THE TORRES STRAIT TREATY: OCEAN BOUNDARY DELIMITATION BY AGREEMENT

*By H. Burmester**

INTRODUCTION

The delimitation of maritime boundaries is one of the major areas of ocean law where disputes between countries occur with frequency and where the development of governing principles of law remains difficult. At the Law of the Sea Conference, delimitation of the continental shelf and economic zones between states with opposite or adjacent coasts was one of the last issues to be resolved.[1] Major judicial and arbitral decisions, such as the *North Sea Continental Shelf* cases[2] before the International Court of Justice and the *Anglo-French Continental Shelf* arbitration,[3] have gone some way to developing a body of relevant law to assist states in the solution of their maritime boundary problems. These decisions have clarified some of the relevant factors that states should take into account, but major boundary problems remain. On the Aegean Sea, Greece and Turkey have still not reached any solution;[4] relations between Canada and the United States have been severely strained by their slow progress on maritime boundary issues;[5] Libya and Tunisia have referred their conti-

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[1] Arts. 74(1) and 83(1) of the Draft Convention on the Law of the Sea (Aug. 1981), UN Doc. A/CONF.62/L.78. Oxman points out that the agreed texts were not considered satisfactory by many states. Oxman, *The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AJIL 1, 14–15 (1982).

Further citations in this article to the Draft Convention will refer to the Informal Text of August 1980, UN Doc. A/CONF.62/WP.10/Rev.3, *reprinted in* 19 ILM 1126 (1980).

[2] [1969] ICJ REP. 3.

[3] THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE FRENCH REPUBLIC DELIMITATION OF THE CONTINENTAL SHELF DECISION OF 30 JUNE 1977, CMND. 7348 (1978), *reprinted in* 18 ILM 397 (1979). For brief notes on the case, see Colson, *The United Kingdom-France Continental Shelf Arbitration*, 72 AJIL 95 (1978) and 73 *id.* at 112 (1979). A further discussion appears in Bowett, *The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches*, 49 BRIT. Y.B. INT'L L. 1 (1978).

[4] An attempt by Greece to bring the matter before the International Court of Justice failed. Aegean Sea Continental Shelf Case (Greece v. Turkey) (Jurisdiction), [1978] ICJ REP. 3. For a summary, see 73 AJIL 493 (1979).

[5] The Treaty Between the Government of the United States of America and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area was signed on March 29, 1979. It was linked with the Agreement on East Coast Fishery Resources, which ran into major opposition in Congress and was withdrawn in March 1981 by President Reagan. However, both countries have now ratified the Treaty as amended and the boundary dispute is being submitted to a Chamber of the ICJ. The Treaty and Agreement, in S. EXEC. DOCS. U and V, respectively, 96th Cong., 1st Sess. (1979), are *reprinted*

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nental shelf dispute to the International Court of Justice.[6]

The signing in December 1978 by Australia and Papua New Guinea of the Treaty concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters thus represents a significant achievement.[7] Not only does the Treaty indicate that direct negotiation can successfully resolve complex maritime boundary disputes, but it also contains several novel and significant features that may point the way to solutions elsewhere. Among the novel features are separate seabed and fisheries jurisdiction lines, establishment of a Protected Zone, and complex arrangements regarding the sharing of the catch of commercial fisheries. Although the Treaty delimits a stretch of approximately 1200 miles, from the Coral Sea in the east to the Arafura Sea in the west, the most significant aspects of the Treaty relate to the Torres Strait area itself and this article will be primarily concerned with that area.

The Torres Strait area is a unique expanse located between Cape York at the northern extremity of Australia and the southern coast of Papua New Guinea. The area consists of a considerable number of islands, some large and inhabited, others amounting to no more than small rocks and uninhabited cays. They are all Australian, with the exception of one or two small islands close to the Papua New Guinea coast. The Australian islands include the three major inhabited islands of Boigu, Dauan, and Saibai, literally only a few hundred yards off the Papua New Guinea coast. Apart from the islands, the area is full of reefs and shoals; navigation by large vessels is largely confined to the North East Channel, which runs through the central Strait area. These geographical features complicated the maritime delimitation problem.

As well as the special geographical features of the area, one of the major factors that had to be taken into account in devising solutions to the maritime delimitation problem was the need to protect the livelihood and life style of the local inhabitants. The Papua New Guineans of the immediately adjacent area and the Torres Strait islanders are ethnically distinct. The islanders are themselves distinct from the Australian aboriginal people. The local inhabitants still engage in many traditional activities which the Treaty has sought to protect.[8]

The Treaty reflects the realization that a maritime boundary dispute is often

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in 9 NEW DIRECTIONS IN THE LAW OF THE SEA 157–210 (M. Nordquist & K. Simmons eds. 1980). *See* Rhee, *The Application of Equitable Principles to Resolve the United States-Canada Dispute over East Coast Fishery Resources*, 21 HARV. INT'L L.J. 667 (1980); McRae, *Adjudication of the Maritime Boundary in the Gulf of Maine*, 17 CAN. Y.B. INT'L L. 292 (1979); Rhee, *Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine*, 75 AJIL 590 (1981); Feldman & Colson, *The Maritime Boundaries of the United States*, *id.* at 729.

[6] At the time of writing, no decision had yet been given in this case. *See* Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), [1979] ICJ REP. 3, for the order setting the procedure and time limits for the hearing of the case.

[7] For the text, see 18 ILM 291 (1979). The treaty is subject to ratification.

[8] For the most detailed study on the socioeconomic conditions of the area, see the Torres Strait Islanders series published by the Research School of Pacific Studies, Australian National University, 1974–1975, particularly vol. I, H. DUNCAN, SOCIO-ECONOMIC CONDITIONS IN THE TORRES STRAIT; vol. V, THE BORDER AND ASSOCIATED PROBLEMS (E. K. Fisk ed.), and vol. VI, E. K. FISK, POLICY OPTIONS IN THE TORRES STRAIT.

not a one-issue problem. In the present case, by treating separately (1) the people, (2) maritime jurisdiction, (3) the islands, (4) fisheries resources, and (5) navigation, and devising solutions to each, the parties were able to reach agreement on what the author considers a just and equitable solution to a complex problem. Such solutions are more likely to result from agreement between the parties concerned than from judicial or arbitral decisions. While such an approach may lead to complexity (in this case a treaty of 32 articles and 9 annexes), it also ensures that each matter is dealt with in the light of its unique characteristics. Too often, maritime delimitation disputes are seen simply as a process of drawing a single line on a map. Through failure to have proper regard to all the surrounding circumstances, negotiations often become protracted and fruitless and no durable solution results. The solution negotiated in the Torres Strait Treaty points to the fact that ocean issues will be settled in the most satisfactory manner once jurisdictional and conceptual approaches are abandoned and functional solutions sought. This has proved apparent in the Law of the Sea Conference itself, particularly when it comes to navigation and pollution.

This article will review the Treaty provisions in relation to each of the five issues mentioned above. Certain provisions in the Treaty may not be readily understood at first glance; in addition to them, this article also seeks to explain some of the novel features.

In considering the provisions of the Treaty, one must keep in mind the unique background to its negotiation: that it was negotiated between a developed country and its former dependent territory, which had recently gained independence. Negotiation of the boundary was one of the major steps in the disengagement of Papua New Guinea from its former dependent relationship, and conclusion of the Treaty had, as a result, added symbolic significance. This special relationship between the two countries colored their respective aims. For Papua New Guinea it was important to obtain a single, all-purpose boundary that, apart from maritime jurisdiction, removed what was seen as a historic anomaly: Australian territory extended to within several hundred yards of the Papua New Guinean coast. Whatever the legal merits, Papua New Guinea also based its claim on moral grounds. Any proposal that maintained Australian influence or control throughout the Strait was seen as suspect because Papua New Guinea understandably feared that Australia would be able, through its weight in the bilateral relationship, to continue to exercise a disproportionate influence. While this view may have appealed initially to some Australians, Australia's perception of the issues involved in the negotiations was quite different. There were a number of significant political and constitutional constraints on the Australian Government, arising largely from its federal structure. But more significantly, Australia was concerned to protect the rights and livelihood of the traditional inhabitants of the Torres Strait. The fact that Australian territory extended up to the Papua New Guinean coast was not seen as an anomaly but as a historical fact. From the Australian perspective, the human element of the problem was therefore very important. To Papua New Guinea, the human element was much less significant. All groups of Papua New Guineans generally follow a traditional way of life, and to single out traditional inhabitants of a

particular area for special treatment could well be perceived as undesirable and unjustified. Facilitation of cross-border movement is one thing; establishment of special rights for one particular group is another.[9]

Despite the very different aims and perceptions of the two countries, they were able to incorporate some significant compromises in the Treaty. In return for special provisions on resources, Papua New Guinea was prepared to go along with Australian proposals designed to meet the special needs of the local inhabitants. Taken as a whole, the Treaty represents a creative approach to maritime delimitation that equitably takes account of the various interrelated issues.

Historical Background

The history of the establishment of the "border" between Queensland and Papua is relevant to the problem of devising a maritime boundary suitable for present conditions. In 1859 Queensland was established as a colony separate from New South Wales. Due to uncertainties as to which islands off its coast formed part of the colony, in 1872 all islands within 60 miles of the coast were brought under the jurisdiction of Queensland. This still left the northern islands of the Torres Strait outside the jurisdiction of Queensland. At the time, Papua had still not been annexed to the British Empire or established as a Protectorate. This was not to happen until 1884. Concern that the northern islands might fall into foreign hands led to a further proclamation in 1879 that brought into force Letters Patent describing the islands to be annexed as

> certain islands in Torres Straits and lying between the Continent of Australia and Island of New Guinea, that is to say all islands included within a line drawn from Sandy Cape . . . thence from Bramble Cays in a line west by south (south seventy-nine degrees west) true; embracing Warrior Reef, Saibai, and Tuan Islands, thence diverging in a north westerly direction so as to embrace the group known as Talbot Islands; thence to and embracing the Deliverance Islands. . . .

This imprecise definition was to lead to problems in determining whether certain features were or were not part of Queensland. Several efforts were made between 1885 and 1920 to move the boundary further south.[10] It was recognized that once Papua became a British possession there was no need for the Queensland boundary to include the islands hugging the Papuan coast. The proposals to redraw the boundary foundered, however, because successive Queensland governments did not agree to the various proposals made by the colonial and local administrative authorities. By the 1970's, the 1879 line was firmly entrenched. What then became important was to determine its precise location.

[9] The author is indebted to G. Dabb, a member of the Papua New Guinean negotiating team, for a valuable exchange of views on the different perceptions of the two countries.

[10] For a more detailed description of the historical background, see P. VAN DER VEUR, SEARCH FOR NEW GUINEA'S BOUNDARIES, ch. 3 (1966). *See also* JOINT FOREIGN AFFAIRS AND DEFENCE COMMITTEE, THE TORRES STRAIT BOUNDARY, [Australian] Parliamentary Paper 416/1976, App. IX, which reproduces many of the documents and correspondence relating to the alteration of the boundary in 1879.

An examination of the original documents, charts, and associated documents led Australia to conclude that the small islands of Kawa, Mata Kawa, and Kussa lying close to the Papua New Guinean coast were in fact part of Papua New Guinea and not included within the islands annexed by the 1879 proclamation.[11] While this came as a surprise to many Australians who were used to seeing the islands included as part of Queensland on most maps, the original documents clearly demonstrate that the 1879 line did not, in fact, embrace these islands.[12]

In addition to the problem of its actual location, the 1879 line came to be seen as a "border" in the same way as a land boundary. The line described in the 1879 Proclamation, however, is clearly only one that indicates the islands annexed to Queensland. At the time, the concept of sea or seabed boundaries, even for territorial seas, was not at all developed and the line was not intended to serve such a purpose. It was to have essentially the same status as the line designated in the 1867 Alaska cession agreement between Russia and the United States.[13] That agreement indicated the territory and adjacent islands to be ceded by reference to geographical limits defined in part by a line running across the Bering Sea and passing through certain designated points.[14] The dispute between the United States and Canada over the status for purposes of maritime boundary delimitation of the line A–B drawn by the Alaskan Boundary Tribunal, from Cape Muzon to the entrance to Portland Canal in the Dixon Entrance, also appears to involve questions similar to those raised by the 1879 line.[15]

The true position is that the 1879 line did not in any sense represent a maritime boundary. The position was complicated, however, by the fact that Australian legislation concerning offshore petroleum and sedentary species had used the 1879 line as a convenient administrative division between Queensland and Papua for purposes of jurisdiction over both living and nonliving seabed resources. While such an arrangement may have been satisfactory while Papua remained an Australian territory, it was not an appropriate basis on which to divide the area between two independent nations.[16] Because of the way that the 1879 line had been drawn, a number of anomalies also existed. For instance,

[11] The detailed reasoning and documentation that led to this conclusion are contained in a document entitled *Status of the Islands of Kawa, Mata Kawa and Kussa,* tabled in the Australian Parliament. The document is reproduced as an Annex to JOINT FOREIGN AFFAIRS AND DEFENCE COMMITTEE, THE TORRES STRAIT TREATY, [Australian] Parliamentary Paper 101/1979.

[12] This view is not universally shared. *See* the remarks of J. Griffin, *Territorial Implications in the Torres Strait*, in THE TORRES STRAIT TREATY 92–137 (P. Boyce & M. White eds., 1981).

[13] 15 Stat. 539, TS No. 301, 11 Bevans 1216.

[14] The U.S. State Department apparently takes the view that the 1867 line defines the boundary between the continental shelves of the United States and the USSR. *See* Feldman & Colson, *supra* note 5, at 751–53.

[15] Bourne & McRae, *Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined,* 14 CAN. Y.B. INT'L L. 175 (1976).

[16] Papua New Guinea became independent on Sept. 16, 1975. In May 1976, the Foreign Ministers of Papua New Guinea and Australia publicly stated that the line "does not represent the Australian view of the appropriate permanent location of the seabed boundary," 47 AUSTL. FOREIGN AFF. REC. 336 (1976).

There was no provision, however, for the investigation or detention of vessels of the other party or for the handing over of such vessels to that party.

The inclusion of special enforcement provisions in the Torres Strait Treaty is a further reflection of the parties' desire largely to ignore the jurisdictional delimitation provisions within the Protected Zone and to manage it as an entity. The special provisions on enforcement were mainly sought by Australia, which wished to avoid the bringing of islanders before courts in Papua New Guinea. This concern arose not so much out of a belief that the system of justice in Papua New Guinea was inadequate, but out of a desire to ensure so far as possible that Australian citizens who lived and worked in the Protected Zone did not find themselves suddenly subject to Papua New Guinean jurisdiction because a seabed or fisheries line had arbitrarily been drawn through the Strait. As with so many of the other Treaty provisions, acceptance of a special regime for fisheries enabled the actual maritime delimitation lines to be drawn where they in fact were. Without special provisions to protect the source of the islanders' livelihood, fishing, it is unlikely that they would have found either a fisheries jurisdiction or a seabed jurisdiction line acceptable. The problem of ensuring the livelihood of fishermen in the Georges Bank area off Canada and the United States has thwarted the conclusion of the proposed treaties for that area.[114] Although the fisheries treaty contained elaborate provisions for the sharing of catch, it was perceived by U.S. fishermen as an inadequate protection of their livelihood.

Because there was a moratorium on seabed mining and, in any event, nonliving resources were seen as contributing marginally to the value of the area, no special provisions were made for the sharing of seabed nonliving resources.[115]

Navigation

Torres Strait is a major international shipping route. The route itself passes just to the north of Thursday Island at the northern tip of mainland Australia and then turns northeast through what is called the Great North East Channel. The eastern entrance of the shipping route lies between Bramble and Anchor Cays. Navigation by large vessels in the rest of the Strait is hazardous and, in many cases, impossible owing to the large number of reefs and sand bars. Through the Channel itself pilotage is strongly advised and is used in nearly every case.

Since Australia has sovereignty over all the islands in the Strait, the security and control of the shipping route lies clearly with Australia. Still, there is a right of innocent passage through the territorial seas of the islands.[116] Furthermore, the Strait qualifies under the definition in the Draft Law of the Sea Convention as an international strait through which a right of transit passage would exist.[117] Nevertheless, Papua New Guinea, if it was to gain no control

[114] *Supra* note 5, especially Colson & Feldman, at 754–60.

[115] The only provision made was the inclusion of the normal common deposit article providing for consultation and equitable sharing of the proceeds of a single accumulation extending across the seabed jurisdiction line. *See* Art. 6.

[116] Territorial Sea Convention, *supra* note 88, Art. 14.

[117] *Supra* note 1, Arts. 37 and 38.

over territory in the Strait, understandably wanted the Treaty to include some guarantees of its navigational and other rights through the area.

This concern was met by the special provisions on navigation by vessels and aircraft within the Protected Zone.[118] In and over the waters of the zone north of the seabed jurisdiction line, and south of that line but beyond the limits of the territorial sea, each party accords high seas freedoms of navigation and overflight to vessels and aircraft of the other party. These freedoms, however, are subject to the requirement that each party take action to ensure that its vessels or aircraft comply with certain measures. These include observance of international regulations for the prevention and reduction of pollution from ships and compliance with the immigration, customs, and fiscal laws of the other party. The freedom of navigation obviously does not extend to vessels engaged in exploration or exploitation of resources. Civil aircraft are also given the rights of overflight and transit in Australian island territory north of the seabed line. This applies to both scheduled and nonscheduled services. The result of these provisions is that Papua New Guinean coastal trading vessels can move freely between points on the southern coast, without facing restrictions that might otherwise have been caused by the existence of territorial seas around the numerous Australian islands. Similarly, aircraft can fly from Daru to points on the southern coast of Papua New Guinea without the need for approvals and compliance with other formalities that could normally be expected to arise from any need to enter Australian airspace.

Apart from its concern about the movement of local traffic, Papua New Guinea wished to be assured that overseas commerce and foreign shipping destined for or leaving from its ports would not be denied access to the Strait. Consequently, a guaranteed right of passage through routes used for international navigation is also given.[119] The right is to be no more restrictive than the regime of transit passage through straits used for international navigation described in Articles 34 through 44 of the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea.[120] These articles appear in the Draft Law of the Sea Convention in similar form.[121] There is provision for the parties to agree on another regime of passage if the mentioned provisions are revised, are not included in a law of the sea convention, or fail to become generally accepted principles of international law. This provision indicates the growing acceptance of the work of the Law of the Sea Conference as already reflecting in many of its parts sound principles of law suitable for bilateral adoption by states.

As with the other features of the Treaty, the navigation provisions were designed to allay special concerns. Because of their inclusion, it was no longer so important for navigation and security purposes that Australian territorial sea or seabed jurisdiction continue to extend in places right up to the Papua

[118] Art. 7.

[119] Art. 7(6).

[120] 8 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, UN Doc. A/CONF.62/WP.10 and Add.1 (1977), *reprinted in* 16 ILM 1108 (1977), issued at the conclusion of the sixth session of the Law of the Sea Conference.

[121] *Supra* note 1, Arts. 34–44.

New Guinean coast. Nor was it so important for Papua New Guinea to gain control of some Australian islands.

CONCLUSION

The above outline of the special provisions of the Torres Strait Treaty is intended to indicate the many complex issues that had to be dealt with. Although the Treaty is primarily a delimitation agreement, it was only possible to arrive at a solution on maritime boundaries by tackling all the other related issues. The author would suggest that only in this way can complex delimitation issues be resolved. Although the quest for solutions led to some significant and novel provisions such as those on residual jurisdiction, in its results the Treaty is consistent with the general principles of international law on delimitation.

The recent agreements between Canada and the United States reflect a similar attempt to resolve a complex delimitation situation. While fisheries were treated separately and a comprehensive solution to that particular issue was devised,[122] it was largely divorced from other aspects of the delimitation problem. By asking an international tribunal to draw a "single maritime boundary,"[123] the parties have significantly limited their room to negotiate and to fashion creative solutions.

It is hoped that the successful conclusion by agreement of the Torres Strait Treaty will serve as a valuable precedent for other negotiators in other parts of the world, faced with similarly complex problems. While the Law of the Sea Conference debates the issue of delimitation interminably, Australia and Papua New Guinea have shown what can be achieved by agreement.

[122] Agreement on East Coast Fishery Resources, *supra* note 5. The Agreement contains complex management and sharing arrangements for individual fishing stocks.

[123] Agreement to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, *supra* note 5, Art. II.

the line as drawn in Australian legislation did not accord a territorial sea of 3 miles to Bramble Cay. Australia was not prepared in the negotiations to forgo such a right or to regard itself as estopped from arguing that it had the right to a full territorial sea around Bramble Cay.

While the true status of the 1879 line was recognized early on in the official negotiations, the popular confusion over the matter did cause problems. The islanders and the state of Queensland, in particular, adopted the slogan "Border No Change" and saw any suggestion that maritime areas south of the 1879 line be given up to Papua New Guinea as an unnecessary concession by Australia. This reaction eventually abated, however, as the true state of affairs was gradually conveyed to the interested parties. It also lost much of its bite once it became clear that no Australian land territory was to be relinquished and that special arrangements to protect the livelihood of the local inhabitants would be included in any Treaty.

Nevertheless, the discussion and problems inspired by the 1879 line did highlight how accidents of history often play a significant role not just in land boundary delimitation, but also in maritime boundary delimitation.

History of the Negotiations

While Papua remained an Australian territory and New Guinea a United Nations Trust Territory, little consideration was given to the need for an international maritime boundary between them and Australia. As the prospect of independence for the territories increased in the early 1970's, attention began to be directed to the problem of the boundaries of the likely new state. In 1971 Australia negotiated an agreement with Indonesia that put on a secure basis the continental shelf boundary between Indonesia and Papua New Guinea,[17] but at the time of its independence on September 16, 1975, the maritime boundary between Papua New Guinea and Australia remained unsolved.

Negotiations had commenced as early as 1973. In a joint statement on January 17, 1973 by the newly elected Prime Minister of Australia, Gough Whitlam, and the Chief Minister of Papua New Guinea, Australia indicated that it was willing to negotiate relocation of the border but that it was reluctant to be party to any settlement not accepted by the islanders.[18] It was recognized that the state government of Queensland would also need to be consulted. Negotiations continued for the next few years with little public interest, other than occasional newspaper headlines of disputes between the Australian and Queensland governments, the latter seeing itself as guardian of the islanders' interests.[19] The new Australian Government elected in December 1975 moved quickly to advance negotiations. In June 1976 certain fundamental points were

[17] Agreement between Australia and Indonesia establishing Certain Seabed Boundaries, May 18, 1971, in UNITED NATIONS, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, UN Doc. ST/LEG/SER.B/18, at 433 (1976), *reprinted in* 10 ILM 830 (1971).

[18] 44 AUSTL. FOREIGN AFF. REC. 41 (1973).

[19] A detailed description of the negotiations with Papua New Guinea, and between the Australian and Queensland governments, up to October 1975 appears in a statement to the Australian House of Representatives by Mr. Whitlam on Oct. 9, 1975, *reproduced in* 46 *id.* at 586 (1975).

agreed at the Foreign Minister level:[20]

> A seabed boundary would be delimited between Australia and Papua New Guinea. It would run through the protected zone which would be established in the Torres Strait. Papua New Guinea agreed that the seabed boundary would lie to the north of all Australian inhabited islands except Boigu, Dauan and Saibai. Australia accepted that the seabed boundary would be drawn in a location more southerly than the line at present applying under Australian legislation for offshore petroleum administration purposes.
>
> Papua New Guinea had accepted that Australia would retain all Australian inhabited islands. It had been agreed that the Australian territorial sea around the islands of Boigu, Dauan and Saibai, which would lie to the north of the seabed boundary, would be three miles, and that there would be a line delimiting the territorial seas between these islands and Papua New Guinea.
>
> A zone would be established in the Torres Strait to protect and preserve the traditional way of life and livelihood of the Torres Strait Islanders and the residents of the adjacent coast of Papua New Guinea, including fishing and freedom of movement throughout such a zone, both north and south of the seabed boundary.

It is of interest that at this time there was only agreement on negotiation of a seabed boundary. Reference was also made to Australian retention of all *in*habited islands, but no mention was made about the future of the uninhabited islands. Certainly, the attitude of Papua New Guinea at the time was that it was negotiating "an all purpose international boundary" in which each nation would have "full sovereignty," and that the new boundary line would be "on top of the water, under the sea and up in the sky."[21]

It became apparent by the end of 1976 that the two countries were seriously deadlocked. Both sides wanted a comprehensive settlement, but Australia was not prepared to allow the seabed line, which by this stage had been provisionally agreed, to become an all-purpose line, cutting off completely the Australian islands north of the line. This opposition was a reflection in part of increasing agitation by the islanders and the state government of Queensland not to "sell out" the islanders' interests. Nor was Australia prepared to contemplate the transfer of uninhabited islands. Any transfer of territory would create constitutional difficulties.[22]

In February 1977, the two parties decided to defer further negotiations for the immediate future, although they agreed to continue trying to resolve the issues through bilateral negotiations.[23] In addition to having reached an impasse,

[20] 47 *id.* at 336 (1976).

[21] JOINT FOREIGN AFFAIRS AND DEFENCE COMMITTEE, *supra* note 10, at 11–12.

[22] Section 123 of the Australian Constitution requires the consent of the Parliament of a state, and the approval of the majority of the electors of a state, before the limits of a state can be increased, diminished, or otherwise altered. Any cession of islands forming part of the state of Queensland would therefore be subject to this provision, and the necessary approvals were unlikely to be forthcoming.

[23] Text of joint communiqué by Prime Ministers of Australia and Papua New Guinea, Feb. 11, 1977, 48 AUSTL. FOREIGN AFF. REC. 88 (1977).

both Governments faced elections in 1977. At this time, moreover, Papua New Guinea enacted its National Seas legislation, which extended its territorial sea from 3 to 12 miles and provided for a 200-mile zone of offshore seas.[24] Consequently, Australia and Papua New Guinea needed to reach agreement on interim arrangements to take account of the proposed establishment of 200-mile fishing or economic zones.[25]

In early 1978, negotiations were resumed and rapid progress was made. It was then that Australia announced its finding that the three uninhabited small islands of Kawa, Mata Kawa, and Kussa just off the Papua New Guinean coast were not among the Torres Strait islands annexed to Queensland.[26] In May 1978, a detailed outline of the elements agreed between the two countries was made public.[27] For the first time, the delimitation of a separate fisheries resources line was recognized as a basis for a settlement, together with provisions for sharing the catch and freedom of navigation. Throughout the remainder of 1978, officials held detailed negotiations to translate the principles agreed by the Foreign Ministers into treaty provisions. Finally, on December 18, 1978, the Treaty was signed by the Prime Ministers and Foreign Ministers of the two countries. The Treaty has still not been ratified, not because of any change of heart by either side, but essentially because of difficulties met in implementing certain of the complex treaty provisions in domestic legislation.

The above brief outline shows that the final result only occurred after a breakdown in the negotiations. The rigid and single-focus approach of the initial round of negotiations, where attention was given primarily to drawing a single maritime boundary, did not lead to productive solutions. It was only after the adoption of an imaginative, broadly focused approach that a solution acceptable to all the parties concerned—not just governments but the people themselves—was achieved. The Treaty represents an *agreed* solution that was reached without the assistance of any third party. While the possibility of referring the dispute to the International Court of Justice was mentioned from time to time in the press, both sides appreciated that no tribunal or court would be able to provide a comprehensive solution that dealt satisfactorily with the whole complex of issues involved. That the negotiations were successful is testimony to the fact that a developing country and a developed country can

[24] The legislation consisted principally of the National Seas Act (No. 7 of 1977). It established a territorial sea of 12 miles, provided for declaration of archipelagic baselines, and created offshore seas extending 200 miles from the baselines. Five other specific resource-related laws were enacted. *See* Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 322, 353–55 (1979). Papua New Guinea has not yet established archipelagic baselines; the legislation is merely enabling in this respect.

[25] It was not until March 1978 that the National Seas legislation was actually proclaimed. By then Australia and Papua New Guinea had been able to work out suitable interim arrangements, which ensured as little overlap in jurisdiction as possible. *See* the statement by the Australian Foreign Minister, March 31, 1978, 49 AUSTL. FOREIGN AFF. REC. 152 (1978). It was November 1979 before Australia declared its own 200-mile fishing zone, at which time special interim arrangements in relation to the exercise of jurisdiction in the Torres Strait area were introduced. COMMONWEALTH OF AUSTRALIA GAZETTE S225 (Nov. 2, 1979).

[26] *Supra* note 11 and accompanying text.

[27] 49 AUSTL. FOREIGN AFF. REC. 242 (1978).

sit down and arrive at equitable solutions to problems concerning allocation of maritime resources. That the agreement contains so many novel and imaginative solutions says much for the ability of negotiation, if approached by both sides with an open mind and goodwill, to produce solutions to difficult problems. It is to the special features of the Treaty that this article will now turn.

Special Features of the Treaty

The People

As mentioned, the Torres Strait islanders are ethnically distinct from the Papua New Guineans of the immediately adjacent coastal area. At the time of the last Australian census for which there are figures (1971), there were 9,663 enumerated islanders. Of these about 16 percent lived on the main islands directly appurtenant to Cape York, the northern extremity of the Australian mainland. These islands include Thursday Island, the most heavily populated of the islands and the administrative center for the region. In this group of islands the islanders generally live as part of the general community. About 2,500 others, or less than 25 percent, live in the "reserve" islands scattered throughout the Strait, including Boigu, Dauan, and Saibai just off the Papuan coast. It is on these reserve islands that the traditional way of life of the islanders continues. In 1971 almost 60 percent of the islander population lived outside the Torres Strait region in other parts of Australia. The islanders are Australian citizens and form part of the population of the state of Queensland. No treaty could ignore their rights.[28]

Economic activity in the region is limited, but includes pearling and fishing. However, the pearling industry has suffered in recent years so that commercial fishing, particularly for barramundi and crayfish, holds the major economic potential for the area in the immediate future.

The people of coastal Papua to whom the Torres Strait is significant live mostly around the delta of the Fly River and on associated islands, including the large island of Daru, the administrative headquarters of the Western Province, which is located in the northeast corner of the Strait. Economically, they are not as well off as the Australian islanders and receive no pension or social security income. Unlike most of the islanders, they depend for a small cash income on fishing, particularly for barramundi and crayfish. The northern Warrior Reefs are a highly regarded fishing ground and Daru is being developed as a center for the processing and handling of much of the catch.[29]

In the past, there was freedom of movement between the islands and the coast of Papua New Guinea. Traditional activities were pursued without concern for the niceties of international boundaries or customs and immigration formalities. During the negotiations, the islanders made very clear to the Aus-

[28] For a detailed account of the islanders' way of life, see H. Duncan, *supra* note 8; Joint Foreign Affairs and Defence Committee, *supra* note 10, at 22–34.

[29] The study by Duncan, *supra* note 8, highlights the lack of interest by many of the islanders in earning cash income, because of an alternative source of income from public money. This is clearly not the attitude of Papua New Guineans, who are seeking to develop commercial fishing.

tralian Government their concern that traditional practices and freedom of movement be allowed to continue. The islanders insisted that "traditional boundaries" in fact existed between their areas and areas belonging to the inhabitants of Papua New Guinea.[30] These boundaries were similar to, but not identical with, the 1879 line referred to above. At the time of the negotiations, it was apparent that the use of the Strait by islanders and coastal Papuans involved considerable movement of both groups through the area. While not great in numbers, the islanders and coastal Papua New Guineans who lived in the Strait or its vicinity depended largely on its resources for their livelihood. Their traditional way of life was closely linked to the special features of the area.

In order to meet many of the concerns of the inhabitants and in recognition of the special environmental vulnerability of the area, the two Governments agreed in the Treaty to a number of special provisions designed to protect the area and its traditional inhabitants. Basically, this was done by establishing a Protected Zone, "comprising all the land, sea, airspace, seabed and subsoil" within a defined area,[31] which essentially comprises the whole of the central Torres Strait area, including the islands and reefs at the eastern and western entrances to the Strait.[32] The zone does not include the major administrative center of Thursday Island and its associated islands, nor does it include Daru, a similar Papua New Guinean administrative center.

The principal purpose of the parties in establishing the zone and "in determining its northern, southern, eastern and western boundaries" was stated to be "to protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement."[33] A further purpose was to protect and preserve the marine environment and indigenous fauna and flora in the Protected Zone and its vicinity.[34] By referring to the determination of the boundaries of the zone, the parties attempted to acknowledge in some way that regard had been had to the representations by the islanders concerning the location of their traditional boundaries. Within the zone free movement and the performance of "lawful traditional activities" are to be permitted.[35]

The establishment of precise boundaries of the zone obviously could create difficulties if a particular activity happened to extend a little beyond the designated boundary. In order to avoid difficulties that may arise from the unavoidable rigidity of lines on maps, provision is made to extend the various rights conferred in the zone to areas "in the vicinity of" the zone. This term is not defined, other than as describing "an area the outer limits of which might vary according to the context in which the expression is used."[36] Its lack of certainty may cause difficulties in law enforcement, but without such a provision necessary flexibility would have been lost.

[30] *See* the islanders' views in a memorandum prepared by Island Chairmen in September 1975, JOINT FOREIGN AFFAIRS AND DEFENCE COMMITTEE, *supra* note 10, at 40.

[31] Art. 10(1).

[32] Annex 9 to the Treaty gives the detailed description.

[33] Art. 10(3).

[34] Art. 10(4).

[35] Art. 11.

[36] Art. 1(3).

The Treaty defines "traditional inhabitants" broadly. One of the criteria is that the islanders or Papua New Guineans concerned "maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities."[37] "Traditional activities" is also defined broadly, and it is provided that in applying the definition, except to activities of a commercial nature, "traditional" shall be interpreted liberally and in the light of prevailing custom.[38] Similarly, the definition of "traditional fishing" concentrates on the purpose of fishing, rather than on the manner, and thus seeks to avoid problems caused by the use of new technology.[39]

As well as free movement and performance of traditional activities, each party agrees to allow, on a reciprocal basis, the pursuit by traditional inhabitants of the other customary rights of access to and usage of areas of land, seabed, seas, estuaries, and coastal tidal areas that are in or in the vicinity of the Protected Zone.[40] Within the zone each party also agrees to take legislative and other measures to protect and preserve the marine environment.[41] Moreover, provision is made for the environmental assessment of any activity that may cause pollution or other damage to the marine environment[42] and for the protection of indigenous species of fauna and flora.[43] In a further effort to protect the islanders and their environment, the parties agreed to a moratorium for a minimum of 10 years on the mining and drilling of the seabed and subsoil of the Protected Zone for purposes of exploration or exploitation of mineral resources.[44]

The freedoms indicated above that are to apply in the Protected Zone obviously could cause problems if abused. Immigration, customs, quarantine, and health formalities therefore continue to apply to the traditional inhabitants, except in cases of temporary stay for the performance of traditional activities.[45] Each party reserves its right to limit free movement to control abuses involving illegal entry or evasion of justice and to apply immigration, customs, health, and quarantine measures to meet problems that may arise such as outbreaks of disease.[46] Adequate control of quarantine and illegal immigration were of particular concern to Australia.

Finally, in order to ensure the effective working of the zone, liaison arrangements[47] and a Joint Advisory Council consisting of representatives of the national Governments, regional governments, and traditional inhabitants are established.[48] The council is only advisory and cannot adopt or implement measures of its own in the area. Management and administration in the zone remain with the respective governments.

This extensive description of the arrangements for the special Protected Zone has been provided because they represent an important component of the Treaty. They indicate that the needs of inhabitants of an area subject to maritime

[37] Art. 1(1).
[38] *Ibid.*
[39] *Ibid.*
[40] Art. 12.
[41] Art. 13(1) and (2).
[42] Art. 13(5).
[43] Art. 14.
[44] Art. 15.
[45] Art. 16.
[46] Art. 16(3).
[47] Art. 18.
[48] Art. 19.

delimitation can be dealt with in special ways, at the same time that the actual delimitation issues are treated separately. The accommodation of the special needs and interests of the inhabitants by the imposition of a Protected Zone over the main area in dispute made possible the actual delimitation of the area in a way that would probably not otherwise have been acceptable to either Government. If the delimitation had been approached in the traditional way of seeking only to draw a single maritime boundary, it is unlikely that an agreement acceptable to those whose interests would be most directly affected could have been reached. As it is, the local inhabitants have accepted the agreement secure in the knowledge that their traditional life style is protected and will not be seriously jeopardized by delimitation lines dividing up the area.[49]

Even before Papua New Guinea became independent, the concept of a protected zone was in the air. In 1974 the Parliament of the state of Queensland passed a resolution urging the establishment of an international marine park in the area.[50] At the same time, the Australian Government was working on proposals for an environmentally protected area.[51] Throughout the negotiations, there was a willingness by both sides to consider special provisions that would effectively protect the interests of the islanders, although they were essentially devised to meet Australian concerns. The solution that emerged is unique in comparison with measures adopted by other states to secure protection of special areas.

International commissions to advise on the use and management of particular areas of water are not new in international law. For example, the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea establishes an international body to "keep under review the living resources" and to make recommendations to be implemented by the member states.[52] Similarly, Canada and the United States have used an International Joint Commission to regulate the quality of the water in the Great Lakes.[53] These international arrangements differ, however, from the Torres Strait Treaty, in which an area is actually given a special status—regardless of the jurisdictional rights of particular states—certain rights are conferred on its inhabitants, and Governments have obliged themselves to manage it with a view to protecting both the local inhabitants' rights and the environment. Although the special status and rights in the zone are directly created by the Treaty, it is left to each Government to ensure that they are given effect.[54] To this extent, the jurisdictional division of the area remains significant.

[49] Extensive consultations were held with the local inhabitants, including several visits to the area by Australian Government ministers.

[50] On April 2, 1974. For the text, see JOINT COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE, *supra* note 10, at 77.

[51] *See* the statement by Mr. Whitlam in October 1975, *supra* note 19.

[52] Art. IX, UN Doc. A/C.1/1035 (1973), *reproduced in* 12 ILM 1291 (1973).

[53] Treaty Relating to Boundary Waters of Canada and the United States, Jan. 11, 1909, 36 Stat. 2448, TS No. 548, 12 Bevans 319; Agreement on Great Lakes Water Quality, April 15, 1972, 23 UST 301, 24 UST 2268, TIAS Nos. 7312, 7747, *reprinted in* 11 ILM 694 (1972); Agreement on Great Lakes Water Quality, Nov. 22, 1978, 30 UST 1383, TIAS No. 9257.

[54] As mentioned above, the Joint Advisory Council has no executive or management powers under the Treaty.

Maritime Jurisdiction

The Treaty does not treat delimitation in respect of maritime jurisdiction as raising a single question. Instead, it establishes separate lines for seabed and fisheries jurisdiction and makes special provision for residual jurisdiction. While for the most part the two lines that define the respective limits of the seabed and fisheries jurisdiction of the two parties are identical, in the Torres Strait area itself they diverge. This is significant. It constitutes a clear precedent for the separate treatment of the seabed and superjacent waters for delimitation purposes.

The Treaty describes a line that divides the area of seabed and subsoil over which Australia and Papua New Guinea are to have "seabed jurisdiction."[55] The definition in Article 1 states that "seabed jurisdiction" is "sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law." It is of interest to note the special reference to low-tide elevations, to which further reference will be made below.[56]

The seabed line runs from a point in the west on the previously agreed Indonesia/Australia continental shelf boundary,[57] through the center of Torres Strait, and then out into the Coral Sea in the east. The line eventually ends at a point that is equidistant not only from Australian and Papua New Guinean base points (Mellish Reef and Pocklington Reef, respectively) but also from a base point that the Solomon Islands is expected to use in subsequent maritime delimitations with Australia and Papua New Guinea. It should be noted that, because of the geomorphological configuration of the area, the seabed line extends more than 200 nautical miles from the base points. The fisheries jurisdiction line, by contrast, terminates at a different point.[58] The western portion of the line essentially represents a median line between the Australian and Papua New Guinean coasts. The eastern portion is a median line in part, but in the area where the small Coral Sea islands become relevant, the line is a modified median that neither gives full weight to the islands nor completely ignores their influence. The line in this area seems consistent with those described in other delimitation agreements involving islands that distort a mainland-to-mainland median line.[59] (See map 1.)

In the Torres Strait itself, the seabed line passes to the south of a number of Australian islands, which have only a 3-mile territorial sea around them. These include the three inhabited islands of Boigu, Saibai, and Dauan. A

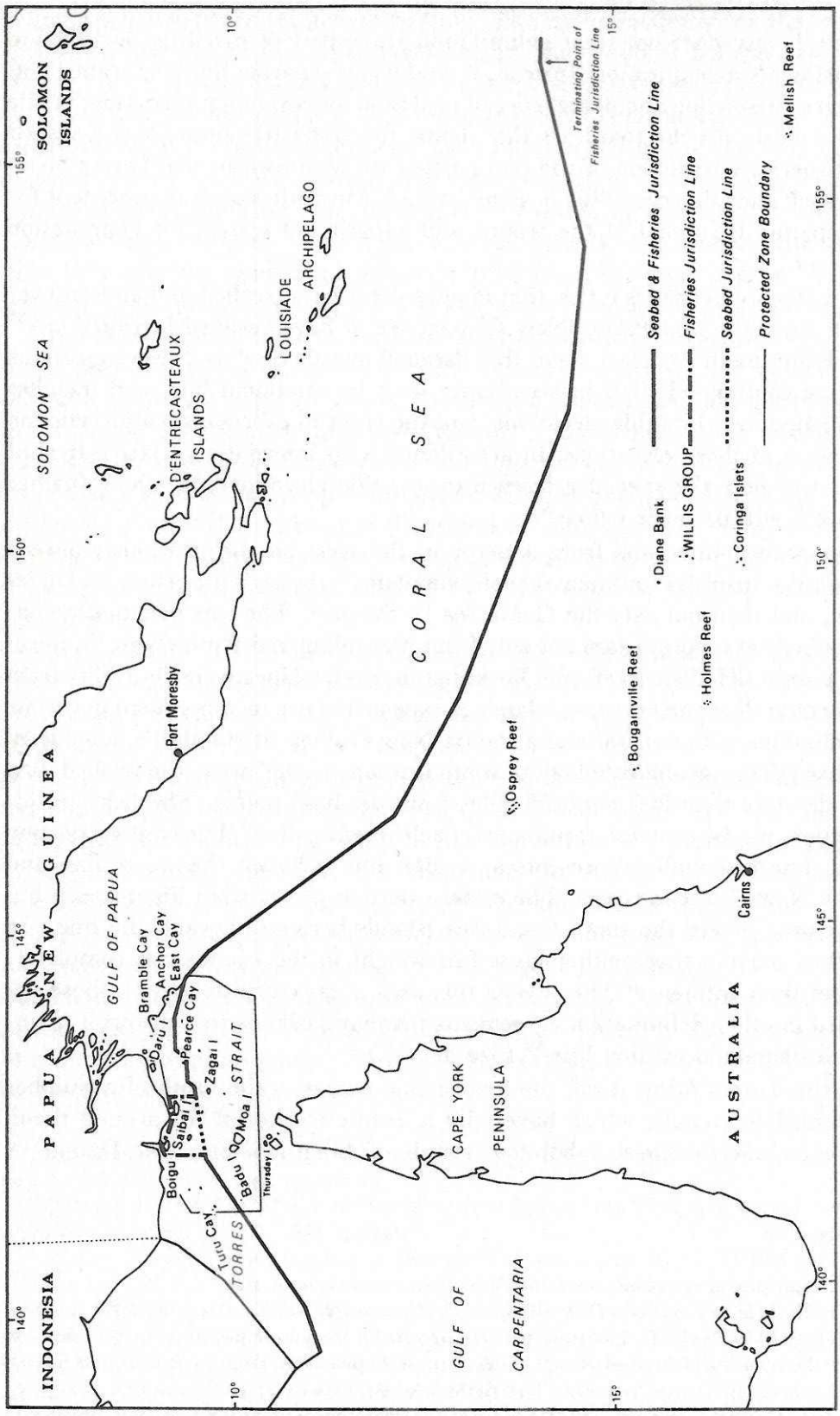
[55] Art. 4(1).

[56] *Infra* p. 339.

[57] *Supra* note 17.

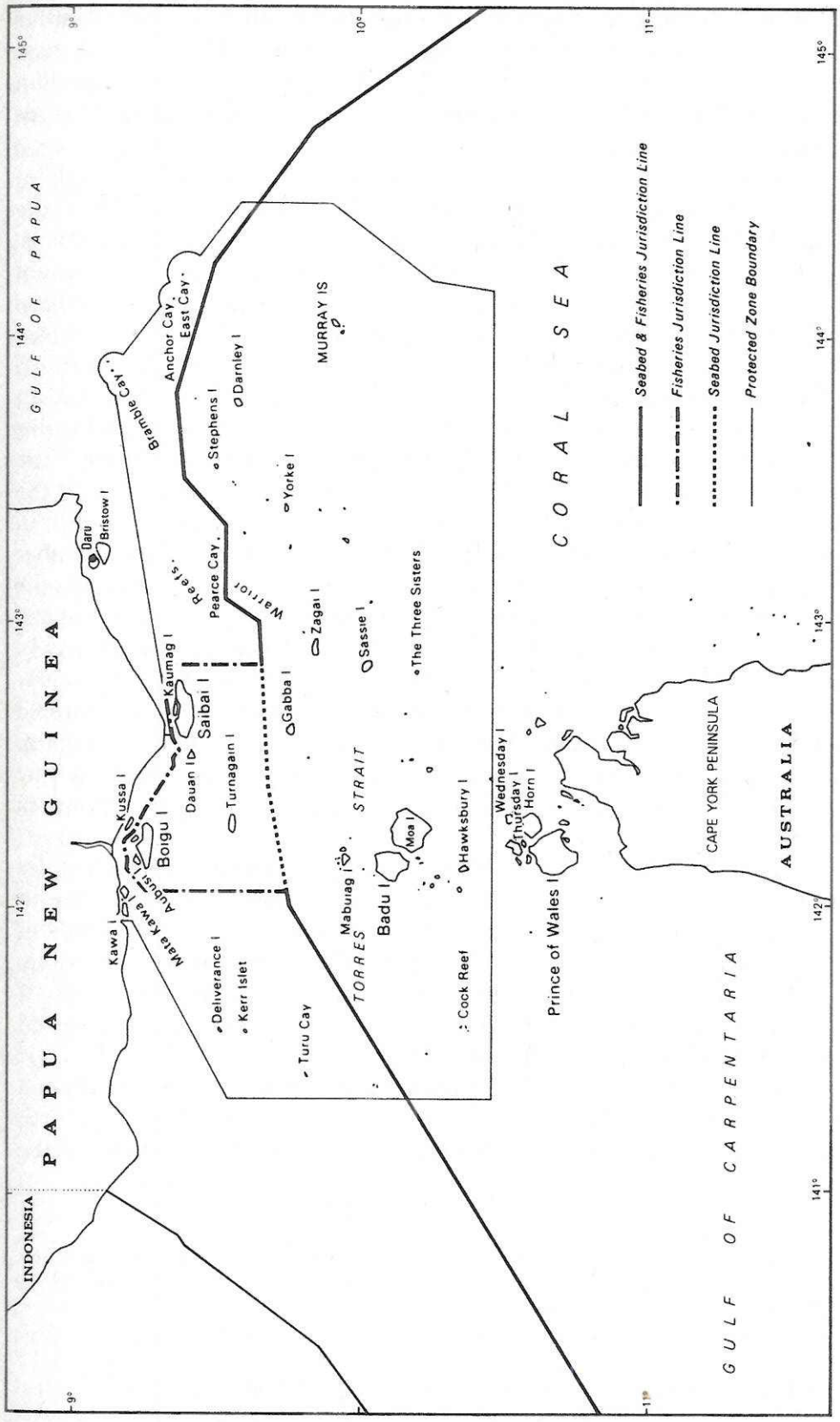
[58] It terminates at the point where the 200-mile zones cease to overlap.

[59] *See* Karl, *Islands and the Delimitation of the Continental Shelf: A Framework for Analysis*, 71 AJIL 642 (1977). R. D. Hodgson in 1973 suggested a special regime might be considered to protect the interests of masked coastal states such as Papua New Guinea: *Islands and Special Circumstances*, in LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 137, 173 (J. K. Gamble & G. Pontecorvo eds., 1973). *See also* the comprehensive analysis of state practice in C. R. SYMMONS, THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW, ch. IV (1979).



MAP 1

DELIMITATION LINES AGREED IN THE TORRES STRAIT TREATY



MAP 2
CENTRAL TORRES STRAIT AREA

number of Australian enclaves are thus created in areas otherwise falling within Papua New Guinean seabed jurisdiction. The parties tried to avoid a similar result for fisheries jurisdiction. The seabed line was drawn so that for the most part the major reefs to the northeast of Cape York remain under Australian jurisdiction. (Map 2 illustrates the delimitation lines agreed in the Torres Strait area.)

The precise principles used to draw the seabed line through the middle of the Strait have never been publicly stated. However, an examination of the maps attached to the Treaty[60] makes it possible to draw certain conclusions. First, a mainland-to-mainland median line was not drawn. Such a line would have run just to the north of the major fringing or portico islands at the northern tip of the Australian mainland. Second, the Australian islands close to the coast of Papua New Guinea were ignored for the purposes of charting a modified median line. However, the islands were given an individual belt of seabed (a 3-mile territorial sea) around them.[61] The result is in some respects similar to that arrived at in the *Anglo-French* arbitration.[62] Third, the seabed line largely represents a modified median line that gives some recognition to the influence of the major Australian islands in the south of the Strait. Fourth, in the eastern area of the Strait, which is primarily composed of a large number of reefs and shoals, and where the islands are numerous but very small, the line has been drawn so as to retain under Australian jurisdiction most of the reefs and at least a 3-mile belt around all the major Australian islands. As in the central part of the Strait, the line passes to the south of certain northerly features, such as Bramble, East, and Anchor Cays. These features are separated from the other islands in the Strait and have their own belts of territorial sea. The only complication is in the vicinity of the Warrior Reefs, where the line passes through a break in the reefs and runs through part of the territorial sea of Pearce Cay.

An analysis of the line indicates that it conforms with the basic principles of international law applicable to delimitation.[63] From the point of view of proportionality, the line achieves a reasonable balance between the rights of Papua New Guinea, based on its mainland coast, and the rights of Australia, based on its ownership of numerous islands scattered throughout the Strait. If every island were given a 12-mile territorial sea, the Strait would be transformed into an area of Australian sovereignty. This was not done.[64] Instead, while Australia retains jurisdiction over a significant proportion of the seabed, Papua New Guinea is given jurisdiction over a significant area of seabed in the north of the Strait. Apart from ensuring a reasonable degree of proportionality,[65] the

[60] The maps are *reproduced in* 18 ILM 325, 327 (1979).

[61] *Infra* p. 342.

[62] *Supra* note 3.

[63] *See* Blecher, *Equitable Delimitation of Continental Shelf*, 73 AJIL 60 (1979); Karl, *supra* note 59; Symmons, *The Canadian 200-mile Fishery Limit and the Delimitation of Maritime Zones around St. Pierre and Miquelon*, 12 OTTAWA L. REV. 145 (1980).

[64] Australia from 1967 did assert jurisdiction in a 12-mile fishing zone. It was prepared to forgo this in the final Treaty settlement.

[65] Proportionality was one of the factors, apart from special geographic and physical factors, that the International Court in the *North Sea Continental Shelf* cases said should be taken into account. [1969] ICJ REP. at 54.

line is essentially a modified median line. The reasons for its modification are not difficult to perceive. The geographical characteristics of the area made a pure median line inappropriate. Other circumstances that were regarded as relevant, such as security considerations, the distribution of the natural resources, and the use of the area by inhabitants of the two countries, are primarily taken care of in special provisions on the particular issue and not in the seabed delimitation itself. From the point of view of the development of the international law of delimitation, the actual location of the seabed jurisdiction line therefore sets no new precedents. It is the special features associated with the drawing of the line that may bear on the further development of international law.

During the negotiations, it was proposed that a seabed line not be drawn through the central Torres Strait area at all. Advocates of this course, particularly some of the traditional inhabitants, argued that the establishment of a protected zone in which mineral exploitation would be prohibited, or limited for a number of years, would remove the need to draw a seabed line through the area.[66] This argument did not prevail. The two Governments considered it necessary to avoid any possibility of future disagreement at a time when a solution might be more difficult to reach. To leave a gap in the seabed line was seen as leaving open for future dispute one of the basic issues in the maritime delimitation. For similar reasons, joint control or management of seabed mineral resources in the area was also seen as an unsatisfactory solution.[67]

As mentioned, the separate fisheries jurisdiction line is identical with the seabed jurisdiction line, except in the central Torres Strait where it diverges to embrace the Australian islands just off the coast of Papua New Guinea.[68] The northern limit of the line in this area of divergence represents in part the territorial sea delimitation line between certain Australian islands and the Papua New Guinean coast.[69] The eastern and western limits of the area of divergence are lines running south along the meridians of longitude from the respective eastern and western limits of the territorial sea of the Australian islands of Saibai and Boigu. The divergence was made in recognition of the importance of the living resources of the area to the inhabitants of the Australian islands and in order to avoid establishing Australian-inhabited enclaves north of a general all-purpose maritime boundary between Australia and Papua New Guinea. Such a result would have given the islanders the clear sense that they were cut off from Australia, and perhaps vulnerable to the wishes of Papua New Guinea. The same considerations did not apply to the uninhabited islands of Bramble Cay, Anchor Cay, and East Cay or to Deliverance Island, Kerr Islet, and Turu Cay. They became enclaves north of the fisheries and seabed lines, and they have 3-mile territorial seas. The southern part of the territorial

[66] JOINT FOREIGN AFFAIRS AND DEFENCE COMMITTEE, *supra* note 9, at 40.

[67] *Contrast* the Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Jan. 30, 1974, *reproduced in* 2 S. ODA, THE INTERNATIONAL LAW OF OCEAN DEVELOPMENT 95 (1975).

[68] Art. 4(2). Fisheries jurisdiction is defined in Article 1 as "sovereign rights for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species."

[69] Art. 3(1) and Ann. 1 to the Treaty.

sea of Pearce Cay is crossed by the seabed and fisheries jurisdiction lines. It is therefore not an enclave, even though the island itself lies north of the lines.

The seabed and fisheries jurisdiction lines do not apply to maritime jurisdiction in respect of all relevant matters, such as pollution or marine scientific research. The Draft Law of the Sea Convention[70] recognizes, however, that the jurisdiction of a state in its economic zone extends to such matters. In the Treaty, the parties dealt with this problem by making special provision for "residual jurisdiction," which is defined as:

> (a) jurisdiction over the area other than seabed jurisdiction or fisheries jurisdiction, including jurisdiction other than seabed jurisdiction or fisheries jurisdiction insofar as it relates to *inter alia*:
>
> (i) the preservation of the marine environment;
> (ii) marine scientific research; and
> (iii) the production of energy from the water, currents and winds; and
>
> (b) seabed and fisheries jurisdiction to the extent that the exercise of such jurisdiction is not directly related to the exploration or exploitation of resources or to the prohibition of, or refusal to authorise, activities subject to that jurisdiction.[71]

Special provision is made for the exercise of this jurisdiction in the "top hat" area, where the seabed and fisheries jurisdiction lines diverge.[72] Outside this area, no special provision is made. It may be assumed, therefore, that when full economic zones are established,[73] full jurisdiction over residual matters will be exercised by each party, outside the "top hat" area, as if the seabed and fisheries jurisdiction line represented an economic zone delimitation line. This would be in accord with developing international law, as reflected in Article 56 of the Draft Law of the Sea Convention.[74]

In the "top hat" area where jurisdiction is divided, the exercise of jurisdiction over pollution, for instance, is closely related to the particular resources for which protection is sought. Where the seabed and fisheries lines diverge, Australia will obviously have an interest in the prevention of pollution affecting fisheries resources, while Papua New Guinea will have an interest in pollution related to seabed resources. Thus, the parties agreed in this area that "(a) neither Party shall exercise residual jurisdiction without the concurrence of the other Party; and (b) the Parties shall consult with a view to reaching agreement on the most effective method of application of measures involving the exercise of residual jurisdiction."[75]

Interestingly, the definition of "residual jurisdiction" consists of two elements,[76] one of which is jurisdiction other than seabed or fisheries jurisdiction.

[70] Art. 56, *supra* note 1.

[71] Art. 4(4).

[72] Art. 4(3).

[73] Papua New Guinea under its National Seas legislation, *supra* note 24, established a 200-mile zone of offshore seas. It has not, however, legislated to control matters such as scientific research or pollution. Australia has to date only established a 200-mile fishing zone.

[74] Article 56 sets out the matters over which a coastal state has sovereign rights or jurisdiction. Article 59 recognizes that Article 56 may not be exhaustive and provides for resolution of conflicts that may arise in respect of unattributed rights or jurisdiction.

[75] Art. 4(3).

[76] *Supra* note 71.

This element includes jurisdiction with regard to preservation of the marine environment and control of marine scientific research. It also includes jurisdiction with regard to the "production of energy from the water, currents and winds." Unlike Article 56(1)(a) of the Draft Law of the Sea Convention,[77] which gives the coastal state sovereign rights over this activity when it is engaged in "for the economic exploitation or exploration of the zone," the Treaty treats the production of energy as a matter of residual jurisdiction that does not form part of fisheries or seabed jurisdiction.

As for the second element of residual jurisdiction, matters may fall within it that appear at first glance to be included within seabed or fisheries jurisdiction, if the exercise of such jurisdiction is "not directly related to the exploration or exploitation of resources or to the prohibition of, or refusal to authorise, activities subject to that jurisdiction." Essentially, therefore, any exercise of jurisdiction not directly related to the control of seabed or fisheries resources falls within the definition of residual jurisdiction.

If one takes the jurisdiction of a state over artificial islands, installations, or structures as an example, one can see how the definition works. Article 60 of the Draft Law of the Sea Convention recognizes the exclusive jurisdiction of a coastal state in its economic zone over such islands and over certain installations and structures.[78] Article 80 extends this jurisdiction to areas of continental shelf.[79] However, the definitions of "seabed jurisdiction" and "fisheries jurisdiction" in the Treaty, when read with that of "residual jurisdiction," only confer jurisdiction over these matters on a state to the extent that they relate to the exploration and exploitation of the seabed or fisheries resources. Thus, the jurisdiction of Australia and Papua New Guinea over artificial islands in the area of divergence only extends to artificial islands that are directly related to the exploration or exploitation of the particular resources over which the individual state has jurisdiction. A similar result obtains for installations and structures, although Article 60 would not, in any event, confer jurisdiction on a coastal state over every such installation and structure.

The reference to "jurisdiction over low-tide elevations" in the definition of "seabed jurisdiction"[80] appears to preclude any argument that a low-tide elevation is an artificial island and thus subject to the provisions on residual jurisdiction. The inclusion of this reference was also intended to prevent the argument from being raised, in areas outside the area of divided jurisdiction, that the jurisdiction of the party entitled to exercise seabed jurisdiction did not run in respect of these features. Because the area is full of low-tide elevations of one kind or another, it was thought desirable to put the matter beyond doubt.

Although the Treaty demonstrates the feasibility of separate maritime delimitation lines for separate purposes such as fisheries and seabed resources, if states do so agree, it is clear that they must also determine how to deal with

[77] *Supra* note 1.

[78] *Ibid.* Article 60 only confers jurisdiction over installations and structures for the purposes provided for in Article 56 and other economic purposes or if they may interfere with the exercise of the rights of the coastal state in the zone.

[79] *Ibid.* Article 80 applies Article 60 *mutatis mutandis* to the continental shelf.

[80] *Supra* p. 333.

matters of residual jurisdiction in areas of divergence. In the Torres Strait Treaty, the parties essentially left this question for future resolution by mutual agreement, but they defined "residual jurisdiction" broadly so that it encompasses jurisdiction over any matter not directly related to resource exploration and exploitation. Consequently, they have forgone certain rights that otherwise, in the light of developments in international law, would be within their jurisdiction by virtue of their sovereign rights over an area for resource purposes. The fact that the two parties agreed in this particular case to these special arrangements reflects their belief that to a large extent the exercise of jurisdiction over matters such as artificial islands in this particular area may be some time off. It also reflects their judgment that it is not possible to deal with matters such as pollution or scientific research divorced from the activity to which they relate, whether it be seabed resource extraction or something else. With goodwill on both sides, there seems no reason why the novel provisions on residual jurisdiction should not work. The solution reached belies the suggestion of some[81] that a single maritime boundary "will invariably be adopted" by states and reinforces the thesis of this article that one should not approach delimitation issues with a focus on a single objective.[82]

In fact, Australia may well conclude another maritime delimitation agreement that provides for separate seabed and fisheries jurisdiction lines. This agreement would be with Indonesia in the Timor Sea area.[83] Negotiations are still under way, but on an interim basis the outer limit of the Australian fishing zone does not extend in certain areas as far as the seabed line negotiated in 1972.[84]

Before leaving the question of maritime jurisdiction, reference should be made to Article 9 of the Treaty, which deals with wrecks. Jurisdiction over wrecks of vessels or aircraft on the seabed is acknowledged to belong to the party who has seabed jurisdiction over the area where the wreck is located. There is provision for the parties to consult if a wreck of historical or special significance to one party is found in an area under the jurisdiction of the other. This provision reflects the parties' concern to protect historic objects found at sea, a concern that is given further recognition in Article 303 of the Draft

[81] *E.g.*, McRae, *supra* note 5, at 301.

[82] An interesting argument is made by Professor Lumb that, in order to avoid different delimitation lines, it may be possible in some circumstances for fisheries zones to be delimited by lines other than median lines. This writer is not attracted by the argument. Lumb, *The Delimitation of Maritime Boundaries in the Timor Sea*, 7 AUSTL. Y.B. INT'L L. 72, 84–86 (1981).

[83] Negotiations between Australia and Indonesia are being conducted to fill the "gap" opposite East Timor in the seabed line negotiated by Australia and Indonesia in 1972. At the time, East Timor was a Portuguese colony and no separate agreement was reached in relation to this area. Negotiations are also being held to reach agreement on a delimitation line for fisheries purposes.

[84] When Australia established a 200-mile fishing zone in 1979, the interim delimitation line established between Australia and Indonesia was a median line drawn from the most favorable base points, including a number of small islands. COMMONWEALTH OF AUSTRALIA GAZETTE, *supra* note 25, at S225. In the Timor Sea area, however, it does not extend in places as far as the seabed line negotiated in 1972. *See* Agreement between Australia and Indonesia establishing certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, Oct. 9, 1972, in NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, *supra* note 17, at 441, *reprinted in* 11 ILM 1272 (1972) and 12 *id.* at 357 (1973).

Convention on the Law of the Sea.[85] While Article 303 refrains from indicating the basis for jurisdiction over archaeological and historical objects,[86] Article 9 clearly asserts that jurisdiction over such objects appertains to the coastal state on whose continental shelf the objects are located. Australia has asserted such jurisdiction in the past.[87]

The Islands

As often happens when islands are involved, sovereignty over certain islands in Torres Strait became an issue in dispute that affected the delimitation of maritime areas. The Treaty, however, deals fully with this issue. Article 2, paragraph 1 provides that Papua New Guinea recognizes the sovereignty of Australia over more than a dozen named islands north of the seabed line, and all islands lying between the mainland of the two countries and south of the seabed jurisdiction line. Paragraph 2 of Article 2 states that no island over which Australia has sovereignty other than those specified in the list lies north of the seabed line.

The Torres Strait area is full of reefs and shoals and low-tide elevations. Its character is such that islands may develop over time. Moreover, there was room for argument during the negotiations over whether certain features actually amounted to islands under international law.[88] Certain of the features over which Papua New Guinea accepted Australian sovereignty, such as Pearce Cay and East Cay, are in fact minuscule, consisting of only a few rocks or small sand cays.[89] In these circumstances, paragraph 2 of Article 2 is designed to prevent Australia from arguing that any other features north of the seabed line amount to islands under its sovereignty. This provision is reinforced by Article 2(3)(b),[90] which as drafted is ambiguous about the position of future features

[85] *Supra* note 1.

[86] Article 303 was first adopted at the resumed ninth session in August 1980. It recognizes that states have the duty to protect archaeological objects and objects of historical origin found at sea. It then provides that in order to control traffic in such objects the coastal state may, in exercising its rights in relation to the contiguous zone, presume that their removal from the seabed from the area of the contiguous zone would result in an infringement within its territory or territorial sea of the regulations of the coastal state that apply to the contiguous zone. This most unusual provision represents a compromise that was forced on a largely apathetic conference. From a legal point of view, it represents a peculiar addition to the contiguous zone regime. Owing largely to the efforts of Australia, the article goes on to provide that it is without prejudice to other international agreements and rules of international law regarding the protection of archaeological objects. For further discussion of Article 303, see Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AJIL 211, 239–41 (1981). For archaeological and historical objects found in the Area beyond national jurisdiction, see the Draft Convention, Art. 149.

[87] Historic Shipwrecks Act, 1976.

[88] The generally accepted definition of an island at international law is "a naturally-formed area of land, surrounded by water, which is above water at high tide." Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, TIAS No. 5639, 516 UNTS 205, Art. 10.

[89] An examination of Annex 4 to the Treaty, which illustrates the territorial sea around certain of the islands, indicates the tiny features that were categorized as islands.

[90] Article 2(3)(b) provides that Australia recognizes the sovereignty of Papua New Guinea over "(b) all the other islands that lie between the mainlands of the two countries and north of the [seabed] line . . ., other than the islands specified in subparagraph 1(a) of this Article." *See*

that may emerge. Papua New Guinea probably regards the provision as ambulatory in nature. It is not clear that Australia does.

The other significant provision relating to sovereignty over islands is paragraph 3 of Article 2, in which Australia recognizes Papua New Guinean sovereignty over the islands of Kawa, Mata Kawa, and Kussa. As already mentioned, it was only in 1978 that Australia discovered that the islands were not historically part of its territory. Although at that time the Government was accused of "researching away" the islands, a well-detailed and documented case was presented for public scrutiny.[91]

Early in the negotiations, Papua New Guinea sought the transfer to it of all uninhabited islands in the northern part of the Strait. This demand was strongly opposed by the Australian Government and various interests in Australia, including the Torres Strait islanders and the state government of Queensland. The discovery of a sound historical basis for saying that certain islands never formed part of Australia therefore enabled Australia to appear to be giving Papua New Guinea something in return for the latter's acceptance of Australian sovereignty over all other islands. Once the question of sovereignty over islands could be settled amicably, the basis for drawing lines of maritime jurisdiction became clearer.

The Treaty contains another significant provision on islands, the agreement by both parties to limit their territorial seas. Australia has to date only claimed a 3-mile territorial sea around its territory.[92] Papua New Guinea in 1977 established a 12-mile territorial sea.[93] Under Article 3, Australia agreed to limit the territorial sea around its islands north of the seabed line to 3 miles. For the northernmost islands, it was necessary to delimit the northern part of their territorial sea with that of the Papua New Guinean mainland.[94] The delimitation of other parts of the territorial sea of those islands and of that of other Australian islands north of the seabed line is described specifically in an annex to the Treaty.[95] The outer limits of the territorial seas consist of a series of intersecting arcs of circles having a radius of 3 miles and drawn from specified points. This method was adopted rather than defining baselines because of the unstable nature of many of the islands' foreshores and the difficulty of actually ascertaining the low-water mark around them. The problem is acute in many cases because the islands are surrounded by mangroves. Thus, the Treaty specifically provides that around these islands the "territorial seas shall not be enlarged or reduced, even if there were to be any change in the configuration of a coastline or a different result from any further survey."[96]

Papua New Guinea for its part agreed not to extend its territorial sea into certain areas. These include the agreed areas of Australian territorial sea to the north of the seabed line, the agreed area of Australian fisheries jurisdiction

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Dingley, *Eruptions in International Law: Emerging Volcanic Islands and the Law of Territorial Acquisition*, 11 CORNELL INT'L L.J. 121 (1978).

[91] *Supra* note 11.

[92] It did, however, claim a 12-mile fishing zone in 1967.

[93] *Supra* note 24.

[94] Art. 3(1).

[95] Ann. 3 to the Treaty. The limits are shown on maps forming Annex 4.

[96] Art. 3(2).

north of the seabed line, and the area south of the agreed seabed line.[97] Nor is it to intrude into these areas with archipelagic baselines or archipelagic waters. In the absence of such a provision, a 12-mile Papua New Guinean territorial sea could seriously intrude into areas that had otherwise been agreed to be subject to Australian jurisdiction.

It may be argued that Australia could legally have claimed a continental shelf around the islands greater than the 3 miles to which it agreed. Certainly, the *Anglo-French* arbitration[98] suggests that enclaves on the continental shelf of another state are entitled to at least 12 nautical miles of their own shelf, particularly as the 12-mile limit of territorial sea is becoming generally accepted in international law.[99] But just as with the Aegean Sea, the consequence here of a general claim to a 12-mile territorial sea around all islands needs to be kept in mind. Such a claim would effectively have turned the Torres Strait area into a sea of Australian jurisdiction extending up to within a mile or so of the Papua New Guinean mainland. (This was in fact largely the case under the 12-mile fishing zone established by Australia in 1967.) Such a result was not seen as satisfactory or equitable by either side. The agreement by Australia to limit its territorial sea should be seen as part of the overall settlement under which Australian interests were largely protected. A protected zone safeguards the interests of the inhabitants, and the fisheries enforcement provisions enable Australia to exercise jurisdiction over its nationals no matter where an alleged offense occurs. Australian retention of sovereignty over large territorial seas in the northernmost part of the Strait was thus seen as unnecessary.

On the other hand, throughout the negotiations Papua New Guinea sought to gain Australian agreement to proposals that would give it some control over the uninhabited islands, even if transfer of sovereignty was not possible. Australia, however, was not prepared to forgo the right to a territorial sea around the small uninhabited islands. Australia could argue, with the support of good authority, that every piece of territory gives rise to an appurtenant territorial sea and that it is not appropriate for territory not to be accorded its normal appurtenant maritime rights up to at least 3 miles.[100] Nevertheless, Australia did agree to special provisions on fisheries within the territorial sea around

[97] Art. 3(6)(b).

[98] *Supra* note 3.

[99] *See* the discussion in Symmons, *supra* note 63.

[100] International lawyers appear divided over whether a solution by which a state would renounce any territorial sea around certain territory is possible. In the *Fisheries* case between Norway and the United Kingdom, Lord McNair, in his dissenting opinion, said:

> To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters. . . . International law does not say to a State: "You are entitled to claim territorial waters if you want them." No maritime State can refuse them. . . . The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

[1951] ICJ REP. 116, 160. This view of the inseparability of territorial sea from land is supported by J. H. W. Verzijl because "as a general rule" the territorial sea has "no independent existence as an element of the national territory severed from the coast which it borders." 3 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 54–55 (1970). This view is also supported in 1 L. OPPENHEIM, INTERNATIONAL LAW 463 (8th ed. H. Lauterpacht, 1955).

islands,[101] including additional rights for Papua New Guinean fishermen in the territorial seas of uninhabited islands north of the seabed line.

Fisheries Resources

Within the Protected Zone, the parties established a special regime for the conservation and management of "Protected Zone commercial fisheries."[102] These are defined as

> fisheries resources of present or potential commercial significance within the Protected Zone and, where a stock of such resources belongs substantially to the Protected Zone but extends into an area outside but near it, the part of that stock found in that area within such limits as are agreed from time to time by the responsible authorities of the Parties.[103]

Fisheries resources means "all living natural resources of the sea and seabed, including all swimming and sedentary species."[104] Thus, within the Protected Zone the parties have dispensed with distinctions between sedentary and other species. For management purposes, division of jurisdiction on the basis of lines of seabed or fisheries jurisdiction is largely disregarded in favor of a regime that seeks to manage the living resources as a whole, even though their actual allocation is determined by reference to jurisdictional rights. The fisheries regime in the Protected Zone has two major aspects: first, the sharing of the resources, and second, the enforcement of conservation measures.

Article 23 sets out detailed provisions for the sharing of the total allowable catch of a particular Protected Zone commercial fishery. The total allowable catch is determined jointly by the parties. In general, in areas under the jurisdiction of one state, that state is entitled to 75 percent and the other state to 25 percent of the allowable catch. This applies in areas both of territorial sea and of fisheries jurisdiction. However, the catch in the territorial sea around *uninhabited* Australian islands north of the seabed line is to be shared 50:50. Special provision is also made to give Papua New Guinea sole entitlement to the allowable catch of the barramundi fishery near its coast in areas outside the territorial sea of Australian islands. This provision reflects the special economic significance of this fishery to the local inhabitants, as well as its biological association with Papua New Guinea. The special barramundi entitlement is disregarded in calculating the total allowable catch to which the more general sharing formula is applied.

This view is not supported, however, by G. Schwarzenberger, who says that it is "not easy to see why a coastal State should contravene international law if it relinquished its claims to a part or the whole of its territorial sea." 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 324 (3d ed. 1957). He does not consider that the argument that a state has duties, as well as rights, in the territorial sea requires that jurisdiction over the territorial sea be regarded as compulsory. He says, however, that "so long as, for *any* purposes, [a state] claims the right of jurisdiction over its territorial sea, it is clear that it is subject to *all* the duties which international law imposes on a State which claims such rights." *Id.* at 325. *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 124 (2d ed. 1973).

[101] *See* "Fisheries Resources" *infra.*

[102] Arts. 20–28.

[103] Art. 1.

[104] *Ibid.*

Any provision for the sharing of resources raises complex problems. How, for instance, is the share to be calculated? The Treaty provides for sharing both in respect of each individual commercial fishery and in respect of the overall catch of Protected Zone commercial fisheries. Thus, the catch of barramundi, crayfish, skipjack, tuna, and prawns are each to be shared in the agreed proportions. The Treaty provides that this apportionment should normally be made in terms of weight or volume. To take account of particular concerns or distribution patterns, shares may be varied by agreement in subsidiary arrangements,[105] but the overall apportionment of all the Protected Zone commercial fisheries is to be maintained in the proportions agreed in the Treaty. For this purpose, regard is to be had to the relative value of the individual fisheries. The parties are to base such a calculation on an agreed common value for the production of each individual fishery, based on the value of the raw product at the processing facility. This provision is designed to overcome problems that could arise if the value of the processed product were taken into account, which might well vary among the different markets where the product might be sold.[106]

Apart from the general sharing provisions, there is a transitional clause designed to ensure that in the 5-year period after the entry into force of the Treaty the existing level of catch taken by each party will not be reduced, provided that it remains within the allowable catch. But there is provision for the catch to be progressively adjusted during the second 5-year period to reach the level to which each party is normally entitled.[107]

It is too early to assess whether the provisions on sharing the catch will work effectively. In part, it will be difficult to obtain sufficient information on how much, and where, a particular fishery has been exploited. No subsidiary arrangements have yet been concluded, but they may provide a way to overcome such thorny problems as how to determine precisely what proportion of fish were taken in the territorial sea or elsewhere. While the special treatment for sharing purposes given to fish caught in the territorial sea of the uninhabited Australian islands can be seen as justifiable politically, in terms of practical implementation it may give rise to problems. Nevertheless, the provisions in the Treaty do appear to contain sufficient flexibility to ensure that the spirit of the agreement is complied with even if its finer points are disregarded in practice.

The other significant fishery matter for which the Treaty makes special provision is the enforcement of fisheries laws. The detailed implementation of these provisions within the framework of the ordinary criminal law system of the two countries has already caused considerable difficulty. In short, the Treaty envisages the issuance of licenses by each country to permit commercial fishing in Protected Zone commercial fisheries. These licenses can extend to any such fishery and are not confined to areas under the jurisdiction of the issuing state. At the request of the issuing party, the other party is obliged to endorse such

[105] Art. 23(7). Article 22 provides for the parties, where appropriate, to negotiate subsidiary conservation and management arrangements.

[106] The parties may agree on a point other than the processing facility, but prior to any enhancement of the value through processing or further transportation or marketing. Art. 23(6).

[107] Art. 24.

licenses authorizing the holder to fish in areas under that other party's jurisdiction. Persons so authorized to fish in waters under the jurisdiction of the other party are to comply with the relevant fisheries laws and regulations of that other party, except that they shall be exempt from licensing fees, levies, and other charges.[108] This avoids the need for fishermen to pay two license fees. Fishing by third states is subject to consultation between the two parties, and vessels under the control of nationals of a third state shall not be licensed to exploit Protected Zone commercial fisheries without the concurrence of authorities of both parties.[109]

Just as licenses are applicable throughout the zone, so each state is to apply its fisheries laws to the unauthorized use of vessels of its nationality to fish in Protected Zone commercial fisheries.[110] Within areas under its jurisdiction, each party is primarily responsible for investigation of suspected offenses. Corrective action, including the prosecution of an alleged offender, will normally be the responsibility of the state of nationality rather than the state in whose jurisdiction the offense was committed. The latter state is entitled to investigate the alleged offense and to detain the alleged offender and his vessel. If it appears, however, that the offense was committed in the course of traditional fishing or by a person or vessel licensed by the other party to fish in the zone, then the detaining party shall either release the alleged offender and his vessel or hand them over to authorities of the first party in accordance with arrangements that will avoid undue expense or inconvenience. Thus, the Treaty provides essentially for enforcement on the basis of nationality, although the state in whose area of jurisdiction an alleged offense occurs may investigate and obtain evidence, and the other party is to facilitate the admission of that evidence in its courts.[111]

As with the sharing arrangements, it is not yet possible to say whether these provisions will work. It is understood that difficulties have arisen in trying to translate these general principles into specific provisions of domestic law. In particular, the handing over of suspects without the normal use of extradition procedures raises problems.

The concept of national jurisdiction for enforcement purposes throughout a particular maritime area is not a new feature of fishery management regimes. The Treaty of 1973 between Argentina and Uruguay concerning the La Plata River[112] provided for a zone within which each party would have jurisdiction over its own vessels. Under that Treaty, the authorities of one party may seize a vessel of the other party when caught in violation of the relevant fishing or pollution laws, and the violating vessel is then to be placed at the disposal of the authorities of the other party. Similarly, in the 1977 Reciprocal Fisheries Agreement between Canada and the United States,[113] provision was made for flag state enforcement in "boundary regions" beyond the zones of either party.

[108] Art. 25.
[109] Art. 26.
[110] Art. 28.
[111] *Ibid.*
[112] Nov. 19, 1973, *reprinted in* 13 ILM 251 (1975).
[113] Feb. 24, 1977, 28 UST 5571, TIAS No. 8648, *reprinted in* 16 ILM 590 (1977). The Agreement was temporary and is no longer in force.