

# KEY QUESTIONS & ANSWERS ABOUT JURISDICTIONAL (J-REDD+) / STATE REDD+ CARBON CREDITS

## THE BRAZILIAN CONTEXT

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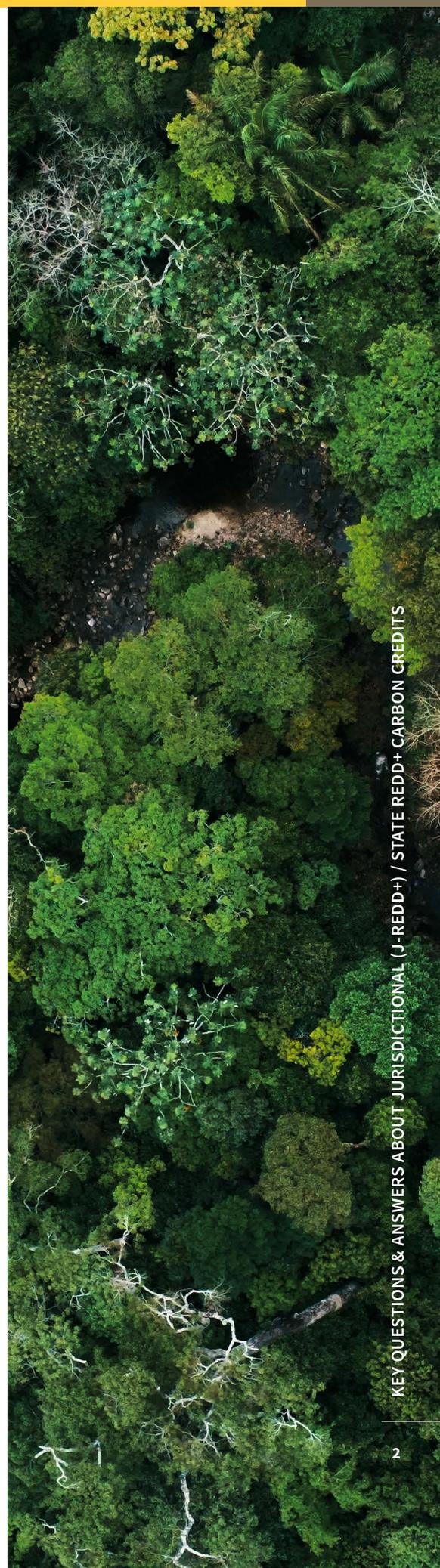


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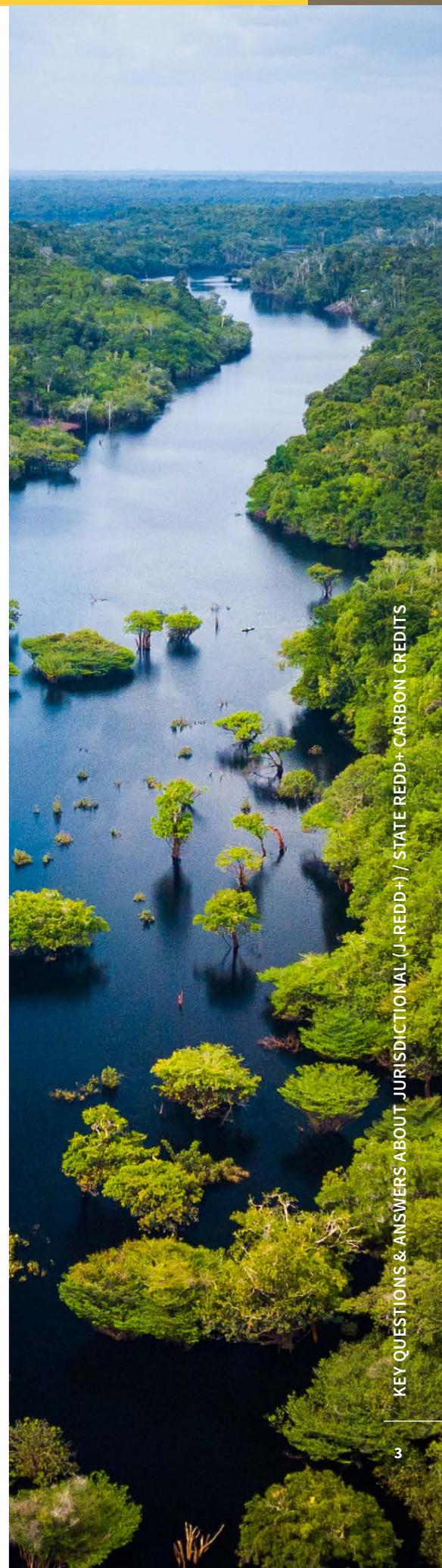
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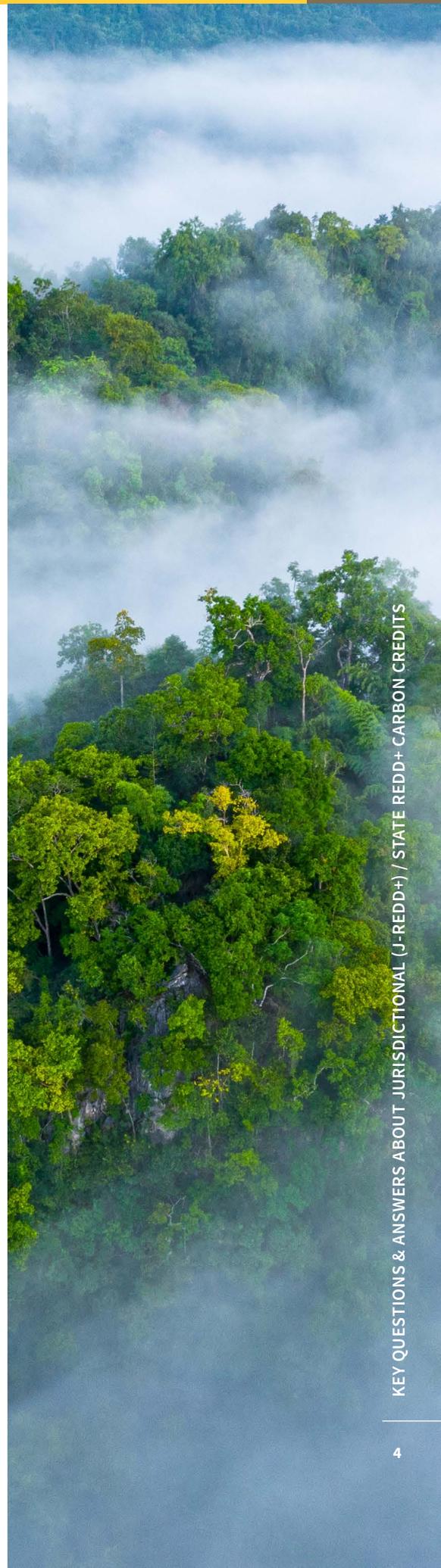
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# Basic concepts

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## 1. What is an ecosystem service?

**A:** According to Brazilian Federal Law 14.119/2021 (National Policy for Payments for Environmental Services, PNPSA)<sup>1</sup>, “ecosystem services” are “the relevant benefits to society generated by ecosystems, in terms of maintaining, restoring or improving environmental conditions.” The NPFS also defines “ecosystems”<sup>2</sup> as “a dynamic complex of plant, animal and micro-organism communities and their inorganic environment interacting as a functional unit”. Thus, the definition includes the following modalities: (a) provisioning services, consistent with the generation of environmental inputs for humanity; (b) support services, considered to be those that maintain the continuity of life on Earth; (c) regulating services, which are those that contribute to maintaining the stability of ecosystem services; and (d) cultural services, a category that encompasses the benefits associated with recreation, tourism, cultural identity, spiritual and aesthetic experiences, and intellectual development. From the definition given by the law, we conclude that **ecosystem services are the direct or indirect benefits provided by nature itself**, i.e. by the ecosystems themselves, and not actions practiced by individuals (i.e., subjects of law).

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## 2. What is an environmental service?

**A:** According to Law 14.119/2021<sup>3</sup>, **environmental services are the individual or collective activities that favor the maintenance, recovery or improvement of ecosystem services**. By referring to two different concepts (environmental services and ecosystem services), and by using the words “activities” (etymologically linked to the verb “to act”), “individual” or “collective”, the law clearly intends to link environmental services to actions practiced by legal subjects - individuals and legal entities, public or private, necessarily for the benefit of an ecosystem service. Environmental services differ from ecosystem services, therefore, in that the former are linked to an action (legally relevant conduct) by a subject of law, and the latter are a finding of an event caused by nature, i.e., not linked to a direct action by a subject.

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## 3. What is an environmental asset?

**A:** In general, “asset” is an expression used to classify an asset or right that can be converted into cash or represents an asset position favorable to the holder. That is, a credit, in balance sheet terms, as opposed to a liability, which represents a debt, a liability. Given the lack of a legal definition for the term “environmental asset”, its practical conceptualization depends on the context through which its application is analyzed.

An environmental asset can be considered as an asset derived from activities performed in the context of a green economy, thus considered a set of activities that entail “(...) an improvement in human well-being and social equity, while significantly reducing environmental risks and ecological deprivation, and is therefore

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1 Law 14.119/2021, article 2, II, “a” to “d”.

2 Law 14.119/2021, article 2, I

3 Law 14.119/2021, article 2, III.

summarized as a low-carbon, resource-efficient, and socially inclusive economy.”<sup>4</sup> Thus, in the context of PES policies and programs, one can conclude that an environmental **asset is a good or right arising from the realization of an environmental service or the occurrence of an ecosystem service**. The valuation of environmental assets is one of the purposes of the law that established the PNPSA (Law 14.119/2021).

#### 4. What is REDD+?

**A:** REDD+ stands for Reducing Emissions from Deforestation and Forest Degradation. The “+” sign means to recognize other conservation efforts as well. The activities that characterize REDD+ arise from: **(i) reducing emissions from deforestation; (ii) reducing emissions from forest degradation; (iii) conservation of forest carbon stocks; (iv) sustainable management of forests; and (v) enhancement of forest carbon stocks.**

The original concept of REDD emerged under the United Nations Framework Convention on Climate Change (UNFCCC) as a financial mechanism for making payments to developing countries with large extensions of forest areas for conserving their forests and contributing to the fight against the effects of climate change.<sup>5</sup> The mechanism has been evolving within the UNFCCC, and has been the object of some relevant decisions and agreements, of which we highlight: Decision 1/CP.16 that established the Cancun Safeguards, Decision 9/CP.19 that established the Warsaw Framework, and the Paris Agreement, which recognized the REDD+ type of payments for results under article 5, and established market mechanisms in its article 6.

Payment-for-results for REDD+ activities under the UNFCCC must be measured against a baseline called the Forest Reference Emission Level (FREL) approved by the UNFCCC, whose evolution and registration of payment-for-results transactions are monitored by the UNFCCC on the REDD+ Infohub. For this, the country must present a national REDD+ strategy. Brazil has FRELS for the Amazon and Cerrado presented in the InfoHub REDD+, and the Ordinance of the Brazilian Ministry of Environment, MMA No. 370/2015, established the National Strategy for REDD+ (ENREDD+) to be managed by the National Commission for REDD+ (CONAREDD+)<sup>6</sup>.

REDD+ methodologies have also been appropriated by voluntary carbon market certification standards, allowing subnational entities and actors in a given project area to undertake REDD+ projects and programs to generate tradable carbon assets.

4 Definition from the United Nations Environment Programme (UNEP), cited in the Green Recovery Plan for the Legal Amazon - Executive Summary July 2021, of the Interstate Consortium for Sustainable Development of the Legal Amazon.

5 In this sense, according to the Ministry of Environment, “REDD+ is an economic instrument developed under the United Nations Framework Convention on Climate Change (UNFCCC), to which Brazil is a party. Its function is to provide financial incentives to developing countries for their results in combating deforestation and forest degradation and promoting an increase in forest cover. Through this instrument, developing countries that present reductions in greenhouse gas emissions and increase in verified carbon stocks will be eligible to receive ‘payments for results’ from various international sources, in particular from the Green Climate Fund (GCF)”. Source: Brazil. Ministry of Environment ENREDD+: national strategy for reducing emissions from deforestation and forest degradation, conservation of forest carbon stocks, sustainable management of forests and enhancement of forest carbon stocks / Brazil. Ministry of the Environment. Secretary of Climate Change and Environmental Quality. Department of Policies to Combat Deforestation. Brasília: MMA, 2016, p. 9, available at [CAPA\\_Port \(mma.gov.br\)](https://mma.gov.br)

6 <http://redd.mma.gov.br/pt/component/k2/item/750-a-estrategia-nacional-para-redd-do-brasil-enredd>

## 5. What is a carbon credit?

**A:** Carbon credit, by the definition of the Brazilian legislation is an **intangible, tradable asset (Law 12.651/2012, Forest Code), fungible and representative of emission reduction, removal or avoided emission of one ton of CO<sub>2</sub>e from the atmosphere**, verified in accordance with the requirements established by law or certification standard.

The carbon credit is the result of measuring and quantifying an emission reduction or removal increase or avoided emission compared to an elaborate baseline for a certain territory (e.g. jurisdiction, private property, Indigenous land, etc.), certified with a monitoring methodology, validation and verification with the issuance of a certificate and registration for later transaction/sale/application. The issuing of the certificate gives birth to the carbon asset, which is nothing more than a certificate issued by certain certification standard institutions (standards), approved for those emissions no longer released into the atmosphere or removed from it.

The composition of this asset guarantees the right: (i) to be able to use a tCO<sub>2</sub>e in the voluntary market and (ii) to transact (buy or sell) the asset (intangible good) at market value, in the national and/or international market.

## 6. Is the carbon credit a financial asset?

**A:** Decree 11,075/2022 defined a carbon credit as a “*financial, environmental, transferable asset that represents the reduction or removal of one ton of carbon dioxide equivalent, which has been recognized and issued as a credit on the voluntary or regulated market*”<sup>7</sup> This definition has generated discussion, given the **lack of consensus among experts regarding some classifications, especially when defining a carbon credit as a financial asset. According to some experts on the subject, the legal nature of the carbon credit is not compatible with that of a financial asset**<sup>8,9</sup>, but it is better suited with the definition already given by Law 12651/12 of an intangible asset (good), intangible, tradable, which should prevail within the current regulatory framework.<sup>10</sup>

Lawyers Tiago Ricci and Daniel Rocha, understand that in the case of carbon credits, the term “financial” used in Decree 11.075/2022 does not have technical-legal acuity, but uses market jargon to refer, essentially, to the value/referential exchange that is attributed to the asset - currency (*i.e.* financial). Thus, the definition given by the Decree was unfortunate in using the term “financial asset” instead of using the same terms as in the Forest Code and using the word “tradable”, bringing more confusion than clarity to the issue.

<sup>7</sup> Decree No. 11,075/2022, Article 2, I.

<sup>8</sup> This framework has no legal basis or accompanies studies on the subject. According to the Accounting Pronouncements Committee (CPC) - formed by institutions such as the Federal Accounting Council (CFC) - financial assets are any assets that contain the following characteristics (CPC 48): Immediately available (Cash) - has immediate liquidity; Equity instrument of another entity - contract that evidences a residual interest in the assets of another entity; Contractual right to receive cash or other financial asset from another entity or to exchange financial assets or liabilities with another entity on potentially favorable terms; and Contract that can be settled in equity securities of the entity itself. These legal characteristics established by CPC 48 do not fit the characteristics and legal nature of the Carbon Credit. <https://www.jota.info/opiniao-e-analise/artigos/evolucao-e-involucao-da-regulacao-do-mercado-de-carbono-25062022>

<sup>9</sup> O Globo. Blog Otavio Yazbek. How not to regulate the carbon market. <https://blogs-oglobo-globo-com.cdn.ampproject.org/c/s/blogs.oglobo.globo.com/capital/post/amp/otavio-yazbek-ex-cvm-como-nao-regular-o-mercado-de-carbono.html>

<sup>10</sup> In the event of conflict between the definitions given by Law 12,651/2012 and Decree 11,075/2022, Law 12,651 will prevail, thus respecting the principle of hierarchy of Brazilian legal norms.

As established by the Brazilian Forest Code, carbon credits are intangible, tradable assets that can be traded by their holders, be they private project developers, states, indigenous and traditional communities, or other entities operating in the market. However, if carbon credits come to be defined by law and regulated as financial assets, experts on the subject understand that this could cause legal, accounting and tax problems, because in this case, the entry of these assets in accounting systems should characterize it as an asset subject to immediate cashing, and its marketing could be restricted to exchanges or other regulated formats.

## 7. What are the rights obligations arising from a carbon credit?

**A: Carbon credits in themselves do not generate obligation because they are assets generated *post factum*.** That is, carbon credits can only be issued and be valid after something has been certified as having occurred, monitored and verified. In order to obtain a credit, as with any right, compliance rules must be followed.

However, there are a number of **obligations that fall on the primary developer/ holder of the program that generated the credits.** The duty to maintain the REDD+ emission reductions or removals project or program in accordance with the standards that have been structured in the *standard* or in the process of constructing the project or program. These include positive and negative obligations, such as the obligation not to do: not to deforest the protected region, through voluntary relinquishment of the legally enshrined right to deforest<sup>11</sup>; and positive obligations to do: such as ensuring perimeter maintenance and strategies to avoid *leakage* (*deforestation leakage into other areas*).

These obligations that fall under the developer / primary owner of the program / project are not enforceable by or against the holder of the carbon credit, since the carbon credit, as a security right, is an autonomous legal asset, unrelated (from the perspective of transmissibility) of the project that originated it.

## 8. What is a Jurisdictional REDD+ carbon credit, J-REDD+?

**A: The J-REDD+ carbon credit is a credit generated as a result of the public policies of the administrative actions of conservation, law enforcement, regulations and rules issued by the Public Administration through its different spheres of competence** (Executive or Legislative), which are applicable to the jurisdiction of that Administration, directed to the realization of certain programs or implementation of public policies for climate, forestry, payment for environmental services and REDD+. In other words, they arise from the environmental services provided by the Public Administration in the exercise of its administrative powers in environmental matters. These credits derive from a series of behaviors performed by the state (federative entity) as the holder of the *duty and prerogative to carry out public policy actions and the police power, from which derive the inspection and control actions aimed at compliance with the constitutional duty*<sup>12</sup> that the states have to “*preserve and restore the essential ecological processes and provide for the ecological management of species and ecosystems*.” These are the actions that will lead to the verification of the occurrence (and subsequent certification and registration) of jurisdictional carbon credits.

11 According to the limits for each national biome - aiming to maintain 80% or, as the case may be, 50% of legal reserve, in the Amazon biome / Cerrado 35% / Atlantic Forest or other biomes 20%.

12 Art. 225, § 1º, clause I, of the Federal Constitution of 1988.

**The jurisdictional carbon credit differs from the carbon credit developed by a project in an isolated area (REDD+ project-based),** because it encompasses an entire territorial jurisdiction of a given state entity. Therefore, the reductions and removals are accounted for within a jurisdiction and not in an isolated area. The jurisdictional approach is an umbrella concept that has at least the following common elements: (i) attract and bring together all relevant stakeholders in a jurisdiction defined by legal boundaries; (ii) foster and align objectives aimed at promoting sustainable practices within that jurisdiction; (iii) have subnational government leadership within that jurisdiction; and (iii) respect social and environmental safeguards.<sup>13</sup>

## 9. How does one measure one ton of CO<sub>2</sub>e?

**A:** One ton of CO<sub>2</sub> equivalent (CO<sub>2</sub>e) represents the reduction or removal of greenhouse gases converted into one ton of CO<sub>2</sub>. To calculate the CO<sub>2</sub>e we need to know the destructive power of the molecules of each gas that causes the greenhouse effect. This concept is known as Global Warming Potential (GWP) and allows us to know how harmful the emission of the same amount of each of these gases is. This result is based on the gas's radiative efficiency, i.e., its ability to absorb heat, and its half-life, usually stipulating a period of 100 years. The damage potential of each gas means how much it interferes with the greenhouse effect in 100 years, compared to an equivalent amount of CO<sub>2</sub> emitted over the same period.

The CO<sub>2</sub> molecule has a GWP of 1. Methane (CH<sub>4</sub>) has a GWP of 23 times greater than CO<sub>2</sub>, i.e., emitting 1 kg of methane will have the same effect as emitting 23 kg of CO<sub>2</sub>. In turn, 1 kg of CO<sub>2</sub> is worth 0.2727 kg of carbon equivalent since it is only considered the mass of carbon molecules in one kilogram of CO<sub>2</sub>.

**The CO<sub>2</sub>e is calculated using the relative GWP value multiplied by 0.2727** (relative GWP x 0.2727).

## 10. What are the “standards” for jurisdictional REDD+ and who regulates them?

**A:** Standards are **sets of principles, criteria, methodologies, and indicators**, which: (a) establish a set of broad principles and standards; (b) detail a list of criteria to ensure compliance with the standard; and provide a list of indicators to demonstrate compliance with the criteria provided.<sup>14</sup>

The choice of the most appropriate standard for a jurisdictional program certification and access to forms of financing will depend on national and jurisdictional legal and regulatory factors, technical requirements for quantifying emissions reductions, requirements related to social safeguards and benefit sharing, as well as the actual arrangements for the type of forest carbon financing.<sup>15</sup>

The most recognized standard options for certification of jurisdictional REDD+ programs are: 1) Verra - Jurisdictional and Nested REDD+ Program (“**JNR**”); and the Architecture for REDD+ Transactions, The REDD+ Environmental Excellence Standard (“**ART TREES**”).

13 CDP, Jurisdictional Approaches An analysis of Brazil's states and companies' contribution, Disclosure Insight Action - CDP Latin America, São Paulo, 2021

14 ROE, STRECK, PRITCHARD, COSTENBADER, 2013. ROE, Stephanie, et al. Stephanie. Safeguards in REDD+ and Forest Carbon Standards: A Review of Social, Environmental and Procedural Concepts and Application. [S. l.], n. May, 2013.

15 LEE, Donna; NEEFF, Till. Shades of REDD+: ART, JNR or GCF ... Which is Best for Countries? 2022

Both aim to be “market-based” standards but have been developed for different purposes: ART TREES is designed to encourage government policy change, with jurisdictional projects to provide the necessary confidence in the integrity of forest emissions reductions to unlock new large-scale investments. Under ART TREES, countries and sub-national jurisdictions can generate verified emission reduction and removal credits by meeting precise and comprehensive requirements.<sup>16</sup>

The JNR is an accounting and verification framework for jurisdictional REDD+ programs and nested projects with a set of provisions designed to ensure that project-level accounting is aligned with jurisdictional strategies and methods. It includes criteria and requirements to ensure alignment of baselines, monitored data, estimates of emission reductions and/or removals, and carbon accounting at all levels, i.e., projects, subnational programs, and national programs.<sup>17</sup>

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## 11. What are and what are the REDD+ socio-environmental safeguards?

**A:** The safeguards can be defined as “**policies, principles, criteria, protocols, procedures or mechanisms to minimize the risks and promote the potential benefits associated with the implementation of REDD+ actions**”<sup>18</sup> and according to the Brazilian Ministry of Environment, has as its main scope: (i) guaranteeing rights, especially of indigenous peoples and traditional populations, who are considered vulnerable; (ii) environmental integrity of the emission reduction results achieved, in order to avoid displacement of activities that cause deforestation to other regions and the non-permanence or loss of carbon stocks concentrated in forests; and (iii) strengthening good governance, transparency and participation.

Under the UNFCCC, to be eligible to receive payments for REDD+ results, developing countries need, among other requirements, to adopt the so-called Cancun Safeguards (UNFCCC Decision 1/CP.16) and have a national information system in place to ensure the monitoring of their compliance. The seven general Cancun principles or safeguards were listed in the decision 1/CP.16,<sup>19</sup> and were established to address social and environmental aspects in the implementation of REDD+, including transparent governance structures, respect for the knowledge and rights of indigenous peoples and local communities, effective stakeholder participation, biodiversity conservation, and reduction of risks of emission reversals and displacement.

Non-implementation or partial implementation of the UNFCCC directives may prevent or hinder the receipt of payments for REDD+ results, as well as the generation and trading of carbon credits from Jurisdictional Programs in the voluntary market. In this regard, the two main certification standards for jurisdictional programs, JNR and ART TREES, require jurisdiction compliance with Cancun safeguards and other additional requirements.

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16 <https://www.artredd.org/trees/>

17 <https://verra.org/project/jurisdictional-and-nested-redd-framework/>

18 GUZMÁN, Sérgio. Understanding LEAF and ART TREES: Understanding REDD+. Washington DC: Forest Trends, 2022.

19 Cancun Principles: 1) actions complementary to or consistent with the objectives of national forest programs and other relevant international conventions and agreements; 2) transparent and effective national forest governance structures, taking into account national sovereignty and national legislation; 3) respect for the knowledge and rights of indigenous peoples and members of local communities, taking into account relevant international obligations, national laws and the UN Declaration on the Rights of Indigenous Peoples; 4) full and effective participation of stakeholders, in particular indigenous peoples and local communities; 5) actions consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of Decision 1/CP 16# are not used for the conversion of natural forests, but rather to encourage the protection and conservation of natural forests and their ecosystem services and to contribute to other social and environmental benefits; 6) actions to avoid the risks of reversal of REDD+ results; and 7) actions to reduce displacement of carbon emissions to other areas.

## 12. Why are safeguards important and what are they for?

**A:** Safeguards are relevant to **reduce negative impacts of jurisdictional REDD+ programs both in regard to social issues, such as land rights, benefit sharing, participation, access to information, conflict resolution, among others, and in environmental aspects, such as avoiding double counting, avoiding leakage and reversal of deforestation and forest degradation, and conserving biodiversity.** Furthermore, the safeguards are also relevant to maximize the positive impacts of jurisdictional programs, ensuring that the social and environmental effects are fair and equitable, for example, with the sharing of benefits, the expansion of environmental conservation, the empowerment of environmental service providers, so that the construction of programs and policies are adherent to the wishes of society, especially indigenous peoples and traditional populations, through instruments for participation and monitoring of decision-making processes of the programs. The safeguards serve as a set of principles and material and procedural rules that guide the planning, implementation, and monitoring of REDD+ Jurisdictional Programs. They also serve as indicators for program certification and demonstration of results before the UNFCCC.



### 13. How to ensure proper enforcement of safeguards?

**A:** The guarantee of compliance with safeguards should be assured from the stage of formulation of safeguards in the jurisdictional territory, through its implementation, by means of the Jurisdictional Program and continuous monitoring and improvement by all actors that integrate the REDD+ system. In this sense, **the form of compliance with the safeguards will vary according to the characteristics of the population, especially the indigenous peoples, quilombolas, traditional peoples and communities, and family farmers of each state, with emphasis on the gender perspective.** These are examples of ways in which the safeguards can be interpreted, fulfilled, and monitored:

- Holding public consultations, participatory workshops, and other forms of consultation about the construction and interpretation of socio-environmental safeguards in the territory;
- Creation of a robust forestry and climate public policy matrix that is compatible with federal legislation, international treaties, adherent to the location of its implementation, and national sovereignty;
- Creation of a robust, transparent, and participatory forest governance structure;
- Creation of ombudsman or other forms of complaint for conflict resolution;
- Creating plans and indicators for monitoring safeguards compliance;
- Carrying out periodic monitoring of safeguards compliance;
- Dissemination of the monitoring results;
- Exchange of knowledge and prior training of stakeholders and use of accessible and culturally appropriate language to enable a qualified decision process;
- Provide transparent and consistent information in a way that is accessible to relevant stakeholders, and that it is updated regularly.

## Relationship with private landowners, indigenous peoples, and others

### 14. Who is the original holder of the J-REDD+ carbon credit?

**A:** Originally, **the State (Public Power) or the entity authorized by the State to implement the J-REDD+ program or project.** To date, the Brazilian legal system does not contain regulations determining how the federal government, states and municipalities will participate (if at all) in the division of ownership of J-REDD+ carbon credits. Judging from the regulations issued by CONAREDD+ on jurisdictional mechanisms for payments by results, it is expected that the federal government will consider itself the recipient of a portion of the reductions or removals achieved by the states and eligible for conversion into J-REDD+ carbon credits and sale. However, in the absence of a legal determination by the federal government, the state entity will hold the carbon credits generated within its boundaries. Depending on the program model to be developed by the state, ownership of part of the J-REDD+ credits can be transferred to nested project holders. See more details in the answers to questions 17, 18, and 23.

**15. What are the obligations of a state J-REDD+ program with respect to private landowners and indigenous peoples, quilombolas, traditional peoples and communities, and family farmers developing voluntary REDD+ credit generating projects?**

**A:** The state **may create regulations that allow the nesting of private projects developed by private owners and indigenous peoples, quilombolas, traditional peoples and communities and family farmers, recognizing the projects** and consequently discounting them from its accounts to avoid double counting. Regarding projects in indigenous areas, quilombolas, traditional peoples and communities and family farmers, the state **may additionally attribute or create a Benefit Distribution Plan** that remunerates directly for the verified reductions or remunerates the indigenous peoples based on a monetary or non-monetary benefit plan.

**Another option is for the state to exclude the area of private REDD+ projects from its territory (jurisdictional program accounting area)**, as recommended by the ART-TREES standard. In this way the state could require the communication of such agents to the state for such areas to be excluded.

The credit originating from indigenous lands counts with the constitutional legal regime of exclusive right of enjoyment of natural resources by the indigenous people. Carbon credits generated by an indigenous community in a demarcated area will be tradable credits in the voluntary or regulated market (should such credits be accepted in possible regulated markets to be established) and will belong to a given indigenous community (or its representative entity(ies), for formal legal purposes). It is worth mentioning Opinion AGU-AFC-1/2011 of the Office of the Solicitor General and the document “Indigenous Peoples and REDD+ in Brazil: General Considerations and Recommendations”, prepared by FUNAI with the support of civil society organizations (IPAM, ISA and IIEB), which point out that indigenous peoples are the exclusive holders of the benefits resulting from environmental services on their lands, so that they can participate in the contracts under the representation of their chiefs, chiefs or councils, according to the social organization of each ethnic group. The government, via FUNAI, can be called upon by these peoples to offer technical and legal assistance. See more information in the answers to questions 17 and 18.

By virtue of the rights constitutionally guaranteed to quilombolas, traditional peoples and communities, and family farmers, as well as by virtue of ILO Convention 169, although not yet expressed, a similar interpretation may be adopted, given the possessory rights that these peoples enjoy over their territories.

**16. What are the areas within the state territory that can be included as areas for accounting for the generation of state J-REDD+ credits? (include: forest concession areas, federal conservation units, indigenous territories, quilombola communities, federal vacant lands)**

**A:** The **entire state territory (jurisdiction), observing the need to exclude eventual projects or the areas of such private projects or areas under forest concession, federal conservation units, indigenous territories, quilombola communities, and federal vacant lands**, to avoid double counting and provide greater legal security for the state, especially to minimize future claims for compensation by private parties.

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**17. What are the possible risks that states may face vis-à-vis private owners if they proceed with J-REDD+ carbon credit trading? If risks are identified, how can the state avoid them?**

**A:** The possible risk is of private parties claiming compensation if the state's conduct could represent a violation of their rights (inability to certify or trade credits in the voluntary market or possible regulated markets). As per response to question 15, it is recommended that state programs provide criteria for accommodating potential private rights and benefit sharing, both to avoid double counting of the same carbon stock and to minimize the chance of private claims for compensation against the state in the future.

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**18. What are the possible risks that states may face vis-à-vis Indigenous Peoples if they proceed with J-REDD+ carbon credit trading? If risks are identified, how can the state avoid them?**

**A:** In line with the responses to questions 11, 12, and 15, the possible risk is of Indigenous Peoples claiming compensation if the State's conduct could represent a violation of their rights to certify or trade credits in the voluntary market (or possible regulated markets). In the case of Indigenous Peoples, it is understood that this risk is mitigated by the safeguards inherent in the certification of J-REDD+ carbon credits, which require that Indigenous Peoples benefit from part of the revenues from the commercialization of J-REDD+ carbon credits, provided that free, prior and informed consultation processes are carried out. In any case, it is recommended that state programs provide criteria for accommodating potential private rights of indigenous communities who may develop carbon credit and benefit sharing projects, both to avoid double counting of the same carbon stock, and to minimize the chance that such Peoples will litigate with the state in the future.



# Credit Commercialization

## 19. What does a state need to do to be able to trade its jurisdictional carbon credits (J-REDD+)?

**A:** Considering that there is no federal rule defining what are tradable jurisdictional carbon credits, it is **recommended that the State of the Federation, within its legal sphere of competence, create a specific law regulating its J-REDD+ program**, that is, foresee its purpose and mechanisms for commercialization of environmental assets.

However, states must consider that there is already a set of rules that regulates the sale/disposal of assets owned by public entities (Federal government, states, and municipalities). In summary, the state must verify if the disposal of public mobile property requires legislative authorization, if the disposal can be performed directly by the administration (executive branch) or indirect administration (its autarchies, public foundations, or state-owned companies). The states shall comply with the Brazilian Bidding Law, Law 14.133/21 (more details in the answer to question 20). The sale must also **accommodate collective interests, inherent to jurisdictional carbon credits, if so defined** (for example, indigenous and traditional peoples) and private interests (owners or possessors of the areas. In addition, **procedures for certification of the REDD+ jurisdictional program shall be taken for carbon credit generation and subsequent registration on trading platforms**. Currently, there are two standards for certification of jurisdictional REDD+ programs: Verra's JNR and Winrock's ART-TREES (see more details in response to question 9).

If the sale of credits is for the purpose of meeting NDC (Nationally Determined Contributions) commitments under the Paris Agreement or other internationally regulated mitigation purposes (e.g. international civil aviation Corsia market), to avoid double counting, the host country of the credit generating program/project must make "matching adjustments" to its NDC equivalent to the amount of credits sold.<sup>20</sup> In this case, states will need prior authorization from the federal government to sell credits for international purposes regulated by international conventions.

## 20. Based on the legal nature of J-REDD+ carbon credits and current Brazilian legislation, what are the possible mechanisms for the transaction of selling state J-REDD+ carbon credits to public and private actors?

**A:** The state can sell the J-REDD+ carbon credit in different ways. For example: **(a) sale made directly by the state; (b) national or international bidding; (c) transfer of ownership to a Public-Private Company, controlled by the state, so that the company sells the carbon credits; (d) through a concession to private companies; and (e) in the format of public-private partnerships.**

As described in item (a), the attorneys Gabriel Burjaili and J. Rubens Scharlack understand that due to the legal nature of carbon credits (legal title) ) and the fact that, in a jurisdictional program, its existence derives from the performance of an activity inherent to the state function (preservation of the environment), the states could sell carbon credits without an open bid, as stated by Article 76, II, paragraphs "d" and "e" of

20 CMA3/COP26 decision. [https://unfccc.int/sites/default/files/resource/cma2021\\_L19E.pdf](https://unfccc.int/sites/default/files/resource/cma2021_L19E.pdf)

the Law 14.133/21.<sup>21</sup> However, the ineligibility of bidding is still not a consensus among experts. Among the points that have generated discussions about the exemption of bidding are the novelty of the sales of jurisdictional carbon credits, and the short period of validity of the new legal framework regulating public contracts.<sup>22</sup>

It is worth noting that each of these modalities presents challenges and benefits that should be analyzed in the specific context of each state's capabilities and legal and institutional framework to maximize the state's efficiency and competitiveness in trading its J-REDD+ carbon credits. See also question 10 on the subject.

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**21. Based on the legal nature of J-REDD+ carbon credits and current Brazilian legislation, what are the limitations for the transaction of selling state J-REDD+ to public and private actors?**

**A:** In principle there **are no barriers to the transaction of credits, except for the rule inserted in the NDC** that reserves to the Federal Government the last word in case such credits may be subject to “future corresponding adjustments” for compliance with the NDCs of a third-party country or company in a purchasing third-party country (more details in response to questions 29 to 31).

Private entities are free to sell carbon credits on the voluntary market. However, such credits are unlinked from jurisdictional programs, and it is up to the states to create mechanisms to nest private projects or exclude the area of such projects from state accounting to avoid double counting.

However, there are **practical limitations to the commercialization of J-REDD+ credits by the state**, among others: (a) depending on the structure chosen, the need to submit the commercialization of credits to a bidding process, as described in response n. 20; (b) linking the revenues from the commercialization of J-REDD+ credits to maintaining the continued reduction of deforestation and increase in carbon stock, and to compliance with safeguards through distribution of benefits and compliance with safeguards (see responses 11-13); (c) the demand from buyers for a certification methodology for standards such as JNR or ART-TREES; and (d) optimizing the taxation of revenues from the commercialization of J-REDD+ carbon credits.

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21 Law 14.133, article 76, item II, letter d.

22 Law 14,133/2021, replaced Law 8,666 in the regulation of administrative contracts, and Law 13,655, 2018, which amended the Law of Introduction to the Norms of Brazilian Law to introduce provisions on legal certainty and efficiency in the creation and application of public law.

## Relationship with different levels of governments and other stakeholders



### 22. Is there today a methodology defining the amount of J-REDD+ carbon credits that a state can trade? If yes, please explain. If no, how can a state determine the amount of J-REDD+ carbon credits that can be traded?

**A:** To date **there is no methodology that defines the quantity of J-REDD+ carbon credits that a state can trade.** However, there is regulatory provision that permeates the topic regarding payment by results for REDD+ activities. The Brazilian Federal Decree No. 10,144/2019 that established CONAREDD+ provides in Article 3, IV, that:

**Art. 3** *The National REDD+ Commission is an execution and advisory body to the States, the Federal District, and the Ministry of the Environment, destined to formulate guidelines and issue resolutions on*

(...)

**IV** - *the allocation of reduced emissions, including the definition of the percentage destined to the federal entities, within the scope of their competence, and to programs and projects of private initiative for forest carbon;*

The CONAREDD+ Resolution No. 6/2017 defines the distribution of limits for obtaining payments for results for emission reductions from deforestation in the Amazon biome. The rule today assigns 40% of the credits to the Union and 60% to the respective state (with a minimum rate of 2% for each state within the Amazon biome), but this **limitation applies only to seeking for payments by results.**

However, there is an explicit limitation that the removals or reductions that give rise to these payments by results will be used to fulfill obligations under United Nations Conventions, such as the Paris Agreement and Corsia, which, because of the corresponding adjustments, first require federal government authorization. However, the trading of J-REDD+ credits in voluntary markets is not prohibited.

Also note that the same Federal Decree 10,144/2019 establishes the competence of CONAREDD+ for the *formulation, regulation and structuring of financial and market mechanisms to foster and encourage the reduction of emissions derived from REDD+ based on the provisions of art. 5, art. 6, art. 8 and art. 9 of Law No. 12,187, of December 29, 2009, (art. 3, IX).* However, to date there are no resolutions in this regard.

**23. Do states need express authorization from the federal government to trade J-REDD+ carbon credits? (If authorization is required in some cases, and not in others, please clarify)**

**A: No.** The Federal Constitution grants autonomy to the states for the management of their assets (property) and the states have concurrent competence with the Union and the Federal District to legislate on nature conservation and environmental protection (articles 18 to 28). As seen above, the J-REDD+ carbon credit generation is considered a derivation, a consequence, of the state's inspection, command and control actions to protect the environment. In the absence of federal legislation on the subject, if the legislative framework of the state authorizes the commercialization of credits, the express authorization of the federal government is not necessary. As stated by Ludovino Lopes, an attorney and expert on the subject: In the absence of a national/federal law, the states can create legal provisions. If a new legal provision arises after the creation of a state legal provision, only future programs and projects will be affected by the new "ex nunc" rules of consequential legal effect.

However, as already described in responses 29 to 31, if states seek the sale of credits under the UNFCCC pursuant to Article 6 of the Paris Agreement, which may become the subject of "future corresponding adjustments" for compliance with the NDCs of a third country or company in a third country buyer, states must seek alignment and consent from the federal government, as the entity representing Brazil under the UNFCCC. This position was reiterated by Decree Nº 11,075/2022.

The Resolution of the Inter-ministerial Committee on Climate Change and Green Growth (CIMV) No. 4, from April 28, 2022, created a Temporary Technical Group with the objective of subsidizing the implementation of the mechanisms of Article 6 of the Paris Agreement in Brazil, among them the granting of corresponding adjustments, under coordination of the Ministry of Economy. Although the resolution does not specify the representation of subnational entities, this participation should be obtained so that states can contribute to the promotion of J-REDD+ in the carbon credit market.

**24. If there is no legal impediment to state governments trading J-REDD+ carbon credits, what are the potential risks that states may face, vis-à-vis the federal government, if they proceed with J-REDD+ carbon credit trading? If risks are identified, how can the state avoid them?**

**A:** As described in the answer to question 23, there is no legal impediment to state governments trading carbon credits by virtue of the concurrent competence provided in the Federal Constitution for the Union, States and Municipalities to protect the environment and combat pollution. Thus, **there is no risk to the states, except that there may be a need to accommodate shares of the Union or municipalities** in the proceeds from the sale of such J-REDD+ carbon credits if required by commitments under the UNFCCC in the future, or to accommodate future federal laws that may address the issue.

**25. If there is no impediment to state governments trading J-REDD+ carbon credits, what are the possible risks that states may face, vis-à-vis local governments, if they proceed with trading J-REDD+ carbon credits? If risks are identified, how can the state avoid them?**

**A:** The possible risk is that the municipality may want to receive a portion of the revenue from the sale of J-REDD+ credits because it is a federal entity, endowed with police power for environmental issues, located in the jurisdiction of the state government. The best way to avoid this risk is to accommodate municipal interests in the development, implementation and benefit sharing of state programs.

## New Carbon Market

**26. What types of financial transactions exist today to reward reductions of forest carbon emissions in Brazil?**

**A:** At the international instrumental level there are **Payments for Performance (PFP) and emissions trading voluntary and regulated carbon markets**. Through the PFP mechanism, donations are made by governments or companies regarding emission reductions that are quantified based on the Brazilian “FREL” (Forest Reference Level), evaluated by the UNFCCC, and registered in the InfoHub. In other words, the donation is recognized through a diploma issued by the MMA and registered in InfoHub. In Brazil, PFP is the fundraising mechanism adopted by the Amazon Fund (resources from Norway, Germany and Petrobras), the Floresta+ Program (resources from the Green Climate Fund), and the contracts between the states of Acre and Mato Grosso with Germany and the UK governments.

In addition, a large set of isolated REDD+ projects have been developed in Brazil and traded in the voluntary carbon market. Today in Brazil there is no regulated market in operation, but there is interest in creating a market as foreseen in Decree 11.075/2022.

**27. What new types of financial transactions will start to work/operate in the near future?**

**A:** **Financial transactions for the sale of carbon credits from jurisdictional REDD+ programs** are in the early stages and should begin to be operationalized in the coming months. These types of transactions differ from other transactions in the voluntary market because of the geographic scale and the multiplicity of actors involved in the contract. Isolated REDD+ projects have their limits defined by protection units, communities, forest concessions, among others. Jurisdictional REDD+ operates at the level of large political geographies, for example states in the case of Brazil. In standalone REDD+ projects, a project developer designs and seeks to validate and verify the credits. The project developer is the credit holder (secondary owner) who has a remuneration contract with the person who owns or legally possesses the property or asset to which the project methodology gives rise to the credits (primary owner).

In jurisdictional REDD+ programs, the secondary owner is the proponent, which can be the government itself or an authorized entity such as a corporation with the right to commercialize emissions reductions. In the contract there is a benefit-sharing agreement with the various stakeholders involved, not only the holders of the areas within the project jurisdiction, but also stakeholders that indirectly participate in conservation efforts.

A jurisdictional REDD+ program can also be the basis for emissions trading between countries within the Paris Agreement. This exchange is regulated by article 6.2 of the agreement, which defines the ITMO (Internationally Transferred Mitigation Outcomes) instrument that trades emissions for NDC compliance purposes without the generation of credits, but rather with the agreement between countries on the scope, activities, and methodologies for monitoring mitigation outcomes.<sup>23</sup> Therefore, financing a jurisdictional REDD+ program can be a way to create these results.

Given its greater assurance of climate integrity, the REDD+ jurisdictional carbon credit market is expected to grow in both the voluntary and regulated international markets in the future.

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## 28. What is the difference between Payment for Performance (PFP), and the voluntary and regulated carbon market?

**A:** The **PFR** modality (mentioned in question 14) **is a form of donation or pledge with a charge and is a climate finance mechanism created under the UNFCCC** and regulated under Article 5 of the Paris Agreement. The donor makes the transfer of funds conditional on the improvement of certain desired practices. As a rule, payments for performance fall into three main phases: 1) *readiness*, including the development of national strategies, plans, policies, measures, and capacity building; 2) implementation of these strategies, policies, plans, and measures, as well as ongoing capacity building, demonstration, and technology development/transfer; and 3) PFP contingent on verified emissions reductions. Historically, funding for PFPs has come primarily from developed country governments and multilateral institutions.<sup>24</sup>

The **voluntary carbon market involves the generation and trading of rights from the voluntary action of the parties involved, whether private or public entities**. Thus, it refers to collective transactions of global compensation that are not motivated by regulatory obligations, and can be transacted by a diverse set of actors (e.g., governments, companies, individuals, etc.) and are inserted in a diverse and growing scenario of transactions.<sup>25</sup> The rules of the game will be unique for each case, since the methodology, the type of project, the region where the property is located and other important factors will influence the pricing of the credits generated by the specific project. The generation of credits depends, as a rule, on the certification and auditing of the project according to internationally recognized standards for assurance that a project has avoided or sequestered CO<sub>2</sub>e, and the registration of the credits on trading platforms.

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<sup>23</sup> [https://unfccc.int/sites/default/files/resource/cma3\\_auv\\_12a\\_PA\\_6.2.pdf](https://unfccc.int/sites/default/files/resource/cma3_auv_12a_PA_6.2.pdf)

<sup>24</sup> STICKLER et al. 2018. The State of Jurisdictional Sustainability. Earth Innovation Institute, CIFOR, and GCF.

<sup>25</sup> The World Bank. 2022. "State and Trends of Carbon Pricing 2022" (May), World Bank, Washington, DC. Doi: 10.1596/978-1-4648-1895-0. MAGUIRE et al, 2021. A green growth spurt: State of forest carbon finance 2021 Washington DCForest Trends Association, 2021.

**Regulated markets, finally, are the result of regulations to reduce Greenhouse Gas (GHG) emissions and set the rules for entities in the regulated sector or jurisdiction to obtain and deliver offsets to meet regulatory targets.**<sup>26</sup>

In the market regulated under the UNFCCC, carbon credits are linked to the duties that countries that are signatories to international agreements have to reduce their emission targets; and the provisions in these international agreements that developing countries with environmental potential (e.g. Brazil) generate carbon credits at the jurisdictional level and trade such credits with countries that have a duty to achieve results and are unable to do so by taking action within their own territories.

There are also regulated jurisdictional markets (currently 34), created in the *cap & trade* system. Some are by region, e.g., Europe and the Regional Greenhouse Gas Initiative (RGGI) in the US, others are by country, e.g., China, Mexico, UK, and sub-national entities such as California and Tokyo. Although they mostly only accept domestic credits, the European market (EU ETS) has accepted Clean Development Mechanism (CDM) credits and the California market has also accepted forestry credits from Mexico. With Article 6 regulation and jurisdictional certification processes, it is possible that regulated jurisdictional markets will begin accepting jurisdictional REDD+ credits.

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### 29. What is the difference between stand-alone forest carbon projects and jurisdictional REDD+, J-REDD+?

**A:** The **main difference lies in the scale of the projects/programs**, as stand-alone forest carbon projects can be carried out at the territorial scale of an area (e.g., property, Indigenous Land) by private entities under voluntary rules. The J-REDD+ carbon credit is a state-managed carbon credit generated from a state program. It results from normative actions and conduct carried out by the state, in its respective sphere of competence, as the holder of the constitutional duty to “preserve and restore the essential ecological processes” and the prerogative to carry out environmental public policies, including police power and inspection and control actions. It can be created and governed by state legislation, given the concurrent competence of the states to legislate on the subject, if it is in accordance with the general federal rules. As a state program, it comprises programs or projects carried out in the jurisdictional sphere of the respective state entity (territorially wider in the national scope, or lower level) obeying rules created by the public entity (REDD+ Program or Action Plan) and may or may not have nesting rules for individual projects.

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### 30. What are the implications of the decisions made by the UN in Glasgow for Brazil?

**A: Emissions trading transactions for compliance with NDC or other international convention targets must make corresponding NDC adjustments in which the selling country adjusts upward its NDC target to accommodate the emissions reductions or removals sold. This avoids double counting of GHG reductions or removals from credits or mitigation results transferred between parties for use.**

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<sup>26</sup> Id.

Article 6.4 of the Paris Agreement provides for the trading of carbon credits between entities and mentions the principle of general mitigation of global emissions (OMGE) in the form of a percentage discount on the total amount of traded credits equivalent to 2% of the traded volume. And there is also the so-called (SoP), already adopted in the CDM, which retains 5% of the value transacted to help developing countries, which are particularly vulnerable to the adverse effects of climate change, to cover adaptation costs.

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### 31. What are credits with “Corresponding Adjustments, CA”?

**A:** The NDCs’ CA mechanism aims to avoid double counting of credits, as per the directive included in article 6.5 of the Paris Agreement. **The CA mechanism requires that internationally traded credits are declared and registered in the platform created under the UNFCCC to ensure that these credits are not double counted by the selling country in the declarations and intentions of another country and/or company.**

Thus, credits with CAs will not be counted by the host country in the accountability that defines the country’s progress in achieving its targets described within its NDCs under the Paris Agreement. The implementation of CAs seeks to avoid double counting of carbon credits traded in international transactions between industry sector companies and/or UNFCCC signatory countries. The system to count, verify, declare, and register credits with corresponding adjustments is still under construction under the Paris Agreement rules.

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### 32. What does Brazil need to do to generate a large volume of credits with CA?

**A:** To generate a large volume of credits with CA, **Brazil needs to achieve emission reductions at the national level that go beyond the Brazilian targets presented in the NDC within the Paris Agreement.** Thus, the credits generated in Brazil as a host country can be used by other countries through the mechanism, without prejudice to the achievement of Brazilian reduction targets, as provided in article 6.4, “c” of the Paris Agreement. This means a reduction of emissions beyond the 26% reduction by 2025, as presented in the NDC (with base year 2005) and 50% by 2030 (official NDC). The main source of reductions in Brazil is related to land use change, mainly deforestation and degradation of the Amazon Forest. Thus, reducing deforestation and degradation of the Amazon Forest would be a way to increase the volume of CA credits that Brazil would have to sell. This should be considered by Brazil due to the higher anticipated price for CA credits (Nepstad et al. 2022).

## List of abbreviations

<b>ACs</b>	Corresponding Adjustments
<b>ART-TREES</b>	Architecture for REDD+ Transactions, The REDD+ Environmental Excellence Standard
<b>CIMV</b>	Interministerial Committee on Climate Change and Green Growth
<b>CO<sub>2</sub>e</b>	Carbon Dioxide Equivalent
<b>CONAREDD+</b>	Brazil's National REDD+ Commission
<b>ENREDD+</b>	Brazil's National REDD+ Strategy
<b>FREL</b>	Forest Reference Emission Level
<b>GHG</b>	Greenhouse Gases
<b>ITMO</b>	Internationally Transferred Mitigation Results
<b>JNR</b>	Verified Carbon Standard - Jurisdictional and Nested REDD+ Program
<b>J-REDD+</b>	Jurisdictional REDD+
<b>CDM</b>	Clean Development Mechanism
<b>MMA</b>	Brazilian Ministry of Environment
<b>NDC</b>	Nationally Determined Contributions
<b>OMGE</b>	Overall Mitigation in Global Emissions
<b>REDD+</b>	Reducing Emissions from Deforestation and Forest Degradation. The "+" sign means to recognize other conservation efforts as well
<b>PNPSA</b>	Brazil's National Policy on Payments for Environmental Services
<b>PPF</b>	Payment for Performance
<b>RGGI</b>	Regional Greenhouse Gas Initiative
<b>SoP</b>	Sharing of Proceeds Principle
<b>UNFCCC</b>	United Nations Framework Convention on Climate

