

**Note on the Ability of Program Entity to Transfer Title to
Emission Reductions**

BioCarbon Fund Initiative for Sustainable Forest Landscapes

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Washington DC**

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1. Requirements on Program Entity's ability to transfer Title to ERs

Tranche Three of the BioCarbon Fund (**BioCFT3**) of the Initiative for Sustainable Forest Landscapes (**ISFL**) requires a Program Entity to demonstrate its ability to transfer Title to Emission Reductions (**ERs**), in accordance with the ISFL ER Program Requirements (September 2017) (hereinafter "**Requirements**") and the ISFL ER Program Document (**ISFL ERPD**) template (August 2017). The term 'Title to ERs' means the full legal and beneficial title and exclusive right to ERs contracted for under any Emission Reductions Payment Agreement (**ERPA**), but excludes any rights to underlying land and territories. Specifically, Section 3.6.1 of the ISFL ERPD template requires that the Program Entity demonstrates its ability to transfer Title to ERs to the BioCFT3 and describe the associated risks that this ability is clear or uncontested. As part of this demonstration, the Program Entity is expected to include a discussion on the implications of the land and resource tenure assessment on its ability to transfer Title to ERs to the BioCFT3 (as required under Section 3.5.1 of the Requirements). If significant difficulties in the ability to transfer Title to ERs have been identified, the Program Entity is required to indicate what proportion of the ISFL ER Program Area might be affected and what measures will be taken to establish this ability.

The ERPA as well as its General Conditions (which still need to be finalized by the International Bank for Reconstruction and Development (**World Bank**), as trustee of BioCFT3 (**Trustee**)) will include covenants requiring the Program Entity to ensure its ability to transfer Title to ERs contracted for under such ERPAs and will provide remedies to the Trustee in case such ability cannot be ensured or is being contested.

1.1 Evidence to demonstrate Program Entity's ability to transfer Title to ERs

Section 3.6.1 of the ISFL ERPD template states that the ability to transfer Title to ERs may be demonstrated through various means, including reference to existing legal and regulatory frameworks, sub-arrangements with potential land and resource tenure rights-holders (including those holding legal and customary rights, as identified by the assessment described in Section 3.4.1 of the ISFL ERPD template), and benefit sharing arrangements under the Benefit Sharing Plan.

However, this list of options is neither exhaustive nor are these three options mutually exclusive. The Program Entity can demonstrate its ability to transfer Title to ERs through any combination of the three options or may even provide other evidence appropriate for the host country's specific legal context, acceptable to the Trustee. In any case, the Program Entity is encouraged to supplement the evidence submitted with relevant court decisions, legal opinion by legal experts who are familiar with the host country's regulatory system, agreements between the Program Entity and certain stakeholders, just to name a few. However, in accordance with Section 3.6.1 of the Requirements, it should be noted that the Program Entity must have prepared a Benefit Sharing Plan prior to signing the ERPA.

Box 1 below provides a few guiding questions to consider under the three listed options. This list of guiding questions is not intended to be an exhaustive list, but an illustrative one to help the Program Entity identify the most relevant information needed to demonstrate its ability to transfer Title to ERs. Annex 1 provides more detailed guidance.

Box 1. Guiding Questions on how to Demonstrate Ability to Transfer Title to ERs	
Option 1: Reference to existing legal and regulatory frameworks	<p>Does the host country have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that stipulate that the Program Entity has (1) the Title to ERs, and/or (2) the authority to transfer Title to ERs generated under the ER Program?</p> <p>Does the host country have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that provide a basis for the land and resource tenure holders to claim interests in the Title to ERs?</p>
Option 2: Sub-arrangements with potential land and resource tenure rights holders	<p>Has the Program Entity entered into any sub-arrangements (e.g., contracts, agreements, payment for ecosystem services schemes) that could be the basis for potential land and resource rights holders to claim interests in the Title to ERs?</p> <p>Have the potential land and resource tenure rights holders willingly, expressly, and validly agreed, through the sub-arrangement(s), that the Program Entity will be the only seller of the ERs, or that the Program Entity may sell the ERs on their behalf?</p>
Option 3: Benefit sharing arrangement	<p>Has the Program Entity prepared a Benefit Sharing Plan in accordance with the Requirements?</p> <p>How has the design of the Benefit Sharing Plan incorporated considerations on land and resource tenure rights (including legal and customary rights of use, access, management, ownership, etc.), and Title to ERs? Have potential land and resource tenure rights holders been included in the list of beneficiaries under the Benefit Sharing Plan? Does the Benefit Sharing Plan require beneficiaries to register with the benefit sharing mechanisms in return for an authorization of the Program Entity to transfer Title to ERs?</p>

1.2 The due diligence review by the World Bank

The World Bank will carry out a due diligence review to assess if and to what extent the Program Entity has demonstrated its ability to transfer Title to ERs generated under the ER Program within the ISFL ER Program Area. The due diligence review will be based on a desk review of the evidence submitted by the Program Entity on a *prima facie* basis¹, assuming the evidence submitted is complete, accurate, and true. The World Bank will undertake this due diligence review at different stages of the ER Program, i.e., before ERPA signature, before ER Title transfer, and if the ER Title is contested, after ER Title transfer (Figure 1).

¹ The term ‘prima facie’ means that the provided evidence will be assessed by the IBRD “at first sight” and be accepted as complete, accurate and true until proven otherwise.

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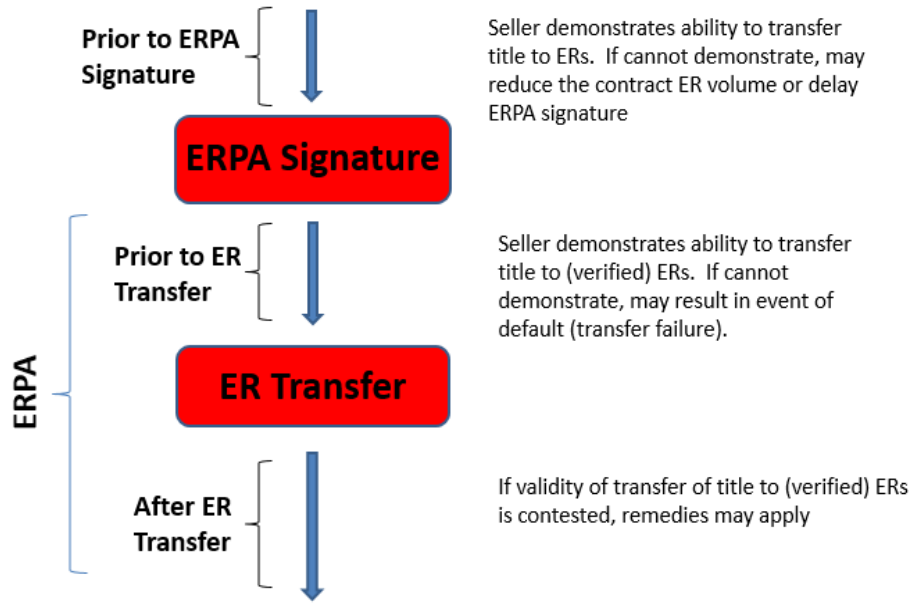


Figure 1. Key stages of an ISFL ER Program where the Program Entity needs to demonstrate its ability to transfer Title to ERs

Annex 1. Guidance on submission of evidence to demonstrate the Program Entity's ability to transfer Title to ERs

1.2.1 Option 1: Reference to existing legal and regulatory frameworks

Guiding Question: Does the host country have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that stipulates that the Program Entity has (1) the Title to ERs, and/or (2) the authority to transfer Title to ERs generated under the ER Program?

Guiding Question: Does the host country have legal instrument(s) (e.g., statutes, regulations, decrees, administrative orders) that provide basis for the land and resource tenure holders to claim interests in the Title to ERs?

- Describe the type of legal instrument (e.g., statutes, regulations, decrees, administrative orders, court decisions) and its legal effect (e.g., To what extent is the legal instrument enforceable and legally binding and on what parties, or is it aspirational that requires further rule-making or promulgating guidelines to clarify the responsibilities of various parties? Does the scope of the legal instrument cover the ISFL ER Program Area?).
- Identify the entity responsible for implementing/enforcing the legal instrument.
- Provide an overview of how the legal instrument was drafted, reviewed, and adopted to confirm if the legislative or rule-making process was transparent, consultative, and respectful of the interest of land and resource tenure holders including Indigenous Peoples (i.e. was the legal instrument passed with due process and consultations with such potential rights holders?).
- Summarize the relevant provisions on issues such as the following:
 - The definition of Title to ERs: assess if it is defined (i) as a right that is separated from the land and resources tenure rights, (ii) as a right that is attached to the land and/or resource tenure rights, or (iii) as a right that is specific to the provision of certain ecosystem/environmental services.
 - The alienation of Title to ERs from the tenure rights to the underlying land and resources: assess whether the Title to ERs can be transferred without altering the tenure rights to the land and resources, and what is the legal/administrative process for such transfer (e.g., certification requirements, contractual requirements related to payment for ecosystem services, licenses, concessions).
- Assess if there are any ambiguities, uncertainties, or apparent contradictions in the legal framework that might affect the ER Program (e.g., does the legal instrument cover all the ISFL ER Program Area/relevant stakeholders). If so, propose a roadmap and a timeline of actions under the ISFL ER Program to manage the potential risks due to such ambiguities, uncertainties, or apparent contradictions in terms of the program design and implementation support.
- In the absence of explicit legislative treatment:
 - Assess whether any legal instrument (e.g., statutes, regulations, decrees, administrative orders, court decisions) provides sufficient basis for determining the existence, ownership, and transferability of carbon rights (e.g., whether there is a legal basis to conclude that the ownership of carbon is vested in the owners of the land or owners of the resources on land, and that the carbon ownership can be transferred to others who are not land or resource owners).

- Discuss whether the government owns the land and assets needed for carrying out the ER activities, or has a right under a sub-arrangement to occupy the land and/or use the resources on that land for carrying out the ER activities, or can cause the land and resources tenure holders to carry out ER activities through the sub-arrangement, additional agreements or administrative actions.
- Whether the national law (e.g., contract law, property law) will uphold some form of agreement between the Program Entity and the land and resources tenure holders whereby the two agree that the Program Entity will be the only seller of the ERs or that the Program Entity may sell the ERs on behalf of the land and tenure rights holders.

1.2.2 Option 2: Reference to sub-arrangements with potential land and resource tenure rights holders

Guiding Question: Has the Program Entity entered into any sub-arrangements (e.g., contracts, agreements, payment for ecosystem services schemes) that could be the basis for potential land and resource rights holders to claim interests in the Title to ERs?

Guiding Question: Have the potential land and resource tenure rights holders, through the sub-arrangement(s), willingly, expressly, and validly agreed that the Program Entity will be the only seller of the ERs, or that the Program Entity may sell the ERs on their behalf?

- Describe the structure, requirements, enforcement, and duration of the sub-arrangement (i.e. whether the sub-arrangement is a contract, payment for ecosystem services scheme, or some other agreements? Who are the parties involved, roles and responsibilities, enforceability, etc.)?
- Describe the legal basis for the sub-arrangement (i.e., Is the sub-arrangement established under a specific statute of the host country, a commercial contract, or some other types of sub-arrangement?)
- Assess whether the sub-arrangement was entered into through a transparent and consultative process (i.e., Were the relevant rights holders properly identified and consulted with prior to entering into such sub-arrangements?).
- Describe how the sub-arrangement affects the ownership and transfer of the Title to ERs.
- If the Title to ERs is attached to the land and resources tenure rights, demonstrate that the land and resource tenure rights holders have willingly, expressly, and validly agreed that the Program Entity will be the only seller of the ERs or that the Program Entity may sell the ERs on behalf of the land and tenure rights holders.
- Discuss whether the government has a right under such sub-arrangement to occupy the land and/or use the resources on that land for carrying out the ER activities, or can cause the land and resources tenure holders to carry out ER activities through the sub-arrangement, additional agreements or administrative actions.
- Discuss how disputes related to the sub-arrangement will be addressed.
- Assess if there are any ambiguities and uncertainties in the sub-arrangement that might affect the ISFL ER Program. If so, propose a roadmap and a timeline of actions under the ER Program to manage the potential risks due to such ambiguities and uncertainties in terms of the program design and implementation support.

1.2.3 Option 3: Reference to the Benefit Sharing Plan

Guiding Question: Has the Program Entity prepared a Benefit Sharing Plan in accordance with the Requirements?

Guiding Questions: How has the design of the Benefit Sharing Plan incorporated considerations on land and resource tenure rights (including legal and customary rights of use, access, management, ownership, etc.), and Title to ERs? Have potential land and resource tenure rights holders been included in the list of beneficiaries under the Benefit Sharing Plan? Does the Benefit Sharing Plan require beneficiaries to register with the benefit sharing mechanisms in return for an authorization of the Program Entity to transfer Title to ERs?

- Explain how the benefit sharing arrangement in the Benefit Sharing Plan improves the Program Entity's ability to transfer Title to ERs:
 - Explain if/how far potential land and resource tenure rights holders or owners of Title to ERs have been included in the list of beneficiaries under the Benefit Sharing Plan?
 - If beneficiaries are deemed to have land and resource tenure rights/Title to ERs, how does their participation in the Benefit Sharing Plan help the Program Entity to transfer Title to ERs? Does the Benefit Sharing Plan, for example, require such beneficiaries to register with the benefit sharing mechanism in return for the authorization of the Program Entity to transfer Title to ERs?
 - If beneficiaries are deemed to have potential land and resource tenure rights, but not Title to ERs (e.g. a statute vests Title to ERs to the State regardless of who holds the land and resource tenure rights), describe whether such potential land and resource tenure rights holders are still eligible to receive benefits under the Benefit Sharing Plan.
 - Describe how the benefit sharing arrangement has considered the land and resource tenure rights, especially in cases where the Title to ERs derives from land or resource ownership and such ownership may be overlaid with customary use rights.
- Explain how the identification of the eligible categories of beneficiaries under the ISFL ER Program and the design of the Benefit Sharing Plan was done in a consultative, transparent, and participatory manner that is appropriate to the country context so that any negative impacts to the underlying land and resources rights of such relevant stakeholders are avoided or minimized.
- If the ownership of ERs is not provided for in the country's legal system or sub-arrangements, explain how the benefit sharing arrangement has provided additional clarity on the Program Entity's ability to transfer Title to ERs under the ISFL ER Program.
- Explain if the relevant feedback and grievance redress mechanism for the ISFL ER Program is available to address grievances and disputes related to the benefit sharing arrangement.