The Torres Strait Treaty

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Introduction

Although the determination of issues of sovereignty over certain islands in the Torres Strait and the establishment of maritime boundaries in the Torres Strait area are not questions which aroused much popular interest during most of this century, they were of considerable importance at the end of the last century, and they re-emerged as potentially troublesome problems as Papua-New Guinea moved towards the achievement of independence on 16th September 1975. Those problems were partly international in character, involving the Commonwealth of Australia and Papua-New Guinea. They were also partly constitutional disputes between the Commonwealth and the State of Queensland, which claimed that the islands and their territorial waters were part of the territory of Queensland, and opposed any solution which would entail the cession of territory to Papua-New Guinea or the limitation of the traditional rights of the Torres Strait Islanders.

In the course of the nineteenth century, by a process outlined in the next section of this paper, the territorial limits of Queensland were progressively extended to include the adjacent islands within sixty miles of the mainland coast of Queensland and the islands lying in Torres Strait between Australia and Papua-New Guinea. The effect of this development was that by August 1879 the territory of the Colony of Queensland, and subsequently the territory of Australia, was extended as far northward as was possible without Queensland attempting to annex part of the Island of Papua-New Guinea itself. What had been established was a situation under which the territory of the Colony of Queensland included islands from which at low tide it was possible for the inhabitants of the Colony of Queensland to wade across a shallow channel to mainland Papua-New Guinea and vice versa. Furthermore, it became impossible for any shipping or maritime traffic of any significant draught to pass along the southern coast of New Guinea without coming within waters which Queensland claimed were its territorial waters.

After Papua-New Guinea became self-governing in December 1973, the determination of claims to sovereignty and of maritime boundaries in the area between Australia and Papua-New Guinea began to loom as a major issue between the two countries. As one writer observed in 1973, it was

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'difficult to look south from Papua and not see the present Queensland border as a cartographic absurdity if not a growing affront to a country on the verge of independence'.[1] It was realised by many in Australia, and in particular by the Commonwealth Government, that some settlement had to be made which would recognise the interest of Papua-New Guinea in the Torres Strait area. That interest comprised several elements: the issue of sovereignty over certain islands; the establishment of maritime boundaries; the protection of the livelihood of Papua-New Guineans who inhabited the mainland coastal area adjacent to the Torres Strait; the freedom of navigation and overflight in the area; the right of access to fisheries resources; the protection of the marine environment; and the exploitation of seabed mineral resources.

Various alternative measures which might be taken by Australia to accommodate Papua-New Guinea's claims were canvassed during the period of two years preceding Papua-New Guinea's independence. One proposal was to move the northern limits of Queensland and Australia south by the cession of territory to Papua-New Guinea. Immediately prior to federation an alteration of the boundary of any colony could be effected by order of the Crown with the concurrence of the self-governing colony under the provisions of the Colonial Boundaries Act, 1895. However, with the enactment of the Commonwealth of Australia Constitution Act, certain provisions were made as to the alteration of boundaries. Section 8 of the Act provided that thenceforth the Colonial Boundaries Act 1895 was not to apply to any colony which became a State of the Commonwealth but the Commonwealth was to be taken as a self-governing colony for the purposes of the Act. The apparent effect of this was to make the Colonial Boundaries Act apply not to the separate States of the Commonwealth but to the Commonwealth as a whole. But the application of the Colonial Boundaries Act after federation was affected by specific provisions in the Commonwealth Constitution, which covered almost every conceivable boundary alteration, and also by the subsequent enactment of the Statute of Westminster, so that the continued operation of the Act is open to question.[2] These specific provisions include s 121 (admission of new States), s 122 (admission and government of Territories), s 51 (xxix) (external affairs) and s 123 (alteration of boundaries of States).

Section 123 is of particular relevance to the situation in the Torres Strait. It provides that the Commonwealth Parliament may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, alter the limits of the State upon such terms and conditions as may be agreed on, and may with the like consent make provision respecting the effect and operation of any alteration of territory in relation to any State affected.[3] Thus, provided

1. Hastings P, *New Guinea: Problems and Prospects* 2nd Ed (1973) p 171.
2. See Lumb and Ryan, *Constitution of Australia* 2nd ed (1977) p 32.
3. In early 1973, when a dispute arose between the Commonwealth Government and the Queensland Government over a proposal to transfer to Papua-New Guinea certain

that the Queensland Parliament, the majority of Queensland electors voting on the question in a referendum and the Commonwealth Parliament all approved, territory in the Torres Strait over which Australia has sovereignty might be vacated. The way would then be open for the sovereign state of Papua-New Guinea unilaterally to take control of the islands vacated by Australia.

A second proposal was to create a new Australian State or Territory of the Torres Strait area. Under s 111 of the Commonwealth Constitution, it only requires the Parliament of a State to act to surrender any part of the State to the Commonwealth. If Queensland surrendered such territory, it would become a Commonwealth territory subject to the exclusive jurisdiction of the Commonwealth under s 122 of the Constitution. The Commonwealth Parliament might be able, under its external affairs power, s 51 (xxix), to alter the boundary of such a territory, since the limitation on alteration of borders contained in s 123 applies only to States. Alternatively, a new State comprising the Torres Strait area might be formed pursuant to s 124 of the Constitution by separation of territory from Queensland, with the consent of the Queensland Parliament. Though this would incidentally affect the boundaries of the present State of Queensland, it is open to question whether it would be a boundary alteration under s 123, so as to require action by the Commonwealth Parliament and approval of a majority of Queensland electors.

A third proposal was that any issues between Australia and Papua-New Guinea should be settled by facilitating the submission of such disputes to the International Court of Justice. On the 17th March 1975 the Australian Government withdrew its reservations to the Optional Clause of the Statute of the International Court of Justice made in its declaration of 6th February 1954, except the reservation of disputes in regard to which the parties had agreed or should agree to have recourse to some other method of peaceful settlement.[4] Among the reservations withdrawn were those as to disputes with the government of any other member of the British Commonwealth, disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia in regard to the Australian continental shelf and the resources of its seabed and subsoil, and disputes in respect of 'Australian waters' as defined in the Australian Fisheries Acts. While the Prime Minister of Australia said that this new declaration was made to indicate the Government's support for the International Court, it is clear that the Government had in mind the possibility of the border issue being decided by the Court in the event of failure to reach

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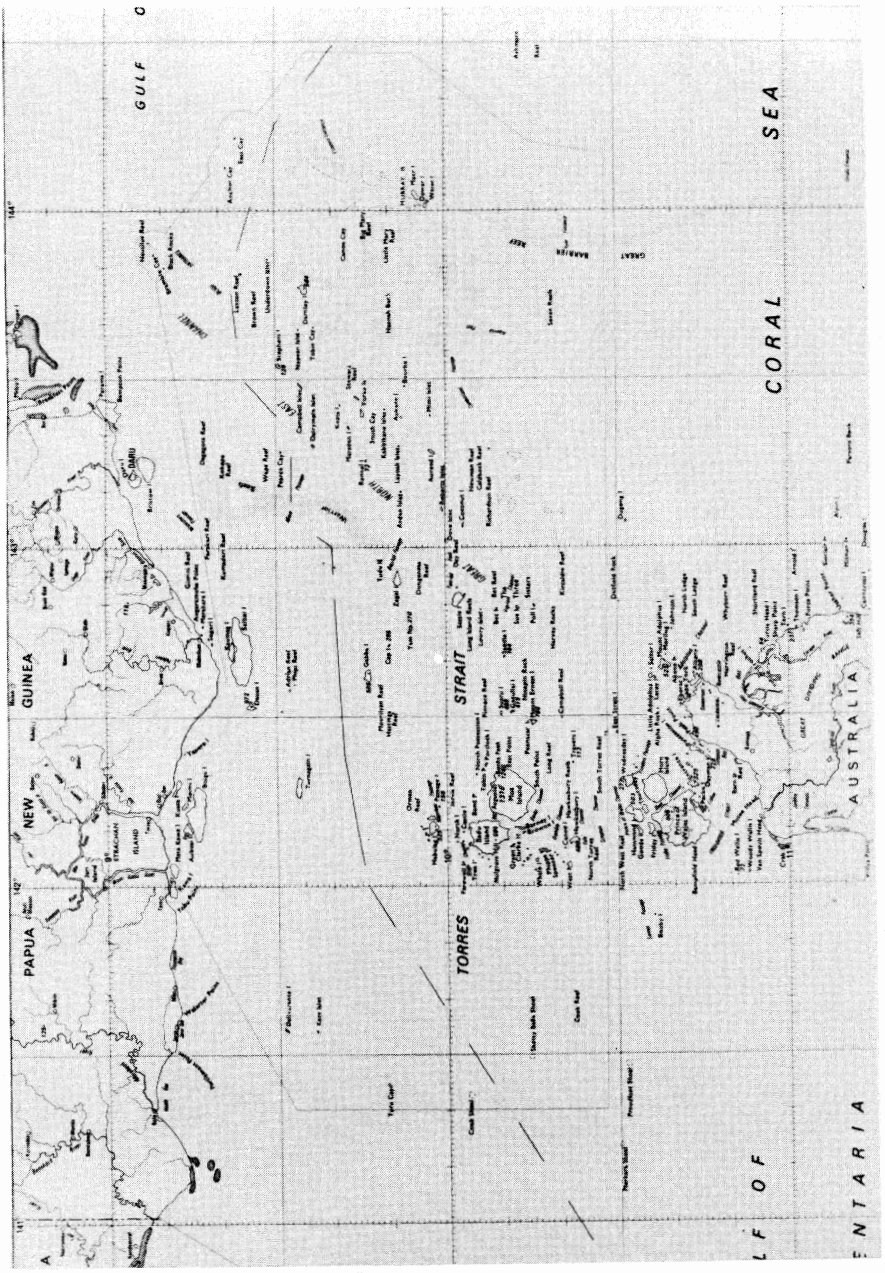
islands in the Torres Strait, the Queensland Premier claimed that such a boundary alteration would fall under s 123. In this he was probably correct. See Lumb and Ryan op cit p 376; see generally Lumb, 'Territorial Changes in the States and Territories of the Commonwealth' (1963) 37 ALJ 172. Note also *Paterson v O'Brien* (1978) 18 ALR 31.

4. Aust TS 1975, No 50. The earlier declaration is in Aust TS 1954, No 8. It is understood that Papua-New Guinea has not made a declaration under Article 36 (2) of the Statute of the International Court of Justice.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consensus with the Government of Queensland and the Government of Papua-New Guinea.

All of these proposals would have involved complex issues of constitutional and international law, and would almost certainly not have resulted in a situation which was acceptable to the two countries or, within Australia, to the State of Queensland. They involved either a transfer of some islands to Papua-New Guinea, and the consequential definition of maritime boundaries between that country and Australia, or the retention of Australian sovereignty and control over the whole area. The former solution was unacceptable to the Torres Strait Islanders, who insisted on the preservation of their right to freedom of movement and to carry on their traditional activities over the whole area, while the latter was unacceptable to Papua-New Guinea. It was only through a careful process of negotiation that an equitable and satisfactory answer to the various claims could be found. It was fortunate that, as Papua-New Guinea moved towards independence, both countries were willing to engage in such negotiations and to consult the State and Provincial leaders of their countries and the Chairmen and Councillors representing the peoples of the Torres Strait area.

In a report to the Papua-New Guinea House of Assembly in December 1974,[5] the Minister for Foreign Relations expressed his Government's attitude on the Torres Strait issue. First, he rejected the notion that the line defining the limits between Australia and Papua-New Guinea[6] was a border; it was certainly, he said, in no sense a border. In saying this, the Minister was clearly correct in law, as is pointed out later in this paper. He went on to say that if the line were ever recognised as an international border, then grave difficulties would arise for all parties concerned. He stressed that in fixing the border, the first priority would be to ensure that the traditional fishing and trading rights of Papuans were protected. He then pointed out that natural justice demanded some sharing of the resources of the area between the two countries. Finally, the Minister expressed the hope that the two Governments would ratify an agreement shortly after independence.

By June 1976, negotiations had reached a stage where a Joint Statement was issued by the Foreign Ministers of the two countries, in which they declared that they had reached agreement on a number of points which were basic to a settlement. In particular, they agreed on the delimitation of a seabed boundary between Australia and Papua-New Guinea, which would lie to the north of all Australian inhabited islands except Boigu, Dauan and Saibai (the three islands closest to the Papua-New Guinea coast). Papua-New Guinea accepted that Australia would retain all Australian inhabited islands. It was agreed that the Australian territorial sea around the islands of Boigu, Dauan and Saibai would be three miles, and that there would be a line delimiting the territorial seas between those islands and Papua-New Guinea. Finally, it was agreed that a zone would

5. (1975) 46 Aust FA Rec 320.
6. The reference is to the 1879 line, which is explained in the next section of this paper.

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.

On 25 May 1978, statements were made by the Foreign Ministers[7] of Australia and Papua-New Guinea in their respective Parliaments on the principal basic elements which they had agreed would be included in a treaty on matters relating to Torres Strait.[8] These were followed by further negotiations on points of substance and the settlement of items of detail, so that by November 1978 the text of a treaty was agreed by the two Governments. The Torres Strait Treaty was signed on 18 December 1978. At the time when this article was written (January, 1980) it was still awaiting ratification.

The Treaty involved in part the establishment by the two countries of an agreed position on their sovereignty over certain islands. This agreement entailed a close examination of the historical factors which indicated whether sovereignty over certain islands belonged to Australia or Papua-New Guinea. The agreement also involved the establishment of maritime boundaries in the Torres Strait. The settlement of these boundaries was not dependent to the same extent on accidents of history. It was only after Papua-New Guinea became a sovereign, independent state on 16 September 1975 that it acquired the right to claim maritime boundaries in accordance with the relevant rules of international law.

In delimiting these boundaries, close regard was paid to the principles which are currently under discussion in the Third Law of the Sea Conference on the territorial sea, the continental shelf, the contiguous zone and the exclusive economic zone. In addition, it was recognised by the two Governments as essential that a settlement of the Torres Strait issue must preserve the traditional way of life of the Torres Strait Islanders and the residents of the adjacent coast of Papua-New Guinea. This involved the preservation of their freedom of movement and fishing rights throughout a 'protected zone' which could not be confined by the maritime boundaries in the Torres Strait area, but which had to be extended north and south of such boundaries.

There are accordingly three main matters dealt with in the Treaty. These are: the settlement of the issue of sovereignty over the islands in the Torres Strait area; the delimitation of maritime boundaries between Australia and Papua-New Guinea; and the determination of the legal regime applicable within the protected zone.

Sovereignty over the Torres Strait Islands

The first substantive article in the Torres Strait Treaty (Article 2) sets out the agreed position of Australia and Papua-New Guinea on the issue of sovereignty over islands in the Torres Strait area. It constitutes a recog-

7. HR Deb 1978, Vol 109, 2483; PNG Parl Deb 25 May 1978.
8. The Treaty has been published in (1978) 18 ILM 291.

nition by the two countries of rights which had been established progressively in the nineteenth century.

Under s 51 of the Australian Constitutions Act, 1842 (Imp), power was given to the Queen to erect into a separate colony territory of New South Wales lying northward of the 26th degree of South Latitude. This demarcation was subsequently altered by the Australian Constitutions Act of 1850 to the 30th degree of South Latitude. That Act also provided (in s 34) that upon petition of the inhabitants, the territory lying north of that latitude could be created into a separate colony by Letters Patent issued under the Great Seal. When New South Wales became a self-governing colony by the New South Wales Constitution Act 1855 (Imp), provision was made by s 7 of that Act for the erection into a separate colony or colonies of any territories separated from New South Wales by alterations of its northern boundary. A separate colony was so created by Letters Patent of 6th June, 1859, which established the Colony of Queensland.

Subsequently, by Letters Patent dated 13th March 1862, the boundary of Queensland was altered by moving part of its western boundary westward, and there were annexed to the Colony of Queensland the adjacent islands in the Gulf of Carpentaria.

The northern boundary of the new colony derived from that of New South Wales as laid down in the two commissions issued to Governor Phillip in 1786 and 1787, which delineated boundaries from the northern extremity of Cape York at 10°37′ South Latitude to the southern coast of Tasmania.[9] The eastern maritime boundary of the Colony of Queensland was left in an uncertain state after 1859. Governor Phillip's Commissions had included 'the islands adjacent in the Pacific Ocean', while the Letters Patent in 1859 referred to the new Colony as including 'all and every the adjacent islands, their members and appurtenances in the Pacific Ocean'. However, the British Law Officers took the view that only islands which were within three miles of the mainland coast were 'adjacent' in the sense used in the Letters Patent (though initially it had been thought that islands as far away as Tahiti and New Zealand fell within the notion of 'adjacent islands' as used in Governor Phillip's Commissions).

In 1863 and 1868, Commissions were issued to the Governor of New South Wales which authorised the leasing of islands belonging to the Crown, not then within the jurisdiction of any Colonial Government. The Queensland northern boundary was then the top of Cape York, and consequently the islands to its north were not within the Colony. Accordingly, the Commissions authorised the Governor of New South Wales to deal, and he did so deal, with islands from the top of Cape York up to 10° south, which was the northern limit of the area authorized to be dealt with by the Commissions. However, as a result of representations to the Imperial authorities that it was unsatisfactory that the Governor of one colony should be empowered to deal with islands near the coastline

9. See Lumb RD, *The Maritime Boundaries of Queensland and New South Wales* (1964) p 4; and Cumbrae-Stewart FWS, *Australian Boundaries*, reproduced in 5 UQLJ 1.

of another, Letters Patent were issued in 1872 which authorized the Governor of Queensland to annex all islands within sixty miles of the Queensland coast. These islands were transferred from the Governor to the Colony of Queensland by deed poll of 22 August 1872.

In 1878, Letters Patent were issued 'for the rectification of the maritime boundary of Queensland, and for the annexation to the Colony of Dauan, Saibai, Talbot, Deliverance and other islands, lying in Torres Straits, and between Australia and New Guinea'. The Letters Patent were not to take effect until the Queensland Parliament passed a law providing that the islands would become part of the Colony. This was done by The Coast Islands Act, 1879 (Qld), and the islands were annexed from 1st August 1879. This further extension was motivated by a desire for Queensland to exercise control over that territory in order that the pearling industry might be properly regulated, and to ensure that the area should not fall under the control of any foreign power.[10]

It is important to observe that the so-called '1879 line' served only to indicate the islands which were to be incorporated into Queensland. Islands south of that line were annexed to the Colony. It was not a maritime boundary in the international law sense. The issue of the respective rights of Australia and Papua-New Guinea in respect of the seas adjacent to their territories could be determined, after Papua-New Guinea became a sovereign independent state, only by the application of the rules of international law. The schedule to the Coast Islands Act, 1879 (Qld), referred only to the islands and not to the sea contained between the mainland and the line there described, as Jacobs J pointed out in the *Seas and Submerged Lands* case.[11] The line was in no sense intended to be, nor could it operate as, a maritime boundary between two independent states.[12]

The situation created by the extension of Queensland's territory by the 1879 Act was recognised as anomalous by many contemporary persons of standing. In 1886 John Douglas, then resident Magistrate on Thursday Island and Special Commissioner to New Guinea, urged that 'the islands of Torres Strait, including the Prince of Wales Group (just north of Cape York) should be transferred to the New Guinea Protectorate'.[13] A less radical change was proposed in 1893 by Sir Samuel Griffith, namely that the islands of Saibai and Dauan should be put under the jurisdiction of British New Guinea. This proposal was varied by the Administrator of British New Guinea, Sir William MacGregor, who suggested in 1893 that a line should be drawn between those put forward by Douglas and

10. Joyce RD, 'The Border Problem between Papua-New Guinea and Australia—Historical Background', (1974) 13 World Rev 42.
11. *NSW v Commonwealth* (1975) 8 ALR 1 at 102.
12. It is suggested by the authors that the reference in the Letters Patent of 1879 to the 'maritime boundary of Queensland' was not to boundaries in the international law sense, but the term was used to delimit the islands annexed to Queensland as opposed to its mainland territory, where land boundaries were defined between Queensland and its neighbouring colonies.
13. See Joyce op cit, p 42.

Griffith, which would add the Warrior Reef's fishing area to British New Guinea.

In February, 1895, the Law Officers in England advised that the Letters Patent of 1872 and 1878 had not completely annexed the Torres Strait islands to Queensland. To correct the situation, the Colonial Boundaries Act 1895 was enacted. It provided in s 1(1) that 'where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or Letters Patent, the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the Colony'. It further provided that 'the consent of a self-governing Colony shall be required for the alteration of the boundaries thereof'.

On 29th June, 1896, an Order in Council was issued to revise the boundary as proposed by Griffith. But as MacGregor objected that this was unacceptable, a compromise was worked out between the suggested Griffith and MacGregor lines. This compromise was agreed to by the Imperial authorities which approved it by an Order in Council on 19th May 1898. However, these Orders in Council required the consent of the Colony of Queensland to the alteration of its boundaries, and this consent was not given, and then federation occurred and introduced a new factor.

In 1906, the Prime Minister sought an opinion from the Commonwealth Attorney General (Isaacs) as to the action necessary to carry into effect the Order in Council of 1895. The matter had been affected by covering clause 8 of the Constitution Act, which provided that 'after the passing of this Act the Colonial Boundaries Act 1895 shall not apply to any Colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act'. The effect of this clause, Isaacs reported,[14] appeared to be that the Commonwealth was now a 'colony' and a 'self-governing colony' within the meaning of the Colonial Boundaries Act, and that the States were not 'colonies' or 'self-governing colonies' within the meaning of that Act. He thought that covering clause 8 authorised the alteration of the boundaries of the Commonwealth under the Colonial Boundaries Act by the King in Council with the consent of the Commonwealth Parliament. He also thought that the consent of the Commonwealth Parliament to the Order in Council of 1898 would not be technically sufficient to alter the boundaries of the Commonwealth. He suggested that the safer course would be to request the Imperial Government to revoke the Order in Council, and to substitute a new Order in Council, altering the boundaries of the Commonwealth, and then to obtain the approval of the Commonwealth Parliament to the alteration. Alternatively, he suggested that the Parliament of Queensland could under s 111 surrender the territory in question to the Commonwealth, and the Commonwealth could accept the territory. Then, under the Colonial Boundaries Act, the territory could be taken out of the Commonwealth and added to Papua.

These suggestions were not pursued. The only further action taken was

14. The opinion has never been published.

an effort by Queensland to consolidate the boundary by requesting and receiving a recitation of all the relevant Letters Patent annexing territory in a 'Proclamation of Letters Patent Constituting the Office of Governor of the State of Queensland', dated 10th June 1925.[15] The effect of this recitation appears to be to confirm the Letters Patent as having full force and effect despite the enactment of the Commonwealth of Australia Constitution Act, subject only to any over-riding provision of that Act.

The main argument advanced in 1893 by MacGregor for an alteration of the boundary in New Guinea's favour was that this was necessary to protect the traditional fishing rights of the inhabitants of the New Guinea Protectorate. 'No one can contend', he argued, 'that it is an equitable arrangement that Queensland should remain possessed of the valuable fishing grounds of the Straits right up to within less than a bowshot of the mainland of the (New Guinea) possession'.[16] This consideration was to retain its validity, and was to be a major factor in inducing Papua-New Guinea to seek a settlement of the Torres Strait problem immediately after it attained independence. The argument which Griffith used to support a transfer of Saibai and Dauan Islands was different. He urged that these islands belonged geographically and ethnologically to New Guinea, and that their inhabitants would be better governed under the laws which applied to their neighbours on the mainland of New Guinea, and which were appropriate to the particular needs and traditions of the islanders, rather than under the laws of Queensland which were framed principally for the white inhabitants. But over the ensuing eighty years the idea that a change in the boundaries would be of benefit to the islanders was to lose its validity in the eyes of the islanders themselves, who had come to think of themselves as Australians and to regard their islands as an integral part of Australia. They were to show resistance to the suggestion made by some in the early nineteen seventies that the solution to the problems of the Torres Strait area was to be found in the transfer of the islands close to Papua New Guinea to that state; and when the negotiations on the treaty were taken in hand one of the matters settled at the outset was that all Australian islands would remain Australian, and all Australian citizens would remain Australian citizens.

The Premier of Queensland, Mr J Bjelke-Petersen, had emphasised the desire of the Torres Strait Islanders to remain Australian citizens and to preserve their traditional fishing area. A motion of the Queensland Legislative Assembly adopted a resolution on 3rd April, 1974, to that effect and also that the area should be designated an International Marine Park. By a letter dated 26th June, 1974, the then Prime Minister, Mr E G Whitlam, wrote to the Queensland Premier pointing out there was much common ground between them concerning the issue, in particular that the status of the Islanders remain unchanged as Australian citizens and that there should be a special regime for the unique Torres Strait area.

15. Reprinted Queensland Statutes (1828-1962) Vol 2 p 806.
16. MacGregor to Sir Samuel Griffith a letter dated 29.6.1896. Reproduced in Joyce RB, *Sir William MacGregor* (1975).

Following elections in 1975 there was a change of Federal Government but the fundamental points established in 1974 were unchanged and from that time the public objections by the Queensland Premier ceased. The cessation of objections from the Queensland Premier may also have been contributed to by the attitude expressed by the then Papua-New Guinea Foreign Minister, Sir Maori Kiki, on 2nd February, 1977, that the matter was one for negotiation between the Papua-New Guinea Government and the Australian Government as representatives of their sovereign nations, which negotiations did not concern the Queensland Premier who had no standing in the matter.[17] At the signing of the Treaty the Queensland Premier and the three Torres Strait Island Group Chairmen were present and no opposition or complaint about the terms of the Treaty was expressed by any of them.

The matter of sovereignty over the islands is dealt with in Article 2 of the Treaty. By this:

(1) Papua-New Guinea recognises the sovereignty of Australia over—
  (a) the islands known as Anchor Cay, Aubusi Island, Black Rocks, Boigu Island, Bramble Cay, Dauan Island, Deliverance Island, East Cay, Kaumag Island, Kerr Islet, Moimi Island, Pearce Cay, Saibai Island, Turnagain Island and Turu Cay; and
  (b) all islands that lie between the mainlands of the two countries and south of the line referred to in Article 4(1) of the Treaty, namely the line used to define the boundary of Australian and Papua-New Guinean seabed jurisdiction (referred to henceforth as the seabed jurisdiction line).

(2) No island over which Australia has sovereignty, other than those specified in Article 1(a), lies north of the (seabed jurisdiction line).

(3) Australia recognises the sovereignty of Papua-New Guinea over—
  (a) the islands known as Kawa Island, Mata Kawa Island and Kussa Island; and
  (b) all the other islands that lie between the mainland of the two countries and north of the (seabed jurisdiction line) other than the islands specified in (Article 1(a)).

The three islands over which Australia recognises Papua-New Guinea sovereignty are small islands which fall between Aubusi Island and Boigu Island and the Papua-New Guinea coast. They are not mentioned in the schedule to the Queensland Coast Islands Act of 1879. In a Parliamentary statement by the Australian Minister for Foreign Affairs on 11th May 1978,[18] it was said that 'research had shown that the small uninhabited islands of Kawa, Mata Kawa and Kussa, which lie very close to the Papua-New Guinea Mainland but which have often been shown on maps as part of Queensland, were not among the Torres Strait islands annexed to Queensland in the last century.' An admiralty chart prepared by the British authorities in 1878, showing the islands intended to be annexed to

17. The steps in the negotiations between the two governments are set out in (1978) 49 Aust FA Rec 572.
18. HR Deb 1978, Vol 109, 2249.

Queensland, excluded these islands. As they were not annexed to Queensland, the effect of the Letters Patent of 8 June 1888 constituting British New Guinea was that islands off the south and south-eastern shores of British New Guinea not forming part of the Colony of Queensland were included within British New Guinea. Islands within the Torres Strait that were not part of the State of Queensland continued to be within the bounds of Papua-New Guinea immediately prior to Papua-New Guinea's independence. The Minister concluded that the recognition of Papua-New Guinea sovereignty over those islands was in accordance with these facts, and that no question arose about any transfer of Australian territory to Papua-New Guinea.

Maritime Boundaries and Jurisdiction

The view accepted by both Papua-New Guinea and Australia that there were not, and could not be, any maritime boundaries between the two countries prior to the time when Papua-New Guinea became independent, and that the 1879 line was not and could not serve as such a boundary, implied that a major concern in settling their interests in the Torres Strait area would be to delimit those boundaries.

The first matter which required consideration was the delimitation of the seabed jurisdiction line between the two countries. The term 'seabed jurisdiction' is used in the Treaty in a definite sense, namely to mean sovereign rights over the continental shelf in accordance with international law. It includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of these elevations, in accordance with international law. The sovereign rights of a coastal state over the continental shelf which are recognised by Article 2(1), Convention on the Continental Shelf of 1958, and which are repeated in Article 77(1), the Informal Composite Negotiating Text (ICNT) presented at the Third United Nations Conference on the Law of the Sea,[19] are rights for the purpose of exploring the continental shelf and exploiting its natural resources, while the term 'Continental Shelf' is used in the Convention (Article 1) and in the ICNT (Article 76) as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea to a certain defined depth or distance. In accordance with this, Article 4(1) of the Treaty delimits a boundary between 'the area of seabed and subsoil that is adjacent to and appertains to Australia and the area of seabed and subsoil that is adjacent to and appertains to Papua-New Guinea, and over which Australia and Papua-New Guinea respectively shall have seabed jurisdiction'. The boundary is thus a seabed resources delimitation line, defining the seabed areas in which each country will have exclusive rights to mineral and sedentary fishing resources.

Two rules of international law were relevant in the negotiations leading

19. This is reproduced in (1977) 16 ILM 1099. See now the ICNT Rev 1. The numbering of Articles in the Revision is substantially identical to the ICNT. Where it differs, this is indicated in brackets.

to the delimitation of the seabed resources line. First, in Article 6(1), Convention on the Continental Shelf, it is provided that where the same continental shelf is adjacent to the territories of two states whose coasts are opposite each other, the boundary of the continental shelf appertaining to each State shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. This provision is recast in Article 82, ICNT (Article 83 ICNT Rev 1), in the form that the delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances. It was thus appropriate for the negotiators to begin with an assumption that the median line should be the seabed resources line. But it was also necessary to take into account a second rule, namely that under the Convention (Article 1) and the ICNT (Article 121), islands have their own continental shelf, at least unless they are rocks which cannot sustain human habitation or economic life of their own.

The Treaty, not surprisingly, contains no indication as to the way in which the course of the seabed jurisdiction line was determined. Article 4 (1) states merely that it shall be the line described in Annex 5 to the Treaty. That annex states the point of commencement of the line in the Gulf of Carpentaria (at latitude 10° 50′ South, longitude 139° 12′ East), details its course by geographical co-ordinates of points, and gives its point of termination in the Coral Sea (at latitude 14° 04′ South, longitude 157° East). An examination of the course of the line indicates that in general it is drawn in accordance with the equidistance principle, though there has been some departure from this in the protected zone area (discussed in the next section of this paper). That departure is explicable by the presence in that area of the numerous islands of the Torres Strait. The course of the seabed jurisdiction line through that area runs south of the three inhabited Australian islands of Boigu, Dauan and Saibai. The effect of Article 2 of the Treaty is that Australia has sovereignty over certain islands north of the seabed jurisdiction line, and that sovereignty includes sovereignty over its territorial sea. As a consequence of this, Australia has sovereignty over the seabed and subsoil in the territorial waters surrounding its islands, but outside the territorial sea boundaries established by Article 3 of the Treaty there will be no Australian right to seabed resources northwards of the seabed jurisdiction line.

One matter which required consideration as a consequence of this was the position of permittees who had received permits to explore for the petroleum resources of the Australian continental shelf under the Petroleum (Submerged Lands) Act 1967 (Cth). That Act established a petroleum mining code to be applied in the 'adjacent areas', that is, areas adjacent to a State or Territory. It set out in a schedule the area adjacent

to each State and Territory. It also provided for arrangements to be made between the Commonwealth Governor-General and the Governor of a State under which a State official would be authorised to issue permits and licences in the adjacent area of that State. Each State passed uniform and complementary legislation, providing for a common mining code to apply uniformly throughout offshore areas. The schedule to the Act defined the area adjacent to Queensland so as to include all the area south of the 1879 line. The effect of this Act, and the corresponding Queensland Act, was to authorise the Queensland Minister for Mines to grant permits and licences in most of the Torres Strait shelf. Accordingly, to protect the position of those holding petroleum permits, Article 5 of the Treaty provides that Papua-New Guinea will treat holders of permits issued by Australia on a most favoured permittee basis. It states that where prior to 16th September 1975 Australia has granted an exploration permit for petroleum under Australian law in respect of a part of the seabed over which it ceases by virtue of the Treaty to exercise sovereign rights, and a permittee retains rights in respect of that part immediately prior to the entry into force of the Treaty, Papua-New Guinea, upon application by that permittee, shall offer to that permittee a petroleum prospecting licence or licences under Papua-New Guinea law in respect of the same part of the seabed on terms that are not less favourable than those provided under Papua-New Guinea law to any other holder of a seabed petroleum prospecting licence.

The possibility of seabed deposits overlapping the areas adjacent to particular States was foreseen in drafting the 1967 agreement between the Commonwealth and States on the exploration and exploitation of the petroleum resources of the seabed, and provision was made (in Clause 16) for consultations between the Designated Authorities on the exploitation of petroleum pools discovered in such areas. Article 6 of the Treaty contains a similar provision. If any single accumulation of liquid hydrocarbons or natural gas, or if any other mineral deposit beneath the seabed extends across any line defining the limits of seabed jurisdiction of Australia and Papua-New Guinea, and if the part of such accumulation or deposit that is situated on one side of such a line is recoverable in fluid form wholly or in part from the other side, the two governments are obliged to consult with a view to reaching agreement on the manner in which the accumulation or deposit may be most effectively exploited and on the equitable sharing of the benefits from such exploitation.[20]

The line delimiting the non-sedentary fisheries resources jurisdiction between the two countries is derived from the seabed jurisdiction line. It coincides with the seabed jurisdiction line except in the central Torres Strait area, where it runs to the north of the islands of Boigu, Dauan and Saibai. It is referred to in Article 4 in the Treaty as the boundary between the area of sea that is adjacent to and appertains to Australia and the area

20. This article is in the same terms as Article 6 of the Agreement between Australia and Indonesia concerning certain boundaries between Papua-New Guinea and Indonesia: Aust TS 1974, No 26.

of sea that is adjacent to and appertains to Papua-New Guinea, and in which Australia and Papua-New Guinea respectively shall have fisheries jurisdiction. In Article 1, the term 'fisheries jurisdiction' is defined as meaning sovereign rights for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species.

Prior to the attainment by Papua-New Guinea of independence, Australia had given effect through an amendment in 1967 to the Fisheries Act 1952 (Cth) to a customary rule of international law under which a coastal state was entitled to delimit a twelve mile exclusive fisheries zone from the baselines of its territorial seas. But it was apparent to the Treaty negotiators that one outcome of a new Law of the Sea Convention would almost certainly be the recognition of sovereign rights of a coastal state in an exclusive economic zone extending up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, within which the coastal state would have jurisdiction over the resources of the sea and the seabed. Such jurisdiction has been claimed by Australia through the Fisheries Amendment Act 1978 (Cth). It may be observed that Article 74 of the ICNT uses the same formula for the delimitation of the exclusive economic zone between adjacent or opposite states as it employs in the case of the continental shelf, and that Article 121 provides that islands have an exclusive economic zone.

The rights of a coastal state in the exclusive economic zone, as proposed in Article 56 of the ICNT, extend beyond seabed jurisdiction and fisheries jurisdiction as defined in the Treaty. They include rights with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, and jurisdiction with regard to (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; and (iii) the preservation of the marine environment. This formulation has been incorporated in the definition in Article 4 (4) of 'residual jurisdiction'. This means —

(a) jurisdiction over the area other than seabed jurisdiction or fisheries jurisdiction, including 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.

The Treaty provides, in Article 4 (3), that in the area bounded by the divergence of the seabed jurisdiction line and the fisheries jurisdiction line, exclusive of the territorial seas of the islands of Aubusi, Boigu, Dauan, Kaumag, Moimi, Saibai and Turnagain, neither Party shall exercise residual jurisdiction without the concurrence of the other Party, and

that 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.

The issue of the territorial seas in the Torres Strait area is dealt with by a series of provisions which comprise Article 3 of the Treaty. First, it is agreed that the territorial seas of the Australian islands north of the seabed jurisdiction line shall not extend beyond three miles from the baselines from which the breadth of the territorial sea around each island is measured. The outer limits of the territorial seas of these islands are described in Annex 3 to the Treaty, which defines a continuous line forming the outer limits of the territorial sea of the islands of Aubusi, Boigu and Moimi, another continuous line for the islands of Dauan, Kaumag and Saibai, other continuous lines respectively for Anchor Cay and East Cay, Black Rocks and Bramble Cay, and Deliverance Island and Kerr Islet. Turnagain Island and Turu Cay are each separately defined by the drawing of a continuous line enclosing each island. In the case of Pearce Cay, the outer limit of that part of its territorial sea which lies north of the seabed jurisdiction line is defined, but no definition is given of the outer limit south of the seabed jurisdiction line and the general limitation of three miles is not extended to that part of its territorial sea.

Secondly, a territorial sea boundary is delimited between the Australian islands of Aubusi, Boigu and Moimi and Papua-New Guinea, and also between the Australian islands of Dauan, Kaumag and Saibai and Papua-New Guinea.

Thirdly, it is agreed that Australia will not extend its territorial sea northwards across the seabed jurisdiction line, nor will Papua-New Guinea extend its territorial sea southwards across that line.

Finally, it is agreed that Papua-New Guinea will not extend its territorial sea off its southern coastline in the central Torres Strait area beyond three miles, nor will it extend its territorial or archipelagic waters into the area in which each Party has agreed not to exercise residual jurisdiction without the concurrence of the other, nor will it establish an archipelagic baseline running in or through that area.

In drafting these provisions, the negotiators have not fettered the rights of the two states to claim territorial seas of twelve miles, which will undoubtedly be the recognised limit in any future convention on the law of the sea. They have however adopted the current Australian and Papua-New Guinea practice under which each claims a territorial sea of three miles in respect of the Australian islands north of the seabed jurisdiction line and in respect of the southern coastline of Papua-New Guinea in the central Torres Strait area. This seems a sensible, practical answer to the problem of defining the limits of the territorial seas in the Torres Strait. In the area where Australian islands lie very close to the Papua-New Guinea coastline, the northern limits of the territorial seas of clusters of islands have been fixed by drawing a line equidistant between the Australian islands and the coastline of Papua-New Guinea, and their southern limit has been confined to three miles. In the case of other

clusters of Australian islands north of the seabed jurisdiction line, the outer limits are formed by intersecting arcs of circles having a radius of three miles, drawn so as to enclose the islands.

The Protected Zone

The most striking and original feature of the Treaty lies in the establishment of a protected zone, in which the Torres Strait Islanders and the Papua-New Guineans who live in the adjacent coastal area will have freedom of movement and the ability to continue their traditional fishing and trading activities.

The genesis of the concept of a protected zone is to be found in a resolution adopted by the Queensland Parliament on 3 April 1974,[21] which included a clause 'that the Torres Strait area should be designated an international marine park within which fishing would be reserved to Torres Strait Islanders and the people of coastal Papua, and that all other exploitation of the natural resources of the sea and seabed shall be prohibited except for the continuance of present commercial operations for pearling and trochus fishing'.[22] The idea of such a marine park or protected zone was a central feature of the statement incorporating the views of the Torres Strait Islanders which was signed at a Conference of Island Chairmen held on Thursday Island on 20 September 1975, which asserted that the Islanders must be free to move and have unrestricted access to all parts of the Straits, and to the sea and seabed for all traditional purposes and activities, and that there must be established an environmentally protected zone or marine park controlled so as to ensure the preservation of the total environment of the Torres Strait as the basis for the traditional way of life of the Islanders and the coastal people of Papua-New Guinea bordering on the Strait. In the negotiations between the Australian and Papua-New Guinea Governments the establishment of such a protected zone was accepted at an early stage as an essential condition for a settlement of the Torres Strait issue.

The protected zone in the Torres Strait comprises all the land, sea, airspace, seabed and subsoil within the area bounded by a line described in Annex 9 to the Treaty. The line follows the 10° 28′ line of south latitude for nearly 200 miles from the Gulf of Carpentaria through the Torres Strait to the Coral Sea and in the north extends to the low water line on the southern coast of New Guinea. Accordingly, the protected zone encompasses all the islands and sea of the Torres Strait area north of the point of latitude 10° 28′ south to the Papua-New Guinea coast. The Treaty states (in Article 10) that the principal purpose in establishing the protected zone is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement. A further purpose is to protect and preserve the marine environment and indigenous fauna and flora in and in the

21. Q Parl Deb Vol 264, 3417 and 3519.
22. This is reproduced in *The Torres Strait Boundary Report* by the Sub-Committee on Territorial Boundaries of the Joint Committee on Foreign Affairs and Defence (1977) pp 40-43.

vicinity of the protected zone. The detailed obligations assumed by the Parties in order to achieve these purposes are spelled out in the following articles. They cover the following matters:

(a) *Free Movement and Traditional Activities.* Article 11 (1) provides that, subject to the other provisions of the Treaty, each Party shall continue to permit free movement and the performance of lawful traditional activities in and in the vicinity of the protected zone by the traditional inhabitants of the other Party. However, this provision is not to be interpreted as sanctioning the expansion of traditional fishing by the traditional inhabitants of one Party into areas outside the protected zone under the jurisdiction of the other Party not traditionally fished by them prior to the date of the entry into force of the Treaty.

The 'free movement' which is to be permitted is defined to mean movement by the traditional inhabitants for or in the course of traditional activities. The term 'traditional activities' means activities performed by the traditional inhabitants in accordance with local traditions, and includes, when so performed:

(i) activities on land, including gardening, collection of food and hunting;
(ii) activities on water, including traditional fishing;
(iii) religious and secular ceremonies or gathering for social purposes, for example, marriage celebrations and settlement of disputes; and
(iv) barter and market trade.

Traditional inhabitants are persons who 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. They must be Torres Strait Islanders who live in the protected zone or the adjacent coastal area of Australia, and who are citizens of Australia, or they must be persons who are citizens of Papua-New Guinea who live in the protected zone or the adjacent coastal area of Papua-New Guinea.

Article 16 of the Treaty obliges each Party to apply immigration, custom, quarantine and health procedures in such a way as not to prevent or hinder free movement or the performance of traditional activities in and in the vicinity of the protected zone by the traditional inhabitants of the other Party. However, traditional inhabitants of one Party who wish to enter the other country, except for a temporary stay for the performance of traditional activities, are to be subject to the same immigration, custom, health and quarantine requirements and procedures as citizens of that Party who are not traditional inhabitants. Moreover, each Party reserves its right to limit free movement to the extent necessary to control abuses involving illegal entry or evasion of justice, and to apply such immigration, custom, health and quarantine measures, temporary or otherwise, as it considers necessary to meet problems which may arise.

(b) *Traditional Customary Rights*. Where the traditional inhabitants of one Party enjoy traditional 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 and that are under the jurisdiction of the other Party, and these rights are acknowledged by the traditional inhabitants living in or in proximity to these areas to be in accordance with local tradition, Article 12 obliges the other Party to permit the continued exercise of these rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.

(c) *Protection of the Marine Environment*. The Treaty has drawn heavily upon the provisions in Part XII of the ICNT relating to the protection and preservation of the marine environment. Article 195 ICNT (Art 194 ICNT Rev 1) sets out the obligations of states to take measures to prevent, reduce and control pollution of the marine environment. The substance of the ICNT provisions, and much of its language, are reproduced in Article 13 of the Treaty, in which it is agreed that each Party will take legislative and other measures necessary to protect and preserve the marine environment in and in the vicinity of the protected zone. The measures are to include measures for the prevention and control of pollution or other damage to the marine environment from all sources and activities under each Party's jurisdiction or control. In particular, each Party is to take measures to minimise to the fullest practicable extent:

  (a) the release of toxic, harmful or noxious substances from land based sources, from rivers, from or through the atmosphere, or by dumping at sea;
  (b) pollution or other damage from vessels; and
  (c) pollution or other damage from installations and devices used in the exploration and exploitation of natural resources of the seabed and its subsoil.

Moreover, under Article 14, it is agreed that each Party will, in and in the vicinity of the protected zone, use its best endeavours to:

(a) identify and protect species of indigenous fauna and flora that are or may become threatened with extinction;
(b) prevent the introduction of species of fauna and flora that may be harmful to indigenous fauna and flora; and
(c) control noxious species of fauna and flora.

The obligations expressed in Articles 198 and 199 ICNT (Arts 197, 198 ICNT Rev 1) for States to cooperate in the protection and preservation of the marine environment and to notify other States of imminent or actual damage to the marine environment by pollution are also incorporated in Articles 13 and 14 of the Treaty. These oblige the Parties to consult, at the request of either, for the purpose of harmonising their policies with respect to measures for the protection of the marine environment, and ensuring the effective and coordinated implementation of these measures. If either Party has reasonable grounds for believing that any planned

activity under its jurisdiction or control may cause pollution or other damage to the marine environment in or in the vicinity of the protected zone, it is required to communicate to the other Party its assessment of the potential impact of that activity on the marine environment. In the case where a Party has reasonable grounds for believing that an existing or planned activity under the jurisdiction or control of the other Party is causing or may cause such damage it may request consultations with the other Party, and the Parties are then obliged to consult as soon as possible with a view to adopting measures to prevent or control the damage. The Parties are also required to exchange information concerning species of indigenous fauna and flora that are or may become threatened with extinction, and to consult at the request of either of them for the purpose of harmonising their policies on the protection of fauna and flora, and ensuring the effective and coordinated implementation of measures they take to protect the fauna and flora.

Commercial activities within the protected zone are controlled through a series of provisions in the Treaty. First, specific provision is made in respect of navigation and overflight on and over the waters of the protected zone. This matter is taken up in the next section of this paper. Secondly, Article 15 provides that neither Party shall undertake or permit within the protected zone mining or drilling of the seabed or the subsoil thereof for the purpose of exploration for or exploitation of liquid hydrocarbons, natural gas or other mineral resources during a period of ten years from the date of entry into force of the Treaty. That period may be extended by agreement of the Parties.

Finally, Part 5 of the Treaty regulates protected zone commercial fisheries. The provisions of the Treaty on protected zone commercial fisheries begin with an assertion of the priority to be given to traditional fishing over commercial fishing in the administration of Part 5 of the Treaty. They then set out the duty of the Parties to cooperate in the conservation, management and optimum utilisation of protected zone commercial fisheries. The Parties are required to consult at the request of either. They must negotiate subsidiary conservation and management arrangements in respect of any individual protected zone commercial fishery, or in respect of resources directly related to such a fishery.

As part of such arrangements, the Parties are required to determine jointly the allowable catch (that is, the optimum sustainable yield) of a protected zone commercial fishery.

The allowable catch is to be shared between the Parties on the following terms:

(a) Provided it remains within the allowable catch, the level of the catch of each protected zone commercial fishery to which each Party is entitled is not to be reduced, during the period of five years immediately after the entry into force of the Treaty, below the level of catch of that Party before the entry into force of the Treaty, but it may during the second period of five years after the entry into force of the Treaty be adjusted progressively so that at the end of that second

five-year period it reaches the level of catch apportioned as set out in (c).

(b) If, in any relevant period, a Party does not itself propose to take all the allowable catch of a protected zone commercial fishery to which it is entitled, either in its own area of jurisdiction or that of the other Party, the other Party shall have a preferential entitlement to any of the allowable catch of that fishery not taken by the first Party.

(c) The levels of take are to be adjusted progressively in the second five-year period so that
  (i) within the territorial seas of Anchor Cay, Black Rocks, Bramble Cay, Deliverance Island, East Cay, Kerr Islet, Pearce Cay and Turn Cay, Australia and Papua-New Guinea will share the take equally;
  (ii) in other areas under Australian jurisdiction, Australia will have a 75% share of the take and Papua-New Guinea a 25% share;
  (iii) in areas under Papua-New Guinea jurisdiction, Papua-New Guinea will have a 75% share of the take and Australia a 25% share;
  (iv) Papua-New Guinea will have the sole entitlement to the allowable catch of the commercial barramundi fishery near the Papua-New Guinea coast, except within the territorial seas of the islands of Aubusi, Boigu, Dauan, Kaumag, Moimi and Saibai. This entitlement is not to be included in calculating the total allowable catch of the protected zone commercial fisheries.

(d) While the above apportionment is to be maintained in respect of the total allowable catch of the protected zone commercial fisheries, the Parties may agree to vary the apportionment of the allowable catch determined for individual fisheries as part of their subsidiary conservation and management arrangements.

The Parties must consult and cooperate in the issue and endorsement of licences to permit commercial fishing in protected zone commercial fisheries. Persons or vessels which are licensed by the responsible authorities of one Party to fish in any relevant period in a protected zone commercial fishery shall, if nominated by the responsible authorities of that Party, be authorised by the responsible authorities of the other Party, wherever necessary, to fish in those areas under the jurisdiction of the other Party in which the fishery concerned is located. In issuing licences, the responsible authorities are directed to have regard to the desirability of promoting economic development in the Torres Strait area and employment opportunities for the traditional inhabitants, who are to be consulted from time to time on the licensing arrangements.

Vessels under the control of third State operators will not be licensed to exploit the protected zone commercial fisheries without the concurrence of the responsible authorities of both Parties.

In drafting these provisions on commercial fishing in the protected zone the Parties have followed closely the provisions in the Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958,

and in the ICNT on the exclusive economic zone, particularly Articles 61 and 62. Article 61 requires a coastal State to determine the allowable catch of the living resources in its exclusive economic zone, to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation, and that populations of harvested species are maintained at levels which can produce the maximum sustainable yield.[23] Article 62 requires the coastal State which does not have the capacity to harvest the entire allowable catch to give other States access to the surplus, but nationals of other States must comply with the conservation measures and with the terms and conditions laid down by the coastal State, including its regulations relating to licensing of fishermen and vessels, the determination of species which may be caught and quotas of catch, and areas of fishing.

Institutional Arrangements

Administrative arrangements between the two countries to ensure that the provisions relating to the protected zone work effectively are included in the Treaty. Each Party is to designate a representative to facilitate the implementation at the local level of the provisions of the Treaty. The Parties are also jointly to establish and maintain an advisory and consultative body, to be known as the Torres Strait Joint Advisory Council. Unless otherwise agreed, the Advisory Council is to consist of nine members from each Party. It must include at least two national representatives, at least one member representing the Government of Queensland and the Fly River Provincial Government, and at least three members representing the traditional inhabitants.

Freedom of Transit

The Torres Strait is a significant sea route. According to evidence presented to the Sub-Committee on Territorial Boundaries of the Joint Committee on Foreign Affairs and Defence by the Department of Transport, in recent years approximately 1400 piloted ships and about 200 unpiloted ships annually have used the shipping route through Torres Strait.[24] The sub-committee's report states[25] that all routes through Torres Strait for vessels up to 39 foot draught make use of the Prince of Wales Channel. This lies wholly within Australian territorial waters; it is south of the seabed jurisdiction line, and it falls outside the protected zone.

The general rule applicable to areas outside the protected zone is expressed in Article 7(6) of the Treaty. This provides that a regime of passage over routes used for international navigation in the area between the two countries, including the area known as Torres Strait, shall apply

23. The Treaty refers (in Article 23) to the 'optimum sustainable yield', which is the term used in Article 2, Convention on Fishing and Conservation of the Living Resources of the High Seas 1958, while the ICNT Art 61(3) refers to 'maximum' sustainable yield, and Art 62(1) refers to the 'optimum utilisation of the living resources'.
24. *Torres Strait Boundary Report*, loc cit, p 81.
25. Page 73.

in respect of vessels that is no more restrictive of passage than the regime of transit passage through straits used for international navigation described in Articles 34 to 44 of the ICNT; but, before a Party adopts a law or regulation that might impede or hamper the passage over those routes of vessels proceeding to or from the territory of the other Party, it must consult with the other Party. Under the relevant articles of the ICNT, ships and aircraft enjoy in straits used for international navigation the right of transit passage, that is, freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. The reference in the proviso is to laws and regulations which are sanctioned by Article 42 of the ICNT, under which States bordering straits may make laws and regulations in respect of a number of matters including the safety of navigation and the regulation of marine traffic by designating sea lanes and prescribing traffic separation schemes for navigation in straits. It is, of course, recognised that the provisions in the ICNT may be revised or not included in any Law of the Sea Convention or fail to become generally accepted principles of international law. In that case, it is provided that the Parties are to consult with a view to agreeing upon another regime of passage that is in accordance with international practice.

Freedom of navigation and overflight in areas of the protected zone are regulated by three provisions contained in Article 7 of the Treaty. First, Article 7(1) provides that on and over the waters of the protected zone that lie north of the seabed jurisdiction line and seaward of the low water lines of the land territory of either Party, and south of that line and beyond the outer limits of the territorial sea, each Party shall accord to the vessels and aircraft of the other Party the freedom of navigation and overflight associated with the operation of vessels and aircraft on or over the high seas. This is however qualified by the application to such transit of certain rules derived from the ICNT on the right of transit passage through straits. Article 7(2), which adapts the terms of Articles 39 and 42 of the ICNT, states that each Party shall take all necessary measures to ensure that in the exercise of the freedom of navigation and overflight accorded to its vessels and aircraft under Article 7(1)—

(a) those vessels observe generally accepted international regulations, procedures and practices for safety at sea and for the prevention, reduction and control of pollution from ships;
(b) those civil aircraft observe the Rules of the Air established by ICAO as they apply to civil aircraft, and State aircraft normally comply with such rules as relate to safety and at all times operate with due regard for the safety of navigation;
(c) those vessels and aircraft north of the seabed jurisdiction line do not engage in the embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the other Party, provided that such laws and regulations do not have the practical effect of denying,

hampering or impairing the freedom of navigation and overflight under Article 7(1); and

(d) those vessels and aircraft north of the seabed jurisdiction line do not act in a manner prejudicial to the peace, good order or security of the other Party.

Secondly, Article 7(4) provides that in those areas of the protected zone north of the seabed jurisdiction line to which Article 7(1) does not apply, civil aircraft of a Party engaged in scheduled or non-scheduled air services shall have the right of overflight, and the right to make stops for non-traffic purposes, without the need to obtain prior permission from the other Party, subject to compliance with any applicable law or regulations made for the safety of air navigation.

Finally, in areas of the protected zone to which Article 7(1) does not apply, the vessels of a party are to enjoy the right of innocent passage. That right may not be suspended, and neither Party is to adopt laws or regulations applying to those areas that might impede or hamper the normal passage of vessels between two points both of which are in territory of one Party.

Conclusion

The Torres Strait Treaty has been drafted so as to settle on a comprehensive basis the rights and obligations of Australia and Papua-New Guinea in the Torres Strait area. The main concern of both countries in negotiating the Treaty has been to prevent a matter which was causing justifiable concern in Papua-New Guinea from developing to a stage where it might threaten the close relations between the two countries. Fortunately, the Governments of both countries have been conscious of the need to resolve the issue without undue delay and in a spirit of cooperation. They have also been fully conscious of the political and constitutional problems which were involved in finding a satisfactory solution. It is a tribute to the diplomatic skill and professional competence of those engaged in the negotiations that only three years after Papua-New Guinea achieved independence, a Treaty has been signed which has the full support of the two national Governments, of the Governments of the State of Queensland and of the Fly River Province, and of the traditional inhabitants of the Torres Strait area.

The Treaty covers all the issues which are likely to arise between countries which have contiguous or adjacent land and sea masses in respect to which they both have claims under international law or interests which they wish to see recognised and protected by the other. The delimitation of the continental shelf, the exclusive economic zone and the territorial seas between the two States, and the definition of the rights of transit passage through the Strait, were greatly assisted by the availability of the text prepared for the United Nations Third Conference on the Law of the Sea, but this had to be adapted to meet the particular situation in the Strait, and above all the desire to preserve the traditional way of life and the livelihood of the inhabitants of the area. The outcome

is a draft which is necessarily complex, but it was vital that so far as possible precise legal rules should be settled to regulate the claims of the two countries in the Torres Strait. Anything less would only have left room for continuing dispute and perhaps would have fomented discord between the two countries which the Treaty is designed principally to end.

Nevertheless, it would be unrealistic to suppose that the implementation of the Treaty may not give rise to some problems. The Australian Foreign Minister has stated that ratification of the Treaty will not occur until both parties have prepared and implemented the supporting legislation. Such legislation will of course be essential, as the Treaty concerns several provisions which contemplate measures being taken by the contracting States which will impose obligations on persons subject to their jurisdiction. Examples will be found in the provisions relating to the measures to be taken in relation to the exercise of the freedoms of navigation and overflight (Article 7(2)); measures to be taken to protect and preserve the marine environment (Article 13), and fauna and flora (Article 14); and measures to be taken to prevent violations of the protected zone commercial fisheries arrangements (Article 28).

The fisheries arrangements in particular are likely to be a source of some contention in the Torres Strait area. Difficulties may arise in this regard in the application of the legislation implementing the Treaty, and in the determination of the respective jurisdictions of the Commonwealth and of the States.

As an illustration of the first, it may be observed that upon the apprehension of a suspected offender against the laws implementing the provisions of the Treaty, a preliminary point for determination may be whether the suspected offender is a 'traditional inhabitant' carrying on a 'traditional activity' (as defined in Article 1). The Treaty provides, in Article 28(8), that in the case of a suspected offence alleged to have been committed in or in the vicinity of the protected zone, corrective action shall be taken by the authorities of the Party whose nationality is borne by the vessel or person concerned, and not by the Party in whose area of jurisdiction the suspected offence occurs, where it appears that the offence may, or might reasonably be considered to, have been committed in the course of traditional fishing. The question of the proper court in which a suspected offender should be tried will depend upon the question of fact whether an accused has the 'traditional' qualities necessary to bring him within the special provisions of the Treaty relating to traditional inhabitants.

The question of the respective jurisdiction of the Commonwealth and of the States in relation to fishing is still a vexed one. In *Bonser v La Macchia,* Barwick CJ remarked that 'the exclusion of the first three nautical miles of coastal water from the Commonwealth legislative power with respect to fisheries as granted by s 51(x) is pregnant with practical difficulties, particularly if there is at any time any diversity between Commonwealth and State laws with respect to fishing on the high seas.

The determination upon a fishing vessel of the point at which it passes out of or into the area of water within the three mile belt must be, to say the least of it, exceedingly difficult if indeed at all possible in practical terms'.[26] When it does pass beyond that belt, it seems from the decisions in *Pearce v Florenca*,[27] *Raptis v South Australia*[28] and *Robinson v WA Museum*[29] that State laws relating to fishing and fisheries may extend to activities beyond territorial waters, on the basis that such laws are for the peace, order and good government of the State; but they will only so extend if the intention is apparent that they are meant to do so, and they will be invalid to the extent that they are inconsistent with Commonwealth legislation. The Commonwealth Parliament may have the power, under s 51 (xxix) of the Constitution, to regulate fishing and fisheries within territorial waters if such legislation can be justified on the ground that it is giving effect to the obligations assumed by Australia under the Treaty. However, this issue may not arise if action is taken to give effect to the decision made at the Premiers' Conference on 29 June 1979 to provide a legislative framework that will enable specified offshore fisheries to be administered by joint authorities or by the Commonwealth or by a single State as appropriate.[30]

An issue of considerable constitutional and international importance is raised by the terms of Article 2 of the Treaty. It will be recalled that Papua-New Guinea recognises Australian sovereignty over certain specified islands and all islands that lie between the mainlands of the two countries and south of the seabed jurisdiction line, while Australia recognises the sovereignty of Papau-New Guinea over three specified islands and all the other islands that lie between the mainlands of the two countries and north of the seabed jurisdiction line. The Article expressly states that no island over which Australia has sovereignty, other than those specified, lies north of the seabed jurisdiction line. If the islands so specified do in fact include all the islands which form part of the State of Queensland north of the seabed jurisdiction line, no problem arises; but if they do not, it is suggested that the ratification by the Commonwealth Government of a Treaty recognising the sovereignty of Papua-New Guinea over part of the State of Queensland could not operate domestically to alter the limits of the State of Queensland, since it may be that this can be affected only by the method laid down in s 123 of the Constitution. At the same time, ratification by the Commonwealth Government would mean that in international law Australia would be obliged to give effect to the Treaty, and in particular to recognise the sovereignty of Papua-New Guinea over the islands in question.[31] This is a conflict which any responsible government would do all in its power to avoid. It must

26. (1969) 122 CLR 177 at 192-3.
27. (1976) 9 ALR 289.
28. (1977) 15 ALR 223.
29. (1977) 16 ALR 623.
30. This is to be carried out by complementary Commonwealth and State legislation.
31. Note in this context, Articles 27 and 46 of the Vienna Convention on the Law of Treaties, 1969, which deal with the national law and treaty law.

therefore be assumed that the Australian Government will ratify the Treaty only if it is fully satisfied that no cession of Queensland territory will be involved in the recognition of the sovereignty of Papua-New Guinea over islands other than those listed in the Treaty, or if it is satisfied that it constitutionally has the power to cede such islands notwithstanding that they are or were Queensland territory.