

Mr. Steiner
UNDP Administrator
United Nations Development Programme
One United Nations Plaza
New York, NY 10017 USA

2nd February 2022

Dear Administrator Steiner,

We are writing in response to your letter of 13 December 2021 on issues related to the UNDP GEF Russia Standards and Labels project and whistleblower protection, and in particular in relation to the two whistleblower cases of Mr. John O'Brien and Mr. Dmitry Ershov. We write to you jointly, with Government Accountability Project and the Whistleblowing International Network (WIN). We would like to make the following points.

First, we note that the UNDP debarment list is not yet public. In your 13 December 2021 letter, you stated that the vendor sanctions policy is being updated and will be released in 2022. We believe it is important that the UNDP make this debarment list and vendor sanctions policy public, and kindly request to be informed of the results of this updated policy once it becomes available.

Second, we would like to correct a statement in your letter; you wrote that Mr. John O'Brien "confirmed he was not retaliated against." Mr. O'Brien has consistently claimed that he was the subject of whistleblower retaliation and that, because whistleblower best practice standards are not applied at the UNDP, particularly with respect to a properly constituted 'reverse burden of proof,' it is nearly impossible to prove retaliation under the current system. We therefore do not accept your statement characterizing what he said.

We welcome the fact that the Head of the UN Ethics Office, Ms. Elia Armstrong, wrote to Mr. O'Brien in October 2021 that once the whistleblower protection policy at UNDP is strengthened, Mr. O'Brien will be free to apply again for protection.

Our organizations are committed to whistleblower protection because of the public interest significance of the information that whistleblowers provide. We also strongly believe in the importance of investing in projects and activities to reduce greenhouse gas emissions and to adapt to and mitigate the impacts of climate damage. Consequently, we cannot afford to allow the important work that UNDP is doing in the field of climate change to be undermined by its own systems that fail to protect those who speak up about corruption or mismanagement of project funding in this area, or to hold wrongdoers to account. Reforming the UNDP whistleblowing system to protect those who use it is therefore urgent. Robust protections for whistleblowers ensure the free flow of information to allow the UNDP to be a stronger and more effective partner to the Global Environment Facility (GEF) and to the Green Climate Fund (GCF).

The Russia independent review concluded that Mr. O'Brien's case was handled unsatisfactorily by UNDP's Office of Audit and Investigations (OAI) and called for an independent review. We understand the UNDP is refusing to allow this independent review but has told the donors that all recommendations have been accepted.

While you have set out briefly in your letter to us how you intend to respond to some of the policy recommendations from the review, we understand that the whistleblower recommendations of the Russia independent Review have not been implemented in regard to the two whistleblower cases. We refer you to the recommendations made by WIN and Government Accountability Project in their letter to the GEF.¹ In the case of Mr. Dmitry Ershov, we understand that neither his concerns about corruption, nor his claim of unfair dismissal were ever considered by the UNDP Ethics Office despite his writing to them many times over a number of years.

We are concerned that the UNDP appears to have adopted two different positions. For the donors, UNDP has informed them that all recommendations of the Russia independent review were accepted. However, for the whistleblowers none of the specific recommendations appear to have been accepted. Nor does there appear to be any intention to act on Mr. O'Brien and Mr. Ershov's whistleblower disclosures and retaliation cases. We believe this is unacceptable for the whistleblowers and simultaneously reduces staff confidence in the UNDP internal justice system.

Effective reforms to the system should be based on lessons learned from implementation. The recommendations on the whistleblowers' cases cannot be de-coupled from those relating to policy reforms. A proper independent review of these two whistleblower cases will ensure that justice is done and help inform improvements to the system going forward.

Statistics show that the UNDP did not protect a single whistleblower in 2020, and now an independent review has concluded that an important whistleblower case was carried out unsatisfactorily. Overhauling the system must be a priority. Central to the international best practice standards for whistleblower protection policies is the implementation of a properly constituted 'reverse burden of proof' standard. We are pleased to note, as you stated in your letter of 13 December 2021, that this is under consideration but are worried about the approach. Indeed, the simple removal of the wording "more likely than not" would not strengthen the Protection against Retaliation Policy. Instead, we recommend the removal of **any** reference to a "causal connection" with respect to establishing a prima facie case.

According to international best practice consensus, a prima facie case is established once the whistleblower has shown that they (1) engaged in a protected activity (or intended to or were believed to have engaged in a protected activity) and (2) suffered a detrimental treatment. We refer you to UNODC's Resource Guide on Good Practices in the Protection of Reporting Persons² and to a briefing prepared by WIN on this legal standard.³

¹ Please see letter to GEF Council from WIN and GAP sent on the 8 December 2021 at

<https://whistleblowingnetwork.org/News-Events/News/News-Archive/Climate-change-resilience-fund-must-protect-whistl>

² See p. 64 at https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf

³ See WIN briefing at <https://whistleblowingnetwork.org/Our-Work/Publications/Burden-of-proof-for-whistleblower-claims-must-be-f>

It is critical that UNDP lead by example by integrating international best practice standards for whistleblower protection policies into its own policy framework, and we are available as a resource to help you accomplish this goal. In order to support your immediate efforts, we have attached further recommendations to strengthen your whistleblower protection policy in Annex 1.

Further, we note that at the December 2021 GEF Council meeting the UNDP was requested to update its self-assessment with respect to meeting the minimum GEF fiduciary standards by June 2022. One of these is to have a strong and robust system of whistleblower protection in place. In our view, a key quality control indicator is reforms taken based on case reviews, particularly those found to have been handled unsatisfactorily. We would like to respectfully request a copy of this self-assessment once it is available.

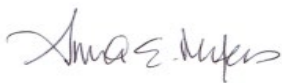
We are copying in several key partners who share an interest in making sure that whistleblower protection is strengthened, including the GEF Secretariat and the United Nations Secretariat as well as key donors on the UNDP Executive Board.

We thank you for taking this matter seriously and we remain at your disposal to assist in any way we can in your efforts to reform the UN internal justice system to protect whistleblowers as a matter of good governance and for the public interest. We have also reproduced recommendations WIN and Government Accountability Project set out in their letter to the GEF leadership in December 2021 (see Annex 2). We trust that these will be understood as important elements to ensuring greater transparency and accountability for the reforms undertaken by the UNDP as well when reporting to the UNDP Executive Board.

We look forward to hearing from you and wish you and the UNDP Executive Board all the best for a successful meeting this week.

Yours sincerely,

XX on behalf of Transparency International



Anna Myers, Executive Director, Whistleblowing International Network (WIN)



Samantha Feinstein, International Director, on behalf of the Government Accountability Project

ANNEX 1 - Policy recommendations to improve UNDP's Policy for Protection Against Retaliation

While UNDP's Policy for Protection Against Retaliation is in line with best practice recommendations on many aspects, significant improvements are needed to comply with international standards and best practices in several areas. Recommendations for improvements are described below.

The requirement of "good faith" should be clearly defined

The policy clearly states that it only applies to individuals who reported allegations of misconduct, or who have cooperated with a duly authorized audit or investigation "in good faith," but does not provide a definition of "good faith."

The concept of "good faith" could be misinterpreted as referring to the personal motivation of the whistleblower for reporting wrongdoing, which would be against international standards and best practices.⁴

We thus recommend that the policy clarifies that the good faith requirement is fulfilled if the person making a disclosure reasonably believes that the information provided is true at the time of the disclosure.

The definition of retaliation should be amended to include the most common situations of retaliation against whistleblowers

The policy states that "If the individual did not engage in a Protected Activity, any detrimental action recommended, threatened or taken against him/her will not be considered Retaliation under this Policy." This is not in line with best practice, as it does not protect individuals against detrimental action that "successfully" intimidated or hindered them from engaging in a protected activity. According to best practice, protection against retaliation should not be limited to individuals who made a disclosure but should be extended to all individuals at risk of detrimental action as a consequence of whistleblowing. This should include:

- individuals who are about to make a disclosure, since they could suffer detrimental actions aiming at discouraging them from blowing the whistle, or as a "pre-emptive strike" to circumvent legal protection⁵
- individuals who are perceived as whistleblowers, even mistakenly⁶
- individuals who assist or attempt to assist a whistleblower

⁴ See for example Transparency International's [Best Practice Guide for Whistleblowing Legislation](#) (2018), pp 15-16; Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and Explanatory Memorandum, p. 39.

⁵ See for example Government Accountability Project, [International Best Practice for Whistleblower Policies](#) (2016), Principle 4; Transparency International Best Practice Guide for Whistleblowing Legislation (2018), p13.

⁶ Paul Latimer and AJ Brown, "Whistleblower Laws: International Best Practice", University of New South Wales Law Journal, 31(3), 2008, p. 790.

We recommend that UNDP extend the scope of its anti-retaliation policy to protect individuals who suffered retaliation because of a protected activity, even if they did not strictly-speaking engage in such protected activity.

In addition, retaliation can take the form of an action or **an omission**. We thus recommend including the latter expressly in the definition of retaliation.

Objective criteria to establish a prima facie case

The UNDP policy requires, in effect, that whistleblowers provide information that “indicates that it is more likely than not that a causal connection exists between the Protected Activity

and the detrimental action that has been taken or threatened against the individual”, and only when the Ethics Office has determined that a prima facie case is established will the matter be referred for a full investigation. This provision is problematic for two reasons.

First, according to best practice, a prima facie case is established once the whistleblower has shown that they (1) engaged in a Protected Activity (or intended to or were believed to have engaged in a protected activity) and (2) suffered a detrimental action or omission.⁷ Establishing that “a more likely than not causal connection” between the Protected Activity and the detrimental action is setting the threshold too high, especially at the pre-investigation stage. An investigation will likely be necessary to gather the facts necessary to establish, or not, this causal link.

Second, the policy does not specify which criteria should be used by the Ethics Office to determine whether that “more likely than not causal connection” exists. Such criteria are necessary to guarantee the objectivity of the decision taken.

We recommend that UNDP anti-retaliation policy be amended so that a prima facie case is established once the following two objective criteria are met: (1) the individual engaged in a Protected Activity (or intended to or were believed to have engaged in a protected activity) and (2) a detrimental action or omission that has been taken or threatened against the individual.

Burden of proof on the employer

Once a prima facie case is established, the burden must then shift to the employer to prove there is no connection between the disclosure and the alleged detriment.

An employer should be required to prove solely independent justifications for an action with clear and convincing evidence, not a mere preponderance. This standard, long a staple at intergovernmental organisations, and in law in the United Kingdom and the United States, is necessary for two reasons:

⁷ See for example UNODC, [Resource Guide on Good Practices in the Protection of Reporting Persons](#), 2015, p 64; Council of Europe, 2014, p. 40; Transparency International’s Best Practice Guide for Whistleblowing Legislation (2018), p55; Whistleblowing International Network, [“Burden of proof for whistleblower claims must be fully reversed”](#),

- 1) there already is a prima facie case of retaliation, and the employer should be held accountable through a higher standard; and
- 2) the employer has such far superior access to documents and witnesses that a higher burden is necessary to sustain an even playing field.

ANNEX 2 - Excerpt from WIN and Government Accountability Project letter to Global Environment Facility (GEF) dated 8 December 2021⁸

We recommend GEF Council members ask the UNDP the following:

- 1) to explain whether anyone at the UNDP has been held to account over what amounted to the misappropriation of an estimated \$4 million USD⁹ of taxpayers' money when the project concluded in May 2017; and if they have been held to account, when and how this was done.
- 2) to provide written evidence to GEF Council Members about how the whistleblower recommendations of the Independent Review have been implemented.
- 3) to make sure that the GEF can obtain a copy of the EY report (even if in redacted form) to formally commission an updated report in time for the May 2022 GEF Council meeting. We recommend that such a report is commissioned by GEF Secretariat to avoid a conflict of interest with the UNDP. We further recommend that the observations of the multiple whistleblowers that have raised the alarm over the last five years be included in the updated report.
- 4) to explain how it proposes to eliminate the potential for a serious conflict of interest with the Office of Internal Audit (OIA). As we understand it, the OIA is now responsible for determining individual and institutional accountability for any alleged misconduct, despite the fact the Independent Review highlighted the OIA as a main unit within the UNDP that, together with others in senior management, was responsible for the failures in handling and satisfactorily addressing both the information of financial wrongdoing and investigating the retaliation against those who reported it.

⁸ Letter addressed to Carlos Manuel Rodríguez (GEF CEO and Chair) and Peter Lallas (GEF Advisor and Conflict Resolution Commissioner) found at <https://whistleblowingnetwork.org/News-Events/News/News-Archive/Climate-change-resilience-fund-must-protect-whist>

⁹ According to consultants Roland Wong and Alexei Zakharov who conducted the final "Terminal Evaluation" of the S&L project. At Pgs. 27, 31 and 59. <https://erc.undp.org/evaluation/evaluations/detail/9603>