

A STACKED DECK THAT KEEPS GETTING HIGHER: THE RELATIONSHIP BETWEEN CRITICAL RAW MATERIALS, THE WTO AND 'STRATEGIC' PARTNERSHIPS

BRIEFING PAPER 79 - APRIL 2024

SUNAYANA SASMAL
UK TRADE POLICY OBSERVATORY

KEY POINTS

- Critical raw materials (CRMs) are central to global energy transition, but they are unequally distributed, creating complex demand-supply tensions.
- The conflicting interests exhibited by resource-rich countries, resource-hungry countries, affected communities and the environment, all operating amid other geopolitical tensions, lead to conflicting trade policies. On one hand, the resource-rich aim to pursue CRM-led industrialization using trade-restrictive policies; and the resource-hungry use free trade agreements or other bilateral agreements to secure market access and/or to prohibit the use of trade-restrictive measures.
- Existing global trade rules tend to support market access to CRMs while challenging the ability of resource-rich countries to pursue certain trade policies in support of CRM-led industrialization. This risks either adverse WTO rulings or adoption of inefficient and inequitable policies.
- Partly in response there has been a rise in new international arrangements in the form of memoranda of understandings, often called “strategic partnership agreements” or “critical minerals agreements”.
- These arrangements lie outside the multilateral trade law framework, are not legally binding, and exhibit several trends: they contain hortatory language on assisting resource-rich countries to pursue domestic value-addition; they serve as engines of standard-creation; and they enable resource-hungry governments to identify and subsidise projects in third countries, while rejecting recipient countries’ efforts to impose horizontal requirements.
- In consequence, development-related trade policies remain relatively constrained while promises of support for value-addition depend on them being effectively upheld. At a minimum, there is a need for greater information on these arrangements, closer scrutiny, and continued review of their contribution to their stated goals.
- The current fragmented approach to CRM governance is problematic for several reasons: the lack of transparency around bilateral or small group arrangements, the lack of representation of countries that are neither resource-rich nor resource-hungry, and the need for global knowledge of CRM reserves.
- While recognising the challenges faced by the WTO, nevertheless it can play an important role through its deliberative and transparency functions, through discussions and monitoring of bilateral arrangements, as well as encouraging, at least plurilateral discussions/solutions, if not a multilateral. Such efforts are more likely to be inclusive and can help avoid fragmentation. The WTO can help facilitate much-needed coordination amongst countries and compromise-driven solutions to ensure that access, development and security interests are met.

INTRODUCTION

In the face of the green transition, the world is once again at a crossroad: of scarcity and of mounting global demand for sparse natural resources called critical raw materials (CRMs). Some countries have natural resources, others have the capital. We have seen this before. Yet, with our currently evolved knowledge and sophisticated international legal system, we have the chance to prevent exploitation and promote equity in our trading patterns.

In contrast to colonial times, there is now [international law](#) supposedly guaranteeing “optimal use of the world’s resources in accordance with the objective of sustainable development, ... to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development” (Preamble to the Marrakesh Agreement Establishing the World Trade Organization). But in its operation, does this very law achieve this aim or rather, contradict it? Despite aiming towards the goal of sustainable development, global trade rules built on free market principles to advance trade liberalization, are often difficult to square with development and other policy objectives. This fault line is clear even in the context of trade in CRMs, whereby the trade liberalization aspects of global trade rules highlight the constraints posed to industrialization goals.

In exploring the various dilemmas in CRM trade, this paper evaluates the contribution of multilateral trade rules and recent strategic partnerships to balancing access and development concerns. It stresses the importance of stepping away from recent fragmented approaches, in favour of enhanced multilateral cooperation.

A CLUSTER OF ISSUES: ACCESS, DEVELOPMENT, SUSTAINABILITY, SECURITY

The criticality of CRMs is owed to their essential role in the green transition. CRMs like copper, lithium, nickel, cobalt and rare earth elements are [necessary](#) for manufacturing clean energy technologies, including electric vehicles (EVs). Thus, the demand for CRMs is [set to quadruple](#) by 2040 if we are to stay within the 2°C rise in global temperature. With all countries being required to embark on the green transition, each country will have interests in acquiring or controlling some form of CRMs, raw or processed.

However, the uneven global distribution of CRMs creates a classic case of haves versus have-nots. The haves (resource-rich countries) and the have-nots (resource-hungry countries) have conflicting interests, ranging from economic development to geopolitical security and sustainability goals. Paradoxically, the have-nots are largely wealthy developed countries, whilst the haves are largely poor developing countries. As a result, the haves are interested in using trade measures to pursue CRM-led industrialization whereas the have-nots seek to reduce dependencies and vulnerabilities in their quest for CRMs. They also purport to ensure that CRM supply chains are [responsible](#) and sustainable.

In addition to different economic interests, geopolitics and related goals of economic security and supply chain resilience add to the complexity. This is because downstream supply chains

are highly concentrated and are currently dominated by the [Chinese](#). Past allegations of [weaponization](#) (also see [here](#) for counterpoint) of raw materials supply chains have since fanned the flames of distrust between the haves and the have-nots. Indeed, recent global events (the pandemic and wars) have shot supply chain resilience and diversification to frontal policy objectives of trading nations. As a result, “friend-shoring” (i.e., a scramble to form alliances with trusted, like-minded partners) features heavily in countries’ economic security and trade policies.

Further, the increased demand for CRMs has environmental and social implications. The extractives industry is infamous for its adverse environmental and social impacts—for example, the prevalence of modern-day slavery and [child labour](#) in the informal cobalt mining sector in the DRC. Resource-hungry countries emphasizing non-economic objectives, impose on their trading partners higher sustainability standards relating to forced labour, supply chain due diligence, anti-deforestation and more. However, these policies may generate a coercive and extra-territorial effect on producing, resource-rich countries, which are often unable to comply with such standards. The objective of environmental sustainability matters in rebalancing trade policy to include technology transfers to aid poor, resource-rich countries in employing suitable clean mining technologies. Labour standards, on the other hand, present a more complex situation. While mining practices undoubtedly need to align with high environmental and social protections, trade policy needs to create adequate safeguards to protect against increased economic inequalities arising out of higher compliance costs in CRM supply chain. The key questions are: who bears these costs and how to distribute them efficiently and equitably?

Thus, trade policy is being used as an important means to various ends: to secure access, enable industrial development, further economic security and ensure sustainability. ***But how; in what order of priority; and at what and whose expense?***

It does not help that the existing global trade rulebook (law of the World Trade Organization (WTO)) prioritises some concerns over others, thereby already establishing a certain hierarchy. Guarantees for access and openness of trade (benefitting the wealthy resource-hungry) often supersede industrialization and sustainability considerations (as explained below). In a heterogeneous institution with its membership holding diverse perspectives and the ability of a single member to veto a decision, any change to the status quo is very difficult. However, the optics of maintaining the status quo are also tricky: an approach to CRMs that aligns with, or even furthers extractivism is reminiscent of colonial power imbalances and will be inefficient in the long run. In consequence, certain [modern international instruments](#) (mainly political and not legal) that are being introduced outside the WTO framework, purport to correct for deficiencies in the multilateral trade rules and sidestep such poor optics. Yet, on a closer look, they reveal several concerning trends.

Thus, CRMs present a unique situation: their sparse availability; the inelastic demand for raw and processed CRMs to power the unescapable green transition; the vulnerability of CRM supply chains to geopolitics; and their immense sustainability implications, are characteristics of a unique conundrum. While the WTO’s legislative lethargy is an important motivation for resorting to targeted international instruments outside the WTO, resource-rich countries could also find them strategically beneficial. In this context, this briefing paper argues that not

everything is all too well with existing multilateral trade rules and evolving international instruments. Both need critical review, and the evolving governance frameworks need strict scrutiny. But more fundamentally, there is strong practical, legal and normative value in realizing the benefits of multilateralism, and in discussing CRM trade at the WTO to avert further fragmentation, increasing opacity, and subverting non-discriminatory trade principles.

IS THE WTO COMPLICIT IN PERPETUATING THE RESOURCE CURSE?

Given the multidimensional nature of the issue, CRM-related trade policies do not serve any one single purpose. Rather, there are different, even conflicting objectives of access, development, and sustainability at play, both within and between approaches. Take, for example, the [EU Critical Raw Materials Act](#) and the proposed [African Green Minerals Strategy](#). The African strategy focuses on value-addition opportunities at home, whereas the EU approach centres on security of access through friend-shoring and on-shoring in the longer term. Simultaneously, the EU legislation seeks to leverage global trade rules and partnerships to secure access. This is done while purporting to help resource-rich countries develop their infrastructure and downstream industries. These objectives need not contradict one another, and indeed, they should not. However, WTO rules rarely allow for a variety of policy objectives to be met in one go. Trade policies that aim to meet these varying objectives, run against each other, whereas CRM trade policies require a nuanced approach.

For resource-rich countries that suffer from the “[resource curse](#)” (i.e., relegated to continually supplying raw materials suppliers without climbing up the economic ladder), trade-restrictive industrial policy enables them to carry out value-addition activities at home. Policy tools may include export restrictions on unprocessed CRMs (including quotas, licensing requirements and taxes), dual pricing, performance requirements such as local content requirements and beneficiation or downstream policies—all of which aim to encourage the growth of domestic downstream firms. Unsurprisingly, an [OECD report](#) found that export restrictions in CRMs have grown five-fold in the last decade, with export taxes being the most frequently used measures, followed by licensing requirements.

But most of these policies (except export taxes) violate WTO law (for example, see [China – Raw Materials](#), [China – Rare Earths](#) and [Indonesia – Raw Materials](#)) and would need to be removed if successfully challenged before a WTO panel. In general, there is some uncertainty over the legal permissibility of dual pricing schemes and [domestic processing](#) requirements. In a dispute involving export restrictions and specifically, domestic processing requirements, a WTO panel found that Indonesia’s domestic processing requirement also violated WTO law. However, in the context of discussing Indonesia’s failure to rebut the EU’s prima facie case on the limiting effect of the processing requirement, it left uncertain whether the ruling would have been different had there been sufficient statistical evidence regarding the sole impact of the processing requirement.¹

¹ Paras. 7.74-7.77, Panel Report, Indonesia – Measures Relating to Raw Materials, WT/DS592/R and Add.1, circulated to WTO Members 30 November 2022, appealed 8 December 2022.

Some of the relevant legal provisions include Article XI of the General Agreement on Tariffs and Trade (GATT) 1994 on the prohibition of quantitative restrictions, as well as the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Trade-Related Investment Measures (TRIMs) disciplining local content policies and certain performance requirements. Thus, these provisions collectively act to ensure trade liberalisation, non-discrimination and free market principles, yet without adequate and meaningful consideration of development concerns. Moreover, countries with deeper pockets can subsidize more, and better.

The scope for invoking exceptions to justify WTO incompatible behaviour remains open, however, it remains nearly impossible to *successfully* do so. For instance, subsidies under Article 8 of the ASCM—permitting environmental, R&D and regional development-related subsidies—expired in 2000, rendering these subsidies now actionable, while the applicability of public policy exceptions to the ASCM is still [under debate](#). For quantitative restrictions taken under Article XI of the GATT and trade-related investment measures, such as performance requirements covered by the TRIMs, the general and security exceptions (under Articles XX and XXI respectively of the GATT) are applicable, both of which contain high thresholds that are difficult, if not impossible, to meet. Article XX(i) of the GATT has special relevance to export restrictions on CRMs. However, the fact that such measures must be part of a government stabilization plan and must not amount to protectionism or export promotion makes the exception difficult to be successfully invoked. Further, Article XI of the GATT contains in-built exceptions to justify export restrictions, including those that are “temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting [country].” However, it has been held by WTO panels that the flexibility in Article XI:2(a) is not meant to enable Members to impose restrictions upon the export of raw materials to protect or promote a domestic industry. For countries seeking to undertake industrialization, the following statement can be discouraging: “an industrial input product can be essential and within the category of ‘absolutely indispensable or necessary’ if it is needed to maintain an industry through a passing need, but not to protect it from the vagaries of competition or ordinary market conditions with respect to access to inputs, or to create an industry that did not yet exist.”²

In response, to offset measures taken in pursuit of industrialization, *resource-hungry*, capital-exporting countries use other trade tools (comprehensive free trade agreements (FTAs) and post-1995 WTO accession protocols) to close the “loopholes” in WTO law. These agreements prohibit WTO-permissible instruments like export taxes,³ dual pricing schemes, and certain performance requirements, like technology transfers and hiring local talent. Further, recent FTAs include [specific chapters](#) with binding commitments on CRMs to pre-empt and prevent specific trade distortions, such as the FTAs signed by the EU, with Chile and New Zealand. For instance, these chapters include specific prohibitions against maintaining export and import monopolies, and also prohibit the ability of resource-rich countries to undertake dual pricing policies in CRMs to support domestic industries. While the EU – Chile FTA contains a carve-out from the export pricing discipline for value-addition, the details of it render it [almost meaningless](#).

² Para 7.100, Panel Report, Indonesia – Measures Relating to Raw Materials, WT/DS592/R and Add.1, circulated to WTO Members 30 November 2022, appealed 8 December 2022.

³ The WTO dispute China – Raw Materials centered on China’s (in)ability to impose export taxes in light of its commitments in its Accession Protocol.

Additionally, some countries also use [trade remedies](#) (such as anti-dumping and countervailing duties) against upstream distortion, i.e., where mineral imports have been impacted by export control measures in the source countries. These provisions seek to ensure openness of trade, as highlighted above. They also contain policy exceptions, although they are near impossible to successfully invoke.

As a result, existing trade rules appear vastly tilted towards addressing access concerns over development goals. Indeed, this squeeze has caused the pendulum to swing so far that several resource-rich countries have also resorted to, or plan to, [pursue nationalization strategies](#) in CRMs to retain control over their sovereign resources.

SETTING PRIORITIES STRAIGHT: WHY DOES IT MATTER?

Alas, both the resource-rich and resource-hungry country approaches are reactive and lead to [inefficient outcomes](#) in the long run, especially in the absence of a functioning WTO appeals court. Restrictive industrial policies by resource-rich countries do not account for shortcomings in domestic governance mechanisms, which may lead to poor business environment for foreign investors. Thus, the poorer resource-rich should not underestimate their own reliance on foreign capital and technology for productive utilisation of their resource wealth. Export taxes can also lead to [inefficiencies](#), such as prolonged reliance upon government subsidies for the development of inefficient industries and risks of trade manipulation. However, limitations on their ability to impose a vast variety of performance requirements or pursue downstreaming policies, make inefficient export taxes attractive, as a way to regain some economic benefits.

On the flipside, resource-hungry countries are faced with the dangers of a non-binding trade governance system that hinders their access to CRMs. At the same time, they are also confronting potential reputation-loss in repeating exploitative behaviours. Panel rulings like [Indonesia – Raw Materials](#) that ruled against Indonesia's industrial policy-driven export restrictions on nickel, have little legal significance after being promptly [appealed](#) into the void. Indonesia has made no indication that it will remove the outlawed requirements on nickel exports; rather, it will [reportedly](#) explore the transposition of similar policies to other sectors. The EU then [explored the possibility](#) of imposing countermeasures using its Enforcement Regulation (no bad deed goes unpunished!). However, it has since been [reported](#) that EU parliamentarians prefer cooperation over countermeasures.

Even if the WTO's dispute settlement functions were fully restored, it does not resolve the underlying premise of imbalance in existing rules. To repeat the obvious, CRMs present a unique predicament. For various reasons, trade measures currently in use on both sides tend to be inefficient, economically as well as from the perspective of sustaining trusted trade relationships between unequal bargaining powers. Overarchingly, using trade instruments for gaining access while undermining resource-rich countries' ability to pursue their resource-based development agenda is normatively wrong. But trade law and its existing interpretation often undermines such normative (or even developmental) considerations outside strictly defined public policy exceptions. Given the specific concerns relating to economic inefficiencies, as well as the widening developed-developing country divide, the global trading

community needs to take a step back and scrutinize implications of existing WTO law and caselaw, as well as global trends in trade rules.

Thus, cooperation is essential to meet both access and development objectives with an equitable distribution of benefits, so that neither side resorts to inefficiency-breeding measures. On this note, the African countries' recent [proposal](#) on revisiting the TRIMs Agreement—aiming to addressing developmental goals, climate action, and structural transformation—deserves greater attention and discussion. Conditionalities for inward investments could provide productive pathways for resource-rich countries to develop their industries. Additionally, the WTO could provide a suitable forum to discuss the limits of such activities. Yet, recent discussions on CRMs have not taken place at the WTO. Instead, the evolving discourse on CRMs lies outside the multilateral trade law framework.

THE CONTINUING FAULTS IN OUR CORRECTIVE INSTRUMENTS: PARTNERSHIP ARRANGEMENTS

Conscious of the inadequacies in existing trade instruments and rules, several resource-hungry countries are turning to new forms of bilateral cooperation and partnership outside the WTO. The aim is to realise goals of access, security and sustainable development (referred to as “partnership arrangements”). Such arrangements typically revolve around some or all of the following: developing open, fair and competitive markets for critical raw and processed materials; commitment to ESG criteria; mobilization of funding; capacity building; cooperation on research and innovation on mineral knowledge, circularity; integration of value chains; and cooperation on international standard-setting. These partnership arrangements usually take the form of unenforceable Memoranda of Understanding (MoUs) which create no legal rights and obligations. They may also be termed as “action plans” or “compacts” when focusing on specific aspects of cooperation, such as technological advancements, environmental standards etc. The EU has also taken to negotiating [CRM-specific chapters](#) in its recent FTAs. All such forms of international cooperation are part of the critical mineral strategies of resource-hungry countries such as the [United States](#), the [UK](#), the [EU](#), and [Japan](#) but also of resource-rich countries like [Australia](#) and [Canada](#). The partnership arrangements discussed in this paper are those reflected in the International Energy Agency's (IEA) database on “international collaboration” on critical minerals⁴, which typically have been signed 2020 onwards. This database does not capture the state-backed foreign investments in the CRM sector over the years (for instance, those by China).

However, several state-state partnership arrangements are unrecorded by the IEA. For example, the United Kingdom's partnerships (or plans to partner) with [South Africa](#), [Kazakhstan](#) and [Saudi Arabia](#) are not included in the database. The EU's [Administrative Arrangement on Cooperation in Critical Raw Materials Supply Chains](#) with Japan is also unrecorded. Saudi Arabia has recently signed MoUs with the [DRC, Egypt, Morocco, and Russia](#), none of which are reflected in the IEA. Neither is the [MoU](#) on building joint research facilities in CRM mining between Korea and Vietnam. The planned [Critical Minerals Dialogue](#) under the Indo-Pacific

⁴ This should be read with the disclaimer that there could be arrangements that are unrecorded in the International Energy Agency database and therefore are not reflected in this analysis.

Economic Framework is not mentioned in the IEA. This lack of uniformity and availability of information highlights a key weakness of a fragmented and decentralized system. It is often unclear whether a government's announcement of its intention to sign a CRM arrangement with another country has materialized. For instance, while reports state that the United Kingdom planned to sign an MoU with [Zambia](#), it is unclear whether such an MoU has actually been signed and if so, what its details are. In several cases, the actual document embodying the partnership is also not publicly available. Yet, in order to maintain objectivity and transparency, this paper relies upon the IEA database to map the partnership arrangements, while noting this critical gap in information.

The EU has signed a large number of strategic CRM partnerships, including with [Canada](#), [Ukraine](#), [Namibia](#), [Kazakhstan](#), [Argentina](#), [Chile](#), the [DRC](#), [Zambia](#), [Greenland](#), and [Uzbekistan](#). The United States has signed a [Critical Minerals Agreement](#) with Japan; a [Climate, Critical Minerals and Clean Energy Transformation Compact](#) with Australia; and an [Expanded Cooperation for Critical Minerals Supply Chain](#) with Korea. It is also leading a group arrangement called the [Minerals Security Partnership](#) (MSP) between 15 major economies that are primarily resource-hungry and higher-income (Estonia, Finland, France, Germany, India, Italy, Japan, Norway, Korea, Sweden, the United Kingdom, the United States, the EU as well as Australia and Canada). The MSP seeks to finance investments in along the CRM value chain in MSP and non-MSP economies, by maintaining rigorous ESG conditionalities. Recently, the MSP has launched the [Minerals Security Partnership Forum](#) to develop and support CRM projects and promote sustainable policies. Membership to the forum remains open to members committed to global supply chain diversification and high ESG standards. To facilitate investments in CRMs, the United States, Australia, India and Japan have launched a [Quad Investors Network \(QUIN\)](#) to connect investors, academia and government. Japan has pursued a [Resource Green Transformation \(GX\) Diplomacy Guideline](#) to stress the relevance of public-private partnerships in CRM investments. This also enables them to assess strengths of different partners and accordingly leverage them, for instance, the regional potential for recycling and waste management. Japan has also signed partnership agreements with the [United Kingdom](#), [Australia](#), and [Canada](#).

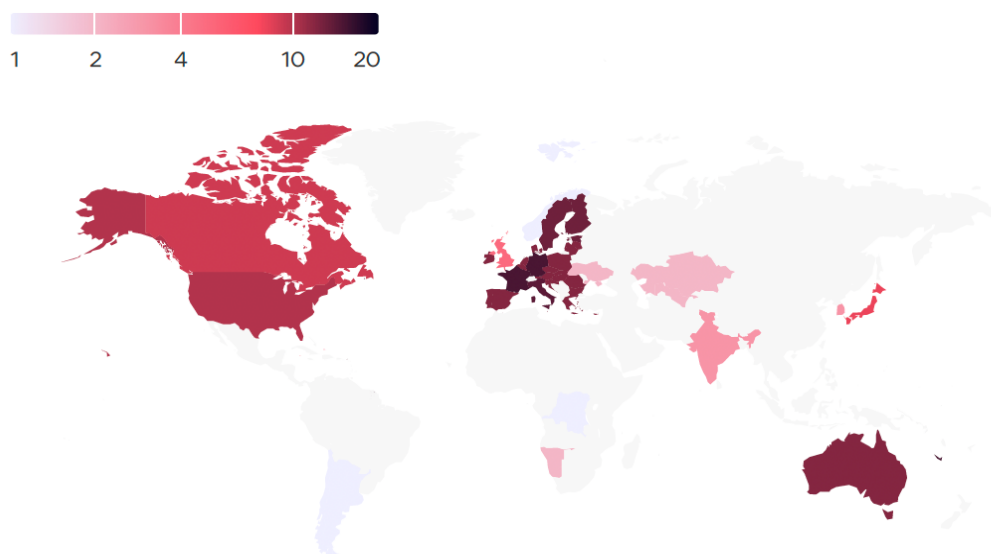
As developed, resource-rich countries, Australia and Canada also seek similar arrangements to secure inward investments, leveraging their commitment to liberal philosophy to encourage foreign businesses. Australia has entered into arrangements with [Germany](#), [France](#), the [United Kingdom](#), the [United States](#), [Korea](#) and [India](#). Canada is collaborating on different aspects of CRM trade with the [EU](#), [United States](#), [Japan](#), [Korea](#), the [United Kingdom](#) and [Australia](#). It is interesting that Australia and Canada, as two resource-rich countries, are collaborating on driving ESG standards in CM supply chains and relevant standard setting; harmonization of CM supply chain transparency and traceability measures; multilateral cooperation on supply chain security; joint R&D collaboration; and engagements with indigenous communities.

In addition, there are other small group formats of collaboration, such as the [Sustainable Critical Minerals Alliance](#) between the G7, the [Conference on Critical Materials and Minerals](#) between Japan, the United States, the EU, Australia, and Canada, and the [Critical Minerals Mapping Initiative](#) between the United States, Australia and Canada. However, these initiatives cover selected groups of countries—mostly involving repeat players—and leave out a majority

of the world's economies, as seen in the map below. As the IEA database does not provide details of all existing arrangements, this map does not reflect an exact science but is representative of the trends regarding the concentration of agreements amongst a few. This underscores the need for greater transparency and monitoring of the evolving international instruments on CRM trade.

International Collaboration on Critical Raw Materials

Number of CRM-specific partnership arrangements signed



Source: Map created by author using everviz. Data from International Energy Agency's "Policies database" on "international collaboration" in critical minerals, available here: <https://www.iea.org/policies?topic%5B0%5D=Critical%20Minerals&type%5B1%5D=International%20collaboration>

Yet, although the partnership arrangements that purport to be development-friendly are encouraging (in contrast to unilateral measures or trade defence instruments), a closer scrutiny reveals several concerning trends.

First, these arrangements remain concentrated amongst developed resource-rich and resource-hungry countries, leaving norm creation to a mere handful. Developing countries are left outside the discussions. Countries that are neither resource-rich nor resource-hungry, but need CRMs for their green transition, are also left in the dark. Due to a lack of rules requiring transparency and publication, there is limited knowledge of signed agreements. Perhaps, geopolitically most relevant is China's absence from these linkages. While the very purpose of the partnership arrangements is arguably to de-risk from China, in the absence of cooperation, retaliatory tactics and hostilities will only increase. For instance, China responded to [strengthened American export controls](#) on semiconductors by imposing export restrictions on [gallium and germanium](#).

Second, these partnership arrangements have no enforceability, turning the statements on financial assistance and technology transfers into little more than political commitments. In the absence of enforceability, it is difficult to assess the contributions of these instruments towards their stated goals. For instance, their commitment to supply chain integration and value-addition in resource-rich countries will need to materialize before a performance assessment can be made. The non-enforceability of SPAs also symbolizes a move towards selective de-judicialization—selective since restrictions on access are still prone to challenge under multilateral trade rules (assuming full restoration of the dispute settlement system) whereas pro-development measures instrumentalized through non-enforceable partnership arrangements carry no legal weight.

Third, these arrangements aim to identify potential projects and drive support towards them. They enable resource-hungry countries with capital to provide support, yet on their terms and preconditions. Such investments raise questions about property rights over the CRMs or related products that result from the economic activity. Moreover, these arrangements do not typically contain strict trade-related obligations against imposing export taxes or other export restrictions while most FTAs do. Where such MoUs exist alongside FTAs containing obligations regarding export restrictions, the FTA obligations will apply regardless. But where there is no FTA between the MoU signatories, the MoUs will not prevent resource-rich countries from imposing export restrictions. Thus, the omission of such obligations from the MoUs is striking, despite there being strong incentives to include them. One notable exception is the US – Japan Critical Minerals Agreement. Broadly, this observation also raises questions around ownership and nature of control over mines and supply chains, granular level conditions, and whether MoUs foreshadow any comprehensive trade agreements.

Fourth, the arrangements are also increasingly used as standard-setting arrangements for sustainability goals in extraction practices in source countries. However, this is done without including those very countries in any discussions. For instance, Article 5.8 of the US – Japan Critical Minerals Agreement provides that “[e]ach Party may consider opportunities to discourage the importation into its territory of goods containing critical minerals extracted or processed in whole or in part by forced or compulsory labour, including forced or compulsory child labour.” Although there is a degree of separation, provisions like these have indirect implications for U.S. and Japan’s trade with third countries. Similarly, Canada’s critical minerals strategy and bilateral partnerships with Japan and the United Kingdom indicate a strong focus on international standards in relation to ESG standards.

Fifth, the interplay of WTO rules and the network of SPAs appears to remove agency away from resource-rich states and their authority to impose measures in the pursuit of CRM-led industrialization. Rather, as the SPAs and other small group arrangements (such as the Minerals Security Partnership) involve funding conditionalities for projects in resource-rich countries, the powers reside with resource-hungry countries to decide which resource-rich countries benefit from investments and how. On the other hand, if resource-rich countries were to impose conditionalities in the form of performance requirements, they would likely be outlawed under WTO law and FTAs.

The *sixth* trend is interlinked with the previous observation. There seems to be a shift towards a firm-centric approach, whereby government partnerships are to be implemented through firm-to-firm engagements (with the governments acting as match-makers of feasible projects, under the Germany-Australia partnership) or through [direct partnerships with foreign firms](#). While such an approach can ensure efficiency associated with targeted support and lower transaction costs, it can lead to foreign governments “picking winners”. This can hinder the ability of less capable firms to develop, without establishing objective and clear criteria for selection. Further, a firm-specific approach raises questions about its coexistence with horizontal government measures, about the locus of property rights over the CRMs (raw or processed) and the ability to derive economic value from them—all of which need to be tracked and studied closely.

The *seventh*, and the final trend, is that these arrangements are not in the form of FTAs. Because they lie outside the multilateral trading system, they avoid the domestic and international scrutiny that a conventional FTA would face. The scope for de facto discrimination also remains strong.

TWO ROADS DIVERGED: WHERE DO WE GO?

Partnership arrangements are attractive mainly because they present lesser of the two evils, meaning, law-making at the WTO has become near impossible. They also offer greater flexibility, customization, and ease of signing. However, they have their own inefficiencies and inequities and are certainly not panacea. When viewed broadly against the wider set of concerns applicable to *all* countries that need CRMs (raw or processed) to transition to cleaner, greener technology, partnership arrangements risk fragmentation, inequality of treatment and increased power imbalances. The talks of a club approach suggest a propensity for cartelization, which is generally [undesirable](#).

On the other hand, multilateral rulemaking (or the lack thereof) suffers from lethargy and inertia, due to the divergent and heterogenous membership. But members must act responsibly, realise the pitfalls of these political arrangements, and understand why, overall, multilateralism is a better approach. In any event, the standard-setting nature of the critical minerals MoUs and FTAs will soon leave no member untouched. Conversely, participating in multilateral rulemaking will be more inclusive and equitable.

In the specific case of CRMs, the benefits of multilateralism and the WTO infrastructure include rules driving transparency and openness with complementary institutional mechanisms promoting them. The interdependencies between WTO members for CRMs [requires members](#) to map the global supply and reserves of CRMs, discuss the developmental goals of resource-rich countries and cooperate on necessary trade liberalization and regulation for sustainability and economic security. To attain each of these objectives, the WTO can enable transparency and information sharing.

Further, the TRIMs and the ASCM are ripe for [reform](#) discussions in light of the green transition and their implications for industrialization globally. At the very least, the WTO should be used to take stock of, a) the implementation of existing rules, b) the challenges posed by those rules in the context of economic priorities of members, and c) proposed reforms of those rules that

could address those concerns. These discussions could take place either at the subject-specific committee levels, or at a specific “Fast-tracked Work Programme on Critical Raw Materials” that members can collectively action, or in plurilateral groupings within the WTO framework. Organisations such as the IMF and the World Bank, who are well-versed in studying and analysing countries’ policies and providing recommendations, could be called upon to work in close cooperation with the WTO. Further, in addition to the WTO, there must be concerted efforts to rethink fair and preferential loan conditions to promote development, to ensure that these countries are not stuck in unsustainable debt cycles or debt traps. Efforts to review these processes must be undertaken simultaneously across development banks.

The WTO also has something to learn from fluidity of partnership arrangements. For instance, nickel, lithium etc. matter today, but in some years, the demand may switch to other resources to keep pace with technological developments. Thus, to confine any rule-making and international instruments to a narrow definition of CRMs would be short-sighted. WTO members would be better off discussing the intersection of criticality, development and security in raw materials trade. But such non-issue-specific discussions spanning several obligations and objectives require horizontal responses. Since the specifics of tomorrow’s fault lines are unknown, WTO members could focus their efforts towards agreeing on basic principles when discussing such issues, instead of hastily agreeing upon blunt trade obligations. While hard obligations come at the cost of reduced trust and agreement, looser obligations detailing minimum standards can help instil much needed trust amongst members.

As the difficulties in achieving a negotiated outcome at the WTO give little cause for hope, the global trading community needs to first undertake a cost-benefit analysis of regulating CRM trade in two different situations. One, when governance lays outside the WTO framework, in pairings or small groups denoting a small fraction of the world, and two, when rules are created and enforced under the watchful eyes of the WTO membership and institution. While this briefing paper seeks to contribute to monitoring and analysing the evolving legal landscape, it supports a continuous and systematic analysis that would better serve the interests of all trading countries. Countries, with robust information and analysis of these frameworks, can take an informed decision on which path to take.

CONCLUSION

The deck, which is already stacked high against the resource-rich, has been getting higher. The CRM conundrum, between the poor “haves” and the rich “have-nots”, in many ways resembles past colonial structures and we must take great care to avoid repeating historical mistakes. The [right to development](#) and sustainable development goals (economic, social and environmental aspects included) provides firm grounds in which to root future CRM-related trade policies. By understanding the various objectives associated with CRM trade, this paper has made the case to review multilateral trade rules considering their apparent one-sidedness favouring access over development and arguably, even sustainability. By further identifying several concerning trends in the partnership arrangements, the paper calls for greater scrutiny of the evolving governance mechanisms and warns against complacency. It also complements peers (see [here](#), and [here](#) (at 41:40-43:00)) and stresses the imperative nature of discussing CRM-related trade rules multilaterally at the WTO.

ACKNOWLEDGEMENTS

The helpful discussions with Emily Lydgate, Michael Gasiorek, Petros C. Mavroidis and L. Alan Winters, and assistance from Jess Madrigal-Fletcher, are gratefully acknowledged by the author of this Briefing Paper. The paper has also benefitted from comments of participants at the Annual UKTPO Conference, London (2023) and Centre for Inclusive Trade Policy (CITP) Seminar Series (2023).

ABOUT THE AUTHOR

Sunayana Sasmal is a Research Fellow in International Trade Law, at the UK Trade Policy Observatory (UKTPO), University of Sussex.

FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages. The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world.

The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

For further information on this theme or the work of the UK Trade Observatory, please contact: Professor Michael Gasiorek
Director UK Trade Policy Observatory University of Sussex,
Jubilee Building, Falmer, BN1 9SL

Email: uktpo@sussex.ac.uk
Website: blogs.sussex.ac.uk/uktpo/
X (former Twitter): [@uk_tpo](https://twitter.com/uk_tpo)

ISBN 978-1-912044-43-6

© UKTPO, University of Sussex, 2024.

The author asserts their moral right to be identified as the author of this publication. Readers are encouraged to reproduce material from UKTPO for their own publications, as long as they are not being sold commercially.

As copyright holder, UKTPO requests due acknowledgement. For online use, we ask readers to link to the original resource on the UKTPO website.