

Clashing over critical minerals

The **green transition** is creating an exponential need for **critical raw materials** (“CRMs”), such as lithium, nickel and cobalt, as these are necessary for environmentally-friendly technologies, from wind turbines to electrical vehicles. The European Union (“EU”) is in desperate need of such minerals due to limited reserves at home and long-lasting reluctance to mine what little amounts it has been endowed with because of the environmental risks that it entails.

The extraction and processing of **CRMs** are currently concentrated in a few States. In particular, **China** dominates many of CRM supply chains and is seeking to secure further supplies abroad. At the same time, the United States of America (“US”) is adopting incentives to encourage the extraction and processing of these minerals in its territory or in those of its preferential trading partners. Many resource-rich developing countries, such as Zimbabwe and Indonesia, have also been hoping to ride on the green transition wagon to kick start their economic development process by adopting measures to discourage the export of minerals extracted therein and promote their domestic processing instead. Faced with growing global competition over CRMs and a fear of over-reliance on China, the EU has started building a multifaceted trade and investment framework to secure access to these minerals for its industries in order to reap the benefits of the **green transition**.

Trading tactics

To start with, the EU has targeted measures taken by resource-rich countries that seek to encourage domestic processing of CRMs and depress exports by relying on existing, and creating new, international trade rules.

A major venue for the EU's actions has been the **World Trade Organization** (“WTO”) via its dispute settlement and negotiation functions. Article XI:1 of the GATT prohibits WTO Members from imposing export bans and restrictions. The EU has used this provision to successfully challenge China's export restrictions on certain rare earth minerals in 2014 and Indonesia's export ban on nickel ore in 2022. The former dispute pushed China to remove the export restrictions on these minerals in 2015.

In the latter dispute, Indonesia appealed the panel's decision “into the void” as the Appellate Body has lost its quorum to hear appeals since December 2019. Consequently, the dispute remains pending so that Indonesia does not need to implement the panel's decision yet. To address the issue of the Appellate Body's unavailability, the **EU** led the establishment of the Multi-Party Interim Arbitration Arrangement (“MPIA”), which is a temporary appellate mechanism. However, some major players have not joined the MPIA. They continue to (ab)use their right of appeal to block panels' decisions, thereby

undermining the EU's objective of restoring an effective dispute settlement system that would help prevent WTO-inconsistent restrictions on the export of CRMs.

However, the existing WTO rules leave abundant policy space for WTO Members to restrict the exportation of CRMs through various means. A major example is through export taxes which are largely unregulated under the WTO and widely used by governments. The EU has attempted to close this loophole in several ways.

As one of the main drivers in the process of accepting new WTO Members, the EU has requested acceding Members to agree to limit their use of export taxes. It has also pushed for commitments forbidding State-owned enterprises ("SOEs") from discriminating between domestic and foreign buyers when selling goods and requiring them to act in accordance with commercial considerations, thereby preventing SOEs in the CRM sectors from favouring domestic customers over foreign ones (for example, for Kazakhstan, at paragraphs 540 and 142). China's WTO accession commitments also include obligations to remove export restrictions and all export taxes as well as rules on SOEs regarding non-discrimination and commercial considerations.

More importantly, the EU has made access to raw materials one of its priorities by developing new rules on raw materials in its most recent free trade agreements ("FTAs"). While the EU has long included provisions prohibiting the use of export taxes altogether (for example, Article 2.6 of the EU-Canada FTA), it now adds an entire chapter on "energy and raw materials" in these agreements. For example, the EU-Chile Advanced Framework Agreement and the modernised EU-Mexico Trade Agreement (which have not yet entered into force) include provisions prohibiting the use of export monopolies and dual-pricing schemes (that is the selling at a higher price of raw materials for export than for domestic sales) in addition to export taxes.

These chapters also set up mechanisms for cooperation on standardization, value chain integration and research and development in CRM industries and are further complemented by rules on SOEs similar to those developed for newly acceded WTO Members, mentioned above. Provisions prohibiting performance requirements such as those restricting export sales, which force companies operating in the mineral sector to sell domestically, have also been included in the EU's recent FTAs. The EU now aims to conclude further trade agreements with similar provisions focusing on access to CRMs with Indonesia and Australia.

Finally, on the unilateral front, the EU has amended its trade defence practice over the last few years to impose higher duties on imports of downstream products from countries having in place policies that encourage the domestic processing of upstream raw materials. The EU

has, for example, recently targeted imports of stainless-steel from Indonesia that are manufactured using nickel ore subject to export restrictions. By doing so, the EU intends to protect its industries from foreign competitors having preferential access to raw materials and to encourage the targeted countries to export these raw materials to the EU. Given that the General Court of the EU recently approved these practices despite repeated WTO rulings opposing this approach, the EU is likely to continue this trade defence practice going forward.

Opening doors

In addition to international trade rules, the EU has been developing an investment framework to support its companies investing in the extraction of CRMs abroad. Since multilateral disciplines, including WTO rules, on investment restrictions and protection are remarkably limited, the EU has negotiated new investment rules bilaterally.

It has tailored investment access obligations in its recent FTAs in the form of positive commitment schedules and specific provisions in the “energy and raw materials” chapters mentioned above. For example, while Vietnam reserved its rights to apply restrictions on foreign investment in the mining industry, Chile and Mexico have committed to grant non-discriminatory access to foreign investors in the exploration and production of minerals. The EU has also included post-investment protection chapters in its recent FTAs to constrain expropriation and ensure fair and equitable treatment, as well as full protection and security for its investors.

Furthermore, to promote and diversify investment abroad by its companies in the extractive mineral sector, the EU has signed an investment facilitation agreement with Angola and memoranda of understanding (“MOU”) with Ukraine, Kazakhstan and Namibia.

The former includes rights and obligations concerning the transparency and predictability of the existing investment framework in Angola. It also streamlines investment procedures, including the impartial and objective administration of such procedures, and creates mechanisms for the parties to further cooperate on investment facilitation. These **MOU** create partnerships to promote cooperation and investment in mineral extraction and related infrastructure in the partner countries. They also encourage discussions to remove barriers to investment in the partner countries and facilitate these countries' integration in the value chains of EU companies and the harmonization of regulatory frameworks. Similar MOU with other countries are also in the pipeline.

Cooperating with allies

Another approach taken by the EU to secure access to CRMs has been strengthening cooperation with allies. The EU and Canada recently initiated, under the auspice of the **EU-**

Canada FTA, a partnership to develop new projects and align financial support for mineral extractions. The EU has also been discussing the issues of access to CRMs and the integration of their value chains in its Trade and Technology Council with the US and will do so in the future in a similar mechanism recently established with India. The EU is now considering taking such cooperation mechanisms further as it has touted the idea of a critical raw materials club with like-minded trading partners, after having already joined the Minerals Security Partnership set up by the US last year together with several other developed countries to bolster critical mineral supply chains for the advancement of clean energy and other technologies.

Dreaming of self-reliance

Domestically, the EU has been actively working towards self-reliance for CRMs. This has involved the ongoing work on a Critical Raw Materials Act which aims to stimulate finance for projects in the critical mineral sector (including also those located abroad) and to cut red tape for facilitating the development of such projects in the EU. This is to be potentially complemented by a loosening of State aid rules vis-à-vis extractive and processing ventures as part of the EU's proposed Green Deal Industrial Plan which would enable EU Member States to finance projects with fewer hurdles.

Moreover, the EU is planning to further reduce its reliance on foreign minerals by encouraging recycling of minerals already present in its territory. While it is expected that the Critical Raw Materials Act will include recycling requirements, the recently agreed upon Batteries Regulation already include recycled content requirements that mandate an increasing amount of recycled minerals in new batteries over time.

Challenges ahead

The EU's multifaceted approach to pursue more secure access to CRMs is a testament to its grave concerns about the growing domestic demand for such minerals, its heavy reliance on foreign supplies and its vulnerabilities in global supply chains. However, the extent to which the EU's approach may achieve a stable and sufficient supply remains to be seen. While the diversification of supply bases is essential, a handful of economies dominating the production of CRMs will continue to cause fluctuations in the volume and value of these CRMs in the global market. This raises the question of whether it would be politically desirable and diplomatically viable for the EU to pursue cooperation with China.

Here, the ill-fated **EU-China Comprehensive Agreement** on Investment has a chapter on Investment and Sustainable Development which may be expanded to cover trade and investment in CRMs. Moreover, given Russia's predominance regarding some types of CRMs, the Russia-Ukraine war, the sanctions imposed by a range of economies and Russia's

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potential retaliation have disrupted the supply of CRMs from Russia to the [EU](#). In addition, even with allies and FTA partners, commitments to cooperate do not make the EU immune to their ongoing competition for access to [CRMs](#) in foreign markets and potential tensions associated with green, security and other policies. Finally, the EU's effort to enhance domestic supplies of CRMs may lead to increased mining activities at home which will have ramifications for its environmental agenda. The future of the EU's CRM security will thus hinge on how it overcomes these challenges ahead.

Source: EJIL