

Appeal Procedure for the Mechanism Established by Art. 6.4 of the Paris Agreement

Paris Agreement Policy Brief and Option Assessment

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This Policy Brief will provide arguments for an appeal procedure to be included in the governance structure for the mechanism established in Article 6.4 of the Paris Agreement, including lessons learned from the Clean Development mechanism (CDM). It will then assess possible options for such an appeal procedure.

1. Why an appeal procedure?

a) Background

The mechanism established under Article 6.4 of the Paris Agreement will be serving several objectives: contribute to the real, measurable, additional and long-term mitigation of GHG emissions, foster and support sustainable development, incentivize and facilitate the participation by public and private entities, lead to a transfer of emission reductions from the host Party to another Party and contribute to overall mitigation outcomes.

The activities covered by the rules, modalities and procedures (RMPs) for Art. 6.4 will affect the interests of participating parties, activity participants as well as stakeholders in various, and potentially conflicting, ways. The impacts of activities can be direct or indirect, intentional or accidental, financially assessable or intangible, beneficial and/or damaging.

A robust set of RMPs and carefully designed contracts (e.g. emissions reduction purchase agreements) can mitigate the danger for confrontation and disputes. However, the risk for concerns and claims to arise cannot be eliminated. The architecture for the Art. 6.4 mechanism has the scope for diverse and complex legal relationships amongst a mix of private and public participants and stakeholders. Within those relationships, there is potential for the use of appeal and/or dispute resolution mechanisms.

Lessons from the CDM show that a significant number of disputes arose between private project participants and parties. Some of these disputes were addressed in national courts, some were resolved

by other means (e.g. mediation), while some were referred to the Permanent Court of Arbitration (PCA)¹.

b) Six Reasons for an Appeal Procedure

An “in-house” appeal procedure (and/or complaints mechanism) in the Art. 6.4 governance structure against the decisions of the Supervisory Body (SB) has already been considered by parties in the negotiations of Art. 6.4 RMPs.² Such a procedure could **add value** to the Art. 6.4 mechanism in the following ways:

(1) Greater accountability: An appeal procedure could promote better decisions, with greater clarity and quality. It could provide a “quality control” in the SB’s decision-making process and ensure that the decisions are taken in compliance with the relevant rules as expressed in the RMPs. It also helps to ensure policy coherence and transparency in decision-making. Depending on the scope for appeal and the final content of the RMPs, such procedure can ensure that the proponent of the activity complies with the requirements defined by the CMA and the SB, including to avoid negative (environmental and social) impacts. Potentially, an appeal procedure could also be designed to deal with remedying a situation where such impacts occurred, incl. by access to redress.

(2) Enhance legitimacy: An appeal procedure promotes greater procedural fairness and due process of the Art. 6.4 mechanism. One important aspect of procedural fairness is that the entity subject to the decision of an administrative body has an avenue to full and fair review the original decision. In addition, it may be considered whether in situations where rights of private entities are affected by SB decisions, these entities should be granted the right to be heard by an independent body.

(3) Better accessibility: An in-house appeal process which is built *into* the governance structure of the Art. 6.4 mechanism would be more easily accessible for parties and participants subject to the decision,

¹ These include under the PCA’s Environmental Rules a CDM dispute in 2015, disputes about Emissions Reductions Units (ERUs) (one in 2014, two in 2013 and one in 2009), and a JI related dispute in 2009. Also relevant are three CDM disputes under the UNCITRAL Arbitration Rules (one in 2010, two in 2014). The PCA Environmental Rules feature in model clauses suggested by the International Emissions Trading Association. International Emissions Trading Association, <http://www.ieta.org/>. Model agreements available at: <http://www.ieta.org/Trading-Documents>. See for example, Model Emissions Reductions Purchase Agreement 3.0, “Code of CDM Terms” 1, Article 7.2 (“The Parties agree that any Dispute ... is to be resolved by final and binding arbitration in accordance with the applicable rules of ... The [PCA] “Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment”; see also Model Emissions Trading Agreement (EU ETS) 5.0, Article 10.1 (“Any dispute arising under, out of or in connection with this Agreement shall be resolved by arbitration. ... [T]he applicable rules of arbitration shall be [*insert detail (eg the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration”).

² Draft Text on SBSTA 50 agenda item 11(b) version 2 of 26 June 2019 15:30hrs, Annex, para 72.

compared to the ad hoc establishment of a conciliation commission or the access to an arbitral tribunal or court. The rules for the appeal process would need to be carefully designed so as to provide clarity, certainty and non-discriminatory access. A further advantage with an “in-house” appeal mechanism is that the CMA as the governing body remains in control over the development of rules for the appeal procedure, including on (i) standing, (ii) the design of the appeal body, (iii) grounds of appeal, (iv) procedures, and (v) costs and remedies.

(4) More (relevant) expertise: It is important that the members of the appeal body have the necessary expertise, especially with respect to the Art. 6.4 mechanism, the Paris Agreement in general, international and administrative law (and relevant environmental and socio-economic fields). Different from external mechanisms, the expertise and qualification for the members as well as selection/nomination procedures of the “in-house” appeal body could be defined by the CMA in the terms of reference. Through greater expertise, the appeal body may adapt to the technical needs of appeals against the decisions of the SB, many of which may involve questions of technical and/or scientific nature.

(5) Greater flexibility: The CMA in the terms of reference can adopt provisions that allow for greater flexibility in procedure, tailored to the issue at stake. This could, for example, involve shorter timelines for certain procedural questions, or access to a roster of experts that could be called in to give expert advice.

(6) Greater consistency: The appeal body would develop its own body of jurisprudence that it and the SB would follow when making future decisions on Art. 6.4 activities. Past decisions of the appellate body could be cited in the reasoning of the SB and in new decisions of the appeal body. This would enhance the SB’s credibility, increase efficiency of the decision-making process and might, over time, reduce demand for appeals. Moreover, Art. 6.4 related claims and disputes would be treated by one body, thereby avoiding “fragmented” and potentially inconsistent findings by different judicial and quasi-judicial institutions (e.g. arbitral tribunals and conciliation committees), as well as “forum shopping” for the most favourable body.

c) Lesson from the CDM

Experiences with the CDM have shown the need for a review body in situations where rights and interests of private entities and parties subject to the EB's decision were affected. In addition, claims were raised by affected stakeholders. The questions and claims raised with regard to decisions of the Executive Board, as well as on contractual grounds, were addressed by different bodies, leading to a certain degree of inconsistency and unpredictability of findings.

Negotiations on "procedures, mechanism and institutional arrangements for appeals against the decisions of the CDM Executive Board" came a long way, but have mainly stalled since 2012 due to the uncertain future of the CDM in the context of the Paris negotiations as well as to political differences.³

With the Paris Agreement in place and in force, the end of the second commitment period of the Kyoto Protocol approaching in 2020 and the (likely) transition of the CDM into the larger framework of the Art. 6.4 mechanism, the discussions have been revived. As said above, Art. 6.4 activities will likely have to deal with and address many of the same concerns (if not more) that were experienced by CDM participants and stakeholders.

The Art. 6.4 mechanism could learn from and capitalize on this experience. An impartial, fair, effective and adequate "in-house" appeal mechanism could help in increasing the legitimacy of the governing structure for Art. 6.4 and gaining broader support for cooperative approaches, including by private actors and civil society, for cooperative approaches under Art. 6.

2. Option Assessment for Art. 6.4

This section will outline options for various aspects of an appeal procedure. The list of options is *not exhaustive*.

a) Nature and Function

The appeal procedure could function in different ways, ranging from administrative review, to a complaint mechanism to dispute settlement.⁴ The following options could be considered:

³ See Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism, UNFCCC/SBI/2012/L.8

⁴ The provisions on the settlement of disputes contained in article 14 UNFCCC apply *mutatis mutandis* to the Paris Agreement (art. 14.8 UNFCCC and art. 24 Paris Agreement). The provisions foresee the peaceful settlement of disputes concerning the interpretation or application of the

1. “Administrative” consideration of appeals against the decisions of the Art. 6.4 supervisory body regarding the approval, rejection or alteration of requests for registration of Art. 6.4 activities, approval of methodologies and the (approval of) issuance of A6.4ERs.
2. “Judicial” review of the decisions of the Art. 6.4 supervisory body regarding the approval, rejection or alteration of requests for registration of Art. 6.4 activities, approval of methodologies, and the (approval of) issuance of A6.4ERs (either with referral back to SB or with own decision).
3. Independent complaints body for Art. 6.4 participants (parties, private entities) and (potentially) non-party stakeholder, such as individuals and communities, who believe that they have been, or are likely to be, adversely affected by an Art. 6.4 activity.
4. Dispute settlement body for disputes between states, or private entities/investors and states. This could involve arbitration, mediation, conciliation, or other forms of alternative dispute resolution (ADR).

b) Grounds for appeal

The grounds for appeal can vary, depending on the function of the body.

For functions nr 1 and 2, the appeal body could be given the competence to decide, inter alia, whether:

1. The SB exceeded its jurisdiction or competence (acted *ultra vires*);
2. The SB committed a procedural error;
3. The SB followed its RMPs or incorrectly interpreted or applied or breached one or more RMPs for Art. 6.4;
4. The SB erred on a question of fact available to the SB at the time of the decision;
5. Members of the SB are not qualified (if qualification criteria are defined in the RMPs);
6. Members of the SB are faced with a conflict of interests, which makes impartial decisions impossible;
7. There was a breach of confidentiality.

Paris Agreement through negotiation, or other means, such as the compulsory jurisdiction of the International Court of Justice and/or arbitration in accordance with procedures to be adopted by the CMA. According to Art. 14.6 UNFCCC, Parties can request the creation of a conciliation commission to render a recommendatory award. Additional conciliation procedures can be adopted (Art. 14.7 UNFCCC/art. 24 PA).

For nr. 3: The body would assess allegations of negative effects to people or the environment of Art. 6.4 activities and review whether the SB followed its RMPs.⁵

For nr. 4, the body could potentially be open to hear disputes which concern the application of treaty or contractual norms related to Art. 6.4. Claims would need to substantiate that in implementing Art. 6.4 activities protected interests or rights have been affected.

This would include:

- (a) a statement of the facts supporting the claim;
- (b) the points at issue;
- (c) the relief or remedy sought; and
- (d) the legal grounds or arguments supporting the claim.

The applicable rules in such cases could be modelled on the PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources (“Environmental Rules”) or the PCA Optional Rules for Conciliation of Disputes Relating to the Environment and/or Natural Resources. The PCA’s Environmental Rules for arbitration and conciliation provide the most comprehensive set of environmentally tailored dispute resolution procedural rules presently available.

c) Body

The appeal body should be independent, impartial and expert-based. The following options to serve as the appellate body could be considered:

1. Creation of a new body under the authority of the CMA;
2. Designation of the Art. 15 Committee. The designation of the Art. 15 committee would have the advantage that the committee is already established, it is a standing committee under the Paris Agreement with equitable geographical membership, and its 12 members and 12 alternates would have the necessary expertise, including legal, scientific, technical and socio-economic expertise.

⁵ Such function seems to be envisaged in Draft Text on SBSTA 50 agenda item 11(b) version 2 of 26 June 2019 15:30hrs, Annex, para 73. This function is similar to and could be modelled on that of the Inspection Panel of the World Bank Group: <https://inspectionpanel.org/sites/inspectionpanel.org/files/publications/Brochure%20Inspection%20Panel.pdf>

3. Delegation of the authority to an official designated by the Executive Secretary to establish ad-hoc or standing appeals panels in consultation with the Bureau;
4. Delegation of authority to the SB to establish ad-hoc or standing appeals panels;
5. Any other body considered appropriate by the CMA.

d) Decisions and orders

The appeal body could take different decisions. It could:

1. Affirm the decision of the SB; or
2. Remand the request for registration or issuance to the SB for further consideration; or
3. Reverse the decision by the SB;
4. For function 3 (complaint body): make a determination about whether there was any harm, and if so, whether a violation of the art. 6.4 RMPs was linked to the harm; issue an assessment or investigation report, make recommendations;
5. For function nr 4 (dispute settlement): reject the claim or issue an award/opinion.