Center for International Environmental Law (CIEL) submission on the draft Appeal and Grievance Processes and Sustainable Development Tool to the Article 6.4 Supervisory Body in response to the Call for Inputs on issues included in the annotated agenda and related annexes of the eleventh meeting of the Article 6.4 Supervisory Body

Thank you for the opportunity to comment on the documents being discussed during the 11th meeting of the Supervisory Body. While we appreciate the Supervisory Body's openness to receiving comments and providing an avenue for comment, one week (or less if you consider when documents are actually posted and if you consider actual working days) is far too short a timeframe for effective engagement of stakeholders. **The Supervisory Body should consider ways to expand the timeframe for receiving comments** as doing so will likely enable more stakeholders, especially those most likely to be impacted by the decisions of the Supervisory Body, to participate and having the participation of more stakeholders and experts on the topics being discussed will help ensure that the Supervisory Body adopts the best possible policies.

The following comments focus on the Draft Procedure: Appeal and grievance processes under the Article 6.4 mechanism ("draft Appeals and Grievance Procedure") as presented in document A6.4-SB011-AA-A05 and the Draft Tool: Article 6.4 Sustainable Development Tool ("draft Sustainable Development Tool") as presented in document A6.4-SB011-AA-A06. **Both the Appeals and Grievance Procedure and the Sustainable Development Tool are important policies and processes to ensure that human rights are respected, and must be in place prior to any activity taking place under Article 6.4. However, that does not mean that the Supervisory Body should adopt just any policy or process in an effort to check a box or say that one exists.** While both documents have responded to some suggestions received during the last comment period, as currently presented neither the draft Appeals and Grievance Procedure nor the draft Sustainable Development Tool are fit to be adopted, and the Secretariat and Supervisory Body should continue to work on them to ensure that they are fit for purpose and represent current good practice. Adopting inadequate policies and processes as important as the Appeals and Grievance Procedure and Sustainable Development Tool could undermine human rights and lead to potentially catastrophic consequences for people and the environment.

Draft Procedure: Appeals and Grievance Processes under the Article 6.4 Mechanism

This iteration of the Procedures of the Appeals and Grievance Process does not adequately address the concerns we, as well as others, raised in our previous submission. Primarily we are concerned that the procedure as presented here continues to fail to be guided by human rights principles and norms, and ensuring the right to remedy, which entails both access to justice and substantive redress. Having an effective independent accountability and grievance mechanism is essential to ensuring the right to remedy for those who may be impacted by activities that take place under Article 6.4. As detailed in our previous submission, **the appeals and grievance procedures laid out in**

this version fail to meet the criteria for an effective grievance mechanism, including that it is legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.[1] The Supervisory Body also does not need to reinvent the wheel or start from scratch, but rather it can learn from existing grievance mechanisms associated with climate finance and international financial institutions and the lessons they have learned over the last several decades. For example, see the Good Policy Paper: Guiding practice from the policies of Independent Accountability Mechanisms, which contains a roadmap for establishing new mechanisms and a tool for evaluating effectiveness. .

In the cover note to the procedures, the Secretariat has helpfully laid out all of the opportunities for stakeholder and rightsholder participation in regards to the activities under article 6.4. This is appreciated. The right to participate and right to remedy and justice are related, but distinct rights. **An independent grievance mechanism and an appeals and grievance process is not about providing an avenue for participation, but one for remedy.**

We remain concerned about the assumption made in the cover note, and that is prevalent throughout, that the appeals and grievance procedures are likely to be abused and that abuse is something that needs to be protected against. **The history of independent accountability and grievance mechanisms does not demonstrate that it is something that is abused, but rather used by those harmed and, if anything, a process that is underutilized**. Assuming that the procedures should be aimed primarily, or even partially, at preventing abuse has resulted in procedures that are inadequate and inaccessible and will fail to protect the potential users and to ensure their right to remedy.

On a positive note, it is good that the procedures recognize the importance of confidentiality for those filing appeals or grievances. **It is critical that people have the opportunity to submit complaints confidentially especially in instances where there is a fear of retaliation.** However, in paragraph 81, the draft procedures mention that confidential information should not be released by the Supervisory Body or Secretariat without consent. This is concerning language, as the Supervisory Body should not have access to the confidential information in the first place.

It is also concerning that paragraph 7 has been amended to limit appeals to only decisions on activities and not on methodologies and baselines as well. In choosing option 1, the Secretariat is proposing to limit the scope of the appeals**. In instances where there are multiple options, the Supervisory Body should choose the option that increases accessibility rather than limiting it.**

The primary aim of the appeals and grievance process should be to ensure the right to remedy, which entails both access to justice and substantive redress. Thus, it is concerning that in both section 4.4.6 (para. 28(b)) and section 5.3.4 (para. 56(b)), there is a

[1] *UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, para. 31 (2011).

possibility for the Supervisory Body to ignore the recommendations of the appeals or grievance panel. This allowance threatens to undermine the independence of the panel as well as undermining the appeals and grievance process overall if those seeking to use it do not have a guarantee that effective remedy will be realized. Also, ignoring the findings and recommendations of the independent panel runs the risk of a continuation of violations and harms to communities or the environment.

Overall, the requirements related to the filing of a grievance are too prescriptive and overly burdensome, undermining the accessibility, and therefore the effectiveness, of the grievance mechanism. The appeals and grievance mechanism should be designed in a manner that seeks to maximize accessibility rather than restrict it.

As mentioned earlier, core criteria for a grievance mechanism to be effective are for it to be accessible and equitable. The proposed procedures in this draft related to standing, filing, and fees erect unnecessary barriers to access, and should be amended. Section 5.1 on standing should be amended to say that the only requirements are that a complainant is or thinks they will be harmed by an article 6.4 activity. **Limiting it to claims of direct and tangible harm to health, property, local environment or other interest overlooks other potential harms, including, for example, to cultural heritage, and also overlooks the indirect harms that may result due to the activity.** Also limiting complaints to those based on direct adverse effects eliminates the possibility of filing a complaint when harm is likely to occur, but has not yet manifested. This option is important as it allows for the possibility of preventing the harm in the first place. People should be able to file complaints throughout the activity cycle.

Accessibility and equitability also mean that there should not be undue burdens placed on complainants. The standing requirements represent an undue burden of proof. Further, the requirements in section 5.3.1 for how to submit a grievance and what should be contained in the complaint are overly burdensome. Complainants should be able to file a complaint in any form (and not just using a specific form as indicated in para. 39) and should only have to indicate the harm they are suffering or anticipate they will suffer as the result of an activity. However, they should not have to know the title or UNFCCC reference number as noted in para. 39(d) or submit an affidavit (para. 39(e)).

None of the options related to fees in para. 40 are appropriate. **Complainants should NOT be required to pay a fee for filing a complaint.** Additionally, while we appreciate the sub-paragraph (b) in Option 2 of para. 40 indicating that no fee shall be paid if the grievance pertains to human rights, this should not be limited by the national laws of the host party to enforce the Universal Declaration of Human Rights (UDHR). Human rights are not limited to those contained in the UDHR and the human rights impacted by article 6.4 activities are not either. It is also unclear what the rationale is to distinguish between human rights and infringements related to land, resettlement or violations of the right to free, prior, and informed consent (FPIC) and deterioration of environmental or social conditions for the purposes of requiring a fee. Having to pay a fee is unduly burdensome and a considerable barrier to accessing remedy for those who are or who may be harmed by article 6.4 activities. It is unacceptable to require a fee to be paid to file a grievance.

Paragraph 80 should also eliminate the reference to the mechanism being funded by appeal or grievance fees.

It is also concerning that the procedures described for how the panel will assess the grievance and issue recommendations do not appear to have any meaningful interaction with the complainants. **Interacting with the complainants is essential for understanding the complaint or determining the appropriate remedy.** Of particular concern is para. 52 indicating that complainants can only ask once for a call with the panel or secretariat for an explanation of the recommendations. The complainants should be able to request discussions with the panel as often as they want and the default assumption should be that they are consulted by the panel in its investigation and development of recommendations. It is beneficial to the panel to interact with the complainants so that the proposed remedy makes sense.

Lastly, paragraph 83 is concerning and a potential barrier to access. **Complainants should be able to file a grievance in any language, not just English.** The appeals and grievance process should not operate only in English, but should strive to produce materials and information about its procedures in numerous languages (for example, see the practice of the Green Climate Fund's Independent Redress Mechanism, which provides information about the IRM in many languages and does not limit it to English or even the official UN languages). Those impacted by article 6.4 activities may not speak or read English and thus should not be required to file complaints in English. Further, impacted people may also not be literate and so should be able to file complaints in a variety of formats including orally.

Draft Tool: Article 6.4 Sustainable Development Tool (SDT)

Like the appeal and grievance procedures, the Sustainable Development Tool (SDT) must be in place prior to any activities taking place. However, that does not mean that any SDT should be accepted. While we appreciate the Secretariat's chart summarizing comments and responses and that some changes have been made to reflect comments received (for example regarding ongoing consultation with rightsholders throughout the activity), we remain concerned that many of these changes were superficial and that the Sustainable Development Tool (draft SDT) still remains unfit for adoption. The draft SDT would benefit from further consultation and development with rightsholders as that could enable it to not only prevent negative impacts, but also to better achieve positive sustainable development outcomes from article 6.4 activities. Many of the comments made and concerns raised in our previous submission remain.

Of primary concern is that the draft SDT continues to treat human rights as only one component rather than taking a rights-based approach to the whole tool. **Human rights should be the overarching lens through which an activity's positive and negative impacts are assessed.** Using human rights as part of the overarching framework will ensure that all environmental and social safeguards applied to article 6.4 activities are designed and implemented in a manner consistent with human rights obligations and norms. This iteration of the draft SDT continues to take a limited view of human rights. No human rights instruments are listed in the normative references section. While the draft

SDT now references the Universal Declaration of Human Rights (UDHR), it fails to reference other human rights instruments. **Human rights are universally applicable and numerous global, regional, and national instruments detailing legal binding commitments related to human rights exist.** Additionally, the draft SDT concerningly continues to preference the right to development rather than treating it as part of the broader human rights framework.

All article 6.4 activities should respect, protect, and fulfil human rights and should contribute to the mitigation of climate change in a meaningful and sustainable way. The draft SDT should include a requirement that activities that fail to comply with applicable environmental and human rights laws, including both national laws and country obligations under relevant international treaties and agreements, will not be supported under the article 6.4 mechanism. Moreover, activities and technologies that have uncertain or demonstrated risks to human rights and the environment should be excluded by the Article 6.4 mechanism.

The draft SDT implies that article 6.4 activities need only be consistent with host country laws or industry best practices. However, they should additionally comply with international law and internationally agreed minimum standards related to the environmental and social safeguards. Table 1 under paragraph 19 states that if there is a lack of national legal/regulatory requirements, then "the activity participant may take industry best practices or voluntary corporate policies of the organization to assess if the aspects are harmful." **Rather than using "industry best practice or voluntary corporate policies," activity participants should be required to use international law and internationally agreed minimum standards.**

We remain concerned that Principle 1 on climate and energy continues to suggest that an article 6.4 activity may increase greenhouse gas (GHG) emissions above the baseline scenarios when it is allowed to do so under an approved methodology. This is extremely worrying as the purpose of article 6.4 is to help increase ambition and the reduction of GHGs in pursuit of keeping global temperature rise below 1.5C. **Allowing an activity under the article 6.4 mechanism that would increase GHG emissions is contrary to the purpose of the mechanism and should be excluded**.

In regards to Indigenous Peoples, it is positive to see commitments to ensuring free, prior and informed consent (FPIC) and that there is now mention of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). However, UNDRIP should not be referenced only in regards to FPIC. Additionally, Indigenous legal systems should be recognized without any caveats. Lastly, there should be no resettlement or displacement of Indigenous Peoples or other communities.

Monitoring of the indicators and compliance with the SDT and safeguards should continue beyond the crediting period. Not all impacts from an article 6.4 activity will occur during the initial implementation of the activity or during the crediting period, but may only surface after the crediting period has ended. Thus, activity participants should be required to monitor and evaluate risks and impacts for the full cycle of the activity itself (including

planning, implementation, operation, and decommissioning, if any). It is positive to see that activity participants need to identify both positive and negative impacts, but identification alone is not enough. To ensure that positive impacts occur and negative impacts are avoided requires robust and continuous monitoring that extends beyond the crediting period.

Appendix 1 appears to have been expanded from covering REDD+ activities to all LULUCF activities. While the Cancun safeguards are absolutely relevant and a requirement for all REDD+ activities, they cannot and should not substitute for the requirements for article 6.4. Any activity taking place under the article 6.4 mechanism must, at a minimum, comply with the requirements set forth including the SDT tool. Certain activities may have additional requirements or considerations, but cannot and should not replace the core requirements for all article 6.4 mechanism activities.

It is notable that the previous Appendix 2 related to activities involving removals is no longer included in favor of revising the SDT once the recommendations on activities involving removals is approved. While this makes sense, it is concerning that in other sections of the SDT there remain references to carbon dioxide removal activities (for example in principle 2.1.1, 2.2.1, 2.3.2 and footnotes in principle 3 and 6). These references could prejudice future discussions as well or indicate that certain activities are going to be part of the article 6.4 mechanism when that has yet to be determined.

Conclusion

Given the significant problems in both the draft Appeals and Grievance Procedure and the draft Sustainable Development Tool, we recommend that the Supervisory Body not adopt them during their 11th meeting, but rather take the time to get them right, including through additional consultations with rightsholders. Not having in place adequate and effective Appeals and Grievance Procedure and Sustainable Development Tool will put people and the environment at greater risk and undermine human rights, including the right to remedy and access to justice. We appreciate the opportunity to comment. If you have any questions or would like to discuss anything further, please reach out to Erika Lennon, elennon@ciel.org.