

THE ROLE OF THE VOLUNTARY CARBON MARKET IN SCALING IMPACT GLOBALLY
- AN ANALYSIS OF RECENT TRENDS

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Abstract: *Interest in the Voluntary Carbon Market ('VCM') has grown considerably from participants ranging from private organizations to international corporations and regulatory bodies. Unprecedented anthropogenic climate change has led governments around the world towards action to limit global warming by setting net zero targets and taking steps towards carbon reduction, including through the purchase of carbon credits.*

In this paper, we provide a high-level overview of the different nature of carbon markets—compliance versus voluntary. After this differentiation, we focus our discussions on the VCM solely. In Part I, we set the scene and provide background of developments across the Global North and the Global South and the divergent nature thereof. Part II explores the evolving regulatory landscape and voluntary framework in respect of standard setters and new guidance that affects the VCM – again, here we see a divergence between different countries depending on the popularity of supply versus demand. In Part III, we turn our focus to judicial developments on claims that go the heart of the issue and question the integrity of the VCM – we analyse how claims of carbon neutrality may be subject to further disclosure and scrutiny including in respect of the nature of the offsets they rely on. Finally, we conclude that there is still a long way to go in formalising the VCM and scaling it for large-scale impact and provide insights into what can be done to harmonise developments globally.

I. SETTING THE SCENE: AN INTRODUCTION TO CARBON MARKETS

Unprecedented anthropogenic climate change has led governments around the world towards action to limit global warming by setting net zero targets and taking steps towards mitigating the effects of carbon emissions, including through the purchase of carbon credits or offsets representing emissions reductions.¹ Simultaneously, across the globe, corporations and investors are increasingly making voluntary commitments and pursuing efforts to *limit the temperature increase to 1.5 degree Celsius above pre-industrial levels*.² These developments have resulted in greater reliance on the voluntary carbon markets ('VCM').

A carbon market typically involves the 'trading of the right to emit greenhouse gases whereby the unit of account for these trades is a ton of carbon dioxide equivalent ('CO₂e').'³ Credits are assigned to projects or activities kickstarted by suppliers that prospectively reduce or remove greenhouse gas emissions in a real, additional, and verifiable fashion.⁴

Broadly, carbon markets can be classified into two types - compliance markets and voluntary markets. On the one hand, in compliance markets, entities transact in *carbon allowances*. A carbon allowance typically represents the right to emit one tonne of carbon dioxide equivalent ('CO₂e').⁵ The demand for carbon allowances in the compliance market is usually generated

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The term 'carbon offsets' implies that entities voluntarily buy credits to undertake the investment in emissions reduction or removal projects only to offset their hard-to-abate emissions. However, this connotation discourages investment in projects for a voluntary purpose aimed not merely at offsetting emissions, but taking proactive measures to fulfil climate obligations, with a people and planet-focused approach. Therefore, this paper refers to the instruments traded in the VCM as carbon credits, except where regulations or legislations refer to them as offsets.

² This is the central objective of the Paris Agreement, to hold global average temperature increase to "*well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels*." The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS. I-54113, art 4.1.

³ Henrique Schneider, 'The Role of Carbon Markets in the Paris Agreement: Mitigation and Development' in T Sequeira and L Reis (eds), *Climate Change and Global Development* (Springer Nature 2019) 120.

⁴ Silvia Favasuli and Vandana Sebastian, 'Voluntary carbon markets: how they work, how they're priced and who's involved' (*S & P Global Commodity Insights*, 10 June 2021) <<https://www.spglobal.com/commodityinsights/en/market-insights/blogs/energy-transition/061021-voluntary-carbon-markets-pricing-participants-trading-corsia-credits>> accessed 25 December 2023.

⁵ United Nations Development Programme, 'What are carbon markets and why are they important?' (*United Nations Development Programme Climate Promise*, 18 May 2022) <<https://climatepromise.undp.org/news-and->

by requirements imposed predominantly by national or regional regulators, often helmed by the government. The government identifies particular sectors based on the carbon intensity of their size and activities. The entities of such identified sectors act as participants in proposed compliance schemes. As part of the scheme, the government imposes a restriction on the amount of CO₂e the sector can emit for a particular period, usually a year, and the total emission allowance is then distributed amongst the various participants in the sector.⁶ The participants are required to comply with their individual emission allowances and disclose their emissions to the regulator at the end of the year. Emissions Trading Schemes (ETS) and other similar Cap and Trade Schemes are examples of such schemes within the compliance market. The price of such allowances in markets like the ETS depends on *inter alia* technology costs and other macro factors.⁷

On the other hand, the VCM has grown largely due to the demand for carbon credits generated by organisations across sectors and industries that voluntarily desire to reduce their emissions and enter into voluntary commitments to do so in the absence of regulatory mandates.⁸ The undertaking of such commitments without government-helmed regulatory requirements is what differentiates the VCM from the compliance market. Occasionally however, carbon credits may also be sought in the VCM by entities seeking to meet their compliance requirements.⁹ Similar to any other market mechanism, transactions in the VCM ebb and flow based on the demand for and the supply of carbon credits. It is pertinent to note that the demand

stories/what-are-carbon-markets-and-why-are-they-important#:~:text=In%20a%20nutshell%2C%20carbon%20markets,or%20reduce%20greenhouse%20gas%20emissions> accessed 11 July 2023.

⁶ Nishtha Singh and Vaibhav Chaturvedi, 'Understanding Carbon Markets: Prospects for India and Stakeholder Perspectives' (*Council on Energy, Environment and Water*, February 2023) 5 <<https://www.ceew.in/sites/default/files/carbon-credit-markets-in-india-prospects-stakeholder-perspectives.pdf>> accessed 6 July 2023.

⁷ International Energy Agency, 'Implementing Effective Emissions Trading Systems: Lessons from International Experiences' (*IEA ETS in Industry*, July 2020) <<https://www.iea.org/reports/implementing-effective-emissions-trading-systems/ets-in-industry>> accessed 6 July 2023. The terms 'Global South' and 'Global North' are frequently used terms to classify countries, especially in the climate change and climate action discourse. As categories, 'Global South' has been used to refer to decolonised nations while 'Global North' is used to refer to former colonial powers. Broadly, this has translated into 'Global South' and 'Global North' being terms used to represent 'developing' nations in Asia, Africa, and Latin America and 'developed' nations of Europe and North America. While the authors acknowledge the varied implications of using the aforementioned terms, the two are nevertheless useful terms to be deployed to analyse the activity in the demand and supply spheres of the VCM; Ifeoluwa Adedeji, 'The Vocabulary of a Development Worldview' (*LSE Blogs*, 8 December 2016) <<https://blogs.lse.ac.uk/africaatlse/2016/12/08/the-vocabulary-of-a-development-worldview/>> accessed 10 July 2023.

⁸ Silvia Favasuli and Vandana Sebastian, 'Voluntary carbon markets: how they work, how they're priced and who's involved' (*S & P Global Commodity Insights*, 10 June 2021) <<https://www.spglobal.com/commodityinsights/en/market-insights/blogs/energy-transition/061021-voluntary-carbon-markets-pricing-participants-trading-corsia-credits>> accessed 11 July 2023.

⁹ Singh and Chaturvedi (n 6) 8.

for carbon credits is largely generated due to voluntary commitments made by corporations located pre-dominantly in the Global North, with the corresponding supply being generated by the development of projects in the Global South.¹⁰ Further, the price of credits in the VCM is determined by multiple factors, including the nature of the project, the nature and type of credits generated (avoidance or reduction-based or removal-based), geographical features, and any co-benefits generated by the credits.¹¹

The VCM has grown exponentially, expanding to four times its 2020 value - reaching a market size of \$2 billion in 2021, and poised to be valued somewhere between \$10 billion and \$40 billion by 2030.¹² The *laissez-faire* nature of the VCM across jurisdictions has led to an ecosystem where third parties undertake verification and engage in standard-setting activities to bring integrity to the credits generated.¹³ This paper focuses on the VCM and so any discussion on ‘carbon markets’ or ‘carbon credits/offsets’ should be read in that light unless stated otherwise.

In **Part II**, we discuss how the growing reliance on the VCM is leading to increasing regulatory scrutiny and consequentially, to regulatory and voluntary requirements across different jurisdictions; the divergence of these developments between the United States of America (‘US’), the United Kingdom (‘UK’) and Europe (for the purposes of this paper, the “Global North”) and (broadly) Asia, Africa, and Latin America (for the purposes of this paper, the “Global South”); and some key takeaways, including the need for this divergence on the one hand, but emphasis on broad-scale convergence on the other.

To gain a holistic understanding of these developments, in **Part III**, we examine judicial developments and decisions handed down by courts and regulatory bodies both in the Global North and the Global South that are shaping trends on carbon and climate-related litigation.

¹⁰ International Emissions Trading Association (IETA) and International Carbon Partnership (ICP), ‘Status and Trends for Compliance and Voluntary Markets in Latin America’ (*International Carbon Action Partnership*, 11 October 2021) <https://icapcarbonaction.com/system/files/document/201025_idb_compliancevoluntary_paper-rz.pdf> accessed 5 July 2023.

¹¹ Favasuli and Sebastian (n 4).

¹² Anders Porsborg-Smith, Jesper Nielsen, Bayo Owolabi, and Carl Clayton, ‘The Voluntary Carbon Market is Thriving’ (*Boston Consultancy Group*, 19 January 2023) <<https://www.bcg.com/publications/2023/why-the-voluntary-carbon-market-is-thriving>> accessed 5 July 2023.

¹³ Nicole Franki, ‘Regulation of the Voluntary Carbon Offset Market: Shifting the Burden of Climate Change Mitigation from Individual to Collective Action’ (2022) 48(1) *Columbia Journal of Environmental Law* 177, 181.

While the disputes discussed have been adjudicated with reference to pre-existing regulations, they continue to remain relevant as judicial precedents in case of future litigation concerning the new regulatory developments across jurisdictions. Finally, we aim to draw emphasis on how jurisdictions need to work together to prioritise people and the planet, and the need for harmonisation of priorities. As we drafted this paper, we did not find many secondary sources or academic sources to merit an overview of the literature review. Rather, the discussion in this paper is guided by our interpretation of primary sources including legislation and case law and we aim to develop literature in this area by a multi-jurisdictional perspective when analysing the VCM space. Where any secondary materials are relied upon, they have been appropriately cited.

II. REGULATORY AND VOLUNTARY DEVELOPMENTS IMPACTING THE VCM: AN EXPLORATION OF THE GLOBAL NORTH VERSUS THE GLOBAL SOUTH

Before we delve into the various developments - both regulatory and voluntary - impacting the VCM across the Global North and the Global South, it is relevant to set out the context and the need for these developments.

There exists a significant concern regarding the integrity and transparency of the transactions in the VCM, raising legal and reputational risks.¹⁴ The lack of regulation means that various VCM participants, including investors, project developers, validation and verification bodies, and standard setters may be incentivised to allocate and market an inflated number of carbon credits for a project, without inviting regulatory scrutiny.¹⁵ For instance, a well-documented phenomenon has been that of greenwashing, wherein VCM participants have been found to have made false or misleading environmental claims that are not substantiated by verification or evidence.¹⁶ This is further exacerbated by the absence of a globally agreed carbon accounting

¹⁴ Vittoria Battocletti, Luca Enriques, and Alessandro Romano, 'The Voluntary Carbon Market: Market Failures and Policy Implications' (2023) European Corporate Governance Institute Working Paper Series in Law 1, 3 <<https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/can-voluntary-carbon-markets-be-fixed>> accessed 10 July 2023. One may also read the recent reports as published in the Guardian and most recently by Verra with respect to certain voluntary projects and the veracity of the carbon credits generated. However, these sources are not cited herein as they are not academic in nature.

¹⁵ Vittoria Battocletti, Luca Enriques, and Alessandro Romano, 'The Voluntary Carbon Markt: Market Failures and Policy Implications' (2023) European Corporate Governance Institute Working Paper Series in Law 1, 3.

¹⁶ Lucia Gatti, Peter Seele and Lars Rademacher, 'Grey zone in – greenwash out. A review of greenwashing research and implications for the voluntary-mandatory transition of CSR' (2019) 4(1) International Journal of Corporate Social Responsibility 1. Please note that greenwashing, for the purposes of this paper, encompasses the

standard, a lack of uniform verification and regulatory oversight, and conflicts of interest between various participants.¹⁷ These lacunae have not gone unnoticed, and regulatory scrutiny over the VCM is resultantly increasing with promising public and private sector initiatives proactively addressing these challenges.

Our discussion below sheds light on these regulatory developments and the influences within each. We start with a review of the Global North because demand (from the Global North) is leading to increased supply (from the Global South), and so, developments in the Global South aim to cater to increasing disclosure requirements in the Global North.

A. Regulatory developments in the Global North

In the *US*, while the bulk of existing regulatory measures focus on obligations of actors engaged in the demand side of the VCM, a slew of recent regulatory measures has increased the oversight of the supply side of the VCM, and the process of the sale of credits. Carbon credits are typically considered to be “commodities”¹⁸ and the Commodity Futures Trading Commission (‘**CFTC**’) has varying degrees of regulatory and enforcement authority over primary and secondary transactions of carbon credits in the VCM.¹⁹ In March 2021, the CFTC established its Climate Risk Unit, with its stated objective being to “*focus on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy.*”²⁰ In June 2021, the CFTC’s Commissioner emphasised the imperative need for the CFTC to keep abreast of developments in primary and secondary carbon markets to ensure that trading entities satisfy their obligations in such transactions.²¹ In May 2022, the CFTC’s Chairman further reiterated the potential regulatory role over the VCM that the CFTC could play.²² A significant step taken by the CFTC to regulate the VCM has been its issuance

selective disclosure (or non-disclosure) of information about a company’s environmental activities or impacts, that aims to obfuscate the likely pernicious impacts of corporations’ actions on the climate.

¹⁷ *ibid.*

¹⁸ The Commodities and Exchange Act 1936, 7 USC ch 1, s 2(a), s4(b).

¹⁹ The CFTC maintains broad fraud and manipulation authority under the CEA (7 USC §§ 6c(a), 9, 12(a)(5) and 15) and Commission Regulation § 180.1, which extends to any contract of sale of any commodity in interstate commerce.

²⁰ Commodity Futures Trading Commission, ‘CFTC Acting Chairman Behnam Establishes New Climate Risk Unit’ (*Commodity Futures Trading Commission*, 17 March 2021) <<https://www.cftc.gov/PressRoom/PressReleases/8368-21> > accessed 20 June 2023.

²¹ Commodity Futures Trading Commission, ‘Opening Statement of Commissioner Daniel M. Berkovitz before the Energy and Environmental Markets Advisory Committee’ (*Commodity Futures Trading Commission*, 3 June 2021) <<https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement060321> > accessed 6 July 2023.

²² Christopher Whittall, ‘Regulators Can Help Fix Carbon Offsets’ Credibility Problem – ISDA AGM’ (*International Financing Review*, 11 May 2022) <<https://www.ifre.com/story/3362021/regulators-can-help-fix-carbon-offsets-credibility-problem-isdagm-7xjxmpj1b2> > accessed 20 June 2023.

of the Request for Information on voluntary carbon markets in June 2022, in order to ensure the integrity of all transactions falling within the Commodities and Exchange Act’s purview.²³

Recently, the CFTC announced the creation of a new Environmental Fraud Task Force to investigate carbon credit quality on the supply side of the VCM, as well as the claimed environmental benefits made on the demand side by purchasers of carbon credits.²⁴ This followed an alert published by the CFTC’s Whistleblower Office in the Division of Enforcement notifying the public on how to identify and report potential Commodity Exchange Act violations connected to fraud or manipulation in the VCM.²⁵

In addition to the CFTC’s efforts, the Federal Trade Commission’s Green Guides offer another source of regulatory guidance pertaining to the advertisement of environmental practices undertaken by businesses, including in relation to carbon offsets.²⁶ Forthcoming developments include updates to the Green Guides related to the use of voluntary carbon offsets,²⁷ and the Securities and Exchange Commission’s (‘SEC’) highly anticipated Climate Disclosure Rule, which is expected to include a number of disclosure requirements around the use of carbon credits especially by listed companies.²⁸ Anticipated to be published early next year, the Rule

²³ Commodity Futures Trading Commission, ‘CFTC Releases Request for Information on Climate-Related Financial Risk’ Committee’ (*Commodity Futures Trading Commission*, 3 June 2021) <<https://www.cftc.gov/PressRoom/PressReleases/8541-22> > accessed 10 July 2023.

²⁴ Commodity Futures Trading Commission, ‘CFTC Division of Enforcement Creates Two New Taskforces’ (*Commodity Futures Trading Commission*, 29 June 2023) <<https://www.cftc.gov/PressRoom/PressReleases/8736-23#:~:text=Environmental%20Fraud%20Task%20Force%3A%20This,change%20and%20other%20environmental%20risks.> > accessed 10 July 2023.

²⁵ Commodity Futures Trading Commission, ‘CFTC Whistleblower Alert: Blow the Whistle on Fraud or Market Manipulation in the Carbon Markets’ (*CFTC Whistleblower Office*, 20 June 2023) <<https://www.whistleblower.gov/sites/whistleblower/files/2023-06/06.20.23%20Carbon%20Markets%20WBO%20Alert.pdf> > accessed 10 July 2023. Potential acts of fraud and manipulation in the VCM identified by the Whistleblower Office include manipulative trading, fraud related to ‘ghost-credits’ listed on registries, double counting of credits, and the potential manipulation of tokenised carbon markets. More recently, in December 2023, the CFTC issued Proposed Guidance Regarding the Listing of Voluntary Carbon Derivatives and has invited comments concerning the same; Commodity Futures Trading Commission, ‘Commission Guidance Regarding the Listing of Voluntary carbon Credit Derivative Contracts; Request for Comment’ (*Federal Register*, 27 December 2023) <<https://www.federalregister.gov/documents/2023/12/27/2023-28532/commission-guidance-regarding-the-listing-of-voluntary-carbon-credit-derivative-contracts-request>> accessed 19 December 2023.

²⁶ Federal Trade Commission Guides for the Use of Environmental Marketing Claims 2012, 16 CFR, s 260. The Green Guides use the term ‘carbon offsets.’

²⁷ *ibid*, s 260.5.

²⁸ US Securities and Exchange Commission, ‘SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors’ (US Securities and Exchange Commission, 21 March 2022) <<https://www.sec.gov/news/press-release/2022-46>> accessed 9 July 2023; US Securities and Exchange Commission, ‘The Enhancement and Standardization of Climate-Related Disclosures for Investors’ (US Securities and Exchange Commission, 21 March 2022) <<https://www.sec.gov/files/rules/proposed/2022/33-11042.pdf> > accessed 9 July 2023.

will also carry with it an additional disclosure burden on the quality of credits, nature of underlying projects, amount of emissions reductions generated, and permanence of these reductions.²⁹

To reiterate, the principles embodied in these provisions, requiring the proper accounting and disclosure of emissions reduction or removal for an accurate allocation and marketing of carbon credits for a project, are essentially targeting the need for greater transparency and integrity in the sale of credits in the VCM.

Another US regulatory measure that has an impact on the VCM includes the recently enacted Inflation Reduction Act ('IRA'), the introduction of which is likely to boost the trading of carbon credits including in the VCM. The IRA amends Section 45Q of the Internal Revenue Code (Credit for carbon oxide sequestration), increasing the tax credit value for carbon capture, utilisation, and storage technologies, giving rise to greater incentives to use and enhance this technology.³⁰ We can expect a greater allocation, especially of industrial/removal-based carbon credits, with businesses expected to adopt such technologies for their projects due to the corollary tax benefits.

In addition to growing regulation at the federal level, it is notable that the state of California in the US has actively legislated and brought into force state laws to oversee the actions of different actors and processes in the VCM.³¹ Recently, the Californian legislature proposed an Assembly Bill, the Voluntary Carbon Market Disclosures Act ('VCMDBA,' AB 1305) and a State Bill, the Voluntary Carbon Offsets Business Regulation Act ('VCOBRA,' SB 390). While the Governor Gavin Newsom brought the VCMDBA into force,³² he vetoed the VCOBRA.³³

²⁹ US Securities and Exchange Commission, 'US SEC Climate Disclosure Rule' <<https://www.sec.gov/securities-topics/climate-esg>> 25 October 2023.

³⁰ The Inflation Reduction Act 2022, 26 USC, s 45Q.

³¹ In fact, the regulation of VCMs is in line with California's increased focus on GHG emissions. Two other state bills, the Climate Corporate Data Accountability Act (CCDA, SB 253), and the Climate Related Financial Risk Act (CFRA, SB 261), albeit not pertaining to VCMs and credits, but concerning GHG emissions, their risks and reporting, were also proposed. On 7 October 2023, Californian Governor Gavin Newsom signed into law the VCMDBA, CCDA, and CFRA, while vetoing the VCOBRA. Dharna Noor, 'California to require big firms to reveal carbon emissions in first law of its kind' (*The Guardian*, 9 October 2023) <<https://www.theguardian.com/us-news/2023/oct/09/california-carbon-emissions-law>> accessed 30 October 2023.

³² The Voluntary Carbon Market Disclosures Act, ch 365, s 44475; The Voluntary Carbon Market Disclosures Act, ch 365, s 44475.1-3.

³³ Office of the Governor of California (7 October 2023) <<https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-390-Veto.pdf>> accessed 30 October 2023.

The VCMDA became effective on 1 January 2024. It aims to provide a comprehensive disclosure framework to govern actors on the demand and supply side of VCMs and amends the Californian Health and Safety Code's 26th Division.³⁴ On the supply side, entities that sell or market credits must annually disclose on their websites particulars regarding the project that generated the credits. These particulars pertain to the disclosure of details about the project itself, including its type, location, and duration.³⁵ They further pertain to the disclosure of the processes involved in estimating the emission reduction in assigning the number of credits to the project,³⁶ which may be used to verify those claims.³⁷ On the demand side, entities that purchase or use credits are also required to annually disclose on their websites information regarding the acquisition of those credits.³⁸ This entails the publication of details concerning the entity that sold them the credits, the transaction specifics (for instance, the registry used), and the credits and their parent project (calculated emissions reduction claims and whether the same has been verified by a third party). The VCMDA also regulates entities that make emissions reduction claims concerning themselves, their products, or a related entity.³⁹ These regulations address general greenwashing concerns, and are not necessarily linked to claims involving carbon credits. Broadly, they require entities to provide the basis for their claims, and update them periodically.

This review of American regulatory measures reveals the following. Predominantly, federal oversight mechanisms focus on disclosure requirements to ensure transparency on the demand side of the VCM. This is the case with the Green Guides, which seek to combat greenwashing claims, not just in the VCM context. The SEC's proposed disclosure rule for listed companies regarding the use of credits is also evidence of the same. However, recent measures at the federal and state levels⁴⁰ have endeavoured to foster integrity and transparency on the supply

³⁴ The Voluntary Carbon Market Disclosures Act, ch 365, s 44475.

³⁵ The Voluntary Carbon Market Disclosures Act, ch 365, s 44475 (a).

³⁶ The Voluntary Carbon Market Disclosures Act, ch 365, s 44475(c).

³⁷ *ibid*, ch 365, s 44475(b).

³⁸ *ibid*, ch 365, s 44475.1.

³⁹ *ibid*, ch 365, s 44475.2.

⁴⁰ Further, with the Californian example, other states are also following suit. California and the states of Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, Vermont became signatories to the mandatory Regional Greenhouse Gas Initiative and have their own carbon offset projects which also capture laws in relation to voluntary carbon credits. For instance, the Vermont CO2 Budget Trading Regulations provide guidance on 'Projects that Have Been Awarded Credits by a Voluntary Greenhouse Gas Reduction Program.' Details of the same can be accessed at New York State Energy Research and Development Authority, '21 NYCRR Part 507' (NYSERDA) <<https://www.nyserda.ny.gov/About/Funding/Regional-Greenhouse-Gas-Initiative/21-NYCRR-Part-507>> accessed 7 December 2023 and Department of Environmental Conservation, 'Vermont CO2 Budget Trading Program Regulations' (An Official Vermont Government Website) <<https://dec.vermont.gov/air-quality/laws#CO2>> accessed 7 December 2023.

side of credit generation as well. The CFTC’s Environmental Fraud Task Force to investigate carbon credit quality on the supply side and VCMDA’s mandate in California for entities that sell or market credits to disclose on their websites particulars regarding the project that generated the credits are both indicative of the same.

Across the pond in *Europe*, in November 2022, the European Union (‘EU’) proposed a voluntary framework for the certification of high-quality removals-based carbon credits.⁴¹ Further, in March 2023, another framework, the Green Claim Directive, was adopted by the European Commission and is currently being debated before the European Parliament. The Directive is aimed at ensuring the veracity of environmental claims made by various entities and increasing consumer awareness pertaining to the environmental effects of their consumption of a company’s products by fostering greater transparency in the environment-related claims made by that company. In this regard, the Directive cautions against the use of potentially misleading terminology including “carbon neutral” and “net zero.”⁴² The Directive seeks to bar companies from relying solely on their purchase of carbon credits and participation in the VCM to make declarations on carbon neutrality and sustainability practices.⁴³

While appreciating this comprehensive framework in the EU, many have emphasised the need for clarification regarding the legal status of carbon credits traded in the VCM. Presently in the EU, carbon credits are widely considered to be “financial instruments” - and fall within the purview of securities law.⁴⁴ Whether financial market regulators may further exercise oversight over carbon credits remains unclear, without a clarification on their legal status.

In the *UK*, although no regulation exists to track the development of the VCM, to support the scaling of the VCM to meet the growing demand for carbon credits, the London Stock Exchange inaugurated its VCM rules by introducing the Voluntary Carbon Market Designation.⁴⁵ The designation is accorded to those funds or projects undertaken by companies that help reduce or remove emissions, to help them attract investment for the carbon credits

⁴¹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establish a Union certification framework for carbon removals (Green Claims Directive)’ COM (2022) 672 final.

⁴² European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims’ COM (2023) 166 final.

⁴³ *ibid.*

⁴⁴ The International Organization of Securities Commissions, ‘Voluntary Carbon Markets Discussion Paper’ (*International Organization of Securities Commissions*, November 2022) <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD718.pdf>> accessed 6 July 2023.

⁴⁵ London Stock Exchange, ‘London Stock Exchange’s Voluntary Carbon Market’ (*London Stock Exchange Voluntary Carbon Market*, October 2022) <<https://www.londonstockexchange.com/raise-finance/equity/voluntary-carbon-market>> accessed 6 July 2023.

issued. The funds or corporations can issue and sell carbon credits on the platform as dividend-in-specie, with the designation attracting prospective buyers. To ensure that the environmental benefits claimed are achieved by the project, the funds and corporations are required to adhere to the Green Revenue Classification System of the FTSE Russell (a subsidiary of the London Stock Exchange).⁴⁶ Buyers are then subject to existing regulatory requirements, and the rules stipulate that they disclose their use of the credits.⁴⁷ This complements the proposed disclosure framework issued under the Transition Plan Taskforce.⁴⁸ Further, in 2023, the UK government published its Green Finance Strategy Report, stating its intention to hold consultations with various stakeholders to foster high integrity within the VCM.⁴⁹ Additionally, in June 2023, the UK Advertising Standards Authority published the updated guidance helping advertisers interpret U.K. rules on environmental-related advertising.⁵⁰ The guidance advises advertisers to avoid making unqualified “carbon neutral” or “net zero” claims, and specifically, where claims are based on offsetting, that they comply with applicable standards of evidence for objective claims and provide information about the offsetting scheme used.⁵¹

It is discernible that the focus in Europe remains on transparency on the demand side of the VCM, with the Directive aiming to ensure the veracity of ‘carbon neutral’ claims by credit purchasers. In the UK, the Designation for projects and funds responsible for reducing emissions caters to the need for credibility that investors seek before purchasing the credits. Much like the US and Europe, the entities on the demand side of the VCM in the UK are also subject to transparency regulations for their purchase and use of the credits.

Therefore, on the basis of the above high-level overview of regulatory developments across the Global North, we can conclude that regulation is increasingly (a) in the form of disclosure requirements aimed at tackling greenwashing⁵² risk and (b) focused primarily on the

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ UK Transition Plan Taskforce, ‘The Transition Plan Taskforce Disclosure Framework’ (*Transition Plan Taskforce*, November 2022) <<https://transitiontaskforce.net/wp-content/uploads/2022/11/TPT-Disclosure-Framework.pdf>> accessed 6 July 2023.

⁴⁹ H.M. Government, ‘Mobilising Green Investment: 2023 Green Finance Strategy’ (*Open Government Licence*, March 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149690/mobilising-green-investment-2023-green-finance-strategy.pdf> accessed 5 July 2023.

⁵⁰ Committee of Advertising Practice, ‘The environment: misleading claims and social responsibility in advertising: Advertising Guidance (non-broadcast and broadcast)’ (*Advertising Standards Authority UK*, June 2023) <<https://www.asa.org.uk/resource/advertising-guidance-misleading-environmental-claims-and-social-responsibility.html>> accessed 5 December 2023.

⁵¹ *ibid.*

⁵² Gatti, Seele, and Rademacher (n 13).

demand/buy-side of carbon credits, with sell-side requirements only being gradually introduced. This has led to increased stringency requirements on the supply side in the Global South, which we examine in further detail below, to be able to keep up with and meet the requirements of the disclosure landscape. Increased voluntary commitments, scope for investment in sustainable products, and demand for lower carbon emitting products are broadly the reasons that can be ascribed to these developments. The VCM is therefore evolving into a more complex regulatory framework with an increased need for quality assurance and integrity.

B. Regulatory developments in the Global South

Before we proceed with the discussion on regulatory developments in the *Global South*, it is pertinent that we reiterate that the Global South is responsible for the generation of the majority of credits traded in the VCM.⁵³

India is a major player in the VCM and the third-largest generator of carbon credits, supplying nearly 20% of the world's voluntary credits.⁵⁴ Despite its predominant role in the VCM, the Indian government has only recently attempted to introduce regulations and proposals for the same, that seek to address activity in the VCM. The Bureau of Energy Efficiency, part of the Ministry of Power, announced that, pursuant to the Energy Conservation (Amendment) Act of 2022,⁵⁵ the government would release a framework for carbon trading in India, relevant to both the compliance market and the VCM. A draft blueprint was subsequently published (Draft Carbon Credit Trading Scheme), with Phases 1 and 2 envisaging an increase in the demand and supply within the VCM in the short and medium term.⁵⁶ However, Phase 3 contemplates a long-term shift to the compliance mechanism,⁵⁷ leading to questions about the relevance of the framework to the longer-term growth of the VCM, and as some may argue, the relevance of

⁵³ IETA and ICP (n 8).

⁵⁴ Ruchira Singh, 'India may announce details of national carbon market scheme in June: official' (*S&P Global Commodity Insights*, 17 March 2023) <<https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/energy-transition/031723-india-may-announce-details-of-national-carbon-market-scheme-in-june-official#:~:text=India%20is%20a%20significant%20exporter,a%202070%20net%2Dzero%20target>> accessed 7 July 2023.

⁵⁵ The Energy Conservation (Amendment) Act 2022.

⁵⁶ Bureau of Energy Efficiency: Ministry of Power, 'National Carbon Market: Draft Blueprint for Stakeholder Consultation' 1, 16-18 (*Bureau of Energy Efficiency*, 2022) <<https://beeindia.gov.in/sites/default/files/publications/files/NCM%20Final.pdf> > accessed 10 July 2023.

⁵⁷ *ibid* 20-21.

the VCM to the Indian market. In fact, the final CCTS published by the Ministry of Power in June 2023,⁵⁸ and amended in December 2023, did not mention the VCM.⁵⁹

Simultaneously, another Ministry, the Ministry of Environment, Forest, and Climate Change through a gazette notification, proposed the Draft Green Credit Programme Implementation Rules, 2023.⁶⁰ This proposal envisages a ‘Green Credit Programme’ designed along the lines of a VCM, where credits generated from different sectors are to be traded on a domestic platform.⁶¹

With multiple Indian projects already issuing several carbon credits, India should use this opportunity to leverage its presence in the VCM and the government should undertake proactive measures to attract private investment. It is also relevant to note that in the current context and without further regulatory guidance, unlike in the US where carbon credits are considered to be “commodities”, or in Europe - where they are considered to be “financial instruments,” carbon credits in India are typically considered to be “intangible instruments”, likely to be subject to Goods and Services Tax.⁶² This growing disparity on the legal status of credits themselves, and differences in views between the demand side and supply side will become increasingly important with an increase in litigation.

Leading the way on what a potentially harmonised future with multi-jurisdictional VCM transactions may look like is the *African Carbon Markets Initiative* (ACMI) - launched at COP27, to promote the production of high quality, credible carbon credits in Africa.⁶³ The VCM in Africa is rapidly growing, at a pace faster than the global markets, with the demand for carbon credits largely being driven by prominent international corporations.⁶⁴ The ACMI

⁵⁸ Carbon Credit Trading Scheme 2023 (28 June 2023, Ministry of Power Notification S.O. 2825(E)).

⁵⁹ Carbon Credit Trading Scheme 2023 (19 December 2023, Ministry of Power Notification S.O. 5369(E)).

⁶⁰ Green Credit Programme 2023 (26 June 2023, Ministry of Environment, Forest and Climate Change Notification S.O. 2779(E)).

⁶¹ *ibid.*

⁶² Pricewaterhouse Coopers, ‘IFRS Financial reporting considerations for entities participating in the voluntary carbon market’ (*PwC Viewpoint- Global*, 3 March 2023) <https://viewpoint.pwc.com/dt/gx/en/pwc/in_depths/in_depths_INT/in_depths_INT/ifrs-financial-reporting-considerations.html#pwc_topic> accessed 6 July 2023; Notification No 256/CDVAT/2009/43 dated 13.01.2010 issued by the Commissioner, Trade and Taxes, Delhi VAT under section 85 of the Delhi VAT 2004.

⁶³ United Nations Framework Convention on Climate Change, ‘Africa Carbon Markets Initiative launched to dramatically expand participation in voluntary carbon market’ (*UNFCCC Race to Zero*, 8 November 2022) <<https://climatechampions.unfccc.int/africa-carbon-markets-initiative/>> accessed 5 July 2023.

⁶⁴ Africa Carbon Markets Initiative, ‘Africa Carbon Markets Initiative (ACMI): Roadmap Report: Harnessing carbon markets for Africa’ (*Africa Carbon Markets Initiative*, November 2022) <https://www.seforall.org/system/files/2022-11/acmi_roadmap_report_2022.pdf> accessed 5 July 2023.

is engaging with multiple stakeholders, including carbon credit developers, buyers, and financiers towards the development of a robust VCM in Africa.⁶⁵

The ACMI identified the need to clarify the regulatory framework to scale up the VCM. In its report, it highlighted how a significant obstacle to generating more carbon credits faced by project developers was the uncertainty surrounding regulations.⁶⁶ The regulations are complex and vary across different countries, especially pertaining to the ownership of the credits and the rights to the land. The ACMI's action plan seeks to address these regulatory challenges for the development of the VCM. The ACMI's report proposes multiple guidelines for the VCM.⁶⁷ The guidelines, inter alia, cover the following: concretising ownership of carbon credits and market rights from the revenue generated from the credits for various actors,⁶⁸ land use regulatory requirements for project developers and associated communities,⁶⁹ the fiscal policies applicable to carbon credit transactions (for instance, relevant exemptions),⁷⁰ and the need for a regulatory approach that aligns with global standards as well.⁷¹

Unlike most other regulatory frameworks, the action plan incorporates guidelines that account for transparency and integrity concerning emission reduction and removal claims undertaken by all actors involved in the VCM (proposed rule *e*). These regulations are also unique in that they not only address region specific problems (proposed rules *a* and *d*), but strive to adopt an approach that aligns with global requirements as well (proposed rule *f*).

⁶⁵ *ibid* 13.

⁶⁶ *ibid* 7.

⁶⁷ *ibid* 31. The guidelines are as follows. “(a) *Carbon market rights and commercialization of carbon credits: Guidelines to define the ownership model for carbon credits, including the rights to revenues from commercialization of carbon credits for project developers, investors, local communities, and regional governments.* (b) *Registration of carbon credits: Adherence to international carbon credit integrity and certification standards for the registration of carbon credits.* (c) *Emissions reporting: Requirements for mandatory reporting and transparency for actors in the carbon market ecosystem.* (d) *Land regulatory requirements: Clarification of land use regulation for developers and communities operating in nature-based projects.* (e) *Fiscal policy: The fiscal regime that is applicable to carbon credit transactions (e.g., exemptions applicable to carbon credit transactions).* (f) *Article 6: Clarification of relevant Article 6 accounting requirements, safeguarding against double-counting in carbon credit trading between countries and clarifying VCM activities eligible for corresponding adjustments within the country’s jurisdiction For example, Mexico updated its National Law for Climate Change to establish the basis for a mechanism allowing the commercialization of carbon credits: this (i) established the right to generate carbon credits, (ii) clarified the mechanisms for transactions of carbon credits, (iii) established the requirements for transparency, reporting and verification of CO₂ emissions”*

⁶⁸ *ibid* [Proposed rule (a)].

⁶⁹ *ibid* [Proposed rule (d)].

⁷⁰ *ibid* [Proposed rule (e)].

⁷¹ *ibid* [Proposed rule (f)].

In March 2023, Kenya published its draft Climate Change (Amendment) Bill 2023, seeking to implement regulations with respect to carbon markets.⁷² The draft creates a national registry together with sector-specific registries to record carbon credit transactions. There is uncertainty with respect to the flow of credits and a draft of the regulations even seeks to nationalise all carbon credits as property of the Government of Kenya, although we expect this to fall away due to incongruency with Kenya’s constitutional documents and bilateral investment treaties. As envisaged, the draft mandates a minimum of 25% of “aggregate earnings” to be deposited with the consolidated fund which shall be set up to work towards fulfilling Kenya’ sustainable development goals. This figure varies based on the type of project – community-led, private entity or national, and is notably, *in addition to* existing benefit-sharing mechanisms with local communities, effectively seeking to impose an indirect levy. Pursuant to the above, the Climate Change (Amendment) Act was subsequently enacted on 1 September 2023 and came into force on 15 September 2023.⁷³

This discussion on the emergence of regulatory developments would be incomplete without briefly turning our attention to the region that generates the second-largest supply of carbon credits - *Latin America. Colombia, Peru, and Brazil* are particularly major contributors, being the largest issuers of credits within the Latin American pool.⁷⁴ VCM programs have been supported by the governments of Colombia and Panama that promote private efforts towards carbon neutrality.⁷⁵ Public-private partnerships across the Latin American region have also enabled growth in the VCM, a case in point is the P-REDD+⁷⁶ agreement between the World Bank Forest Carbon Partnership Facility and the Dominican Republic government.⁷⁷ In August 2022, Peru’s Ministry of the Environment released draft regulations for consultation, which hold various participants in the VCM process accountable to a standard higher than at present.⁷⁸ To eliminate issues of double counting and increase credibility, the proposed regulations and

⁷² Parliament of Kenya, 2023 – Climate Change (Amendment) Bill 2023 26.3.23-CLIMATE-CHANGE-AMENDMENT-BILL-2023.pdf (environment.go.ke).

⁷³ The Climate Change (Amendment Act) 2023.

⁷⁴ Katie Sullivan, Antoine Diemert, Carlos Cordova, Joseph Hoekstra, Constanze Haug, Stephanie La Hoz Theuer, Alexander Eden, Stefano De Clara, Victor Ortiz Rivera, Frank Schroeder and Daniel Peon, *Status and trends of compliance and voluntary carbon markets in Latin America* (International Emissions Trading Association, International Carbon Partnership, and Interamerican Development Bank 2021) 42.

⁷⁵ *ibid* 48.

⁷⁶ REDD+ refers to 'Reducing emissions from deforestation and forest degradation in developing countries' and the '+' signifies additional forest related activities that protect the environment.

⁷⁷ Sullivan and others (n 72).

⁷⁸ Ministry of the Environment (MINAM), 'Ministerial Resolution No 156-2022-MINAM' (*Unique digital platform of the Peruvian State*, 2 August 2022) <<https://www.gob.pe/institucion/minam/normas-legales/3308574-156-2022-minam>> accessed 6 July 2023.

guidance seek to create integrity throughout the VCM process.⁷⁹ Similar to the ACMI's action plan, the regulations concern all actors involved in the VCM process, right from the generation of carbon credits and setting up of a project, to their allocation. To participate in carbon markets, initiatives will be expected to register in the National Registry of Mitigation Actions (RENAMI), administered by the Ministry of the Environment, which will verify, among other things, that the proponents hold carbon rights, are using an official quota of Peru's forest emissions reference levels, and are complying with social safeguards.⁸⁰ RENAMI does not aim to eliminate the need for privately run carbon registries such as the Verified Carbon Standard or the Gold Standard. It appears that the intention is for RENAMI to co-exist with those registries and ensure information symmetry.

Hence, in line with the fact that the Global South hosts many of the projects from which credits traded in the VCM are generated, the regulatory developments focus more on the supply/sell-side of carbon credits and the process of the sale of the credits. The regulations concern all actors involved in the VCM process, and also account for the entire mechanism of transactions in the VCM, right from the generation of carbon credits and setting up of a project, to their allocation. It is also important to note that the legal status of credits themselves has been dealt with differently in different jurisdictions across the Global South, and there is a need for increased clarity on this aspect.

While the increased oversight of the VCM is welcome, it is important to ensure that developments are harmonised across the Global North and the Global South. A key point is the need for *clarity on the legal status of carbon credits* across jurisdictions. Given that transactions involving credits are often multi-jurisdictional in nature, the legal status of a carbon credit will impact multiple processes that are linked to the integrity and transparency of VCM transactions, including how transfers are recorded in registries, how credits are disclosed in audited financial statements and any disputes over ownership. It would also help to have a *global framework* that ensures synergy between the various standards, regulations, and guidance - similar to the Paris Agreement, but at a more localized level, i.e., one that goes beyond the scope of Internationally Traded Mitigation Outcomes⁸¹ to also include credits that

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ The Paris Agreement paved the way for new form of trading carbon credits internationally, with the new unit of trade being Internationally Transferred Mitigation Outcomes ('ITMOs'). Countries that are unable to comply with the reduction of greenhouse gases can purchase ITMOs from countries who are exceeding their reduction targets. *See* The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS. I-54113, art 6.

may not be traded under the Paris mechanism, yet represent *real, verifiable, permanent and additional benefits and are not being double counted*. Any regulation though must also address *transparency and integrity* concerns pertaining to *all* significant actors involved in the VCM, much like the ACMI's measures. For instance, in the US, the Green Guides which combat greenwashing claims and SEC's proposed disclosure rule for listed companies regarding the use of credits, both only pertain to demand side regulation of the VCM. Measures at the federal and state levels have only recently endeavoured to foster integrity and transparency on the supply side of credit generation as well, thereby strengthening the oversight of the VCM. This is evidenced by the CFTC's Environmental Fraud Task Force to investigate carbon credit quality on the supply side, and VCMDA's mandate in California for entities that sell or market credits to disclose on their websites particulars regarding the project that generated the credits. Further, oversight mechanisms must not be fragmented and spread across multiple regulatory bodies such that they remain paper tigers. There is a need for integration across the Global North and South as both seek to provide solutions to a global problem which cannot be resolved in a vacuum narrowed by borders or unilateral interests.

In this regard, it is pertinent to take note of the developments concerning carbon markets in general, with the conclusion of the Conference of Parties 28 (**'COP 28'**), where discussions were held regarding the operationalisation of Article 6 of the Paris Agreement. Article 6 recognises the manner in which countries to the Paris Agreement may achieve their climate action targets by voluntary cooperation, through market and non-market mechanisms.

The market mechanisms are dealt with in Articles 6.2 and 6.4 and are a recognition of the trade in carbon credits. While Article 6.2 refers to trading in carbon credits between countries using ITMOs, the ambit of Article 6.4 also includes and actively encourages private actor participation in trading activities. Article 6.4 envisages regulating the global carbon market through a Supervisory Body of the United Nations.⁸² The intention is for any emissions reduction project to be certified by the Body and the host country before credits are issued in its name. The recognition of project-based carbon credit trading under Article 6.4 has contributed to the growth of the VCM, which is similarly project-based, with private actors being the primary participants for the demand and supply of credits

⁸² The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS. I-54113, art 6.4.

At COP 28, while countries reached an agreement on the non-market mechanism to address the emissions problem under Article 6.8, no agreement was reached with respect to the market mechanisms envisaged under Article 6.4.⁸³ Relevant to the discussion on the VCM is that a significant part of climate action pursued by the private sector in the trade of carbon credits in the VCM derives its legitimacy from the formal recognition in Article 6.4.⁸⁴ Without the operationalisation of Article 6.4, which could have provided instruction for regulating the VCM, the need for regulatory integration across the Global North and South continues to remain.

Having analysed existing regulations and forthcoming developments, to gain a holistic view of what the future of the VCM is going to carry, and better understand the wider scenario, it becomes imperative to examine the existing wave of climate litigation, in particular, cases related to (i) emissions reductions, (ii) claims of climate neutrality and (iii) climate action, which will influence the applicability of any incoming regulation. Following the pattern of the first section, we first delve into an analysis of the Global North, where we observe case law developing on the disclosure side - focusing on the buy-side perspective, followed by a review of judicial developments in the Global South - where judicial interpretation is focused on increasing integrity, both, of existing polluters and potential sellers. At the outset, it is important to set out that none of these cases involve a dispute in relation to the VCM (which is yet to be seen), but based on the cases below, we can see trends that are likely to influence any dispute that may arise in the reasonable future relating to any VCM transactions.

III. THE IMPACT OF JUDICIAL TRENDS ON VCM - THE GLOBAL NORTH VERSUS THE GLOBAL SOUTH

In the Global North, increasing climate commitments by governments and private bodies have led to a growing focus on greenwashing. As we discussed above, regulation focuses on increased disclosure of evidence underlying net zero claims and targets, and ensuring the

⁸³ M Ramesh, 'COP 28 text silent on carbon markets' (*The Hindu Businessline*, 13 December 2023) <<https://www.thehindubusinessline.com/news/cop28-text-silent-on-carbon-markets/article67635396.ece>> accessed 17 December 2023.

⁸⁴ Mareike Blum, 'The legitimization of contested carbon markets after Paris- empirical insights from market stakeholders' (2020) 22(2) *Journal of Environmental Policy & Planning* 226, 232; Mareike Blum, *The Discursive Legitimation of Market-driven Climate Governance after the Paris Agreement: The Case of the Global Carbon Offset Markets* (Albert Ludwigs Universität Freiburg im Breisgau 2020) 38.

integrity and quality of carbon credits. This has led to litigation on greenwashing claims in different jurisdictions. While the courts and regulatory bodies have referred to pre-existing regulatory standards in these disputes, the cases discussed below will serve as relevant precedents for future VCM litigation.

The subsequent analysis provides a detailed review of the judicial trends discernible from major disputes adjudicated in countries from the Global North and South. These decisions question the use of terms such as “climate neutrality” which inherently rely on the use of carbon credits, and can oft be seen to be misleading to consumers. While these decisions are not in connection with carbon credits, they may nevertheless remain relevant precedents. Increasingly, we will see greater claims on misleading and false advertisements with an underlying argument related to the use of carbon credits, making the below discussion relevant to the VCM context.

A. Judicial trends in the Global North

Litigation before various **regulatory bodies** concerning greenwashing claims has been on the rise in **Europe and the UK**. The major issue in these disputes relates to greenwashing claims made by corporations in the emissions reduction context. Recently, regulatory bodies, especially advertising commissions across Europe and the UK have ruled against corporations in such lawsuits. For instance, the Swiss Fair Advertising Commission in *KlimaAllianz v FIFA* ruled against FIFA for its claims about carbon neutrality.⁸⁵ It held that FIFA’s advertising of the 2022 World Cup as carbon neutral was misleading as it did not adequately disclose the significant greenhouse gas emissions caused due to the event. The Swiss Fairness Principles in Commercial Communication state that commercial communications must be truthful, clear, and unambiguous.

Similarly, in the Netherlands, the Dutch Advertising Code Committee (RCC) found Shell’s advertising campaign ‘Drive CO2 Neutral’ to be unfair as it gave customers the perception that they could drive Shell-fueled cars in an environmentally sustainable way when in reality, it means such as transitioning to electric vehicles are truly climate-friendly and reduce carbon emissions.⁸⁶ The RCC also ruled against Arla in a claim brought against them for advertising

⁸⁵ *KlimaAllianz v FIFA* (Switzerland, Fair Advertising Commission, 2022).

⁸⁶ RCC Ruling on Shell “Drive CO2 neutral” 1 Reclame Code Commission 2021/00190.

“climate neutrality” on the label of its organic dairy products.⁸⁷ The RCC found that Arla could not demonstrate with certainty the offsetting of emissions through forest projects and thus fell afoul of the advertising code. A similar case was brought against Chiquita for advertising its bananas as “CO2 Neutral” and the RCC found its claims to be misleading as they lacked context or information regarding the claim being asserted.⁸⁸ Further, the Advertising Standards Authority of the United Kingdom also banned three Shell UK Ltd advertisements for misleading customers about the corporation’s environmental credentials.⁸⁹ The advertisements deceptively gave the impression that Shell’s business mainly consisted of lower-carbon energy products, when in reality, most of its revenue came from oil and gas.

There have also been numerous notable cases involving **judicial involvement** in issues surrounding carbon emissions. The Hague District Court in 2021 heard and decided a suit filed by the climate activist organization Mileudedefensie (Friends of the Earth) against Shell Ltd.⁹⁰ The key issue revolved around whether Shell has a duty of care to its shareholders and the public to reduce its carbon emissions to mitigate climate change. The court ruled in the affirmative, and ordered Shell to reduce its carbon-dioxide emissions by 45% by 2030. It also found that it had a duty of care and that its current emission reduction plans were insufficient. In this regard, it is pertinent to note that Shell has since appealed this ruling.

Elsewhere, in *Neubauer v Germany*,⁹¹ the German Constitutional Court ruled that the Federal Climate Protection Act (KSG) was too unambitious in setting a 55% target for 2030. Hearing a constitutional challenge to the Act, the court ruled that the German legislature should amend the Act, and set higher and more proactive targets to reduce greenhouse gas emissions. The government then amended the KSG and revised the target upwards to 65%. A slew of climate lawsuits were filed against various automobile manufacturers including Mercedes Benz, Volkswagen and BMW.⁹² The key issue in all these cases was whether these companies could be ordered to phase out internal combustion engines in their vehicles by 2030, being violative of the fundamental right to climate protection. The court of first instance in all these cases

⁸⁷ RCC Ruling on Arla “climate neutral milk” Reclame Code Commission, Netherlands.

⁸⁸ RCC Ruling on Chiquita “climate neutral bananas” Reclame Code Commission, Netherlands.

⁸⁹ ASA Ruling on Shell UK Ltd Advertising Standards Authority Complaint Ref:G22-1170842.

⁹⁰ Climate case against Royal Dutch Shell Court of The Hague C/09/571932 / HA ZA 19-379.

⁹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Ma. 24, 2021, Case No BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20.

⁹² *Kaiser, et al v Volkswagen AG* <<https://climatecasechart.com/non-us-jurisdiction/regional-court-of-braunschweig-landgericht-braunschweig/>> 29 July 2023; *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW)* (pending), Regional Court of Braunschweig.

dismissed the suit, declaring that it was up to the legislature to determine appropriate measures to protect the climate. The appeals are currently pending before the higher courts. Despite the initial dismissal, these cases show a growing trend of seeking judicial protection where the legislature and/or large corporations have failed in their duty to mitigate negative impacts to the climate and be responsible planetary stewards. Taken together, these rulings further demonstrate the increased willingness of regulatory authorities and the judiciary to hold corporations liable for emissions reduction claims.

We also have a few landmark judicial interventions in the *UK* and the *US*. The England and Wales High Court ruled that the UK's net zero strategy, which set out plans to decarbonise the economy, did not meet the government's obligations under the Climate Change Act.⁹³ The Climate Change Act of 2008 requires the Secretary of State to set legally binding carbon budgets and to develop policies to meet those budgets. In the numerous pages of the plan and associated documents, there were no specifics on the extent of risk posed by each policy, or an overview of whether the plans for each sector are high, medium or low risk are. This case is another relevant example of the growing global trend of climate change claims brought against corporations and governments, highlighting the effectiveness of climate change regulation as a means of holding governments responsible.

In the *US*, although courts have swayed both ways and the anti-ESG movement is burgeoning in certain states, there have been notable instances where the judiciary has exercised its powers to protect the climate and reduce carbon emissions. The Ninth Circuit Court of Appeals in *Rocky Mountain Farmers Union v Corey* held that California's Low Carbon Fuel Standard was a legitimate exercise of state police power to control carbon emissions and address climate change.⁹⁴ It was challenged for being discriminatory against out-of-state ethanol producers. The court rejected this contention, ruling that the state has attempted to devise a potential solution to the climate threat posed by these fuels, and this would not succeed without differentiating between production processes involved in their power generation. In an impactful decision on inter-state regulation of commerce and its nexus with climate change, it ruled that states must be allowed to subject services and processes within their borders to higher environmental standards without having automatically discriminated against states with lower

⁹³ *Friends of the Earth, ClientEarth, Good Law Project v Secretary of State for Business, Energy and Industrial Strategy* y [2022] EWHC 1841 (Admin) (18 July 2022).

⁹⁴ *Rocky Mountain Farmers Union v Corey*, 730, F3d 1070 (9th Circuit, 2013).

standards. Similarly, the Supreme Court in *Massachusetts v Environmental Protection Agency*,⁹⁵ ruled against the Environmental Protection Agency, and determined that they have the authority and duty to regulate greenhouse gases under the Clean Air Act. The court disagreed with the EPA's argument that carbon emissions were excluded from the scope of "air pollution agent(s)" within the Act. It opined that the broad language of the Act grants the EPA the power to regulate carbon dioxide and other contributors of global warming and that it must consider factors such as climate change in its regulatory decisions.

The England and Wales High Court decision, and the two American decisions bear relevance in the VCM context. They embolden litigants to pursue claims against actors purchasing credits in the VCM based on the proliferation of existing regulatory requirements, which have been highlighted in the previous section of the piece.

The above landmark rulings make for important precedent as the use and reliance on voluntary offsets increases, leading to increasing litigation risk questioning the nature of credits and whether they meet the requirements of being *real, additional, verifiable and permanent*. Reliance on offsets that cannot demonstrate the above criteria shall lead to an increased risk of regulatory scrutiny. It is important to keep in mind that standardised accounting and calculation methodologies in the VCM space with regard to credits and their corresponding emissions reduction need to be properly formulated- only then can reduction claims be challenged or substantiated via litigation. When such VCM litigation is pursued, it may act as a catalyst for legislators to account for newer problems that these cases identify, which existing regulations or voluntary standards may not already address.

B. Judicial trends in the Global South

Increasingly, courts in the Global South are recognizing that governments and organisations must be held accountable for climate change, especially due to increased carbon emissions as a result of their activities.

In *Earthlife Africa Johannesburg v. Minister of Environmental Affairs*,⁹⁶ the **South African High Court** was concerned with the grant of a permit for the construction of a coal-fired power

⁹⁵ *Massachusetts v Environmental Protection Agency*, United States Court of Appeals, District of Columbia Circuit, No 03-1361 filed on June 26, 2008.

⁹⁶ *Earthlife Africa Johannesburg v The Minister of Environmental Affairs* High Court of South Africa, Gauteng Division, Pretoria Case number: 65662/16.

plant. The court determined that climate change constituted a relevant factor to be considered while conducting the environmental review of a developmental project. It observed that despite the Environmental Management Act lacking an express mention of climate change as a relevant factor, it still needs to be taken into consideration. It cited various reasons including South Africa's commitments under the Paris Agreement to hold that climate change was a relevant consideration. Subsequently, after this decision, the Environmental Affairs Minister re-approved the construction of the coal-fired power plant, while reasoning that the additional power generation capacities needed to be prioritized over the impact of carbon emissions. This was again appealed by Earthlife and ultimately, the Minister's decision was set aside and dismissed with costs in *Earthlife Africa NPC v Minister of Environmental Affairs*.⁹⁷

Particularly relevant to the growing VCM, in June 2023, Governor Lenku of Kajiado County reportedly revoked all carbon credit contracts between private entities and local communities on the allegation that they were opaque and disadvantageous to communities. Kenya does not have any laws that deal with such unilateral revocation and if current negotiations over the dispute fail, it is likely that foreign investors in the project will have to seek dispute resolution under the relevant bilateral investment treaty. However, under the Climate Bill currently before Parliament, existing projects will have a grandfathering period within which they will need to comply with the requirements of the regulation, and non-compliance can lead to revocation once the Bill comes into effect.⁹⁸

Further, in a first-of-its-kind decision relevant to the Niger Delta, the *Court of Appeal in the Hague* ruled against Shell for its actions in Nigeria.⁹⁹ In the significant climate lawsuit instituted by Friends of the Earth along with four Nigerians, the court held that Shell was accountable to the Nigerians for having violated its duty of care by committing large-scale oil pollution in the Niger Delta. For several decades, millions of people living in the Niger Delta have been suffering from the consequences of large-scale oil pollution. Friends of the Earth Netherlands' lawsuit sought to hold Shell accountable for pollution from leaks of Shell oil in

⁹⁷ *ibid.*

⁹⁸ 'Lenku quashes 'opaque' deals on carbon credits' *Nation* (7 June 2023) <<https://nation.africa/kenya/counties/kajiado/lenku-quashes-opaque-deals-on-carbon-credits-4260672>> 1 September 2023.

⁹⁹ Business and Human Rights Resource Centre, 'Nigeria: In historic Dutch court ruling, Nigerian farmers and Friends of the Earth win oil pollution case against Shell' (*Business and Human Rights Resource Centre*, 29 January 2021) <<https://www.business-humanrights.org/en/latest-news/nigeria-in-historic-dutch-court-ruling-nigerian-farmers-and-friends-of-the-earth-win-oil-pollution-case-against-shell/>> accessed 11 July 2023.

three villages, which has rendered local people's fields and fish ponds unusable. The leaked oil was never thoroughly cleaned up and new oil is still leaking out regularly.

Asia and Latin America have also witnessed a host of carbon emission-related developments. The Philippines Commission on Carbon Majors published a historic investigative report holding 47 heavily polluting carbon-intensive companies such as Chevron and BP accountable for their actions.¹⁰⁰ Their findings included claims of wilful prevention of meaningful climate action and the presence of knowledge on the part of these polluting companies of the impact of their actions on the environment. The *Indian Supreme Court* in *Hindustan Zinc Ltd v Rajasthan Electricity Regulatory Commission* heard a challenge to Rajasthan's imposition of minimum renewable energy purchasing requirements upon captive power plants and upheld its validity.¹⁰¹ It held that, "*the provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution in the area by utilizing renewable energy sources as much as possible in larger public interest.*" It also relied on the Directive Principles of State Policy, in particular, Article 48A of the Indian Constitution, read with Article 21 and 51-A (g) as well as India's international climate obligations under the Kyoto Protocol to emphasize the state's duty protect the environment. Additionally, high emitting industrial corporations¹⁰² are also under heavy litigation and regulatory pressure across the globe.¹⁰³

¹⁰⁰ Center for International Environmental Law, 'Roadmap and Initial Reflections on CHR's Final Report in the Philippines National Inquiry on Climate Change' (*Center for International Environmental Law*, 6 May 2022) <https://www.ciel.org/wp-content/uploads/2022/05/CIEL-Philippines-CHR-Roadmap-and-Initial-Reflections_May-2022.pdf> accessed 10 July 2023.

¹⁰¹ *Hindustan Zinc Ltd v Rajasthan Electricity Regulatory Commission* (2015) 12 SCC 611.

¹⁰² Climate Justice Programme, 'Who are the Carbon Majors' (*Climate Justice Programme*) <<https://climatejustice.org.au/carbon-majors-1#:~:text=The%20Carbon%20Majors%20%2D%20Big%20Oil%2C%20Coal%20and%20Gas%20Producers&text=The%20%22Carbon%20Majors%22%20include%20investor,%2C%20Exxon%2C%20Chevron%20and%20BHP>> accessed 15 August 2023. 'Carbon Majors' is a term used to identify those private corporations that are singlehandedly responsible for a significant proportion of industrial carbon emissions. The list of such corporations was initially tabulated in 2013 by a Climate Justice Programme report, commissioned by Greenpeace and the Climate Justice Programme. Shell, BP, BHP, and Chevron are part of the Carbon Majors group.

¹⁰³ One instance that serves as an illustration for the same is the shortening of extraction licenses of Carbon Majors by Guyana. This was the result of a landmark decision by the High Court of Guyana in *Environmental Protection Agency v Esso Exploration and Production Guyana Limited* 2022-HC-DEM-CIV-FDA-1314, wherein they brought ExxonMobil's environmental permit in conformity with the law by reducing it from 20 years to five years. In another related significant judgement, the Court ordered the Environmental Protection Agency to secure an independent insurance policy for any liability arising from ExxonMobil's actions as well as an unlimited guarantee to provide for any damage caused due to their oil and gas developmental project.

From this review of emissions reduction case law in the Global South, albeit not in the VCM context, we infer the following. (i) There is a focus on accountability and integrity rather than having a narrow focus solely on disclosure. This is demonstrated by the rulings detailed above, where the affixation of liability on these corporations is not merely for the breach of emission related laws, but also with regard to the broader harm inflicted upon the environment and local communities. We can expect this higher standard of scrutiny to continue when the demand side actors of the VCM (private corporations) are pursued in litigation actions in lieu of the credits purchased and their actual environmental effects. (ii) The non-VCM emissions reduction litigation in these jurisdictions has only challenged the actions of private corporations- however, these corporations primarily represent the demand side of the VCM market, with their actions already being regulated and litigated in jurisdictions of the Global North. The Global South however, remains host to the projects that generate these credits purchased by the above corporations. Whether this provides impetus for individuals to initiate action against VCM project developers and verification and validation bodies for inconsistencies included the inflated certification of credits assigned to projects remains to be seen. The Kenyan government's revocation of the credit contracts between project developers and investors represents the institutional cognisance of transparency and integrity concerns present on the supply side of the VCM.

Therefore, we have sought to highlight above the recent rise in judicial accountability of states and corporations in aspects such as mandating reduction in emissions and preventing misleading carbon claims, in the Global North and the Global South. There is already a definite trend among states and courts favouring the phasing out of climate unfriendly development projects for more sustainable alternatives.

Thus, when litigation in the VCM landscape grows, we should expect to see (a) buyer-side responsibility to ensure appropriate disclosure and avoid all forms of greenwashing and increasing focus on (b) seller-side integrity and accountability to ensure that transacted emissions reductions are real, verifiable, additional, and permanent. Actions targeting buyer-side responsibility implicate actors (private corporations) already pursued in non-VCM emissions reduction contexts. However, litigation that pursues actors for wrongdoing on the supply side will particularly hold VCM specific players liable, including project developers and verification and validation bodies. A well-functioning, internationally coordinated and appropriately regulated VCM would ensure alternate avenues for revenue and investment

generation as well as climate-conscious development, while benefitting corporations by reducing the risk of lawsuits and sanctions.¹⁰⁴ Furthermore, consumers prefer to purchase goods and services from companies that operate in an environmentally sustainable manner.¹⁰⁵ The searing indictment of Carbon Majors across the world coupled with the transition to greener forms of energy more generally as well as proactive climate action by courts and states should hopefully translate into climate sustainability in the near future.

IV. CONCLUSIONS AND LOOKING AHEAD

Interest in the VCM has grown considerably- from participants, private organizations, international corporations, regulatory bodies, standard-setters, and governments, to name a few. In this light, we have discussed the concomitant increase in regulatory scrutiny over VCM transactions across jurisdictions, highlighting the divergence in these developments across the Global North and the Global South. While recognising that such divergence plays a necessary role, we have sought to emphasise the parallel need for a certain degree of convergence. Judicial developments regarding carbon and climate-related decisions of courts and regulatory bodies across jurisdictions have also been considered since these may act as relevant precedents for future litigation concerning the new regulations. Additionally, throughout our discussion, we have sought to draw attention to how jurisdictions need to work together to prioritise people and the planet, and the need for harmonisation of priorities.

In our analysis, we have also identified certain lacunae in the developments which are yet to be addressed – specifically with respect to the tax and accounting analysis of these credits, which will become increasingly relevant for structuring multi-jurisdictional transactions.

Recently, in November 2022, the United Nations’ expert group on private sector net zero commitments actively endorsed the use of voluntary carbon credits as a mechanism for providing climate finance to developing nations and balancing unabated emissions.¹⁰⁶ The

¹⁰⁴ Victoria Cherkasova and Irina Nenuzhenko, ‘Investment in ESG Projects and Corporate Performance of Multinational Companies’ (2022) 37(1) *Journal of Economic Integration* 54–92.

¹⁰⁵ *ibid.*

¹⁰⁶ United Nations High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, ‘Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions’ (*United*

report cited the work of the Integrity Council for the Voluntary Carbon Market (ICVCM) on the Core Carbon Principles, which seek to serve as a global benchmark for reliable, credible and high-integrity carbon credits, particularly for the supply-side.¹⁰⁷ The ICVCM is an independent standard-setting body that seeks to invoke standardisation in the VCM.¹⁰⁸ The ICVCM is complemented by the Voluntary Carbon Markets' Initiative (VCMI) which aims to establish demand-side standards for the credible use of carbon credits.¹⁰⁹ These bodies aim to bring consistency in the use of the VCM across jurisdictions.

However, the linkage between the VCM, private standard-setters, and international compliance remains uncertain. Whilst the mechanism in Article 6.4 of the Paris Agreement permits the international transfer of mitigation outcomes, very few, if any, carbon credits have gained recognition under the mechanism.¹¹⁰ The ICVCM by way of its Core Carbon Principles seeks to meld this regulatory mechanism into the voluntary sphere by tagging such credits with “host country authorisation under Article 6,”¹¹¹ a move that is expected to increase their inherent value since they rely on internationally agreed regulatory mechanisms to demonstrate the real, verifiable, permanent, and additional benefits.

Nations Climate Action) <https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf> accessed 15 August 2023.

¹⁰⁷ The Integrity Council for the Voluntary Carbon Market, ‘Core Carbon Principles’ (*ICVCM The Core Carbon Principles*) <<https://icvcm.org/wp-content/uploads/2023/03/CCP-Section-2-FINAL-27Mar23.pdf>> accessed 16 August 2023.

¹⁰⁸ The Integrity Council for the Voluntary Carbon Market, ‘Who we are’ (*The Integrity Council for the Voluntary Carbon Market*) <<https://icvcm.org/>> accessed 15 August 2023. The ICVCM (the successor to the Task Force on Scaling Voluntary Carbon Markets, TSVCM) is an independent organisation concerned with fostering integrity in the VCM, primarily on the supply side. The ICVCM engages with integrity concerns in the generation, issuance, and exchange of carbon credits. The organisation’s Core Carbon Principles and Assessment Framework act as a rulebook for these supply-side activities in the VCM.

¹⁰⁹ Voluntary Carbon Markets Integrity Initiative, ‘What we do’ (*Voluntary Carbon Markets Integrity Initiative*) <https://vcmintegrity.org/about/> accessed 15 August 2023. The VCMI is an independent non-profit body interested in ensuring and enabling high integrity in the working of VCMs. It is primarily concerned with integrity on the demand side of VCM transactions, with its Claims Code of Practice being an important manual of standards for corporations to utilise their carbon credits in a sustainable and scientific manner. Recently, the VCMI also released the VCM Access Strategy Toolkit concerning integrity on the supply side of the VCM, providing instruction to countries participating in VCMs.

¹¹⁰ The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS. I-54113, art 6.4. In May 2023, authorisation was issued by the Government of Pakistan for one of the world’s largest mangrove restoration projects. Pollination Group, ‘Landmark authorization a critical step towards higher-integrity carbon markets’ (*Pollination Group Media*) <https://pollinationgroup.com/media_post/landmark-authorisation-a-critical-step-towards-higher-integrity-carbon-markets/> accessed 15 August 2023

¹¹¹ The Integrity Council for the Voluntary Carbon Market, ‘Core Carbon Principles’ (*ICVCM Summary for Decision Makers*), <<https://icvcm.org/wp-content/uploads/2023/03/CCP-Section-3-FINAL-27Mar23.pdf>> accessed 16 August 2023.

In parallel, the VCMI has released its Claims Code of Practice, which seeks to establish integrity by providing guidance on the credible use of credits towards climate commitments and associated disclosures. Drawing on both voluntary initiatives including the ICVCM’s Core Carbon Principles and the Science-Based Targets Initiative, and regulations such as the Paris Agreement, the Claims Code sets out the foundational criteria that companies must provide information on, to credibly represent beyond-value chain mitigation. It is important to note that governments and standard-setters are increasingly encouraging a shift away from the use of terms such as “climate neutrality” or “carbon neutral”, unless substantiated with rigorous, scientific evidence. Whilst we expect interest in the VCM to increase significantly in the coming few years, we anticipate the use of credits to become wider than for offsetting, and a large number of existing projects falling away due to legitimate concerns relating to integrity and additionality.

Private initiatives such as those led by the ICVCM and VCMI may potentially influence regulators to harmonise legislative developments to respond to the growing reliance on the VCM. This is especially so since the participants in the VCM are already re-evaluating the nature and scope of their commitments, the accuracy of their disclosures and the integrity of the credits being generated using such standards. As developments unfold, participants in the VCM must put their best foot forward by aligning with best practices and integrating regulatory requirements into their climate strategies.