

OPINION PAPER

# The Double Discourse on the Energy Transition

## Green Economy for Europe and Extractivism for Latin America – Reflections on the EU Critical Raw Materials Act

*Business & Human Rights Resource Centre*

The EU's strategic raw materials diplomacy and partnerships are on the rise, not just since the EU has adopted the Critical Raw Materials Act to secure the supply for its renewable energy, digitalisation, defence, and space industries. In this context, Germanwatch publishes two opinion papers written by authors from Kazakhstan and Colombia to delineate and strengthen their perspectives on the EU's raw materials diplomacy. In the second opinion paper, the two Kazakhstani transparency experts Mariya Lobacheva and Tatyana Sedova analyse the Critical Raw Materials partnership that was established between Kazakhstan and the EU in 2022. The authors are valued partners of Germanwatch; the opinions expressed in the series do not necessarily reflect the opinions of Germanwatch.

On 18 March 2024,<sup>1</sup> the European Council and the European Parliament agreed on the draft of a Critical Raw Materials Act (CRMA)<sup>2</sup> after various discussions that had begun in March 2023. This European law aims to ensure a secure, diversified, affordable, and sustainable supply of 37 minerals considered critical or indispensable for strategic sectors of the Union, such as renewable energy, digital, space, defence, and health industries. The act seeks to guarantee sovereign access of EU countries to raw materials critical for the energy transition. The EU thereby reacts to pressure generated by both the conflicts emerging on European territory<sup>3</sup> and the expansionist strategy of China, the latter being better positioned in the market of transition minerals than Europe.<sup>4</sup>

In summary, the CRMA expands the number of strategic raw materials for transition, introduces a consultation mechanism as part of environmental impact assessments (although the time required for an initial report as a basis for these consultations is not taken into account in the maximum time periods stipulated

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<sup>1</sup> [Although it entered into force on 23 May 2024](#) (Last accessed: 21 June 2024).

<sup>2</sup> Council of the EU, 2024, [Strategic autonomy: Council gives its final approval on the critical raw materials act](#) (Last accessed: 21 June 2024).

<sup>3</sup> The Ukraine war has had a direct impact on Europe's energy transition goals. For this reason, the EU has raised a strategy to guarantee its energy independence from Russian gas (European Commission, 2022, [REPowerEU: Joint European action for more affordable, secure and sustainable energy](#)). Energy sovereignty has even become a matter of national security, which is why European diplomacy is working in favour of expanding its 'green extractivism' ([Energy transition in Europe, green extractivism in Latin America?](#)) (Last accessed: 21 June 2024).

<sup>4</sup> Pérez, A., Cañada, B., Pérez, M., and Nualart, J., 2023, [LA MINA, LA FÁBRICA Y LA TIENDA. Dinámicas globales de la "transición verde" y sus consecuencias en el "triángulo del litio"](#). Observatori del Deute en la Globalització. Barcelona (Last accessed: 21 June 2024).

in the CRMA that the competent authorities may take until granting the project permit),<sup>5</sup> and requires a periodic supply chain risk assessment for large companies.

However, this approach continues to prioritise the EU's access to resources over possibly deleterious impacts on producer countries, thus perpetuating a double discourse on transition. That means Europe diversifies and strengthens its industries on the premise of recycling raw materials or of building up circular economies, while it still requires the net producers of raw materials to continue to sacrifice territories and strategic ecosystems. In this respect it is essential to point out that the European model of circular economy is not enough not put an end to raw materials consumption, but continues to shift the socio-environmental costs outside of its territory. This risks negative impacts on the lives of millions of people in Latin American, African, and Asian countries.

## The role of Latin America in the context of the CRMA

In the CRMA context, Latin America plays a central role in securing sovereignty for the EU's transition, as some of the strategic minerals, such as copper, lithium, and nickel,<sup>6</sup> are extracted on the subcontinent. A large number of extraction projects are or will be located in the region. There is therefore great concern about the potential impacts of this regulation on both new and existing mining projects.

These concerns especially regard environmental and human rights impacts in light of historical human rights violations associated with extractive industries, as recorded by the Inter-American Commission on Human Rights and others.<sup>7</sup>

Between 2015 and 2022, the Business and Human Rights Resource Centre documented around 1,976 attacks on human rights defenders in the context of business activities around the world. Of these, 42% occurred in Latin America in various sectors, such as mining and renewable energy.<sup>8</sup>

Hence, the European regulation needs to consider the fact, that Latin American governments systematically do not comply with their human rights obligations, or fail to account for the increasingly marked inefficiency of voluntary corporate action.<sup>9</sup> If it fails to do so, it will only exacerbate these problems and benefit the EU to the detriment of the countries that supply raw materials.

## Requirements for the application of the CRMA in terms of a globally just transformation

The CRMA clearly illustrates what could be termed 'the double discourse on transition'. On the one hand, the CRMA makes reference to a rapid, diversified transition focused on a maximum of resource utilisation

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<sup>5</sup> Brussels, 16 March 2023 COM (2023) 160 final 2023/0079 (COD), REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework to ensure a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (Last accessed: 21 June 2024).

<sup>6</sup> IRENA, 2023, Geopolitics of the energy transition: Critical materials, International Renewable Energy Agency, Abu Dhabi (Last accessed: 21 June 2024).

<sup>7</sup> Inter-American Commission on Human Rights, Indigenous peoples, Afro-Descendant Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities (OAS. Official documents; OEA/Ser.L) (Last accessed: 21 June 2024).

<sup>8</sup> Business and Human Rights Resource Centre, 2023, Guardians at Risk: Confronting corporate abuse in Latin America and the Caribbean (Last accessed: 21 June 2024).

<sup>9</sup> Op. cit.

for the EU. The CRMA refers to human rights standards for Europe<sup>10</sup> and even some national regulations, such as the German Due Diligence Act.<sup>11</sup> On the other hand, the energy transition of countries such as those in Latin America is not taken into account. The act reduces them to mere suppliers of raw materials, transfers social and environmental costs (cost shift), prolongs extractive models (lock-in effects), and hinders the development of technologies and sectors for a just transition (inertial effect).<sup>12</sup>

Civil society stakeholders have identified several concerns regarding the geopolitical aspects of the so-called ‘critical raw materials for transition’ that this new European regulation overlooks.

## Strategic partnerships

The initial proposal by the European Commission showed significant gaps in relation to environmental and human rights implications of its strategic partnerships and projects. Strategic partnerships are envisaged as a ‘[...] commitment between the Union and a third country to increase cooperation related to the raw materials value chain through a non-binding instrument setting out actions of mutual interest [...]’.<sup>13</sup>

These partnerships are envisaged as a ‘revised’ continuation of the partnerships stemming from the 2020 Critical Raw Materials Action Plan, and they aim to diversify the sources of supply for raw materials.<sup>14</sup>

With regard to third countries, the finally approved CRMA established some criteria for strategic partnerships, including that a regulatory framework preventing and mitigating environmental impacts must be established by the partner countries and the declared ambition to guarantee supply for European countries. However, these criteria are defined as issues to be assessed periodically, and not as a prerequisite for partnerships.<sup>15</sup>

In addition, the EU has established a Global Gateway strategy<sup>16</sup> as a guide for the formation of these partnerships, emphasising co-operation and shared benefits, yet this strategy has turned out to be a false solution for development. This is not to mention the fact that the strategy uses the argument of international co-operation as an opportunity to impose extractivism in the so-called Global South.<sup>17</sup>

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<sup>10</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Last accessed: 21 June 2024).

<sup>11</sup> Act on Corporate Due Diligence Obligations in Supply Chains of 16 July 2021 (Last accessed: 21 June 2024).

<sup>12</sup> Aldana Rivera, S.E. and León Peñuela, F.A. 2022. Hidrógeno en Colombia: si se hace mal, podría ser peor. Reflexiones sobre su apuesta. Heinrich Böll Foundation, Bogotá-Colombia Office (Last accessed: 21 June 2024).

<sup>13</sup> Official Journal of the European Union, 2024, 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 (Last accessed: 21 June 2024).

<sup>14</sup> European Commission, 2023, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020. Brussels, 16 March 2023. P. 2. [Spanish version] (Last accessed: 21 June 2024).

<sup>15</sup> Article 37 (1) (c) (i-iv).

<sup>16</sup> Presentation of the Global Gateway strategy (Last accessed: 21 June 2024).

<sup>17</sup> Araujo, N. & Maldonado, I., 2023, “América Latina y el Caribe frente al neocolonialismo europeo. Reflexiones en torno a la III cum-bre CELAC-UE” ¿Qué pasa en el mundo?, núm. 22. Red de Estudios Globales Atlas-Polaris (Last accessed: 21 June 2024).

The CRMA does not clearly define the relationship between strategic partnerships and projects that ought to guarantee the supply of critical raw materials for the transition.<sup>18</sup> So, for the purposes of this text, they will not be linked, given the uncertainty as to whether a strategic project is necessarily framed by a partnership. However, the minimum standards mentioned below apply to both instruments of the Act.

### **Veiled relaxation of environmental standards**

Similarly, environmental and human rights impacts assessments should be part of strategic partnerships and projects. These impact assessments are necessary to avoid that companies evade their responsibilities for alleged human rights violations, given that socio-environmental conflict and human rights violations often arise in third countries where raw materials for the transition are sourced. As an assessment basis for relations with third countries, all economic stakeholders of projects and strategic partnerships should be required to align their conduct to the most exacting standards available, especially in jurisdictional conflicts on the responsibility for violations of due diligence and human rights.

Reducing asymmetries between communities and companies, adopting this principle would protect people in third countries insofar as companies would need to comply with the regulations of either the country of origin or the country of operation, depending on which prescribes the most robust standards.

In line with promoting the above mentioned human rights standards, project requirements and adjustments should extend to the production model required for the just transition, ensuring shared benefits for both EU and third countries. Strategies such as the circular economy should thus apply in EU countries as much as in countries where companies or parts of the supply chains with relevance to critical raw materials operate. Levelling the playing field, this should be a prerequisite for relations in which countries with the best starting conditions co-operate with those that are less well equipped. In other words: 'The European Union must ambitiously implement its Circular Economy Action Plan and take further measures to reduce the use of primary metals and set absolute natural resource reduction targets.'<sup>19</sup>

### **Certifications:<sup>20</sup> false independence of market players**

The assumption that, seemingly independent, certifications will ensure compliance with environmental and human rights ignores due concerns about the imbalance of power, i.e. that enterprises will make use

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<sup>18</sup> The CRMA describes the measures for strategic projects as follows: '[...] to ensure the development of Strategic Projects across the Union, such projects should benefit from streamlined and predictable permitting procedures and support in gaining access to funding. Such measures could also lead to improvements in other permitting procedures and access to finance for projects related to critical or other raw materials. In order to focus support and ensure their added value, projects should, before receiving such support, be assessed against a set of criteria. [...] In order to be recognised as strategic projects in the Union, projects should strengthen the Union's security of supply for strategic raw materials.' (Recital 14 of the CRMA).

<sup>19</sup> VVAA. 2021, [Responsabilidad ambiental a través de la cadena de suministro - Miradas desde América Latina](#). Editores: Sydow, J. y Ángel. Edito, A. P. 17 (Last accessed: 21 June 2024).

<sup>20</sup> Paragraph 49 and article 29 of the CRMA refer to recognised certifications which can be obtained 'in the context of a broad range of public and private certification schemes'. These mechanisms are known as multi-stakeholder governance (MSI) systems. There are serious questions about them, since, as we will point out in this section, they operate under the laws of the market and not in the interest of human rights. Reports have found that many of these mechanisms are outright designed to fail. On the subject see: MSI Integrity, 2020, [Not Fit-for-Purpose. The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance](#) (Last accessed: 21 June 2024).

of these instruments as they see fit to respond to market dynamics. Along these lines, several studies have pointed out the total failure of these mechanisms to identify human rights violations in supply chains.<sup>21</sup> Moreover, on issues such as workers' rights, some of these mechanisms are outright designed to fail and do not reveal blatant human rights impacts and violations.<sup>22</sup>

A progressive approach to rights protection must guide the CRMA. A project or strategic partnership should not be considered legitimate if it curtails guarantees of human and environmental rights for communities in third countries. Otherwise, this would leave matters up to private stakeholders to establish whether the sustainability of a strategic project translates into independence and transparency. Certifications must be strengthened and subjected to monitoring, oversight, and social auditing, in essence through citizen participation. Additionally, certifications must undergo exhaustive evaluation, which also requires legitimate and binding citizen participation. To this end, the independence of the expert actors in the permanent evaluation must be ensured, which should especially involve academic institutions, must be allowed to work independently.

## Conclusions

The regulation has considerable gaps when it comes to the protection of human rights. The first one is due to the fact that human rights are not specifically mentioned in due diligence processes. Initially, this was explained by the fact that the EU had been discussing a Due Diligence Directive at the same time. Thus, the CRMA authors had cross-referenced the Directive understanding that its stipulations were prerequisite for the CRMA implementation. However, the Directive went through difficult stages of modifications and weakening<sup>23</sup> – which jeopardised its approval.<sup>24</sup> The absence of a clear position on human rights reflects the level of corporate appropriation and interference in the public agenda for the business sector.

The second gap concerns the lack of clarity regarding mechanisms for the participation of non-state actors within the formation of partnerships. It is essential to ensure direct and effective participation of potentially affected communities. Therefore, the context in which different business operate needs consideration. Additionally, mechanisms should be established to balance power asymmetries governing information access, as well as possibilities for communities and citizens to contest the provided information.

Finally, as mentioned above, there is concern about the possible transfer of socio-environmental costs to third countries (cost shift). Given that the EU is committed to an energy transition based on respect for human and environmental rights, this rights-based approach must be transversal in the CRMA, which in turn implies reinforcing the implementation of mandatory due diligence obligations. This goes beyond corporate social responsibility (CSR), which rests on the premise that the actions of companies are limited by the 'maximisation of shareholder profit, while complying with the legal obligations established by the State in social and environmental matters.'<sup>25</sup>

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<sup>21</sup> [Business & Human Rights Resource Centre, Beyond Social Auditing](#) (Last accessed: 21 June 2024).

<sup>22</sup> [The Guardian, 2023, Corporations are paying for worker abuse audits that are 'designed to fail', say insiders](#) (Last accessed: 21 June 2024).

<sup>23</sup> [ICOCA: JOINT STATEMENT ON EU DIRECTIVE ON MANDATORY HUMAN RIGHTS DUE DILIGENCE](#) (Last accessed: 21 June 2024).

<sup>24</sup> [EU Corporate Sustainability Due Diligence Directive finally & formally adopted](#) (Last accessed: 21 June 2024).

<sup>25</sup> [Quinche Martín, F. L., 2017, Una mirada crítica a las teorías predominantes de la responsabilidad social corporativa. Revista Facultad De Ciencias Económicas, 25\(2\), 159-178](#) (Last accessed: 21 June 2024).

Therefore, companies either assume or reject the responsibility for rights depending on the costs, thus generating a double discourse that weakens the guarantee of rights and turns profitability into the decisive factor.<sup>26</sup> Consequently, there must be a measure of responsibility that is not subject to corporate will or cost-benefit analyses, in order to realise the sustainability approach advocated in this regulation. Voluntary standards such as guiding principles and voluntary corporate due diligence are clearly insufficient to guarantee human rights. The monitoring of their implementation must not be handed over to private actors, who are naturally subject to conflicts of interest that arise from weighing responsibility with outcomes of cost-benefit analyses.

In addition, the CRMA may imply a transfer of costs to third countries to the detriment of a just energy transition. This is because, in many cases, third countries have neither sufficient resources nor institutions to prevent impacts on the environment and human rights. However, **overcoming structural asymmetries between countries** should be a guiding principle of this regulation, together with commitments to strategies for mutual development, fair trade, and respect for human rights. These principles could help build policies for a transition that prioritises the well-being of the populations where projects and investments take place.<sup>27</sup>

Civil society organisations, such as the Business and Human Rights Resource Centre, demand that the consolidation of a rapid, global, and just transition needs to be based on three principles:

- First, an economic model for transition is needed, which is based on the conditions of shared prosperity. This implies that operations must guarantee a dignified life for the people who inhabit the mining territories, without being reduced to corporate profits.
- Secondly, a real commitment by public and private sectors to the protection of human rights, with a clear focus on due diligence and risks prevention in the interest of communities and workers.

Finally, in the framework of project development associated with strategic raw materials, it is essential that both communities and workers are guaranteed fair negotiation of projects that affect them, including access to effective compensation when negative impacts occur.<sup>28</sup>

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<sup>26</sup> For more on this topic see: [Ramasastry, Anita, Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability \(2015\), Journal of Human Rights, Vol. 14, No 2, pp. 237-59 \(2015\), University of Washington School of Law Research Paper No. 2015-39](#) (Last accessed: 21 June 2024).

<sup>27</sup> Business & Human Rights Resource Centre, 2023, [Below ground: Human rights and renewable energy value chains in the Andes](#) (Last accessed: 21 June 2024).

<sup>28</sup> Business & Human Rights Resource Centre, 2023, [Just energy transition principles for human rights in business and investment](#) (Last accessed: 21 June 2024).

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