

## ***From expectation to frustration***

### ***How European development institutions are letting down communities in the Democratic Republic of Congo***

*A note of caution to community activists seeking redress to legacy land conflicts through the complaint mechanism operated jointly by Germany's DEG, FMO of the Netherlands and France's Proparco*

In November 2018, leaders from nine communities from the Democratic Republic of Congo (DR Congo) whose land rights and livelihood were affected by the PHC-Feronia large-scale palm oil plantation took a historic step and [filed a complaint](#) (with the [Independent Complaints Mechanism](#) (ICM) (DEG 2017) jointly operated by the German development finance institution DEG, FMO of the Netherlands and France's Proparco. This grievance mechanism had been in operation since 2014, but the nine communities in the DR Congo are the first to request a mediation.

For them, the mediation represented an extra-judicial avenue that would facilitate the resolution of a [long-standing land conflict](#) with *Plantations et Huileries du Congo (PHC)*, a palm oil company claiming concession rights to 107,000 hectares in the three provinces in the DR Congo where the communities reside (RIAO-RDC et al. 2021). These concessions in the Equateur, Mongala and Tshopo provinces date back to the colonial era: the communities have disputed their validity throughout PHC's occupation of their ancestral land.

The possibility of triggering a mediation process was offered by the fact that two of the three DFIs part of the ICM (i.e. DEG and FMO) were creditors of PHC, along with the Belgian development finance institution (BIO). Along with them, the British CDC played a crucial role in the establishment of the project and its kick-off as one of the main shareholders of the company. These four institutions had been, between 2013 and 2020, directly investing in the project of scaling up palm oil production in PHC's plantation (RIAO-RDC et al. 2021a) and their involvement – along with the existence of a grievance mechanism - provided community leaders with an alternative avenue to uphold their rights and the rights of their communities.

With the technical assistance of a national and international network of support, they thus filed the complaint with the ICM with the expectation that the ICM would uphold the development mandate of these public institutions and that the mediation process would, in a fair and just manner, facilitate resolution of a land conflict that is rooted in the colonial past of DR Congo.

In January 2019 [the ICM accepted the complaint](#) and agreed to initiate the mediation process (DEG 2018). The mediation requested by the communities is a first-of-its-kind for all the parties involved: the representatives from the nine communities, the development institutions operating the complaint mechanism as well as the Expert Panel that was charged with processing the complaint. As a first-of-its-kind, the mediation is also a test case for the ICM's procedures; it may furthermore set a precedent for future complaints submitted to the ICM that involve mediation.

The reflections presented here are based on the close monitoring by the author of the dispute resolution process, made possible, among others, through the ESRC IAA project "Communities, land rights and development institutions' complaint mechanism" supported by the University of Bristol Law School. The engagement of the project dates back to the initial discussions between the Congolese organisation RIAO-RDC, which is supporting the communities in this complaint, and a

coalition of NGOs in the global North that has been working closely with RIAO-RDC and community leaders. Since the filing of the complaint with the ICM, the author has remained in regular contact with the director and focal points of RIAO-RDC in Boteka and Lokutu, the two plantation sites named in the complaint. These meetings and exchanges, including in-person meetings with communities in Lokutu in January 2020, have provided a wealth of information on the (mal-)functioning of the ICM's dispute resolution process to date, revealed gaps and structural flaws and clarified the aspirations of the communities. The text reflects developments up to June 2021.

The author hopes that these initial reflections are useful to activists and community leaders elsewhere who may consider using the mediation path of the ICM's dispute resolution process. Sharing the painful and frustrating experience to date of the complainants from the DR Congo can, with any luck, help communities elsewhere to better prepare for what awaits them if they request a mediation through the ICM. The experience to date with the first mediation request certainly raises doubts about the ICM as a suitable instrument for communities to seek redress to legacy land conflicts or serious human rights abuses.

As discussed in this brief document, reports from community members as to the reaction of the company and the experience with the ICM and the institutions since the complaint was filed demonstrate that the financial support provided by the DFIs to the investor has not guaranteed a fair and just dispute resolution process. In addition, it has also not protected community members from an [escalating level of violence](#) perpetrated by PHC security (RIAO-RDC 2021).

The community members at the Lokutu plantation site in the province of Tshopo registered their disappointment, both with the DFI's approach to the mediation and the wholly inadequate development bank response to escalating violence perpetrated by PHC security. In particular, the community members stressed the fact that, since the complaint was filed in November 2018, the violence [had left three villagers dead](#) (RIAO-RDC & GRAIN 2021) and [more than 25 people](#) (WRM 2020) have been [arrested](#) (RIAO-RDC 2021a). Six villagers were, as at July 2021, still being held in jail without charge, months after their arbitrary arrests.

While the mediation proper was yet to get underway, 30 months after the complaint had been accepted, initial lessons can already be drawn from the extended – and, from the complainants' perspective, excruciatingly slow – preliminary process precedes the mediation.

Overall, the complainants have been confronted with wholly inadequate institutional support from the ICM. The ICM seems to expect complainants to be self-funded or rely on northern NGOs and civil society organizations for financial support. Moreover, the ICM does not seem to have provided materials and adequate opportunities of exchange that could help complainants prepare for mediation or find out about community experiences with mediation of legacy land conflicts elsewhere. In combination with a lack of adequate procedures, including procedures that clearly describe the formal role, if any, of northern NGOs and civil society organizations, the mechanism as currently designed can easily reinforce unequal power relations both between complainants and the company and between complainants and northern civil society organisations.

What has occurred (and not occurred) in the three Congolese provinces during the first 30 months since the nine communities requested a mediation through the ICM shows that the grievance mechanism operated by DEG, FMO and Proparco is ill equipped to facilitate mediation relating to the legacy land conflict going back to the colonial-era land grab of the Congolese oil palm company PHC.

This is clear among local communities, who have ***developed a univocal understanding that development institutions must refrain from financing companies with unresolved legacy land***

***issues rather than expect the grievance mechanism they have set up to resolve long-standing land conflicts that their clients are embroiled in.***

With this document and the underlying research, the aim is to firstly raise awareness about what has gone wrong in this first ever mediation process under the ICM, so that other communities will be in a better position to face *inadequate support from the ICM and the development institutions*. The process to date has revealed an extremely uneven playing field that complainants did not expect considering the ICM is a dispute resolution mechanism operated by public institutions with a development mandate and commitments to upholding human rights. However, the main point that arises is that a mediation process structured like the ICM is unlikely to be able to address long-lasting tensions and tenure issues that arise when ‘development’ projects on public lands take over large tracts of ancestral land. As it stands, the ICM mediation process that followed the community complaint from the DR Congo may, in the best case scenario, divert attention from the underlying land issue and generate a sense of frustration and impotence among the local communities. In the worst case, the impossibility for the mediation to effectively address the root causes of the problem can have the effect of intensifying existing tensions and give rise to new conflicts.



## **Context: Plantations et Huileries du Congo (PHC) - the colonial-era land grab dating back more than a century**

Communities affected by the Congolese company Plantations et Huileries du Congo (PHC) have been deprived of their ancestral land since 1911, when the founder of PHC and co-founder of the global food company Unilever, British industrialist Lord Leverhulme, turned their palm groves into industrial oil palm plantations. Community members never consented to their forests being turned into oil palm plantations. Throughout the [decades of demanding justice](#) (GRAIN 2016), they have faced repression and [violence](#) (TeleSur 2017). Until mid-2020, PHC was owned by a Canadian financial company called Feronia Inc. which had bought the company from Unilever in 2009.

In June 2020, almost 18 months after a complaint filed by nine communities affected by the company plantations had been accepted, [Feronia Inc. declared bankruptcy](#) (Feronia 2020). The mediation process that communities had requested as part of their complaint, ground to a halt. At that stage, Feronia Inc. and its subsidiary PHC had received funding to the tune of more than US\$ 150 million since 2013 from four European national development finance institutions. Given the amount of shares, CDC [owned a majority packaged of Feronia-PHC](#) (RIO-RDC et al. 2021a), whereas the other DFIs (DEG, FMO and BIO) were the largest creditors.

When Feronia Inc. collapsed, the development institutions had a big opportunity to start making amends for the occupation of community land by PHC that dates back to European colonial occupation of the Congo. They could have explored ways to hand over concession rights and their holdings in PHC to communities; or they could have discussed with the complainants how to use the pending mediation process to address the legacy land conflict that has been depriving communities of the use of their ancestral land for over a century. Neither points were addressed or discussed with the communities or with the network of civil society organizations and NGOs supporting them.

Instead, while the mediation had yet to commence<sup>1</sup> and in the midst of a global pandemic, the [development institutions agreed within months of the bankruptcy to hand the PHC assets over to a Mauritius-based private equity company](#) (GRAIN 2020) and to liquidate their credit at a fraction of the outstanding amount. Although the nine communities that had filed the complaints had not yet received financial support from the DFIs to prepare for the mediation, the same institutions agreed to accept a massive write-down of their debt to the benefit of the new private equity owner.

### **The Independent Complaints Mechanism (ICM)**

The Independent Complaints Mechanism (ICM) was established jointly by the Dutch and German development institutions [FMO](#) (FMO 2017) and [DEG](#) (DEG 2017) in February 2014, with France's Proparco [joining](#) (Proparco 2019) in February 2019. Individuals, organisations or other parties who are negatively affected by an investment financed by any of the three development institutions can submit a complaint or nominate someone to file a complaint on their behalf. The complaints are submitted to the Complaints Offices of the respective bank which pass them on to an Expert Panel responsible for the further handling of the complaint. The Expert Panel currently consisting of three persons who serve for a fixed period of time.

Once a complaint is filed, it is assessed by the Expert Panel. The panel will determine whether the complaint is admissible and if the complaint will proceed to a dispute resolution/mediation process or a

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<sup>1</sup> A first visit by the complaints panel and the mediation team took place in Mai 2022, after the closing of this text.

compliance review. In the latter case, the Expert Panel investigates whether the development institutions complied with their respective policies relevant to the investment in question. Three complaints involving a compliance review have been filed thus far with the ICM through DEG; the FMO website lists four cases. More cases have been filed, and are currently under review.

The three institutions' websites contain basic information about who can file a complaint and what information needs to be submitted when filing a complaint and how a decision will be monitored. A [policy document](#) (DEG 2017), updated in 2017, outlines rules of procedures and the responsibilities and roles of different parties involved in a complaint. The specific procedures for mediation are described in a mere 18 lines of the policy. Vital aspects of mediation such as the roles of the different parties, criteria for how the Expert Panel chooses a mediator or the circumstances under which a development bank client can refuse participation in a mediation are thus inadequately addressed. No further information is provided that would address the specific information needs of complainants who often will have very little if any experience with or access to information about such mediation processes. This is particularly problematic considering the likely complexity and high stakes in dispute mediation complaints, particularly complaints involving legacy land issues.

Procedures for dispute resolution through mediation are still being developed following the admission of the first complaint requesting dispute resolution through mediation in November 2018. In February 2021, the ICM issued a "[Non-Retaliation Statement](#)" (ICM 2021) to express a "non-tolerance for reprisals" against complainants. It remains unclear, however, how the ICM will implement the statement. What consequences will the statement have for Feronia-PHC, a company that has been associated with the extreme violence perpetrated inside the company concession area, both [before and after](#) the ICM issued its statement (RIAO-RDC & GRAIN 2021).

### What is a dispute resolution in the context of development finance institutions?

In the [report](#) *Harm from International Financial Flows and Strategies for Supporting Community-led Access to Remedy* (ACCA 2020), dispute resolution is described as follows:

"Dispute resolution is a voluntary process designed to address community concerns about a project that was the subject of a complaint. Dispute resolution brings together affected people and the company or government in charge of the project, and may also involve other local stakeholders and/or the IFIs that supported the project. The parties work together to try to reach a solution to the issues raised in the complaint. Typically, after finding a complaint eligible, [a complaint mechanism] will hire a neutral mediator or facilitator to work at the local level to assist the parties to voluntarily reach agreements. Dispute resolution frequently involves information sharing, engagement of independent experts to conduct studies to help the parties understand the harm and possible solutions, and negotiation between the parties. The process may take months or even several years. [...]. A hallmark of dispute resolution in the context of [a complaint mechanism] is the challenging imbalance of resources between the community and the company or government operating the project at issue. Communities often need effective advocates to support their ability to successfully engage in dispute resolution, with the [complaint mechanism] and its mediator or facilitator frequently also playing a key role. However, even with advocacy support, dispute resolution often involves compromise and power imbalances that may disadvantage communities. As a result, ***outcomes reached through dispute resolution often fall far short of fully remediating harm, or providing "effective remedy" as the UN Guiding Principles on Business and Human Rights require.***" (p.45/46, emphasis added)



**What stage is the community complaint against the development bank financing of Feronia-PHC at?**

In November 2018, members from nine of the more than 100 communities affected by the PHC operations [filed a complaint](#) with the dispute resolution mechanism jointly operated by DEG, FMO and Proparco (RIAO-RDC 2018). The communities are requesting resolution of the century-old legacy land conflict which in their opinion the development (Germany's DEG, Belgian BIO and FMO of the Netherlands) were aware at the time they approved the loan to PHC in 2015 and CDC purchased a large amount of shares. Given the fact that CDC and BIO are not part of the ICM, it is important to highlight that they are not legally involved in the process of mediation and do not consider themselves as such. Both CDC and ICM, however, dispose of independent grievance mechanisms that can be triggered with regards to investments in which they have been involved.

On 7 January 2019, the ICM's Expert Panel [accepted their mediation request](#) (DEG 2018) and declared the complaint admissible under the criteria of the [2017 ICM Policy](#) (DEG 2017). It then took five months for an Expert Panel delegation to undertake its first visit to the plantation area; another three months passed before a panel delegation met with complainants a second time, in August 2019. On both of these visits, the Expert Panel met with complainants from the two locations separately rather than bringing them together for joint discussions in one location. At the time of writing, no further Expert Panel visit has taken place since.<sup>2</sup>

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<sup>2</sup> A first visit by the complaints panel and the mediation team took place in Mai 2022.

On 22 November 2019 the Expert Panel published a [preliminary review report](#) (ICM 2019). The report contains the Panel's recommendation that a dispute resolution be conducted. An [interim report](#) (ICM 2021a) dated 12 March 2021 describes the Panel's assessment of the context of and outlook on the **mediation. More than 30 months after the complaint was declared admissible** by the Expert Panel, no actual mediation between the parties had started. Communities would have to wait until May 2022 for the first meeting with the mediation team.

While communities were still waiting to discuss the proposals for the mediation directly with the Expert Panel as of August 2021, the Expert Panel's [2020 annual report](#) (ICM 2021b) states that "the Panel participated in a board meeting of PHC" in the Netherlands in February 2020. According to the annual report, at this meeting, the Panel "presented the idea and the outline of the planned Dispute Resolution by mediation" (p.7). Proposals presented by complainants, through the Congolese organisation RIAO-RDC named as their representative in the complaint, e.g. on the composition of the mediation team or the location(s) for the mediation meetings, do not seem to be reflected in the ideas presented in the Panel's March 2021 interim report.

In February 2021, the ICM posted a "[Position Statement on Addressing Risk of Reprisals related to ICM Operations](#)" (ICM 2021) on its website. The position statement does not outline how the ICM will enforce non-tolerance of reprisal against complainants, and what consequences companies in effect face if they act in violation of the statement. The statement also does not spell out any responsibilities or obligations of the DFIs should their client engage or be perceived to be engaged in acts of retaliation against complainants. Neither the statement nor the action of the ICM or the development institutions have, for example, prevented the killing of another two community members by Feronia-PHC security and the arrest of more than 15 community members in 2021 alone. These recent killings bring the total of community members killed in connection to the legacy land dispute between Feronia-PHC and communities to three since the complaint was filed in November 2018.

In their complaint submission, communities requested "that the independent complaints panel ensure that complainants have access to independent advice throughout the process of dispute resolution and mediation." This request for transparency and information arose from the conditions that characterized the involvement of the DFIs and the disbursement of Official Development Aid money. According to the communities, they had limited access to information regarding the project, along with almost non-existing knowledge of the national as well as international human rights obligations that the development institutions and their investee had signed up to.

While at least one of the development institution, [FMO, has provided EUR 250,000 to Feronia-PHC to invest in community relations and hire a consultancy to support it in this work](#) (FMO 2019), complainants and their Congolese support organisation have received no such support. They have yet to be informed by the ICM whether their request for support will be granted.

These comments clearly point to the limits of a complaint mechanism that is accessible in a meaningful way only to those members of affected communities who have access to external funding and who already possess enough expertise to draw on during the preparatory phase and the mediation itself. When this is the case, the mediation procedure would in essence exclude many communities from actively engaging and participating in the definition of their rights vis-à-vis investors and donors, and is likely to prevent other communities from filing a complaint even if they are adversely affected by development bank-financed projects.

## **Community perceptions of the ICM thus far: voices and experiences from the ground**

In January 2020, the author met with complainants and community members during a visit to the Lokutu plantation area. The conversations and discussions at a 2-day workshop and village meetings during this visit as well as the exchanges throughout the 30 months since the complaint was accepted by the Expert Panel have brought into focus some early lessons from this first mediation experience under the ICM. These voices and experience of the communities vis-a-vis the ICM mediation have been summarized in five key points discussed below.



### ➤ **Absence of communication by Expert Panel on time frames and delays causes immense frustration**

Community members affected by PHC's oil palm plantations in the DR Congo were deeply disappointed that more than 30 months after their complaint was accepted, the mediation had not yet started. Restrictions due to the COVID-19 pandemic may explain some of the delays since February 2020. The complainants' experience with haphazard communication of the ICM, however, predates the pandemic. During a January 2020 visit by the author to the Lokutu plantation area, community members were expressing their frustration with the lack of communication, long delays and the absence of support and inaction by the ICM and the development institutions to what community members described as continuous attempts by the company to sabotage and undermine the dispute resolution process.



Complainants expressed particular disappointment that direct communication from the Expert Panel has been extremely limited.<sup>3</sup> Complainants were not provided, for example, with a report on the first meeting with the Panel before the second visit took place. This made it very difficult for complainants to prepare for the second visit and address differences in perception, misunderstandings and open questions during the second meeting with the Expert Panel. This second meeting between the Expert Panel and complainants presumably had significant influence on the proposals for the mediation process that the Expert Panel presented in its March 2021 interim report.

➤ **The absence of clear rules of procedure for the mediation process puts complainants at big disadvantage vis-à-vis the investor**

The complaint against Feronia-PHC undoubtedly was going to be a challenging one for any dispute resolution process to carry out well. Logistically, the huge distances between communities involved in the mediation are a major challenge, with complainants from communities spread across two provinces. Mistrust is deep-seated and the company has walked away from previous agreements with communities where much less was at stake for the company than in this request for mediation focused squarely on the legacy land conflict. In April 2021, the company's security firm went as far as proposing a "cahier de charges" (!) with the family of Blaise Mokwe, a young man who died after having been assaulted by the company's security in February 2021.

In this context, a complaints mechanism with accessible information explaining the process of mediation, the specific mediation procedures and the roles of parties to complainants and the obligations (including consequences in case of non-compliance) on the bank client against which a complaint has been filed, would have been key. As it is, complainants have no information about consequences, if any, a bank client faces for rejecting or sabotaging a mediation declared eligible by the ICM, or what they can expect from the ICM in case of threats and intimidation related to their involvement in a complaint. Regrettably, ICM procedures and information materials from the ICM that would enable communities to prepare for mediation and know what they can expect from the ICM have been lacking or inadequate. For example, complainants report to not have received any written information about the mediation process from the ICM or the development institutions to questions such: as how are mediator(s) chosen; at what stage and how are complainants consulted about the choice of the mediator(s) and the procedures the ICM proposes for the mediation; when and how do complainants propose their mediation team; does the ICM or the company have a right to reject the team or open the mediation to others without consent from the complainants; what support do complainants receive from the ICM to be able to prepare for mediation in a context as challenging as the legacy land conflict caused by the Feronia-PHC occupation of community land.

Why, complainants asked during a workshop held in January 2020 in Lokutu, after so many years of operation, the ICM still has no written material which addresses these basic questions on mediation?

The absence of such information not only makes it nearly impossible for communities to prepare well for the mediation. It also nurtures the perception that the company, by threatening to refuse mediation, is dictating the rules of procedure. The Expert Panel's description of the status of the complaint in the ICM's [2020 annual report](#) (ICM 2021) furthers this perception. The report notes that "the Panel participated in a board meeting of PHC" in the Netherlands in February 2020 where the

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<sup>3</sup> Pers. comm. during meetings 23-28 January 2020 at the Lokutu plantation site (including with signatories of the complaint documents submitted to the ICM in November 2018) between a member of the NGO coalition co-publishing this report and community representatives.

Panel "presented the idea and the outline of the planned Dispute Resolution by mediation" (p.7). This appears to provide the bank client with an undue advantage over the shaping of the mediation process. Have complainants been offered any such direct interaction with the Expert Panel regarding the outline of the planned mediation process?

Complainants feared that their input into decisions such as the final choice of the mediators, the location of meetings (complainants requested joint meetings between the two plantation sites because they filed a joint complaint and fear the company will pit communities against each other in separate meetings) and the sequencing of agenda items (will the legacy land question be the first item on the agenda, as complainants insisted?) may not be reflected in the final set-up of the mediation process.

Even if the Congolese organisation RIAO-RDC (named as their representative in the complaint), has presented some proposals (e.g. on the composition of the mediation team, the location(s) for the mediation meetings, or whether mediation meetings will be held separately for the nine communities or jointly), these proposals do not seem to be reflected in the ideas presented in the Panel's March 2021 interim report.

Several community leaders also expressed their concerns regarding the fact that their complaint is being opened to participation by other parties with different motives than the original complainants. This concern, too, seems to be confirmed by the Panel's decision to discuss participation to the mediation as part of the initial phase of negotiations rather than invite the nine communities to nominate their representatives for the mediation. This procedure seems to violate current best practise in mediation. In the [2020 annual report](#) (ICM 2021), the Panel claims that "issues concerning appropriate participation and representation of all parties involved" must be addressed "before the panel can initiate a Dispute Resolution". As to the next steps towards mediation, the Expert Panel writes that "the Panel intends to address the following items with all actors at the beginning and during the Dispute Resolution process: (i) who will be part of such a Dispute Resolution, (ii) who is accepted as representatives of communities, (iii) what issues should be discussed, and (iv) a development of an understanding about potentially good outcomes." ([p.7](#)).

Similarly, the March 2020 interim report by the Expert Panel indicates that "The Company was clear that a more inclusive mediation approach would be required to address the issues raised effectively. It did not seem to be inclined to participate in a mediation process restricted to the Complainants only" (p. 7). In other words, the Expert Panel accepted demands on the composition of the complainants' mediation team from the company against which a complaint has been launched – and it did so without the explicit consent of the complainants.

➤ **The ICM has no functioning measures in place to ensure the safety of complainants and participants involved in the mediation and preparatory meetings**

In their [2020 report](#) (ACCA 2020), *Accountability Counsel* and the *African Coalition for Corporate Accountability, Accountability in Africa* write that "for communities speaking up about human rights and environmental abuses from international investment in African communities, threats of retaliation and efforts to silence dissent are common." The report cites Liberian activist Alfred Brownell, Founder and Lead Campaigner of Green Advocates International who explains that those "who stand up and protect the rights of Indigenous people are facing the wrath of the clients of development finance institutions. They are using the criminal justice system to suppress defenders and bring up frivolous charges. There are threats of intimidation and violence, but also murder."

The ICM and the DFIs which jointly operate the mechanism should certainly be aware of the [risks and the growing deadly violence against land right defenders that land right defenders face the world over](#) when they demand justice for their communities (Frontline Defenders 2019). However, this did not seem to be reflected by the adoption of adequate instruments to guarantee the physical and moral integrity of the people involved.

Communities affected by the Feronia-PHC operations in the DR Congo have perceived a marked increase in intimidation, harassment and violence since the nine communities submitted their complaint to the DEG's ICM in November 2018 (see a detailed description of incidents from page 18 in the [report](#) published in 2021 by a coalition of NGOs supporting the community complaint (RIOA-RDC et al. 2021) and [information on arrests of more than 15 people](#) in total (RIOA-RDC 2021) and the [killing of two villagers by PHC security](#) in early 2021 (RIOA-RDC & GRAIN 2021); more recent communiqués on incidents of violence also available on the website [www.farmlandgrab.org](http://www.farmlandgrab.org)).

Complainants expressed concern that confidentiality of meetings with the ICM panel members was not ensured due to the way the ICM carried out its community meetings. For the initial two visits, the ICM panel members relied on Feronia-PHC for organizing part of the logistics, inevitably disclosing locations and participation to the meetings aimed at discussing the investor's responsibility. For example, the members of the ICM panel were accommodated at the company facilities and used transport facilities associated with PHC to travel across the region. Shortly after the second Expert Panel visit, several villagers were arrested without charges in the middle of the night, and five of them were detained for five months, with the court case still hanging over their heads after their release on bail in March 2020.

Two of the villagers who were arrested also took part in meetings with the ICM panel members during their second visit. During this meeting, they shared information about company repression and the company expanding onto land used by the community. Voicing their concern about the significant risk of retaliation if they participated in the mediation meetings, villagers understood that the ICM panel would set up a hotline so they could immediately reach out to the ICM in case of need. To the author's knowledge, the hotline still did not exist as of June 2021. And the five villagers who spent over five months in jail and still have a case hanging over their heads, feel abandoned by the ICM, never having heard once from the ICM panel in all the months they were kept in jail. The perceived inaction in the cases of violent retaliation that complainants have faced in this first mediation case through the ICM has started to undermine community trust that the ICM can in fact ensure the safety that panel members promised during meetings with complainants in 2019.

The adoption of a non-tolerance statement on retaliation by the ICM represented a necessary step forward. However, it remains unclear how the ICM will enforce non-tolerance of reprisal against complainants, and what consequences companies will face if they act in violation of the statement. It also remains unclear how the ICM will make sure complainants are aware of the ICM's non-tolerance statement on retaliation and when information will be made available which explains what support and action complainants can expect from the ICM in case of retaliation and threats against them. This is a gap the ICM must urgently close.

➤ **Access to information explaining the role and limitations of mediation under a voluntary complaints mechanism like the ICM key to complainants yet not available through the ICM**

Despite the existence of the grievance mechanism and despite the beginning of an official mediation, community leaders and local activists had to rely on the support of international civil

society organizations to access information about good practise in mediation and to learn about the experiences that other communities had with mediation processes elsewhere. During the workshop held in January 2020, community members expressed the need to better understand the differences and limitations of mediation in relation to legal procedures.

At present, the ICM does not provide information which explains or points complainants to information explaining key characteristics of mediation and how mediation differs from legal proceedings. Neither did the DFIs, to the author's knowledge, provide such information before financing the project or in the years that preceded the beginning of the mediation.

Complainants, however, may not be aware that mediation processes like the one offered by the ICM do not have the binding character of a court case where a judge or jury will issue a verdict that is binding on the company. Given the internal and quasi-judicial nature of the process, the outcome of the ICM mediation will not be legally binding on Feronia-PHC or on the State (the government of the DR Congo is a minority shareholder in PHC). While complainants were aware that the ICM mediation involves a negotiation with the company, they were surprised to learn that the company may decide not to participate, walk out of the process at any time of the meditation or not comply with the decision, with no significant repercussion in terms of obligations, finance and support from the DFIs. Complainants were also unaware that the company may simply reject the choice of the mediators, as has happened in the case of a mediation between a [rubber company and communities affected by the company's plantations](#) in Liberia (Bread for All 2019).

➤ **No funding and expert support from ICM during extended pre-mediation phase undermines meaningful preparation and puts complainants at disadvantage in the mediation**

The complainants from the nine communities involved in the complaint against Feronia-PHC have a strong understanding of their rights and the historical link with their land and territory. They also are acutely aware of their need to learn more about the mediation process, to receive support and information to be put in the condition to engage on an equal footing with the company and the complaints panel. In particular, they are aware that the lack of adequate funding and financial support may have a severe repercussion on their capacity to engage and participate, therefore contradicting the purpose and aim of the whole procedure.

As of June 2021, the Expert Panel had not yet informed complainants if or when the ICM will provide the financial or legal support that the complainants requested when they filed the complaint. This leaves the complainants at a huge disadvantage.

The imbalance is even more so given the fact that Feronia-PHC's concessions spans 107,000 hectares in three provinces and affect hundreds of communities. Even for a meeting of only the complainants from the nine communities which submitted the complaint, half of them would have to take an internal flight or travel for several days one way on the Congo river. Community leaders from the nine communities have thus been unable to meet and prepare together since they submitted the complaint. By contrast, at least one development bank, [FMO, has provided upwards of US\\$250,000 to the consultancy Earthworm to advise Feronia-PHC on relations with communities](#) (FMO 2019).

The delay in communicating the ICM's decision regarding the complainants request for financial and resource support puts the complainants from the nine communities in the DR Congo at a huge disadvantage and deprives them of adequately engaging in the pre-mediation phase. The lack of support may leave the complainants without adequate preparation to assess how decisions in this preparatory phase may influence the mediation proper.

## Experience with dispute resolution mechanisms elsewhere over legacy land conflicts

As mentioned above, the Feronia-PHC mediation is of particular importance given the fact that it is the first one to happen in the context of the ICM. However, the ICM is not the only grievance mechanism established by national and international development finance institutions. Similarly, the weaknesses and flaws that arose from the encounters with the communities in DR Congo are not unknown to the other frameworks. The fact that similar problems tend to repeat across mechanisms indicates structural issues and the fact that DFIs do not learn from the negative experiences of their pairs.

In 2016, the NGO CIEL and 11 other organisations assessed accountability mechanisms operated by different public entities. Their [report](#) (CIEL et al. 2016) noted that when complaints are filed, "banks [tend to] spend resources to deny that any harm was done rather than using the complaints as a means to better their policies and system. Accountability mechanisms have little purpose if banks do not use them to learn from their mistakes and do better in applying a human rights-based approach to project design, selection and implementation," and that "the compensation offered cannot make up for the dispossession of land, loss of resources, diminished livelihoods, and environmental degradation caused by the projects. In the seven case studies included in the report, there was a pattern of bad investment decisions based on flawed social and environmental assessments."

One such example is a mediation process triggered by a [complaint under the World Bank International Finance Corporation's \(IFC\) grievance mechanism](#) (CAO 2018) linked to the [eviction of around 1,000 families in Uganda](#) (Oxfam 2011) in the context of a timber plantation run by the New Forests Company. The mediation had identified responsibilities and inadequacies, but still left [nearly half the community of 1,000 families without any compensation](#) (Witness Radio 2020). Despite that both the company and the development institutions cite this mediation process as a model and evidence that conflicts have been resolved.

A 2020 report published by Accountability Counsel and the African Coalition for Corporate Accountability, *Accountability in Africa*, noted that dispute resolution mechanisms have "[only been effective in achieving a desired result for communities in a small number of cases](#)" (ACCA 2020). The allegedly positive cases are not described in detail and not sufficient information is provided to assess the effectiveness of the mechanisms. The author is not aware of a case where dispute resolution through a grievance mechanism set up by a development bank has led to significant portions of disputed land having been handed back to community control.<sup>4</sup>

In the specific context of conflicts surrounding legacy land, i.e. dispossessions that date back the colonial time, the assessment of the grievance mechanisms is made more complicated by the fact that very few of these mediation processes are well documented. When [cases](#) are discussed (Hughes 2020), they [show](#) how grievance mechanisms are failing to resolve legacy land conflicts in a just and fair manner for the communities affected (ACCA 2020). These cases seem to confirm the experience with the complaint against the development bank financing of Feronia-PHC, namely that grievance mechanisms are structured to address human rights violations that happen in the context of the investment rather than providing an opportunity for communities to reclaim their land and

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<sup>4</sup> The author is aware of only one case of a grievance filed under the Roundtable on Sustainable Palm Oil (RSPO) grievance mechanism where the mediation prevented further expansion. However, the already existing corporate land grab was not addressed during the mediation which has been ongoing for over seven years now.

therefore challenge the feasibility of the investments themselves. Resolution of such conflicts seems secondary, although they are intrinsically connected with the capacity of Official Development Aid to generate development in the areas where the investments take place.

The DR Congo complainants' experience with the ICM mediation therefore mirrors the disillusioning track record of dispute resolution mechanisms to resolve land legacy conflicts in a just and fair manner for communities. [Like communities elsewhere](#) (FPP 2020) who have counted on dispute resolution procedures to resolve long-standing legacy land conflicts caused by companies financed by development institutions, the complainants affected by the Feronia-PHC plantations are witnessing the impacts of a troubling shift where mandatory legal requirements and adherence to the few binding human rights norms are replaced by voluntary grievance and arbitration mechanisms.

The emerging evidence points to a second troubling pattern of mediation processes that tend to be structurally biased against resolution of legacy land conflicts in a way that would do justice to community demands. It appears that the existing grievance mechanisms are designed to tire out communities and appease them with the promise of social projects and employment at the company rather than ensure the restitution of land. As a result, these mechanisms are becoming a huge frustration to communities and civil society, while their popularity with institutions and companies seems to be growing.

#### **Legacy land conflicts: colonial legacy meets dispute resolution mechanisms shaped by former colonizers**

The fact that the majority of traditional and communally used and occupied land in most countries on the African continent is formally claimed by the state is what Liz Alden Wily calls a „[colonial legacy](#).” The formal ownership of the state, rather than of the people who live in the region, makes the land „legally available,” a condition that leads to the possibility of more easily disposing of it and attracting private investors with less formalities.

Corporate operations, based on often large concessions granted by the state, thus almost always [infringe on the territorial rights encoded in traditional customs regulating community use of the land](#) (Alden Wily 2013). Legacy land conflicts can almost always be traced back to this colonial legacy which deprived communities of their traditional ways of regulating the use of the land and allocated formal ownership of community land to the state. In addition to being the source of widespread violence against land rights defenders, this colonial legacy also presents complex barriers for communities mounting legal challenges to land uses and ownership that the state has granted to corporations.

These complex barriers are also at play in the case of Feronia-PHC, where for years development institutions financing Feronia-PHC had been fiercely defending their investment and their client's claim to holding legitimate concession contracts with the colonial legacy of a land ownership system that robbed communities of their traditional rights and declared the state the formal owner of the land. The DFIs that have now withdrawn from the project had originally approved funding for Feronia-PHC even though they knew that the concession contracts their client held contained errors that make them null and void. For example, the [2015 credit agreement between PHC and the German development bank DEG](#) (PHC 2020) contains an annex listing concession contracts described

as 'not yet valid'. In their 2018 complaint, communities also reiterated that they never gave consent to the conversion of their ancestral forests to oil palm plantations.

Given that the development institutions were aware of these facts and the existence of the legacy land conflict their client was embroiled in at the time they decide to finance Feronia-PHC, the question arises about the role dispute resolution mechanisms play in the institutions' strategy to keep investing in a colonial model of development that is built on the appropriation of community land and the resulting destruction of community resilience and the exploitation of villagers as labourers on short-term contracts. As one woman from a community affected by the Chinese Development Bank financed Golden Veroleum Liberia (GVL) in Liberia summarised her intervention at a recent Peoples' Tribunal: "The plantation wants to grow, but we want to live".

Effective due diligence procedures would simply prevent development bank financing if a client was embroiled in land legacy issues or human rights violations. In a context where the development institutions were the majority owners of Feronia-PHC, they had a second chance of addressing the legacy land issue without communities having to resort to filing a complaint: They could have applied the advise they published in a document addressed at clients of the institutions facing land legacy conflicts. Little in the behaviour of the development institutions in relation to their investment and quasi-ownership of Feronia-PHC in 2015-2016 suggests they took their own advise for addressing legacy land issues in their own investments seriously.

Obvious design flaws of the ICM are coming to light even before the mechanism's first mediation process gets under way. Perhaps these are another reflection that it's not an issue of lacking information but of lacking interest in facing the colonial legacy of their investment in companies like Feronia-PHC. If this were the case, the prospect of the ICM carrying out a mediation process around legacy land conflicts in such a way that complainants can expect a just and fair outcome will be slim.

### **Filing for mediation with the ICM – high risk to complainants' life for low prospect of redress to legacy land conflicts**

Almost four years into the process, representatives of the communities who filed a mediation request in 2018 are witnessing an Independent Complaint Mechanism (ICM) that is poorly prepared to take on a mediation involving a company whose operations affect more than a hundred communities in three provinces, where complainants are separated by long distances from each other, and face many other challenges and intimidation by the company. On paper, the ICM is open to any and all persons and groups negatively affected by operations financed by the three development institutions. In practise, the first mediation case has thus far shown that complainants will depend on industrialized country NGOs for financial support and their interpretation about the functioning of the mechanism and the prospects the ICM may provide to the community. All of these realities increasingly put a fair mediation process out of reach for the complainants.

As it stands, the ICM may provide communities with an opportunity to expose the illegal occupation of their land by a company financed by development finance institutions. A mediation process through the ICM may also help communities to voice their demands beyond the local level. The ICM may even be able to help resolve grievances that are not tied to legacy land conflicts. According to the people who are directly affected by the investment and who had some expectations on the ICM,

the mechanism is lacking adequate procedures to ensure an even playing field for complainants seeking redress of a legacy land conflict with a company financed by DFIs. On the contrary, as the initial reflections contained in this document have shown, the ICM's mediation process as currently structured provides little hope for the nine communities affected by Feronia-PHC to obtain a just and fair resolution of their century-old land legacy conflict: the ICM appears reluctant to accept the communities' request to assess the validity of the concession and the tenure of the land. Doing so would in all likelihood challenge the due diligence of the DFIs that have established the mechanism itself, and this does not seem to be what contemporary grievance mechanisms are about. The experience thus far with this precedent-setting mediation also sends the message to other communities exploring the use of the ICM that the mechanism is not made for communities without their own access to funding and resources.

In such a context, effective due diligence procedures would have prevented development institutions from financing Feronia-PHC until the existing legacy issues and human rights violations had been resolved in a way that is considered just and fair by the affected communities. Once the project was approved and funded, the existence of a grievance mechanism appears to be nothing more than a way for creditors to divert the attention from the structural problems of an investment that was already assessed as valuable. In addition, the existence of the grievance mechanism appears to be a substitute for the use of contractually binding mechanisms (including an earlier withdrawal from the investment) that DFIs could trigger to push their debtors to resolve legacy land conflicts and manage their operations in such a way that human rights abuses are avoided, and where they occur, from providing affected communities with the financial support and protection that are needed so that violations can be reported, investigated and the perpetrators brought to justice.

## **Bibliography**

ACCA (2020). Harm from International Financial Flows and Strategies for Supporting Community-led Access to Remedy. Report by Accountability Counsel and African Coalition for Corporate Accountability. Available at: [https://accahumanrights.org/images/news/2020/accountability-in-africa-web\\_en.pdf](https://accahumanrights.org/images/news/2020/accountability-in-africa-web_en.pdf)

Alden Wily, L. (2012). Customary Land Tenure in the Modern World. Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa. Rights & Resources Brief #1. Available at: <https://rightsandresources.org/wp-content/exported-pdf/rightstoresourcesincrisiscompiledenglish.pdf>

Alden Wily (2013). The Global Land Grab: The New Enclosures. Interview with Liz Alden Wily. Available at: <https://www.boell.de/en/2013/04/17/global-land-grab-new-enclosures>

Bread for All (2019). Struggle for Life and Land. Socfin's Rubber Plantations in Liberia and the Responsibility of Swiss Companies. Bread for All (now HEKS). Available at: <https://grain.org/e/6142>

CAO (2018). Resolution of Land Disputes After Mediation in Uganda. Report by the Office of the Compliance Advisor Ombudsman. Available at: <https://www.cao-ar18.org/resolution-of-land-article/index.html>

CIEL et al. (2016). Glass Half Full: The State of Accountability in Development Finance. Available at: <https://www.ciel.org/reports/glass-half-full-the-state-of-accountability-in-development-finance-jan-2016/>



DEG (2017). Complaint Mechanism Policy 2017. Independent Complaints Mechanism DEG. Version 2.0, 01.01.2017. Available at: [https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/170101\\_Independent-Complaints-Mechanism\\_DEG.pdf](https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/170101_Independent-Complaints-Mechanism_DEG.pdf)

DEG (2018). PHC (FERONIA) / 18-002. Available at: <https://www.deginvest.de/%C3%9Cber-uns/Verantwortung/Beschwerdemanagement/Feronia/>

FAO (2012). Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security. Available at: <https://www.fao.org/3/i2801e/i2801e.pdf>

farmlandgrab.org (2018). DRC communities file complaint with German development bank to resolve century-old land conflict with palm oil company. Available at: <https://www.farmlandgrab.org/post/view/28543-drc-communities-file-complaint-with-german-development-bank-to-resolve-century-old-land-conflict-with-palm-oil-company>

Feronia (2020). Feronia Inc. reports 2019 financial results. Available at: <https://feronia.com/news/view/feronia-inc-reports-2019-financial-results;-announces-short-term-debt-financing-proposed-restructuring-and-director-changes>

FMO (2017). Mécanisme Indépendant de Plaintes de la FMO. Version 2.0. 01.01.2017. Available at: [https://www.fmo.nl/l/library/download/urn:uuid:08304834-e260-48d4-906f-f7f3bac13eda/m%C3%A9canisme+ind%C3%A9pendant+de+plaintes+de+la+fmo.pdf?format=save\\_to\\_disk](https://www.fmo.nl/l/library/download/urn:uuid:08304834-e260-48d4-906f-f7f3bac13eda/m%C3%A9canisme+ind%C3%A9pendant+de+plaintes+de+la+fmo.pdf?format=save_to_disk)

FMO (2019). FMO Building Prospects Fund 2019.

FPP (2020). Non-judicial grievance mechanisms as a route to remedy - an unfulfilled opportunity. Briefing November 2020. Available at: [https://www.forestpeoples.org/sites/default/files/documents/Non-Judicial-Grievance-ENG-v04\\_0.pdf](https://www.forestpeoples.org/sites/default/files/documents/Non-Judicial-Grievance-ENG-v04_0.pdf)

Frontline Defenders (2019). Frontline Defenders Global Analysis 2018. Available at: [https://www.frontlinedefenders.org/sites/default/files/global\\_analysis\\_2018.pdf](https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf)

GRAIN (2016). Feronia 2016 company reports and community documents to government authorities and PHC. Available at: <https://grain.org/e/5560>

GRAIN 2020. Development banks must be held accountable for their disastrous oil palm plantation investments in the Congo. Available at: <https://farmlandgrab.org/29868>

Hughes, L. (2020). Politics Geothermal Development in Kenya: The Good, the Bad and the Ugly. The Elephant - Speaking truth to power. Available at: <https://www.theelephant.info/features/2020/12/04/geothermal-development-in-kenya-the-good-the-bad-and-the-ugly/>

ICM (2019). Independent Complaint Mechanism (ICM) /DEG / FMO / Proparco Preliminary Review Report on DEG complaint 18-002 PHC (Feronia)re Plantations et Huileries du Congo SA (PHC). Available at: [https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/ICM-Preliminary-Review-Report-DEG-complaint-18002-PHC\\_191122\\_final\\_EN-2.pdf](https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/ICM-Preliminary-Review-Report-DEG-complaint-18002-PHC_191122_final_EN-2.pdf)

ICM (2021). Non-Retaliation Statement Independent Complaints Mechanism-Position Statement on Addressing Risk of Reprisals related to ICM Operations. Available at: <https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/ICM-Non-Retaliation-Statement.pdf>

ICM (2021a). Interim Report. DEG Complaint 18-002 PHC (former Feronia) Plantations et Huileries du Congo SA (PHC). 19 March 2021. Available at: <https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/Interim-Report-2021.pdf>

ICM (2021b). Annual Report January – December 2020. Independent Complaints Mechanism DEG / FMO / Proparco. Available at: <https://www.deginvest.de/DEG-Documents-in-English/About-us/Responsibility/ICM-Annual-report-2020.pdf>

Oakland Institute (2021). Kuramo Capital Management Embroiled in a Legal Battle Over Ownership of PHC Oil Palm Plantations in the DRC. Available at: [https://www.oaklandinstitute.org/kuramo-capital-management-legal-battle-phc-oil-palm-drc?utm\\_source=land\\_rights&utm\\_medium=email&utm\\_campaign=information&utm\\_content=title](https://www.oaklandinstitute.org/kuramo-capital-management-legal-battle-phc-oil-palm-drc?utm_source=land_rights&utm_medium=email&utm_campaign=information&utm_content=title)

Oxfam (2011). The New Forests Company and its Uganda plantations: Oxfam Case Study. Available at: <https://www.oxfam.org/en/research/new-forests-company-and-its-uganda-plantations-oxfam-case-study>

PHC (2020). Supplementary Affidavit of Gilles Marit. 23 August 2020. Credit agreement from page 41, Exhibit D. File 001 Application. Available at: <https://documentcentre.ey.com/#/detail-engmt?eid=390>

Proparco (2019). Environmental and Social Independent Complaints Mechanism (ICM). Available at: <https://www.proparco.fr/en/icm>

RIAO-RDC (2018). ICM Complaint DEG financing of PHC. Complaint as submitted to DEG. Available at: [https://www.farmlandgrab.org/uploads/attachment/DEG\\_Complaint\\_PHC\\_Annexes\\_final\\_redacted.pdf](https://www.farmlandgrab.org/uploads/attachment/DEG_Complaint_PHC_Annexes_final_redacted.pdf)

RIAO-RDC (2021). RIAO-RDC exige une enquête internationale après le mort d'une autre villageois aux mains des gardes industrielles de la PHC Lokutu. Available at: <https://farmlandgrab.org/30263>

RIAO-RDC (2021a). DR Congo oil palm company bankrolled by development banks unleashes wave of violence against villagers after peaceful protests. Available at: <https://farmlandgrab.org/30142>

RIAO-RDC et al. (2021). Development finance as agro-colonialism: European development bank funding of Feronia-PHC oil palm plantations in the Democratic Republic of Congo. Available at: <https://farmlandgrab.org/30066>

RIAO-RDC et a. (2021a). Development Bank funding of Feronia-PHC. Graphic available at: <https://www.farmlandgrab.org/uploads/attachment/Infographic-Feronia-EN-FINAL.pdf>

RIAO-RDC & GRAIN (2021). RDC: Entretien avec Mme Augin Nolofana, la maman d'un jeune villageois de Mwingi, qui aurait été tué par les agents de la société PHC/KKM. Available at: <https://farmlandgrab.org/30275>

TeleSur (2017). Congo: continúa lucha comunitaria contra multinacional Feronia. TeleSur video news report. Available at: [https://www.youtube.com/watch?app=desktop&v=xaZ\\_DellZug&feature=emb\\_title](https://www.youtube.com/watch?app=desktop&v=xaZ_DellZug&feature=emb_title)

Witness Radio (2020). The Agony of a Tree-Planting Project on Communities' Land in Uganda. WRM Bulletin 251. Available at: <https://wrm.org.uy/articles-from-the-wrm-bulletin/section1/the-agony-of-a-tree-planting-project-on-communities-land-in-uganda/>

WRM (2020). Action Alert! Immediate release of villagers in the DR Congo imprisoned on false charges related to a land conflict with Feronia Inc. World Rainforest Movement Action Alert.

Available at: <https://wrm.org.uy/actions-and-campaigns/action-alert-immediate-release-of-villagers-in-the-dr-congo-imprisoned-on-false-charges-related-to-a-land-conflict-with-feronia-inc/>