

**TITLE:** A Global Green Subsidies Race? The EU's Green Deal Industrial Plan: Effective and WTO-Compatible?

**Name & Affiliation:** Kristiyan Stoyanov is a PhD Candidate at Durham Law School, the UK. Email: kristiyan.stoyanov@durham.ac.uk

**Abstract.**

*On August 16<sup>th</sup> 2022, the US passed the Inflation Reduction Act of 2022 (“IRA”) – the world's largest green subsidy measure in modern economic history. This legislation came at a time when subsidies for green energies have been increasing substantially around the globe. This article analyzes the EU Green Deal Industrial Plan (“GDIP”) – the EU’s response to the US’ IRA and the general increase of subsidies worldwide. In particular, the article argues that the two key legislations under the GDIP – the Critical Raw Materials Act (“CRMA”) and the Net-Zero Industry Act (“NZIA”) – are in line with WTO law as well as makes recommendations on how the EU use its external relations to strengthen its development of green energy technologies.*

**10 words describing the content: EU; WTO; subsidies; CRMA; NZIA**

## 1) Introduction

In recent years, there has been a notable rise in subsidies across the globe. This renewed interest emerges as governments seek effective tools and strategies to address the effects of multiple crises and challenges, such as slow post-financial crisis growth, the global pandemic and consequent supply disruptions, soaring inflation and interest rates, the return of war in Europe, heightened geopolitical tensions and the return of bipolarity in global politics. Meanwhile, global warming is accelerating, emphasizing the urgent need to transition away from ‘dirty’ to ‘clean’ energy. Halfway through the presidential term, President Biden signed into law the Inflation Reduction Act of 2022 (“IRA”) allocating more than \$369 billion in clean energy and climate incentives over a decade.<sup>1</sup> While the increased support for environment-friendly energies is generally embraced for its environmental benefits, a great number of these generous subsidies are linked to discriminatory local content requirements (“LCRs”) favoring US companies over foreign ones. The IRA has prompted numerous countries to review their subsidy programs to maintain their competitive edge and prevent companies from relocating business operations to the US.<sup>2</sup>

Against this background, the EU enacted its own Green Deal Industrial Plan (“GDIP”). Instead of providing additional green subsidies, the GDIP aims to significantly increase the technological development, manufacturing production and installation of net-zero products and energy supply over the next decade.<sup>3</sup> The GDIP is based on 4 pillars: a predictable and simplified regulatory environment; faster access to sufficient funding; skills; and open trade for resilient supply chains. As part of the first pillar, the EU recently passed two hugely important legislation: the Net-Zero Industry Act (“NZIA”)<sup>4</sup> and the Critical Raw Materials Act (“CRMA”)<sup>5</sup>. The NZIA aims to scale up the manufacturing of clean technologies in the EU, attract investments and create better conditions and market access for cleantech in the EU.<sup>6</sup> In pursuing these objectives, the NZIA has introduced non-price criteria of resilience and sustainability into public procurement procedures, auctions, and subsidies. If not met, the resilience and

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<sup>1</sup> UN Trade & Development, *Investment Policy Monitor: United States of America - \$369 billion in investment incentives to address energy security and climate change* (16 Aug 2022), available at <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4004/-369-billion-in-investment-incentives-to-address-energy-security-and-climate-change-> (accessed 12 March 2024). According to some reports, however, the figure could be over US\$800 billion. Credit Suisse, *US Inflation Reduction Act: A catalyst for climate action* (ESG Report Treeprint, 2022).

<sup>2</sup> Aruna Chandrasekhar, *Media reaction: US Inflation Reduction Act and the global ‘clean-energy arms race’* (CarbonBrief February 2023), available at <https://www.carbonbrief.org/media-reaction-us-inflation-reduction-act-and-the-global-clean-energy-arms-race/> (accessed 12 March 2024).

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Green Deal Industrial Plan for the Net-Zero Age COM/2023/62 final, page 3. As will be seen below, net zero technologies have a broad definition under the EU legislation and include numerous ‘green’ technologies.

<sup>4</sup> Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe’s net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 (hereinafter NZIA).

<sup>5</sup> Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (hereinafter CRMA).

<sup>6</sup> NZIA, Article 1.

sustainability criteria could potentially render certain bids from non-EU countries outside the scope of the Act.<sup>7</sup> The NZIA dovetails with the CRMA, and the latter aims to establish a legal framework to ensure the EU's access to a secure, resilient and sustainable supply of critical raw materials, strengthening international engagement, as well as facilitating extraction (where relevant), processing and recycling.<sup>8</sup> Under the CRMA, the EU should not be reliable for more than 65% of the annual consumption of any strategic raw material from any third country.<sup>9</sup>

While the LCRs in the US's IRA have been widely viewed as WTO-incompatible,<sup>10</sup> the conformity of the CRMA and the NZIA with WTO law has been relatively underexplored in legal scholarship. The purpose of this article is to fill this gap in literature by evaluating the compatibility of the CRMA and the NZIA with WTO law, as well as to make recommendations on how the EU can strengthen its development of green technologies through its external relations powers.

After a brief discussion of the recent global surge in subsidies in Section 2.1, Section 2.2 presents the IRA. Section 3 will focus on the GDIP – the EU's response to the IRA and the increased deployment of subsidies around the globe discussed previously. This Section argues that green technologies are adequately subsidized in the EU. Therefore, the EU's decision against implementing significant green subsidies was justified, with the CRMA and NZIA, as elaborated in this section, arriving at an opportune moment. The next Section evaluates these two pieces of legislation vis-à-vis WTO law. After a brief discussion of the policy space for green subsidies under WTO law, this Section will show that, although legal challenges are not impossible, the NZIA and the CRMA are on a generally safer footing than the IRA in light of WTO law. Section 5 will make recommendations on how the EU can leverage its external relations to improve its post-GDIP strategy. Section 6 concludes.

## Section 2) A Global Green Subsidies Race?

### 2.1) Green Subsidies around the Globe.

According to a recent report by the International Monetary Fund and the Global Trade Alert, there were more than 2,500 industrial policy interventions for 2023 around the globe, of which more than 2/3 were trade-distorting by discriminating against foreign interests.<sup>11</sup> Historically, industrial policy interventions were more prevalent among emerging and developing economies, with various such measures still in place today. However, in recent years, this trend has shifted with advanced economies being more active than developing and least-developed countries. For instance, statistics relating

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<sup>7</sup> NZIA, Articles 25 – 29.

<sup>8</sup> CRMA, Article 5.

<sup>9</sup> CRMA, Article 5(1)(b).

<sup>10</sup> See e.g. Chad P. Bown, *Industrial Policy for Electric Vehicle Supply Chains and the US-EU Fight Over the Inflation Reduction Act (2023)* (Peterson Institute for International Economics Working Paper No. 23-1). On 26 March 2024, China requested consultations with the US regarding certain subsidies in the IRA. See *United States — Certain Tax Credits Under the Inflation Reduction Act* WT/DS623/2 (2024).

<sup>11</sup> Simon Evenett et al, *The Return of Industrial Policy in Data* (WP/24/1: International Monetary Fund, 2024).

to China, the European Union and the United States indicate that, typically, there is a 73.8% chance that if one of these three economies offers a subsidy for a specific product, another will respond with a subsidy for the same product within a year.<sup>12</sup>

The green energy industry has also been a major recipient of subsidies. In August 2022, the US passed the IRA, a landmark legislative package which allocates more than \$369 billion in incentives for 'clean' energy and climate over a decade and is a unique opportunity to, inter alia, significantly reduce the cost for green energy goods. Other countries have implemented (or are in the process of implementing) various subsidy measures to avoid falling behind the US IRA. For instance, Japan is in the process of issuing \$133 billion in transition bonds over the next decade to support green friendly technologies.<sup>13</sup> India has put forward the Production Linked Incentive Scheme aiming to, inter alia, build a system for manufacturing RE technologies and reducing dependency.<sup>14</sup> Canada has announced an allocation of \$80 billion towards clean energy initiatives as part of its 2023 budget.<sup>15</sup> As will be seen below, the EU's subsidies from green energies (broadly construed) amount to EUR800 billion.<sup>16</sup> As reported by the Global Trade Alerts, there were 220 new 'green' subsidy programs launched by the world's largest economies for 2023 which is three times more than the previous year;<sup>17</sup> however, none of these subsidy programs has been as ambitious as the IRA. But why are green subsidies used and what explains the recent recourse to subsidies in the US?

## 2.2) The IRA

Despite the scientific consensus on climate change, combating it has rarely been viewed as the primary reason why governments would provide subsidies for climate-mitigating technologies. Instead, energy security and technological innovations have been the main drivers.<sup>18</sup> For example, substantial subsidies over the years have significantly benefited the Chinese solar industry and contributed to its growth; as a result, by 2012, it surpassed the solar industries of the EU and the US. Other green technologies, such as wind energy technologies, were also beneficiaries of large

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<sup>12</sup> Simon Evenett et al, *id.*; see also International Monetary Fund, *Fiscal Monitor* (April 2024), Chapter 2, available at <https://www.elibrary.imf.org/display/book/9798400255632/CH002.xml>. More generally on this topic see Dani Rodrik, *Premature deindustrialization*, 1 *Journal of Economic Growth* 21(1) (2016); Ilaria Espa, *New Features of Green Industrial Policy and the Limits of WTO Rules: What Options for the Twenty First Century?*, 53 *Journal of World Trade* 6 (2019).

<sup>13</sup> Shanny Basar, *Japan's historic climate transition bond* (May 2023, *The Banker*), available at <https://www.thebanker.com/Japan-s-historic-climate-transition-bond-1716452250> (accessed 08 August 2024).

<sup>14</sup> Ministry of New and Renewable Energy, *Production Linked Incentive Scheme 2024*, available at <https://mnre.gov.in/production-linked-incentive-pli/> accessed 7 August 2024.

<sup>15</sup> Nour Ghantous, *Canada's Inflation Reduction Act response* (Energy Monitor, 2023), available at < <https://www.energymonitor.ai/policy/canadas-ira-response-an-80bn-clean-energy-plan/> accessed 7 August 2024.

<sup>16</sup> See Section 3.1 of this paper.

<sup>17</sup> Global Trade Alert, *The Green Goods Trade War is in Full Swing* (April 2024), available at [https://www.globaltradealert.org/global\\_dynamics](https://www.globaltradealert.org/global_dynamics) accessed 7 April 2024.

<sup>18</sup> For a very insightful discussion see Elena Cima, *Caught Between WTO Rules and Climate Change: The Economic Rationale of 'Green' Subsidies* in Klaus Mathis et al, *Environmental Law and Economics* (Springer 2017).

subsidies allowing China to establish a global lead in the green technologies market.<sup>19</sup> While the support for green energy goods has led to cost reduction for many technologies, this has created a production void in other countries and put many already established manufacturers out of business.<sup>20</sup> As a result, many countries have found themselves in a situation where they rely on Chinese exports to meet domestic demand and transition to clean energy but, in the meantime, seek to decouple and reduce dependence on it.

Therefore, the main driver behind the US involvement and resort to subsidies has not been the fear of global warming but instead the overwhelming supremacy of China in the rapidly expanding 'clean' energy market. To put in the words of Podesta, Biden's senior clean energy adviser,

[w]e make no apologies for the fact that American taxpayer dollars ought to go to American investments and American jobs. ... The United States clearly went too far in not paying enough attention to its industrial base" and that reliance on China for clean technology has created vulnerability in the US and abroad.<sup>21</sup>

The IRA categorizes subsidies related to the environment as 1) subsidies for clean vehicle purchases, 2) production and investment subsidies for manufacturers of clean-tech products, 3) subsidies for producers of carbon-neutral electricity, as well as hydrogen and other 'clean' fuels.<sup>22</sup> Taking advantage of these incentives is subject to complying with various eligibility requirements, including, in certain cases, local content requirements. For instance, the \$7500 consumer tax credit will be available if only the electric car has been assembled in North America (Canada/Mexico/the US). Tax credits are also linked either to the origin of the batteries, or raw materials in the electric car. To obtain either of these tax credits, a minimum share of the value of battery components (currently 60%) or critical minerals (currently 50%) needs to come from the US or countries with which the US has a free trade agreement (currently 20 countries). Both thresholds will increase by 10% points on a yearly basis until they eventually reach 100%.<sup>23</sup> In addition to electric vehicles, renewable energy producers will be eligible for a bonus subsidy linked to LCRs if the steel and iron used in an energy production facility are 100% US-produced and manufactured products meet a minimum local content share. Moreover, the IRA contains production subsidies for clean-tech manufacturing and clean fuel estimated at \$30 billion and 22 billion,

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<sup>19</sup> Theodore Chia, *How China is Winning the Race for Clean Energy Technology* (Fairbank Center for Chinese Studies, October 2022), available at <https://fairbank.fas.harvard.edu/research/blog/how-china-is-winning-the-race-for-clean-energy-technology%EF%BF%BC/> (1 Jan 2024).

<sup>20</sup> For a good overview of industrial policy support in China see: Kaya Partners, *Race to the top on clean energy – The US and EU response to China's dominance* (IPR, 2023) <https://www.unpri.org/download?ac=17824>, pages 10 – 15 (1 Jan 2024).

<sup>21</sup> Aime Williams et al, *US makes 'no apologies' for prioritising American jobs, clean energy tsar tells EU* (Financial Times 2023), available at <https://www.ft.com/content/cb0a8ddf-6b32-49d8-8870-d1384580e9c9> (14 Jan 2024).

<sup>22</sup> See also David Kleimann, et al, *Green tech race? The US Inflation Reduction Act and the EU Net Zero Industry Act* (Bruegel 2023), page 3422.

<sup>23</sup> IRA 2022, Section 13401.

respectively, that could potentially be actionable<sup>24</sup> under the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).<sup>25</sup>

The IRA has generated significant attention around the world, coinciding with a remarkable shift in government subsidies across various industries around the world. Although bringing decarbonization back on the agenda by the US is welcome news, the main problem is that a great number of subsidies under the IRA are linked to discriminatory LCRs.<sup>26</sup>

### Section 3. The GDIP – the EU’s Response to the IRA and Global Subsidies Increase

The previous sections have demonstrated the increased use of subsidies for green energy goods around the globe and the problems arising under the IRA’s LCRs. This Section will focus on the EU’s response to these developments.

#### 3.1. EU green subsidies

The EU does not have a flagship subsidy scheme such as the US’ IRA; instead, subsidies are provided on different levels (including EU, national, regional) and can come from different sources due to the lack of harmonization under the EU law of subsidies provided by Member States (‘MS’).<sup>27</sup> According to a study by Kleimann et al, EU subsidies for green energies (broadly construed) are estimated to amount to around €800 billion and, as the below shows, different schemes can be used for such purposes.

Following the outbreak of COVID-19 and the world going into lockdown, the EU adopted the NextGenerationEU Recovery Plan, out of which nearly one-third is set to be allocated for the European Green Deal (“EGD”) – a landmark initiative for the EU aiming to make it climate neutral by 2050 that has been described by President von der Leyen as “Europe’s ‘man on the moon’ moment”.<sup>28</sup> As part of the EGD, the Commission adopted the Fit for 55 package, a set of proposals aiming to adopt new and revise existing rules in line with the EU’s climate goals and make the EU climate-neutral by 2050.<sup>29</sup>

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<sup>24</sup> A subsidy could be ‘actionable’ under the SCM Agreement if it ‘injures’ the domestic industry to another Member (Article 5(a)), or causes serious prejudice to the interest of another Member (Article 5(c)).

<sup>25</sup> IRA 2022, 26 U.S.C. 45 and 26 U.S.C. 45Y. Congressional Budget Office, Estimated budgetary effects of public law 117–169, to provide for reconciliation pursuant to title II of S. con. Res. 14. Public Law 117-169 as enacted on August 16, 2022, available at <https://www.cbo.gov/publication/58455> (5 March 2024).

<sup>26</sup> For extensive analysis of the problems with LCRs see: Jan-Christoph Kuntze et al, *Local Content Requirements and the Renewable Energy Industry - A Good Match?* (ICTSD 2013).

<sup>27</sup> Anna Marhold, *EU State Aid Law, WTO Subsidies Disciplines and Renewable Energy Support Schemes: Disconnected Paradigms in Decarbonizing the Grid?* in Elena Cima et al, *A Multifaceted Approach to Trade Liberalisation and Investment Protection in the Energy Sector* (BRILL 2021), pages 188 – 190.

<sup>28</sup> Press remarks by President von der Leyen on the occasion of the adoption of the European Green Deal Communication (11 December 2019) SPEECH/19/6749, available at [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_19\\_6749](https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6749) (accessed 18 May 2023)

<sup>29</sup> Fit for 55, Council of the European Union, available at

In addition to the EU's highly ambitious green agenda and NextGenerationEU Recovery Plan adopted in response to the COVID-19 pandemic, Russia's full-scale invasion of Ukraine has had huge political and economic consequences for the EU. In May 2022, the Commission put forward the REPowerEU plan aiming to, *inter alia*, reduce dependency on Russia's fossil fuels, strengthen the EU's energy resilience, and diversify supplies.<sup>30</sup> Under the REPowerEU plan, the EU adds €20 billion in funding for energy projects, which include those aiming at sustainability.<sup>31</sup> The European Commission also loosened State aid rules through the Temporary Crisis Framework – later transformed into the Temporary Crisis and Transition Framework (“TCTF”) – to allow EU Member States to provide matching aid vis-à-vis subsidies of another country to undertakings based in the EU if they can make a credible case that they would relocate elsewhere due to foreign subsidies provided by that other country.<sup>32</sup>

Furthermore, other EU-wide initiatives could be used to support green energies on MS level: for instance, MS can apply for access to loans and grants for investments under the Recovery and Resilience Facility (“RRF”); support for major cross-border innovation and infrastructure projects under the Important Projects of Common European Interest (“IPCEIs”); EU Innovation Fund set up under EU emissions trading system; European Innovation Council under Horizon Europe; European Investment Bank (“EIB”) loans. The EU is also in the process of establishing a European Sovereignty Fund.<sup>33</sup> These initiatives do not include subsidies provided by EU MS and other efforts of the EU to support green programs, such as coordinating national spending, innovation funds paid for by revenue generated by auctioning GHGs emission allowances under the Emissions Trading Scheme Directive, etc.<sup>34</sup>

### 3.2 The GDIP

As the above shows, there are a number of schemes that can be used to support green technologies. To this end, the EU was right not to provide even more subsidies which would have led to further challenges, such as determining potential funding sources, scope, type, or attempt to imitate the IRA. Not only would the latter have had negative trade and environmental implications but also would have highly likely disrupted the EU's diplomatic relations with its partners and weakened the EU's credibility in advocating for global rules adherence. Instead, the EU adopted the GDIP as a response to the IRA and increased subsidy spending by other nations. As stated in Section 1 of this paper, the GDIP's key aim is to massively increase the

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<https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/> (8 June 2024).

<sup>30</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU Plan COM/2022/230 final.

<sup>31</sup> Editorial comments, *Paying for the EU's industrial policy* 60 *Common Market Law Review* 617 (2023), page 620.

<sup>32</sup> Communication from the Commission – Second amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (May 2024) C/2024/3123.

<sup>33</sup> See further David Kleimann et al, *supra* n. 22, page 3424; David Kleimann et al, *How Europe should answer the US Inflation Reduction Act* (Policy Contribution Issue n°04/23, 2023).

<sup>34</sup> Editorial comments, *supra* n. 31, pages 619–621.

technological development, manufacturing production and installation of net-zero products and energy supply in the next decade. As part of the GDIP, the European Commission has adopted the NZIA and the CRMA.

### 3.2.1 NZIA

The NZIA aims to establish a framework of measures for innovating and scaling up the manufacturing capacity of net-zero technologies in the EU to support the EU's green objectives. It also aims to ensure access to a secure and sustainable supply of net-zero technologies needed to safeguard the resilience of the Union's energy system and to contribute to the creation of quality jobs.<sup>35</sup> In order to achieve these objectives, the Regulation intends to ensure that: i) by 2030 the manufacturing capacity of strategic net-zero technologies approaches or reaches at least 40% of the EU's annual deployment needs in order to meet the 2030 climate and energy targets<sup>36</sup>; ii) as well as that the EU's share for these net-zero technologies is reaching 15% of the global production by 2040.<sup>37</sup>

The scope of the Regulation set out in Article 2 includes net-zero technologies, which are defined in Article 3(1) to include a number of 'clean' technologies, such as solar PVs, onshore wind and offshore renewable technologies, hydrogen technologies. The NZIA also aims to streamline administrative and permit-granting procedures by establishing one or more contact points at MS level<sup>38</sup> and sets out the duration of permission-granting processes.<sup>39</sup>

### 3.2.2 CRMA

As meeting the EU's ambitious green objectives and the manufacturing of green technologies is impossible without access to the relevant critical raw materials, the risk of supply disruptions is increasing too and so is the environmental risk from speeding up their extraction locally. As the EU lacks an abundant domestic supply of critical raw materials ("CRMs"), it must import these vital goods from third countries. Some of those CRMs<sup>40</sup> are concentrated for more than 65% in a single nation.<sup>41</sup> But that is not the end of the story; looking at the whole supply chain shows that many technologies for which CRMs are necessary are manufactured and assembled in few countries.<sup>42</sup> For example, at present times of writing, the EU relies on China for more than 80% of its solar imports. Even in areas where the EU industry is strong, such as wind turbines, challenges exist due to rising energy and input costs and deteriorating trade balance.

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<sup>35</sup> NZIA, Article 1.

<sup>36</sup> NZIA, Article 5(1)(a).

<sup>37</sup> NZIA, Article 5(1)(b).

<sup>38</sup> NZIA, Article 6.

<sup>39</sup> NZIA, Article 9.

<sup>40</sup> For a list of the CRMs by the EU see: European Commission, Study on the critical raw materials for the EU (2023), available at <https://op.europa.eu/en/publication-detail/-/publication/57318397-fdd4-11ed-a05c-01aa75ed71a1> (4 April 2024).

<sup>41</sup> At the time of writing, China provides 100% of the EU's supply of heavy rare earth elements, magnesium (91%) and silicon metal (79%), Turkey provides 99% of the EU's supply of boron, and South Africa provides 71% of the EU's needs for platinum. Critical raw materials, available at [https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials\\_en](https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials_en) (4 April 2024).

<sup>42</sup> Marie Le Moue, *Why Europe's critical raw materials strategy has to be international* (Bruegel 2023).



<sup>43</sup> The rapid and substantial growth in demand for CRMs by the EU will only amplify their necessity in the future.<sup>44</sup>

In order to remedy all these concerns, the EU has adopted the CRMA – a framework that intends to ensure a stable supply chain of CRMs at all stages from diversified sources of countries as well as tools to monitor and mitigate supply risks.<sup>45</sup> In order to achieve the objective of the CRMA, the legislation aims to do three things: first, it aims to lower the risk of supply disruptions related to CRMs that could potentially distort competition and fragment the internal market. In this regard, the EU will aim to identify and support strategic projects that contribute to lowering dependencies, diversify imports, undertake efforts to incentivize technological progress and resource efficiency; second, it aims to improve the EU's monitoring and supply risk mitigation capabilities; third, it ensures free movement of critical raw materials within the Internal Market as well as high-level environmental protection and sustainability.<sup>46</sup>

The CRMA also sets a benchmark according to which the EU intends to diversify its imports of strategic raw materials to ensure that the EU is not reliable for more than 65% of its annual consumption of any strategic raw material from any third country.<sup>47</sup> The CRMA also intends to reduce administrative burden and streamline permit-granting procedures for critical raw materials projects in the EU while ensuring high social and environmental protection. Selected raw materials strategic projects will benefit from support for access to finance and expedited permitting timeframes.<sup>48</sup>

#### Section 4. The GDIP: Compatible with WTO law?

In the landmark *Canada – RE*, the AB found that LCRs had been imposed by Canada to its Feed-in Tariffs (“FIT”) program and, therefore, this was in breach of WTO law, though there was insufficient evidence to conclude that there was a subsidy in this case and hence no violation of the SCM Agreement was found.<sup>49</sup>

This decision has generated an avalanche of (mostly negative) academic commentary<sup>50</sup> and experts have warned that the WTO DSB cannot complete the ‘legal acrobatics’<sup>51</sup> in future disputes – a FIT program, as well as other green subsidy

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<sup>43</sup> Victor Jack, *EU snubs dying solar manufacturers as China poised to swallow market* (Politico 2024), available at <https://www.politico.eu/article/solar-panels-manufacturing-china-europe-market/> (April 2024).

<sup>44</sup> Samuel Carrara et al, *Supply chain analysis and material demand forecast in strategic technologies and sectors in the EU – A foresight study* (Publications Office of the European Union, Luxembourg 2023).

<sup>45</sup> CRMA, recital 3 and Article 1(1). The list of critical raw materials is enshrined in Annex II, section 1 and, per Article 4, it shall be reviewed by the European Commission.

<sup>46</sup> Article 1(2). Articles 3 and 4 list the strategic and critical, respectively, raw materials.

<sup>47</sup> Article 5(1)(b). See further Article 37 on International Cooperation and Strategic Partnerships of the CRMA.

<sup>48</sup> See Articles 8 – 15.

<sup>49</sup> WTO, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Measures Relating to the Feed-In Tariff Program*, WT/DS/412/AB/R, WT/DS/426/AB/R, 24 May 2013, at 5.246 (“*Canada – Renewable Energy*”).

<sup>50</sup> See, for instance, Aaron Cosbey and Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 *Journal of International Economic Law* 11 (2014).

<sup>51</sup> The term ‘legal acrobatics’ in this context was coined by Mavroidis et al, *ibid*, page 28.

measures, could potentially be a subsidy. Following *Canada – RE*, the WTO DSB ruled in several other cases that the LCRs attached to the RE subsidies were in breach of WTO law.<sup>52</sup> But even green subsidies without LCRs could potentially amount to an actionable subsidy under the SCM Agreement and, as such, it is argued that the policy space for green subsidies is very narrow. To this end, the fact that WTO law lacks exceptions for green subsidies and the difficulty of applying GATT Article XX here<sup>53</sup> is a severe limitation to the WTO legal framework. Academic literature has advanced several proposals to improve the policy space for green subsidies,<sup>54</sup> however, a WTO reform is highly unlikely to occur at the current moment.

This section will show that, although legal challenges are not impossible, the NZIA and the CRMA are on a generally safer footing than the IRA vis-à-vis WTO law.

## 4.2 NZIA

As briefly mentioned above, under Article 25(7), the tender's resilience contribution shall be taken into account in public procurement procedures for NZ technologies. If determined that a third country supplies more than 50% of the concerned NZ technology or its main specific components in the EU, contracting authorities and entities will include the condition that for the duration of the contract the third country should not supply more than 50% of the value of the specific NZ technology or its main components. However, this rule is subject to the limitation that contracting authorities shall not apply the resilience requirement for contracts covered under the Agreement on Government Procurement ("GPA") Annex I and other international agreements binding on the EU.<sup>55</sup> This provision is to a certain degree less ambitious compared to the Commission's proposal for the Regulation according to which the resilience requirement would not have been waived in procurement procedures for contracts covered by the GPA or other binding agreements on the EU.

Article 26 concerns auctions to deploy renewable energy sources and, again, sustainability and resilience contribution play an important role in the criteria. Under Article 26(1)(b), Member States shall in the design auctions for the deployment of energy from renewables include:

(b) award criteria or pre-qualification criteria to 'assess the auction's sustainability and resilience contribution'

According to Article 26(2), the auction's sustainability and resilience contribution shall be based on the following criteria which shall be objective, transparent and non-discriminatory:

Auctions shall contribute to resilience, taking into account the proportion of the net-zero technology or its main specific components that originates from a third

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<sup>52</sup> Ilaria Espa et al, *Energy Subsidies and International Trade Law* in Michael Mehling et al (eds.), *Research Handbook on Climate Finance and Investment Law* (Edward Elgar 2024), Section 3.2.1.

<sup>53</sup> For excellent recent discussion see Henok Asmelash, *The First Ten Years of WTO Jurisprudence on Renewable Energy Support Measures: Has the Dust Settled Yet?* 21 WTR 455 (2023), pages 471–473.

<sup>54</sup> For a good, recent discussion see: Ilaria Espa et al, *supra* n. 52, Section 5.

<sup>55</sup> Article 25(8).

country accounting for more than 50 % of the supply of that specific net-zero technology or its main specific components within the Union.

And at least one of the following three:

- (a) environmental sustainability going beyond the minimum requirements in applicable law;
- (b) innovation by providing entirely new solutions or improving comparable state-of-the-art solutions;
- (c) the energy system integration.

Under Article 26(4), when applied as award criteria, MS shall give the sustainability and resilience contribution a minimum weight of 5% but this can go up to 100%. The sustainability and resilience contribution shall have a combined weight between 15% and 30% of the award criteria.

The NZIA is silent on what weight the sustainability and resilience contribution can have in the pre-qualification criteria. If the sustainability and resilience contribution can account to 100% as part of the pre-qualification criteria, this raises the question if in an auction for NZ technology for which country A supplies more than 50% on the EU market is disqualified but not country B supplying less than 50% would be in line with WTO law? If yes, this could prima facie run afoul of GATT Article I.1 because it appears to discriminate against the 'like' product of another nation. Thus, the question is whether government procurement is excluded from GATT Article I.1?

MFN treatment is at the core of the WTO and requires a WTO member that grants certain favorable treatment to any given country to grant that same favourable treatment to all other WTO Members.<sup>56</sup> Thus, a WTO Member cannot discriminate between and among other WTO members by giving more favourable treatment to the products of one country compared to the 'like' products of another. Historically speaking, there is support for the proposition that government procurement is excluded from MFN treatment. The early drafts of the International Trade Organization (ITO) and the GATT contained provisions that would have extended national treatment and MFN to government procurement, but they were never included in the final texts. Therefore, the GATT treated government procurement as an exception until the GPA was adopted, of which there are 21 parties at the present times of writing.<sup>57</sup> Such a position appears to be also supported by case law. In *EC – Commercial Vessels*, the Panel looked at the discussion on draft Article 18.8(a) of the Havana Charter (now GATT Article III:8(a)) and stated that: "...the Sub-Committee had considered that the language of paragraph 8 would except from the scope of Article 18 [national treatment] and hence from Article 16 [MFN treatment]...".<sup>58</sup> As such, the drafting history of the

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<sup>56</sup> GATT Article I.

<sup>57</sup> Mary Footer, *International developments: GATT: developments in public procurement procedures and practices* 6 PPLR 193 (1993), page 193. See also who support this proposition based on the drafting history of the provisions: John H. Jackson, *The Jurisprudence of GATT & WTO* (CUP, 2000), pages 63; Petros C. Mavroidis, *Trade in Goods* (OUP 2012), pages 800–801.

<sup>58</sup> United Nations Conference on Trade and Employment, Third Committee: Commercial Policy, Summary Record of the Forty-First Meeting, E/CONF.2/C.3/SR.41 (23 February 1948), p. 3. (my emphasis).

provision demonstrates that government procurement is excluded from the MFN treatment.<sup>59</sup>

Another argument in support of the proposition above is based on the relationship between GATT Articles I.1 and III:8(a). GATT Article I:1 refers to Article III: 2 and 4, of which the latter provision applies to ‘all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use’. GATT Article III:8(a) has a general characteristic and applies to all provisions in this Article. It states that ‘the provisions of this Article shall not apply to laws, regulations or requirements governing the procurement’ and in doing so excludes from application all provisions of Article III. As Article I.1 states that it applies to ‘all matters referred to in paragraph 2 and 4 of Article III’, it can be argued that Article III:8(a) applies by analogy to the MFN obligation and excludes it for the purposes of procurement. This interpretation is possible because Article I.1 extends to ‘all matters referred to in paragraph 2 and 4 of Article III’, and as Article III:8(a) is a derogation to these provisions, to which Article I.1 applies, it will consequently apply to the MFN obligation (Article I.1).<sup>60</sup>

The resilience requirement can be even more important when it comes to support schemes for households, companies or consumers (consumer subsidies). Under Article 28, when deciding to set up new or update existing subsidies incentivizing the purchase of NZ technology final products, the granting authority (e.g. Member State, regional authority, etc)<sup>61</sup> can design them in a way to promote the purchase by beneficiaries of net-zero technology final products with a high sustainability and resilience contribution. This can be done by either providing additional proportionate financial compensation or by conditioning the scheme’s eligibility based on the criteria referred to in Article 28(4). The criteria stipulated in Article 28(4) shall include the scheme’s contribution to resilience as well as at least one of the 3: environmental sustainability, contribution to innovation, and contribution to the energy system integration. As above, the resilience requirement would not be met if a single source supplies more than 50% of the total demand for a specific NZ technology within the EU.<sup>62</sup>

As such, for the purposes of support schemes under Article 28, the resilience requirement seems to discriminate against foreign suppliers if they supply more than 50% of the relevant technology. Besides, unlike auctions, the NZIA does not stipulate how many percentages can resilience count, which means that it can go up to 99% as long as one of the three environmental sustainability, contribution to innovation, and contribution to the energy system integration is included. As such, a subsidy with a 99% resilience requirement, which excludes non-EU suppliers that supply more than 50% of the relevant NZ technology, can run afoul of GATT Art III:4 and TRIMs Art 2.1 as well as potentially SCM Agreement Art 3.1(b).

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<sup>59</sup> WTO, *European Communities — Measures Affecting Trade in Commercial Vessels* WT/DS301/R, 20 April 2005, para 7.86 – 87 (“*EC-Commercial Vessels*”).

<sup>60</sup> Kamala Dawar, *Government Procurement in the WTO: A Case for Greater Integration*, 15 WTR 645 (2016), page 657.

<sup>61</sup> Recital 37.

<sup>62</sup> Recital 74.

This also seems very similar to *Canada-RE*, where, on the facts, there was a minimum domestic content level requirement (25-60%) that had to be met in order to benefit from the scheme. However, one must keep in mind that, according to recital 79, public authorities **can** condition the eligibility of the scheme based on sustainability and resilience contribution. This is an important caveat because it does not establish the NZIA WTO-incompatibility per se; instead, certain discriminatory schemes could be WTO-incompatible but in line with the NZIA in certain circumstances. Moreover, recital 79 also states that the use of the resilience contribution shall be ‘without prejudice to State aid rules and to WTO rules on Subsidies’. Even though it is yet to be seen how and what way future schemes will look like, it is of crucial importance to note that the EU here has managed to strike the right balance and adhere to WTO law.

#### 4.3) CRMA

GATT Article XI(1) prohibits quantitative restrictions on trade in goods. Quantitative restrictions are measures that limit the quantity of a product that may be exported or imported and can come in different forms, such as bans, minimum export or import price requirements, trade balancing requirements, quotas, licensing, etc. As ruled in *China – Raw Materials* (2012), the word ‘restrictions’ in Art XI refers to something that has a limiting effect while ‘quantitative’ suggests that the restriction is a measure that limits the quantity or amount of the imported product.<sup>63</sup> WTO case law shows us that Art XI has been construed broadly and is not limited to restrictions in a quantitative nature.<sup>64</sup> As ruled in *India-Autos*, the words “no prohibitions or restrictions ... whether made effective through quotas, import or export licenses or other measures’ ... suggest an intention to cover any type of measures restricting the entry of goods out of the territory of a Member”.<sup>65</sup>

As shown above, the CRMA has a benchmark according to which the EU should not be reliant for more than 65% of the annual consumption of any strategic raw material from any third country.<sup>66</sup> This could potentially raise problems under GATT Article XI as it restricts the imports of goods from another country if it supplies more than 65% of these goods. However, the CRMA is slightly unclear whether this benchmark is a binding objective. Article 44(2) states that, by May 24<sup>th</sup> 2027 and at least every 3 years thereafter, the Commission shall monitor progress towards the benchmarks stipulated in Article 5(1)(b). This report shall include quantitative information on the extent of the EU’s progress towards the benchmark, a list of the Strategic Partnerships and an assessment of how they contribute to reaching the benchmark. Neither this Article nor any other in the Regulation mandates any obligation on the Commission beyond monitoring in case the EU is not on track to meet the benchmark. Moreover, the Strategic Partnerships are not binding under Article 2(63) and, as such, this can be connected to Article 5(1)(b). Whether the Commission uses its infringement procedure against Member States failure to contribute to the benchmark is another question and, of course, not excluded under the CRMA. However, if it is a binding objective, the benchmark could potentially raise issues under the GATT.

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<sup>63</sup> WTO, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, 22 February 2012, paras 319–320.

<sup>64</sup> Chien-Huei Wu, *Law and Politics on Export Restrictions: WTO and Beyond* (CUP, 2021), Chapter 2.

<sup>65</sup> WTO, *India — Measures Affecting the Automotive Sector*, WT/DS146/14 WT/DS175/14, 19 March 2002, para. 7.264.

<sup>66</sup> CRMA, Article 5(1)(b).

#### 4.4. No LCRs linked to subsidies under EU law after all? Think again!

Finally, subsidies with LCRs can be potentially provided by EU MS and one can ask the question whether EU law facilitates this in the context of RE subsidies. In other words, do the EU's rules used to authorize RE subsidies by MS take into consideration WTO law?

According to the EU's Renewable Energy Directive ("RED-II"),<sup>67</sup> the EU has a binding target of energy from renewables of at least 42.5% by 2030 in the EU final gross consumption.<sup>68</sup> Under Article 4(1), this target can be met by MS through support schemes.<sup>69</sup> But even though RED-II makes it possible to use RE subsidies to reach the EU target, these MS support schemes need to also comply with EU law on State aid. As under EU Law State aid is generally prohibited unless it qualifies under one of the exceptions to that rule,<sup>70</sup> RE subsidies provided by MS must fall under the exception as well as comply with WTO law if falling under WTO law definition of a subsidy under the SCM Agreement.<sup>71</sup> In effect, as State aid is generally not permitted, the European Commission must approve any State aid measure by MS that falls within the general exception to the no-State aid rule before it can be put into effect.

Within the context of renewable energy subsidies, the EU has developed two instruments, namely the General Block Exemption Regulation ("GBER")<sup>72</sup> and Guidelines on State aid for climate, environmental protection and energy ("CEEAG").<sup>73</sup> If a MS RE subsidy measure meets the conditions under the GBER or CEEAG, it will not fall under the general prohibition of State aid. State aid that falls under the GBER is exempted from the prior notification requirement and covers smaller schemes.<sup>74</sup> By contrast, the CEEAG provide guidance to the Commission in assessing the compatibility of environmental protection and energy aid measures by EU MS subject to notification under TFEU Article 107(3)(c).<sup>75</sup>

#### - CEEAG

The CEEAG do not prevent the potential incompatibility of a MS subsidy with WTO law. Pursuant to Section 2.1(13), the CEEAG state that they do not apply to aid for: environmentally-friendly products, machinery, equipment or means of transport,<sup>76</sup> research, development and innovation under the Framework for State aid for research

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<sup>67</sup> RED-II Article 1.

<sup>68</sup> Art 3.1; Recital 8.

<sup>69</sup> BRIEFING Implementation Appraisal Renewable Energy Directive Revision of Directive (EU) 2018/2001 EPRS March 2021, page 3.

<sup>70</sup> TFEU Article 107.

<sup>71</sup> Anna Marhold, *supra* n. 27, pages 210–213.

<sup>72</sup> Commission Regulation (EU) 2023/1315 of 23 June 2023 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty C/2023/4278 OJ L 167.

<sup>73</sup> Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 C/2022/481 OJ C 80, 18.2.2022, p. 1.

<sup>74</sup> GBER, Article 3.

<sup>75</sup> CEEAG, Section 1(7).

<sup>76</sup> (a)

and development and innovation,<sup>77</sup> agriculture and forestry sector or fishery and aquaculture sector to which specific State aid rules apply,<sup>78</sup> nuclear energy.<sup>79</sup> From this, it can be inferred that the CEEAG 2022, just like their predecessor,<sup>80</sup> do not directly prevent MS subsidy measures that would be prohibited under WTO law. Among the prohibited subsidies under WTO law are also subsidies linked with LCRs, which run afoul of SCM Agreement Article 3.1(b).

Also very importantly, under none of the conditions of compatibility assessment in Section 3, the European Commission will have to take into consideration if the aid may be in breach of WTO law. This opens the door not only to prohibited subsidies under the SCM Agreement but also to actionable subsidies that can be in breach of WTO law but in compliance with the CEEAG. It is not impossible to imagine a scenario where State aid for, for example, technologies that can contribute to the reduction of greenhouse gas emissions causes adverse trade effect to the interests of another WTO member and thus breach SCM Agreement Article 5 but is in line with the CEEAG. For instance, some EU MS, such as France, Germany, Greece, Italy, and Spain had RE support schemes linked to LCRs.<sup>81</sup> Although these schemes were authorized before the CEEAG, as the current legal framework can potentially authorize such LCRs, this demonstrates the potential tension between the two regimes.

The possibility of new RE support schemes in future that have LCRs or are actionable under the SCM Agreement is not excluded. For example, France recent reform of the 'Ecological Bonus' scheme supporting the purchase of electric vehicles (EVs) by domestic consumers introduces a new criterion based on the amount of carbon emitted in the vehicle's manufacturing. This scheme is the first green subsidy for EVs linked to carbon emissions, combining fiscal policy with regulatory standard-setting. This scheme may run afoul of GATT Articles I and III and potentially be actionable subsidies under the SCM Agreement. The likelihood of other nations introducing similar protectionist schemes cannot be excluded.<sup>82</sup>

## -GBER

Prohibited subsidies under WTO law will not be in line with GBER. According to Article 1(2)(d), 'aid contingent upon the use of domestic over imported goods', and, under Article 1(2)(c), 'aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export

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<sup>77</sup> (b)

<sup>78</sup> (c)

<sup>79</sup> (d)

<sup>80</sup> See Ilaria Espa et al, *EU and WTO Regulatory Approaches to Renewable Energy Subsidies: Negative and Positive Integration* in Rike Krämer-Hoppe (eds), *Positive Integration - EU and WTO Approaches Towards the "Trade and" Debate* (EYIEL 2020), pages 71 – 74; Anna Marhold *supra* n. 27.

<sup>81</sup> Megan Hogan, *Local content requirements threaten renewable energy uptake* (PIIE 2021)

< <https://www.piie.com/blogs/trade-and-investment-policy-watch/local-content-requirements-threaten-renewable-energy-uptake> >

<sup>82</sup> See further Meng Mandy Fang, 'When Electrification Meets Reindustrialization: The First EU Green Electric Vehicle Subsidies and the WTO Consistency' *Duke Journal of Comparative & International Law* (2025).

activity'.<sup>83</sup> However, this does not prevent other subsidies that might be actionable under WTO law.

## 5) The EU post-GDIP: The Way Forward

The EU's CRMA and NZIA are welcoming initiatives aimed at filling legislative gaps and strengthening the security of supply for CRMs. There is no doubt that the EU will never be self-sufficient in CRMs, making an international strategy of paramount importance for the EU. However, as argued elsewhere, the current trade policies offer limited opportunities for diversification.<sup>84</sup> To this end, the EU will need to strengthen its global engagement strategy and trade with reliable partners.<sup>85</sup> This paper will make several recommendations on how the EU can further strengthen its international supply chains and achieve a sustainable and secure supply of CRMs.

### 5.1 The EU – US CRMs Agreement

The EU has adopted a prudent strategy to start diplomatic talks with the US concerning the impact of the IRA on the EU. The two parties established the US-EU Task Force on October 26<sup>th</sup> 2022, which is an important step in the right direction. This Task Force complements other diplomatic efforts related to energy cooperation and, under its auspices, the two sides achieved a positive outcome on commercial car tax credits. In December 2022, the US Treasury Department announced that EVs leased by consumers from January 1st 2023 can qualify for up to \$7,500 in commercial clean vehicle tax credits, even if not assembled in North America. This adjustment extends commercial EV credits to EU companies,<sup>86</sup> providing consumers with a wider range of EV choices and is an additional incentive over internal combustion engine vehicles. However, this seems a rather pyrrhic victory. Despite the amendment in December 2022, only 10 EVs qualified for the \$7,500 credit in March 2023 because they failed to meet the requirements of Section 13401 of the IRA according to which a minimum share of the value of battery components (currently 60%) or critical minerals needs to come from the US or countries with which the US has a free trade agreement ("FTA").<sup>87</sup>

In order to mitigate the harshness of Section 13401 of the IRA rendering the subsidy contingent on having a free-trade-agreement with the US, the EU and the US have been negotiating an agreement – but what does a 'free trade agreement' mean under US law that could potentially qualify here? This term is not defined in US law, affording the US a certain level of flexibility. Adopting a broader definition could potentially open

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<sup>83</sup> See further Espa et al, *supra* n. 80.

<sup>84</sup> Marie Le Mouel, *Why Europe's critical raw materials strategy has to be international* (Bruegel 2023).

<sup>85</sup> European Commission, PRESS RELEASE 16 March 2023, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_1661](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1661) (June 2024).

<sup>86</sup> David Shepardson, *U.S. Treasury says consumer leases can qualify for EV tax credits* (Reuters, 2022), available at <https://finance.yahoo.com/news/u-treasury-says-consumer-leases-160000983.html> (June 2024).

<sup>87</sup> Ari Natter et al, *Only 10 Electric Vehicles Qualify for Full \$7,500 US Tax Credit* (Bloomberg, 2023), available at <https://www.bloomberg.com/news/articles/2023-04-17/gm-tesla-and-ford-evs-will-be-the-only-cars-eligible-for-7-500-us-tax-credit> (June 2024). See also produce 'less efficient outcomes for the reduction of global greenhouse gas emissions'. See Giulia Leonelli, *Critical Raw Materials, the Net-Zero Transition and the 'Securitisation' of the Trade and Climate Change Nexus: Pinpointing Environmental Risks and Charting a New Path for Transnational Decarbonisation* LSE Legal Studies Working Paper 25/2023, pages 15-16 criticising the EV's LCRs.



access to generous subsidies under the IRA to non-US stakeholders.<sup>88</sup> In March 2023, the EU and the US launched talks on a trade agreement on critical minerals (“CMA”) aimed at enhancing international supply chains of critical minerals and related sectors. This initiative aims to mitigate some negative repercussions of the IRA’s LCRs by allowing relevant critical minerals extracted or processed in the EU to count towards certain IRA clean vehicle tax credit requirements.<sup>89</sup> Instead of trying to revive the negotiations on the Transatlantic Trade and Investment Partnership, which would have removed both tariff and non-tariff barriers, the Biden Administration has taken a more targeted approach to addressing relevant issues between the parties; for example, the EU and the US concluded an interim agreement on WTO Boeing-Airbus subsidies disputes in 2021 and have reached an agreement to extend the suspension of tariffs on EU steel and aluminium products, as well as the possibility of retaliatory European measures, until March 2025.<sup>90</sup>

Although an agreement on critical minerals may help to a certain extent mitigate the tension, pursuing a narrowly focused sectoral agreement would not be without problems under WTO law. Under Article XXIV: 8(b) of GATT, a free trade area should eliminate ‘substantially’ all the duties and other restrictive regulations of commerce. The AB found in *Turkey — Textiles* that ‘Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term “substantially” in this provision. It is clear, though, that “substantially all the trade” is not the same as all the trade, and also that “substantially all the trade” is something considerably more than merely some of the trade’.<sup>91</sup> More recently, in *Peru — Agricultural Products*, the AB found that a roll-back measure in an FTA that restricts regional trade cannot be covered under GATT Article XXIV.<sup>92</sup> In general, FTAs serve as an exception to the MFN rule and thus enable a country to discriminate against the goods of non-FTA parties if certain conditions are met.<sup>93</sup> However, a narrow sectoral agreement on critical minerals providing preferential tariff-free access, or services liberalization, in only one or a few sectors could be seen as discriminatory and inconsistent with the MFN principle. This Agreement may be subject to challenge before the WTO, potentially resulting in a ruling that deems it WTO-incompatible. The EU, claiming to be a champion of multilateralism, seeks to remain within the limits of

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<sup>88</sup> According to the US Treasury Department, free trade agreements cover ‘substantially all trade in goods and services between the parties, including trade in critical minerals’ but the US also shows a willingness to include additional countries for the purposes of the IRA free-trade-agreement requirement, as illustrated by the reference to the US-Japan Agreement (2023).

<sup>89</sup> Council of the EU, Press release of 20 July 2023, available at <https://www.consilium.europa.eu/en/press/press-releases/2023/07/20/trade-with-the-united-states-council-authorises-negotiations-on-eu-us-critical-minerals-agreement/#:~:text=14%3A20-Trade%20with%20the%20United%20States%3A%20Council%20authorises%20negotiations,EU%2DUS%20Critical%20Minerals%20Agreement&text=The%20Council%20today%20adopted%20a,and%20the%20related%20negotiating%20directives> (3 April 2024).

<sup>90</sup> Cecilia Malmström, *Next steps for Europe and the US on their green agenda: Steel and critical minerals* (PIIE 2023), available at <https://www.piie.com/blogs/realtime-economics/next-steps-europe-and-us-their-green-agenda-steel-and-critical-minerals> (3 June 2024).

<sup>91</sup> WTO, *Turkey — Restrictions on Imports of Textile and Clothing Products* WT/DS34/AB/R, 22 October 1999, para 48.

<sup>92</sup> WTO, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R WT/DS457/AB/R.Add.1, 20 July 2015, para 5.116.

<sup>93</sup> GATT, Article XXIV.

GATT Article XXIV in FTA negotiations.<sup>94</sup> Having said that, WTO jurisprudence shows that WTO members are unlikely to challenge FTAs and so far the DSB has not found an FTA to violate Article XXIV; therefore, while the risks are relatively low, they are still not completely eliminated under WTO law. As of now, the EU–US Agreement on CRMs has not materialized due to, according to the EU’s representatives, additional requests beyond the US–Japan Agreement and refusal to use it as a template.<sup>95</sup> However, this is slightly unsurprising given that the US-EU relationship differs from that of the US-Japan and so it is not unexpected for the US to explore further opportunities. In any case, it is argued that both parties should show flexibility and ensure a deal is reached, as this would further strengthen their geopolitical and economic power.

## 5.2 Memorandums of Understanding (“MoUs”)

As part of its raw materials strategy, the EU has pursued raw materials diplomacy by reaching out to non-EU countries through strategic partnerships and policy dialogues. Since 2021, the EU has signed Memorandums of Understanding (‘MoUs’) with 13 different countries on raw materials.<sup>96</sup> The MoUs have an ambitious scope and cover various areas, such as the promotion of and cooperation on trade and investment in CRMs, R&D, skills, capacity building, and competencies. The MoUs aim to identify concrete actions for cooperation and establish working groups to discuss progress and future collaboration.

However, the MoUs could be improved from institutional and legal standpoints. Even though all MoUs state that the parties should monitor their implementation and establish Working Group, only 2<sup>97</sup> out of 13 MoUs include a rudimentary dispute resolution mechanism, while the EU-Norway MoU explicitly excludes the right to bring a dispute under any tribunal. However, the EU – Greenland MOU should be understood within the context of the special relationship between the two sides and Greenland’s association with the EU under TFEU Articles 198–204. Although Greenland is not an EU Member, due to its special relationship with Denmark, it has been associated with the EU and the relationship between the two is governed by the Overseas Association Decisions. The EU – Canada Memorandum is subject to dispute settlement under Chapter 29 of the Canada – EU Comprehensive Economic and Trade Agreement.

Furthermore, none of the MoUs creates rights under international or national law, contains commitments to give preferential treatment to the other side, or commits to financing the ambitious projects they intend to establish. As such, although the EU has set ambitious benchmarks in the NZIA and the CRMA, the lack of legal obligations and

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<sup>94</sup> See Emily Lydgate, *Deep and not comprehensive? What the WTO rules permit for a UK-EU FTA* 3 WTR 451 (2023).

<sup>95</sup> Bloomberg News, *US Demands Are Why Mineral Deal With EU Failed, Dombrovskis Says* (Bloomberg, 2023), available at <https://www.bloomberg.com/news/articles/2023-10-28/us-demands-are-why-mineral-deal-with-eu-failed-dombrovskis-says?embedded-checkout=true>; <https://subscriber.politicopro.com/article/2024/01/eu-trade-chief-presses-u-s-on-critical-mineral-pact-00138478> (December 2023).

<sup>96</sup> European Commission, *Raw materials diplomacy*, available at [https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/raw-materials-diplomacy\\_en](https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/raw-materials-diplomacy_en) (December 2023).

<sup>97</sup> EU – Greenland MoU 2023; EU – Canada MoU 2021.

avenues for the EU to enforce its rights under the MoUs will make it difficult to maximize their effectiveness and help meet the EU's benchmarks.

### 5.3 FTAs

FTAs can also be used by the EU to source CRMs. The EU has the world's largest free trade agreements coverage<sup>98</sup> and at present times of writing a significant number of CRMs imports (92% in value) do not pay import duties.<sup>99</sup> Beyond tariff exemptions, the EU has used proactive and defensive strategies to secure CRMs from third countries.<sup>100</sup> Although many EU FTAs have chapters on CRMs,<sup>101</sup> some agreements with resource-rich countries have only rudimentary CRM chapters while others have none.<sup>102</sup> The EU should review its CRM chapters with the view to modernize and, where necessary, incorporate new CRMs chapters in its FTAs. The EU is also negotiating FTAs with several resource-rich countries, such as Australia and Indonesia. Therefore, developing a coherent strategy for CRMs and agreeing to reduce taxes on these goods with trade partners will be crucial.

### 5.4 Critical Raw Materials Club

The EU should further advance its proposal for a Critical Raw Materials Club ("CRMC") and bring together resource-rich and resource-seeking countries willing to strengthen CRMs global supply chains.<sup>103</sup> Although the precise scope and responsibilities of this Club are yet to be officially released, its overall aim will be to channel financial resources and infrastructure from resource-seeking countries to resource-rich countries, enhance monitoring, and facilitate coordination and transparency.<sup>104</sup> The proposed CRMC is a step in the right direction, as it has the potential to bring together countries with similar goals and make it easier to make decisions on important issues compared to other international forums. The proposed Club can also address some of the shortcomings identified in the MoUs concluded by the EU.

However, the success of the Club will depend on a variety of factors. It is important to have strong tools to enforce rights and obligations and go beyond the existing international forums; otherwise, achieving positive results would be difficult. In practice, however, it may not be easy for resource-rich and resource-seeking countries to agree on creating robust dispute settlement and decision-making procedures for the

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<sup>98</sup> 72 FTAs until date.

<sup>99</sup> Francesco Findeisen, *The Club Approach: Towards Successful EU Critical Raw Materials Diplomacy* (Jacques Delors Centre | Hertie School, 2022), page 5.

<sup>100</sup> Victor Crochet et al, *Critical insecurities? The European Union's strategy for a stable supply of minerals* 27 JIEL 147 (2024).

<sup>101</sup> European Commission, Trade in raw materials:

[https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/trade-raw-materials\\_en](https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/trade-raw-materials_en) (7 August 2024).

<sup>102</sup> EU – Eastern and Southern Africa States; EU – Mexico (1997); EU – Morocco (2000); EU – South Africa (2000); EU – Chile (2003).

<sup>103</sup> European Critical Raw Materials Act, see

[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/green-deal-industrial-plan/european-critical-raw-materials-act\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/green-deal-industrial-plan/european-critical-raw-materials-act_en) (7 August 2024).

<sup>104</sup> Edoardo Righetti, *Reducing supply risks for critical raw materials* (CEPS 2024), page 17; Nicole Lawler et al, *The EU needs a buyers' club for critical minerals. Here's why.* (Atlantic Council, 2023), available at

<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-eu-needs-a-buyers-club-for-critical-minerals-heres-why/> (1 August 2024).

Club, especially when the WTO AB is in paralysis. The Club should also balance the interests of all parties, as a Western-dominated Club may leave resource-rich countries on the sidelines and reluctant to join. Moreover, as Findeisen suggests, the success of the Club will depend on resource-rich countries making commitments to freely trade raw materials, while resource-seeking countries making commitments to provide financial compensation and development support in return.<sup>105</sup>

The US has already initiated several efforts resembling a Club for CRMs. Under the Indo-Pacific Economic framework (“IPEF”), the US aims to strengthen supply chains in the Indo-Pacific region. Building on the IPEF, the US together with Japan and South Korea pledged to develop a system for sharing supply chain resilience.<sup>106</sup> Most importantly, in 2022, the US initiated the Minerals Security Partnership (“MSP”), aiming to strengthen the resilience of the global raw materials value chain across 13 resource-seeking countries. However, the major drawback of the MSP is that its membership currently consists of resource-seeking countries, while resource-wealthy countries participate only in business forums, thus falling short of forming an ambitious CRMC.

## 6) Conclusion

The purpose of this article was two-fold. First, it evaluated the compatibility of the CRMA and the NZIA and argued that the legislations are unlikely to create significant legal challenges under WTO law. Second, it showed how the EU can leverage its external relations tools to strengthen its security of supply of CRMs and in doing so further advance the key objectives of the NZIA and the CRMA in response to the world’s increasing use of green subsidies.

The enactment of the GDIP comes at a time of a remarkable shift in government spending in addition to various crisis and challenges that the world has faced. The GDIP also relates to the late ‘rebirth’ of the EU’s (“OSA”). In pursuit of OSA the EU has adopted a range of strategies and tools to safeguard its economic and political prosperity at times of multilateral fragmentation, such as the anti-coercion instrument, carbon border adjustment mechanism, foreign subsidies regulation, with mixed motives balancing competitiveness between EU firms and third countries, promoting sustainability and security.<sup>107</sup>

In this article, I have provided a timely assessment of the EU’s CRMA and NZIA and made several recommendations how post-GDIP the EU can further strengthen its international supply chains and achieve a sustainable and secure supply of CRMs.

As argued above, MFN treatment is excluded from government procurement procedures and, as such, Articles 25 and 26 of the NZIA seem to be on a relatively safer footing under WTO law. Even though the resilience requirement in support schemes seems to directly discriminate against foreign suppliers if they supply more than 50% of the relevant technology, public authorities could condition the eligibility of

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<sup>105</sup> Francesco Findeisen, *supra* n. 99, page 2.

<sup>106</sup> Nicole Lawler, *supra* n. 104.

<sup>107</sup> Ferdi De Ville et al, *The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU’s New Trade Instruments* 28 *European Foreign Affairs Review* 15 (2023), pages 25–28.

the scheme on the basis of the sustainability and resilience contribution. Hence, there is no automatic obligation on these authorities to do so. The CRMA has a benchmark according to which the EU should not be reliable for more than 65% of annual consumption of any strategic raw material from any third country. Nonetheless, it remains to be seen whether this benchmark will be a binding objective. In any event, LCRs attached to subsidies can be provided by EU MS and, as argued above, the CEEAG of 2022 does not require the European Commission to take into account their compatibility with WTO law as part of the conditions of compatibility assessment under CEEAG Section 3. In examining the EU's post-GDIP strategy, this paper argued that the EU could improve the institutional and legal standing of its MoUs with third states. FTAs also can be used by the EU to source CRMs. The EU should also push further on its EU – US CRMs Agreement and CRMs Club bringing together like-minded countries.



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