



INPUT OF INDIGENOUS PEOPLES ON THE APPEAL AND GRIEVANCE DRAFT PROCEDURE

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General observations

The proposed rules governing appeals violate due process. They are totally inadequate to deal with the issues outlined in the Sustainable Development Tool (SDT).

For example, the SDT requires “recognizing and respecting Indigenous Peoples’ collective rights to own, use, and develop and control the lands, resources and territories that they have traditionally owned, occupied or otherwise used or acquired, including lands and territories for which they do not possess title.” P9.4.¹

Many projects will be proposed on lands to which Indigenous title has not been recognized. The process of establishing legal title can take years and an enormous amount of expertise and money. The proposed rules are inadequate to this task. Assume that the Indigenous Peoples involved claim that a planned project is on their land, which is not titled. Assume that there is consultation, a process not conducive to the resolution of title claims, and that the Supervisory Body makes a decision to approve the project, rejecting the claim to title.

The Indigenous Peoples have 28 days to appeal and demonstrate to a panel of three that the Supervisory Body’s decision that the land was not theirs is in error. Whatever they can gather in that short time and with limited resources is all that the appellate panel will look at according to paragraph 22 – “The appeal panel shall take into account only: (a) The information in the appeal form provided by the appellant and published in accordance with paragraph 17 above, including the references to supporting documents and other sources of information.”

¹ This particular issue is chosen for illustrative purposes. The problems with the appeal process extend to all the issues under Principle 9.

This falls far short of due process. Indigenous Peoples cannot possibly be expected to have the resources and time to fully present their claim. Nor is there the opportunity for live witnesses, or for cross examination of opposing “experts”. To make matters worse, paragraph 33 provides (in brackets) “Conclusions by the appeal panel, including ruling on, or rejection of, the appeal shall be final...”

The grievance procedure, which has its own problems, at least provides in paragraph 54 that if the grievant is dissatisfied with the decision, “the grievant may submit the case for consideration to the Host Party national court system, ombudsman or any other relevant judiciary system.”

The Supervisory Body has no authority to deprive anyone of a right to recourse in a proper court, and the attempt to do so violates due process.

No project can go forward where land title is not secured, and then only with the Free, Prior, and Informed Consent of the Indigenous Peoples. That is required by preambular paragraph 11 of the Paris Agreement, which recognizes the rights of Indigenous Peoples, which includes the United Nations Declaration on the Rights of Indigenous Peoples. When a claim of title is made by an Indigenous People and they oppose a project, all aspects of the project must be halted until the question of title is determined in a manner compatible with due process. This will involve the activity participant providing sufficient funding up front for capacity building for the Indigenous Peoples, for the hiring of historical, anthropological, legal, and other expertise needed, as well as the time to fully develop the case. Once ready to go forward with the land claim, there must be full opportunity to present the evidence and to cross examine opposing “experts”, if any there be. Finally, if title is confirmed, the project cannot go forward without the Free, Prior, and Informed Consent of the Indigenous Peoples involved.

Given the aforementioned and the complexities and critical nature of addressing Indigenous Peoples' rights and due process in the context of the Article 6.4 mechanism appeal and grievance processes, several technical and structural proposals are essential to enhance the fairness, inclusivity, and effectiveness of these processes.

The following proposals aim to ensure that Indigenous Peoples can effectively engage with and influence decisions that affect their lands, resources, and rights, particularly in scenarios where legal title to their lands has not been recognized or is in dispute.

1. **Explicit Recognition of Indigenous Peoples:** The document must clearly acknowledge Indigenous Peoples as distinct and crucial collective rights holders, incorporating specific measures to protect their rights within the appeal and grievance processes. This includes the integration of Indigenous Peoples' rights as fundamental principles, ensuring that references to international law or obligations consistently encompass “and international standards” to uphold these rights effectively.
2. **Inclusion of Indigenous Rights in Standing, Grounds, and Scope:** Amend the sections on standing, grounds, and scope to include specific references to the rights of

Indigenous Peoples, ensuring that appeals can be filed based on violations of these rights.

3. **Extended Timelines and Support for Indigenous Appellants:** Given the unique challenges faced by Indigenous Peoples, including resource limitations and the need for extensive evidence gathering, the procedure should allow for extended timelines for filing appeals and grievances by Indigenous appellants. Additionally, provisions for technical and legal support should be included so as to enable Indigenous Peoples in preparing their cases.
4. **Consultation and Free, Prior, and Informed Consent (FPIC):** Strengthen the requirements for consultation with Indigenous Peoples, ensuring that the FPIC principle is fully integrated into the appeal and grievance processes. This includes requirements for genuine engagement and efforts to reach agreement before any decision that affects Indigenous lands or rights is made.
5. **Mechanisms for Land Title Disputes:** Introduce specific mechanisms to address disputes over land titles, ensuring that projects affecting Indigenous lands cannot proceed without a clear resolution of such disputes.
6. **Capacity Building and Funding:** Establish a fund to support Indigenous Peoples' participation in the appeal and grievance processes, including resources for legal representation, evidence gathering, and other necessary preparatory activities.
7. **Transparent and Accessible Processes:** Ensure that all aspects of the appeal and grievance processes are transparent and accessible to Indigenous Peoples, with all relevant documents and decisions made available in languages and formats that are accessible to affected Indigenous Peoples.
8. **Detailed Explanation of the Relationship Between SDT and Project Decision-Making:** The document should explicitly detail the relationship between the Sustainable Development Tool and the decision-making process regarding projects, particularly in contexts that may affect Indigenous Peoples rights. It must specify how the assessments of projects, including any identified risks to the land rights of Indigenous Peoples, influence the final decision on project approval. The explanation should cover whether the presence of such risks could lead to a project's denial and under what circumstances a project might proceed despite potential adverse impacts. Additionally, the document needs to outline what remediation measures are deemed adequate to address identified risks, ensuring that the process is transparent and that the protection of Indigenous Peoples' rights is a central consideration in project evaluations. This clarity is crucial for upholding the principles of fairness, accountability, and respect for Indigenous rights throughout the project review process.

Recommendations

4.1 Standing

Paragraph 7 + Option 2

*An appeal may be filed against an appealable decision of the Supervisory Body as defined in paragraph 9 below by the following individuals, communities, **Indigenous Peoples**, and organizations (hereinafter referred to as appellants):*

Note: The inclusion of "Indigenous Peoples" explicitly acknowledges their rights and interests, ensuring their access to appeal processes. This aligns with international standards on the rights of Indigenous Peoples, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which emphasizes their right to participate in decision-making in matters affecting their rights.

4.3 Grounds

Paragraph 10

*The grounds for an appeal shall be one or more of the following, **including violations of human rights and the rights of Indigenous Peoples**:*

Note:

Rules, modalities and procedures for the mechanism established by Article 6, paragraph 4, of the Paris Agreement, paragraph 24(a)(ix) references the rights of Indigenous Peoples, which is covered implicitly under paragraph 10(b) however explicitly including violations of human rights and the rights of Indigenous Peoples as grounds for appeal strengthens the framework's alignment with international human rights standards. It ensures that the appeal process is responsive to issues that directly affect Indigenous Peoples' rights and well-being, in line with principles outlined in UNDRIP and other international human rights instruments.

REMOVE BRACKETS - Paragraph 10(d)

The information provided by the designated operational entity (DOE) or the activity participants on which the Supervisory Body made the decision contained an error or misstatement that materially affected the decision;

4.4 Procedure

Paragraph 11

*An appellant, **including Indigenous Peoples**, may file an appeal by submitting through a dedicated interface on the UNFCCC website a duly completed "Appeal form" (A6.4M-APP-FORM) available in Arabic, Chinese, English, French, Portuguese, Russian, and Spanish designed to be inclusive of oral traditions and non-written evidence, covering the following information within 56 days of the publication on the UNFCCC website of*

*an appealable decision of the Supervisory Body except for an appeal against the decision referred to in paragraph 9(c) above in which case within [14] [28] days of the publication of the decision, **with specific accommodations for appeals related to Indigenous claims for which the period is extended to [90] days to account for the collection of traditional evidence and community consultations. In the case of an appeal by Indigenous Peoples the filing of an appeal will start the process of funding in the preparation of their case, which will take all the time necessary.***

Note: Indigenous Peoples often face significant barriers in accessing information and resources, and the preparation of land claims is exceedingly complex.

Paragraph 11(a)

*Name and category of the appellant (**Indigenous Peoples, stakeholder, activity participant, or participating Party**), **with an option for appellants to request confidentiality of personal and community identification and data.***

Paragraph 11(g)

*References to supporting documents, which may be attached, and other sources of information, with an explanation as to how the supporting documents, **including, where appropriate, oral histories, community testimonies, and other forms of traditional evidence** and other information will support the arguments made in the appeal.*

Paragraph 12(b)

No appeal fee if the appeal is submitted by Indigenous Peoples, local communities or non-profit organizations...

REINTRODUCE - Temporary suspension of processing cases

*Upon receipt of an appeal, the processing of the case within the respective procedure shall be suspended immediately until the conclusion of the appeal proceedings made in accordance with sections 4.4.2–4.4.6 below. The secretariat shall immediately notify the Supervisory Body of the receipt of the appeal and the suspension of the process. **Additionally, to ensure the rights of Indigenous Peoples are upheld during the appeal process, adequate time and funding shall be allocated for Indigenous Peoples to fully prepare their claim.***

NEW - Early Warning

Upon the submission of an alert concerning potential impacts on the rights of Indigenous Peoples due to project activities, the immediate review of the situation shall be initiated, adhering to the principles of the eleventh preambular paragraph of the Paris Agreement. The secretariat is tasked with promptly informing the Supervisory Body of the submission and the initiation of this review process by the Appeal panel.

SUPPORT - Paragraph 19

Upon publishing of the eligible appeal on the UNFCCC website, the processing of the case

within the respective procedure shall be suspended immediately until the conclusion of the appeal proceedings made in accordance with sections 4.4.5–4.4.6 below. The secretariat shall immediately notify the Supervisory Body of the publishing of the eligible appeal and the suspension of the process.

Paragraph 21

Except in the case of appeals by Indigenous Peoples, the appeal panel shall review the appeal to consider the merits of the matter and prepare a ruling within [14][28] days after the publication of the appeal on the UNFCCC website. In doing so, the appeal panel may, through the secretariat, request the designated operational entity (DOE) that validated or verified the request regarding which the Supervisory Body has made the decision in question, or any other relevant individual or organization that is independent from the appellant, to clarify any of the information contained in the appeal form, as set forth in paragraph 11 supra filing of an appeal by Indigenous Peoples marks the beginning of the preparation of their case.

NEW - Paragraph 22(g)

Testimonies and evidence presented during hearings, including live testimonies and cross-examinations, as part of the appeal process.

Paragraph 33:

Conclusions by the appeal panel, including ruling on, or rejection of, the appeal, shall not be deemed final. If dissatisfied, the appellant may submit the matter for reconsideration to the Host Party national court system, ombudsman, or any other relevant judiciary or review system.

GRIEVANCE PROCESS

5.1 Standing

Paragraph 34

*A grievance may be submitted by individuals, communities, **Indigenous Peoples**, and organizations (hereinafter referred to as grievants) that meet all the following eligibility requirements:*

Paragraph 34(a)

*They are connected to the jurisdiction by means of residency, domicile, or **traditional territorial claims**, where the activity in question is implemented or has an effect; in the absence of documentary evidence, the residency, domicile, or traditional territorial claims can be substantiated by **any credible means** that demonstrate the grievant's connection to the jurisdiction and/or affected area.*

Paragraph 34(b)

They have a substantial presence in the geographic area through business activity,

community-related activity, **residence, lifeway, or traditional use**, which may be directly affected by the activity in question.

Paragraph 34(c)

They **may** suffer adverse effects from the implementation or treatment of the activity in question within the activity cycle under the Article 6.4 mechanism by way of concrete, tangible, and particularized claims of harm to health, property, local environment, **human rights, rights of Indigenous Peoples, cultural heritage**, or other interests.

Paragraph 35

A grievance may be submitted on the basis of **potential** adverse effects of a social, economic, or environmental nature suffered by local individuals, communities, **or Indigenous Peoples** as a direct consequence of the implementation or treatment of a registered A6.4 activity within the activity cycle under the Article 6.4 mechanism, **including but not limited to human rights and rights of Indigenous Peoples, impacts on land rights, cultural heritage, and access to natural resources, regardless of formal title recognition**. This also includes **potential** adverse effects suffered by communities **or Indigenous Peoples** in the countries where an approved Article 6.4 mechanism methodology, methodological tool, or standardized baseline is applicable as a consequence of approval of such methodology, methodological tool, or standardized baseline.

Paragraph 36

A grievant **or their representative, including representatives of Indigenous Peoples** may submit a grievance through a dedicated interface on the UNFCCC website using the **form which should allow for the inclusion of collective grievances by Indigenous Peoples, emphasizing collective rights and impacts**.

Paragraph 38(b)

No grievance fee if the appeal is submitted by Indigenous Peoples, local communities or non-profit organizations...

Paragraph 41

Upon successful conclusion of the completeness check, the secretariat shall establish a grievance panel to review this specific grievance by appointing three experts on the roster referred to in paragraph 15 above, taking into account the specificity of the case and the expertise of experts to correspond to the specifics of the case, and designating one of them as the chair of the panel. The secretariat shall forward the grievance form and any supporting documentation submitted by the grievant to the members of the grievance Panel. **In addition, to ensure the equitable participation of Indigenous Peoples in the grievance process, funds shall be provided for Indigenous Peoples to develop adequate supporting documentation of the potential harm. This shall include financial support for fact development by experts and for legal representation.**

ROSTER OF EXPERTS

Paragraph 60(f)

*They shall possess relevant experience in international law and administrative law with the knowledge of carbon markets, environmental and socioeconomic fields, **and scientific fields relevant to climate change. At all times, at least seven experts on the roster shall be Indigenous and have expertise in the rights of Indigenous Peoples, ensuring representation and informed perspectives on Indigenous issues. In any appeal or grievance involving Indigenous issues at least one of the three panel members must be Indigenous.***