCOL AND “MINIMAL STANDARD” PROVISION IN REIO CLAUSE



5-c. Major Energy Charter Transit issues:
- Right of First Refusal



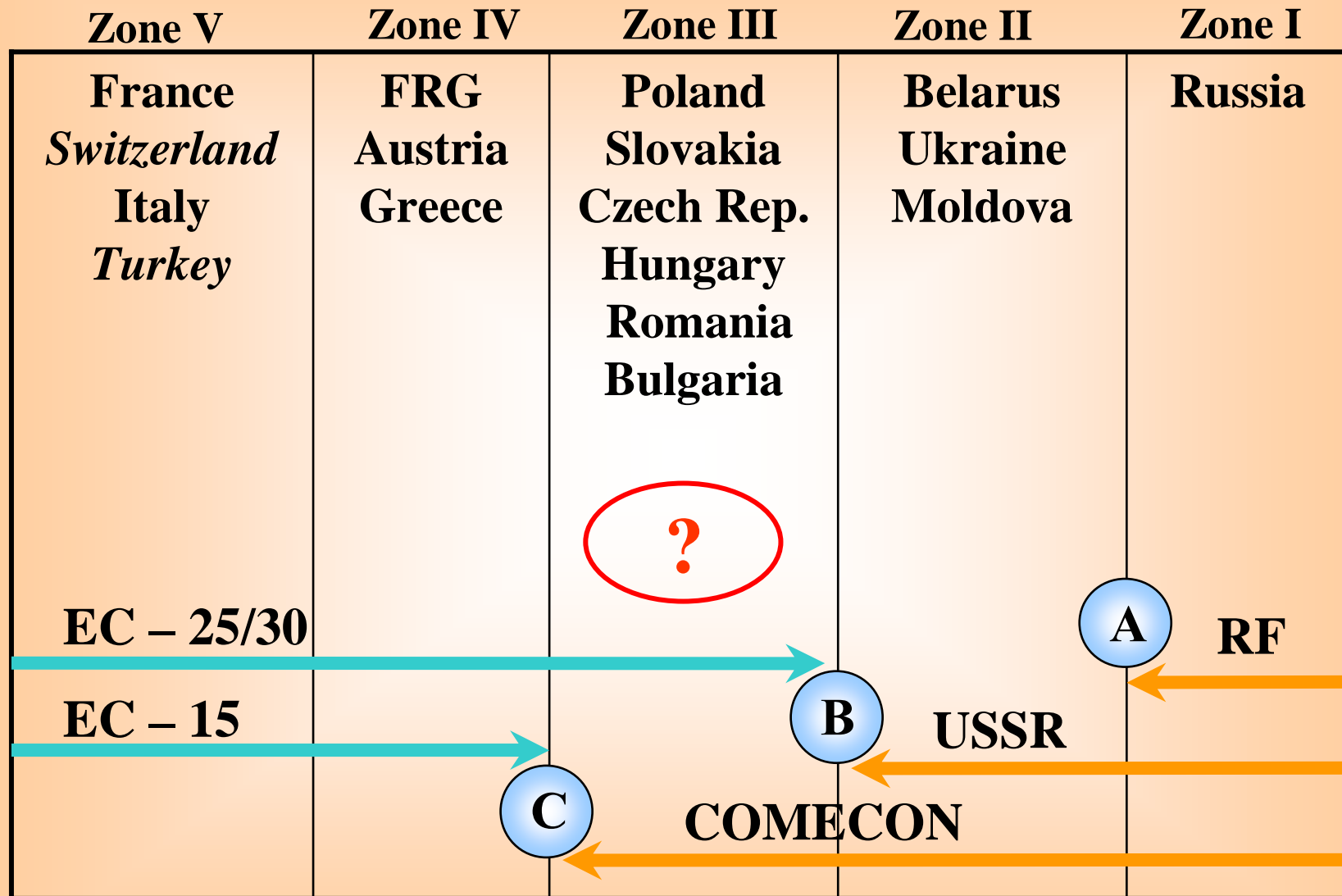
RIGHT OF FIRST REFUSAL (RFR): SCOPE AND MECHANISMS OF APPLICATION



RIGHT OF FIRST REFUSAL AND INTEREST OF DIFFERENT COUNTRIES IN ITS APPLICATION IN EUROPE (case-study: Russia -1)

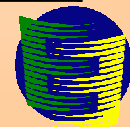


RIGHT OF FIRST REFUSAL AND INTEREST OF DIFFERENT COUNTRIES IN ITS APPLICATION IN EUROPE (Case-study: Russia - 2)

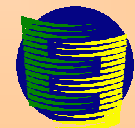


Italic – non-EC countries

A, B, C – points of change of ownership for gas and/or pipeline

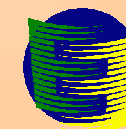


**6. Transit Protocol finalisation prospects
(incl. Russia-EU ECT-WTO debate)**



ENERGY CHARTER TRANSIT PROTOCOL: 2002-2003 FINALISATION CHRONOLOGY- 1

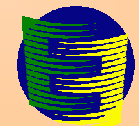
- **18 December'02.** 11th ECC. Multilateral phase of negotiations ended to be continued by bilateral consultations RUF-EU on 3 remaining outstanding issues (REIO clause, RFR, transit tariffs/auctions).
- **10 June'03.** Bilateral consultations RUF-EU. Preliminary agreement is reached on 3 outstanding issues between two delegations subject to approval in the capitals.
- **23 June'03.** Statement of RUF Government on TP.



RUSSIA (V.KHRISTENKO) ON THREE OUTSTANDING ISSUES

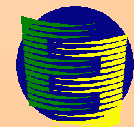
“Ratification of the ECT means only one thing for Russia as of today - namely, completion of negotiations and reaching final formulations on the one single protocol ... That is the Protocol on Transit ... Consultations on this protocol ... are still being conducted. As of today, the Russian Federation still has a number of serious concerns. We have three points, which are quite serious ones for us, and on which we would like to find satisfactory answers. Once we achieve satisfactory results on this protocol, we will be ready to sign it ... Therefore, we are proposing to continue the work and seek a mutually acceptable outcome - and then, correspondingly, options will open up with regard to the ECT in general.”

(Press-conference given by Russian Deputy Prime Minister Viktor Khristenko at the Russian EU Mission in Brussels , 23 June 2003)



ENERGY CHARTER TRANSIT PROTOCOL: 2002-2003 FINALISATION CHRONOLOGY- 2

- **26 June'03.** 12th ECC. RUF delegation: consultations on 3 issues to be continued.
- **17 September'03.** Provisionally agreed RUF-EU bilateral consultations postponed by RUF (mentioned as joint) initiative.
- **4-6 October'03.** RUF-EU WTO accession negotiations. EU has presented new energy-related agenda of 6 issues, incl. 4 energy-transit-related.
- **01 December'03.** Statement of RUF Government on ECT-WTO/transit.



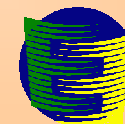
RUSSIA (V.KHRISTENKO) ON ECT - WTO

The issue of transiting Russia's gas across the European Union should be dealt with in the framework of the Energy Charter, not WTO.

V.Khristenko labelled "unexpected" the fact that the issue of gas transit across Europe has surfaced in the framework of negotiations on Russia's accession to the WTO. "From our point of view, this is impossible as a matter of principle: to leave aside the Charter which has been established especially to deal with such issues, and take the topic to negotiations on the WTO. Our position is simple - WTO in no way resolves the transit problems. This theme is not covered by WTO norms and rules"

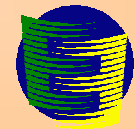
"It is not possible to discuss a topic everywhere and in all places. For starters, clarity should be reached where to discuss and return to a single venue - either one or the other negotiating table". Vice-premier stated that, in all likelihood, the theme of gas transit in WTO negotiations will be dropped, after all, and the discussions will return to the Transit Protocol of the Energy Charter.

From RIA-Novosti, Moscow, 1 December 2003



ENERGY CHARTER TRANSIT PROTOCOL: 2002-2003 FINALISATION CHRONOLOGY- 3

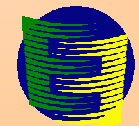
- **10 December'03.** 13th ECC. RUF delegation: no way to finalise TP negotiations until ECT-WTO agenda is decoupled. TP negotiations suspended.



EU ON TRANSIT PROTOCOL

“The Council recalls the importance of the role of the Energy Charter Treaty in supporting long-term cooperation between the EU and its neighbors and partners by promoting investment in energy facilities, free trade in energy, and the uninterrupted transit of energy; underlines that the Russian Federation should be further encouraged to ratify the Energy Charter Treaty and seek agreement to the Transit Protocol...”

From Conclusions adopted by the Meeting of the European Union Council on Transport, Telecommunications and Energy, Brussels, 15 December 2003



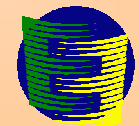
From the Conference Chairman's Statement
on the results of the 13th Meeting of the ECC on 10th Dec.'03
concerning the Energy Charter Protocol on Transit

I note that delegations have reached wide agreement on most of the provisions of the draft Energy Charter Protocol on Transit as contained in document CC 251 of 31 October 2003. I am therefore of the view that this draft represents the best possible compromise.

In recognition of the above, the Energy Charter Conference will continue to work actively towards achieving a situation in which the Transit Protocol can be adopted and signed by all Contracting Parties and Signatories of the Energy Charter Treaty at the earliest possible stage.

I would strongly recommend that the draft Energy Charter Protocol on Transit should guide Contracting Parties and Signatories when formulating policies concerning Transit of Energy Materials and Products.

I invite the Energy Charter Secretariat to review the application of this statement and to report to the Energy Charter Conference, recommending any measure necessary to reach its objectives.



FULL TEXT OF DRAFT ENERGY CHARTER PROTOCOL ON TRANSIT IS AVAILABLE AT THE ENERGY CHARTER WEB-SITE:

Transit

FULL TEXT OF DRAFT ENERGY CHARTER PROTOCOL ON TRANSIT

Together with the text of statement issued by the Energy Charter Conference Chairman, December 2003

Following the decision taken at the Energy Charter Conference meeting on 10th December 2003 to suspend further work on the draft Energy Charter Protocol on Transit, a statement was issued by Henning Christophersen, Chairman of the Energy Charter Conference, which is reproduced below in full:

"I have listened very carefully to our debate during the 13th Meeting of the Charter Conference regarding the Transit Protocol negotiations. I am encouraged by the strong desire expressed by Contracting Parties and Signatories to complete the Energy Charter Protocol on Transit as soon as is practically possible.

I note that delegations have reached wide agreement on most of the provisions of the draft Energy Charter Protocol on Transit as contained in document CC 251 of 31 October 2003. I am therefore of the view that this draft represents the best possible compromise.

I also take note of the views expressed by delegates regarding the importance of the provisions of the draft Energy Charter Protocol on Transit for their economies, in particular for access to energy transport facilities and markets, thereby enhancing energy security interests of producers, consumers and transmitters.

In recognition of the above, the Energy Charter Conference will continue to work actively towards achieving a situation in which the Transit Protocol can be adopted and signed by all Contracting Parties and Signatories of the Energy Charter Treaty at the earliest possible stage. I would like to invite all participants to contribute actively and constructively to this process.

In addition, I would strongly recommend that the draft Energy Charter Protocol on Transit should guide Contracting Parties and Signatories when formulating policies concerning Transit of Energy Materials and Products.

Finally, I invite the Energy Charter Secretariat to review the application of this statement and to report to the Energy Charter Conference, recommending any measure necessary to reach its objectives."

In the interests of transparency, the final draft text of the Transit Protocol, as submitted to the Energy Charter Conference in December 2003, has been made publicly available below as a PDF file.

Downloads [English]

[Final draft text of the Energy Charter Protocol on Transit, as submitted to the Energy Charter Conference in December 2003](#)

Downloads [Russian]

[Окончательный проект текста Протокола к Энергетической Хартии по Транзиту \(декабрь 2003 года\)](#)

Downloads [Other]