

Joint Response by a Group of Civil Society Organizations on the Whistleblower and Witness Protection Policy

I. Background

Whistleblower and witness protection is a core component of ensuring transparency and accountability in public institutions. Thus, a whistleblower and witness protection policy is an indispensable early warning system for serious wrongdoing that is within the public interest to be prevented and/or addressed. Such a policy has both an internal, institution-inward looking focus, as well as an external, outward looking one addressing, in particular, those affected by policies and projects/programmes or who are supposed to benefit from them. Both need to be given serious consideration here.

Within public institutions, staff acting with morality and integrity in illuminating wrongdoing need to be protected and need to be informed how the protection against retaliation will ensure that their job, their career, and their future livelihoods are not negatively impacted. This is crucial in situations, such as at the Green Climate Fund (GCF), where staff has an obligation to report and attempt to prevent fraud, corruption, and other prohibited practices. It is fundamentally unfair to establish such a duty to report to staff unless the duty to report is complemented by a comprehensive set of measures guarding against retaliation and the duty to report functions essentially as a protection against retaliation. Outside of public institutions, civil society actors play an important role in providing such early warning. However, around the world, we have seen a shrinking space for civil society. In recent years there has been an increase in attacks on people who question or submit complaints related to development projects financed by international financial institutions (IFIs).¹ While the most prominent instances of this have related to people challenging projects/programmes as a whole, that does not mean that those who report fraud, corruption, and other prohibited practices are immune. The GCF must ensure that in conducting its work it does not exacerbate this growing problem. The GCF should ensure that people feel safe to report on these issues and should ensure that its Accredited Entities and Executing Entities do as well. Additionally, the GCF should have zero tolerance for retaliation.

In addition to this needed policy for the protection of whistleblowers and witnesses, the GCF, and especially its Independent Redress Mechanism (IRM) in close cooperation with the Independent Integrity Unit (IIU), should develop an overarching policy on the protection of environmental and human rights defenders who submit complaints or question GCF-funded projects. It is essential that people have the ability to report fraud, corruption, and other

¹ See, e.g., Global Witness, *On Dangerous Ground* (June 2016), available at <https://www.globalwitness.org/en/reports/dangerous-ground/> (noting that 2015 was the deadliest year for land and environmental defenders worldwide); Frontline Defenders, *Annual Report on Human Rights Defenders at Risk in 2016* (2016), available at <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2016> (highlighting that in 2016, over 1,000 human rights defenders were killed, harassed, detained, or subjected to smear campaigns against them); Article 19, Center for International Environmental Law & Vermont Law School, *A Deadly Shade of Green: Threats to Environmental and Human Rights Defenders in Latin America* (2016) (noting that Latin America is the most dangerous region for environmental and human rights defenders due to a number of factors including lack of guarantees for human rights protection, weak rule of law, and shrinking civil society space).

prohibited practices, and submit complaints when they are being or anticipate being harmed, as well as report on potential or ongoing human rights abuses or imminent dangers to public health.

Beyond developing broader GCF policies on ensuring that environmental and human rights defenders are protected, as part of its due diligence, the GCF should evaluate shrinking civil society spaces in the countries in which it is considering projects. In determining projects to fund, the GCF should take into account whether it is in a country where civil society space is narrowing due to government action, especially when the Accredited Entity is a government ministry or other government entity. In those instances the entity actually may be a direct part of the suppression of civil society. Under those circumstances, it would be extremely difficult and dangerous for whistleblowers and witnesses, environmental and human rights defenders, or others to come forward to present claims of fraud, corruption, other prohibited practices, or environmental and social harms, including human rights abuses and threats to public health, among others. Therefore, as part of the duty to protect potential external whistleblowers and witnesses to mismanagement, abuse, fraud corruption, and other prohibited practices, the GCF should give careful consideration to where it operates and should not evaluate projects purely on whether they could be considered transformational and compliant with the GCF's environmental and social management system, as that may not provide a complete assessment of the regional context.

II. Issues to be addressed in the Whistleblower and Witness Protection Policy

In its call for public submissions on the Whistleblower and Witness Protection Policy, a list of questions to be addressed was provided for consideration and to guide public response. Below are comments in response to those questions submitted on behalf of numerous civil society organizations² who follow and work to ensure that the GCF maintains the highest standards and that GCF projects do not harm people or the environment, and that when they do or when there are instances of fraud, corruption, and other prohibited practices (such as coercive and collusive practices, abuse, conflict of interest, and retaliation against whistleblowers),³ people feel safe to report it.

(a) Whistleblowing

(i) In the context of GCF operations, activities and programmes, who or what actors should have an obligation to report prohibited practices (as listed in the General Principles on Prohibited Practices (see Annex I below), harassment (included as a prohibited practice in the GCF's ethics and conflict of interest policies) and misconduct (usually referring to a violation by staff of organisational rules and regulations)? Should other acts or behaviour also be included as a reporting obligation?

² A number of civil society organizations provided input on this draft and additional civil society organizations signed-on in support of the draft. They are listed at the end of this submission.

³ This list comes from the Terms of Reference of the Independent Integrity Unit as adopted at the Sixth Board Meeting of the GCF, however, whistleblowers and witnesses should also be able to report on practices that are leading to human rights violations or imminent threats to public health and safety. *See* Terms of Reference of the Independent Integrity Unit, Decision GCF/B.06/18, Annex IV, para. 1 (Apr. 17, 2014) [hereinafter IIU's TOR].

(ii) Related to the above, who or what other actors associated with GCF should be able to report prohibited practices, harassment, or misconduct (including when such conduct or activities are perceived or potential)? Should these actors also be able to report any other wrongdoing such as illegal or hazardous activities which are of concern to or threaten the public interest –and if so what?

According to the GCF General Principles of Prohibited Practices, which are part of the GCF’s template Accreditation Master Agreement (AMA) with its Accredited Entities (AEs) and approved at the 12th GCF Board meeting, **all counterparties** “shall take timely and appropriate measures to: [...] c. prevent Prohibited Practices from occurring in relation to a Fund-related Activity” and have an obligation to “d. Promptly inform the Fund of allegations of Prohibited Practices found, suspected or alleged in connection with a Fund-related Activity”; [...] as well as to “g. Cooperate fully with the Fund in any Fund investigation into allegations of Prohibited Practices related to a Fund-related Activity.”⁴

The same General Principles define both “Fund-related Activities” and “Counterparties” very broadly. Specifically, counterparties are defined as “any party that contributes to, executes, implements, bids for, benefits from, or in any way participates in, Fund-related Activities, including receiving, or being a beneficiary of, a grant, loan or other form of financing or support from the Fund”, and thus include, but are not limited to, the Accredited Entity and any Executing Entity.⁵

Any GCF staff member or counterparty, regardless of terms of employment (contract or permanent), volunteer, intern, consultant, or other person involved in or affected by a Fund-related activity should be authorized, and under the General Principles on Prohibited Practices would be required, to report on prohibited practices and therefore their disclosures must be protected. Given that the GCF, through the General Principles, imposes this duty to report on staff and counterparties, it must similarly ensure that when people do report they are adequately protected from retaliation. This policy must make that explicitly clear. While it is good policy to have this duty to report and to encourage whistleblowers and witnesses to come forward when they see or suspect fraud, corruption, other prohibited practices, or other imminent harms, this duty to report has to also come with the guarantee of protection. The GCF cannot require reporting as a whistleblower or witness without also providing sufficient protection from retaliation including interim protection. Additionally, project/programme beneficiaries and affected people should be encouraged to report on prohibited practices, harassment, or misconduct that they see and be given protection and support for their disclosures.

In addition, those suspected of making a disclosure, even if wrongly suspected, or those associated with a whistleblower or a witness must be protected. There may be instances in which information was shared by a confidential source where people assume who the source is based on the information disclosed, for example if only a few people would have the information divulged. In those instances, the person suspected of making the disclosure should be afforded protection even if they were not the actual whistleblower or witness.

⁴ Green Climate Fund, Decision B.12/31, Exhibit A - General Principles on Prohibited Practices (2016).

⁵ *Id.* at Exhibit A, para. 2(b).

Protection for those making disclosures should extend to all relevant applicants or personnel **who challenge betrayals of the organizational mission or public trust, regardless of formal status.** Most significantly, whistleblower protection should extend to all those who participate in or are affected by the organization's activities. An increasing number of global statutes do not limit protection to employees, but rather protect "any person" who discloses misconduct. As this policy is intended to cover both internal and external actors, the GCF should make it explicitly clear that this is the case and that all whistleblowers or witnesses are protected. Protected whistleblowing should cover "any" disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions within the GCF accountability system. The consistent standard in national law and in the existing policies at international organizations is for the whistleblower to "reasonably believe" the information is evidence of misconduct. The definition for "reasonable belief" is an affirmative answer to the question: "Would an objective third party, examining the same set of facts, be likely to reach the same conclusion as the whistleblower." The GCF should adopt this definition to be in line with current best practice and to ensure that it is not unnecessarily limiting its protection by requiring additional proof from the person disclosing the information.

Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, violations of human rights, and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties. As such, disclosures of an imminent danger to the public health or safety should also be protected. Further, disclosures of actual or potential human rights violations should be protected. Unnecessarily limiting the scope of what wrongdoing can be disclosed and people afforded protection for disclosing it will undermine the GCF's work as it should want to know of any illegal or hazardous activity or threat to the public interest associated with its projects. This is critical to helping the GCF ensure that its projects/programmes do not harm the environment or people who should be benefitting from its work. Additionally, allowing for this disclosure by protecting those who disclose it, will help prevent harm from occurring which should be in the interest of the GCF and the accredited and implementing entities. More generally, disclosures of any conduct that betrays the organizational mission of the GCF should be protected.

(iii) In that context, should the GCF's whistleblowing principles underscore that whistleblower protections and duties override confidentiality and other pertinent rules?

The policy should establish authorized internal channels for protected disclosures. So long as the whistleblower reports through authorized channels, protections should override confidentiality. Additional regulations may establish authorized circumstances for public or external disclosure that override confidentiality rules. For example, if a whistleblower has made a public interest disclosure internally, but is either informed that no action will be taken, or is not informed about the action taken for three months, the whistleblower is entitled to make his or her disclosure publicly.

(b) Witnesses

(i) Witnesses may be understood as any person who is not the subject of an investigation but who provides information or evidence on request regarding a matter under investigation. Is this a sufficient understanding of witnesses who would be eligible for protection?

This definition should be expanded to make explicit that witnesses include people who submit initial information or evidence that leads to an investigation. The “definition” set forth above could be read to exclude those who provided the initial information given that it says “regarding a matter under investigation.” It also appears too restrictive due to the inclusion of the phrase “on request,” which implies that only people who submit information or evidence when requested are considered witnesses. The understanding of witnesses should be broadened. For example “Witnesses may be understood as any person who is not the subject of an investigation but who provides initial information or evidence or who provides information or evidence, solicited or unsolicited, regarding a matter under investigation.”

(c) Retaliation

(i) Is the interim definition of retaliation (see Annex I below) best suited to trigger the need for protection by concerned actors? Should this be improved? If should, how?

The GCF must ensure that people feel safe to submit information to the IIU when they see or suspect fraud, corruption, or other prohibited practices as well as seeing or suspecting there is an imminent danger to public health or violations of human rights. The GCF should not tolerate any form of retaliation against people who submit reports or who cooperate with the GCF in an investigation. The interim definition appears to limiting in that it says “Retaliation against whistleblowers or witnesses’ means any detrimental act, direct or indirect, recommended, threatened or taken against a whistleblower or witness, in a manner material to a complaint because of the report or cooperation with a Fund investigation by the whistleblower or witness.” It is imperative that the definition retain the fact that the act can be direct or indirect and that it includes threats in addition to actual measures taken. However, the phrase “in a manner material to a complaint” seems unnecessary and could be limiting, thus it should be deleted.

The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination or retaliation taken in response to a protected activity, whether active retaliation, such as termination, or passive retaliation, such as refusal to promote, provide training, or allow for travel. Further, recommended, threatened, and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from civil liability such as defamation suits, and the most chilling form of retaliation – criminal investigation or prosecution.

(d) Protection

(i) What protections should the GCF afford to whistleblowers and witnesses? Should they include protection from retribution, preservation of confidentiality and/or anonymity and personal safety protection?

The GCF should afford a broad range of protections to whistleblowers and witnesses. This protection should include protecting witnesses and whistleblowers from retribution or threats of retribution. It is essential for people to know that when they submit information to the GCF or IIU specifically that the GCF will work to ensure that they do not face retaliation. The GCF should make it explicitly clear that they will preserve confidentiality as in many instances this may be essential to ensuring that there is no retaliation. The IIU should follow international best practice and create a system that will ensure that it can keep identities confidential. This includes keeping identities confidential from people both inside and outside the GCF, including Accredited and Executing Entities especially as some of those entities may be government agencies that engage in suppressing civil society generally. Additionally, the IIU should accept information related to fraud, corruption, and other prohibited practices as well as other gross harms such as imminent threats to public health or human rights abuses that are submitted to it anonymously. While the ideal situation would be for the IIU and no one else to know the identity of the whistleblower or witness, that is not always possible nor something that potential witnesses or whistleblowers will believe to be possible. For example, in some instances and countries, people may not feel safe due to national or local policies and the GCF should know this and not require people to submit their name if they do not want to.

Further, there may be instances in which a witness or whistleblower requires personal safety protection (or protection for their families and acquaintances, which will be discussed later in this submission). In these instances, the GCF should take actions to provide it. In conducting its work, the GCF should always keep in mind the importance of not harming people. This includes creating opportunities for people to report on instances of fraud, corruption, and other prohibited practices without fearing retaliation.

Any retaliatory action (as defined above) must be categorized as unlawful and recognized as a prohibited practice as well as being recognized as misconduct and not tolerated. Further, protections should provide for a “make-whole” solution for a whistleblower or witness. For example, the whistleblower or witness must be restored to the position and privilege held before making the disclosure. In instances of internal whistleblowers this may include reinstatement for validated whistleblowers who have been dismissed or whose contracts are not renewed.

Whistleblowers and witnesses should also be entitled to interim protections, e.g., if an action would be prohibited when a disclosure is protected, then the protections must apply while the GCF is in the process of determining whether a disclosure is protected. Often, it may take the IIU significant time to conduct its investigation into the allegation and during this time period the witness or whistleblower may require interim protective measures to ensure that he or she is not retaliated against. As such protection measures cannot just be extended following the IIU’s determination that a submission was valid because that leaves the whistleblower or witness vulnerable in the interim. Further, these protective interim measures must be administered with

the consent of the whistleblower or witness, as they often involve a change of reporting structure or transfer, particularly when it is an internal whistleblower.

To the extent possible, the confidentiality of the whistleblower or witness must be respected. At times, however, this is not possible. In those cases, every effort must be made to protect the status and standing of the whistleblower. Given the ever-shrinking civil society space and the fact that in a number of instances the Accredited Entity may be a government agency involved in the repression of civil society generally, this is critical. Additionally, it will support the GCF's efforts to not merely be like another fund with more traditional and anachronistic ways of operating such as the World Bank, but instead to be a fund with a more a modern response to one of the most challenging problems we face globally that can be truly transformative.

To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect. Confidentiality goes beyond just promising not to reveal a name. It also extends to restrictions on disclosure of "identifying information," because often, when facts are known only to a few, that information easily can be traced back to the source and are the equivalent of a signature. Further, almost no whistleblower can guarantee absolute confidentiality, because testimony may be required for a criminal conviction or other essential purpose. Under those circumstances, a best practice confidentiality policy provides for as much advance notice as possible to the whistleblower that his or her identity must be revealed.

(ii) In what situations should such protection not be provided e.g. when someone knowingly discloses false information?

In its due diligence, the IIU should investigate the claims it receives related to fraud, corruption, and other prohibited practices, including those listed in the policy and instances of human rights abuses and threats to public health. If the GCF discovers that someone has knowingly or maliciously disclosed false information, then it should not be obligated to provide personal protection. However, if someone has errantly submitted false information and is facing retaliation then the GCF should protect them. The standard here should be a "good faith requirement," which does not necessarily equate to true or accurate. Allegations of integrity violation, misconduct, fraud, corruption, other prohibited practices, or threats to public health, safety, and the environment, even if inaccurate, should remain protected under the policy when they are made in good faith. It is incumbent on the GCF to take steps to protect people and part of that is understanding that people may have gotten information wrong and these people should not be punished for trying to do the right thing.

(iii) Should whistleblowers and/or witnesses be protected from sanctions or disciplinary actions arising from their own wrongdoing?

No. However, their efforts to right a wrong through coming forward as a whistleblower or witness might be considered as a mitigating factor/circumstance in considering sanctions or disciplinary actions against them. Additionally, there is a difference between wrongdoing

knowingly committed and wrongdoing unknowingly committed. For example, in an instance where someone acts in accordance with information they are told or something they are told to do without knowing it is wrong, then they should be afforded protections from sanctions or disciplinary action. It is not fair to punish someone who did not knowingly engage in wrongdoing. Further, it should be clear that people, namely employees, have the right to refuse to participate in wrongdoing and if they do so, they should not be retaliated against.

(iv) How can the GCF best ensure that such protections are implemented?

The GCF should seek out examples of evolving best practice and attempt to apply the most-up-to date protective options. The IIU should regularly conduct research and consult with experts and others to learn what the best practice is, and review and update its own protection protocols frequently, so that when it is attempting to protect someone it does not exacerbate the situation and provides people with the best possible protections.

In this area, as in all anti-corruption actions, the tone-at-the-top is the best guarantee that the measures will be implemented. Exceptions cannot be made for certain individuals, and all oversight offices responsible for implementation must be insulated from political pressures. Thus, it is critical that measures are put in place to guarantee the IIU's independence.

(e) Scope

(i) Who can be a whistleblower or witness and eligible for protection and under what circumstances? Any individual or organisations with an interest in the GCF (e.g. GCF staff, advisors, technical experts, board members, observers, contractors and subcontractors, accredited and other funded entities, national designated authorities, project or programme beneficiaries, other stakeholders)? How can this remit be best defined?

The GCF should broadly define who can be a whistleblower or witness. While for the most part these individuals or organizations may be people who have an interest in the GCF, that should not be a prerequisite. Ideally, the whistleblower or witness protection policy should cover all people providing disclosures relevant to any action that undermines the GCF's public service mission. So if someone witnesses or has information related to fraud, corruption, or other prohibited practices in a GCF project and they submit it, they should be considered a witness or whistleblower and eligible for GCF protection. The GCF should be receptive to receiving information from anyone who wishes to provide it when they believe there is fraud, corruption, or other prohibited practices including human rights abuses and imminent danger to public health occurring in the GCF project/programme. Receiving this information and taking steps to rectify the situation will make the GCF a better actor and fund as it is not in the GCF's best interest for its mission to be undermined by fraud, corruption, and other prohibited practices in its projects and programmes. Further, in some instances fraud, corruption, or other prohibited practices may be emblematic of a larger problem with the Accredited or Executing Entity. This information is then vital for the GCF to consider when it considers funding further projects involving the Accredited and Executing Entity or when it evaluates the Accredited Entity to determine its reaccreditation.

(ii) In addition to the above, who else might be eligible for protection from retaliation and under what circumstances? Should protection extend to persons who suffer from retribution or discrimination for refusing to participate in wrongdoing? Should family members and close friends or associates of whistleblowers and witnesses be included? Should protection extend to persons who are perceived to be whistleblowers or witnesses?

The GCF should adopt a broad definition about who might be eligible for protection from retaliation. It is not enough to protect the individual because in some instances that will only lead to other people (i.e. family members or associates and friends) being harmed. As stated previously, the GCF should strive to ensure that its projects do not result in harm to individuals, organizations, or communities, and part of that is ensuring that people are not subject to retaliation when they submit information alleging fraud, corruption, or other prohibited practices (or when they submit a complaint to the IRM or question a GCF project).

As discussed above in response to question (d)(i)(ii) and (e)(i), people suspected (rightly or wrongly) of whistleblowing and/or of being associates of whistleblowers must also be protected. “Spillover” retaliation is quite common and must be prohibited as misconduct. In addition, all stakeholders working to help the GCF accomplish its mission, which includes acting as whistleblowers or witnesses, must be protected, and all must be extended the right to refuse to violate the law or the regulations of the GCF. Retaliation for such refusal must be considered misconduct at the GCF.

(f) Reporting, responsiveness, communications and outreach

(i) What information should a whistleblower provide when making an initial disclosure?

In making the initial disclosure, the whistleblower should provide the information/evidence that led him or her to a reasonable belief that misconduct such as fraud, corruption, or other prohibited practices has occurred. It should be as detailed as possible, but the GCF and IIU should not mandate specific information or a specific submission template or form because it should be open to different ways for people to submit these disclosures. For example, the inability to correctly fill out a form should not prevent somebody from reporting a suspected prohibited practice. Further, the GCF and IIU should accept information submitted in a variety of ways, such as by letter, email, phone call, or other means of communication, recordings may be audio or video, analog or digital, and in multiple languages. Also, if the whistleblower or witness has authorized information to be submitted by a third party on their behalf, perhaps because of fear of retaliation, this should be accepted as well. Primarily, the IIU should make sure that it is easily accessible by any whistleblower or witness who wants to report on fraud, corruption, other prohibited practices, human rights violations, and threats to public health, among others. Allowing for whistleblower and witnesses to submit information in a variety of ways, forms, and languages will ensure that the IIU is accessible for those who wish to use it.

Additionally, as mentioned earlier in regards to confidentiality, the GCF should not require disclosure of the whistleblower’s name. Should the GCF require this information, it must ensure that information can be kept confidential as this is an important step in trying to prevent retribution or retaliation.

(ii) What useful information should the GCF communicate to the public regarding its whistleblower and witness protection policy and operations to facilitate user engagement?

The GCF should communicate this policy widely internally (for all GCF staff, including temporary staff such as consultants, interns, etc.) and externally. Internally, staff should be informed regularly about the policy, including how their duty to report fraud, corruption, and other prohibited practices safeguards and protects them against other existing staff guidelines, for example with respect to confidentiality requirements and prohibition of information disclosure. Externally, any communication about the policy should outline in some detail the protections against and/or restitution for potential retaliation against whistleblowers and witnesses. Such explicit outreach and information provision, including on the option of anonymity, is crucial to give potential whistleblowers and witnesses the courage and the assurance that it is safe to come forward. This will be particularly important in GCF recipient countries in which civil society and their rights are already under threat as well as in cases where reporting fraud, corruption, or other prohibited practices might involve state/government institutions (for example as national implementing entities) of the country of which they are citizens or residents.

(iii) How can the GCF best demonstrate that it is responsive to whistleblowers and is effectively implementing its protection policy?

The GCF should create a registry of the “cases” it receives so that there is a public record of these instances and the GCF’s reaction. In that registry, the GCF should provide information about the location of the project, date the information was received, information about steps taken, and whether the issue was resolved and what steps against the perpetrators have been taken. However, this should not include information about who submitted the information initially, especially if that person requested confidentiality, as this could subject the witness or whistleblower to retaliation. Additionally, in updating this registry, the GCF should consider whether doing so will endanger the whistleblower or witness even if his or her name is kept confidential. Thus, the GCF may consider when to update the registry and that may be after the issue is resolved. This information will increase transparency and the public’s trust that the GCF takes issues of fraud, corruption, and other prohibited practices seriously and responds accordingly.

An example of how this can be done is provided by the United Nations Ethics Office at the UN Secretariat in New York. The Ethics Office issues an annual report documenting the number of retaliation complaints received, the number sent for investigation after preliminary review, the number validated by investigations, and the recommendation for action sent to the Secretary General.

(iv) How can the remits of the Independent Integrity Unit (IIU) and the Independent Redress Mechanism (IRM) best be communicated to and understood by the public to ensure the best efficiency in terms of resources and responsiveness?

The remits of the IIU and the IRM should be publicly disclosed in a variety of ways. The GCF homepage should have a link to both the IIU and IRM and this link should be obvious.⁶ Further, it should require that all Accredited and Implementing Entities disclose the existence of the IIU and IRM as well as how to contact them at the project site, during any public consultations, upon request, and in all documents released to the public. Additionally, in publicly disclosing this information at the project level, the GCF and its accredited entities should do so in a manner that is culturally appropriate and in the local language. It is critically important that information about the IIU and IRM be disclosed in the local language and, at a minimum, in the language of the country, so as to ensure that people know they exist and can be contacted when necessary.

Further information about the remits of the IIU and IRM and how they can and should work together is discussed later in this submission.

In regards to internal whistleblowers and in response to sub-questions (ii), (iii), and (iv), whistleblowers are not protected by any law if they do not know that such law or standard exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who fear the loss of their job or have already experienced it. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

(g) Given the need to ensure effective implementation through an independent function, free from the influence of management, what GCF office ought to be the custodian of the Whistleblower and Witness Protection Policy, and be primarily responsible for its implementation?

The IIU should be the custodian of the Whistleblower and Witness Protection Policy and primarily responsible for its implementation, however, when necessary, it should work closely with the IRM. Importantly, the office that adjudicates retaliation complaints must be structurally independent of management. This is sometimes a difficult goal in international organizations, but it can be achieved. While it is appreciated that the Terms of Reference (TOR) for the IIU specifies that the Director of the IIU will be headed by someone with experience and proven

⁶ Accessibility is key to creating a robust accountability framework. Though focused on independent accountability mechanisms, the report *Glass Half Full? The State of Accountability in Development Finance* looked at issues related to accessibility, including the lack of knowledge about mechanisms due to language barriers and lack of disclosure, among other issues, and also looked at how many clicks from the homepage it took to find the independent accountability mechanism for that institution as a demonstration of accessibility. See C. Daniel, K. Genovese, M. van Huijstee & S. Singh (Eds.), *Glass Half Full? The State of Accountability in Development Finance*, secs. 3.2, 5.1, 5.2, & annexes (SOMO, Jan. 2016).

record related to conducting investigations and heading an integrity unit and will have an “impeccable reputation of honesty and integrity,” the TOR should also specify that the Director of the IIU must be chosen from outside the GCF. It is also appreciated that the TOR specifies that the Director is appointed for a 3-year term, renewable only once. Both of these things are necessary to prevent appointing a person with a history at the GCF or who wishes to make a career there. Additionally, post-IIU employment at the GCF should be restricted and one year, as specified in the current TOR, is too short. As the GCF strives to be a continually learning institution, it should take this into consideration at the point at which the TOR of the IIU is revised.

While the IIU is the custodian of the Whistleblower and Witness Protection Policy, and primarily responsible for its implementation, it reports to the GCF Board directly or through the Board’s Ethics and Audit Committee, including through an annual report of its activities. According to the TOR of the IIU, the IIU’s findings and/or recommendations on remedial actions, including possible sanctions, will be a) decided by the Executive Director of the Secretariat with reference to any staff misconduct;⁷ b) brought to the attention of the Board Co-Chairs and the Ethics and Audit Committee with reference to a misconduct by the Executive Director of the Secretariat;⁸ and c) reported to the Board regarding remedial actions decided upon by an oversight body in the case of external stakeholders or by an accredited or implementing entity.⁹ However, the TOR of the IIU does not explain who this “oversight body” is, but rather just notes that the IIU may report findings to an oversight body and that they may decide on remedial actions as noted above. The GCF needs to specify what this oversight body is, how it is chosen, and how it operates. Additionally, in doing so, the GCF must ensure that the oversight body follows this Whistleblower and Witness Protection Policy, including keeping information confidential and taking steps to ensure that people are not retaliated against, either actively or passively, or threatened with retaliation and if this is a possibility that the whistleblower or witness is protected.

(h) Please state any other concerns or issues to be addressed by the GCF’s whistleblower and witness protection policy.

Relationship between the IIU and IRM

It is critically important that environmental and human rights defenders and whistleblowers and witnesses be protected and safe from retaliation. The GCF and its independent units, the IIU and IRM, must take steps to ensure this, including through direct collaboration in complaints or redress cases that might, for example, include coercion or collusion or fraud as prohibitive practices in the implementation of GCF projects/programmes. This includes developing robust policies, including a policy on protection of environmental and human rights defenders who submit complaints to the IRM, and implementing them. The GCF should strive to meet the highest standards or be a leader in this arena.

⁷ IIU’s TOR, *supra* note 3, at Annex IV, para. 15(f).

⁸ *Id.* at Annex IV, para. 15(g).

⁹ *Id.* at Annex IV, para. 15(j).

Further, the IIU and IRM should communicate to ensure that the appropriate unit is addressing the complaint or disclosure and, when warranted, work together. The IRM and IIU can and should have a cooperative relationship that is mutually reinforcing. For example, if the IIU receives a disclosure that relates to actual or potential environmental and social harm or other alleged harm that is more in the remit of the IRM, then the IIU should submit that complaint to the IRM. However, before doing so, the IIU should reach out to the person disclosing the information to tell them about the IRM and explain that it might be the more appropriate avenue and then send the information to the IRM. Similarly, if the IRM receives a complaint from an external source that alleges instances of fraud, corruption, or other prohibited activities, which is in the remit of the IIU, then the IRM should transfer the complaint to the IIU.¹⁰ However, before doing so, the IRM should communicate with the complainant to let him or her know that this is happening and why. This will help ensure a robust accountability system in which complaints do not fall through the cracks because the person submitting the information was unclear about where to go.

Moreover, in some instances a disclosure or complaint may include information that falls in the remit of both the IRM and the IIU. In those instances the two units may consider cooperating to address the issues, and, at the very least, they should be in communication about it. However, in working together, the IRM and IIU should also ensure that they are adhering to their policies, for example related to ensuring confidentiality of complainants as that will help in protecting them from retaliation.

Process for Addressing Instances of Retaliation

The policy to be developed must specify the process for resolving a retaliation conflict or how it will address instances of retaliation. While we recognize that this document outlines guidelines and definitions that will serve as a framework for the actual policy, the policy itself must set out the process for making a disclosure and for adjudicating a complaint of retaliation. Accordingly, whistleblowers and witnesses who claim they have been subjected to retaliation must have access to an Independent Tribunal.

Moreover, in these cases, a shifting burden of proof standard must apply.¹¹ Through a process of preliminary review, carried out by the IIU, the whistleblower must establish through a preponderance of evidence that he or she has a reasonable belief that wrongdoing has occurred. Once this is established, the whistleblower should be recognized as having made a protected disclosure. If claiming to be the target of retaliation, the whistleblower must then establish

¹⁰ For example, the independent accountability mechanism of the Inter-American Development Bank, the Independent Consultation and Investigation Mechanism (MICI), excludes cases of fraud from its remit, but in MICI's policy it states that it will forward cases of fraud, among others, to the relevant IDB office and also report that referral in its registry. See Policy of the Independent Consultation and Investigation Mechanism of the IDB, para. 19(a) (Dec. 16, 2015), available at <http://www.iadb.org/en/mici/about-us,1758.html>.

¹¹ The GCF should follow international best practice in developing all aspects of its Whistleblower and Witness Protection Policy. For example for what is best practice regarding burden of proof as well as what is best practice on many other topics discussed in this submission, the GCF could look to a piece from the Government Accountability Project's Legal Director on best practices. See, e.g., Government Accountability Project, Tom Devine, "International Best Practices for Whistleblower Policies," <https://www.whistleblower.org/international-best-practices-whistleblower-policies>.

through a preponderance of evidence that a specific practice or administrative decision was retaliatory. Four questions establish this:

- Was there a protected disclosure?
- Did the alleged retaliator know about or was he/she influenced by someone who did?
- Did the negative action occur after the disclosure was made?
- Is there a logical link between the disclosure and the alleged retaliation.

Once the whistleblower has established this through a preponderance of evidence, the burden of proof shifts to the Organization to prove, by clear and convincing evidence, that the negative action would have been taken even absent the disclosure.

Role of External Arbitration

Whistleblowers and witnesses must also have access to external arbitration, if they wish to resolve their disputes more expeditiously. This should be a shared-cost, mutual strike process in which the whistleblower or witness and the GCF pay the cost of arbitration jointly (because this process is expeditious, the cost is usually less than the cost of outside counsel in a tribunal case), and the arbitrator is chosen by mutual agreement from a list of qualified arbitrators provided by an international association of arbitrators. This process is commonly used in commercial disputes at international organizations.

Access to Forum for Objection to Reprisal Action

In regards to internal whistleblowers and witnesses, there may be a role for an Administrative Tribunal. However, it remains unclear what the role of an Administrative Tribunal with jurisdiction over GCF staff is in ensuring that protections provided are not only on paper, but also guarantee judicial due process rights. The IIU should clarify this, especially since in the case of the GCF the Administrative Tribunal with jurisdiction over GCF staff will be that of another organization. With decision B.15/15, the GCF Board decided that rather than establishing its own administrative tribunal, the GCF would recognize the jurisdiction of the administrative tribunal of the International Labour Organization (ILO) and request the ILO to extend its jurisdiction over staff of the GCF Secretariat or any of the independent accountability units. Pending the approval of the ILO, any disputes involving a member of staff of the Secretariat or any of the independent accountability units who have exhausted all internal dispute settlement procedures without resolution shall be referred to international arbitration, to be determined by a sole arbitrator with expertise in international administrative law (with the Secretariat asked to make the necessary arrangements for such arbitration).

Time-frame for Processing Retaliation Complaints

In processing a retaliation complaint, the preliminary review conducted by the IIU should take no longer than 30 business days. An investigation of the complaint must be completed within 180 business days, and the IIU must issue its determination within ten days of receiving a report from investigators.

Relationship between the IIU and Integrity Units at Accredited or Implementing Entities

As noted in the above comments, the IIU must be accessible at any time and there should not be barriers to entry. In addition to the comments on this previously, access to the IIU should not be impeded by having to access another independent integrity unit prior to going to the GCF's IIU. As such, there should be no sequencing between the IIU and similar integrity units at Accredited or Implementing Entities. This is in line with the Terms of Reference for the IIU as adopted at the 6th Board meeting, which state that the IIU will have "close relationships" with integrity units of the Accredited and Implementing Entities, but that "the IIU will not be precluded from conducting its own investigations."¹² The witness or whistleblower should be able to directly access the IIU, if that is what he or she chooses to do. This decision will likely be based on prior experience or mistrust of the other entity's office and that should be respected. Allowing for this is also part of the GCF protecting whistleblowers and witnesses as forcing them to go to the Accredited Entity's unit may increase the chances of retaliation especially in instances where that entity is a government agency and the government is actively diminishing civil society space.

Other Considerations to be addressed by the IIU Whistleblower and Witness Protection Policy

In its policy, the IIU should also address the following considerations, as all of these are critically important and necessary for the GCF and IIU to answer. To do so, they should look to international best practice to determine the answers to the following questions:

- Will the whistleblower or witness have access to an ombudsman or independent attorney to help him or her navigate the process?
- What access to information regarding their own cases are whistleblowers and witnesses given?
- What are the penalties imposed for retaliation?
- Is the whistleblower entitled to be informed about the progress made in investigating his or her complaint?
- Is there a statute of limitations for reporting retaliations?

Review of the Whistleblower and Witness Protection Policy

Lastly, in order to fulfil its mandate to be a constantly learning institution, the GCF should review its Whistleblower and Witness Protection Policy periodically, at a minimum every five years, or earlier if needed, for example in conjunction with a broader review of the work of the IRM and the IIU. As noted in these comments, the GCF should work to make sure that its policies and practices are in line with international best practice. However, international best practice in this arena is evolving especially in regards to protections for environment and human rights defenders. Thus, to stay up to date with best practice this policy will need to be reviewed and updated.

¹² See IIU's TOR, *supra* note 3, at paras. 4, 16-18.

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Additionally, the following civil society organizations (CSOs) have signed-on in support of this submission (in alphabetical order):

- Abibiman Foundation, Ghana
- Both ENDS, The Netherlands
- Friends of the Earth US
- Forest Peoples Programme, United Kingdom
- Fundación M'Biguá. Ciudadanía y Justicia Ambiental, Argentina
- Germanwatch, Germany
- Human Rights Foundation Aotearoa, New Zealand
- International Work Group for Indigenous Affairs (IWGIA), Denmark
- NGO Forum on ADB, Philippines
- Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education), Philippines
- Third World Network, Malaysia