

INDEPENDENT COMPLAINTS MECHANISM (ICM)

Interim Report

19 March 2021

DEG Complaint 18-002 PHC (former Feronia) Plantations et Huileries du Congo SA (PHC)

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Recipients:

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Client Company - PHC (formerly known as Feronia)

DEG

This Report is based on information provided to the Independent Expert Panel (IEP) by the complainants, the lenders, the client company and other relevant parties. This document is not given, and should not be taken, as legal advice, and is not intended to be used as proof for its content in a court of law. The content of this document is only intended for the parties to which it is addressed.

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About the Independent Complaint Mechanism (ICM)

The Independent Complaints Mechanism (ICM) aims to provide complainants with an effective, fair and credible tool to facilitate the resolution of disputes. At the same time, it assists Netherlands Development Finance Company (FMO), Deutsche Investitions- und Entwicklungsgesellschaft (DEG) and PROPARCO in implementing and adhering to its own environmental and social policies and procedures.

The ICM is supported by an Independent Expert Panel (IEP). The IEP is fully independent from DEG, FMO and PROPARCO. It reviews complaints from communities and individuals affected by DEG-, FMO- and/or PROPARCO-financed operations and decides whether a complaint is admissible. In case a complaint is admissible, the IEP processes the complaint in line with the ICM procedures and reports on the outcome of such process.

For more information about the ICM, please visit

- DEG's website: www.deginvest.de/icm
- FMO's website: www.fmo.nl/icm
- PROPARCO's website: www.proparco.fr/icm

1. Overview of the course of the case

Date	Development
5 November 2018	<ul style="list-style-type: none"> Complaint filed with DEG
7 January 2019	<ul style="list-style-type: none"> Case declared admissible
23 May to 3 June 2019	<ul style="list-style-type: none"> Site visit of the ICM to the Democratic Republic of Congo (DRC): Kinshasa, Mbandaka, Boteka, Kisangani and Lokutu
18 August to 2 September 2019	<ul style="list-style-type: none"> Site visit of the ICM: to the Democratic Republic of Congo (DRC): Kinshasa, Mbandaka, Boteka, Kisangani and Lokutu
22 November 2019	<ul style="list-style-type: none"> Preliminary review report issued
6 December 2019	<ul style="list-style-type: none"> A Mediation Outline proposed by the Panel was sent to the Complainant and the Company
2020	<ul style="list-style-type: none"> The Panel had planned to conduct site visits in order to prepare the mediation. Due to COVID-19 travel restrictions as well as a new Ebola outbreak in Boteka, the Panel was unable to carry out any site visits in 2020
3 February 2020	<ul style="list-style-type: none"> The Company, PHC, agreed to the mediation outline during the meeting with the ICM in Den Haag
March - November 2020	<ul style="list-style-type: none"> Restructuring of the Company
23 November 2020	<ul style="list-style-type: none"> Announcement of closing of the restructuring transaction with new ownership
<p>2021: Envisaged next steps March and following months</p> <p>Later in 2021</p>	<ul style="list-style-type: none"> Update of the proposal for a mediation outline to be sent to the Complainant and the Company Get agreement of the Complainant and the Company to start the mediation, that can include external parties Mobilisation of a team of mediators (local and international) Preparations for the mediation <p><i>Depending on whether travel restrictions will be lifted</i></p> <ul style="list-style-type: none"> Clarification of participation and representation issues in preparation for a mediation Start of the mediation

2. Development of the case

On 5 November 2018, the Complaints' Office of Deutsche Investitions- und Entwicklungsgesellschaft mbH (DEG) received a complaint ("Complaint"), dated 5 November 2018. It concerned the DEG-financed operation Plantations et Huileries du Congo SA (PHC), at that time subsidiary of Feronia Inc., a company listed at the Toronto stock exchange. The Complaint was lodged by a non-governmental organisation (NGO), RIAO-RDC (Réseau d'Information et d'Appui aux ONG en République Démocratique du Congo) and its chairperson Mr. Jean-François Mombia Atuku ("Complainant") on behalf of persons from nine villages out of over 60 villages in the area of influence of the Boteka and Lokutu plantations, which are two of the three locations of the PHC ("Company") plantation. The Complaint contains signatures of 265 represented individuals in several lists (represented individuals are collectively referred to below as "Complainants"), including notables and other community leaders from communities and groups from the two plantation areas. During admissibility and preliminary review phases, the ICM was able to confirm the validity of the representation of several individuals from all lists attached to the complaint.

The Complainants claim that they have been negatively impacted by the DEG-financed operation and that this was a result of a failure to comply with DEG's policies. The Complainants are asking that the Independent Complaints Mechanism (ICM) facilitate a "dispute resolution that involves external mediation"¹ in relation to the various identified issues, rather than carry out a compliance review of DEG's actions against its policies.² While the operation is also financed by FMO and other European Development Finance Institutions in a consortium and although FMO is part of the ICM, the complaint was directed to DEG as consortium leader.

The Complaint covers three areas of concern:

- (1) The first issue relates to the legitimacy of the land titles of the plantation and access rights to part of the plantation sites. According to the Complaint, PHC claims concession rights over 107,000 hectares of land, of which around 25,000 ha are currently managed by the Company as an industrial palm oil plantation. The Complainants claim that communities in the area are unaware of the boundaries of PHC's land claims and that the land validation process carried out after the granting of a loan facility by the above-mentioned consortium of development banks in 2015 demonstrated some irregularities pertaining to concession contracts. The Complainants claim that there have been breaches of the communities' customary land rights. They further claim that they are deprived of their use of their customary land, forests, water sources and related natural resources, which will lead to poverty and extreme food insecurity.
- (2) The Complainants allege that members of the Complainants' communities have been subject to regular harassments, grave physical and human rights abuses by PHC security guards and the local police.

¹ Complaint, p. 11.

² According to the ICM Policy, a Dispute Resolution process aims "to assist in finding a resolution for the issues underlying an Admissible Complaint. This process may include information sharing, fact-finding, dialogue and mediation. A pre-condition for Dispute Resolution is that all relevant parties are willing to participate in such a process." ICM Policy, p. 3.

- (3) The Complainants argue that they were not provided with sufficient information by PHC and the concerned development banks and thus do not have a level playing field in negotiations with PHC. They claim that this 'knowledge gap' and the absence of legal support and affordable legal aid is contrary to standards developed in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests adopted by the FAO council in 2012. The Complainants are of the view that DEG, as well as the other investors, have failed in their due diligence assessment and failed to put in place appropriate remedial actions. Moreover, they claim that recent concession contracts developed in 2015 after the granting of the loan facility were done without the consent or consultation of the affected communities.

In light of the above, the Complainants allege that IFC Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts, Standard 5 on Land Acquisition and Involuntary Resettlement and Standard 7 on Indigenous Peoples are not met by the project.

2.1. Admissibility of the case

On 7 January 2019, the ICM published a Notice of Admissibility declaring the case admissible. The Panel decided that the admissibility criteria were met. Namely, the Panel was satisfied that:

- DEG has an active financial relationship with the client;
- there is an indication of a potential relationship between the DEG -financed operation and the alleged impacts; and
- the complaint relates to substantial direct or indirect and adverse impacts or risks.

Through telephone interviews, the Panel could verify that several persons on the lists that are enclosed to the complaint, are indeed represented Complainants who sought RIAO-RDC's representation.

2.2. Preliminary Review

Under the terms of paragraph 3.2.3 of the ICM Policy, the Panel is required to conduct a preliminary review of the issues raised by the Complainants. As part of the Preliminary Review Process, the Panel addressed the following three aspects:

- (1) The Panel decided to verify the complainants' identity, to understand the size of the represented group and to assess whether RIAO-RDC has been appropriately authorized to represent them.
- (2) The Panel assessed the concerns raised in the complaint, including the alleged harm, and verified the relationship to the project funded by DEG. Furthermore, the Panel assessed whether parties would be prepared to address the issues through a dispute resolution process.
- (3) The ICM assessed previous and ongoing attempts to resolve the dispute and any known barriers to resolution.

The ICM issued [the Preliminary Review Report](#) on 22 November 2019, which is available on the ICM website.

As part of the Preliminary Review, in 2019, the Panel conducted two site visits to the plantation locations in Boteka and Lokutu. During these visits, the Panel met with representatives of the Company in Kinshasa and different key resource persons from local government (in Kisangani und Boteka), churches and other civil society organisations in Kinshasa, Mbandaka, Boteka, Kisangani and Lokutu and with representatives and community members from several villages in Boteka and Lokutu (for details see Preliminary Review Report).

The Panel was able to confirm that RIAO-RDC was authorized by a group of Complainants as their representative. In some villages that the ICM visited, merely a few of the encountered individuals confirmed wanting to be represented by RIAO for the purposes of the Complaint. In other villages, all individuals that the ICM encountered confirmed their interest in being represented by RIAO. In Boteka and Lokutu, RIAO-RDC organised meetings with individuals and some community representatives from several of the nine villages in which Complainants reside. Due to logistical and communication challenges, as well as time constraints, the Panel could only meet some of the persons who signed the Complaint, but was able to start a discussion about a potential mediation with smaller groups of Complainants. The participants of the meetings confirmed their wish for a mediation.

The Panel was able to visit three of the nine villages in Boteka and in Lokutu. In two of those villages, the Complaint was known and we met community member supporting the complaint. In one of the villages, local leaders organized a village gathering, when the Panel was visiting the village, and many people did not support the complaint.

During the site visits, the Panel recognized that there are individuals and village representatives in the area of Boteka and Lokutu who have not filed a complaint with the ICM but claim that they have been harmed by the Company. They expressed interest in participating in a future mediation process. At the same time, they underlined that they do not want to be represented by RIAO-RDC. In particular, the village chiefs made clear that a mediation without inclusion of the larger population on and around the two plantations would undermine the effectiveness of a mediation settlement and would lack legitimacy. In their view, such outcome could result in increased divisions and conflicts between the communities. They sought to broaden the participation beyond the group of potentially affected people who have filed the Complaint with the ICM. In the exchange during one of the public meetings in Boteka, RIAO accepted the idea that a broader participation of villages could be helpful. Likewise, 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. A decision on the participation in the proposed mediation process and the overall setting of a mediation requires further follow-up with the Complainants and with the Company.

In Kinshasa, the Panel met with one village chief from the third plantation location, Yaligimba, who declared that the people of Yaligimba should also be represented in a possible mediation. The Panel met also with other local actors, such as local NGOs, workers' representatives and trade unions, who also expressed an interest in taking part in a future mediation process.

Based on the findings of the Preliminary Review, the ICM Panel concluded the Preliminary Review Phase in November 2019 and recommended that a dispute resolution/mediation be conducted.

Due to the complexity of the situation as described above, the Panel has not been in a position so far to settle the issues of participation and representation in the mediation process. It was therefore planned to use sufficient time in 2020 to address these open questions before a mediation could start.

3. Necessary steps in preparing the mediation

The Panel originally aimed to formally start the mediation / dispute resolution phase in 2020, by holding the necessary discussions with the Complainants, the Company and other External Parties.³ It had planned for (i) two or three extended travels to the affected sites in 2020, and (ii) the selection of a mediation team composed of one or two experienced mediators from the DRC and one internationally experienced mediator. In addition, the Panel is considering to build up a communication structure for the mediation period.

In February 2020, the Panel met with the senior management of the Company and received its agreement to participate in a mediation. The Company made clear that it would be interested to include other representatives from villages and civil society. The Complainant had not formally agreed to any setting yet, but it was planned to try to solve open questions during the first site visits in 2020.

Thereafter, however, the process was significantly delayed for three main reasons:

- (1) COVID-19 restrictions,
- (2) Restructuring process and new ownership of the Company, and
- (3) Participation and representation issues.

3.1. Effects of COVID-19 restrictions

Due to the worldwide travel restrictions caused by the COVID-19 pandemic, the Panel had to postpone all case-related travel. The ICM Panel made this information publicly available on its website. In addition, a new Ebola epidemic broke out in the area of Boteka starting in June 2020 resulting in a ban of all national and international travels into the affected area.

As experience has shown, in this case, remote communications with the relevant actors and their representatives, especially with affected community members and leaders, is not possible at this early stage of the process that requires intensive and inclusive communications with all relevant stakeholders.

Therefore, with no access to the affected communities, only limited progress in setting up a dispute resolution process could be achieved in 2020.

³ According to the ICM Policy, an **External Party** is defined as “[a]n natural or legal person that is not a party to the financing agreements between DEG and the Client (non-exhaustive examples: customers of the Client, individual persons or groups, workers, non-governmental organizations representing affected persons). ICM Policy, p. 3.

3.2. Restructuring and new ownership of the Company

The Company has undergone extensive restructuring during the past year (see timeline of the changes below). These changes interfered with the Company's ability to renew its commitment formally to participate in a dispute resolution process, and caused delays in communications regarding the preparations for a mediation.

Timeline of the changes undergone by the Company in 2020

Date	Change	Source
22 May 2020	Feronia announcement concerning its entry into a restructuring purchase agreement	www.feronia.com/news/view/feronia-inc-enters-into-restructuring-purchase-agreement
2 June 2020	Feronia announcement of a third-party sale process	www.feronia.com/news/view/feronia-inc-enters-into-restructuring-purchase-agreement
20 July 2020	Feronia announcement of definitive purchase agreement with Straight KKM 2 Ltd. that provides for the acquisition by KKM of the Company's direct and indirect equity interests in its operating subsidiary PHC; KKM provided the best and sole offer to the Company.	www.feronia.com/news/view/feronia-inc-enters-into-restructuring-purchase-agreement
10 September 2020	Feronia announcement that it has obtained an Order of the Supreme Court of British Columbia in Bankruptcy and Insolvency approving the third-party sale and restructuring transaction previously announced by the Company.	www.globenewswire.com/news-release/2020/09/10/2091740/0/en/Feronia-Inc-Announces-Court-Approval-of-Restructuring-Transaction.html
23 November 2020	Feronia Inc. announcement of the closing of its previously announced third party sale and restructuring transaction.	https://www.globenewswire.com/fr/news-release/2020/11/23/2131781/0/en/Feronia-Inc-Announces-Closing-of-Restructuring-Transaction.html

The new Company leadership has already accepted in principle to follow on with the mediation in one of its press statements.

3.3. Participation and representation issues and setting of the mediation

As explained above, the Preliminary Review has uncovered complex issues concerning participation and representations in a future mediation in this case. The relevant provisions of the ICM Policy specify two key aspects:

- (1) “A pre-condition for Dispute Resolution is that all relevant parties are willing to participate in such a process”,⁴ and
- (2) “If an External Party is representing others, it must identify such others and explicit evidence of the representative authority must be provided”.⁵

The core challenges for the preparation work towards a mediation in this case concern:

- (1) identifying the groups of affected people who will participate as parties in the mediation,
- (2) identifying the appropriate and legitimate representatives of the affected communities, the Complainants, the Company and possibly other External Parties (such as representatives from other villages, or representation of other NGOs, trade unions, religious leaders etc.), and
- (3) facilitating an agreement between the parties on the communication setting and arrangements for such mediation (e.g., how to organize it on two or three very distanced plantation sites, or potentially on a remote basis). In the next steps, these challenges will have to be addressed and clarified.

The Panel will aim to facilitate a dialogue for all the parties and in particular the Complainants and the Company, to come to a resolution on these preliminary issues. Should an agreement to proceed with a dispute resolution fail the ICM Panel will then consider whether to conduct a compliance review based on the allegations raised in the Complaint.

4. Next steps and expected time line

The experience accumulated by other accountability mechanisms in development finance shows that, frequently, clarifying participation and representation issues forms an inseparable part of the mediation process. While it is clear that the Complainants and the Company will participate in the mediation, the participation of other External Parties still needs to be discussed and agreed upon as just described. Therefore, as soon as travel restrictions are lifted and the Panel would be in a position to resume direct communications with all relevant stakeholders, the Panel expects to initiate a facilitated dialogue between the parties on the issues of participation and representation.

With this goal in mind, the Panel sets out below the next steps undertaken by the Panel for 2021:

- (1) The panel will communicate and discuss the potential outline of the mediation with the Complainant and the Company (May 2021).
- (2) In preparation for the mediation, the Panel will identify and select potential mediators, *i.e.*, one or two national mediation experts and one international expert mediator, and – in accordance with paragraph 3.2.6 of the ICM Policy – will seek the agreement of the Complainant and the Company on the selected mediators (June 2021);
- (3) The Panel will prepare further activities with the mediation team and will establish a communication network with all parties involved. The communication network will be extended during the mediation process (July 2021).

⁴ ICM Policy, p. 3.

⁵ ICM Policy, para. 3.1.2.

Contingent upon developments in the COVID-19 and Ebola situations, the Panel will also aim to:

- (4) Together with the mediators, continue the preparation for the mediation in situ by facilitating a dialogue between all relevant stakeholders with a view to settle the participation and representation issues, as well as address any capacity building needs of the Complainants (if possible, second half of 2021 or beginning of 2022).
- (5) Ensure that sufficient time will be dedicated at the outset of the mediation for the parties to agree on ground rules of engagement, including any rules for public communication and confidentiality, in order to create an atmosphere of respect, security and trust. Moreover, the parties will then need to agree on a framework or structure for the mediation, defining the issues to be tackled.
- (6) Facilitate and support the identification of the issues for mediation based on the alleged harms raised in the Complaint (if possible, second half of 2021 or beginning of 2022).
- (7) Facilitate and support a mediation on the issues as identified by the parties (if possible, second half of 2021 or beginning of 2022).

While it will remain difficult to resolve the issues of participation and representation (step (4)) on a remote basis, the Panel expects to be able to make progress on steps (1) through (3) while using remote means of communications (i.e. email, telephone and possibly virtual meetings).

5. Conclusion

The Panel puts utmost efforts to continue the preparation process for a mediation with a view to be able to engage the parties in a facilitated dialogue over the core issues raised by the Complaint in this case as soon as travel restrictions will be lifted.