

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



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Resilient nations.*

TERMS OF REFERENCE (TOR) FOR INVESTIGATION

In response to allegations of non-compliance with UNDP's social and environmental commitments in the context of the Memorandum of Understanding between the United Nations Development Programme and the Musina-Makhado Special Economic Zone State Owned Company

**Case No. SECU0020
Date: 14 December 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

I. Overview

The Complaint:

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 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."
5. 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,

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.

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.”

The UNDP Activity:

6. 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.
7. The UNDP South Africa Country Office (herein ‘UNDP South Africa’), 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 UNDP South Africa providing a description of how each area of cooperation in the MOU furthers a CPD priority area.
8. The basis for the MOU is accordingly the CPD, as all UNDP supported activities within South Africa should align with the country programme.
9. 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.”
10. 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.

11. As presently understood by SECU, the MOU exhibits characteristics of, and relates to, both a UNDP programme (the South Africa country programme) and preliminary work done in furtherance of a likely UNDP project. During its investigation, SECU will seek to better understand the lifecycle of activities (including projects) developed under the South African country programme. However, it recognizes that the situation is fluid and that how the MOU relates to the country programme and specific UNDP projects can change over time.

SECU actions thus far:

12. On 14 June 2022, SECU registered the case on its online case registry. SECU, as part of its efforts to determine eligibility made document and information requests to UNDP South Africa. UNDP South Africa responded to these requests and provided additional relevant documents. SECU also obtained additional information and documentation from the Complainants.
13. On 11 November 2022, SECU determined that the complaint met the eligibility criteria for a compliance review: (1) The complaint relates to a project or programme supported by UNDP; (2) raises actual or potential issues relating to compliance with UNDP's social and environmental commitments, and (3) reflects that, as a result of UNDP's noncompliance with its social and environmental commitments, complainants may be or have been harmed.⁵
14. The fact that no UNDP project documents have been developed since the MOU was signed means that, without further investigation, SECU cannot conclusively determine which policies and which provisions of these policies are applicable in this case. However, SECU understands that, at a minimum, the complaint raises actual or potential issues related to due diligence and compliance with the UNDP's revised Social and Environmental Standards (SES). The following provisions of the revised UNDP SES, which came into effect on 1 January 2021, appear to be applicable:
 - a. Programming Principle 1: Leave No One Behind
 - b. Programming Principle 2: Human Rights
 - c. Programming Principle 4: Sustainability and Resilience
 - d. Programming Principle 5: Accountability
 - e. The following Social and Environmental Management System Requirements:
 - i. Programming Quality Assurance and Risk Management
 - ii. Stakeholder Engagement and Response Mechanisms
 - iii. Access to Information

⁵ Section 8.2 of SECU's Investigation Guidelines detail the eligibility criteria for a SECU compliance review. Available at: https://www.undp.org/sites/g/files/zskgke326/files/publications/SECU%20Investigation%20Guidelines_4%20August%202017.pdf.

15. Depending on what SECU's investigation uncovers regarding the more precise relationship between the MOU and UNDP project activities, the complaint may also raise actual or potential issues of compliance with the project-level standards under the SES.
16. In addition to potential issues under the SES, the complaint 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.⁶

II. Scope of Work

17. The aim of this compliance review 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 the SES and other relevant policies and procedures, mitigate any harm that results from the breach of UNDP's social and environmental commitments and help identify avenues to prevent similar compliance concerns in the future.
18. The scope of this compliance review, like all compliance reviews, is limited to that over which UNDP has reasonable control. It does not focus on the actions of other entities except insofar as they relate to UNDP's commitments to conduct appropriate due diligence and to assess, mitigate and address social and environmental risks that occur in the context of UNDP supported activities.
19. The compliance review carried out by SECU will involve the following key activities:
 - a. Based on an initial desk-based examination of accessible documents (e.g., country programme documents and related workplans, MMSEZ related documents (especially any independent assessments conducted as part of national licensing processes and comments and objections submitted by stakeholders), UNDP South Africa generated documents related to the MMSEZ, government generated documents, documentation provided by the Complainants and other stakeholders, and other relevant documents) develop a more detailed analysis of issues in light of the SES, the Policy on Due Diligence and Partnerships with the Private Sector, and other relevant UNDP commitments.

⁶ 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).

- b. SECU will analyze the information obtained from these sources and determine the best way to hear directly from the Complainants and other concerned stakeholders about perceptions of harm, actions undertaken, and solutions to the identified problems.
- c. Using these analyses, identify initial questions for which answers need to be secured in country and otherwise (identifying questions will necessarily be an iterative process as more information is secured).
- d. Interviews are conducted on a willing basis, and interviewees are given multiple opportunities to answer questions and provide requested documentation. Targeted interviewees include:
 - i. Current and former UNDP staff members and consultants involved in the design and implementation of the South Africa Country Programme and in discussions concerning the MMSEZ and UNDP South Africa's decision to sign the MOU with the MMSEZ SOC.
 - ii. The Complainants, their representatives, and other affected community members. In particular, SECU views the groups listed in footnote 4 as especially beneficial to meet with and gather testimony from and will make every effort to do so.
 - iii. Representatives of the MMSEZ SOC.
 - iv. Relevant government officials in South Africa.
 - v. Other groups and individuals who are able to provide evidence regarding the MMSEZ and its anticipated impacts, the impact of the signing of the MOU on public and official sentiment towards the MMSEZ, as well as the impacts of any specific UNDP-supported activities that are being considered or may be under implementation in connection with the MMSEZ.
- e. Establish contact with those identified above, to set up interviews.
- f. Travel to South Africa to obtain evidence relating to UNDP adherence to the SES and other relevant policies.
- g. Manage any Covid 19-related restrictions and risks of community transmission while travelling.
- h. Assess the risks of acts of intimidation or reprisal at various stages of the investigation process and identify preventative and response measures in consultation with relevant stakeholders as necessary.
- i. Prepare a draft investigation report that assesses compliance of UNDP activities with the SES and other relevant social and environmental commitments.
- j. Make publicly available for comment the draft report, and specifically request comments from Complainants, the South Africa CO, relevant Government officials, and other relevant stakeholders.
- k. Finalize the report and submit it to the Director of OAI and the UNDP Administrator and relevant units.
- l. Post the final report on the SECU registry.
- m. Monitor the implementation of the Administrator's decisions.

III. Anticipated Milestones and Timeframes

20. The SECU process expects to achieve the following milestones in terms of developing its report and its component parts:

Milestones	Expected Completion Dates
1. Issue Draft Terms of Reference on SECU website for public comment.	November/December 2022
2. Revise Terms of Reference based on public comments.	December/January 2022
3. Request additional information and documentation from Complainants and CO staff knowledgeable about the MMSEZ and MOU. Desk-based document review, and virtual interviews as feasible and necessary.	December 2022 – February 2023
4. Field Mission (South Africa).	January/February 2023
5. Continue requests for additional information from relevant stakeholders.	February – June 2023
6. Complete and release for public comment the Draft Investigation Report.	July 2023
7. Issue final report to the Administrator and relevant units, publish the report publicly, and circulate to all stakeholders.	September 2023