

**United Nations Development Programme – OAI, Social and
Environmental Compliance Unit**

Investigation Report:

Investigating allegations of non-compliance with UNDP social and environmental commitments regarding the Memorandum of Understanding between the United Nations Development Programme and the Musina-Makhado Special Economic Zone State Owned Company

Case No. SECU0020

Date: 22 April 2024

Basic Data

Case No.	SECU0020
Categories of Non-Compliance:	Social and Environmental
Location:	South Africa
Date Complaint received:	7 June 2022
Source of Complaint:	Earthlife Africa and Living Limpopo
Related Case(s):	N/A

Executive Summary

1. A complaint was filed with UNDP's Social and Environmental Compliance Unit (SECU) concerning the Memorandum of Understanding (MOU) that the United Nations Development Programme (UNDP) Country Office (CO) had signed with the Musina-Makhado Special Economic Zone State Owned Company (SOC) on 17 March 2022.
2. The Musina-Makhado Special Economic Zone (MMSEZ) is a special economic zone that was designated in 2017 by the Department of Trade and Industry in South Africa. It is still in the process of obtaining all the authorizations required to operate. According to its website, the MMSEZ, when fully operational, will comprise of two sites, one focusing primarily on Energy and Metallurgy (South Site) and the other on three sectors: general manufacturing, agro-processing and logistics (North Site).¹ According to the description on the South African Heritage Resources Agency website, the North Site is classified as a Heavy Industrial development and includes eleven plants and ancillary infrastructure associated with the metallurgical and mineral beneficiation value chain.² Metallurgical and mineral beneficiation is the process of extracting minerals from ore, separating the higher grade product from a waste stream (tailings). Coal is a central resource for much of the planned metallurgical activities in the South Site of the MMSEZ. The concerns of the complainants center primarily around the social and environmental impacts associated with the activities planned for the South Site.
3. In 2021, the SOC contacted the CO. It was interested in exploring the possibility of the CO assisting it in dealing with some of the social and environmental issues associated with the MMSEZ. Following some discussions, the CO and the SOC signed an MOU which identifies areas of collaboration between the parties to "support the development and promotion of MMSEZ initiatives".
4. The complainants, upon learning of the MOU, expressed their concerns about the MOU and the MMSEZ in an open letter, in a meeting with the CO, and in the media. The complainants contend that the MMSEZ will have significant adverse impacts on water use, air pollution, climate change, biodiversity loss, sacred and heritage sites, and many other aspects of life for people living in the area. The complainants also contend that the CO, by signing the MOU, in effect, has expressed support for the MMSEZ, increasing the likelihood that the MMSEZ will proceed and the complainants and the communities they represent will suffer irreparable harm. The CO, in addition to meeting with the complainants, explained its reasons for supporting the project in the press. It maintained that the MOU would enable it to work with all the MMSEZ stakeholders to ensure that the project leaves no-one behind in regard to the social and economic benefits of the project and is not harmful to the planet.

¹ <https://mmsez.co.za/>

² <https://sahris.sahra.org.za/cases/musina-makhado-special-economic-zone-development-project>

5. SECU's investigation focused only on whether the CO complied with all the applicable UNDP policies and procedures when it prepared and decided to enter into the MOU with the SOC. It did not investigate or assess the actions of the SOC, the merits of the MMSEZ project, or the decisions of either the local or national government regarding the MMSEZ.
6. When UNDP country offices decide to enter into MOUs there are two templates available at the institutional level for their use, one for MOUs with government agencies and one for MOUs with private sector entities. The CO had to decide which of these two templates to use in preparing the MOU with the SOC.
7. There are no specific UNDP policies dealing with MOUs with government agencies. When a country office enters into an MOU with a private sector entity, on the other hand, they must take into account the relevant private sector engagement policies, namely the UNDP Policy on Private Sector Partnerships and the Policy on Due Diligence and Partnerships with the Private Sector.
8. The CO used the template for government agencies for the MOU with the SOC. This choice had significant consequences for two reasons.
9. First, there are important differences between the two MOU templates. The private sector template has provisions dealing with publicity, the use of the UNDP emblem and reputational risk. Had the CO used the private sector template it would have been prompted to seek representations from the SOC to assure itself of certain facts before entering into the MOU. While the language of the MOU explicitly states that it does not create legally binding obligations for either party, it is clear from the information received from the CO, the response of the complainants to the MOU, and the articles in the press on the project that the MOU does have implications for the operations of the CO and for the reputation of UNDP.
10. Second, the UNDP Policy on Private Sector Partnerships and the Policy on Due Diligence and Partnerships with the Private Sector are explicit: a state-owned company must be treated as a private sector entity when assessing its potential as a UNDP partner. These policies require due diligence assessments to be carried out as early as possible in the process of forming a partnership. The SOC should have accordingly been treated as a private sector entity and the CO should have carried out the requisite due diligence when the CO was considering an MOU with it.
11. The Policy on Due Diligence and Partnerships with the Private Sector and the associated Risk Assessment Tool makes it clear that projects involving coal and other minerals are high risk projects that require rigorous due diligence before the CO enters a relationship of any sort with the sponsors of such projects.
12. The Risk Assessment Tool spells out the steps that UNDP should follow in doing the requisite due diligence, including assessing whether any exclusionary criteria are met and assessing whether any controversies exist that may relate to the proposed partnership. The 2016 tool, applicable at the time the MOU was signed in 2022,

required that the decision as to whether to enter into the partnership should be escalated to UNDP headquarters (HQ) if there is evidence that the exclusionary criteria have been triggered or alternatively required that the CO consult with HQ if there is evidence of or uncertainty about the existence of one or more potential controversies relating to the potential partnership. In relation to this matter, there is evidence that alleged harms relating to the MMSEZ could, if realized, result in the triggering of one of the exclusionary criteria. As indicated in paragraph 4, there was also evidence indicating that the SOC could be implicated in one or more controversies of the sort referred to in the risk assessment tool. This should have prompted escalation to and/or consultation with UNDP HQ.

13. There are also principles under the UNDP's Social and Environmental Standards that should be considered before entering into an MOU. These principles apply to all UNDP programming activities, regardless of whether they arise from or result in a specific project or programme. A MOU with the SOC therefore implicates these principles and should have led the CO to assess whether such an MOU complied with these principles.
14. After a full review of the evidence, including a field visit to South Africa, SECU offers the following findings in relation to UNDP's obligations under the relevant UNDP policies:
 - 14.1. The CO should have used the template for an MOU with a private sector entity when preparing and signing the MOU with the SOC and should have asked for the required representations from the SOC to fully inform itself about the potential risks to UNDP's reputation from an association with the SOC and MMSEZ.
 - 14.2. The CO failed to undertake the due diligence required by the UNDP's Policy on Due Diligence with the Private Sector and associated Risk Assessment Tool before entering into the MOU with the SOC, and failed to escalate and/or consult with UNDP HQ about its decision to enter into the MOU with the SOC.
 - 14.3. The MOU that UNDP signed with the SOC had reputational and operational significance for the CO and UNDP.
 - 14.4. The UNDP CO failed to give due regard to the applicable SES programming principles before entering into the MOU with the SOC. SECU recognizes, however, that, while the programming principles apply to all UNDP programming activities, the SES does not provide clear guidance about how UNDP staff should apply the programming principles outside of the project context. This lack of clarity made it difficult for the CO to comply with its obligations in this regard.

The UNDP CO's acts of non-compliance with relevant UNDP policies have increased the threat of harm to the complainants.

15. In light of these findings, SECU recommends that:

- 15.1. The CO should withdraw from its current MOU with the SOC, explaining that it used the wrong template. If the SOC wishes to continue its relationship with the UNDP, the parties will need to prepare a new MOU using the correct template, and the UNDP CO will need to complete the due diligence required by the applicable UNDP policies, including the necessary consultations with the appropriate offices in the UNDP hierarchy, before signing a new MOU.
- 15.2. The UNDP should ensure its staff are aware of and fully understand the content and rationale behind its partnership policies, and in particular the requirement to treat state owned enterprises as private sector entities. The UNDP should also clarify to its staff that even though MOUs may not create binding legal obligations, they can be a source of reputational risk to the UNDP, particularly when the counterparty is undertaking activities that the UNDP considers high risk because of their potential to cause harm to local communities and the environment. The UNDP should accordingly stress the importance of UNDP staff carrying out the due diligence required by the applicable UNDP policies before they conclude MOUs with private sector entities (including state owned enterprises).
- 15.3. The CO should ensure that its staff understand that the SES Programming Principles apply to all UNDP programming activities and that they can consult with the UNDP SES technical expert in the UNDP Africa regional hub if they are unsure about how to apply the SES Programming Principles to a particular activity.
- 15.4. The UNDP should develop guidelines for its staff on how they should apply the SES Programming Principles outside the context of a project. It should also further promote the use of its network of SES technical experts in all its regional bureaux and that Country Offices can consult these experts if they are unsure about how to apply the SES Programming Principles in a particular UNDP activity.

Part 1: Overview

The Complaint

16. On 7 June 2022,³ Earthlife Africa, a South African based civil society group, filed a complaint⁴ with UNDP’s Social and Environmental Compliance Unit (SECU) concerning the Memorandum of Understanding (MoU) that the United Nations Development Programme (UNDP) Country Office (CO) had signed with the Musina-Makhado Special Economic Zone State Owned Company (SOC) on 17 March 2022. The MOU discusses the possible support that the CO may provide to the Musina-Makhado Special Economic Zone (MMSEZ). The MMSEZ was designated in 2017 by the Department of Trade and Industry in South Africa as a Special Economic Zone under the Special Economic Zones Act.⁵ As of the date of this report, the SOC is still in the process of obtaining the authorizations required for the Special Economic Zone to begin operations.⁶ Subsequent to the complaint filed by Earthlife Africa, Living Limpopo, which is another South African civil society organization, informed SECU that it wished to be joined as a complainant. Both Earthlife Africa and Living Limpopo stated that in bringing this complaint, they are representing local communities who work and live in the Musina-Makhado area and allege that they will be directly and negatively affected by the proposed MMSEZ and UNDP’s involvement therein.
17. In the complaint, Earthlife Africa and Living Limpopo alleged that the MMSEZ would have significant adverse impacts on “water use, air pollution, climate change, biodiversity loss, sacred and heritage sites, and many other aspects of life for people living in the area.” They also expressed concerns that the jobs that may be created by the MMSEZ would be high-skilled jobs and that, since many of the people living in the area did not have the requisite skills, they would not be eligible for the jobs. They claimed that the adverse impact of the project on tourism and agriculture in the area could lead to local communities actually losing jobs.
18. The complainants and the local communities with which they work also contend that the CO, by signing the MOU with the SOC, has effectively expressed support for the project thereby increasing both the likelihood that the MMSEZ project would

³ Correspondence from Earthlife Africa was first received by SECU on 1 April 2022. SECU responded to this correspondence and engaged with Earthlife Africa and other stakeholders to better understand their concerns. After the CO shared a copy of the MOU with Earthlife Africa, further discussions were had between Earthlife Africa and other concerned stakeholders, and SECU and the UNDP’s Stakeholder Response Mechanism (SRM). Earthlife Africa formally requested a compliance review from SECU on 7 June 2022.

⁴ Complaint is available at: https://secu.info.undp.org/sites/g/files/zskgke461/files/sites/registry/secu/SECU_Documents/Earthlife%20Africa%20-%20Complaint76b7303758254798ba2d264759efc003.pdf

⁵ Special Economic Zones Act No.16 of 2014, available at: <https://www.gov.za/documents/special-economic-zones-act> (accessed on 31 August 2023)

⁶ For the Southern Site of the MMSEZ, the SOC has environmental authorization for the clearance of indigenous vegetation, the development of infrastructure (pipelines for bulk transportation of sewage, effluent, process water, wastewater, return water and industrial discharge), the development of internal roads, securing the property (fencing), access roads, and water reticulation pipelines. The Complainants have also informed SECU that this environmental authorization is the subject of a review application to the High Court of South Africa, and that, as of the date of this report, this matter is pending.

proceed and that the complainants and the communities they represent would suffer irreparable harm.

Summary of case activities

19. SECU registered the complaint on 14 June 2022.⁷ Thereafter, SECU reviewed the complaint in order to determine its eligibility for a compliance review. On 14 November 2022, SECU determined that the complaint was eligible and authorized an investigation into the issues raised in the complaint. The aim of the investigation is to establish a background factual record through the objective gathering of evidence, make findings based on this record, and, if necessary, make recommendations on how to bring UNDP-supported activity into compliance with its Social and Environmental Standards (SES) and other relevant UNDP policies and procedures. In this case, the other relevant policies include those dealing with partnerships between UNDP and other entities, including those deemed by UNDP to be private sector entities.
20. In January - February 2023, a team from SECU visited South Africa to undertake required field activities and gather relevant evidence. The team visited the Musina-Makhado region to speak with the complainants and the local communities they represent, including the Mulambwane community, and to meet with representatives of the SOC and its owner, the Limpopo Economic Development Agency. The team met with the CO in Pretoria. It also met with local experts on the flora and fauna of the Vhembe region of Limpopo Province in which the MMSEZ is located. Following the mission to South Africa, the SECU team had an additional virtual meeting with some of the CO staff.
21. The SECU team wishes to express its gratitude to all the people with whom it met (a comprehensive indicative list of interviewees is included as Appendix 1 to this report). It wishes to thank the leadership of the Venda people who took the time to meet with it and to facilitate its meetings with the communities, including the Mulambwane community, that will be affected by the MMSEZ. In addition, it wishes to express its gratitude to the UNDP Resident Representative in South Africa and the staff of the CO, who were both generous with their time and gracious and efficient in responding to the SECU team's questions and requests for information.
22. This report is based on the information that the SECU team gathered from its in-person and virtual meetings with the CO, its visit to the region, its meetings with the complainants and the affected communities that they represent, the representatives of the SOC and other stakeholders in this project and its own research.
23. There is one general observation from all these meetings that the SECU team thinks is particularly noteworthy. It was clear in all the meetings that the SECU team had with the leadership of the Venda people and with members of the Mulambwane

⁷ <https://secu.info.undp.org/case-file/secu0020>

community and other affected stakeholders that the MMSEZ project, even though it has not yet been constructed, is already creating stress within the affected communities. There are supporters of the project in these communities, who see the potential for economic benefit. Given SECU's mandate, the SECU team focused on the concerns of the complainants, who expressed deep misgivings and even fear about the social and environmental impacts of the MMSEZ project. Most significantly, they said that the project, if it is constructed, will inevitably result in the permanent destruction of the many graves and sacred sites located in the project area. They explained that, pursuant to their customary law, these graves and sacred sites cannot be moved. They feared that this development would irreparably damage the wellbeing and integrity of their communities. These communities were also concerned that the environmental impacts of the project, for example its impact on land, air and natural water sources, would damage their health and ability to continue supporting themselves in the way they found most culturally comfortable. They were skeptical that the jobs that the MMSEZ would generate would, in fact, be available to members of the local communities and they worried that the jobs would not be consistent with their traditional way of life.

The Applicable UNDP Policies

24. Pursuant to the SECU Investigation Guidelines, the purpose of a SECU investigation is to determine if the UNDP failed to comply with the applicable UNDP policies and procedures in those decisions and actions that are the basis for the eligible complaint and if these instances of non-compliance caused or threatened to cause harm to the complainants.
25. This case focuses on the MOU that the UNDP CO signed with the SOC. Consequently, the policies and procedures that the CO is expected to comply with are, firstly, those that relate to the signing of MOUs.
26. UNDP has two model templates for MOUs. One is specifically for MOUs with government entities and the other is for MOUs with the private sector. There is no specific UNDP policy dealing with partnerships with government entities. However, section 1 of the UNDP Policy on Private Sector Partnerships⁸ states that the term "private sector entities" refers to "...among others.... state owned enterprises." Similarly, Section 3 of the Policy on Due Diligence and Partnerships with the Private Sector⁹ defines the term private sector as including state owned enterprises. This definition is also repeated in footnote 1 of the 2016 Risk Assessment Tool.¹⁰
27. The SECU investigation team notes that the Policy on Due Diligence and Partnerships with the Private Sector was updated in June 2023 and this updated

⁸ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Private%20Sector%20Partnerships%20Policy.pdf>

⁹ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

¹⁰ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Due%20Diligence%20and%20Risk%20Assessment%20Tool.pdf>

policy became effective on 12 October 2023.¹¹ This updated policy was accompanied by an updated 2023 Risk Assessment Tool¹² and an updated Guidance Note on Managing Risks in Partnerships with the Private Sector. Since the updated policy, risk assessment tool, and guidance note were only published after the CO prepared and entered into the MOU with the SOC, these updated documents are not relevant to the question of whether the CO complied with the applicable policies.

28. There is no specific UNDP policy document or guidance note that informs staff about the role that MOUs should play in the work of the UNDP. However, Annex 1 to the Policy on Due Diligence and Partnerships with the Private Sector¹³, includes memoranda of understanding as one possible instrument for establishing partnerships with the private sector.
29. The second set of policies that are applicable to this investigation are UNDP’s Social and Environmental Standards (SES).¹⁴ The SES consists of two parts. The first part is the five programming principles that are applicable to all UNDP programming activities. The second part is the eight Project Level Standards. Since this complaint does not involve an ongoing UNDP project, it is only the five programming principles that are applicable to this investigation.

Part 2: Facts

30. The South African government designated the Musina-Makhado Special Economic Zone (MMSEZ)¹⁵, which is located in the Vhembe region of Limpopo province, in 2017. The same year the Limpopo provincial government created the Musina-Makhado Special Economic Zone State Owned Company (SOC)¹⁶ to oversee and operate the MMSEZ. The SOC is a wholly owned subsidiary of the Limpopo Economic Development Agency (LEDA), a public institution which is overseen by the Limpopo Department of Economic Development, Environment and Tourism. The SOC has its own legal personality, board of directors, and audited financial statements.
31. According to the MMSEZ’s website, the MMSEZ seeks to “accelerate economic growth, development and job creation in Limpopo through promoting industrialization, facilitating increased trade and investment, supporting the development of sustainable enterprises, and ensuring infrastructure development”.¹⁷ The MMSEZ website explains that the project, when fully

¹¹ <https://popp.undp.org/document/policy-due-diligence-and-partnerships-private-sector> (accessed on 15 November 2023).

¹² https://view.officeapps.live.com/op/embed.aspx?src=https://popp.undp.org/sites/g/files/zskgke421/files/2023-10/Partnerships_UNDP%20Private%20Sector%20Risk%20Assessment%20Tool%202023_0.docx (accessed on 15 November 2023).

¹³ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

¹⁴ <https://www.undp.org/publications/undp-social-and-environmental-standards>

¹⁵ https://www.gov.za/sites/default/files/gcis_document/201712/41287gon1324.pdf

¹⁶ <https://mmsez.co.za/> (accessed on 19 June 2023).

¹⁷ https://mmsez.co.za/?page_id=853

operational, will consist of a Smart City (including retail spaces, commercial hubs, residential estates, offices hubs and public transport systems); agro-processing cluster; general and light manufacturing cluster (including equipment manufacturing plants, and agro- and petro-chemical manufacturing); power generation cluster (including solar panels, wind turbines, and hydro fuel cells); mineral beneficiation cluster (including an iron steel plant, ferrochrome plant, chrome plating plant, and lime, phosphate and chemical plants); and a logistics cluster.¹⁸ It is projected to attract foreign direct investment and to create about 21 000 jobs. It is expected to cost a total of about R150 billion (US\$7,6 billion).¹⁹

32. In 2021, the SOC contacted the CO. It was interested in exploring the possibility of the CO assisting it in dealing with some of the social and environmental issues associated with the MMSEZ. The SOC explained to SECU that it was facing challenges in its relations with the communities that could be affected by the MMSEZ and that it thought that it could benefit from UNDP's experience in engaging with communities about the social and environmental impacts of large projects. It also explained to SECU that it thought that the CO could help facilitate dialogue between the SOC and the local communities about the MMSEZ.²⁰ From the CO's perspective,²¹ its engagement with the SOC around the MOU was driven by its understanding of the MMSEZ as an opportunity "to address the triple challenge of poverty, unemployment and inequality, which is aligned with the NDP [National Development Plan]" and with presidential priorities.
33. Over the course of the second half of 2021, officials from the CO and the SOC had five meetings to discuss the possibility of the CO providing technical assistance to the SOC. During these meetings, the CO learned that the SOC was experiencing challenges in its relations with the communities that would be impacted by the MMSEZ and with the civil society groups, such as the complainants, that worked with these communities. However, the CO only became aware of some of the specific issues that were causing these challenges after the MOU with the SOC was signed. For example, it only learned that there were graves and sacred sites on the land designated for the MMSEZ in January 2023.²²
34. Following the five meetings, the two parties agreed to sign a MOU describing the type of assistance that the CO could provide to the SOC. The CO erroneously decided to use the UNDP template for an MOU with a government entity rather than the template for an MOU with the private sector to prepare the MOU with the SOC. It based this decision on the fact that the SOC was a wholly owned subsidiary of a government agency.²³

¹⁸ https://mmsez.co.za/?page_id=3625#

¹⁹ Exchange rate is US\$1=ZAR19,68 (conversion on 29 May 2023)

²⁰ Statements of CEO of SOC to SECU investigation team in meeting in Musina on 1 February 2023.

²¹ As communicated to SECU in correspondence dated 27 July 2023.

²² Statement made by UNDP official in meeting with SECU investigation team on 31 January 2023 in Pretoria.

²³ Statement made by UNDP official in meeting with SECU investigation team on 31 January 2023 in Pretoria.

35. As part of its preparations for signing the MOU, the CO prepared an action plan with an indicative budget for raising funds in the event that the CO and SOC agreed to operationalise the areas of cooperation listed in the MOU. The plan described the tasks for which each party would be responsible.²⁴ SECU has not received any evidence indicating that the parties ever finalized the action plan. On 18 March 2022, the CO and SOC announced that they had signed a MOU.²⁵ The UNDP press release announcing the MOU indicated that²⁶:

“The key focus areas of this partnership will include the identification and piloting of affordable and clean energy solutions, preventing deforestation and improving knowledge on environmental best practices. The collaboration will also focus intently on supporting early-stage businesses and skills development within the MMSEZ locality. More strategically, this collaboration will support the development and promotion of MMSEZ initiatives like the upcoming smart city that will leverage on the existing skills, talent, and resources to benefit local people.”

36. Based on the MOU signed with the CO, the SOC identifies UNDP on its website as one of its “key ... international partners...”²⁷ In fact, as of 31 January 2024 UNDP is the only international entity promoted as a strategic partner on the SOC website.

37. Between 29 March and 1 April 2022, Earthlife Africa and other stakeholders who had seen this press release approached SECU and other UNDP business units asking to see a copy of the MOU. The MOU was made available to these stakeholders by the CO. On 20 May 2022, the CO held a meeting with some of these stakeholders to discuss their concerns about the MOU.

38. On 4 July 2022, the Complainants, together with a number of other interested stakeholders, published an Open Letter²⁸ condemning the signing of the MOU with the SOC. This letter was published before SECU issued its eligibility determination for this compliance review. The Open Letter also criticizes SECU for failing to investigate this complaint. The UNDP CO issued a response to the Open Letter on 13 July 2022.²⁹ In the course of the next 2 months, some civil society representatives published an article in the press criticizing UNDP’s role in the MMSEZ project and the CO published a rejoinder in the same publication explaining its reasons for supporting the project.³⁰ In this article, the CO explained that the MOU “enables the UNDP to influence the areas of cooperation outlined in the memorandum and

²⁴ The CO conveyed to SECU in email correspondence dated 27 July 2023 that “the proposed annual workplan outputs and activities are to assist MMSEZ to address social and environmental aspects and strengthen the capacity of local communities to take advantage of opportunities that the project can generate”.

²⁵ <https://www.undp.org/south-africa/press-releases/undp-and-mmsez-sign-memorandum-understanding-achieving-sustainable-development> (accessed on 19 June 2023)

²⁶ Ibid.

²⁷ https://mmsez.co.za/?page_id=3804 (accessed on 19 June 2023)

²⁸ Available at: <https://naturaljustice.org/wp-content/uploads/2022/07/Open-Letter-to-UNDP-regarding-MoU-with-MMSEZ-4-July-2022.pdf>.

²⁹ Available at: <https://www.undp.org/south-africa/press-releases/response-open-letter-concerning-undp-and-mmsez-memorandum-understanding>.

³⁰ <https://mg.co.za/tag/musina-makhado-special-economic-zone-2/>

support the MMSEZ to mainstream human and environmental rights. It is through such agreements that we are working with civil society organisations, local residents, the media and other stakeholders to ensure that the MMSEZ leaves no one behind in the socioeconomic development benefits, is not harmful to the planet and sets an example for the future development of similar SEZs.”³¹ There was also discussion about another meeting between the CO and some of the stakeholders, but this follow-up meeting did not materialize.

Part 3: Issues Investigated and Findings

39. Pursuant to the SECU Investigation Guidelines, the purpose of a SECU investigation is to determine firstly, if the UNDP failed to comply with the applicable UNDP policies and procedures in those decisions and actions that are the basis for the eligible complaint. Second, if applicable, the investigation will determine whether the acts of non-compliance cause or threaten to cause harm to the complainants.
40. It is important to stress that this means that the SECU investigation team is only concerned with determining whether the CO complied with all the applicable UNDP policies and procedures when it prepared and decided to enter into the MOU with the SOC. It should not – and indeed, did not - investigate or assess the actions of the SOC, the merits of the MMSEZ project, or the decisions of either the Limpopo government or the South African government regarding the MMSEZ. Consequently, this report does not make any findings or comments on the feasibility or desirability of the MMSEZ, the decisions and actions of the SOC or of LEDA or any other provincial or national government agency. It also does not make any findings about the quality or accuracy of the various impact studies undertaken in connection with the MMSEZ. To the extent that the report discusses the MMSEZ, it is only for the purpose of determining the risk level of the project and the associated level of due diligence that the CO was required to make pursuant to the applicable UNDP policies and to make findings, if appropriate, about whether or not the CO, through non-compliance with the applicable UNDP policies, caused or threatened to cause harm to the plaintiffs.
41. The SECU team’s investigation was focused on addressing five issues. Each of these issues and the findings of the SECU team on each issue are discussed below.

Issue 1: Did UNDP use the correct MOU template in preparing the MOU with the SOC and what is the significance of the CO using the MOU template for a government entity rather than the one for a private sector entity?

42. Section 1 of the UNDP Policy on Private Sector Partnerships states that the term “private sector entities” refers to “...among others.... state owned enterprises.”³² Similarly, Section 3 of the Policy on Due Diligence and Partnerships with the Private

³¹ <https://mg.co.za/thought-leader/opinion/2022-08-24-undp-supports-special-economic-zones-to-drive-sustainable-development/>

³² <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Private%20Sector%20Partnerships%20Policy.pdf>

Sector³³ defines the term private sector as including state owned enterprises. This definition is also repeated in footnote 1 of the 2017 Risk Assessment Tool³⁴.

43. The language in these UNDP policies is clear and unambiguous: state-owned enterprises must be treated as private sector entities when being considered for partnerships with UNDP. The decision to treat state-owned enterprises as private sector entities for these purposes is because UNDP can be exposed to reputational risk whenever it enters a partnership with an enterprise, regardless of its ownership, that is undertaking activities that have substantial social and/or environmental impacts. The risk arises from the activity and not from the ownership structure of the enterprise. Thus, a state-owned enterprise that is engaged in activities that have substantial social and/or environmental impacts can be as much a source of reputational risk to UNDP as a private sector entity.
44. The SOC is a state-owned enterprise that is an independently established but wholly owned subsidiary of the Limpopo Economic Development Agency.³⁵ It has its own independent legal personality, board of directors, capacity to sign and enter into agreements and has its own audited financial statements. Its purpose is to own and operate a special economic zone whose occupants will have operations that are likely to have substantial social and environmental impacts.
45. There are two important differences between the two MOU templates. The first difference is found in the respective articles IV of the two templates. Article IV in the MOU template for partnerships with government entities deals with visibility relating to the MOU. The template has no provisions that specifically deal with publicity, the use of the UNDP emblem or with reputational risk. Article IV in the private sector template, on the other hand, deals with the issue of publicity relating to the relationship between the parties to the MOU. It seeks to protect UNDP's reputation by establishing some requirements for publicity relating to UNDP's relationship with the private sector entity, including the use of the UNDP emblem.
46. The significance of the differences in the two versions of Article IV can be discerned from the fact that the SOC prominently displays the UNDP logo on its website on a page dealing with strategic partnerships. Above the logos of the six entities which it lists as strategic partners, the SOC states "The MMSEZ development is enabled by a competitive local and national business environment, supported by partnership and collaboration with key local, national and international partners and stakeholders."³⁶ The only international entity promoted as a strategic partner on the website is the UNDP. While the CO informed SECU that the SOC did not request permission from the CO to display the UNDP logo, and that the CO would address

³³ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

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https://info.undp.org/docs/pdc/Documents/HND/00122642_Due%20Dilligence%20and%20Risk%20Assesment%20DT%20Global%20112020.pdf

³⁵ https://mmsez.co.za/?page_id=853 (accessed on 19 June 2023)

³⁶ https://mmsez.co.za/?page_id=3804 (accessed on 19 June 2023)

the issue with the SOC, as of 31 January 2024, the UNDP logo still appears on the MMSEZ website.³⁷

47. If the CO had used the private sector template, Article IV would have put it on notice that an MOU with the SOC could result in the SOC using the UNDP emblem as part of its efforts to convey support for the MMSEZ and that this could expose the organization to reputational risk. This in turn may have encouraged it to inquire into whether the SOC intended to use the UNDP emblem and, if so, how it would use the emblem. It would also have indicated to the CO that it should make some effort to understand the types of activities the MMSEZ was planning to undertake and whether these activities may cause reputational risk for UNDP if UNDP were to become publicly associated with the MMSEZ.
48. The second difference between the two templates is found in their respective articles VI. Article VI in the government template deals with notices. It states that “Any notice or request required or permitted to be given or made under this MOU shall be in writing.” In the case of the template with the private sector, this issue is dealt with in Article VII.
49. Article VI in the template for the private sector deals with the representations and undertakings that the CO should require from its counterparty. In particular, Article VI.2 states that “The Partner represents that it is not involved in any activity that may be in contravention of or have a negative or adverse impact on UNDP’s status, neutrality, ideals and objectives or its image and reputation”. It goes on to require that the partner shall “promptly notify UNDP of any event or circumstances that may affect the Partner that may cause reputational risk or injury to UNDP, including investigations or legal proceedings”.
50. In other words, this provision would have required the CO to ask the SOC to confirm that none of its activities could adversely impact UNDP’s reputation. This is particularly relevant because a project that involves activities like mineral beneficiation, chemical production, agro-processing and logistics could have substantial and potentially adverse social and environmental impacts. Furthermore, if these impacts materialize and are not effectively managed, they could adversely affect UNDP’s reputation. Thus, if the SOC had been asked to make the representations required by the template for the MOU with the private sector, it should have put the CO on notice that it should do substantial due diligence before signing the MOU.

Finding

51. The language in the applicable UNDP policies, namely the UNDP Policy on Private Sector Partnerships and the Policy on Due Diligence and Partnerships with the Private Sector, is clear and unambiguous: a state-owned company must be treated as a private sector entity when assessing its potential as a UNDP partner. This

³⁷ https://mmsez.co.za/?page_id=3804 (accessed on 31 August 2023)

means that the CO should have used the template for an MOU with a private sector entity when preparing and signing the MOU with the SOC. The fact that the CO used the template for a MOU with a government agency rather than the template for a MOU with a private sector entity, therefore, constitutes an act of non-compliance with the applicable UNDP policies. The CO's decision to use the template for partnerships with government entities rather than the template for partnerships with the private sector had important consequences. It meant that the CO did not require any representations from the SOC and, as a result, was not fully informed about the potential risks to UNDP's reputation from an association with the SOC and the MMSEZ.

Issue 2: Was the CO required to conduct due diligence under the Policy on Due Diligence and Partnerships with the Private Sector and the associated risk assessment tool before signing the MOU?

52. As established above, the SOC is a private sector entity under the UNDP Policy on Private Sector Partnerships and the Policy on Due Diligence and Partnerships with the Private Sector.
53. The UNDP Policy on Due Diligence and Partnerships with the Private Sector makes it clear that an MOU is a possible instrument for establishing a partnership with a private sector entity.³⁸ The same policy requires that if a potential private sector partner approaches UNDP to initiate a partnership, it is important for UNDP to undertake due diligence as early in the process as possible (Section 4.1) and that the due diligence should be based on the UNDP's Risk Assessment Tool for Private Sector Partnerships and its associated guidelines (Section 4.3).³⁹ The policy also emphasizes that for the sake of transparency and to manage expectations, it is important for the UNDP to make it clear to a potential partner, at an early stage in discussions, that UNDP undertakes due diligence of its private sector partners and that it cannot commit to a partnership until such due diligence has been completed (section 4.1).
54. Both the Policy on Due Diligence and Partnerships with the Private Sector⁴⁰ and the associated risk assessment tool make it clear that projects involving coal and other minerals are high risk projects that require rigorous due diligence before the CO enters a relationship of any sort with the sponsors of such projects.
55. The risk assessment tool⁴¹ spells out the steps that the UNDP should follow in doing the requisite due diligence. The first step in this process is to assess if the potential partner should be rejected because of the exclusionary criteria set out in the tool.

³⁸ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

³⁹ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Due%20Diligence%20and%20Risk%20Assessment%20Tool.pdf>

⁴⁰ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

⁴¹ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Due%20Diligence%20and%20Risk%20Assessment%20Tool.pdf>

These exclusionary criteria include that the potential partner may be implicated in human rights violations. Given the limited progress made to date with the MMSEZ, it is unlikely that the SOC would have been implicated in any human rights violations at the time the CO should have completed the risk assessment. However, it should be noted that the potential harms alleged by the complainants include such harms as failure to consult, destruction of sacred sites and ancestor's graves, deprivation of access to water and denial of access to land belonging to the claimants. If realized, these potential harms could result in human rights violations.

56. The second step in the process is for the UNDP officials to research any controversies that may relate to the partnership. The Risk Assessment Tool guides UNDP officials on how to conduct this research, noting that controversies and reputational risks may relate to issues such as impact on livelihoods, local participation, indigenous peoples, pollution (including climate change), and impact on ecosystems and landscapes. The Risk Assessment Tool directs UNDP staff to consider whether there is evidence of criticisms from local or international non-governmental entities, the media, or social media, or whether there are any relevant legal cases, which evidence controversies on these issues. These questions in the Risk Assessment Tool, along with the case examples provided in supplementary internal guidance, direct UNDP officials to carefully consider the impacts of the activities of a potential partner on people and the environment before entering into a partnership. As indicated above, there is substantial information suggesting that the MMSEZ could have adverse impacts on people and the environment and that the SOC already has tense relations with the complainants and local communities.
57. Finally, pursuant to the applicable UNDP policies, the CO was required to escalate the partnership decision to UNDP headquarters (UNDP HQ) before entering such an arrangement if there was evidence that the exclusionary criteria had been triggered. Alternatively, the CO should have consulted with UNDP HQ about whom in the UNDP organization should make the partnership decision if there was evidence of or uncertainty about the existence of one or more potential controversies relating to the potential partnership.
58. The importance of these requirements is that they protect UNDP from entering a relationship, regardless of how informal, with an entity engaged in high-risk activities without full knowledge of the risks that the activity poses for the organization.

Finding

59. The CO was required to carry out due diligence under the Policy on Due Diligence and Partnerships with the Private Sector and the associated risk assessment tool before signing the MOU for the SOC. Pursuant to these policies, the CO should have considered the type of activities to be undertaken in the MMSEZ to be high risk activities requiring the completion of all the due diligence steps laid out in UNDP's Risk Assessment Tool for Private Sector Partnerships. The CO also appears not to

have recognized that the Risk Assessment Tool applicable at the time required it to escalate the partnership decision to consult with UNDP HQ about whom in the UNDP organization should make the partnership decision if there is evidence of or uncertainty about the existence of one or more potential controversies relating to the potential partnership.

60. These failures constitute an instance of CO non-compliance with the policies of UNDP.

Issue 3: What are the operational and reputational implications of the CO signing an MOU?

61. The CO maintains that an MOU is a non-binding statement of intent by the parties to possibly further develop a relationship that is of interest to both parties. It may later mature into a more substantial and binding relationship with each side assuming some enforceable obligations. However, this is not necessarily the case. The CO indicated to SECU that most MOUs signed by the CO do not progress beyond the MOU stage.⁴²
62. The CO also maintains that the signing of an MOU is a relatively cost-free activity for the UNDP for two reasons. First, it contends that this follows from the fact that UNDP has templates for MOUs which country offices are expected to use, without significant alteration. Second, the CO maintains that it did not need to conduct an SES risk assessment because the MOU is a non-binding document. In addition, the SES risk assessment requirements would only be triggered when and if the CO and the SOC decided to enter a more binding relationship that imposes specific obligations on the UNDP. As discussed below, SECU agrees that the project level SES requirements are not triggered by the signing of an MOU, but that the SES programming principles still apply. Furthermore, and as discussed throughout this report, the Policy on Due Diligence and Partnerships with the Private Sector required the CO to do appropriate due diligence before signing the MOU with the SOC.
63. While the language of the MOU explicitly states that it does not create legally binding obligations for either party, it is clear from the information received from the CO, the response of the complainants to the MOU, and the media reports following its signing that the MOU did have implications for the operations of the CO and for the reputation of UNDP. First, as discussed above, the CO had to devote the time and resources required to organize and participate in five meetings about the MOU with the SOC, to prepare an action plan, and to arrange for the Resident Representative and some UNDP staff to travel to Musina for the signing of the MOU. In addition, the fact that the signing of the MOU resulted in UNDP being publicly identified as a partner,⁴³ means that the mere existence of the signed MOU had significance for the SOC. This in turn exposed UNDP to whatever reputational

⁴² Statement made by UNDP official in meeting with SECU investigation team on 31 January 2023 in Pretoria.

⁴³ On the SOC website (https://mmsez.co.za/?page_id=3804), and in a publicly released signing ceremony photo (<https://www.undp.org/south-africa/press-releases/undp-and-mmsez-sign-memorandum-understanding-achieving-sustainable-development>).

risks may arise from being associated with a company, whose project, pursuant to the applicable UNDP policies, the UNDP considers to be high risk.

64. Second, the SOC⁴⁴ sought an MOU with UNDP precisely because it believed that engaging with the CO would help it deal with the challenges that it faced in its relations with outside stakeholders who were concerned about the potential adverse social and environmental impacts of the project. Given the SOC's objective, merely by signing the MOU the CO put itself in the position of appearing to support the SOC's objective of using the UNDP to help it resolve its problems with outside stakeholders in the MMSEZ. This impression is strengthened by the publicity associated with the signing of the MOU and the fact that the UNDP is listed as one of its strategic partners on its website. These developments suggest that the CO, by signing the MOU and allowing the SOC to publicly align itself with the UNDP, was exposing the UNDP to reputational risk even if the MOU itself did not impose any binding obligations on the CO. Given that one of UNDP's strongest assets is its good name and high reputation, the potential costs of exposing itself to reputational risk without proper due diligence are considerable.
65. Third, it is noteworthy that the Policy on Due Diligence and Partnerships with the Private Sector states in Annex 1 that an MOU is one instrument for establishing a partnership with the private sector.⁴⁵ In fact, Article I of the MOU specifically states that "The MOU forms the foundation for the partnership between MMSEZ and UNDP SA". This suggests that the UNDP anticipates that an MOU can lead to a more substantial relationship with its counterparty and so should be seen as the first step in the process of building a more formal relationship with the counterparty. In the case of the CO-SOC relationship, this impression is further supported by the fact that the CO developed an action plan for operationalizing the MOU before signing the MOU with the SOC. This action plan contains detailed information on the types of tasks that could be undertaken by the parties and designates the responsible party for each of these tasks. The action plan also includes estimates of the costs for each task. Internal correspondence suggests that the CO was also considering how the funding for the action plan would be raised. While the action plan may not yet have been converted by the parties into a more legally binding arrangement, the fact that the CO allocated staff time to developing the action plan and negotiating with the SOC about its contents and costs suggests that the CO viewed the MOU as the first step in a process that could lead to a more substantial and formal relationship with the SOC.

Finding

66. The MOU that UNDP signed with the SOC had reputational and operational significance for the CO. One indicator of this is that the MOU resulted in the SOC advertising its relationship with the CO on its website. In addition, the CO deemed the relationship to be sufficiently substantial that it was willing to issue a press

⁴⁴ Statement by CEO of SOC in interview with SECU on 1 February 2023.

⁴⁵ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

release announcing the MOU, to defend it in the media and to allocate the time and resources needed to develop an action plan and an indicative budget for a more defined partnership with the SOC even before signing the MOU with the SOC. It is important to note that the CO allowed its relationship with the SOC to develop in the indicated ways without doing any significant due diligence either on the SOC or the MMSEZ. This lack of due diligence constitutes non-compliance with the applicable policies.

Issue 4: What were the CO's responsibilities relating to UNDP's Social and Environmental Standards (SES)?

67. The relationship between UNDP and the SOC is still at a preliminary stage. Their relationship is based on the MOU which sets out the types of activities that the UNDP may undertake for the SOC but it does not yet oblige the CO to do any specific activities for the SOC.
68. Part B of the SES, 'Project-Level Standards', clearly apply at the project level and are not applicable to this complaint as it is undisputed that the CO has not yet designed or approved any specific activities that can be viewed as part of a particular UNDP project. However, the CO, by participating in discussions with the SOC about the possibility of concluding an MOU and by signing an MOU and by discussing it in the media was engaged in "programming" activity. Part A of the SES, 'Programming Principles', apply to all UNDP programming. The SES define "programming" broadly as: "comprises the planning, implementation, reporting and evaluation of development results achieved with partners through UNDP support."⁴⁶ This is distinct from a "programme" which is defined more narrowly in the SES as "a plan for effectively contributing to outcome-level development results through UNDP's project modalities: development projects, the engagement facility and development services."⁴⁷ The CO has stated that the negotiation and signing of the MOU should be interpreted as the "scoping of opportunities that can enable the implementation of CPD [Country Programme Document] priorities".⁴⁸ These are clearly planning activities, carried out in preparation for potential, future projects under the South Africa Country Programme. A concrete project need not materialize for this to be considered a planning activity.
69. The five programming principles in the applicable version of the SES, which came into effect on 1 January 2021, apply in this context. These principles are:
- Programming Principle 1: Leave No One Behind
 - Programming Principle 2: Human Rights
 - Programming Principle 3: Gender Equality and Women's Empowerment
 - Programming Principle 4: Sustainability and Resilience
 - Programming Principle 5: Accountability

⁴⁶ Footnote 4, page 3, of the SES.

⁴⁷ Ibid.

⁴⁸ Email correspondence from the CO to SECU dated 27 July 2023.

These principles are an expression of UNDP's values. Promoting and applying these principles to all that UNDP does is essential for protecting UNDP's reputation as a rights respecting development entity.

70. The CO was expected to apply these principles in its assessment of a partnership with the SOC. While the CO has confirmed that it did not undertake any formal due diligence before signing the MOU with the SOC, it advised SECU that "the main reason why the CO engaged with the MMSEZ is because we understood that it generates opportunities to leave no one behind in one of the poorest provinces of the country and also because we saw opportunity to influence the project to ensure adherence to human rights, gender empowerment, sustainability and accountability. The CO saw an opportunity to bring a sustainable human development perspective to the project".⁴⁹ The CO's position is accordingly that it implicitly assessed the proposal against the programming principles. However, apart from communicating this position, the CO provided no further evidence of their approach to assessing conformity with the principles. A robust assessment of these principles should have triggered a critical analysis, flagging concerns that aspects of the MMSEZ project could potentially undermine these principles. The project, by potentially depriving the community of access to land to which they were entitled to have access and by decreasing people's access to water was potentially leaving some people behind. It could also potentially undermine their human rights. Given the potentially adverse impacts of the project on traditional livelihoods without any indication of how these adverse impacts would be mitigated, suggests that the project could adversely affect gender relations in affected communities and potentially undermine women's empowerment. The project's potentially adverse environmental and social impacts also risk undermining the project's claims to promote sustainable development, and resilience.

Finding

71. The CO failed to comply with the applicable SES programming principles. Had the CO consulted these principles it would have been on notice that it was expected to do sufficient due diligence to ensure that it was complying with the SES Programming Principles in advance of signing the MOU with the SOC. These failures constitute an act of non-compliance with the SES.
72. In making this finding, SECU recognizes that the broad definition for "UNDP programming", which indicates, on a close reading of the SES, that these principles apply to a broad range of planning, implementation, reporting and evaluation activities, is not highlighted or explained with sufficient clarity in the SES. SECU also notes that there is no clear guidance provided as to how to apply the programming principles outside of the project context. This made it difficult for the CO to comply with the applicable SES programming principles.

⁴⁹ Ibid.

Issue 5: Did the CO's non-compliance cause/threaten to cause harm to complainants and affected communities?

73. The complainants allege that the reason that the CO has caused/threatened to cause them harm is that by signing the MOU the CO has effectively endorsed the MMSEZ thereby making it more likely that the project will proceed and that its threatened impacts will materialize.
74. To fully address the issue of threatened harm, it is necessary to consider the potential impacts of the MMSEZ on the complainants. However, it is important to stress that the purpose of this inquiry is to determine the consequences of the CO signing the MOU with the SOC. It is not to assess the likelihood of the MMSEZ actually having the identified potential impacts or their implications for the MMSEZ project or the SOC.
75. There are two points to note in regard to the complainants' contention that the CO has threatened to cause them and the affected communities harm. The first is that the actions of the CO seem to support the complainants' contention that, at least implicitly, it has expressed support for the MMSEZ. The CO invested some resources in preparing and signing the MOU, discussing it in the media and in preparing an action plan with a budget for the activities to be undertaken in the course of the CO-SOC relationship. This suggests that the CO viewed the budding relationship with the SOC as adding value to the work of the CO. This suggestion is strengthened by the CO's assertion, in its response to SECU's documentation and information request, that the areas of cooperation outlined in the MOU "are fully aligned with the Country Document, which in its Program Rationale states that 'It will focus on empowerment of youth and women as a pathway to reducing poverty and inequalities and will utilize innovation in finding local solutions to accelerate implementation of the Sustainable Development Goals'." Moreover, the CO was willing to participate in a public ceremony with the SOC in which it signed the MOU and expressed its support for working with the SOC, and the CO subsequently published a press release which included a photograph of the CO Resident Representative and the SOC CEO sitting together and signing the MOU.⁵⁰ It was not unreasonable for outside stakeholders to conclude from this that the CO supported the SOC and the MMSEZ. This impression would have been strengthened by the fact that the SOC listed the UNDP as a strategic partner on its website and that the CO was willing to write about the project in the South African press.⁵¹ Furthermore, it should be noted that generally international organizations only enter into partnerships with private sector entities when it is clear that doing so is consistent with fulfilling their mandates.
76. Second, had the CO complied with all the applicable UNDP policies and procedures, it would have completed the requisite due diligence assessment of the SOC and the

⁵⁰ <https://www.undp.org/south-africa/press-releases/undp-and-mmsez-sign-memorandum-understanding-achieving-sustainable-development> (accessed 19 June 2023)

⁵¹ <https://mg.co.za/thought-leader/opinion/2022-08-24-undp-supports-special-economic-zones-to-drive-sustainable-development/>

MMSEZ. However, the CO did not comply with the applicable policies and did not undertake the requisite due diligence. As a result, it was not fully informed about the social and environmental impacts of the project. This meant that its decision to sign the MOU was based on inadequate information about the SOC and the MMSEZ and thus about the potential reputational risk posed to the UNDP and to the wellbeing of those stakeholders who could be affected by the project. It also could not be sure that the MMSEZ project was consistent with the mission of the UNDP of eradicating poverty and reducing inequality.⁵²

77. The complainants allege that the harm that the MMSEZ threatens to cause is substantial. They identify the following potential harms and allege that the likelihood of each of these occurring is enhanced by the CO signing the MOU with the SOC. Since UNDP did not carry out due diligence before deciding to sign the MOU, UNDP has not been able to assess the likelihood or impact of any of these serious potential harms and may have inadvertently increased the likelihood that the complainants and affected communities could suffer each of the harms discussed below.

77.1. Threat of harm to sacred sites and graves

The complainants maintain that the current designs for the project would result in the destruction of a number of sacred sites and gravesites located inside the MMSEZ land area. This harm would be irreparable since the graves and sacred sites cannot be moved or replaced.

77.2. Threat of Lack of Access to Land

One of the communities represented by the complainants, the Mulambwane community, was forcibly evicted from their land during the apartheid era in South Africa. They were also denied access to the sacred sites and graves located on their land during this period. Following the advent of democracy in South Africa, the Mulambwane filed a land claim seeking to regain access to their land. Their claim was successful, and they were authorized to take possession of their land again. However, since their legal victory, they have not been able to reclaim their land. This land has now become part of the land that the state has designated for the MMSEZ further complicating resolution of this issue.

77.3. Threat to livelihoods

The complainants allege that the MMSEZ will undermine biodiversity-based income generation in the area. Two specific examples are the effect that the complainants allege the MMSEZ will have on their communities' ability to earn part of their income from collecting mopane worms and the fruit of the baobab trees. They are concerned there will be an adverse impact caused by

⁵² <https://www.undp.org/about-us#:~:text=Mission%20and%20vision,people%20build%20a%20better%20life.>

pollution from the project on the mopane worm population in the area and on the baobab trees.

77.4. Threat to Access to Water

It is clear from the project documents and the environmental impact assessments of the MMSEZ that the project will be water intensive. It is anticipated that the project will draw on the Limpopo River for much of this water. The project plan also calls for a dam to be constructed along the Limpopo River that will supply water to the project. The complainants are concerned that this water will go to the project at the expense of the resiliency of the Limpopo River basin system and all those who depend on it.⁵³ In other words, they are worried that the project will take the water that they currently depend on for its own purposes, thereby threatening their ability to access enough water for their farms, household, and other needs. Although not specifically mentioned in the complaint, members of the affected communities also expressed concerns that the project could pollute their wells and local springs.

77.5. Threat of increased pollution

The complainants allege that the project includes a number of activities that will cause increased air, water and soil pollution in the area. They include the expected metallurgical facilities that will be constructed in the MMSEZ, the agro-processing facilities and the logistics operations.

77.6. Threat to biodiversity

The complainants allege that the project will have serious impacts on biodiversity⁵⁴ and that the project is inconsistent with prior and ongoing biodiversity planning for the Vhembe region, particularly given the overlap of the MMSEZ footprint with portions of the Vhembe Biosphere Reserve.⁵⁵ The UNDP has also been working with communities in the Vhembe region to support environmental protection projects through its Small Grants Program, and the complainants allege that the MMSEZ is inconsistent with this prior support.

⁵³ For more about the water risks anticipated by the Complainants, see:

https://southafrica.fes.de/fileadmin/user_upload/Water_research_Limpopo_Catchment.pdf.

⁵⁴ The complaints point to the advisory issued by the Academy of Sciences South Africa - Scientific Advisory Group on Emergencies, available at: <https://www.assaf.org.za/science-advisory-group-on-emergencies-sage/>

⁵⁵ <https://www.vhembebiosphere.org/>. The Vhembe Biosphere Reserve is part of a network of UNESCO registered Biosphere Reserves across the world. Activities carried out in Biosphere Reserves are intended to promote solutions that reconcile the conservation of biodiversity with its sustainable use.

77.7. Threat that the MMSEZ will drive coal exploitation

The complainants allege that the MMSEZ will drive coal resource exploitation on a vast scale. This follows from the metallurgical activities planned for the MMSEZ which require coal as a raw material.

77.8. Threat to climate change vulnerability

The complainants allege that the project will have extremely high GHG emissions and will undermine South Africa's GHG mitigation obligations under international agreements.

Finding

78. SECU did not assess the merits or risks of the MMSEZ project, but found that the failure to comply with the applicable UNDP policies means the CO did not have the information needed to fully understand the potential impacts of the project on the complainants when it signed the MOU with the SOC. This act, bolstered by the implicit support indicated by the CO's press release and articles in the media about the project, inadvertently increases the chances that the SOC will proceed with the project. The complainants have provided evidence indicating that the project will have substantial and adverse social and environmental impacts. Thus, the CO's non-compliance has also increased the risk of harm to the complainants and affected communities.

Conclusion

79. The CO failed to comply with the applicable UNDP policies. In particular,

- 79.1. It failed to comply with the clear wording of Section 1 of the UNDP Policy on Private Sector Partnerships⁵⁶ which required it to treat the SOC as a private sector entity when assessing the potential for entering into a partnership with the SOC.
- 79.2. The CO used the incorrect template in preparing the MOU with the SOC. It incorrectly used the template for a MOU with a government entity rather than the one for a MOU with a private sector entity. As a result, it failed to obtain the necessary representations from the SOC. It also created reputational risk for the UNDP because of the nature of the MMSEZ activities and their associated risk of harm, without the CO having undertaken the necessary due diligence or consultations with head office.

⁵⁶ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2016%20Private%20Sector%20Partnerships%20Policy.pdf>

- 79.3. It failed to comply with the requirements of the UNDP Policy on Due Diligence and Partnerships with the Private Sector.⁵⁷ Section 3 of the policy defines the term private sector as including state owned enterprises. By failing to identify that this policy applied to the SOC, the CO failed to undertake the due diligence required by the policy before entering into any form of relationship with the SOC. In this regard it is noteworthy that Annex 1 to the Policy on Due Diligence and Partnerships with the Private Sector⁵⁸, includes memoranda of understanding as one possible instrument for establishing partnerships with the private sector.
- 79.4. The CO failed to apply the SES Programming Principles in its preparation for signing an MOU with the SOC, even though these Principles are applicable to all UNDP programming activities. As a result, it failed to do sufficient due diligence to ensure that it was complying with the SES Programming Principles in advance of signing the MOU with the SOC. SECU recognizes, however, that, while the programming principles apply to all UNDP programming activities, the SES does not provide clear guidance about how UNDP staff should apply the programming principles outside of the project context. This lack of clarity made it difficult for the CO to comply with its obligations in this regard.

The CO's acts of non-compliance with UNDP policy have increased the threat of harm to the complainants.

Recommendation to the CO

80. The CO should withdraw from its current MOU with the SOC because it used the wrong template and did not do the required due diligence before entering into the MOU. If the SOC wishes to continue with its relationship with the UNDP, the parties will need to prepare a new MOU using UNDP's template for MOUs with the private sector. If the SOC decided that it wishes to continue having a relationship with UNDP, the CO should do the due diligence required pursuant to the applicable UNDP policies⁵⁹ before deciding to sign a new MOU with the SOC. This should include the CO escalating the decision to the appropriate level of decision making

⁵⁷ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

⁵⁸ <https://secu.info.undp.org/sites/g/files/zskgke461/files/2024-02/2013%20Policy%20on%20DD%20and%20Partnerships%20with%20the%20Private%20Sector.pdf>

⁵⁹ As described in paragraph 27 above, the Policy on Due Diligence and Partnerships with the Private Sector was updated in June 2023 and this updated policy became effective on 12 October 2023. This updated policy was accompanied by an updated 2023 Risk Assessment Tool and an updated Guidance Note on Managing Risks in Partnerships with the Private Sector. The SECU investigation team also notes that on 2 March 2023 additional internal guidance on MOUs was made to UNDP staff on the UNDP's intranet. A page in the intranet distinguishes between MOUs and Statements of Intent, noting that "The MOU is a **recognized and formal partnership instrument**, whereas the Statement of Intent is an informal tool that may be considered by UNDP colleagues primarily for visibility and statement purposes, allowing for a pragmatic and rapid means of establishing a partnership" (emphasis added). This same intranet page also specifically highlights that due diligence is required before MOUs are entered into with the private sector, and that this due diligence must be done in accordance with applicable private sector due diligence policies.

within UNDP pursuant to the applicable UNDP policies so that the organization has the opportunity to appropriately consider the risks to UNDP associated with entering into a partnership with an entity undertaking activities that UNDP has identified as being high risk activities.

81. The CO should ensure that all its staff are aware that the SES Programming Principles apply to all UNDP programming and not only to UNDP projects. It should also ensure that all its staff are aware that the UNDP has a SES Technical Expert in its Africa regional hub and that they should consult with this expert if they are unsure about how to apply the SES Programming Principles.

Recommendations to UNDP

82. UNDP should ensure its staff are aware of and fully understand the content of its partnership policies so that they understand that for these purposes, state owned enterprises should be treated as private sector entities. This is important because state owned enterprises are operating companies and capable of undertaking activities that cause comparable social and environmental harm and reputational risk to UNDP as private sector entities. UNDP should educate staff about its view of MOUs. It should clarify that, even though MOUs may not create any binding legal obligations for the UNDP, they can be the source of reputational risk, particularly when the counterparty is undertaking activities that the UNDP considers high risk because of their potential to cause harm to local communities and the environment. The UNDP should accordingly stress the importance of UNDP staff carrying out the due diligence required by the applicable UNDP policies before they conclude MOUs with private sector entities (including state owned enterprises).
83. The UNDP should develop guidelines for its staff on how they should apply the SES Programming Principles outside the context of a project. It should also further promote the use of its network of SES technical experts in all its regional bureaux and that Country Offices can consult these experts if they are unsure about how to apply the SES Programming Principles in a particular UNDP activity.

INDICATIVE LIST OF INTERVIEWEES

Complainants and community groups

1. Earthlife Africa
2. Living Limpopo
3. Save our Limpopo Environment (SOLVE)
4. Dzomo La Mupo
5. Pepperbark Environmental
6. Mulambwane Women's Organisation
7. Baobab Foundation
8. Centre for Applied Legal Studies
9. Endangered Wildlife Trust
10. Mining and Environmental Justice Community Network of South Africa (MEJCON)

UNDP Staff

11. UN Resident Coordinator for South Africa
12. UNDP South Africa Resident Representative
13. UNDP South Africa Deputy Resident Representative
14. Other UNDP CO staff members

MMSEZ SOC and Local Government

15. CEO of the MMSEZ SOC
16. Stakeholder Relations Manager of the MMSEZ SOC
17. Investment Promotion Executive Manager of the MMSEZ SOC
18. Representative of the Limpopo Economic Development Agency

Tribal Authorities

19. Dzanani Tribal Authority
20. Tshidzivhe Tribal Authority and Council

Communities

21. Mulambwane community members (approximately 50 individuals)
22. Musina community members (approximately 30 individuals)
23. Thathe community members (approximately 50 individuals)
24. Tshikuwi community members (approximately 20 individuals)

Independent Experts

25. Independent entomology expert
26. Independent water expert

Other

27. Local business owner, Eco-Products
28. Political economist and Director at the African Centre for Citizenship and Democracy, University of the Western Cape