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# Policy coherence and the promotion of foreign direct investment in the renewable energy sector: Lessons from Europe

**Abstract**

This article explores the various home-country measures (HCMs) offered by public international law that can, or potentially could support foreign direct investment in the renewable energy sector. A 'bird's eye' evaluation of a variety of HCMs reveals that while international law indeed offers many legal tools to support investors' needs, the current legal framework is fragmented; legal instruments are designed in isolation and the potential for mutually-supportive, synergetic policies is not being explored. This fragmented reality is in contradiction to the notion of *Policy Coherence for Development,* which is increasingly gaining support in Europe and elsewhere. It is suggested that additional research be conducted on the manner in which HCMs could be connected in order to maximise their potential and boost investment in renewable energies in the developing world.

## 1. Introduction

Despite significant technological advancements, it is clear that the renewable energy (RE) sector cannot be based on free-market incentives alone. According to the International Energy Agency (IEA), investment in RE remains 'well below' the level necessary for achieving the goals of the Paris Agreement.[1] Achieving the commitments made under the Paris Agreement will require a 'USD 13.5 trillion investment in energy efficiency and low-carbon technologies – 40% of total energy sector investment to 2030'.[2] As the current commitments do not even come close to achieving the 1.5°C target aspired by the Paris Agreement, the numbers described above are expected to be significantly higher.[3]

On its own, the free market is not expected to deliver the necessary rise in investment. Large-scale RE projects are associated with too many market failures, political uncertainties (e.g. expropriations and retrospective changes in support schemes) and financial risks (e.g. price

[1] International Energy Agency (IEA), *Energy, Climate Change & Environment* (IEA 2016) 13.
[2] *Ibid*, 20.
[3] *Ibid*, 11.

volatility [4]).[5] Indeed many countries are constantly adopting domestic policies that are aimed at intervening in markets and correcting these deficiencies.[6]

On the international level these problems are amplified. On the one hand, the developing countries' demand for development and increasing hunger for energy present a unique, even historical opportunity for the deployment of RE infrastructure, and base these economies on cleaner foundations. On the other hand, many developing countries suffer from a weak starting point in terms of hosting Foreign Direct Investment (FDI), namely insufficient resources[7] and frail governance which significantly reduces investors' willingness to invest in long term projects.

This paper will discuss the legal tools offered by *public international law* that can or potentially could support FDI in the RE sector in the developing world. The focus in this respect will be not on tools that are designed to *attract* FDI, but rather on those far less studied measures that are used by investors' home countries ('home country measures', or 'HCMs') to support *outward* FDI (OFDI);[8] an area described by Sauvant *et al.* as 'unexplored'.[9] In order to concretise the discussion (and due to space limitations), this paper will focus mostly on the European Union ('EU'), its international commitments, development policies and private investors.

This paper's main objective is to test the hypothesis that while public international law HCMs indeed offers many tools to support the needs of investors in the RE sector, the current legal framework is fragmented. In other words, this paper asks whether international law HCMs are being designed in isolation from one another; with no coordination or attempts to create

[4] Souvik Sen et al., 'Opportunities, barriers and issues with renewable energy development – a discussion' (2017) 69 Renewable and Sustainable Energy Review 1170.
[5] According to the IEA, a 'radical near-term reductions in energy sector' is required if the international community is to achieve the 1.5°C goal prescribed by the Paris Agreement. See: IEA, *World Energy Outlook: 2016, Executive Summary* (IEA 2016) 5-6.
[6] Please see numbers of states adopting policies such as FIT (110 states) quotas (100 states) and bio-fuel obligations (66 states) in: REN21, *Renewables 2017 Global Status Report* (REN21 2017) 21.
[7] This includes high initial capital costs, lack of financing mechanisms, lack of subsidies, lack of consumers' paying capacity, lack of local infrastructure, lack of national infrastructure, and more. See: review in Sunil Luthra et al., 'Barriers to renewable/sustainable energy technologies adoption: Indian perspective' (2015) 41 Renewable and Sustainable Energy Reviews 762, 765-769; Mohammed Yaqoot et al. 'Review of barriers to the dissemination of decentralized renewable energy systems' (2016) 58 Renewable and Sustainable Energy Review 477, 478-486.
[8] Karl P. Sauvant et al., 'Trends in FDI, Home Country Measures and Competitive Neutrality' in Andrea K. Bjorklund (ed), *Yearbook on International Investment Law & Policy 2012-2013* (OUP 2014) 3.
[9] *Ibid*, 4.

synergies and policy coherence. This fragmentation, it will be argued, is damaging as it inhibits the efforts to deploy RE-technologies in the developing world.

This paper will begin by explaining the guiding concept of Policy Coherence for Development (PCD), which is increasingly recognised as crucial in the context of FDI in the RE sector (Section 2). It will then define the concept of public international law HCMs and will provide a review of these measures (Section 3). The purpose of this review is twofold. The first objective of this section is to map and illustrate the universe of RE-related international law HCMs. The second objective of this section is to evaluate whether each of the reviewed HCMs was designed in a manner that is consistent with the notion of PCD, and whether the EU considered the existence of, or potential for, synergies between different HCMs when designing individual HCMs. After performing this HCM review, this paper comes to the conclusion that the design of existing international law HCMs is relatively fragmented (Section 4). Such fragmentation is inconsistent with the notion of PCD, inefficient and to a certain extent even wasteful.[10] It is therefore recommended that a new generation of *sector-specific* investment treaties should be designed, such that will be based on PCD and will rely on a myriad of relevant HCMs (rather than the limited tools offered by BITs). Such instruments, it is argued, will provide foreign investors with a more comprehensive and effective support, and will support the global effort to shift into a greener economy.

## 2. Policy Coherence for Development: An Emerging Trend

Before delving into the technical waters of RE-related FDI, it is necessary to explain the conceptual background of this paper and the current academic debate to which this paper will contribute.

### *2.1 Policy Coherence for Development: Background*

The basic premise that different policies must be harmonious or at least coordinated, has gained ground in recent years.[11] Notably, the Organisation for Economic Co-operation and Development (OECD) has been paying increasing attention to policy coherence in the context

[10] It may seem wasteful for example, to provide Official Development Assistance for the establishment of facilities in countries where funds are likely to be misappropriated, or where high trade barriers are still in place that increase the cost of funded projects.

[11] See an historical review in Lauri Siitonen, 'Theorising politics behind policy coherence for development (PCD)' (2015) 28(1) European Journal of Development Research 1, 7. Although the OECD began their work on Policy Coherence already in 1996, we see the emergence of reports and more practical recommendations only since 2008, following the OECD's Ministerial Declaration. See in OECD, 'Policy coherence for inclusive and sustainable development' OECD and Post-2015 Reflections <http://www.oecd.org/pcd/POST-2015%20PCD.pdf>, 3.

of development. A key landmark was the 2008 OECD Ministerial Declaration, in which it was stated *inter alia*:[12]

> WE AGREE on the necessity of greater coherence and better co-ordination between the various international arrangements and institutions in order to help ensure that the benefits of globalisation are realised and broadly shared and to cope with the challenges it brings and maximise its benefits;
>
> The term often used with respect to policy coherence in the context of development is Policy Coherence for Development (PCD), or Policy Coherence for Sustainable Development (PCSD), defined as 'a policy tool to systematically integrate the economic, social, environmental, and governance dimensions of sustainable development into policymaking, and ensuring that they are mutually supportive.[13]

In the past, most efforts in the context of PCD were focused on how to avoid conflicts between policies and preventing a situation where policy from one area (e.g. protectionist agriculture policy), frustrates the success of another (e.g. support of developing countries agricultural sector).[14] In recent years however, the focus has expanded to also include *synergies* between policies, i.e. the manner in which one policy from one policy area could *promote* the effectiveness of policies from other areas.[15]

### *2.2 Development, PCD and RE-related FDI*

This study places the need to promote RE-related FDI within the context of PCD as a search for *synergetic policies,* that will link the attainment of climate change objectives with the process of development. Today, consideration of RE-related FDI within this context sounds today sensible by most people's standards. However, this was not always the case. As explained by Gupta and van der Grijp, 'the political framing of the climate change problem has changed

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[12] OECD, 'Ministerial Declaration on Policy Coherence for Development' (4 June 2008) C/MIN(2008)2/FINAL, <http://www.oecd.org/pcd/ministerialdeclarationonpolicycoherencefordevelopment.htm>.
[13] OECD, *Better Policies for Development 2015: Policy Coherence and Green Growth* (OECD 2015) 3.
[14] OECD, 'Policy coherence for inclusive and sustainable development' (n 11) 5; Maurizio Carbone and Niels Keijzer, 'The European Union and Policy Coherence for Development: Reform, Results, Resistance' (2015) 28(1) European Journal of Development Research 30, 31.
[15] OECD, 'Policy coherence for inclusive and sustainable development'(n 11) 5; Carbone & Keijzer, 'The European Union and Policy Coherence for Development' (n 14) 31. Please also see the work of Thomas Gehring and Sebastian Oberthür, notably *institutional interaction in global environmental governance* (MIT 2006).

over time'.[16] During the early 1990s, the problem of climate change 'was seen as an abstract, global, technological and economic challenge' and even 'technocratic in nature'.[17] Climate change was not considered an issue that was strongly linked to developing countries' attempts to make progress, or to the specific challenges that those countries faced in this context.

However in the past 20 years, a variety of reasons (notably the political shift towards the achievement of the Millennium Development Goals) have led to a shift in the conceptualisation of this problem, as development-oriented and development-linked.[18] The links between climate change and development have been explored at length.[19] Such links include *inter alia* the fact that the developing world is highly vulnerable to the adverse effects of climate change on the one hand, and the increasing demand by these countries for energy (and the implications of such demand for climate change) on the other.

The link between RE-related FDI and development should be understood within this context and the search for *synergetic* policies should be expanded.[20] Any attempt to design synergetic and active interactions between policies requires some level of climate change 'mainstreaming', defined by Gupta as 'a process by which development policies, programmes and projects are (re)designed, (re)organized, and evaluated from the perspective of climate change mitigation and adaptation.'[21] Such a process inevitably requires the re-allocation of resources, notably in the context of financial transfers, from a variety of development-oriented objectives towards development objectives that are related to climate change. This situation unavoidably creates new 'winners and losers'.[22] For example, the channelling of more fixed Official Development Assistance ('ODA') resources towards RE-related projects will mean that less of those resources will be available for the achievement of other objectives (e.g. health and education).

Understanding this point is crucial in the context of this paper, for two reasons. First, it is important to realise that there are no 'magic' solutions: the resources invested in supporting

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[16] Joyeeta Gupta and Nicolien van der Grijp, 'Introduction: Mainstreaming climate change in development cooperation' in Joyeeta Gupta and Nicolien van der Grijp (eds.) *Mainstreaming climate change in development cooperation* (CUP 2010) 8.
[17] Gupta & van der Grijp (n 16) 8-9.
[18] *Ibid*, 9-10.
[19] See for example: World Bank, *World Development Report 2010: Development and Climate change* (World Bank 2010).
[20] Christopher Flavin and Molly Hull Aeck, *Energy for Development: The potential role of renewable energy in meeting the Millennium Development Goals* (REN 21 2001).
[21] Joyeeta Gupta, 'Mainstreaming climate change: a theoretical exploration' in Joyeeta Gupta & Nicolien van der Grijp (eds.) *Mainstreaming climate change in development cooperation* (CUP 2010) 77.
[22] *Ibid*, 90.

RE-related investment may help to mitigate the impacts of climate change, but such benefits will certainly come at a price. Secondly, understanding the 'price' tag of such mainstreaming clarifies the importance of synergies and competing policies, notably in the context of trade and investment rules that do not require the direct allocation of resources but rather are aimed at increasing resources by *reducing costs* and *facilitating* the operation of green industries abroad. The importance of such policies in PCD design therefore is clear as their 'price tag' for other developmental goals is usually very low (if not outright profitable).

## 3. Home Country Measures (HCMs) and the promotion of RE-related FDI

Before continuing, clarification concerning this paper's methodology is necessary. While it is clear that each of the below reviewed HCMs deserves an in-depth review of its features and potential, this paper discusses the issues at hand at a rather high-level of abstraction. This methodological choice is required due to space restrictions, but that is not the only reason. The paper's objective is to address a *systemic* issue - the existence of a certain fragmentation in the investment environment, a reality in which many HCMs are designed in isolation, with no coordination and with little regard to the concept of PCD. This objective justifies a "bird's eye view" approach, addressing a number of HCMs and the manner in which they connect (or not), rather than a detailed focus over one HCM or another.

### *3.1 HCMs: Background*

Most of the literature on investment and climate is concerned with the measures that *host states* may take in order to attract foreign investors.[23] This paper explores this relationship from a different perspective. More specifically, it considers the policy measures that an investor's *home state* may implement in order to increase outwards RE-related FDI.[24]

The United Nations Conference on Trade and Development (UNCTAD) defined Home Country Measures (HCMs) as:[25]

[23] See for example: Marie-Claire Cordonier Segger et al. (eds) *Sustainable Development in World Investment Law* (Kluwer, 2011); Caroline Henckels, 'Protecting regulatory autonomy through greater precision in investment treaties: The TPP, CETA and TTIP' (2016) 19(1) Journal of International Economic Law 27; Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge 2016); Anthony VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat 2013).

[24] Sauvant et al., 'Trends in FDI, Home Country Measures and Competitive Neutrality' (n 8) 4.

[25] UNCTAD, *Home Country Measures* (UNCTAD 2001) 66.

> [P]olicy measures taken by the home countries of firms that choose to invest abroad designed to encourage FDI flows to other countries. Their formulation and application may involve both home and host country Government and private sector organizations.
>
> HCMs exist at the national, regional and multilateral levels and involve a broad variety of measures, ranging from information provision, technical assistance and capacity-building, to financial, fiscal and insurance measures, investment-related trade measures, and measures related to the transfer of technology. Given this variety, HCMs have to be adaptable and flexible, since "no one size fits all".

To date, the author is aware of two attempts to map the universe of available HCMs; the above-mentioned UNCTAD report (2001) and the work of Sauvant *et al* (2014).[26] The UNCTAD report identified six major types of HCMs, which are especially useful for the promotion of FDI in developing countries.

The **first type** is described as 'policy positions', defined as 'positive in tone but vague in specific commitments […] generalized statements on intentions or goals'.[27] As can be seen below, the EU often relies on this type of measure. The **second type** of HCMs is identified as 'information provision and technical assistance'.[28] This type of HCM refers to the provision of necessary information such as concerning potential risks, sectoral conditions, legal frameworks, etc. The UNCTAD report also included within this group the possibility of providing technical assistance to host states wishing to improve elements related to transparency and the availability of information.

The **third type** of HCMs is defined as 'technology transfer facilitation'.[29] This category of measures refers to those which are tailored to support FDI intended to increase technology transfer, for example, by prioritizing grants to such projects, or even through technical assistance to host states in order to strengthen their capacity to host such investments. The **fourth type** of HCMs is defined as 'financial and fiscal incentives',[30] straightforwardly referring to financial support measures such as grants, loans, equity participation, tax measures and more.

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[26] Sauvant et al., 'Trends in FDI, Home Country Measures and Competitive Neutrality' (n 8), 3 -.
[27] UNCTAD (n 25) 8.
[28] *Ibid*, 9.
[29] *Ibid*.
[30] *Ibid*, 10.

A **fifth type** of HCMs are investment insurance, defined as guarantees and insurance that help to mitigate the costs involved with FDI in developing states. Such measures include *inter alia,* political and non-commercial risks which are traditionally conceived as being higher in developing countries.[31] A **sixth type** of HCMs are market access regulations.[32] The UNCTAD report refers here mostly to trade related measures and the removal of trade barriers, which may impact the viability and profitability of investments. Sauvant *et al*. address trade-related measures as only 'indirectly' supporting FDI.[33] As explained below, however, the author believes that certain trade policies should indeed be regarded as 'direct' measures, affecting investment in a manner similar to that of other HCMs.

Sauvant *et al*. provides an extensive list of more specific HCMs, including a range of financial measures (grants, loans, etc.), investment insurance measures, information services, as well as services offered by export credit agencies, trade/investment promotion agencies, and lastly, international treaties.[34] Despite the clear relevance of public international law tools and their efficiency in this context, Sauvant *et al*. did not focus on international treaties, and indeed many of these were omitted from their discussion.[35] International treaties will therefore be the focus of this paper.

### *3.2 International Law HCMs*

The term 'international law HCMs' is not defined in the literature. A short elaboration is therefore required. International law HCMs are those that were created in a treaty between two (or more) states following negotiations, and are based on the notion of international cooperation. They differ from other HCMs that are offered unilaterally by states to their investors on several levels.[36] Notably, unilateral HCMs incorporate mostly private economic and commercial objectives. They are meant to support local industry in its efforts to increase its wealth through international expansion, and indirectly promote the well-being of the supporting state. International law HCMs on the other hand, are intended to support much wider and more public objectives: notably the well-being of *all involved* states, and in some cases even more (as in the case of climate change which affects the international community

[31] UNCTAD (n 25) 10.
[32] *Ibid*.
[33] Sauvant et al., 'Trends in FDI, Home Country Measures and Competitive Neutrality' (n 8) 19.
[34] *Ibid*, box 2, 13.
[35] *Ibid*, 18-19.
[36] For a list of 'non-international law' mechanisms see: 'Chapter 16: Cross-cutting Investment and Finance Issues' in IPCC, *Climate Change 2014: Mitigation of Climate Change: Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 1226-1227.

as a whole). As such, international law HCMs often include objectives that are related to sustainable development, poverty alleviation, technology transfer, and as discussed in this paper, also to environmental protection.  Increasingly, these HCMs are also designed with careful attention to the host states' right to regulate, which is often regarded as restricted due to the involvement of international law.

The wider nature of international law HCMs makes them far more challenging to design than regular unilateral HCMs. The objectives of unilateral HCMs are simple and straightforward, and can be achieved through relatively simple tools, based mostly on commercial viability and risks. International law HCMs on the other hand are at least in theory, far more selective and complex, as states will aspire to support only investments that could potentially achieve *a number of goals* (e.g. investments must be commercially viable, be sustainable in nature, and harmless/supportive to the environment). With the specific nature of RE-related HCMs the challenge is even greater because as explained above, investors' needs are unique and require careful long-term design.

Moreover, the increasingly 'distributive' nature of certain international law arrangements suggests that the role and the importance of international law HCMs will significantly increase in the near future. Obligations made under international law, whether in the form of ODA (see for example the instruments discussed in part 3.2.1) or through the extensive financial pledges made by the members of the United Nations Framework Convention on Climate Change (UNFCCC), imply that much of the resources that will be allocated for climate-related projects will be delivered via international law-based instruments. These large amounts are expected to dwarf equivalent national funds, making international sources much more important. Linking these international law-based tools to the wider effort to increase RE-related investment is therefore expected to be ever more urgent.

Lastly, at least in theory, international law HCMs could well be much more effective and beneficial than unilateral HCMs. This is due to the fact that both home and host countries are committed to these HCMs (indeed both were involved in their design).

In the following section, a review and analysis of the HCMs that are provided by public international law, will be presented. This part will concentrate on those international treaties through which, at least potentially, states are able to actively promote RE-related FDI. As the focus of this paper is on EU investors that are operating in developing countries, the emphasis will be on the treaties that are relevant for those specific investors.

As this paper examines the existence of policy coherence with respect to development, special attention will be given to the manner in which these HCMs are connected, and coordinated, *if at all*.

### 3.2.1 Official Development Assistance (ODA):

When discussing PCD, the first type of HCM to consider is development assistance. More specifically, this study will be focused upon ODA as an HCM and the key for increasing RE-related FDI in the developing world. ODA is a clear international law HCM, which can be classified as falling under the **fourth type** of HCMs ('financial and fiscal incentives').

The EU is a fruitful source of ODA. In 2015 it provided a staggering 68 billion USD[37] (the US in comparison provided 31 billion USD during this year[38]). This sum is a combination of ODA originating from the EU's institutions (almost 14 billion USD)[39] and from EU member states.[40]

#### *3.2.1.1 ODA and RE-related FDI*

Due to its difficult competitive position vis-à-vis fossil-fuel based energy production, private FDI in RE is often dependant on external financial support. This reality is well understood by decision-makers, and indeed the vast majority of the world's nations have adopted national support schemes in order to promote the RE.[41] Technological improvements imply that, at some point in the future, RE will become commercially viable and RE support schemes will no longer be needed. In most parts of the world, however, this point in time has not yet arrived, and waiting for the free market's invisible hand to simply take its course does not sit well with the urgency of the struggle to overcome the problem of climate change. As stated in the introduction to this paper, a massive financial effort is still necessary to achieve the commitments undertaken via the Paris Agreement, and an even greater effort is necessary in order to attain the 1.5°C target.[42] The IEA aptly describes the need for 'radical near-term

[37] See in European Commission, 'EU Official Development Assistance reaches highest-ever share of Gross National Income' (European Commission, 13 April 2016) <http://europa.eu/rapid/press-release_IP-16-1362_en.htm>.
[38] See data collected by the OECD, 'Table 1: Net Official Development Assistance from DAC and Other Donors in 2015: Preliminary Data for 2015' <http://www.oecd.org/dac/stats/ODA-2015-complete-data-tables.pdf>.
[39] *Ibid.*
[40] Denmark's direct contribution for example, played a key role in the establishment of the AfDB's Sustainable Energy Fund for Africa (SEFA). Other states that contributed to SEFA directly include the UK and Italy, see: SEFA, *Annual Report* (AfDB 2015) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/SEFA_ANNUAL_REPORT_2015.pdf>, 4-5.
[41] According to the OECD, by 2015, 145 states have adopted national support schemes in order to promote the RE. See: OECD, *Overcoming Barriers to International Investment in Clean Energy* (OECD 2015) <http://www.oecd-ilibrary.org/environment/green-finance-and-investment_24090344>, 19.
[42] IEA (n 1).

reductions',[43] which even according the more optimistic scenarios will not happen at the desired speed without aggressive policies to support this change.

Efficient support schemes are a viable alternative only where the state can allocate the necessary funds. As many developing countries have more urgent concerns and far less resources to rely on, investing funds in RE support schemes is not always a priority.[44] Furthermore, many developing countries also resist the idea that they have any obligation to invest precious resources in RE schemes intended to mitigate the effects of a problem they feel has been caused by the developed West.[45]

The solution for this situation may come in the shape of 'external' financial support from developed counties, which will fund developing countries effort to transit into a greener economy. Such financial support may arrive in the shape of ODA, defined as 'government aid designed to promote the economic development and welfare of developing countries.'[46] According to the OECD's definition, funds transfer for the purpose of supporting local RE investment are most likely to be considered as ODA.[47]

As for the sums that were transferred in the past via ODA, the Inter-governmental Panel on Climate Change (IPCC) presented (now somewhat dated) data concerning the climate-related ODA's commitments, according to which the seven multilateral development banks distributed 24.1 billion USD in 2011, and 26.8 billion USD in 2012.[48] A more recent assessment by the OECD estimates bilateral climate-related development finance in 2016 at 30 billion USD.[49] Multilateral climate-related development finance is estimated in the same review until 2015, at 21 billion USD for that year. The transfer of ODA to support developing countries' transition into a low-carbon economy is also expected to continue into the future as the 2015 UNFCCC

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[43] IEA (n 5). The reader should note that the IEA (just like other major energy forecasting agencies such as the US Energy Information Administration) has been criticized in the past for underestimating the future deployment of RE. The reader should therefore proceed with caution. Regardless, the author is unaware of any respectable estimate to the contrary, i.e. according to which external funding is unnecessary and the 1.5°C target could be achieved without it. This study will therefore accept the uncontroversial assumption that the free market's invisible hand, on its own, will not deliver the 1.5°C target and external intervention, including in the form of subsidization, is necessary.
[44] See data on number states support schemes, according to their levels of income in REN21, *Renewables 2015: Global Status Report* (REN21 2015) Table 3, 99.
[45] See the meaning, history and origins of the principle of common but differentiated responsibilities under the climate change regime in Jutta Brunnée and Charlotte Streck, 'The UNFCCC as a negotiations forum: towards common but more differentiated responsibilities' (2013) 13(5) Climate Policy 589.
[46] OECD, 'OECD Net ODA' <https://data.oecd.org/oda/net-oda.htm>.
[47] See OECD, 'Is it ODA?' Factsheet (November 2008) <https://www.oecd.org/dac/stats/34086975.pdf>.
[48] IPCC, 'Chapter 16: Cross-cutting Investment and Finance Issues' (n 36) 1215.
[49] OECD, *Climate-related Development Finance in 2016* (OECD 2017) <http://www.oecd.org/dac/stats/climate-change.htm>.

Paris agreement instructs the developed world to transfer financial assistance (such as ODA) in order to support developing states' attempt to meet the objectives of the UNFCCC.[50]

ODA transfers are structured so that they are administered mostly via public international funds. As identified by the IPCC, there are approximately 50 relevant public international funds.[51] One could, therefore, argue that this fact alone is evidence of the fragmentation of international law HCMs. However, when one considers the existence of these funds along with additional sources such as carbon market funds (45 according to the IPCC) and the numerous private funds (about 6000) that are available for investors it is difficult to deny the fragmented landscape of international law HCMs.[52]

Reviewing all the funds and the channels through which ODA is distributed is beyond the scope of this paper. However, three key actors, namely the UNFCCC's Green Climate Fund (GCF), the Global Environmental Facility, and the World Bank's Climate Investment Funds are worth mentioning.

#### *3.2.1.2 The Green Climate Fund*

The GCF was established under the UNFCCC, and defined as its 'main financial entity'.[53] The GCF was established in 2010 but only became fully operational in 2015[54]. It is managed by an independent board, which receives instructions from the UNFCCC's COP. The GCF's declared objective is 'to support projects, programmes, policies and other activities in developing country Parties'.[55] Around 50% of the fund's resources (currently about 10 billion USD) are provided by EU member states.

One of the GCF's four declared 'mitigation strategic impacts' is 'energy generation and access',[56] making it very relevant for investment in RE. Furthermore, this fund also sets up a 'Private Sector Facility', with the purpose of using its (relatively) scarce resources for scaling up much larger private sector investments. The GCF offers a wide variety of financial tools,

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[50] See The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (Paris Agreement) art 9.
[51] IPCC, 'Chapter 16: Cross-cutting Investment and Finance Issues' (n 36) 1228.
[52] *Ibid.*
[53] Green Climate Fund, *Brief on the Green Climate Fund for Climate Change Negotiators* (GCF 2015) 4.
[54] For more details about the fund and its operation see: Liana Schalatek et al., 'The Green Climate Fund' (2015) Climate Finance Fundamentals <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10066.pdf>.
[55] UNFCCC 'Decision 1/CP.16' (2011) UN Doc. FCCC/CP/2010/7/Add.1, [102].
[56] Green Climate Fund, *Investment Opportunities for the Green Climate Fund: GFC's Role and Impact within the Climate Finance Ecosystem* (GCF 2015) 2.

including grants, loans, equity investments, and various forms of guarantees.[57] The resources of the GCF are distributed via multilateral development banks (MDBs), as well as through a list of public and private accredited *entities.*[58]

#### *3.2.1.3 Global Environmental Facility (GEF):*

The Global Environmental Facility (GEF) was established in 1991 in order to support the finance of a variety of international environmental agreements. GEF funds are contributed by a list of donor countries, which include most but not all EU member states.[59] The GEF's role is inherently linked to development and indeed contributions to GEF are considered as ODA.[60]

According to the GEF, since its inception a total of 5.2 billion USD has been invested in 167 countries, for 839 projects related to climate adaptation and mitigation.[61] Much of this finance was invested in order to foster and scale up the private sector via the deployment of a variety of financial instruments.[62]

According to the GEF's most recent programming directions (GEF-6):[63]

> [GEF's strategy] does not prioritize direct support for large-scale deployment and diffusion of mitigation options with GEF financing only. Rather, GEF-6 resources are utilized to reduce risks and address barriers, so that the results can facilitate additional investments and support by other international financing institutions, private sector, and/or domestic sources. This approach also ensures that the GEF mandate is complementary to those of other climate finance options that aim for scaling-up.

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[57] See a review of projects supported by the fund so far in Green Climate Fund, *Project Briefs* (Green Climate Fund 2015) <http://www.greenclimate.fund/documents/20182/194568/GCF_Project_Briefs_2015.pdf/b3cb6cd3-cac4-409f-92e7-028ad2fb902b>.

[58] List of accredited entities can be found here: <http://www.greenclimate.fund/documents/20182/114261/20160516_-_GCF_List_of_Accredited_Entities.pdf/e09bb9b3-9730-4adc-bca9-ff32739ecae8>.

[59] See: list of donor countries on GEF's website <https://www.thegef.org/partners/participants>.

[60] Please see Note prepared by the OECD secretariat which lists GEF as one of the institutions 'core contributions to which may be reported as official development assistance, either in whole or in part.' OECD Secretariat, 'Is it ODA?' Factsheet (May 2007) <https://www.oecd.org/dac/stats/34086975.pdf>.

[61] GEF, *Report of the Global Environment Facility to the Twenty-first Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change* (GEF 2015) 2.

[62] See for example the GEF non-grant pilot <https://www.thegef.org/gef/NGI>.

[63] GEF, *GEF-6 Programming Directions* (2014-2018) (GEF 2014) <https://www.thegef.org/gef/sites/thegef.org/files/webpage_attached/GEF6_programming_directions_final_0.pdf>, 52.

Furthermore, according to the 'Instrument for the Establishment of the Restructured Global Environmental Facility'[64] the GEF 'shall ensure the cost-effectiveness of its activities'.[65] These instructions all suggest that the GEF could and should explore policy synergies with other policy-areas, which may improve the 'cost-effectiveness' of its investment, as well as the scaling up of the private sector's role.

With respect to PCD, the GEF programming directions emphasise the necessity of promoting synergies between policies.[66] While the GEF activity indeed shows promise with respect to achieving PCD (for example with respect to issues such as gender equality), this institution currently does not explore synergies with international trade and investment laws.[67]

#### *3.2.1.4 Climate Investment Funds (CIF)*

Another key ODA-based instrument is the World Bank-managed multilateral Climate Investment Fund (CIF), and more specifically its Clean Technology Fund (CTF) and the Scaling Up Renewable Energy Program (SREP). The CIF's aim is among others, to support private investment in RE by 'covering high up-front costs and risks, championing first-movers, stimulating markets, and bridging financing and information gaps'.[68] The funds made available by the CIF for this purpose, are allocated via its partner MDBs, *inter alia* in the form of loans, grants, equity and guarantees.[69] Examples of the activity of CIF include early finance of large-scale RE projects in Morocco, Thailand, Indonesia, Turkey and Mexico.[70] According to CIF, its funding in these cases allowed the reduction of financing costs, and of finance risks for lenders. CIF funds further helped to bridge financing gaps between available commercial loans and investors' needs, to reduce interest rates, and more.[71]

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[64] The 'Instrument' is essentially a treaty between the relevant states, which regulates the GEF's activity, available online: GEF, 'Instrument for the Establishment of the Restructured GEF' (2 March 2015) <https://www.thegef.org/documents/instrument-establishment-restructured-gef>.
[65] *Ibid,* Art I(5).
[66] GEF (n 63) 52, and 54 (see box 2 in this page).
[67] Nothing is mentioned with respect to these areas in any of the GEF's leading guidelines or programming directions.
[68] See CIF's website <http://www-cif.climateinvestmentfunds.org/fund/private-sector>.
[69] *Ibid.*
[70] See a factsheet issued by CIF, 'Clean Technology Fund' (November 2015) <http://www-cif.climateinvestmentfunds.org/sites/default/files/knowledge-documents/ctf_factsheet_nov2015_web.pdf>.
[71] *Ibid.* See also: CIF, 'De-risking Climate Smart Investment' <http://www-cif.climateinvestmentfunds.org/sites/default/files/knowledge-documents/ps_factsheet_nov2015_web.pdf>.

In light of the establishment of the GCF, the future of the CIF is somewhat uncertain as donor states may not be willing to finance 'twin' funds that are largely aimed to achieve the same goal.[72]

### *3.2.1.5 ODA and PCD:*

ODA could play an important role in the efforts to achieve PCD. Notably, it could be useful in addressing *some* of the obstacles faced by RE-related investors; whether through the creation of a better investment environment (e.g. by investment in infra-structure, or training programs), the reduction of the cost of investment (e.g. loans, guarantees, etc.), or even through the financing of support schemes and ensuring sufficient levels of returns,[73] or the mitigation of some risks.[74] In other words, *if targeted and designed properly*, ODA could supplement and enhance other HCMs and improve their effectiveness.

On the other hand, one must also be aware of the dangers of such a possibility. Notably, linking ODA to firmer, stricter international legal obligations, may reduce donor states' willingness to undertake meaningful financial commitments. Perhaps the most striking example in this respect, is the 100 billion USD commitment that was accepted via the Copenhagen Accord, which was achieved through a 'soft', non-binding mechanism. It is doubtful whether such commitments would have been made under a more binding mechanism.

Compared to the rest of the developed world, the EU's commitment to climate-related ODA is indeed impressive. However, the relevant sums *on their own,* are without a doubt insufficient for supporting a genuine transition into a green economy as well as for achieving the objectives of UNFCCC goals, such as those stipulated in the Paris Agreement. Much of the ODA is indeed dedicated to *scaling up* existing funds by creating adequate infrastructure, or through mechanisms such as the Private Sector Facility. In other words, PCD is not only recommended but in fact crucial for the effectiveness of ODA.

However impressive the EU's ODA-related efforts are, RE-related investors require more than mere financial support; they require *inter alia* a sufficient answer to policy uncertainties and

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[72] Chiara Trabacchi and Jessica Brown, 'Uncertain Future of the Climate Investment Funds makes Achieving Climate Finance Goals Tougher' (Climate Policy Initiative, June 2016) <http://climatepolicyinitiative.org/2016/06/14/uncertain-future-climate-investment-funds-makes-achieving-climate-finance-goals-tougher/>.

[73] The IPCC 2014 report reviews the rates of return expected by investors in low-carbon sector, and summaries that '[m]any renewable energy projects, especially in developing countries where additional risk margins are added, are struggling to reach returns of this level to satisfy the expectations of financiers of equity and debt.' IPCC, 'Chapter 16: Cross-cutting Investment and Finance Issues' (n 36) 1223.

[74] Elizabeth Asiedu et al. 'Does Foreign Aid Mitigate the Adverse Effect of Expropriation Risk on Foreign Investment? (2009) 78(2) Journal of International Economics 268.

risks, as well as means that will ensure sustainable high returns in the longer-run. Other HCMs could be useful in this respect. IIAs for example, could provide an answer for the first requirement, while reduced, bound tariffs on Environmental Goods could help with the latter. The role of PCD in this respect, is far from completed and more policies should be dedicated to the challenge of increasing RE-related FDI. Further international law HCMs that could be engaged to support this process are discussed below.

### 3.2.2 International Investment Agreements (IIA)

Despite the ever-growing critique by certain academics and Non-Governmental Organisations (NGOs) concerning the use of IIAs, and in light of proposals to improve these,[75] many states are concluding IIAs in order to increase foreign investment. At the time of writing, the UNCTAD estimates that there are 3324 IIAs in force.[76]

There is a constant debate regarding whether IIAs actually promote foreign investment. While the author is certainly not qualified to judge, a review of the literature suggests that at least to a certain extent and under certain conditions, IIAs do promote investment,[77] including in developing countries.[78] IIAs may include both investment protection provisions and investment promotion provisions; the former are extremely common while the latter can be found only on rare occasions. The following part of this paper presents a review of both types of provisions, however greater emphasis is placed on the far less explored investment promotion provisions.

#### *3.2.2.1 Investment protection under IIAs*

Several authors have addressed the manner in which IIAs are supportive of RE-related investment.[79] Notably, the standard of protection found in IIAs can offer predictability, stability

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[75] See for example: Armand de Mestral and Celine Levesque (eds), *Improving International Investment Agreements* (Routledge 2013); Anthony VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements: A guide for Developing Country Negotiators* (Commonwealth Secretariat 2013); Marie-Claire Cordonier Segger and Avidan Kent, 'Promoting sustainable development through international investment law', in Marie-Claire Cordonier Segger, Markus Gehring & Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer 2011); Karl Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland 2013).

[76] UNCTAD, *World Investment Report* (UNCTAD 2017), xii.

[77] See literature review in Roberto Echandi et al., 'The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature' (2015) World Bank Group, Policy Research Working Paper 7437, 22; and a literature review in Zbigniew Zimny *et al.* 'The Role of International Investment Agreements in Attracting Foreign Direct Investment' (2009) UNCTAD Series on International Investment Policies for Development (UNCTAD 2009) <http://unctad.org/en/Docs/diaeia20095_en.pdf>.

[78] Matthias Busse et al., 'FDI promotion through bilateral investment treaties: more than a bit?' (2010) Review of World Economics 147.

[79] See for example: Anatole Boute, 'Combating climate change through investment arbitration' (2012) 35 Fordham International Law Journal 613; Edna Sussman, 'The Energy Charter Treaty's investor protection

and a fair business environment for foreign investors. For example, IIAs protect foreign investors from protectionism and the need to deal with corrupt judicial systems. They also often assure foreign investors of Western standards of administrative due-process, and provide protection from arbitrary state behaviour, an effective recourse for compensation, and a non-politicised dispute-settlement mechanism. Notably the fair and equitable treatment standard of protection (FET) provides guarantees that investors' legitimate expectations at the time of making the investment will be maintained. These measures are important in order to reduce the risk of long-term investment, and to encourage investors to operate abroad. The reduction of the political risks inherent in foreign investment directly diminishes financial risk, and reduces the cost of capital.

When discussing HCMs, the notion of investment *protection* seems *prima facie* irrelevant as it is the *host* state that is acting in order to promote the investment. Despite this initial inclination, this author believes that IIAs should also be seen as HCMs, especially where one of the parties is an investment exporting state (which is almost always the case). In such cases, investment exporting states are actively negotiating a treaty that will be useful for their home investors and will provide them with sufficient guarantees. In other words, investment exporting states are actively preparing and improving the business environment for their own prospective investors.

IIAs' investment protection guarantees fall under the UNCTAD report's **fifth type** of HCMs, as these guarantees operate as a form of investment insurance by reducing some of the risks associated with investing abroad. These types of assurances may be especially useful in the case of RE-related FDI, which are often long-term, and include a significant component of sunk cost.[80] Most RE support schemes, for example, are built on a similar model; the investor invests a substantial amount of money to create the energy production facilities (e.g. solar farms) and as 'payment' receives some sort of a long term contractual right to profit from these facilities. In other words, once the investment is made, the investor's ability to profit is completely dependent on the host state's intention to respect its part in the deal, a dependency that usually lasts for a very long period. The need for investment protection provisions in the case of RE-related investment is therefore clear.

provisions: Potential to foster solutions to global warming and promote sustainable development' (2007) 14(2) ILSA Journal of International and Comparative Law 391. More recently the OECD identified the 'insufficient investor protection' as one of the reasons inhibiting a growth in low-carbon investment, see: OECD, *Better Policies for Development 2015: Policy Coherence and Green Growth* (OECD 2015) 73.

[80] See: IPCC, 'Chapter 16: Cross-cutting Investment and Finance Issues' (n 36) 1227.

Addressing investment risks and policy uncertainties is particularly crucial in the case of climate-friendly investments. For example, investment in climate-friendly technologies is considered to be unusually 'risky',[81] due *inter alia* to the relatively high initial cost of these technologies, and the difficulty in making long-term predictions about profitability of investments in this field. Likewise, other particular factors such as the current lack of long-term climate change policies, the need to engage closely with governments (often susceptible to political 'moods'), and the high upfront expenses on infrastructure, all decrease the attractiveness of these investments. As a result, any form of assurance or guarantee for long-termed stability will continue to be important in order to promote RE-related FDI and mitigate the impacts of climate change.

Such guarantees are particularly important when one considers some of the recent decisions host countries have made to renege on long-term commitments in the RE sector. For example, a number of states recently decided to retroactively change the terms of long-term support schemes such as feed-in tariffs, *de facto* reducing the returns expected by investors in this sector, at the time of making their investment.[82] The use of IIA protection provisions in these cases, has proven to be popular among investors seeking to recover their promised profits.[83]

Whether RE investors' rights will be protected by investment tribunals remains an open question.[84] Arbitral awards so far attempt to balance investor rights with the sovereign rights of host states. While certain changes to the regulatory framework protecting RE sector investment are permissible, arbitral tribunals suggest that more drastic regulatory changes

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[81] For a full review of the risks embedded in RE-related investment: IEA, *Tracking clean energy progress 2015* (IEA 2015); Souvik Sen et al. 'Opportunities, barriers and issues with renewable energy development – a discussion' (2017) 69 Renewable and Sustainable Energy Review 1170; MIGA, *World Investment and Political Risk: World Investment Trends and Corporate Perspectives; The Political Risk Insurance Industry; Breach of contract* (World Bank 2014); Iordanis M. Eleftheriadis, 'Identifying Barriers in the Diffusion of Renewable Energy Sources' (2015) 80 Energy Policy 153.

[82] See description of changes made in Spain in: Pablo del Rio and Pere Mir-Artigues, 'A Cautionary Tale: Spain's Solar PV Investment Bubble' (2014) IISD/GSI <https://www.iisd.org/gsi/sites/default/files/rens_ct_spain.pdf>; See reports about changes made in Greece in: Nilima Choudhury, 'Greece cuts FITs retroactively' (PV-TECH, 14 May 2013) <http://www.pv-tech.org/news/greeks_cuts_fits_retroactively>; in Italy, see: Edgar Meza, 'Italian PV industry threatened by retroactive FIT cuts' (PV Magazine, 19 June 2014) <http://www.pv-magazine.com/news/details/beitrag/italian-pv-industry-threatened-by-retroactive-fit-cuts_100015473/#axzz48ulPwlNK>; and in the Czech Republic, see: Ian Clover, 'Czech PV industry denounces retroactive measures on renewable energy' (PV Magazine, June 12 2014) <http://www.pv-magazine.com/news/details/beitrag/czech-pv-industry-denounces-retroactive-measures-on-renewable-energy_100015395/#axzz48ulPwlNK>.

[83] According to the UNCTAD, in 2015 the '[s]tate conduct most frequently challenged by investors in 2015 included legislative reforms in the renewable energy sector'. UNCTAD, 'IIA Issues Note No 2' (June 2016) <http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf>.

[84] The most relevant question was whether retroactive changes in RE support schemes such as FIT could (or could not) be legitimately expected by foreign investors.

would be problematic. In *Charanne v Spain* the tribunal rejected the claim according to which certain retroactive changes made in Spain's support schemes could be protected under IIAs.[85] The following *Eisner v Spain* tribunal however, ruled in favour of foreign investors, justifying the inconsistency with the *Charanne* ruling by explaining that '[t]he measures complained of in *Charanne* had far less dramatic effects than those at issue here.'[86]

In a different case (*Blusun v Italy*), the foreign investors' claim was rejected *inter alia* as the Italian measure was deemed 'quite substantial, but was not in itself crippling or disabling', and 'the reduction in incentives was proportionately less than the reduction in the cost of photovoltaic technology', and that other important conditions (notably the length of the support scheme) remained intact.[87] In summary, most tribunals have suggested that the state will not be held liable for relevant changes in the legal and fiscal framework. If one may predict, it is somewhat likely that this line will also be adopted in future decisions (at least in cases against Spain) as the disputed measure in these cases[88] are likely to be similar to those discussed in *Eisner* (as well as other publicly available cases such as *Isolux* and *Novenergia*). However, due to the lack of binding precedent in investment arbitration, this prediction should be regarded as speculative.

#### 3.2.2.2 Investment promotion under IIAs

While the traditional tools available in the majority of the 3000 plus investment treaties can be considered as supportive of RE-related FDI (that is, if one is to accept the view that IIAs indeed promote FDI), there is no doubt that more could be done by states wishing to actively support such investment. Notably, while most investment treaties include investment *protection* provisions, only a handful also include investment *promotion* i.e. measures that provide active support for foreign investment.[89] An UNCTAD report defines investment promotion provisions in the following words:[90]

> Investment promotion provisions stand out as a special category in IIAs since – contrary to the treaty obligations concerning investment protection – they establish a commitment of the contracting parties to do something. While investment protection is

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[85] *Charanne v Spain*, SCC Case No V062.2012, Award (21 January 2016).
[86] *Eiser v Spain*, ICSID Case No. ARB/13/36, Award (4 May 2017) [368].
[87] *Blusun v Italy*, ICSID Case No. ARB/13/3, Award (27 December 2016) [342].
[88] One can only speculate as to the content of claims in unpublished cases, but the author assumes that these claims will be mostly similar to the (now publicly available) *Eiser, Isolux and Novenergia* claims in which investors addressed also the recent and more drastic measures that were imposed by the Spanish government.
[89] UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (UNCTAD 2008) 13.
[90] *Ibid*, 6.

geared to prevent contracting parties from taking certain measures – e.g. to discriminate against investors or to expropriate them without proper compensation – investment promotion goes further and demands from contracting parties to become active.

As stated in the UNCTAD report, investment promotion provisions may arrive in many different shapes and colours.[91] The usefulness of these provisions in the context of RE-related FDI is clear as they could be tailored for the needs of RE-related FDI, or even be used only for RE investors, thereby granting these investors an advantageous competitive position over fossil fuel-based investments. Furthermore, studies have shown in the past that investment promotion policies (although not necessarily policies that were enshrined in treaties) that targeted specific sectors were indeed very efficient in promoting investment.[92]

As for the types of investment promotion provisions available in IIAs, available surveys of this universe describe measures such as exchange of information on investment opportunities and increased transparency with respect to host state regulatory environment.[93] For example, Schedule II of the Common Market for Eastern and Southern Africa (COMESA) investment agreement (title 'promotion and awareness programme') instructs member states to organise investment promotion activities such as joint seminars, the organisation of investment-related training programmes for civil servants, and the exchange of information.[94] Another example can be found in the investment chapter of the Association of Southeast Asian Nations (ASEAN) -New Zealand-Australia FTA, in which the parties agree to assist certain ASEAN member states, *inter alia* by providing technical assistance to strengthen their capacity to attract investment, indirectly making it easier for their own investors to invest in these countries.[95]

Other measures that are mentioned at times include the granting of preferential market access by removing trade barriers,[96] which is discussed in more detail below under 'trade treaties'.[97] Other activities include the establishment of follow-up, monitoring councils and the

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[91] *Ibid*, 5.
[92] Torfinn Harding and Beata Javorcik, 'Roll Out the Red Carpet and They Will Come: Investment Promotion and FDI Inflows' (2011) 121 The Economic Journal 1445.
[93] See surveys of investment promotion provisions in UNCTAD (n 89) 14; VanDuzer et al. (n 75), Chapter 8.
[94] See: Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007), Schedule II. Please also see ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012), Art 24.
[95] See: Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 10 January 2010), Investment Chapter Art 15. A somewhat similar provision can also be found in the ASEAN Comprehensive Investment Agreement, Art 23.
[96] UNCTAD (n 89) 19.
[97] It is important to note that in this respect, to the best of the author's knowledge, no standalone IIA (i.e. an investment treaty that is not an integral chapter within a Free Trade Agreement) addresses trade barriers.

organization of joint investment promotion activities, such as workshops, outreach and education events.[98]

The most striking example of an investment promotion HCM would be the granting of financial incentives, by home (often rich) countries, for investment in the other (often developing nation) party. Examples of such provisions are naturally very rare, but where they do occur these provisions are drafted in vague and non-obligatory language. For example in Article 34 of the European Free Trade Association (EFTA)-Egypt agreement, EFTA states 'declare their readiness' to provide financial support to Egypt, in order to facilitate investment by EFTA's investors in this country.[99]

Similar examples can be found in several EU Association Agreements. However, most of these agreements are not considered investment agreements and do not include typical investment protection provisions. The EU-Egypt Association Agreement addresses investment only in a very limited manner and calls for the conclusion of an IIA as a means to create a more 'conducive' legal environment for investors (a call that on its own demonstrates the desire to increase PCD).[100] This very agreement however, also mentions the possibility that investment in Egypt will be promoted *inter alia,* via financial support, fiscal incentives and investment insurance.[101] It is not clear however, who will be paying for such support and whether it could be considered as a HCM.

A more interesting prospect can be found in the EU-Economic Community of West African States (ECOWAS)/West African Economic and Monetary Union (UEMOA) Economic Partnership Agreement. While this agreement does not currently include an investment chapter, the 'rendezvous' clause specifies that the Parties will be discussing this possibility in the future. Indeed this agreement states that the promotion of investment is one of its objectives,[102] and even targets investment in specific sectors.[103]

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[98] UNCTAD (n 89) 26.

[99] See: Free Trade Agreement between the European Free Trade Association (EFTA) and Egypt (signed 27 January 2007, entered into force 1 September 2008), Art 34.

[100] See European Communities (EC)-Egypt Association Agreement (signed 25 June 2001, entered into force 1 June 2004), Art 46.

[101] *Ibid*.

[102] See: Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA) and the EU, Preamble, Art 1.2(d), and Art 56(3)(f).

[103] *Ibid*. Mentioned sectors are Agriculture (see Art 48(2)), Fisheries (Art 49(1)(c)).

Interestingly, Art 61 of this agreement establishes a 'regional fund' as 'the main financing instrument of the EPA Development Programme', which is intended to be the 'preferred instrument for channelling support from the European Union'.[104] The EU committed to transfer 6.5 billion euros through this regional fund. However, for the time being this fund is not operational.[105] Once operated, this fund could benefit from completing legal instruments such as provisions on investment promotion, protection and trade facilitation, in line with the notion of PCD.

Investment treaties have the potential to facilitate RE-related FDI but they address only certain type of investors' rights, particularly those that concretize after an investment has been established in a host state. As discussed above, there are examples where states have attempted to *supplement* IIAs with other HCMs in order to improve the effectiveness of IIAs in promoting investment and achieve wider goals in line with the notion of PCD. This could be implemented also in the context of RE-related investment. On very few occasions are the possibilities of adding direct financial contributions mentioned, as well as the realisation that investment protection tools should be added in order to maximise the efficiency of other HCMs. These examples however are very few in number, often defined in a vague and non-committed manner, and in some cases (e.g. COMESA) were not followed up by the parties.

Similar to the context of investment protection instruments, investment promotion-based HCMs will have to be designed with the utmost sensitivity towards states' right to regulate; with carefully designed exceptions and mechanisms that will ensure the price paid to investors is fairly and systematically re-evaluated and indexed in line with the cost of production. A treaty that simply 'locked' the transfer of public funds to private investors without adequate regard being given to public considerations and needs will not, and cannot, be regarded as reflecting the notion of PCD.

### 3.2.3 Trade Treaties

Trade treaties can support RE-investment in several ways, including via the facilitation of trade in services, the adjustment of rules on subsidies and the protection of IP rights. Notably, several forums states are currently negotiating the liberalisation of the international trade in environmental goods and services (EGS), such as those necessary for RE-related investments.

[104] *Ibid,* Art 61.
[105] See: ECOWAS, 'West Africa- EU prepare for final signatures towards implementation of the EPA' <http://www.ecowas.int/west-africa-eu-prepare-for-final-signatures-towards-implimentation-of-the-epa/>.

It is clear that in reducing the tariffs and non-tariffs,[106] trade barriers on EGS will support RE investment.[107] Most green technologies are developed in a very limited number of states.[108] An international dissemination of these products therefore, requires international trade. Reduced tariffs will naturally decrease the price of EGS and increase their availability. Reduced tariffs that result in *bound* tariffs (rather than applied tariffs) will also reduce financial uncertainties and increase investor confidence.[109] A UNCTAD report on investment promotion identified the removal of trade barriers as key for encouraging FDI, stating that '[a]long with market size, openness to trade has been identified as one of the most reliable indicators of the attractiveness of a location for foreign investment.'[110]

Efforts to liberalise the international trade in EGS are being made by a group of World Trade Organisation (WTO) member states where a specific WTO Environmental Goods Agreement (EGA) is being negotiated,[111] as well as under bilateral and regional frameworks.[112] Within the WTO, the negotiations are currently focused on the list of EGS which will be eligible for preferential treatment.[113] As an important hub for the production of RE generation-related EGS, the EU is currently attempting to push for the inclusion of goods such as solar panels and wind turbines in the final list, as well as related services (e.g. the maintenance of wind farms).[114]

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[106] According to some, the reduction of non-trade barriers is expected to be much more impactful than the mere reduction of tariffs, see: EU Commission, 'Trade Sustainability Impact Assessment on the Environmental Goods Agreement: Inception Report' (European Commission, May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153485.pdf>, 15.

[107] For a review of tariffs/non-tariffs trade barriers, see: Heiner Bucher et al., 'Trade in Environmental Goods and Services: Opportunities and Challenges' (2014) International Trade Centre Technical Paper <http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AssetPDF/EGS%20Ecosystems%20Brief%20040914%20-%20low%20res.pdf>.

[108] Antoine Dechezlepretre et al., 'Invention and Transfer of Climate Change–Mitigation Technologies: A Global Analysis' (2011) 5(1) Review of Environmental Economics and Policy 109.

[109] Jaime de Melo and Mariana Vijil, 'Barriers to Trade in Environmental Goods and Environmental Services: How Important are They? How Much Progress at Reducing Them?' (2014) FEEM Working Paper No. 36.2014, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428192>, 11.

[110] UNCTAD (n 89) 19.

[111] See ICTSD, 'Environmental Goods Agreement Negotiators Discuss Tariff Cut Offers' (ICTSD, 28 April 2016) <http://www.ictsd.org/bridges-news/bridges/news/environmental-goods-agreement-negotiators-discuss-tariff-cut-offers>.

[112] See for example the list concluded by the member states of the Asia Pacific Economic Cooperation (APEC) Forum, 'Annex C – Trade and Investment in Environmental Goods and Services', <http://egs.apec.org/more-articles/285--annex-c-trade-and-investment-in-environmental-goods-and-services->.

[113] See more in: EU Commission, 'Report from the 13th round of negotiations for an Environmental Goods Agreement (EGA)' (4 May 2016) <http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154551.pdf>.

[114] See European Commission, 'Environmental Goods Agreement: Promoting EU environmental objectives through trade' (22 January 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1438>.

The EGA is expected to be a plurilateral WTO agreement, i.e. not all members of the WTO will be included. Only WTO members that ratify the agreement will be bound by its provisions. Currently the list of negotiating states is rather short. It includes only the EU and an additional 18 (mostly) developed states, including China.[115] On the one hand, if successfully concluded, there is no doubt that the RE industry will benefit greatly from the EGA, as the negotiating states include the most developed (and lucrative) markets. On the other hand, the EGA, in its current form, will not solve the problem discussed above; green technology does not transfer to the developing parts of the world, where tariffs on EGS on average are much higher than in the developed world.[116]

Given this reality, it is important to examine bilateral/regional agreements, which include both RE-developers (such as the EU) and developing countries. Gehring *et al*. have surveyed the provisions that are related to climate change within regional trade agreements.[117] These authors identified *inter alia*, several trade agreements which stated environmental protection as a leading principle. One such agreement is the EU-Chile Association Agreement, the Preamble of which states that 'sustainable development and environmental protection' shall be taken into account when interpreting the provisions in the treaty.[118] Similarly, Articles 1 and 3 of The Forum of the Caribbean Group of African, Caribbean and Pacific States (CARIFORUM)-EC Agreement affirms 'sustainable development' as the Treaty's objective.[119] Still other agreements incorporate exceptions for measures that are related to climate change (mostly General Agreement on Tariffs and Trade (GATT) Art XX-like exceptions),[120] or provide specific instructions concerning compliance with environmental agreements.[121] These measurers, it should be stated, are 'defensive' in nature as they are aimed to ensure states' right to regulate, and notably that their climate policies will not conflict with their trade law obligations.[122] As such, these provisions can hardly be considered as HCMs, as they are not aimed at investment promotion (at least not directly).

[115] *Ibid*.
[116] de Melo and Vijil, 'Barriers to Trade in Environmental Goods and Environmental Services' (n 109) 23.
[117] Markus Gehring et al., *Climate Change and Sustainable Development Measures in Regional Trade Agreements* (ICTSD 2013)
[118] Chile-EC Association Agreement (signed 18 November 2002, entered into force 1 February 2003), Preamble.
[119] CARIFORUM-EC Economic Partnership Agreement (signed 15 October 2008, entered into force 1 January 2009), Art 1 and 3.
[120] See for example: Colombia-Ecuador-EU-Peru Trade Agreement (signed 26 June 2012, entered into force 1 June 2013), Art 106.
[121] See for example: Central American Common Market (CACM)-EU Association Agreement (signed 29 June 2012), Art 287.
[122] The reader should note that existing exceptions may not always be useful in avoiding conflicts between trade obligations and climate change obligations, and much depends on how such provisions are to be interpreted, the

With respect to directly and explicitly promoting trade in EGS and climate-related investment, some relevant instructions can be identified within EU RTAs. These instructions, however, are mostly declaratory, vague, and non-committed, and they often build on future arrangements which may or may not be negotiated. As such their usefulness could be doubted. For example, Art 275(4) of the Colombia-Ecuador-EU-Peru FTA states:[123]

> Considering the global objective of a rapid transition to low-carbon economies, the Parties will promote the sustainable use of natural resources and will promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change.

Article 138 of the CARIFORUM-EC agreement (titled: 'Cooperation on eco-innovation and renewable energy') provides somewhat more concrete (but nevertheless non-committed) language according to which 'the Parties agree to cooperate, including by facilitating support, in the following areas […] projects related to energy efficiency and renewable energy'.[124] Article 183(5) of this agreement states with respect to EGS:[125]

> The Parties and the Signatory CARIFORUM States are resolved to make efforts to facilitate trade in goods and services which the Parties consider to be beneficial to the environment. Such products may include environmental technologies, renewable- and energy-efficient goods and services and eco-labelled goods.

Another similarly worded provision can be found in Art 288 of the Central American Common Market (CACM)-EU Association Agreement (title: 'Trade favouring sustainable development'). Pursuant to this clause the parties 'reconfirm that trade should promote sustainable development', 'endeavour' to 'facilitate and promote trade and <u>foreign direct investment in environmental technologies and services, renewable-energy and energy-efficient products</u> and services, including through addressing related non-tariff barriers.'[126] The parties also agree to facilitate and promote trade in EGS.[127] These provisions could, at best, be

manner in which preambles' statements and treaty objectives are understood by panels, or even whether existing legal exceptions apply (e.g. most will agree that GATT XX exceptions do not cover the SCM agreement).

[123] See also: Columbia-Ecuador-EU-Peru Trade Agreement (n 120), Art 24.12; EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art 24.9 (.

[124] CARIFORUM-EC Agreement (n 119), Art 138(b).

[125] *Ibid*, Art 183(5).

[126] Emphasised by the author, CACM-EU Association Agreement (n 121), Art 288(b).

[127] *Ibid,* Art 288(c)-(d).

classified under the **first type** of HCMs, i.e. vague, non-committed and declaratory language, which at least for now does not mean much in practice.

While tariffs are obviously relevant for international trade in EGS, other trade law disciplines should also be considered in the context of climate change mitigation.[128] Notably, the author has claimed in the past that the trade rules on subsidies and anti-dumping (including relevant remedies) can be problematic for international trade in EGS, especially if one is to aspire to the quick and massive dissemination of these technologies.[129] The remedies that states are using in their reaction to the subsidisation of EGS production are inhibiting the international trade in EGS. Representatives from the Solar Trade Association commented with respect to the EU's decision to extend the use of countervailing and anti-dumping duties on Chinese solar panels:[130]

> These price controls on imports of Chinese solar panels need to be dropped. Europe is currently paying far more than it should for its solar – and that applies both to our homeowners and our governments. […]

The main issue with these trade rules is that they impose difficulties on the subsidisation of EGS (e.g. it is prohibited to provide export-based subsidies, or subsidies that are dependent on local content), and thus prevents the existence of the fourth type of HCMs, i.e. direct financial contributions.[131]

Questions with respect to the subsidisation of the RE industry have been debated to a great extent by many authors,[132] and due to space limitations, these issues will not be discussed in

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[128] An EU Commission impact assessment report on the EGA mentions in this respect barriers such as Accreditation procedures for standards, Government procurement rules, customs and licenses procedures, and local content requirements. EU Commission, 'Trade Sustainability Impact Assessment on the Environmental Goods Agreement' (n 106) 15-16.

[129] Avidan Kent and Vioma Jha, 'Keeping Up with the Changing Climate: The WTO's Evolutive Approach in Response to the Trade and Climate Conundrum' (2014) 15(1) Journal of World Investment and Trade 245; Avidan Kent, 'WTO Law on Subsidies and Climate Change: Overcoming the Dissonance' (2013) 5 Trade Law and Development 344.

[130] Solar Trade Association, 'European Commission extends 'unfair' import tariff on Chinese solar panels' (Solar Trade Association, 7 December 2015) <http://www.solar-trade.org.uk/european-commie-solar-panels/>; see also views of STA's representatives in Sonia Dunlop, 'Why EU tariffs on solar panels need to end' (The New Economy, 8 February 2016) <http://www.theneweconomy.com/energy/eu-import-tariffs-on-chinese-solar-panels-need-to-end>.

[131] See for example the author's criticism of *Canada – Measures Relating to the Feed-in Tariff Program* WT/DS412/AB/R in this respect; Kent, 'WTO Law on Subsidies and Climate Change' (n 129); and Kent and Jha, 'Keeping Up with the Changing Climate' (n 129).

[132] See for example: Aaron Cosbey & Petros Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17(1) Journal of International Economic Law 11; Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15(2) Journal of International

this paper. It is important nevertheless to mention their relevance to PCD, and to stress that they (as well as other non-tariff trade barriers) should not be ignored in any future attempts to regulate this field.

The issue of subsidies can also be addressed from a different angle by designing trade rules that will lead to the elimination of fossil-fuels subsidies, considered by most as a significant barrier to the dissemination of RE. Indeed in a recent Ministerial Conference, a group of eleven Member States issued a statement on the need for such a reform, recognising *inter alia*, 'that fossil fuel subsidies encourage wasteful consumption, disadvantage renewable energy, and depress investment in energy efficiency, and that effectively addressing fossil fuel subsidies will deliver trade, economic, social and environmental benefits'.[133] Joel Trachtman has mentioned in this context the possibility of designing a specific agreement for energy subsidies (as was already done in the case of agriculture-related subsidies).[134] Trachtman, as well as others,[135] have made detailed proposals in this respect which could be relied on in the design of new HCMs.

The above reviewed is not intended to provide an exhaustive review of the manner in which trade treaties could be used as HCMs, but simply to demonstrate that at least potentially, they can. This brief review also points at the fact that this potential is currently not being fulfilled. While the EU is indeed pushing forward some of these goals, notably the negotiated EGA within the WTO framework, these efforts are limited and will not result in RE-related investment in the majority of the developing world.

When looking at the EU's efforts to connect trade policies with other policies that are aimed at the promotion of RE-related FDI, whether within the WTO or in the EU's bilateral trade agreements, one cannot avoid the conclusion that at least for now, such efforts seem to lack a level of concreteness. While the EU identified the tools by which trade agreements could be

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Economic Law 525; Sadeq Bigdeli, 'Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy' (2014) VI(1) Trade Law and Development 177.

[133] World Trade Organisation, 'Fossil Fuel Subsidies Reform Ministerial Statement' (12 December 2017) WT/MIN(17)/54 <http://fffsr.org/wp-content/uploads/2018/01/ministerial-statement-ffsr-mc11-side-event.pdf >.

[134] Joel P. Trachtman, 'Fossil fuel subsidies reduction and the World Trade Organization' (ICTSD 2017) <https://www.ictsd.org/themes/climate-and-energy/research/fossil-fuel-subsidies-reduction-and-the-world-trade-organization>; See also Gary Horlick, 'The WTO subsidies agreement can be changed to discipline fossil fuel subsidies' (ICTSD, 22 August 2017) <https://www.ictsd.org/opinion/the-wto-subsidies-agreement-can-be-changed-to-discipline-fossil-fuel-subsidies>; Heloisa Pereira, 'How the WTO can help tackle climate change through fossil fuel subsidy reform: Lessons from the fisheries negotiations' (ICTSD 2017) https://www.ictsd.org/themes/climate-and-energy/research/how-the-wto-can-help-tackle-climate-change-through-fossil-fuel.

[135] *Ibid.*

useful (e.g. the facilitation of trade in EGS), its international law commitments include mostly declaratory language and avoid any concrete instructions. This point of departure is not helpful from the perspective of PCD. Not only are trade policies not connected with other types of policies, but for the time being it seems that trade climate policies are not sufficiently concretized such that connection with other international HCMs is difficult.

### 3.2.4 International cooperation and development agreements

Another interesting type of international law HCMs can be found in international cooperation and development agreements. While trade and investment agreements are mostly under the responsibility of trade ministries (or DG Trade in the case of the EU), these agreements often fall under the responsibility of international development ministries (or DG international cooperation and development, in the case of the EU).

International cooperation and development agreements can be found in different shapes and under different titles. It is not always easy to classify an agreement as a 'trade' agreement, or a 'development' agreement, especially as many agreements are 'hybrid' in nature and include both aspects. The CARIFORUM-EC Economic Partnership Agreement for example, is focussed around both elements and indeed the EU Commission states on its website that 'the Economic Partnership Agreement between the EU and the 15 Caribbean countries is *in part* a free trade agreement', and that this agreement 'comes with substantial EU aid for trade'.[136] Indeed the objectives of this agreement intertwine elements such as poverty reduction and international trade,[137] and Article 3 specifically places the principle of sustainable development as a guiding principle for the implementation of this agreement.

The CARIFORUM-EC Agreement includes provisions with respect to both trade (discussed above) and investment.[138] Interestingly in the context of PCD, this agreement states that the parties will 'facilitate support' for projects related to energy efficiency, and more specifically also for FDI established via the Kyoto Protocol's Clean Development Mechanism (CDM); effectively an HCM established under a different international regime. While the meaning of such a vague commitment is not yet clear, the mentioning of CDM in this context demonstrates at least an appetite for PCD.

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[136] See the EU Commission's website <http://ec.europa.eu/trade/policy/countries-and-regions/regions/caribbean/index_en.htm>.
[137] CARIFORUM-EC Agreement (n 119), Art 1.
[138] *Ibid*, Title II.

Another very relevant example where investment promotion provisions are attempted within an economic development agreement, is the Cotonou Agreement between the EU and the African, Caribbean and Pacific Group of States (ACP), entitled 'investment and private sector development support'. Art 75 for example, states that the Parties will 'implement measures' to encourage private investors 'who comply with the objectives and priorities of ACP-EC development cooperation',[139] 'support efforts of the ACP States to attract financing, with particular emphasis on private financing, for infrastructure investments and revenue generating infrastructure critical for the private sector',[140] 'disseminate information on investment opportunities and business operating conditions in the ACP States',[141] all of which can be considered as falling within the UNCTAD categories of HCMs.

Article 76 of this agreement ('investment and financial support') provides for 'long-term financial resources, including risk capital, to assist in promoting growth in the private sector' including grants, technical assistance, 'institutional support related to a specific investment,' 'risk capital for equity or quasi-equity investments, guarantees in support of domestic and foreign private investment and loans or lines of credit on the conditions laid down'.[142]

Other relevant instructions can be found in Article 77, in which the parties commit to increase the availability of investment guarantees in order to 'boost investor confidence in the ACP States', to 'assist with guarantees funds', including via re-insurance schemes against legal and political uncertainties, guarantees for debt financing, and by supporting 'national and regional guarantee funds'.[143]

As reviewed above, attracting FDI in RE will require a range of interventions. While investment and trade facilitation (and promotion) are indeed a part of development and cooperation agreements, in most countries RE-related FDI will benefit drastically also from some sort of subsidization, whether in a direct form or not as well as from the removal of local fossil-fuel subsidies as discussed above. From a PCD perspective, it is imperative that the EU's ODA be linked to such agreements, to ensure their effectiveness. Indeed, the EU does connect some of its financial instruments to these treaties. The Cotonou Agreement for example, is linked to the European Development Fund (EDF). Annex IA of this Agreement dictates not

[139] The Cotonou Agreement (signed 23 June 2000) <http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf>, Art 75(a).
[140] *Ibid*, Art 75(f).
[141] *Ibid*, Art 75(h).
[142] *Ibid*, Art 76.
[143] *Ibid*, Art 77(1)-(2).

only that the EU shall maintain its aid efforts, but also that such 'efforts' will remain 'at least the same' as its previous commitments,[144] for a period of five to six years.[145]

Currently, financial assistance is being provided through the '11th EDF' (years 2014-2020),[146] according to an agreed budget of EUR 29,089 million.[147] Annex IC sets the framework for the allocation of this sum. Interestingly, a small part of it will be allocated to the Investment Facility, established in Annex II of this agreement, through which funds will be allocated to 'eligible enterprises' in a variety of forms,[148] and which will be made available to investors in 'all economic sectors'.[149] This language suggests that RE-related investors could potentially enjoy access to this fund.

From the perspective of PCD, it is interesting to find Chapter 5 of Annex II, which is entitled 'investment protection agreements'. The fact that IIAs are connected to development policies is encouraging as it demonstrates a wider understanding of the environment in which the private sector is operating. This Chapter, however, includes only a vague recognition of the usefulness of IIAs, most of which are seen as redundant. Perhaps the most useful commitment in this chapter is an obligation to study the main features of IIAs, in order to allow a better fit with the circumstances of FDI flows between the parties.

Other forms of HCMs that can be found in the Cotonou agreement include the establishment of the Centre for the Development of Enterprise (CDE), whose role is to provide 'necessary support in the promotion of private sector development activities in ACP countries and regions'.[150] The CDE's role is to provide non-financial support, *inter alia* via the provision of relevant information, facilitating business cooperation, providing technical, professional and managerial training, and more. The CDE is mostly geared toward assisting ACP private investors. Nonetheless, Article 2(f) of Annex III prescribes for example, that the CDE shall 'provide information to European companies and private sector organisations on business opportunities and modalities in ACP countries'.

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[144] 9th EDF period (2000-2007).
[145] See: The Cotonou Agreement (n 139), Annex IA [2].
[146] Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies [2013] OJ L 210/1.
[147] See: The Cotonou Agreement (n 139), Annex IC [2].
[148] *Ibid*, Annex II Art 2.
[149] *Ibid*, Annex II Art 3.
[150] The Cotonou Agreement (n 139), Annex III.

Another promising sign (with respect to PCD) can be found in the latest amendment of The Cotonou Agreement (2010) in which Article 32A (entitled 'climate change') was added. This Article states *inter alia*:

> The Parties acknowledge that climate change is a serious global environmental challenge and a threat to the achievement of the Millennium Development Goals requiring adequate, predictable and timely financial support. For these reasons, and in accordance with the provisions of Article 32, and particularly of point (a) of paragraph 2 thereof, cooperation shall: […] (b) strengthen and support policies and programmes to mitigate and adapt to the consequences of, and threat posed by, climate change including through institutional development and capacity building […]

And that cooperation shall be focussed on activities such as:

> (i) integrating climate change into development strategies and poverty reduction efforts; […]
>
> (vii) promoting renewable energy sources, and low-carbon technologies that enhance sustainable development.

The above reveals positive signals with respect to future linkages between development policies and climate-related policies, and more specifically also for the promotion of RE-related FDI. At the same time, it should be noted that financial support may not always be enough. The Cotonou Agreement for example, does not include necessary trade rules or an investment protection chapter that would undoubtedly add further attractiveness to RE-related FDI. The necessity for an investment protection agreement in the context of EU-ACP countries was stressed already in 2003 by Konrad von Moltke, who stated in this respect:[151]

> A Cotonou Investment Agreement is needed to amplify investment provisions of the CPA to identify the full range of issues that need to be addressed to ensure that a Cotonou Investment Agreement promotes the objectives of the CPA.

For the time being however, investment protection is mentioned only in Chapter 5 of Annex II ('investment protection agreements'), which states, in essence, that a 'Contracting State may

[151] Konrad von Moltke, 'A Cotonou Investment Agreement: Report for the Commonwealth Secretariat' (Commonwealth Secretariat, 2003) <http://www.iisd.org/pdf/2003/investment_cotonou.pdf>.

request where appropriate, the negotiation of an investment promotion and protection agreement with another Contracting State'.[152]

Lastly, it is important to stress that especially in the context of development and cooperation agreements, HCMs will have to be *custom designed.* They should support technologies that are suitable for the host countries circumstances, sophistically financed and reflect the genuine cost of production, provide suitable guarantees for investors, *and states*, and address relevant trade barriers, including fossil-fuel subsidies. There is no 'one size fits all' arrangement, and each development agreement must be designed according to the specific needs of the relevant state.

### 3.2.5 MIGA

Another instrument that can be defined as an international law HCM is the World Bank's Multilateral Investment Guarantee Agency (MIGA) Convention, which established MIGA. There are currently 181 Member States to the MIGA Convention. The mission of MIGA is the promotion of 'foreign direct investment (FDI) into developing countries to help support economic growth, reduce poverty, and improve people's lives'.[153] MIGA's operation is focused on providing private sector investors with political risk insurance guarantees. The risks that are covered by the MIGA Convention are essentially non-commercial,[154] and include expropriation ('and similar measures'), currency transfer, the breach of contract by host states, and war and civil disturbance.[155] Although MIGA's coverage is currently limited to 250 million USD, it can cover higher amounts through reinsurance.[156]

Being essentially an insurance provider, MIGA falls within UNCTAD's fifth category of HCMs. The distinctiveness of *international law* HCMs from other HCMs is especially striking in this case; unlike private insurance arrangements, MIGA supports only investments that are 'developmentally sound and meet high social and environmental standards.'[157] Indeed the Convention's preamble states that the Parties are '[d]esiring to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives [...]'.[158] The commentary on the Convention

[152] See: The Cotonou Agreement (n 139), Annex II Art 15.
[153] See: MIGA's website <https://www.miga.org/who-we-are>. See also: The Convention Establishing the Multilateral Investment Guarantee Agency (signed 11 October 1985, entered into force 12 April 1988) (MIGA Convention), Preamble.
[154] MIGA Convention (n 153), Art 2(a).
[155] *Ibid*, Art 11.
[156] MIGA, 'Investment Guarantee Guide' (MIGA 2015) <https://www.miga.org/Documents/IGGenglish.pdf>.
[157] See: MIGA, <https://www.miga.org/who-we-are>.
[158] MIGA Convention (n 153), Preamble.

further states that MIGA 'should satisfy itself that the investment concerned will contribute to the economic and social development of the host country, comply with the laws and regulations of that country, and be consistent with the country's declared development objectives.'[159]

Political risks are one of the main factors that deter FDI in the RE sector.[160] MIGA's role in reducing these risks (especially in light of its focus on developing countries) is important. MIGA however is also useful for investment promotion in two other meaningful ways. Notably, the Convention created an *organizational body* – an agency. A large body of academic literature demonstrates that institutions possess autonomous powers, and can in fact impact the activity/behaviour of states.[161] It is interesting to note in this respect that MIGA's affiliation with the World Bank provides it (according to MIGA's secretariat) with an 'umbrella of deterrence against government actions that could disrupt insured investments'.[162] While some research indeed supports MIGA's claim in this respect,[163] admittedly not much information is available on this issue and more research will be required for confirming the credibility of this claim.

Secondly, MIGA also offers dispute mediation services, for dealing with investor-state disputes. While not much is known about the operation of this mediation service, it seems to be very successful, as according to MIGA's website '[t]o date, MIGA has been able to resolve disputes that would have led to claims in all but two cases.'[164]

The MIGA Convention was drafted in the early 1980s and does not include specific language with respect to environmental protection. Further developments however, established that MIGA does view environmental protection (and more specifically climate change) as an inherent part of its operation. Notably in 2013, MIGA adopted its environmental and social

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[159] MIGA, 'Commentary on the Convention establishing the Multilateral Investment Guarantee Agency', (MIGA 2010) <https://www.miga.org/documents/commentary_convention_november_2010.pdf>, [21].

[160] See for example: Cheuk Wing Lee and JinZhong 'Financing and risk management of renewable energy projects with a hybrid bond' (2015) 75 Renewable Energy 779; Gianleo Frisari & Valerio Micale, *Risk mitigation instrument for renewable energy in developing countries: A case study on hydropower in Africa* (CPI 2015); MIGA, 'Investment in clean power MIGA Brief', <https://www.miga.org/documents/cleanpower.pdf.>.

[161] See for example: Michael Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) International Organizations 699; Sikina Jinnah, 'Secretariat Influence on Trade-Environment Politics' (2010) 10(2) Global Environmental Politics 54; Steffen Bauer, 'Does Bureaucracy Really Matter? The Authority of Intergovernmental Treaty Secretariats in Global Environmental Politics' 6(1) Global Environmental Politics 23; and Avidan Kent, 'Implementing the principle of policy integration: institutional interplay and the role of international organizations' (2014) 14(3) International Environmental Agreements: Politics, Law and Economics 203.

[162] MIGA, 'Dispute Resolution' <https://www.miga.org/investment-guarantees/dispute-resolution>.

[163] Axel Drehel et al., 'Membership has its Privileges – The Effect of Membership in International Organizations on FDI' (2015) 66 World Development 346.

[164] *Ibid.*

policy.[165] Furthermore, MIGA's Strategic Directions for the years 2015-2017 also emphasise MIGA's aspiration to promote environmental and social goals, including the need to address climate change through the promotion of energy efficiency and RE projects.[166] Indeed in the past MIGA has insured a list of RE projects.[167]

MIGA's environmental policy is implemented mostly via the requirement that insured projects comply with a set of environmental and social performance standards.[168] MIGA's performance standards are enforced through its due diligence and monitoring mechanisms,[169] as well as through the independent Office of Compliance Advisor/Ombudsman (CAO), which addresses concerns regarding supported projects' compliance with MIGA's performance standards.

MIGA's Performance Standards (modified in 2013) contain eight standards, including a variety of environmental and cultural issues. Although low levels of GHG emissions were not defined as a standard by itself, this objective is included within some of MIGA's wider standards. Notably, Standard 3 (entitled 'resource efficiency and pollution prevention') specifically mentions the need to reduce GHG levels[170] and the reduction of 'project-related GHG emissions' is explicitly mentioned as one of this standard's three objectives.

As for the requirements that projects must abide by in order to comply with Standard 3, Paragraph 7 of this Standard vaguely instructs investors to take certain actions that will reduce their project's emissions. Paragraph 7 of Standard 3 provides an open list of examples of what such action might be, but does not include any mandatory, specific obligations.[171] A more concrete obligation can be found in paragraph 8, in which large emitters are instructed to quantify their emissions.[172]

In short, while the idea of using performance standards may be a step in the direction of PCD, the standards themselves are relatively unclear and weak. Indeed nothing in these standards prevents the insurance of extremely polluting projects, as long as the investor has

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[165] MIGA, 'Policy on Environmental and Social Sustainability' (MIGA 2013) <https://www.miga.org/documents/Policy_Environmental_Social_Sustainability.pdf>, [1].
[166] MIGA, 'MIGA Strategic Directions FY 15-17',< https://www.miga.org/documents/MIGA_FY15-17_Strategy.pdf>, [13], [62].
[167] See review of certain projects in: IEG, *Climate change and the World Bank group: Phase II: The challenge of low-carbon development* (World Bank 2010) 21-22.
[168] MIGA, 'Policy on Environmental and Social Sustainability' (n 165).
[169] These include *inter alia* site visits by MIGA staff and a reporting mechanism, see: MIGA, 'Understanding MIGA's environmental and social due diligence process' <https://www.miga.org/Documents/Understanding_MIGA_ES_Due_Diligence_Process.pdf>.
[170] MIGA, *Performance Standards on Environmental and Social Sustainability* (MIGA 2013), Standard 3 [1].
[171] MIGA (n 170), Standard 3 [7].
[172] *Ibid*, Standard 3 [8].

'implement[ed] technically and *financially feasible* and *cost-effective* options to reduce project-related GHG emissions during the design and operation of the project'.[173] The words 'financially feasible' and 'cost-effective' significantly water down any substance that this vague obligation might have had. In addition, the fact that the obligation to 'reduce' GHG emissions is not quantified reduces its effectiveness.

A much stronger standard would, for example, dictate that a certain percentage of insured projects' energy demands must be provided from RE sources. Other examples of more meaningful standards are that only projects that rely on certain technological (green) standards would qualify, or that projects that pollute above a certain level of GHG would be disqualified.[174]

Another feature that is currently lacking in the MIGA's framework is the active incentivising of RE-related investment. For example, MIGA could offer significantly cheaper tariffs for such projects, or a much higher coverage than the standard 250 million USD. In other words, MIGA could achieve both the fourth and the fifth types of HCMs by providing a competitive commercial advantage for RE investment, as well as insurance against risks. MIGA could look into the experience of national investment promotion agencies (e.g. the US Overseas Private Investment Corporation (OPIC)), in which far more targeted RE-related products indeed exist.

### 3.2.6 The Kyoto Protocol's flexible mechanisms

The Kyoto Protocol's (KP) flexible mechanisms provide perhaps the most striking example of an international law instrument that was designed to incentivise RE-related FDI. Briefly put, the KP's Joint Implementation (JI)[175] and Clean Development Mechanism (CDM)[176] allow investors to gain tradable emission reduction units, by investing in projects that result in a reduction of GHG emissions. The additional funds provided by the CDM and JI can increase the competitiveness of RE projects, and *may* be seen as falling under the fourth type of HCMs (financial and fiscal incentives).

It is not entirely clear whether the CDM and JI should be regarded as HCMs, as the financial contribution element is not necessarily sourced in the investor's home country.[177] One may

[173] Emphasis is not in the origin. *Ibid*, Standard 3 [7].
[174] Such a condition could include exceptions, such as the performance of emission 'offsetting' action (e.g. purchasing emission trading units under a certain recognizable emission trading schemes).
[175] Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11 December 1997, entered into force 16 February 2005) (Kyoto Protocol), Art 6.
[176] *Ibid*, Art 12.
[177] Other states may also purchase European investors' units via the EU ETS.

claim however that investors' home countries are 'paying' for this financial support by agreeing to be included in Annex I, which implies undertaking pricey emission cuts.

In the context of PCD, the CDM is certainly relevant as unlike the JI, it is directed at investors from developed countries (Annex B countries) who invest in the developing world. The connection between development and climate policies is made explicitly in Article 12 of the Kyoto Protocol, according to which the CDM's 'purpose' 'shall be to assist Parties not included in Annex I in achieving sustainable development'.[178]

Following the conclusion of the 2015 UNFCCC Paris Agreement, it seems that the Kyoto Protocol will eventually be discontinued. As this international agreement will, likely, eventually expire, an exhaustive review of the CDM mechanism will not be provided. A few issues however, should be highlighted. Notably, it should be stressed that the connection of CDM and development policies has been criticized by authors.[179] The criticism concerns *inter alia*, the allocation of already limited ODA for CDM capacity-building purposes, *de facto* transferring resources from development goals to climate mitigation goals.[180] Others may also criticise the *de facto* transfer of ODA to western private investors. Scholars have also claimed that the CDM basically allows rich countries to 'buy their way out' from having to reduce their emissions locally.[181]

Nevertheless, the CDM did support many projects that had positive impact on development goals.[182] Moreover, according to the UNFCCC's secretariat, the CDM contribution was efficient in terms of leveraging finance, as well as in terms of CO2 reductions (1.5 giga-tonnes of CO2 were reduced/avoided, according to the UNFCCC secretariat).[183] It also worth remembering that the CDM is an innovative tool, which requires 'trial and error' refinement and therefore, expecting 'perfection' in this respect may be unreasonable.

From a PCD perspective, the CDM can be seen as a positive step, as it was explicitly aimed at the incorporation of environmental and development goals, including through the use of ODA. The CDM however, is blind to any existing trade and investment policies which could in

[178] Kyoto Protocol (n 175), Art 12.
[179] See review in: Joyeeta Gupta, Harro van Asselt and Michiel van Drunen, 'Global Governance: Climate Cooperation' in Gupta and van der Grijp (n 16) 155-161.
[180] *Ibid.*
[181] *Ibid.*
[182] See a review of such projects on the UNFCCC's CDM website, <http://cdm.unfccc.int/about/ccb/index.html>.
[183] UNFCCC Secretariat, *CDM Fact Sheet, Leveraging private finance, delivering verified results* (UNFCCC 2014).

theory, maximize its potential. While the CDM provides mostly financial incentives, it could have benefited from additional features such as tax adjustments and investment protection guarantees which are significant for longer term assurances and profitability. Indeed authors have argued in the past in favour of linking the CDM mechanism with IIAs.[184] Supplementing the CDM with relevant trade rules could have also been useful; reduction of tariffs on EGS for CDM-approved projects, [185] would provide additional incentive for foreign investors. Economic treaties however, seem to be 'clinically isolated' from UNFCCC negotiations, despite obvious relevance.

## 4. Concluding remarks

The universe of international law is complex and fragmented in nature. The analogy of an ocean, filled with isolated islands is often used to describe the architecture of this world. Addressing this 'fragmentation' requires what may be seen as an oxymoron - on the one hand, a more general and holistic view of international law is essential, one that overviews its entirety and is not restricted to one 'island' or another. Such a 'bird eye-view' approach is necessary in order to understand the different fields of international law, and the manner in which they could potentially complete one another and work in harmony.

On the other hand, much more concrete specialisation (even 'atomisation') is needed in order to connect the different spheres of international law. It is not enough to understand 'trade law', or 'environmental law' any more, as this type of specialisation seems too 'general' for dealing with concrete and multifaceted problems. Rather, new specialties such as 'trade and climate' are now required in order to effectively *connect* the different fields.

The challenge faced by those wishing to design policies with respect to RE-related FDI is therefore highly complex. The EU is indeed trying to address this challenge head on. It appointed a PCD rapporteur in 2015, it established an investment 'blending' mechanism, and it is constantly seeking to improve the efficiency of its policies via improved PCD.

As reviewed above, the EU is attempting to apply a coherent approach also with respect to the issue at hand, namely the promotion of RE-related FDI via international law. But while the EU connects (to a certain extent) between its environmental and development policies, the remit of international economic treaties is mostly being ignored, and attempts to engage instruments

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[184] Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions' in Segger, Gehring & Newcombe (n 103) 524-529.

[185] While EGS negotiations are based on the 'list approach' (described above), a 'project based' approach was also considered in the past.

such as IIAs, trade treaties and even insurance treaties (MIGA) to this goal are not being seriously made. In light of the amount of both public and private money that is being invested in RE, as well as the economic, social and environmental benefits that such investments may bring to the European public, the EU's lack of action in this area is questionable.

The case for an integrated legal framework is clear. A legal framework that will provide RE investors with a complete 'one-stop shop dream package', including *all* mentioned HCMs at once, (e.g. MIGA's securities and meditation services, ODA grants, the legal protection of IIAs, zero tariffs on imported (and exported) goods, trade facilitation rules, etc.) will, without a doubt, provide these investors with a significant competitive advantage, address their needs, and eventually boost RE-related investment. Moreover, the availability of such a comprehensive instrument might even attract investors from other fields to enter this market. Such a legal framework might be especially effective if accompanied with proper technical and legal assistance, i.e. officials that will inform and direct investors concerning *all* different angles and possibilities that are available to them, and will provide guidance with respect to the utilization of these tools.

Also politically, the wrapping up of the variety of international law HCMs into one package might well be beneficial. Many developing states for example, resist developments *in some* of the above-mentioned channels (e.g. WTO and investment treaties). Linking these 'sticks' with the 'carrots' (i.e. ODA, MIGA, Kyoto tools) may convince these states to accept more instruments than they currently do, at least with respect to RE-related investment. It is also likely that the re-framing (or re-packaging) of the more contentious elements within new institutions away from their current Bretton-Woods-oriented environment could untangle these issues from other non-related sensitive debates.

This all points towards the need to integrate the existing legal frameworks. The need to integrate policies with respect to climate change and development is receiving increasing attention in recent years, notably from the OECD and the European Union. The efforts of these two organizations, so it seems, are in their early stage, and often include mostly vague and declaratory language.

Exactly how such a comprehensive package will be designed, whether through a bilateral *ad hoc* RE treaty, the expansion of the Energy Charter Treaty, via a plurilateral WTO agreement or any other possibility, are open questions worthy of attention. It is hoped that this paper has laid the foundations for proposals and future research on this matter.