I. Background

1. The Malaysian State of Sarawak welcomes the opportunity to share the progress that it has made in relation to human rights in hydropower development.

2. Sarawak has a notably diverse indigenous population, comprising 27 ethnic groups. Respect for the human rights, land and cultural identities and traditions of these native peoples forms a central part of Sarawakian identity. Furthermore, the Sarawak State Government (the "State") has made mutual tolerance across these distinct indigenous cultures a cornerstone of its policies over the past 50 years of Sarawak's independence within Malaysia.

3. Before Malaysia's 2009 Universal Period Review (the "UPR"), the State of Sarawak, Malaysia, embarked on the implementation of a comprehensive economic development agenda, the Sarawak Corridor of Renewable Energy ("SCORE"), to harness Sarawak's abundant natural resources and attract new industries, investment and employment to the State.

4. The SCORE strategy reflects the State's firm belief that the people of Sarawak deserve the same life opportunities, infrastructure and public services as people in developed economies. From this premise, it follows that the State not only has the right, but also the responsibility, to develop its natural resources for the benefit of present and future generations.

5. The SCORE strategy has succeeded beyond expectations. Global customers from the aluminium, silicon and manganese industries have already purchased all of the energy from the first phase of SCORE, including two hydropower projects at Bakun and Murum, as well as a coal-fired power plant at Balingian. Demand for energy from future projects also remains strong.

6. The success of the SCORE strategy reflects Sarawak's:
   a. genuine and sustainable competitive advantage in bulk hydropower;
   b. strategically important location in the centre of ASEAN, halfway between China and India;
   c. a young, well-educated and motivated workforce; and
   d. a stable, competent and dynamic government.

7. The strength of customer demand has led the State to identify a further ten potential sites for hydropower projects as part of the SCORE program, in addition to Bakun and Murum. There has been no decision made to proceed with any of these potential projects to date.

8. The economic opportunities created by this development strategy enable the State to make progress across a broad range of basic human rights including:
   a. adequate housing and standard of living;
b. the right to education;
c. poverty eradication; and
d. the right to health.
9. Sarawak Energy Berhad ("SEB"), the state-owned utility, has served as one of the State's main drivers of SCORE. Early in SCORE's development (e.g., with the Murum hydropower project), SEB had only limited experience with the social analysis and community engagement that underpin sustainable development of large hydropower projects. However, since 2009, the State and SEB have taken major steps to embed sustainability in their development efforts.

10. This report will outline the steps taken, and progress made, by State and SEB in key areas of concern to the Human Rights Council and international community.

II. Steps Toward Sustainability

A. Adopting Best Practices

11. In 2011, SEB became one of the first hydropower developers in the world to voluntarily adopt, and incorporate within its project development model, the Hydropower Sustainability Assessment Protocol (the "Protocol") of the International Hydropower Association (the "IHA"), the leading international organization representing the global hydropower industry. Adoption of the Protocol has assisted SEB to improve its capacity in respect of human rights and sustainability issues, in accordance with the UPR's recommendations.

12. The IHA was formed under the auspices of the UN Educational, Scientific and Cultural Organization in 1995 to promote best international practice in the hydropower sector.

a. In 2010, the IHA published the Protocol, which outlines four separate assessment tools (corresponding to the early stage, preparation, implementation, and operation of a hydropower project) to evaluate environmental, social, technical, and economic/financial factors, such as "Project Benefits," "Projected Affected Communities & Livelihoods," "Resettlement," "Indigenous Peoples," and "Cultural Heritage."

b. The Protocol draws on international standards and experience, including the work of:

i. The Nature Conservancy and the World Wide Fund for Nature for environmental factors;

ii. Oxfam and Transparency International for social factors;

iii. The International Finance Corporation Performance Standards;

iv. The World Bank Safeguard Policies;

v. The Equator Principles; and

vi. The World Commission on Dams' Criteria and Guidelines.

The Protocol thus benefits from the insight and perspective of the full range of stakeholders involved in sustainable hydropower production, lending credibility to the protocol as well as to those developers and projects guided by it.
13. SEB has developed its internal process of project development to align with the requirements of the Protocol. This comprehensive effort has increased the capacity of its staff to understand the linkages of the Protocol and related human rights issues with each phase of the project, improving the organization's ability to mitigate the impact of, and respond to, such issues and assisting in the auditing and review of each project.
14. The process applies to every hydropower project under development in Sarawak. The decision to proceed with any particular project will depend on an assessment of its sustainability in light of the Protocol, customer demand, feasibility studies, comprehensive Social and Environmental Impact Assessment ("SEIA") reports and approvals from Sarawak's National Resources and Environment Board ("NREB") and the State. Where development involves resettlement or relocation, the State will need to endorse a Resettlement Action Plan before SEB makes its final investment decision. The State publicly affirmed this commitment to due process before the world during the IHA World Congress in May 2013.

B. Sharing Experiences Internationally

15. SEB and the State have taken steps in line with the UPR recommendations to share experiences and best practices in developing comprehensive policies for the advancement of indigenous groups and economic development. In November 2011, representatives of the State and SEB visited the Lao People's Democratic Republic to share experiences in respect of hydropower developments. The Sarawak parties took key lessons from this visit, which led to the institutional reforms described below.

16. In May 2013, SEB hosted the IHA Congress. This event allowed SEB, State representatives and other international parties to share information on incorporating sustainability into business practices with delegates from over 60 countries and supported the IHA, in cooperation with the Asian Development Bank, the International Finance Corporation, the World Bank, and the Inter-American Development Bank, to conduct a workshop on hydropower's role in regional development.

C. Reforming the Institutional Framework

17. At the time of Malaysia's first cycle UPR, and in light of the limited experience within SEB at that time, Sarawak's State Planning Unit undertook the commissioning and management of studies related to the social and environmental impact of hydropower development projects in Sarawak.

18. Applying lessons learned from the State's visit to the Lao People's Democratic Republic mentioned above and its engagement with other hydropower developers through the IHA, the State reformed the institutional framework in respect of hydropower to better promote accountability and human rights, as recommended by the UPR. Now, for each project, SEB will serve as the proponent. The State Planning Unit, supported by a new SEIA Steering Committee, will act as the regulator, subject to the policy direction established by the State. The checks and balances introduced by this explicit division of responsibility have increased the accountability and attention to sustainability issues in the hydropower development process.

D. Supporting

Indigenous Rights

Land Rights

19. Sarawak has long had a legal framework which recognizes and protects native customary rights ("NCR") to land. The State's land and forestry laws have acknowledged and protected land rights lawfully created in accordance with customary practices,
20. Based on well-documented official records, Sarawak has approximately 1.5 million hectares of land subject to NCR claims, or "temuda". Since 2010, the State has surveyed a total of 344,000 hectares of NCR land through its New NCR Initiative under the Government Transformation Programme. A further 150,000 hectares has been earmarked for survey each year from 2014-2015, which means that 50% of the estimated area will be surveyed by 2015.
21. Surveying land provides security of ownership to its rightful native claimants and also enables such landowners to monetise their land assets for their economic well-being. Sarawak continues working to survey all of the NCR land with the help of federal government funding to better ensure recognition of each NCR claim.

22. For the Murum project, the State has granted the resettled Penan access to wildlife and forest produce in approximately 19,500 hectares of Danum and Linau Protected Forests, located in the vicinity of the resettlement areas. This is in addition to the land allocation for the resettlement sites outlined below.

Civil Participation

23. SEB has assisted the National Registration Department with 12 "registration drives" into the interior of the Borneo, resulting in the registration of 839 Penans and Kenyahs (including 405 identity cards and 434 birth certificates) in Murum, Sarawak. Registration allows increased participation in the State's social welfare and other programs, supports NCR claims and promotes better community integration.

Consultation

24. The development of hydropower in Sarawak is undertaken pursuant to the laws of Malaysia and Sarawak.

25. To date, the Malaysian Parliament has not enacted any law adopting the principles in the United Nations Declaration of the Rights of Indigenous Peoples ("UNDRIP").

26. Nonetheless, there is a strong alignment in both concept and in practice between Sarawak's approach to hydropower development and the aspirations captured in the UNDRIP, as outlined below.

27. The State recognizes that its right to development closely relates to the concept of free, prior and informed consent. Article 32.2 of the UNDRIP says that "States shall consult and cooperate in good faith... in order to obtain their free and informed consent prior to the approval of any project." Yet, to the extent that some economic development projects (e.g., creating sustainable sources of cheap and clean hydropower energy) have the potential to cause "adverse environmental, economic, social, cultural or spiritual impact" (e.g., changing ecosystems and habitability of lands in discrete areas around dam projects), Article 32.3 of the UNDRIP states that "appropriate measures shall be taken to mitigate" such impact. Article 32 therefore recognizes the trade-offs necessary for overall economic development. With respect to the relocation of indigenous peoples, a number of articles of the UNDRIP call for "free, prior and informed consent" including with respect to lands (Articles 10 and 32.2), other cultural properties (Article 11.2), legislative measures impacting them (Article 19), and disposal of hazardous materials (Article 29.2). Concerning measures affecting land, both Articles 10 and 32.2 draw a direct connection to fair and just compensation or redress.

28. Importantly, the International Labour Organization Convention ("ILO") No. 169 strikes the same balance between consent and mitigation/development as the UNDRIP. That is, Article 16.2

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1 Any such laws which may subsequently be proposed to the Malaysian Parliament would be governed by Article 76 of the
Malaysian Federal Constitution. According to Article 76, although Parliament may make laws with respect to any matter enumerated in the State List for the purpose of implementing any treaty or similar instrument from the United Nations, clauses (2) and (4) of Article 76, read with Article 950, provide that no such law may be made relating to any matters of native law or custom in the States of Sarawak and Sabah. Further, any other Bill for a law to be made under Article 76 (1)(a) cannot be introduced into Parliament until the Government of any State concerned has been consulted. As any law purporting to adopt principles in UNDRIP would affect the interest of the State of Sarawak in matters pertaining to land matters, amongst others, the need to consult the State is mandatory in nature. Finally, the law of Malaysia is clear (per the comments of Zaki CJ and Raus FCJ on behalf of the Federal Court in Bato Bagis & Ors v Kerajaan Negeri Sarawak & Another Appeal (2011) 8 CLJ 766) that although pre-acquisition hearing (a form of human rights to prior consultation) may be desirable, this process is not compulsory, and the absence of pre-acquisition hearing does not invalidate any land acquisition process, including the extinguishment of Native Customary Rights.
indicates that relocation "shall take place only with their free and informed consent," yet it goes on to provide for procedures in the case "[w]here their consent cannot be obtained." It allows for resettlement in such cases under the "appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."

29. Thus, to the extent that members of local populations do not consent to resettlement, such persons do not have a "veto" right over State action, and the efforts of the State, with the support and assistance of SEB, to adequately follow democratic procedures can still ensure respect for their indigenous rights. The State understands that the Human Rights Council of Malaysia (SUHAKAM) supports this view.

30. Since the first UPR, SEB and the State have made significant efforts to improve the community engagement and consultation process in respect of the SCORE hydropower projects. In the case of the Murum project, consultation first commenced in 1994 during the initial feasibility study, many years prior to the construction of the dam. Such consultation proceeded without coercion and with the intent of informing indigenous people about the plans for the potential project. Formal engagement picked up again in 2008, after which SEB carried out in good faith over 40 formal and over 100 informal consultations with the Penan and Kenyah. SEB has recorded evidence of such consultations, including video, meeting notes and photographs.

31. In January 2010, SEB and the State began consultations with the indigenous population from Murum regarding their resettlement sites. By the end of 2010, all of the directly-affected communities (seven in total) had chosen their respective resettlement sites at Metalun and Tegulang. In August and September 2011, these communities pegged the sites for their seven new longhouses themselves, with the participation of the State, including the Land and Survey Department and SEB. They also had active involvement in the design of their longhouses.

32. Moving forward, SEB has revised its consultation process to further align with the Protocol and indigenous culture. The process now involves multi-step consultations with State and district governments, local community leaders and headmen (i.e., the traditional representatives of their communities), working down through traditional hierarchies to all members of the community. SEB will take and incorporate feedback at each stage of the process. This multi-stage approach will ensure incorporation of local feedback into the overall planning process while showing respect for indigenous traditions.

33. The Baram hydropower project, one of the next most likely projects to proceed, demonstrates the improvements SEB has made to the consultation process with project-affected communities. SEB initiated the community consultation process for Baram in August 2011, and, by April 2012, had set up a community engagement team made up of members of the project-affected communities. This team worked with SEB and the indigenous communities to get community consent for initial site investigation work for two of the project-affected villages very early in the process.

34. On 9 October 2012, SEB organized a briefing of over 170 people representing all of the 32 villages likely affected by the Baram project. Attendees included community leaders,
headmen and village committees, among others. At the briefing, SEB shared the scope and process of the SEIA for the project, introduced the project consultant, Chemsain, to the affected community, and fielded questions from the attendees.

35. SEB commenced the Baram SEIA in November 2012. Since then, SEB's community relations team has visited all 32 of the potentially-affected communities during multiple site visits to listen, and respond to, feedback about the proposed development.

36. Thus, the State's commitment to consultation aligns with the international norms described above.
Compensation

37. As a policy, the State prefers voluntary resettlement arising from hydropower development. Where it cannot achieve voluntary resettlement, the State has committed to restore and improve the livelihood of the directly-affected communities by contributing to their economic development, education and poverty reduction, within the resources of the government, in accordance with the laws of Malaysia and Sarawak. The focus on improving standards of living through resettlement aligns with the Protocol, and exceeds certain international standards.

38. Regarding issues of compensation, the UNDRIP and the ILO Convention No. 169 require the provision of fair and full compensation to make resettlement populations whole again. For example, Article 28 of the UNDRIP states that, when a government cannot give restitution, it should provide "just, fair and equitable compensation" for lands "confiscated, taken, occupied, used or damaged without their free, prior and informed consent." Article 16.4 of the ILO Convention No. 169 states that, when return is not possible, "these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development" (italics added). Note, as this provision clarifies, that international norms make fully adequate compensation the goal, even where a state cannot obtain the full consent of every individual.

39. In the event that the State acquires or extinguishes NCR claims to land, Article 13 of the Federal Constitution requires the State to compensate the former landowner for such land. In Sarawak, the Land Code guides the provision of such compensation, while the Land and Survey Department guides compensation for crops and fruit trees, and the Museum Department guides compensation for graves and cultural heritage. Compensation will usually take the form of replacement in kind, such as housing and land, and will only take the form of cash compensation when the compensating authority cannot immediately replace the lost assets (e.g., crops and fruit trees).

40. The public disclosure in May 2013, and subsequent implementation, of the Murum Resettlement Action Plan and the compensation package for communities directly-affected by the Murum hydropower project provides the best available evidence of the State's policy commitments on compensation. The Murum project directly affects 353 households, comprising 335 Penan households with 1,304 Penan and 18 Kenyah Badeng households with 113 Kenyah. As compensation for their displacement, the State has provided the directly-affected communities with a comprehensive compensation package that includes:

a. 15 hectares of land for each family to own and utilize;

b. a 1,300 square feet good quality longhouse for each family;

c. sanitation and drainage;

d. subsidized, clean and
stable water supply;
e. subsidized, reliable power supply;
f. integrated community hall for pre-school, healthcare and a place of worship;
g. primary schools;
h. community training;
i. government support in cash and in kind;
j. agriculture assistance and training;
k. home garden for fruit trees and vegetables;
l. fruit farm for future cash crop; and
m. plantation for rubber or oil palm as cash crop.

41. These arrangements represent a massive and immediate improvement in the standard of living for the affected communities compared with their previous situation. Specifically, the Contemporary Ethnography undertaken as part of the Social and Environmental Impact Assessment for the Murum project recorded that living conditions remained difficult, electricity supply sporadic and food supply inadequate. Severe malnourishment affected 12% of children below five years old among such populations. Moderate malnourishment affected another 31%. Remoteness limited access to sources of income and education.

Resettlement Policy

42. Since the first UPR, SEB and the State have undertaken to develop a formal Resettlement Policy Framework. The framework will provide guidelines on a wide range of resettlement issues, including consultancy, compensation, grievance mechanisms and others. While the framework remains in development, substantial progress had been made as of August 2013. Once finalized, it will help the State to better communicate and fairly assess the issues involved in resettlement. SEB also publicly disclosed the Murum Resettlement Action Plan in May 2013 in an effort to increase the transparency of that project.

Culture and Heritage

43. SEB recently entered into a partnership with the Sarawak Museum to support the upgrading and refurbishment of the museum's indigenous exhibit. This initiative, entitled "Longhouses of Sarawak," aims to communicate the rich culture, heritage and values of Sarawak's indigenous communities. The exhibit draws from the research collections of the Sarawak Museum, collections of historical artefacts, replicas of longhouses of various indigenous groups, historical photographs, legendary stories, traditional musical instruments, handicrafts, tools and traps used for fishing and hunting. The exhibit opened in mid-2013.

44. In early December 2012, SEB organised and sponsored the inaugural "Pesta Penan Murum" (Murum Penan Festival) as part of its effort to further engage with the indigenous people of Sarawak. The unique two-day sports and cultural festival in the remote Long Singu village in Murum created a way to unite people and share cultures while enjoying the healthy benefits of sports and games. The local communities enjoyed a full programme of activities including football, tug of war, karaoke and beauty pageant contests. The carnival also combined several traditional Penan games such as Sumpit (bow and arrow), Payu (wrestling), Payu Usu (arm wrestling) and Ngajat (traditional dance) in an effort to promote the culture.

45. SEB has also commenced a programme to recognize indigenous cultural traditions in its development projects. It now conducts "Pelah Daleh", ceremonies based on the indigenous belief in requesting consent and good fortune from the land's ancestor, before commencing works on transmission towers, site investigations and other projects in and around NCR lands.
In 2012, SEB built a kindergarten to serve the indigenous community of Long Wat, and also provided assistance for the construction of a kindergarten at Long Malim, both communities lying deep in the interior of the Murum area. SEB has also provided uniforms and stationary sets for Penan students in the Murum area, and electric generators for the kindergartens.
47. SEB also conducted a successful literacy programme with Penan women, in cooperation with the Society for the Advancement of Women and the Family Sarawak. The programme significantly increased the literacy rate within the indigenous community. To date, close to 50% of the 330 Penan have learned to read and write in the national language with confidence. Apart from reading and writing classes, the literacy programme also addresses numerical literacy, hygiene and healthy living, personal and leadership development and vegetable farming.

Other Community Support

48. In late 2012, the Long Wat community suffered a devastating fire that destroyed one of their longhouses. SEB offered the first assistance to the community, providing relief aid within hours, and followed up with a second donation a short time after. It has since assisted the community in re-building the longhouse that burnt down.

49. In 2011 and 2012, SEB provided food assistance to indigenous communities affected by food shortages resulting from cultivation shortfalls.

50. SEB, together with other State agencies, provided training to the Penan and Kenyah in agriculture and household economy in 2012.

51. SEB directly employs Penan workers at the Murum project and in the resettled communities.

Community Health and Environment

52. Participants in SCORE commit to comply with international standards and best practice in the design and operation of their plants. Current plants in operation, including the aluminium smelter at Balingian, meet the World Bank’s emissions standards, and the Department of Environment ("DOE") continuously monitors such emissions for regulatory purposes.

53. The DOE also reviews quarterly environmental surveys, covering areas such as surface water monitoring, ambient air monitoring, air emission monitoring, pot-room ventilation system monitoring, among others, prepared by external consultants and submitted to the DOE by the aluminium smelter. The DOE has not found any irregularities to date in such reports. The Malaysian Ministry of Medical and Health Services has also confirmed that no epidemiological evidence exists of any increased prevalence of illness since the commencement of operations at the smelter in Sarawak.

54. The NREB undertakes monitoring of the water quality of the river, the Batang Balingian, into which the aluminium smelter discharges water. Their analysis confirms that no change in the water quality has occurred since the smelter commenced operation.
III. Conclusion

55. Sarawak emphatically rejects any allegations of human rights violations. It has taken, and continues to take, all the necessary steps to ensure the proper respect for human rights of indigenous and other project-affected peoples in hydropower development for their overall well-being.

56. The development of the State's hydropower and other natural resources supports basic human rights and represents a well-considered strategy designed to maximize the wellbeing of the people and accelerate the rate of economic progress of the State of Sarawak. The strategy brings the affected native communities, living in remote interior regions of the State and traditionally dependent on subsistence farming or semi-nomadic lifestyle, into the mainstream of Malaysian society, while ensuring recognition and protection of their indigenous rights.

57. Through this process, affected indigenous communities have secured new opportunities and better educational and health amenities for their present and future generations, whilst preserving their cultural identities and native traditions. To this end, the State provided the directly-affected peoples a level of compensation, the scope and quantum of which exceeds that provided in any similar hydropower project in Southeast Asia and which should ensure the multi-generational welfare of the recipients. The General Elections held in Sarawak result of the 13th less than six months ago confirms that the State's approach enjoys the support or endorsement of the vast majority of the native population.

58. By reflecting on insights derived from exposure to international best practice, and implementing lessons learned from earlier hydropower developments, Sarawak has made steady, and even strong, progress in the application of best practices, including as regards the quality of its constructive engagement with the native communities directly-affected by the implementation of hydropower projects. Nonetheless, the State acknowledges that it and SEB still have much to learn. In its journey of continuous improvement, Sarawak will continue to be guided by both the lessons learned from previous experience in Sarawak and the standards and procedures developed by countries and institutions engaged in similar endeavours.

59. Sarawak therefore calls upon the Human Rights Council to give due and careful consideration to the facts. The matters addressed in this paper provide substantial evidence of Sarawak's commitment to protection of the human rights of the native peoples of Sarawak in the process of implementation of economic development projects on land claimed by the natives as their customary land. The State welcomes constructive comments and engagement with stakeholders as it seeks to uphold and enhance these rights throughout the process of economic development in which Sarawak is presently engaged.

Page 14 of 9

Sarawak
Government
Kuching, Sarawak,
Malaysia
Community Engagement and Compensation in Hydropower development in Sarawak: a Human Rights Perspective


24 October 2013

General Information on Sarawak

- Formation of Malaysia in 1963 with Sarawak as a member State
- Under colonial rule from 1946-63
- 12.4 million hectares land area
- 0.15% of World Tropical Rainforest
- 16% of Borneo Tropical Rain Forest
- 2.5 million population
The People: Multi-ethnic (27 ethnic Groups)

The Sarawak Corridor of Renewable Energy has exceeded expectations: all the available energy is sold.
Remote indigenous communities in project affected areas already face significant challenges

**Conditions of the Murum Indigenous People**

- **353 families live in 212 houses with the size of 600 sqf, without proper sanitation and electricity.**

- **Very low income:** average over the 353 families was -US $600 per year (semi-nomadic, mainly food hunter-gatherer)

- **Low life expectancy (40+)**

- **Very low literacy rate** (less than 20% received formal education)

- **Many children moderately malnourished**
Existing Penan Settlement: Long Malim
Community engagement has been extensive

Site Identification with Villagers
Compensation for affected communities is comprehensive

Land Allocation for Resettlement at Murum
**Actual Resettlement Infrastructure at Murum**

*Infrastructure including:*

- 1,300 sq foot of longhouse accommodation per family (353 families)
- Sanitation and drainage
- Clean and stable water supply
- Power supply
- Integrated community halls with chapel and kindergarten
- Temporary schools

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**Longhouse View**
Provision of Infrastructures

Provision of Street Lightings

Genset Room

One Duty & One Standby Genset for each Village
Locals Harvesting Vegetables

Resettlement & Relocation Fund
CSR Interim Support on Relocation

Package 3, Household Essentials (RM 58,245):
RM 165/household

Package 4, TV & NJOI (RM 65,520):
RM 186/household
Comprehensive Social and Environmental Impact Assessment and Community Engagement for Future Projects
• On 9 October 2012, Sarawak Energy introduced the SEIA process and our appointed consultant to 160+ potentially affected people: headmen, community leaders, relevant local government officers and politicians in Miri.

• The Community Relations team has visited all 30 potentially affected longhouses. We have made progress in establishing communication with affected communities. In addition to regulations of the State and prevailing international standards, the Baram SEIA will also be guided by the International Hydropower Association (IHA) Sustainability Assessment Protocol.

• The SEIA has been progressing well with the support and participation of community leaders and the villagers.
Thank You