

# The Role of Bilateral Investment Treaties (BITs) in Investment Promotion

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TIPS

2015/02/17

# Definition

- **Bilateral Investment Treaties (BITs)**

- BITs are agreements between two countries for the reciprocal **encouragement, promotion and protection of investments** in each other's territories by companies based in either country.
- BITs are established through trade pacts such as FTAs

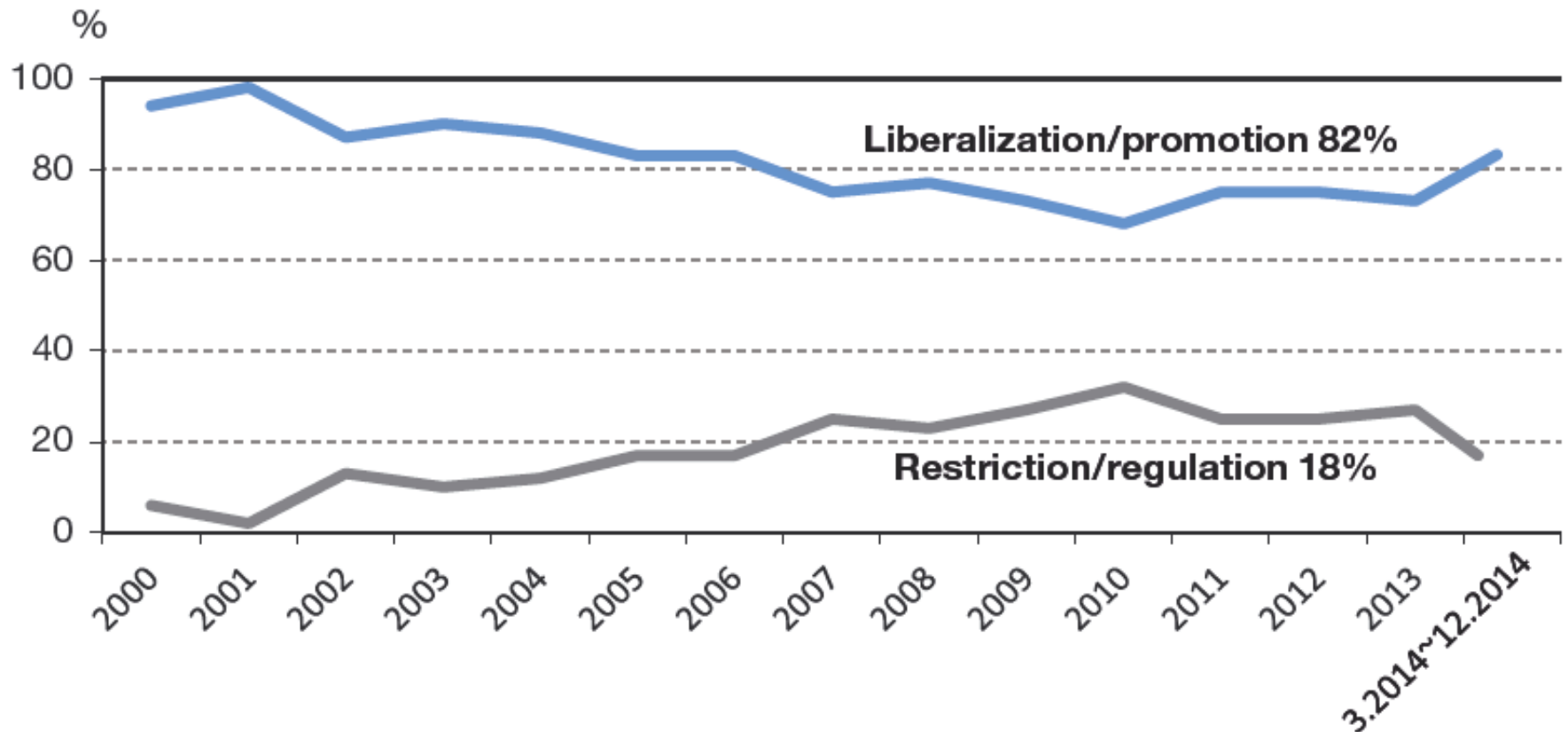
# Global View of BITs

- There are currently **2818 BITs (2116 are in force)**, involving most countries in the world
- Most BITs grant investments made by an investor of one contracting country in the territory of the other **a number of guarantees**, which typically include:
  - fair and equitable treatment,
  - protection from expropriation,
  - free transfer of means and full protection and security
- The distinctive feature of many BITs is that **they allow for an alternative dispute resolution mechanism**, whereby an investor whose rights under the BIT have been violated could have **recourse to international arbitration**, rather than suing the host country in its own courts

# Critique of BITs

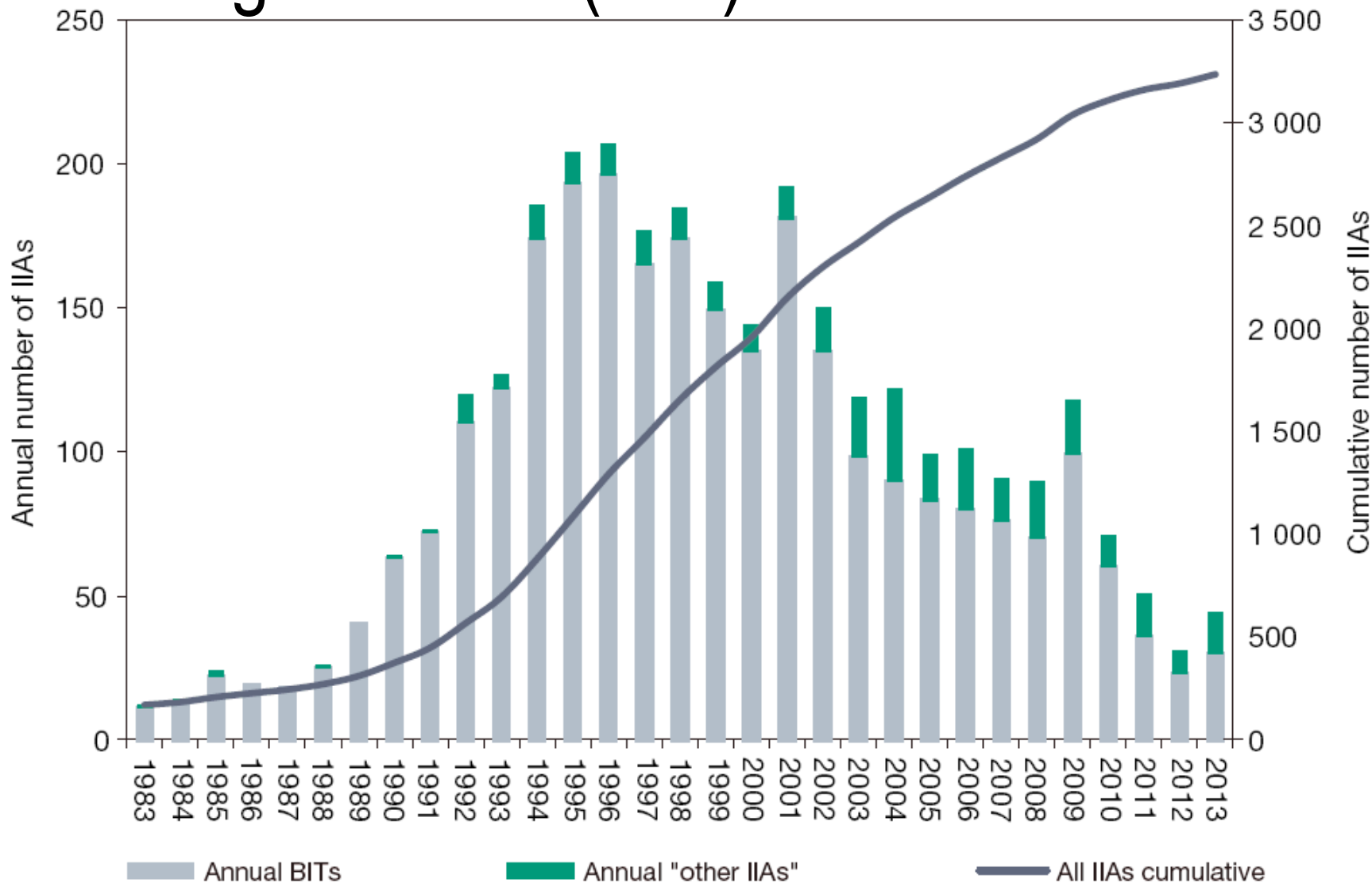
- BITs have been criticised for being **designed mostly to protect the foreign investors** and do not take into account obligations and standards to **protect the environment, labour rights, social provisions and/or natural resources**
- Moreover when such clauses are agreed upon the formulation is **legally very open-ended and unpredictable**
- Many governments are **not fully satisfied with the existing BITs**
  - Concerns relate mostly to the **development dimension of BITs, the balance between the rights and obligations of investors and States, and the systemic complexity** of the BITs regime
  - There has been a growing uneasiness about the actual effects of BITs in terms of **promoting FDI or reducing policy and regulatory space, increasing exposure to investors' claims and the lack of specific pursuit of sustainable development objectives.**
- Views on BITs are strongly diverse, even within countries.

# Changes in National Investment Policies – 2000 - 2014



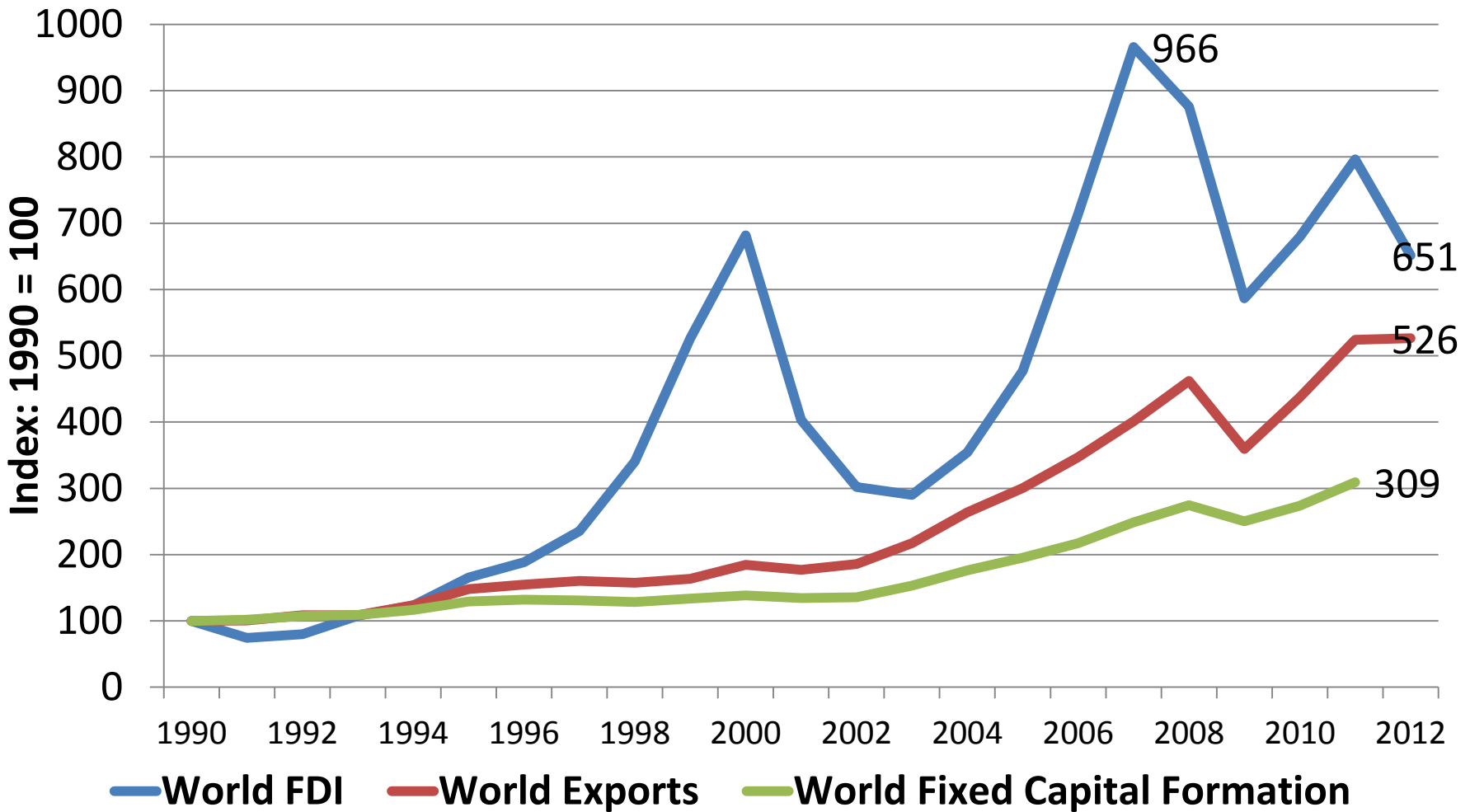
Source: UNCTAD (2015)

# Trends in International Investment Agreements (IIAs) – 1983 - 2013



Source: UNCTAD, World Investment Report (2014)

# Relative trends in the value of world FDI flows and exports in US dollars



Source: TIPS (2014)

# Top 10 Countries with number of BITs

No.	Country	<u>Total BITs *</u>	<u>Total Other IIAs *</u>
1	<a href="#"><u>Germany</u></a>	134 (127 in force)	64 (49 in force)
2	<a href="#"><u>China</u></a>	130 (106 in force)	17 (16 in force)
3	<a href="#"><u>Switzerland</u></a>	118 (112 in force)	31 (28 in force)
4	<a href="#"><u>United Kingdom</u></a>	105 (96 in force)	64 (49 in force)
5	<a href="#"><u>France</u></a>	103 (92 in force)	64 (49 in force)
6	<a href="#"><u>Egypt</u></a>	100 (72 in force)	13 (11 in force)
7	<a href="#"><u>Netherlands</u></a>	96 (90 in force)	64 (49 in force)
8	<a href="#"><u>Belgium</u></a>	93 (66 in force)	64 (49 in force)
9	<a href="#"><u>Luxembourg</u></a>	93 (66 in force)	64 (49 in force)
10	<a href="#"><u>Italy</u></a>	92 (73 in force)	64 (49 in force)
58	<a href="#"><u>South Africa</u></a>	41 (18 in force)	10 (8 in force)



# South Africa's BITs

<p>Paraguay (1974); UK (1994); South Korea (1995); Cuba (1995); France (1995); Denmark (1996); Austria (1996); Iran (1997); Mozambique (1997); Italy (1997); China (1997); Finland (1998); Czech Rep. (1998); Mauritius (1998); Greece (1998); Argentina (1998); Russia (1998); Sweden (1998)</p>	<p><b>In Force (18)</b></p>
<p>Canada (1995); Senegal (1998); Ghana (1998); Chile (1998); Egypt (1998); Uganda (2000); Brunei Daru. (2000); Rwanda (2000); Turkey (2000); Algeria (2000); Yemen (2002); Libya (2002); Tunisia (2002); Qatar (2003); Equitorial Guinea (2004); Israel (2004); DR Congo (2004); Congo (2005); Angola (2005); Tanzania (2005); Madagascar (2006); Ethiopia (2008); Zimbabwe (2009)</p>	<p><b>Signed (23)</b></p>
<p>Netherlands (1995); Germany (1995); Switzerland (1995); Belgium-Luxembourg (1998); Spain (1998)</p>	<p><b>Terminated (5)</b></p>

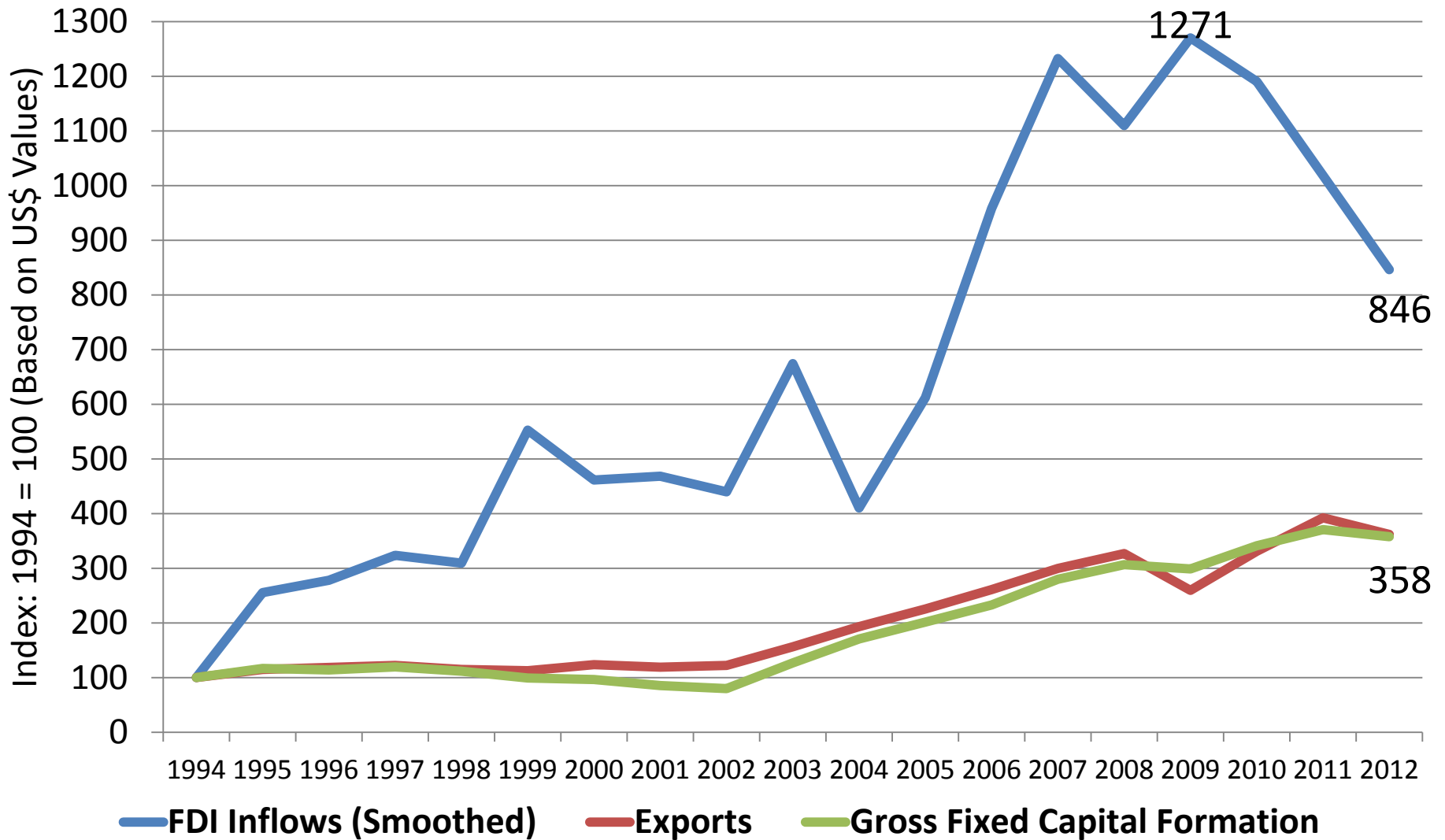
Source: Investment Policy Monitor (2015)

- Prior to 1994, South Africa had only one BIT signed and in force (*Paraguay, 1974*),
- Indicative that post 1994 South Africa was under immense pressure to show positive signs towards integration into the global market in order to attract investment

# SA FDI Inflows per Country – 2003 to 2013

Source Country		Projects	Capex - Rm	Avg Capex - Rm	Jobs Created	Avg Jobs	Companies	BITs Yes, No OR Cancelled?
1	UK	145	90 051.6	620.8	30 407	209	100	Y
2	United States	131	87 383.3	667.1	22 862	174	104	N
3	<b>Germany</b>	<b>57</b>	<b>35 248.2</b>	<b>618.3</b>	<b>17 930</b>	<b>314</b>	<b>45</b>	<b>C</b>
4	India	46	36 184.0	786.9	9 211	200	34	N
5	Australia	30	69 450.0	2315.3	12 715	423	20	N
6	Netherlands	25	7 427.9	296.8	2 527	101	21	C
7	Japan	24	27 467.4	1144.9	4 857	202	18	N
8	Canada	24	26 754.0	1115.1	6 866	286	19	N
9	France	24	14 473.1	603.4	2 479	103	19	Y
10	China	24	14 128.4	588.5	10 616	442	18	Y
11	Switzerland	23	17 281.1	751.4	12 916	561	15	C
12	Ireland	15	16 438.8	1096.1	1 082	72	8	N
13	Sweden	12	2 323.6	193.4	2 314	192	9	N
14	Italy	8	5 253.9	657.2	1 907	238	7	Y
15	Belgium	7	6 336.0	905.1	1 127	161	5	C
16	Luxembourg	7	5 758.2	822.5	1 399	199	5	C
17	Mauritius	6	4 289.3	715.0	535	89	3	Y
18	Norway	6	19 043.4	3174.2	363	60	6	N
19	Finland	6	3 207.2	534.8	348	58	6	Y
20	Spain	5	6 307.8	1261.4	548	109	4	N

# Trends in FDI inflows, exports and gross fixed capital formation for South Africa



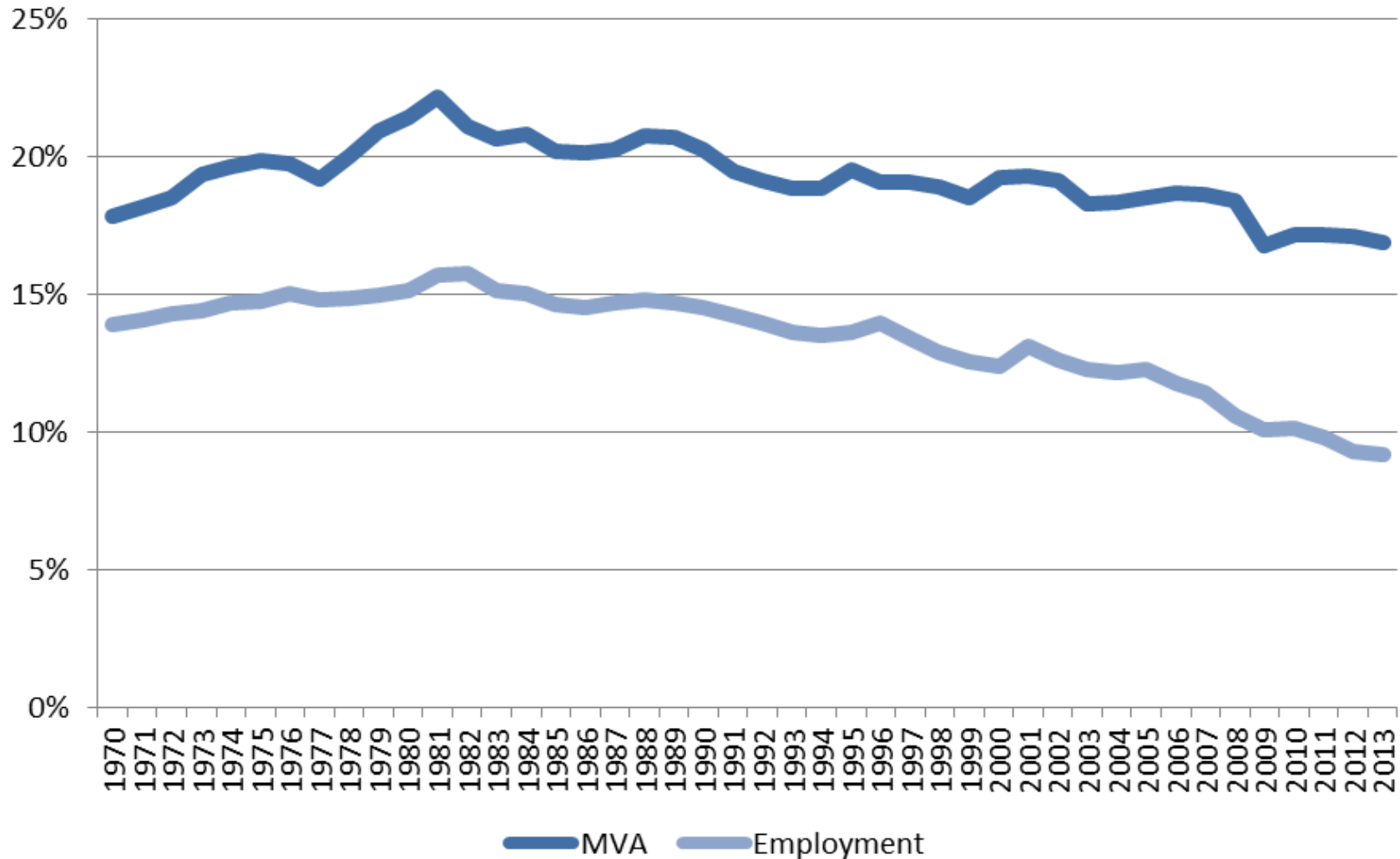
Source: TIPS (2014)

# SA FDI Inflows by Industry – 2003 to 2013

	Industry	Projects	Capex - Rm	Avg Capex - Rm	Jobs Created	Avg Jobs	Companies	Sector
1	Retail banking	52	6 307.0	121.5	1 320	25	27	Tertiary
2	<b>Automobiles</b>	<b>29</b>	<b>24 986.7</b>	<b>861.3</b>	<b>16 287</b>	<b>561</b>	<b>18</b>	<b>Secondary</b>
3	Corporate & investment banking	25	2 204.6	88.4	582	23	22	Tertiary
4	Accommodation	18	18 509.4	1028.3	4 444	246	12	Tertiary
5	<b>Heavy duty trucks</b>	<b>18</b>	<b>14 640.1</b>	<b>813.4</b>	<b>7 111</b>	<b>395</b>	<b>17</b>	<b>Secondary</b>
6	Custom computer programming services	18	5 882.1	326.5	3 895	216	15	Tertiary
7	Advertising, PR, & related	16	935.7	58.7	181	11	15	Tertiary
8	Professional, scientific & technical services	16	955.6	59.5	175	10	16	Tertiary
9	Software publishers, except video games	15	2 510.4	167.0	1 977	131	15	Tertiary
10	Other metal ore mining	14	21 682.8	1549.1	12 218	872	10	Primary
11	Solar electric power	14	28 239.4	2016.9	932	66	8	Tertiary
12	<b>Other motor vehicle parts</b>	<b>13</b>	<b>2 206.2</b>	<b>169.5</b>	<b>2 694</b>	<b>207</b>	<b>12</b>	<b>Secondary</b>
13	<b>Agriculture, construction, &amp; mining machinery</b>	<b>13</b>	<b>2 097.1</b>	<b>161.2</b>	<b>2 732</b>	<b>210</b>	<b>11</b>	<b>Secondary</b>
14	Other non-metallic mineral products	11	2 469.1	224.8	1 820	165	11	Primary
15	Wireless telecommunication carriers	11	13 485.3	1225.9	2 099	190	8	Tertiary
16	Business support services	11	632.4	57.9	3 033	275	9	Tertiary
17	Coal mining	11	33 783.5	3070.9	1 739	158	8	Primary
18	<b>Pharmaceutical preparations</b>	<b>11</b>	<b>2 705.5</b>	<b>246.3</b>	<b>852</b>	<b>77</b>	<b>6</b>	<b>Secondary</b>
19	Freight/Distribution Services	10	6 646.8	664.6	1 008	100	10	Tertiary
20	<b>Basic chemicals</b>	<b>9</b>	<b>9 745.7</b>	<b>1082.9</b>	<b>734</b>	<b>81</b>	<b>8</b>	<b>Secondary</b>

Source: FDI Intelligence (2014)

# MVA and Manufacturing Employment as a % of the SA Economy – (1970-2013)



# SA FDI Performance

- **2010:** Review of BITs, no more BITs will be negotiated
- **2011-13: 292 New FDI**, 120 re-investments, 40 disinvestments
- **2013: 100 New FDI**, 49 re-investments, 18 disinvestments – **after the 1<sup>st</sup> BIT cancellations**
- **1990-2000: 516 New FDI** deals were secured during this decade

*Source: Stephen Gelb (2014)*

# Investment Policy Framework for Sustainable Development (IPFSD)

Pooling UNCTAD's cumulative expertise on national and international investment policymaking, the *IPFSD* responds to a **fast-changing international investment landscape** where new issues relate to:

- Evolving economic geography
- Policy coherence and effectiveness
- Systemic flaws in the current system
- The need to mainstream "**sustainability**" in investment strategies
- To facilitate the development of a new generation of investment policies, the IPFSD addresses these new challenges **in line with the objective to make investment work for sustainable development and inclusive growth.**

The *IPFSD* consists of a **set of Core Principles** for investment policy-making and translates them into:

- Guidelines for national policies;
- Options for international investment agreements.
- The *IPFSD* is meant to be the point of reference for all investment stakeholders, gathering in one handbook a comprehensive list of options designed to support rule-makers in shaping modern investment policies.

# Conclusion

- SA's performance in **attracting FDI improved** over the 90s even when considering firm level decisions
- However, research has shown that attracting investment is **about more than BITs**
- SA should **consider regulations and policies** that balance effective protection of investment with measures that:
  - ensure FDI supports **national development**,
  - establishes **beneficial linkages** to the national economy,
  - augments **domestic financial resources**,
  - fosters **enterprise development**,
  - and **enhances the technology, skill and knowledge base** of the economy.