



THE INTRACTABLE PROBLEM OF LANDOWNER IDENTIFICATION IN THE PNG LNG PROJECT: A HISTORICAL PERSPECTIVE

Colin Filer

LANDOWNERS of the Hides gas field in the Hela Province have forced the shutdown of the PNG LNG Project over the Government's failure to address outstanding issues, landowner chief Larry Andagali said.....

"This Government has taken five and half years since the signing of last and final LBBSA agreement at Hides PDL 1 Nogoli Camp on December 7, 2009. It has taken all [these] years to give a blind eye on its people to complete clan vetting and landowner identification process," he said.....

He said the identification process will identify legitimate clans and their leaders to carry out and develop their future generations benefit management trust, develop an infrastructure development plan to spend K120m per annum IDG grants, raise 4.27 per cent Kroton equity, develop proper umbrella company structure to [manage] 30 per cent of its community investment programmes from their royalty and equity benefits, [and] develop proper ILG cash distribution processes.

(Post-Courier, 8 August 2016)

In July 1990, Komo-Magarima MP Alfred Kaiabe claimed that the Hides Joint Venture had paid for a group of **putative landowners** to be accommodated at the Davara Hotel in Port Moresby during talks with officials in the Department of Minerals and Energy, in breach of an order by the Tari District Court which barred all such negotiations until the **'true ownership'** of the land had been established. Lands Minister Kala Swokin then ordered compulsory acquisition of the land required for the Hides gas project in order to by-pass such disputes.

Landowners, University of PNG students and three parliamentarians told Mr Swokin in Port Moresby to revoke his order “or there will be nothing to negotiate on and there will be no development” After two hours of talks, shouting and table-thumping, the landowners drew an apology from Mr Swokin “for signing”, but no guarantee that he would retract his decision..... Landowners chairman Kupiawi Aluya said: “This is my land. I owned it before laws and government came. I can deal with the company myself and not through the Government.”

(Post-Courier, 13 September 1990)

KEY MILESTONES

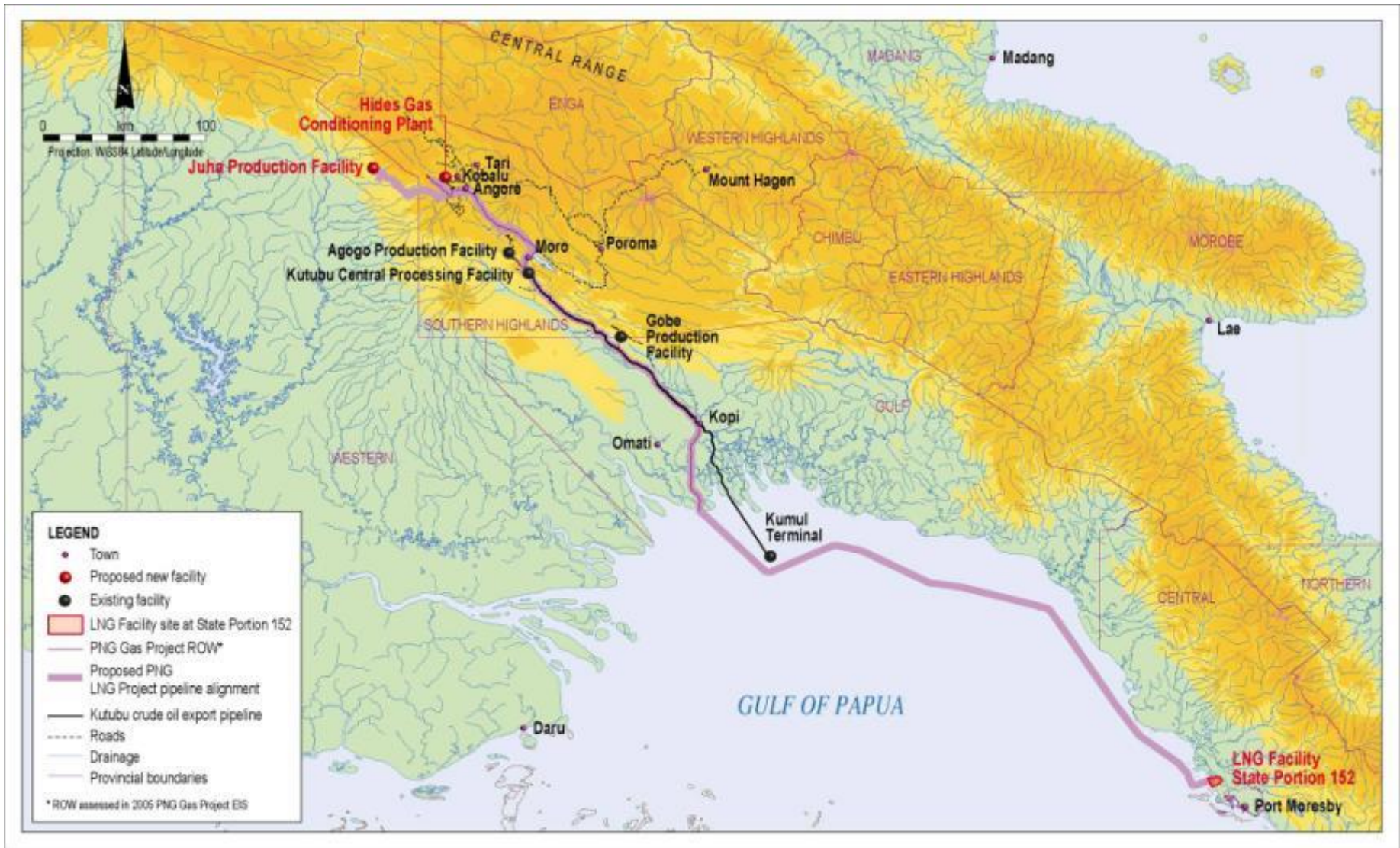
The problem of ‘landowner identification’ has beset PNG’s petroleum industry for more than 25 years, but as the industry has grown, so has the size of the prize that should accrue to the ‘true landowners’, as opposed to the ‘putative landowners’ who frequent the hotels of Port Moresby

The history of attempts to ‘solve’ this problem since the grant of the first two development licences in 1990 can be divided into five periods, punctuated by:

- **passage of a new Oil and Gas Act (1998);**
- **initial plans for an onshore LNG project (2006);**
- **the benefit-sharing agreements for that project (2009); and**
- **the actual start of LNG exports (2014)**

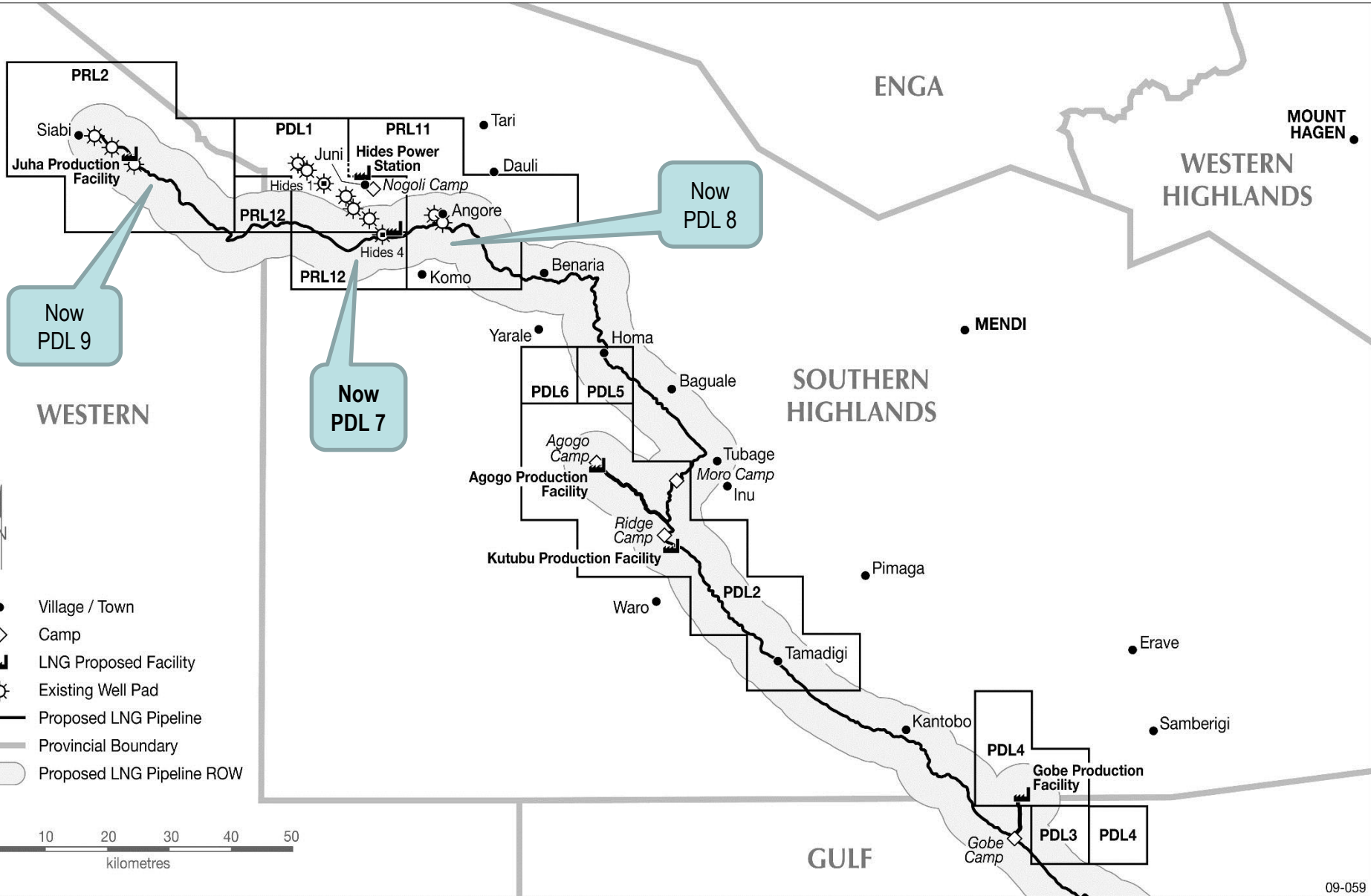
But where (or when) will it all end?

GAS PROJECT LAYOUT





UPSTREAM LICENCE AREAS 2009



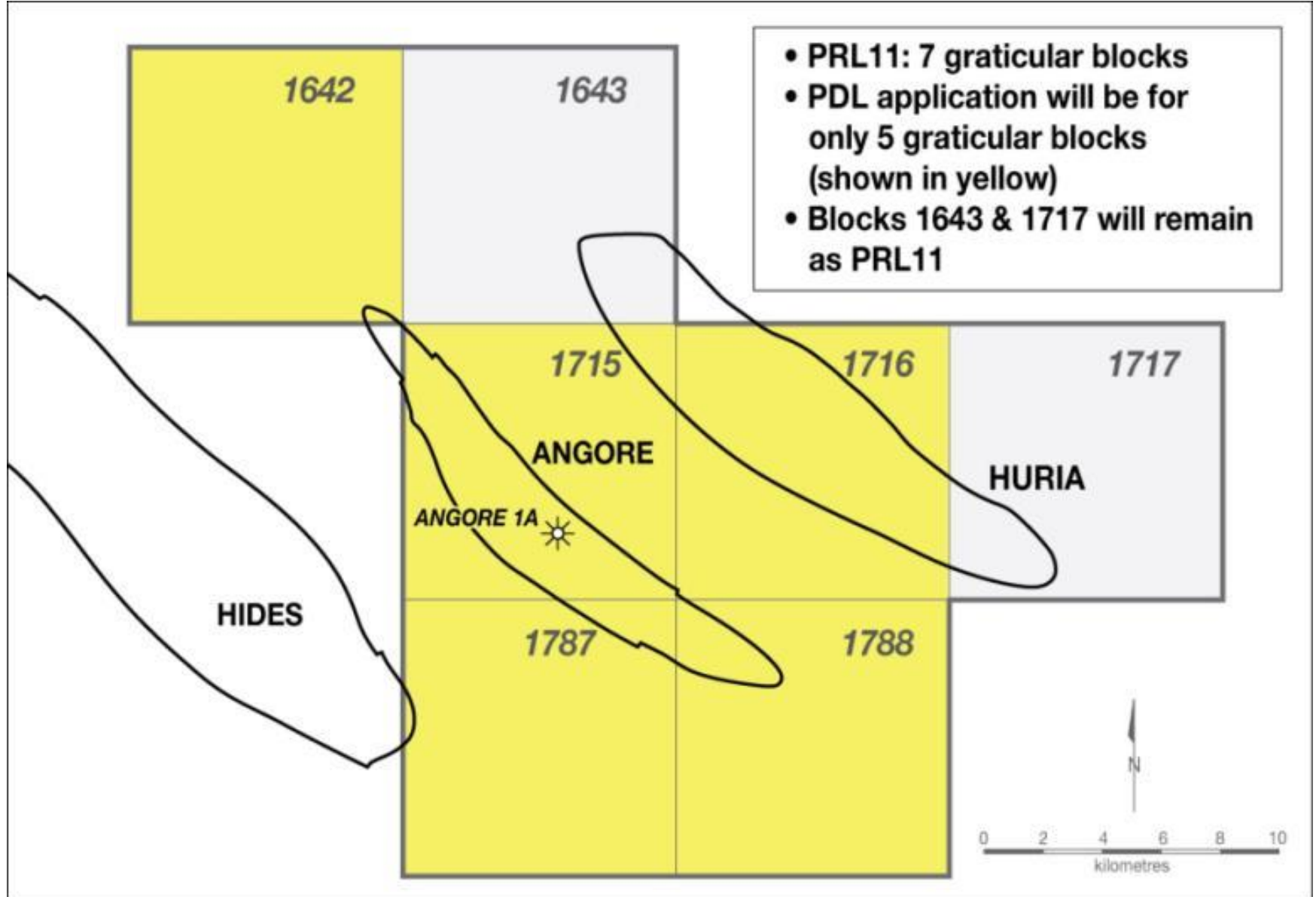
UPSTREAM LICENCE AREAS

Area	Blocks	1 ST Forum	% Gas
Hides (PDL 1 & 7)	7	1990	69%
Kutubu (PDL 2)	12	1990	16%
Gobe (PDL 3 & 4)	4	1997	2%
Moran (PDL 5 & 6)	2	1997	2%
Angore (PDL 8)	5	2009	7%
Juha (PDL 9)	10	2009	4%

PDLs 7, 8 and 9 were 'greenfield' licence areas in 2009;
PDL 3 was not included in the LNG project

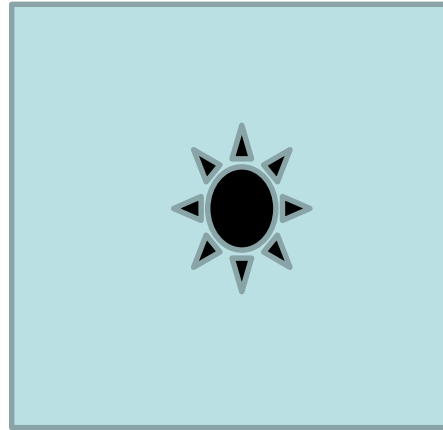
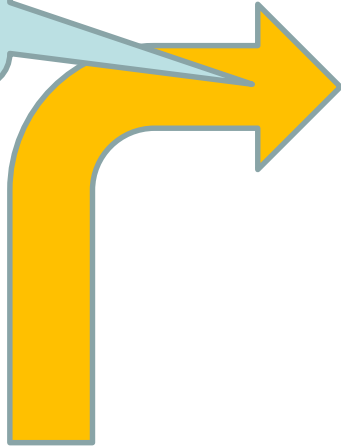


ANGORE LICENCE AREA 2009



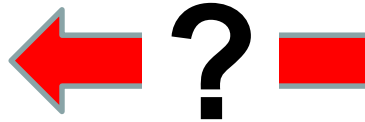
THE BIG ISSUE

Principles of customary land tenure



Graticular block

Principles of resource rent collection



- The problem of REPRESENTATION boils down to the question of how customary landowners should be represented in the negotiation of ‘development forum’ agreements **and** the subsequent distribution of landowner benefits
- The problem of DISTRIBUTION then boils down to the question of what principles **and** procedures should be applied to the distribution of landowner benefits between customary landowners
- The problem of REGULATION then boils down to the question of who makes the rules that purport to solve the first two problems, **and** the means by which these rules are both made and enforced

I distinguish 3 approaches to solving all 3 problems, and I call these PRAGMATISM, IDEALISM, and INDIVIDUALISM

- **Distinction can be made between ‘benefit streams’ whose distribution is effectively controlled by developers and those whose distribution is nominally controlled by the government**
- **This not a hard-and-fast distinction because government can regulate distribution *by* developers and delegate distribution *to* developers (e.g. royalty payments or tax credit scheme)**
- **The focus here is on benefits under state control in a situation where the state does not have effective control of the landowner identification process**



1990-1998

- The main purpose of social mapping and landowner identification studies (SMLIS) is to satisfy the Minister [for Petroleum and Energy] ‘that the people who would be project area landowners of the petroleum project **are truly represented** by the persons who are to be invited to the development forum as their representatives’.
- The secondary purpose is to inform the preparation of a government proposal to this same development forum for the **‘equitable sharing of the equity benefit and the royalty benefit’** amongst the project area landowners.
- While the State has the power to regulate the conduct of SMLIS, it is the developers who commission their own ‘experts’ to provide **technical solutions to political problems.....**

SECTION 169(4)

When the Minister decides which groups or individuals are to receive the ‘landowner benefits’ prescribed under the Act and negotiated through the development forum, he may “consider any agreements by persons who are or claim to be project area landowners, the decisions of courts of Papua New Guinea as to ownership of land or rights in relation to land in the vicinity of the petroleum project in question, **the results of social mapping and landowner identification studies that have been carried out in accordance with this Act, and submissions from affected Local-level Governments or affected Provincial Governments of the petroleum project in question or from any other person claiming an interest or to be affected by the decision of the Minister”.**

So SMLIS are what the developers contribute to a decision-making process from which they are formally excluded

When SMLIS lead the Minister to believe that “some project area landowners have a greater or **more substantial occupation or right of occupation** of the land referred to in the definition of ‘project area landowners’ or are **more adversely impacted** by the petroleum project than other project area landowners, the Minister may, by instrument, determine that the sharing amongst project area landowners of equity benefits or royalty benefits in accordance with this section shall favour, on a per capita basis, those project area landowners who have that greater or more substantial occupation or right of occupation or are more adversely impacted by the petroleum project”.

So how do SMLIS relate to the social impact studies which the developer must submit to the Minister for Environment?

INPUTS TO THE ACT

- **Two lawyers (Meg Taylor and Kathy Whimp) commissioned by ADB to produce reports on ‘land issues’ (December 1997) and ‘benefit distribution’ (September 1998) in oil and gas sector**
- **Multi-stakeholder workshops held September 1997 and January 1998 to discuss the first report, followed by formation of Landowner Benefits Action Team (LBAT) in March 1998**
- **After 17 meetings, the LBAT produced drafting instructions for a ‘Petroleum (Project Benefits) Act’ (to be distinct from the Oil and Gas Act) in June 1998, and these were approved by NEC**
- **Final workshop held September 1998 to discuss future legal relationship between SMLIS and land group incorporation as vehicle for landowner representation and benefit distribution**
- **Policy process partly (but not wholly) reflected in the OGA**

A TALE OF TWO CAMPS

- **Contrast between the ‘pragmatic’ approach adopted at Hides (PDL 1) and the ‘idealistic’ approach adopted at Kutubu (PDL 2)**
- **Not really a difference between the corporate philosophies of the two operating companies (BP and Chevron), since both projects were joint ventures in which all partners tended to hire former *kiaps* to deal with land matters and ‘community affairs’**
- **More to do with the difference between a gas-fired power station producing electricity for the Porgera gold mine and an oil export operation with a pipeline to the Gulf of Papua**
- **And even more to do with the difference between the social organisation of the **Huli and Ipili** people in the north, and the **Fasu, Foe, and ‘pipeline’** people in the south**

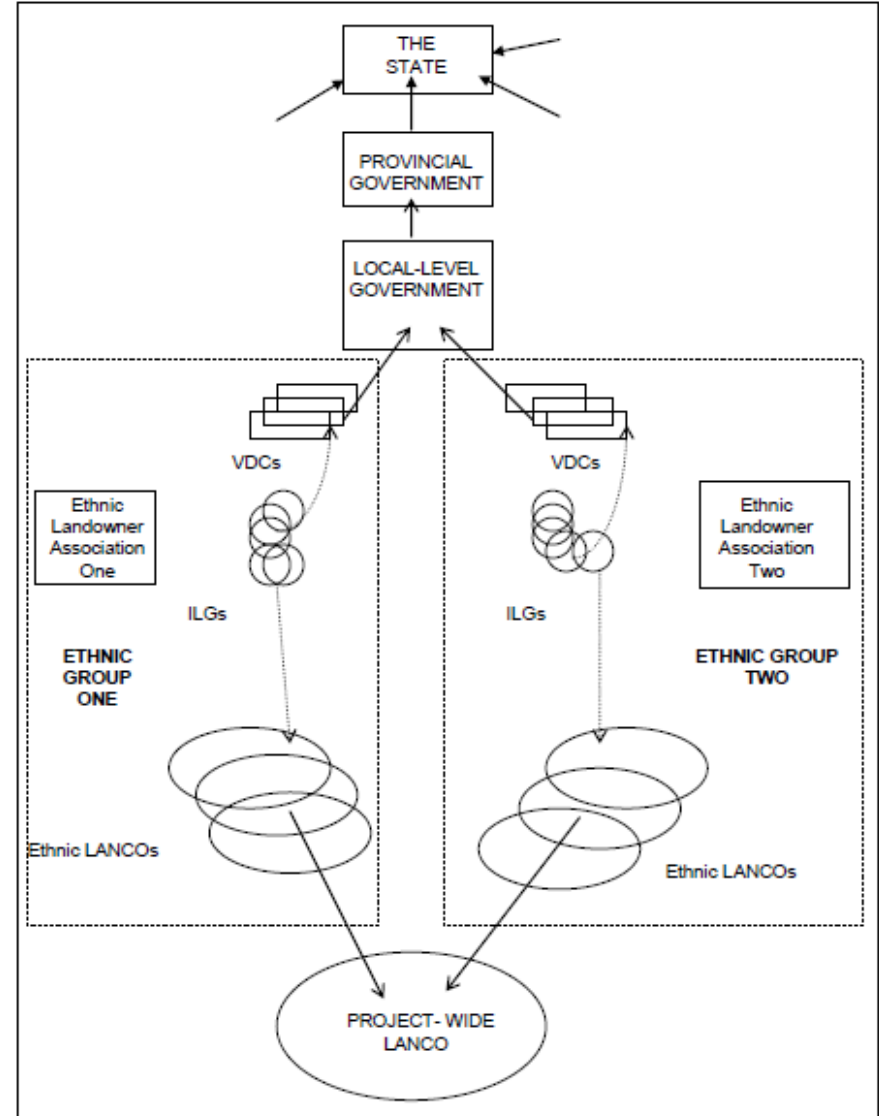
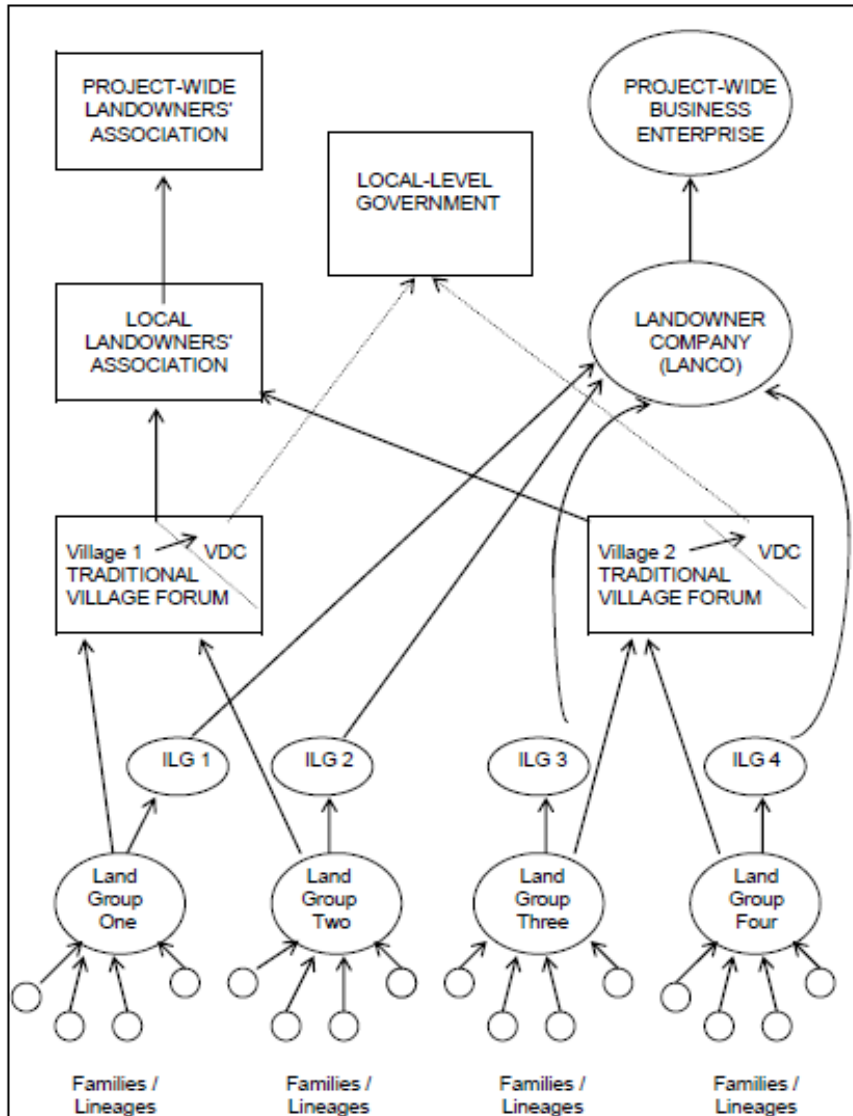
- **Section 9 of the Land Act empowers a Local (District) Land Court or the Land Titles Commission to appoint ‘agents’ (often known as ‘clan agents’) to receive land-related payments on behalf of larger customary groups of landowners**
- **BP staff did not even attempt to identify all the customary owners of PDL 1, let alone divide that space into customary group territories; they just tried to secure the support of all the local ‘big men’ who threatened the flow of power to the mine**
- **They also learned from experience that the courts could not produce a legal resolution to the problem of landowner identification that would put an end to local power struggles**
- **Hence the adoption of what has come to be known in some quarters as the ‘patrol box’ method of benefit distribution**

“Surely, instead of relying on obscure principles of [English] common law made to suit circumstances in a vastly different society on the other side of the globe, the way that agents are viewed, particularly where they are customary clan leaders, could be embodied in a law that embraces **a more pragmatic stance which, at the same time as providing a firm legal basis, could be still essentially Melanesian in derivation.....**

By far the best method to ensure that some compensation monies trickle down to the grass roots level is to pay in cash and use the agent system. In that way the money is there for immediate division according to custom, the people know when it is going to be paid out and, although the leaders as agents may be entitled to keep some back, at least the larger proportion is divided out according to custom.”

- **Tony Power (not a former *kiap*) joined Chevron in 1990 and became the key advocate for use of *Land Groups Incorporation Act 1974* as ‘post-colonial’ alternative to the clan agent system in solving the problems of representation and distribution**
- **Chevron staff organised the incorporation of more than 400 land groups with notional customary rights to PDL 2 and the oil export pipeline route from 1992 to 1994, with other groups added as the Gobe and Moran oilfields (PDLs 3-6) came on stream**
- **The distribution of landowner benefits between the land groups attached to different ‘tribes’ and licence areas was accompanied (and sometimes blocked) by many legal disputes, and did not give rise to a consistent set of rules or principles, but did give rise to the corporate practice of ‘ILG maintenance’**

IDEALISM IN PICTURES



Source: Power 2000, Volume 2: 64-65



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KUTUBU PETROLEUM PROJECT
Social mapping and incorporated
land groups project report

REPORT TO CHEVRON NIUGINI

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February 1993

From 1992, anthropologists were monitoring the operation of ILGs as recipients of landowner benefits (PDL 2), conducting 'social mapping' and 'social impact' studies of new licence areas, and participating in the policy process that led to passage of the OGA in 1998

Anthropologists have generally argued that social mapping reveals the **differences** between the principles of customary land tenure **and social (or political) organisation** in different parts of the country, **so they are not idealists**

IDEALISM WINS THE DAY

- **The pragmatic approach was based on legal provisions and institutions that were part of the Australian colonial legacy**
- **Its strongest advocates were former kiaps now working as lands officers or community affairs managers in the private sector**
- **Their approach to the problems of representation and distribution was the one adopted at Panguna (and look what happened there)**
- **Pragmatism means flexibility in the face of local difference and instability, which is hard to enshrine in the letters of the law**
- **Idealism appeals to public servants as a means of protecting themselves against the vagaries of political interference**
- **Not to mention protecting themselves against ‘paper landowners’ intent on invading the DPE offices in Konedobu**



1999-2006

- **Oil Search took over BP's role as operator of the Hides power plant in 1999; ExxonMobil took over Chevron's role as developer of what was then called the 'Gas-to-Queensland' project in 2001; and Oil Search took over Chevron's role as operator of the existing oil export project in 2003**
- **Meanwhile, the World Bank instituted the last of 3 technical assistance projects to develop the bureaucratic capacities of the Department of Petroleum and Energy, while AusAID paid for a legal team to unblock drains in the Oil and Gas Act**
- **All of which made less difference to the practical management of 'lands and community affairs' than the efforts of then Southern Highlands Governor Hami Yawari to redirect the flow of landowner benefits from PDL 2 to his own (Foe) followers**

- The OGA did not resolve the question of how ‘social mapping’ is related to ‘landowner identification’ (or even if they are distinct)
- No reference was made to the draft SM (not LI) regulation produced by the LBAT, which assigned **9 purposes** to a full-scale social mapping study (prior to landowner identification)
- In October 2002, John Rivers (sociologist) produced a ‘Social Mapping Issues Paper’ for DPE which identified **215 issues** that needed to be resolved before SMLI regulation could be drafted
- Nevertheless, Rivers drafted a regulation in November 2002 which assigned **16 purposes** to a full-scale SMLI study.
- This regulation was still being re-drafted one year later, by which time there were **22 purposes** (but was it ever gazetted?)

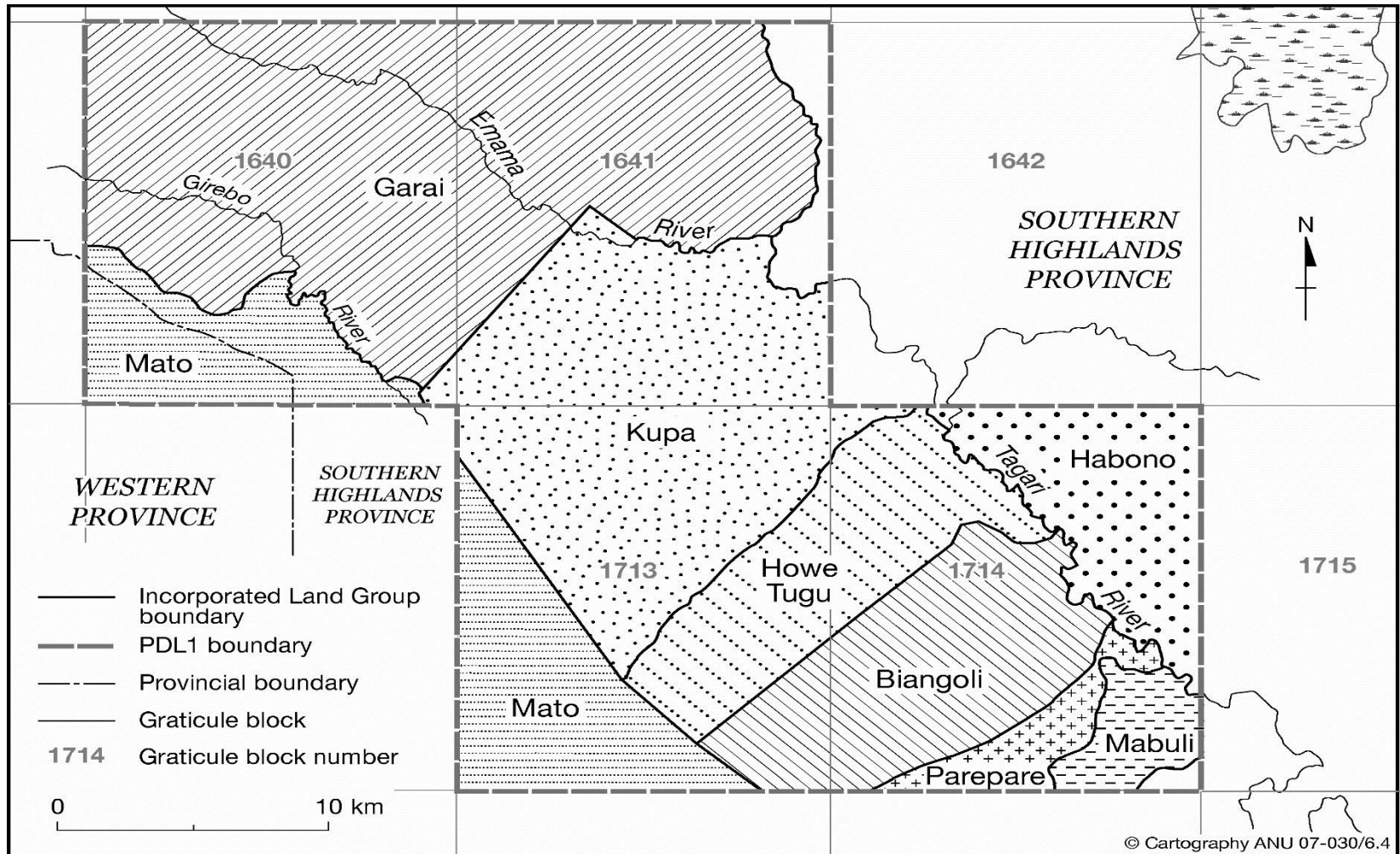
“We are all aware of the problems which have arisen from the establishment of ILGs as the preferred institution for the distribution of landowner benefits in the oil and gas sector. These problems have **not resulted from the practice of social mapping, but from Chevron’s belief that land group incorporation under the *Land Groups Incorporation Act* would solve all the problems associated with the conduct of colonial-style land investigations under the *Land Act*. We now know that this is not the case, and social mapping practitioners were eventually brought in to clear up the mess. But it may be too late. One of the things which social mapping **cannot** do is to wind back the clock and start all over again.” (Filer 2002)**

“Both SM & LIS are self-evidently *processes* that inevitably continue beyond the juncture when findings are collated for a written and submitted *product* known as a 'report'.

Anthropologists universally indicate that issues such as clan/landowner identity and status are by their very nature 'contestable' -- so that ethnographies of social organisation attempt merely to explain the principles by which indigenes assert and argue these issues. That is, **the tenets of social organisation are revealed in crucibles of conflict and dispute. 'Truth' here is always a matter of perspective, and SM/LIS studies should not be considered to represent frozen landscapes, or 'scientific litmus tests' about landowners, land boundaries or any other aspect of customary identity or conventions.” (Goldman & Weiner 2002)**

- **Almost 500 ILGs had been established by the developers, and recognised by the government, as vehicles for the distribution of landowner benefits derived from oil export operations**
- **There was no enthusiasm for the political task of ‘winding back the clock’ and establishing a new set of institutions for distributing landowner benefits in existing licence areas**
- **BUT no progress had been made in finding an idealistic solution to the problems of representation and distribution in PDL 1 or in the ‘greenfield’ licence areas that would be part of the gas export project already being planned in 1998 (now PDLs 7-9)**
- **And that is because these areas were either dominated or claimed by Huli-speaking people whose social organisation appeared to resist the ideal type of land group incorporation**

GOLDMAN'S 'ZONE ILGS'



Anthropologist Laurence Goldman tried (and failed) to persuade DPE officials to accept the idea that Huli land groups would best be organised as large groups of people living in the same part of the licence area

SWING TO INDIVIDUALISM

- **DPE and EHL discussed new ‘landowner identification and benefit distribution’ (LIBD) model in Brisbane in June 2006**
- **Royalty and equity benefits to be distributed to equally to all individual (male and female) adult landowner beneficiaries ‘in the field and in cash’ (removing the problem of representation)**
- **‘Beneficiary list’ (or ‘telephone directory’) to be derived from previous SMLI studies, supplemented by further census or genealogical work, and then made public**
- **Specific legal mechanisms to resolve disputes about initial constitution of lists for each licence area and technologies to update lists in light of demographic change over time**
- **But how much would this cost and who would pay for it?**

- **Mike Kennedy from BHP had told the LBAT how landowner benefits from the Ok Tedi mine were distributed to households, not clan agents or ILG executives**
- **Anthropologists had tried (without much success) to show that application of the ‘genealogical method’ did not necessarily lead to the recognition of mutually exclusive ‘descent groups’ (clans), but could throw some light on the existence of differential (individual) customary rights to customary land**
- **However, anthropologists still find it difficult to sustain a distinction between the *methodological* individualism of the genealogical method and the ideology of *possessive* individualism that seems to threaten the integrity of ‘custom’**



2006-2009

BACK TO IDEALISM

- **Internal DPE records show that individualistic solution to the distribution problem was still being canvassed in 2008**
- **But there could not be an individualistic solution to the problem of representation, when 60,000 upstream and downstream ‘landowners’ had to be represented in a development forum**
- **Past experience had shown that most individuals elected or appointed as ‘landowner representatives’ would stake a claim to the customary right to distribute ‘landowner benefits’**
- **MEANWHILE, the National Land Development Taskforce had come up with the long-sought amendments to the Land Groups Incorporation Act that would supposedly make land groups more transparent, bureaucratic, and accountable in the practice of benefit distribution**

LANDOWNER INVITATIONS

DPE adopted 6 ‘principles’ as basis for selection of landowner reps:

- 1. Executives of ‘DPE Recognized Associations’**
- 2. ‘Prominent leaders [agents] of project area clans’**
- 3. Chairmen of ILGs recognised after completion of SMLI process**
- 4. Women’s reps elected/nominated by ‘impacted communities’**
- 5. Church reps nominated by ‘impacted communities’**
- 6. Ward councillors nominated by ‘impacted communities’**

Area	Blocks	Invited
Hides (PDL 1 & 7)	7	52+47
Kutubu (PDL 2)	12	54
Gobe (PDL 4)	4	51
Moran (PDL 5 & 6)	2	31+34
Angore (PDL 8)	5	50
Juha (PDL 9)	10	31

Plus 145 reps from pipeline corridor and 33 from the plant site (Portion 152)

This was the plan for the ‘umbrella’ BSA forum in Kokopo

A TOUCH OF PRAGMATISM

6. PDL 1-Hides

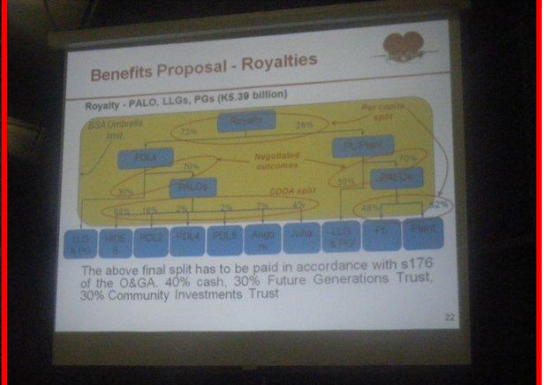
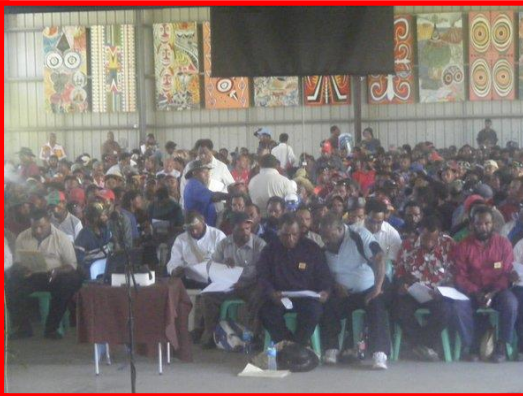
No. of Associations	No. of clans or ILGs	Others	Proposed Total	Comments
HTH LOA recognized by the State	17 Agencies. 9 Hiwas and 8 Tuguba clans current beneficiaries plus 17 other clans in wider PDL. Total 34 clans. (68) 2 reps each	Women Reps (4) Church Reps (2)	74 Reps	HTH LOA leadership court decision pending.

- Proposed venue ---Nogoli Haus win alternatively Juni Police Station (Need to provide security)
- Logistics requirements- Vehicles.
- Duration: 3 days max.
- Cut lunch for 74 LOs and 10 State Team.

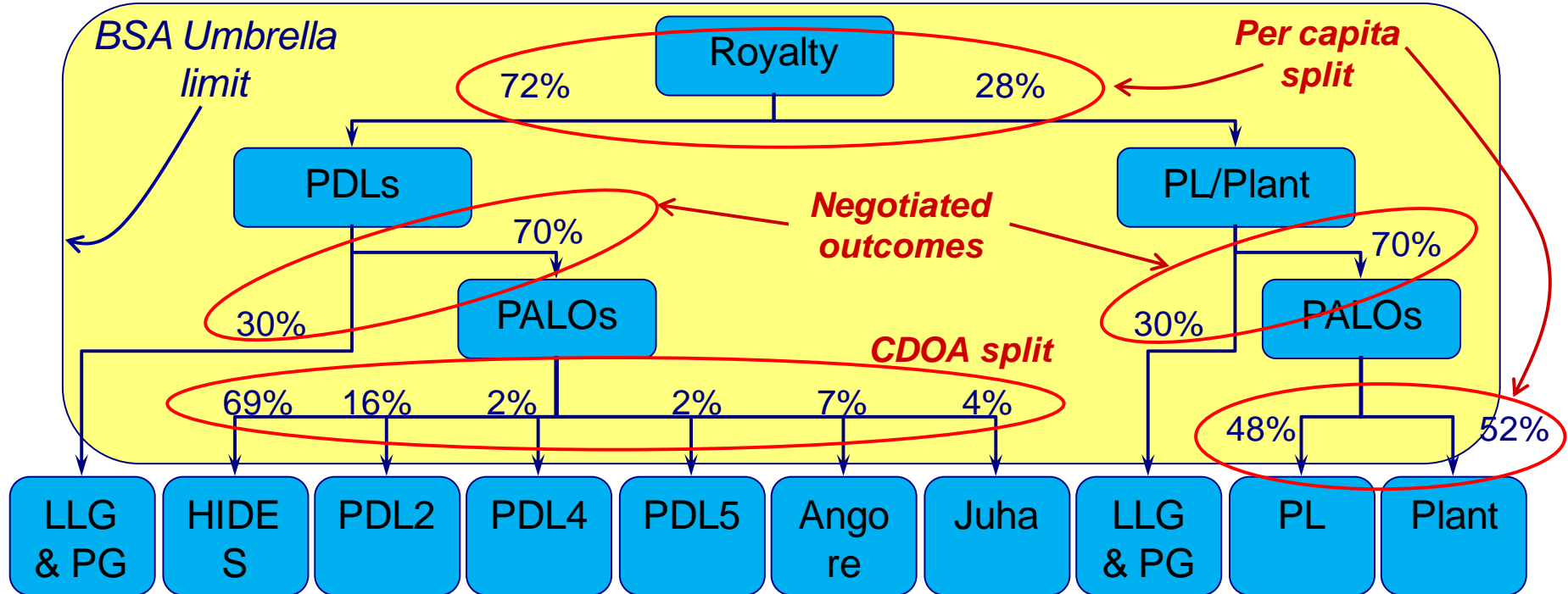
This was the plan for the LBBSA forum to be held at Nogoli



NO PLACE FOR OLD WHITE MEN



ONE BUCKET ON SCREEN



Does this look like a proposal based on a sequence of social mapping and landowner identification studies?

5 BUCKETS OF (STATE) MONEY

- 1. Business development grants (BDGs)** to ‘landowner companies’ worth K120 million during construction phase
- 2. Royalty benefit** (2% of value of output from 2014), of which 40% payable in cash (rest in trust funds)
- 3. Infrastructure development grants (IDGs)** to ‘affected provinces’ worth K1.2 billion spread over 10 years from 2010
- 4. Development levies** (2% of value of output from 2014) entirely payable to affected provincial/local governments
- 5. Equity benefit** (dividends) from shares in project (some carried ‘free’ by government)

Streams 1 and 2 divided 72:28 between PDL areas and other (pipeline and plant site) areas.
Stream 2 divided 70:30 between landowners and affected provincial/local governments.
Stream 5 divided 76:24 between PDL areas and other areas, and 90:10 between landowners and provincial/local governments.

WHAT THIS MEANT

- During the project construction phase (2010-2014), ‘landowner companies’ would first compete for the BDGs, and then compete for contracts to employ ‘landowners’ build the public ‘infrastructure’ funded by the IDGs and development levies
- (If the infrastructure proved to be imaginary during the operational phase of the project, the developers could pay for it with government money through the tax credit scheme)
- Once production and exports started, the ‘landowner share’ of the ‘royalty and equity benefit’ would accumulate in government trust funds until such time as the process of ‘landowner identification’ had been completed to everyone’s mutual satisfaction, **which could take an indeterminate amount of time**



2009-2014

- **Since some ‘landowners’ had already take legal action to nullify the results of the development forum agreements, National Court judges invoked the process of ‘Alternative Dispute Resolution’ to solve the problem of landowner identification**
- **DPE officials, unable to assess the relative merit of all possible solutions with which they had so far been presented, opted to institute a new process known as ‘clan vetting’ to identify the land groups to be incorporated in ‘greenfield’ licence areas**
- **Huli ‘clan chiefs’ are only united on one point, which is that they will tell the State how to solve the problem of landowner identification, even if there is no solution to which they all agree**
- **Amendments to Land Groups Incorporation Act eventually certified in February 2012, entailing the reincorporation of 500 ILGs in existing licence areas within a 5-year period**

Principal landowners of the Tuguba Block of Petroleum Development License 1 this week called on Petroleum and Energy Minister William Duma to seriously analyse the authenticity of clans in their block.....

Clan vetting for PDL1 in Hides, Komo in the Hela Province was not completed after individuals allegedly from outside the legitimate block attempted to force their clans into the Tuguba clan block and the competition amongst individuals to become overall clan chairmen intensified and turned rowdy.....

Mr Lole's team is made up of five original chiefs and prominent upcoming young leaders from the project area. Three other groups also made their presentations during clan vetting conducted in November and December by the Department of Petroleum and Energy. Those teams were led by Peter Potabe, Libe Parindali and Stanis Talu.

(Post-Courier, 20 December 2013)

About 20 clan leaders representing various clans in the Tuguba tribe signed a petition yesterday at the Gateway Hotel in Port Moresby to present to the government to ensure officers from the Department of Petroleum and Energy fully carryout the clan vetting process and identity clans in the PDL 1 project area.

The clan leaders headed by Chief of Tuguba tribe Marako Pate signed the petition to present to the government on their concern. Chief Pate said the petition is not to go against the government but to show that all the clan leaders of Tuguba tribe are happy with the clan vetting process and want the government to fully complete the clan vetting because part of the clan vetting process had been hijacked, resulting in some clans being unidentified.....

"We want the government officials to come visit on the ground so that we can assist them in the land vetting process to ensure all the clans are registered for all the clan members to benefit," Chief Pate said.

(Post-Courier, 31 December 2013)

Chief of Pee Koe clan within the Tuguba Tribe, John Karius Gane, said that Marako Pate's claim of being the paramount chief of Tuguba in an article published recently by the Post-Courier was incorrect.

According to Mr Gane, Mr Pate is just another chief of one of the many clans within the Tuguba tribe and the Paramount chief is Kupiawi Aluya.* He also said that Mr Pate's call for the government to complete the clan vetting was unnecessary since ... a six months clan vetting had taken place in the Upstream Gas Project PDL 1, 7, 8 and 9 and had ended in early December.

Mr Gane claimed Mr Pate knew this but went to the media in the hope that the vetting would continue and include strangers who were not part of the Tuguba tribe.

(Post-Courier, 3 January 2014)

*** Apparently the 'chief' who stated in 1990: "I can deal with the company myself and not through the Government."**

The chairman of the Tuguba tribe in Hela Province, which hosts part of the LNG project, says the highly expected export of the first LNG gas would be impossible.....

"I maintain since day one that ExxonMobil and Oil Search failed to undertake full-scale social mapping and landowner identification studies and therefore the Kokopo UBSA Forum was illegal....."

He said it was now a big joke when the state is carrying out Clan Vetting exercise when that activity, which is very important, was supposed to have been done before the landowners were invited to the Kokopo UBSA.

"Tuguba is the principal owner of most land in Hides PDL01, Hides PDL07, Angore PDL08 and Juha PDL09. I am the undisputed leader and Chairman of this Tribe. I even disputed the Gas Agreement before it was signed in 2008," Mr Ekanda said.

(Post-Courier, 2 May 2014)

While these Tugubas on the ground receive the 'patrol box' containing the rent for the Komo airstrip



Photo courtesy of Bryant Allen



AWKWARD CONCLUSIONS

- 1. The idealism of the current legal framework is like an ‘iron cage of bureaucracy’ that appears not serve to contain any animals**
- 2. Pragmatism continues to dominate company-community relationships, even after the old kiaps have retired from the scene**
- 3. Possessive individualism may guide the accumulation strategies of ‘putative landowners’, but methodological individualism has gained little purchase as an instrument of distributive justice**
- 4. Anthropologists never had a chance of beating other professional guilds (especially lawyers) in the business practice called SMLI**
- 5. As the deadline for (re-)incorporating land groups under the current legislation looms, the task does not get any easier**
- 6. As the value of landowner benefits in the royalty and equity buckets continues to grow, we must surely ask whether more conflict will result from distribution than from non-distribution**