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Subject: Appeal of ART decision on APA's Complaint
Date: Friday, June 16, 2023 4:52:50 PM
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Dear ART Board,

Please find attached the submission of our appeal.

Please acknowledge receipt.

Regards,

Laura

Laura George
Governance and Rights Coordinator

Amerindian Peoples Association

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16 June 2023

To:

Mary Grady, ART Secretariat
Christina Magerkurth, ART Secretariat

cc:

Frances Seymour, ART Board
Pasang Dolma Sherpa, ART Board
Lucia Madrid, Winrock International
Paz Lozano, Emergent
Hege Ragnildstveit, Senior Policy Advisor, NICFI
Leif John Fosse, Senior Advisor, NICFI
Daniel Kandy, US Dept of State
Christine Dragisic, US Dept of State
Chris Penrose Buckley, UK FCDO
Jenny Lopez, UK FCDO

Re: Appeal of ART Decision on Complaint about issuance of credits to Guyana for 2016-2020

Dear ART Secretariat:

The Amerindian Peoples Association writes to appeal, pursuant to The REDD+ Environmental Excellence Standard (TREES), version 2.0, Section 16.2, the decision taken in response to our complaint submitted on 8 March 2023 (APA Complaint). In accordance with the guidance on ART's complaint process, we appeal the Secretariat's decision to adopt the findings of the assigned Winrock investigator, and specifically, findings 5, 6, 8, 9, 10, and 11 of the investigation report published on 18 May 2023.¹ We also note further concerns regarding the legitimacy of ART's grievance mechanism and urge ART to ensure that this grievance mechanism addresses complaints in a manner consistent with international standards (Section I).

The investigation report and subsequent statement from the ART Secretariat (also published on 18 May 2023) err in failing to find the following two primary allegations: (1) The Government of Guyana does not fully respect the land rights of indigenous peoples and therefore does not meet TREES Section 12.5.1, Theme 1.2, Section 12.5.2, Themes 2.3 and 2.4, and Section 12.5.3, Theme 3.3 (Section II); and (2) The Government of Guyana did not respect the right of indigenous peoples to free, prior, and informed consent (FPIC) in the process of developing its ART proposal and therefore did not meet TREES Section 12.5.1, Theme 1.2, Section 12.5.2, Themes 2.1 and 2.4, Section 12.5.3, Theme 3.3, and Section 12.5.4,

¹ Guidance on ART's Complaints and Appeals Process, p. 4 ("The request for appeal must include a statement of the specific finding(s) that is being appealed and an explanation of why it was in error.")



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Themes 4.1 and 4.2 (Section III). The failure of the Government to respect indigenous peoples' rights in the above-mentioned ways also means that the Government of Guyana has not demonstrated ownership of, or rights to, emission reductions and removals (ERRs) as required in each TREES Document (Section IV).

Each of these issues was raised in the APA Complaint.² Each is therefore admissible on appeal.

I. ART must ensure that its grievance mechanism meets international standards.

The APA reiterates ART's obligation to ensure that this grievance mechanism meets international standards. The investigation report suggests that the ART grievance mechanism has a different intended function than grievance mechanisms designed to process complaints of human rights violations. However, TREES contains requirements that participants respect human rights and also requires adherence to relevant international conventions. For most states, and certainly for Guyana, this includes the core international human rights treaties. In order for the ART grievance mechanism to properly address complaints of non-compliance with these parts of its standard, it must adhere to international standards regarding grievance mechanisms.

In this regard, we note preliminarily that the investigation report and subsequent ART Secretariat decision focus on procedural issues and largely ignore the substantive issues that constitute the majority of the APA Complaint. They both attempt to reframe our complaint as being that our concerns were not heard or considered during the validation and verification process. However, our primary complaint is not about the process, but about the misapplication of the ART program requirements. It is thus extremely concerning that the section of the investigation report entitled "Overview of Relevant TREES Standards" does not mention TREES Section 12, which contains environmental, social, and governance safeguards. This omission is reflected in the rest of the investigation report's cursory dismissal of the APA Complaint that the Government of Guyana does not respect indigenous peoples' rights as required by TREES Section 12, and thus that the ART program requirements have not been properly applied. Charlotte Young, the Winrock officer assigned by ART to investigate the complaint, stated that the purpose of her investigation was to "ensure that the process was followed" and that "there could be an appeal for a more substantive review."³ It is not at all clear from TREES that the initial investigation should only focus on the process (indeed, there appears to be a separate complaints process for complaints relating to validation and verification). We therefore focus in this appeal on the substantive matters raised in our complaint.

In addition, we are concerned that the new Complaints Guidance combined with the findings regarding our complaint taken together appear to nullify the ability to make any substantive complaints regarding a participant's conformance with TREES. We observe, first, that the new ART Complaints Guidance suggests that it will be out of scope of the ART Complaints process to consider complaints on "matters previously submitted through the mechanism or addressed as part of a public comment submission unless

² APA Complaint, pp. 8-18.

³ Meeting between Laura George and Charlotte Young, 17 April 2023.



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new, compelling evidence is provided". Given that the investigation report mentions numerous times that the APA Complaint raises the same concerns it raised during the verification process, we are concerned that a complaint process designed in this way will inevitably fail to address errors made during the verification process insofar as those errors relate to substantive requirements of TREES, rather than procedural requirements.

Second, we observe that the investigation report and ART Secretariat statement deferred concerns raised regarding the ability of the NTC to give consent to the proposal, stating that it was a newly-raised concern that would be addressed in the next crediting period. This issue was newly-raised because there were no indications until December 2022, with the announcement of ART's approval of retrospective carbon credits for Guyana, that ART would consider NTC endorsement sufficient to meet TREES's FPIC requirements. TREES allows for objections to the application of ART program requirements. It would render the grievance process nugatory to dismiss any complaint simply on the basis that the complaint related only to decisions made after the verification period is over.

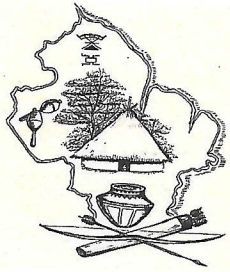
Taken together, the above two features of the ART grievance mechanism raise questions about precisely what types of complaints regarding conformity with TREES can in fact be raised and addressed. If a complaint based on actions taken after the end of verification can be brushed aside on the basis that the complaint will be addressed in the next verification, and a complaint based on actions taken during or before verification can be brushed aside on the basis that the actions were considered during verification, it is not clear to us that the ART grievance mechanism would in fact address any substantive complaints about a participant's nonconformance with TREES. We hope that this is not the case, and that on appeal, this grievance mechanism will recognize the flaws of this approach and engage substantively with the issues raised in our complaint.

II. The Government of Guyana does not fully respect the land rights of indigenous peoples and therefore does not meet TREES Section 12.5.1, Theme 1.2; Section 12.5.2, Themes 2.3 and 2.4; and Section 12.5.3, Theme 3.3.

The respect for and protection of indigenous peoples' rights to their traditional lands is incorporated into several themes of the Cancún Safeguards and accordingly TREES. TREES Section 12.5.1, Theme 1.2 requires that the proposal demonstrates "Consistency with the objectives of relevant international conventions and agreements". TREES Section 12.5.2, Theme 2.3 requires participants to "Respect, protect, and fulfill land tenure rights", and Theme 2.4 requires participants to "Respect, protect, and fulfill access to justice". TREES Section 12.5.3, Theme 3.3 requires participants to "Respect, protect, and fulfill rights of indigenous peoples".

In response to the extensive evidence that the APA provided regarding the Government's lack of respect for indigenous peoples' land rights, the investigation report found the following:

- "Specific comments about control over titled lands are out of [the] scope of ART TREES" (Finding 9).



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- “Specific comments about land titling dispute mechanisms do not understand the TREES process; and were considered” (Finding 10). The investigation report maintains that under TREES, “there is no requirement that all disputes must be settled prior to verification being completed. The requirement is that the process exists and is effective.”
- “Other specific comments are outside of the scope of ART TREES, are factually incorrect, or will be addressed (per the Secretariat) in the current 2021 verification” (Finding 11). Among the comments under this finding, Ms. Young states that “ART does not specify a required legal framework for land titling. ... ART is a carbon program so its scope is limited to forestry related issues and the requirements of TREES. Mining issues are outside the scope of the requirements of TREES for example. For this reason, comparison to other types of programs or processes is not appropriate.”

With respect to Finding 9, the outcome indicator for Theme 2.3 of Safeguard B states: “Stakeholders had access to, use of, and *control over land and resources* in line with relevant ratified international conventions, agreements, and/or domestic and if applicable, subnational, legal framework.”⁴ It is difficult to see how lack of control over titled land is outside of the scope of TREES when the phrase “control over land and resources” is included in one of TREES’s indicators. Ms. Young also makes the puzzling assertion in Finding 9 that “ART only addresses forestry programs – not mining or other activities”.⁵ While TREES may not be concerned with mining programs per se, in Guyana’s case, it is concerned with all areas included in the national forest estate. These areas within the national forest estate (and therefore within the scope of Guyana’s “forestry program”) include areas that are titled indigenous lands with mining concessions imposed on them without consent. TREES cannot legitimately narrow the application of Safeguard B to be concerned with land tenure rights only insofar as the threats to those rights stem from specific forestry programs. Indeed, many REDD+ activities aim to target mining as the greatest driver of deforestation in Guyana.⁶ More broadly, neither the investigation report nor ART Secretariat decision address the APA’s complaint regarding the government’s ongoing failure to recognize and protect currently untitled indigenous lands, nor the effectiveness of the existing legal framework to meet the outcome indicator for Theme 2.3 of Safeguard B.

With respect to Finding 10, the outcome indicator for Theme 2.4 of Safeguard B states: “Resolved disputes, competing claims, and effective recourse and remedies have been provided when there was a violation of rights, grievance, dispute or claim related to the implementation of REDD+ actions.”⁷ Given that ownership of land and resources is important to the environmental and social integrity of ERRs, land titling disputes are clearly “related to the implementation of REDD+ actions.”⁸ Ms. Young notes that there is no requirement in TREES that all disputes be resolved prior to verification; nevertheless, she acknowledges that land titling dispute mechanisms must exist and be effective. However, the

⁴ TREES Section 12.5.2, Theme 2.4, p. 59 (emphasis added). See also TREES Section 12.5.1, Theme 1.2.

⁵ Investigation report p. 14.

⁶ See Guyana Extractive Industries Transparency Initiative, Report for Fiscal Year 2019 (May 2022), p. 43.

⁷ TREES Section 12.5.2.

⁸ Id.



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investigation report fails to discuss a single land dispute raised by the APA's complaint in this section. It instead cites the Validation and Verification Body (VVB) finding that, without any evidence, "Review of supporting documentation substantiates disputes or competing claims have been resolved, or that effective recourse or remedies were being provided..."⁹ The investigation report also cites the NTC endorsement of the LCDS, which did not concern the land disputes cited in the complaint. The examples cited in the APA Complaint and in the land tenure reports cited therein demonstrate the ineffectiveness of land titling dispute mechanisms in Guyana. One was the case of the Akawaio and Arekuna peoples, who waited 24 years for a court decision on their land claim. That decision was finally handed down in December 2022,¹⁰ and the Government has since appealed the decision, claiming that the indigenous peoples do not have communal title to the lands in question. Other examples, all cited in the APA Complaint, include the situation of Chenapou, Santa Rosa, Shea, Shulinab, Sand Creek, Rupunau, and a few other villages who have had protected areas imposed on parts of their traditional lands without consent. They also include villages left more vulnerable to imposed mining and other extractive concessions as a result of unresolved land claims, such as Kako, whose title does not appear on any government maps; and Parabara, whose lands remain untitled despite its long-standing claim for recognition of its rights.

With respect to the portions of Finding 11 cited above, while we recognize that ART does not mandate a specific land titling framework, TREES does require that participants respect, protect, and fulfill the rights of indigenous peoples and specifically land tenure rights. As one indicator of compliance with this requirement, participants must show that they have in place a legal framework for recognizing and securing both customary and statutory land and resource tenure rights, anchored in international conventions and/or the domestic legal framework, and that the participant's public institutions have made use of mandates, procedures, and resources to recognize and secure customary and statutory land and resource tenure rights. We further note that the right of access to justice implicates the broader protection of the law, which Guyana's highest court has ruled "encompasses the international obligations of the State to recognize and protect the rights of indigenous people" and to "honour its international commitments".¹¹

While Guyana does have a legal framework in place, this legal framework reflects the Government of Guyana's evident misunderstanding of, and failure to recognize and protect, indigenous peoples' rights. The Government suggests that indigenous communities can "acquire" lands or that the President can grant titles. However, indigenous peoples' rights to their lands and resources are inherent rights, and it is obligatory upon the government—both by the Constitution and by its international commitments—to legally recognize and respect those rights, including through titling.

As explained in the APA Complaint, the recommendations of multiple human rights treaty bodies indicate that Guyana's legal framework for recognizing and securing land and resource tenure rights is inadequate

⁹ VVB Verification Report, Finding 29, p. 93.

¹⁰ Van Mendason et al. v. Attorney General of Guyana, High Court of Guyana (2022).

¹¹ Maya Leaders Alliance et al. v. AG of Belize, [2015] CCJ 15 (AJ), para. 52.



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and not anchored in international or domestic legal frameworks. Article 154A of the Constitution of Guyana incorporates six international human rights treaties into Guyanese law, making them part of the domestic legal framework. Those treaties include the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Economic, Social, and Cultural Rights.¹² By ratifying these and other conventions and incorporating them into Guyanese law, the state has undertaken obligations to implement the conventions. CERD and CESCR, along with the other human rights bodies identified in the complaint, have expressed concerns that Guyana is not meeting its treaty obligations with respect to indigenous peoples' land rights and recommended that Guyana revise the Amerindian Act to strengthen the legal framework for the recognition and securing of customary land and resource tenure rights.¹³

Despite this, the Government of Guyana has not taken any material steps toward revising the Amerindian Act to bring it in line with international standards. Last year, the Government announced its intention to establish a committee to oversee the revision by the end of 2022.¹⁴ Contrary to the Government's public undertakings, to our knowledge, the committee has neither been formed to date, nor has the Government taken any other step toward revising the Act. This is despite the submission of a consultation proposal by a coalition of indigenous governance bodies describing the ways that Guyana's indigenous peoples want to fully and meaningfully participate in the revision of the Act.¹⁵

Because it continues to disregard the recommendations of international human rights bodies concerning the Amerindian Act and other human rights violations detailed in the complaint,¹⁶ the Government of Guyana also runs afoul of TREES Section 12.5.1, which requires that REDD+ actions be undertaken consistently with the objectives of relevant international conventions.

In addition, even under the current framework, Guyana's public institutions have made little use of the existing mandates, procedures, and resources to recognize and secure land and resource tenure rights, as required by the process indicator of Theme 2.3. As explained in the complaint, the recognition of customary lands has proceeded extremely slowly under the existing framework. The current Minister of Amerindian Affairs herself noted in 2020 that almost no progress had been made in the previous five years under the 2013 Amerindian Land Titling project.¹⁷ In 2021, she announced two new titles were to be awarded and three villages would receive extension requests, noting that one of them had applied for

¹² See Schedule 4 of the Constitution of Guyana.

¹³ See, e.g., CERD/C/GUY/CO/14, 4 April 2006; CESCR, E/C.12/GUY/CO/2-4.

¹⁴ Committee to revise Amerindian Act to be established before year-end, 21 Nov. 2022, <https://dpi.gov.gy/committee-to-revise-amerindian-act-to-be-established-before-year-end/>.

¹⁵ Lethem residents lay out proposal for consultations on Amerindian Act revision (6 Mar. 2023), <https://www.stabroeknews.com/2023/03/06/news/guyana/lethem-residents-lay-out-proposal-for-consultations-on-amerindian-act-revision/> (note that this article misattributes the consultation proposal to residents of Lethem, Guyana; in fact, the proposal was created and submitted by indigenous peoples from several regions in Guyana).

¹⁶ APA Complaint, pp. 9-11.

¹⁷ Nothing substantive came of ALT project in five years – Minister Sukhai (15 Aug. 2020), <https://dpi.gov.gy/nothing-substantive-came-of-alt-project-in-five-years-minister-sukhai/>.



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their extension in 2004.¹⁸ This is in respect of a total of more than 60 communities waiting decades for their title or extension requests. The 2016 midterm evaluation of the project reflects this poor performance, stating “The accomplishment of the outputs and the component targets of the project are delayed.”¹⁹ Meanwhile, new extractive concessions continue to be granted on customary lands. Moreover, a group of indigenous communities in the Upper Mazaruni region that received judicial recognition of common-law title to their customary lands in December 2022 are now defending that recognition against the Government of Guyana’s appeal of that judgment. Instead of using resources to recognize and secure land tenure rights, the Government is in this case using resources to *reverse* such recognition.

The investigation report attempts to dismiss these concerns about the incompatibility of Guyana’s law, policy, and practice with international conventions by reiterating that TREES is not concerned with mining but only with areas within REDD+ activities. There is no explanation for why ART considered that Guyana had met TREES indicators related to compliance with international human rights law. Moreover, again, as explained above, mining concessions are included within the accounting area of Guyana’s proposal to ART.

Ms. Young states that comparison to other programs and processes is inappropriate; it is not clear to us what comparison she is referring to. We merely note, once again, that drastically narrowing the scope of TREES effectively removes any requirement for a participant to respect indigenous land rights. Such an interpretation would run contrary to the second Immutable Principle governing ART’s operation.²⁰

Because the Government of Guyana has failed to meet international standards for respecting, protecting, and fulfilling land tenure rights and access to justice, ART should determine that the Government has failed to meet the requirements of Theme 1.2 under TREES Section 12.5.1, Themes 2.3 and 2.4 under TREES Section 12.5.2, and Theme 3.3 under TREES Section 12.5.3.

III. The Government of Guyana did not respect the right of indigenous peoples to FPIC in the process of developing its ART proposal and therefore did not meet TREES Section 12.5.1, Theme 1.2; Section 12.5.2, Themes 2.1 and 2.4; Section 12.5.3, Theme 3.3; and Section 12.5.4, Themes 4.1 and 4.2.

As with indigenous peoples’ land rights, indigenous peoples’ right to FPIC is incorporated into TREES through the Cancún Safeguards. TREES Section 12.5.1 (Cancún Safeguard A²¹) requires “Consistency with

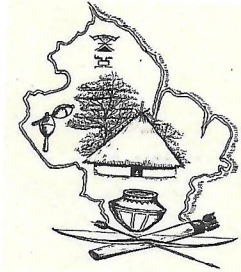
¹⁸ Land titles, extension for eight Amerindian communities (25 Nov. 2021), <https://guyanachronicle.com/2021/11/25/land-titles-extension-for-eight-amerindian-communities/>.

¹⁹ UNDP, Mid-Term Evaluation of the Amerindian Land Titling Project in Guyana, p.35.

²⁰ TREES Section 1.1, p. 12 (“to ensure the recognition, respect, protection, and fulfillment of the rights of indigenous peoples and local communities”).

²¹ “Actions are complementary or consistent with the objectives of national forest programs and relevant international conventions and agreements”

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the objectives of relevant international conventions and agreements” in the context of REDD+ actions. TREES Section 12.5.2 (Cancún Safeguard B²²) requires ART participants to “Respect, protect, and fulfill the right of access to information.” TREES Section 12.5.3 (Cancún Safeguard C²³) requires that ART participants “Respect, protect, and fulfill rights of indigenous peoples and/or local communities, or equivalent.”²⁴ TREES Section 12.5.4 (Cancún Safeguard D²⁵) requires participants to “Promote adequate participatory procedures for the meaningful participation of indigenous peoples and local communities, or equivalent.”

The relevant findings from the investigation report relating to this right and on these safeguards are the following:

- “Specific issues raised related to information access were considered and addressed” (Finding 5). The report found that outreach efforts in relation to Guyana’s participation in ART “were in conformance with the TREES requirements.”
- “Specific issues regarding shortcomings of the public consultation process ignores [sic] the record of what was considered” (Finding 6).
- “Guyana does not claim to conduct consultations in line with these documents [international human rights guidance regarding proper consultation and FPIC processes], and conformance with the documents are [sic] not a requirement of TREES” (Finding 11).
- Several statements that consultations were done with the National Toshias Council, and that any concerns regarding the ability of the NTC to give consent to the proposal on behalf of indigenous peoples were raised too late (Findings 8, 11).

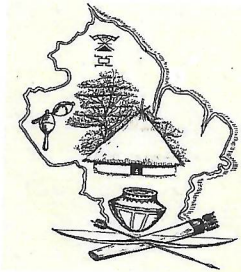
With respect to Finding 5, this finding is procedural, rather than substantive, and fails to address the information raised in the complaint. For example, the investigation report failed to address the fact that concerns raised regarding access to information *in the government’s own outreach sessions* were never addressed. For example, the complaint made note of comments raised in those outreach sessions requesting better information access, including informational materials in indigenous languages and in simpler language. In addition, many of Guyana’s indigenous communities have intermittent internet access, at best. As a result, making Guyana’s TREES proposals and documents more accessible on ART’s website does little to make such information accessible to indigenous communities. As we stated in our complaint, requests for information to line ministries are routinely ignored. Regardless of the legal framework in place for access to information, TREES requires that participants “respect, protect, and fulfill

²² “Transparent and effective national forest governance structures, taking into account national legislation and sovereignty”

²³ “Respect for the knowledge and rights of indigenous peoples and members of local communities by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples”

²⁴ TREES Section 12.5.3, Theme 3.3.

²⁵ “The full and effective participation of relevant stakeholders—in particular indigenous peoples and local communities—in actions referred to in paragraphs 70 and 72 of decision 1/CP.16”



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the right of access to information.”²⁶ Indigenous peoples cannot have effectively “exercised the right to seek and receive official information on REDD+ actions”²⁷ under the circumstances described above.

Finding 6 similarly says nothing about the quality of the public consultation process. The investigation report suggests that the APA complaint “ignored the record of what was considered”, but the APA complaint explicitly cites that record to demonstrate that even the government’s own record of its so-called “consultation” process was insufficient to ensure full, effective, and meaningful participation of indigenous peoples. Specifically, the government’s so-called “consultations” in communities were short information-sharing sessions with limited room for questions or discussion and focused only on the benefits of proposed programs rather than any of the possible risks. In addition, that consultation record, which the investigation report alleges was “ignored” by the complaint, leaves out comments from a meeting in Maruranau Village in which attendees explicitly informed government employees that they considered the meeting merely a preliminary information-sharing session, *not* a consultation. No follow-up meeting was conducted in Maruranau, and the meeting has nonetheless been used as evidence of consultation with indigenous peoples. The government’s record of those meetings includes community comments requesting more accessible information and trainings to better understand the information provided. However, the Government never fulfilled those community requests.

As a matter of national law, Guyana’s Constitution defines “consultation” as a process in which “the person or entity responsible for seeking consultation shall ... ensure that each person or entity to be consulted is afforded a reasonable opportunity to express a considered opinion on the subject of the consultation.”²⁸ Similarly, the structural indicator for Theme 4.1 of Cancún Safeguard D explains that full and effective participation includes “timely access and culturally appropriate information *prior to* consultations.”²⁹ We assert that such information is a necessary condition for the reasonable opportunity to express a considered opinion.

We maintain that “culturally appropriate information” must mean, *inter alia*, information in local languages and in appropriate formats (for example, in audiovisual form rather than written form if requested). The complaint stated that the Government of Guyana failed to provide sufficient culturally appropriate information, despite assurances that it would do so.³⁰ Indigenous people in Guyana who are not fluent in English, and those who relied on the Government’s promise to provide translated versions

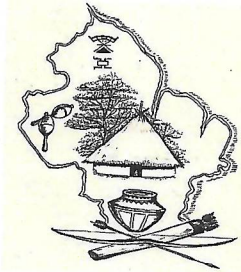
²⁶ Theme 2.1, p. 58. We note that the phrasing of the themes in the language of international human rights law is intentional. See TREES Section 12.2, p. 55 (“[A]s certain Cancún Safeguards encompass human rights obligations, the wording of associated themes is aligned with international human rights laws, which requires countries to “respect,” to “protect,” and to “fulfill” these obligations.”)

²⁷ Theme 2.1 Outcome indicator, p. 58.

²⁸ Constitution of the Cooperative Republic of Guyana, Art. 232.

²⁹ TREES 2.0, Section 12.5.4, p. 61 (emphasis added).

³⁰ Office of the President, “Guyana’s Low Carbon Development Strategy 2030: Summary of Feedback from Consultations Process and Consideration of Comments”, July 2022, available at <https://lcds.gov.gy/summary-of-feedback/>, p. 136.



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of the LCDS, were therefore not “afforded a reasonable opportunity to express a considered opinion” on Guyana’s participation in ART.

Even if the information provided by the Government of Guyana to indigenous communities met the standard for culturally appropriate information sufficient to allow community members to form considered opinions, the inclusion of the phrase “prior to consultations” indicates that the provision of information is not itself consultation. In addition, meetings held in indigenous communities before those communities were provided with sufficient and culturally appropriate information would not have provided a reasonable opportunity for community members to express considered opinions and therefore did not afford the opportunity for meaningful participation.

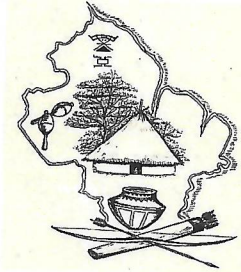
The above-mentioned factors are all considered part of what would be international best practice for consultations and FPIC processes. It is both worrying and telling that the investigation report notes in Finding 11 that TREES does not require conformance to the guidance produced by the various UN human rights experts cited in the APA Complaint. TREES and the Cancún Safeguards are anchored to international human rights standards. International human rights standards are defined and elaborated by experts such as the UN Special Rapporteur on the Rights of Indigenous Peoples and bodies such as CERD and CEDAW. To dismiss such experts and bodies is to divorce TREES from the international human rights standards with which it purports to align. ART should therefore reject any implication that the recommendations of the Special Rapporteur and treaty bodies are irrelevant to the question of the Government of Guyana’s compliance with TREES safeguards.

With respect to comments in Findings 8 and 11 regarding consultations with the NTC, the APA reiterates that the NTC cannot give consent for the government’s proposal to ART on behalf of indigenous peoples.³¹ The NTC’s resolution endorsing the LCDS and government’s plan to sell carbon credits does not constitute, and cannot substitute for, FPIC. The investigation report and ART Secretariat dismissed this concern by stating that it is a newly-raised concern that will be considered for the 2021 crediting period. However, this concern was newly-raised only because there was no indication until December 2022 that the NTC’s resolution would be considered sufficient to meet TREES’s requirement of obtaining FPIC (see Section I).

The investigation report fails to grasp that the right of indigenous peoples to free, prior, and informed consent is exercised through their chosen representative institutions, and that the NTC is not such an institution. Ms. Young emphasizes in the investigation report that “ART does not act as a judge or arbiter of intra-governmental disputes.”³² Nonetheless, she proffers a superficial interpretation of the Amerindian Act, stating that Part III of the Amerindian Act, entitled Governance, includes a section on the

³¹ We note that the investigation report incorrectly attributes the following quote to the APA complaint: “The National Toshihaos Council is not a representative body for all Indigenous Peoples in Guyana, but only for those living in titled lands.” The APA did not make this statement in the complaint. The allegation in the complaint is that the NTC is not the representative institution for indigenous peoples in Guyana at all (regardless of land titling status) and cannot give consent on their behalf for decisions requiring their FPIC.

³² Investigation report, 1-2.



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functions and powers of toshaos, and Part IV of the Amerindian Act is entitled The National Tashaos Council. She uses this to dispute the statement we make in our complaint that the “Amerindian Act does not imbue the National Tashaos Council with ... authority to make decisions on behalf of Indigenous Peoples”.

Ms. Young’s interpretation suffers from serious flaws. First, the interpretation fails on its own terms. The premise that toshaos (by virtue of their membership in Village Councils³³) have governance functions, absent anything else, does not require the conclusion that a body composed of toshaos would also have governance functions. Ms. Young fails to cite any text from the law aside from section and part headings, and she does not account for the fact that the NTC’s functions are not in Part III of the Act, on governance. On Ms. Young’s theory, if the NTC were a governance body, it would presumably be established and given authority in Part III of the Amerindian Act. It is not.

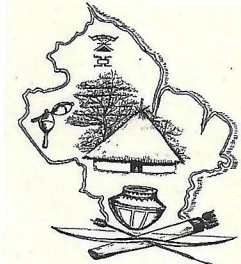
Second, neither individual toshaos nor the NTC has authority to dispose of rights and interests in emissions reductions and, therefore, to consent or not to the proposed carbon crediting scheme. Under section 20 of the Amerindian Act, toshaos (a) are members and chairpersons of their respective Village Councils; (b) are members of the NTC; (c) are responsible for ensuring good governance including accountability and transparency within the Village Council; and (d) are responsible for keeping peace and order in their villages.³⁴ None of these functions could reasonably be construed to give toshaos in their individual capacities the authority to make any decisions regarding projects affecting their land rights, including to dispose of ERRs, on behalf of their villages. Although Ms. Young’s analysis does not mention it, section 22 elaborates further on duties of toshaos, which are to (a) represent the interests of the village; (b) carry out their duties with honesty and integrity; (c) chair meetings of the Village Council; (d) participate in the NTC; (e) attend and participate at other meetings; (f) report to village general meetings on other meetings attended; (g) provide the Minister of Amerindian Affairs with copies of village residency rules; (h) provide the Minister of Amerindian Affairs with a copy of the village’s annual accounts; and (i) report to the Minister on matters that affect the village.³⁵ Although section 22(d) authorizes toshaos to participate in the NTC on the village’s behalf, that participation is necessarily limited to the statutory functions of the NTC.

In Part IV of the Act, the functions and authorities of the NTC are described in section 41. They are to (a) nominate members of the Indigenous Peoples Commission; (b) investigate allegations of improper conduct in village councils; (c) promote good governance in villages; (d) prepare strategies and plans for reducing poverty and improving access to health and education in villages; (e) prepare strategies and plans for the protection, conservation, and sustainable management of village lands and resources; (f) promote the use and recognition of indigenous languages; (g) provide advice to the Minister of Amerindian Affairs on various enumerated topics; (h) coordinate and integrate activities of villages; (i) share, document, and

³³ Amerindian Act, section 20(1)(a).

³⁴ Amerindian Act, section 20.

³⁵ Amerindian Act, section 22.



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record experiences of villages; and (j) send an observer to village and district council elections.³⁶ None of these functions vests any property interest in the NTC, nor do they give the NTC the authority to unilaterally dispose of property interests, including in ERRs, held by villages.

These sections may be contrasted with section 13(1) of the Amerindian Act, which provides that village councils' functions are to, among others, "hold for the benefit and use of the village all rights, titles, and interests in or over village lands" and "represent the village".

We understand that ART's role is not to provide authoritative interpretations of domestic law.³⁷ ART need not do so here because there is no law in Guyana that could reasonably be construed to imbue the NTC with the authority to grant or withhold FPIC on behalf of villages for the proposed carbon crediting scheme. Under national law, that power is unambiguously vested in Village Councils.

Importantly, under international law (including conventions ratified by Guyana as well as conventions incorporated into its Constitution – as discussed above), rights to lands and resources and the associated right to give or withhold FPIC for projects affecting those lands and resources are vested in indigenous peoples and representative institutions to whom those rights are delegated.³⁸ The Government of Guyana has not produced any decision of any indigenous people of Guyana delegating any such rights to the NTC. ART should not assume without any justification that the NTC is an institution chosen by Guyana's indigenous peoples to exercise their rights to their customary resources. Indeed, ART itself notes in TREES registration and monitoring document templates that "[i]f the institutions consulted are not considered representative by the people they claim to represent, the consultation may have no legitimacy."³⁹ As discussed above, this failure to adhere to FPIC as it is protected under international law violates TREES Section 12.5.1, which requires REDD+ actions to be undertaken consistent with the objectives of international conventions that Guyana has ratified.

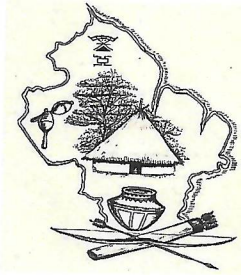
It is a gross misunderstanding of indigenous peoples' rights to assume that a body such as the NTC has the authority to exercise the right to FPIC on behalf of indigenous peoples. An NTC resolution such as the one adopted in July 2022 does not have the legal status necessary to represent the FPIC of the indigenous peoples of the country, nor to effect a transfer of ERRs from village councils (under domestic law) or indigenous peoples (under international law) to the Government of Guyana. In fact, the resolution had no such legal status; at most, it reflects the NTC's capacity to provide advice to the Minister of Amerindian

³⁶ Amerindian Act, section 41.

³⁷ However, we note that a complaint related to the laws of a host country is within the scope of ART's complaint mechanism insofar as it "directly relates to the entity's obligation to comply with ART's standards and procedures." (Guidance on ART's Complaints and Appeals Process, p. 2). This is the case here, as the Government of Guyana's obligation to respect indigenous people's right to FPIC is directly implicated by the legal issues discussed in this section.

³⁸ UN Declaration on the Rights of Indigenous Peoples, Arts. 18, 19, 32.

³⁹ TREES Registration Document p. 69 n.47.



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Affairs on a program that would affect indigenous peoples (as described in section 41(g) of the Amerindian Act).

The Government of Guyana has failed to respect the rights of indigenous peoples to FPIC and effective participation in the design of the proposal to ART, and has therefore failed to meet TREES Sections 12.5.1, 12.5.2, 12.5.3, and 12.5.4. The ART Secretariat and investigator erred in finding otherwise, and the APA requests a substantive review of the same on appeal.

IV. The Government of Guyana has not demonstrated ownership of ERRs as required in each TREES document.

TREES requires that an ART participant provide in each TREES document a “[d]escription of ownership rights to ERRs to be issued by ART ... The Participant must explain how, under existing constitutional or legal frameworks, carbon rights and/or related intangible property interests, are established and addressed. This explanation should include ... how claims to such rights from ... Indigenous Peoples ... will be resolved. ... To address the latter, the Participant must describe any agreements in place or that will be in place, for the transfer of TREES rights or benefit allocation arrangements. TREES will only be issued that have demonstrated clear ownership or rights.”⁴⁰

On this point, the investigation report found that “[s]pecific comments about ownership of credits – titled and untitled – were addressed” and that “TREES does not require carbon rights to be explicitly defined in legislation” (Finding 8).

It is not clear to us what Ms. Young understands “titled credits” and “untitled credits” to be, but we assume that Ms. Young refers to credits generated from forests on titled land and credits generated from forests on untitled land. The further explanation provided in Finding 8 appears to be that these concerns regarding the ownership of the ERRs are addressed by the endorsement of the NTC. The VVB validation and verification reports suggest that there were earlier concerns that there was no “documentation demonstrating which Amerindian villages have consented to include their titled lands or otherwise have executed agreements with GFC to participate by enrolling forested areas on their titled lands within the ART program.”⁴¹ However, the VVB then notes in its Round 3 findings that the Government’s rights to credits from indigenous titled lands are evidenced in, first, the NTC’s July 2022 resolution endorsing the LCDS, and second, the sections of the LCDS referencing the ART program. The VVB noted that it took “the endorsement as evidence for support for LCDS 2030 [including the parts therein relating to the ART program] by the NTC on behalf of Indigenous Communities and Titled Amerindian Villages”.

The Government’s TREES documents, the VVB’s validation and verification reports, and the subsequent statements and reports published by ART make clear that they consider that the NTC’s July 2022 endorsement of the LCDS amounts to either (1) a method of facilitating the participation of indigenous

⁴⁰ TREES Annex A, p. 81.

⁴¹ Aster Global, Validation report p. 142.



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titled lands in the carbon crediting scheme, (2) a transfer of ownership rights of ERRs generated from titled lands, or both. The VVB further suggests that the same considerations were not even applicable to untitled lands, while the investigation report and ART Secretariat suggest that indigenous peoples' customary rights over ERRs on untitled lands were similarly transferred to the government by the NTC endorsement. As explained earlier, however, the authority that the Government suggests was exercised by the NTC is possessed under national law by village councils.⁴² To our knowledge, no village council has reached an agreement with the Government to transfer their rights to ERRs, and if they did, no evidence of this was included in the Government's description in its TREES documents.

Therefore, the Government of Guyana has failed to provide a clear demonstration of its purported ownership rights to ERRs in its TREES registration and monitoring documents.

V. Conclusion

In light of the foregoing, the APA respectfully reiterates our hope that ART's grievance mechanism will engage substantively and fairly with the issues raised herein, consistent with international standards for such mechanisms. We also request, once again, that ART freeze credits already issued that have not yet been purchased and refrain from issuing any further credits until Guyana has demonstrated its compliance with TREES. In particular, we reiterate the four recommendations in our complaint for actions that the government must take to demonstrate this compliance: (1) revise the Amerindian Act in line with international human rights law; (2) resolve outstanding indigenous land claims; (3) ensure access to justice for Chinese Landing and Isseneru Villages; and (4) engage indigenous peoples in a proper national consultation process to fully respect indigenous rights and to determine the most appropriate method for benefit-sharing from the sale of carbon credits. While we acknowledge that ART's validation and verification standards provide that credits will not be invalidated once issued even where errors have occurred, we are not seeking the invalidation of credits. Rather, we seek ART's temporary suspension of credits that have not yet been sold, and no further issuance of credits, until the Government of Guyana demonstrates conformance with TREES.

Respectfully,

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Amerindian Peoples Association

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(APA)*

⁴² See Amerindian Act, section 13(1)(d). We note here that similarly, by international human rights law and standards, indigenous peoples in Guyana for the most part customarily consider the village council to be their representative institution. There are some indigenous peoples and in regards to certain issues where villages have collectively decided that they are to be represented by district councils, e.g., for decisions that affect a wider territory as opposed to individual villages.