International Institute for Sustainable Development
Institut international du développement durable

http://www.iisd.org

International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals

Aaron Cosbey

September 2005

A Scoping Paper Prepared for the International Development Research Centre, Canada

© 2005 International Institute for Sustainable Development (IISD) and International Development Research Centre (IDRC)

Published by the International Institute for Sustainable Development

The International Institute for Sustainable Development contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and assessment, and natural resources management. Through the Internet, we report on international negotiations and share knowledge gained through collaborative projects with global partners, resulting in more rigorous research, capacity building in developing countries and better dialogue between North and South.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the Canadian International Development Agency (CIDA), the International Development Research Centre (IDRC) and Environment Canada; and from the Province of Manitoba. The institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.

International Institute for Sustainable Development
161 Portage Avenue East, 6th Floor
Winnipeg, Manitoba
Canada R3B 0Y4
Tel: +1 (204) 958-7700
Fax: +1 (204) 958-7710

E-mail: info@iisd.ca
Web site: http://www.iisd.org/

Table of Contents

1. Introduction 1
2. International Investment Agreements 2
3. Framework for Analysis: The Millennium Development Goals 3
4. Analysis 6
   4.1. Goal 1: Eradicate Extreme Poverty and Hunger 7
   4.2. Goal 2: Achieve Universal Primary Education 17
   4.3 Goal 3: Promote Gender Equality and Empower Women 18
   4.4. Goals 4, 5 & 6: Reduce Child Mortality, Improve Maternal Health, Combat HIV/AIDS, Malaria and Other Diseases 20
   4.5 Goal 7: Ensure Environmental Sustainability 25
   4.6 Goal 8: Develop a Global Partnership for Development 30
5. Conclusions 32
References 34

1. Introduction[1]

Since NAFTA's Chapter 11 and the OECD's Multilateral Agreement on Investment exploded onto the international economic law agenda in the mid 1990s, researchers, civil society groups and governments have been struggling to identify the linkages between international investment agreements (IIAs) and development. Recent analysis counts some 2,392 bilateral investment treaties have been signed, 1,718 of which are actually in force.[2] But the actual number changes quickly, with some three IIAs per week being negotiated in 2004.[3] As well, there is a mushrooming growth of investment rules in regional trade agreements, NAFTA being the first of this kind.

IISD and many other organizations believe that investment is a critical requirement if we are to move, globally, towards a more sustainable future. Investments are needed to add sustainable energy resources, sounder industrial processes, better natural resource use and harvesting processes, as well as to achieve the economic and social factors at the heart of the development agenda.

But the relationship between IIAs and sustainable development remains unclear. Even the more direct relationship between IIAs and investment—a fundamental aspect of the larger issue—is not straightforward. Traditionally, IIAs were seen and sold as a development tool; developing countries that sign IIAs with capital exporting countries were expected to see significant inflows of investments due to the protections for foreign investors that the agreements provide.[4]

Regardless of the merit of such claims (examined in detail below), they miss the wider question: do IIAs actually contribute to the host country development objectives? This broader question can be seen as covering at least three separate themes:

- Do IIAs actually attract investment?
- If so, does the resulting investment contribute to sustainable development?
- What other sustainable development impacts (beyond those related to investment flows) do IIAs have?

This paper takes these questions as a starting point, and asks what research to date has been devoted to answering them, looking for gaps and areas of recommended further work. But it takes an approach that differs from the vast body of legal research on IIAs available today, which takes the legal provisions as a starting point and tries to assess their impacts. Instead, it turns the analysis on its head and starts with a defined set of development objectives, and asks whether they are being fulfilled by IIAs.

---

[1] This paper benefited greatly from helpful suggestions and comments made by Howard Mann and Luke Eric Peterson. Of course, any remaining errors or deficiencies are attributable to the author alone.
[2] UNCTAD (2005)
[3] *Ibid.*
[4] Capital-exporting countries, for their part, had other motives including the protection of their investments abroad.

What is at stake is a sound understanding of the dynamic relationship between IIAs and development objectives. If the research agenda continues to be set by the legal issues, and those issues arise first and foremost in the context of protecting investor rights, significant dimensions for new and important research will be missed. Consequently, potential new approaches to defining the purpose and content of IIAs as a core part of the international economic law regime will also be missed.

This last point is critical. The form of the current IIAs is dictated primarily by the need to protect investor rights—an important goal, but not a broad one by the standards of sustainable development. If IIAs were to start not from the current state of the law and accept its propriety as given, but with the global development goals, then new thinking on the costs and benefits of IIAs could emerge, and new approaches to such agreements could be articulated. This paper is intended to start this process.

Instead of asking, "What impacts do existing rules have on domestic development policies?" this paper asks "Based on current global development goals, do IIAs contribute positively or negatively to their achievement?" The natural follow-up question in this context is "What changes or new directions are needed to ensure their positive contribution to the achievement of global development goals?"

This analysis takes as its starting point the Millennium Development Goals (MDGs) and their associated targets and indicators as the framework for analysis. The MDGs are not a static or unflawed starting point. But they do have the advantage of a large measure of acceptance as a set of priority development goals, and hence of an objective starting point for the kind of scoping exercise being proposed. The following section outlines some of the characteristics of IIAs as currently elaborated. The next section outlines the history and scope of the MDGs. After that the paper draws the links between the two, asking how each of the MDGs might potentially be affected by IIAs. This section also incorporates a literature review, looking for gaps in our current understanding on each of the questions posed. A concluding section summarizes what we have learned from the analysis.

2. International Investment Agreements

Some 2,300 international investment agreements have been signed (somewhat fewer are in force). Most of these are bilateral agreements specifically covering investment: bilateral investment treaties (BITs). A growing number are investment rules embedded in a broader regional or bilateral trade agreement, NAFTA's Chapter 11 being the pioneer of this genre.

The provisions vary from agreement to agreement, but many of the modern agreements share enough characteristics that they can be described in a general sense. All place obligations on host countries as to the treatment they should accord foreign investors establishing and/or operating investments in their countries. The standard list of obligations (again, not all present in all agreements) consists of:

- **Non-discrimination:** Host countries should not discriminate against foreign investors by according them treatment any worse than they accord nationals in like

circumstances (national treatment) or than they accord investors from any other country (most-favoured-nation treatment).

- **Minimum standards of treatment:** Most IIAs contain some obligation to accord foreign investors a (usually undefined) minimum standard of treatment, often characterized as minimum international standards of treatment, or fair and equitable treatment. This obligation is usually understood to relate to procedural fairness, and may also refer to standards dictated by customary international law.
- **Expropriation:** Most IIAs also prohibit expropriation of an investment, unless it is for a public purpose, is non-discriminatory, is in accordance with the due domestic legal process, and is adequately compensated in a timely manner. Expropriation is usually specified to include measures tantamount or equivalent to expropriation, but which is short of a physical taking of an enterprise.
- **Performance requirements:** Some IIAs also prevent host countries from enacting specified performance requirements. These are usually related to export performance or linkages to the domestic economy, and are set out as conditions of investment or continued operation. For example, many agreements prohibit demands to purchase local inputs, or demands to export a certain percentage of output.

Almost all modern investment agreements contain provisions that allow investors to compel their host states into binding arbitration over alleged breaches of these obligations.[5]

A purely legal view of the provisions described above paints a fairly unbalanced picture of rights and obligations, with the benefits tilted squarely toward the investors and away from their host states. If the agreement in question is between a capital-exporting state and a capital-importing state, we might ask why the latter would be interested in such a deal.

At least part of the answer is that IIAs are not simply legal in nature; they are seen by capital importing countries as a part of a broader strategy to foster economic development, including through increases in foreign direct investment. As such, the questions posed in this analysis are important, both in helping refine the strategies employed by such countries, and in helping to refine the template used in crafting international investment agreements.

3. Framework for Analysis: The Millennium Development Goals

The turn of the Millennium was an occasion for reflection on many fronts. For the international community concerned with human wellbeing it was a chance to reflect on the disappointing progress to date, and to urge the international organizations and their member states to greater effort.

[5] IIAs traditionally have been of this character, with developed countries exporting capital and developing countries importing it. However this dynamic has begun to change, and increasing numbers of developing countries are also becoming exporters of capital. The result is an increasing number of IIAs being negotiated between developing countries.

In that vein the UN General Assembly designated its 55th session, held in September 2000, the Millennium Assembly, and in conjunction with that Assembly held a Millennium Summit. 189 countries were represented, 147 of them by heads of state.

The Summit issued a Millennium Declaration that provided the background framework for a set of eight goals and their associated targets: the Millennium Development Goals. These goals, reproduced below in Table 1, amount to the most concrete and widely-accepted expression to date of the international community's development aspirations. They are far from perfect,[6] but they provide a useful point of reference for evaluating efforts toward global development and the elimination of poverty. In our case, they provide the starting point for our question: do IIAs foster development?

Table 1. The Millennium Development Goals

Goals and targets **(from the Millennium Declaration)**	**Indicators for monitoring progress**
Goal 1: Eradicate extreme poverty and hunger	
Target 1: Halve, between 1990 and 2015, the proportion of people whose income is less than less than one dollar a day	1a. Proportion of population below $1 (PPP) per day 1b. Poverty headcount ratio (% of population below the national poverty line) 2. Poverty gap ratio [incidence x depth of poverty] 3. Share of poorest quintile in national consumption
Target 2: Halve, between 1990 and 2015, the proportion of people who suffer from hunger	4. Prevalence of underweight children under-five years of age 5. Proportion of population below minimum level of dietary energy consumption
Goal 2: Achieve universal primary education	
Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling	6. Net enrolment ratio in primary education 7a. Proportion of pupils starting grade 1 who reach grade 5 7b. Primary completion rate 8. Literacy rate of 15–24 year-olds
Goal 3: Promote gender equality and empower women	
Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015	9. Ratios of girls to boys in primary, secondary and tertiary education 10. Ratio of literate women to men 15–24 years old 11. Share of women in wage employment in the non-agricultural sector 12. Proportion of seats held by women in national parliament
Goal 4: Reduce child mortality	
Target 5: Reduce by two-thirds, between 1990 and 2015, the under-five mortality rate	13. Under-five mortality rate 14. Infant mortality rate 15. Proportion of 1 year-old children immunised against measles
Goal 5: Improve maternal health	
Target 6: Reduce by three-quarters, between 1990 and 2015, the maternal mortality ratio	16. Maternal mortality ratio 17. Proportion of births attended by skilled health personnel
Goal 6: Combat HIV/AIDS, malaria and other diseases	
Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS	18. HIV prevalence among 15–24 year old pregnant women 19. Condom use rate of the contraceptive prevalence rate

[6] See, for example, IIED analyses

	19a.Condom use at last high-risk sex 19b.Percentage of population aged 15-24 with comprehensive correct knowledge of HIV/AIDS 19c. Contraceptive prevalence rate 20. Ratio of school attendance of orphans to school attendance of non-orphans aged 10–14
Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases	21. Prevalence and death rates associated with malaria 22. Proportion of population in malaria risk areas using effective malaria prevention and treatment measures 23. Prevalence and death rates associated with tuberculosis 24. Proportion of tuberculosis cases detected and cured under directly observed treatment short course
Goal 7: Ensure environmental sustainability	
Target 9: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources	25. Proportion of land area covered by forest 26. Ratio of area protected to maintain biological diversity to surface area 27. Energy use (kg oil equivalent) per $1 GDP (PPP) 28. Carbon dioxide emissions (per capita) and consumption of ozone-depleting CFCs (ODP tons) 29. Proportion of population using solid fuels
Target 10: Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation	30. Proportion of population with sustainable access to an improved water source, urban and rural 31. Proportion of urban and rural population with access to improved sanitation
Target 11 By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers	32. Proportion of households with access to secure tenure
Goal 8: Develop a global partnership for development	
Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system Includes a commitment to good governance, development, and poverty reduction – both nationally and internationally Target 13: Address the special needs of the least developed countries *Includes: tariff and quota free access for least developed countries' exports; enhanced programme of debt relief for HIPC and cancellation of official bilateral debt; and more generous ODA for countries committed to poverty reduction*	*(Some of the indicators listed below are monitored separately for the least developed countries (LDCs), Africa, landlocked countries and small island developing States.)* ***Official development assistance*** 33. Net ODA, total and to LDCs, as percentage of OECD/DAC donors' gross national ***Income*** 34. Proportion of total bilateral, sector-allocable ODA of OECD/DAC donors to basic social services (basic education, primary health care, nutrition, safe water and sanitation) 35. Proportion of bilateral ODA of OECD/DAC donors that is untied 36. ODA received in landlocked countries as proportion of their GNIs 37. ODA received in small island developing States as proportion of their GNIs ***Market access*** 38. Proportion of total developed country imports (by value

Target 14: Address the special needs of landlocked Countries and small island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly)	and excluding arms) from developing countries and LDCs, admitted free of duties
	39. Average tariffs imposed by developed countries on agricultural products and textiles and clothing from developing countries
	40. Agricultural support estimate for OECD countries as percentage of their GDP
Target 15: Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term	41. Proportion of ODA provided to help build trade capacity ***Debt sustainability*** 42. Total number of countries that have reached their HIPC decision points and number that have reached their HIPC completion points (cumulative) 43. Debt relief committed under HIPC initiative, US$ 44. Debt service as a percentage of exports of goods and services
Target 16: In co-operation with developing countries, develop and implement strategies for decent and productive work for youth	45. Unemployment rate of 15-24 year-olds, each sex and total
Target 17: In co-operation with pharmaceutical companies, provide access to affordable, essential drugs in developing countries	46. Proportion of population with access to affordable, essential drugs on a sustainable basis
Target 18: In co-operation with the private sector, make available the benefits of new technologies, especially information and communications	47. Telephone lines and cellular subscribers per 100 population 48a. Personal computers in use per 100 population and Internet users per 100 population 48b. Internet users per 100 population

What sorts of linkages can we draw between the MDGs and IIAs? Clearly not all of these goals are significantly affected, either directly or indirectly, by investment agreements, or even by FDI more broadly. What follows is a framework for analysis that tries to lay out the various "impact pathways" by which we might see IIAs having some effect.

4. Analysis

This section will consider in turn each of the eight MDGs, and for each asking how IIAs might affect their achievement. For each goal this section will then give some supporting rationale for the questions posed, and will survey the literature to draw out the state of the relevant research.

4.1. Goal 1: Eradicate Extreme Poverty and Hunger

Goal 1: Eradicate extreme poverty and hunger	
Target 1: Halve, between 1990 and 2015, the proportion of people whose income is less than less than one dollar a day	1a. Proportion of population below $1 (PPP) per day[a] 1b. Poverty headcount ratio (% of population below the national poverty line) 2. Poverty gap ratio [incidence x depth of poverty] 3. Share of poorest quintile in national consumption
Target 2: Halve, between 1990 and 2015, the proportion of people who suffer from hunger	4. Prevalence of underweight children under-five years of age 5. Proportion of population below minimum level of dietary energy consumption

The linkages here are potentially some of the most important, and they are referenced repeatedly in connection with other goals below. As such, this set of linkages is surveyed in greater depth than many of the others presented below.

But they present some degree of challenge. There is a nascent literature on the impacts of IIAs on investment. There is a large and well-established literature on the impacts of investment on growth. And there is a mid-sized body of more controversial literature on the relationship between growth and poverty. Stringing the three together to obtain some sort of causal link is no mean feat, and to our knowledge has never been attempted.[7] As such, this paper will examine the body of existing literature on these three questions in turn (also considering a few "satellite" issues), eventually bringing it all together to see how strong any resulting conclusions can be.

It was noted above that one of the key reasons developing countries negotiate IIAs is the expectation that they will attract investment, and that investment in turn will foster development. Most conceptions of development involve (but go further than) poverty reduction, either in an absolute or a relative sense, and many definitions of poverty go much wider than lack of income.[8] But in the context of the first MDG, the understanding is that we are defining poverty narrowly as low income, and focusing on raising incomes as an important element of development.

The primary relationship between FDI and alleviating hunger also comes through its potential income effects, and for the purposes of analyzing the first MDG we will treat hunger and poverty together as a single problem (while recognizing that they are distinct challenges).

There are two lines of questioning to pursue in analyzing the links between MDG 1 and IIAs. The first relates to the expected dynamic: the connection between IIAs and investment, and between FDI and development.

- Do IIAs foster incremental FDI?
- If so (and even in the case of uncertainty):
    - Does FDI lead to economic growth?

[7] Jalilian and Weiss (2002) string the last two threads together, asking about the relationship between FDI and poverty. Even that analysis is rather groundbreaking.
[8] One of the most compelling and influential recent arguments to this effect is found in Sen (1999).

- What are the impacts of FDI on income distribution and poverty reduction?
- Do IIAs prohibiting capital controls contribute positively or negatively to economic stability?
- Do performance requirements effectively foster economic development?

The second line of enquiry asks about the relationship between IIAs and affirmative action programs that may have as one of their objectives the alleviation of poverty:

- Could affirmative-action type programs be challenged under IIAs?

Do IIAs foster incremental FDI?

Much hinges on the first question: do IIAs attract investment? If they do not, then there is no need to carry on to further analysis of the type and impacts of the investment attracted. Indeed, some early studies seem to show no discernable link at all between BITs and investment flows. UNCTAD (1998) performed both a panel dataset analysis covering FDI in the periods before and after the signing of some 200 BITs, and a cross-sectional analysis of 133 countries aimed at determining whether there was a correlation between the number of BITs signed and increased investment. The first analysis found a positive but minimal influence from the signing of BITs. But the analysis is not overly careful about isolating the effects of the BITs from other influences such as the growing global flows of FDI over time. The second analysis found no significant influence of BITs on flows of FDI, but results from such cross-sectional studies need to be taken with caution.

A much more rigorous analysis was undertaken by Hallward-Driemeier (2003) in the context of OECD FDI flows to some 31 developing country hosts, covering the period 1980 to 2000. She finds that while FDI covered by BITs grew significantly over that period, this was explained by the fact that such a large number of BITs came into force, rather than by the power of those agreements to foster increased FDI. FDI was positively influenced by openness and market size, and negatively influenced by instability (inflation is used as a proxy). But the coefficient for BITs was negative and insignificant. Further tests show those countries with strong domestic institutions are more likely to actually benefit from the signing of a BIT: "BITs act as more of a complement than a substitute for domestic institutions," (p. 23).

Tobin and Rose-Ackerman (2005) come up with similar results, in two fixed effects models that cover 63 countries over the same time period. They find a negative relationship between BITs and FDI (as a share of world FDI) in situations of high risk (most developing countries, in their study), and a positive relationship only at low levels of risk – again seeming to show that BITs do not substitute for strong domestic institutions. They also find no significant relationship between signing US BITs and increased FDI flows.

Other studies arrive at different conclusions. Salacuse and Sullivan (2005) conduct a time series and a cross-sectional analysis. The former – a fixed effects study – looks at US investment in response to US BITs in 31 countries over ten years. It finds a strong positive effect. But this study does not include a policy effects variable, missing the impact of institutional changes in Mexico over the period of NAFTA accession. It also fails to include China, which received significant investment but had no US BIT.

The cross-sectional study looks at aggregate FDI inflows in over 100 developing countries in three years. It finds a strong impact of US BITs when the number of OECD BITs is below the mean, but an insignificant impact when OECD BITs are above the mean, suggesting diminishing returns to additional BITs. US BITs, which have stronger protections, are more significant than OECD BITs. This type of study, however, cannot capture the variables in any given country that may be affecting FDI inflows, and is therefore not particularly useful in answering the most important questions.

A more definitive answer is found by Neumeyer and Spess (2005), who analyze aggregate investment flows to developing countries as a result of BITs in a 119 country study. They weight the importance of BITs according to the partner's global share of capital exports. They find that BITs are significant attractors of FDI from all countries (not just from signatories), indicating a signalling effect, but they also find an impact on signatory country outflows. They find a diminishing marginal return to signing more BITs. The results are robust to a number of sensitivity analyses.

Gallagher and Birch (*forthcoming*) use fixed effects regressions to analyze FDI flows to Latin America and the Caribbean between 1980 and 2001, looking separately at US investment in response to US BITs and at total FDI in response to total BITs signed. They find that some limited evidence that FDI increases with total number of BITs signed, but that US BITs have no significant impact on levels of US investment.

Banga (2005) finds that inflows of FDI to 15 developing countries in Asia is significantly affected by BITs, but only by BITs with developed countries. Egger and Pfaffermayr (2004) look at OECD outward FDI stocks in developing and OECD countries, and find that ratification of BITs has a significant impact on them (whereas simply signing a BIT has almost none).

In attempting to answer the question: do IIAs attract more FDI, we are left with some uncertainty. The message seems to be at least in part that the initial question is too simple. It matters, first, what kind of BIT we are talking about. The strong significant findings in Sallacuse and Sullivan are, the authors argue, probably due to the fact that their topic of study is US BITs, rather than BITs in general. These agreements are in the distinct minority of IIAs that go further than investment protection (guarantees of fair treatment after the investment has arrived) to actual liberalization (guarantees of market access, for example through pre-establishment national treatment). As such, they actually dismantle barriers to inward investment. It would perhaps not be surprising that such agreements have a stronger effect than BITs that focus just on investment protection. While this argument is intuitively appealing, both Gallagher and Birch, and Tobin and Rose-Ackerman find no correlation of the type found in the Salacuse and Sullivan study.

In a similar vein, the Egger and Pfaffermayr study points out the significant differences between BITs that have been ratified and those that have not. The difference here is likely due to the fact that when ratification occurs, it must be accompanied by actual legal changes in country to bring the investment regime in line with the new obligations. This kind of action will usually be a force for making the host country more investment friendly.

This leads to another thread common to many of the studies: the importance of domestic institutions. This is obvious in the Hallward-Driemeier study, and in the Rose-Ackerman and Tobin studies; both found BITs to be no substitute for domestic institutions. However, it can also be found in other studies, including the Egger and Pfaffermayr findings, where the institutional changes wrought by ratification may be the influencing variable. As well, Neumeyer and Spess' funding that incremental BITs have a diminishing return in the form of new investment (also found by Sallacuse and Sullivan), and that BITs are important in attracting FDI even from non-partners, might reflect the fact that institutional changes made in response to ratifying a single agreement will tend to make the host more attractive for *all* investors. This speculation runs counter to the findings of Hallward-Driemeier and Tobin and Rose-Ackerman that BITs have no significant effects on FDI in the first place.

It is, however, worth asking whether BITs themselves have an impact on domestic institutions such as rule of law and governance. If they act to improve them (as per the suggestion from the Egger and Pfaffermayr results), then they might also act to increase FDI flows, and have broader benefits relative to the MDGs. In fact there is some possibility that they do not. Tobin and Rose-Ackerman note that:

> "The trade literature has demonstrated that foreign investors have a great deal of power in host country political decisions. Thus, in the absence of BITs, these investors might be advocates of broader reforms that could benefit all investors. In contrast, a world with BITs might reduce the interest of MNCs in property rights reform and enforcement in developing countries. Domestic reform may be less likely and the country may even regress toward policies that harm domestic investors." (p. 11)

They further note that even where BITs might be a force for institutional reform, that reform might be solely focused on improving conditions for foreign investors, to the exclusion of benefit for domestic investors. Given the importance of domestic investment to most countries, and particularly to those least-developed countries with little FDI, this would be a concern. Their results do not refute either possibility. Ginsburg (2005) finds preliminary evidence to indicate the possibility that BITs do in fact erode the quality of the rule of law in host developing countries, speculating that the dynamic is just as mooted by Tobin and Rose-Ackerman, above.

More research is clearly needed on all facets of this discussion: do BITs attract FDI? Are there important differences between traditional BITs and those that include liberalization provisions? Do BITs substitute for strong domestic institutions, or might they in fact erode them in important ways? Do BITs work to improve or worsen the climate for domestic investment? On the basis of the literature examined above we cannot draw solid conclusions. In any case, we have not *ruled out* the possibility that IIAs foster increased FDI, and can therefore continue the line of analysis that asks about the impacts of the additional FDI that IIAs might bring.

Does increased FDI lead to economic growth?

The answer is important since, while growth is not development, it is an important ingredient of development, particularly when the issue at hand is poverty alleviation and freedom from hunger.

In a recent survey of the prominent empirical evidence on all types of investment flows, Prasad *et al.* (2003: 23) find that "it has proven difficult to empirically identify a strong and robust causal relationship between financial integration and growth." They explain this by hypothesizing the importance of "social infrastructure" (such as governance, rule of law, respect for property rights) as a necessary complement to openness. Cosbey (2002) makes a similar argument, based on the results of a number of surveys of investors and potential investors.

However, they found that when the varieties of investment are disaggregated it seems that foreign direct investment (FDI), alone among the types of investment, might be associated with higher growth. Even this finding, however, is subject to question; they base this conclusion on a limited number of studies, at least one of which requires other factors (i.e., sufficient human capital) to derive the result.

Carkovic and Levine (2002), in an analysis of data from a large number of countries, took particular pains to control for the problems of endogeneity – the prospect that growth and other related factors (such as human capital) in country are what drives FDI, rather than the other way around.[9] Their results indicate that there is no relationship between FDI and economic growth that is independent of other determinants, such as trade openness and black market premiums (an indicator that could be interpreted as testifying to the weakness of macroeconomic management). That is, the observed correlation between FDI and growth was not a case of the former causing the latter, but rather FDI was being attracted by factors related to growth. Lipsey (2000), in a seminal study, is also careful to control for such problems, but finds the opposite: that growth causes increased FDI.

Gallagher and Zarsky (2004) surveyed twelve studies linking FDI and growth, and found that the clear majority (8 of 12) concluded "it depends." The deciding factors seemed to be domestic circumstances (the achievement, of example, of a certain level of development, education, etc.), domestic institutions or domestic policies. A number of studies not included in their survey have similar findings. Hermes and Lensink (2003), in a 67-country study, find that the development of a sound financial system is a prerequisite to economic growth from FDI. Zang (2001) finds that FDI is more likely to foster growth in the context of a liberalized trade regime, an educated workforce, macroeconomic stability and export-promoting policies.

Agosin and Mayer (2000), in a recent exhaustive survey of developing country experience with FDI from 1970 to 1996 found that in many cases it actually crowded out domestic investment. The effect was particularly pronounced in Latin America but the reverse was true in South-East Asia, a finding supported by Kim and Seo (2003). The authors speculate that the difference might be an inclination for choosiness, and mechanisms for investment

[9] Kim and Seo (2003) find evidence of just such a dynamic in Korea for the period from 1985 to 1999.

screening. Based on a survey of a dozen studies, Gallagher and Zarsky (2004) find that both crowding out and crowding in are possible, but that most studies indicate the need for host countries to attain certain threshold level of development, or to maintain certain policies or institutions in order for crowding in to occur.

All in all, the relationship between FDI and economic growth does not seem straightforward. There is certainly no consensus on the former causing the latter, and some analysts contend that the relationship works in the other direction. At best we can say that FDI is one of several necessary elements that can lead to economic growth.

What are the impacts of FDI on income distribution and poverty reduction?

If our concern is the alleviation of extreme poverty and the end of hunger, we need to be concerned not just about economic growth, but about the location of that growth. If aggregate GDP increases but inequities increase, we might be worse off than before. If the reverse occurs, then FDI may have in fact contributed to the achievement of the first MDG. The next question in our line of analysis is the relationship between FDI and income distribution/poverty alleviation.

The literature on FDI and income equity seems to present a consensus view. Feenstra and Hanson (1997), using state-level data from Mexico, find that increased FDI is associated with increased wage inequality, specifically with the relative rise in wages for skilled labour. They attribute this result to the bias of FDI toward skill-based technologies, and the associated increase in demand for skilled labour. Behrman, Birdsall and Székely (2000), based on an 18-country study in Latin America, come to the same conclusions, though their study looks at capital account liberalization rather than FDI flows. Zhao (2001) also finds this effect in China's labour market, but attributes it to a segmented labour market, and high labour costs of mobility. Gardiner (2000) agrees that a segmented labour market is likely to cause inequalities between groups to worsen. TeVelde and Morissey (2002) explain the same sorts of findings (in the context of Africa) by reference to a disparity in negotiating skills.

The Overseas Development Institute (2002) surveys the evidence (albeit using very few studies as a basis) and finds that while wage levels rise for all workers, they rise much more for skilled workers. The differentials found are significant. For example, one study surveyed found that in Mexico foreign investors paid 22% more than domestic firms to skilled workers, but only 3.3% more to unskilled. Te Velde (2003) similarly found, in a more recent survey of the evidence, that skilled workers benefited more than unskilled from FDI, but cautioned that business and government policies, and the specifics of the sectors involved, make a difference. In general he found it likely that FDI had perpetuated inequalities.

On the basis of what evidence there is, we can suggest that FDI tends to exacerbate income inequalities, but does increase absolute wage levels in even the unskilled workers among which the poor obviously number. However, the first MDG talks about impacts on *extreme* poverty and hunger. Nunnenkamp (2004:667) argues that "it is questionable that FDI benefits the poorest segment of the population working in the informal sector. Employment in the informal sector may even increase if foreign investors acquire local firms and shed unqualified labour as a consequence of labour-saving technological progress." This is a convincing line of argument, and it has been shown in some studies that FDI does tend

to favour capital-intensive production processes (Jenkins, 1986). But in absence of any empirical evidence one way or another, it must remain an open question.

One way in which FDI might combat extreme poverty is through job creation, and here there is some limited evidence that FDI is responsible for significant amount of employment creation (Aaron 1999, cited in Jenkins and Thomas, 2002). Jalilian and Weiss (2002) find (but not outside ASEAN) that FDI has two components leading to poverty alleviation, one of which is the raising of aggregate income (trickle down effect) and the other of which is direct effects, which they speculate includes direct employment. Jenkins and Thomas (2002) assert that FDI may be a "key source of employment for women in developing countries." If this is true, given that increased income for women is generally an effective attack on poverty (Cotton and Ramachandran, 2001), FDI may in this way help achieve the first MDG. Evidence on this question is not exactly abundant, however.

Do IIAs prohibiting capital controls contribute positively or negatively to economic stability?

Most of the recent IIAs signed by the United States have provisions that prohibit capital controls. Their target is restrictions on entry of investment and lending, and on repatriation, such as taxes on outflows from portfolio investment, bonds, bank lending; or repatriation restrictions/reinvestment requirements on proceeds of direct investments. Capital account liberalization dismantles these restrictions, though there are a variety of approaches to doing so, and not all components of the capital account need be liberalized (Johnston, 1998).

Cobham (2001) surveys the literature on this question and finds no evidence for capital account liberalization resulting in any sort of beneficial growth effects. On the other hand, he finds a number of ways in which it might in fact contribute to or exacerbate poverty, particularly by exposing the poor to the detrimental effects of financial crises (primarily in terms of reduced government spending and as a result of inappropriately tight fiscal policy). He also notes that government revenues (that could be devoted to pro-poor policies and measures) suffer due to the costs of managing investment inflows, and program spending may suffer directly from the imposition of market discipline by foreign investors. Behrman, Birdsall and Székely (2000) find that capital account liberalization contributes to increased wage differentials between skilled and unskilled workers. Citing the danger of fickle short-term capital flows (primarily bank lending, but also covering portfolio investments), The Economist (2003) concluded, "In negotiating new free-trade arrangements with Chile (and with Singapore), the United States has recently sought assurances of complete capital-account liberalisation. Bitter experience suggests that such demands are a mistake. It is past time to revise economic orthodoxy on this subject." This thinking draws on arguments put forward by Bhagwati (1998) and others, who argue that liberalization in goods is very different from liberalization of capital, and that the latter adopted *in extremis* holds many risks for developing countries.

Schneider (2000) argues that the opening of developing countries' capital accounts is not a choice, but a necessity in a world of multinational business, and the new technologies in information, communications and banking. He notes the benefits that successful liberalization can bring, including increased liquidity and decreased interest rates for domestic entrepreneurs and governments. He also argues that, in the context liberalized

trade capital account controls are ultimately ineffective, as firms will finds ways to remit capital through the current account (e.g., through transfer pricing) . The challenge then becomes liberalizing in such a way as to minimize the very real risks. His survey of developing country experiences shows that capital account liberalization must be undertaken gradually, after current account liberalization, and as part of a broader effort to reform aiming for improved labour markets, financial sector institutions, macroeconomic stability and financial regulatory capacity. He argues for certain types of controls during the transition period, and some emergency types in the longer-term.

The prevailing wisdom seems to be that capital controls might serve some purpose, but in any event should be phased out only in a sequenced manner, and only in the presence of a number of prerequisite factors. The OECD Code of Liberalization for Capital Movements allows for certain types of restrictions where the economic and financial state of the host country so dictate, and for controls to stem balance of payments problems. Absent any sort of mechanisms in IIAs to assess or build the requisite capacity in developing country negotiating partners, it would seem that barring capital controls (particularly limited emergency controls and transition measures) would be unwise. In terms of the first MDG, it might frustrate poverty alleviation by working against stability and economic growth.

Do performance requirements effectively foster economic development?

As noted in the previous section, the typical modern BIT prohibits performance requirements, the ostensible purpose of which is economic development. The argument for this is two-fold: first, performance requirements are deterrents for foreign investors, imposing conditions on them that they would prefer to be free of, and second, they are ineffective in any case. On the first argument there is not much to say; if the argument is true, then the market will discipline those states that are foolish enough to use these sorts of instruments.

On the second argument there has been some good empirical work. Moran (1999, 2001), for example, finds that certain types of performance requirements do not work (primarily those associated with joint venture, domestic content and technology sharing requirements), and that in fact they are harmful to the host country's development. On the other hand, he finds evidence of the efficacy of export-related performance requirements. He argues strongly that wholly owned subsidiaries that are integrated into the parent's global marketing strategy, exporting to a world market, offer extensive benefits to the host country. He cites evidence of extensive coaching and capacity building aimed at local suppliers, cutting edge technology and management practice and other dynamics that make such operations preferable to those that sell only to domestic market. Thus, he argues, there is some compelling logic behind certain types of export-oriented performance requirements, designed to foster this type of investment.

Zampetti and Fredriksson (2003) find the evidence on performance requirements mixed, though their analysis is much less thorough. UNCTAD (2003) looks at a number of case studies and finds that "a number of the performance requirements reviewed have helped a number of countries meet different development objectives." The study is rather negative on the effectiveness of joint venture and technology sharing requirements, as is Moran. Again in agreement with Moran's analysis, it finds that export requirements in fact can be highly

effective in forcing FDI to generate more economic benefit to the host country. If there are indeed some economic benefits to be derived from appropriate use of performance requirements then it would seem unwise to ban them, and would of course potentially frustrate the achievement of the goal of poverty reduction.

Could affirmative-action type programs be challenged under IIAs? [10]

The final question asks whether affirmative action programs, which could be used to fight poverty and inequity, might be challenged under IIAs. In societies where different ethnic groups face large disparities in the socio-economic prospects, policy measures may be taken to ameliorate the conditions which contribute to such disparities. Perhaps most visible among recent efforts of this type has been the system of Black Economic Empowerment (BEE) introduced in the Republic of South Africa. Owing to the systemic and long-term exclusion and marginalization of blacks from the South African economy in the period prior to 1994, South African society continues to be characterized by stark race-based disparities in wealth, education and employment. Through a comprehensive range of policy measures and initiatives the BEE scheme seeks to "bring about significant increases in the numbers of black people that manage, own, and control the country's economy, as well as a significant decrease in income inequalities."[11] Among the various policy tools employed by the BEE scheme are: employment equity requirements; preferential government procurement policies; subsidies, financing and support for small black enterprises; and, mandatory divestment of stakes in larger enterprises to black owners or black-owned enterprises.

While the BEE program contemplates the support and cooperation of both domestic and foreign businesses operating in South Africa, foreign investors may object to certain obligations imposed by that program.[12] Section 2 noted that many IIAs bar states from imposing performance requirements on foreign investors, such as obligations to source goods and services from the local market or requirements that they hire locals to fill senior management or executive positions. It is possible that foreign investors might object to comprehensive affirmative action programs such as the BEE scheme on the grounds that they constitute performance requirements. Indeed, US investors have cited the BEE scheme – and its potential incompatibility, in some cases, with US-style investment treaties – as a potential stumbling block to a US-South Africa investment agreement.[13]

Another more common investment treaty protection which may harbour complications for affirmative action programs is the almost universal guarantee that foreign investors will be entitled to National Treatment. What remains unclear, however, is whether this guarantee should entitle foreign investors to "best in jurisdiction" treatment: i.e., to the same level of treatment as is enjoyed by the most favored of domestic investors. If the national treatment guarantee extends that *degree* of protection to foreign investors, then it might be violated by policy measures which accord more favorable treatment to South African blacks (thereby "disadvantaging" or "discriminating against" foreign investors). Peterson (2005) notes that

---

[10] This section of the analysis was written by Luke Eric Peterson.
[11] Black Economic Empowerment strategy document, section 3.2.2, pg.12, available on-line at: http://www.dti.gov.za/bee/bee.htm (last visited on July 28, 2005).
[12] *Ibid.*, section 3.4.2, pg.13.
[13] INVEST-SD (2003).

some recent South African investment treaties have clarified that affirmative action measures in favor of disadvantaged groups should not be interpreted as running afoul of IIAs' national treatment provisions. However, he notes, not all South African investment treaties have incorporated such a clarification, leaving open the prospect that foreign investors might object to BEE measures which favor local blacks.

While it might be politically imprudent for foreign investors to object to BEE policies on such grounds, it should be noted that investment treaties open up avenues for foreign investors to challenge host government policies under conditions of relative secrecy. Claims alleging violation of the investment protections may be mounted by foreign investors through international arbitration channels without any public notice whatsoever. Awards of monetary compensation might be sought by foreign investors for any alleged breaches of the investment protection treaty, including where foreign investors are "discriminated against" vis-à-vis genuinely disadvantaged groups.

While it is unclear how investment treaties would be interpreted by arbitration tribunals in such circumstances, the broad treaty protections for foreign investors give some cause for concern. The pervasive existence of such treaties - and their relative lack of flexibility with respect to matters such as affirmative action – could complicate efforts to remedy extreme socio-economic disparities in South Africa or in other developing countries.

What sorts of conclusions are we left with as a result of the survey of evidence on this MDG? IIAs may attract FDI, though there is still some uncertainty on this score. Any FDI that does come may foster economic growth, but this probably depends heavily on the presence of other prerequisite factors such as trade openness, macroeconomic stability, an economy of sufficient size and development, and others. The impacts on extreme poverty are likely to be minimal, but FDI does seem to raise all wages in the formal sectors, and create jobs. It may exacerbate inequity between wages in the skilled and unskilled sectors, however. Two elements of IIAs that seem detrimental to economic development in general are restrictions on performance requirements (the export-promoting variety of which seems to work, while others do not), and on capital controls, some varieties of which may be necessary as transitional and emergency measures to ensure stability. The final impacts on poverty and hunger would not be direct, but would work through a trickle down effect. As well, there is some possibility that affirmative action programs might be challenged as breaches of IIA law. IIAs seem to hold some potential for achieving MDG 1, but at the same time also hold some clear risks.

There are at least two clear gaps in the research on this set of questions. First, there is very limited analysis of the ability of IIAs to attract FDI. The need in particular is for more nuanced analysis that can differentiate between the types of IIAs (i.e., between those focused on protection, and those that also include liberalization), and can answer the question: do BITs substitute for domestic policies? Second, there is a need for more research on the economic case for or against the inclusion in IIAs of prohibitions on performance requirements, and on capital account liberalization.

4.2. Goal 2: Achieve Universal Primary Education

Goal 2: Achieve universal primary education	
Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling	6. Net enrolment ratio in primary education 7a. Proportion of pupils starting grade 1 who reach grade 5 7b. Primary completion rate 8. Literacy rate of 15–24 year-olds

As with many of the MDGs, the linkages here will in part be expressed through those channels discussed in the previous section. If IIAs do in fact lead to greater FDI flows, which in turn lead to economic development an poverty reduction, then government revenues will probably increase, first due to increased taxation of income and business activity, and second due to a decreased need for social support services (in those countries where such services are provided). More general revenue means an increased ability to spend on priorities such as universal primary education.

All told, this is a somewhat tenuous connection given the many uncertainties discussed above, and given the added risk that increased revenues will not in fact be devoted to this goal. But it is a possibility, and so is worth mentioning here.

Foreign investment in education services is governed for the most part by a particular variant of the IIA: agreements on trade in services, such as the WTO's General Agreement on Trade in Services (GATS), or the services provisions in bilateral or regional trade agreements. Most such agreements primarily cover what is, in the GATS structure, called mode 3 services: services provided by a foreign investor in a host country. In effect then, while they are referred to as services agreements, they in fact are specialized investment agreements, covering investment in services sectors.

Some have expressed concerns that these agreements could deprive host states of policy space to regulate education systems, and would ultimately threaten public provision (and, presumably, quality control) of these services (see CAUT, 2005). Others counter that no such threat to policy space exists, and that GATS offers on education in any event are unlikely to materialize (see Sauvé, 2002). But there seems to be little discussion about private investment in *primary* education; rather the analysis always centres on higher education. Likely this is because primary education is not widely seen as a profitable area for private investment.

4.3 Goal 3: Promote Gender Equality and Empower Women

Goal 3: Promote gender equality and empower women	
Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015	9. Ratios of girls to boys in primary, secondary and tertiary education 10. Ratio of literate women to men 15–24 years old 11. Share of women in wage employment in the non-agricultural sector 12. Proportion of seats held by women in national parliament

While the target expressed in the MDGs focuses narrowly on gender disparity in education, the associated indicators also cover other aspects of gender equity. The linkages discussed below similarly go further than education, while acknowledging that gender equality in education is a fundamental basis for empowerment of women and for equity more broadly.

There are at least three types of possible linkage, expressed by the questions:

- Should IIAs contain requirements related to corporate social responsibility (for example, related to gender equity)?
- Does FDI (if it comes as a result of IIAs) affect gender equity?
- Could affirmative action type programs (promoting, for example, gender equity) be challenged under IIAs?

Should IIAs contain requirements related to corporate social responsibility (for example, related to gender equity)?

There is, of course, a large body of literature on the subject of corporate social responsibility (CSR). But there is very little on whether and how IIAs might promote it, and what there is does not deal specifically with gender issues. Robinson (1998:88), in calling for more development friendly investment agreements, calls for the ideal agreement to "provide for" the social responsibility of investors, but goes no further to elaborate the details of the proposed obligations, or the modalities. McCormick and Thompson (2004) go into greater detail, suggesting for example that investors be required to establish their credentials as environmentally responsible before gaining the rights normally found in investment agreements. They do not, however, advocate for the type of CSR that might encompass promotion of gender equity, focussing more narrowly on environmental issues. Mann et al. (2005) propose an IIA that calls for CSR and other obligations on the part of investors, again as a prerequisite to gaining the agreement's rights. Most of the obligations for CSR in their agreement are not hard law, but rather are framed as best efforts provisions. In the end there is little research on how these sorts of requirements might be incorporated into IIAs, and correspondingly little discussion on whether such inclusion would in fact be appropriate.

Does FDI (if it comes as a result of IIAs) affect gender equity?

In theory there are reasons we would expect FDI to either widen or narrow the wage gap between female and male workers, depending on the socio-economic characteristics of the host country. On the positive side, Black and Brainard (2002) note that increased competition in formerly monopolistic sectors makes discrimination more costly, and thus leads to a narrowing of the gender wage gap. If FDI is in the export sector, it may be that

increased opportunities for women in new job types will raise wages and narrow the gap (Standing (1999); Ozler (2000)). Generally, to the extent that increased FDI does work toward fulfilling MDG 1, it may also work toward gender equity. An extensive multi-country World Bank study concluded that "To the extent that economic development betters the lives of the poor—by increasing incomes and income earning opportunities or expanding the availability of such public services as schools, transportation, and health clinics—avenues for improving the well-being of girls and women and increasing gender equality also open." (King and Mason (2001):181)

On the other hand, Joekes (1995) cautions that export-led narrowing may peak and then recede if the pattern of the export-led growth changes over time to involve fewer unskilled women labourers. As well, the altered nature of economic production may shift men into new export sectors (such as cash crops) and displace women, or have them shift into the unskilled positions that men formerly occupied (King and Mason (2001); Kevane (2001)). And the evidence surveyed in Section 4.1, above, suggested that FDI tended to increase wage inequity between skilled and unskilled workers. So in the context of existing inequity, one result of which was less formal education for women, FDI might exacerbate wage differentials between male and female labourers. Note, though, that absolute levels of wages would be expected to rise.

In the final analysis, the answer to this question depends on the structure of the economic change wrought by FDI in response to IIAs (noting the discussion in Section 4.1 on whether such flows would indeed materialize); is the FDI going to export industries, in previously concentrated sectors, to predominantly skilled workers? It also depends on the nature of the existing gender inequities; are women under-educated, and therefore a larger part of the unskilled labour market? Will they be pushed aside as agricultural labourer/managers when subsistence farming turns to cash cropping? More research is needed on this specific line of inquiry to see how FDI has played out in practice, and how the various prerequisite factors have influenced the outcomes.

Could affirmative action type programs (promoting, for example, gender equity) be challenged under IIAs?

The basic legal mechanics of this sort of threat were discussed in 4.1, where it was asked whether IIAs banning performance requirements might also prohibit affirmative action programs such as the South African BEE. The logic was that firms might complain that demanding a certain type of hiring practice (for example, one that employed a certain percentage of women) amounted to an illegal condition of operation, similar to a demand to source locally, or to export a certain level of production. The conclusions reached above were that while there is some uncertainty as to whether such an argument would prevail in actual dispute settlement, there is enough of a threat to take the possibility seriously.

4.4. Goals 4, 5 & 6: Reduce Child Mortality, Improve Maternal Health, Combat HIV/AIDS, Malaria and Other Diseases

Goal 4: Reduce child mortality	
Target 5: Reduce by two-thirds, between 1990 and 2015, the under-five mortality rate	13. Under-five mortality rate 14. Infant mortality rate 15. Proportion of 1 year-old children immunised against measles
Goal 5: Improve maternal health	
Target 6: Reduce by three-quarters, between 1990 and 2015, the maternal mortality ratio	16. Maternal mortality ratio 17. Proportion of births attended by skilled health personnel
Goal 6: Combat HIV/AIDS, malaria and other diseases	
Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS	18. HIV prevalence among 15–24 year old pregnant women 19. Condom use rate of the contraceptive prevalence rate 19a.Condom use at last high-risk sex 19b.Percentage of population aged 15-24 with comprehensive correct knowledge of HIV/AIDS 19c. Contraceptive prevalence rate 20. Ratio of school attendance of orphans to school attendance of non-orphans aged 10–14
Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases	21. Prevalence and death rates associated with malaria 22. Proportion of population in malaria risk areas using effective malaria prevention and treatment measures 23. Prevalence and death rates associated with tuberculosis 24. Proportion of tuberculosis cases detected and cured under directly observed treatment short course

These three goals are grouped together here because, with few exceptions, they present the same linkages and issues. Those centre around how IIAs might impact the vitality of national health care systems, since there are few linkages that go directly to the specific elements of those systems used as targets or indicators in the MDGs.

The questions that frame the analysis in this section are:

- Do IIAs lead to poverty reduction and economic development?
- Do the rights conferred to investors in IPR-protected investments conflict with the flexibility granted under TRIPs for compulsory licensing and parallel imports of medicines?
- Policy space on health care:
    - Do IIAs restrict the ability of states to mandate universal coverage of services provision in such areas as health care?
    - Do IIAs foster FDI in the health care sector?
    - If so (and even in the case of uncertainty) does FDI in this sector improve or erode the provision of quality services, particularly to the poor and marginalized?

Do IIAs lead to poverty reduction and economic development?

This question is relevant for several reasons. First, poverty reduction (defined as increased income and income equity) leads to better population health. In general it does so by reducing vulnerability to shocks that might create health-related problems, and reducing exposure to disease vectors and precursors. Increased income allows for better nutrition, better access to fee-based medical service, better sanitation. So, in a sample of 24 developing countries Minujin and Delamonica (2003) found the under-5 mortality rate for the poorest quintile to be 2.2 times higher than the rate for the richest quintile. Increased income also avoids forced risk, such as the exposure to HIV/AIDS by women with no alternatives to prostitution. Finally, economic development in general gives the state more revenues to invest in priorities such as the public health care system.

Section 4.1 concluded on this score that IIAs may have impacts on economic growth, but that the linkages were uncertain and probably relied on host country level of development, trade openness and other factors. As well, it noted that several aspects of the typical IIA (prohibitions on capital controls and on performance requirements) might in fact be detrimental to host country economic wellbeing. Cornia (2001) notes that the increased volatility associated with capital account liberalization has led to a number of adverse health impacts.

As such, the linkages between IIAs, increased income and population health are tenuous, but potentially important. They are, however, difficult to describe with accuracy, particularly in the abstract. Each country case will hold different dynamics. This paper will have to settle for describing the linkages as important possibilities.

Do the rights conferred to investors in IPR-protected investments conflict with the flexibility granted under TRIPs for compulsory licensing and parallel imports of medicines?

The flexibilities in question are part of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which allows countries in certain circumstances to grant licenses to produce patented products without the authorization of the patent holder. Brazil, for example, has vowed to use compulsory licensing to grant domestic manufacturers the right to produce generic anti-retroviral drugs (for the treatment of HIV/AIDS) at prices that are far below those charged by the patent holders, and therefore are affordable by its public health care regime.[14] The use of compulsory licensing under the TRIPs Agreement is subject to a lengthy list of conditions, including payment to the patent holder of "adequate remuneration … taking into account the economic value of the authorization."[15]

A related flexibility in the TRIPs Agreement, reiterated in WTO (2003) allows states with no domestic manufacturing capacity (which therefore cannot take advantage of the ability to grant compulsory licenses – usually least-developed countries) to import products produced

[14] Brazil's intention is to force the firms involved (Merck, Abbott and Gilead) to reach voluntary agreements on compensation, with the threat of compulsory licensing if those negotiations fall through. At the time of this writing, talks were still ongoing.

[15] TRIPS Agreement, Art. 31(h).

in *other* countries under compulsory license. This is known as parallel importing, and is an important and hard-won right for least developed countries facing health crises.

Some analysts (see Correa (2004), South Centre (2005) and Drahos (2001)) argue that these flexibilities may be at risk from the provisions of certain IIAs. Many IIAs cover intellectual property under their definition of protected investments, and of those that do not, many have broad definitions of protected investment-related assets that would arguably include intellectual property rights (Correa (2004)). There is a possibility, though it has never been tested, that the holder of a patent might object that being subject to compulsory licensing, or being exposed to competition from parallel imports, is tantamount to expropriation.[16] To be clear, expropriation is allowed under IIAs, but it has to meet certain criteria: it usually must be for a public purpose, be non-discriminatory, be in accordance with the due process of law, and be compensated at some approximation of fair market value.

The patent holder might claim, for example, that the payments offered under the conditions of a compulsory license were not in line with the compensation due to an expropriated investment under the terms of an IIA. Even were the terms of the TRIPs Agreement satisfied, the terms of the IIA might not be. Alternatively, the patent holder might complain that allowing parallel imports infringes on its market share in a way that amounts to expropriation.[17]

Not all IIAs harbour these kinds of risk. The new model IIAs used by the US and Canada, for example, have explicit provisions stating that compulsory licensing cannot be considered an expropriation (which in effect confirms the argument that this is a possibility in the first place). But the older IIAs signed by both countries do not have such provisions. Neither do many other countries' current IIA formulations. Clearly if there are provisions in IIAs that limit the flexibility of governments to engage in compulsory licensing or parallel imports as granted under the TRIPS Agreement, those limits will impinge on that country's ability to combat epidemics such as HIV/AIDS, malaria and tuberculosis.

Policy space on health care

The third question covers two themes relating to the impact of IIAs on governments' ability to maintain adequate health care regimes in country. The first theme is the issue of whether IIAs restrict the ability of states to mandate universal coverage of services provision in such areas as health care. Since the delivery of health care (and health insurance) is considered a service, health care provisions would conceivably be covered under two types of investment law: traditional IIAs, and the investment provisions of law on trade in services: the WTO's General Agreement on Trade in Services and services agreements in bilateral and regional trade agreements.

In the area of services law, a concern raised by Grishaber-Otto and Sinclair (2004) stems from Article VI (4) of the GATS, which mandates ongoing negotiations to ensure "that measures relating to qualification requirements and procedures, technical standards and

---

[16] One could imagine other sorts of arguments as well, alleging breech of IIA obligations on national treatment or minimum international standard of treatment.

[17] There is some precedent for arguing that market share constitutes an investment. See the analysis of *Pope & Talbot v. Canada* under NAFTA's Chapter 11 in Cosbey, Mann, Peterson and von Moltke (2004:9).

licensing requirements do not constitute unnecessary barriers to trade in services." This goal is to be effected through new rules which would require new regulations to be "based on objective and transparent criteria, such as competence and the ability to supply the service," and ensure that such regulations are "not more burdensome than necessary to ensure the quality of the service."

The domestic regulation negotiations remain at a very preliminary stage, but analysts have warned that they may have the potential to impact on health policy by, inter alia, subjecting health measures to a necessity test that would ask whether a government measure was necessary to achieve its objectives, or whether those objectives might have been met in a less trade-restrictive manner (Cosbey, Peterson and Pinter (2005), Tuerk and Krajewski (2003)). As noted above, the types of measures potentially subject to such a test are those relating to technical standards and qualification requirements. It is not clear whether a requirement for universal health coverage might fall under this category, but it seems unlikely.

A more likely threat to universal coverage requirements might come from the traditional IIAs, where a potential investor in the health care delivery or health care insurance sectors could argue that such requirements amount to prohibited performance requirements. Concerns of a similar nature were discussed in depth above, using the example of South Africa's Black Economic Empowerment program, and the same sort of dynamic might apply here.

The second theme relates to whether IIAs foster FDI in the health care sector, and if so what impact this would have on the quality of health care services available to the poor in developing countries. There is nothing much in the literature that would allow us to judge *a priori* whether IIAs work to attract FDI in the health care sector. Above we surveyed the arguments in the literature on the more general question of whether IIAs in fact attract FDI, and found some limited evidence that they were one of several important causative factors. We also noted above that most for-profit investments in the health care sector tend to be covered under services law as well as traditional investment law.

Most of the health-related concerns in the literature cited above are developed country concerns, related to the integrity of existing public health care programs, health insurance systems and so on. Most of these focus on a fear of privatization, and premise their arguments on the assumption that for-profit provision of health care is likely to be of worse quality than that delivered by public systems, and that liberalization will lead to privatization. Indeed, there is some analysis that might lead us to question the quality of for-profit systems. Brugha and Zwi (1998) find that private practitioners in low and middle-income countries tend to deliver lower quality care, and be harder to regulate. (see, for example,), as well as to worry that for-profit systems are inherently more costly to administer (Krugman, 2005).

In systems with existing public coverage, either of delivery services or health care insurance, private service providers might be able to force their way into the system under services law. If under a publicly funded scheme of provision, the government allows limited provision of some private services, or charges user fees, then potential investors might argue that they have a right of entry. The argument would be that the provision of health care is not being carried on a "non-commercial basis"—the criterion under the GATS for excluding publicly provided services from the obligations otherwise incumbent on governments. Sinclair and

Grieshaber-Otto (2002) argue that since the GATS does not define several key terms ("commercial" and "in competition with"), it will be left to dispute panels to define what is and is not covered.

While the literature has focused on developed country concerns, there may also be reason for caution in developing and least-developed countries. While most of these may not yet have extensive public programs of health care (with some notable exceptions, such as China and Cuba), Cosbey, Peterson and Pinter (2005) argue that extensive commitments in the area of health services may in fact prevent such programs from emerging. This is because in systems where there exist private competition in the health care sector (either in health care delivery or in health insurance), implementing a system of public provision may open the government up to claims for compensation from investors arguing that their investments had been expropriated (this would be under traditional IIA law). And, notably, services law commitments in the area of health care may be particularly inappropriate for economies and societies where regulatory systems are in their infancy, and where some experimentation may be necessary before a desired result is obtained. In the face of investment protection under services agreements, any regulatory changes that hurt existing investors —for example, a change back to a system of public provisions after experimenting with a private model— might end up costing the government large amounts in compensation.

Of course for any of these concerns to be relevant the health care sector would have to be explicitly listed by a government as covered under its GATS obligations. Some argue that the request and offer process of negotiations on services means that countries are not forced to make concessions in areas (such as health care) that they consider sensitive. The government of Canada, for example, has rejected the notion of putting health care delivery services on the table in services negotiations (though it *has* offered up health insurance services). The problem here is that states in weak bargaining positions may be coerced to offer up health-related services to obtain other negotiating concessions, without realizing the full scope of the costs entailed.

In conclusion, there seems to be some possibility, albeit unpredictable in the abstract, that the income-raising potential of IIAs might help achieve the health-related Millennium Development Goals, by its impacts on personal disposable incomes. Those IIAs that cover IPRs as investments and which fail to carve out compulsory licensing and parallel imports from expropriation provisions (the huge majority) risk impairing the ability of developing countries to use those measures to fight national epidemics in areas such as HIV/AIDS, malaria and tuberculosis. This risk has not yet materialized, but remains worrying. Finally, there seems to be some cause for concern that the investment protection provisions of services agreements (such as the GATS), and that found in more traditional IIAs, might erode the vitality of national health care provision, but in large part that fear is grounded on the assumption that public health care provision is inherently of poorer quality than that provided by the public sector. Here we have another research gap—there is not enough existing analysis of the two options to make a reasoned assessment of their relative strengths and weaknesses.

4.5 Goal 7: Ensure Environmental Sustainability

Goal 7: Ensure environmental sustainability	
Target 9: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources	25. Proportion of land area covered by forest 26. Ratio of area protected to maintain biological diversity to surface area 27. Energy use (kg oil equivalent) per $1 GDP (PPP) 28. Carbon dioxide emissions (per capita) and consumption of ozone-depleting CFCs (ODP tons) 29. Proportion of population using solid fuels
Target 10: Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation	30. Proportion of population with sustainable access to an improved water source, urban and rural 31. Proportion of urban and rural population with access to improved sanitation
Target 11 By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers	32. Proportion of households with access to secure tenure

Goal 7 focuses on the linkages between environmental sustainability and development. The case for such a linkage has been strongly made by a number of analysts (see, for example, Duraiappah 2001, 2004). Target 9 is rather general, and two specific linkages are identified below as potentially being salient. Target 10, on water, is more specific, and again some specific linkages are proposed below. Target 11 does not on its face present any linkages to IIAs, and is not discussed.

The linkages discussed below are all in the nature of potential threats from IIAs to the achievement of MDG 7. There is a potential positive linkage as well, though how it would be expressed in the various indicators is not clear-cut. The point has been repeatedly made above that if IIAs do manage to attract FDI, and if FDI in fact raises incomes and government revenues, then there could be some linkage between IIAs and the MDGs. In the case of Goal 7, one such linkage would be through the availability of government funds for environmental policies and enforcement. It could also work by alleviating poverty, and providing the poor with alternatives to mining the natural resources on which they depend (alternatives to slash and burn agriculture, for example). Finally, a number of authors have contended that increased personal income translates at some point into increased demands for environmental quality.[18] Any or all of these effects might be important, but we must recall the uncertainty with which we characterized the relationship between IIAs and poverty alleviation in our discussion of the first MDG.

Integrating sustainable development principles into policies and programs

Target 9 focuses specifically on the integration of sustainable development principles into policies and programs, and on reversing the loss of environmental resources. With respect to the first theme—integration—it is worth exploring possible conflicts between IIAs and multilateral environmental agreements (MEAs). Several of the targets suggest the importance of properly addressing energy and climate change issues, so if there are conflicts

[18] A full discussion of this hypothesis, sometimes expressed as the *Environmental Kuznets Curve*, is beyond the scope of this paper. Suffice it to say that the relationship between income and environmental quality seems to be neither straightforward nor automatic.

with the Kyoto Protocol they would be important. As well, target 28 implicates the Montreal Protocol.

There is a long history of analysis on the potential conflicts between *trade* law and MEAs, dating back to the earliest days of the WTO's Committee on Trade and Environment, and finding recent expression in Paragraph 31 of the Doha Declaration—the document used to launch the current round of multilateral trade talks—where a mandate is established to negotiate some greater certainty to the relationship between the two bodies of law. There is also a smaller body of literature focused more specifically on the relationship between WTO law and the Kyoto Protocol (see Cosbey and Cameron (1999); Tarasofsky (2005); Brewer (2003)), but little of this focuses on investment law. Werksman et al. (2001) analyzed the potential conflicts between investment agreements and the Kyoto Protocol, and found a number of concerns—primarily associated with the Protocol's Clean Development Mechanism (CDM), a vehicle for investment in developing countries—but all of them seem to have been either addressed during the evolution of the CDM, or off the mark in the first place. Wiser (2002) finds little or no conflict between the working of the CDM and the investment provisions in services agreements.

There are in fact few ways in which the rules of the CDM could conflict with the investment protection offered by IIAs. The latter are agreements between countries, and offer investors the opportunity to complain about actions by host governments. But the rules and procedures of the CDM are not in any sense actions by host governments. They are, rather, rules decided at the international level by a group of countries, and implemented by an Executive Board appointed by the Parties. For example, Werksman et al. (2001) argue that there may be grounds for an investor alleging discrimination if the CDM rules do not allow it to participate in a CDM project. But those rules are not propounded or enforced by national governments, and so there is no investor-state conflict as such. Werksman et al. anticipate this possibility, in fact recommending that there be specific direction by the Parties so as to shift most responsibility from the host countries acting individually to the international agreement and its mechanisms. In the event this has in fact occurred.

Similarly, Werksman et al. note that under Kyoto rules host governments must define those projects that will by allowed as CDM projects, certifying that they foster sustainable development. They argue that investors might argue that these constitute performance requirements. But the criteria set for sustainable development by host governments are not conditions of establishment, but rather conditions for the granting of a desirable status (CDM status) to an investment. That is, the investment, even if it does not meet the conditions, can still enter (subject to applicable laws and regulations). Conditioning the receipt of a benefit on a certain actions is not a performance requirement by any reading of the provisions. In the end, none of the concerns raised by Werskman et al. seem to have survived as relevant.

It is, however, possible that IIAs might be used as vehicles for complaint about measures taken by host countries in the fulfilment of their obligations under MEAs. In the context of the Basel Convention on the Transboundary Movement of Hazardous Waste, for example, a developing country might enact a ban on the import of hazardous waste from OECD exporters, in accordance with the provision of the amendment to that effect. A foreign investor in that country operating a hazardous waste processing facility might argue that

such a measure amounted to an expropriation of its investment. In fact, a Canadian export ban on PCBs (considered a hazardous waste) was successfully challenged by a US investor under NAFTA's Chapter 11, though it was argued that such a ban was in keeping with Canada's obligations under the Basel Convention (Mann (2001)).

The same sort of scenario might play out in the pursuit of developing country commitments under the Montreal Protocol. Developing Parties will eventually need to phase out the production of ozone-depleting substances such as the CFCs mentioned in indicator 28. When they do, foreign investors operating the production facilities might allege an expropriation of their investment. It is unlikely that such an argument would carry much weight in an investor-state dispute, particularly if the host country in question exercised care in propounding its legislation, such that for example domestic and foreign producers were treated alike. But it is a possibility, and would not be the first case where an investor challenged an environmental measure of general application as an expropriation.[19]

Reversing the loss of environmental resources

The second theme of Target 9 focuses on reversing the loss of environmental resources. In several passages above it has been noted that there is some danger that the provisions of IIAs will be used by investors to challenge the legitimate exercise of regulatory authority for environmental protection. In the context of the IIA provisions on expropriation, for example, Mann (2001) describes a NAFTA Chapter 11 case brought by a Canadian investor against the US government for a Californian measure banning a suspected carcinogen from use as a gasoline additive, after it was found to be contaminating groundwater supplies. In this case—the *Methanex* case—the investor argued that the ban constituted an expropriation, because it meant the investor could no longer sell the feedstock for that additive to US producers. The argument failed badly in that case, though it has fared better in other, earlier cases. (Mann, 2005) This divided case law leaves continued uncertainty in this area, though if the latest decision in *Methanex* is followed by other cases that uncertainty will be significantly reduced.

That uncertainty s reflected in the literature, where opinion is divided on the credibility of the threat that IIAs' expropriation provisions will infringe on the ability of states to reverse the loss of environmental resources. Tollefson (2003), Been and Beauvais (2003) and Cosbey (2003) all argue for caution, while Mann and Soloway (2002) and Fortier (2003) offer a mixed assessment. Gaines (forthcoming) discounts the possibility of such challenges. Arguably as a result of this risk, the modern model IIAs used by the US and Canada and others contain provisions affirming that non-discriminatory measures taken to protect public health or the environment will rarely constitute expropriation (Notably, India and Singapore used a similar formulation in the investment provisions of the free trade agreement they concluded in June 2005[20]). In those new agreements (if not so much in the overwhelming majority of other IIAs) there is less risk of this sort of threat by this means.

Ironically, it may be that in light of the *Methanex* ruling the new and improved approaches of the model IIAs offer less protection than the NAFTA. Mann (2005) argues that the

[19] See the (rejected) case of Methanex v. the United States of America, heard under NAFTA's Chapter 11, as described by, inter alia, Mann (2001).
[20] INVEST-SD (2005).

Methanex argument, if it is followed by subsequent tribunals, provides the type of clear carve-out that environmentalists have been seeking for some time. The language of the US and Canadian models, on the other hand, is more limited, directing tribunals to look, among other things, at the extent of economic damage done by a measure in deciding whether it constitutes expropriation. *Methanex* compels no such examination, focusing instead on the character of the measure in question.

There are other concerns as well as expropriation. Cosbey, Mann, Peterson and von Moltke (2005) argue that the national treatment provisions in IIAs might prevent regulators from treating new (and foreign) entrants to a market differently than existing producers, even where there is environmental cause. For example, if the existing producers in an area are already at or exceeding ambient pollution limits, then regulators would be right to deny entry to additional producers. But a prospective foreign producer might argue that this constituted worse treatment than that accorded to domestic producers in similar circumstances. Such an argument has not yet materialized that we know, and would probably be rejected if it did, but the possibility is still a concern.

In the final event there seems to be some cause for concern about the possibility that IIAs might impair the ability of governments to achieve Target 9 of the MDGs, both by dint of the potential conflict with MEAs, and because of the possible conflict between certain types of environmental regulation and provisions on expropriation and national treatment. None of these conflicts seems particularly likely, but they are all possibilities. It may even be that the threat of these sorts of conflicts in itself might have some chilling effects on the ability of regulators and negotiators to protect public goods such as the environment and public health.[21]

IIAs and water

Target 10 focuses on the provision of safe drinking water and basic sanitation infrastructure. As was the case with the discussion above on public health, the discussion here will refer to linkages with the investment provisions of services trade agreements as well as with the provisions of traditional investment law found in IIAs.

Two basic questions will guide the discussion:

- Do IIAs foster FDI in the water and sanitation sector?
- If so (and even in the case of uncertainty) does FDI in this sector improve or erode the provision of quality services, particularly to the poor and marginalized?

On the first question, as in the case of health care services, there is not much in the way of analysis in the literature, beyond the body of work devoted to analyzing the links between IIAs and FDI in general.

[21] There are a few known cases of threatened action used in an attempt to forestall legislation. For example, the government of Quebec was threatened with Chapter 11 action when it considered enacting a ban on the cosmetic use of pesticides (for landscaping) in the Province. In the end, the ban was enacted and no action has yet ensued. But the threat of arbitration was one of the tools used by industries opposed to the legislation.

So we are left with uncertainty, and should proceed to the second question on the assumption that IIAs might in fact increase FDI to water infrastructure projects. On the subject of such projects, there is wide agreement on the fact that massive amounts of investment are needed in developing countries (The Economist (2004)).[22] But the question is: how it shall be delivered: by government investment, by private investment, or by some mix of the two? The Economist (2004) notes that the private sector currently funds some 10% of the annual $15 billion layout for water infrastructure.

In surveying the experience to date on services privatization of public services in general, DfID (2002) concludes, as did the World Bank (1994) in its groundbreaking study, that the focus needs to be broadened to include the institutions for managing the investment, rather than just on the delivery of the goods. That is, services liberalization and private investment can lead to either positive or negative impacts, and the key differences lie in such domestic institutions as accountability and transparency, regulatory capacity, environmental management capacity and so on. Also critically important is the model of privatization used; it can range from outright open competition to the private operation of a state-run monopoly.

In the specific context of water services, Mann (2003), Oxfam (2002) and others have noted that privatization has not always gone well in practice, with the investors either not delivering services at the expected levels of quality, or with price hikes that have made the service inaccessible for an unacceptable portion of the population. Either of these scenarios is in direct opposition to the goals of Target 10. The problems seem to boil down to both a need by the investor for a too-rapid payback of its investment, and the inability of governments to write and/or enforce contracts and regulations that will oblige the investors to perform adequately.

McIntosh (2003) has similar findings. Based on an extensive survey of Asian experiences, he argues that privatization alone is not a panacea, either in terms of bringing in needed funding, or of increasing efficiency. In the same vein, a survey of three Latin American countries showed no observable difference in connection rates between those locations with private sector participation and those without (Clarke et al., 2004). McIntosh asserts the central importance of domestic factors such as strong independent regulatory bodies, transparency of process, competition in the privatization process and (critically important) the political will and ability to raise water tariffs.

The specific proposition that privatization increases efficiency is tricky in the context of water infrastructure services, as they are in fact regulated monopolies. Vaughan (2003) argues that water services privatization places, if anything, a *greater* burden on regulatory and competition authorities in ensuring that "market oriented policies meet public objectives." This, he notes, has been difficult enough in developed countries' experiences of privatization, and may demand from developing countries something they are not equipped as yet to supply. Some of the most difficult of the many challenges in this context are those related to universal coverage of services – ensuring that the poorest of the poor are covered.

[22] The discussion on this question draws heavily on the analysis in Cosbey (2004).

As with the discussion on health services provision, there may be concerns that the commitments made under services law agreement are difficult to reverse. If, for example, a developing country government offers up water services under its GATS commitments, and then decides that a publicly provided service would be preferable, it will face a prohibitively difficult and costly process of reversing its decision.

The conclusion seems to be that FDI, even if it is brought by IIAs, will not automatically work to achieve Target 10. If the model used is outright privatization there may be difficulties in getting the investment to translate into increased access to water services, particularly for the poor. In any case, if the requisite domestic institutions and capacities are missing the result may be actually worse from the point of view of the poor. There is no doubt, however, that the need for increased investment in this area is urgent, and that one of the most obvious places to look for such investment is the private sector. It may simply be a matter of finding the right model, and building up the requisite capacities in the host state.

4.6 Goal 8: Develop a Global Partnership for Development

Goal 8: Develop a global partnership for development	
Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system Includes a commitment to good governance, development, and poverty reduction – both nationally and internationally	*(Some of the indicators listed below are monitored separately for the least developed countries (LDCs), Africa, landlocked countries and small island developing States.)* ***Official development assistance*** 33. Net ODA, total and to LDCs, as percentage of OECD/DAC donors' gross national ***Income*** 34. Proportion of total bilateral, sector-allocable ODA of OECD/DAC donors to basic social services (basic education, primary health care, nutrition, safe water and sanitation)
Target 13: Address the special needs of the least developed countries *Includes: tariff and quota free access for least developed countries' exports; enhanced programme of debt relief for HIPC and cancellation of official bilateral debt; and more generous ODA for countries committed to poverty reduction*	35. Proportion of bilateral ODA of OECD/DAC donors that is untied 36. ODA received in landlocked countries as proportion of their GNIs 37. ODA received in small island developing States as proportion of their GNIs ***Market access*** 38. Proportion of total developed country imports (by value and excluding arms) from developing countries and LDCs, admitted free of duties
Target 14: Address the special needs of landlocked Countries and small island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly)	
Target 15: Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term	39. Average tariffs imposed by developed countries on agricultural products and textiles and clothing from developing countries 40. Agricultural support estimate for OECD countries as percentage of their GDP 41. Proportion of ODA provided to help build trade capacity

	Debt sustainability 42. Total number of countries that have reached their HIPC decision points and number that have reached their HIPC completion points (cumulative) 43. Debt relief committed under HIPC initiative, US$ 44. Debt service as a percentage of exports of goods and services
Target 16: In co-operation with developing countries, develop and implement strategies for decent and productive work for youth	45. Unemployment rate of 15-24 year-olds, each sex and total
Target 17: In co-operation with pharmaceutical companies, provide access to affordable, essential drugs in developing countries	46. Proportion of population with access to affordable, essential drugs on a sustainable basis
Target 18: In co-operation with the private sector, make available the benefits of new technologies, especially information and communications	47. Telephone lines and cellular subscribers per 100 population 48a. Personal computers in use per 100 population and Internet users per 100 population 48b. Internet users per 100 population

Most of the targets and indicators expressed in MDG 8 have no obvious linkages to IIAs as currently structured, since existing agreements are set up as government-to-government treaties involving, for example, no investor responsibilities. The focus of MDG 8 is on the actions of developed country governments, rather than the actions of investors *per se*. There are, however, some areas of possible linkage, by which the actions of investors might facilitate or frustrate the actions of governments in pursuit of MDG 8. Both the relevant linkages have been addressed in some form in the preceding analysis, but they are recapped below in summary form.

Do IIAs increase FDI?

Again, if IIAs do increase FDI, and if that FDI does increase income levels, many of MDG 8's targets and indicators will be positively affected. For example, if employment increases it will be that much easier to find decent and productive work for youth (Target 16), and if government revenues increase then debt problems addressed by Target 15 will become more manageable. Clearly if the FDI in question is in the right sectors, it will complement government efforts. For example, investment in the pharmaceutical manufacturing sector might help in achieving Target 17, and investment in the telecommunications sector might similarly help with Target 18. The survey of the evidence presented above found some evidence that IIAs might attract FDI, and little certainty about the relationship between FDI and incomes, employment and poverty alleviation.

IIAs and essential medicines

Target 17 focuses on provision of affordable essential drugs in developing countries. The discussion above cautioned that most IIAs define intellectual property rights as protected investments, and fail to carve out from expropriation provisions measures allowed under the WTO agreements: compulsory licensing and parallel importing of essential medicines. There is, in the agreements in question, a risk that the actions of governments to provide

affordable essential medicines to their citizens might be found to contravene IIA provisions on expropriation.

5. Conclusions

This paper started off by posing three basic questions:

- Do IIAs actually attract investment?
- If so, does the resulting investment contribute to sustainable development?
- What other sustainable development impacts (beyond those related to investment flows) do IIAs have?

To answer them, it used as a framework for analysis the Millennium Development Goals elaborated by the UN General Assembly in 2000, asking to what extent IIAs might help or hinder the achievement of these widely accepted goals for development.

Again and again in the analysis we returned to the question of whether IIAs actually work to attract FDI, and what sorts of impacts that FDI might have on income levels, income distribution, employment. On the first question, we found some limited evidence that FDI can be attracted by IIAs, but there is no certainty on this question. The FDI that does come may indeed foster economic growth, but this probably depends heavily on the presence of other prerequisite factors such as trade openness, macroeconomic stability, an economy of sufficient size and development, and others. The impacts on extreme poverty are likely to be minimal, but FDI does seem to raise all wages in the formal sectors, and create jobs. It may exacerbate inequity between wages in the skilled and unskilled sectors, however, and in so doing also exacerbate gender inequity.

If FDI does come, and does raise income levels and foster economic activity, it will probably also increase government revenues, making an across the board contribution to the ability of host governments to achieve the MDGs, for example in such areas as education, health care, alleviation of poverty and hunger and pursuit of environmental sustainability.

Balanced off against these rather uncertain gains are a number of concerns about the specific ways in which IIAs might actually frustrate the achievement of the MDGs. The restrictions on capital controls found in many IIAs may be detrimental to the economic stability of developing countries in the context of transition and fiscal emergencies. As well, there is some evidence that certain types of performance requirements (banned by many IIAs) might be useful tools for economic development. There is also the worrying possibility that affirmative action programs might be challenged as performance requirements. As well, affordable access to pharmaceuticals might be made more difficult by IIAs that do not carve out compulsory licensing and parallel importing from their expropriation provisions.

Finally, most IIAs have provisions on expropriation that may conflict with the legitimate exercise of environmental regulatory authority. As well, there may be conflicts with other provisions such as national treatment. These may even extend to cover measures taken in the pursuit of obligations under multilateral environmental agreements.

Neither the benefits nor the risks of IIAs are straightforward from a development perspective. There is, in the end, nothing in the IIAs that compels, or even encourages, investors to align their activities with the development goals of the host countries. This is not surprising; in fact it is standard practice. It does beg the question, however, whether a new model of IIA might be employed that does explicitly seek to achieve such goals. There have been only a few calls for such agreements, and they are mentioned above.[23] But on the basis of the evidence presented here if IIAs are to be the tools for development that they are sold to be, there will need to be first a fix of those provisions that may in fact threaten development, and then a proactive search for ways to boost the quality of FDI such that it in fact achieves that which most host countries hope for when they sign on the dotted line.

[23] Primary among them is Mann, von Moltke, Peterson and Cosbey (2005).

References

Agosin, Manuel R. and Ricardo Mayer. 2000. "Foreign Investment in Developing Countries: Does it Crowd out Domestic Investment?" UNCTAD Discussion Paper #146 (UNCTAD/OSG/DP/146). Geneva: UNCTAD.

Banga, Rashmi, 2003. "Impact of Government Policies and Investment Agreements on FDI Flows." Working Paper No. 116, Indian Council for Research on International Economic Relations.

Been, Vicki and Joel C, Beauvais, 2003. "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine." *New York University Law Review*, Vol. 78.

Behrman, Jere R., Nancy Birdsall and Miguel Székely, 2000. "Economic Reform and Wage Differentials in Latin America." IADB Research Department Working Paper No. 435. Washington, DC: Inter-American Development Bank.

Black, Sandra and Elisabeth Brainard, 2002. "Importing Equality? The Impact of Globalization on Gender Discrimination," NBER Working Paper 9110, National Bureau of Economic Research.

Bhagwati, Jagdish,1998. "The Capital Myth: The Difference between Trade in Widgets and Dollars," *Foreign Affairs* 77(3): 7-12.

Brewer, Thomas L., 2003. "The Trade Regime and the Climate Regime: Institutional Evolution and Adaptation," *Climate Policy* Vol. 3: 329-341.

Brugha, Ruairí and Anthony Zwi, 1998. "Improving the Quality of Private Sector Delivery of Public Health Services: Challenges and Strategies," *Health and Policy Planning* 13(2): 107-120.

Carkovic, Maria and Ross Levine, 2002. "Does Foreign Direct Investment Accelerate Economic Growth?" University of Minnesota Department of Finance Working Paper.

CAUT, 2005. "GATS Threatens Education Sector." Canadian Association of University Teachers Bulletin, January.

Clarke, George R.G., Katrina Kosec and Scott Wallsten, 2004. "Has Private Participation in Water and Sewerage Improved Coverage? Empirical Evidence from Latin America." Working Paper 04-02, AEI-Brookings Joint Center for Regulatory Studies.

Cobham, Alex, 2001. "Capital Account Liberalization and Poverty." Queen Elizabeth House Working Paper #70, Oxford University.

Cornia, Giovanni Andrea, 2001. "Globalization and Health: Results and Options," *Bulletin of the World Health Organization* 79(9).

Correa, Carlos, 2004. "Bilateral Investment Agreements: Agents of New Global Standards of Intellectual Property Rights?" Study commissioned by GRAIN.

Cosbey, Aaron, 2004. A Capabilities Approach to Trade and Sustainable Development: Using Sen's Concept of Development to Re-Examine the Debates. Commissioned by the Swiss Agency for Cooperation and Development. Winnipeg: IISD.

________________, 2003. "NAFTA's Chapter 11 and the Environment." Commissioned paper for the Joint Public Advisory Committee of the North American Commission for Environmental Cooperation. Mexico City, March.

________________, 2002. "Foreign Investment: Making it Work for Sustainable Development." Paper commissioned for the IISD Eastern Europe Capacity Building Workshops project.

________________ and James Cameron, 1999. "Trade Implications of the Kyoto Protocol" *Policy Matters*, Issue No. 4, Spring.

________________, Luke Peterson and Laszlo Pinter, 2005. "Environmental Health and International Trade: Linkages and Methodologies," Paper commissioned by Health Canada, Winnipeg: International Institute for Sustainable Development.

________________, Howard Mann, Luke Eric Peterson and Konrad von Moltke, 2004. Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements. Winnipeg: International Institute for Sustainable Development.

Cotton, L. and V. Ramachandran, 2001. "Foreign Direct Investment in Emerging Economies: Lessons from Sub-Saharan Africa." WIDER Discussion Paper 2001/82.

DfID (UK Department for International Development), 2002. Making Connections: Infrastructure for Poverty Reduction. London: DfID.

Drahos, Peter, 2001. "BITs and BIPs – Bilateralism in Intellectual Property," *Journal of World Intellectual Property*, Vol. 4(6): 791 – 808.

Duraiappah, Anantha Kumar, 2001. "Poverty and the Environment: A Role for UNEP." Concept paper written for the United Nations Environment Programme in preparation of Guidelines on Poverty and the Environment.

________________, 2004. Human Well-Being, Poverty and Ecosystem Services: Exploring the Links. Nairobi/Winnipeg: United Nations Environment Programme/International Institute for Sustainable Development.

The Economist, 2004. "Third World Water and the Private Sector: How Not to Help Those in Need." Aug. 6th, 2004.

________________, 2003. "A Place for Capital Controls," May 1.

Egger, Peter and Michael Pfaffermayr, 2004. "The Impact of Bilateral Investment Treaties on Foreign Direct Investment," *Journal of Comparative Economics*, 32: 788 – 804.

Feenstra, Robert C. and Gordon H. Hanson, 1997. "Foreign Direct Investment and Relative Wages: Evidence from Mexico's Maquiladoras." *Journal of International Economics*, Vol. 42(3-4): 371-393.

Fortier, L. Yves, 2003. "Caveat Investor: The Meaning of "Expropriation" and the Protection Afforded Investors under NAFTA," *NEWS From ICSID*, Vol. 20, No. 1.

Gaines, Sanford (forthcoming). "Environmental Policy Implications of Investor-State Arbitration under NAFTA Chapter 11," paper prepared for the Commission for Environmental Cooperation's

Third North American Symposium on Assessing the Environmental Impacts of Trade, Montreal, Nov. 30 – Dec. 1, 2005.

Gallagher, Kevin P. and Melissa Birch, (forthcoming). "Do Investment Agreements Attract Investment? Evidence from Latin America," *European Journal of Development Research*.

Gallagher, Kevin P. and Lyuba Zarsky, 2004. "Sustainable Industrial Development? The Performance of Mexico's FDI-led Integration Strategy," Global Development and Environment Institute, Tufts University.

Gardiner, Rosalie, 2000. "Foreign Direct Investment: A Lead Driver for Sustainable Development?" *Toward Earth Summit 2002*, UNED Economic Briefing Series No. 1. London, UK: United Nations Environment and Development Forum.

Ginsburg, Tom, 2005. "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance." *International Review of Law and Economics* 25: 107-123.

Grishaber-Otto, Jim and Scott Sinclair, 2004. Bad Medicine: Trade Treaties, Privatization and Health Care Reform in Canada. Ottawa: Canadian Centre for Policy Alternatives.

Hallward-Driemeier, Mary, 2003. "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit … And They Could Bite." Policy Research Working Paper No. 3121, Washington, DC: The World Bank.

Hermes, Niels and Robert Lensink, 2003. "Foreign Direct Investment, Financial Development and Economic Growth." *Journal of Development Studies* 40(1): 142-163.

INVEST-SD, 2005. "India-Singapore FTA Inked, Investment Provisions Include Important Innovations," *Investment Law and Policy News Bulletin* August 3.

_______________, 2003."South Africa's Black Economic Empowerment Plans an Obstacle to a US FTA?" *Investment Law and Policy News Bulletin*, July 8.

Jalilian, Hossein and John Weiss, 2002. "Foreign Direct Investment and Poverty in the ASEAN Region." *ASEAN Economic Bulletin* 19(3): 231-253.

Jenkins, Carolyn, 1986. "Disinvestment: Implications for the South African Economy." Economic Research Unit, University of Natal.

Jenkins, Carolyn and Lynne Thomas, 2002. "Foreign Direct Investment in Southern Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation." London: Institute of Development Studies Globalisation and Poverty Research Programme.

Joekes, Susan, 1995. "Trade-Related Employment for Women in Industry and Services in Developing Countries," UNRISD Occasional paper No.5.

Johnston, Barry R., 1998. "Sequencing Capital Account Liberalization," *Finance & Development* 35(4).

Kevane, Michael, 2000. "Extra-Household Norms and Intra-household Bargaining: Gender in Sudan and Burkina Faso," in Anita Spring, ed. Women Farmers and Commercial Ventures: Increasing Food Security in Developing Countries. Boulder, CO: Lynne Rienner Publishers, pp. 89-112.

Kim D.D-K.; Seo J-S., 2003. "Does FDI Inflow Crowd out Domestic Investment in Korea?" *Journal of Economic Studies*, Vol. 30(6): 605-622.

King, Elizabeth, and Andrew Mason, 2001. Engendering Development through Gender Equality in Rights, Resources and Voice. World Bank Policy Research Report No. 21776. Washington, DC: World Bank and Oxford University Press.

Krugman, Paul, 2005.

Lipsey, Robert. 2002. "Home and Host Country Effects of FDI." NBER Working Paper Series 9293, Cambridge, Massachusetts.

_______________, 2000. "Inward FDI and Economic Growth in Developing Countries." *Transnational Corporations* 9(1).

Mann, Howard, 2005. "The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles." Winnipeg: International Institute for Sustainable Development.

_______________, 2003. "Who Owns 'Your' Water? Reclaiming Water as a Public Good under International Trade and Investment Law." Winnipeg: IISD.

_______________, 2001. Private Rights, Public Problems: A Guide to NAFTA's Controversial Investment Chapter on Investment Protection. Winnipeg: International Institute for Sustainable Development/World Wildlife Fund US.

_______________, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, 2005. IISD Model Agreement on Investment for Sustainable Development. Winnipeg: International Institute for Sustainable Development.

_______________ and Julie Soloway, 2002. "Untangling the Expropriation and Regulation Relationship: Is there a way forward?" A Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade (Canada), March 31.

McCormick, Rachel and Dixon Thompson, 2004. "The Reversed and Responsible MAI: Responsibility Proven First, Investor Rights Second." *The Journal of Corporate Citizenship* 14(Summer): 27-46.

McIntosh, Arthur C., 2003. Asian Water Supplies: Reaching the Urban Poor. London: Asian Development Bank.

Minujin, Alberto and Enrique Delamonica, 2003. "Mind the Gap! Widening Child Mortality Disparities." *Journal of human development*, Vol. 4(3): 397-418.

Moran, Theodore H., 2001. Parental Supervision: The New Paradigm for Foreign Direct Investment and Development. Washington, D.C.: Institute for International Economics.

_______________, 1999. "Foreign Direct Investment and Development: A Reassessment of the Evidence and Policy Implications." In OECD, Foreign Direct Investment, Development and Corporate Responsibility, Paris: OECD. pp. 43-55.

Neumayer, Eric and Laura Spess, 2005. "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" Economics Working Paper Archive at WUSTL.

Nunnenkamp, Peter, 2004. "To What Extent Can Foreign Direct Investment Help Achieve International Development Goals?" *The World Economy* 21: 657-677.

Overseas Development Institute, 2002. "Foreign Direct Investment: Who Gains?" ODI Briefing Paper.

Ozler, Sule, 2000. "Export Orientation and Female Share of Employment: Evidence from Turkey," *World Development* 28(7): 1239-48.

Oxfam, 2002. "Rigged Rules and Double Standards: Trade Globalisation and the Fight against Poverty." Oxford.

Peterson, Luke Eric, 2005. "The Global Governance of Foreign Direct Investment: Madly Off in All Directions", Frederich Ebert Stiftung, Dialogue on Globalization Series.

Prasad, Eswar, Kenneth Rogoff, Shang-Jin Wei and M. Ayan Kose, 2003. "Effects of Financial Globalization on Developing Countries: Some Empirical Evidence." IMF Occasional Paper 220. Washington DC: International Monetary Fund.

Robinson, Patrick L, 1998. "Criteria to Test the Development Friendliness of International Investment Agreements." *Transnational Corporations* 7 (1): 83-89.

Salacuse, Jeswald W. and Nicholas P. Sullivan, 2005. "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain." *Harvard International Law Journal*, 46(1): 67 – 130.

Sauvé, Pierre, 2002. "Trade, Education and the GATS: What's in, What's out, What's All the Fuss about?" *Higher Education Management and Policy*, 33: 48-80.

Schneider, Benu, 2000. "Issues in Capital Account Convertibility in Developing Countries." Background paper for the ODI Conference *Capital Account Liberalisation: The Developing Country Experience*, 21 June 2000. London: Overseas Development Institute.

Sen, Amartya, 1999. Development as Freedom. New York: Anchor Books

South Centre, 2005. "Intellectual Property in Investment Agreements: The TRIPs-Plus Implications for Developing Countries." South Centre Analytical Note SC/TADP/AN/IP/5; SC/TADP/AN/INV/2.

Standing, Guy, 1999. "Global feminization through flexible labor: a theme revisited," *World Development*, 27(3): 583-602.

Tarasofsky, Richard, 2005. "The Kyoto Protocol and the WTO," background paper to an experts' workshop: *Climate Change, Trade and Competitiveness*, Chatham House, London, March 30, 2005.

Te Velde, Dirk Willem, 2003. "Foreign Direct Investment and Income Inequality in Latin America." International Economic Development Group, Overseas Development Institute.

_______________ and Oliver Morrissey, 2002. "Spatial Inequality for Manufacturing Wages in Five African Countries." Research Paper 02/18, Centre for Research in Economic Development and International Trade, University of Nottingham.

Tobin, Jennifer and Rose-Ackerman, Susan, 2005. "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties." Research Paper No. 293, Yale Law Centre for Law, Economics and Public Policy.

Tollefson, Chris, 2003. "NAFTA's Chapter 11: The Case for Reform," *Choices* 9(2): 48-58.

Tuerk, Elisabeth and Markus Krajewski, 2003. "The Right to Water and Trade in Services: Assessing the impact of GATS negotiations on water regulation," Paper presented at the CAT+E Conference Moving forward from Cancun, October.

UNCTAD, 2005. "Recent Developments in International Investment Agreements," UNCTAD Research Note (UNCTAD/WEB/ITE/IIT/2005/1), Geneva: UNCTAD.

_______________, 2003. Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries. New York and Geneva: United Nations.

_______________, 1998. Bilateral Investment Treaties in the Mid-1990s. New York and Geneva: United Nations.

Vaughan, Scott, 2003. "Privatization, Trade Policy and the Question of Water." Les séminaries de l'Iddri no. 9. Paris: Institut de Développment Durable et des Relations Internationales.

Werksman, Jacob, Kevin A. Baumert and Navroz K. Dubash, 2001. "Will International Investment Rules Obstruct Climate Protection Policies?" World Resources Institute *Climate Notes*.

Wiser, Glenn, 2002. "Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services," *International Journal of Global Environmental Issues* 2(3/4): 288-309.

World Bank, 1994. World Development Report 1994: Infrastructure for Development. Washington: World Bank/Oxford University Press.

WTO, 2003. "Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health." Decision of the General Council of 30 August, 2003.

Zampetti, Americo Beviglia and Torbjörn Fredriksson, 2003. "The Development Dimension of Investment Negotiations in the WTO—Challenges and Opportunities," *Journal of World Investment*, Vol. 4, No. 3.

Zhang, K, 2001 "Does Foreign Direct Investment Promote Economic Growth? Evidence from East Asia and Latin America." *Contemporary Economic Policy*, Vol. 19(2): 175-185.

Zhao, Yaohui, 2001. "Foreign Direct Investment and Relative Wages: The Case of China." *China Economic Review* 12: 40-57.