

**Conference "The Future of Trade in a Polarized World Order", 23 - 25  
June 2023, Vienna**

**“The energy transition and the European trade policy: new rules to  
access resources in the Global South.”**

Lucia Bárcena (TNI)

Luciana Ghiotto (CONICET-Argentina/TNI)

Bettina Muller (TNI)

**1. Introduction**

Energy transition is now a reality, and it is moving at a very fast speed. This is going to have enormous impacts on production processes and consumers on a global scale. For example, the EU announced that from 2035 the sale of gasoline-powered vehicles will be prohibited - with a small exception for cars running on e-fuels. Other countries like Japan, Canada, and South Korea have made similar pledges.

The climate crisis is undeniable. A large survey commissioned by UNDP in 2020 showed that 72% of European citizens and 70% of Americans understand that we live in a climate emergency, while 53% support the push for renewable energy. There is an increasing number of voices that agree that it is not possible to continue growing in a way that is detached from material and energy consumption. Therefore, one of the most important challenges of this transition lies in the urgent need to change our energy matrix based on fossil fuels to one based on renewable energy. However, the visions of the energy transition and how we could achieve them are very diverse and depend on those who imagine it.

Despite the undeniable environmental and social benefits of renewable energy (such as less pollution and the possibility of decentralized management), several scientific studies are beginning to assess the need for orderly planning of renewable development. One reason for this is the projected significant increase in the demand for critical metals and minerals, including cobalt, nickel, and lithium. An article published in the scientific journal Nature concludes that materials necessary for harnessing renewable energy would be extracted from approximately 82% of the

planned new mines. Furthermore, these studies reveal that the renewables currently in use still depend on fossil fuels for their construction and operation.

In this regard, a sustainable energy transition necessarily involves significantly increasing efficiency in consumption, promoting small and medium-scale installations near consumption points (with minimal energy loss during transportation), and reusing materials for infrastructure construction, among other measures.

However, within the capitalist framework of the energy sector, a financial company or an investment fund will build as many renewables as possible and incentivize their consumption because that is their business model. This market logic for promoting renewables has allowed a few investors to make a lot of money. In fact, major fossil fuel-based energy companies are already reducing their investments in fossil fuels and expanding their businesses into the more lucrative renewable sector.

Having the same companies that dictate the rules of the electricity market lead the energy transition could lead to making the same mistakes that led to the current climate catastrophe. This understanding has generated strong social pressure on governments to change public policies along this path, advancing clean energy and decarbonization. In the European Union, this caused various governments (such as Germany, Spain, the Netherlands, and France) to announce in 2022 that they would withdraw from the Energy Charter Treaty (ECT), which protects investments in the fossil energy sector and has generated dozens of investor claims against the European states in international arbitration institutions. However, the EU is signing new trade and investment agreements with countries outside of the Union in the search for critical raw materials for the energy transition. This double standard raises the questions...

Undoubtedly, renewable energy plays a fundamental role in the energy transition, but its implementation must be planned and orderly to ensure the general interest and environmental care prevail over the profit of an increasingly small group of transnational companies.

Thus, the question is not whether the energy transition process is going to move forward, but rather: 1) under *what rules* and *how* will it be carried out, that is, what are the national and international legal frameworks which drive this process; 2) which are the public and private, national and global, actors that *benefit or are harmed* by these developments.

## **2. A global race to access raw materials for the energy transition**

The green transition, driven by the need for moving towards renewable energy systems, is being promoted and led by states. Currently we are observing a growing competition between states (especially China, Japan, the US, and the EU) and a competition between "their" companies to guarantee access to raw materials like rare

earth and metals which is crucial for the transition to cleaner and more technologically advanced economies. In the global race to access these raw materials, China has become the dominant supplier and processor, which has raised concerns about the excessive influence of that country in the processes of extraction and hoarding of energy resources on a global scale.

But most of the raw materials necessary for the energy transition are not located in the countries where the technology to produce for example lithium batteries is based (especially with regard to Asia-Pacific).

Latin American countries have the capacity to provide an important part of the raw materials needed for the energy transition. This region will see much of the pressure from companies and states to have access to energy materials such as lithium. In the greater Atacama region (Chile, Argentina, Bolivia) alone, 58% of the global lithium mining resources are concentrated, and almost 53% of the world's reserves. If Peruvian, Mexican and Brazilian potential reserves were added, the region would hold nearly 70% of the world's lithium reserves. This would translate into a restructuring of the world economic scenario around the energy transition and a provide a new, sound source of income for Latin American economies, according to the Latin American Strategy Centre for Geopolitics (CELAG). In Sonora, Mexico, the Chinese company Ganfeng Lithium is building the world's largest lithium mine. For its part, the EU is 100% dependent on the import of lithium and, if the decarbonization commitments are to be met, it is estimated that in 2030 18 times more lithium and 5 times more cobalt will be needed.

In this context, Latin American governments are designing new rules to profit from this increased demand in critical raw materials to make sure that this time the money stays in the territories. For example, Argentina, Chile, Bolivia, and Brazil are considering creating a "lithium OPEC" to coordinate production flows, pricing, and good practices for mined lithium, which is used in batteries for electric vehicles. Mexico's new mining code has changed the way to obtain mineral concessions making it more difficult for big transnational corporations who have avoided tax payments, caused environmental damage or put excessive pressure on the use of water. Or the nationalization of Mexico's Lithium reserves. These policy changes have angered many foreign investors. Canada has already threatened Mexico with international litigations for allegedly breaching its obligations under the free trade US-Mexico-Canada Agreement as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

And here is where trade and investment agreements acquire a new meaning. These have become a guarantee for industrialized countries, especially the EU, to have access to the raw materials they require from countries like Mexico and Chile. In order not to lose in the new race of achieving a new energy matrix and leading the way to green transition, it is essential that European technology and automotive companies have unrestricted access to these materials (no matter what new policies are in place).

The renegotiation of trade agreements and the inclusion of Energy and Raw Materials chapters with both countries show this new reality. In order to secure access and mitigate regulatory risk, the EU is currently (re)negotiating a number of trade and investment agreements with specific chapters on *Energy and Raw Materials as well as strategic partnerships on raw materials*. The geographical interest to expand such agreements coincides directly with the geographical location of such CRM. According to the European Commission, the EU will establish a “Critical Raw Materials Club for all like-minded countries willing to strengthen global supply chains, strengthening the World Trade Organization (WTO), expanding its network of Sustainable Investment Facilitation Agreements and Free Trade Agreements and pushing harder on enforcement to combat unfair trade practices.”

This paper works on 2 hypotheses:

**1) The EU’s green transition process is based on a new set of rules which are included in their FTAs and other trade related instruments, such as strategic partnerships on raw materials, that can be an obstacle for the development of national policies in resource rich countries.** The renegotiation of trade agreements and the inclusion of *Energy and Raw Materials* chapters with several countries are examples of this new reality (cases of Chile, Mexico, Indonesia, and New Zealand).

**2) The green transition promoted by industrialized countries, among them the EU member states, implies the deepening of extractivist practices in countries in the Global South.** Albeit promises to build structures of processing the raw materials in the countries of origin, the proposed trade and partnership agreements rather deepen existing asymmetries and do not change the structure of international division of labour dating back to colonial times. Countries such as Chile, Mexico and Indonesia will suffer the externalities generated by the EU’s quest for raw materials to keep up in the international race towards the establishment of a “greened” capitalism. This means the creation of new “zones of sacrifice” in which local communities are driven out of their livelihoods and the environment will be destroyed, for the sake of a reconfiguration of capitalism.

Without a justice-focused approach, the transition risks undermining human rights and perpetuating existing and historical injustices and inequalities. The indigenous and rural communities are already facing injustices and violations of rights related to the energy transition, such as land grabbing for energy renewables and so-called "transition" minerals, without any type of prior consultation, benefit, or compensation. In conclusion, what we are witnessing in the latest EU trade negotiations is the repeating of *colonial practices* inside the trade and investment agenda.

**3. What are the Critical Raw Materials (CRM) according to the EU**

On the 16th of March 2023 the European Commission updated its so-called *Critical Raw Materials Act*, which is a set of actions to ensure the EU's access to a secure, diversified, affordable and sustainable supply of CRM. The Act identifies a list of strategic raw materials critical for the development of Europe's green and digital transition, as well as aerospace and defense. There are some additions to the list of critical raw materials compared with its previous iteration in 2020, including feldspar, helium, nickel (battery grade), and manganese. CRM are defined as those which are of high importance for the overall EU economy and subject to a high level of supply risk.

For some raw materials, the EU is almost fully dependent on a single foreign supplier. In 2021, China represented around 95% of its supply of magnesium. All rare earths used for permanent magnets globally are refined in China. 63% of the world's cobalt used in batteries is extracted in the Democratic Republic of Congo, while 60% is refined in China. The EU sets an ambitious target to diversify the supply of strategic raw materials for 2030 by ensuring that no more than 65% of the EU's annual consumption should come from a single third country (at any stage of processing). However, the EU will always be dependent on some critical raw materials for its industries and will rely on imports for the majority of its consumption, such as Lithium.

### ***CRM for battery production***

Of all materials currently used in battery manufacturing, cobalt, natural graphite, lithium, Nickel and Manganese are critical in the 2023 list of CRMs. The EU only produces 1% of all battery raw materials. While other countries concentrate most of its production. 54% of global cobalt production is in the Democratic Republic of Congo, 46% of refined cobalt comes from China and around 90% of global lithium is mined in Chile (40%), Australia (29%), Argentina (16%). According to the EU's perspective of raw materials demand 2030 and 2050 there will be a shift to a higher demand in all materials. As such, part of the Strategic Action Plan on Batteries includes a major component on securing trade agreements with third countries for cobalt, lithium, natural graphite and nickel to "reduce supply risk".

### ***CRM for wind turbines and photovoltaics (PV)***

The supply risk for wind turbines are among the highest along the supply chain of raw materials. Meaning that the European Union is dependent on importing all the parts needed to build one single wind turbine. Critical Raw materials needed: Niobium, Boron, Dysprosium, Neodymium, Praseodymium.

For PV installations, the EU considers some the supply of certain relevant raw materials used as a high supply risk and as such are defined as critical raw materials by the EU., i.e. silicon metal, indium, gallium, germanium and borates. On the other side, other raw materials such as copper, cadmium, selenium, silver and tellurium have lower supply risk. The most vulnerable step along the supply chain of PV

technology is at the component level for which China dominates the supply market with about 89%. Actually, China dominates nearly all aspects of solar PV manufacturing and use.

#### 4. A better global governance for CRM?

*We're strengthening our cooperation with reliable trading partners globally to reduce the EU's current dependencies on just one or a few countries.* President of the European Commission, Ursula von der Leyen<sup>1</sup>.

In 2008, the Commission adopted the “Raw Materials Initiative” which set out a strategy for tackling the issue of access to raw materials in the EU. This strategy has 3 pillars which aim to ensure:

1. Fair and sustainable supply of raw materials from global markets;
2. Sustainable supply of raw materials within the EU;
3. Resource efficiency and supply of 'secondary raw materials' through recycling.

The key word here is *supply*. The access to the raw materials that are not on (or underneath) European soil has become critical in the energy transition process. The first pillar is crucial in this sense. The Commission proposes to create a *raw materials diplomacy* that will act to get access to raw materials at a not-distorted price. There is an understanding that some of the most important CRM suppliers are in China, Africa, South America, Russia and Australia, which are parts of the world “without a free market system or with political or economic instability problems, which presents special risks”.<sup>2</sup> At the same time, these emergent economies are using more state-control measures that distort global trade of raw materials, such as export pricing control, export quotas, double prices systems, and restrictive measures for foreign investors.

To secure supply and guarantee access to CRM, the EU commission decided to include specific provisions on energy and raw materials into trade agreements with key partners (especially CRM suppliers). According to the Commission, “access to raw materials should be a priority in trade and regulatory policies of the EU”.<sup>3</sup> Thus, the EU should: 1) promote new rules and agreements on sustainable access to raw materials wherever it is necessary, and see to the respect of international bilateral or multilateral agreements such as free trade agreements and WTO rules; 2) work to obtain the elimination of trade distorting measures adopted by third countries in important fields of raw materials access, and act energetically when WTO or trade

---

<sup>1</sup> Critical Raw Materials: ensuring secure and sustainable supply chains for EU's green and digital future; March 16 2023; [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_1661](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1661)

<sup>2</sup> Communication from the Commission to the European Parliament and the Council - The raw materials initiative: meeting our critical needs for growth and jobs in Europe; 2008. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0699>

<sup>3</sup> See Note<sup>1</sup>.

agreements measures are violated using all the mechanisms at hand, including the dispute settlement measures; 3) the EU should take every measure possible in the universe of trade policy (including preferential trade agreements and economic partnerships) to comply with the objective of achieving open and efficient markets of raw materials.

So the trade policy has been used as a mechanism to guarantee not only market access to other countries, or to guarantee protection for the investments abroad, but also it has been used by the EU to guarantee the supply of CRM. This has led to the inclusion of a specific set of clauses inside the trade agreements that guarantee this access, while at the same time they have the effect of reducing the policy space for the country that has the resources and will export them to the EU.

Nowadays, and as a result of what was mentioned above, the EU has become the most active trade negotiator, far ahead of the other big economies such as China and the United States. On the one hand, it has an intense agenda of new trade agreements: with Indonesia, New Zealand, India. These agreements should be added to the ones already signed and that are in force, such as the one with Japan (known as JEFTA).

On the other hand, it has been involved in the “modernization” of old agreements with Mexico and Chile, also with Tunisia.

Also, the EU has been actively signing “Raw Materials Partnerships” with countries such as Ukraine, Kazakhstan, Canada and Namibia.

#### **4.1 The role of EU trade agreements in the supply of raw materials**

On October 15, 2015, the European Commission (EC) presented its new trade and investment strategy called "Trade for All." As part of the new strategy, the EC concluded that all new trade and investment agreements should include a chapter specific on “Energy and Raw materials”.

These chapters intend to guarantee the supply of CRM from the other party to the EU territory. As the EU puts it, the WTO rules are not enough for this, as “the general rules do not address certain energy and raw materials related issues”. So, these chapters are WTO-Plus. The EU has set specific “energy and raw materials rules” that have been negotiated bilaterally with each trade partner. The EU has called this “a better global governance” of CRM.

So the EU is set to establish a “Critical Raw Materials Club for all like-minded countries willing to strengthen global supply chains”<sup>4</sup>, and this is being pushed by the signing of these treaties.

---

<sup>4</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_1661](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1661)

In this text, we concentrate on the agreements negotiated by the EU with: Mexico, Chile, Tunisia and Indonesia, especially on their Energy and Raw Materials chapters. From this point, we will refer to the trade agreements as “TA”, for example the EU-Chile agreement will be TA EU-Chile.

In order to analyze the meaning of the chapters, we have used the research technique of Content Analysis through deep reading and identification of its key clauses.

#### **4.1.1 Analysis of the Clauses of the Energy and Raw Materials chapters**

It is important to clarify that these chapters refer not only to raw materials, but to “energy goods” as well. So these clauses refer not only to access to minerals, but also to different kinds of energy sources, including fossil fuels and hydrocarbons. They refer to: solid fuel, crude oil, oil products, natural gas and electrical energy (TA EU-Chile).

A critical analysis of the clauses allows us to create 6 groups of topics inside the Energy and Raw Materials chapters.

##### **1- Rules apply only “one way”:**

The rules set in the chapters only apply for the need of the EU to access the raw materials from the trade partner, and the whole chapter relates to the need of the EU to guarantee the supply form that partner. So, even though the clauses refer to “the Parties”, in several clauses we find that it defines directly how the partner must proceed regarding the EU. In the TA EU-Chile, Annex II defines that

The chapters guarantee the supply of raw materials to the EU. The term *Transparency*, in that way, means that the European investors or stakeholders in this process must have all the information available, that the partner state will guarantee six months in advance of notification of any new measure and that new rules will not take any private actor by surprise.

##### **2- Market principles are the key rule:**

The aim of these chapters is to impose market principles in the process of trade of CRM. This implies:

a) **the elimination of import and export restrictions**, “including the elimination in principle of all export duties or any measure having an equivalent effect”.

b) **the elimination of import and export monopolies**

This article appears in all the Energy and Raw Materials chapters analyzed, with the exact same terminology. Article 8.4 in the TA EU-Chile states that: “No Party shall designate or maintain a designated import or export monopoly” which means, “the exclusive right or grant of authority by a Party to an entity to import energy goods or raw materials from, or export energy goods from or raw materials to, the other Party”.

This prevents the development of national agencies that buy local raw materials and hoards that material, for example to speculate with international prices and export conditions. This clause tries to guarantee the existence of competitive private markets.

### **c) the elimination of export prices**

European manufacturers have said that globally they encounter competitors with unfair advantages. One is the local mineral processors and manufacturers, to whom the government or a state-owned mining company diverts output at lower prices than it sells to the world market. To avoid this, different clauses state that the supply of energy goods shall be based on market principles.

A set of clauses on “Export Pricing” and “Domestic Regulated Prices” are set to guarantee open and free markets: “the Parties recognize the importance of competitive energy markets to deliver a wide choice in the supply of energy goods and to enhance consumers welfare” (TA EU-Chile, Article 8.6).

Article 4 in the TA EU-Mexico states that: “A Party shall not adopt or maintain a higher price for exports of energy goods or raw materials to the other Party than the price charged for such goods when destined for the domestic market, by means of any measure”. In the TA with Tunisia and with Chile, it adds to the last part: “such as licenses or minimum price requirements”.

In the case of the last version of the TA with Chile (of 2022), the Article continues: “2- Notwithstanding paragraph 1 of this Article, Chile may introduce or maintain *measures with the objective to foster value addition*, by supplying industrial sectors at preferential prices of raw materials so they can emerge within Chile provided that such measures satisfy the conditions set out in Annex II to this Chapter”. From this clause we can understand that some measures regarding export pricing might be allowed for Chile. It must be explained that this clause was not in the previous version of the TA, as of 2018.

But when analyzing Annex II that sets the general rules to that clause, we find that such measures: “shall not result in an export restriction for the other Party”, and “*shall not adversely affect the capacity of the European Union to source raw materials from Chile*”. Plus, regarding the way that such measures are implemented, “Chile shall share with the EU detailed and reliable information on the product scope, the production volume that is covered by the measure, whether domestic sales at

preferential prices have taken place, and the domestic price that has resulted from the measure”.

### **3) Access to energy transport infrastructure**

All the chapters on Energy and Raw Materials include clauses on third-party access to energy transport infrastructure. The EU has publicly stated that the agreements could provide “that Third Party Access (TPA) to the energy transport infrastructure should be mandatory, subject to regulatory control by an independent regulator vested with the legal powers and capacity to fulfill this function” (Factsheet Indonesia).

In the TA EU-Indonesia, it is stated that the Parties shall ensure that owners or operators of transmission networks in its territory grant access to the energy infrastructure for the transport of gas or electricity “of any entity of the Parties”. This shall be fulfilled in a transparent and non-discriminatory way.

The

The EU and Indonesia should also consider rules on the non-discriminatory transport of energy goods by natural gas pipelines or electricity grids. In this context,

4) right to regulate: So even if the EU argues that the state partners have the sovereign right to achieve legitimate policy objectives, the rules included in these chapters are unilateral, corporate-captured, and pushing to lower standards related to trade and investment.

### **4) Cooperation on Standards**

The TAs include articles on Cooperation. These might not be seen as the key part to the chapters, but they set objectives to move forward in regulatory cooperation and harmonization of standards and measures. The aim is to achieve transparency, which means in this case the publication of every state measure related to energy and raw materials so the private foreign investors will have all the information at hand and with that, maintain the highest levels of certainty for the investment as it is possible.

The objective of the clauses is to prevent, identify and eliminate “unnecessary technical barriers to trade in energy goods and raw materials”. In this sense, in the TA EU-Chile, the articles that relate to this topic are 8.12, 8.13 and 8.14.

Cooperation on Raw Materials, Article 8.14, states that Parties shall cooperate to “reduce or eliminate measures that (..) could distort trade and investment, including of a technical, regulatory, and economic nature affecting energy or raw materials”.

### **5) Cooperation in energy transition process**

The clauses on cooperation on raw materials include a set of words regarding how the EU sees the mining. A special set of clauses on Cooperation has to do with the commitment to cooperate on any relevant issue of mutual interest, such as “renewable energy (..) and the whole hydrogen supply chain”.

The inclusion of hydrogen supply relates to the fact that the European Council foresees a total demand of green hydrogen of 2-3 tons for 2030, most of which will be imported. The German chancellor Olaf Scholz explained in his visit to Chile that “It’s clear that Germany will still be a country that imports energy in the hydrogen world. On the other hand, Chile can become an exporter of this clean energy. The natural conditions here are of the best”<sup>5</sup>. In 2019, both countries created the Energy Partnership Chile-Germany and from 2021 the Green Hydrogen Task Force works on the criteria of sustainability.

## 5. Some preliminary conclusions

After analyzing the clauses of the chapters, we come to some key points that still have to be further developed.

First, referring to our hypothesis in the introduction, on under *what rules* is energy transition being developed and *how* it is being carried out, we observe that the EU is nowadays an active actor in the signing of trade agreements with clauses that have been developed to guarantee the access to the raw materials and energy goods supply. We see that the Energy and Raw Materials chapters refer not only to the critical raw materials needed for energy transition, but also to access to hydrocarbons. The chapters state that the European private sector (investors) must have access to needed infrastructure for energy transport, in a non-discriminatory way.

Second, who are the actors that *benefit or are harmed* from this process, we see that these chapters have a clear aim to guarantee supply of raw materials to the EU, while at the same time they have a direct impact on the regulatory capacity of the exporting country. So, while the EU secures the supply of raw materials, the country that has the resources sees a cut in its capacity to set further rules on the trade process. The rules aim at the heart of any regulation set by the partner state to control the export of raw materials.

So, this has a direct impact on the ability of the states that own the resources to move forward in a process of industrialization of the raw materials extraction, and by doing so, advance in the global value chain, for example, by getting the technology to add

---

<sup>5</sup> <https://h2lac.org/noticias/alemania-profundiza-su-alianza-con-chile-para-el-avance-de-la-transicion-energetica-renovable-y-el-h2v/>

value to the raw material and producing, for example, lithium or nickel batteries for electric vehicles.