

COMMENTARY

What the EU's Critical Raw Materials Act means to miners

New act's ambitious goals lack legal force



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The EU published its proposed Critical Raw Materials Act (CRMA) on Mar. 16, with the ambitious goal of “establishing a framework for ensuring a secure and sustainable supply of critical raw materials.” While the proposal contains much to be celebrated, the question remains whether the proposed legal framework goes far enough to make the EU’s goals a reality.

The European Commission has set out the EU’s critical raw materials problem in stark terms. The EU is heavily reliant on imports of minerals like lithium, cobalt, copper and rare earth elements that are critical to strategic sectors of the economy and the energy transition. Many of those imports come from a handful of countries or even a single country: the EU sources 98% of its rare earths and 97% of its magnesium from China. EU members are concerned that supplies could face disruption, price hikes or be used as a geopolitical tool (as seen with Russian oil and gas). Supply chain risks are compounded by ballooning demand from the renewable energy and tech sectors, with EU demand for rare earths set to grow five times, and lithium twelve times, by 2030.

What the CRMA says...

As announced last September, the proposed CRMA intends to break this “quasi-monopoly” with a two-fold approach.

First, the CRMA aims to reduce reliance on imports by promoting extraction, processing and recycling of critical raw materials within the EU. This means investing in Europe’s untapped resources, including rare earths in Sweden; lithium in France,

Germany, Spain and Portugal; and magnesium and graphite in Romania. The CRMA will oblige EU member states to draw up national exploration programs and to designate a national authority as a “one-stop shop” for permitting critical raw material projects. Mining projects designated by the European Commission as “strategic projects” will benefit from a streamlined permitting process lasting a maximum of two years, as well as EU support in facilitating financing and offtake agreements.

Second, the CRMA envisages that “strategic partnerships” with non-EU states will diversify imports, making supply chains more resilient. To date, the EU has concluded partnerships with Canada, Ukraine, Kazakhstan and Namibia to foster cooperation on trade and investment in critical raw materials. Talks between the EU and U.S. are underway on a similar partnership. The EU also plans to improve bargaining power by creating a club of authorities and businesses to jointly purchase the most vital critical raw materials, so-called “strategic raw materials” like boron, copper, cobalt, lithium and platinum.

Accompanying these reforms are ambitious targets. By 2030, the EU aims to extract 10% and process 40% of its strategic raw material needs domestically. No single country should account for more than 65% of the EU’s annual consumption of any one strategic raw material.

... and what it doesn't

The CRMA sends the right messages and has been welcomed by the industry, even though it will have to pass through the European Parliament and Council before it can become law, something that will take some time. But while the EU may talk the talk, there is doubt over whether the CRMA contains enough

detail and legal force to support its ambitions. The EU’s targets are aspirational, with no legal mechanism to enforce them. Similarly, its vaunted strategic partnerships, as the proposed CRMA acknowledges, are established only in “non-binding” instruments.

Given that it champions more non-binding partnerships with resource-rich nations, it is perhaps surprising that the CRMA does not mention existing binding instruments – namely, treaties for the promotion and protection of investments, in particular bilateral investment treaties (BITs). Those treaties play a key role in protecting mining investments and resolving disputes.

Explorers, developers and producers in critical raw materials, like other mining companies, must reckon with the risk of disputes with host governments. In the past year alone, legal claims have been threatened or launched against the Democratic Republic of the Congo (DRC), Chile, Panama and Denmark over the authorities’ alleged unfair treatment of critical raw material projects. Issues with host governments – ranging from disagreements over royalties to blockades of mines – can bring supply chains grinding to a halt. The risk is particularly acute for critical raw materials given their strategic importance, which is only likely to grow. Political risk, whether in the form of nationalization, bans on ore exports or other measures, may make shareholders and financiers think twice before sinking the billions needed into exploring and extracting new resources.

Where disputes arise, one of the first questions investors ask is, “what are my rights?” — which is where BITs come in. BITs provide investors with safeguards against hostile government action, such as expropriation or discriminatory treatment, and often provide a neutral forum to resolve disputes with the

host government as an alternative to the local courts. The EU has begun to include investment protection chapters, covering many of the same protections as BITs, into free trade agreements like those with Canada and Singapore.

In its communication accompanying the CRMA, the European Commission notes the role of the EU's trade and investment agreements in creating an "investor friendly, predictable and stable" business environment. It points to the EU's trade deal with Chile agreed in December 2022, which includes an investment protection chapter covering EU investors in Chile and vice versa. Chile, notably, accounts for more than 60% of the EU's lithium imports. The European Commission intends to expand the EU's network of trade and investment agreements, which it describes as "complementary" to the strategic partnerships on critical raw materials.

It's a promising move but there is a long way to go before new trade and investment

treaties can enter into force. Even once the ink is dry on the EU-Chile agreement, it must be ratified by all 27 EU member states (a process which has lasted almost nine years in the case of the EU-Canada Comprehensive Economic and Trade Agreement). In the meantime, investors in many resource-rich countries may be left without treaty protection. The DRC, for example, produces around 70% of the world's cobalt but has BITs in force with only two EU members, France and Germany.

Where does this leave miners? If passed, the CRMA should make the EU a more attractive investment destination for critical raw materials projects. But, for both miners investing in the EU and those investing in other countries who are planning to supply the EU's critical raw material demand, it is important to regard the legal framework beyond just the CRMA. That includes structuring investments — or reviewing existing investments — to optimize their protection under existing BITs or other investment

treaties. When planning a project as a foreign investor, it is arguably as important to consider investment treaties as it is to consider the tax treaties in force. Waiting until a dispute is on the horizon often proves to be too late. Rather, taking advice at an early stage is essential, especially as political risk is one barrier to investment that the CRMA does not address.

So let's hear two cheers for the CRMA. The EU is taking the problem of critical raw material supplies seriously and has set itself the worthy ambition of promoting investment in mining. But to secure supplies and satisfy the explosion in demand, it will take more than just voluntary targets and partnerships — investment protection needs to be part of the solution too. ^{TNM}

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