NEW APPROACHES TO GLOBAL LEGAL ORDERING

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What is legal ordering?

- Legal "ordering" constructed by:
  - texts (legal sources)
  - interpretive rules (norms & practices)
  - hierarchy of authority
- Legal ordering is not geo-political order
  - Loose coupling between discourse and practice
  - Legal ordering may create new problems/tensions

Old and New Problems

☐ How to create consensus (texts)

☐ How to implement rules (interpretations)

☐ How to harmonize rules when conflicts of law (hierarchy of authority)

Old and New Solutions

□ How to create consensus

→ de-politicize issues with experts (Finnemore)

→ transnational networks (Slaughter, Adler&Haas)

→ ambiguity or soft law (Abbott&Snidal)

→ opacity or double meanings (Mallard)

Real or Superficial Consensus?

	Similarity of meanings in public and private interpretations	Differences of meanings in public and private interpretation
Monosemy of the interpretation in the same forum	Transparency	Opacity
Polysemy of the interpretation in the same forum	Ambiguity	—

Old and New Solutions

☐ How to create consensus

→ de-politicize issues with experts (Finnemore)

→ transnational networks (Slaughter, Adler&Haas)

→ ambiguity or soft law (Abbott&Snidal)

→ opacity or double meanings (Mallard)

☐ Problems postponed to implementation phase

Old and New Solutions

- How to implement rules
  - → socialize political elites into modern culture (norms-incorporation) (Meyer&Boli)
  - → monitoring mechanisms, naming and shaming tactics (Sikkink&Finnemore)
  - → clarify ambiguities through judicial review (Abbott&Snidal)
- Debates about right level of authority

Old and New Solutions

□ How to solve conflicts of law

→ Hegemony (Keohane, Drezner)

→ Harmonization

   → legal pluralism as interpretive rule (Koskenniemi, Maduro, Benvenisti&Downs)

   → Harmonization as social process (Mallard)

→ Exceptions in one regime

→ And sometimes silent subversion

	Transparency	Ambiguity	Opacity
Power relations in negotiation process	Increases policy makers' control over negotiators	Leaves some freedom to negotiators	Leaves some freedom to negotiators
		Exposes politicians/negotiators to being blamed for a sloppy job	Creates some measure of deniability for politicians
Proposals in negotiation process	Limits the range of acceptable policies	Widens the range of acceptable policies	Focuses the public's attention on acceptable policy proposals and away from controversial ones
Negotiation outcome	Decreases the likelihood of success	Increases the likelihood of success	Increases the likelihood of success
Ratification process	Increases the predictability for lawmakers/public	Increases the uncertainty for lawmakers/public	Gives the appearance of predictability for lawmakers/public
Ratification outcome	Increases the likelihood of success	Decreases the likelihood of success	Increases the likelihood of success
Power relations in implementation process	Constrains the interpretation by bureaucrats, inspectors, courts	Leaves a lot of freedom in the interpretation of new rules to bureaucrats, inspectors, courts	Creates conflicts of interpretation between insiders with knowledge of private goals (politicians) and outsiders (bureaucrats, courts, etc.)
Implementation outcome	High coupling between initial goals and achieved objectives	Hazardous decoupling between initial/broad goals and achieved objectives	Decoupling between private goals and achieved objectives is unsustainable in the long term, except if bureaucrats, courts, are co-opted by insiders

	Transparency	Ambiguity	Opacity
Vulnerability to mechanisms of actor substitution	Low: newcomers in politics/bureaucracy are likely to keep the same rules (or they will face sanctions), except if they have a public mandate to change them	High: newcomers in politics/bureaucracy are likely to interpret the rules to fit their own policy objectives, without a public mandate	Very high: newcomers in politics/bureaucracy will likely abandon private goals if they do not share them, and claim to follow the rules as publicly interpreted (no sanction)
Vulnerability to mechanisms of actor mismatch	Low: insider powers will defend clear goal under pressure from outside power	High: insider powers will be divided under pressure from outside power	Low: insider powers will defend public goal and will deny the existence of private objective
Vulnerability to overlaps between distinct legal regimes	Low: regime complexes likely to emerge with no clear winner and strong tensions	High: low tensions in case both regimes are equally ambiguous; and in case one regime gives ambiguous rules and the other clear ones, the latter will become hegemonic	High: if the member states situated at the point of overlap want to abandon private goals to fit with their other treaty obligations Low: if the overlap states want to pursue their private goals, despite some contradictions with other legal obligations

Example

- NUCLEAR PROLIFERATION
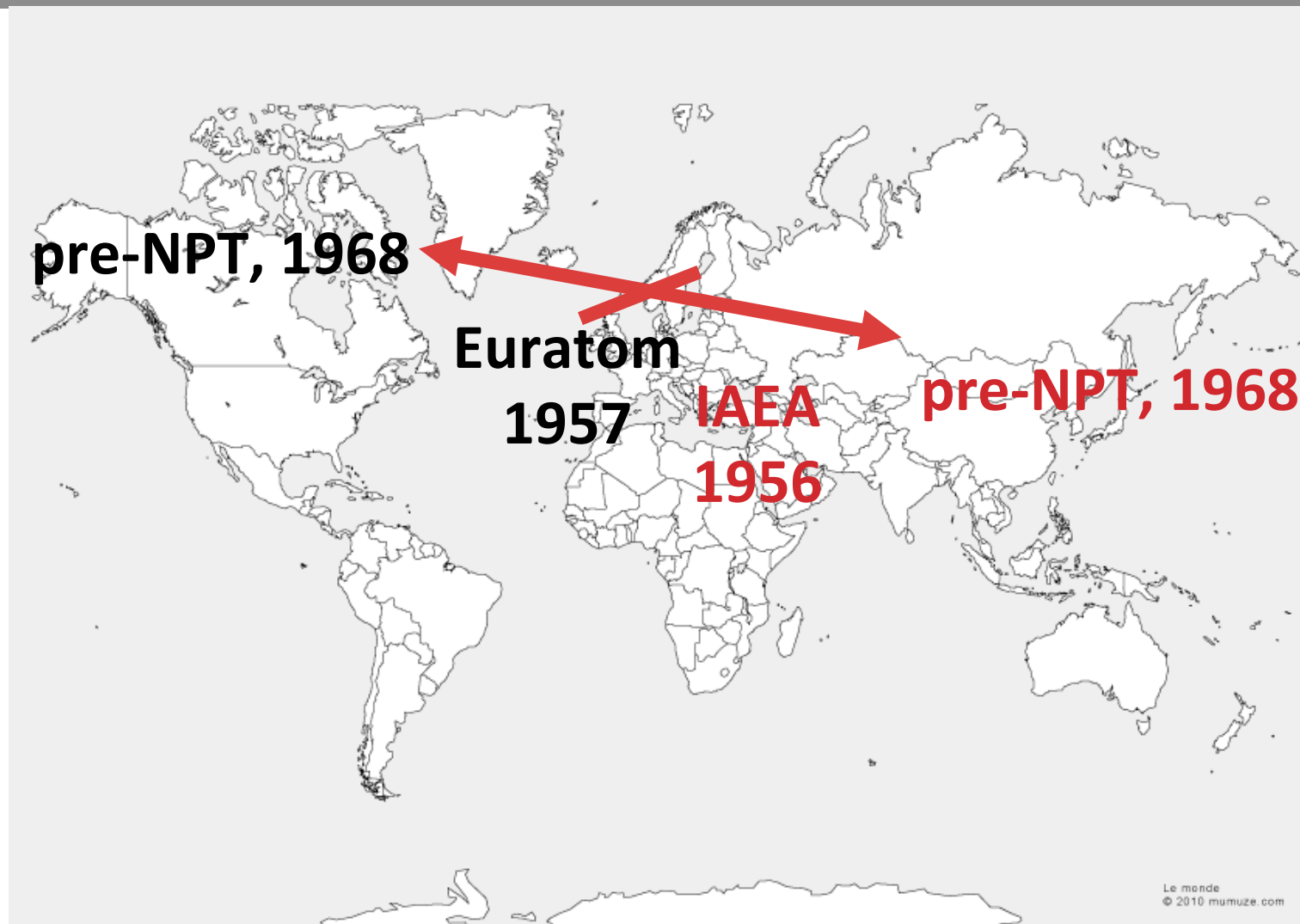
FALLOUT

✳ ✳ ✳

NUCLEAR DIPLOMACY

IN AN AGE OF

GLOBAL FRACTURE

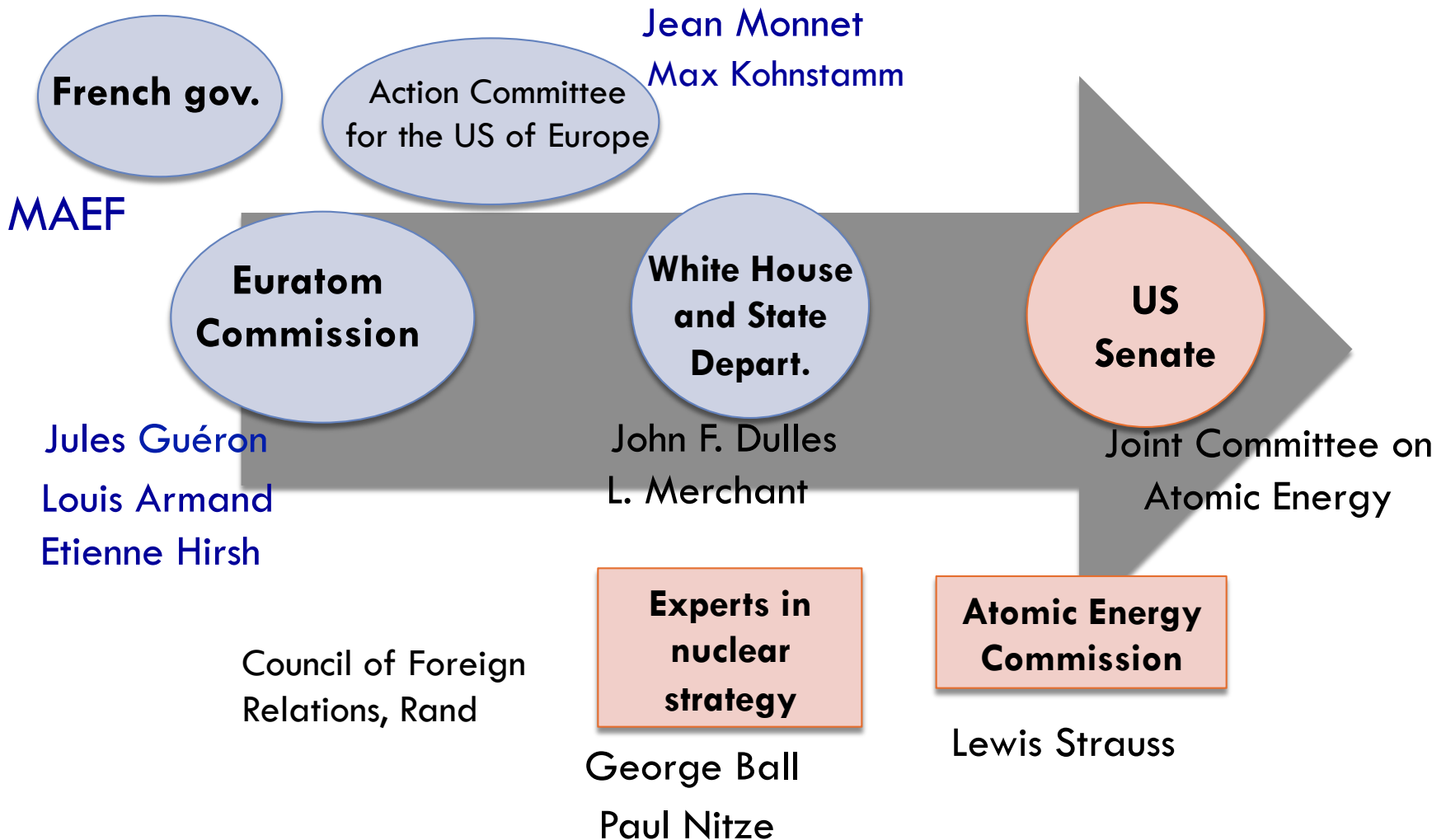GRÉGOIRE MALLARD

Nuclear nonproliferation regime(s)

Euratom 1957

IAEA 1956

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Nuclear nonproliferation regime(s)

pre-NPT, 1968

Euratom 1957

IAEA 1956

pre-NPT, 1968

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Nuclear nonproliferation regime(s)

Euratom 1957

US-Euratom Treaty 1958

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2. Map of archives

French gov.

Action Committee for the US of Europe

Jean Monnet
Max Kohnstamm

MAEF

Euratom Commission

White House and State Depart.

US Senate

Jules Guéron
Louis Armand
Etienne Hirsh

John F. Dulles
L. Merchant

Joint Committee on Atomic Energy

Council of Foreign Relations, Rand

Experts in nuclear strategy

Atomic Energy Commission

George Ball
Paul Nitze

Lewis Strauss

Nuclear nonproliferation regime(s)

US-Euratom
Treaty 1958

Euratom
1957

IAEA
1956

US-India 1963

Nuclear nonproliferation regime(s)

pre-NPT, 1968

Euratom 1957

IAEA 1956

pre-NPT, 1968

post-NPT, 1973

post-NPT, 1973

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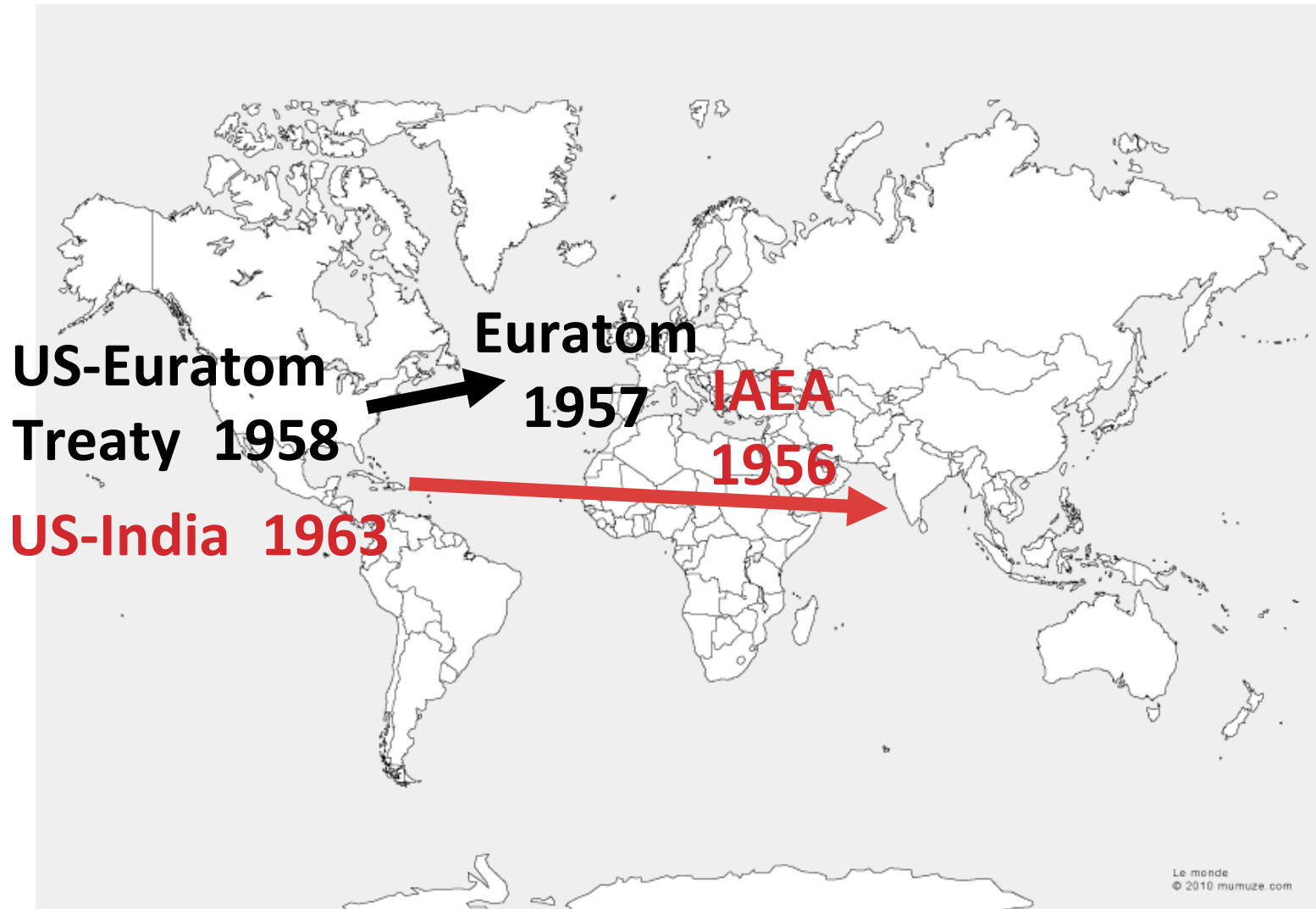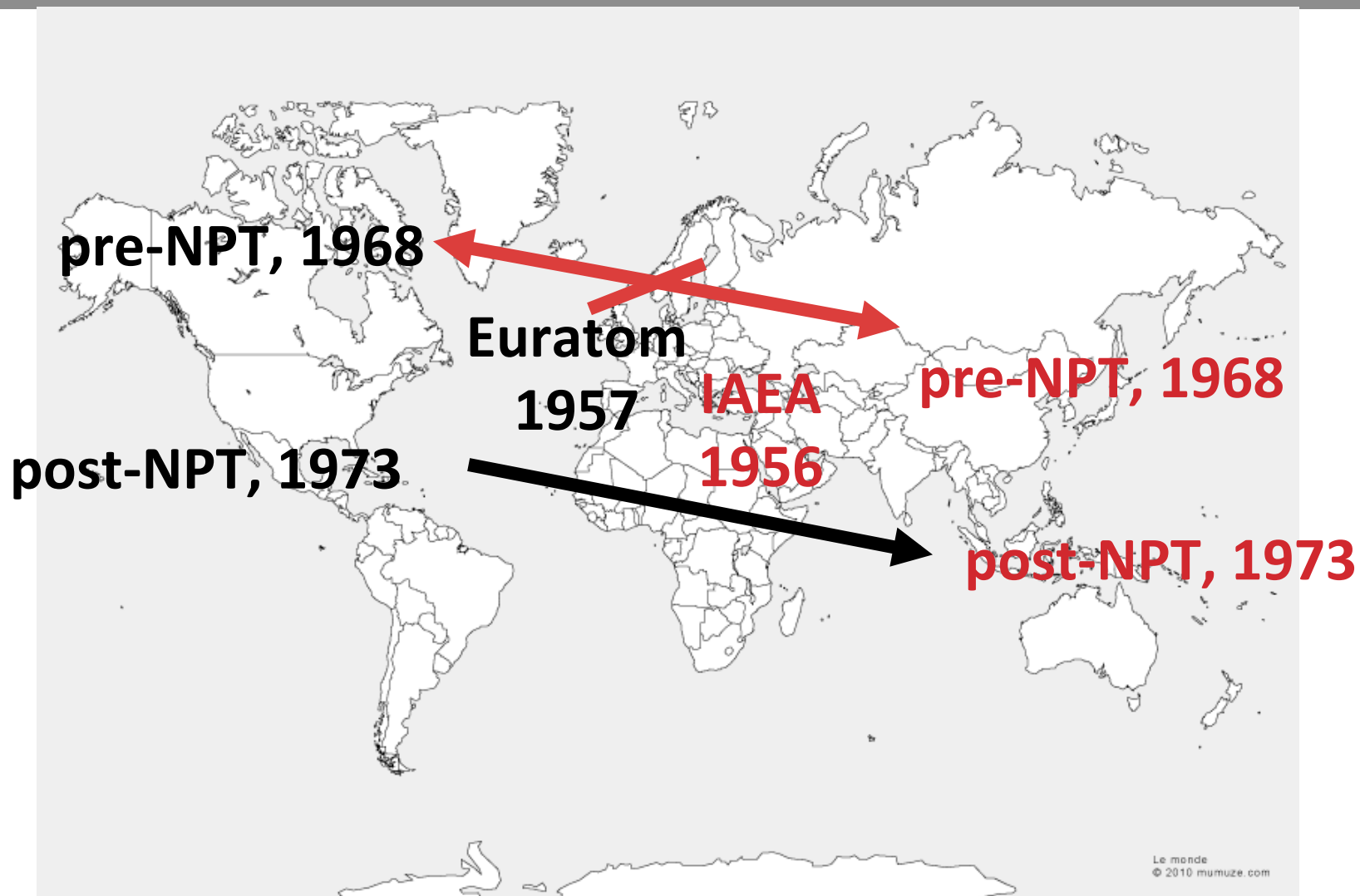
Evolution of opaque rules

Clarification of opaque rules? Conflict of legal rules?	Recoupling of public and private interpretations	Decoupling of public and private interpretations maintained over time
Easy harmonization between global and specific rules	Harmonization (Euratom)	Unacknowledged exception (Israel)
Difficult harmonization (or no harmonization) between rules	Acknowledged exception (India)	Subversion (Pakistan)

Conclusions

❑ Are the predictions listed robust across legal fields?

❑ For social scientists who study the interpretive quality of the law,

  ❑ What kind of data should they collect?

  ❑ What kind of criteria should they adopt to distinguish types of interpretation?