GIBSON DUNN

Carbon Markets Update – Q3 2023

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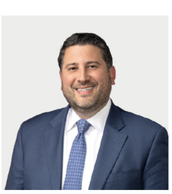
Susy Bullock
Partner, London
SBullock@gibsondunn.com


Abbey Hudson
Partner, Los Angeles
AHudson@gibsondunn.com


Brad Roach
Partner, Singapore
BRoach@gibsondunn.com


Lena Sandberg
Partner, Brussels
LSandberg@gibsondunn.com


Jeffrey L. Steiner
Partner, Washington D.C.
JSteiner@gibsondunn.com

This quarterly newsletter aggregates the knowledge and experience of Gibson Dunn attorneys around the globe as we help our clients across all sectors navigate the ever-changing landscape of voluntary carbon markets.

Worldwide Carbon Markets Continue to Grow[1]

In May, the World Bank published its 2023 State and Trends of Carbon Pricing. Almost a quarter of the world's emissions are now covered by carbon credits, up from just 7% a decade ago. The voluntary market remains the primary driver behind carbon credit market activity.

But regulatory mechanisms are becoming increasingly common, with several nations implementing new carbon regulations this year and many more teeing up for future rollouts. While the United States federal government has recently favored funding green supply chains, the European Union and the rest of the world are increasingly adopting carbon trading schemes and carbon taxes.

The World Bank noted that carbon offset prices and issuances fell relative to the prior year. Some of this is likely due to concerns and criticisms about carbon offsets, tougher economic conditions, and supply bottlenecks. Additionally, standardizing contracts within the marketplace appears to be increasing liquidity and putting downward pressure on carbon trading. Among regulatory carbon markets, prices for the EU emissions trading system ("ETS") fell mid-year before bouncing back, for example, while both New Zealand's and Korea's ETS prices remain low. Within the voluntary carbon market, buyers tended to prefer newer vintages over old ones and renewable energy projects over nature-based credits. Prices for credits are expected to rise once again.

United States

Litigation Update

We are tracking a growing number of lawsuits against companies marketing themselves as carbon neutral, their products as net zero, or otherwise publicizing their use of carbon credits. A handful of plaintiff-side firms have brought multiple actions.

For instance, one firm has sued Dutch airline KLM twice: first, in *Dakus v. KLM*, filed in the U.S. District Court for the Southern District of New York in September 2022, and second, in *Long v. KLM*, filed in the U.S. District Court for the Eastern District of Virginia in July 2023. Both cases attack KLM's program allowing passengers to purchase carbon credits through the airline to offset the environmental impact of their flights. They allege that it is fundamentally misleading to suggest that it is possible to "fly responsibly," that the credits KLM sells do

Abbey Hudson, Brad Roach, Lena Sandberg, Arthur Halliday, Yannis Ioannidis, Alexandra Jones, Virginia Somaweera, Mark Tomaier, Richie Vaughan, and Alwyn Chan also contributed to this update.

not actually offset the amount of carbon they claim, and that KLM misleading cited the Paris Agreement's goals as its own.

On September 12, 2023, Judge Ronnie Abrams dismissed the *Dakus* suit, holding that the plaintiff did not have standing to sue. She hadn't actually bought her KLM ticket—a third party had—and the plaintiff had filed a supplemental declaration that directly contradicted facts asserted in her complaint. Because Dakus did not buy her ticket, the court found she lacked standing to sue KLM. And because the court had "serious concerns" about Dakus's filings, Judge Abrams ordered plaintiff's counsel to show cause why he should not be sanctioned. Sanctions briefing is ongoing.

After filing the inconsistent declaration, and perhaps realizing that the *Dakus* case was doomed, Dakus's counsel filed a largely identical complaint against KLM in Long. KLM has moved to transfer the case to the Southern District of New York, hoping to put it before Judge Abrams to resolve the "copycat case."

Dakus is among the first carbon-credit suits to reach a dispositive ruling. There is also a motion to dismiss pending in a similar false advertising claim in the U.S. District Court for the Southern District of New York against the makers of Evian bottled water, a case concerning use of carbon credits to support Evian's claims to sell carbon neutral water (*Dorris v. Danone Waters of America*).

New California Climate Legislation:

On October 7, California's governor signed into law the Voluntary Carbon Market Disclosures Act (AB 1305), a bill that, in relevant part, requires businesses to make certain disclosures if they rely on carbon offsets to make carbon neutrality and similar claims. Such businesses are required to disclose all information documenting how, if at all, a carbon neutrality or similar claim was determined to be accurate or actually accomplished, how interim progress toward that goal is being measured, and whether there is independent third-party verification of the company data and claims listed. Businesses are also required to disclose on their website the project information for any carbon offsets they relied on in making the carbon neutrality or similar claims. Violations of the bill are subject to a $2,500 per day penalty for each violation, not to exceed a total amount of $500,000. The penalties would be assessed in a civil action brought by the Attorney General or other designated state, county, and municipal officials. The bill also requires those that market or sell voluntary carbon offsets within California to make disclosures about the projects.

Governor Newsom vetoed another piece of legislation, the Voluntary Carbon Offsets: Business Regulation Act (SB-390), which would have made it unlawful to provide offsets that do not reduce or remove greenhouse gases in a way that is quantifiable, real or additional or are less than the atmospheric lifetime of carbon dioxide emissions. Governor Newsom expressed concerns that the bill risked creating significant turmoil in the carbon-offset market by imposing civil liability for even unintentional mistakes about offset quality.

For additional information on two other climate-disclosure bills recently signed into law, see https://www.gibsondunn.com/california-passes-climate-disclosure-legislation/#:~:text=If%20enacted%2C%20SB%20261%20would,disclosed%20climate%2Drelated%20financial%20risks

Chambers RANKED IN Crisis & Risk Management 2023
Susy Bullock
Susy Bullock ranked for **Global-wide Environmental, Social & Governance Risk.**

Brad Roach
Best Lawyers Lawyer of the Year 2023
Energy Law
Singapore

Chambers RANKED IN UK 2023
Gibson, Dunn & Crutcher LLP
Gibson Dunn ranked for **Energy & Natural Resources: Oil & Gas – UK-wide.**

Chambers TOP RANKED Asia-Pacific 2023
Gibson, Dunn & Crutcher LLP
Band 1 Energy & Natural Resources: **Singapore Project & Energy Indonesia**

The LEGAL 500 UNITED STATES TOP TIER 2023
Gibson Dunn ranked Top Tier and Abbey Hudson named Next Generation Lawyer for **Industry Focus – Environment – Litigation.**

Asia

Indonesia, Taiwan, and China join Asian carbon trading push

Indonesian Carbon Exchange

On September 26, 2023, Indonesia launched its government-backed carbon exchange, called the Indonesia Carbon Exchange, or “IDXCarbon”, operated by the Indonesia Stock Exchange.[2] On the opening day of the trade, 13 carbon credits for nearly 460,000 metric tonnes of carbon dioxide equivalent from PT Pertamina Geothermal Energy (“PGE”)’s geothermal projects, specifically from Project Lahendong Unit 5 and Unit 6 PT Pertamina Geothermal Energy, were traded and priced at 69,600 rupiah (approximately US$4.51) per tonne.[3] These projects concern the development of two geothermal plants in the North Sulawesi Province each boasting a capacity of 20 megawatts. PGE’s geothermal work areas have total installed capacity of 617 megawatts, with a potential reduction of carbon emissions of 2.58 million tonnes of CO2 per year. PGE is included in the Clean Development Mechanism (“CDM”) and manages seven (7) CDM projects.[4] The CDM allows emission-reduction projects in developing countries to earn certified emission reduction credits, each equivalent to one tonne of CO_2.[5] Buyers in the initial trade included leading banks like Bank Central Asia, Bank CIMB Niaga, Bank DBS Indonesia and Bank Mandiri, along with various units of state energy firm, PT Pertamina (Persero), and companies from the mining sector.[6]

The purpose of the IDXCarbon is to provide a “transparent, orderly, fair and efficient trading system.” Companies who have an obligation and/or commitment to voluntarily reduce greenhouse gas emissions may become IDXCarbon’s users and buy available carbon credits.[7] IDXCarbon operates with four trading mechanisms: Auction Market, Regular Market, Negotiated Market, and Marketplace. IDXCarbon is connected to the National Registry System - Climate Change Control (SRN-PPI) belonging to the Ministry of Environment and Forestry (KLHK) to facilitate efficient carbon unit transfers and prevent double counting.[8] The Indonesia Financial Services Authority (“OJK”) has issued regulations which require entities desiring to operate in the business of carbon exchange to be specifically licensed as Carbon Exchange Organisers.[9] Carbon units traded on IDXCarbon will be considered securities and must be registered. Carbon Exchange Organisers must obtain licenses from the OJK, with stringent restrictions imposed on the types of environmental products that can be traded.[10]

Currently, an emissions cap has only been set for the power sector, so regulators expect utilities to be the most active buyers in the market in the early stage. However, once pollution caps are set for other sectors, other companies may join.[11] Further, the Indonesian Government is actively developing a plan for comprehensive national regulations on pollution control, which may include the implementation of a carbon tax according to Coordinating Minister of Maritime and Investment, Luhut Pandjaitan.[12] Carbon tax (at a rate of approximately US$2 per tonne) was supposed

to be progressively rolled out in Indonesia starting on April 1, 2022, but the carbon tax was subsequently postponed to 2025.[13] To strengthen its position in the global carbon market, Indonesia intends to adopt international standards and expedite efforts to gain mutual recognition from foreign markets. This will enable the country to offer its carbon credits to international buyers.

Taiwan Carbon Solution Exchange

On August 7, 2023, President Tsai Ing-wen opened Taiwan's inaugural carbon exchange, known as the Taiwan Carbon Solution Exchange, in Kaohsiung as part of the government's commitment to achieving net-zero emissions by 2050. This initiative, jointly established by the national stock exchange, Taiwan Stock Exchange, and the sovereign wealth fund, Executive Yuan's National Development Fund, with an initial investment of NT$1.5 billion (US$46.7 million), is geared towards providing local businesses with valuable carbon-related services.[14] The facilitation of domestic and international carbon credit rating is scheduled to begin in the first half of 2024.[15] Some Taiwanese businesses have already ventured into the international market, with Chimei, a materials producer, participating in Singapore's Climate Impact X Project Marketplace where it was able to obtain offsets directly from specific projects.[16]

China National Emissions Trading Scheme and China Certified Emission Reduction

China's national emissions trading scheme ("ETS") celebrated its second anniversary in July 2023 and has largely achieved its initial goals, according to analysts.[17] These goals included raising market awareness, establishing trading mechanisms, and prompting companies to focus on their emissions. China's ETS, the world's largest in terms of emissions regulated, covers companies emitting three times more than the European Union's emissions scheme.[18] It plays a crucial role in China's efforts to reach carbon neutrality by 2060.[19] Currently, the ETS covers the power sector, with plans to include other heavy emitter industries like iron and steel, petrochemicals, and building materials.[20] So far, the ETS has completed only one compliance period, during which 1,833 companies covered their emissions for 2019 and 2020, achieving a compliance rate of 99.5%.[21] As of July 14, 239.9 million tonnes of emissions allowances had changed hands, with a cumulative turnover of 11.03 billion yuan (approximately US$1.54 billion).[22] However, the Chinese ETS faces challenges, such as low liquidity and imbalanced trading activity, primarily due to companies only buying allowances at the end of each compliance period solely to fulfill their market duties. Unlike the EU emissions scheme, which caps companies' overall emissions, the Chinese ETS focuses on reducing emissions intensity,[23] thereby encouraging companies to consider emissions-reduction methods in business decisions. China's carbon price is currently much lower than the EU, standing at around 60 yuan (US$8) per tonne,[24] but is forecasted to rise gradually, reaching 130 yuan (approximately US$18) per tonne by the end of the decade.[25]

Data integrity has also been a prominent concern in relation to China's carbon market, although efforts are underway to enhance data accuracy by the Ministry of Ecology and Environment ("MEE").[26] [27] Another obstacle is the absence of comprehensive legislation to govern the imposition of severe enough penalties to deter companies from disregarding carbon emissions rules. Zhao Xiaolu, the Director of Global Climate Change at the Beijing Office of the Environmental

Defense Fund, anticipates the imminent publication of a state-level legislative document by the State Council, China's top administrative body.[28]

To expand China's carbon market, increase volume, and improve liquidity, China is set to revive its voluntary carbon credit program, the China Certified Emission Reduction ("CCER") scheme, by the end of 2023.[29] [30] The scheme was launched in 2012 but suspended in 2017 due to low trading volume.[31] The reintroduction of the CCER scheme will allow power companies to offset their emissions and encourage stakeholders from various industries to participate in the national carbon market.

Ongoing advancements

The above developments align with the trend among Asian economies to embrace carbon markets as a means to advance their net-zero goals. Singapore launched its Climate Impact X Exchange in June 2023 to facilitate trading in nature-based offsets alongside its existing carbon tax. Similarly, Malaysia and Thailand introduced voluntary carbon markets in 2022, while India and Japan are developing their own carbon market plans. Vietnam is also taking steps toward implementing a carbon price, although with a marketplace potentially several years away.[32]

Asia Carbon Institute launches voluntary carbon credit registry

The Asian Carbon Institute ("ACI") announced its launch in Singapore on August 29, 2023, and its launch in Hong Kong SAR, on August 31, 2023. The ACI was established to "help accelerate the development of technology- and urban-based greenhouse gas mitigation solutions across Asia and beyond." [33] An example of a technology-based project in an urban space is concrete manufactured from carbon capture utilization technologies.[34]

ACI provides an independent, science-based review of project developments, while also supporting the issuance of voluntary carbon credits. ACI will partner with government entities and the private sector to standardize voluntary carbon credits and reduce carbon emissions.[35] It intends to provide public access to project documents and methodologies, ensuring transparency in its operations and it plans to seek membership in CAD Trust, a global platform designed to prevent double-counting of climate benefits within carbon registries.

The ACI is in talks with policymakers in the region, including in Singapore, which is preparing a "whitelist" of carbon crediting programmes its businesses can use to offset emission payments. As of August 29, 2023, there were 20 projects in the pipeline waiting to be certified by ACI, ranging from energy efficiency and greenhouse gas avoidance to blue carbon and nature-based type of projects.[36] ACI expects to register around 100 projects within a year.[37]

MAS and McKinsey explore the use of high-integrity carbon credits to accelerate the early retirement of Asia's coal-fired power plants[38]

On September 26, 2023, the Monetary Authority of Singapore ("MAS") and McKinsey & Company jointly published a working paper exploring the use of revenue from the sale of carbon credits to offset the financial cost of retiring coal-fired power plants ("CFPP") early. The controlled phase-out of CFPPs with financing mechanisms to make early retirement economically viable is crucial for Asia's energy transition alongside the development of cleaner energy sources.

The paper proposes the use of "transition credits" generated by retiring CFPPs early and replacing them with cleaner energy sources. Key components of this approach include quantifying the economic gap, leveraging transition credits, mitigating transaction risks, and addressing measures to mitigate harm to communities and livelihoods resulting from CFPP early retirement, the costs of which should be considered in financing. The report suggests that transition credits should align with the Core Carbon Principles defined by the ICVCM, but does not create a new carbon credit methodology.

Europe

Start of the transitional phase of the Carbon Border Adjustment Mechanism

October 1 was the start date for the transitional phase of the Carbon Border Adjustment Mechanism (CBAM) (Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, Official Journal of the European Union, L 130, 16 May 2023, Document L:2023:130:TOC).[39] This means that importers of cement, iron, steel, aluminium, fertilizers, electricity and hydrogen into the EU will need to start reporting their import volumes and embedded emissions. A new CBAM transitional registry has been made available in order to facilitate reporting. The European Commission is gradually releasing information to further facilitate the reporting such as online training materials and webinars, sector-specific factsheets and a step-by-step checklist to support businesses.

Talks continue on the proposed Directive on substantiation and communication of explicit environmental claims ('Green Claims Directive')

On 22 March 2023, the European Commission put forward a proposal for a directive on green claims.[40] The proposed directive would require companies to substantiate the voluntary green claims they make in business-to-consumer commercial practices, by complying with a number of requirements regarding their assessment.

The Directive establishes minimum requirements on the substantiation and communication of voluntary environmental claims and environmental labelling, meaning that companies will have to be able to prove that the environmental claims they are making are based on scientific evidence and that the claims are not equivalent to requirements imposed by law. The Directive establishes an ex-ante verification of environmental claims and labelling schemes by an officially accredited independent body ('verifier').

It would apply to voluntary explicit environmental claims and environmental labelling schemes, which are not regulated by any other EU acts, such as Regulation (EC) No 66/2010 (EU ecolabel), Regulation (EU) 2018/848 (organic products), Regulation (EC) No 1221/2009 (Community ecomanagement and audit scheme (EMAS)), or the future regulation establishing an EU certification framework for carbon removals.

The goal of the proposed directive is to stop companies from making misleading claims about the environmental merits of their products and services, thus protecting consumers from greenwashing by ensuring that all environmental claims are trustworthy.

The proposed Directive would apply to most companies operating in the European Union except for micro SMEs which are those with fewer than 10 employees or an annual turnover of less than EUR 2 million.

The proposal is now in the hands of the co-legislators (the Parliament and the Council). In Parliament, the file was allocated jointly to the Committees on Internal Market and Consumer Protection (IMCO) and on Environment, Public Health and Food Safety (ENVI). In the Council, the proposal has been discussed both at meetings of the Working Party on the Environment and of the Working Party on Consumer Protection and Information. The file was discussed in July 2023 during the informal ministerial meeting on consumer affairs and industry and internal market, organised by the Spanish Presidency of the Council in Bilbao.[41]

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