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To the Supervisory Body:

### **Background**

Namati works to advance social and environmental justice by building a movement of people who know, use, and shape the law. Namati supports grassroots legal advocates, also known as community paralegals, who help people to solve justice problems on the ground. Namati also convenes the Grassroots Justice Network, a global network of more than 15,000 legal empowerment practitioners in 175 countries that share knowledge and resources.

Across our network, communities have found themselves in the middle of carbon markets they didn't expect and they don't understand. Namati and our network partners are supporting communities to understand their rights, negotiate fair agreements, monitor project implementation, and seek remedies when violations occur. We are also gathering lessons from across these carbon market experiences to influence national laws and global policy.

As global carbon markets expand, the communities that we work with expect to see more projects with funding from the sustainable development mechanism. We hope that these projects will bring the benefits communities envision, including jobs and business opportunities. At the same time, our experience shows that there is a high risk that some projects will harm people or the environment. That is why the Article 6.4 mechanism needs an effective and independent grievance redress process.

### **Comments on the draft appeal and grievance process under the Article 6.4 mechanism**

#### **General comments**

- (a) The Supervisory Body should initiate an expert-led redesign of the process that includes consultation with impacted communities. The required expertise for this task includes:
  - (a) knowledge of the UNFCCC framework,
  - (b) expertise in the design of UNGP aligned non-judicial grievance mechanisms,
  - (c) understanding of the harms or risk of harms for communities impacted by carbon markets, and
  - (d) experience working with communities navigating grievance mechanisms.This should lead to a design document which describes the proposed grievance process, its objectives, key features, and alignment with the UNGPs effectiveness criteria, which in turn can guide the drafting of procedures.



- (b) In line with the [guiding practice from the policies of independent accountability mechanisms](#), we propose that the mechanism should establish an external stakeholder advisory group to regularly provide strategic guidance, advice and feedback: The advisors should include representatives from CSOs and technical experts in fields such as accountability, sustainable development and conflict resolution.
- (c) Should the Supervisory Body need an interim grievance process, we suggest exploring a memorandum of understanding with an established independent accountability mechanism. For example, the Independent Redress Mechanism of the Green Climate Fund could be asked to handle Article 6.4 complaints pending the establishment of a standalone process.

### **Accessibility**

#### **Fees: Facilitate access by removing barriers to entry, especially financial obstacles**

For a grievance mechanism to work, impacted communities, who usually do not have much money, need to be able to access the process without concerns about paying. Good practice for grievance mechanisms across the world is that they are freely accessible, and this usually includes no fees. For instance, the Green Climate Fund Independent Redress Mechanism provides that it shall bear the costs of conducting problem solving, compliance review and monitoring as well as the costs of ensuring the meaningful participation of complainants, witnesses and stakeholders in problem solving, compliance review or monitoring. (*paragraph 91 of Green Climate Fund's procedures and guidelines of the independent redress mechanism*)

We support all options that result in no fees for impacted communities to access the redress mechanism, regardless of whether their claim is completely meritorious. The language up for discussion includes options that would require communities to pay if they are responding to social and environmental harms. The language also questions whether the fee structure should be based on the type of grievance.

We reiterate the comments by the The Office of the Commission of Human Rights raising concerns by the Supervisory Body's focus on risk of abuse of process and agree that this promulgates false assumptions about those who have suffered harm and prejudicing more important considerations regarding the design of the processes. We support the comments that charging a high fee will also result in the abuse of the process by those who are privileged because they would know that those affected will not have the means to appeal wrongs.

We recommend:

- Vote for options with no fees - fees will act as a barrier to the access of the grievance and appeal mechanism by the indigenous and local communities. Strongly oppose the management of a fee structure based on the type of grievance.



- Oppose the contents of *paragraph 46* - good practice is to encourage access to the grievance mechanism not to require local communities to pay the price if they use the wrong procedure or aren't able to gather enough evidence.
- Oppose the contents of *paragraph 13* - communities should not be required to pay deposit a bond in the sum of the standard fee (despite having been exempted from the fees) for challenging the decision of the supervisory body to approve or reject a request for issuance of an emission reduction for a registered article 6.4 activity.

#### Ensure communities are aware of the appeal and grievance mechanism and that the language and process is accessible

Many communities impacted by carbon projects struggle to understand the actors involved in the carbon credit projects tied to their land. It is even more difficult to envision them knowing how the project's operating on their land are funded. Other land based investments have shown that highly complex processes and technical language acts as a barrier to access for most communities unless they have strong legal or advocacy support.

The proposed process includes no proactive outreach. We are extremely concerned that this will result in communities being unaware that they could access the grievance mechanism for activities under the Article 6.4 mechanism. The language of the mechanism is highly complex, using technical terms that are not widely understood. The process has complex eligibility requirements and requires use of a specific electronic 'grievance form' in an official language of the UN. Even the decisions are only required to be published on the UN website (*paragraph 30*)

We propose the following recommendations in accordance with [guiding practice from the policies of independent accountability mechanisms](#) —

- (a) The grievance mechanism system should develop a public outreach strategy, including accessible events in the UNFCCC signatories, with adequate budget to support participation in the events by potentially affected communities.
- (b) The mechanism should ensure that the grievance redress mechanism process is culturally appropriate, gender responsive, and equally available to all: the aggrieved parties should be able to submit grievances or appeals in a variety of forms, either in writing, orally, or via recording, and in their own language.

#### Access to independent legal and technical support for local communities

Even when communities are able to know about the grievance mechanism and understand the language of operation, navigating rights, obligations, and financial roles is often beyond the expertise of impacted communities. An accessible process would be available in the local languages of the impacted communities and all decisions would be reported out to the communities where a grievance was submitted.

Communities often need legal and technical support to navigate the system, and engage on a more level playing field with the various powerful actors involved in a project. As was noted by



some members in the March Supervisory Body meeting, the current draft assumes that the people who will be affected will have access to legal counsel or someone to explain the process. This type of legal support is costly for communities and usually only available when problems have escalated. We support the suggestion for the setting up of a funding mechanism for locally appointed mediators that would guide communities through the process and explain to them.

We also recommend that the supervisory body create a pool of resources for communities to access independent legal and technical support as they navigate the grievance mechanism.

Accessibility can also increase by creating pathways for mediation. Without an option for mediation, parties are forced into an adversarial process when their needs may be able to be addressed with more nuance. This reduces incentives for parties to engage in the mechanism until problems escalate. We recommend the inclusion of an option for mediation or problem solving function that could support parties in addressing community grievances by mutual agreement.

#### Protection for Environmental Rights Defenders: Ensure confidentiality

Carbon projects often involve many powerful actors who stand to benefit. In many sectors such powerful actors have silenced anyone who opposes their investments, including human and environmental rights defenders. In recent documented cases of rights violations on carbon projects, multiple victims said they were hesitant to report the violations because of threats of reprisals from local corporate and community actors who were directly benefiting financially from the project.

The current language of the text proposes that confidentiality should be upon request and not by default. This creates a large potential risks for human and environmental rights defenders.

In response, we recommend making confidentiality the default position in the grievance mechanism with the following decisions:

- Oppose the suggestion that the personal identification and data shall be treated confidential upon request (par 10(c), 11, 39(a), 399c), 45) and propose that confidentiality should be agreed by default and that disclosure should be upon request. The Green Climate Fund's Independent Redress Mechanism requires that confidentiality is by default (*paragraph 97 of Green Climate Fund's procedures and guidelines of the independent redress mechanism*)
- Once a grievance contains accusations against specific individuals or organizations that may trigger legal actions under the relevant domestic laws, the chair of the grievance panel should immediately make the decision not to make publicly available the grievance or any specific information and there should be no option to make the information publicly available. (*paragraph 46*)
- Information shall be disclosed as required by the national law only if it does not result in reprisals and retaliation. (*paragraph 81*)



- The Supervisory Body should have a zero tolerance policy for any project that has reprisals against individuals or communities making use of the appeal and grievance mechanism. Operators or states that violate this policy should be barred from participation in the market.
- Adopt whistleblower procedures and policies such as those that exist in the GCF that would offer consideration for whistleblowers who may not necessarily want to launch a grievance or an appeal.

## **Legitimacy**

### Ensure the resources exist to have an effective appeal and grievance mechanism

To make robust findings and recommendations, fact finders need sufficient time, resources, or methodologies to support evidence gathering or analysis. The current draft does not address the realities of the time and resources necessary for fact finding and recommendations. The 14 day time period for preparing recommendations provided for in the draft process will be unrealistic in most cases.

The grievance review process should lead to the preparation of a reasoned decision supporting the recommendations made. Depending on the grievance, those conducting the review should be empowered to: (a) require the production of documentation from the Supervisory Body or an “activity participant,” (b) conduct interviews with staff of the Supervisory Body, an “activity participant” and other relevant stakeholders, (c) conduct fieldwork including consultations with grievants and inspections of the activity that is the subject of the grievance, and (d) engage subject matter experts to advise on technical aspects of the grievance. In accordance with [guiding practice from the policies of independent accountability mechanisms](#), the mechanism’s policy should empower the mechanism’s staff to conduct site visits as a matter of routine during the admissibility phase and as often as necessary throughout the process.

We appreciate that panel members will be selected in such a way as to ensure that the expertise of the members corresponds to the specifics of the case. However, our suggestion on the need to have paid full time staff who are hired based on clear selection criteria with a consistent, established process has not been addressed. This would ensure that consistent jurisprudence or approaches to complaint handling are developed. We reiterate that the selection criteria for the panel of experts should include includes: (a) knowledge of the UNFCCC framework, (b) expertise in the design of UNGP aligned non-judicial grievance mechanisms, (c) understanding of the harms or risk of harms for communities impacted by carbon markets, and (d) experience working with communities navigating grievance mechanisms.

### The mechanism must have independent reporting structures and independent decision making from the Supervisory Body



International [good practice](#) dictates that to have credibility, grievance mechanisms must have independence. If the Supervisory Body is able to have discretionary power over decisions, then the grievance mechanism will not be independent.

The draft grievance procedure does not address the implementation concerns that we had highlighted in our earlier draft. We reiterate that the process lacks structures or incentives that would support implementation of panel recommendations. The current draft proposes to do away with provision in *paragraph 54* that required the to secretariat follow-up with DNAs after a recommendation is issued. This leaves the Supervisory Body with no clear reporting requirement from DNAs and now power to verify the implementation of recommendations.

The current draft also creates an arbitrary discretionary power for the Supervisory Body to choose whether to take any actions without giving any reasons for that decision (*paragraph 56*). It also creates a situation where the Supervisory Body may undermine the authority of both the appeal and grievance panel. (*paragraph 28 and 56*)

Therefore, we propose that the provision be amended to include that the Supervisory Body can appeal the decision of the grievance panel giving reasons for not agreeing with the actions proposed by the grievance panel. Additionally, that the aggrieved party shall be given the opportunity to respond to the reasons put forth by the Supervisory Body.

#### The mechanism must be grounded in international human rights law

The basis on which the grievance panel should make findings and recommendations is not clear. The process does not require panels to prepare reasoned decisions. This creates a high risk of arbitrary decision making. Currently, the current draft only refers to the United Nations Declaration on Human Rights (UDHR). Instead, at a minimum, the appeal and grievance process should also be grounded in the UN Guiding Principles on Business and Human Rights (“the UNGPs”) as well as good practice environmental and social standards such as IFC’s Performance Standards.

#### The appeal and grievance mechanism should give the appeal panel authority to award compensatory damages

There is no requirement to explore the scope of the violation or consult about remedies with the grievant. This creates a risk of decisions with arbitrary remedies that do not meet the needs of the grievant and could perpetuate problems. Further, it misses an opportunity to build trust with impacted communities, manage expectations, and point them to alternative sources of remedy. Limiting the clarification process to procedural provisions only denies the communities an opportunity to ask questions on the reasoning behind the ruling/recommendation of a panel. We recommend that the appeal panel should be given the authority to award compensatory damages.



### Conclusion

We trust that the Supervisory Body wants credible markets that ensure human rights protection through a strong grievance mechanism. For this reason, we urge the Supervisory Body to restart their process of defining a grievance mechanism that prioritizes accessibility and protection of impacted communities. If that is not possible, we recommend drawing from the experience of other successful grievance mechanisms, such as the Green Climate Fund.