

# Comments of the Office of the High Commissioner for Human Rights on the Review of the Terms of Reference of the Independent Redress Mechanism of the Green Climate Fund

2 February 2017

The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes this opportunity to comment on the Terms of Reference (TOR) of the Independent Redress Mechanism (IRM) of the Green Climate Fund (GCF).

The right to a remedy is a core tenet of the international human rights system. This consultation provides an important opportunity to incorporate lessons learned from the operation of similar accountability mechanisms at international financial institutions, ensure that the documented obstacles to access to remedy under these mechanisms are adequately understood and addressed in the TOR for the GCF's IRM, and promote access to effective remedies for all those potentially impacted by GCF funded projects.

In the context of efforts to fund climate mitigation and adaptation, the importance of ensuring effective access to remedy is eminently clear. Under international human rights and environmental law, States have an obligation to protect against environmental harm that infringes upon human rights, including by providing effective remedy for violations of human rights related to climate change.<sup>1</sup> Human rights norms and standards relevant to ensuring access to justice for rights-holders are set out in a series of international and regional human rights instruments.<sup>2</sup> To address human rights violations, duty-bearers are required to have in place appropriate procedures to guarantee rights-holders access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and redress mechanisms.

Equally relevant for the functioning of the IRM are the human rights standards entitling rights-holders to access appropriate and timely information and to participate in all public affairs that can impact the enjoyment of their rights. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights enshrine the right to freedom of expression, to seek, receive and impart information, and the right to take part in

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<sup>1</sup> John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/31/52)* 2016  
OHCHR, *Key Messages on Human Rights and Climate Change*

[http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages\\_on\\_HR\\_CC.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf)

<sup>2</sup> See e.g. The Universal Declaration of Human Rights, art. 8; The International Covenant on Civil and Political Rights, art 2; The International Convention on the Elimination of Racial Discrimination, art. 6; The Convention on the Rights of the Child, art. 39; The African Charter on Human and Peoples' Rights, art. 7; The American Convention on Human Rights, art. 25; The European Convention on Human Rights, art.13.

the conduct of public affairs.<sup>3</sup> Moreover, the UN Framework Convention on Climate Change, the Conference of Parties for which the GCF reports annually, requires States Parties to promote and facilitate public participation and access to information on climate change and its effects.<sup>4</sup> Importantly, the linkages between human rights and climate change have been recognized by the UN Human Rights Council which has also stated that human rights obligations, standards, and principles should inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.<sup>5</sup> The Paris Agreement to the UN Framework Convention on Climate Change further calls upon States to respect, promote and consider human rights when taking climate action. According to the GCF's website, "[GCF] is guided by the principles and provisions of the [UNFCCC]", which would include these human rights provisions.

In its recent advocacy for a human-rights based approach to climate change adaptation and mitigation, OHCHR has emphasized that such an approach should inform both the allocation of climate finance and the implementation of related projects.<sup>6</sup> OHCHR is particularly concerned that climate finance has sometimes been directed towards projects that have caused negative impacts on human rights. In some cases, projects such as hydroelectric dams or biofuel production have been documented to cause loss of livelihoods and biodiversity as well as forced displacement, often with particularly severe impacts for indigenous peoples among others.<sup>7</sup> The GCF IRM has a critical role to play in preventing such harms and ensuring adequate remedies where they do occur. In its advisory capacity, the IRM can also promote integration of human rights due diligence and a "do no harm" approach throughout the GCF and its funding operations.

This submission contains OHCHR's preliminary observations on the current TOR of the IRM (which are under revision). These observations focus largely on the role of the IRM as a grievance mechanism designed to address harms caused by GCF funded projects and programmes. OHCHR's analysis begins with a set of key principles and effectiveness criteria and further addresses several procedural aspects.

## **I. THE IRM SHOULD BE GROUNDED IN HUMAN RIGHTS PRINCIPLES**

The UN Guiding Principles on Business and Human Rights, which were adopted by the Human Rights Council in 2011, clarify the complementary, but distinct, human rights responsibilities of States and private enterprises. The third pillar of these Guidelines proposes a set of effectiveness criteria to guide the design, revision and assessment of non-

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<sup>3</sup> Art. 19 of the International Covenant on Civil and Political Rights and Universal Declaration of Human Rights.

<sup>4</sup> Article 6 of the United Nations Framework Convention on Climate Change (1992).

<sup>5</sup> See Human Rights Council Resolution 32/33 (2016).

<sup>6</sup> OHCHR, *Key Messages on Human Rights and Climate Change*. OHCHR, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/23 (2016).

<sup>7</sup> United Nations Environment Programme, *Climate Change and Human Rights* (2015), p. 8-9.

judicial grievance mechanisms.<sup>8</sup> These standards constitute an authoritative normative basis that can be useful, *mutatis mutandis*, for the design of the IRM and represent a legitimate basis against which it can benchmark its subsequent rules of procedures and guidelines.

Paragraph 6 of the TOR which states “the IRM will follow international best practices” could be strengthened by explicitly referencing the UN Guiding Principles and other human rights instruments. The Guiding Principles’ effectiveness criteria as well as their implications for the configuration of the IRM are briefly outlined below.

**Legitimacy** is achieved by enabling trust from the stakeholder groups for whose use a redress mechanism is intended, and accountability for the fair conduct of grievance processes. The IRM should have clear recruitment and appointment rules that remove any doubts about political capture or potential conflicts of interest. Credible mediation and fact finding efforts require staff to have knowledge about the local contexts where projects are undertaken, critical skills to recognize and address asymmetries of power, and sensitivity to cultural contexts. The functioning of the IRM should be assessed following an independent evaluation process. Legitimacy is affected not only by the actions of the IRM, but also by the extent to which the management implements the remedial measures suggested, including in respect to the cessation of funding and the withdrawal of the accreditation from implementing entities in cases of significant adverse impacts.

**Accessibility** entails that the redress mechanism be known to all stakeholder groups for whose use it is intended, and provide adequate assistance for those who may face particular barriers to access. To meet this criterion, the IRM should be publicized through public outreach campaigns, but also through disclosure requirements included in the loan agreements with clients. Affected parties should be supported in accessing the mechanism, through the removal of any barriers linked to language, disability, literacy, costs, etc. When designing the procedural and formal requirements for the eligibility of a complaint, IRM should aim at accommodating different levels of legal knowledge among plaintiffs, with the aim of making the process the least burdensome as possible for complainants.

**Predictability** refers to the IRM providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.

**Equitability** assesses the degree to which the aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms. The power asymmetries between plaintiffs and the organizations and/or institutions they complain against are real and consequential, and the IRM should aim at reducing these at all stages. The reimbursement of third party costs and

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<sup>8</sup> UN Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), para. 31.

expenses when a complaint is deemed eligible could facilitate greater access for all affected individuals and groups.

**Transparency** refers to stakeholders being informed about the progress of complaints before the IRM, and being provided sufficient information about the mechanism's performance to build confidence in its effectiveness. The IRM should publicly disclose information about its compliance review and mediation activities, the remediation measures proposed, and the conclusions of its monitoring efforts. The requirement for transparency should be balanced against the distinct needs for confidentiality of plaintiffs.

**Rights-compatibility** requires that outcomes and remedies accord with internationally recognized human rights. The IRM should be equipped with the expertise to recognize when alleged adverse impacts amount to a violation of human rights, and ensure that the human rights legal framework is used to inform its findings and recommendations. When complaints highlight serious and irreversible risks of human rights harms, the IRM should have the competence to halt a project and prevent the occurrence of harm.

**The criterion of continuous learning** entails that the mechanism be designed in a way that allows it to draw upon lessons learned to improve policies and procedures and prevent future grievances.

## II. FUNCTIONS OF THE IRM

OHCHR welcomes the recognition of an advisory role for the IRM, as evidenced by its competence to make recommendations to the GCF Board. However, the current TOR do not clearly delineate the two functions of problem solving/mediation (para 8c) and compliance review (para 8d) as two independent procedures through which the IRM can discharge its responsibility to address project related grievances.

### A. Separation of functions

While compliance review is a fact finding and investigation activity, the purpose of mediation is to achieve consensus-based solutions through flexible means. As such, they should be contemplated as two distinct procedures with a separate institutional setup, as their effective realization requires the commitment to distinct sets of professional behaviours and standards. The IRM should assign different members of its staff to the mediation and compliance review teams, respectively, and design separate procedural rules to guide their engagement and interaction with the Board, the Secretariat and the operational departments. The clarification of the differentiated nature of these two mechanisms should inform a more comprehensive definition of the types of complaints that the IRM can hear, as discussed below.

## B. Lessons learned

In accordance with the effectiveness criteria outlined above, and within the IRM's mandate to make recommendations to the Board, OHCHR would suggest that the TOR include a provision whereby the IRM can produce lessons-learned reports to inform the continuous improvement of practices and operational policies and procedures. The IRM is in a distinctively unique position to understand broader patterns of harm and adverse impacts resulting from structural failings in operational policies, and should consequently integrate its findings into recommendations for the improvement of performance at the GCF.

## III. REPRISALS

With reprisals against human rights and environmental defenders increasing, including against complainants to the independent accountability mechanisms of international financial institutions, it is important that the IRM have a protocol or policy on how to handle cases where aggrieved parties fear retaliation.<sup>9</sup> In this respect, OHCHR would like to highlight relevant guidance on the protection of human rights defenders developed by UN human rights mechanisms to address the issue of potential reprisals against those seeking to engage with them.<sup>10</sup>

In addition to “ensuring transparency and fairness” (para. 6), IRM should also commit itself to ensuring confidentiality. In order to mitigate any risks of reprisals, the complainants' names and personal details should be kept confidential when so requested.

## IV. ELIGIBILITY CRITERIA

### A. Complainants

The provisions in the current TOR, which limit access to the IRM to “a group of persons” (paras 2(b), 7), are excessively restrictive. The IRM should be open to *any individual or group of persons and their representatives acting on the behalf and with the consent of the plaintiffs* that allege potential and actual harm. In addition to affected parties and their representatives, the TOR should also recognize a role for the IRM itself to initiate an investigation when it learns about actual and potential adverse impacts on people and environment.

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<sup>9</sup> See e.g. the World Bank Inspection Panel, *Guidelines to Reduce Retaliation Risks and Respond to Retaliation during The Panel Process* (30 March 2016).

<sup>10</sup> See e.g. UN Human Rights Treaty Bodies, *Guidelines against Intimidation or Reprisals (“San Jose Guidelines”)*, adopted at the twenty-seventh meeting of chairpersons of the human rights treaty bodies, HRI/MC/2015/6 (2015); UN Special Procedures, *Acts of intimidation and reprisal for cooperation with the special procedures* available at: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Actsofintimidationandreprisal.aspx>; UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on Human Rights Defenders: an essential guide to the right to defend human rights* (2011) available at: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CommentarytotheDeclarationonHumanRightsDefenders.aspx>;

## **B. Definition of impact**

According to the draft TOR, the IRM can receive complaints from persons “directly affected by adverse impacts” resulting from a failure to implement GCF operational policies and procedures, including but not limited to the environmental and social safeguards (paras. 2(b), 7). In OHCHR’s view, the strict limitation of the scope of the complaint procedure to *direct* and *actual* impacts is problematic, as it can limit the accessibility of the mechanism and therefore weaken its role for harm prevention.

Firstly, the IRM should consider complaints that allege both actual and potential adverse impacts. Affected parties should be allowed to lodge complaints prior to the implementation of a project, which is a necessary condition for preventing irremediable and irreversible impacts.

Secondly, proving direct impacts as an eligibility condition (para. 8a) imposes an unnecessary burden of proof on complainants, whereas the complaint procedure should be sufficiently simple and straightforward to allow persons without legal knowledge to make use of it. In addition, ascertaining the nature of causality prior to the launch of a proper investigation may be objectively difficult.

Thirdly, it is not clear why indirect impacts should not be eligible for consideration by the IRM. Mitigation and adaptation projects are not implemented in a vacuum, but in socio-economic contexts that should be factored in when assessing their environmental and social risks. The GCF and the accredited and implementing entities have a responsibility to ensure that projects do not exacerbate underlying situations of inequality or discrimination, and /or compound existing adverse impacts associated with their business relationships and the activities of other actors.

## **C. Mandatory mediation**

Depending on the specific case, making compliance review conditional upon the prior use of the problem solving/mediation approach (para. 8(d)) could amount to an unnecessary obstacle to access timely remedies. The IRM, like other accountability mechanisms,<sup>11</sup> could allow complainants to express a preference for one of the two functions when lodging a complaint. This choice may be particularly important in specific instances involving severe human rights impacts. Moreover, attention should be drawn to the fact that the IRM will co-exist with other grievance mechanisms, as mentioned in paragraph 18 of the draft TOR. If, for example, complainants already used the mediation procedure of one of the accredited entities and was dissatisfied with its outcome, they should be given the opportunity to opt directly for compliance review when accessing the IRM.

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<sup>11</sup> See e.g. Asian Development Bank, *Accountability Mechanism Policy* (2012), African Development Bank Independent Review Mechanism, *Operating Rules and Procedures* (2015).

#### **D. Breach of operational policies**

According to paragraph 7, grievances can be solely raised in relation to the failure of the Fund, or projects and programmes funded by the Fund, to comply with and implement its operational policies. However, in line with the procedures of other independent complaint procedures, mediation/problem-solving should be made available to all complainants who allege having been affected by a project, irrespective of whether operational policies and procedures have been complied with. It is therefore suggested that paragraphs 2(b) and 7 be reformulated to reflect the broader nature of complaints eligible for mediation/problem-solving. As indicated in paragraph 8(d), the eligibility of cases brought under the complaint procedure could remain contingent upon allegation of a breach of operational policies and procedures.

### **V. GOVERNANCE AND MANAGEMENT STRUCTURE**

Finally, OHCHR recommends that the language on the independence of the Head of IRM be strengthened. The proposed period of a one-year employment ban with the GCF after the completion of a mandate may be insufficient to prevent conflicts of interest and/or the appearance of impropriety. The TOR should also stipulate the number of years that should lapse before a former GCF employee can apply for the position of the Head of the IRM.

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