



## Regarding the Draft procedure. Appeal and grievance processes under Article 6.4 mechanism (A6.4-SB008-AA-A05), v. 01.0

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The International and Comparative Law Research Center (ICLRC) thanks the Article 6.4 Supervisory Body (SB) for the continued work on the operationalization of the Article 6.4 mechanism and for the consideration of stakeholder inputs. This input document contains views of the ICLRC experts on the issues covered in the annotated agenda and annex 5 of the eighth meeting of the SB.

### Appeal process

#### Comments on individual provisions

- Para 7(b)(i) [Option 2]

It is proposed that the term ‘global stakeholders’ should be defined to avoid ambiguity and facilitate the implementation of this option.

- Para 10

These are some of the core provisions in the appeals mechanism as they define the grounds for challenge and, accordingly, for reversal of the decision in question. There should be no ambiguity as to the meaning of the terms that will have to be applied both by the appellants and other participants of the appeals process in addressing the appeal.

In this context, the language of para 10(b) referring to “incorrect[ly] implement[ation]” by the SB of applicable provisions, standards, etc. “in a way that is unreasonable” requires special attention. It is not apparent against which standard this “unreasonableness” may be assessed, in particular since it refers to “the way” the provisions were “incorrectly implemented”. The clause may also be understood as implying that the applicable provisions can be implemented by the SB incorrectly, yet in a way that may be reasonable, which will not serve as grounds for appeal.

- Para 11(f)

None of the preceding provisions relating to the standing, scope and grounds for appeal suggests the need to claim any “direct adverse effect on the interests of the appellant” to substantiate the appeal or for any other purpose. Nor do subsequent provisions attach any significance to any claim of such direct adverse effect. The requirement to supply “a statement on the nature of the claimed direct adverse effect on the interests of the appellant” included in para 11(f) thus appears unjustified and unduly burdensome on the appellant.



- Paras 13 and 18

It is noted that the provisions on the immediate ‘freezing’ effect of the appeal may not be fully applicable to the various types of appealable decisions (such as approving methodologies) and may require adjustment to accommodate the different nature of the challenged decisions. Thus, decisions related to specific A6.4 activities may be suspended. As for methodologies, there is no procedure specifically associated with an adopted methodology until it is used for A6.4 activities. It might be reasonable to consider whether a filed appeal should lead to suspension of the effect of the challenged methodology until the appeal is resolved. A provision on putting a methodology on hold provided for in para 82 of the methodologies procedure (A6.4-SB006-A04) could be a helpful example.

Likewise, it is unclear whether any temporary freezing effect should, if at all, follow the appeal against any decision of the SB to decline a request for a revision of a methodology.

In the absence of any such freezing effect for methodology or baseline related appeals, it would be helpful to provide a relevant clarification in the text.

Besides, the two provisions should probably be reconciled in order to ensure that the SB becomes aware of the immediate suspension of “the processing of the case within the respective procedure” once the appeal is received (para 13), rather than later, when it is published on the UNFCCC website following completeness and eligibility checks that may take up to several weeks (para 18).

- Para 22

The standard of review in subpara (b) is confusing in that it implies that the appeal panel may (1) on its own choice, assess whether the “applicable standards and procedures adopted by the [SB]” “are unreasonable in light of the text of the RMPs or other relevant CMA decisions and past rulings of appeal panels under the appeal process”, and (2) based on such assessments, not rely, in consideration of the appeal, on the SB’s implementation of those.

The draft as it stands does not allow for appeals against “standards and procedures adopted by the SB”. If this approach remains, the language of this provision may need to be corrected in order to prevent unsolicited findings, by appeal panels, on unreasonableness of standards and procedures adopted by the SB.

- Section 4.4.5: Para 26

The term “reconsidered decision” introduced to denote the outcome of the “reconsideration” is misleading. To avoid confusion of the original and reviewed decisions and reconsideration per se, a distinction could be made between the decision proper (in its original or reviewed form) and the ‘reconsideration’ decision (ie to affirm or review the original decision) that should provide the rationale as envisaged in para 27. For the latter decision, in our view, “reconsideration decision” would be a preferred neutral alternative term.



## Grievance process

We believe that some features of the proposed process should be additionally clarified.

### **Eligibility to file a grievance**

It is not clear whether individuals can bring their own grievances, or can only represent communities or organizations. Current provisions such as paras 33, 34, 46(c) are not particularly informative.

More generally, activities under Article 6.4 should comply with the need to, “when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity” (Paris Agreement, Preamble). The grievance process should be suited to this objective and be available to those who (may) become exposed to direct adverse effect of the activity which is to a considerable extent governed at the level of the SB, that is – beyond national jurisdiction.

### **Presence of direct adverse effects**

Para 34 determines that a grievance may be submitted “only on adverse effects of a social, economic or environmental nature suffered by the local communities or businesses as a direct consequence of ... a registered A6.4 activity”. We understand this to refer to actual harm, which is also discussed in para 33(c) as: “concrete, tangible and particularized claim of harm to the health, property, local environment or other interest”. Yet para 36(e) also mentions potential direct adverse effect, which seems to mean that potential adverse effect can also be a valid ground for submitting a complaint. The latter approach is outlined in the Cover note (see paras 24, 26) and is, we believe, a matter to be set out at the very beginning of the draft Procedure in the Grievance process section.

### **Applicable law**

In the current draft, there is no guidance provided as to what law should be applied by grievance panel in consideration of the complaint. The absence of such guidance leaves it open for panels to choose and vary their standards in each individual case, which may affect the legitimacy of the mechanism.

### **Scope of review and recommendations**

The SB may wish to consider what the grievance panels can (should) review to arrive at their decision. Among these issues could be the existence of harm or risk thereof, its gravity, existence of causal links between the harm and activities in question, etc. With regard to every such aspect it should be assessed whether the panel will be sufficiently



knowledgeable and what consequences of its findings may extend beyond the specific grievance process (e.g. a finding of absence of harm with reference to international human rights law).

We also believe it would be an improvement to specify that a finding on the existence of harm (or risk) and a link thereof with the activity in question should lead to the issuance of recommendations by the panel. It does not expressly follow from the current text, which leaves broad discretion to the panel regarding issuance of recommendations (“If the grievance panel decides to prepare recommendations...”, para 47).

### **Relation of this procedure to other potentially available complaint procedures**

It is not clear whether the Supervisory Body should provide consistency and coherence with existing non-judicial grievance mechanisms. For instance, the National Contact Points for Responsible Business Conduct under the OECD Guidelines for Multinational Enterprises may also potentially consider cases on adverse effects of the registered A6.4 activities. It is worth considering here how these procedures are correlated, specifically in case of parallel proceedings or when there is already a ruling issued by either of the bodies.



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