

A SHORT GUIDE TO THE TORRES STRAIT COMPROMISE

In government offices in PNG, whether in Konedobu, Waigani or further afield, maps always hung on, or were stuck on, the walls. Usually, there would be a map of Papua (and) New Guinea. On this would be a (possibly different-coloured) bit down the bottom labelled 'Australia'. If the eye went to this, it could not fail to note a dashed line running up the outside of the Great Barrier Reef and enclosing nearly all of the sea area known as Torres Strait, even appearing to brush the mainland of Papua. This, to most people, was 'the border'.

Much of the concern about 'the border', on the part of those Papua New Guineans who were concerned about it, probably derived from the impression conveyed by those maps. It looked as if Australia had unfairly grabbed the whole of the sea almost to the PNG coast. Moreover, any resident of the nearby Papuan coast would, it seemed, not be able to go more than a few hundred metres offshore without being in Australia, if indeed he/she was allowed to go that far.

In reality, the dashed line was not intended to indicate that any sea areas were part of Australia; it only indicated that certain islands were part of Australia. If there had been immediate general acceptance that the relevant islands were and would remain part of Australia, there would still have been a need for a division of sea and seabed areas that would have been less difficult, although still calling for some imagination.

As it happened, the issue of the status of the islands had to be addressed as well. This was done in negotiations extending over the period from 1972 to 1978, leading to the package of compromises underlying the instrument known as the Torres Strait Treaty. If the status of all the islands had not been thoroughly probed, this would have made the journey to a compromise less complete, and, I think, less comfortable for those who had to endorse the result as a long-term settlement.

On the map, and in the census book

Sea distances are usually reckoned in nautical miles (of 1852 metres, as against 1609 metres for a statute mile). The closest distance between the PNG and Australian mainlands is about 80 nautical miles (about 150 km). In 1972, several (presumed) Australian islands lay close to the PNG coast. At high tide, the nearest such island (Kussa) was less than one kilometre distant. At extreme low tide the distance was anyone's guess, but in the vicinity of Kawa I could have been about 300m. The high-tide distance from PNG of the nearest inhabited island (Boigu) was about 5 km.

A moment's reflection should make it plain enough that there is no necessary incongruity or injustice about islands of State A lying close to the coast of State B. If State A had a common land border (the usual kind of border) with State B, there would be no separation at all, no no-person's area of sea or other divider. PNG is closer to Indonesia than it was ever likely to be close, territorially, to Australia.

In 1973, some population figures were tabled by Australia, and were taken to represent the approximate state of affairs through the subsequent negotiations, with the understanding that variations could occur over quite short periods of time. The islands population in Torres Strait was about 5,000, of which nearly 700 lived on the islands of Boigu, Saibai and Dauan close to the PNG coast. Torres Strait islanders living on the Australian mainland amounted to a further 5,000-8,000. No such precise count was made of the residents of PNG with traditional links to areas of the strait, but PNG suggested that the number that could have such links was about 20,000.

The islands

A succinct historical account of how the islands became part of Australia may be found in Paul van der Veur's *Search for New Guinea's Boundaries*. In 1879 they were incorporated into the colony of Queensland as a result of Queensland's desire to see the dominion of the British crown extended as far north as possible, Papua not then being a British possession. Throughout Australia's administration of PNG, the islands were within the statutory definition of Queensland and excluded from that of Papua.

The PNG case for a transfer of at least some islands could be put in various ways.

(a) The unfinished business argument. The acquisition of Papua in 1884 removed the rationale for the extreme northward extension of Queensland, with its attendant administrative difficulties. Before the end of the century, even Queensland had agreed that the 'close-in' islands of Boigu, Saibai and Dauan should be transferred to the new possession. However, that proposed action had not been taken by federation, leaving the Lieutenant Governor of British New Guinea to complain (as quoted by van der Veur):

that 'the long unfulfilled promise of the Queensland government' had not yet come about and that the matter still stood as 'an inequitable, arbitrary and purely unnecessary injustice to the Possession'.

(b) The link between the islands and the broader question of sea and seabed jurisdiction. Torres Strait waters are shallow, with many islands spread across them. No-one could be sure of how many islands there were, technically speaking. Some claimed Australian islands (eg East and Anchor Cays) were said to be 'awash at high tide', and therefore not islands at all in the legal sense. Elsewhere were large upflung coral boulders and sand cays of uncertain permanence, but possibly technical islands and a basis for claimed individual belts of 12-mile territorial sea, as a natural incident of sovereignty. To avoid such complications, PNG proposed a new boundary line that would be 'all purpose', determining sovereignty over islands, sea and seabed.

(c) The need for a reasonable adjustment of territory on PNG independence. Obviously, PNG had had no say in the actions of others that had determined its pre-independence boundaries. There were precedents for adjustments of boundaries on the emergence of new states. Australia itself had inherited most of its external territories (eg Christmas and Cocos Islands, Coral Sea Islands) by transfer from the United Kingdom following federation. Similarly, one remote islet in the Coral Sea (Pocklington Reef Island) was proposed for transfer by Australia to PNG. There were

also many precedents for differences of opinion over boundaries to fester for many years. While Australia could refuse to transfer any islands, PNG could not be obliged to accept such a refusal as fair and reasonable.

A difficulty in the way of transfer of any Queensland islands was the Australian constitution. Such a surrender of territory would require either the consent of Queensland or a national referendum. Outside the constitution, a possibility that might have been explored was recourse to the United Kingdom government to alter the boundaries of Australia, as had been considered by Attorney-General Isaacs in 1906. Of those possibilities, the persuading of Queensland seemed the most realistic. True, this might have required a hefty quid pro quo, but that, in the view of PNG, would have been a matter for the Commonwealth.

However, a very formidable obstacle to the transfer of any inhabited islands was the islanders themselves. Without their agreement, which was unlikely to be given, it was difficult to conceive their either being transferred to PNG along with their islands or being evicted to find a home elsewhere.

In March 1974, after quite detailed exchanges of views through talks and correspondence, PNG foreign minister Kiki wrote to his Australian counterpart putting PNG's position on a single all-purpose boundary line. He said Australia 'should at least transfer the uninhabited islands north of the boundary line' to PNG. That position by implication accepted that the inhabited close-in islands of Boigu, Saibai and Dauan would be Australian enclaves north of the proposed sea/seabed line.

Progress was slow over the next two years. PNG was preparing for independence, and relations were strained between the Commonwealth (Whitlam) government and the Queensland (Bjelke-Petersen) government. Soon after PNG independence, the Queensland position was set out in the premier's statement to parliament on 7 October 1975, and the Commonwealth position, in response, in a lengthy statement to parliament by Prime Minister Whitlam on 9 October 1975. Andrew Peacock, shadow foreign minister and former territories minister, responded to the latter statement referring to the boundary issue as a 'festering problem', 'probably' to be 'the greatest dispute between ourselves and our closest neighbour'.

It was not surprising, therefore, that the Fraser government returned to the issue with a sense of urgency. In early 1976, Australian ministers told PNG that Australia was prepared to negotiate 'some revision of present arrangements in Torres Strait', that a seabed boundary could be expected to run to the south of Boigu, Saibai and Dauan, but that 'the Australian position was that no Australian islands would be transferred to Papua New Guinea'. At ministerial talks in May 1976, Australian retention of the inhabited islands was agreed, subject to their territorial sea being limited to no more than 3 miles, and to agreement on other parts of the package.

The uninhabited islands, small and uninhabitable, but of importance because of their uncertain total number and effect on sea delimitation, were a separate matter. A strong part of the PNG argument was the glaring anomaly of the very close-in mud-and-mangrove islets of Kawa, Mata Kawa and Kussa. However, as to these, officials of both sides had noted to one another in 1973 that there was uncertainty about just what was or was not caught by the 1878 line. That issue was resolved by a

remarkable feat of research by the Australian Attorney-General's Department that led convincingly to the conclusion that the three troublesome islets were not caught by the line and hence had all along been part of Papua and not Queensland. ('Status of the Islands of Kawa, Mata Kawa, and Kussa', published in 1978 in the Parliamentary Papers series.)

In the result, when the seabed line was negotiated, only 9 uninhabited Queensland islets were identified by Australia as lying to the north of it. PNG ministers were able to accept that situation as part of the overall package.

The sea and seabed boundaries

The 1972-1978 negotiations took place against the background of the developing law of the sea and parallels to Torres Strait, although generally less complex, in marine delimitation situations in various parts of the world. Under previous policy (applied also to PNG), Australia had already claimed:

- a 3-mile territorial sea measured from unspecified coastal baselines;
- a fisheries zone out to 12 miles from the same baselines;
- 'continental shelf' jurisdiction (over minerals, petroleum and sea-floor fisheries) extending over relatively shallow areas of contiguous seabed, as in the Arafura Sea and Torres Strait.

Under the new law of the sea:

- a 12-mile territorial sea was likely to become standard;
- coastal-state jurisdiction could be exercised over fisheries in an 'exclusive economic zone' that could extend 188 miles, sometimes more, from the outer territorial sea limit;
- the coastal state could exercise a range of controls in the 188-mile zone over pollution, structures, shipping, and some other activities.
- delimitation between overlapping sea and seabed areas of adjoining or opposite countries was to be effected by agreement, with the possibility of recourse to other dispute settlement procedures in the absence of agreement.

This meant that on PNG independence a sea and seabed boundary, in a practical and legal sense, had to be established for the first time. There was no 'existing boundary' for this purpose, except for an incongruous seabed line specified in Australian legislation for the purpose of allocating functions and benefits between individual Australian states and territories with respect to offshore petroleum and minerals. In the north of Torres Strait this purported, rather crudely, to follow the 1878 line. However, that line had no more authority against an independent Papua New Guinea than a line unilaterally drawn by Australia would have had against Indonesia, and Australia at no stage suggested that it did have such authority.

Both Australian and Papua New Guinea advisers were participating actively in the 3rd UN Law of the Sea Conference (UNCLOS). They had worked together in the negotiation of respective boundaries with Indonesia. In 1972, although political decisions about the islands still needed to be made, they were well aware of the complexities and challenges waiting to be faced in establishing sea and seabed boundaries between Papua New Guinea and Australia.

In all differences over marine delimitation between states with opposite coasts, one side would favour a 'median line', one of the recognised bases for fixing a boundary. The side not favoured by a median line, would invoke another basis, the existence of 'special circumstances' calling for a departure from a median line. The most common 'special circumstances' situation was where one or more islands of State A lay close to State B. The exhausting debates on delimitation principles at UNCLOS were an endless ping-pong game between State As and State Bs.

It can be seen that in Torres Strait the resolution of a sea/seabed boundary was linked, but not necessarily decisively linked, to the issue of sovereignty over islands. It was a matter of the influence, if any, to be given to particular islands. In 1974, PNG presented for discussion two possible lines: one, the 'mainland median line' and PNG's starting position, was drawn by giving full weight to the respective mainlands but disregarding all islands; the second, the 'modified median line', was drawn giving full weight only to those Australian islands closer to the Australian mainland than to the PNG mainland ie disregarding those Australian islands that were closer to PNG.

When negotiations resumed in 1976, between the Fraser and Somare governments, Australia was prepared, as the next step, to negotiate a seabed line to the south of Boigu, Saibai and Dauan. A small group of representative officials met in July and August 1976 and agreed to recommend a line (the August 1976 line) that was virtually the same as the ultimately agreed seabed boundary. This is not the place to discuss all the factors relevant to the run of that line, but it might be noted that:

- It traversed the whole distance between end-points where Indonesian jurisdiction was engaged in the west and Solomons jurisdiction in the Coral Sea to the east;
- In the strait, it split the Warrior Reefs, a shallow area of interest to both sides;
- In the Coral Sea it gave about half weight to Australian islets (PNG accepting this in light of the Forum countries' position that such islets qualified for full EEZs, and in the expectation that PNG would similarly use its newly-acquired Pocklington Reef Island in relation to the Solomons boundary).

Foreign ministers endorsed the recommended line in August 1976, with the express proviso on the Australian side that it was only endorsed for seabed purposes and was subject to agreement on the rest of the Torres Strait settlement. At that point, the two main unresolved issues were the status of uninhabited islands north of the line and whether that line or some variation of it would be the boundary for sea, as distinct from seabed, purposes.

There followed a period of slow progress, punctuated by the most confrontational moment in the road to the treaty. This was when the Somare government, becoming understandably impatient as the post-independence clock ticked away with Australian jurisdiction still asserted on paper up to the PNG coast, proposed to introduce its own marine-jurisdiction legislation that would have foreshadowed, but not actually asserted, overlapping jurisdiction in the strait. The reaction of Australian ministers was brutally sharp and PNG was persuaded to exercise restraint, but the episode gave a strong incentive to both governments to address the remaining difficulties standing in the way of the treaty. (Later, in the 80s, Indonesia was to make a much more dramatic assertion of overlapping jurisdiction in its own push towards a fisheries boundary agreement with Australia.)

The Olewale/Peacock statement of February 1978 announced that ‘after a period of suspension during the time of the Papua New Guinea and Australian elections, substantive negotiations on all issues relating to Torres Strait would be resumed forthwith...’. The following months of that year saw intensive negotiations, with the signing of the treaty in December. The remaining jurisdictional issues were resolved as follows.

The position of PNG on the uninhabited islands was partly a last echo, reluctantly abandoned, of the old complaints originally made by British New Guinea, its predecessor in title so to speak, for a readjustment of the 1878 sovereignty line. However, its main concern was that under the international baseline rules the islands and even associated ‘low-tide elevations’ could be used to generate large areas of Australian territorial sea where PNG seabed jurisdiction (and any sea jurisdiction) would be ousted. This concern was addressed by agreement on what features, definitively, would be regarded as islands for that purpose, and the setting down for the future of what the territorial sea limits would be, on the basis of only a 3-mile breadth. With mapping technology then available, it was possible to calculate those limits with an accuracy of 25 metres. This is why the treaty devotes so much paper to describing and illustrating the sea limits of 9 small uninhabited islets.

Australia did not want, on the map, a solid black line below Boigu, Saibai and Dauan with the misleading appearance of a drastically relocated ‘border’. The agreed solution was that a ‘sea’ (fisheries) line would diverge northwards from the seabed line and form an embracing ‘hat’ around those three islands.

As an inducement to PNG to agree to the excision of the 9 islands, with 3-mile belts, and to the ‘hat’, Peacock proposed to PNG ministers a sharing of the commercial fisheries resources of the strait, tied to the proposed ‘protected zone’. Within the zone, each country would allow the other access to one quarter of the resources on its side of the line, with PNG to have half the resources of the northern ‘enclave’ islets. Australia stressed the higher value of the fish stocks on its side of the line. That proposal depended on adherence in good faith to the UNCLOS concept of ‘optimum sustainable yield’, which had been developed to guarantee access by foreign fishermen to genuinely excess resources not to be left at the unfettered discretion of a coastal state. The Peacock proposal had considerable attraction to a PNG government anxious to foster the development of a PNG-based fishing industry aimed at the resources of the strait.

With agreement on the above points, the jurisdictional issues were settled, but the package still depended on an exchange of undertakings on other matters.

The protected zone and rights of the traditional inhabitants

The protected zone regime was laid over the various lines of delimitation in the strait. This guaranteed traditional freedom of movement and exercise of other traditional rights. Such arrangements are not unusual in relation to international boundaries; PNG had its own 'border arrangements' treaty with Indonesia. What was unusual in relation to Torres Strait was that the traditional rights regime was an integral part of the boundary treaty itself and locked to all its other elements. Australia had insisted on that position, so as to be better able to show the advantages of the treaty package to the islanders. In a sense, the zone was a more developed and practical version of the 'marine park' proposal that had been favoured by Queensland.

PNG also saw advantage in the regime, provided it did not unduly restrict, as a 'park' might have suggested, commercial use of the resources of the area. (Without making any unkind imputation about the islanders' access to Australian services and welfare benefits, the PNG traditional inhabitant's only income, by contrast, was likely to come from use of available natural resources, either directly or as employed labour.) By 1978, PNG could hardly have failed to be aware of the importance of the islanders' wishes in the treaty development process. Moreover, it was quite possible that more PNG traditional inhabitants than Australian ones would benefit from the regime. Qualifying inhabitants only needed to live 'in the vicinity' of the zone, not necessarily within it, and the zone area, a smorgasbord of seafood if the maps were to be believed, was much more extensive on the Australian side of the sea and seabed lines.

This writer is not qualified to say whether any local inhabitants on either side were or are unhappy with any aspect of the treaty. Like all boundary arrangements and despite elaborate efforts, it is necessarily a blunt instrument, although intended to be made flexible, and responsive to the needs of those affected by it, through built-in liaison and consultation measures. However, some response might be made to the suggestion that the treaty-makers insensitively over-rode a pre-existing, well-recognised traditional boundary.

The claim that there was such a traditional boundary appears in Mr James Griffin's 1977 article, which draws in that respect on the views of Mr Peter English. Mr English was told by the local inhabitants that traditional boundary points were already recognised in the form of two specific low-tide elevations, between, respectively, Saibai and Boigu, and the Papuan coast. In fact, considerable efforts were made for the purpose of the negotiations to determine patterns of traditional uses of the area. These led to reports of patterns of non-exclusive fishing, including by Papuans right around the three inhabited islands. Sometimes this was said to be pursuant to a 'traditional right', perhaps belonging to one Papuan village but not others. With a history of cross-boundary uses, even entitlements, one wonders what followed from 'recognition' of a 'boundary' in a particular place and whether this was in truth recognition of a right to exclude others.

Definitive, treaty-based marine delimitation, as found necessary elsewhere, was needed to provide the means to control entry and use not by traditional inhabitants but by third parties, including (in this case) 'foreign' Australians and Papua New Guineans. Moreover, there were real questions whether traditional understandings about uses of the areas in question, if they existed, could, by their internal logic, even apply to, let alone be effective to control, serious commercial exploitation with modern equipment, either by local inhabitants or outsiders.

The advice to the negotiators was that sea areas near the inhabited coastal areas held resources sufficient for subsistence or ceremonial needs without going much further afield. More remote, occasionally visited, areas were another matter again. These included areas such as Bramble Cay and the Warrior Reefs, areas difficult to reach and exploit by traditional methods. Traditional use would have been occasional but surely non-exclusive; patterns of more frequent use with powered vessels were developing, but hardly traditional. To base definitive 'ownership' and hence sovereignty of sea areas primarily on 'use' could only open the door to a host of competing claims. Quite sufficient of these were heard to convince any responsible treaty-maker of the grave danger of attempting to draw a sovereignty line by a process of adjudication between them. More than one group can use an area, particularly in a time span from the beginning of legend until the present moment.

The protected zone concept at once preserved the area for the free play and interplay of current understandings about traditional rights and practices (see Article 12), and allowed for the exclusion or regulation of non-traditional uses by appropriate national authorities.

Apart from relevance or non-relevance to delimitation, the matter of traditional rights touches on another issue. The treaty was, of course, pre-Mabo. That case was a watershed only in Australia. In PNG traditional proprietary rights already had the force of law, and indeed were the foundation of the land tenure system. However, the recognition of proprietary rights in sea areas *beyond* 'internal waters', that is beyond the limits of the state, would have broken new ground for both systems. Whether such rights are legally recognised is a matter for the legal system from time to time of the relevant country, whether the recognition is via the common law, statute, constitutional affirmation of custom, or a combination of those. It is a matter for PNG whether it recognises private land rights in PNG of inhabitants of Indonesia; they are not relevant to the location of the border. In the Torres Strait, Article 12 is broad enough to call for recognition of cross-border proprietary sea rights where, and if, capable of recognition under respective national systems.

(As an aside, it is interesting to note that the claimants' original pleadings in the Mabo case actually invoked the Torres Strait treaty as an instance of recognition by government of the traditional rights that were in issue in that case.)

All this, of course, made for a fairly complicated treaty, far removed from the single boundary line originally favoured by PNG. As a result of that complexity, the treaty, signed on 18 December 1978, did not enter into force until 15 February 1985.

[Mr Griffin also made several criticisms of the treaty process and of the role in it of almost everyone except the traditional inhabitants. These are no more worth responding to now than they were then, but one point may be relevant to present purposes. He referred to PNG reliance on ‘Australian lawyers’:

... it seems to me unfortunate that the parameters of what is possible and the limits that might be set to PNG’s ambitions are not being conceptualised by PNG nationals, particularly after making themselves familiar with Torres Strait Islanders in their own habitat.

In fact: all significant decisions on the PNG side were made by PNG nationals; PNG ministers had more of an eye to the needs of future generations and less for the expedience of the political moment than I would expect in the average Australian minister; and Ebia Olewale was entitled to be annoyed at any suggestion that he was unfamiliar with Torres Strait Islanders in their own habitat.]

A post-script or two

Even given agreement on substance, the final treaty text took several weeks of concentrated, one might say feverish, work to refine and edit into its final form. It was a technical document, in which one changed word or numeral could have made a large difference to the effect of a provision whose fine balance had taken months of bilateral labours to achieve. When all was done at last, Tony Siaguru and I sent our personal souvenir copies to Canberra in the hope of obtaining Fraser and Peacock signatures alongside those of Somare and Olewale. We were told that the Peacock pen hesitated over the dotted line. ‘Can we be sure that this isn’t some kind of trick?’ he wanted to know.

Much later in Canberra, after I had joined the Australian public service, I was discussing the treaty’s fisheries provisions with the relatively new head of the fisheries division in the primary industry department. I referred to the treaty’s guarantee to PNG of a share of Australian fish resources. Having attended an international forum or two, the relatively new head scoffed, expressing the view that ‘optimum sustainable yield’ was an illusion, and would mean no fish at all if Australia thought that such a determination served its interests. Such an Australian position, in my view, would have been not only unsustainable but, given the negotiating history, an invitation to PNG to complain of bad faith; the incident does demonstrate that treaties must be written to be read by persons with a different cast of mind from the authors. Carefully drafted treaties make good neighbours.

Finally, there is the durability of that dashed – or dotted – black line. Some people, it seems, just want that line as ‘the border’ without explanation or qualification. The National Museum of Australia in Canberra contains an extensive display on Torres Strait Islanders. This is introduced by a large illuminated map of Torres Strait. On this map is a single black line of demarcation, a very solid line in this case. It is declared to be the ‘Australia/Papua New Guinea Border’, and its apparent application to sea and seabed is driven home by ‘Australia’ and ‘Papua New Guinea’ being printed alongside it at its eastern and western extremities. The line follows no known precedent. Unbelievably, it runs between the PNG mainland and the islands of Kawa and Mata Kawa, although PNG is allowed Kussa. The line claims for Australia large chunks of the PNG territorial sea, including in the vicinity of Daru. Having made a

couple of polite attempts to get the map corrected, this writer confesses that he has allowed it to affect his view of the authority of the institution: if the national museum can't get the national boundaries right, what else might it have got wrong?