

Final Investigation Report

Investigating allegations of non-compliance
with UNDP social and environmental
commitments relating to the following UNDP
activities:

Integrated and Transboundary Conservation
of Biodiversity in the Basins of the Republic of
Congo, TRIDOM II.
(October 2017 – March 2023)

Case No. SECU0009

Date: 4 June 2020

Case No.	SECU0009
Category of Non-Compliance	Environmental and Social
Location:	Republic of Congo
Date complaint received:	2 August 2018
Source of complaints:	Six indigenous communities located in the vicinity of the proposed Messok-Dja Protected Area, northern Republic of Congo

Table of Contents

I.	EXECUTIVE SUMMARY	6
II.	BACKGROUND, FINDINGS AND RECOMMENDATIONS	12
	TRIDOM II in the Republic of Congo	12
	The Baka People	12
	Indigenous Rights Law – Law N° 5-2011.....	14
	Insights gleaned from Evaluation Reports of Previous Projects	15
	Issues raised in the Complaints	17
	FINDINGS.....	18
1.	Social and Environmental Standards (SES).....	18
	Social and Environmental Screening Procedure	18
	Identification of Risks in the Project Document (Prodoc).....	19
	Indigenous Peoples Standard	21
	Access to Information.....	23
	Stakeholder Engagement and Response Mechanisms.....	25
2.	Overarching SES Policy and Principles.....	26
	Human Rights Principle.....	26
	Harm to Communities	27
	Testimony from the Baka	27
	Intimidation and Violence	27
	Lack of access to vital resources & inability to transmit knowledge.....	28
	Lack of support for social infrastructure and alternative livelihoods.	29
	Allegations of Baka Involvement in Criminal Poaching	29
	Growing Pressure on the Forest surrounding Messok Dja.	30
	Corroboration of human rights abuses by eco-guards throughout the region	31
	WWF Reaction to Reported Abuses Committed by Eco-Guards.....	31
3.	Policy on Due Diligence and Partnerships with the Private Sector	32
	RECOMMENDATIONS.....	34
	ANNEX 1. TECHNICAL NOTE. RELEVANT UNDP SOCIAL AND ENVIRONMENTAL COMMITMENTS AND POLICIES.....	36
	UNDP SES.....	36
	Social and Environmental Screening Procedure - Overview	37
	Applying the Social and Environmental Screening Procedure – Screening Questions....	39
	Approach to Environmental Assessment When Indigenous Peoples Are Potentially Impacted	40
	Stakeholder Engagement.....	42
	Measures in Response to Risks Identified in Screening and Assessment Process	43
	SES Standards – Standard 6, Indigenous Peoples	44
	SES Standards – Standard 5 Displacement and Resettlement.....	48

SES Standards – Standard 4, Cultural Heritage	49
SES Overarching Policy and Principles – National Law, International Law (Human Rights)	49
SES Policy Delivery and Accountability Process.....	50

List of Acronyms

CIFOR	Center for International Forestry Research
CPAP	Country Programme Action Plan
ESIA	Environmental and Social Impact Assessment
ETIC	Espace TRIDOM Interzone Congo
EU	European Union
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GEF	Global Environment Facility
IFO	Industrie Forestière de Ouessou
IPP	Indigenous Peoples Plan
IUCN	International Union for Conservation of Nature
IWT	Illegal Wildlife Trade
LAP	Livelihood Action Plan
MEFDDE	Congo Ministry of Forest Economy, Sustainable Development and Environment
NGO	Non-Governmental Organization
NIM	National Implementation Modality
OAI	Office of Audit and Investigations
PAC	Project Appraisal Committee
POPP	UNDP Programme and Operations Policies and Procedures
Prodoc	Project Document
RAP	Resettlement Action Plan
SECU	UNDP Social and Environmental Compliance Unit
SEFYD	YUAN DONG Woods Industry Co.,Ltd, CONGO
SES	UNDP Social and Environmental Standards
SESA	Strategic Environmental and Social Assessment
SESP	UNDP Social and Environmental Screening Procedure
SIFCO	Lebanese Industrial Logging Groupe Fadoul
TRAC	Target for Resource Assignment from the Core
TRIDOM	Tri-national Dja Odzala Minkebe
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNOPS	United Nations Office for Project Services
WWF	World Wide Fund for Nature

I. EXECUTIVE SUMMARY

1. On 2 August 2018 the UNDP Social and Environmental Compliance Unit (SECU) received complaints from six Baka indigenous communities who live in the forest region of the northern Republic of Congo. The Baka are a people of traditional hunter-gatherers who for millennia have lived in the Congo Basin rainforest. The complaints were submitted to SECU via the UK-based NGO Survival International. The Baka communities, allege that UNDP supported activities to establish the Protected Area of Messok Dja on their traditional forest lands are violating their human rights. They state that they suffer acts of violence by eco-guards (forest rangers), who are patrolling the area, and that they are being deprived of having access to their forests and the resources that are vital to their livelihoods. They state that their exclusion from the future Messok Dja Protected Area is severely affecting their well-being, way of life and chances for survival as a people. The employment contracts of the eco guards are signed by the government.
2. Messok Dja is considered to be a critical wildlife corridor linking protected areas in the Republic of Congo and in Cameroon. The GEF/UNDP “Integrated Transboundary Conservation of Biodiversity in the Basins of the Republic of Congo,” known as Tridom II, includes 16 expected outcomes, and the establishment of the Messok Dja Protected Area is central to the Project’s goal of expanding the network of globally protected areas in the Congo Basin.
3. TRIDOM II considers the Illegal Wildlife Trade (IWT), including ivory poaching, to be the main threat to the area’s rich biodiversity. The anti-poaching strategy pursued by the project includes the strengthening and expansion of Protected Areas and the expansion and strengthened management of High Conservation Areas outside Protected Areas. With the support of UNDP, the World Wide Fund for Nature (WWF) is the key implementer of project activities related to the establishment of Messok Dja as a protected area.¹ The Project was initiated in October 2017, was suspended in March 2019 and is scheduled to be completed by March 2023.
4. The project’s grand-total financing is USD 23,807,650, of which USD 4,125,250 is administered by UNDP. The latter consists of a USD 3,125 million GEF grant and USD 1 million from the UNDP-TRAC resources. A total of \$ 226,800 is paid to WWF based on Letters of Agreements of 2017 and 2018 between UNDP and WWF. The remaining amounts are in-kind contributions from the Government of Congo and parallel cash from a tourism company (Congo Conservation Company), a palm oil company (Eco-Oil Energy), a logging company (Industrie Forestière de Ouesso) and two conservation NGOs (Wildlife Conservation Society and WWF-ETIC).²
5. The project management arrangement follows the “National Implementation Modality” (NIM), where the Government is the project Implementing Partner and assumes full responsibility and accountability for the use of GEF resources. UNDP is accountable for the use of resources for the achievement of programme results in conjunction with the implementing partner. UNDP also undertakes project assurance and oversight. The

¹ Lettre d’Accord Standard Entre le Programme des Nations Unies pour le Developpement et l’ONG “World Wide Fund for Nature (WWF)” Concernant la Réalisation du Projet “Conservation intégrée et transfrontalière de la biodiversité dans les bassins de la République do Congo” , October 15, 2017. Lettre d’Accord Standard Entre le Programme des Nations Unies pour le Developpement et le Fonds Mondial pour la Nature (WWF) Pour la Réalisation d’Activités Dans le cadre de Services d’Appui fournis par le PNUD au Projet Conservation Intégrée et Transfrontalière de la Biodiversité dans les Bassins de la République du Congo Dit “TRIDOM II”, April 9, 2018.

² UNDP Congo CO. ‘Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Congo Project Document’. April 2017.

project's implementing partner is the Republic of Congo's Ministry of Forest Economy, Sustainable Development and Environment (MEFDDE). Parallel cash is an estimate of the cost of in-kind support the co-financers would provide to the objectives of the project. No parallel amount has been received or managed by UNDP. This type of support is managed by the co-financer.

6. On 24 October 2018 the complaints were found eligible for an investigation by OAI/SECU.
7. SECU undertook a document review and, from 20 February – 1 March 2019, undertook a field mission to the Republic of Congo to interview complainants, adjacent communities, UNDP staff both in the capital and in the field, government officials in relevant ministries, civil society organizations, technical experts and others. SECU wishes to express its appreciation for all the assistance provided by the Country Office and the Republic of Congo stakeholders, all of whom sought to better understand the compliance issues in the project as well as possible solutions.
8. The investigation focused on gathering and reviewing evidence with regard to compliance of the project with UNDP standards and policies concerning (a) the screening of social and environmental risks; (b) implementation of the requirements enshrined in UNDP's Social and Environmental Standards, especially concerning Indigenous Peoples (Standard 6); (c) public access to information; (d) stakeholder engagement and response mechanisms; (e) adherence to the Policy on Due Diligence and Partnerships with the Private Sector. These standards are spelled out in Annex 1.

Summary of key findings.

Finding 1

UNDP's over-arching commitment to human rights, which also constitutes Principle 1 of the SES, was not adhered to with respect to the rights of indigenous peoples.

9. SECU's investigation has obtained credible testimony during the fieldwork in February 2019 not only from representatives of the indigenous (Baka) communities, but also from government and non-governmental sources, that armed eco-guards engage in violence and threats of violence against the indigenous Baka people in the Messok Dja area. The testimonial evidence from the indigenous communities expressed an on-going situation of intimidation related to eco-guard abuses. The eco-guards are employed by the Government of the Republic of Congo's MEFDDE (UNDP's implementing partner).
10. In addition to supporting community consultations on geo-referencing maps, UNDP has paid for training fees, uniforms, and daily subsistence allowances for missions through WWF, a parallel co-financier of the project and whose project together with the Government of the Republic of Congo on the ground is known as ETIC. (WWF points out that ETIC is an entity which is a collaboration between the Government of the Republic of Congo and WWF. However, UNDP and consultants to WWF refer to WWF-ETIC or simply to WWF. This report adopts the usage of WWF-ETIC.)
11. The violence and threats are leading to trauma and suffering in the Baka communities. It is also preventing the Baka from pursuing their customary livelihoods, which in turn is contributing to their further marginalization and impoverishment.

Recommendation 1

12. In addition to addressing the findings in paragraphs 9 through 11 through, inter alia, appropriate in-kind or service-based support determined in consultation with the Baka

and project partners as part of UNDP's programmatic work³, UNDP Congo must take appropriate and effective measures to prevent future acts of violence against Baka communities.⁴

Finding 2

The Social and Environmental Screening Procedure (SESP) failed to identify critical project risks. As a result, Social and Environmental Standards (SES) were not implemented.

13. As required by UNDP Policy, the project under review has undertaken a Social and Environmental Screening Procedure (SESP). However, the SESP was handled in a perfunctory manner and did not identify critical risks of the project. This contributed to a project design that inadequately mitigated project risks.
14. The project's executed SESP describes an assumption that the project will provide socio-economic benefits to Indigenous Peoples and that it will restore their access and tenure rights over natural resources in protected areas in order for them to be able to meet their livelihood and cultural needs.
15. However, the SESP notes that it had not been possible to organize consultations with the communities in the region of the proposed Messok Dja protected area.⁵ Its assumption that the project will bring only benefits to indigenous communities leads it to conclude that there is no discernible risk and that culturally appropriate consultations with the goal of obtaining Free Prior and Informed Consent (FPIC) are not required. However, as a means of ensuring that UNDP projects that may impact indigenous peoples are designed in a spirit of partnership with them, UNDP standards require securing their free, prior and informed consent where their rights, lands, resources and traditional livelihoods may be affected.⁶
16. As a result of its optimistic and unverified assumptions, the SESP did not trigger UNDP's Social and Environmental Standards (SES). Standard 6 on Indigenous Peoples is of special relevance here. It requires a prior assessment, the elaboration of an Indigenous Peoples' Plan and, as referred to above, obtaining the Free, Prior and Informed Consent for any UNDP-supported activity that may affect Indigenous Peoples.

³ UNDP Social and Environmental Standards mandate that "SECU evaluates whether UNDP has complied with its obligations, whether any non-compliance has caused harm to the complainant, and how UNDP can correct the non-compliance." The SECU Investigation Guidelines state, "There are numerous options to encourage compliance with UNDP's social and environmental comments. Such options include...[a] decision by the UNDP Administrator to mitigate any harm caused by a project, and to restore claimants to a pre-harm state, in collaboration with the implementing partner, where the circumstances and financial resources allow for it."

⁴ UNDP Social and Environmental Standards require that no relocation of indigenous peoples take place without their free, prior and informed consent (FPIC) and only after agreement on just and fair compensation and, where possible, with the option of return (Standard 6).

⁵ As stated by the SESP, it had not been possible to organize consultations with the communities in the region of the proposed Messok Dja. However, UNDP's Country Office notes that it took into consideration a 2016 workshop done by the Government and WWF. Furthermore, it adds that in 2018, 18 villages were consulted in the broader project area of the Tridom landscape. While appreciative of the efforts of the Country Office, SECU found that these efforts did not contribute to a robust FPIC process and the development of an Indigenous Peoples Plan as required by SES.

⁶ UNDP, "Social and Environmental Standards," January 2015.

17. The project's objective is to create synergies between conservation and development. However, the lack of adherence to the SES has led to a de facto situation where Project activities to date have failed to explore the natural synergies between protection of an area of significant biodiversity and promoting the rights of Indigenous Peoples.

Recommendation 2

18. UNDP Congo should create a detailed Stakeholder Engagement Plan that meets the requirements of SES. This has to be followed by the preparation of an Indigenous Peoples Plan with the full participation of the communities concerned as an integral part of the project. It has to clearly spell out objectives, activities, budget, institutional responsibilities and monitoring indicators.
19. These initiatives have to be accompanied by the establishment of fair, effective and transparent grievance mechanisms accessible to communities to report to UNDP any problems that may occur. The establishment of project-level grievance mechanism is an integral part of UNDP's stakeholder engagement requirements.

Finding 3

Policy on Due Diligence and Partnerships with the Private Sector – Partnerships were not reviewed

20. The Project Document (Prodoc) identifies the road networks created by logging concessions as being associated with high levels of poaching because they open up access to previously inaccessible regions and provide the transport arteries required by the Illegal Wildlife Trade.
21. The Prodoc also refers to the expansion of monocultures, especially of palm oil, as creating an environment hostile to the survival of wildlife.
22. UNDP's private sector partners, which provide parallel financing to the project, include large international logging and palm oil industry conglomerates: Industrie Forestière de Ouessou (IFO), an affiliate of German-Swiss group Danzer, which covers an area almost twice the size of the state of Delaware in northern Congo, and the Malaysian Eco-Oil Energy company. The latter expects to vastly increase its initial concession area of 50,000 hectares for the export of biofuels. The private sector partners have not received any funding from UNDP, nor is SECU aware of any partnership agreements. However, the Prodoc lists working with private logging and agro-forestry companies as part of the project's strategy.
23. According to UNDP's Social and Environmental Standards, UNDP is not required to ensure compliance with the SES of activities that are not funded through UNDP accounts. However, UNDP is required to review the entire Programme or Project for consistency with SES requirements.
24. UNDP's Policy on Due Diligence and Partnerships with the Private Sector identifies industrial logging and palm oil as high risk sectors requiring a due diligence assessment.
25. SECU's investigation found no evidence that a due diligence review of these partnerships had taken place as elements potentially damaging UNDP's ability to achieve the outcomes desired for the project and exposing UNDP to reputational risk.

Recommendation 3

26. UNDP Congo should conduct a due diligence assessment on the project's private sector partners and commit to documenting the direct and indirect impacts of extractive activities on the biodiversity in the region.

The way forward

27. The continuation of Tridom II represents a unique opportunity to chart a new course for biodiversity protection in the Congo Basin.
28. In the Messok Dja area there is a significant convergence of the interests in protecting a region of significant biodiversity and promoting the rights of Indigenous Peoples. There is a commonality of objectives of the international community in protecting endangered wildlife and the Bakas' need to protect their traditional land, territories and resources from external threats.
29. The establishment of national parks in the Congo Basin has a history of being focused on conservation while de facto ignoring human rights of the indigenous communities living in or on the periphery of protected areas. This approach considers Indigenous Peoples a threat and fails to take into account the role that Indigenous Peoples have historically played in conserving biodiversity given the inextricable links between indigenous identities and culture and the land they have traditionally used.
30. The window of time to address the impoverishment and related loss of cultural identity of the Baka people, as well as the biodiversity they have helped protect for millennia is likely to be short. Careful monitoring of the situation is required to ensure that good intentions are translated into tangible outcomes that are fully consistent with UNDP goals, policies and standards.



Messok Dja area in Republic of Congo



Detail of Messok Dja area in Republic of Congo

II. BACKGROUND, FINDINGS AND RECOMMENDATIONS

TRIDOM II in the Republic of Congo

31. The Integrated and Transboundary Conservation of Biodiversity Projects, known as TRIDOM II, seeks to protect biodiversity on the Republic of Congo side of a tri-national area also covering forest ecosystems in neighboring Cameroon and Gabon. The region as a whole is known for its wealth in rare and endangered species, including large mammals such as forest elephants, lowland gorillas and others.
32. This is a UNDP-GEF project managed under a National Implementation Modality arrangement with the Ministry of Forest Economy, Sustainable Development and Environment as the implementation partner. Its scheduled starting date was April 2017 and its projected closing date is March 2023.
33. Total project costs are listed as USD 23.807 million of which USD 3.125 million are financed through a GEF grant and USD 1 million from the UNDP TRAC resources. There are six parallel co-financiers listed in the Project Document. They include: The Congo Government providing USD 6,522,400, the Congo Conservation Company providing USD 4,360,000, Eco Oil Energie SA providing USD 2,150,000, Wildlife Conservation Society (WCS) providing USD 1,250,000, Forest Industry of Ouessou providing USD 1,250,000, and the World Wide Fund for Nature / Espace TRIDOM Interzone Congo (WWF / ETIC) contributing USD 4,150,000. The remaining amounts are in-kind contributions from the Government of Congo and parallel cash from a tourism company (Congo Conservation Company), a palm oil company (Eco-Oil Energy), a logging company (Industrie Forestière de Ouessou) and two conservation NGOs (Wildlife Conservation Society and WWF-ETIC). Parallel cash is an estimate of the cost of in-kind support the co-financiers would provide to the objectives of the project. No parallel amount has been received or managed by UNDP. This type of support is managed by the co-financier.
34. The project seeks to protect biodiversity by combatting the illegal trade in wildlife, especially of bushmeat and ivory. As per the Prodoc, the strategy pursued by the project includes the expansion of protected areas and functional zoning that incorporates sustainable development goals. It also seeks to strengthen the governance capacity in the Republic of Congo to effectively manage protected areas, to address the Illegal Wildlife Trade and to use community-based resource management systems/ sustainable livelihoods as anti-poaching tools.
35. A principal expected outcome of the project is the establishment of the Messok Dja National Park on an area of 144,000 ha. In addition to its populations of forest elephants, gorillas and chimpanzees, Messok Dja is considered to be a critical link in the wildlife corridors connecting the protected area of Odzala in the Republic of Congo and the Nki protected area in neighboring Cameroon (Maps).
36. The proposed establishment of Messok Dja lies at the heart of the complaints received by SECU. The indigenous Baka communities allege that they are suffering harm as a result of restrictions on access and acts of violence and intimidation by Eco-Guards in connection with the establishment of the future Messok Dja protected area. They state that their traditional use of the Messok Dja area is central to their survival and compatible with establishing a sustainable resource system for the Park.

The Baka People

37. The Baka are one of the indigenous groups spread out through the Central African forests who are often collectively referred to as Pygmies. The term “Pygmy”, however, is perceived as pejorative as it has been used to indicate the inferior and marginalized status of forest peoples as opposed to mainstream Bantu society. The Baka, as with the other indigenous groups in the region, prefer to be called by their proper ethnic names.
38. Scholarly literature refers to the Central African forest peoples as the first on the land and a fountain of civilization when Bantu people first migrated to equatorial Africa some 2000 years ago.⁷ Their knowledge of the region’s pharmacopeia remains renowned to the present day as do their unmatched skills in navigating vast expanses of forest land while maintaining a precise sense of their location.
39. A study led by the Center for International Forestry Research (CIFOR) estimates the number of indigenous forest people in the Congo Basin to be about 920,000 and describes them as being of great significance to humanity’s cultural diversity as the largest group of hunter-gatherers in Africa and perhaps the world.⁸ The study also warns of the cultural extinction of these peoples unless the international community comes together to respect their human rights.
40. Among the defining features of the Baka is their semi-nomadic way of life, their mobility over vast areas of forest, their in-depth knowledge of the forest and deep attachment to their traditional territories. Their social structure is of an egalitarian nature and they lack highly defined hierarchical leadership. Typically, the Baka spend part of the year inside the forest with their formidable knowledge and sense of orientation allowing them to cover vast distances. Other parts of the year they return to their small settlements/ camps in proximity to sedentary Bantu villages.
41. While the sedentary farming Bantu communities also face great economic difficulties and lack of access to social services, they are clearly dominant. The Bantu farmers often continue to view themselves as the “masters” of the Baka and do not consider them to be equally human. Exclusion and marginalization, including by public authorities, continue to be pervasive.⁹ The Bakas’ mobility, which traditionally has assured them independent access to the resources their livelihoods depend on, has been essential to their resilience in the face of relentless discrimination.¹⁰ In addition, while the Baka were able to access their traditional forest land, they were able to trade with the Bantu in products that the Bantu were not able to obtain themselves, such as medicinal plants and other forest products. In exchange for which the Baka would receive articles of clothing, knives and other objects. However, with their traditional forest lands shrinking due to industrial logging and the establishment of protected areas, these traditional exchange relations have eroded. As a result, the Baka report that they find themselves increasingly subject to working under exploitative and slave-like conditions on Bantu farms.

⁷ Vansina, J., “Paths in the Rainforests – Toward a History of Political Tradition in Equatorial Africa,” The University of Wisconsin Press, 1990.

⁸ CIFOR Forest News, “First Estimate of Pygmy Populations reveals their Plight,” Jan 12, 2016. <https://forestsnews.cifor.org/39177/first-estimate-of-pygmy-population-reveals-their-plaint?fnl=en> (accessed on May 29, 2019).

⁹ L’Observatoire Congolais des Droits de l’Homme, “Rapport sur la Situation des Droits des Peuples Autochtones 2017,” report supported by the European Union, Brazzaville.

¹⁰ Lewis, J., Freeman L. and Borreil, S., “Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin,” Anthroscap, Intercooperation, Swiss Foundation for Development and International Cooperation, Bern, and Society for Threatened Peoples Switzerland, July 2008.

42. The U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, investigated the situation of indigenous peoples in the Republic of Congo and emphasized that they suffer from extreme social and economic disadvantages, discrimination and marginalization when compared to the rest of Congolese society.¹¹
43. There are no reliable census data on the indigenous peoples in the Republic of Congo and Anaya's report refers to widely varying estimates, which put their number at anywhere between 1.4% and 10% of the country's total population. The Baka are concentrated in the northern Likouala and Sangha Departments.
44. The Special Rapporteur notes the lack of civil status of the indigenous peoples given the difficulties they face in obtaining birth certificates. Without civil status, access to social services, such as healthcare and education, becomes that much more unattainable.
45. His report also refers to the fact that indigenous peoples in the Republic of Congo rarely hold formal title to land or guaranteed rights to the land they have traditionally used or occupied. He adds that the Land Law of 2004 does not appear to have a provision to involve affected indigenous communities in the process of determining collective and customary property rights.
46. It is important to note that the Prodoc refers to the Land Law of 2004, especially its Article 10, as the basis for helping realize community rights on wildlife and other forest resources via allocation of forest lands for community ownership and development.¹² It is unclear why the Prodoc did not refer to the more recent and comprehensive Indigenous Rights Law of 2011 as a pivotal legal instrument to meet its stated objective of restoring access and ownership of forest and wildlife for local and indigenous communities.
47. According to the Special Rapporteur, the passage of the Indigenous Rights Law (Law N° 5 of 2011) created a potentially ground-breaking legal basis recognizing the rights of indigenous peoples in the Republic of Congo to their traditional lands and resources. Reference to this law in the Prodoc would have been essential in describing the current legal context in the Republic of Congo.

Indigenous Rights Law – Law N° 5-2011

48. In 2011 the President of the Republic of Congo promulgated Law No 5-2011 on a range of social, economic and cultural rights of indigenous peoples.¹³ United Nations agencies were deeply involved in assisting with the development of the Law. According to the Special Rapporteur, this law is largely consistent with the U.N. Declaration on the Rights of Indigenous Peoples.
49. The Law provides for the protection of rights of Indigenous Peoples to lands and resources they have traditionally used or occupied for their subsistence, pharmacopeia and work. According to the Law, the State is obliged to facilitate the delimitation of these lands on the basis of customary rights. Concerning the establishment of protected areas

¹¹ Anaya, J., "Report of the Special Rapporteur on the rights of Indigenous Peoples - The Situation of the Indigenous Peoples in the Republic of Congo," Report presented to the Human Rights Council, 18th session, July 11, 2011.

¹² Project Document, Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Congo (UNDP-GEF-PIMS ID N° 5612), GEF/UNDP/ Republic of Congo, starting date April 2017, p.12 and p.28. The project was initiated in October 2017.

¹³ Loi No. 5/ 2011 du 25 Février 2011 portant sur la promotion et la protection des droits des populations autochtones (on file at SECU).

that affect the way of life of Indigenous Peoples, the Law stipulates that consultations with indigenous peoples are carried out in good faith in order to obtain their Free, Prior and Informed Consent.

50. While the law dates from 2011, its first six implementation decrees (Décrets d'Application), were issued in July 2019. This is a welcome step forward. Issues addressed by the decrees include the participation and consultation of indigenous peoples as well as their access to education and social services. As Congolese human rights organizations make clear, it is now important to ensure the effective implementation of these decrees and to adopt further implementation decrees that address the critical questions of rights to land and natural resources.¹⁴
51. Moreover, the Baka only have limited knowledge of their rights under this Law. The lack of awareness of the rights enshrined in this Law combined with the expense involved, the language barrier and the distance to towns where administrative offices and courts are located, continues to impede their access to justice.¹⁵
52. During SECU's interviews at the Ministry of Forest Economy, Sustainable Development and Environment in Brazzaville in February 2019, officials stated that the dates for the adoption of the implementation decrees for Law No.5-2011 were not known. However, as one senior official noted, the lack of implementation decrees is no impediment to implementing the spirit of this Law.
53. Very much in line with the spirit of Law No.5-2011, the U.N. Special Rapporteur's report of 2011 recommended:

"Further, the United Nations country team should ensure that awareness about indigenous peoples and their rights is integrated into all planning processes with regard to programmes and initiatives developed by the United Nations system in Congo."
54. Following SECU's mission, six implementation decrees for Law No5-2011 entered into force on July 12, 2019. These address important areas such as the consultation and participation of indigenous peoples as well as their access to social services. However, they do not yet cover critical issues such as rights to land and natural resources.

Insights gleaned from Evaluation Reports of Previous Projects

55. As part of its document review, SECU tried to verify if evaluations of similar UNDP-supported projects in the region provided any indication of problems that might cast light on the issues raised by the complaints from the Baka communities. Our review found that the evaluations did not particularly focus on impacts related to indigenous peoples, but that they raise pertinent questions that relate to the problems raised in the complaints.
 - a) ***Mid-term Evaluation of UNDP-GEF project "Catalysation de la Gestion durable des Forêts sur le Site des Zones Humides Transfrontalières des Lacs Tele-Tumba" (Project Atlas PIMS 4182) of 2017.***

¹⁴ Observatoire Congolais des Droits de l'Homme, Agir Ensemble Pour les Droits de l'Homme, Communiqué de Presse, Brazzaville / Lyon, July 23, 2019.

¹⁵ Ayari, I. and Counsell, S., "The Human Cost of Conservation in the Republic of Congo," The Rainforest Foundation, London, 2017.

56. This transboundary UNDP-GEF project covers both the Republic of Congo and the Democratic Republic of Congo.¹⁶ The mid-term evaluation was unable to obtain direct testimony from indigenous peoples. It states that one of the problems encountered during its mission was that it had been unable to meet with indigenous peoples because the community had not been previously informed and therefore were not present in the village when the mission arrived.
57. However, the evaluation notes with surprise that the Prodoc does not mention indigenous peoples. It states that it would be an illusion to think that sustainable results involving indigenous peoples could be achieved if their particular way of life, their mobility, and their strong socio-economic dependence on the forest and its resources are not taken into account.
58. The evaluation notes that it could not find any environmental and social assessments, resettlement or compensation plans despite the fact that the establishment of protected areas would affect the communities' access to resources. It expresses dismay that a GEF project of such magnitude, which affects indigenous people, would not have carried out such previous studies despite the fact they are a requirement of multilateral agencies, including the World Bank and UNDP.¹⁷

b) Evaluation of TRIDOM I of 2014 (UNDP Project ID 1583).

59. TRIDOM I, the predecessor of TRIDOM II, covers the same broader Dja-Odzala-Minkebe transboundary region between the Republic of Congo, Cameroon and Gabon. TRIDOM I was initially identified in 1998/99, approved by the GEF Council in 2004, but only started after significant delays in 2009 and was officially closed in 2015. Total project costs, including all co-financiers and covering the three countries, exceeded USD 45 million.
60. An evaluation of this project in 2014 found that its goals were hampered by a lack of ownership of key stakeholders and that its impact in terms of alternative income generating activities for its intended beneficiaries was not perceptible.¹⁸ On the whole, the evaluation considers the impacts of the project to be minimal, while pressure from poaching and industrial mining, logging and agro-industrial activities had increased.
61. Among the recommendations of the evaluation of the TRIDOM I project for its successor TRIDOM II are the need to gain the trust of local populations by creating alternative income-generating activities and by ensuring that the maintenance of the ecological wildlife corridors not infringe on community development. While Tridom II intended to address these issues, SECU found little evidence that they were implemented on-the-ground.
62. Another recommendation of the 2014 evaluation concerns the need to improve monitoring of WWF and ensure greater clarity and transparency of WWF activities in the region. This recommendation is of special relevance to TRIDOM II. While the government of the Republic of Congo is the UNDP project's implementing partner, project activities on-

¹⁶ Kasisi, R. and Kaya, J.A.P., "Projet PNUD-FEM: Catalysation de la Gestion Durable des Forests sur le Site des Zones Humides Transfrontalières des Lacs Tele-Tumba," mid-term evaluation report, November 2017.

¹⁷ UNDP notes that GEF requirements at project design have only been in place since November 2011 and this project was approved in May 2010.

¹⁸ Ngono, G., "Rapport de l'Évaluation finale do Project 'Conservation de la Biodiversité Transfrontalière dans l'Interzone Cameroun, Congo et Gabon," October 2014.

Project carried out under the auspices of UNDP, GEF, UNOPS and TRIDOM.

the-ground in the Messok Dja area are carried out by WWF, which is a parallel co-financier of the UNDP project and works closely with the government. It is WWF's local project, known as WWF-ETIC (Espace TRIDOM Interzone Congo) which is visible to local communities.

63. In addition, given the multiple pressures on the region, the evaluation calls for a multisectoral approach to conservation, and calls on donors to address land grabs in the region by influential persons and companies. Intended outputs in Tridom II included measures to address these problems, but SECU found little evidence that these measures had been implemented
64. The findings and recommendations of both evaluation reports emphasize the need to engage with local communities of which indigenous peoples are the most marginalized and vulnerable segment. They foreshadow problems that led to the complaints received by SECU. The absence of previous studies related to the impacts on indigenous peoples of establishing protected areas or wildlife corridors is consistent with a lack of attention to the rights and needs of affected indigenous people, as described in the Prodoc stating the "vast majority of protected areas in the Republic of Congo were established without taking into account customary rights to land or the historical, cultural or socio-economic realities that have shaped these ecosystems over millennia of habitation and use by indigenous peoples."
65. During the course of its investigation, SECU found little evidence that the findings of these evaluation reports were used to shape the preparation and implementation of TRIDOM II.

Issues raised in the Complaints

66. The complaints received from six indigenous communities in the Sangha region in the north of the Republic of Congo focus on the Project's planned creation of the Messok Dja protected area. Messok Dja is considered to be a vital component of a corridor allowing wildlife to pass from northern Congo into the Nki Protected Area in neighboring Cameroon. The indigenous Baka allege that their access to the area, which is their traditional homeland and is essential to their livelihoods, has been severely restricted. Neighboring Bakwele (Bantu) communities, while not subject to the same deeply engrained discriminatory attitudes suffered by the semi-nomadic Baka people, have supported the complaints submitted by the Baka.
67. Although UNDP has undertaken consultations in 18 villages in the broader Tridom landscape, the Baka state that they have not been informed or consulted about the boundaries of the proposed protected area. They state that WWF-ETIC staff arrive in their settlements and simply inform them where they may no longer go for their traditional hunting and gathering activities. This perceived de facto policy of restricted access, differs from the official policy, which according to WWF, is that there are no restrictions on access to the protected areas. ¹⁹

¹⁹ The Country Office in Congo notes that 18 meetings were held in 2018 (pls. also see footnote 4, page 8). While it is not clear whether any of these meetings were related to the establishment of Messok Dja or whether they were addressing issues faced in other parts of the TRIDOM, they did not contribute to a robust FPIC process. The Country Office notes that WWF-ETIC held FPIC meetings in two villages in 2017 and in another three villages in 2018. SECU has seen the mid-term report covering these meetings and notes that it shows a misunderstanding of what the FPIC process is meant to be. Much to its credit, in 2019 WWF commissioned two separate entities to help it with carrying out FPIC in Messok Dja. These entities published their reports in June 2019 : "FPIC in Messok Dja" by the Forest Peoples Programme and "Appui à la Mise en Oeuvre du Consentement Libre, Informé et Préalable (CLIP) des communautés

68. The Baka allege that the eco-guards subject them to beatings and arrests as they go about their traditional livelihood activities. They state that they have seen their houses and forest camps burned down by eco-guards, that the eco-guards are stealing their food and that they are subject to indiscriminate violence, humiliation, and intimidation.
69. The Baka communities SECU interviewed state that they live in constant fear and that the loss of access to their traditional forest lands has led to a situation where they can no longer find the food and medicines that are indispensable to their well-being and survival. The communities state that they fear for the future of their children to whom they can no longer transmit their deep knowledge of life in the forest, including their renowned pharmacological expertise. Yet Baka children have no access to schools or medical care as possible alternatives. As a result, the Baka fear they will not be able to survive as a people.

FINDINGS

1. Social and Environmental Standards (SES)

Social and Environmental Screening Procedure

70. SECU finds that the project under review has undertaken a Social and Environmental Screening Procedure (SESP) as required by the SES. The SESP assumes that the project will provide socio-economic benefits to Indigenous Peoples and that it will restore their access and tenure rights over natural resources in protected areas to ensure their ability to meet their livelihood and cultural needs. It also states that the project's human rights approach will ensure full participation of indigenous and local communities in project activities
71. The SESP notes that it had not been possible to organize consultations with the communities in the region of the proposed Messok Dja protected area. Its assumption that the project will only bring benefits to indigenous communities leads it to conclude that there will be no discernible risk and that culturally appropriate consultations with the goal of obtaining Free Prior and Informed Consent (FPIC) are not required.
72. The SESP turns out to be a listing of good intentions, which only perfunctorily responds to the detailed questionnaire included in the SESP form. Indications of its lax approach include its reference to "Cameroonian" law when the project is located in the Republic of Congo (RoC), as well as its use of the French term "indigène" with its colonial associations in the French language as opposed to the term "autochtone" which is the current term in French for the English term "indigenous".
73. UNDP's screening procedures categorize projects which may adversely impact the rights, lands, resources and territories of Indigenous Peoples as being of high risk. Given its cursory nature, the SESP fails to identify potentially adverse risks for Indigenous Peoples at the earliest stages of project development.
74. Both the record of displacement and exclusion in the establishment of protected areas in the RoC, which is referred to in the Prodoc, and the evaluation report of the previous project TRIDOM I, should have raised red flags as the new project was being screened for risks.

75. Since the SESP failed to identify possible risks, the application of UNDP's Social and Environmental Standards were not adequately ensured. The most immediately relevant standard is Standard 6 on Indigenous Peoples. In addition, both Standard 1 on Biodiversity and Standard 5 on Displacement and Resettlement refer to the special attention that needs to be paid in projects where Indigenous Peoples are present.
76. Standard 6 on Indigenous Peoples requires a limited social and environmental review for projects without adverse impacts and a full social and environmental assessment for projects with potentially significant adverse impacts. In addition, any project that may affect the rights, lands, resources and territories of Indigenous Peoples requires the elaboration of an Indigenous Peoples Plan (IPP) which is developed with the effective and meaningful participation of the Indigenous Peoples.
77. In cases of potentially adverse impacts on Indigenous Peoples, Standard 6 states "...in no case shall Project activities that may adversely affect Indigenous Peoples, including the existence value, use of enjoyment of their land, resources or territories take place before the action plan is carried out" (Paragraph 14).
78. Neither a limited social and environmental review, nor a full social and environmental assessment were carried out to date. The required Indigenous Peoples' Plan was not prepared.
79. Furthermore, the SESP does not raise the issue of possible risks associated with UNDP's partnerships with private sector entities linked to this project. These partnerships include companies in sectors (industrial logging and palm oil) which are well known for their potential negative impacts on biodiversity and indigenous communities. UNDP's Policy on Due Diligence and Partnerships with the Private Sector (2013) explicitly lists palm oil and other large monocultures, as well as timber production and logging, among the high-risk sectors that require following the Policy's full risk assessment tool to identify any significant controversies in order to manage risks to its reputation and ensure the integrity and independence of UNDP.
80. Since the SESP did not identify the potential risks of partnerships with private sector entities as a matter requiring attention, UNDP's Policy on Due Diligence and Partnerships with the Private Sector was not triggered. As a result, the due diligence required before entering such partnerships was not carried out.

Identification of Risks in the Project Document (Prodoc)

81. In its section on "Social and Environmental Safeguards," the Prodoc refers to and accepts the low risk rating of the Social and Environmental Screening Procedure (SESP) and its claim that there is virtually no social risk because local and indigenous communities would be fully participating and be the beneficiaries of the project.
82. However, unlike the SESP, the Prodoc describes a project context of high risk. Its sections on "The Challenge for Sustainable Development" and "Threats, root causes, and barriers" lay out a whole range of serious risks. Some of the risks identified relate to the historical record of marginalization and eviction of Indigenous Peoples from protected areas in the region and the lack of community involvement in the management of protected areas. Other identified risks concern the expansion of industrial logging operations and of monocultural plantations.
83. The Prodoc recognizes the evidence that traditional forms of using the forest by Indigenous Peoples has contributed to biodiversity conservation, but that forest

dependent communities have often been perceived as a threat rather than as partners in conservation. Considering the experience in the Republic of Congo, the Prodoc states that the establishment of protected areas has taken place without taking into account the customary rights to land or the historical, cultural and socio-economic realities that have shaped these ecosystems over millennia through the use by its indigenous inhabitants.

84. Seemingly anticipating the complaints received by SECU in 2018, the Prodoc notes that anti-poaching activities are often brutally carried out by eco-guards. It notes that the Illegal Wildlife Trade (IWT) is well-structured and organized by elite criminal networks, which often operate internationally and are supported by politically well-connected actors. Given that those behind IWT are almost never caught and prosecuted, the Prodoc refers to the eco-guards as unfairly penalizing traditional hunting and gathering activities. This leads to a situation where the Baka are unable to maintain their customary rights, unique knowledge, and traditional way of life, while also not having the choice of alternative livelihood activities.
85. The Prodoc also discounts the importance of Baka people assisting criminal poachers. It notes that given the precarious living conditions and the lack of alternative options, criminal networks may exploit traditional hunters and gatherers given their skills in tracking wildlife. The Prodoc adds that even where this may occur, the Baka only receive a meagre share of the value of the wildlife. They clearly are among the victims of the IWT.
86. In addition to excluding the Baka and other communities from protected area management, the Prodoc lists government corruption as a driving force of poaching. Furthermore, the Prodoc includes the increased availability of automatic weapons stemming from recent civil wars in the region as a contributing factor to the escalation of poaching.
87. The Prodoc highlights the negative impacts on biodiversity of the expansion of monocultural plantations and industrial logging, including illegal logging. The expansion of road networks in logging concessions is especially relevant because it supports the Illegal Wildlife Trade by opening up previously inaccessible areas and provides arteries of transportation for the illegal trade.
88. Although the TRIDOM II project based on its Prodoc, entered co-financing partnerships with private sector companies in the high-risk sectors of palm-oil production and industrial logging, the Prodoc contains no reference to due diligence measures as required by UNDP's Policy.
89. The Prodoc is very articulate in its descriptions of the historical record of marginalization and exclusion of Indigenous Peoples in the establishment of protected areas in the region. It refers to the displacement of indigenous communities in and around protected areas and anti-poaching activities that are brutally enforced by eco-guards, which penalize traditional hunting and gathering activities on which their subsistence depends.
90. However, the awareness of these risks did not lead to a revision of the Social and Environmental Screening Procedure and subsequently inform the application of the SES. However, it should be noted that the Prodoc identified overestimation of the feasibility of local economic activities as alternatives to poaching as a risk.
91. Those preparing the Prodoc apparently lacked knowledge of SES requirements, in particular where they allowed the project to proceed without first preparing and carrying out an Indigenous Peoples Plan.

92. As a result, the Prodoc deprived the project of a pivotal instrument that would have been of critical importance to its stated objective of restoring access and ownership of forest and wildlife resources to local and indigenous communities.
93. The Prodoc states that it has paid and will pay special attention to applying the UNDP guiding principles regarding Indigenous Peoples (“UNDP and Indigenous People – A Policy of Engagement” of 2001). It specifies the need to encourage the active participation of “Pygmies” and recognition of their rights to natural resource ownership.
94. The Prodoc, however, makes no reference to UNDP’s Social and Environmental Standards of 2015, which were applicable to TRIDOM II. Along with the international community paying greater attention to indigenous rights, UNDP had moved on from the guiding principles of the 2001 Policy to more stringent requirements enshrined in UNDP’s Social and Environmental Standards.
95. The lack of the Prodoc’s reference to UNDP’s Social and Environmental Standards is all the more surprising since UNDP’s Design & Appraisal Stage Quality Assurance Report of April 3, 2017 refers to “Social & Environmental Standards” and provides the project with a quality rating of “*Highly Satisfactory*”.²⁰ UNDP must ensure that its Quality Assurance Reports provide objective assessments that are free of possible conflicts of interest.

Indigenous Peoples Standard

96. The SECU investigation found that project activities to date have largely focused on anti-poaching measures. Combatting the Illegal Trade of Wildlife which supplies international demand for ivory, giant pangolin scales and other wildlife products is clearly essential to protecting the region’s rich wildlife. The same holds for the trafficking of bushmeat to meet the demand in major urban areas, such as Brazzaville, Yaoundé and Douala.
97. UNDP’s Standard 6 on Indigenous Peoples is designed to ensure that indigenous identities and rights are respected and the well-being of indigenous communities is improved. In order to fulfill this mandate, projects affecting the rights, lands, resources, territories of Indigenous Peoples are required to develop an Indigenous Peoples Plan that must be part of project documentation.
98. However, TRIDOM II did not consider the requirements of the standard and an Indigenous Peoples Plan was not elaborated. In the absence of an Indigenous Peoples Plan, the anti-poaching measures to date have not included the Indigenous Peoples as valuable partners in protecting wildlife and biodiversity. To the contrary, the planned establishment of Messok Dja as a protected area has until to date involved restrictions of access for the local Baka communities and the often brutal enforcement of these restrictions by eco-guards.
99. The on-the-ground activities to establish the Messok Dja protected area are carried out by the World Wide Fund for Nature (WWF), which works together with the Ministry of Forest Economy, Sustainable Development and Environment (MEFDDE) in the ETIC Program of the Government of the Republic of Congo, UNDP’s implementing partner.
100. Although government agents are in the region as part of the ETIC (Espace TRIDOM Interzone Congo) and perhaps other programs, Government structures in general are

²⁰ UNDP, Implementation and Monitoring Stage Quality Assurance Report, Project No. 0092643, April 3, 2017.

largely absent from these forest areas. WWF's cooperation with and support from UNDP is formalized in Letters of Agreement (*Lettres d' Accord*) signed by UNDP and WWF dated October 15, 2017 and April 9, 2018.²¹ UNDP signed these Letters of Agreement not with MEFDDE, but with WWF given that WWF has the resources to manage the project on-the-ground.

101. The center piece of the activities of the Letters of Agreement concerns the establishment of Messok Dja as a national park covering an area of 144,000 hectares. The indicators for the activities include the elaboration of 48 geo-referenced maps on the use of natural resources by the communities bordering on the future protected area of Messok Dja and a report on how local communities have been "sensitized" (*sensibilisation*) to the establishment of the protected area. The second expected result is the establishment of the "National Unit for Application of the Law on Criminality concerning Wildlife" through training and equipment of the Sembé sub-Unit, which includes the eco-guards.²²
102. The indicators for the success of this activity include the annual numbers of patrols, annual numbers for wildlife seized by the patrols, annual number of arrests made and of convictions for poaching and the illegal wildlife trade.
103. The Letters of Agreement also refer to WWF's contribution to socio-economic studies, the development of participatory management approaches and strengthening of sustainable livelihoods in the broader region of the TRIDOM. These, however, are not further specified in the indicators.
104. Further below in the section "Access to Information and Participation of Indigenous Peoples" of this report SECU provides its findings related to the mapping exercise and "sensitization" of the Baka communities.
105. Messok Dja shares a border in the north with Cameroon's Nki protected area. Its sides are framed by two axes of mostly dirt and some recently paved roads which run from the small local town of Sembé to the village of Souanké on one side, and from Sembé to the village of Ngbala on the other.
106. The Baka and Bantu communities, who have settled near the two road axes running alongside Messok-Dja, see the establishment of Messok Dja as a WWF project, because what is most visible to them are the four-wheel drive vehicles with WWF's logo, the contact made with WWF-ETIC staff and most of all their encounters with armed eco-guards working under the aegis of WWF-ETIC.
107. The paramilitary training of the eco guards was given by the Government. According to WWF, WWF has trained the eco guards on Human Rights, use of GPS and ecology and was also providing input on the terms of reference for the recruitments of eco guards which took place in the second half of 2019. Sometimes the eco-guards are accompanied by

²¹ Lettre d'Accord Standard Entre le Programme des Nations Unies pour le Developpement et l'ONG "World Wide Fund for Nature (WWF)" Concernant la Réalisation du Projet "Conservation intégrée et transfrontalière de la biodiversité dans les bassins de la République do Congo", October 15, 2017. Lettre d'Accord Standard Entre le Programme des Nations Unies pour le Developpement et le Fonds Mondial pour la Nature (WWF) Pour la Réalisation d'Activités Dans le cadre de Services d'Appui fournis par le PNUD au Projet Conservation Intégrée et Transfrontalière de la Biodiversité dans les Bassins de la République du Congo Dit "TRIDOM II", April 9, 2018.

²² According to UNDP, these Letters of Agreement were under implementation between October 2017 and March 2019 when the project was suspended and represented a budget of USD 220,000 of which USD 163,000 was spent by WWF which represents less than 4% of the total budget of the project.

government police or military forces. Although the final boundaries and exact conservation status of Messok Dja have not yet been established, there are numerous reports of acts of violence, harassment and intimidation against indigenous people by eco-guards in the Messok Dja area.

108. The quantitative indicators, such as the number of patrols, meant to measure the success of the project, did not refer to the special relationship of the Baka to their traditional resources. SECU was unable to find evidence that the anti-poaching activities reflected in the indicators lead to the dismantling of the criminal networks behind the Illegal Trade in Wildlife.²³ As a result the indicators are likely to inadvertently contribute to penalizing the easiest targets.
109. UNDP staff and other observers interviewed by SECU, referred to these networks as being linked to politically well-connected elites. Since these powerful actors are difficult to confront, the activities of the armed eco-guards in the field appear to include measures of intimidation and accompanying violence directed at indigenous communities to prevent them from accessing their traditional forest land and pursuing their subsistence hunting and gathering activities.
110. The SECU investigations heard numerous accounts in all the communities that were interviewed about the eco-guards' failure to distinguish between traditional hunting (mostly traps set for small animals) and gathering activities and the poaching of wildlife. As a result, the Bakas' traditional subsistence activities are being criminalized.²⁴
111. SECU found no evidence that local communities meaningfully benefit from the Illegal Wildlife Trade. To the contrary, they are obviously in a state of deep distress given the restrictions on their livelihood activities and the threats and attacks on their personal safety by the personnel hired by the project to combat poaching.
112. Concerning the anti-poaching measures related to the establishment of the Messok-Dja protected area, SECU finds continuity of the marginalization, exclusion and violence against Indigenous Peoples that the Prodoc had so clearly identified as the hallmarks of previous experience with the creation of protected areas in the region.
113. SECU finds that the lack of adherence to UNDP's Standard on Indigenous Peoples and the elaboration of an Indigenous Peoples Plan led to default position of business-as-usual. In terms of project activities to date, TRIDOM II has repeated the patterns that the Prodoc had identified as the legacy of past projects.

Access to Information

114. UNDP's Information Disclosure Policy as well as its Social and Environmental Standards (SES) consider the public disclosure of its programs at the earliest stages a key prerequisite for public participation of all stakeholders.

²³ UNDP notes that the Project was only under implementation for 16 months before it was suspended in March 2019. According to UNDP, this short time frame may explain the lack of evidence demonstrating the dismantling of criminal networks.

²⁴ Ayary, I. and Counsell, S., "The Human Cost of Conservation in the Republic of Congo," The Rainforest Foundation, U.K., London, December 2017.

For broader human rights situation, please see Observatoire Congolais des Droits de l'Homme, "OCDH – 2017 - Rapport sur la Situation des Droits des Populations Autochtones." Report supported by the European Union, Brazzaville, 2017.

115. Stakeholder engagement plans are a requirement early during project development with the goal of ensuring that project-affected people understand the opportunities and risks of a project. The information is to be made available not only in a timely manner, but also in a form and in the language of the affected people in order to allow them to provide meaningful input into the design and implementation of the project.
116. Standard 6 on Indigenous Peoples of the SES further specifies that all projects that may impact the rights, land, resources and territories of Indigenous Peoples require prior reviews and assessments that are conducted transparently with the meaningful participation of the Indigenous Peoples concerned.
117. However, as the Project's Social and Environmental Screening Procedure (SESP) notes, no consultations with the communities in the region of the proposed Messok Dja protected area had taken place.
118. SECU's fact-finding mission in the region in February 2019 found that the communities had received no prior information and were only made aware of the plans for the creation of the protected area when WWF-ETIC staff first informed them of the mapping exercise that would be undertaken in the region.
119. This is confirmed by a WWF-ETIC document describing the various phases of the FPIC process it was going to carry out in the region. It states that WWF-ETIC would use its contact with the local communities to inform them that a "National Park" would be established in their area. The incomplete understanding of the FPIC process by WWF was confirmed in a study commissioned by WWF in 2019 performed by the Oxford-based NGO Forest Peoples Programme.²⁵
120. In some cases, WWF-ETIC staff informed the affected indigenous people and their neighboring communities that they were no longer allowed to enter certain forest areas. In other cases, the eco-guards hired by the project informed local people when they found them in forest areas that they were no longer allowed to be there because a "park" was going to be there now. WWF claim that the eco guards have never received instructions to inform community members that restrictions on access to resources were implemented.
121. According to UNDP staff in the region, there was no prohibition in place for indigenous and other communities to go about their livelihood activities in the forest. But the testimony provided to SECU showed that such a prohibition was often enforced by the eco-guards.
122. The way the information for local communities was handled led to wide-spread opposition to the future protected area of Messok Dja. The initial community mapping exercise carried out by WWF-ETIC and which was part of its Letter of Agreement with UNDP did little to address the fear of communities that they would be deprived of access to resources vital for their subsistence by the establishment of the protected area.
123. WWF-ETIC carried out the initial community mapping exercise along the axes of the Sembé-Ngbala and Sembé-Souanké roads which frame the future Messok Dja protected area. Carrying out participatory mapping is always a complex undertaking requiring several rounds of confirmation and validation to obtain an approximate picture of resource use by local communities in a region.

²⁵ Forest Peoples Programme, FPIC in Messok Dja: A report and assessment by FPP on the free, prior and informed consent process undertaken in respect of the proposed Messok Dja protected area in the Republic of Congo, 5 June 2019.

124. The mid-term report produced by WWF does not indicate attention to the distinct cultural and livelihood relationship of the Baka indigenous people to the forest areas they have traditionally used.²⁶ While the local Bantu (Kwélé) and Baka communities share to some degree a dependence on forest resources for their livelihoods, the semi-nomadic hunting and gathering Baka have very distinct notions of territory marked by their seasonal traditional activities, the use of much larger extensions of forest areas and a much more diverse and expert use of forest resources.
125. The more sedentary Bantu communities survive to a large extent on fields with established boundaries. They supplement their crops with food, medicines and building materials from the forest and also suffer as a result of restricted access to the forest. But to them the central problem is the destruction of their crops by elephants. In their view, the establishment of Messok Dja is designed to protect animals to the detriment of people being able to feed their families.
126. The WWF-ETIC Mid-Term report also reflects a deep misunderstanding of the concept of “Free Prior and Informed Consent (FPIC)” which it appears to view as a tool to involve all stakeholders in decision-making, including the private sector and local authorities. However, FPIC, as enshrined in the U.N. Declaration on the Rights of Indigenous Peoples and included in UNDP’s Social and Environmental Standards, is meant to be a specific tool designed for securing the free, prior and informed consent of Indigenous Peoples in projects that would affect their rights, resources, traditional livelihoods and territories.
127. WWF has now engaged several non-governmental-organizations (NGOs), which operate at the international, national and local levels to advise on preparing and implementing FPIC in the region.²⁷ A first visit to the region by some of these NGOs coincided with the tail end of SECU’s fact-finding mission in late February 2019.
128. Although late in the process, and after harm to communities has generated ill-will towards the establishment of Messok Dja, this is a positive development. The concrete outcomes of WWF’s initiative will have to be carefully monitored to ensure that they present a fresh start in which indigenous rights and well-being are fully respected, as required by UNDP policies.
129. UNDP policy requires that project activities it supports are consistent with the SES, and, in this regard, to the extent activities advanced by WWF and others to implement the project are supported by UNDP, they have to be monitored by the CO to ensure consistency with the SES.²⁸ If the UNDP-supported activity is not compliant with the SES and other applicable standards, UNDP must work to ensure the activity is brought into compliance with the standards or cease supporting the activity.

Stakeholder Engagement and Response Mechanisms

130. UNDP’s commitment to ensuring meaningful, effective and informed participation of stakeholders in the formulation and implementation of projects includes the establishment of project-level grievance mechanisms where needed.

²⁶ WWF-ETIC, “Rapport a Mi-Parcours sur la Mise en Oeuvre du Processus Clip autour de Messok-Dja,” June 2018.

²⁷ The NGOs contracted by WWF include Brainforest (Gabon), Comptoir Juridique Junior (Brazzaville), Cercle des Peuples Autochtones de la Sangha (Ouesso) and Forest Peoples Program (UK).

²⁸ UNDP, Social and Environmental Standards, Paragraphs 8-10, 2014.

131. Both the Social and Environmental Screening Procedure and the Prodoc of TRIDOM II state that such a project-level grievance mechanism would be established to ensure a rapid response to concerns raised by local communities. The Prodoc enters into some detail on the technicalities of such a mechanism. It states that such a mechanism must be easily accessible, that complaints must be registered, that there has to be feedback to complainants and that there must be the possibility to appeal decisions should complainants not be satisfied with the response given.
132. As of the time of SECU fact-finding mission in February 2019, a grievance redress mechanism accessible to communities in the Messok Dja region had not been put in place.²⁹
133. However, local communities informed the SECU mission that shortly before its arrival in the region, WWF-ETIC personnel had come by the villages to drop off a French language form explaining what to do in case of becoming a victim of aggression of WWF-ETIC agents, i.e. the eco-guards.³⁰ In the interviews conducted by SECU, Baka stated that the form was dropped off without further explanation and that it did not make sense to them.
134. When SECU inquired about why the form did not make sense to them, community members referred to instances in the past when they had tried to complain to the WWF-ETIC office in Sembé about severe abuses committed by eco-guards. They found that their complaints were not taken seriously and that the individual eco-guards they accused of the abuses were actually protected by the WWF office. They also reported that they were threatened when they tried to complain.
135. Given the lack of transport connecting the communities along the road axes from Souanké and Ngbala to the regional town of Sembé, it takes considerable effort and sacrifice for Baka to cover the distance from their small villages to Sembé.
136. The fruitless and intimidating experience of trying to complain coupled with the difficulties in reaching Sembé help explain why the form dropped off by WWF-ETIC staff did not make sense to the Baka communities. They expressed a deep sense of desolation for not having access to any kind of recourse when they suffer at the hands of the eco-guards.

2. Overarching SES Policy and Principles

Human Rights Principle

137. The protection and fulfillment of human rights represent the overarching principle in UNDP's work to advance sustainable development and reduce poverty. The SES reinforce application of this principle at the programme and project levels. Human Rights constitute Principle No. 1 of the SES.
138. While UNDP does not have a role in monitoring State efforts to meet their human rights obligations, its due diligence obligations require UNDP to monitor compliance with its policies in the context of UNDP Programmes and Projects.

²⁹ For the meetings held with 18 communities in 2018 and WWF-ETIC meetings in 2017 and 2018, please see footnotes 4 (page 8) and 18 (page 16).

³⁰ ETIC letterhead form, "Victime d'Aggression Commise par un Agent ETIC – Que Faire?" (undated, on file at SECU office).

139. The TRIDOM II project includes human rights goals. It lists the restoration of access and ownership of forest and wildlife resources for local and indigenous people among its objectives. The Prodoc explicitly refers to Indigenous Peoples having been marginalized in previous projects to establish protected areas and that there were reports of abuse and human rights violations by eco-guards. The project's strategy to restore community rights and ensure that communities benefit from a stable and sufficient revenue flow carries the implicit promise of overcoming the legacy of past approaches that ignored the human rights dimensions of establishing protected areas.
140. However, the translation of these well-intended goals into practical outcomes has been hampered by the lack of adherence to UNDP standards, notably the failure to jointly with the communities prepare and implement an Indigenous Peoples Plan.
141. Moreover, UNDP has not monitored the activities carried out by WWF, one of its project partners in Messok Dja. Monitoring of WWF activities, as had been recommended by the evaluation report of TRIDOM I and as is required by UNDP due diligence requirements, did not take place. As a result there was no early recognition that TRIDOM II was repeating the patterns of the past in terms of marginalizing and penalizing Indigenous Peoples. The opportunity to halt abuses and revise project implementation early on was missed.

Harm to Communities

142. Any visitor to the region will quickly notice the profound distress suffered by the Baka communities, among them the complainants, who are forced to eke out a living along the two mostly dirt roads that frame the proposed Messok Dja protected area to the east and to the west. Even in a region where deep poverty is endemic among the vast majority of its inhabitants, the destitution of the Baka stands out.
143. In the Messok Dja region, the Baka not only suffer a de facto lack of access to their traditional forest land as the result of the planned establishment of the protected area, they are also forced out of the adjacent areas by major logging concessions surrounding Messok Dja.
144. While there are differences from community to community, the subordination and marginalization of the Baka relative to their Bantu neighbors stands out in every case. The Bakas' housing, clothing and food insecurity are visibly and substantially more precarious than those of the adjacent Bantu communities.
145. The SECU field mission held extensive meetings with both Bantu and Baka communities, but great care was taken to also meet separately with the Baka. This turned out to be indispensable in creating an environment where the Baka could express themselves freely.
146. SECU interviews were not limited to the Baka communities who had submitted the complaints, but also included other Baka communities along the two road axes framing Messok Dja. What emerged is a generalized atmosphere of intimidation, fear and deprivation resulting from actions by the eco-guards.

Testimony from the Baka

Intimidation and Violence

147. Both Bantu and Baka communities SECU met with expressed their fear and hatred of eco-guards, but SECU interviews show that the Baka are more severely affected by acts of violence by the eco-guards. The reasons for this are likely to be multilayered.
148. Numerous Baka referred to the eco-guards treating them as sub-human. This may be a reflection of the deeply ingrained racial prejudices against traditional hunters and gatherers by Bantu society, from which most eco-guards are drawn.
149. Another critical factor is that Baka livelihoods are more dependent on access to forest resources than their sedentary Bantu neighbors. This generates more conflict with the eco-guards as the Baka try to go about their traditional hunting and gathering activities for their subsistence needs in the forest.
150. There are numerous reports of severe beatings of Baka. These beatings occur both when the Baka are in their camps along the road as well as when they are in the forest. The beatings affect men, women and children alike. Other reports refer to eco-guards pointing a gun at one Baka to force him to beat another Baka. Others refer to the eco-guards taking away the machetes of the Baka, then beating them with those machetes.
151. There are reports of Eco-guards forcing Baka women to take off their clothes and be “like naked children.” There was palpable cultural reluctance of women to talk about these incidences except to say that they were shameful “humiliations.”
152. Numerous Baka provided testimony about the burning down of their camps and homes and the constant need of having to rebuild their shelters.
153. (There are reports) Testimonial evidence obtained by SECU referred to Baka men having been taken to prison and of torture and rape inside the prison. The widow of one Baka man spoke about her husband being so ill-treated in the prison of Ouesso that he died shortly after his release. He had been transported to the prison in a WWF-marked vehicle.
154. There are additional accounts of vehicles with the WWF logo having transported members of the Baka communities to the prison in the Sangha region’s main town of Ouesso. For the Baka, even visiting the small provincial town of Sembé is rare and few community members do. Reaching the regional capital of Ouesso, which is just over 100 miles away, is exceptionally hard. Since there also no telephone or other means of communication available, the Baka prisoners are isolated from any type of support from their families.

Lack of access to vital resources & inability to transmit knowledge

155. The SECU investigation finds that the eco-guards do not distinguish between traditional hunting and gathering activities and poaching. This has led to a situation where the Bakas’ customary ways of meeting their subsistence needs have been criminalized. The Baka referred to this as being made to “feel as if we are thieves in our own forests.”
156. The Bakas’ traditional uses of forest resources include the typical Baka women activities of fishing in forest streams and lakes, the collection of wild mangoes, wild yams and the protein-rich coco leaves (*Gnetum africanum*). Baka men find that they can no longer go into the forest to obtain honey, which is collected high up in trees. They fear they are no longer able to trap small animals without running the risk of being severely punished by the eco-guards. All of these traditional foods are essential to the Baka diet and their insufficiency shows in the poor nutritional health of the Baka in their roadside settlements.

157. There were numerous reports of Baka caught in the forest not only being beaten, but also of the food they have been collecting being stolen by the eco-guards to be “eaten in the houses of the Bantus.”
158. The restrictions on the Bakas’ access to the forest also affects their ability to collect traditional medicines. The Baka are renowned in the region for their in-depth knowledge of medicinal plants. In the Baka-Bantu relationships the Baka are traditionally regarded as healers and the medicines brought from the forest were an important item to be traded with the Bantu in exchange for items of clothing and metallic objects.
159. One Baka woman in a community close to the future Messok Dja protected area summed up the situation:
- “We used to have all the medicines we needed from the forest. We knew which plants to use. But this knowledge is now getting lost, the young people are losing this knowledge. Women used to give birth in the forest without any problems, we had no malaria. Now if a Baka is in the forest for a few days, he is called a poacher. This makes it impossible for the Baka to teach their children about the medicinal plants of the forest.”*
160. A foreign source familiar with the health situation of the Baka in the region confirmed to SECU the worsening condition of the Baka without access to traditional medicines. The weakened state of women in particular has severe impacts on childbirth and the health of infants. The source referred to a recent case of a Baka woman dying immediately following childbirth. The surviving newborn in the arms of a toddler sibling was presented to this source who saw that the infant had few chances of survival given the family’s lack of access to food.
161. The restrictions of access to their traditional livelihood activities surely has serious impacts on community health and well-being, indigenous culture and knowledge transmission systems to the next generation.

Lack of support for social infrastructure and alternative livelihoods.

162. Although the TRIDOM II project includes sustainable livelihoods as part of its anti-poaching strategies, no such activities have been implemented in the Messok-Dja region during the 16 months before the project was suspended in March 2019. The Baka have little to no access to schools since even when there is a school in a Bantu village, most cannot afford the school fees, clothing and school material for their children. They have no access to conventional healthcare or basic medicines in their communities.
163. UNDP staff in the region and in the capital confirm that no measures have been taken to date to support Baka livelihoods in the Messok Dja region. They indicate that they place much hope in the future of ecotourism in the region. They referred to plans for wildlife observation zones, where Baka could serve as guides for safaris.
164. UNDP staff referred to future plans for using GEF small-grants to support economic activities in the region. While this might be helpful, utmost care would have to be taken to avoid elite capture of such grants. Furthermore, it is not likely that such small grants would be able to make much of a difference without adequately addressing the broader questions of indigenous rights to traditional resources and indigenous participation in the management of Messok Dja under some type of protection status.

Allegations of Baka Involvement in Criminal Poaching

165. The Prodoc notes that given the precarious living conditions and the absence of alternative options, criminal networks may exploit traditional indigenous hunters given their skills in tracking wildlife. It adds that those so engaged receive a meagre price for the animals they help hunt.
166. SECU heard reports that criminal networks provide guns to Bantu chiefs who in turn ask the Baka, of whom they consider themselves to be the masters, to assist with the illegal hunting.
167. The SECU mission was unable to confirm these allegations. The precarious situation of the Baka combined with their wildlife tracking skills makes such participation in criminal poaching plausible. However, as the Prodoc noted, any such incidents must be viewed as acts of desperation given the great pressure on the Baka and that the Baka do not reap real benefits from any such activity.
168. The traditional Baka hunt is carried out with traps and spears. In response to SECU questions on elephant hunting, the Baka said that it was their grandfathers' tradition to hunt elephants for ritual purposes when young boys were initiated into manhood. The Baka say that this practice has been largely abandoned and that the evolution of Baka culture has replaced this initiation ritual with other ceremonial rites.
169. While SECU cannot rule out a complete abandonment of traditional ritual practices, such practices cannot be compared with the poaching done with automatic weapons carried out by criminal networks for the profitable international ivory market.
170. The Baka expressed their incredulity at the idea that a park could be protected when it is empty of people. In their view, people who know the forest are central to keeping out the poachers. They also expressed their commitment to protecting elephants and other wildlife as part of their engagement in a future arrangement to protect Messok Dja.

Growing Pressure on the Forest surrounding Messok Dja.

171. The local Bantu (Bakwele) communities also refer to conflict with eco-guards, but they report that the destruction of their fields and crops by elephants is causing them great hardship. They view the establishment of Messok Dja as an indication of outsiders granting special status to wildlife, while ignoring the needs of people. Some Baka also referred to wildlife/human conflict but to a lesser degree since they do not rely on sedentary farming as much as their neighbors.
172. The most likely explanation for growing conflict between elephants and farmers is the growing pressure on elephant populations stemming from habitat loss caused by the two main logging concessions in Messok Dja. The companies carrying out large-scale industrial logging operations are the Chinese company SEFYD and the Lebanese company SIFCO. A technically detailed independent report financed by the European Union documents how both companies are engaged in illegal logging, the falsifying of records and ignoring Congolese Forest Law.³¹

³¹ Independent Report financed by the European Commission, Rapport 001/CAGDF/CV4C, "Observation Forestière dans le Bassin do Congo – APV-FLEGT (Accord Partenariat Volontaire – Forest Law Enforcement, Governance and Trade), February 26, 2018.

173. The findings of the EU-financed report mirror an investigation by the Environmental Investigation Agency about the staggering extent of bribery, tax evasion and forest crimes in the forest sector of the Republic of Congo more broadly.³²
174. SECU's investigation did not include a review of the region's timber concessions, but finds it necessary to refer to them given the pressure they put on the region's forests. The evaluation report of TRIDOM I had called on TRIDOM II, its successor project, to adopt a multisectoral approach to conservation, which would take into account the multiple pressures on the region. The Prodoc of TRIDOM II addresses these issues but does not consider measures on how to manage them.

Corroboration of human rights abuses by eco-guards throughout the region

175. SECU's findings of severe abuses by eco-guards in the Messok Dja area are not unique. Similar abuses of Indigenous Peoples in the course of the establishment of protected areas in the Congo Basin have recently been the subject of reports in the international media and an earlier report by the NGO Rainforest Foundation UK.³³ The media reports in turn are leading to parliamentary investigations in Europe and a call for a review of WWF funding by U.S. lawmakers.
176. In addition, the Forest Stewardship Council (FSC), a leading timber certification agency, also found human rights abuses of eco-guards towards Baka in the Sangha region. In its review of the certification of the logging concession Industrie Forestière de Ouessou (IFO), a UNDP co-financing partner in the TRIDOM II project, it issued a notice of non-compliance with FSC rules related to the ill-treatment and abuse of Indigenous Peoples (please see below in the section on "Partnerships with the Private Sector" examining UNDP's decision to partner with private entities).

WWF Reaction to Reported Abuses Committed by Eco-Guards

177. In interviews conducted by SECU with WWF offices in the region and in the capital, WWF staff members acknowledged that there are reports of abuse against Baka people by its eco-guards. Such occurrences were presented as isolated incidents due to the existence of a "few bad apples" among the eco-guards in what was otherwise a successful operation. A WWF staff member familiar with the problems explained that these incidences were occurring because of the psychological ramifications of "putting someone in uniform and giving him a gun," which for some men represents a license to commit abuse. Improved training for eco-guards and sanctioning of inappropriate behavior were cited as the way to address these problems.
178. In November 2018 WWF-ETIC drafted a Code of Conduct for its personnel, which includes the eco-guards and also is meant to apply to the police and military forces which work jointly with the eco-guards. Respect for human rights and in particular for the traditional rights of Indigenous Peoples is included in the draft. As of June 2019, the draft Code of Conduct had not yet been signed by the relevant government agencies and had not come into force.³⁴

³² Environmental Investigation Agency, "Toxic Trade – Forest Crime in Gabon and the Republic of Congo and the Contamination of the US Market," Washington, D.C., 2019.

³³ Pyhaelae A, Orozco A.O, and Counsell S., Protected Areas in the Congo Basin: Failing Both People and Biodiversity, Rainforest Foundation UK, London, April 2016

³⁴ WWF-ETIC, Charte de Bonne Conduite du Projet d'Appui à la Conservation de la Biodiversité dans l'Espace TRIDOM Interzone Congo (ETIC), undated. On file at SECU.

3. Policy on Due Diligence and Partnerships with the Private Sector

179. The Prodoc refers to the establishment of palm oil plantations and commercial logging operations as major threats to the region's biodiversity and wildlife.
180. It states that the land-use changes brought about by palm oil plantations threaten to turn large tracts of land into hostile areas for medium and large-sized mammals either because they cannot survive in oil palm monocultures or because the presence of animals will not be tolerated by plantation managers.
181. Concerning logging, the Prodoc states that timber production is not only affecting the region's forest cover, but is also associated with high levels of poaching as formerly inaccessible forest tracts are being opened up by the logging roads crisscrossing the concession areas.
182. TRIDOM II lists two companies in these high risk sectors as key stakeholders in the zoning of protected areas, the development of Integrated Management Plans and the involvement of local and indigenous communities.
183. These are Eco-Oil Energy (palm oil) and Industrie Forestière de Ouessou (logging) which are among the partners providing parallel co-financing for the project.
184. According to UNDP's Social and Environmental Standards, UNDP is not required to ensure compliance with the SES of activities that are not funded through UNDP accounts. However, UNDP is required to review the entire Programme or Project for consistency with SES requirements. SECU finds no evidence that such a review has taken place.
185. Furthermore, the Prodoc indicates no awareness of UNDP's Policy on Due Diligence and Partnerships with the Private Sector (2013). This Policy includes palm oil and logging on its list of high risk sectors. The due diligence measures include a pre-screening to assess whether a partner is involved in a high risk sector. If this is the case, the Policy calls for an extra careful approach by following the full risk assessment tool to establish the existence of significant controversies.
186. The due diligence assessment criteria of the Policy that are particularly relevant for palm oil and logging in northern Congo include respecting the rights of Indigenous Peoples, impacts on livelihoods, impacts on ecosystems and landscapes and corruption.
187. Basic internet research on the two companies providing parallel financing for the project raises questions that confirm the importance of carrying out the due diligence assessment required by UNDP's Policy.
188. Eco-Oil Energy is a Malaysian company which acquired the territories of two previously existing companies (Sangha Palm and Régie Nationale de Palméraies du Congo) in 2013. The concession agreement with the Congolese State covered an initial area of 50,000 hectares but is expected to vastly expand. Most of its production is meant for exporting biofuel.³⁵
189. The evaluation report of TRIDOM I³⁶, carried out on behalf of UNDP, GEF, UNOPS and the TRIDOM Project, recommends that donors call on the Government to limit landgrabs by

³⁵ For additional information, see Eco-Oil Energie SA's website, www.ecoenergy.com.

³⁶ Ngono, G, Rapport de l'Évaluation Finale du Projet "Conservation de la Biodiversité Transfrontalière dans l'Interzone Cameroun, Congo et Gabon," PNUD, GEF, UNOPS, Project TRIDOM, October 2014.

influential persons or companies, which seek to occupy large areas of forest land for agribusiness operations. While not mentioning Eco-Oil Energy by name, it clearly refers to companies of this nature.

190. A 2014 study on palm oil development in Central Africa³⁷ notes that land attributions for industrial palm oil plantations in the Republic of Congo have targeted forested areas in the Northern part of the country although the Government would have been better advised to establish plantations in other parts of the country in order to promote coherence with its engagement toward a green economy.
191. The same study calls attention to the fact that the definition of available land in the Congo Basin region is most often based on assessments which do not consider existing land-use and traditional rules governing access to land. Given overlapping land claims, the study calls for the full agreement of villagers to the precise limits of plantations.
192. Industrie Forestière de Ouessou (IFO) is an affiliate of the German-Swiss group Danzer, one of the world's largest timber conglomerates. IFO's concession in Northern Congo covers an area of 1.16 million hectares, which corresponds to nearly twice the size of the state of Delaware.
193. The IFO concession has been certified by the Forest Stewardship Council (FSC), an international certification organization. According to FSC principles, a forest concession must be well managed from an environmental, economic and social perspective. FSC-labeled timber products obtain higher prices from western consumers.
194. However, NGO and academic critics note that FSC is dominated by industry representatives, has not had an impact on reducing deforestation and has been found to cover up illegal deforestation.³⁸
195. However, independent of any such controversies, FSC's latest certification report on IFO includes a finding of non-compliance concerning the actions of eco-guards against local villages:

*"The eco-guards are not without fault since they invade villages and houses without following established protocol, to seize meat and basic hunting weapons, and sometimes ask the villagers to pay unapproved fines. The auditors received testimonials on this matter from persons directly affected in three of the five villages visited, as well as from local NGOs and IFO workers. Despite the training given by IFO, the eco-guards do not always respect the protocols established for conducting inspections in the villages. This represents nonconformity."*³⁹

196. The abuses carried out by the eco-guards, which led to FSC's non-compliance finding as well as a TV documentary on the impoverishment of Pygmies on the IFO concession as a result of the severe restrictions on their traditional livelihood activities (European TV

³⁷ Feintrenne, L. et al., "Modelling as a Tool for Spatial Planning of Commodity Production: The Example of Certified Oil Palm Plantations in Central Africa," 2014 World Bank Conference on Land and Poverty, Washington, D.C., March 24, 2014.

³⁸ Conniff, R., "Greenwashed Timber – How Sustainable Forest Certification has Failed," Yale Environment 360, February 20, 2018.

³⁹ "Audit Report: Annual Verification of 2017 for Forestry Management Of Ouessou Forest Industry," The Rainforest Alliance, April 2018.

Channel Arte)⁴⁰, mirror the complaints received by SECU concerning the establishment of the Messok Dja protected area.

RECOMMENDATIONS

Recommendation 1

197. In addition to addressing the findings of this report through, inter alia, appropriate in-kind or service-based support determined in consultation with the Baka and project partners as part of UNDP's programmatic work, UNDP Congo must take appropriate and effective measures to prevent future acts of violence against Baka communities.

Recommendation 2

198. UNDP Congo should create a detailed Stakeholder Engagement Plan that meets the requirements of SES. This has to be followed by the preparation of an Indigenous Peoples Plan with the full participation of the communities as an integral part of the project. It has to clearly spell out the objectives, activities, budget, institutional responsibilities and monitoring indicators. Given the region's extreme power imbalances, special attention must be paid to prevent elite capture of project benefits targeted at indigenous and adjacent communities.

199. These initiatives have to be accompanied by the establishment of fair, effective and transparent grievance mechanisms accessible to communities to report to UNDP any problems that may occur. The establishment of project-level grievance mechanism is an integral part of UNDP's stakeholder engagement requirements.

Recommendation 3

200. UNDP Congo should conduct a due diligence assessment on the project's private sector partners and commit to documenting the direct and indirect impacts of extractive activities on the biodiversity in the region.

A new paradigm for the establishment of Protected Areas in the Congo Basin

201. In the Messok Dja area there is a significant convergence of the interests in protecting a region of significant biodiversity and promoting the rights of Indigenous Peoples. There is a commonality of objectives of the international community in protecting endangered wildlife and the Bakas' need to protect their traditional land, territories and resources from external threats. It is a serious detriment to both that these synergies have not been put to work by TRIDOM II. Although participatory approaches and the need to involve indigenous and local communities are often cited in project documents, the prevailing conservation model is still dominated by the ideological view that protected areas have to be empty of people. However, evidence from other regions shows that empowering Indigenous Peoples to manage the biodiversity in their own territories results in more sustainable and cost-effective ways to protect biodiversity. Satellite images of the Brazilian Amazon reveal that indigenous territories have formed an effective barrier to

⁴⁰ "Arte Documentary: IFO Has Deprived Indigenous People on Their Livelihoods in the Republic of Congo," FSC Watch, October 2018.

deforestation, while global studies indicate that forests managed by local communities suffer lower rates of deforestation than strictly protected forests.⁴¹

202. The establishment of national parks in the Congo Basin has a history of being focused on conservation while ignoring the human rights of the indigenous communities living in or on the periphery of protected areas. This approach considers Indigenous Peoples a threat and fails to take into account the role that Indigenous Peoples have historically played in conserving biodiversity given the inextricable links between indigenous identities and culture and the land they have traditionally used. The violent abuses and economic impoverishment caused by this approach have recently received extensive coverage by international media and brought the problem to the attention of policy-makers.
203. While the challenges of operating in the Republic of Congo with its governance conditions cannot be underestimated, the country adopted a landmark law in February 2011 on the Promotion and Protection of the Rights of Indigenous Populations (Law N° 5-2011). This law is to a large extent consistent with the United Nations Declaration on the Rights of Indigenous Peoples.
204. While this law dates from 2011, its first implementation decrees were adopted in July 2019. This welcome development should provide an added lever in finally moving forward with implementing policies based on the recognition of indigenous rights.
205. The TRIDOM II project provides a critical opportunity to serve as a catalyst for implementing the Law on Promotion and Protection of the Rights of Indigenous Populations of 2011. Doing so would create a valuable precedent for a new model for conservation in the Congo Basin as a whole.
206. Responsible UNDP staff in the Republic of Congo are now cognizant of the problems and willing to address them. UNDP's project partner WWF has also expressed its intention to adopt a different approach. Coinciding with the SECU mission to the region, it has launched an effort for a process intended to ensure that the rights of indigenous and local communities are taken into account. However, the translation of good intentions into tangible outcomes that are consistent with UNDP's goals, policies and standards has to be subject to careful monitoring.
207. As mentioned above, members of the Baka communities in the Messok Dja area told SECU that they found it inconceivable that parks emptied of people could be protected. This point of view is supported by international research showing a strong correlation between indigenous presence and the protection of natural ecosystems.⁴²
208. The U.N. Convention on Biodiversity Conservation (1992), the IUCN World Parks Congress (2003) and the United Nations Declaration on the Rights of Indigenous Peoples (2007) are among the international documents that highlight the recognition of the rights of Indigenous Peoples with regard to their land, territories and resources that fall within protected areas, the need to obtain their free, prior, informed consent for any decisions that affect these areas and their crucial role in biodiversity conservation. UNDP's Social and Environmental Standards, especially Standard 6 on Indigenous Peoples, enshrine

⁴¹ Porter-Bolland, L., Ellis, E.A., Guariguata, M.R., Ruiz-Mallén, I., Negrete-Yankelevich, S. and Reyes-Garcia, V., "Community-managed forests and forest-protected areas: An assessment of their conservation effectiveness across the tropics," *N. Forest Ecology and Management* 268, 2012.

⁴² Sobrevila, C., "The Role of Indigenous Peoples in Biodiversity Conservation," The World Bank, May 2008.

these very principles and require their application in project development and implementation.

209. The establishment of Messok Dja is an ongoing process and presents a unique opportunity to break with the legacy of the past establishment of protected areas in the Congo Basin. Whether it should be a protected area, a community reserve or an area with some other type of special status should be determined in line with the preferences expressed by the Baka communities. Empowering and supporting indigenous community-driven conservation of wildlife and providing the social infrastructure (health and education) the communities want, would greatly enhance the well-being of the Baka, the preservation of their ancestral knowledge systems while also representing the most promising approach to protect biodiversity.

ANNEX 1. TECHNICAL NOTE. RELEVANT UNDP SOCIAL AND ENVIRONMENTAL COMMITMENTS AND POLICIES

UNDP SES

210. UNDP's Social and Environmental Standards (SES) describe actions UNDP staff must take, in the context of projects and programmes funded through UNDP accounts, to avoid and mitigate social and environmental harms. Most fundamentally, the SES require UNDP to ensure that potential social and environmental risks, impacts, and opportunities are identified and addressed in all UNDP projects and programmes.
211. UNDP's standard Legal Agreement – which UNDP has required staff to use since March 2016 – indicates that UNDP's Programme and Operations Policies and Procedures (POPP) require UNDP Country Offices to apply the SES and ensure that Implementing Partners are conducting activities in a manner consistent with the SES. It states, "Consistent with UNDP's Programme and Operations Policies and Procedures, social and environmental sustainability will be enhanced through application of the UNDP Social and Environmental Standards (<http://www.undp.org/ses>) and related Accountability Mechanism (<http://www.undp.org/secu-srm>).... The Implementing Partner shall: (a) conduct project and programme-related activities in a manner consistent with the UNDP Social and Environmental Standards, (b) implement any management or mitigation plan prepared for the project or programme to comply with such standards, and (c) engage in a constructive and timely manner to address any concerns and complaints raised through the Accountability Mechanism."⁴³
212. SES provisions most relevant to the TRIDOM II project include the following: (1) a requirement to apply UNDP's Social and Environmental Screening Procedure (SESP) to identify social and environment-related risks and pursue additional assessments and measures as necessary to respond to these risks; (2) a requirement to meaningfully engage with local communities, including through implementation of a Stakeholder Engagement Plan; (3) SES Standard 6 requirements related to Indigenous Peoples; (4) SES Standard 5 Related to Displacement and Resettlement; (5) SES Standard 4 related to Cultural Heritage; (6) Overarching Policy and Principles requiring UNDP to avoid

⁴³ UNDP, "Project Document Template," March 1 2016.

Regarding SECU, the Legal Agreement additionally notes, "UNDP will seek to ensure that communities and other project stakeholders are informed of and have access to the Accountability Mechanism. 6. All signatories to the Project Document shall cooperate in good faith with any exercise to evaluate any programme or project-related commitments or compliance with the UNDP Social and Environmental Standards. This includes providing access to project sites, relevant personnel, information, and documentation."

supporting activities that do not comply with National Law and obligations of International Law (whichever is the higher standard), and to further the realization of Human Rights; and (7) a requirement to ensure that mechanisms exist to receive and respond to grievances from potentially-impacted communities.

Social and Environmental Screening Procedure - Overview

213. The SES require UNDP staff to screen projects using UNDP’s Social and Environmental Screening Procedure (SESP). The purpose for this is described in the SES as follows, “All proposed Projects will be screened to identify potential application of requirements of the SES Overarching Policy and Principles (i.e. human rights, gender equality, environmental sustainability) and relevant Project-level Standards. UNDP utilizes its SESP to identify potential social and environmental risks and opportunities associated with the proposed Project.”⁴⁴
214. The screening considers how activities outlined in the Prodoc might directly and indirectly impact the environment or communities in the “Project’s area of influence” – defined to include, “areas and communities potentially affected by cumulative impacts from the Project or from other relevant past, present and reasonably foreseeable developments in the geographic area ... and (iv) areas and communities potentially affected by induced impacts from unplanned but predictable developments or activities caused by the Project, which may occur later or at a different location (e.g. facilitation of settlements, illegal logging, agricultural activities by new roads in intact forest areas).”⁴⁵
215. The SESP describes when and how the screening must be performed. More particularly, it describes that, as a “first step”, a range of existing social and environmental-related information should be used to perform a “pre-screening” that informs project design, “Review available information relevant to the Project’s social and environmental aspects, such as: UNDAF, CPAP; planning documents including existing gender, human rights, social, environmental studies; applicable legal and regulatory framework; input from stakeholder engagement activities; relevant reports of UN or other agencies, such as Universal Periodic Reviews.”⁴⁶
216. As detailed more in paragraphs below, UNDP Country Offices must provide local communities with opportunities to express their views “at all points” in the decision-making process on matters that affect them, including “social and environmental risks and impacts... (and) proposed mitigation measures.” When the project potentially impacts Indigenous Peoples, the UNDP Country Office must identify Indigenous Peoples presence in the project area, and engage Indigenous Peoples’ representatives in this pre-screening and project design process.⁴⁷ As noted in the Guidance Note for Standard 6, “An early mapping of the affected indigenous peoples to be consulted should begin in the design phase. It is essential that such processes be developed in a participatory manner with the indigenous peoples concerned.”⁴⁸

⁴⁴ UNDP, “Social and Environmental Standards,” page 47, January 2015.

⁴⁵ Id. P. 49.

⁴⁶ UNDP, “Social and Environmental Screening Procedure,” page 11, March 2016.

⁴⁷ See also UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” January 2017.

⁴⁸ Id. Page 12. SECU notes the following about UNDP Guidance documents: UNDP adopted the Guidance for Standard 6 in January 2017 and for Stakeholder Engagement in October 2017. The Prodoc was submitted to the GEF for CEO endorsement in December 2016, before the UNDP Guidance for Standard 6 and Stakeholder Engagement were issued. Based on comments received from the GEF Secretariat, the ProDoc was resubmitted in March and May 2017 and received final CEO endorsement in June 2017. The Guidance is not prescriptive

217. Risks identified during the screening are then used to “categorize” the significance of the risk and to help UNDP determine if additional social and environmental assessments are necessary. The SES describes categorization as follows, “UNDP’s SESP applies a Project-level categorization system to reflect the significance of potential social and environmental risks and impacts and to determine the appropriate type and level of social and environmental assessment. Each proposed Project is scrutinized as to its type, location, scale, sensitivity and the magnitude of its potential social and environmental impacts.... Based on the screening, UNDP categorizes Projects according to the degree of potential social and environmental risks and impacts. In some cases, applicability of specific requirements will need to be determined through additional scoping, assessment, or management review. The screening process results in one of the following three categories for the proposed Project: low...moderate...high....Projects that undergo substantive revision after the initial screening and categorization will be re-screened and potentially re-categorized.”⁴⁹
218. According to the SESP’s “List of High Risk Projects,” when projects may adversely impact the rights, lands, and/or resources of Indigenous Peoples’ they “should generally be categorized as High Risk.” The Guidance Note for Standard 6 describes risks that conservation-related projects pose for Indigenous Peoples: “While some might see a Project activity – such as restricted access to resources for conservation purposes – as having little or no adverse impact on indigenous rights, lands or resources, from an indigenous perspective, it may be a deprivation of traditional medicines and materials or an interference with spiritual practices related to sacred flora or fauna. Such restrictions might represent a permanent loss of the territorial base from which indigenous people sustain their unity and distinct governance, and manifest, preserve and transmit their cultural norms, values and practices.”⁵⁰
219. The Guidance Note for Standard 6 includes indicative examples of low, moderate, and high risk projects, including an example specific to conservation-related activities that are defined “in partnership” with indigenous communities: “A forest conservation project conducted in conjunction with affected local indigenous communities. The risks are likely to be at most moderate if the project’s parameters and activities are defined in partnership with the affected indigenous community.”⁵¹
220. UNDP Country Office staff must use SESP screening questions - detailed in the next section – to determine the final risk category.
221. Upon completion of the screening process, the following information and measures should exist: (1) A list of SES standards triggered by project activities; (2) An understanding of

and does not affect compliance with the SES, but it is important for building the capacity of staff to implement the SES Policy.

⁴⁹ UNDP, “Social and Environmental Screening Procedure,” March 2016.

⁵⁰ The Guidance Note additionally states on this point, “Standard 6 thus requires that ‘UNDP Projects will recognize that indigenous peoples have collective rights to own, use, and develop and control the lands, territories and resources they have traditionally owned, occupied, or otherwise used or acquired, including lands and territories for which they do not yet possess title’ (see Requirement 6). In addressing this requirement, it is important to keep in mind at all times that: i. a profound relationship exists between indigenous peoples and their lands, territories and resources which has various social, cultural, spiritual, economic and political dimensions and responsibilities; ii. the collective dimension of this relationship is significant; and iii. the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.”

⁵¹ UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” page 18, January 2017.

the significance/category of risk posed by project activities, e.g., low, moderate, or high risk); (3) a description of the approach the UNDP Country Office will take to any additional social and environmental assessments; and (4) a Stakeholder Engagement Plan (or at least a draft plan, as reflected below) with detail that responds to the level of risk (including information that help shapes required FPIC processes in a manner consistent with SES standards).

Applying the Social and Environmental Screening Procedure – Screening Questions

222. The Social and Environmental Screening Procedure – SESP - includes two parts – the first, Part A., must be applied by UNDP staff to identify opportunities to integrate “overarching principles”, e.g. human rights and gender equality, into the project to strengthen social and environmental sustainability, and the second, Part B., must be applied to identify potential social and environmental risks and impacts associated with all activities outlined in Project documentation, and measures to respond to these risks.
223. To respond to the first question for Part B., “What are the Potential Social and Environmental Risks?” UNDP staff are directed to use UNDP’s, “Social and Environmental Risk Assessment Screening Checklist.”
224. Checklist questions most relevant to the TRIDOM II project include questions related to Human Rights (Principle 1.); Cultural Heritage (Standard 4.); Displacement and Resettlement (Standard 5); and Indigenous Peoples (Standard 6).
225. SESP screening questions related to Human Rights, and pertinent in the context of the TRIDOM II project, include the following: “1. Could the Project lead to adverse impacts on enjoyment of the human rights (civil, political, economic, social or cultural) of the affected population and particularly of marginalized groups? 2. Is there a likelihood that the Project would have inequitable or discriminatory adverse impacts on affected populations, particularly people living in poverty or marginalized or excluded individuals or groups? 3. Could the Project potentially restrict availability, quality of and access to resources or basic services, in particular to marginalized individuals or groups? 4. Is there a likelihood that the Project would exclude any potentially affected stakeholders, in particular marginalized groups, from fully participating in decisions that may affect them? 5. Is there a risk that duty-bearers do not have the capacity to meet their obligations in the Project? 6. Is there a risk that rights-holders do not have the capacity to claim their rights? 7. Have local communities or individuals raised human rights concerns regarding the Project during the stakeholder engagement process? 8. Is there a risk that the Project would exacerbate conflicts among and/or the risk of violence to project-affected communities and individuals?”⁵²
226. SESP screening questions related to Cultural Heritage, and pertinent in the context of the TRIDOM II project, include the following: “4.1 Will the proposed Project result in interventions that would potentially adversely impact sites, structures, or objects with historical, cultural, artistic, traditional or religious values or intangible forms of culture (e.g. knowledge, innovations, practices)? (Note: Projects intended to protect and conserve Cultural Heritage may also have inadvertent adverse impacts).”
227. SESP screening questions related to Displacement and Resettlement, and pertinent in the context of the TRIDOM II project, include the following: “5.2 Would the Project possibly result in economic displacement (e.g. loss of assets or access to resources due to land acquisition or access restrictions – even in the absence of physical relocation)? 5.4 Would

⁵² UNDP, “Social and Environmental Screening Procedure,” page 31, March 2016.

the proposed Project possibly affect land tenure arrangements and/or community based property rights/customary rights to land, territories and/or resources?”⁵³

228. SESP screening questions related to Indigenous Peoples, and pertinent in the context of the TRIDOM II project, include the following: “6.1 Are indigenous peoples present in the Project area (including Project area of influence)? 6.2 Is it likely that the Project or portions of the Project will be located on lands and territories claimed by indigenous peoples? 6.3 Would the proposed Project potentially affect the human rights, lands, natural resources, territories, and traditional livelihoods of indigenous peoples (regardless of whether indigenous peoples possess the legal titles to such areas, whether the Project is located within or outside of the lands and territories inhabited by the affected peoples, or whether the indigenous peoples are recognized as indigenous peoples by the country in question)? 6.4 Has there been an absence of culturally appropriate consultations carried out with the objective of achieving FPIC on matters that may affect the rights and interests, lands, resources, territories and traditional livelihoods of the indigenous peoples concerned? ... 6.6 Is there a potential for forced eviction or the whole or partial physical or economic displacement of indigenous peoples, including through access restrictions to lands, territories, and resources? 6.7 Would the Project adversely affect the development priorities of indigenous peoples as defined by them? 6.8 Would the Project potentially affect the traditional livelihoods, physical and cultural survival of indigenous peoples? 6.9 Would the Project potentially affect the Cultural Heritage of indigenous peoples, including through the commercialization or use of their traditional knowledge and practices?”⁵⁴
229. Significantly, responses to these questions must consider risks as they exist prior to mitigation or management measures. As noted in the SESP, “risks should be identified and quantified as if no mitigation or management measures were to be put in place’ because ‘It is necessary to form a clear picture of potential inherent risks in the event that mitigation measures are not implemented or fail.”⁵⁵
230. As noted above, once the checklist questions are answered, and potential social and environmental risks are identified, the SESP requires staff to “categorize” risks based on the potential severity and likelihood of risk.
231. Note that the SESP specifies that a “yes” answer in response to question 6.3. – would the project potentially impact rights, natural resources, lands, livelihoods, etc. of Indigenous Peoples - means “the potential risk impacts are considered potentially severe and/or critical and the Project would be categorized as either Moderate or High Risk.”⁵⁶

Approach to Environmental Assessment When Indigenous Peoples Are Potentially Impacted

⁵³ Id. P. 33.

⁵⁴ Id. P. 34.

⁵⁵ UNDP, “Social and Environmental Screening Procedure,” page 7, March 2016.

See the following information from page 7, “Question 2 of Social and Environmental Standards Procedure – What are the potential social and environmental risks? 33. Project activities are screened for their inherent social and environmental risks regardless of planned mitigation and management measures. It is necessary to form a clear picture of potential inherent risks in the event that mitigation measures are not implemented or fail. This means that risks should be identified and quantified as if no mitigation or management measures were to be put in place.”

⁵⁶ As noted in Annex 2 of the Social and Environmental Screening Procedure, UNDP’s Indicative List similarly reflects that for projects that involve Indigenous Peoples and with “yes” answers to screening questions related to Indigenous Peoples, UNDP is required to perform additional assessments/reviews of potential impacts to these communities, and to take measures to avoid and mitigate such impacts.

232. As noted above, after the UNDP Country Office applies the SESP and identifies risks and the significance of risk, e.g., category of risk, it must determine the scope of any required social and environmental assessments.
233. While low risk projects require no additional assessment, moderate and high-risk projects require additional social and environmental assessment and management measures to ensure compliance with the SES.⁵⁷
234. Standard 6, Indigenous Peoples, specifies that “All [emphasis added] Projects that may impact the rights, lands, resources and territories of indigenous peoples require prior review and/or assessment of potential impacts and benefits.” Additionally, ‘Projects with potentially significant adverse impacts require a full social and environmental assessment conducted by an independent and capable entity.’⁵⁸
235. The SESP specifies that such assessments should be “conducted as part of Project preparation.” The Guidance Note for Standard 6, Indigenous Peoples, notes the same for projects involving Indigenous Peoples, “Timing of assessments: Every effort should be undertaken to ensure that the assessment is conducted and shared with potentially affected indigenous peoples and other stakeholders prior to Project approval.”
236. The SESP and the Guidance Note on Social and Environmental Assessment, also recognize, however, that in certain circumstances completion of a social and environmental assessment (and the scoping process) may need to be financed through the Project budget (hence, conducted during Project implementation). “In such cases, the Project Document needs to incorporate an initial management plan and budget to conduct appropriate assessment during project implementation.”
237. Regardless of when the assessment occurs, potentially impacted Indigenous Peoples must be involved in the assessment process, “Reviews and assessments will be conducted transparently and with the full, effective and meaningful participation of the indigenous peoples concerned.”⁵⁹
238. Assessments must accomplish the following (detailed more in the Guidance Note on indigenous Peoples)⁶⁰: (1) Examine the short-and long-term, direct and indirect, and positive and negative impacts⁶¹; (2) Analyze gender dimensions and impacts on marginalized groups; (3) Examine ownership and usage rights to lands, territories,

⁵⁷ UNDP, “Social and Environmental Screening Procedure,” page 20, March 2016.

Note also that Strategic Environmental and Social Assessment (SESA) and/or Environmental and Social Impact Assessments (ESIA) are required for High Risk Projects, and may also be utilized to address potential impacts of Moderate Risk Projects.

⁵⁸ UNDP, “Social and Environmental Standards,” page 39, January 2015.

⁵⁹ Id.

⁶⁰ UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” page 23, January 2017.

⁶¹ Id. P. 21. The full paragraph is ‘Examine the short-and long-term, direct and indirect, and positive and negative impacts of the Project on the social, cultural and economic status and differential impacts of the project on their livelihood systems, culture and socioeconomic status of affected indigenous peoples (Requirement 10). The assessment should include confirmation and description of the presence (via both occupation and use) of indigenous peoples in areas that may be affected by the Project’s activities, including baseline socioeconomic profile of the IP groups in the project area (Requirement 5). In addition, the assessment needs to summarize the participatory processes with affected indigenous groups on the conduct of the assessment, including, if already initiated, a summary of FPIC processes and documented outcomes (Requirement 9).’

resources.⁶² (4) Analyze potential impacts on Cultural Heritage; and (5) Analyze potential relocation and displacement risks and impacts.

239. The SESP also addresses situations in which UNDP is not taking the lead on assessments, “Where UNDP will not take the lead on additional social and environmental assessment that may be required (see SESP para. 45), UNDP ensures that support is provided to partners through Project implementation to ensure adequate assessment and management plans are in place that are consistent with UNDP’s SES.”⁶³

Stakeholder Engagement

240. SES stakeholder engagement provisions require that UNDP Country Offices identify and consult with potentially-impacted local communities, with particular attention to vulnerable and marginalized communities, “Stakeholder analysis and engagement will (ensure) that potentially affected vulnerable and marginalized groups are identified and provided opportunities to participate. Measures will be undertaken to ensure that effective stakeholder engagement occurs where conditions for inclusive participation are unfavourable.”⁶⁴
241. The purpose, it notes, is to build a constructive relationship with these communities, and to avoid and mitigate potential risks in a timely manner, “Meaningful, effective and informed stakeholder engagement and participation will be undertaken that will seek to build and maintain over time a constructive relationship with stakeholders, with the purpose of avoiding or mitigating any potential risks in a timely manner.”⁶⁵
242. UNDP Country Office staff must provide local communities with opportunities to express their views “at all points” in the decision-making process on matters that affect them.⁶⁶ It lists examples of topics stakeholders “will be able to express their views on: Programme and/or Project goals and strategies; social and environmental risks and impacts; proposed mitigation measures; sharing of development benefits and opportunities; and implementation issues.”⁶⁷
243. The approach the UNDP Country Office will use to engage stakeholders this way must be detailed in a “Stakeholder Engagement Plan.”
244. For projects affecting Indigenous Peoples, the Guidance Note for Standard 6 further elaborates, “Mechanisms and processes for Indigenous Peoples to be involved throughout project development and implementation are to be articulated in a Stakeholder

⁶² Id. The full paragraph, ‘Where Project activities may affect indigenous peoples’ lands, territories and resources, the social and environmental assessment will need to include a targeted analysis of the status of ownership and usage rights of the affected lands, territories and resources in order to analyze the Project’s potential impacts on such rights (see Box 8). The analysis would be conducted as part of the scoping exercise for the assessment in order to help focus the assessment on critical issues that require detailed examination.’

⁶³ UNDP, “Social and Environmental Screening Procedure,” page 19, March 2016.

⁶⁴ UNDP, “Social and Environmental Standards,” page 51, January 2015.

⁶⁵ Id. P. 51.

⁶⁶ Id. Para. 14, “Meaningful, effective and informed consultation processes in UNDP Programmes and Projects seek to identify priorities of stakeholders and will provide them with opportunities to express their views at all points in the Programme and/or Project decision-making process on matters that affect them and allows the Programme and/or Project teams to consider and respond to them.”

⁶⁷ Id. P. 52. The SES Stakeholder engagement provisions identify characteristics of “meaningful, effective and informed consultation processes” including, for example, documentation of these processes with a description of measures to address risks and impacts.

Engagement Plan that is incorporated in Project documentation, and specifically in the Indigenous Peoples Plan (described in greater detail in paragraphs below).⁶⁸ Additionally, “An early mapping of the affected indigenous peoples to be consulted should begin in the design phase. It is essential that such processes be developed in a participatory manner with the indigenous peoples concerned.”⁶⁹

245. As described in the Guidance Note for Standard 6, the Stakeholder Engagement plan for Indigenous Peoples must ensure that consultation processes meet the following criteria: “(1) are culturally appropriate and conducted in good faith, i.e., exercised through the communities’ own governance structures and chosen representatives, and in accordance with their own laws and customs for decision-making on such matters; (2) pay attention to disadvantaged individuals/groups; (3) ensure timely access to information that is understandable to communities – ensuring for example, that both full and abbreviated versions of the Indigenous Peoples Plan– in draft and updated forms – are disclosed locally, in a proactive manner; and (4) ensure access to grievance redress mechanisms.”⁷⁰
246. The Guidance Note for Standard 6 further notes in relation to Stakeholder Engagement that the UNDP Country Office must secure the free, prior, informed consent (FPIC) of communities in certain circumstances, “while all consultations with Indigenous Peoples should be carried out in good faith with the objective of achieving agreement, Standard 6 stipulates circumstances in which FPIC must be pursued and secured before proceeding with the specified actions....” Paragraphs describing Standard 6, Indigenous Peoples, describe when and how requirements related to FPIC apply.

Measures in Response to Risks Identified in Screening and Assessment Process

247. As noted above, after screening and any additional assessments of risks are completed, UNDP staff are required to identify measures that must be taken to respond to these risks. For moderate or high risk projects, these measures must be included in an Environmental and Social Management Plan or Framework.⁷¹
248. The Guidance Note for Standard 6 reflects that, for projects that may affect Indigenous Peoples, this Plan/Framework typically is an Indigenous Peoples Plan, i.e., mitigation and management measures are typically contained in an Indigenous Peoples Plan (IPP) – a plan based on the findings of the social and environmental assessment.⁷² “This plan must

⁶⁸ UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” page 59, January 2017.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ UNDP, “Social and Environmental Standards – Policy Delivery,” December 2016.

Excerpt: “Enhance positive impacts and avoid, minimize, and/or mitigate adverse impacts through social and environmental planning and management. Develop an Environmental and Social Management Plan (ESMP) that includes the proposed measures for mitigation, monitoring, institutional capacity development and training (if required), an implementation schedule, and cost estimates. When uncertainty remains regarding specific Project components or exact locations (e.g. for ‘upstream’ activities), develop an Environmental and Social Management Framework (ESMF) in place of an ESMP.”

⁷² UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” page 25, January 2017.

As noted in Section 5, there is a presumption that such Projects are to be considered either Moderate or High Risk projects (depending on the significance of risk rating). High Risk Projects would require an IPP in all cases. The presumption is that Moderate Risk Projects that affect indigenous peoples’ rights, lands, resources or territories would also require development of an IPP.

be developed with the full, effective and meaningful participation of potentially affected indigenous peoples.”⁷³

249. The Guidance Note for Standard 6 describes that “For projects that may require an IPP, every effort should be expended to ensure that the assessment is undertaken prior to project appraisal and a fully developed IPP be presented for PAC consideration. Where the assessment must be funded through the project budget and hence conducted during project implementation, an initial management plan must be presented for PAC consideration.”⁷⁴
250. The Guidance Note for Standard 6 further details, “The initial management plan must address as many aspects of the required IPP as possible ... and needs to clearly state when and how the full IPP will be developed and reflect the findings and recommendations of the social and environmental assessment, consultation and any required FPIC processes once undertaken. A subsequent PAC meeting or the Project Board needs to review the completed IPP and ensure all required measures are incorporated into the Project plan, budget, and monitoring indicators.”
251. The SES Standards detail measures that must be taken and included in the Indigenous Peoples Plan (described in greater detail in paragraphs below).⁷⁵ As noted in paragraph above, for the TRIDOM II project, the most relevant SES Standards include those related to Indigenous Peoples, cultural heritage, and displacement.

SES Standards – Standard 6, Indigenous Peoples

252. Standard 6, Indigenous Peoples, details requirements and measures UNDP must take to avoid and mitigate risks and potential impacts (identified during screening and assessment) to Indigenous Peoples.⁷⁶
253. This Standard applies “to all Projects which may affect the human rights, lands, natural resources, territories, and traditional livelihoods of indigenous peoples regardless of (i) whether the Project is located within or outside of the lands and territories inhabited by the indigenous peoples in question, (ii) whether or not title is possessed by the affected indigenous peoples over the lands and territories in question, or (iii) whether the indigenous peoples are recognized as indigenous peoples by the country in question.”
254. It first requires UNDP to respect the human rights of Indigenous Peoples (this is a requirement for the current SES “Human Rights” principle also)⁷⁷ and a UNDP commitment to the United Nations Declaration on the Rights of Indigenous Peoples

⁷³ Id. P. 25.

⁷⁴ Id.

⁷⁵ UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” January 2017. See Annex 1. Attached to this report as Annex *, Annex * includes a description of what must be included in the IPP.

⁷⁶ SECU notes the following about UNDP Guidance documents: UNDP adopted the Guidance for Standard 6 (Indigenous Peoples) in January 2017 and for Stakeholder Engagement in October 2017. The Prodoc was submitted to the GEF for CEO endorsement in December 2016, before the UNDP Guidance for Standard 6 and Stakeholder Engagement were issued. Based on comments received from the GEF Secretariat, the ProDoc was resubmitted in March and May 2017 and received final CEO endorsement in June 2017. The Guidance is not prescriptive and does not affect compliance with the SES, but it is important for building the capacity of staff to implement the SES Policy.

⁷⁷ It was also a commitment under the former 2014 UNDP POPP. UNDP committed to “respect and promote the human rights principles of transparency, accountability, inclusion, participation, non-discrimination, equality and the rule of law, and standards derived from international human rights law.”

(UNDRIP): 'UNDP will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDP will ensure that social and environmental assessments for Projects involving indigenous peoples include an assessment of their substantive rights, as affirmed in Applicable Law.⁷⁸

255. Several articles of the UNDRIP emphasize the rights of Indigenous Peoples to lands and resources, and with consideration for future generations. Article 25, for example, describes the right of Indigenous Peoples to maintain and strengthen the distinctive spiritual relationship with their traditionally owned or occupied and used lands, territories, and waters and to uphold their responsibilities to future generations. Article 26 also indicates the rights of Indigenous Peoples to lands and resources they possess by reason of traditional occupation or use.
256. The UNDRIP reflects that securing these rights requires the participation of Indigenous Peoples in decision-making when activities or measures would affect their rights. This must occur through representatives chosen by the communities, in accordance with their own procedures.⁷⁹
257. Relatedly, another key requirement in Standard 6 is that FPIC must be ensured in certain circumstances: "FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned. Project activities that may adversely affect the existence, value, use or enjoyment of indigenous lands, resources or territories shall not be conducted unless agreement has been achieved through the FPIC process.... UNDP will respect, protect, conserve and not take or appropriate the cultural, intellectual, religious and spiritual property of indigenous peoples without their free, prior and informed consent."⁸⁰
258. The Guidance Note for Standard 6 further elaborates, "In certain circumstances, free prior informed consent (FPIC) must be sought. These requirements go beyond the general stakeholder engagement requirements of the SES and must be carefully reviewed and implemented." These circumstances include the following:
 - "Rights, lands territories, resources, traditional livelihoods: FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned. Project activities that may adversely affect the

⁷⁸ UNDP, "Social and Environmental Standards," page 37, January 2015.

⁷⁹ United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," September 13, 2007. Art. 18, P. 15. "Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." See also, "Article 19, States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; Article 20, 1. Indigenous Peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities; and Article 23, Indigenous Peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous Peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

⁸⁰ UNDP, "Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples," page 11, January 2017.

existence, value, use or enjoyment of indigenous lands, resources or territories shall not be conducted unless agreement has been achieved through the FPIC process. (Requirement 9)

- Resettlement: No relocation of indigenous peoples will take place without the free, prior and informed consent (FPIC) of the indigenous peoples concerned and only after agreement on just and fair compensation, and where possible, with the option of return (Requirement 8)
- Cultural Heritage: UNDP will respect, protect, conserve and not take or appropriate the cultural, intellectual, religious and spiritual property of indigenous peoples without their free, prior and informed consent (Requirement 13d)."

259. Key parameters for this process are described in the Guidance Note, including the overall aim, "The overall aim of the FPIC process with all stakeholders is to obtain a signed agreement or oral contract witnessed by an independent entity agreed to by both parties, ensuring that the greatest number of community members are involved and represented, including potentially marginalized groups. The community's customs and norms for participation, decision-making and information sharing are to be respected...."⁸¹
260. The SES also refer to guidance documents reflecting that not all FPIC processes will lead to consent, "while the objective of a consultation project is to reach agreement, not all FPIC processes will lead to the consent of and approval by the rights-holders in question. At the core of FPIC is the right of the peoples concerned to choose to engage, negotiate and decide to grant or withhold consent, as well as the acknowledgement that under certain circumstances, it must be accepted that the project will not proceed and/or that engagement must be ceased if the affected peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent..."⁸²
261. The UNDP, in ensuring respect for rights, will consider findings of UN and regional human rights bodies, that might be related. This might include, for example, findings of the African Court on Human and People's Rights relating to Indigenous Peoples.
262. A landmark decision from the African Court, involving the Ogiek community in Kenya, provides a clear analogous example in this regard. First, the Court found that because the Ogiek have certain traits, namely "presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions, self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalization, dispossession, exclusion or

⁸¹ Id. P. 13. Note, also, that SES footnote 74 points to guidance available to UNDP staff to implement FPIC requirements, including the United Nations Development Group Guidelines on Indigenous Peoples (herein UNDG Guidelines) and the UN-REDD Guidelines on Free, Prior and Informed Consent (herein UN-REDD Guidelines). The UNDG Guidelines describe that FPIC implies "an absence of coercion, intimidation or manipulation, that consent has been sought sufficiently in advance of any authorization or commencement of activities, that respect is shown for time requirements of indigenous consultation/consensus processes and that full and understandable information on the likely impact is provided....The participation of indigenous peoples may be through their traditional authorities or a representative organization." The UN-REDD Guidelines provide a similar description of FPIC.

⁸² The UNDG Guidelines and UN-REDD Guidelines refer to the "Report of the UNPFII workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples" as providing elements of a common understanding of FPIC.

discrimination, whether or not these conditions persist.”⁸³, the Ogiek community is considered Indigenous and have a right to use, occupy and enjoy their ancestral lands. Second, the court considered when rights to ancestral lands can be restricted. The Court acknowledged that while they can be restricted when measures in the public interest are necessary and proportional, the evictions of the Ogieks from their territory for the preservation of the natural ecosystem were not legal because the Government failed to provide any evidence that the Ogiek were the main cause for the depletion of the environment in that area. The Court concluded that the eviction of the Ogiek population was not necessary nor proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest and as a result, the Court held that the Government violated the rights to land, as defined by Article 26 of UNDRIP, as well as 14 of the Charter.⁸⁴

263. As noted above, Standard 6 also includes a requirement for an Indigenous Peoples Plan when projects may affect Indigenous Peoples.

264. UNDP’s Guidance Note for Standard 6 lists the following as key components of an IPP:

“(B) Description of the Project: General description of the project, the project area, and components/activities that may lead to impacts on indigenous peoples;

(C) Description of Indigenous Peoples: A description of affected indigenous people(s) and their locations, including: i. a description of the community or communities constituting the affected peoples (e.g. names, ethnicities, dialects, estimated numbers, etc.); ii. a description of the resources, lands and territories to be affected and the affected peoples connections/ relationship with those resources, lands, and territories; and iii. an identification of any vulnerable groups within the affected peoples (e.g. uncontacted and voluntary isolated peoples, women and girls, the disabled and elderly, others);

(D) Summary of Substantive Rights and Legal Framework: A description of the substantive rights of indigenous peoples and the applicable legal framework.

(E) Summary of Social and Environmental Assessment and Mitigation Measures, including i. a summary of the findings and recommendations of the required prior social and environmental impact studies (e.g. limited assessment, ESIA, SESA, as applicable) – specifically those related to indigenous peoples, their rights, lands, resources and territories. This should include the manner in which the affected indigenous peoples participated in such study and their views on the participation mechanisms, the findings and recommendations, and ii. Where potential risks and adverse impacts to indigenous peoples, their lands, resources and territories are identified, the details and associated timelines for the planned measures to avoid, minimize, mitigate, or compensate for these adverse effects.”⁸⁵

265. Annex 1 to the Guidance Note for Standard 6, provides an “indicative outline of the substantive aspects’ that are to be addressed in the IPP, including: (1) Ensuring culturally

⁸³ African Court on Human and People’s Rights, “African Commission on Human and People’s Rights v. Republic of Kenya Judgement,” page 31, May 26, 2017.

⁸⁴ Id. P. 37.

⁸⁵ UNDP, “Guidance Note, UNDP Social and Environmental Standards, Standard 6: Indigenous Peoples,” page 28, January 2017.

appropriate benefits;⁸⁶ (2) creating action plans for legal recognition of indigenous peoples rights to lands, territories, resources and legal personality;⁸⁷ (3) supporting rights implementation; and (4) creating a Resettlement Action Plan/Livelihood Action Plan.”⁸⁸

266. A Livelihood Action Plan is required when displacement (including economic displacement) of Indigenous Peoples is unavoidable. The Guidance Note for Standard 6, observes, “In the exceptional circumstances when physical displacement or economic displacement of indigenous peoples is unavoidable, UNDP needs to integrate into the Project documentation a Resettlement Action Plan (RAP) or Livelihood Action Plan (LAP) that has been developed transparently with the individuals and communities to be displaced....The RAP/LAP must meet the requirements of Standard 5 and Standard 6, including documentation of agreement through FPIC. The objectives, activities, and timelines for both of these plans will be harmonized and incorporated by reference in the IPP.”
267. Finally, the IPP must also outline monitoring measures to ensure that the Project’s mitigation and management measures (also described in the IPP) are being implemented, “Transparent participatory monitoring arrangements must be put in place wherein the indigenous peoples concerned will jointly monitor Project implementation.”

SES Standards – Standard 5 Displacement and Resettlement

⁸⁶ Id. P. 26. The full paragraph is, “The IPP needs to detail the arrangements agreed to with the indigenous peoples concerned regarding the equitable sharing of benefits to be derived by the Project in a manner that is culturally appropriate and inclusive and that does not impede land rights or equal access to basic services including health services, clean water, energy, education, safe and decent working conditions, and housing (Requirement 11). Those arrangements should be evidenced in the written outcomes of the consultation and consent process undertaken. Indigenous peoples should be provided with full information of the scope of potential income streams, services and benefits that the Project may generate for all potential beneficiaries. In determining what constitutes fair and equitable benefit sharing – particularly where traditional knowledge, cultural heritage, lands, resources, and territories are involved – indigenous peoples should be treated not just as stakeholders, but appropriately as rights holders.”

⁸⁷ Id. The full paragraph is, “Certain Project activities may not be successful or may lead to adverse impacts unless the rights of indigenous peoples to traditional lands, territories and resources are officially recognized. For example, initiatives to support indigenous peoples land tenure or to develop resources on traditional lands may first require official recognition of legal rights. In addition, recognition of the rights of indigenous peoples to legal personality may also be required if not adequately provided for under domestic law. Where the success and continuation of the Project as a whole, or specific Project activities, are contingent (Box 9) on establishing legally recognized rights to lands, resources, or territories of the affected indigenous peoples, the IPP will need to contain an action plan that outlines UNDP must carefully evaluate whether a Project could continue without undue harm if needed legal reforms or delimitation, demarcation and titling activities cannot take place within the relevant time period of the Project given its mandate and financing. In such cases the IPP would need to clearly address the potential consequences where only some of the activities take place within the Project period (e.g. some progress but not final recognition of the land and territory rights). With the consent of relevant authorities, UNDP will support such activities to achieve such recognition.”

⁸⁸ Id. P. 27. The full paragraph states: “In the exceptional circumstances when physical displacement or economic displacement of indigenous peoples is unavoidable, UNDP needs to integrate into the Project documentation a Resettlement Action Plan (RAP) or Livelihood Action Plan (LAP) that has been developed transparently with the individuals and communities to be displaced. No relocation of indigenous peoples will take place without the free, prior and informed consent of the indigenous peoples concerned and only after agreement on just and fair compensation and, where possible, with the option of return (Requirement 8). The RAP/LAP must meet the requirements of Standard 5 and Standard 6, including documentation of agreement through FPIC. The objectives, activities, and timelines for both of these plans will be harmonized and incorporated by reference in the IPP. (See the Guidance Note on Standard 5 Displacement and Resettlement).”

268. The requirements of this standard largely overlap with the requirements of Standard 6, Indigenous Peoples for TRIDOM II activities. Standard 5, Displacement and Resettlement, however, details criteria and the process for creating a Livelihood Action Plan, which is required when communities (including Indigenous communities) are displaced (including economically displaced).
269. Key criteria for a Livelihood Action Plan include “(a) Displaced individuals and communities are compensated for loss of assets or loss of access to assets at full replacement cost. (b) In addition to compensation for lost assets, if any, economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income-earning capacity, production levels, and standards of living. An independent review, considering baseline data, will confirm that capacity, production levels and standards of living have been improved or restored. (c) Transitional support is provided to displaced persons and communities as necessary, based on a reasonable estimate of the time required to restore their income-earning capacity, production levels, and standards of living.”⁸⁹

SES Standards – Standard 4, Cultural Heritage

270. This standard reflects that for projects that might impact the Cultural Heritage of indigenous peoples, the requirements of Standard 6: Indigenous Peoples apply. Requirements of Standard 6 are most relevant to the investigation.

SES Overarching Policy and Principles – National Law, International Law (Human Rights)

271. SES “Overarching Policy and Principles” require UNDP to avoid supporting activities that do not comply with National Law and obligations of International Law (whichever is the higher standard), and to further the realization of Human Rights.⁹⁰
272. The most relevant National Law includes Law N° 5/2011 on the Promotion and Protection of the Right of Indigenous Populations of 25 February 2011, which covers a range of social, economic and cultural rights of indigenous peoples.
273. The Law provides for the protection of rights of Indigenous Peoples to lands and resources they have traditionally used or occupied for their subsistence, pharmacopeia and work. According to the Law the State is obliged to facilitate the delimitation of these lands on the basis of customary rights. Concerning the establishment of protected areas that affect the way of life of Indigenous Peoples, the Law stipulates that consultations with indigenous peoples are carried out in good faith in order to obtain their Free, Prior and Informed Consent.
274. The first implementation decrees (Décrets d’Application) of Law N° 5/2011 were issued in July 2019. They cover issues such as the participation and consultation of Indigenous Peoples as well as their access to education and social services. Further implementation decrees in critical areas such as rights to land and natural resources are still remain to be issued. However, a senior official at the Ministry of Forest Economy, Sustainable Development and Environment in Brazzaville noted in an interview with SECU that the lack of implementation decrees represents no impediment to the implementation of Law N° 5/2011.

⁸⁹ UNDP. “Social and Environmental Standards,” page 34, January 2015.

⁹⁰ This requirement to comply with international law and further the realization of human rights overlaps with Standard 6, Indigenous Peoples, requirements to ensure respect for the human rights of Indigenous Peoples.

SES Policy Delivery and Accountability Process

275. In addition to the SESP and requirements for a Stakeholder Engagement Plan, other key policy delivery provisions include those relating to Stakeholder Engagement and establishing a grievance mechanism.
276. The SES notes “When necessary, UNDP will ensure that an effective Project-level grievance mechanism is available. The mandate and functions of a project-level grievance mechanism could be executed by the Project Board or through an Implementing Partner’s existing grievance mechanisms or procedures for addressing stakeholder concerns. Where needed, UNDP and Implementing Partners will strengthen the Implementing Partners’ capacities to address Project-related grievances.”⁹¹ It further notes, “Project-level grievance mechanisms and UNDP’s Stakeholder Response Mechanism will address concerns promptly through dialogue and engagement, using an understandable and transparent process that is culturally appropriate, rights-compatible, and readily accessible to all stakeholders at no cost and without retribution. They will be gender- and age-inclusive and responsive and address potential access barriers to women, the elderly, the disabled, youth and other potentially marginalized groups as appropriate to the Project.”⁹²

UNDP Policy on Due Diligence and Partnerships with the Private Sector (2013)

277. The purpose of this Policy is to facilitate and guide the selection of private sector partners in such a way that UNDP manages risks to its reputation.⁹³
278. Cases where the private sector provides co-financing for a specific UNDP project are one of the modalities of UNDP’s various types of engagement with the private sector.
279. The TRIDOM II Project for the Republic of Congo lists a palm oil company and a logging company among its private sector partners and co-financers.⁹⁴
280. The Policy lists palm oil, timber production and logging as among the high risk sectors that require an extra careful approach by undertaking due diligence measures such as carrying out a pre-screening to assess whether a partner is involved in a high risk sector. Where this is the case, the Policy calls for following UNDP’s full risk assessment tool to establish the existence of significant controversies.
281. The due diligence assessment criteria of the Policy that are particularly relevant for palm oil and logging in northern Congo include respect for the rights of indigenous peoples, impacts on livelihoods, impacts on ecosystems and landscapes, as well as corruption.

⁹¹ UNDP, “Social and Environmental Standards,” page 52, January 2015.

⁹² *Id.* P. 53.

⁹³ UNDP, “Policy on Due Diligence and Partnerships with the Private Sector,” paragraph 1, 2013.

⁹⁴ UNDP/GEF, Project Document.

ANNEX 2. INDICATIVE LIST OF INTERVIEWEES

Communities

- 6 Baka Communities Surrounding Messok Dja (Complainants)
- Several Bantu Communities Surrounding Messok Dja
- Additional Members of Baka Communities
- Additional Members of Bantu Communities

UN/UNDP Personnel

- The UN Resident Coordinator
- The UNDP Resident Representative
- 5 UNDP Project Staff in Brazzaville
- 2 UNDP Project Staff in Ouesso

Representatives of WWF

- 1 Representative from WWF in Geneva, Switzerland
- 2 Representatives from WWF in Brazzaville
- 2 Representatives from WWF/ETIC in Ouesso

Representatives of the Government of the Republic of Congo

- 2 Representatives from the Ministry of Justice and Human Rights and the Promotion of Indigenous Peoples Rights
- 2 Representatives of the Ministry of Economy and Forestry
- Several Representatives of the Ministry of the Environment
- 1 Representative of the Ministry of the Interior

Other Stakeholders

- 2 representatives of Survival International
- Representatives of three NGOs conducting FPIC work for WWF near Messok Dja
- President of a local NGO related to the Bakwele People
- Executive Director of a national human rights NGO in Brazzaville
- Representative of a religious order working in the Messok Dja region
- Representative from the Forest Peoples Programme