

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



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**ELIGIBILITY DETERMINATION:
Complainants: Earthlife Africa and Living Limpopo
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: 11 November 2022**

Basic Data

Case No.	SECU0020
Category of Non-Compliance:	Social and Environmental
Location:	South Africa
Date Complaint received:	7 June 2022
Source of Complaint:	Earthlife Africa and Living Limpopo
Eligibility assessment conducted by:	Richard Bissell, Lead Compliance Officer
Compliance Officer assigned:	Daniel Bradlow, Compliance Officer
Other investigators assigned:	Paul Goodwin, Christine Reddell
Related Case(s):	N/A

Signatures:



Prepared by:

Richard Bissell, Lead Compliance Officer, SECU

Approved by:

Helge Osttveiten, Director, OAI

I. Overview

1. On 7 June 2022, Earthlife Africa,¹ a South African non-profit environmental justice organisation, submitted a complaint to the Social and Environmental Compliance Unit (SECU) concerning a Memorandum of Understanding (MOU) that had been signed between the United Nations Development Programme (UNDP) and the Musina-Makhado Special Economic Zone State Owned Company (MMSEZ SOC).
2. The UNDP and MMSEZ SOC had issued a press release on 18 March 2022 publicly acknowledging the signing of this MOU.² On 1 April 2022, having seen this press release, Earthlife Africa and other interested stakeholders in South Africa approached SECU and other business units within the UNDP requesting access to a copy of the MOU. The MOU was made available by the UNDP South Africa Country Office to these stakeholders.
3. Having received a copy of the MOU, Earthlife Africa decided to formally lodge a complaint about the MOU with SECU on 7 June 2022. Subsequently, Living Limpopo,³ which is a South African non-profit organisation campaigning against the Musina-Makhado Special Economic Zone, informed SECU that it was requesting to be joined as a Complainant. Both Earthlife Africa and Living Limpopo partner with other organisations and individuals in South Africa and are representing other local organisations and people in this complaint who work and live in the Musina-Makhado area and allege that they will be directly affected by the proposed Musina-Makhado Special Economic Zone (MMSEZ) and UNDP's involvement therein.⁴
4. The South African Minister for the Department of Trade and Industry designated⁵ the MMSEZ in 2017 and the MMSEZ SOC is an entity mandated to develop and operate the MMSEZ. The proposed MMSEZ is the largest single planned Special Economic Zone (SEZ)⁶ development in South Africa.⁷ Targeted economic sectors for the MMSEZ are Energy and Metallurgy; Agro Processing; Logistics and General Manufacturing.⁸ The list of proposed metallurgical components of the MMSEZ include a coking plant, thermal power plant, ferrochrome plant,

¹ <https://earthlife.org.za/>

² <https://www.undp.org/south-africa/press-releases/undp-and-mmsez-sign-memorandum-understanding-achieving-sustainable-development>

³ <https://livinglimpopo.org/>

⁴ Earthlife Africa's partners in this complaint include: Save Our Limpopo Environment; Dzomo La Mupo; Pepperbark Environmental; and the Mulambwane Women's Organisation. Living Limpopo's partners in this complaint include: the Baobab Foundation; Philip Herd Private Nature Reserve; and local community members harvesting natural resources, including edible insects (particularly Mopane worms). These local organisations and community members have confirmed their association with Earthlife Africa and Living Limpopo, their support for the filing of the complaint to SECU, and that they can provide further information to SECU concerning the impacts that they would suffer as a result of the MMSEZ and UNDP's association with the MMSEZ.

⁵ https://www.gov.za/sites/default/files/gcis_document/201712/41287gon1324.pdf

⁶ A Special Economic Zone (SEZ) is a tool to promote national economic growth and exports by using targeted support measures to attract foreign and domestic investments and technology.

⁷ Environmental Impact Assessment Report for the Musina-Makhado Special Economic Zone Designated Site, February 2021, at page IV.

⁸ <https://miningindaba.com/Exhibitor-list/musina---makhado-sez-soc>

ferromanganese plant, ferro-silicon plant, steel plant, stainless steel plant, and lime plant.⁹ For the MMSEZ to proceed as planned by the South African government, various approvals from different governmental departments are required for the activities to be conducted therein, such as environmental authorizations, water use licenses, atmospheric emission licenses, etc., which are subject to procedural and legal requirements, including public participation.

5. The MOU between the UNDP and the MMSEZ SOC records that “UNDP represented by UNDP South Africa is interested in enhancing its development activities by exploring areas of opportunity to provide support to MMSEZ, in the Limpopo Province of South Africa. Areas of opportunity include, but are not limited to: technical support and expertise; capacity building and skills development; research and innovation; solutions for sustainable development, knowledge advancement, attracting foreign investment/investors, facilitating partnerships to address developmental needs.”
6. The Complainants allege that the planned activities in the MMSEZ “will have significant 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”. With particular reference to the UNDP, the Complainants allege that the MOU has caused, and will continue to cause, harm to communities and the environment because the MOU lends the MMSEZ project “significant legitimacy, prestige and momentum” given the UNDP’s “prestige as a UN body” and that “the photograph of Dr Ayodele Odusola of United Nations Development Programme and Musina SEZ CEO Lehlogonolo Masoga signing the MoU, in particular, has conveyed a picture of formal endorsement.”
7. As required by SECU’s Investigation Guidelines (<http://www.undp.org/content/undp/en/home/librarypage/operations1/secu-investigation-guidelines/>), this memorandum provides SECU’s assessment of whether the complaint is eligible for a full investigation by SECU.
8. SECU has determined, for the reasons stated below, that the complaint is eligible for a Compliance Review.

II. Further Details of UNDP Supported Activity

9. UNDP South Africa’s activities are guided by the Country Programme Document (CPD). The CPD was endorsed by the Executive Board of the UNDP on 14 May 2020 and is a five-year programme plan for UNDP’s work in South Africa (June 2020-2025). The CPD outlines the programme rationale, programme priorities and partnerships, programme and risk management, and monitoring and evaluation.
10. The UNDP South Africa Country Office (CO), in response to an information and documentation request from SECU, confirmed that the proposed areas of cooperation in the MOU “are fully aligned with the Country Document”, with the CO providing a description of how each area of cooperation in the MOU furthers a CPD priority area.

⁹ Environmental Impact Assessment Report for the Musina-Makhado Special Economic Zone Designated Site, February 2021, table of contents.

11. The basis for the MOU is accordingly the CPD, as all UNDP supported activities within South Africa should align with the country programme.
12. Article II of the MOU outlines the areas of cooperation which the parties have identified. These include:
 - a. “Technical support in areas of project management, financial planning, conceptualization of novel solutions towards advancing the SDGs, leveraging international expertise/knowledge, etc.
 - b. Capacity building; training of local communities, businesses and government towards creating an employment pool for jobs of the future and to support the vision of the development of smart cities.
 - c. Research and innovation in the field of agro-processing, value-adding/ beneficiation of raw materials, energy, water, mining, etc.
 - d. Environmental sustainability and climate change; promoting the identification and adoption of climate friendly solutions in various sectors, including energy generation and water management (such as renewable energy, clean energy technologies and improved natural resource management, while ensuring a just transition). Advancing knowledge of environmental sustainability within MMSEZ.
 - e. Forging and facilitating partnerships to grow foreign direct investment in the MMSEZ.
 - f. Transforming existing skills and assets within rural villages/towns towards the creation of smart cities and the adoption of the 4th industrial revolution.”
13. While the MOU states that it is “an expression of intent and does not constitute a legally binding document” and that “nothing herein shall be construed as creating a legally binding commitment, financial or otherwise”, the MOU contemplates obligations on the side of both parties to consult and share information “on matters of common interest, which in their opinion are likely to lead to mutual collaboration”.
14. MOUs are a recognized mechanism within UNDP for the UNDP and a partner “...to express interest in exploring and determining collaboration when commitments do not extend to the transfer of resources”.¹⁰ Regardless of whether legal obligations were created between UNDP and the MMSEZ, and irrespective of whether or not any project is developed, this implies that the signing of an MOU amounts to a form of commitment by the UNDP.
15. The areas of cooperation listed in the MOU are technical areas in which the UNDP has expertise and mirror the sorts of issues which often form the basis of UNDP projects. While clearly signifying an early stage of engagement, the MOU necessarily contemplates the further conceptualization, approval and implementation of a specific UNDP project or projects, or other programming delivery instruments.
16. Lastly, the MOU, regardless of whether a project materializes, appears to formalize a partnership between the UNDP and the MMSEZ SOC¹¹, the details of which will be further understood during the investigation, and this provides the basis for the application of due

¹⁰ UNDP, Private Sector Partnerships, December 2016, page 7.

¹¹ The UNDP’s Policy on Due Diligence and Partnerships with the Private Sector recognizes MOUs as “UNDP instruments” which can be used to formalise partnership engagements (at page 14 of the Policy).

diligence requirements under the UNDP's private sector partnership policies (discussed in more detail below) and the Social and Environmental Standards.¹²

III. Summary of Process to Date

17. The Investigation Guidelines for SECU detail the process for responding to complaints: Section 8. The Complaint Review Process – Eligibility and Terms of Reference directs SECU to register complaints within five business days of receipt if they are not automatically excluded pursuant to Section 1.1 Policy basis.
18. SECU received the complaint on 7 June 2022, registered the complaint on 14 June 2022 and posted it on its case registry, available at www.undp.org/secu.
19. Section 8.1, Determining Eligibility of a Complaint, indicates that within twenty business days after registering the complaint, SECU will determine if the complaint meets the eligibility criteria specified in Section 8.2. To be eligible a complaint must: (1) Relate to a project or programme supported by UNDP; (2) Raise actual or potential issues relating to compliance with UNDP's social and environmental commitments; and (3) Reflect that, as a result of UNDP's noncompliance with its social and environmental commitments, complainants may be or have been harmed.
20. Due to delays outside of SECU's control, SECU was not able to conduct an eligibility determination on this case within the required 20 business days. As per Section 1. Purpose of the investigation guidelines, Compliance Review Investigations circumstances "may require a deviation from guidelines in the interest of a fair process to the complainants..." In this circumstance, SECU's operational requirements prevented it from being able to conduct an eligibility determination within the required timeframe. However, this delay will not delay the timeline for its field mission and thus should not prolong the overall duration of the compliance review.

IV. Determination of Eligibility

21. **Criterion 1: Relates to a project or programme supported by UNDP.** As described above, the MOU, while not a legally binding document, creates obligations to consult and share information to further matters of common interest in relation to the proposed MMSEZ. The signing of the MOU was also publicized and as of the publication of this eligibility determination appears on the UNDP website,¹³ creating expectations that the UNDP will undertake specific activities if the MMSEZ proceeds. The MOU accordingly exhibits characteristics of early project preparation (i.e., preliminary scoping work as part of the design phase of a more specific project). As indicated by the UNDP CO, the MOU is also aligned with, and was executed in promotion of the UNDP South Africa Country Programme and can accordingly be characterized as an activity undertaken under a particular programme. Precise details concerning the South

¹² The UNDP's Policy on Due Diligence and Partnerships with the Private Sector specifically includes "state-owned enterprises" within its application.

¹³ <https://www.undp.org/south-africa/press-releases/undp-and-mmsez-sign-memorandum-understanding-achieving-sustainable-development>

Africa Country Programme and the lifecycle of activities (including projects) developed under that programme are issues which will be further understood through an investigation, recognizing that the situation is fluid and that how the MOU relates to the Country Programme and specific UNDP projects can change over time. Since the MOU exhibits characteristics of, and relates to, both a UNDP programme and preliminary work done in furtherance of a likely UNDP project, the requirements of this eligibility criterion are satisfied.

22. **Criterion 2: Raises actual or potential issues relating to compliance with UNDP’s social and environmental commitments.** The UNDP’s Social and Environmental Standards (SES) apply to all UNDP programming. The SES define UNDP programming as “the planning, implementation, reporting, and evaluation of development results achieved with partners through UNDP support. A UNDP “programme” is a plan for effectively contributing to outcome-level development results.”¹⁴ The UNDP’s “Visual Guide to UNDP Programming Cycle” explains that outcomes can be delivered through selected delivery instruments, and lists four such instruments: development projects, the engagement facility, development services, and institutional effectiveness projects.¹⁵ The SES has three parts: Part A, Programming Principles; Part B: Project-Level Standards; Part C: Social and Environmental Management System Requirements. While the project-level standards would not apply to the full programming cycle, there are requirements in Part A and C that extend to all programming. The complaint raises potential issues relating, *inter alia*, to UNDP’s compliance with SES commitments concerning human rights, sustainability and resilience, accountability, programming quality assurance and risk management, stakeholder engagement, and access to information. The complaint also raises issues relating to the UNDP’s due diligence in partnership screening under the UNDP’s Programme and Operations Policies and Procedures (POPP), specifically the section on Private Sector Partnerships, and the UNDP’s associated Policy on Due Diligence and Partnerships with the Private Sector. Partnerships with state-owned enterprises are explicitly included within the definition of “private sector” in the POPP and related policies.¹⁶ The UNDP’s Policy on Due Diligence and Partnerships with the Private Sector requires that the UNDP complete appropriate due diligence checks before entering into partnerships and apply the UNDP’s Private Sector Risk Assessment Tool, which requires the UNDP to assess various criteria, including whether there is “Significant criticism from local or global NGOs/media/social media or other significant partners of UNDP (including CSO advisory committee, marginalized people etc.) locally or globally” or “Controversies or risks related to community health and safety, pollution (including climate change)” before entering into a partnership with an entity that is the subject of such criticism or controversies.¹⁷ According to the UNDP CO’s response to SECU, the Policy on Due Diligence and

¹⁴ UNDP Social and Environmental Standards, 1 January 2021, footnote 4.

¹⁵ See: https://popp.undp.org/UNDP_POPP_DOCUMENT_LIBRARY/Public/PC_complete_visual_guide_v3.0.pdf.

¹⁶ Policy on Due Diligence and Partnerships with the Private Sector:

“This Policy defines the private sector as:

- a) For-profit and commercial enterprises of any size
- b) Corporate foundations
- c) Business associations, coalitions and alliances (including e.g. chambers of commerce, employers’ associations, cooperatives, industry and cross-industry initiatives where the participants are for-profit enterprises). These organizations will be assessed on their own merits, rather than on the merits of its members.
- d) **State owned enterprises.**” (Own emphasis).

¹⁷ The Private Sector Risk Assessment Tool contemplates that if there is evidence of one or more of the risk criteria being met, then the Country Office should “consult with HQ to determine escalation of the decision to HQ after risk assessment finalization”.

Partnerships with the Private Sector and associated risk assessment tool was not applied before entering into the MOU with the MMSEZ SOC, which raises actual or potential issues relating to compliance with UNDP commitments. The requirements of this criterion are accordingly satisfied.

23. **Criterion 3: Reflect that, as a result of UNDP's noncompliance with its social and environmental commitments, complainants may be or have been harmed.** The Complainants¹⁸ describe various ways in which they may be harmed by the MMSEZ. On the issue of harm, it is important to distinguish between the MMSEZ, as a project in its own right to be carried out by the MMSEZ SOC, and any project or other activities that the UNDP may implement flowing from the MOU or under the UNDP South Africa Country Programme more broadly. Another distinction should be made between specific activities and the UNDP's decision to enter into the MOU with the MMSEZ SOC. Harm that the Complainants could suffer as a result of the MMSEZ has been well documented in objections submitted in distinct national licensing processes carried out by the MMSEZ SOC, as well as in the environmental impact assessment prepared in support of MMSEZ SOC's application for environmental authorization. The Complainants allege that the UNDP, by lending the MMSEZ project "its prestige as a UN body", has "created momentum and confidence in a fundamentally flawed project", which, by implication, has increased the likelihood of this project proceeding and infringed upon the Complainants' ability to lobby for their interests, which in turn increases the likelihood that the Complainants will suffer harm. Accordingly, the UNDP's decision to partner with the MMSEZ SOC, which may have been made without carrying out the necessary due diligence, may have already, or could in the future cause harm to the Complainants. In addition to harm of this nature, the MOU contemplates a specific role in the MMSEZ for the UNDP and, given the nature of the heavy industrial activities to be carried out in the MMSEZ, it is possible that the UNDP's activities in this project would be a contributing factor in causing harm to the Complainants.¹⁹
24. As all three criteria are satisfied, SECU has determined that the complaint is eligible for a social and environmental Compliance Review.

V. Next Steps

25. SECU will initiate the review with discussions with the Complainants and relevant UNDP Staff. A complete description of investigative steps will be available in the terms of reference for the investigation.

¹⁸ As set out above, both Earthlife Africa and Living Limpopo represent other community organisations and people in the filing of this complaint who allege that the MMSEZ and UNDP's involvement threatens to directly harm them.

¹⁹ SECU recognizes that this point is speculative in nature given the uncertainty of the activities that the UNDP may undertake, but that this is nevertheless an opportune time to flag these issues before any UNDP projects are designed and any harm is caused as a result thereof. Furthermore, the determination of eligibility by SECU does not turn on these speculative harms, for the reasons outlined earlier in the treatment of criterion 3.