

FDI in the Energy Sector: Challenges for IIA negotiators

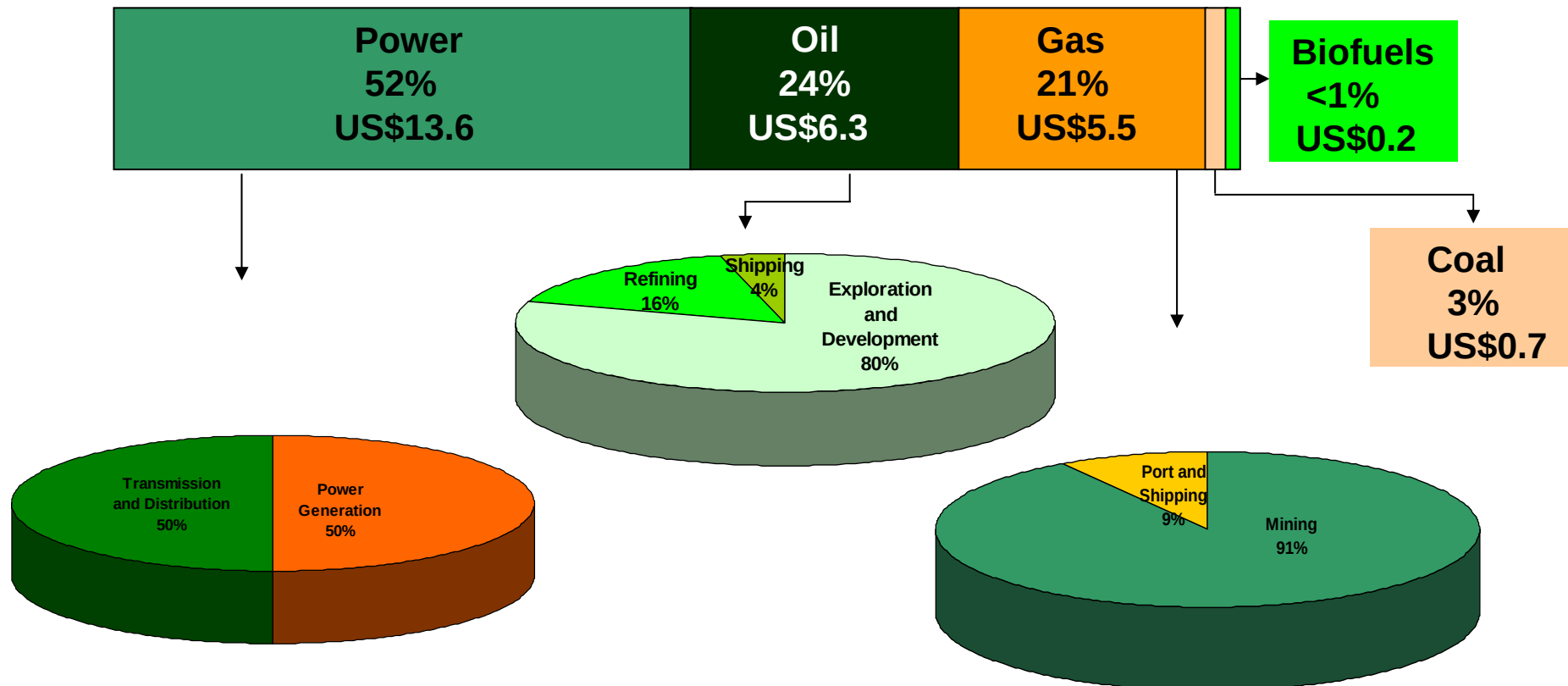
Workshop on the Role of Intergovernmental Agreements in Energy Policy

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Investment needs in the energy sector

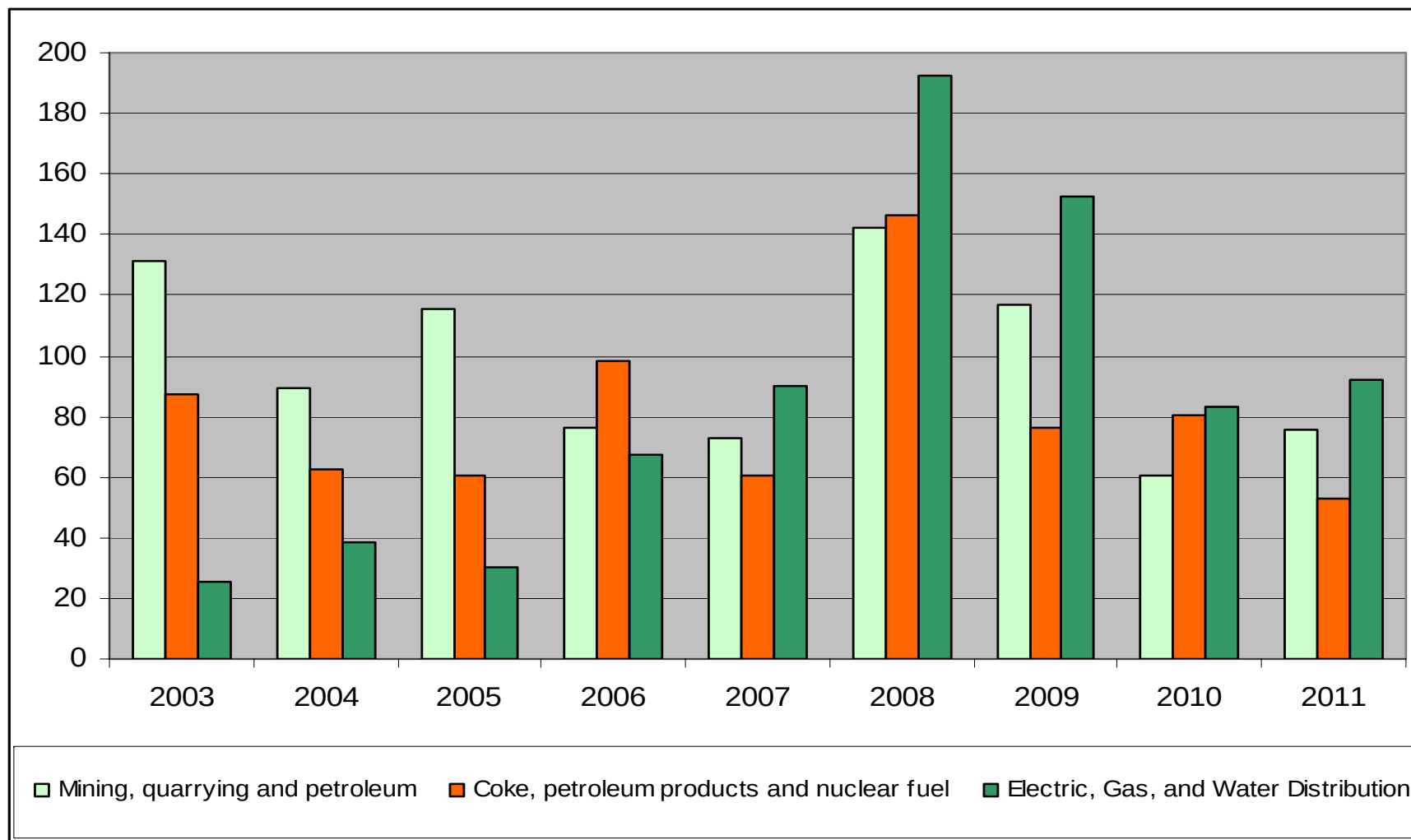
- **US\$ 26 trillion** will be required in the energy sector until 2030



IEA: World Energy Outlook

Greenfield FDI in the energy sector, 2003-2011

- The annual FDI flows continue to remain below pre-crisis peak



Factors that discourage FDI in the energy sector:

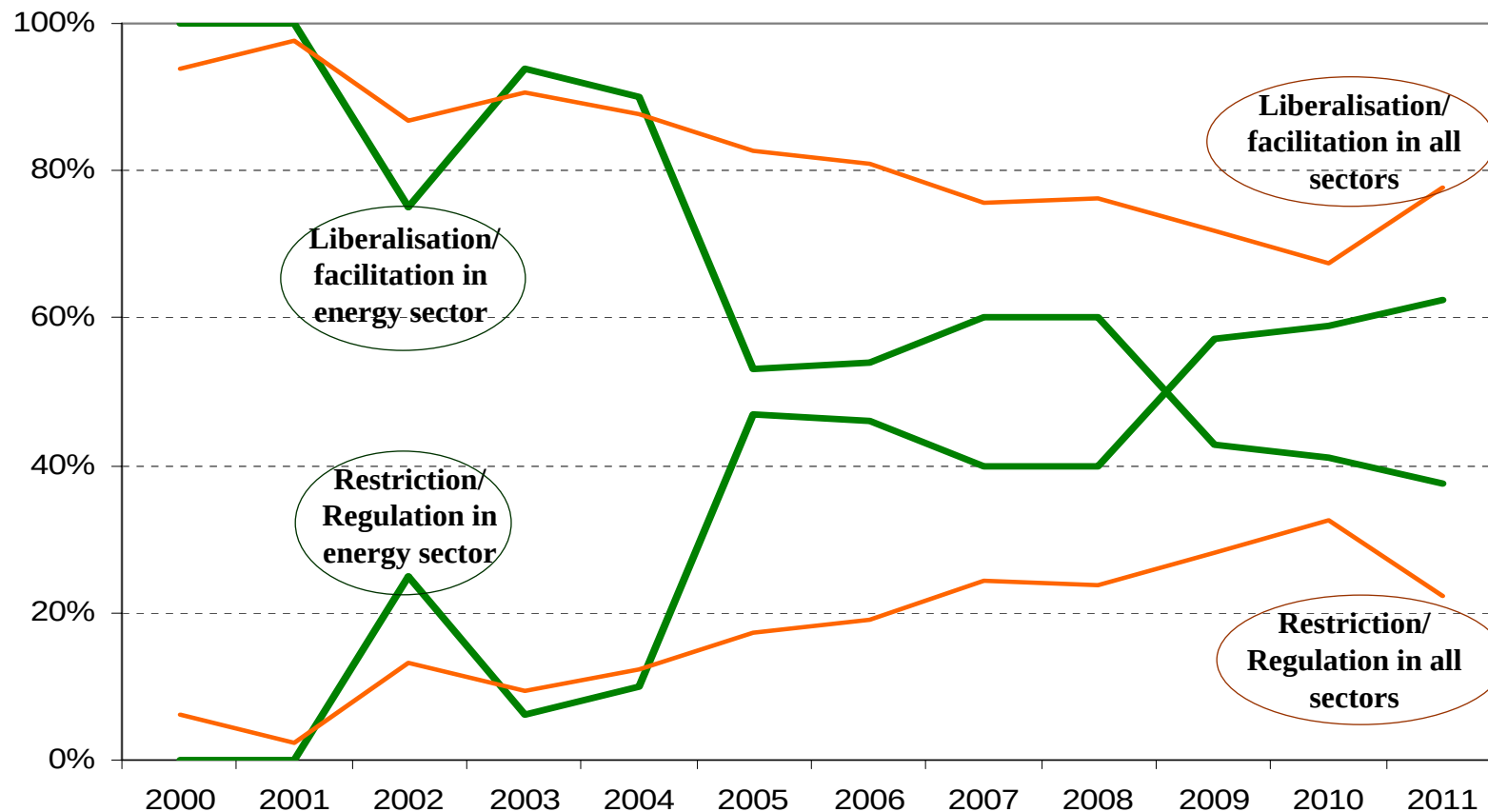
1. “**Cash overhang**” in TNCs
2. **Resource nationalism** among energy producing countries
3. **Unstable political and legal environment**
4. Deficiencies in the **international policy framework**
5. Local **resistance** to new investment projects
6. Increasing investment **costs**

The dichotomy of investment policies in the energy sector

- ❑ On the one hand, many countries seek to promote FDI in the energy sector in light of pressing investment needs;
- ❑ On the other hand, many countries seek to keep control over natural resources and a strategically important sector.

Policies with regard to FDI in the energy sector

The energy sector is more prone to State intervention than most other economic activities



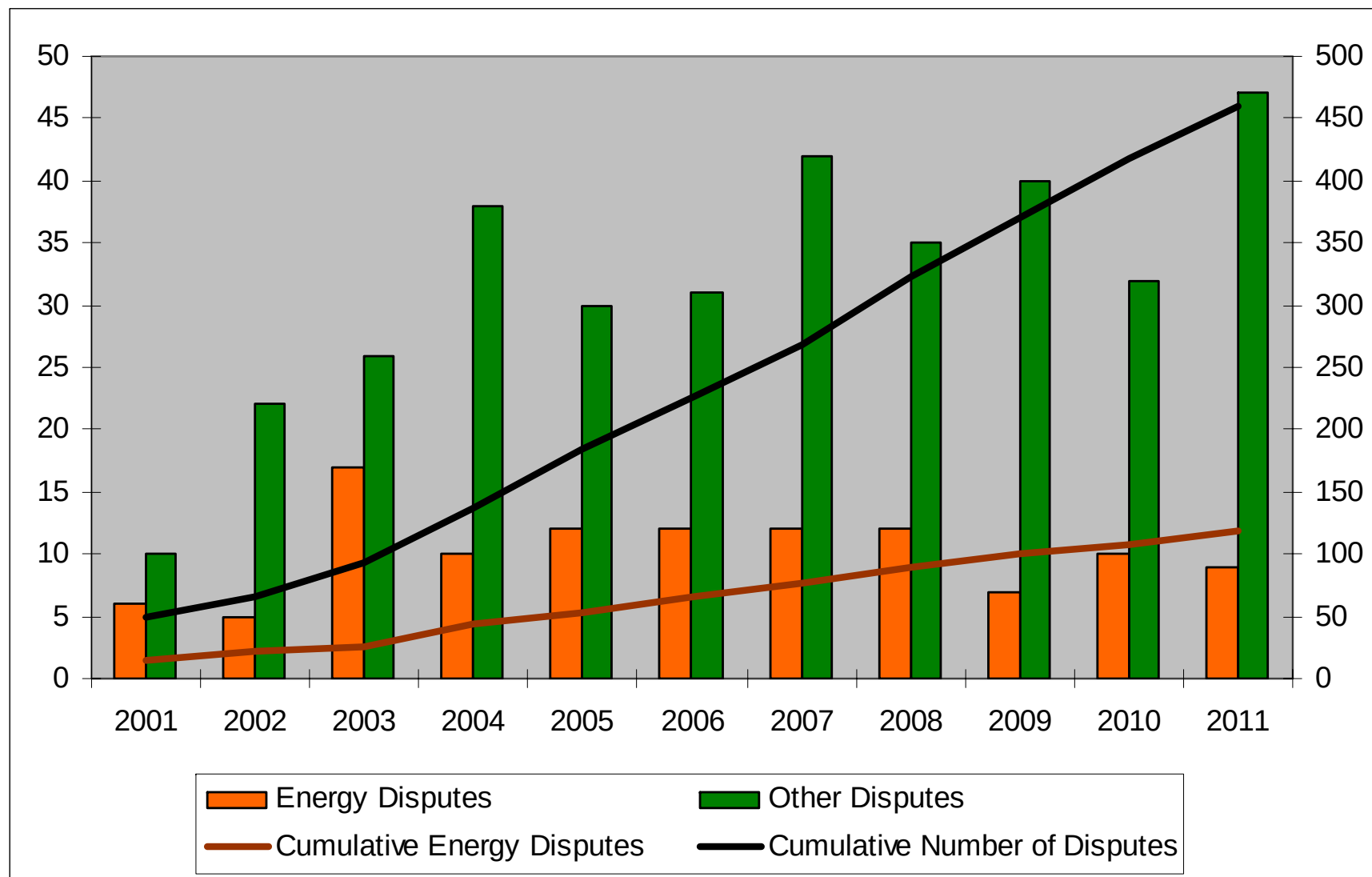
Recent examples of new investment liberalisation and promotion measures in the energy sector

- ☐ Approval of large-scale foreign acquisitions;
- ☐ Relaxation of approval requirement for FDI in subsoil resources;
- ☐ Privatisation of state-owned power generation and gas distribution companies;
- ☐ Granting of incentives to investments in unconventional energy resources.

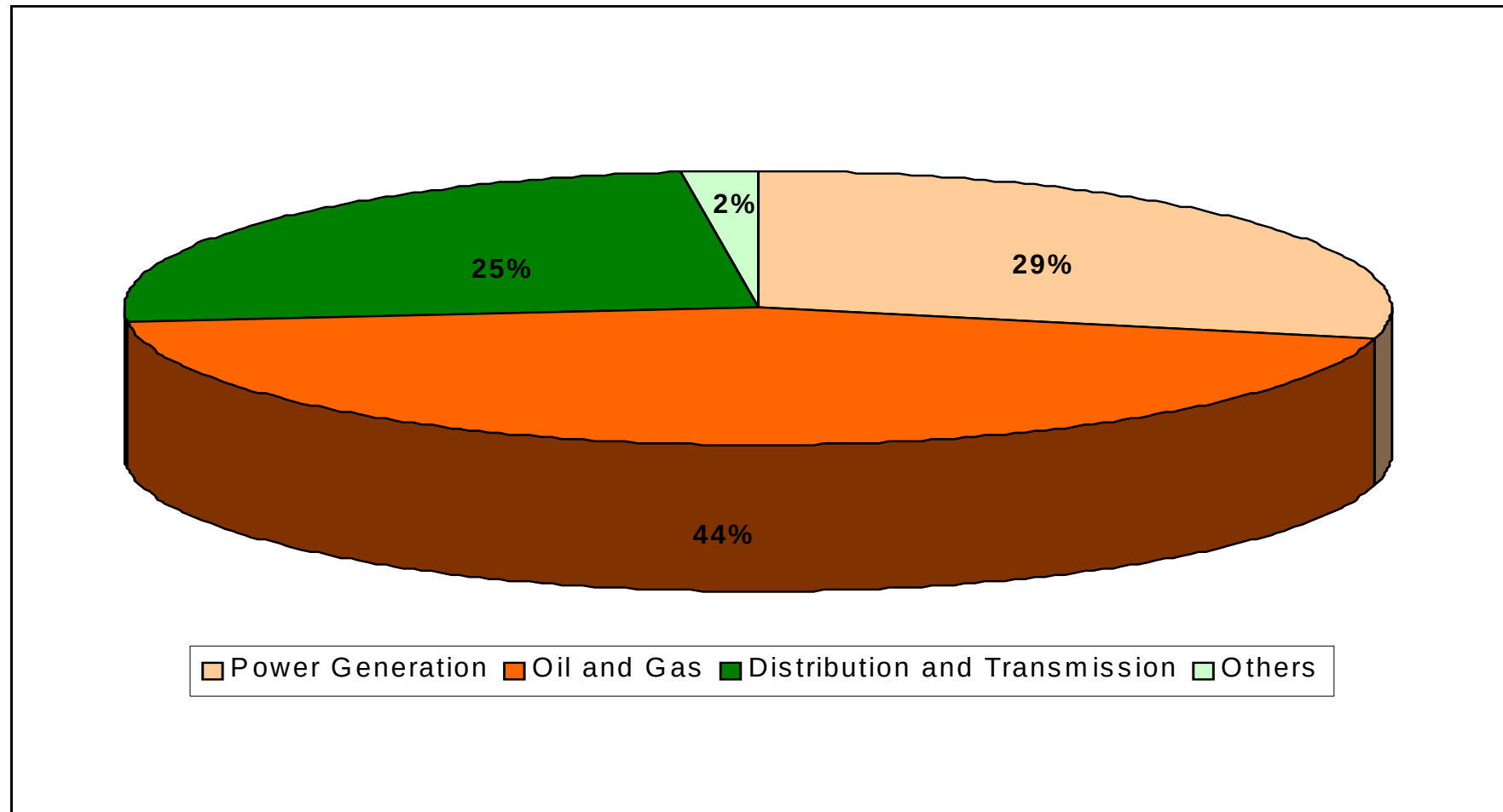
Recent examples of new investment regulations and restrictions in the energy sector

- ☐ Tightened screening requirements;
- ☐ Expropriations and nationalizations;
- ☐ Increases in taxes or royalties;
- ☐ Renegotiation of investment contracts;
- ☐ Exit from nuclear energy.

International investment arbitration on the rise



Investment arbitration in the energy sector (I)



Most FDI in the energy sector is covered by at least one type of IIAs

- ❑ BITs: More than 2,800. However, most of them are limited to post-establishment protection.
- ❑ Regional IIAs: Increasing in number and importance.
- ❑ ECT: Broad coverage of all policy aspects. However, many important oil and gas producer countries are absent.
- ❑ WTO (GATS, TRIMS): Cover (1) investment in services and (2) prohibit certain trade-related performance requirements.

How to balance private and public interests- A key challenge for IIA negotiators

1

Strengthening the development dimension of IIAs

- Safeguarding policy space for sustainable development needs
- Making investment promotion provisions more concrete and consistent with sustainable development objectives

2

Balancing the rights and obligations of states and investors

- Reflecting investor responsibilities in IIAs
- Learning from and building on CSR principles

3

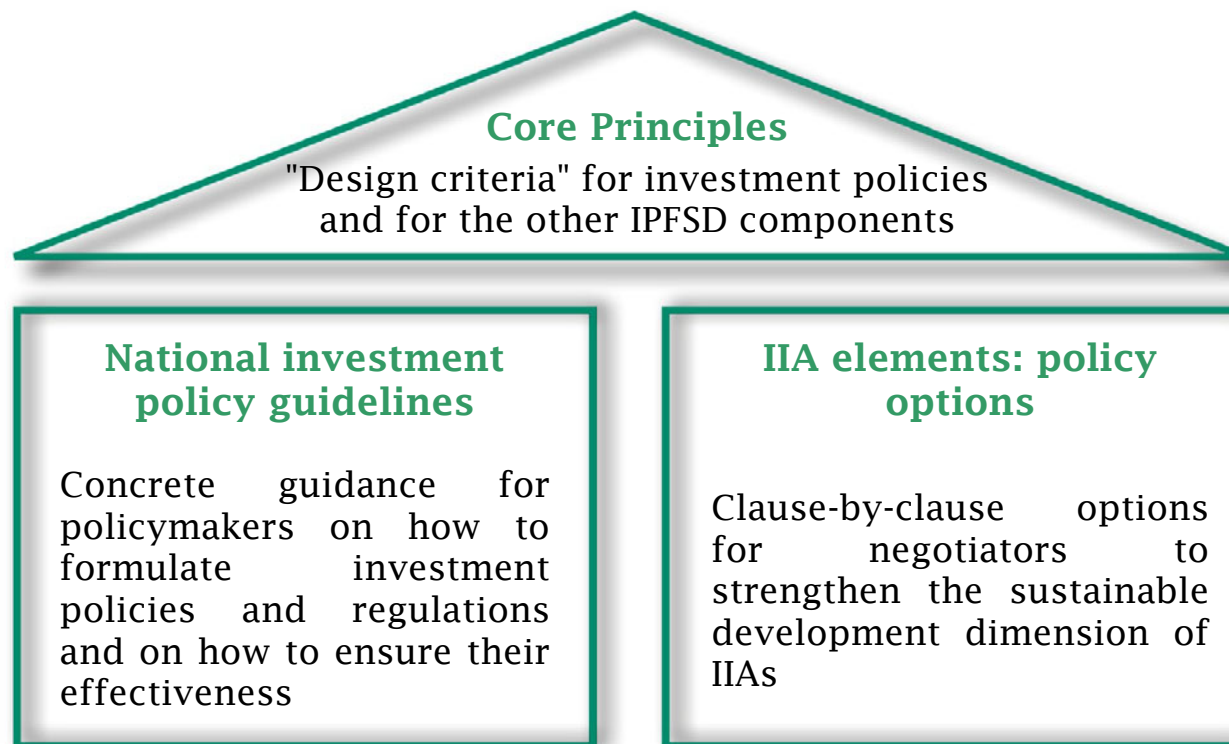
Managing the systemic complexity of the IIA regime

- Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues
- Ensuring effective interaction and coherence with other public policies and systems

Crucial policy issues for IIAs

- ☐ Entry rights - yes or no?
- ☐ Need for reservations and exceptions?
- ☐ Respect clause - yes or no?
- ☐ Interpretation of fair and equitable treatment clause;
- ☐ Issue of indirect expropriation;
- ☐ Access to international arbitration;
- ☐ Promoting non-binding standards on investor behaviour, such as the UN Global Compact, “Ruggie Principles”, ILO, OECD Guidelines, CSR codes.

UNCTAD's Investment Policy Framework for Sustainable Development helps policymakers address these challenges



Thank you

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