

## Some Thoughts on Australia and the Freedoms of Navigation

Sam Bateman

Freedoms of navigation and overflight issues have been attracting considerable interest in recent months with calls for Australia to support the United States in conducting freedom of navigation (FON) operations in the South China Sea to challenge China's claims in the area. This comment discusses the importance of freedoms of navigation to Australia, including how this interest can sometimes conflict with Australia's interests both as a coastal State and in maintaining a stable neighbourhood. It concludes by identifying the costs and benefits of possible FON operations by Australia in the South China Sea. This comment piece draws upon work previously published by the Australian Strategic Policy Institute's *The Strategist* blog and the Australian National University's *East Asia Forum* blog.<sup>1</sup>

Freedoms of navigation and overflight (FON) are extremely important to Australia both economically and strategically. This is mainly because of Australia's dependence on seaborne trade most of which passes through the archipelagos to our north and north-east. The archipelagic arc stretching from Indonesia, the Philippines and Papua New Guinea (PNG) in the north, to the Solomon Islands, Vanuatu and Fiji in the north-east has great strategic importance to Australia. This is the region from or through which a threat to Australia could most easily be posed. It is also the area that provides opportunities for Australia to work on common interests with the ultimate objective of a more secure and stable region.<sup>2</sup>

The countries in the archipelagic arc, with the exception of Timor-Leste and New Caledonia,<sup>3</sup> are all archipelagic States under the regime of the archipelagic State established under the 1982 UN Convention on the Law of the Sea (UNCLOS). In a careful balancing of the interests of archipelagic States and the major maritime user States, rights of navigation and overflight through the waters of these countries are preserved through the regimes of innocent and archipelagic sea lanes (ASL) passage. The archipelagic State

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<sup>1</sup> See, Sam Bateman, 'Australia and the Freedoms of Navigation', 5 Jun 2015, 'What Are Australia's Interests in the South China Sea', 28 May 2015, 'Does the US Know what It's Doing in the South China Sea?', 19 May 2015, all at *The Strategist* <[www.aspistrategist.org.au](http://www.aspistrategist.org.au)>. See also, Sam Bateman, 'The Risks of US Freedom of Navigation Operations in the South China Sea', 1 June 2015, at *East Asia Forum* <[www.eastasiaforum.org](http://www.eastasiaforum.org)>.

<sup>2</sup> Sam Bateman and Quentin Hanich, 'Maritime Security Issues in an Arc of Instability and Opportunity', *Security Challenges*, vol. 9, no. 4 (2013), pp. 87-105.

<sup>3</sup> Timor-Leste is not an archipelagic State because it does not meet the UN Convention on the Law of the Sea (UNCLOS) criteria of being constituted wholly by one or more archipelagos and other islands. New Caledonia is not an archipelagic State because it is part of mainland France. Interestingly, it would qualify for archipelagic status if it were independent.

regime in UNCLOS allows countries that are constituted wholly by one or more archipelagos and possibly including other islands, to draw archipelagic straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that such baselines include the main islands and certain other criteria relating to the ratio of land to water and the length of these baselines are met.<sup>4</sup>

The security of shipping passing through the Pacific Arc is a vital strategic interest for Australia. About 62 per cent of Australia's merchandise trade (73 per cent of exports and 52 per cent of imports) by value passes to or through the Arc.<sup>5</sup> This trade transits either from the north-west of Australia through the Indonesian archipelago or from the east coast to the east of PNG. Australia thus has a major interest in the freedom of navigation through the Pacific Arc as guaranteed by the ASL passage regime in UNCLOS.<sup>6</sup> Australia played a prominent role at the International Maritime Organization (IMO) in negotiations regarding Indonesia's implementation of this regime,<sup>7</sup> but no other archipelagic country in the arc has implemented the regime through the IMO. Without the ASL passage regime, Australia's seaborne trade would be subject to the vagaries of the archipelagic States to its north, which if only innocent passage was available, could suspend passage in particular straits from time to time.

## Navigational and Overflight Regimes

UNCLOS and customary international law identify three distinct navigational regimes: innocent passage applying to the territorial sea and archipelagic waters; transit passage through straits used for international navigation; and ASL passage through archipelagic waters. Innocent passage is the most restrictive of the passage regimes. UNCLOS Article 19 sets out the activities that constitute non-innocent passage, such as operating aircraft and engaging in an activity that is "prejudicial to the peace, good order or security of the coastal State". UNCLOS Article 24 provides that innocent passage may be suspended in certain circumstances, and Article 20 requires that submarines must travel on the surface and show their flag. Innocent passage applies only to ships and there is no associated right of overflight.

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<sup>4</sup> These criteria are set out in UNCLOS Article 47. Archipelagic baselines are drawn to different and more liberal rules to those applying to territorial sea straight baselines as set out primarily in UNCLOS Article 7.

<sup>5</sup> Trade with the ASEAN countries, China, Japan, Republic of Korea, Hong Kong and PNG. Figures are based on data in Australian Bureau of Statistics, *International Trade in Goods and Services August 2013* (Cat No 5368.0), <[www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/2E7E69A2898BC922CA257BF70011982A/\\$File/53680\\_aug%202013.pdf](http://www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/2E7E69A2898BC922CA257BF70011982A/$File/53680_aug%202013.pdf)> [Accessed 25 November 2013], Table 14.

<sup>6</sup> UNCLOS Article 53.

<sup>7</sup> Robin Warner, 'Implementing the Archipelagic Regime in the International Maritime Organization', in Donald Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2000), pp. 170-1.

The burden of proving non-innocent passage rests with the coastal State. This might be problematic in terms of proving whether a vessel is engaging in one of the activities in UNCLOS Article 19(2) that are deemed to be “prejudicial to the peace, good order or security of the coastal State”. For example, it would be hard to prove an act “aimed at collecting information to the prejudice of the defence or security of the coastal State”,<sup>8</sup> as there might be no external indication (e.g. additional aerials to collect communications or electronic intelligence) that such an act was being carried out. Another problem with innocent passage in the region is that some countries have legislation and regulations requiring prior notification or authorisation of the transit of warships through their territorial sea. These countries include China, Indonesia, the Philippines, South Korea and Vietnam.

The regime of ASL passage introduced by UNCLOS guarantees the non-suspendable right of ships and aircraft to transit through the waters of an archipelagic State, provided they use ASLs designated by the archipelagic State, or if no such lanes have been designated, along routes normally used for international navigation or overflight.<sup>9</sup> Outside these sea lanes, ships of all nations have the right of innocent passage only,<sup>10</sup> and there is no right of overflight. The vast difference in operational terms between the liberal nature of the ASL passage regime and the restrictions with innocent passage has made the identification of ASLs a vexed issue, with an archipelagic State seeking to minimise the number of sea lanes and the user States wishing to maximise the number. Interpreting the rules for drawing sea lanes, as set out in UNCLOS Article 53(5), in particular, is also proving more complex than may have been anticipated.<sup>11</sup>

Only Indonesia has so far designated ASLs.<sup>12</sup> However, these are just a partial designation as the designated ASLs only provide for a North-South transit and there is no East-West sea lane through the Java and Flores seas. Because this is a route normally used for international navigation, Australia, the United States and possibly other countries continue to exercise a right of ASL passage through these seas although this appears contrary to Indonesian regulations.

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<sup>8</sup> UNCLOS Article 19(2).

<sup>9</sup> UNCLOS Article 53.

<sup>10</sup> UNCLOS Article 52(1).

<sup>11</sup> UNCLOS Article 53(5) refers to continuous axis lines for archipelagic sea lanes (ASLs) from entry to exit and that ships and aircraft shall not deviate more than 25 nautical miles from either side of such axis lines, provided that ships and aircraft shall not navigate closer to the coast than 10 per cent of the distance between the nearest points on islands bordering the sea lane. The experience with Indonesia’s designation of ASLs has shown that implementing these rules has required hydrographers and navigators from the archipelagic State and the user States to negotiate on virtually every mile of an ASL.

<sup>12</sup> Sea Power Centre—Australia, ‘Indonesian Archipelagic Sea Lanes’, *Semaphore*, Issue 6, April 2005, <[www.navy.gov.au/spc/publications/semaphore/semaphore-2005-issue-6](http://www.navy.gov.au/spc/publications/semaphore/semaphore-2005-issue-6)> [Accessed 12 June 2015].

The regime of transit passage in Section 2 of Part III of UNCLOS is similar to that of ASL passage. It gives all ships and aircraft the right to travel through straits used for international navigation in their normal operational mode on, under or over the water. Transit passage is defined as the exercise of the freedom of navigation and overflight by ships and aircraft through an international strait “between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone”.<sup>13</sup> Torres Strait and Bass Strait are both regarded as straits used for international navigation, as well as key global straits, such as Hormuz, Malacca and Singapore.

One difference between ASL passage and transit passage is that ASL passage in UNCLOS means the exercise of “the rights of navigation and overflight”,<sup>14</sup> whereas transit passage means the exercise of a “freedom of navigation and overflight”.<sup>15</sup> The difference between a ‘freedom’ and a ‘right’ may not be great in English, but when translated into Bahasa Indonesian, there is considerable difference. In Bahasa, a ‘freedom’ is a *kebebasan*, but a ‘right’ is a *hak*. A *kebebasan* is absolutely free, but a *hak* has connotations of a favour being granted with the granter of the favour retaining the right to set conditions on the favour. This distinction helps explain why Indonesians can be very sensitive to issues associated with the ASL passage regime.

The regimes of ASL and transit passage established by UNCLOS include a right of overflight. The ability to deploy military aircraft through these archipelagos to and from bases in mainland Australia is strategically important to Australia. Two operating methods are available to military and state aircraft in regard to flying through regulated airspace over an international strait or an ASL.<sup>16</sup> The first is to comply with the operating methods of civil aircraft and to seek necessary diplomatic clearances. This is generally simple and in peacetime normally achieves the objective as diplomatic clearances to enter sovereign airspace, either to land or transit through, are routinely granted by most countries.

The second method is to exercise the rights of transit or ASL overflight and fly through irrespective of Flight Information Region (FIR) or Air Defence Identification Zone (ADIZ) boundaries and without seeking diplomatic clearance. Air safety can be maintained by information messages to the air traffic control authorities. It is unlikely that civil aircraft will use these passage regimes as more convenient and less risky processes exist under current International Civil Aviation Organisation (ICAO) procedures.

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<sup>13</sup> UNCLOS Article 38(2).

<sup>14</sup> UNCLOS Article 53(3).

<sup>15</sup> UNCLOS Article 38(2).

<sup>16</sup> John Mordike and Ric Casagrande, ‘The 1982 Law of the Sea Convention: Some Implications for Air Operations’, *APSC Paper Number 51*, Canberra, Air Power Studies Centre, 1997, <[airpower.airforce.gov.au/Publications/Details/108/The-1982-Law-of-the-Sea-Convention-Some-Implications-for-Air-Operations.aspx](http://airpower.airforce.gov.au/Publications/Details/108/The-1982-Law-of-the-Sea-Convention-Some-Implications-for-Air-Operations.aspx)> [Accessed 14 June 2015], p. 9.

## Indonesia and the Law of the Sea

It is a major consideration for Australia that our large northern neighbour, Indonesia, attaches considerable importance to law of the sea issues, as well as to maritime issues generally.<sup>17</sup> Indonesia took a leading role in promoting the concept of an archipelagic State and has actively pursued maritime boundaries with its neighbours. For Indonesians, the sea is an integral part of the nation-state. Concepts of *nusantara* and *tanah air*, linking the islands of the Indonesian archipelago together rather than separating them, are fundamental principles of nation-building for Indonesia.<sup>18</sup>

Over the years, Indonesia has shown considerable sensitivity to the presence of foreign ships and aircraft in its waters. In July 2003, two Indonesian F-16Bs intercepted five F/A 18s from USS *Carl Vinson* in the Java Sea north-west of Bawean Island north of Bali. The aircraft jammed each other's electronics and flew attack profiles against each other. Indonesia claimed the Hornets were in Indonesian airspace and the United States asserted what it claimed to be customary rights to an East-West passage.<sup>19</sup> In October 2014, Indonesian Sukhoi fighter jets intercepted an Australian civilian plane and forced it to land in Manado for flying through Indonesian airspace.<sup>20</sup>

Australia was severely embarrassed in early 2014 when it was revealed that several RAN and Australian Customs vessels had entered Indonesian territorial waters in connection with Operation Sovereign Borders in December 2013 and January 2014. Australia apologised for these incidents and Indonesia demanded a halt to asylum-seeker boat turnbacks.<sup>21</sup> These incidents arose from a poor appreciation of Indonesia's straight archipelagic baselines.<sup>22</sup> As an archipelagic State, Indonesia is entitled to draw straight baselines connecting the outermost points of its archipelago, provided certain criteria are met. While the territorial sea normally extends 12 nautical

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<sup>17</sup> Iis Gindarsah and Adhi Priamarizki, 'Indonesia's Maritime Doctrine and Security Concerns', *RSIS Policy Report*, 9 April 2015, <[www.rsis.edu.sg/rsis-publication/idss/indonesias-maritime-doctrine-and-security-concerns/#.VYESetKJi3A](http://www.rsis.edu.sg/rsis-publication/idss/indonesias-maritime-doctrine-and-security-concerns/#.VYESetKJi3A)> [Accessed 14 June 2015].

<sup>18</sup> Robert Cribb and Michelle Ford, 'Indonesia as an Archipelago: Managing Islands, Managing Sea', in Robert Cribb and Michelle Ford (eds), *Indonesia Beyond the Water's Edge: Managing an Archipelagic State* (Singapore: ISEAS Publishing, 2009), p. 11.

<sup>19</sup> Hasjim Djalal, 'Indonesia's Archipelagic Sea Lanes', in Cribb and Ford, *Indonesia Beyond the Water's Edge*, p. 68.

<sup>20</sup> 'Indonesian Jets "Force Australian Plane to Land"', *news.com.au*, 23 October 2014, <[www.news.com.au/national/indonesian-jets-force-australian-plane-to-land/story-fncynjr2-1227098858304](http://www.news.com.au/national/indonesian-jets-force-australian-plane-to-land/story-fncynjr2-1227098858304)> [Accessed 9 June 2015].

<sup>21</sup> David Wroe and Michael Bachelard, 'Australian Breach of Indonesian Territorial Waters Angers Jakarta', *Sydney Morning Herald*, 18 January 2014, <[www.smh.com.au/federal-politics/political-news/australian-breach-of-indonesian-territorial-waters-angers-jakarta-20140117-310kk.html](http://www.smh.com.au/federal-politics/political-news/australian-breach-of-indonesian-territorial-waters-angers-jakarta-20140117-310kk.html)> [Accessed 11 June 2015].

<sup>22</sup> Sam Bateman, 'Incompetence: Australia's Incursions into Indonesian Waters', *The Interpreter*, Lowy Institute, 28 February 2014, <[www.lowyinterpreter.org/post/2014/02/28/Incompetence-Australias-incursions-into-Indonesian-waters.aspx](http://www.lowyinterpreter.org/post/2014/02/28/Incompetence-Australias-incursions-into-Indonesian-waters.aspx)> [Accessed 2 March 2014].

miles from land, if straight baselines are used it can extend much further — a ship can be well beyond 12 nautical miles from land and still be within the territorial sea of Indonesia.

## Australia and the Law of the Sea

As a maritime State with one of the largest exclusive economic zones (EEZs) in the world and an extensive outer continental shelf, the law of the sea is of considerable importance to Australia. However, a policy dilemma can arise between our interests as a maritime State and our interests in FON. This was apparent during negotiations on UNCLOS when Australia's position needed to reflect its interests as a coastal State while not wanting to see traditional FON reduced by extensions of maritime zones.<sup>23</sup>

Despite Australia's concern for FON, particularly in the archipelagos to its north, Australia has introduced measures that other countries view as restrictions on their FON. These measures include the introduction of compulsory pilotage in the Torres Strait,<sup>24</sup> the declaration of prohibited anchorage areas around undersea cables in the EEZ,<sup>25</sup> the introduction of mandatory ship reporting in parts of the EEZ adjacent to the Great Barrier Reef, and the declaration of the entire Australian EEZ as a submarine exercise area.<sup>26</sup>

Unlike the United States, Australia does not have a formal FON program, and we rarely follow the US example of formally protesting so-called 'excessive claims' to maritime jurisdiction. However, Australia routinely conducts de facto FON operations by, for example, not giving prior notification of the entry of RAN vessels into Indonesian waters outside of the declared ASLs. A noteworthy probable FON incident involving Australia occurred in 2001. A Chinese warship challenged three Australian navy ships in the Taiwan Strait heading from South Korea to Hong Kong.<sup>27</sup> The incident occurred about two weeks after a Chinese fighter jet collided with an American spy plane over the South China Sea, sparking diplomatic tensions between Beijing and Washington. The Australian vessels apparently

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<sup>23</sup> Ian Knox, 'Australian Naval Representation at UNCLOS III', in Stuart Mayer, Ian Knox and Ivan Shearer, 'Reflections on the Royal Australian Navy and the United Nations Convention on the Law of the Sea 1982', *Soundings*, no. 3, November 2014, <[www.navy.gov.au/media-room/publications/soundings-papers-november-2014](http://www.navy.gov.au/media-room/publications/soundings-papers-november-2014)> [Accessed 14 June 2015], p. 6.

<sup>24</sup> Sam Bateman and Michael White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment', *Ocean Development & International Law*, vol. 40, no. 2 (2009), pp. 184-203.

<sup>25</sup> Border Protection Command, *Guide to Australian Maritime Security Arrangements* (Canberra: Australian Border Protection Command, December 2009), Figure 8, p. 30.

<sup>26</sup> Australian Hydrographic Service, 'Information Concerning Submarines', *Australian Annual Notice to Mariners*, No. 19, para. 3.

<sup>27</sup> Damian Grammaticas, 'Stand-off in Taiwan Strait', *BBC News*, 29 April 2001, <[news.bbc.co.uk/2/hi/asia-pacific/1303037.stm](http://news.bbc.co.uk/2/hi/asia-pacific/1303037.stm)> [Accessed 18 June 2015].

declined to change course, saying they were exercising their right to free navigation in accordance with the laws of the sea.

The United States is the only country in the world with a formal FON program.<sup>28</sup> It has three elements: bilateral and multilateral consultations with other governments that may be planning new claims regarded as contrary to international law; diplomatic representations and protests; and operational assertions of rights by US military units. The philosophy of the US FON program is that if claims and constraints are not challenged, they may over time come to be considered to have been accepted by the international community.

Three claims made by Australia have been protested by the United States.<sup>29</sup> These are firstly our establishment of territorial sea straight baselines and declaration of Anxious, Encounter, Lacedpede and Rivoli Bays as historic bays. The United States does not recognise these claims and has lodged a diplomatic protest against them. However, while the United States routinely conducts FON operations against historic bays elsewhere in the world, it has not undertaken FON operations against the bays claimed by Australia. Secondly, the United States has protested Australia's claim to an EEZ around the Australian Antarctic Territory. Lastly, and the most serious of Australia's disagreements with the United States, is our introduction in 2006 of compulsory pilotage through the Torres Strait and the Great Northeast Channel.<sup>30</sup> This regime does not apply to ships with sovereign immunity, but due to difficulties of navigation in the area, US Navy vessels routinely take pilots for the passage of the strait. However, in requesting a pilot, a US Navy ship will note that its request is voluntary and not based on the mandatory pilotage scheme.

## **FON in the South China Sea**

The United States is contemplating sending military ships and aircraft to assert FON around Chinese-claimed islands in the South China Sea.<sup>31</sup> There are three main implications of this possible action. The first is the status of China's claims to the disputed islands. A recent authoritative report

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<sup>28</sup> During the fiscal year 2014, the United States conducted operational assertions to challenge excessive maritime claims by the following regional countries: China, India, Indonesia, Iran, Malaysia, Maldives, the Philippines, Sri Lanka, Taiwan and Vietnam. The claims by Indonesia challenged by the United States included the partial designation of archipelagic sea lanes and the requirement for prior notification by foreign warships to enter Indonesia's territorial sea and archipelagic waters. Under Secretary of Defense for Policy, US Department of Defense, *DoD Annual Freedom of Navigation (FON) Reports*, <[policy.defense.gov/USDPOffices/FON.aspx](http://policy.defense.gov/USDPOffices/FON.aspx)> [Accessed 12 June 2015].

<sup>29</sup> US Navy Judge Advocate General's Corps, 'US Maritime Claims Reference Manual', <[www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm)> [Accessed 8 June 2015].

<sup>30</sup> Bateman and White, 'Compulsory Pilotage in the Torres Strait'.

<sup>31</sup> Andrew Browne, 'U.S. Gambit Risks Conflict With China: Option to Challenge Beijing in South China Sea is Fraught with Danger', *Wall Street Journal*, 13 May 2015, <[www.wsj.com/articles/u-s-gambit-risks-sucking-it-into-conflict-with-china-1431505129](http://www.wsj.com/articles/u-s-gambit-risks-sucking-it-into-conflict-with-china-1431505129)> [Accessed 16 May 2015].

from the Center for Naval Analyses in Washington concluded that while Vietnam may have a better claim to both the Spratlys and the Paracels, “[a]t the same time, U.S. policymakers cannot lose sight of the fact that China’s claims may be superior”, and that “[t]he absence of an unambiguous legal case in any of these disputes reinforces the wisdom of the U.S. policy of not taking a position regarding which country’s sovereignty claim is superior.”<sup>32</sup> The action now being contemplated risks being seen as an indication that the United States has taken a position on the sovereignty claims.

The second issue is the oft-stated line from Washington that China threatens FON in the South China Sea. But China has always said that with freedoms of navigation and overflight, it only disputes the right of the United States to conduct military activities, particularly certain types of intelligence collection and military data gathering (so-called ‘military surveys’) in its exclusive economic zone. China’s disputation of the right of the United States to undertake the latter activities has some merit, particularly when the military surveys constitute marine scientific research, which is under the jurisdiction of the coastal State in its EEZ. It is also significant that several other regional countries, India, Malaysia and Thailand, share China’s position on military activities in the EEZ.

The last issue arises from reports that the options being considered in Washington include sending aircraft and ships *within* 12 nautical miles of the reefs and islands occupied by China. This would be acceptable if the features had previously been submerged at high tide and thus only entitled to a 500 metre safety zone around them and not a territorial sea. If, however, they were features that were entitled to a territorial sea, the United States would be exercising a right of innocent passage. But sending ships into such waters specifically for demonstrating a right would not be a legitimate exercise of innocent passage. UNCLOS makes clear that innocent passage should be “continuous and expeditious”, and should not involve “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State”.<sup>33</sup>

The Australian Government is also contemplating a ‘freedom of navigation’ exercise, which would involve an Australian P-3 Orion surveillance aircraft flying very near artificial islands being built by China in the South China Sea.<sup>34</sup> This would be acceptable if it only involved the features not entitled to a territorial sea. There is no right of overflight through a territorial sea. However, Australia does have some established practice in this area with

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<sup>32</sup> Michael McDevitt, ‘The South China Sea: Assessing U.S. Policy and Options for the Future’, *CNA Occasional Paper*, November 2014, <[www.cna.org/sites/default/files/research/IOP-2014-U-009109.pdf](http://www.cna.org/sites/default/files/research/IOP-2014-U-009109.pdf)> [Accessed 12 February 2015], p. vii.

<sup>33</sup> UNCLOS Articles 18(2) and 19(2).

<sup>34</sup> ABC, ‘Government Reportedly Planning “Freedom of Navigation” Exercise in South China Sea’, RN Breakfast, 2 June 2015, <[www.abc.net.au/radionational/programs/breakfast/government-reportedly-planning-freedom-of/6513778](http://www.abc.net.au/radionational/programs/breakfast/government-reportedly-planning-freedom-of/6513778)> [Accessed 5 June 2015].

Australian aircraft routinely conducting maritime surveillance patrols in the South China Sea through Operation Gateway. This is part of Australia's enduring contribution to the preservation of regional security and stability in South East Asia under the Five Power Defence Arrangement (FPDA).<sup>35</sup>

Australia must weigh the costs and benefits of joining the United States in FON operations in the South China Sea beyond what currently takes place with Operation Gateway. The only benefits lie in the support such operations would provide for the United States as our major strategic partner but Australia needs to tread carefully here. The legal situation is less than clear and US objectives in undertaking FON operations in the South China Sea need also to be seen in the provocations they provide to China.

An argument has been made that our own freedoms of navigation are under threat in the South China Sea. It is patently false to claim that about 60 per cent of overseas trade passes through the South China Sea.<sup>36</sup> Based on the latest data for Australia's overseas trade, it might not even be half that—and about three-quarters of it would be trade to and from China. Thus the notion of a threat to our seaborne trade from China is rather a non-sequitur. Our overseas trade crossing the South China Sea includes that with China (with a total of 23.9 per cent of our two-way overseas trade), Thailand (2.8 per cent), Taiwan (1.9 per cent), Vietnam (1.4 per cent) and Hong Kong (1.2 per cent).<sup>37</sup> And even these figures overstate our dependence on the South China Sea, as it is only trade with southern China that crosses the sea. These figures are based on overseas trade by value. Trade by volume could provide a different result recognising the high volume of our exports (coal, iron ore, LNG, and other minerals) carried by sea, but it would still be nothing like 60 per cent.

Strategically, freedom of navigation is an important interest for Australia, particularly through the archipelagos to our north, but it would be unwise of Australia to become associated with the currently unilateral, and legally questionable, assertions by the United States. Such an involvement would do nothing for our image as an independent player in the region.

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<sup>35</sup> Department of Defence, 'Operation Gateway', <[www.defence.gov.au/operations/SouthChinaSeaIndianOcean/](http://www.defence.gov.au/operations/SouthChinaSeaIndianOcean/)> [Accessed 8 June 2015].

<sup>36</sup> Bonnie Glaser, 'High Stakes for Australia in Limiting China's South China Sea Incursions', *The Age*, 22 May 2015, <[www.theage.com.au/comment/high-stakes-for-australia-in-limiting-chinas-south-china-sea-incursions-20150521-gh6nvw.html](http://www.theage.com.au/comment/high-stakes-for-australia-in-limiting-chinas-south-china-sea-incursions-20150521-gh6nvw.html)> [Accessed 25 May 2015].<sup>37</sup>

Department of Foreign Affairs and Trade, 'Composition of Trade Australia 2013-14', <[dfat.gov.au/about-us/publications/Documents/cot-fy-2013-14.pdf](http://dfat.gov.au/about-us/publications/Documents/cot-fy-2013-14.pdf)> [Accessed 24 May 2015], Table 8.

<sup>37</sup> Department of Foreign Affairs and Trade, 'Composition of Trade Australia 2013-14', <[dfat.gov.au/about-us/publications/Documents/cot-fy-2013-14.pdf](http://dfat.gov.au/about-us/publications/Documents/cot-fy-2013-14.pdf)> [Accessed 24 May 2015], Table 8.

## Conclusion

Australia has a clear strategic interest in the situation in the South China Sea not deteriorating further. However, the situation with maritime claims there is complex and there is no evidence at present that Australia's core navigational rights and freedoms are being challenged. Any attempt to assert less than core rights would risk an accusation of hypocrisy given that Australia itself has adopted arrangements that other countries, most particularly the United States, regard as limitations on customary FON.

Australia's broader regional relations must also be considered. As Peter Drysdale has recently pointed out, Asia takes Australia seriously as a "crucial element in Asia's security in terms of strategic resource and energy supply".<sup>38</sup> That is where Australia's bigger picture and interests in the South China Sea lie. The sea itself is not that important to Australia rather it is our broader regional role. Rather than contemplating direct involvement, Australia might use its good offices to play a role in de-escalating the situation in the South China Sea. The overall objective of all stakeholders in regional stability should be to demilitarise the South China Sea to reduce the risks of an unfortunate incident. Australia could help by expressing its concern to China about using its reclaimed islands for military purposes, and to the United States about an overly aggressive military response to China.

China has not made clear just what restrictions on navigation and overflight it is imposing around features it occupies in the South China Sea. When and if it does, then after careful consideration of the legal 'rights and wrongs' of China's claims, a diplomatic protest by Australia would be more appropriate than by now 'jumping the gun' and flying aircraft into a disputed and complex legal situation. As well as provoking China, such a gesture would be widely seen in the region as Australia slavishly following the United States and trying to act again as the region's 'deputy sheriff'.

We might also promote the notion of an operational and strategic level agreement to cover issues such as safety zones around disputed features, restrictions on particular types of operation in particular areas. These might include submarine 'no go' areas (or even not to conduct FON operations in disputed waters), hot lines, operational transparency, and prior notices of major maritime operations.

*Sam Bateman is a Professorial Research Fellow at the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, and also Adviser to the Maritime Security Programme at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore. He is a former Australian naval officer with a long-standing interest in regional law of the sea issues having completed a PhD at the University of*

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<sup>38</sup> Peter Drysdale, 'The Importance of Reliable Resource Markets to Australian and Asian Security', *East Asia Forum*, 25 May 2015, <[www.eastasiaforum.org/2015/05/25/the-importance-of-reliable-resource-markets-to-australian-and-asian-security/](http://www.eastasiaforum.org/2015/05/25/the-importance-of-reliable-resource-markets-to-australian-and-asian-security/)> [Accessed 28 May 2015].

*NSW in 2001 on 'Strategic and Political Aspects of the Law of the Sea in East Asian Seas'.  
[sbateman@uow.edu.au](mailto:sbateman@uow.edu.au).*