Working Paper:
The EU's Critical Raw Materials Act – could the 'Brussels Effect' help protect Indigenous rights?

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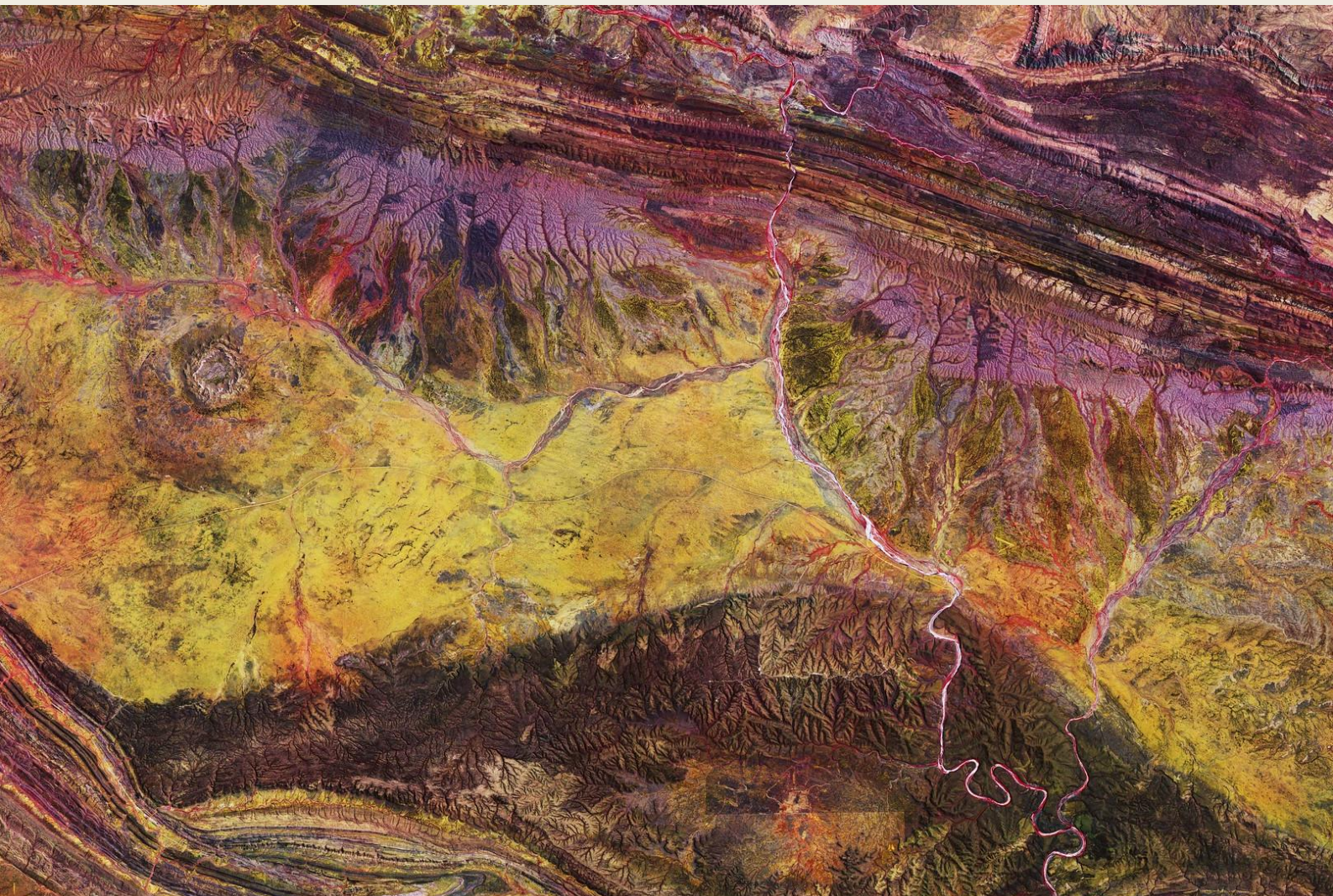

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Last year (April 2024) the European Union passed the Critical Raw Materials Act (CRMA). Ostensibly with the aim of 'establishing a framework for ensuring a secure and sustainable supply of critical raw materials', the CRMA lays out a series of regulations surrounding the exploitation, processing and recycling of a long list of critical raw materials (e.g. graphite, lithium, cobalt, copper, nickel, etc.).[i] Despite the urgency with which a secure supply of critical minerals to the EU is to be established, the CRMA sets out to ensure this supply also meets certain standards of environmental and social sustainability. Accordingly, the Act lays out broad due diligence regulations for raw materials project proponents both within the EU and in third countries (i.e. not in the EU). The CRMA is one of many examples from recent years of the increasingly competitive race for critical minerals, and precedes the G7's (incl. France, Germany, Italy and the EU) statement last month announcing a preliminary strategy to secure their own supply of critical minerals.

The quantity of the metals and minerals identified as critical that are on or near Indigenous owned, occupied or administered lands across the world means that the regulations laid out in the CRMA should be of great interest to Traditional Owners and their representative institutions, as well as those working within the extractive industries more generally. Given the extensive deposits of minerals in Australia, and Australian companies' not inconsiderable presence in the world mining industry, Australia is expected to play an important role in the hunt for critical minerals. This role was no doubt the impetus behind the signing of a Memorandum of Understanding between Australia and the EU just a month after the CRMA was passed.[ii] The MoU, detailing the objectives of this partnership, is described as '[providing] a framework for the Sides to build secure sustainable critical and strategic minerals value chains between the EU and Australia that support the clean energy and digital transition and are relevant for other key industrial sectors such as defence and aerospace.' Notable, too, is the stated commitment within the MoU to enhance 'cooperation to promote high ESG criteria and improved policy alignment, driven by

high regard for worker conditions and worker safety, and the importance of sustainable and secure production of critical minerals.' A statement that, by any sensible reading, can be understood to include respecting or protecting the rights of the Traditional Owners of the lands many of these critical minerals are on or in.

The Brussels Effect

The CRMA is not the first attempt by the EU to influence industry practices outside of the Union. The tangible, global impacts of EU regulations on industry over the past two decades have been studied in detail by Professor Anu Bradford (Columbia University) in her 2020 book *The Brussels Effect: How the European Union Rules the World* (Oxford University Press). As Bradford describes it, the Brussels Effect refers to 'the EU's unilateral ability to regulate the global marketplace (…) where the markets are transmitting the EU's regulations to both market participants and regulators outside the EU' (p1). Normally this is done *only* by the EU regulating its *own* market and then relying on the size and attractiveness of its market to do the rest. '[I]n essence, the Brussels Effect emerges from market forces and multi-national companies' self-interest to adopt relatively stringent EU standards globally' (p2).

Bradford suggests the Brussels Effect can come about in two ways. The *de facto* Brussels Effect happens when companies adopt new standards voluntarily to meet the new regulations. The *de jure* Brussels Effect happens when other states legislate to incorporate the new standards into their own legal code. In some cases, the *de facto* effect may happen first before companies then lobby foreign governments to legislate to create an even playing field in the country of activity. Importantly, the Brussels Effect is not limited to products but also impacts production processes as well.

For the Brussels Effect—and global standards more generally—to occur, Bradford identifies five necessary conditions: a large domestic market, regulatory capacity, stringent standards, inelastic (i.e. non-movable) targets, and the non-divisibility of production (p63). Beyond just the influence of market forces, EU standards may also take effect due to the perception of the EU as a "normative power". This is especially the case in relation to standards surrounding the environment and sustainable development, but also human rights, an area where EU regulations have been generally much less successful globally.

Part of the success of the EU's regulatory agenda is attributable to the reliance on foreign corporations, who are willing to trade in the EU market, to cooperate with new regulations. In this sense, the EU can rely on corporations' self-interest to create market harmonization without the need for other states to change their laws (p83-86). Corporations, especially those based within the EU, may have a lot to gain from customer or reputational confidence when adopting new, higher standards, especially as consumers and NGO observers increasingly are able to call out lax standards abroad. It has become much harder for corporations to "outsource" any human rights violations or malpractice.

Ultimately, however, the Brussels Effect relies on the attractiveness of the European market for goods and services, and the positive cost benefit analysis of trading in the EU over the additional costs incurred by adopting higher standards.

Due diligence regulations under the CRMA

Under the CRMA, the EU is committed to identifying and supporting so-called 'Strategic Projects'. These are certain raw materials supply chain projects that can be identified as playing—or the potential to play—an integral part in achieving a secure and sustainable supply of critical materials. Projects can include the extraction, processing, or recycling of critical materials. Project proponents can submit a proposal to have their project recognised as a Strategic Project as part of a semi-regular call for applications. Successful projects will benefit from streamlined and predictable permitting procedures and ready access to finance. 'As a speedy recognition is key to effectively supporting the Union's security of supply, the assessment process should remain light and not overly burdensome' (Preamble, recital 14). Importantly, Strategic Projects can be in the EU or in a third country. Projects both within the Union and outside must comply with the same minimum social and environmental sustainability standards (Preamble, recital 16).

The criteria for recognition of Strategic Projects are laid out in Article 6. Projects will need to demonstrate that they are going to make a 'meaningful contribution' to the EU's stated aims, are technically feasible, and will have 'cross-border benefits'.

In addition:

> The project would be implemented sustainably, in particular as regards the monitoring, prevention and minimisation of environmental impacts, the prevention and minimisation of socially adverse impacts through the use of socially responsible practices including respect for human rights, indigenous peoples and labour rights, in particular in the case of involuntary resettlement, potential for quality job creation and meaningful engagement with local communities and relevant social partners, and the use of transparent business practices with adequate compliance policies to prevent and minimise risks of adverse impacts on the proper functioning of public administration, including corruption and bribery. (Article 6,1(c))

The fulfilment of these criteria is to be assessed following the elements and evidence set out in Annex III. In relation to sustainability aspects, the assessment for projects within the EU 'shall take into account an overall assessment of a project's compliance with relevant Union or national law as well as relevant supplementary evidence, taking into account the location of the project.' Furthermore, as part of an application for recognition as a Strategic Project, proponents must submit a plan for 'meaningful

consultation' with affected indigenous peoples and the minimisation or prevention of 'adverse impacts' to their human rights (Preamble, recital 20). In such cases, an interpretation of what is considered 'meaningful' or 'adverse' appears to do much of the heavy lifting, and these terms will no doubt be subject to contention. Notably absent from the due diligence standards in the CRMA is any explicit requirement for proponents to meet the standards of Free, Prior and Informed Consent (FPIC), a core component of protecting indigenous peoples' fundamental human right to self-determination as outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Perhaps unsurprisingly, in the context of protecting the rights of Indigenous peoples, the reliance on assessing social sustainability requirements by adherence to *existing* legislation, coupled with vague allusions to meaningful consultation and preventing adverse impacts, has not been without critics. Within the EU especially, concern has been raised about the impact expanding efforts to source critical materials are likely to have on the Sámi people, and particularly the Sámi communities in northern Sweden where the mining permitting process is well recognised as failing to protect Sámi rights or provide Indigenous communities with the option to give or withhold FPIC. [iii] (Under the first round of successfully awarded Strategic Projects applications, five are on traditional Sámi lands. Several of these are in Sweden including the Australian run Talga Group graphite mine in Vittangi.)

While the impact of the newly minted Strategic Projects is already being felt by Europe's indigenous people, the global impact in third countries outside the EU has the potential to be greater still. So far thirteen projects outside of the EU have been awarded Strategic Project status, and future rounds are likely to see more. Although two of the thirteen are run by proponents headquartered in Australia, there is yet to be a Strategic Project within Australia itself. Nevertheless, anecdotal evidence and last year's MoU hint at a number of proponents gearing up to apply for recognition of future projects within Australia.

The requirements to prove due diligence under the CRMA for projects outside the EU differ to those within the Union. Although adhering to relevant state law remains a requirement, additional standards are listed presumably to try to level the playing field in countries in which legislated standards are deemed to be lower than those within the EU or there is a perception of ineffective enforcement. (The extent to which Australia fits those categories remains open to conjecture.)

For projects outside the EU, proponents must demonstrate that the project complies with a series of international instruments. These include, among others: the OECD Due Diligence Guidance for Responsible Business Conduct; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector; OECD Guidelines for Multinational Enterprises on Responsible Business Conduct; and the UN Guiding Principles on Business and Human Rights. All of those listed here make direct reference to the need for corporations to take further measures when necessary to protect Indigenous rights as detailed by UNDRIP. This would appear to place a higher standard of due diligence relating to Indigenous human rights on Strategic Projects outside the EU compared to those within.

The role of industry schemes

Strategic Project applications must include a plan on how proponents are going to adhere to the given due diligence standards laid out at Article 6, 1(c). One way in which proponents of projects both within and outside the EU can demonstrate adherence is by providing evidence that the project is certified by one or more 'recognised schemes'. The guidelines and criteria for the certification of these schemes include 'requirements for ensuring socially responsible practices, including respect for human rights and labour rights including the community life of indigenous peoples' (Annex IV, 2(b)). In practice, to fulfil the Article 6, 1(c) requirements, schemes applicable to projects outside the EU will need to comply with the international instruments listed above—including upholding UNDRIP—or risk becoming obsolete. All approved schemes are to be listed on an open, free to access website. (To the best of this author's knowledge, at the time of writing, the list and website have not yet been publicly released.)

This reliance on industry certification schemes within the CRMA places even greater responsibility on voluntary industry standards than already exists, creating both challenges and opportunities for Indigenous peoples and organisations. The concerns surrounding voluntary industry standards schemes—the so-called 'privatisation' of worker and human rights protection—have been well articulated by NGOs and civil society observers, including, *inter alia*, Human Rights Watch, SOMO-The Centre for Research on Multinationals, and Germanwatch.[iv] The reliance on industry standards schemes has been described at times as a 'race to the bottom' by providing the minimum levels of due diligence proponents can get away with whilst allowing them to hide behind the smoke screen of being a member of some vague or unenforceable standard. Regular criticisms include a lack of multistakeholder direction, conflicts of interest (as many auditors are employed by the extractive industry), limited transparency, difficulties in assessing compliance, and a lack of enforceability or access to remedy when violations do occur.

Yet, if these perceived weaknesses can be addressed, the growing importance of industry standards schemes to corporate due diligence practices does present extra-judicial opportunities for Traditional Owners. In countries like Sweden and Australia, in which there is an identifiable regulatory gap between legislation and the standards of FPIC and other human rights protections, industry standards can be used to encourage proponents to address negative impacts on human rights or the environment. Unlike domestic state legislation, industry standards, when combined with international or domestic legal instruments, also have the benefit of encouraging due diligence by companies that have activities spread across multiple jurisdictions, thereby making it harder for multi-nationals to "outsource" their human rights abuses to other countries.

Not all industry standards are created equally, and the test of how successful they will be may rest on the extent to which they incorporate the principles of UNDRIP and FPIC. This will undoubtedly depend on how much influence Traditional Owners have in the making and governance of industry standards. If industry standards schemes are going to be effective in fulfilling the CRMA's objectives of securing a supply of critical raw materials in a socially sustainable way that protects *all* human rights, they will need to respect and support indigenous leadership and representation at all levels of decision making and

compliance. This representation must be permanent and not only for the purposes of consultation when designing new standards. To ensure this happens, the EU could, for instance, refuse to recognise any standard that does not have permanent indigenous leadership as a part of a clearly structured and independently appointed multistakeholder governance model.

Summary

On the surface of it, the CRMA would appear to present opportunities to improve industry standards and with them the protection of human rights globally, but further steps will need to be taken to guarantee this. If we return to Bradford's five conditions for the Brussels Effect to occur, the promotion of Strategic Projects under the CRMA is likely to satisfy them. The EU market is massive enough to provide incentives for corporations to adhere to new standards. The EU's regulatory capacity has already been demonstrated over the past two decades. Ensuring the minerals extracted from Strategic Projects are delivered within the EU provides an inelastic target. And by awarding Strategic Project status to individual projects (as opposed to a corporation), the indivisibility of production can be maintained. A question remains, however, over how stringent the standards will be. The lack of any specific mention to FPIC in the CRMA is likely to cause some concern among indigenous organisations. Similarly, the reliance on industry standards will concern others. Yet these are not insurmountable obstacles. So, could the 'Brussels Effect' help protect indigenous rights? It could, but only by guaranteeing the proper and permanent leadership by Traditional Owners across the globe at each and every level.

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[i] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02024R1252-20240503#anx_I

[ii] https://www.industry.gov.au/publications/memorandum-understanding-between-european-union-and-australia-strategic-partnership-sustainable-critical-and-strategic-minerals

[iii] See, for example, A/HRC/33/42/Add.3; CERD/C/SWE/CO/22-23, paras. 16-17; Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013 : Committee on the Elimination of Racial Discrimination; K. Raitio, C. Allard & R. Lawrence (2020) 'Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices', *Land Use Policy* 99; R. Kløcker Larsen & K. Raitio (2023) *EU's Critical Raw Materials Act fails to protect Sámi rights – here's how to strengthen it*. Stockholm Environment Institute. Accessed: https://www.sei.org/perspectives/eus-critical-raw-materials-act-sami-rights-protection/

[iv] Human Rights Watch (2023) *EU's Flawed Reliance on Audits, Certifications for Raw Materials Rules*. Accessed: https://www.hrw.org/news/2023/05/24/eus-flawed-reliance-audits-certifications-raw-materials-rules ; G. Quijano & J. Wilde-Ramsing (2022) *A piece, not a proxy: The European Commission's dangerous overreliance on industry schemes, multi-stakeholder initiatives, and third-party auditing in the Corporate Sustainability Due Diligence Directive*. SOMO. November 2022; R. Heinz, J. Sydow & F. Ulrich (2022) An Examination of Industry Standards in the Raw Materials Sector. Germanwatch. Accessed: www.germanwatch.org/en/85063