



Investigation Report

Investigating allegations of non-compliance with UNDP social and environmental commitments relating to the following UNDP projects: “Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panama” and “Apoyo al Programa de Reformas del MINGOB”

Case No. SECU0004

Date: April 19th 2018

Basic Data

Case No.	SECU0004
Category of Non-Compliance	Social and Environmental
Location:	Panama
Priority:	High
Date complaint received:	15 August 2017
Source of complaint:	M10: MOVIMIENTO 10 DE ABRIL
Eligibility assessment conducted by:	Richard Bissell, Lead Compliance Officer
Compliance Officer assigned:	Richard Bissell, Lead Compliance Officer
Other investigators assigned:	Anne Perrault, Compliance Officer

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I. Executive Summary

1. Two UNDP projects, the 'Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panamá' (herein 'MIRE project'), with a start date of December 2014, and 'Apoyo al Programa de Reformas del MINGOB' (herein 'MINGOB programme'), signed in May 2015 (with no specified start date), supported a dialogue process in 2015 and 2016 related to Panama's Barro Blanco Hydropower Project.
2. On 22 August 2017, the Social and Environmental Compliance Unit (SECU) of the United Nations Development Programme registered a complaint from the Panama-based Ngäbe Buglé area organization M10: MOVIMIENTO 10 DE ABRIL, regarding these projects, and the supported dialogue process, and requesting a compliance review.
3. On 25 September 2017, SECU determined the complaint met the criteria necessary for SECU to investigate UNDP's compliance with its social and environmental commitments, posting the signed Eligibility Determination to its registry [here](#).
4. SECU undertook a document review, and, from 9 November to 13 November 2017, SECU traveled to Panama to interview complainants, relevant government officials, the UN Resident Coordinator/UNDP Resident Representative, UNDP staff, relevant civil society organizations, technical experts and others.
5. The investigation, including fieldwork, was focused on gathering and reviewing evidence, including relevant UNDP reports and material, relevant meeting documentation, in-person interview statements, among other evidence. The evidence sought related to the dialogue process from February 2015 to August 2016, including UNDP's role in each phase of the process, procedures employed by UNDP and others to create and implement each phase of the dialogue process, participation of indigenous communities and transparency for each phase of the dialogue process, how UNDP assessed and mitigated risks throughout the dialogue process, and UNDP's participation in the final agreement.
6. After the fieldwork and additional research, SECU makes the following findings:
 - i. UNDP did not meet UNDP requirements to screen projects and programmes, including a requirement to apply the Environmental and Social Screening Procedure (ESSP) to projects approved in 2014, and a requirement to apply the Social and Environmental Screening Procedure (SESP) to projects and programmes approved after 1 January 2015. The UNDP Panama Country Office (UNDP CO) did not apply the ESSP to the 2014 MIRE Project. It also did not apply the ESSP or SESP to the 2015 MINGOB Programme, and did not seek an official waiver from application of the screening tools. The relatively broad and non-detailed description of activities to be supported by the significant volume of funding for the MINGOB programme made screening for risks more challenging.
 - ii. UNDP did not prepare a stakeholder analysis and stakeholder engagement plan prior to the Roundtable dialogue, as required for UNDP engagements with

Indigenous Peoples - engagements that pose at least moderate (and likely significant) risks for both communities and UNDP.

- iii. Despite UNDP's failure to apply screening tools and prepare a robust stakeholder analysis and engagement plan to guide UNDP's engagement throughout the dialogue process, UNDP otherwise largely met UNDP requirements for transparency, consultation/consent, and Indigenous Peoples' rights during the Roundtable Dialogue from February 2015 to May 2015. UNDP's support for development of the Methodology for the Roundtable and an agreement on the composition of the Indigenous Commission were important procedural undertakings reflecting UNDP efforts to comply with UNDP commitments. Arguably, the agreed Methodology for the Roundtable Dialogue, while relatively sparse on detail, functioned as the consultation framework recommended by the UN Special Rapporteur to secure rights. UNDP's commitments to transparency and inclusiveness in the Roundtable also were consistent with UNDP commitments, as was UNDP's consistent and clear articulation of its commitments to respect for rights.
 - iv. UNDP did not meet requirements for due diligence, transparency, consultation/consent and Indigenous Peoples' rights after the Roundtable Dialogue was concluded, in approximately June 2015. UNDP, for example, did not ensure consistency with the cautions and findings of the UN Special Rapporteur, including cautions that inadequate consultation and consent processes were the source of most issues and problems regarding respect for and protection of indigenous rights, and measures necessary to ensure respect for rights (detailed more below).
7. To help ensure UNDP's compliance with its policies, SECU makes the following recommendations for action by the UNDP Panama Country Office – with an initial observation about limitations on remedies in this context for specific harms:
- i. Normally, in a SECU compliance review, SECU is able to identify remedies in response to harm. In this case, where management currently has decided to terminate involvement in issues related to the BBHP, specific recommendations to remedy harms are limited, although clearly there have been harms to excluded parties during the dialogue process. For instance, while remedies to be considered have been advanced - particularly lowering the flood level to avoid impacts to territories of complainants and other Indigenous Peoples, ensuring revenues in a trust fund for Indigenous Peoples, among others – UNDP's current noninvolvement limits its capacity to advance discussion of such remedies. The following recommendations apply to UNDP engagements in future activities, including any related to BBHP. It should be noted that multiple projects are underway or proposed for exploitation of natural resources in the territories of Indigenous Peoples in Panama.
 - ii. Prepare a robust stakeholder analysis that guides future UNDP engagements in activities that involve Indigenous Peoples, to help ensure that UNDP activities respect rights, strengthen Indigenous Peoples' institutions and their own decision-making structures and processes, ensure attention to the rights, views, and needs of affected communities, and do not increase divisions within and among communities.

- iii. Ensure application of screening procedures to future projects and programmes, and ensure, for activities not detailed in programmes, that risks associated with a given sector of activities are identified at programme development. When activities are detailed subsequently, ensure that social and environmental risks associated with such activities are avoided and/or mitigated in a manner consistent with the SES.
- iv. Ensure that UNDP activities are consistent with findings of UN bodies, including, for UNDP engagements related to the Barro Blanco Hydropower Project, and findings of the UN Special Rapporteur on indigenous rights. These findings relate to robust consultations and the need for consent free from coercion, and explicit and careful attention to standards and robust procedures when engagements relate to measures in the public interest, e.g., the finding that ‘the State should not allow the territorial rights of this people to be prejudiced in any way unless it is necessary to do so for a public purpose that is valid from a human rights perspective and, in such cases, only to the extent that it is necessary for and proportional to that valid purpose.’
- v. Robust application of SES requirements to develop Stakeholder Engagement Plans and Indigenous Peoples Plans, as appropriate, when UNDP activities involve Indigenous Peoples, and notification to the Panamanian government that UNDP must comply with UNDP SES.
- vi. Robust application of SES requirements for transparency and inclusivity in UNDP activities, including, in the context of dialogue activities.

II. Overview

8. On 22 August 2017, the Social and Environmental Compliance Unit (SECU) of the United Nations Development Programme registered a complaint from the Panama-based Ngäbe Buglé area organization M10: MOVIMIENTO 10 DE ABRIL, concerning two UNDP-supported projects: ‘Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panamá’ (herein ‘MIRE’ project) and “Apoyo al Programa de Reformas del MINGOB’ (herein ‘MINGOB’ programme).
<https://info.undp.org/sites/registry/secu/SECUPages/CaseDetail.aspx?ItemID=2>
9. The Project Document for the MIRE project was signed by UNDP on 28 November 2014 (Atlas Award ID: 00084302, Project ID: 00092385), with a start date of December 2014, an end date of December 2016, and a US\$ 926,497.00 budget. The project document for the MINGOB programme was signed by UNDP on 20 May 2015 (Atlas Award ID: 00083709) with no project start and end date, occurring during the 2014 – 2019 country programme timeframe, and with a US\$ 65,402,369.81 budget.¹

¹ The UN Resident Coordinator and UNDP Resident Representative for Panama noted, in an 11 September 2017 response to a SECU request for information, ‘UNDP also provided logistical support for the mobilization of the representatives, venues, etc. through projects PS 92046 “Apoyo al Programa de Reformas del MINGOB” and PS 00092385 “Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panamá”.

10. On 25 September 2017, SECU determined the complaint met the criteria necessary for SECU to investigate UNDP's compliance with its social and environmental commitments, and posted the signed Eligibility Determination on its public registry [here](#).
11. SECU undertook a document review, and from 9 November to 13 November 2017, SECU traveled to Panama to interview complainants, relevant government officials, the UN Resident Coordinator/UNDP Resident Representative (herein 'RC/RR'), UNDP staff, relevant civil society organizations, technical experts and others.
12. This report includes the following: (1) overview; (2) background and concerns that led to the complaint; (3) social and environmental commitments that applied in the context of this project; (4) findings related to application of the commitments; and (5) recommendations.

III. Background and Concerns That Led to Complaint

13. In 2006, the Panamanian government selected a Panamanian corporation, the Generadora del Istmo S.A. Corporation (GENISA), to advance a 19 MW hydropower project – the Barro Blanco Hydropower Project (BBHP) – on the Tabasará River, a river flowing through the territory of the Ngäbe Buglé Indigenous Peoples.² The proposal indicated that the dam for the BBHP was to be built downstream from, but in close proximity to, this territory.
14. On the basis of an environmental impact assessment commissioned by GENISA in 2007, the Panamanian Environmental Authority (ANAM) approved the project in 2008, and in early 2009 GENISA and the government of Panama signed the concession contract.³
15. In May 2009, GENISA requested a modification of the permit to increase the capacity of the dam to 28.8 Megawatts from the original 19 Megawatts (a 52% increase) – increasing the size of the dam and area flooded. In January 2010, ANAM approved the modification, apparently in the absence of significant modifications to the environmental impact assessment,⁴ and in January 2011 the concession contract was modified to increase the dam capacity to 28.8 Megawatts.

² According to the 'Barro Blanco Hydroelectric Project' investigation report, published on 29 May 2015 by the Independent Complaints Mechanism – the accountability mechanism for two banks funding the BBHP (the German Investment Corporation (DEG) and the Netherlands Development Finance Company [FMO]) - a much larger hydropower project had been proposed for this site in the late 1990s, but was abandoned in light of opposition to the project (by the M10 movement formed in response to the effort).

³ GENISA claims it secured valid consent from Indigenous Peoples to build the dam (Roundtable Dialogue Meeting Minutes 19 March 2015). Indigenous Peoples dispute the idea that valid consent was provided (Roundtable Dialogue Meeting Minutes 19 March 2015).

⁴ A report by the Independent Complaints Mechanism, the accountability mechanism for two banks funding the project, FMO and DEG, reflects that no additional environmental and social impact analysis had been performed prior to 10 July 2010. FMO-DEG Independent Complaints Mechanism, Panel report No. 1, Barro Blanco Hydroelectric Project Panama, 29 May 2015.

16. According to a report shared with SECU by the United Nations Resident Coordinator/ UNDP Resident Representative (UN RC / UNDP RR), 'Conflict over the Barro Blanco Hydroelectric Project. Origins, evolution and agreements. Prepared by United Nations System', (herein 'UNS Report') the dam 'will require flooding of 258.67 hectares to enable Tabasará's reservoir operations; and 5 hectares for the dam, engine room, and complementary works...the reservoir would flood an area of 6 hectares' of the Ngäbe Buglé region, although the dam is located outside this region.
17. In January 2011, two European state-owned banks, the German Investment Corporation (DEG) and the Netherlands Development Finance Company (FMO), agreed to fund the project, and, in 2011, the Central American Bank for Economic Integration (CABEI) approved a loan to the project developer.
18. Construction of the dam began in February 2011.
19. Beginning with the initial project proposal, and leading into the dialogue process at issue in the complaint to SECU, the project was challenged by most Indigenous Peoples in the region of the Tabasará River, including not only complainants, but also other Indigenous Peoples and their representatives (including the Caciques - the traditional authorities of the Ngäbe Buglé Comarca, i.e., indigenous territory).⁵ Indeed, the dialogues at issue in this complaint were a reflection of the strong opposition by Indigenous Peoples to the project.
20. During this time, Indigenous Peoples had raised significant issues with the project, and, based on these issues, sought to challenge the project. They sought assistance and/or redress from several entities, including the United Nations, the FMO-DEG Independent Complaints Mechanism (the accountability mechanism for two banks funding the project, FMO and DEG), and Panama's domestic courts (various lawsuits). Indigenous Peoples additionally held several protests, including protests that were violent and resulted in physical injury and death. One such protest required a temporary halt to dam construction in May 2012.
21. Among the most significant issues identified by Indigenous Peoples included an inadequate environmental and social impact assessment, insufficient transparency, flawed consultations with Indigenous Peoples, a lack of valid free, prior, informed consent from Indigenous Peoples for the project, inattention to the rights of protestors, and related human rights concerns. Although Indigenous Peoples were not successful in every challenge, significant project shortcomings (including those related to the issues above) were acknowledged and confirmed by several of the entities from which they sought redress.
22. The UN's response to Indigenous Peoples' requests for help included several UNDP-funded initiatives: a 'Technical Commission' study from May to August 2012, a 'joint verification mission' in September 2012,⁶ and a detailed 'independent assessment' in 2013, carried out by the expert team of Gonzalo Castro de la Mata and Luis Lopez. This

⁵ In 2009, M10 and several other organizations filed a complaint to the EIB accountability mechanism when EIB in the process of deciding whether to fund the project. After GENISA withdrew its request for assistance, the complaint was dismissed.

⁶ Protests at the dam (which had halted dam construction in May 2012) were suspended to allow the UN inspection.

team prepared an 'Independent Appraisal of the Barro Blanco Dam, Panama,' which included a participatory rural appraisal, analysis of the ecological and economic aspects of the project, and a water flow simulation. Subsequently, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, investigated in July 2013 and published a report in 2014 examining issues related to Indigenous Peoples' rights in Panama.⁷ He offered recommendations specific to the BBHP (described more below).

23. One function of the technical report funded by UNDP and prepared by de la Mata and Lopez was to study ecological and economic factors and related social concerns not adequately considered in the original environmental and social impact assessment - including concerns related to the increase in megawatts production.⁸
24. On the inadequacy of the original impact assessment and the need to more robustly consider impacts to the Ngäbe Buglé peoples the report noted: 'The project is adjacent to the Indigenous Comarca of Ngäbe Buglé, and it is estimated that the reservoir could permanently flood approximately 6 hectares of the region in its adjacent areas, without consideration for possible additional flooding during times when the water level rises (Lopez 2013). The lack of clear information on the project and its effects on the indigenous population of the Ngäbe Buglé Region has caused a number of conflicts in 2011 and 2012, including protests that resulted in the closure of the Inter-American highway, and a tragic loss of human lives.'
25. It noted that while the dam had no impact on global biodiversity, it had 'real and important impacts' on the indigenous populations living in the area, and further concluded, 'the local population had not been correctly consulted.' It identified several potentially significant ecological impacts that had not been adequately considered, including impacts to the gallery forest adjacent to the river, aquatic biota - and particularly to the movement of migratory species, and the riverbank. It described the implications of these impacts for communities, describing, for example, that 'natural resources such as wood, medicinal plants, and other crops used by the community will be lost. With respect to hydro-biological resources, fish and crustaceans will be affected. Whilst the net impact may not necessarily represent a decrease in the total volume of aquatic life, given that some species will benefit and will replace those that are disadvantaged, these changes will have an impact on the traditional way of life of the Ngäbe population.' It also noted that flooding and increased water levels would decrease access of the communities to the natural resources they use and rely on. Finally, it observed, 'there are intangible effects related to the culture of the Ngäbe community, and their traditional way of life. One of these is the alteration of the Petroglyphs of Quebrada Caña and Kiad, which continue to have cultural significance for the Ngäbe population. The cumulative effects of the described changes in characteristics and access to natural resources may also have significant consequences for the way of life and culture of the three Ngäbe communities.'

⁷ Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya.' 3 July 2014.

⁸ All interviewees interviewed by SECU similarly acknowledged that the original impact assessment was flawed.

26. It noted the following requirements for development in the area, 'Any opportunity for development being carried out will require joint assessment and transparent and open dialogue, in order to ensure that its implementation respects the legitimate aspirations and traditional values of the communities. These actions may in no way be considered a replacement for actions of mitigation and compensation for the affected populations, to which the firm is obliged on the basis of the impacts identified within this expert report.'
27. Subsequent to the UN technical experts report, the UN Special Rapporteur on the rights of Indigenous Peoples, Mr. Anaya, visited Panama in 2013, and submitted a report to the UN General Assembly in July 2014.⁹
28. He similarly concluded the Ngäbe "were not properly consulted' and emphasized Indigenous Peoples' concerns related to hydropower and the BB dam specifically. He confirmed that while the dam was to be located outside the boundaries of the Comarca, the dam's reservoir would flood lands in an adjacent area 'and will thus have a direct impact on a number of the comarca's inhabitants.'
29. The report acknowledged shortcomings in the environmental impact study approved by the National Environment Agency, noting it has 'given cause for concern, since it fails to assess the project's impact on the lands and territories of the Ngäbe Buglé people' and 'irregularities in the processes involved in obtaining authorization for the construction of hydroelectric power stations or in reaching agreement on such projects.'¹⁰
30. Of particular note for the UNDP-supported dialogues is the observation that tensions are directly related to inadequate consultations, 'Representatives of the Government and of the Indigenous Peoples concerned agree that the existing tensions and the continued rejection of the project by the Ngäbe people are, to a large extent, the consequence of shortcomings in the consultation process.
31. This report acknowledges, as the earlier UN-supported independent investigation did, significant conflicts related to the dam, including the violent demonstrations in 2011 and 2012 that eventually led to a 2012 joint verification mission to carry out a

⁹ Human Rights Council, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya.' 3 July 2014.

¹⁰ Anaya's report to the Human Rights Council notes, 'In general, the Indigenous Peoples affected by these projects claim that there have been irregularities in the processes involved in obtaining authorization for the construction of hydroelectric power stations or in reaching agreement on such projects. It has also been claimed that the revenues from these projects have been distributed improperly. Most of these projects are located outside of the boundaries of the indigenous comarcas, but they nevertheless have an impact on lands recognized as belonging to or claimed by Indigenous Peoples. Recent experiences in connection with hydroelectric projects in Panama illustrate the consequences of the lack of an appropriate governing framework for consultations with indigenous communities. In the cases that have arisen recently, consultations were carried out in an improvised manner. Representatives of both the Government and Indigenous Peoples stated that those processes were unsatisfactory, partly because the enterprises involved undertook to carry out the consultations on their own and failed to work with the peoples concerned through their representatives.

preliminary study on the impact of the project, and, in turn, the UN-supported international team of experts.¹¹

32. It provided the following two key recommendations specific to the Barro Blanco Hydropower Project:

‘In the light of recent experiences with the implementation of hydroelectric projects without appropriate consultations with the indigenous communities concerned, such as the Barro Blanco..., establish, in coordination with indigenous representatives, a governing framework for a system of consultations to be applied in the case of hydroelectric and extractive projects that have an impact on Indigenous Peoples (paras. 42 to 46).’

‘As to the Barro Blanco hydroelectric project, the lands of the Ngäbe people should not be flooded or adversely affected in any way without the prior agreement of the representative authorities of that people as to the conditions attached thereto. Without the agreement or consent of the Ngäbe people, the State should not allow the territorial rights of this people to be prejudiced in any way unless it is necessary to do so for a public purpose that is valid from a human rights perspective and, in such cases, only to the extent that it is necessary for and proportional to that valid purpose (paras. 42 to 45).’

33. On 29 May 2015, the FMO-DEG Independent Complaints Mechanism report described similar key shortcomings, noting an inadequate initial assessment of potential impacts to Indigenous Peoples, their cultural heritage, biodiversity and the local ecosystem. With respect to the latter, the report further concludes, ‘the subject of the gallery forests, its value and social economic use of the communities remains un-resolved and

¹¹ It describes, ‘The disputes surrounding this project began at the start of 2011, when members of the Ngobe people closed off various sections of the Inter-American Highway. The demonstrations ended on 27 February 2011 with the signing of the San Félix Agreement by the Government and the Coordinating Body for the Defence of the Natural Resources and Rights of the Ngobe-Bugle People and Campesinos. The Government undertook to work for the passage of a law that would prohibit mining and mineral exploration in the Ngobe-Bugle comarca. However, when the bill was passed into law by the National Assembly at its first reading, the article providing for the cancellation of commercial mining concessions already in operation within the *comarca* had been removed from the text. This sparked a fresh wave of demonstrations, and the Inter-American Highway was again closed off in February 2012. Two members of the Ngobe community died during those demonstrations, and the inquiry into the circumstances surrounding their deaths has not been completed. Indigenous Peoples and various civil society organizations also claim that, while in police custody, a number of girls and women were subjected to sexual violence, including rape in one case. Investigations are also ongoing in these cases.... Following the signing of the San Lorenzo Agreement in February 2012, the Government, with the Catholic Church acting as mediator and the United Nations country team in Panama as an observer, set up two round tables with representatives of the Ngobe people to address controversial issues that remained unresolved, including the Mining Act and the Barro Blanco hydroelectric project. The round table on the Mining Act led to the drafting and adoption of Act No. 11 of 2012 (see para. 15 above). As a result of the round table on the Barro Blanco dam, the parties agreed to send a joint verification mission comprised of representatives of the Government of Panama, the United Nations and the Ngobe-Bugle comarca to the area to carry out a preliminary study on the impact of the project... In its report of September 2012, the joint verification mission recommended that an independent study be carried out by an international team of experts. The hydraulic, ecological and economic aspects of the project were examined in July and August 2013 and a participatory, community-level assessment was prepared.’

the inability to finalize the assessment and put in place appropriate actions in the disputed area stems from the failure to enter into healthy dialogue and consequently an inability to carry out detailed analysis and visits to the forest.’¹² The mechanism additionally determined FMO/DEG should have taken action to respond to UN findings of impacts to a limited number of people.

34. The mechanism gave pointed attention to how FMO and DEG consulted with affected communities, finding, ‘Regardless of the question of the formal relationship and consultation with the representative structures of the Comarca, there are serious questions as to whether the lenders could be satisfied that the consultations with the *affected communities* (emphasis added) have been conducted in a format and intensity (good faith negotiations) that is required by IFC PS7. The panel is of the opinion the lenders have not taken the resistance of the affected communities seriously enough. This may be, to an extent, because a legal agreement was reached between BBHP and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the Indigenous Peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in that Report....The Indigenous Peoples report concluded that it was not aware of any plan how to relate to the Ngäbe people in the affected communities. This conclusion should have been taken more seriously by the lenders and they should have insisted in clarifying the issue faster and trying more options for consultation.’
35. After several unsuccessful attempts to resolve concerns, the dialogue process at issue in this complaint was initiated in February 2015.
36. As detailed below, this process was not a single dialogue, but several. It was initiated as a ‘Roundtable Dialogue’ in February 2015, when BBHP was approximately 95% completed.¹³ This Roundtable was concluded by June 2015. Subsequently, on 10 August 2015, the government and the Cacica General of the Ngäbe Buglé Comarca signed an agreement to create a ‘Joint Technical Team’ and ‘continue the dialogue process.’ The ‘Joint Technical Team’ began meeting 28 September 2015, and appeared to complete its work toward the end of November. Subsequently (there are no public documents reflecting a specific date), the government and the Caciques of the Ngäbe Buglé Comarca (without the participation of the directly affected communities within M10) began meeting and signed a ‘Commission Agreement’ on 17 August 2016 (detailed in paras. 103-108, below).
37. According to UNDP Panama CO (UNDP CO) staff, the Panamanian government requested support from the United Nations System for the entire dialogue process beginning in February 2015 and ending in August 2016. The UN RC/ UNDP RR, Martin Santiago, was asked to co-facilitate this process with the United Nations Office of the High Commissioner on Human Rights (UN OHCHR) Regional Representative for Central America.
38. One UNDP representative interviewed by SECU described the collaboration with UN OHCHR as follows, ‘UNOHCHR participation in the dialogue was critical, as it provided

¹² FMO-DEG Independent Complaints Mechanism, Panel report No. 1, Barro Blanco Hydroelectric Project Panama, 29 May 2015.

¹³ Roundtable Dialogue Meeting Minutes, 5 March 2015.

the necessary technical assistance to the UN RC / UNDP RR throughout the process to ensure that the rights of indigenous people were not compromised in any way. Moreover, UNOHCHR also played a key role in ensuring that any agreement coming out of the dialogue process be in full compliance with national and international standards.’

39. Ms. Carmen Rosa Villa Quintana participated in this process for UN OHCHR until her retirement in June 2015. Mr. Francesco Notti became Regional Representative after Ms. Villa Quintana’s departure, but his participation was much more limited than Ms. Villa Quintana’s, i.e., he attended only one dialogue meeting, in March 2016, and he left his post in June 2016.¹⁴
40. Mr. Santiago and Ms. Villa Quintana accepted the request and reached agreement with the National government and Indigenous Peoples – including directly affected communities as well as traditional indigenous authorities, e.g., the Caciques – on the role the UN was to play in the first Roundtable Dialogue initiated in February 2015.
41. UNDP provided initial technical and financial support for the entire dialogue process through two projects: ‘Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panamá’ (MIRE project) – approved in 2014, and ‘Apoyo al Programa de Reformas del MINGOB’ (MINGOB programme) – approved in 2015.¹⁵
42. The current UN RC / UNDP RR described the specific project document provisions that supported the dialogue process, “The dialogue process was supported under the activity “Las capacidades del Estado han sido fortalecidas para dar respuesta a las demandas y necesidades de los pueblos indígenas” (pages 18 and 27, in Apoyo al Programa de Reformas del MINGOB Project document) and “Facilitados los insumos técnicos necesarios para el desarrollo de las iniciativas estratégicas del MIRE y de las funciones asociadas a la Vicepresidenta”, specifically under the activity “La dirección y seguimiento de las mesas sectoriales de diálogo y consenso ya instaladas (salud, educación y empleo) y las que se decidan instalar en el marco de la política de diálogo y consenso del gobierno” (pages 13, 14 and 27, in Fortalecimiento institucional para la gestión basada en resultados del Ministerio de Relaciones Exteriores de la República de Panamá Project document).
43. As noted in the above paragraph, the project documents through which support for the dialogue occurred do not explicitly reference dialogues related to BBHP, although they do reference activities to strengthen capacities of national institutions to improve governance of indigenous territories. They also identify ‘agreements’ reached as an indicator of success.
44. The UNDP CO has maintained that the dialogue process was not co-facilitated by UNDP. The CO describes that the UN was represented by Mr. Martin Santiago in his role as UN Resident Coordinator and by Ms. Villa Quintana for UN OHCHR.¹⁶ At that

¹⁴ According to Mr. Notti, the March dialogue meeting was held on the sidelines of another meeting focused on Panama and International Labor Organization Convention No. 169 (ILO 169).

¹⁵ This information was provided in an 18 September 2017 email to SECU.

¹⁶ UNDP, in its initial communication with SECU, relayed that UNDP had ‘no role’ in the dialogue process

time, Mr. Santiago was serving as both the UN Resident Coordinator (for the UN System) and the UNDP Resident Representative. The distinction between the UN System and UNDP likely was not clear to most attendees. In interviews with SECU, the UNDP CO described that UNDP's role in relation to the UN Resident Coordinator is not easily distinguished in practice; the UN Resident Coordinator relies wholly on UNDP to function. The UN Resident Coordinator has only UNDP staff to support its efforts, and his/her salary is paid by UNDP. All procurement, staff rules and regulations, procedural/logistical/finance, and applicable policies, standards and procedures are governed by UNDP.

45. Each set of minutes to the ten dialogue meetings occurring from 21 February to 18 May 2015 chronicle that Mr. Santiago participated as a representative of UNDP (listed as either 'Martin Santiago, Resident Representative of UNDP' or 'Martin Santiago, UNDP Representative'). Additional UNDP staff, including Iñaki de Francisco, Coordinator of the Development Plan for Indigenous Peoples at UNDP, attended most, if not all, of the dialogue sessions, as did Cynthia Rodriguez and Samara Pellecer, identified as 'UNDP's Technical Secretary' in the 19 March 2015 meeting notes. Various other UNDP staff, including Gisele Didier, Fernando Hiraldo, and Julie Castillo, attended at least one meeting.
46. In interviews with SECU, the UNDP CO acknowledged that, in addition to funding various aspects of the dialogue process, e.g., transportation for local communities, , the UNDP CO staff provided other logistics support, including preparing and circulating meeting agendas and minutes. Several interviewees described UNDP as playing an important role, with one Government Commission member describing it as 'a very important central role.'
47. The UNDP CO did not screen either the MIRE or MINGOB project documents using UNDP's screening tools existing when the project documents were signed. The Environmental and Social Screening Procedure (ESSP) was in place, and its application required, when UNDP approved the first project, the MIRE project, in 2014. The Social and Environmental Screening Procedure (SESP) was in place, and its application required, when UNDP approved the second project, the MINGOB programme, in 2015. The UNDP CO indicated that since UNDP was entering into a new partnership, and the process to create the programme had been moving forward for a while, it made a conscious decision to deal with the SES later - whenever a substantive revision to the project occurred.
48. Although the UNDP CO did not use the ESSP and SESP to identify potential environmental and social risks when the projects were approved, at some later date UNDP posted to the 'Quality Assurance' portion of UNDP's internal website brief responses to several questions under the heading 'Social and Environmental Standards.'
49. For the MINGOB project, this included the following two questions: '8. Does the project seek to further the realization of human rights using a human rights based approach?' And '9. Are social and environmental impacts and risks (including those related to human rights, gender and environment) being successfully managed and monitored in accordance with project document and relevant action plans?' The response for both was a reference to a one-page risk matrix that does not mention Indigenous Peoples, human rights, or any other social and environmental standard.

50. For the MIRE project, one additional question included '10. Are unanticipated social and environmental issues or grievances that arise during implementation assessed and adequately managed, with relevant management plans updated? For the first question, the response was 'The project foresees within its activities the 1. Planning, monitoring and institutionalization of the position of Panama in the Council of the Inter-American Court of Human Rights.' For the second and third questions, the answer was 'no posee' – presumably suggesting there were no social and environmental impacts to be considered.
51. Sometime during (or after)¹⁷ the 2015 Dialogue Roundtable, the UNDP CO prepared a two page informal, undated 'Stakeholder Analysis.... about indigenous stakeholders in the Barro Blanco conflict.' It identifies M10 as a key group within the Indigenous and peasants commission, and indicates that this commission is one of 'four indigenous stakeholders' in the conflict. It describes M10 as the representative of the indigenous communities directly affected by the project. A 'Stakeholders Map' is attached to the analysis, and it describes relationships among the four stakeholder groups briefly described in the analysis.
52. The parties to the Dialogue Roundtable, including the government and Indigenous Peoples, prepared a brief 'Consensual Methodology' that was finalized on 27 February 2015 to guide the Dialogue Roundtable. The methodology 'Objective' described that the Roundtable was established for dialogue and reflection, aimed at (i) identifying agreements and disagreements over points of contention and (ii) discussing possible solutions to the existing conflict between the Ngäbe Buglé and peasant peoples and the Genisa Company, due to the hydroelectric Project Barro Blanco. No other formal framework for consultation was prepared.
53. The 'Dialogue Structure' outlined in the methodology described two major groups to this dialogue – the 'Government' and 'Affected People' - that each had a commission, a Government 'High level commission' and an 'Indigenous Commission.' These commissions were mandated to aim at 'solutions identification.'
54. Specific 'Subjects to be discussed' in the methodology included 'agreements and disagreements related to... Environmental system, Social development, Economic development and, Cultural development... of the Ngäbe Buglé and peasant people, according to the legal system and Human Rights' and 'Ngäbe Buglé and peasant people's request to cancel the Barro Blanco Project and free Tabasará river.'
55. UNDP's Results Oriented Annual Report (ROAR) from 2015, which was prepared by the UNDP CO, provides the following description of the methodology, and emphasizes attention to affected indigenous communities: 'Through a co-designed process, a dialogue methodology was jointly constructed to find a solution to the Barro Blanco conflict. This methodology was based on a sustained dialogue tool with the objective of identifying similarities and differences on the possible impacts of the project - environmental, social, cultural and economic level. Both the joint construction of the methodology of the process and the facilitation of UNDP throughout it, ensured the

¹⁷ A hardcopy of the analysis was provided to SECU, and it does not specify when the document was prepared. It describes, however, 'The Indigenous and Peasants Commission's position has remained constant throughout the 2015 dialogue process, they demand to cancel the Barro Blanco project.'

inclusion and active participation of the *affected* (emphasis added) indigenous communities, which contributed to an agreement between the national government and the traditional indigenous authorities.'

56. According to all interviewees, all Indigenous Peoples participating in the dialogue process agreed on the composition of the Indigenous Commission as well as the Roundtable Dialogue procedures.
57. According to the minutes of the first meeting, on 21 February 2015, Ricardo Miranda (a leader of the directly affected community that is part of M10) was the 'General Coordinator,' and 'spokesperson,' and other members of the Commission included the traditional authorities – the Caciques, the Mayor of Muna, a 'Deputy', technical advisors, among others. In the 27 February 2015 minutes, the Indigenous Commission indicated, 'we made it clear who would be the spokesperson, but all those who are part of the Commission are authorities... Ricardo Miranda is the spokesperson but Chito can talk about this topic.' The individual composition varied somewhat through the February to May 2015 phase of the Roundtable dialogue, but with Ricardo as General Coordinator until the final two meetings, on 4 May and 18 May 2015, which he did not attend. Panama's Vice President observed, in the first meeting, 'We have accepted that this Commission is representative of the region.' The Indigenous Peoples' General Congress was never a formal member of the Indigenous Commission, and its participation was debated during several meetings.
58. The Government Commission included Panama's Vice President and Minister of Foreign Affairs, Isabel Sant Malo de Alvarado, other government ministries, including the Minister and Deputy Minister for the National Environmental Authority (ANAM), the Minister of Security, the Ministry of Indigenous Affairs, among other ministries, and the Chief of Office for the Minister of Foreign Affairs. The composition varied somewhat through the February to May 2015; not all ministries or individuals participated in every meeting.
59. GENISA was invited to participate in meetings from 5 March to 31 March 2015.
60. Minutes from the first dialogue meeting, on 21 February 2015, describe the participants of the United Nations as follows: 'United Nations facilitation team consisting of: Martin Santiago, UNDP Representative; Carmen Rosa Villa, UNOHCHR Regional Representative, Francesco Notti, Assistant Representative UNOHCHR; Gastón Aín, Gisele Didier, Iñaki de Francisco, Cynthia Rodríguez, Alejandra Araúz and Samara Pellecer' (the final six UN participants appear to have UNDP affiliations).
61. The Roundtable from February to May 2015 was, by all accounts, fully transparent and inclusive. Meeting minutes were taken and published, meetings were open to the public, most meetings were held in Tolé, and at least some meetings (meetings not in Tolé) were broadcast, e.g., the 19 March 2015 meeting held in Panama City. The 21 February meeting notes quote the Vice President as stating 'The presence of the observers is important in order to arrive at a solid agreement, and to avoid complaints....' She observed that while the Indigenous Commission was representative of the region, 'we believe that it may be inappropriate not to allow other parties to be heard.' The 27 February notes reflect the Indigenous Commission request for 'respect and transparency. Do not make a closed system.'

62. Minutes from the meetings reflect that Indigenous Peoples were participating in the Roundtable Dialogue with the expectation the BBHP could be cancelled – and would be cancelled if the ‘incompatibilities’ identified during the dialogue process were not resolvable. They note in the first meeting on 21 February 2015, ‘We would like to highlight the point made by the Vice President that she is one of us. If this is the case, we have been very clear since before a single brick was laid: we want the project to be cancelled. If she is indeed one of us, we welcome her, and if she is one of us, she will say the same as us: that the project should be cancelled.’ In the second meeting on 27 February, the Cacica General observed, ‘The transmission towers in Barro Blanco are still being built.... In order to guarantee this dialogue, the project must be totally stopped.’ Several interviewees suggested that the halt in dam construction prior to the dialogues was an encouraging sign for Indigenous Peoples in this regard, i.e., that Indigenous Peoples perceived that the halt to construction reflected the possibility that the entire dam could be cancelled as a result of the dialogue. The Indigenous Commission emphasized in several of the meetings that it should not be a ‘negotiation’ but a dialogue.
63. In response, the Government Commission, in several meetings, described responsibilities to both the communities and the company and a desire to find solutions to the project. For example, the Government Commission stated, in the 21 February 2015 meeting, ‘The Government has taken significant steps to build confidence. The project has been temporarily halted. The people here today were not here previously, and we ask to be given a vote of confidence. The Government has a responsibility that it cannot avoid. The firm is making use of and exercising its rights to put in place legal measures.... It is vital that we keep in mind human rights and the rights of indigenous people, and that we seek social peace and security. The Government cannot turn back the clock. I cannot give you now the rights to prior, free and informed consent, because in this case it is not prior. Allow us, in today’s reality, to fulfill our work in the framework of rights; both your own rights, and those of others.... We need a dialogue, not a negotiation.’ On 9 March 2015, the Government Commission indicated, ‘the government is being pressure by banks and others. They have the right to do so. The government has a lot of pressure from the Indigenous Commission and the company. We are looking for a solution to the standoff we have at this moment. Let’s try to find a middle ground.’
64. Indigenous participants requested responses to the possibility of dam cancellation in several meetings, including the second meeting on 27 February 2015 in which one indigenous participant urged such a response: ‘We have been fighting for more than 15 years. Be honest and tell us what will happen as soon as possible.... We want the cancellation of Barro Blanco because the company did not consult with us.... Decide cancellation or no cancellation, and we can stop wasting paper here.’ On 9 March 2015, after the Government’s suggestion for solutions, the Indigenous Commission stated, ‘This is the fifth time we sit down at the table and the population is asking what the objective of this is. We come for an answer. We want to know if the project is going to be cancelled or they will ruled out in favor of the company, tell the truth.’ On 27 March 2015, the Indigenous Commission reiterated, ‘With all due respect, the purpose of this table is to cancel the Barro Blanco project.... There is only one solution and it’s the project cancellation. Barro Blanco is not compatible with the community based in the law and human rights.... We will not tolerate that this decision takes much longer if you’re going to tell us that the project won’t be cancelled....You bring us here to entertain us so at the end you can tell us that project cannot be cancelled.’ The

Indigenous Commission reiterated requests for cancellation on both 30 March and 1 April 2015.

65. The Facilitators observed, in the 13 March 2015 meeting that 'In the preliminary discussions we had with both Commissions, it was agreed that the dialogue would be conducted without preconditions or impositions.'
66. Meetings held from March through April discussed issues with the project, including, but not limited to, the following: inadequate consultations/consent and impact assessments leading to construction of the dam, i.e., on 27 March 2015 the Government Commission acknowledged 'The State has acted irresponsible with the indigenous people'; a lack of clarity relating to the minimum and maximum flood height; questions regarding why the dam was allowed to move from 19 to 28 meters in height without an additional environmental impact assessment; lingering questions associated with safety of the dam (e.g., the left abutment) and measures necessary to respond to safety risks; impacts to culture, e.g., petroglyphs, cemeteries, etc.; payments made to individuals by the company; questions about how the dam is 'compatible' with the rights of local communities; and concerns about use of force; etc.
67. During meetings attended by GENISA, it provided its own perspective, i.e., it won the bid for the dam in good faith in response to the government's own request for proposals; it attempted to meet requirements but agreed that several measures were inadequate – including inadequate consultations and impact assessments; it was willing to provide other measures to find a solution; it paid Panama US \$700,000 and would request compensation if the project was cancelled; it believed the project was '100% compatible.'
68. On 16 April 2015, after several meetings to discuss these issues and 'incompatibilities,' the Indigenous Commission submitted a report - Informe Técnico Sistema Ambiental. This report detailed the Commission's understanding of the various ways in which their experts believed BBHP was not consistent with Indigenous Peoples' wellbeing and rights – and thus not compatible for the area.
69. At the 16 April 2015 (9th) meeting of the Roundtable, the Indigenous Commission formally submitted a request for final cancellation of the project (after denouncing GENISA's public announcement that it was finishing construction and starting operations).
70. At the 4 May 2015 (10th) meeting of the Roundtable, the Cacica General reiterated that the Indigenous Commission 'delivered all technical proofs that demonstrate the incompatibilities between the Barro Blanco project and the Ngäbe Buglé people. They want indigenous people to decide their own development and this development not to be imposed.'
71. At this meeting, the UN indicated, 'it's important to look for agreements that foster, defend, guarantee indigenous rights, which are established by international legal systems and the UN as well. These agreements are related to life, integrity, territory, natural resources and governments.... The dialogue has been conducted following mutual respect, egalitarianism, transparency and impartiality principles. The parties have shown willingness to cooperate, and the government has temporarily stopped all works in the dam site. The dialogue has followed a methodology and structure.'

72. At this meeting, the Government Commission (represented by the Vice-President of Panama) acknowledged 'the community's claims were fair' and 'highlighted the great value and dignity shown throughout the Ngäbe Buglé's fight.' She expressed that the government had a dilemma because 'energy is an element of development' but GENISA made mistakes and has limitations. She noted a need for the government to 'find a solution that fulfills the Ngäbe Buglé's legitimate demand, and complies with their responsibilities as the executive government.' She then outlined a proposal, offering 'options to be discussed.' She described government discussions with the banks (financing the project) to transfer the project's management to another company' – this would occur only 'after consultation with the indigenous community, without imposition, because only the community can define what a decent life means of the solution to the cultural issues discussed.' She stated, 'The government has to guarantee the community's rights. They cannot abandon the communities and let them deal with the company,' and indicated a government commitment to several measures, including several 'immediate actions to ensure that the project is effectively conducted' – establishing a new government office near the project site, providing administrative support to the Muna district to help them ensure laws are followed, establishing an energy project for the Comarca, and creating a \$15 million investment plan for educational, reforestation, clean water and road improvement actions in the Comarca.
73. The Government observed 'the situation is difficult but that is necessary to solve it together. The truth is that there's an almost completed dam, built without consultation. The company has made mistakes. How can we withdraw the project without harming the country? Any decision has consequences and Panama can face lawsuits inside and out of the country. There are investors from Sweden and Netherlands. How can we compensate the harm to the Ngäbe and peasant peoples? There is a real possibility that the banks dismiss Genisa, which will help to avoid a lawsuit. These banks must send a new team approved by the government and the community. A new administrator opens new possibilities, for example, to establish that a percentage of the generated energy benefits only affected people and the rest of the Comarca, to guarantee that level 103 will be the maximum limit allowed, to open a water treatment plan, put fishes and guarantee animal protein. There are several options to be discussed, thus we are going to set up an office in the region.'
74. Meeting minutes describe the following response, among others, from the Indigenous Commission: 'Definitive suspension of the Barro Blanco project; The government must cancel GENISA's contract; We do not accept that another company takes on the project or any negotiation with the banks; We request that all decisions in regards to the project are defined by the indigenous commission formed by traditional authorities, administrative authorities, surrounding affected communities represented by M10, and technical team, alongside the national government. The statement is signed by Cacica General Silvia Carrera, Mayor Rolando Carpintero; Local Cacique Chito Gallardo, M10 Manolo Miranda, Kadri Cacique Jeremias Montero, Legislator Crescencia Prado.'
75. The meeting concluded with the Government Commission confirming 'they cannot proceed with a final cancellation that would cause a million dollar lawsuit to the Panama government.... Genisa's ejection is the right path, and that they need to find a solution that generates less costs to the Panamanian government.' The Indigenous

Commission responded ‘They have demonstrated the project inconsistencies, not Genisa’s inconsistencies’ and although ‘They understand the government’s concerns’ project incompatibilities require cancellation. A proposal to have both Commissions’ technical teams meet to quantify possible solutions (in a to-be-confirmed 15 day period) was accepted by both parties.

76. Notes from the final Roundtable Dialogue meeting on 18 May 2015 (the 11th), reflect a Government Commission desire to ‘continue the dialogue through a technical roundtable’ with no clear change in the position articulated in the previous meeting, but with a decision that GENISA will ‘withdraw from administration of BBHP construction.... A third party will manage the construction’ and a ‘commitment to work alongside the indigenous and peasants’ communities, and the shareholders of the Barro Blanco project, to solve the discrepancies found throughout the dialogue.’
77. The Indigenous Commission rejected the proposal for a continued dialogue through a ‘new technical roundtable,’ citing ‘Genisa’s disrespectful actions’ including, from their perspective, GENISA continuing to build the dam (not just fix the left embankment) during the dialogue process. The Indigenous Commission indicated that while ‘They know that the government cannot cancel the grant agreement, but they should have said it since the beginning instead of creating a dialogue roundtable... The problem is not to select a third party, the problem is that the indigenous rights were violated and the project is not going to be cancelled...’ and ‘They have lost their ability to trust the government.’ They then asked the UN ‘to establish its position in regards to the project or that the cancellation request is discussed in the general assembly.’
78. The UN team concluded the roundtable discussion with the following points: ‘it is not going to be possible to schedule a next meeting.... The dialogue showed the inconsistencies and it’s historic.... The UN is willing to hold individual meetings with the commissions given this dialogue stage has concluded and it has been difficult to bridge differences of opinion.’ The team further indicated, ‘The UN has insisted that indigenous communities need to participate in all projects that might affect them, not only through the consultation process but also to achieve a free, previous and informed consent. The UN also has the Declaration on the Rights of Indigenous Peoples, and has been working with indigenous communities for the last 20 years to finally ratify this declaration in 2007. The UN has not been and will never be part of a scheme, we have facilitated the roundtable because we believe dialogues can have good results even no consensus is achieved. They highlighted that dialogue does not mean consensus, it is a joint learning process in which bridges can be constructed to solve differences of opinion. The UN will continue to ask for the government’s ratification of agreement 169, and that in any future project, a consultation process needs to be conducted with the Indigenous Peoples as a key element to ensure democracy and prevent social conflicts.’ The identified ‘next steps’ were for the UN to ‘hold individual meetings with both commissions to discuss possible next steps.’
79. The UNDP CO’s response to SECU’s initial request for information corroborated that the Roundtable ‘was formally concluded in June 2015.’

80. According to complainants and other interviewees, more demonstrations ensued on 25 July 2015 – with many people detained and arrested, and several injured.¹⁸
81. On 10 August 2015, a new agreement was entered into between the President of the Republic of Panama and the Cacica General, with the following heading, ‘The Government Of The Republic Of Panama And The Traditional Authorities Designated By The Laws Of The Ngabe-Buglé Region, In Light Of The Barro Blanco Conflict, And In Order To Continue With The Dialogue, Have Agreed To The Following’.
82. In the new agreement, the parties made several joint commitments including ‘to create a joint technical team to study the current problem with the dam... and, to issue an opinion about the status of these issues’; ‘continue the dialogue process about the project feasibility, based on the inconsistencies discussed during the roundtable’; ‘analyze potential solutions for the project, including the purchase of the Barro Blanco project property, justified by scientific and financial reasons, and under the principles of respect for communities, specially to those directly affected’; and ‘accept the results and conclusions that result from the technical team’s analysis, as a basis for future decision-making.’
83. The government made several of its own commitments, including to ensure ‘all necessary works to stabilize the dam... to avoid harming the communities’; ‘finalize all civil works, however electro-mechanic works would be avoided;’ and not flood ‘the reservoir or start operations in the Barro Blanco Project, until a final agreement between the disputing parties has been reached and legitimized by the local democratic institutions established by the Law.’
84. The agreement mentioned ‘those directly affected,’ but the group representing Indigenous Peoples did not include all individuals formerly part of the Indigenous Commission that was endorsed by all indigenous participants. The group did not include, for example, members of M10, including the previous spokesperson for the Indigenous Commission. Relatedly, the agreement did not indicate how those directly affected indigenous communities would be engaged in, or informed about, the subsequent dialogue process.
85. The UN System (UNS) Report shared with SECU in response to requests for information, described that ‘several internal divisions occurred within the Indigenous Commission, that led to the creation of a new Indigenous Commission formed by traditional authorities (General Cacica, Regional Cacique, Local Cacique and Local Congress President, together with administrative authorities, Muna’s Mayor, municipality representatives, and others.)’
86. The subsequent dialogues did not use the methodology previously agreed by all for the earlier Roundtable Dialogue initiated in February 2015. The United Nations

¹⁸ SECU was not able to confirm the numbers. The complainants indicated to SECU, in their complaint and in an interview, that more than 50 were detained and five injured – with one person permanently crippled by an ankle wound. The complainants described that this occurred in front of the UNDP coordinator, and ‘This situation caused a total breakdown of the Dialogue Table by the Government, which convened a new Technical Dialogue Table formed by decision-makers and supported by UNDP.’

report does not indicate that the UNDP CO or UN OHCHR performed any assessment of social or human rights-related risks related to continuing the dialogue.

87. One member of the Government Commission characterized the Roundtable Dialogue as 'not a democratic process, they looked for consensus' and when M10 did not agree, and did not want to continue to engage in a dialogue process, the process was advanced without them.
88. According to a Panamanian newspaper,¹⁹ on 31 August 2015 the government of Panama fined GENISA \$775,200 for non-compliance with its obligation to "negotiate with, relocate and compensate those affected by the hydroelectric project."
89. The 'Joint Technical Team' first met on 28 September 2015. It met at the UNDP offices (as did subsequent meetings of this Team). According to the UNS report, the Technical group meetings were the 'first phase' of a new dialogue process. Indigenous Peoples participating included several members of the former technical team to the Roundtable Dialogue, but not all. One non-participant indicated to SECU that he did not participate because affected communities had decided not to participate. The UN OHCHR did not participate in these meetings.
90. Unlike the previous meeting, the Joint Technical Team meeting was not open for observation by any interested individual. Meeting notes from 28 September 2015 to 11 November 2015, prepared by UNDP, were provided to SECU. It is not clear if these notes were made public immediately after they were prepared, or if they were ever disseminated publicly.
91. Notes indicate, among other items, that meetings included discussions related to requests for information from GENISA, a decision that UNDP would be the repository for information, concerns that GENISA was not making all requested information available, plans to visit the site, and a plan to make presentations to the signatories of the 10 August agreement on 10 December 2015 and 14 January 2016.
92. The Technical Team completed its work in January 2016, with a presentation of its findings in Llano Ñopo.²⁰
93. Regarding the dialogue occurring after the Technical Team completed its work, the UNS Report provided to SECU indicates, "The second phase of the process began with the installation of a Joint Work Commission in order to analyze potential solutions to the inconsistencies found by the 2015 Dialogue Commission. From March to May 2016, a series of weekly meetings were held to deal with inconsistencies in four key axes: environmental, social, cultural and economic. The result of these meetings was the joint development of four documents containing recommendations and proposals to be implemented. These documents must be transformed into a roadmap to address

¹⁹ La Prensa, 24 September 2015. Another company, Hidraulica San Jose, was fined \$450,000 over "unauthorized discharges" into a stream and a "lack of follow-up reports."

²⁰ According to the UNS Report, it not only developed a 'stirrups study, but also a comprehensive analysis on the technical feasibility of the project, focusing on different design and construction's features. The final report bring clarity to the project's issues as it concluded that the project was designed and constructed according to the geological, topographical and hydrological conditions of the dam site. The team recommended minor adjustments.'

the effects of the Barro Blanco Project in the Tabasará Basin. The aforementioned documents contained recommendations such as the gallery forests recovery, ensuring the social and productive uses by communities downstream from the dam, not developing any other structure or hydraulic project in the basin, and developing an Integral Plan of Development of the basin. Likewise, the recommendations documents and the general agreement established that all consensus must be discussed and approved by the Region's authorities as established by Law 10 of 1997 and Region's Charter.'

94. SECU was not provided any agreed methodology for this Joint Work Commission. This Commission was supported by the UNDP CO, but no public documents describe this support. The UNDP CO did not share any analysis of potential social/human rights-related risks with SECU.
95. As noted earlier, UN OHCHR participated in only one dialogue-related meeting after June 2015 (after the previous Roundtable Dialogue was concluded). This meeting was in March, on the sidelines of another meeting focused on Panama and ILO No. 169.
96. Notices of Joint Commission meetings from March to May 2016 were not provided to the broader public or community members, and meeting notes are not available. Complainants stated to SECU that they were not provided information about these meetings – they were not aware of when and where they were taking place. A member of the Government Commission shared a belief that these meetings were more transparent because the government visited communities in the Comarca, including those not suggested by M10, to secure their opinions on the issues.
97. According to the UNS Report, 'The third phase of the process included the creation of a Financial Sub-Commission responsible of analyzing the Project's financial situation. It was defined that the State was able to take ownership of the project, provided a scientific and financial justification. The analysis carried out by this entity, led by the MEF, shown the real project's value and expected future value in greater detail.'
98. On 24 May 2016 GENISA began to fill the reservoir behind the dam, leading to flooding of the area and weeks of significant and sometimes violent protests.
99. A press release posted on the Panamanian government's website on 24 August 2016 suggested the flooding was a test of the dam, and noted that people potentially impacted were relocated 'ensuring respect for their human rights.'²¹
100. Other groups and individuals indicated that human rights had been violated. They noted that the flooding was a surprise – that it occurred in the absence of an agreement with Indigenous Peoples and, as such, was not consistent with a key finding of the UN Special Rapporteur on indigenous rights that such an agreement was necessary, and also not consistent with the 10 August 2015 agreement of the

²¹ Barro Blanco: The Story of An Arduous Process of Dialogue, 24 August 2016.. 'All the people who were in the floodplain areas and private lands of the Hydroelectric Project, were transferred on May 23 by the State security forces to Jesus Obrero de Tolé Mission Center' and 'On May 24, 2016, a group of people from the Mama Tata church who were in the flood areas (these people did not live in the project area) were moved within the legal parameters and ensuring respect for their human rights.'

traditional authorities with the government that such flooding would not occur without the support of Indigenous Peoples.

101. According to a report prepared by the Human Rights Network of Panama, filling of the Barro Blanco reservoir began on 24 May 2016, after an illegal forced eviction occurred. It noted, 'A group composed of the State Police, firefighters, and SINAPROC' entered the dam site, carried out 'the eviction of the Mama Tata camp,' and 'force(d) the transfer of people' to Jesus Obrero de Tolé Mission Center on 23 May 2016. It quoted witnesses to the eviction as saying 'evicted peoples were mainly women and children....four tractors came in and destroyed the houses and the camp church.'²² The report described roadblocks, protests, and many arrests. It noted that water from the flooding reached the Comarca – specifically the Quebrada Cana community – on 28 May, and M10 gave an ultimatum of 48 hours for the Barro Blanco floodgates to be reopened. It described a series of roadblocks and protests from 29 May until mid-June, including 'a peaceful protest in front of the PNUD [UNDP] buildings in Ciudad del Saber.' It also reported several meetings, including one with the United Nations in the Kiad community on 6 June, and visits by the Panamanian Ombudsman.²³
102. A civil society group interviewed by SECU shared that while the filling may have been a preliminary test, it killed the fish, vegetation, and crops, and harmed patrimonial sites in violation of human rights.
103. On 8 June 2016, the government (led by the Vice President) and the traditional authorities of the Comarca met in Tolé to discuss issues related to the filling of the dam and the dialogue. Newspaper articles describe several outcomes. One key outcome was the rejection by Indigenous Peoples of a government proposal to move management of the project to a new group and explore mechanisms to guarantee economic benefits for the 'comarca and affected parties,' in exchange for commitments from communities to allow the initial filling of the dam (for 'the sole purpose of demonstrating the project works properly') and recognize that progress in government commitments would 'lay the foundation to authorize project implementation.'²⁴ According to the articles, (unspecified) Indigenous Peoples attending the meeting maintained the position that the project be cancelled, the government agreed to maintain the dam water testing level at 'level 87' in response to concerns expressed by the Comarca, and the traditional authorities and the government agreed to continue the dialogue process. Regarding the filling that had been initiated on 24 May, and prompted protests, the Vice President was quoted as stating that the test filling was necessary for GENISA to be able to leave the project, and, on that basis, ASEP gave the authorization to fill the reservoir.
104. Regarding the relationship between M10 and the traditional authorities at that time, the Human Rights Network of Panama report described in-person interviews that reflected a perception that the Cacica Silvia Carrera continued to support cancellation of the dam. The report observed, 'Currently there is tension between this authority

²² Mariela Arce Olmedo Carrasquilla and Illeana Molo. Human Rights Network of Panama. Human Rights Report. Barro Blanco Crisis: Filling the Dam. Comarca Ngabe Bugle. Panama. Date of Field Work: 12-15 June 2016, Research Period: May 22 2016-June 15 2016.

²³ Id..

²⁴ Nimay Gonzalez. Telemetro, 8 June 2016. 'Without Reaching Agreement, the Meeting on Barro Blanco Concludes, Dialogue Continues.'

and leaders of the organizations that are in the conflict zone. Although both parties agree upon the cancellation of the Barro Blanco dam.²⁵

105. According to a report by Global Sisters, and a description provided by a member of the Indigenous Commission from the Roundtable Dialogue, test flooding occurred again on 19 August, three days prior to the signing ceremony.²⁶
106. According to the UNS Report, 'During June, July and August 2016, a series of meetings were held with the objective of drafting a joint settlement document that would include all the agreements made in previous months.' The report does not describe who participated or where the meetings were held, and meeting notes are not available for these meetings.
107. A brief description on the Panamanian government website indicates 'An attempt was made to approach the environmental group known as Movimiento 10 de Abril (M10) to inform them about the process up to that moment and they did not show interest.'²⁷ A member of the Government Commission conveyed to SECU, 'M10 was invited to join the second phase of the dialogue commission but they refused this invitation'. Complainants indicated to SECU that they were not provided information about the meetings, and they knew nothing about the agreement eventually signed.
108. The UNS Report further notes, 'This settlement document was finally approved at a meeting on August 17th, 2016, attended by the President and Vice President of Panama, in the Presidential building. Traditional authorities were represented by the General Cacica, the Regional Cacique, and the Local Cacique; along with other Region's authorities and, Indigenous Commission leaders. The official signing of the agreement was held on August 22nd, in Llano Tugr , in the Ng be Bugl  region. During the signing of the agreement, several members of M10, the organization that originally requested the cancellation of the project, along with another group of people, used violence to prevent the signing of the agreement. Finally, after hours of delay, the document was signed. The President Mr. Juan Carlos Varela signed in representation of the National government, while for the Ng be Bugl  region, the General Cacica General Silvia Carrera signed the agreement.'
109. The agreement reflects that Martin Santiago attended the signing ceremony and also signed, as UN Resident Coordinator, witness of honor. At the ceremony, and subsequently, Mr. Santiago described, to various media, that the agreement was a good agreement. UN OHCHR was not represented at the ceremony.
110. A member of the Indigenous Commission who did not participate in discussions after the Roundtable Dialogue claimed that Mr. Santiago said the agreement was exemplary and human rights were not violated in the Barro Blanco project. This member indicated that these statements upset many Indigenous Peoples.

²⁵ Mariela Arce Olmedo Carrasquilla and Illeana Molo. Human Rights Network of Panama. 'Human Rights Report. Barro Blanco Crisis: Filling the Dam.' Comarca Ngabe Bugle. Panama. Date of Field Work: 12-15 June 2016, Research Period: May 22 2016-June 15 2016.

²⁶ Tracy L. Barnett. Global Sisters Report, 29 March 2017. 'A Wall in Their River: Flooded Ngabe Communities Continue to Fight Dam'

²⁷ Barro Blanco: The Story of An Arduous Process of Dialogue, 24 August 2016

111. M10 and other interviewees indicated to SECU that the protest during the signing ceremony began as a peaceful protest but turned violent, and lasted for several hours. The violence, they claimed, was witnessed by Mr. Santiago. For a period of time, protestors prevented the Caciques from signing the agreement. Eventually, the signing ceremony was moved to a location in which signatories could sign. Some interviewees described a small group of protesters, approximately 12. Others, including a government representative, indicated that 70-80 people protested against the agreement.
112. The UNS Report describes the 'agreement's main conclusions' as follows: '1. The withdrawal of GENISA from the Hydroelectric Project's operations; 2. The creation of a trust fund that will receive 15% of the annual income generated by the hydroelectric dam, to fund development activities in the Tabasar River Basin and in the region; 3. To guarantee proper compensation to those who are directly affected by the project, including their resettlement in lands of equal or greater value than the affected ones. These compensations shall be reached by common agreement; 4. To cancel any hydroelectric concession that may exist in the Tabasar river basin. For future concessions, region and traditional authorities must give its consent through a consultation process; 5. The National Government undertakes to implement all recommended actions identified in the social, economic, cultural and environmental inconsistencies documents prepared by the Commission from March to May 2016.'
113. Other signatories included Chito Gallardo, the Local Cacique, and Jeremias Montero, the Regional Cacique, among others, but not the President of the General Congress, Demesio Cases. Most interviewees agreed that for the agreement to take effect the General Congress must sign it, and it has not. Two members of the Government Commission interviewed by SECU indicated a belief that the Congress has signed the agreement, but the President of the General Congress stated to SECU that it has not been signed.
114. Some members of the Indigenous Commission who did not participate in the dialogue process after May 2015, and another indigenous interviewee, conveyed a belief that while the Caciques under domestic law are traditional authorities, they are not representatives who can decide and sign an agreement for the people within the Comarca, particularly in the absence of consultations with members of the community. These individuals perceive there is no 'agreement' (because there cannot be) and, in any event, the General Congress has not provided the necessary agreement for the BBHP. These individuals relayed a belief that the UNDP CO should have known more about traditional decision-making procedures, and been more cautious about efforts to change or ignore such procedures. They indicated that the UNDP CO should have indicated a need for the General Congress to approve the document for it to be an official agreement.
115. Another interviewee indicated, however, that the Caciques decided to sign because the Congress was divided, i.e., there were two Congresses and decision-making by the Congress was, therefore, not possible
116. Two Indigenous Peoples who participated in the dialogue process after the conclusion of the Roundtable Dialogue indicated to SECU that after completion of the dam and test flooding there appeared to be no choice but to secure some benefits.

117. The 2017 Global Sisters Report article described an in-person interview with the General Cacica, indicating that while she had been a strong voice against the dam, 'something changed last August, when she signed the agreement.' The article described, she 'signed the agreement because the dam was done, and she felt it fell to her to negotiate some benefits for the comarca.'²⁸
118. The Global Sisters Report report indicated that M10 requested that, at the very least, 'the reservoir levels be lowered to below the limits of the Ngäbe territory. It's not enough to repair the damage or even the river, but it's a solution they can live with.'²⁹
119. Another indigenous leader signing the agreement described a concern for 'social interests' of the broader community, and noted that many community members (other than those within M10) support the agreement. This individual agreed, however, that ratification by Congress is necessary for completion of the agreement and this has not yet occurred.
120. The UNDP CO indicated it is no longer involved in the BBHP-related dialogues or efforts. A Government representative described that one UNDP CO staff member is working on the UNDP-supported effort to develop a comprehensive development plan for Indigenous Peoples and a governance framework, but UNDP no longer has a point person for the BBHP project specifically.

IV. UNDP's Social and Environmental Commitments

121. Since 2014, UNDP has required staff to screen projects to identify risks related to human rights and the environment, and to pursue additional assessments and measures as necessary to respond to these risks.
122. UNDP's Environmental and Social Screening Procedure (ESSP) was the first tool developed to assist staff efforts to perform this screening. In 2015, the Social and Environmental Screening Procedure (SESP) replaced the ESSP. Screening performed by these tools considers potential risks and impacts associated with all activities outlined in Project documentation and 'includes review of direct and indirect impacts in the Project's area of influence.'
123. Both tools enable UNDP staff to identify risks related to activities involving Indigenous Peoples.
124. SESP screening questions tied to UNDP engagements with Indigenous Peoples and other local communities, and pertinent in the context of the UNDP-supported dialogue activity, include the following: 'Could the Project lead to adverse impacts on enjoyment of the human rights (civil, political, economic, social or cultural) of the affected population and particularly of marginalized groups? Have local communities or individuals, given the opportunity, raised human rights concerns regarding the Project during the stakeholder engagement process? Is there a risk that the Project would exacerbate conflicts among and/or the risk of violence to project-affected communities and individuals? Will the proposed Project result in interventions that

²⁸ Tracy L. Barnett. Global Sisters Report, 29 March 2017. 'A Wall in Their River: Flooded Ngabe Communities Continue to Fight Dam'

²⁹ Id.

would potentially adversely impact sites, structures, or objects with historical, cultural, artistic, traditional or religious values or intangible forms of culture (e.g. knowledge, innovations, practices)? The ESSP poses similar questions.

125. 'Yes' answers to these questions reflect risks to consider. For projects with 'yes' answers and that involve Indigenous Peoples, UNDP is required to perform additional assessments/reviews of potential impacts to these communities, and to take measures to avoid and mitigate such impacts.
126. UNDP's Social and Environmental Standards (SES) Standard 6 – Indigenous Peoples - emphasizes the need for additional assessment or review when the rights and resources of Indigenous Peoples may be impacted, stating, '10. Prior social and environmental impact study: All Projects that may impact the rights, lands, resources and territories of Indigenous Peoples require prior review and/or assessment of potential impacts and benefits. Projects with potentially significant adverse impacts require a full social and environmental assessment conducted by an independent and capable entity. Reviews and assessments will be conducted transparently and with the full, effective and meaningful participation of the Indigenous Peoples concerned.' SES footnote 75, notes, 'For Projects without adverse impacts on rights, lands, resources and territories of Indigenous Peoples but which still affect Indigenous Peoples, UNDP will ensure that such Projects are reviewed to identify any potential other impacts. Reviews may take the form of a limited social and environmental impact assessment, social assessment, or mitigation and management plan.'
127. This emphasis on reviews and assessments of potential impacts and benefits responds to the stated objectives of SES Standard 6 to 'ensure that UNDP Projects that may impact Indigenous Peoples are designed in a spirit of partnership with them, with their full and effective participation, with the objective of securing their free, prior, and informed consent (FPIC) where their rights, lands, resources, territories, traditional livelihoods may be affected.... To promote greater control and management by indigenous peoples over developments affecting them, including their lands, resources and territories, ensuring alignment of Projects with Indigenous Peoples' distinct vision and self-identified development priorities....To avoid adverse impacts on the rights of indigenous peoples, their lands, resources and territories, to mitigate and remedy residual impacts, and to ensure provision of just and equitable benefits and opportunities for Indigenous Peoples in a culturally appropriate manner.'
128. Standard 6 additionally details requirements and measures UNDP must take to avoid and mitigate impacts identified during these reviews and assessments.
129. One key requirement of the SES, included in both Standard 6 and in the SES 'Human Rights' principle (and also reflected in 2014 UNDP social and environmental commitments), is respect for human rights. In this regard, the SES provides explicit attention to UNDP's commitment to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), "UNDP will not participate in a Project that violates the human rights of Indigenous Peoples as affirmed by Applicable Law and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDP will ensure that social and environmental assessments for Projects involving Indigenous Peoples include an assessment of their substantive rights, as affirmed in Applicable Law."

130. Several articles of the UNDRIP emphasize the rights of Indigenous Peoples to lands and resources, and with consideration for future generations. Article 25, for example, describes the right of Indigenous Peoples to maintain and strengthen the distinctive spiritual relationship with their traditionally owned or occupied and used lands, territories, and waters and to uphold their responsibilities to future generations. Article 26 also indicates the rights of Indigenous Peoples to lands and resources they possess by reason of traditional occupation or use.
131. The UNDRIP reflects that these substantive rights must be secured through robust procedures, including effective and transparent consultation procedures with Indigenous Peoples, and procedures to secure their consent in specific circumstances.
132. The UNDRIP acknowledges this through several articles, including the following: 'Article 18, Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions; Article 19, States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; Article 20, 1. Indigenous Peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities; and Article 23, Indigenous Peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous Peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
133. To ensure respect for rights, UNDP must also consider findings of UN human rights bodies. In this regard, the findings of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, regarding Panama are important for UNDP. As noted earlier, Mr. Anaya provided two recommendations specific to Barro Blanco.
134. Other SES provisions similarly emphasize the rights of Indigenous Peoples to their land and resources, and imply that attention to procedures is a necessary part of securing these rights.
135. Standard 6, Requirement 6, 'Land, resources and territory: UNDP Projects will recognize that Indigenous Peoples have collective rights to own, use, and develop and control the lands, resources and territories that they have traditionally owned, occupied or otherwise used or acquired, including lands and territories for which they do not yet possess title.'
136. The SES 'Policy Delivery Process and Accountability' requirements for 'Screening, Assessment and Management of Social and Environmental Risks and Impacts,' include acknowledgement that UNDP must consult with affected communities, 'Stakeholder analysis and engagement will be conducted in a gender-responsive, culturally sensitive, non-discriminatory and inclusive manner, ensuring that potentially affected vulnerable and marginalized groups are identified and provided opportunities to

participate.’ And also notes a need for ‘stakeholder engagement plans,’ ‘Stakeholder engagement plans will be developed for all Programmes and Projects, scaled to reflect the nature of the activity and its potential impacts (e.g. from relatively simple measures for Programmes/or Projects with few if any social and environmental risks to comprehensive plans for High Risk activities with potentially significant adverse risks and impacts).’

137. Standard 6 Requirement 9, describes the need for ‘Full, effective and meaningful participation’ of Indigenous Peoples: ‘At the earliest stage of Project conceptualization and design, and iteratively throughout implementation and closure, mechanisms will be identified and implemented to guarantee the meaningful, effective and informed participation of Indigenous Peoples on all matters. Culturally appropriate consultation will be carried out with the objective of achieving agreement and FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the Indigenous Peoples concerned. Project activities that may adversely affect the existence, value, use or enjoyment of indigenous lands, resources or territories shall not be conducted unless agreement has been achieved through the FPIC process.’
138. SES footnote 74 points to guidance available to UNDP staff to implement FPIC requirements, including the United Nations Development Group Guidelines on Indigenous Peoples (herein UNDG Guidelines) and the UN-REDD Guidelines on Free, Prior and Informed Consent (herein UN-REDD Guidelines). The UNDG Guidelines describe that FPIC implies ‘an absence of coercion, intimidation or manipulation, that consent has been sought sufficiently in advance of any authorization or commencement of activities, that respect is shown for time requirements of indigenous consultation/consensus processes and that full and understandable information on the likely impact is provided....The participation of indigenous peoples may be through their traditional authorities or a representative organization.’³⁰ The UN-REDD Guidelines provide a similar description of FPIC.
139. Both guidance documents similarly refer to the ‘Report of the UNPFII workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples’ as providing elements of a common understanding of FPIC. This report reflects that while the objective of a consultation project is to reach agreement, ‘not all FPIC processes will lead to the consent of and approval by the rights-holders in question. At the core of FPIC is the right of the peoples concerned to choose to engage, negotiate and decide to grant or withhold consent, as well as the acknowledgement that under certain circumstances, it must be accepted that the project will not proceed and/or that engagement must be ceased if the affected peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent to the project.’

V. Findings

140. The UNDP CO played an important role in the dialogue process from February 2015 to August 2016, providing not only funding, but other key support including facilitation,

³⁰ UNDG Guidelines, p. 13

agenda setting, and logistics. Many interviewees perceived that the UNDP CO was playing a lead role.

141. **Finding:** The UNDP CO did not meet UNDP requirements to screen projects and programmes, including a requirement to apply the Environmental and Social Screening Procedure (ESSP) to projects approved in 2014 and the Social and Environmental Screening Procedure (SESP) for projects and programmes approved in 2015. The UNDP CO did not apply the SESP to the 2015 MINGOB Programme because the Programme had been in development for a significant period of time. The ESSP, however, could have been applied to the programme, and, in any event, the UNDP CO could have sought an official waiver from application of the screening tool.
142. Given that the MIRE Project and MINGOB Programme did not identify or detail many of the activities to be funded by UNDP, social and environmental risks associated with specific activities such as the dialogue process could not have been identified and addressed when the project and programme were approved. Nevertheless, application of the screening tool could have helped the UNDP CO understand in broad terms the types of risks likely with 'downstream' activities, e.g., activities involving Indigenous Peoples are likely to pose at least moderate risks. SECU observes that the expansiveness and vague nature of activities funded through the 2015 programme would have posed a particular challenge for application of the screening tool.
143. Although risks associated with the dialogue activities could not have been identified when the project or programme were approved, the UNDP CO could have applied the screening tools to, or otherwise assessed risks associated with, the dialogue activity once this activity was identified.
144. As acknowledged during the 4 May 2015 Roundtable Dialogue meeting, the dialogue activities were related directly to rights of Indigenous Peoples to lands, access to resources, and culture. The UNDP CO would have had affirmative responses to several questions posed in the screening tools, including those attempting to determine if the project could lead to adverse impacts on enjoyment of human rights; if communities had raised concerns about the project, i.e., affected communities had indicated concerns about continued dialogue, and protested when test flooding occurred during this dialogue; if there was a risk of violence, i.e., if the dialogue continued, and agreement was reached without affected communities, violence clearly was possible; and if the project could result in impacts to indigenous culture, i.e., it was clear the dialogue could lead to an agreement that would adversely impact the petroglyphs and other forms of affected community culture.
145. Given these 'yes' responses, the dialogue, as a project/programme activity, would have been characterized as posing at least moderate (and likely high) risks of impacts to communities. As such, these dialogue activities also posed at least moderate risks for UNDP.
146. **Finding:** SECU finds that while the UNDP CO met important UNDP commitments to due diligence, transparency, participation, consultation/consent, and human rights during the Roundtable Dialogue, the UNDP CO did not meet these requirements after the Roundtable Dialogue was concluded.

147. The UNDP CO, in engaging in the dialogue process, clearly was engaging in a situation that had been fraught with issues – particularly significant issues relating to the rights of Indigenous Peoples, and issues relating to violence and even death. UN investigations, including the UNDP investigation by de la Mata and Lopez and the investigation by the UN Special Rapporteur on the Rights of Indigenous Peoples, identified many of these concerns and shortcomings. The UN Special Rapporteur, for example, indicated that inadequate consultation and consent processes were the source of most issues and problems regarding respect for and protection of indigenous rights. He identified measures necessary to ensure respect for rights, and the UNDP CO had an obligation to attempt to advance these measures with the Panamanian government and not engage if these measures were not taken. Identified issues were red flags indicating a need for the UNDP CO to proceed with caution.
148. The UNDP CO proceeded with relative caution during the first Roundtable Dialogue, working closely with UN OHCHR and pursuing several measures necessary to avoid potential harms and ensure respect for rights, and, to a large extent in this regard, met UNDP commitments. The UNDP CO's support for the development of the Methodology for the Roundtable and agreement on the composition of the Indigenous Commission was an important undertaking that reflected UNDP CO efforts to comply with UNDP commitments. Arguably, the agreed Methodology for the Roundtable Dialogue, while relatively sparse on detail, functioned as the consultation framework recommended by the UN Special Rapporteur to secure rights.
149. The UNDP CO's commitments to transparency and inclusiveness in the Roundtable, including publishing meeting minutes, allowing any interested individual to observe the proceedings, and broadcasting the proceedings when they were not held in Tolé, also were consistent with UNDP commitments. The UNDP CO's clear articulation of roles UNDP would (and would not) play during the Roundtable Dialogue, and its consistent and clear articulation of its commitments to respect for rights e.g., clearly articulating that it would be an unbiased facilitator and encourage Panama government's attention to the UN DRIP and ratification of human rights treaties, also were consistent with UNDP's commitments.
150. Despite these key measures, the UNDP CO should have prepared a more detailed stakeholder analysis, as required by UNDP standards, prior to the start of the dialogue process, reflecting a nuanced understanding of community perceptions of decision-making structures and procedures, e.g., perceptions of when the Caciques and Congress can sign documents and implications of such a signature, the implications of conflict within the indigenous Congress and conflict among other indigenous groups, etc., and detailing possible responses in various scenarios, i.e., UNDP CO responses if/when indigenous groups face internal divisions (as occurred in this context). It should have applied such an analysis to a required Stakeholder Engagement Plan outlining how the UNDP CO would engage in the dialogue process under various scenarios, and clarifying what could be expected from the UNDP CO throughout the process. Clear explicit parameters could have helped the UNDP CO avoid perceived or actual bias and contributions to increased divisions within indigenous communities.
151. The UNDP CO's actions *after* the Roundtable Dialogue concluded were, as described in the following paragraphs, not as consistent with UNDP requirements - including requirements related to human rights.

152. Despite UNDP's clear reliance on UN OHCHR to ensure respect for human rights in the initial Roundtable Dialogue process, UNDP did not ensure the continued robust participation of UN OHCHR in the subsequent dialogue. UNOHCHR's participation in only one meeting after the Roundtable Dialogue was concluded, and apparent noninvolvement in the final outcome, challenged UNDP's capacity to ensure respect for rights of Indigenous Peoples.
153. After all communities said 'no' to continued dialogues after the Roundtable Dialogue process concluded, the UNDP CO did not explicitly analyze whether and how it should continue to engage in the process when traditional authorities subsequently agreed to continue but affected communities continued to say 'no.'
154. When the subsequent dialogues did not use the methodology previously agreed by all for the earlier Roundtable Dialogue initiated in February 2015, the UNDP CO did not seek to create a new methodology agreed to by all, and did not perform an assessment of social or human rights-related risks related to the new dialogue. It did not explicitly analyze whether and/or how the continued dialogues would ensure respect for the rights of directly affected communities not part of the agreement, how the dialogues would otherwise not increase divisions within the indigenous communities, and whether measures were necessary to avoid harms to these communities – communities identified in UNDP's Stakeholder Analysis as key parties - in the dialogue process.
155. Whereas UNDP's ROAR analysis for the Roundtable Dialogue acknowledged the importance of including affected communities in decision-making processes, the UNDP CO appeared willing to advance the subsequent dialogue processes without these directly affected communities, and with no explicit written understanding of the circumstances that created divisions within the communities and measures needed to ensure respect for rights of affected communities moving forward. The Roundtable Dialogue's early meeting minutes were rife with acknowledgments of the need for affected communities to participate; these minutes described the potential for violence, stalled project activities, and community division without the participation of all key communities in dialogue processes.
156. As noted above, respect for FPIC requires not only respect for 'yes' but also respect for 'no.' When key parties indicated 'no,' the UNDP CO should have performed an assessment of risks associated with continuing to engage and measures necessary to avoid harms to rights if it did continue to engage. SECU is aware that the Panamanian government likely felt compelled to move the process forward even without affected communities, given the strong position of the affected communities against the BBHP. The UNDP CO, however, was not obligated to continue.
157. FPIC also requires that agreements occur in the absence of coercion. The flooding that occurred twice during the final dialogue process, including only a few days prior to the signing ceremony, may have been perceived as coercive. It is not clear that Indigenous representatives signing the agreement did so without pressure.
158. The UNDP CO's continued involvement in the dialogue process after the conclusion of the Roundtable dialogue, including particularly through the UN RC/ UNDP RR's participation and use of UNDP facilities, when affected communities were saying 'no' to the process and the BBHP, may have been perceived by some as signaling the UN

position on this latter dialogue process and the BBHP, i.e., the UN RC/ UNDP RR's continued participation may have been perceived as an indication of a UN position that both the dialogue and BBHP were sufficiently respectful of the rights of Indigenous Peoples. This question of the UN's position on the BBHP was posed by the Indigenous Commission during the final Roundtable Dialogue meeting, and it appeared to be an open question leading into the dialogue process after the Roundtable concluded.

159. As noted above, the UN Special Rapporteur also described that 'the lands of the Ngäbe people should not be flooded or adversely affected in any way without the prior agreement of the representative authorities of that people as to the conditions attached thereto.'
160. The 'test flooding' that occurred in both May and August (days before the signing) was not consistent with the UN Rapporteur's finding. As such, the UNDP CO's failure to withdraw from the process at this time was a violation of UNDP's commitments to advance respect for rights.
161. The UN Special Rapporteur's final observation regarding activities impacting the Ngäbe people included recognition that Indigenous rights are not absolute, 'Without the agreement or consent of the Ngäbe people, the State should not allow the territorial rights of this people to be prejudiced in any way unless it is necessary to do so for a public purpose that is valid from a human rights perspective and, in such cases, only to the extent that it is necessary for and proportional to that valid purpose (paras. 42 to 45).' Nevertheless, the process did not include explicit attention to each of these factors. Several interviewees questioned, for example, whether flooding into the Ngäbe territory, i.e., including, particularly, flooding associated with the increase in dam capacity, was necessary and proportional to valid public purposes given the impacts to Indigenous rights. Roundtable Dialogue meeting minutes reflect outstanding questions related to whether water levels can be reduced to avoid key impacts to lands and resources of affected peoples above the dam.

VI. Recommendations

162. Normally, in a SECU compliance review, SECU is able to identify remedies in response to harm. In this case, where management currently has decided to terminate involvement in issues related to the BBHP, specific recommendations to remedy harms are limited, although clearly there have been harms to excluded parties during the dialogue process. For instance, while remedies to be considered have been advanced - particularly lowering the flood level to avoid impacts to territories of complainants and other Indigenous Peoples, ensuring revenues in a trust fund for Indigenous Peoples, among others - UNDP's current noninvolvement limits its capacity to advance discussion of such remedies. The following recommendations apply to UNDP engagements in future activities, including any related to BBHP.
163. Prepare a robust stakeholder analysis that guides future UNDP engagements in activities that involve Indigenous Peoples, to help ensure that UNDP activities respect rights, strengthen Indigenous Peoples' institutions and their own

decision-making structures and processes, ensure attention to the rights, views, and needs of affected communities, and do not increase divisions within and among communities.

164. Ensure application of screening procedures to future projects and programmes, and ensure, for activities not detailed in programmes, that risks associated with a given sector of activities are identified at programme development. When activities are detailed subsequently, ensure that social and environmental risks associated with such activities are avoided and/or mitigated in a manner consistent with the SES.
165. Ensure that UNDP activities are consistent with findings of UN bodies, including, for UNDP engagements related to the Barro Blanco Hydropower Project, findings of the UN Special Rapporteur on indigenous rights. These findings relate to robust consultations and the need for consent free from coercion, and explicit and careful attention to standards and robust procedures when engagements relate to measures in the public interest, e.g., the finding that ‘the State should not allow the territorial rights of this people to be prejudiced in any way unless it is necessary to do so for a public purpose that is valid from a human rights perspective and, in such cases, only to the extent that it is necessary for and proportional to that valid purpose.’
166. Robust application of SES requirements to develop Stakeholder Engagement Plans and Indigenous Peoples Plans, as appropriate, when UNDP activities involve Indigenous Peoples, and notification to the Panamanian government that UNDP must comply with UNDP SES.
167. Robust application of SES requirements for transparency and inclusivity in UNDP activities, including, in the context of dialogue activities.