

Forest Carbon Partnership Facility (FCPF)

FCPF Charter: Article 11 and Amendment Procedure under Section 21.1(c) (i)

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This note discusses the legal aspects of a possible amendment to the FCPF Charter's provisions related to the Participants Committee and the relationship between the Participants Committee and the Participants Assembly, in particular the oversight of the Participants Assembly on the Participants Committee.

Background

1. Resolution PC4/2009/2, adopted at the fourth meeting of the Participants Committee (PC4) in October 2009, states that the PC: "In view of some concerns raised over accountability and potential conflict of interest regarding the role of the Participants Committee (PC) in revising Article 11 of the Charter set forth in Section 21.1(c) (i), requests the Facility Management Team to present a note to analyze the implications of a possible amendment to Section 21.1(c) (i) for consideration at a future PC meeting, and to distribute the note to the PC at least fourteen days before the meeting."
2. In response to such request, this note provides (i) background information on the amendment procedure under the Charter Establishing the FCPF (Charter); (ii) some analysis of the provisions of Article 11; (iii) clarification on the relationship between the Participants Assembly (PA) and the PC; and (iv) some options for consideration by the PC at its fifth meeting (PC5).

Amendment Procedure under the Charter

3. The amendment procedure under Section 21.1 is structured in two tiers:
 - a. A general amendment procedure, following which the Charter may only be amended "by the Bank with the prior unanimous consent of the Participants Committee, provided that all other Participants that are not the members of the Participants Committee at the time the amendment is adopted are notified and there is no objection from any such Participant within thirty (30) days after the notification is issued by the Facility Management Team" (hereinafter referred to as "General Amendment Procedure");¹
 - b. Exceptions to the General Amendment Procedure, including possible amendments to Article 11 concerning the Participants Committee. Section 21.1 (c) states that any amendment to Article 11, together with Article 1 ("Definitions") and the annex to the Charter (on Criteria for Selection of the REDD Country Participants), only requires unanimous consent of all the members of the PC (hereinafter referred to as "Special Amendment Procedure for Article 11").

¹ Article 21.1(a) was amended through Resolution PA/2009/2.

4. The rationale behind the simplified special arrangement for amending Article 11 is that the FCPF focuses on learning-by-doing and the PC, which serves as the decision-making body of the FCPF, may need to make adjustments to procedures from time to time in response to various arising needs. However, to strike a balance between efficiency and accountability, the adoption of an amendment to Article 11 is subject to unanimous consent of all the PC members - a higher hurdle for decision-making compared with the two thirds majority requirement for other decisions by the PC (in accordance with Section 11.4).
5. The Special Amendment Procedure for Article 11 was triggered for the first time when the UNFCCC Secretariat and UN-REDD Programme were accepted as observers at the first PC meeting by amending Section 11.7, Observers to the PC, as per Resolution PC 2008-4.
6. The procedure was invoked again when an amendment was proposed and adopted by unanimous consent of the PC at the fourth meeting of the PC in respect of Sections 11.2 (a) and (b) concerning the size of the PC, which was expanded from 20 to 28 members with half of the members from REDD Country Participants, and half from Donor Participants and Carbon Fund Participants together (“Financial Contributors”).² It was in this context that a Participant raised concerns that the ability of the PC to change its own procedures and arrangements in Article 11 without a broader consent and support by all the Participants, for example, through a full discussion at the PA, presented accountability and potential conflicts of interest.

Article 11 of the Charter

7. To understand the implications of a potential change to the amendment procedure envisaged in Section 21.1(c) in order to address the accountability and potential conflicts of interest referred to above, it is necessary to review each section of Article 11. Article 11, entitled “Participants Committee”, contains the following eight sections:

Section 11.1 Role of the Participants Committee

8. Altogether this section has 17 subsections covering the main functions of the PC, including selection of the REDD Country Participants, review of Readiness Preparation Proposals (R-PPs), endorsing a Readiness Package, adopting policy guidance on pricing methodologies for Emission Reduction Payment Agreements (ERPAs), approving General Conditions of the ERPAs, evaluating operation of the FCPF, adopting guidelines for achieving “Additional Benefits”, and approving the budget and grant allocation. Subsection (q) further provides that PC can perform any other functions necessary to facilitate operation of the FCPF.
9. The FCPF is structured in a way that the PC is the main decision-making body and undertakes the full responsibility for operation of the FCPF, in particular with regard to the readiness process. Except for the four issues that can be overturned by the PA (see “Relationship between the PA and PC” below), any decision by the PC is final.

² Resolution PA/2/2009/1 amended Section 11.2 (a) and (b) by providing that the PC will consist of 14 members from REDD Country Participants and 14 members from Donor Participant and Carbon Fund Participants collectively.

Section 11.2 Membership of the Participants Committee

10. This section covers the size and composition of the PC (subsections (a) and (b)), arrangement for the election of PC members (subsection(c)), obligation for elected PC members to consult with the constituencies they represent (subsection (d)), capacity and replacement of the PC members (subsection (e), (g) and (h)), term of PC members (subsection (f)), and designation of the chairperson of the PC (subsection (i)).

Section 11.3 Meetings of the Participants Committee

11. This section sets out the procedures for PC meetings, which are further elaborated through the Rules of the Procedures of the PC.

Section 11.4 Voting

12. This section provides that each PC member has one vote and that decisions are to be taken by a two-thirds majority of the PC members present and voting at the meeting if the efforts to reach consensus have been exhausted.

Section 11.5 Quorum

13. This section sets out the threshold for convening a meeting of the PC, namely a double majority (a majority of the members from the REDD Country Participants and a majority of the members from the financial contributors).

Section 11.6 Conflict of Interest

14. This section provides general descriptions on conflicts of interest between a PC member's professional work or personal duty and his or her functions as a PC member, and sets out a procedure for disclosure and recusal. It further requests the Facility Management Team to develop, where necessary, guidelines for consideration by the PC.

Section 11.7 Observers to the Participants Committee

15. The section provides that Participants who are not members of the PC and representatives from the entities named in the section may attend PC meetings as observers.

16. This section was amended under the amendment procedure of Article 21.1(c) to allow the UNFCCC Secretariat and UN-REDD Programme to observe PC meetings (Resolution PC 2008-4).

Section 11.8 Rules of Procedures

17. The section states that the proceedings and the procedures for the PC should be further elaborated through the rules of procedures of the PC. The PC adopted its rules of procedures at its first meeting in 2008 (PC Resolution PC 2008-1).

18. The above review of Article 11 shows that some sections are procedural while some provisions are substantive and critical for the PC's operation, such as Sections 11.1, 11.2 (a) (b) and (d), 11.4 and 11.5. If the PC decides to adopt a 'differentiated' treatment of the various provisions under Article 11 in the context of applying different amendment procedures, the PC may consider establishing some benchmark for this purpose, to be discussed and decided by the PC.

Relationship between PA and PC

19. The PA and PC are the two existing standing bodies under the FCPF.³ The PA, which meets annually and is open for participation by all the Participants and Observers, is designed to serve mainly as a forum for information exchange and electing the PC. As outlined in the consultations with prospective Participants during the design phase of the FCPF, given the piloting nature of the FCPF and the projected limited number of REDD Country Participants,⁴ the governance of the FCPF was structured in a way that the PA would exercise "light touch" functions whereas the decision making would be undertaken by the representative body of the Participants - the PC.

20. Nevertheless, the PA exercises oversight on the PC by giving general guidance to the PC which is carried out mainly through consideration of a report by the Chairperson of the PC on the PC decisions (Section 10.2 (a)(i)).⁵ Furthermore, with respect to the following four issues, the PA may review the decisions of the PC and decide, by a double majority of respective REDD Country Participants and Financial Contributors, to overturn a PC decision (Section 10.2(a)(ii)). The four issues are the following:

- a. Pricing methodologies for Emission Reductions Payment Agreements (ERPAs);
- b. General Conditions of ERPAs;
- c. Guidelines on Additional Benefits; and
- d. Evaluation of operation of the Facility.

21. The FCPF has now been in operation for almost two years and two PAs and four PC meetings have been held. It would be useful for the Participants, based on their experience to date, to examine the respective functions of the PA and the PC in order to assess whether the original design of the governance structure of the FCPF is still appropriate.

22. For the purpose of this note and in the context of the Special Amendment Procedure for Article 11, the PC could consider expanding the four issues stated in Section 10.2(a)(ii) to include any PC decision to amend Article 11, thereby giving the PA the ability to reconsider and overturn decisions by the PC through a double two-thirds majority, as set out in Section 10.2(a)(ii).

³ Once the Carbon Fund becomes operational, the Trustee of the Carbon Fund may decide to establish a Carbon Fund Participants Committee (Section 12.1 of the Charter).

⁴ It was projected at the time of FCPF design phase that FCPF would only serve at most twenty REDD countries.

⁵ At the first and second Participants Assembly meetings, the Chair and Facility Management Team reported to the PA on FCPF developments, including PC Resolutions and additional decisions.

Recommendations

23. In response to Resolution PC4/2009/2 on the amendment procedure under Article 21.1(c) (i) in respect of Article 11, and taking into consideration Section 10.2 (a)(ii), the PC may wish to review each subsection under Article 11 to decide one of the following:

- a. *Option A:* Any amendment to Article 11 would no longer be subject to the Special Amendment Procedure but fall under the General Amendment Procedure envisioned in Section 21.1(a), where such amendment would require not only the consent of all the PC members but also a no-objection from the Participants who are not PC members at the time the amendment is adopted by the PC;
- b. *Option B:* Only amendments to specific provisions of Article 11 would be subject to the General Amendment Procedure and the rest of the provisions would still be governed by the Special Amendment Procedure set out in Section 21.1(c) (i), where the amendment only requires the consent of all the PC members. The PC would need to determine which provisions it would want to bring under the General Amendment Procedure;
- c. *Option C:* Maintain the Special Amendment Procedure for Article 11 as it is, but amend Section 10.2(a) (ii) by inserting an additional provision, following which the PA can overturn decisions by the PC regarding any amendment to Article 11; or
- d. *Option D:* Maintain the status quo, namely amendments to Article 11 would remain subject to the Special Amendment Procedure.

24. In considering the options outlined above, it is important to note that an amendment to Section 21.1(c)(i) and Section 10.2(a) (ii) is subject to the General Amendment Procedure set out in Section 21.1 (a), namely unanimous consent of the PC and absence of objection from any other Participant within 30 days of the FMT notifying such unanimous consent.