

Private International Law and Sustainable Development: Establishing International Traceability of Critical Raw Materials Supply Chains

Presented by

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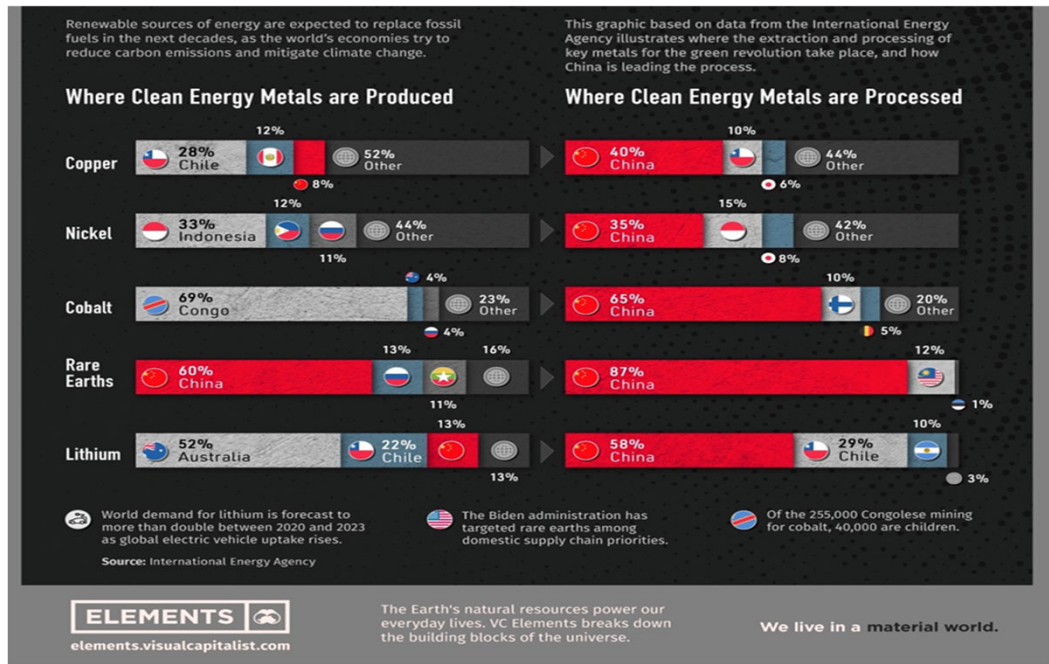
1. Traceability and Critical Raw Materials Global Supply Chains



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The concept of **critical raw materials (CRMs)** is dynamic and can vary across different jurisdictions (Goddin, 2018, p. 118). Typically, it encompasses three key aspects: supply risk, **environmental consequences**, and susceptibility to supply disruptions (Peck, 2018, p. 97).

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What is traceability?



- **Traceability** is understood as the ability to “identify and trace the history, application, location and distribution of products, parts and materials to ensure **the reliability of sustainability claims** in the areas of human rights, labour (including health and safety), the environment and anti-corruption”; and “the process by which enterprises track **materials and products** and the conditions in which they were produced through the supply chain” in both consumption and post-consumption.

ISO 9001:2015. United Nations Global Compact Office, *A Guide to Traceability A Practical Approach to Advance Sustainability in Global Supply Chains* (New York, 2014). Organisation for Economic Co-operation and Development (OECD), *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Paris, 2018).

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Why do we need traceability?

The US Inflation Reduction Act (IRA)

A minimum percentage of the value of such critical minerals in the battery must be either **extracted or processed** in the US or in a US FTA partner country or **recycled** in North America

The EU Digital Product Passport (DPP)

The European Commission defines DPP as “**a structured collection of product related data** with predefined scope and agreed data ownership and access rights conveyed through a unique identifier”

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Traceability about what and between who?

- Product data
- Process data
- Stakeholders
 - First consumption
 - Miner, Refiner, Precursor and CAM producer, battery cells and modules manufacturer, battery pack producers, car manufacturer, importer, exporter, shipper, government regulators, End-users, consumer organizations, etc
 - Recycle:
 - Re-user, re-manufacturer, repurposer, waste collector, dismantler, new manufacturer etc

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Benefits of traceability

- Rule-based global **TRACEABILITY** can enhance the **VISIBILITY, TRANSPARENCY, and TRUST** of supply chains
 - ESG compliance with obligations under the Paris Agreement for Climate Change
 - Access to finance: investors and lenders
 - Consumers
 - Circular economy
 - ...



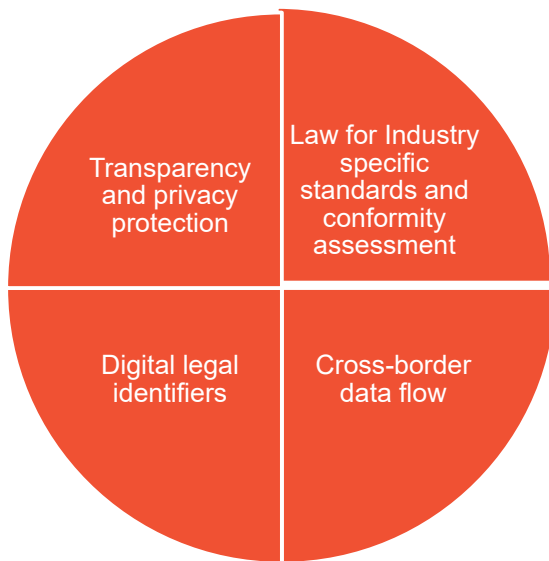
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2. Conflict of laws to achieve cross-border traceability



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Sustaining these critical resources will require **global cooperation.**

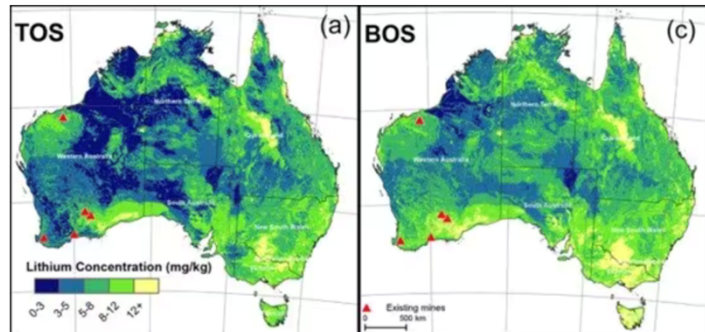
But no overarching, integrated legal/ethical instrument

covering the sustainable production and consumption of Lithium-ion batteries and other mineral products - to inform businesses, governments, and consumers.

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Eg LITHIUM

- **Mined in Australia, Processed in China, Traded in London/UK, and Consumed in the EU/US**
- **Major conflict of laws issues:**
 - **Different laws/standards for ESG**
 - **Insufficient interoperability of ESG reporting tools**



Map showing predicted lithium concentrations in upper sediment (TOS) 0–10 cm and lower sediment (BOS) 60–80 cm. [Credit: Ng et al.]

Image source: <https://www.sydney.edu.au/news-opinion/news/2023/08/31/mapping-australia-s-hidden-lithium-reserves.html>

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Provisions related to traceability of data in Asia Pacific	WTO	Aus-China FTA	RCEP/AANZ FTA	CPTPP	DEPA	Aus-Sing Digital Economy Agreement
Trade facilitation provisions (paperless trade, etc)	Yes	Yes	Yes	Yes	Yes	Yes
Fraudulent & deceptive commercial activities and other consumer protection provisions	No	Limited	Yes	Yes	Yes	Yes
Personal information protection and privacy	As an exception	Limited	Yes	Yes	Yes	Yes
Cybersecurity	No	No	Yes	No	Yes	Yes
Free cross-border transfer of information	No	No	Limited	Yes	Yes	Yes
Prohibition of data localisation	No	No	Limited	Yes	Yes	Yes
Open government data, digital identities, e-payment, etc	No	No	No	No	Yes	Yes

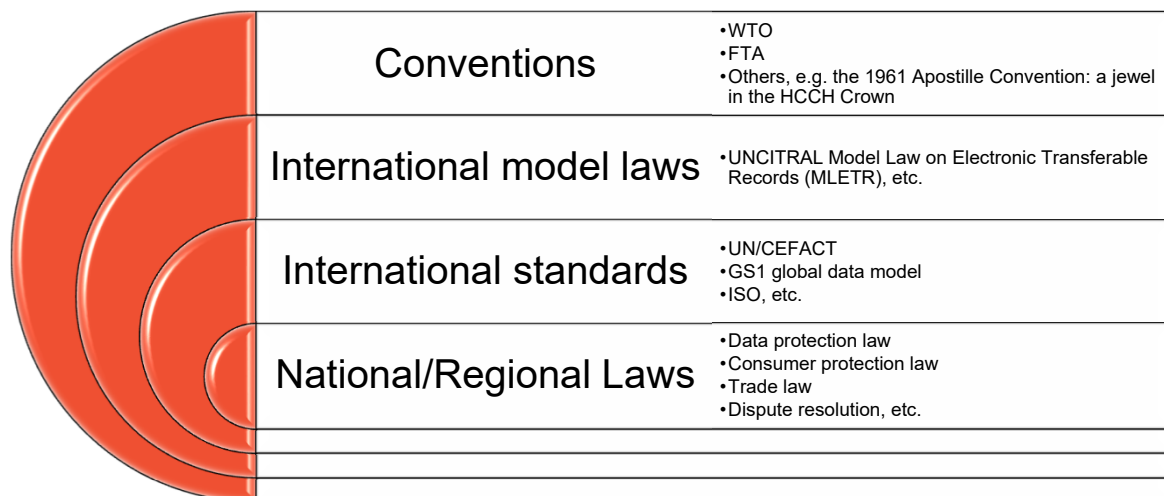
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3. Insufficient international legal framework to resolve conflicts



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Existing legal infrastructure



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Australia and New Zealand Free Trade Agreement

- **Section C - Creating a Conducive Environment for Electronic Commerce**
- **Article 8 - Digital Trade Standards and Conformity Assessment**
- 1. The Parties recognise the important role of relevant international standards in reducing barriers to trade and fostering a well-functioning digital economy, including their potential to decrease trade compliance costs and increase interoperability, reliability and efficiency.
- 2. Each Party shall, where appropriate, encourage the adoption of international standards that support digital trade.
- 3. The Parties shall endeavour to explore collaborative initiatives, share best practices and exchange information on standards, technical regulations and conformity assessment procedures in areas of mutual interest with a view to facilitating electronic commerce and digital trade.

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We can **learn** from the existing traceability systems -

- Seafood, textile/leather, and ‘conflict minerals’ from war zones,

But we need **more**

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4. Inspirations from private international law: Three Models of Traceability



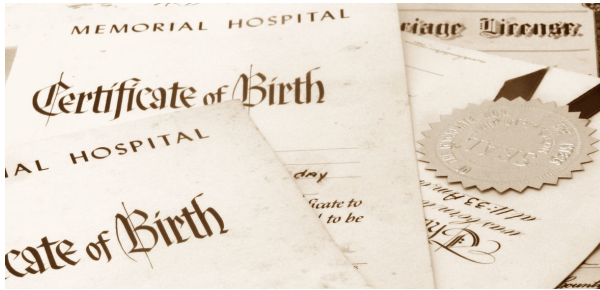
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Three models to resolve conflict of laws in global traceability

1. Limited Decentralisation with an International Agreement and Local Central Authority in Each Country: e.g. the Apostille Convention (for public documents such as birth, marriage and death certificates-123 parties) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (for export permits-184 parties).
2. Decentralised but with an International Agreement: e.g. the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (172 parties)
 - With some centralisation from UNCITRAL Model Law / arbitration law at seat
3. Decentralised without a Widely-accepted International Agreement: e.g. cross-border recognition and enforcement of civil and commercial judgments hinging on bilateral treaties or domestic laws. (Convention of 30 June 2005 on Choice of Court Agreements-34 parties; Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters-29 parties)

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Model One: de-centralized with local Central authority in each country



- Global mutual recognition of birth, marriage, and death certificates and other public documents across borders under the Apostille Convention with 125 member states
 - The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
- Hague Conference on Private International Law

Traceability System under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)

Three categories of subject matter

Article II

Fundamental principles

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.
2. Appendix II shall include:
 - (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and
 - (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.
3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade.
4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

Model Two: Decentralized-with procedural verification and reciprocity requirement



Image source:
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https://www.lawsoncentre.org/readnews/Mzg3/Whether-Arbitral-Award-can-be-binding-on-Non-Signatory-to-the-Arbitration-Agreement

- Arbitration awards
- **United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (172 member states)
 - Define what are arbitration awards
- Confidential information v. public enforcement

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- Member state courts cannot refuse recognition / enforcement of foreign-seated arbitration unless problem with the arbitration agreement (or subject-matter arbitrability) or procedure (including 'public policy')
 - No review of the merits (substantive contents) of the arbitral award
- If refusal in one state, award creditor can seek enforcement in another
 - But growing 'deference' to decisions of first court(s)? (& arbitrators)?
- Some further centralisation is injected by NYC Art V allowing (but not requiring!) refusal if award has been *set aside* by courts at the agreed seat
 - Also tendency (but not eg in France) for NYC enforcing courts to (mostly) defer to seat court decisions that instead *uphold* challenges to awards
 - Facilitated by convergence in seat arbitration law through UN Model Law
- Reciprocity reservation was permitted and quite often taken by states
 - This encouraged NYC ratifications by others seeking to grow local arbs

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Model Three: recognition without widely adopted international framework



- Judgments
- Based on domestic law
- With/without Reciprocity

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- **Convention of 30 June 2005 on Choice of Court Agreements (34 member states)**
- **Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (29 member states)**
 - 1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. **Recognition or enforcement may be refused only on the grounds specified in this Convention.**
 - 2. There shall be **no review of the merits** of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.
 - 3. **Recognition or enforcement may be refused on limited grounds** (e.g. no capacity of a party, undue service, fraud, public policy, etc.)

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4. Preliminary insights and lessons



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These conflict-of-law frameworks have significantly reduced the cost of international business transactions

These frameworks focus on

- Decentralization
- Vocabulary/semantics
- Procedure



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Take Away

Sustaining our planet's most critical raw materials will require global traceability anchored by a carefully-designed conflict-of-laws framework

Thank you and Questions

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