

Reform Development Finance Institutions' (DFIs) grievance mechanisms to uphold human rights

Tommaso Ferrando (University of Antwerp)

About the research

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 \(ICM\)](#), a so-called 'alternative dispute mechanism' aimed at finding a solution outside of courts. With the support of local and international civil society, they formulated clear requests concerning recognition of their land titles and remediation for the socio-environmental damages suffered since the DFIs decided to support the PHC-Feronia palm oil project.

The ICM is jointly operated by three European Development Finance Institutions (DFIs) that were backing the agricultural project: the Deutsche Investitions- und Entwicklungsgesellschaft (German Development Finance Institution – DEG) the Nederlandse Financieringsmaatschappij voor Ontwikkelingslanden (Dutch Development Finance Institution) and France's Proparco. This grievance mechanism has been in operation since 2014, but the nine communities in the DR Congo are the first to request mediation.

In January 2019 [the ICM accepted the complaint](#) and agreed to initiate the mediation process. 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 and it may set a precedent for future complaints submitted to the ICM that involve mediation.

A [policy document](#) produced by DEG outlined the procedures and responsibilities of different parties involved in a complaint. The document briefly outlines some vital aspects of the mediation process such as how the Expert Panel chooses a mediator or the circumstances under which a development bank client can refuse participation in a mediation. However, no further information is provided to

parties who submit the complaints, despite the likelihood that they may have had very little experience with, or access to information about, mediation processes. Furthermore, procedures for dispute resolution through mediation were still being developed following the initiation of the first complaint in November 2018.

Because of this, and given that the DFIs' grievance mechanisms should be [informed by the protection, respect and fulfilment of international human rights obligations](#), a research team from the University of Bristol and the University of Antwerp decided to gather experiences of those involved in the first phase of the mediation. As part of this research, funded by the ESRC IAA, a series of workshops and community-based interactions have been held since the mediation process started. These events involved complainants and community members from the local area affected.



Image credit: Palm oil tree plantation being cleared by SADEX, Democratic Republic of Congo, by Axel Fassio/ CIFOR

Research findings

The absence of communication from the Expert Panel has caused immense frustration

- Community members affected by PHC's palm oil 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. However, the complainants' experience of haphazard communication with the ICM predates the pandemic.

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

- The complaint against Feronia-PHC was always going to be challenging 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. Research participants from the communities have stated that a lack of communication from the ICM about procedures has hindered their ability to prepare for the medication.

The ICM has no measures in place to ensure the safety of complainants and participants involved in the mediation

- 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. For example a [report](#) published in 2021 by a coalition of NGOs supporting the community complaint detailed various incidents as well as [information on arrests of more than 15 people](#) and [the killing of two villagers by PHC security](#) in early 2021. More recent information on incidents of violence also available on the website www.farmlandgrab.org.

Confidentiality of the process is undermined by reliance on the company's logistics and infrastructure

- Complainants expressed concern that confidentiality of discussions with the ICM panel members was not maintained due to the way the ICM carried out its community meetings. For the initial two visits, the ICM panel members relied on Feronia-PHC to organize the logistics, inevitably disclosing locations and members' participation at the meetings that focused on discussing the investor's responsibility.



Image credit: Jutta Kill

A lack of funding and expert support from ICM during the extended pre-mediation phase undermines meaningful preparation and puts complainants at disadvantage in the mediation

- The complainants are acutely aware of their need to learn more about the mediation process and to receive support on how to make sure their knowledge, voices and experiences are presented in such a way that they are able 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 severe repercussions on their capacity to engage and participate in the process, therefore contradicting the purpose and aim of the whole procedure. The absence of financial provision and support leaves the complainants at a huge disadvantage. The imbalance between the resources of the communities affected and the company is stark given the vast size of the area affected: Feronia-PHC's concessions span 107,000 hectares in three provinces and affect hundreds of communities. Even a meeting of the nine communities which submitted the complaint would necessitate half of them needing to take an internal flight or travel for several days one way on the Congo river.

There is no guarantee of continuity for the mediation process after DFIs' exit

- In 2020, in the midst of the pandemic and before the mediation had started, the European [development institutions agreed to write off part of their credits and sell their shares to a Mauritius-based private equity company](#). The new investor had to pay a fraction of the outstanding amount and the development institutions exited the board of the company and any financial control over it. Although abrupt, the exit of the DFIs was a response to months of criticism that they received at home, in particular to reports of human rights violations and the recognition that the investment had been wrongly assessed.
- Despite the verbal reassurances that the nine communities received with regards to the continuation of the mediation, the exit of the DFIs in the midst of a grievance process raises several concerns and requires particular attention. Firstly, the communities were left with the impression that their rights and claims were less important than the financial interests of the investors. For them, it was unacceptable that they had not yet received financial support from the DFIs to prepare for the mediation while these institutions had agreed to accept a massive write-down of their debt to the benefit of the new private equity owner. Money could not be found for the mediation, but money could be lost in order to exit a problematic investment.

- Secondly, the exit of the DFIs meant that the communities lost the main opportunities to put pressure on the investor: through the use of the public funders' proximity with the board of directors, the threat to withdraw their funds in case of non-compliance with the social and environmental standards, and the request to repay the debt in absence of adequate participation in the mediation process. Once the DFIs exited, the mediation process no longer involved any financial risk for the company, because they are not shareholders or debtors anymore. Although the mediator made a visit to the communities in May 2022, the communities felt even more alone in their attempt to achieve justice, knowing that they cannot put pressure on the company by means of the financial leverage that DFIs have on it anymore.
- Thirdly, the decision to exit during the mediation process led the communities to question the objectives and goals of the DFIs, and to question their legitimacy. Whereas the stated aim of DFIs is to increase the social and environmental performance of investments, from the communities' perspective the institutions were leaving a project beset by violations and challenges, which is the opposite of what was expected. Although the presence of the DFIs as creditors and investors had not prevented abuses, their absence reduces the international visibility of what happens on the ground and the '[legal choke points](#)' and strategies that communities can leverage.

There are structural limitations to mediating legacy titles

- Interactions with the involved communities highlighted that the grievance mechanisms are not set up to deal with conflicts surrounding the dispossession of land that dates back to the colonial era (i.e. 'legacy land' or 'legacy land rights'). These 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 therefore challenge the feasibility of the investments themselves. Whilst resolution of such conflicts seems secondary, they are intrinsically connected with the capacity of Official Development Aid to generate development in the areas where the investments take place.

Policy recommendations

The first thirty months of experience with the ICM in DR Congo lead to the following policy recommendations for the DFIs involved and their governments:

- There is a strong need to re-align the current functioning of the DEG grievance mechanism to the reality on the ground including the information gap, the financial imbalance and the risks that individuals and communities experience on a daily basis. In the absence of reform, the mechanism is not guaranteeing fundamental human rights and access to justice, and is therefore not legitimate.
- Given the risks that people undertake when denouncing a project and given the DFIs' obligation to guarantee adequate and effective access to justice, the process must be sped up and prioritized.
- Access to information and a clear explanation of the procedures is a key obligation that should be supported by the ICM rather than passing this responsibility to civil society organizations, NGOs or academics.
- The ICM needs to set out detailed timelines, project milestones and a rigorous agenda to make sure that plaintiffs aren't disadvantaged and to hold the mediators to account in mediations that are not adequately completed
- Clear and concise information, in relevant languages, explaining the processes and specific procedures, as well as the roles of parties and the obligations (including consequences in case of non-compliance) on the investors against which a complaint has been filed, must be shared at the beginning of the process.
- DFIs and their governments should evaluate the capacity of their internal grievance mechanisms to make sure they provide an adequate mechanism to guarantee and enforce their human rights obligations.
- DFIs need to address the fact that current grievance and mediation systems are not able to deal with legacy land rights and violations that pre-date the DFIs investment but were initially not considered such to halt the disbursement of funds. Redistribution of legacy land should be a priority and large-scale projects on legacy land should not be financed by DFIs.
- DFIs should implement, at the very least, a mandatory Free, Prior and Informed Consent (FPIC) process before any project is selected and disbursement is realised. An adequate process of consultation and a provision for consent would require that resources are disbursed and that conditions are created so that communities are involved in the decision-making process. National and international civil society organizations should act as observer and watchdog.
- Policymakers and DFIs need to recognize that the current grievance mechanism is not compatible with the aspirations of communities who are critical of an investment and therefore can hardly solve the most significant tensions with the companies. A broader set of ex ante and ex post policies and procedures must be implemented to specifically deal with land rights and controversies around tenure. The implementation of the FAO voluntary guidelines on the responsible governance of tenure of land is identified as a first step forward.

Further information

This research was funded by an ESRC IAA awarded to Tomaso Ferrando whilst he was based at the University of Bristol.

The full report is available in [English](#) or [French](#).

KFW-DEG, [Independent Complaints Mechanism DEG](#), version 2.0, 2017

Ferrando T. et al, [The Belgian Investment Company for Developing Countries \(BIO\) as a Sustainable Development Actor](#), University of Antwerp, April 2022

OHCHR, [Benchmarking study on DFIs and human rights](#), 2022

Contact the researchers

Prof. Tomaso Ferrando (University of Antwerp Faculty of Law and IOB): tomaso.ferrando@uantwerpen.be