

From: laurag@apaguyana.com
To: [Magerkurth, Christina](#)
Cc: [Grady, Mary](#); apaguy@networksgy.com; [Mailbox, REDD](#); [Nicholas Peters](#)
Subject: RE: FW: Appeal of ART decision on APA's Complaint
Date: Wednesday, October 4, 2023 2:32:21 PM
Attachments: [untitled](#)
[letter to ART re appeal TOR.v3.pdf](#)

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Dear Christina

Receiving the TOR during the week of my participation at Climate Week activities did not allow me to focus properly on the document you sent. While we are not negotiating the content of the TOR, the email did say that it was being sent for us to review as we support a participatory process.

We have had a review and are now sending our comments. Please see attached.

Laura George
Governance and Rights Coordinator

Amerindian Peoples Association

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----- Original Message -----

Subject: RE: FW: Appeal of ART decision on APA's Complaint

From: "Magerkurth, Christina" <Christina.Magerkurth@winrock.org>

Date: 10/3/23 8:12 pm

To: "laurag@apaguyana.com" <laurag@apaguyana.com>

Cc: "Grady, Mary" <MGrady@WINROCK.ORG>, "apaguy@networksgy.com" <apaguy@networksgy.com>, "Mailbox, REDD" <REDD@winrock.org>, "Nicholas Peters" <Nicholas.Peters@apaguyana.com>

Dear Laura,

Thank you for the prompt response. I'll be in touch under separate email with some options for a virtual meeting.

We will need your proposed edits by COB tomorrow (Wednesday) to determine if we can address them or not. The Terms of Reference for the appeal is not meant to be a negotiated document since the scope of work and need for confidentiality are straightforward.

It is important that we have the Terms of Reference signed this week to ensure the process continues to move forward in a timely manner. Please provide your suggestions as soon as possible so that we may review in time for the document to be finalized and signed by the end of the day on October 6.

Sincerely,

Christy

From: laurag@apaguyana.com <laurag@apaguyana.com>

Sent: Tuesday, October 3, 2023 9:45 AM

To: Magerkurth, Christina <Christina.Magerkurth@winrock.org>

Cc: Grady, Mary <MGrady@WINROCK.ORG>; apaguy@networksgy.com; Mailbox, REDD <REDD@winrock.org>; Nicholas Peters <Nicholas.Peters@apaguyana.com>

Subject: RE: FW: Appeal of ART decision on APA's Complaint

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Dear Christina

It was indeed a pity that we could not meet better. I hope we can still have a virtual meeting.

Thank you for reaching out back. Apologies for not responding earlier but we are still reviewing the Terms of Reference and planning to suggest some revisions. We are looking forward to moving ahead as well and will therefore send as soon as we are able to.

Moving forward, may I please ask that my colleague, Nicholas Peters is copied on emails who is also now copied here.

Laura

Laura George
Governance and Rights Coordinator

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----- Original Message -----

Subject: FW: Appeal of ART decision on APA's Complaint
From: "Magerkurth, Christina" <Christina.Magerkurth@winrock.org>
Date: 10/3/23 9:06 am
To: "laurag@apaguyana.com" <laurag@apaguyana.com>
Cc: "Grady, Mary" <MGrady@WINROCK.ORG>, "apaguy@networksgy.com" <apaguy@networksgy.com>, "Mailbox, REDD" <REDD@winrock.org>

Dear Laura,

It was a pleasure to meet you in person briefly in New York and I am sorry that our attempts to coordinate a longer meeting were unsuccessful. I hope you enjoyed the time with your friend!

I wanted to follow-up on my earlier correspondence. It is important that we have the appeals process move forward to ensure you receive a response in a timely manner. Could you please sign the Terms of Reference no later than Friday, October 6th so that we may schedule the initial meeting? I just resent the Docusign link. Please let me know if you did not receive it.

If you have any questions, please let me know.

Sincerely,

Christy



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October 4, 2023

Christina Magerkurth
Managing Director
ART Secretariat

Dear Ms. Magerkurth,

Thank you for providing draft Terms of Reference (TOR) for the Appeal Committee. We have reviewed the TOR and write today to provide comments and suggested revisions which seek to bring the intended operations of the Appeal Committee in line with international standards for non-State-based grievance mechanisms. We draw your attention to, in particular, Principle 31 of the UN Guiding Principles for Business and Human Rights, which describes criteria for the effectiveness of non-judicial grievance mechanisms such as ART's, and the UN Office of the High Commissioner's Accountability and Remedy Project III Report on enhancing the effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse.¹

At the outset, we note that Principle 31(g) provides that grievance mechanisms should be "a source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism".² In line with this principle, we are glad to provide recommendations to bring ART's grievance mechanism in closer alignment with these and other international standards. In this spirit, we outline below several broad concerns as well as suggested line edits to the TOR.

1. Constitution of the Committee

We are concerned by the lack of any provision in the TOR for the inclusion in the Committee of persons knowledgeable on Guyana's national laws and, aside from our nominee, of persons knowledgeable on the rights of indigenous peoples. We consider that this omission negatively affects the legitimacy and rights-compatibility of the grievance mechanism.³ In this regard, we note that TREES Article 16.2 states that members selected to be on the Committee "will depend on the subject matter and nature of the

¹ OHCHR Accountability and Remedy Project III: Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse, <https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase3-non-state-based-grievance-mechanisms>.

² UN Guiding Principles on Business and Human Rights (hereinafter Guiding Principles), Principle 31(g). See also UN High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms*, UN Doc A/HRC/44/32 (hereinafter OHCHR Report), para. 11, which recognizes that "meaningful stakeholder engagement is fundamental to meeting each of the Guiding Principles' effectiveness criteria", and Recommendation 7.2 ("There is meaningful consultation with relevant rights holders and other stakeholders as to the optimal design of the mechanism and its processes").

³ See Guiding Principles, Principle 31(a) ("enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance process") and 31(f) ("ensuring that outcomes and remedies accord with internationally recognized human rights").



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appeal.” We would be grateful to know on what basis Thomas Green and Roselyn Fosuah Adjei were selected.⁴ For example, based on our review of the online biographies of these Committee members, it does not appear that they have any special expertise regarding the rights of indigenous peoples that constitute the subject matter and nature of the appeal. Our review of the biographies of the ART and Winrock Board members on their respective websites indicates that there is only one Board member who appears to have any expertise in indigenous peoples’ rights – Ms. Pasang Dolma Sherpa. If two of the three voting members of the Committee have little or no experience with the subject matter of the appeal, it is difficult to trust that the Committee’s decision will be fair⁵ or that the outcome will accord with the internationally recognized human rights that constitute the subject matter of the appeal.⁶ We also note that ART informed us in a letter dated July 16th that the Secretariat would share the names of the Committee members from the Winrock and ART Boards “once selected.” According to the TOR, these selections were confirmed on July 17 and July 19, respectively, yet we were not informed of these nominees until the TOR was shared with us on September 18, 2023.

In addition, as we have indicated previously, we consider it important for the Appeal Committee to include non-voting technical and subject-matter experts in accordance with TREES Article 16.2 and Article 4.3 of the Complaint Guidance. The complaint and appeal concern aspects of Guyanese law directly relevant to the Government of Guyana’s obligation to comply with TREES (see Article 2.3 of the Guidance). We therefore consider that including specific provisions in the TOR for the appointment of such subject-matter experts would make the grievance process more legitimate by building trust in “the fair conduct of grievance processes”.⁷ For example, to the extent that the TOR will not provide for the appointment of any specific subject-matter experts, paragraph 5 should be deleted and a paragraph added to the effect that the Appeal Committee shall appoint subject-matter experts to assist with their understanding of issues raised in the appeal, including inter alia experts on Guyanese law and indigenous peoples’ rights in Guyana.

As a final matter pertaining to the constitution of the Committee, we wish to record here our concern that the very design of the Appeal Committee in TREES and the Complaint Guidance raises concerns about legitimacy. Two of the three voting members of the Committee are members of the ART and Winrock Boards, respectively, and while ART and Winrock claim to be separate entities, the ART Secretariat is hosted by Winrock and indeed the ART grievance mechanism is operated via a Winrock email account. These factors suggest to us a close connection between the two entities. The ART Board must approve any credits that are issued, raising a clear conflict of interest for at least one member of the Appeal Committee. We note that no ART representative is listed on page 2 of the TOR; we hope that

⁴ This request aligns with OHCHR Report, Recommendation 9.3(b) (“The mechanism consults meaningfully with relevant right holders prior to ... appointing a third party to investigate, mediate or adjudicate a grievance or issue”).

⁵ Guiding Principles, Commentary on Principle 31(a) (“Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it.”).

⁶ Guiding Principles, Commentary on Principle 31(f) (“where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights”).

⁷ Guiding Principles, Principle 31(a).



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the person acting as the representative for ART in the appeal will be neither the Committee member who is a member of the ART Board nor the listed members of the ART Secretariat. As a result of these potential and actual conflicts of interest, we feel that it is especially important that the members chosen to represent the ART and Winrock Boards on the Appeal Committee have the relevant expertise to review our appeal, and that the Committee be advised by technical and subject-matter experts.

2. Appeal Secretariat

We are concerned by the appointment of ART Secretariat officials as the secretariat of the Appeal (see paragraphs 4 and 50 of the TOR). As stated above, international standards for non-State-based grievance mechanisms such as ART's require that they be legitimate, predictable, and equitable. The commentary on Principle 31(a) notes regarding legitimacy that "Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust."⁸ Similarly, the UN High Commissioner on Human Rights has recommended that for a non-State-based grievance mechanism to be effective, it should have "been provided with an appropriate degree of independence from the business enterprise(s) and other actors whose activities may be the subject of grievances and ha[ve] adopted and implemented the policies, processes and practices needed to maintain that independence in its day-to-day operations and at all stages of the grievance process."⁹

It is difficult to trust that the ART Secretariat would act independently in all matters and not interfere with the fair conduct of the Appeal given that the ART Secretariat is secretariat to one of the parties to the Appeal. In particular, we consider that it would be inappropriate for members of the ART Secretariat to be permitted under paragraph 50 to attend otherwise confidential meetings of the Committee. At best, such an arrangement would constitute a serious inequity and imbalance in the parties' access to information about the conduct of the Appeal.

3. Changes to Grievance Mechanism

In addition, we remind you that changing the processes and substantive requirements undermines the predictability and transparency of the grievance mechanism.¹⁰ The UN High Commissioner on Human Rights recommended in regards to predictability that a non-State-based grievance mechanism "publishes accurate and realistic information ... sufficient to foster a clear understanding among rights holders ... as to ... criteria as regards eligibility to initiate and participate in the grievance process".¹¹ TREES Article 16 does not mention an eligibility review for appeals, while the Guidance (only published after the ART Secretariat issued a decision on our complaint) states that this review will be conducted by ART within 30 days of receipt of the appeal. In July, you informed us that the eligibility review would be conducted by

⁸ UNGP

⁹ UN Doc A/HRC/44/32, recommendation 7.5

¹⁰ See Guiding Principles, Principle 31(c), 31(e).

¹¹ OHCHR Report, Recommendation 9.2(c).



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the Committee. The Guidance implies, though it does not actually list any criteria, that the eligibility criteria are the requirements now listed in paragraphs 29(1), 29(2)(i), and 29(3) of the TOR. However, paragraph 29(2)(ii) presents a newly articulated standard (i.e., “demonstrating a reasonable likelihood of a material error”) not included either in TREES or the Guidance. Without prejudice to the question of whether the appeal submission meets this standard, we note that it is unreasonable to hold an appellant’s submissions to a standard that was not articulated until after the submissions. Similarly, paragraphs 30(i) and 30(ii) restate requirements found in the Guidance, but paragraph 30(iii) contains yet another new standard (i.e., “submissions on how the error, if proven, would have had a material impact on the recommendations set out in the Memorandum of Review”). This “material impact” standard has not been shared prior to this TOR.

Moreover, we note that the ART Secretariat’s July 24 letter to the APA states that “the Secretariat will formally convey its views regarding eligibility to the Committee during this initial step of the process [the eligibility review].”¹² This statement, taken together with the provisions of the draft TOR referenced above, suggests that ART will have an opportunity to make submissions on the newly articulated eligibility standard, while APA will not be permitted to make any such submissions regarding a standard that was changed after the submission of the appeal. This would run counter to the recommendation of the High Commissioner on Human Rights that “parties to a grievance receive adequate opportunities to verify the accuracy of, and to comment on and respond to, relevant information pertaining to a grievance prior to any material decision on the basis of such information (including with respect to decisions regarding admissibility or whether a matter should be deemed closed).”¹³

Similarly, the standard articulated for the determination of the issues on the Appeal in paragraph 37(2) creates a new standard for which the APA had no notice prior to its submissions for the Appeal. Neither TREES Article 16 nor the Guidance mentions the standard that “the error, if remedied, would have had a material impact on the decision, recommendations of the Independent Reviewer set out in the Memorandum of Review.” Without allowing the APA to amend its submission to address this new standard, it is manifestly unreasonable to instruct the Committee to decide the merits of the Appeal on this basis.

4. Narrow Scope of Review

Even if the changes described above were remedied, either by reverting them or allowing the APA to amend its submissions to specifically address them, we consider that the scope of review described in the TOR would be too narrow to render an effective and legitimate decision on the Appeal. Paragraph 37(1) states that the Committee is to determine whether “there was a clear and proven error in the Memorandum of Review reflecting the decision recommendations of the Independent Reviewer.” This standard artificially narrows the mandate of the Committee because the Memorandum of Review wholly failed to engage with the substance of the initial complaint, restricting itself instead to procedural

¹² Letter from Christina Magerkurth to Laura George, 24 July 2023.

¹³ OHCHR Report, Recommendation 10.3.



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matters that were not germane to the complaint. We remind the Secretariat that ART representatives informed us during the investigation of the complaint that the initial step of the complaint process was meant to address procedural matters, while the appeal would be an opportunity for substantive issues to be considered (though this distinction is not found in either TREES or in the Guidance). If, as paragraph 37(1) suggests, the Committee is limited to the procedural issues described in the Memorandum of Review, then the entire grievance mechanism will have failed to engage with the substantive issues raised in both the complaint and the appeal submissions, rendering the grievance mechanism wholly ineffectual.

5. Line Edits

In addition to the above, we suggest the following line edits (additions in italics where mixed with existing language):

- Amend the first page, second page, and paragraph 3(1) to correct misspellings of Professor Celorio's name.
- Amend paragraph 2 to read "Any addition or change to the registered office of a Party or to a Party's legal representation after the date *of the execution* of these Terms of Reference..."
- Amend paragraph 6 to read "Accordingly, the Parties waive any objections *to the present composition of the Committee, without prejudice to the Committee's right to appoint (additional) non-voting technical and subject-matter experts to the Committee,...*"
- In paragraph 15, strike the phrase "and Article 3.1 of the Guidance." This paragraph refers to the submission of the APA's complaint in March 2023; at this time the Complaint Guidance did not exist.
- In paragraph 16, strike the phrase "its formal response" and insert in its place "a response" (this response by the Government of Guyana was not a formal component of the complaint process, and the APA did not receive an opportunity to respond to these submissions¹⁴); and strike the phrase "Guyana Response" and insert in its place "Government Response".
- In paragraph 17, strike the phrase "its formal response" and insert in its place "a response" (for the same reasons as above).
- In paragraph 21(2)(3), strike the clauses presently labeled (ii) and (iii), re-numbering the remaining clauses accordingly. We note that the Government Response and NTC Response were not part of the formal complaint procedure, and in any case, both documents are described in the Memorandum of Review and would be available to the Committee in accordance with our first suggested revision to paragraph 21(2)(4), below.
- In paragraph 21(2)(3), add an additional clause for the Threshold Decision.
- In paragraph 21(2)(4), strike the phrase "based exclusively on the written record before it" and insert in its place the phrase "based on the Appeal Record and any other document that the

¹⁴ See OHCHR Report, Recommendation 10.3 ("parties to a grievance receive adequate opportunities to verify the accuracy of, and to comment on and respond to, relevant information pertaining to a grievance prior to any material decision on the basis of such information").



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Committee deems relevant". In this regard we note that because the Memorandum of Review did not consider the substance of the complaint, it is important that the Committee is able to consider external documents such as Guyanese laws, previous submissions to ART made by the APA, and other documents referenced by the APA to demonstrate the Government of Guyana's failure to meet TREES requirements.

- In paragraph 21(2)(4), insert at the end "The Committee may issue an Interim Decision to pause the verification process for any future credits pending the determination of the Appeal."
- In paragraph 22, strike the phrase "based exclusively on the record before it" and insert in its place "based on the Appeal Record and any other relevant information", for the same reasons as above.
- Strike paragraphs 23-24 and re-number the succeeding paragraphs accordingly. The ability to make new procedural rules while the consideration of a complaint or appeal is already underway undermines the legitimacy and predictability of the grievance mechanism (see above).
- In paragraph 26, strike the phrase "Article 16.2 of TREES and"; Article 16.2 of TREES does not mention the limitation described in this paragraph.
- In paragraph 29, strike the phrase "Article 16.2 of TREES". Article 16 of TREES does not discuss eligibility of appeals.
- Strike paragraphs 30 and 31 and re-number the succeeding paragraphs accordingly. Paragraphs 30 and 31 are drafted to suggest that APA will have an opportunity to make submissions to support the evaluation of the Threshold Requirements; however, it appears from the TOR that no such additional submissions will be permitted, and the Threshold Requirements were not shared with the APA in their present form before the receipt of the draft TOR. Likewise, it harms the legitimacy, predictability, and transparency of the grievance process to lay a burden of proof on the Appellant when the standard for which the burden must be met was not disclosed to the Appellant until after the submission of both the complaint and the appeal. In the alternative, a paragraph should be inserted permitting the APA to amend its submissions or make new submissions to address the newly articulated standard.
- Strike paragraphs 35 and 46 and re-number succeeding paragraphs accordingly. In paragraphs 21(1) and 33 strike the phrase "and the decision of the Committee shall be final and binding". In paragraph 21(2)(4), strike the phrase "final and binding, with the effect of any such Decision being".
- In paragraph 43, strike the phrase "it receives the completed Appeal Record" and insert in its place the phrase "the date of the Threshold Decision" to reconcile this paragraph with paragraph 21(2)(4).
- Strike paragraph 53 and re-number succeeding paragraphs accordingly. The Appeal should not be confidential (with exceptions laid out in the succeeding paragraphs); in fact, paragraph 56(2)-(3) contemplates that the Appeal will be made public once determined.
- Strike paragraph 55(2) and re-number succeeding subparagraphs accordingly. All documents filed in the Appeal, if not already of public record, should be of public record to aid in the transparency of the grievance process.



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- In paragraph 56(1), strike “as of September 4, 2023”. Any information available on the ART website cannot be confidential, whether found on the website as of September 4 or at a later date.
- Amend paragraph 56 to insert subparagraph 4: “These Terms of Reference.”
- Amend paragraph 56 to insert subparagraph 5: “Correspondence between or among the Parties, the Committee, the Secretariat, and/or any third parties in relation to the Appeal, once the Threshold Decision or Decision have been rendered and communicated to the Parties.”
- In paragraph 59, strike the phrase “(including experts, delegates and representatives)”. This phrase is extraneous, as experts would be non-voting members of the Committee per TREES Article 16.2 and Guidance Article 4.3; the term “delegates” is nowhere explained or defined in the TOR; and representatives of the parties would be authorized to receive Confidential Information without their inclusion in paragraph 59.
- Amend paragraph 1 of the Confidentiality Undertaking to read “a presumption of confidentiality applies to all materials *designated as Confidential Materials in the Terms of Reference...*”.
- In paragraph 3 of the Confidentiality Undertaking, strike the word “all” and insert in its place the word “certain”.

We look forward to working together to reach agreement on the TOR and moving forward with the Appeal.

Sincerely,

A handwritten signature in black ink, appearing to read 'L George', is placed over a grey rectangular background.

Laura George
Governance and Rights Coordinator
Amerindian Peoples Association (APA)