

16<sup>th</sup> February 2024

## **Comments on CFTC's Proposed Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts**

This response is based on the extensive knowledge of the undersigned indigenous and allied organisations of the severe negative impacts that indigenous peoples increasingly face as a result of the high demand for carbon credits in the voluntary carbon market. We urge the CFTC to take on board our recommendations in the final version of the guidance regarding the listing of voluntary carbon credit derivative contracts.

The below response addresses mainly two questions posed by the CFTC:

*“In addition to the VCC commodity characteristics identified in this proposed guidance, are there other characteristics informing the integrity of carbon credits that are relevant to the listing of VCC derivative contracts?”* and

*“Certain private sector and multilateral initiatives recognize the implementation by a crediting program of measures to help ensure that credited mitigation projects or activities meet or exceed best practices on social and environmental safeguards, as a characteristic that helps to inform the integrity of VCCs issued by the crediting program. When designing a VCC derivative contract, should a DCM consider whether a crediting program has implemented such measures?”*

### **Economically significant characteristics**

#### **a) Quality Standards**

1. The draft CFTC guidance states that: *“With respect to a physically-settled derivative contract, the Appendix C Guidance states that the terms and conditions of the contract ‘should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract.’”*
2. The list of economically significant characteristics in the draft guidance does not cover all characteristics of voluntary carbon credits (VCCs) that affect the overall integrity of these credits, and if not revised, would render the precise nature of the commodity that the contract is pricing ambiguous, which would make the contract susceptible to manipulation or price distortion.
3. Since the aim of the proposed CFTC guidance is precisely to support accurate pricing, help reduce the susceptibility of the contract to manipulation, and foster confidence in the contract, it is crucial for the final guidance to be revised by adopting a more holistic approach to integrity.
4. The aspect of integrity which is currently missing from the draft guidance is the assurance that carbon credits are not produced in violation of international human rights law.
5. In the past few years, it has increasingly been exposed – through media, civil society studies and academic research – that in addition to environmentally flawed credits, the voluntary carbon market is trading credits that are produced in violation of

human rights.<sup>1</sup> For example, one study looking at 61 media reports on carbon credit projects between 2018 and 2023 found that 44 (72%) of these presented evidence of carbon-offset projects causing harm to indigenous peoples or to local communities.<sup>2</sup>

6. The human rights violations reported in relation to the production of carbon credits include:
  - a. dispossession of indigenous communities from their customary lands and territories or other expropriation of indigenous peoples' property rights;<sup>3</sup>

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<sup>1</sup> Haya, B. K., Alford-Jones, K., Anderegg, W. R. L., Beymer-Farris, B., Blanchard, L., Bomfim, B., Chin, D., Evans, S., Hogan, M., Holm, J. A., McAfee, K., So, I. S., West, T. A. P., & Withey, L. (2023). *Quality assessment of REDD+ carbon credit projects*. Berkeley Carbon Trading Project. <https://gspp.berkeley.edu/research-and-impact/centers/cepp/projects/berkeley-carbon-trading-project/REDD+>; Carbon Brief, (2023) *Mapped: The impacts of carbon-offset projects around the world*, <https://interactive.carbonbrief.org/carbon-offsets-2023/mapped.html>; Patrick Greenfield, "Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis show" *The Guardian* (18 January 2023), <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe>; Nina Lakhani, "Revealed: top carbon offset projects may not cut planet-heating emissions", *The Guardian* (19 September 2023), <https://www.theguardian.com/environment/2023/sep/19/do-carbon-credit-reduce-emissions-greenhouse-gases>; Jones, J. P. & Lewis, S. L. (2023). Forest carbon offsets are failing. *Science*, 381(6660), 830–831. <https://doi.org/10.1126/science.adj6951>; West, T. A., Wunder, S., Sills, E. O., Börner, J., Rifai, S. W., Neidermeier, A. N., Frey, G. P. & Kontoleon, A. (2023). Action needed to make carbon offsets from forest conservation work for climate change mitigation. *Science*, 381(6660), 873–877. <https://doi.org/10.1126/science.ade3535>; Patrick Greenfield, "'Nowhere else to go': forest communities of Alto Mayo, Peru, at centre of offsetting row", *The Guardian* (18 January 2023), <https://www.theguardian.com/environment/2023/jan/18/forest-communities-alto-mayo-peru-carbon-offsetting-aoe>; Shane Shifflet & Ryan Dube, "Middlemen Snag Carbon-Credit Cash Aimed at Peruvian Amazon", *The Wall Street Journal* (29 December 2022), <https://www.wsj.com/world/americas/middlemen-snap-carbon-credit-cash-aimed-at-peruvian-amazon-11672321001>; Ed Davey, "In Peru, Kichwa tribe wants compensation for carbon credits", *The Associated Press*, <https://apnews.com/article/business-peru-forests-climate-and-environment-2c6cddb1707a12c31c14d9a226699068>; Ed Davey, "'Gone wrong': Doubts on carbon-credit program in Peru forest", *The Associated Press* (10 March 2023), <https://apnews.com/article/peru-cordillera-azul-carbon-credits-deforestation-d02b39c4f90896c29319f31afef11b2d>; Simon Counsell & Jutta Kill, "How Shell is Using Nature-Based Solutions to Continue Its Fossil Fuel Agenda", *Milieudefensie* (13 October 2022), <https://en.milieudefensie.nl/news/2486-f19b4682dbb1aaeeb1bff8680f75c70b-2.pdf>; Chris Lang, "Cordillera Azul National Park REDD project in Peru: Fake additionality, fake baseline, fake leakage, and failure to recognise the rights of Indigenous Peoples", *REDD-Monitor* (31 March 2023), <https://reddmonitor.substack.com/p/cordillera-azul-national-park-redd>; Centro de Latinoamericano de Investigación Periodística, "Carbono Gris" (25 de enero de 2023), <https://www.elclip.org/carbono-gris/>; Centro de Latinoamericano de Investigación Periodística, "Carbono Opaco" (6 de diciembre de 2023), <https://www.elclip.org/carbono-opaco/>; SOMO & Kenya Human Rights Commission, "Offsetting Human rights: Sexual abuse and harassment at the Kasigau Corridor REDD+ Project in Kenya" (November 2023), <https://www.somo.nl/offsetting-human-rights/>; Simon Counsell, "Blood Carbon: how a carbon offset scheme makes millions from Indigenous land in Northern Kenya", *Survival International* (March 2023), [https://assets.survivalinternational.org/documents/2466/Blood\\_Carbon\\_Report.pdf](https://assets.survivalinternational.org/documents/2466/Blood_Carbon_Report.pdf); Chris Lang, "Phantom carbon credits from Bosques Amazónicos' REDD project in Brazil nut concessions, Peru", *REDD-Monitor* (16 January 2024), <https://reddmonitor.substack.com/p/phantom-carbon-credits-from-bosques>.

<sup>2</sup> See Carbon Brief (2023) <https://interactive.carbonbrief.org/carbon-offsets-2023/mapped.html>.

<sup>3</sup> E.g. members of the Kichwa people in San Martín report being displaced, having their property destroyed, and facing legal threats for trying to use their lands, <https://www.forestpeoples.org/en/report/2022/conservation-without-indigenous-peoples-kichwa-san-martin-peru> (pp. 14-15), <https://apnews.com/article/business-peru-forests-climate-and-environment-2c6cddb1707a12c31c14d9a226699068>; large-scale evictions were reported in relation to the establishment of the Mt. Elgon National Park, later turned carbon credits project, in Uganda, [HYPERLINK "https://www.land-links.org/wp-content/uploads/2016/09/Land-Tenure-and-REDD.pdf"](https://www.land-links.org/wp-content/uploads/2016/09/Land-Tenure-and-REDD.pdf) <https://www.land-links.org/wp-content/uploads/2016/09/Land-Tenure-and-REDD.pdf> (p. 2)..

- b. failures on the part of state and non-state project or programme proponents to consult with, and obtain the free, prior and informed consent (FPIC) from, the customary land owners before the establishment of a project/programme.<sup>4</sup> This includes cases where project proponents have entered into agreements with individuals as opposed to the legitimate and collective decision-making institutions of indigenous peoples;<sup>5</sup>
  - c. indigenous communities being prevented from carrying out their traditional livelihood activities in their lands, such as rotational farming, hunting and livestock grazing;<sup>6</sup>
  - d. failures on the part of project and programme proponents to conduct adequate due diligence and to recognise and respect indigenous peoples' inherent rights over carbon stored in their territories under their customary laws and the resource dimension of their right to self-determination;
  - e. a deprivation of customary land-owners to a fair and equitable share of the proceeds from the sale of carbon credits generated from their lands as well as deprivation of related non-monetary benefits;<sup>7</sup>
  - f. systemic sexual harassment and abuse.<sup>8</sup>
7. Whether the production of the underlying VCC has caused – or is otherwise linked to – violations of human rights is economically significant to the buyer since such violations are regularly challenged by the rightsholders and allied organisations and could have both legal and reputational consequences (for the carbon project/programme and subsequently the buyers of credits from these). The failure to guarantee respect for indigenous peoples' land, resource, carbon, FPIC and livelihood rights, and to ensure fair and equitable benefit sharing, therefore not only

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<sup>4</sup> See e.g. examples from Guyana, <https://www.artredd.org/wp-content/uploads/2023/05/APA-Complaint-Letter-March-8-2023.pdf>; Peru, <https://apnews.com/article/business-peru-forests-climate-and-environment-2c6cddb1707a12c31c14d9a226699068>, <https://www.forestpeoples.org/en/report/2022/conservation-without-indigenous-peoples-kichwa-san-martin-peru> (pp. 14-18), and Kenya, [https://assets.survivalinternational.org/documents/2466/Blood\\_Carbon\\_Report.pdf?\\_gl=1\\*27bg4r\\*\\_ga\\_VBQT0CYZ12\\*MTcwNzg1NTU0MS4xLjEuMTcwNzg1NTYyOC4wLjAuMA](https://assets.survivalinternational.org/documents/2466/Blood_Carbon_Report.pdf?_gl=1*27bg4r*_ga_VBQT0CYZ12*MTcwNzg1NTU0MS4xLjEuMTcwNzg1NTYyOC4wLjAuMA).

<sup>5</sup> See the case of the community of Pira Parana (Colombia), <https://www.japantimes.co.jp/environment/2023/12/06/climate-change/amazon-community-carbon-credit/>; <https://www.elclip.org/bonos-carbono-yurupari/>; <https://recursos.elclip.org/carbono-gris/timeline-en/index.html>.

<sup>6</sup> See e.g. [https://www.forestpeoples.org/sites/default/files/documents/JA-519%20Traditional%20Kichwa%20forms%20of%20occupation%20and%20control%20-%20ENG%20v6\\_0.pdf](https://www.forestpeoples.org/sites/default/files/documents/JA-519%20Traditional%20Kichwa%20forms%20of%20occupation%20and%20control%20-%20ENG%20v6_0.pdf) (p. 14) and [https://assets.survivalinternational.org/documents/2466/Blood\\_Carbon\\_Report.pdf?\\_gl=1\\*27bg4r\\*\\_ga\\_VBQT0CYZ12\\*MTcwNzg1NTU0MS4xLjEuMTcwNzg1NTYyOC4wLjAuMA](https://assets.survivalinternational.org/documents/2466/Blood_Carbon_Report.pdf?_gl=1*27bg4r*_ga_VBQT0CYZ12*MTcwNzg1NTU0MS4xLjEuMTcwNzg1NTYyOC4wLjAuMA).

<sup>7</sup> Ed Davey, "In Peru, Kichwa tribe wants compensation for carbon credits", *The Associated Press*, <https://apnews.com/article/business-peru-forests-climate-and-environment-2c6cddb1707a12c31c14d9a226699068>; Miguel Valderrama Cevallos, "Conservation Without Indigenous Peoples. The Case of Kichwa Territories in Cordillera Escalera and Cordillera Azul in San Martin, Peru", *Forest Peoples Programme* (10 November 2022), pp. 15-18, [https://www.forestpeoples.org/sites/default/files/documents/JA-519%20Traditional%20Kichwa%20forms%20of%20occupation%20and%20control%20-%20ENG%20v6\\_0.pdf](https://www.forestpeoples.org/sites/default/files/documents/JA-519%20Traditional%20Kichwa%20forms%20of%20occupation%20and%20control%20-%20ENG%20v6_0.pdf).

<sup>8</sup> See reports from the Kasigua Corridor REDD+ project in Kenya, <https://www.somo.nl/systemic-sexual-abuse-at-celebrated-carbon-offset-project-in-kenya/>

undermines the quality of the carbon credits but renders them subject to legal challenge and constitutes a material risk for those who trade in them.

8. Indigenous communities and organisations are already challenging rights violations of carbon projects and programmes through national legal channels and non-judicial grievance mechanisms. Examples include the court case against the Peruvian state brought by the indigenous community of Puerto Franco,<sup>9</sup> the case brought by the Pirí Paraná Indigenous Council to the Colombian Constitutional Court,<sup>10</sup> and the complaint to the grievance mechanism of the carbon credit certification body Architecture for REDD+ Transactions (ART) filed by the Amerindian Peoples Association in Guyana.<sup>11</sup>
9. Indigenous peoples are also bringing carbon market-related rights violations to international human rights bodies, such as UN Special Procedures,<sup>12</sup> UN Treaty Bodies<sup>13</sup> and the Inter-American Commission on Human Rights (IACHR). The IACHR will be conducting a hearing on “Carbon credits and impacts on rights of indigenous peoples and local communities in Latin America and the Caribbean” on February 28<sup>th</sup> at 4pm in Washington DC.

#### **b) Inspection Provisions (Third-Party Validation and Verification) and Delivery Points**

10. The draft CFTC guidance states that “*the Commission believes that any inspection or certification procedures for verifying compliance with quality requirements or any other related delivery requirements for physically-settled VCC derivatives contracts should be specified in the contract's terms and conditions*” and that “*The Commission preliminarily believes that, when designing a VCC derivative contract, a DCM should consider whether the crediting program has up-to-date, robust and transparent validation and verification procedures, including whether those procedures contemplate validation and verification by a reputable, disinterested party or body*”.
11. These are important points. Taking into account the information provided above (paragraphs 5-9), and responding to CFTC’s question in paragraph 16 of the request for comments; the guidance must clarify that the importance of ensuring validation and verification through robust and transparent processes by disinterested and independent bodies relates to ensuring *social* as well as environmental integrity.

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<sup>9</sup> See <https://www.forestpeoples.org/en/press-release/kichwa-take-Peru-state-PNAZ-court>; Ed Davey “Indigenous community wins, then loses, path to reclaim ancestral rainforest land in Peru”, *The Associated Press* (14 June 2023), <https://apnews.com/article/peru-cordillera-azul-carbon-credits-rainforest-deforestation-f543b86a1afba26022bf5186b00e4a47>.

<sup>10</sup> See <https://climatecasechart.com/non-us-case/1pira-parana-indigenous-council-and-association-of-indigenous-traditional-authorities-of-river-pira-parana-acaipi-v-ministry-of-environment-and-sustainable-development-and-others/>.

<sup>11</sup> See <https://www.artredd.org/wp-content/uploads/2023/05/APA-Complaint-Letter-March-8-2023.pdf>.

<sup>12</sup> See e.g. <https://documents.un.org/doc/undoc/gen/g23/139/03/pdf/g2313903.pdf?token=WJ6qT78u3HXTPG7E1R&fe=true>

<sup>13</sup> See <https://www.forestpeoples.org/sites/default/files/documents/CERD%20urgent%20action%20request%20Kichwa%20PNCAZ%2015.7.22%20EN.pdf>

Such social integrity necessarily requires ensuring respect for indigenous peoples' rights under applicable international and national law.<sup>14</sup>

12. Since it is not assured that the validation and verification systems of existing carbon certification programs do indeed guarantee disinterested and independent processes, it is important for DCMs to review and consider the strength of the governance framework of any crediting program underlying the VCC, including how independence of validation, verification and treatment of grievances is ensured.
13. It is in the interest of buyers in the Designated Contract Markets (DCMs) that any potential human rights violations are discovered through the validation and verification process to avoid legal or other challenges to VCCs, and subsequent derivative products, after they are already listed on exchanges and registers.

### Recommendations for the CFTC:

To avoid rendering the quality, integrity and legality of the underlying VCCs open to challenge, the CFTC guidance should instruct DCMs to consider whether VCCs have been produced in line with international human rights law, including the applicable law protecting the rights of indigenous peoples.<sup>15</sup> This is particularly critical given the fact that legal frameworks in countries where the underlying VCCs are generated often fail to protect the rights of indigenous peoples in line with international human rights law;<sup>16</sup> lack clear frameworks on ownership of carbon rights or fail to recognise indigenous peoples' carbon rights,<sup>17</sup> and in general lack adequate regulation of carbon project developers and other private sector actors involved in the markets.<sup>18</sup> To mitigate the potential negative impacts of low quality carbon credit projects/programmes on indigenous peoples and communities as well as the subsequent risks to the buyers of low quality derivative contracts, the CFTC guidance should communicate a clear expectation to DCMs that they:

- consider whether the carbon crediting programme in question has strong social safeguard requirements (i.e. whether these requirements align with the rights of indigenous peoples protected in international law, including in UN human rights treaties and the UN Declaration on the Rights of Indigenous Peoples);
- check that the validation and verification process leading to the certification of the underlying VCCs confirmed that the VCCs were generated in line with the internationally protected rights of indigenous peoples and that the verification process itself ensured the effective participation of indigenous peoples claiming land rights in the area where the VCCs are generated;

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<sup>14</sup> Doyle, C and Laughlin, J (2023) *Respecting the Rights of Indigenous Peoples in Forest Carbon Markets*, <https://www.climateandforests-undp.org/news-and-stories/respecting-rights-indigenous-peoples-forest-carbon-markets>

<sup>15</sup> Including for example the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Covenant on Civil Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

<sup>16</sup> FPP (2022), *Preventing human rights violations associated with deforestation: why reliance on local laws is not enough*, [https://www.forestpeoples.org/sites/default/files/documents/FPP\\_Preventing%20v4.pdf](https://www.forestpeoples.org/sites/default/files/documents/FPP_Preventing%20v4.pdf)

<sup>17</sup> RRI (2021), *Status of Legal Recognition of Indigenous Peoples', Local Communities' and Afro-descendant Peoples' Rights to Carbon Stored in Tropical Lands and Forests*, <https://rightsandresources.org/publication/carbon-rights-brief/>

<sup>18</sup> See e.g. <https://www.reuters.com/article/idUSL8N34C5GA/>

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- check whether complaints about the certification of VCCs have been submitted either to the carbon credit programme grievance mechanism or to other national or international instances challenging the legality of the VCCs.

**Signed:**

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Forest Peoples Programme ([www.forestpeoples.org](http://www.forestpeoples.org))

Rainforest Foundation US (<https://rainforestfoundation.org/>)