

# Terms of reference



Empowered lives.  
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## GENERAL INFORMATION

**Title:** International Consultant Specialist – Clarifying Carbon Rights for REDD+ Results-Based Payments

**Project Name:** GCF Indonesia

**Reports to:** Senior Adviser to Natural Resource Governance in UNDP Indonesia and the UNDP Climate and Forests team's Regional Technical Advisor in the Bangkok Regional Hub

**Duty Station:** Home-Based

**Expected Places of Travel (if applicable):** N/A

**Duration of Assignment:** From 30 working days within September to October 2019

## REQUIRED DOCUMENT FROM HIRING UNIT

|                                     |  |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | TERMS OF REFERENCE   |
| <input checked="" type="checkbox"/> | CONFIRMATION OF CATEGORY OF LOCAL CONSULTANT, please select: |
|                                     | 1. Junior Consultant   |
|                                     | 2. Support Consultant  |
|                                     | 3. Support Specialist  |
|                                     | 4. Senior Specialist   |
|                                     | 5. Expert/ Advisor   |
|                                     | CATEGORY OF INTERNATIONAL CONSULTANT, please select:         |
|                                     | 6. Junior Specialist   |
|                                     | 7. Specialist  |
|                                     | 8. Senior Specialist   |
| <input checked="" type="checkbox"/> | APPROVED e-requisition                                       |

## REQUIRED DOCUMENTATION FROM CONSULTANT

|                                     |                               |
|-------------------------------------|-------------------------------|
| <input checked="" type="checkbox"/> | P11 / CV                      |
| <input checked="" type="checkbox"/> | Copy of education certificate |
| <input checked="" type="checkbox"/> | Completed financial proposal  |
| <input checked="" type="checkbox"/> | Completed technical proposal  |

### Need for presence of IC consultant in office:

- ☐ partial (explain),  
☐ intermittent (explain)  
☐ full time/office based (needs justification from the Requesting Unit)

### Provision of Support Services:

- Office space: ☐ Yes ☒ No  
Equipment (laptop etc): ☐ Yes ☒ No  
Secretarial Services ☐ Yes ☒ No

If yes has been checked, indicate here who will be responsible for providing the support services: N/A

## I. BACKGROUND

REDD+ is a voluntary process under the UNFCCC to incentivize developing countries to mitigate climate change through the forest sector. UNFCCC Decision 1/ CP.16 paragraph 70 encourages developing countries to contribute to mitigation actions in the forestry sector, in accordance with their respective capabilities and national circumstances, by undertaking (a) reducing emission from deforestation, (b)

reducing emission from forest degradation, (c) conservation of forest carbon stock, (d) sustainable management of forest, and (e) enhancement of forest carbon stock.

Indonesia, the largest economy in southeast Asia, is a leading REDD+ country. In December 2015, the country submitted a Forest Reference Emission Level (FREL) to the UNFCCC as a benchmark for mitigation action under forestry sector and a starting point for REDD+ implementation in Indonesia. Indonesia has also worked to operationalize its Safeguards Information System (SIS), set up a measuring, reporting and verification (MRV) system, strengthen its national forest monitoring system (NFMS), develop a national REDD+ strategy and a finance instrument as part of Climate Change Fund under Environmental Fund. Indonesia is currently going through the technical analysis of its Technical Annex which contains REDD+ results from years 2013 through 2017.

The country has put REDD+ as an important part of its Nationally Determined Contribution (NDC) to the UNFCCC. REDD+ results-based payments are an important financial means for the implementation of the country's NDC. These funds will be raised from, among other sources, the Green Climate Fund.

### **Legal Title/ Carbon Ownership**

As REDD+ or other forest-based climate funding schemes become an important resource for forest conservation and development, issues pertaining the legal title to emission reductions/ carbon rights need to be considered by developing countries implementing REDD+ programs.

Carbon rights have been defined by some experts, as a form of property that 'commoditize' carbon and allow it to be traded in voluntary and regulatory markets (Lisa Ogle, Environmental legal expert). Carbon rights are also considered as intangible rights created by people carrying out certain activities under relevant laws or contracts. Therefore, carbon rights could rather be compared to intellectual property rights that are intimately associated with an activity (Streck, C., 2008). As such, it can be reasonably asserted by analogy that forest carbon or carbon in trees is owned by the person who owns forestlands, encompassing the category of usufruct rights and forest user rights. In referring to forest carbon rights, laws and contracts may also distinguish between sequestered carbon, carbon sink, carbon sequestration potential, carbon stock or carbon credits (FAO, 2012). Carbon rights have also been defined as "a new and unprecedented type of property right" (LaViña, 2010).

Regardless of whether it is a new property right, reducing carbon emissions in the forest sector through REDD+, will invariably result in some restriction on the rights of land and forest owners to maximize benefits from their property. REDD+ will have an impact on owners of land and trees depending on whether they are deemed to own the carbon in their trees (FAO, 2012).

### **Requirements from existing RBP initiatives**

Some REDD+ results-based payment (RBPs) initiatives and most market-based programs and standards for REDD+ have requirements related to the legal title/ ownership of emission reductions. Developing countries' existing legal frameworks in some cases encompasses legal instruments that may satisfy these requirements. In other cases, additional regulation may be required to provide enough assurances to those paying for emission reductions that these emission reductions are under the domain of the country that is receiving the payments and that these will not be sold twice. In other cases, when there is a transfer of rights to the carbon, legal title is needed, so national legislation may need to be amended. Developing countries' ability to access RBPs as well as market-based finance for REDD+ in the future depends on their ability to meet these requirements.

#### *The Green Climate Fund*

In the Terms of Reference of the pilot program for Result-Based Payments ([page 5 of ToRs](#)) there are requirements on GCF "Ownership and legal title".

*3.6 Ownership and legal title – Par.15. Ownership of the emissions reductions paid for by the GCF will not be transferred to the GCF. Payments should be recorded in the UNFCCC web portal and recipient*

*countries' national counterpart, and corresponding results will no longer be eligible for RBPs under the GCF or in any other arrangement. Countries can consider, at their own discretion, to use the emission reductions towards achievement of their NDCs. The proposals should indicate the measures to be taken to ensure that such emissions reductions will not be transferred and/or used for any other purposes (e.g. offsetting). Host countries<sup>9</sup> will be expected to covenant that no other party has a competing claim to the results proposed to the GCF for payment, in accordance with national policy, legal or regulatory framework and provide information in the funding proposal about how such results will be treated or used". Either through the NDA or national REDD+ entity or focal point. See also Decision 10/CP.19, para 2. In the instance in which there are no such national policy, legal or regulatory framework, a letter from the relevant overarching governmental authority, e.g. Presidency or Chancellery, may be provided.*

#### The Forest Carbon Partnership Facility

The Forest Carbon Partnership Facility, Carbon Fund in January 2018 prepared a *Note on the Ability of Program Entity to Transfer Title to Emission Reductions (ERs)* ([see note](#)). It proposes 3 options:

- Option 1: Reference to existing legal and regulatory frameworks
- Option 2: Sub-arrangements with potential land and resource tenure rights holders
- Option 3: Benefit sharing arrangement

#### The Verified Carbon Standard (VCS), Verra

The Verified Carbon Standard, or VCS, Program, which was developed and is managed by Verra adopts a series of requirements related to Ownership and Legal title to REDD+ ERs although it uses different terminology.

Section 3 of the [VCS Project Standard](#) has a section 3.11.1 on Project and Program Ownership which says the following:

*3.11.1 The project description shall be accompanied by one or more of the following types of evidence establishing project ownership accorded to the project proponent(s), or program ownership accorded to the jurisdictional proponent(s), as the case may be (see VCS document Program Definitions for definitions of project ownership and program ownership). To aid the readability of this section, the term project ownership is used below, but should be substituted by the term program ownership, as appropriate:*

- 1) Project ownership arising or granted under statute, regulation or decree by a competent authority.*
- 2) Project ownership arising under law.*
- 3) Project ownership arising by virtue of a statutory, property or contractual right in the plant, equipment or process that generates GHG emission reductions and/or removals (where the project proponent has not been divested of such project ownership).*
- 4) Project ownership arising by virtue of a statutory, property or contractual right in the land, vegetation or conservational or management process that generates GHG emission reductions and/or removals (where the project proponent has not been divested of such project ownership).*
- 5) An enforceable and irrevocable agreement with the holder of the statutory, property or contractual right in the plant, equipment or process that generates GHG emission reductions and/or removals which vests project ownership in the project proponent.*
- 6) An enforceable and irrevocable agreement with the holder of the statutory, property or contractual right in the land, vegetation or conservational or management process that generates GHG emission reductions or removals which vests project ownership in the project proponent.*
- 7) Project ownership arising from the implementation or enforcement of laws, statutes or regulatory frameworks that require activities be undertaken or incentivize activities that generate GHG emission reductions or removals.*

The [VCS Program definitions](#) complement the standard with the following relevant definitions:

Jurisdictional Proponent *The government agency, department or organization that has overall control and responsibility for the jurisdictional REDD+ program, or a government agency, department or organization that together with others, each of which is also a jurisdictional proponent, has overall control or responsibility for the jurisdictional REDD+ program. The entity(s) that can demonstrate*

*program ownership in respect of the jurisdictional REDD+ program.*

**Program Ownership** *The legal right to control and operate the program activities. Distinct from proof of right.*

**Proof of Right** *The document(s) demonstrating the entity's right to all and any GHG emission reductions or removals generated by the project or program during the crediting period or verification period, as the case may be. Distinct from project ownership and program ownership.*

### **Existing Legal Framework for Forests in Indonesia<sup>1</sup>**

All lands in Indonesia fall into one of two groups:

- Forest estate (*Kawasan hutan*), under the administration of the Ministry of Environment and Forestry (MOEF), with an area of about 124 million ha (MOEF, 2014), which represents about two-thirds of Indonesia's landmass.
- Non-forest estate also known as APL (*areal penggunaan lain/area for other land uses*), which covers an area of about 64 million ha, or about one third of the landmass of Indonesia, and is under the administration the National Land Agency (part of the Agrarian Ministry) and Governors. The area under APL includes both State lands and private lands and includes land zoned for agriculture. About 30% of the non-forest area is formally titled as privately-owned lands. However, in 2011 a presidential taskforce identified that of the 57 million hectares of land zoned for agriculture, at least 15 million hectares were still forested.

Under the existing legal framework in Indonesia, within the forest estate, forests are categorized as state forest, individual forest and customary forest (the latest is based on the Constitutional Court Decision No. 35 Year 2012). Meanwhile, in terms of function, forest estates are divided into protection forest (29.7 million hectares), conservation forest (22.1 million hectares) and production forest (68.8 million hectares). For conservation forest, the central government has the responsibility to manage it directly by establishing national park units and Natural Resource Conservation Agency (BKSDA) for non-national park areas (e.g. natural preservation and wildlife reserve areas). For protection and production forests, the Ministry of Environment and Forestry has the authority to establish Forest Management Units (FMUs), designate the area under each FMU and provide guidelines and procedure for the FMU. Based on the designated FMU and the area, the Provincial Government establishes the FMU under its relevant organization (Forestry Dept).

For forest management, the Ministry of Environment and Forestry is allowed by the existing regulation to issue various permits in forest areas. Those concessions cover commercial timber utilization, industrial forest plantation, individual or community forest plantation, community forest, village forest, customary community forest recognition, borrow to use permits for mining, oil and gas as well as ecosystem restoration. For business purposes, the authority to issue the permits have been given to Indonesia's Investment Coordinating Body based on MoEF's technical review and final recommendation, while social forestry related permits are still under the authority of the Ministry of Environment and Forestry. In addition, all types of permits require recommendation letter or acknowledgement from the sub- national government.

The Government of Indonesia through Ministry of Environment and Forestry also allows permit holders to request carbon sequestration permit, meaning that each permit holder who is interested in carbon business needs to have a special permit. Prior to application, the permit holder needs to verify whether the permit area is under the designated REDD+ area, as it is a key requirement for obtaining results-based payment. The areas designated by Ministry of Forestry and Environment as REDD+ areas are the islands of Java, Bali and Nusa Tenggara, Maluku, Sulawesi, Kalimantan, Sumatera and Papua. The total REDD+ area is 96,5 million hectares.

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<sup>1</sup> Adapted from various sources including: "Overview of forest tenure reforms in Indonesia" (CIFOR, 2017), "Protecting forests in Indonesia - legal options in land zoned for agriculture" (The Forest Trust, 2017)

## Existing REDD+ regulation in Indonesia<sup>2</sup>

In 2008 and 2009, Indonesia's then Ministry of Forestry issued REDD+ regulations governing REDD+ demonstration and commercial projects. There are three primary regulations (2008, 2009a, 2009b).

The 2008 Decree establishes permission and approval procedures for REDD+ demonstration activities so as *"to test and develop methodologies, technology and institutions for sustainable forest management that endeavor to reduce carbon emissions through controlling deforestation and forest degradation."*

The first 2009 Decree establishes procedures and requirements with which REDD+ project developers must comply, including verification and certification, types of forest areas where projects can be established, and standards and requirements to be met by implementing bodies. The decree authorizes demonstration activities and voluntary carbon trading prior to final determination of an international REDD+ regime. As explained in some detail in the Indonesia case study, various categories of forest rights holders expressly receive an entitlement to participate in REDD+ projects in partnership with an international entity. Rather than address revenue sharing, the decree explicitly states that the issue will be addressed in a regulation that will be adopted later.

The second decree of 2009 sets forth procedures for licensing specifically defined commercial carbon sequestration projects in Production and Protected Forests. It also covers approvals for those with and without pre-existing licenses for various forestland uses, including environmental services, ecosystem restoration services, and timber production in different types of forests. The decree includes required benefit sharing allocation percentages for each forest rights category.

[Decree No. P. 20/Menhut-II/2012](#) replaced at least partially the 2008 and 2009 Decrees. This 2012 Decree defines, to some extent, *"Forest carbon"* *"Forest carbon management"*, *"Forest carbon management permits"*, *"Forest carbon activities"* in the context of *"Demonstration activities"* and *"implementation of forest carbon activities"*. This may not however address adequately the clarification and security of rights on all forest carbon in the country to the extent required by the various RBP schemes.

According to this Decree, forest carbon projects can be implemented in state forests that have been designated to have the functions of either production, protection, conservation or a private/community forest. Permits for the implementation of forest carbon are integrated with permits on forest use / yield (art. 7). The proponents of forest carbon activities can be the government, state-owned or private enterprises, cooperatives or a community. In order to obtain an *"operating license for forest carbon"*, the project proponent submits a written request to the then Minister of Forestry that includes a description of the project activities, the project map, duration, estimated value of the activities and risk management. *"Forest carbon management permits"*, defined as *"permits granted by Minister of Forestry to carry out forest management that includes activities for carbon stock storage, sequestration, and emissions reduction in both forest areas and in private forests"* enable permit holders to trade forest carbon. The Decree mentions a separate Ministerial Regulation on procedures for forest carbon trading. This Decree may be under revision.

## II. SCOPE OF WORK, ACTIVITIES, AND DELIVERABLES

### Duties and Responsibilities:

To ensure that Indonesia meets the requirements of the various RBP schemes, an international

<sup>2</sup> Adapted from "REDD+ and carbon rights: lessons from the field" (USAID, 2016) and "" ()

consultant will be hired to do the following:

- Summarize the existing and forthcoming legal requirements of the various RBP schemes and market-based schemes, both under and outside the UNFCCC, regarding ownership and legal title of ERs;
- Create a legal analysis process, with corresponding methodology, to assess the relevant existing legal framework for the land use and forest sector in Indonesia and potential implications with regards to ownership and legal rights to emission reductions, having in perspective the existing and forthcoming legal requirements of the various RBP schemes and market-based schemes;
- In consultation with the national consultant, analyze how the existing legislation deals with forest carbon ownership, identify the main regulatory gaps and make recommendations for clarification or amendments to existing laws, paying attention to the role and mandate of national versus subnational governments and local communities in REDD+ transactions;
- Propose a regulatory solution for the potential issues identified through the gap analysis and draft a roadmap for the incremental implementation of a legal framework that would satisfy all types of RBP schemes and market-based mechanisms, both under and outside the UNFCCC, in terms of legal ownership/ legal title requirements (from less stringent frameworks that do not require the formal title, when there is no transfer of rights to the more stringent frameworks, likely to be adopted for markets); and
- In consultation with the national consultant, assess these institutions against criteria such as background of the institution, operational capacity, presence in regional level, etc.
- Propose the role of each institution responsible for the implementation of the policies, regulations, plans and activities part of REDD+ implementation in Indonesia.

The international consultant is expected to work closely with a national consultant, recruited through a separate process, who will work on the following responsibilities:

- Use the methodology developed by the international consultant for the legal analysis process to assess the existing legal framework for the land use and forest sector in Indonesia and potential implications with regards to ownership and legal rights for emission reductions (gap analysis), taking into account the existing regulatory framework for REDD+ and its potential gaps;
- Based on the summary of the legal requirements of the different RBP schemes and market-based schemes for REDD+ developed by the international consultant, identify any conflicting jurisprudence that may exist in the land use and forest sector to assess the severity and implications on institutional mandates as well as ownership and legal rights for emission reductions in Indonesia;
- Review the mandate and assess the functional adequacy of the institutions currently responsible for land tenure, land use planning and forest management at the national level; and

Prepare consultations and a national workshop on the proposed solution in the context of the REDD+ implementation process.

**Expected Outputs:**

- Summary report on the existing legal requirements of the various RBP schemes regarding ownership and legal title of ERs (maximum 10 pages);
- A legal analysis process, with corresponding methodology to assess the relevant existing legal framework for the land use and forest sector in Indonesia and potential implications with regards to ownership and legal rights to emission reductions, having in perspective the existing and forthcoming legal requirements of the various RBP schemes and market-based schemes (maximum 5 pages);
- Report on the legal gap on how the existing legislation deals with forest carbon ownership, identify the main regulatory gaps and make recommendations for clarification or amendments to existing laws, paying attention to the role and mandate of national versus subnational governments and local communities in REDD+ transactions (maximum 10 pages);
- Roadmap with proposed solutions, including risks, alternatives, pros and cons of each option (maximum 5 pages);

- Draft of the legal instrument to be used by the country to satisfy all international legal requirements for RBP and other market-based schemes, including the role of key institutions;

Report of the consultations with stakeholders and amendments to the regulatory proposal.

#### Payments

| Deliverables  | Number of days estimated to complete output | Completion deadline | Percentage of total payment | Review and Approvals Required  |
|---|---|---------------------|-----------------------------|--|
| Report on the existing legal requirements of the various RBP schemes regarding ownership and legal title of ERs   | 3   | 13 Sept 2019        | 10%                         | Senior Adviser to Natural Resource Governance in UNDP Indonesia and the UNDP Climate and Forests team's Regional Technical Advisor in the Bangkok Regional Hub |
| Create a legal analysis process, with corresponding methodology, to assess the gaps of the existing legal framework for the land use and forest sector to comply with the international requirements from the various RBP schemes | 10  | 24 Sept 2019        | 35%                         |  |
| Legal gap analysis for Indonesia  | 5   | 1 Oct 2019          | 15%                         |  |
| Roadmap with potential solutions  | 3   | 7 Oct 2019          | 10%                         |  |
| Draft legal instrument  | 8   | 21 Oct 2019         | 25%                         |  |
| Report of the consultations   | 1   | 31 Oct 2019         | 5%                          |  |
| <b>Total</b>  | <b>30 days</b>                              |                     | <b>100%</b>                 |  |

Payment will be made upon submission of deliverables and clearance from supervisor.

Signed contracts in the individual agreement mode do not entail any advance fees either at the contract start date or at the start of the specific consulting periods.

### III. WORKING ARRANGEMENTS

**Institutional Arrangement**

The consultant will carry out his/her functions under the direct supervision of the Senior Advisor for Natural Resources Governance and intermittently to the UNDP Climate and Forests team's Regional Technical Advisor in the Bangkok Regional Hub. As part of his/her duty, the consultants will also participate in policy dialogues, discussions, and any strategic meetings held by UNDP.

**Duration of the Work**

Maximum 30 working days of work starting September 2019

**Duty Station**

The consultancy will be home based.

**Travel Plan**

N/A

**IV. REQUIREMENTS FOR EXPERIENCE AND QUALIFICATIONS****Academic Qualifications:**

Bachelor Degree in Law or Master's Degree specialized in international and/or environmental law, or climate legal, policy and regulatory framework.

**Years of experience:**

- Minimum of 10 years (for Bachelor Degree) or 7 years (for Master's Degree) on practical working experience in developing countries with international environmental law issues, including legal aspects related to climate change, forest carbon and REDD+.
- Working experience in an international organization is an advantage;

**III. Competencies and special skills requirement:**

- In-depth knowledge of the UNFCCC, REDD+ and pilot result-based payment initiatives is required;
- Full proficiency in English is essential.
- An understanding of the REDD+ agenda and climate finance in the context of UNFCCC negotiations, the challenges and opportunities is required;
- Familiarity with forest carbon markets and associated standards are a must;
- Demonstrated strategic technical and intellectual skills in substantive area;
- Full computer literacy;
- Good organizational, time management and strong interpersonal skills.

**V. EVALUATION METHOD AND CRITERIA**

Individual consultants will be evaluated based on the following methodology:

**Cumulative analysis**

When using this weighted scoring method, the award of the contract should be made to the individual consultant whose offer has been evaluated and determined as:

- a) responsive/compliant/acceptable, and
- b) Having received the highest score out of a pre-determined set of weighted technical and financial criteria specific to the solicitation.

\* Technical Criteria weight; [70%]

\* Financial Criteria weight; [30%]

Only candidates obtaining a minimum of 70 point would be considered for the Financial Evaluation



| <b>Criteria</b>  | <b>Weight</b> | <b>Maximum Point</b>                                       |
|--|---------------|--|
| <u>Technical</u>   |               |  |
| <p><i>Criteria A: qualification requirements as per TOR:</i></p> <ol style="list-style-type: none"> <li>1. Bachelor Degree on Law or master's degree specialized in international and/or environmental law, or climate legal, policy and regulatory framework.</li> <li>2. Minimum of 10 years (for Bachelor Degree) or 7 years (for Master's Degree) on practical working experience in developing countries with international environmental law issues, including legal aspects related to climate change, forest carbon and REDD+.</li> <li>3. Working experience in an international organization is an advantage</li> <li>4. In-depth knowledge of the UNFCCC, REDD+ and pilot result-based payment initiatives is required;</li> <li>5. An understanding of the REDD+ agenda and climate finance in the context of UNFCCC negotiations, the challenges and opportunities is required;</li> <li>6. Familiarity with forest carbon markets and associated standards are a must</li> </ol> | 70%           | <p>10</p> <p>20</p> <p>5</p> <p>10</p> <p>15</p> <p>10</p> |
| <p><i>Criteria B: Brief Description of Approach to Assignment</i></p> <ol style="list-style-type: none"> <li>1. Understands the task and applies a methodology appropriate for the task</li> <li>2. Important aspects of the task addressed clearly and in sufficient detail</li> <li>3. Logical, realistic planning for efficient project implementation.</li> </ol>  | 30%           | <p>10</p> <p>10</p> <p>10</p>                              |