

CUSTOMARY LAND TENURE AND COMMON/PUBLIC RIGHTS TO MINERALS IN  
PAPUA NEW GUINEA

This paper looks at the issue of customary land tenure and rights to minerals under customary land in Papua New Guinea (PNG). However perceived, ownership of minerals is a prerogative right of the State.

State ownership of minerals is part of common property interests. There is justification in State ownership of minerals, so far as the State is representative of the public/common interest. In PNG, the State is an arena of conflict, and sectional groups tend to capture it for their own ends.

Customary landowners, even without ownership of minerals, benefit a lot from the development of minerals which are under their land. They are entitled to the right to receive just compensation for private and common property rights. An important policy consideration follows.

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ABSTRACT

This paper looks at the topic of customary land tenure and rights to minerals under customary land in Papua New Guinea (PNG). However perceived, ownership of minerals is a prerogative right of the State.

State ownership of minerals is part of common property interests. There is justification in State ownership of minerals, so far as the State is representative of the public/common interest. In PNG, the State is an arena of conflict, and sectional groups tend to capture it for their own ends.

Customary landowners, even without ownership of minerals, benefit a lot from the development of minerals which are under their lands. It is submitted that the right to receive just compensation, meaningful participation by customary landowners and co-existence of private and common property rights, are important policy considerations to facilitate societal development.

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## 1. INTRODUCTION

Customary land tenure and rights to minerals are important and sensitive issues in PNG, in the contemporary sense. But the issues in themselves and their inter-relationships are often complex and are not well understood by most people. In many instances, there is often biased arguments on the issues and their inter-connections, leaving more confusions rather than clarity.

This paper is written from a multi-disciplinary stand and it also represents a balanced view. It takes a neutral stance; neither speaking for the customary landowners or for the mining interests. It looks at the issues concerned, more from a societal point of view.

The paper is brief and is in fact a condensed version of a longer paper that looks at wider views. Hopefully, the paper is a valuable contribution to the over-all theme of this Seminar, "Common Property Issues".

## 2. RIGHTS TO NATURAL RESOURCES AND MINERALS UNDER CUSTOMARY LAW

The general principal arising from the literature on customary land tenure in PNG (example Crocombe and Hide, 1987; James, 1985; Lakau, 1994), shows that all kinds of natural resources such as precious stones, water and clay which are found in or on the land are part of the land. What this means is that, whichever human community or kinship group that has legitimate right of control over the land, also possesses or have controlling interests over



the natural resources which are attached to the land. This conforms to the common law principals (see Table 2 below). However it may be argued that this is more coincidental, rather than a parallel existence.

There are however two exceptions to the customary principal of communal or landowning group ownership of natural resources attached to their group territory. The first arises from relation to things such as buildings, planted trees, crops and other improvements. These are in legal terms known as chattels. They are brought about by humans input of labor. Custom perceives these as belonging to those individuals whose labor brought them about. They do not necessarily belong to the landowning group. Thus, the improvements can even be claimed by absentees or complete strangers to the landowning group.

However, there is always some kind of obligations which are rendered to the proprietary right-holders of the land. Such obligations includes paying tributes and helping in times of warfare or other forms of needs or activities. These are necessarily not the same as rents and royalties which are parted in accordance with statutory law.

Another interpretation to that is that, the physical land always remains the property of the landowning groups as a whole. This has connotations of communal property right. Individual members of the various landowning groups can claim exclusive possession of the improvements affixed to it. These individual members can be both resident and absent. Absentees are those living



outside the landowning group territory but hold various kinds of contingent or dormant rights within them.

The above scenario can be likened to a "lease" of land on which the lessee erects something with a right to remove it in the future. What this means is that community proprietary interest in the land exists in conjunction with individual possessory rights over any improvements.

Where there is a contention between different parties, the general ruling always appears to be that the exemption is not a break from custom. It is one of right or privilege guaranteed, and in some cases granted, by the community by virtue of being a member of the landowning group.

The second exception is in relation to how customary law interprets minerals, gas or oil (natural resources of immense value found under the land), and to their right of ownership and exploitation by individuals or groups at whatever level. At least in the traditional or pre-white settlement times, one may argue that customary law had no distinct reference to or had a value attached to them.

Such values may be expressed in monetary terms, some traditional substitutes such as the "tambu" (shell money) and others that may have existed. This was mainly because there was no practical utility for them during traditional times.

And also, there was arguably no technology which existed to get the minerals and utilize them. But one may also argue that had it not been for colonial intervention, with the passage of time,



the indigenous people would have developed the technology needed, to extract the minerals and put them to some beneficial use.

On the other hand, there was clear-cut rights and obligations associated with other natural resources. These includes clay, salt, precious stones and so forth which had some definite values as already stated. The customary rule with these resources is that, the customary landowners can assert ownership of such resources merely because they were firmly fixed to the land which they owned, whatever the nature of the rights associated with them.

It is evident throughout PNG of wide range of natural resources or substances which were extracted from the land, sea and waters, using variety of techniques which were at their disposal or known to them. There was also clear claims to the exploitation and even of their ownership. At times, there was conflicting claims which were asserted by neighboring groups over these resources or substances.

In the coastal areas coral reefs, shells and other resources in the sea or shore line always had great value and people attached territorial attachment to them. In the Highlands there is wide evidence of stone quarries and other extraction work which went on for many thousands of years. The extraction techniques that were used ranged from very simple ones to the most highly sophisticated. There was also different kinds of dealings and transactions with respect of them. These dealings went about between different individuals, groups and communities.

Haynes (1995:33) summarizes the evidences of the traditional



attachments, customary landowning groups had to resources or substances of value by stating that:

for pre-colonial trade, significant sub-surface substances were extracted for use in the manufacture of items for trade, or for trade in their original form. These included mineral pigments of various kinds, edible earth (a dietary supplement of pigs), various kinds of stone and clay (for pottery and other purposes). Furthermore, water from mineral springs was used to make salt and mineral oil from seepage was used as a cosmetic, medicines and possibly as cooking fuel. Stone was the substance most extensively extracted, being used for many purposes which included cooking stones, hammer and anvil stones, drill points, awls, scrapers, knives, bark cloth beaters, axe blades and prehistoric mortars and pestles and naturally weathered curiously shaped stones were used in magico-religious rituals.

It is submitted that law (whether it is in the form of statute or custom), is subject to constant adjustment in space and time. Such adjustments responses to changes which are generated from within or are external to the operations of the law and to the community within which the law is enforced. Such changes, whatever they are and whatever shape they take, goes on all the time. The degree of changes varies from community to community.

It is inevitable that custom particularly has changed in reaction to post-colonial settlement and contemporary circumstances with respect of rights to minerals. Consistent with prevailing principals, custom recognizes all forms of minerals, oil and gas as part of other resources of value which are attached to land by mother-nature. As with other natural resources, ownership of minerals, gas and oil and uses associated with them, also belongs to the group which owns the land.



An alternative argument is that minerals are like other natural resources such as rivers, gravel, limestone and lakes. These are seen as public or common properties. Thus their ownership may be perceived as common properties and consequently can be exploited by the public as a whole. Those landowning groups on whose land such resources are found, are merely seen as trustee administrators.

Table 1 below illustrates various rights under customary land tenure, and at what level they are held. The table is meant to re-emphasize what has already been discussed in this Section.

TABLE 1: HOW CUSTOM PERCEIVES CERTAIN RIGHTS

RIGHTS TO	HELD BY
Land (soil).	Communal.
Improvements.	Individuals (those whose labor brought them about).
Natural resources.	Communal.
Minerals.	Communal/Public.
Right to the use of any of the above.	Varies (may be individual, communal or public).

Individual rights refers to those rights which are enjoyed by a person or family. Communal rights belongs to the landowning group.

Public or common rights refers to both the landowning group and those who are strangers to it. In public/common rights, there is open access (*res nullius* or property to no one), free for all



and are neither exclusive nor transferrable.

One line of thought that must be used to advance the above premise (changing perceptions of customary law relating to minerals), can be put in the words of Sack (1973:20):

Primitive law being an open system, it cannot be argued that no rights to rock outcrops and patches of poor soil exist because the traditional law says nothing about them (as could probably be argued in Western law). Although not yet defined, these rights will be defined when their existence becomes a practical issue. This definition does not create new rights; they existed all the time, only in a latent form.....

It must be further added that even though customary landowners and the customary land tenure systems were silent or may not have known about minerals and to their utilization, evidences suggest that custom is not static. It (custom) has an "outward look", and therefore would go beyond the right of use. In some respects therefore, right of ownership of land and resources under customary land tenure systems do not have to be reduced to use and physical possession. The key issue really is who holds what right in the land. This was answered by Table 1 above and the discussions preceding it.

### 3. JUSTIFICATION ON STATE OWNERSHIP OF MINERALS

It is obvious that there are variations as well as similarities presented, when comparisons are made with the different meanings to land given by custom, statute, common law and that arising from the power of eminent domain (James, 1985; Knetsch



and Trebilcock, 1981; Lakau, 1994; Haynes, 1995). This is summarized in the table below.

TABLE 2: SUMMARY OF DIFFERENT MEANINGS TO LAND

SOURCE OF LAW	MEANING
Statutory Law.	Land and minerals are part of the same object.
Case Law.	Same as above.
Eminent Domain.	All minerals belongs to the State by virtue of it's sovereign authority.
Customary Law.	Minerals can be both communal and or public property.

From a societal point of view, there is some justification in State maintaining ownership rights over minerals and arguably other natural resources which are found under the soil which had no traditional value or use. There is also a powerful and valid argument in the PNG situation that, resources of immense economic value should not be left to a few or single individual(s) or communit(ies).

It follows that ownership of such valuable natural resources should be vested in the State, the same way as ownership of customary land is vested in the clan or kinship group as a whole. Both such authorities exercises their roles on a trustee basis, one (State) for the whole society and the others (landowning groups), for all it's legitimate or affiliated members from the many



tribe/clan based communities. There fair bargaining and benefits to

In pre-contact times tribes or single communities performed roles and functions of nation-States. In the modern sense, there is a single society or nation-State structure called PNG. This encompasses all the different tribal groupings, which have remained intact to the present. necessary commitment from foreign explorers

and There is often a challenge in re-conciliation of the modern State and the 10,000 or so tribal societies in PNG, even 20 years after independence. But any suggestion of re-instating such traditional norms is inconsistent with nation building and is anti-constitutional as well.

It may be further argued that minerals should be owned, controlled and managed for the common or public interest. It is a public property that should be exploited for the benefit of the public. Whatever benefits accruing from them and the uses should be equitably distributed, although the custodians of the land have to be fairly compensated and their consents required for access or use. net wealth generated from oil and petroleum is siphoned-off by

It must be re-stated that society as a whole has a right to share in whatever socio-economic advantages flowing from the development of mineral resources. It is common knowledge that parties in a mining deal should not be just the mining company and the customary landowners. The State as custodian of the public interest must regulate or officiate the deal on behalf of the society as a whole as well as derive it's own share of benefits. At the same time, it is the State which owns the minerals, guarantees



security on the investment, ensure fair bargaining and benefits to either sides as well as it's own dues (see Figure 1).

The best scenario is one where there is maximum benefits flowing from mining development accrued to society as a whole and the customary landowners. At the same time, such a scenario should continue to attract the necessary commitment from foreign explorers and miners. After all it is foreign investors who have the expertise and capital, which are essential for continued development of mineral resources in PNG. But sometimes, success does come down to proper conduct and adaptability to local situations.

In democratic States, where governments are arguably made up of a wide sector of the community and representative of the whole society, the value of minerals far exceeds individual or sectional interests. To amend that proviso of common property rights, to favor the interest of a minority or sectional group would lead to similar situations to the "oil gurus" of the Middle East. There, the vast wealth generated from oil and petroleum is siphoned-off by a few individuals at the expense of the impoverished masses. PNG must never contemplate (consciously or unconsciously), planting seeds that will yield the same kind of a situation or travel the same road as that of the Middle East and some South American countries.

The community or individuals in whose land minerals are found can benefit by way of compensation, royalty payments and various forms of incomes (Lakau, 1995; Haynes, 1995). Environmental



consideration can be part of that remedy package. These are all provided for under all small to large-scale mining operations in PNG.

But to leave the right of ownership of mineral resources to customary landowners is dangerous to society, although this may be acceptable in other countries or jurisdictions. In PNG, it is very likely that leaving ownership of minerals to sectional groups or private customary landowners would open the flood gates for numerous claims to gain exclusive benefits from mining development. This would only lead to disharmony (between those who have accident of minerals under their land, and most, who do not have) and anti-development.

Private landowners, in the name of customary rights would try to dictate terms of reference to legitimate governments and even to society as a whole. Although not wholly, the Panguna and early phases at Mount Kare has some versions of such scenario. Private ownership of minerals would also lead to "veto", where the landowners may refuse to have developed, mineral resources under their land. Where such eventuates, they can be likened to holding society to ransom by a minority group.

It should be noted that customary landowners can not be "free-riders" on what other benefits they derive from society (see below). It is worth noting in this respect, that it is largely because of the efforts of society as a whole and of how it perceives of minerals which gives it and the land an economic value. In reality, conflict of interest arise more in relation to



how people think of their own self-interests rather than that of the land tenure system and of society.

It must be further argued that it is society which creates the need for the land and mineral resources to be utilized as well as give them an economic value. Society also provides the social and economic infrastructures to use land and mineral resources. Such infrastructures includes roads, bridges, safety or security, markets and finance. These are provided through public funding for the public interest.

Thus, the economic value of land and the mineral resources which are attached to it, depends largely on how society enhances or diminishes their usefulness and usability. It follows that it is society which has the overriding interests in the use of mineral resources.

Private landowners and communal landownership confers on sectional groups the right to profit from public actions in which they have played no part. Such private property rights may be argued as incorporated in our constitutional right. But when it is concentrated in the hands of a few or sectional/selected groups, this is seen as an abuse of the rights of private property. Speculations, manipulations, concentration of wealth and the like are not desired and were never the dreams of PNG's founding fathers.

In this connection, State ownership of all minerals as a common property is justified. Individuals and communities within the nation-State system cannot enjoy other privileges and



subsidiary rights flowing from them, without the State at large safeguarding everyone's interests. Hence, even the question of history and mere customary rights seems not persuasive to claim exclusive possession of minerals on or under their land.

The customary land tenure systems in PNG have clear reference to individual, community and public or common property rights (see Tables 1 and 2). These are clearly demarcated amongst themselves and other rights which exists within them. Advocacy of exclusive possession carries connotations of greed, and is arguably alien to customary principles of land use and tenure.

#### 4. CONFLICTING ROLES OF THE STATE

The contending view, to what was discussed in the previous Section (Section 3), is that State ownership of minerals is fine so far as the State, with its structure and roles is representative of the common or public interest. What has turned out in practice in PNG over the years leaves a lot of dismal records. This is one prime factor, which may be responsible for the lack of development, break-down of law and order and the masses being left out of the mainstream of prosperity and nation-building in PNG (Dorney, 1990; Holzknecht, 1995).

Thus, what is happening in practice is that, the State is becoming an arena of conflict. That is to say that governments are supposed to be apparatuses of the State. Their roles should be to manage resources such as minerals which belong to the State and the



land which belong to it (which comprises of about 2 % of all the land area in the country) on a trustee basis. In PNG, the governments that have come and gone see themselves as the State. But governments and those that are part of it (parliamentarians and bureaucrats) have been prone to corruption and mismanagement (Dorney, 1990; Holzknrecht, 1995).

Individuals and groups who enter it via the parliament or government, have made it their established practice to capture them for their own private interests. This is either individually and for the factions they represent. Factions includes political parties, cronies and supporters. They use slogans such as the "people", "national interest" and "privatization", when in fact the real beneficiaries are those who wield power and control the public coffer. deprive them or dictate terms of reference on this

It is in the midst of this conflicting roles, corrupt practices and mismanagement, that State ownership of minerals is challenged. More often than not, the challenge is not over the logic or the legitimacy of State ownership of minerals. But, it is more over the distribution of benefits flowing from the development of minerals. public or common property rights (see Table 1)

Other times individuals or sectional groups at the community level calling themselves as "representing" the people, community or customary landowners can also hijack benefits that should go directly to the silent masses. There is a patron-client connection from the national to the local level, through which goods and services are channelled. This means that there is very little or



nothing accruing to the silent masses. This is a proven reality amongst many development projects, and in the delivery of goods and services in PNG (ibid).

## 5. CONCLUSION

Ownership of minerals is a prerogative right of the State (see Figure 1). This is without challenge (legally or through other means). Legal challenges to State ownership of mineral, have had no success in PNG to date.

PNG is a property owning democracy. It follows that the customary landowners have unchallenged rights to ownership of the land and of how and for what purposes their land can be used. No one can deprive them or dictate terms of reference on this fundamental right.

By the same token, the pursuits of national economic growth in PNG can be largely achieved with a pluralistic approach that contains a mixture of private and common property rights. Customary land tenure systems in themselves have connotations of individual, communal and public or common property rights (see Table 1).

Any form of development is always meant for the benefit of people. The concepts human and sustainable development <sup>are</sup> therefore part of it. Development should not benefit a few.

Instances where many are disadvantaged from development, which is all too common in PNG, must be avoided. Development must be consciously directed to benefit all peoples. Thus what is required

FIGURE 1: FLOW OF BENEFITS AND OWNERSHIP STRUCTURE



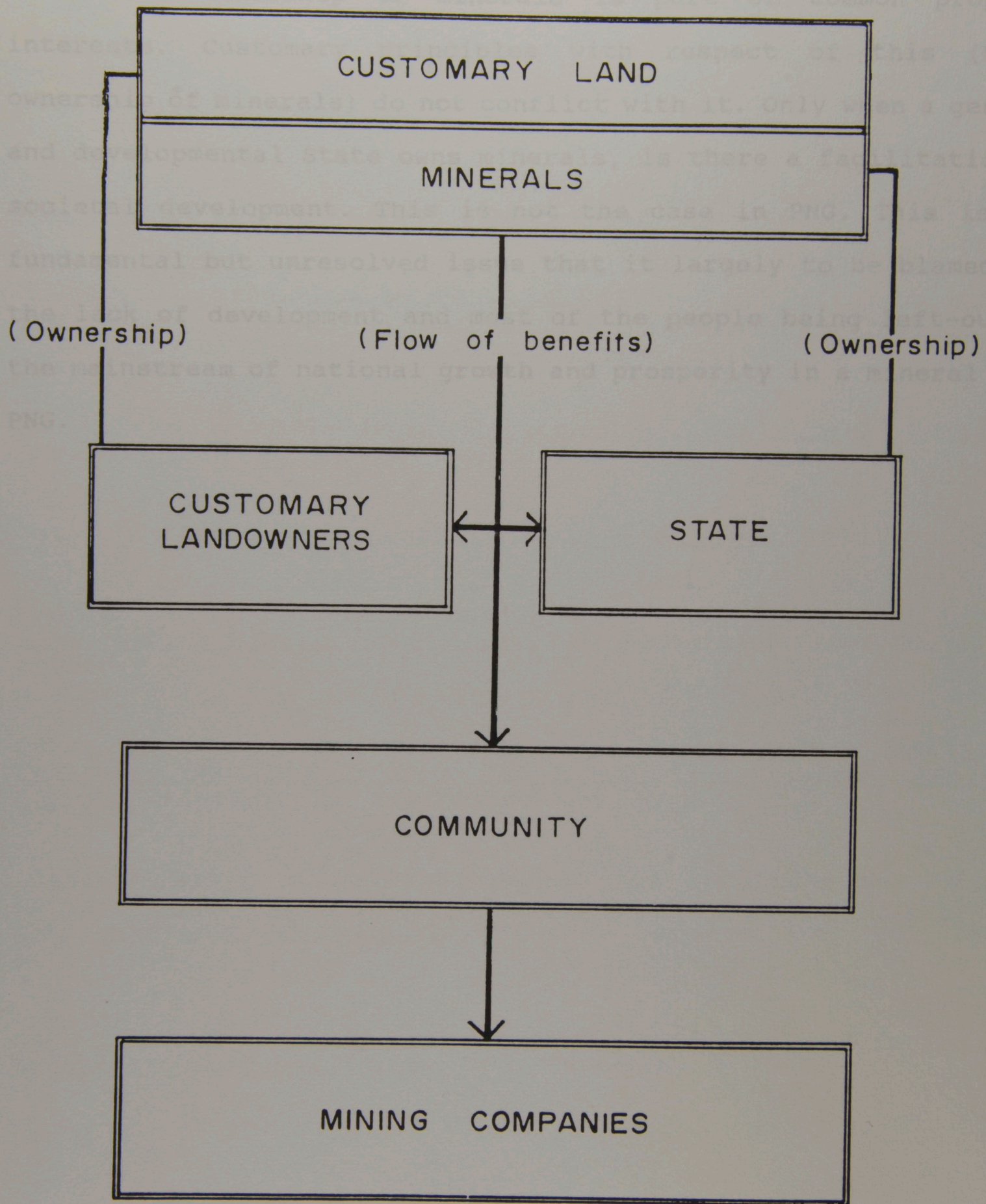


FIGURE 1: FLOW OF BENEFITS AND OWNERSHIP STRUCTURE



is development of society as a whole.

State ownership of minerals is part of common property interests. Customary principles with respect of this (State ownership of minerals) do not conflict with it. Only when a genuine and developmental State owns minerals, is there a facilitation of societal development. This is not the case in PNG. This is the fundamental but unresolved issue that it largely to be blamed for the lack of development and most of the people being left-out of the mainstream of national growth and prosperity in a mineral rich PNG.

Knecht, H., 1993. Managing Papua New Guinea's Forest Resources. ANU, Canberra. Occasional Paper.

James, R. F., 1985. Land Tenure in Papua New Guinea. UPRC, Waiyoni.

Knecht, H. and Trebilcock, M., 1981. Land Policy and Economic Development in Papua New Guinea. IMA, Discussion Paper No. 61, Port Moresby.

Lakau, A.A.L., 1994. Customary Land Tenure and Alienation of Customary Land Rights Among the Haina, Iloga Province, Papua New Guinea. University of Queensland, (Ph.D. thesis).

Lakau, A.A.L., 1995. "Options for the Pacific's Next Complex Nation." Customary Land Tenure and Sustainable Development: Complementarity or Conflict, edited by Francesco, R.G. SPG, Noumea. p.95-118.

Sack, F., 1973. Land Between Two Levels: Early European Land Acquisitions in New Guinea. ANU, Canberra.



#### REFERENCES

Crocombe, R.G., and Hide, R., 1987. "New Guinea: Unity in Diversity." Land Tenure in the Pacific, edited by Crocombe, R.G. USP. Suva. P.324-367.

Dorney, S., 1990. Papua New Guinea: People, Politics and History Since 1975. Milsons Point: Randon House, Australia.

Haynes, V., 1995. The Ownership of Minerals and Petroleum in Papua New Guinea: Millirrpum to Mabo and Teori Tau to Tumbuna Tano. University of Tasmania. Occasional Paper.

Holzknrecht, H., 1995. Managing Papua New Guinea's Forest Resources. ANU. Canberra. Occasional Paper.

James R., 1985. Land Tenure in Papua New Guinea. UPNG, Waigani.

Knetsch, J. and Trebilcock, M., 1981. Land Policy and Economic Development in Papua New Guinea. INA, Discussion Paper No. 6: Port Moresby.

Lakau, A.A.L., 1994. Customary Land Tenure and Alienation of Customary Land Rights Among the Kaina, Enga Province, Papua New Guinea. University of Queensland. (Ph.D. Thesis).

Lakau, A.A.L., 1995. "Options for the Pacific's Most Complex Nation." Customary Land Tenure and Sustainable Development: Complementarity or Conflict, edited by Crocombe, R.G. SPC, Noumea. p.95-118.

Sack, P., 1973. Land Between Two Laws: Early European Land Acquisitions in New Guinea. ANU. Canberra.