

Name of submitter: N/A

Affiliated organization of the submitter (if any): Permanent Court of Arbitration (PCA)

Contact email of submitter: unfccc@pca-cpa.org

Date: 1 December 2023

Legend for table 1: comments on any other elements contained in the draft procedure.

1 = Section Number in the document or Appendix

2= Paragraph, table or figure number

3 = Nature of input is general, technical or editorial

4 = Comment – the actual feedback or observation, including justification for what needs changing

5 = Proposed change – suggest the text if possible

6 = Assessment of comment – secretariat to document response/action taken to comment

The Supervisory Body wishes to seek comments on the draft procedure in particular the following aspects of the appeal and grievance processes. You may wish to provide your views on any of the questions or sub-questions below (it is entirely optional).

1. How can the risk of abuse of the processes be minimized while ensuring equitable access to the processes, in terms of:

- (i) Standing for stakeholders who may file an appeal or submit a grievance?
- (ii) Fees for filing an appeal or submitting a grievance?
- (iii) Timeframe for filing an appeal, taking into account potential impacts on investments?
- (iv) Scope of appeal (which Supervisory Body decisions should be appealable)?
- (v) Measures to ensure the finality of Supervisory Body decisions related to appeals or specific subject matters of grievances, to provide a reasonable level of certainty to activity participants regarding their A6.4 activities?
- (vi) How should the appeals and grievances procedure relate to integrity safeguards under the Article 6.4 mechanism?

Comments:

2. **How can the processes ensure competence and independence of appeal and grievance panels, and their independence from the Supervisory Body, activity participants or the host Party?**

Comments:

As the oldest universal intergovernmental institution dedicated to the resolution of international disputes, the Permanent Court of Arbitration (PCA) is grateful to the Article 6.4 Supervisory Body and UNFCCC Secretariat for the opportunity to provide these brief comments on two specific aspects of the Draft Procedure (A6.4-SB008-A09-v2), flowing from its experience administering a wide range of international dispute settlement processes (including arbitrations, conciliations, expert determinations and review/appeal panels).

The PCA would be very happy to provide further input and/or answer any questions arising from these comments at the next Supervisory Body meeting, or otherwise at the convenience of the Supervisory Body.

Introductory Remarks

The appeal and grievance processes under the Article 6.4 mechanism are critical for the proper and fair operation of the mechanism, and help safeguard the legitimacy of the mechanism from the perspective of the CMA, participating Parties, activity participants, and other stakeholders in, or affected by, Article 6.4 activities.

The independence and impartiality of the appeal and grievance panels and the independence of the administration of the procedures are in turn fundamental for the efficacy and legitimacy of these processes, as has been recognized in the concept note for the appeal and grievance processes (A6.4-SB007-AA-A04) and the technical paper for an appellate process for CDM Executive Board decisions (FCCC/TP/2011/3, see in particular, paragraphs 23-25, 42, and 67).

Aspect 1: Appointment of Appeal and Grievance Panels

In the Draft Procedure, the three members of the appeal and/or grievance panel for any particular dispute are selected by the UNFCCC Secretariat (paras. 16; 41), from a short roster of experts also appointed by the Secretariat (para. 58). While the appointment is to be done in a manner “that ensures the impartiality and independence of any panel member with respect to the case in question” and the experts on the roster are obliged to “[r]efrain from behaviour that may be incompatible with the requirements of independence and impartiality” (para. 60), there is no independent challenge mechanism to resolve issues with respect to the independence and impartiality of panel members.

Comments: (A) The perception of the independence and impartiality of appeal and grievance panels could be enhanced by delegating the authority to appoint panel members in a given dispute to an independent third party. The UNFCCC Secretariat, given its role in supporting the Article 6.4 Supervisory Body (including the decision-making being appealed and/or in registering Article 6.4 activities the subject of a grievance), together with its role in the selection of the roster itself, may not be perceived as an independent authority (notwithstanding the appointments are to be handled by different Secretariat staff members to those involved in the underlying Supervisory Body decisions).

Delegation of the appointing authority function to an independent third party is standard in many international dispute settlement procedures. For example, under the UN Commission on International Trade Law Arbitration Rules (2021), the PCA Secretary-General is proposed as a potential appointing authority (and indeed acts as appointing authority in many cases), and is the default designating authority (to select an appointing authority if one cannot be agreed

upon). The PCA Secretary-General could equally serve such a function in respect of Article 6.4 appeal and grievance panels.

(B) A mechanism for those involved in a dispute to challenge a panel member who is alleged to lack independence or impartiality, and have that challenge resolved by an independent third party, would enhance the legitimacy of the panel's decisions. This function is typically performed by an appointing authority (for example, under the UN Commission on International Trade Law Arbitration Rules (2021)). To that end, the PCA Secretary-General regularly resolves such challenges in his capacity as appointing authority. Safeguards would nevertheless need to be introduced to ensure the mechanism is not subject to abuse.

Aspect 2: Administration of Appeal and Grievance Procedures

In the Draft Procedure, the appeal and grievance procedures are administered by the UNFCCC Secretariat and panels are assisted by members of the Secretariat, who are to “be independent from those supporting the Supervisory Body, be impartial to any appeal or grievance, [and] avoid direct or indirect conflicts of interest” (paras. 77-78).

Comments: The perceived legitimacy of appeal and grievance processes may be enhanced by delegating administration (and in particular, assistance provided to appeal and grievance panels in a given case) to an independent third party. The importance of the independence of case administration is already recognised in the Draft Procedure. However, as outlined above, the UNFCCC Secretariat may not be perceived to be sufficiently independent from the Supervisory Body. Engaging a third party secretariat with highly-developed procedural expertise could also ease some of the procedural burden on panels, and give greater flexibility in the expertise required of experts on the roster / panel members. It could also enhance the cost-effectiveness of administration, given existing case administration structures would already be in place, and resources could be allocated flexibly as necessary given the appeal and grievance process caseload.

To that end, the PCA has experience administering international disputes in similar contexts. For example, with respect to appeal panels, the PCA has administered Review Panels under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention), which assess appeals (or objections) to decisions made by the SPRFMO Commission. The Review Panel procedure is a bespoke procedure established by the Convention with very demanding timelines and the involvement of multiple parties (including the Commission itself). With respect to grievances, the PCA likewise has experience administering disputes arising from the intersection of commercial activities and human rights issues involving the participation of a range of stakeholders (for example, the Bangladesh Accord arbitrations), and serves as the administering authority for disputes under The Hague Rules on Business and Human Rights Arbitration.

3. How should the cost for the operation of the processes (e.g. remuneration for panel members, administrative costs for secretariat support) be funded?

Comments:

--

