



INPUT OF INDIGENOUS PEOPLES ON THE APPEAL AND GRIEVANCE DRAFT PROCEDURE VERSION 4.0

April, 2024 | SB011

The International Indigenous Peoples Forum on Climate Change (hereinafter “Indigenous Peoples’ Caucus” or “Caucus”) notes with disapproval that the majority of our recommendations included in our submission of February, 2024, were not incorporated in your most recent draft procedure (version 4.0). We therefore attach, again, in Annex 1 our comments and recommendations from our previous submission of February, 2024. We urge you to carefully review and consider these comments and recommendations in the context of the rights of Indigenous Peoples and the overarching legal and human rights framework. The Caucus strongly objects to adoption of this draft procedure at the upcoming meeting of the Supervisory Body. The draft in its current form is wholly inadequate for its intended purpose, does not provide even basic due process safeguards, and should not be adopted as the standard for appeal and grievance procedures.

We stress again that Indigenous Peoples have unique, collective rights that must be considered and protected in this process. These are inherent rights—clearly set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)—which exist within the larger legal and human rights framework by which you are bound in your drafting of the Article 6.4 appeals and grievance procedures. Further, for various reasons, Indigenous Peoples often face significant challenges and barriers to accessing information and participating in justice systems. The Caucus has consistently highlighted these issues, which are crucial to your work in developing standards for implementation of the Article 6.4 mechanism of the Paris Agreement.

With regard to your latest draft procedure (version 4.0), and among our other recommendations and points discussed in greater detail in our submission of February 2024, we note the following.

The unique realities, challenges, and rights of Indigenous Peoples must be considered and adequately provided for in the text of the appeals and grievance procedure for Article 6.4. As noted with specificity in our February, 2024, submission, reference to “Indigenous Peoples” should therefore be expressly made, and provision for safeguarding their collective rights included, throughout the draft procedure.

For example, sections 4.1 of the appeals process and 5.1 of the grievance process, regarding “Standing,” still fail to include express reference to “Indigenous Peoples.” The express inclusion of “Indigenous Peoples” in these sections is necessary to ensure that Indigenous Peoples are not denied access to the appeals and grievance processes. As the Caucus has raised many times to the Supervisory Body, the UNDRIP clearly sets forth the right of Indigenous Peoples to



participate in decision-making in matters affecting their rights. The draft procedure should clearly provide that Indigenous Peoples have standing to file appeals and grievances.

With specific regard to the appeals process of the draft procedure, we similarly briefly note the following (again, urging you to review our more detailed submission of February 2024 on these and other points):

In section 4.10, “Grounds,” paragraph 10, we reiterate that the grounds for an appeal should expressly include human rights violations under international law and standards, *including violations of the collective rights of Indigenous Peoples* as set forth in the UNDRIP. The RMPs for the mechanism established by Article 6.4 of the Paris Agreement, paragraph 24(a)(ix), expressly reference the rights of Indigenous Peoples. The rights of Indigenous Peoples are therefore impliedly included within the scope of your section 4.10, paragraph 10(b). However, expressly including “violations of human rights and the rights of Indigenous Peoples” as grounds for appeal will strengthen the framework’s alignment with international human rights standards and ensure that Indigenous Peoples, their rights and well-being, are protected, in accordance with principles outlined in UNDRIP and other international human rights instruments, and that they are not marginalized by omission.

With regard to section 4.4, paragraph 11, we note that you have shortened the time period for filing an appeal and have ignored the Caucus’ recommendation that the time period be extended for Indigenous Peoples to file such appeal. We further note that in this paragraph you have disregarded our recommendation that the appeals form be provided in multiple languages in order to facilitate more universal access and participation in the appeals process. We reiterate that Indigenous Peoples often face significant barriers in accessing the kinds of information and resources that will be necessary to prepare and file appropriate and timely appeals under your proposed procedure. Compounding the challenge is the reality that the preparation of land claims or claims based on effects on lands is exceedingly complex and time consuming. Therefore, Indigenous Peoples must be allowed sufficient time to file and prepare the legal, historical, anthropological, and other bases for such appeals. Every effort should be made in this draft procedure to provide accommodation for the protection of Indigenous Peoples rights and to address the challenges they legitimately face in defending their rights. The time frames proposed in the revised draft are entirely inadequate for such purposes and appear to reflect a lack of understanding and foresight on the part of the drafters.

In Paragraph 11(a) you continue to omit reference to “Indigenous Peoples.” As holders of unique collective rights, Indigenous Peoples are a unique category of appellant, and therefore should be expressly referenced as such. While the Caucus notes with approval that you have included an option for appellants to request confidentiality of their personal identification and data, we insist that any community or Indigenous Peoples’ identification and data should also be treated as confidential, if the appellant so chooses.

With regard to Paragraph 11(g), the Caucus reiterates its position that express language should be included, clarifying that oral histories, community testimonies, and other forms of traditional evidence will be accepted as appropriate as supporting documentation and other sources of information in the filing of an appeal.



The Caucus notes with approval that you have reintroduced in version 4.0 section 4.4.2, Temporary suspension of processing cases. We thank you for your attention to this provision. We again urge you to include express language that ensures that adequate time and funding are allocated to Indigenous Peoples so that they may prepare their claims. Such language will help ensure that the rights of Indigenous Peoples are properly considered and honored in the appeals process. This language is particularly important since, as noted above, claims involving land title, or effects on land, are very complicated.

Along with our other detailed recommendations provided in our submission of February 2024, commenting on version 3.0 of this draft procedure, the Caucus reiterates that a new paragraph should be included in the appeals procedure, in accordance with the Caucus' draft language offered below, "Early Warning." Such provision would require additional measures and safeguards to help ensure that Indigenous Peoples are not marginalized in this process, whether by intention or omission, and that their collective rights are not violated due to any oversight or barriers to accessing the systems of justice contemplated by your draft procedure.

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.

Further, paragraph 22 of version 4.0 of the appeals procedure (paragraph 21 of version 3.0) must be amended to include language acknowledging the unique situation and rights of Indigenous Peoples, as well as the exceedingly complicated, and time- and resource-intensive nature of land title claims, and claims of effects on Indigenous lands. We urge you once again to review the discussion and recommendations included in our submission of February, 2024, and with regard to the above points, note the Caucus' proposed language for paragraph 22 (21 of version 3.0) provided in that submission.

Finally, with regard to the finality of conclusions by the appeal panel, the Caucus provided proposed draft language in our submission of February, 2024, that would make clear that any conclusions by the appeal panel would *not* be deemed final, but instead could be submitted for review and reconsideration in or by other appropriate judiciary or review systems, including the Host Party national court system, or the court system of the Indigenous Peoples involved. Providing opportunity for this additional level of review is necessary since claims by Indigenous Peoples often involve land titles, or claims regarding effects on land. The protection of such rights such as those to land and other natural resources—resources central to the existence of Indigenous Peoples—cannot be taken lightly or without due process. There simply must be an additional level of independent review contemplated in your draft procedure.

With regard to the Grievance Process, the Caucus made similar recommendations and amendments to your draft language in our February, 2024, submission, all offered to address the particular nature of Indigenous Peoples, their unique rights and situations. The Caucus asks you, again, to turn your careful attention to our advice and justifications included in our submission of February, 2024. Among the many other of our recommendations in that



submission worthy of your attention, we note again now that paragraph 37 of your draft procedure 4.0 (paragraph 35 of version 3.0) must be amended to provide express and particular inclusion of Indigenous Peoples, and to clarify that potential impacts to human rights and the rights of Indigenous Peoples will be an allowable, legitimate bases for which a grievance may be submitted under this procedure.

In section 5.3.1 paragraph 39 of version 4.0 (paragraph 37 of version 3.0), the Caucus notes with approval that you have included language that would allow *a representative* of the grievant to file a grievance. We note again, however, in accordance with our previous submission of February 2024, that the form for submitting the grievances must allow for *collective* grievances by Indigenous Peoples, Peoples which hold collective rights under international standards and may experience collective impacts from a project activity. Ensuring that the form for submitting any grievance intentionally and expressly allows for collective grievances and impacts is necessary to ensure that Indigenous Peoples and their representatives are able to meaningfully participate in the process and to submit their grievances as collective in nature, where appropriate.

With regard to equitable access and participation of Indigenous Peoples in the grievance process contemplated under this draft procedure, the Caucus holds firm that there should be no fee for Indigenous Peoples to file grievances. And, again, as we provided in our submission of February 2024, the Caucus strongly advises that funds be provided for Indigenous Peoples to develop adequate supporting documentation of any potential harm to them by a project activity, including financial support for fact development by experts and for legal representation.

These and other important explanations, recommendations and advice, and proposed language and amendments were included in the Caucus' submission of February 2024, and should be reviewed carefully by your Body. You should make every effort to understand the underlying reasons for the Caucus' recommendations and proposed language, and to incorporate language that addresses the issues we highlight herein and in our submission of February, 2024.



ANNEX 1:

INPUT OF INDIGENOUS PEOPLES ON THE APPEAL AND GRIEVANCE DRAFT PROCEDURE

February, 2024 | SB010

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.”

This falls far short of due process. Indigenous Peoples cannot possibly be expected to have the

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



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.***