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Commentary in Reply to "Is it Time for the United States to Join the Law of the Sea Convention"

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We comment in reply to Capt.[1] Raul ("Pete") Pedrozo's article "Is It Time for the United States to Join the Law of the Sea Convention?" published in this Journal[2] where the author argues strongly but unpersuasively in the negative. We think that the author looks only at selected clauses of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982)[3] to form his statements. We think too that he unfairly reflects the argumentation structure his protagonists employ. Thus, his subsequent dialectic seems to be an adjunctive mix of disapproving comments on a brief by Scott G. Borgerson & Thomas R. Pickering to the Council of Foreign Relations (CFR) on climate-related matters leavened with his interpretation of the US security interests as related therein.[4] We cannot understand that document's relationship to maritime matters. Moreover, security interests as presented by the author seem to be strongly colouring other equally or more important matters of United States (US) policy including maritime and trade policies. Thus, we are puzzled as to the author's motivation in expressing his views. We present our comments in general terms in section I and provide within each subsection specific commentary on the author's averments. We conclude in section II.

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[2]41 J. *Mar. L. & Com*. Vol. No. 2 (April 2010) 151.

[3]United Nations Convention on the Law of the Sea, Dec. 10, 1982, Available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf Feb. 2, 2011).

[4]Scott G. Borgerson & Thomas R. Pickering, *Expert Brief: Climate Right for U.S. Joining Law of the Sea Convention,* Council of Foreign Relations (Dec. 23, 2009), available at http://www.cfr.org/publication/21041/climate_right_for_us_joining_law_of_sea_convention.html, (Feb. 2, 2011).

I
OVERVIEW

A. The Author Did Not to Appreciate the Global Importance of UNCLOS 1982

By dismissing in general UNCLOS 1982 as merely another treaty of passing US interest, the author damned the most ambitious and successful international maritime law reform movement ever undertaken to implement key Grotian[5] concepts and the original SOLAS[6] 1914.[7] We think he was at best cavalier toward the vitally important US contribution to bringing about UNCLOS 1982. We say without hyperbole that the US delegations participating in the various sessions of the Third UN Conference on the Law of Sea[8] met the highest standards and skills for negotiating missions set by the state since the early days of the US organizing its government. The UNCLOS 1982 delegation included USCG representatives who invariably argued strongly elsewhere in favour of US acceptance of the final Convention—often against fellow delegates representing different interests.[9] Although Capt. Pedrozo expressed concerns for the US role in international maritime matters, in reality he failed to address them. Instead he concentrated on what appears to be the self-selected paramount priority of national security. In doing so he singled out US environmental agencies and NGOs for his words and sternly criticised President Obama's National Oceans Proclamation of 2009.[10]

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[5]Grotius, Hugo [Hugo de Groot][1583-1645] *Mare Librum* [1609].

[6]Convention on the Safety of Life at Sea 1914 was agreed as a direct consequence of the allision and sinking of *TITANIC* in 1912. Later versions were adopted in 1929, 1948, 1960, and 1974.

[7]See JOHN A. C. CARTNER, R.P. FISKE & T.L. LEITER, THE INTERNATIONAL LAW OF THE SHIPMASTER at § 1.4(2009). SOLAS 1914 followed the *Titanic* allision and sinking of 1912.

[8]United Nations General Assembly: Report on the Third United Nations Conference on the Law of the Sea, 1982: http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html, et al.

[9]Id. Edgar Gold participated in many sessions of the Third United Nations Conference on the Law of the Sea and personally observed the negotiations.

[10]With no intent whatsoever to argue *ad hominem* in this footnote or in the text or in this paper overall, it appears to us that the author is a senior USN lawyer. Seeing neither express nor implied disclaimer in his article, we are not sure if Capt. Pedrozo's views are his own, or if they are intended to signal the stirrings of a most surprising change in policy in the USN, the Department of State, or in the sundry US organs of state security. If such is the case, the notion of change certainly has neither been widely distributed, nor publicised, nor is it widely known. This in turn leads us to suspect that the author's approach is perhaps not as unbiased as it should be for a senior officer holding the commission of the head of state and government of the US. We would hope that his observations are the *bona fide* collective creature of his own idiosyncratic and subjective perceptions rather than the actual or potential policies of the US government.

B. As a Formal Matter the Author Argued Unfairly

We are troubled, as a formal matter, with the author's argumentative structure. As negativist, he provided seven exclusive arguments in a collective counter to the similarly nominated seven non-exclusive arguments posited by Pickering and Borgerson. They, however, merely organized their paper around these points: a) access to the Arctic and extended continental shelf claims; b) a seat on the Continental Shelf Commission; c) deep seabed mining; d) freedom of navigation and maritime security; e) protecting the marine environment; f) economic security; and g) assuming a world leadership role. They then thematically argued the broad salutary benefits and implications of UNCLOS 1982 and used the seven categories not as exhaustive and definitional but simply as rational organizing tools. The author, however, adopted the categories in a narrow, definitional, exclusive, and categorical Aristotelian sense.[11] He further assumed *a priori* that the protagonists intended the categories be exhaustive and definitional. His arguments were founded on an exclusivity never intended and appear to us mere sophistry couched as objectivity. Because the arguments are not objective they are subjective and mislead. Moreover, when his arguments are compared to the summary of the content and purpose of UNCLOS 1982, it becomes clear that the author selected parts not reflective of the overall content of the Convention but those which we can only interpret as self-serving. This stacks the deck which is both unfair to objective reflection and imbalanced in presentation. Had he presented a more balanced view by providing *pro* and *contra* on each position, his overall argument would have been more nearly balanced and far stronger.[12] We think, therefore, on formal grounds alone that his approach is sufficiently suspect to warrant dismissal of its resultant statements.

C. The Author Distorted the Achievements of the UNCLOS 1982 Reality

We are concerned that the author distorted many of the UNCLOS 1982 achievements by suggesting that the US has got whatever it wanted without ratification. That distorts reality and suggests a flaw in the author's apparent full understanding of international law, how it is implemented and how states behave within it. Despite the fact that the US can rightly regard itself as a leading power in the world economically, politically and militarily, it is

[11]Aristotle, *Posterior Analytics*, Bk. II, Ch. 3-10, 123c-123d; Ch. 13, 131b-133c; *Topics*, Bk. VI-VII, 192a-211a,c; *Metaphysics*, Bk. VII, Ch 4-6, 552b-555a, et seq.

[12]By so arguing, however, the author, it appears, performed a classic dialectic trick rather than shedding light on the subjects to which he objects.

still part of the family of sovereigns, as confirmed by its membership in and contributions to the United Nations. As a result, it is expected by other states, both the powerful and the not-so powerful, to function as a willing and cooperative participant in world affairs. The US failure to ratify UNCLOS 1982, we believe, places it in a losing position in terms of its own and the world's oceans policy. This is a position far short of the leadership role it is accustomed to providing to the world since at least 1917.

D. UNCLOS 1982 Must Be Seen in Global Context

In order to appreciate UNCLOS 1982 in its global[13] context, several matters must be examined correctly and thoroughly. These relate to the Convention's wide international acceptance and demographic representation; the fundamental bases of international law pertaining to international conventions; the specific Convention clauses protecting individual state sovereignty; and the overall importance of UNCLOS 1982 in the context of global ocean governance and management. From the following seven paragraphs, it can be inferred that the author's general arguments ought not to be the basis of any effective US policy relatable to UNCLOS 1982, any logical fallacy in them put aside.

It is curious that the author ignored some of the fundamental rules of conventional law well-known in theory and practice. No state is compelled by any other to be a party; any party may denounce a treaty or convention; every convention allows an executing state to reserve matters of interest to it; although not a desirable course of action, any state party may simply refuse to comply with a provision if special situations require such action, or purposively distort or evade the language of both convention and its own domestic laws to meet its ends.[14] Further, the government executive or the

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[13]The support of UNCLOS 1982 by people and their governments worldwide is witnessed by these facts of the world deme: There are currently some 6.9 billion people in the world represented for the most part by 203 sovereign states and a few other forms of statehood as stated in the *CIA World Factbook 2010*. The population represented comprises approximately 95% of the world population [John A. C. Cartner calculation]. There have been acts by 161 sovereigns expressing formal interest in the Convention. The remainder, except the US, have special situations such as being landlocked, seeing no need to finance a convention which relates to them very little, being of small size, or being in a state of war or having an unstable or otherwise dysfunctional government or not being recognized as full sovereigns. Id., CARTNER, FISKE & LEITER, supra note 10, Part III. This leaves the US with a little less than 5% of the world's population as the principal holdout and, because of its economic power and presence, the principal obstructionist to the Convention's goals. One cannot help but think that this position is a symptom of US isolationism, chauvinism, and xenophobia fostered since 2001 by its political regime.

[14]This is due to the reality of international diplomacy and enforcement. It recognizes that relatively little can be done to enforce treaty violations outside political expediency, moral suasion and shame, or trade restrictions of some sort.

highest court of a state party may invalidate, strengthen or weaken a treaty clause or clauses as a part of the domestic law of such state.[15]

We believe that US leadership of the world is more important now than ever before. That said, national security, while essential to any state's longevity, is not necessarily the US government's most important function. It is certainly a critical component in today's dangerous world and of any sovereign's duties equally to all its domestic constituents. Programs ensuring national security excessive to any state's sufficient needs, however, must be balanced against the many other national and international interests to make such programs necessary. This is properly a matter of governance with which every sovereign state – including the US – must deal — within available resources. The US is not faced, however, with survival of the state, as some would have it, but a set of choices made by the executive and legislative branches of the government to allocate resources to programs which are believed to improve the national security under prevailing conditions and within the reasonable limits of the Constitution. Currently these decisions are influenced by a good deal of emotion and guided by divers and sundry political currents, eddies and pressures. Throughout his arguments against UNCLOS 1982, the author seems to have assumed that national security, as an interest, was paramount to all other state interests and that economic allocatory choices should be made on that premise. However, in arguing for his version of *Leviathan*,[16] The author never defined "national security" outside a generally vague, inchoate, and incoherent topos.

In fact, the term national security has no generally agreed upon and acceptable definition.[17] In the US, the debate about it is so sufficiently immature that neither politicians nor academia nor the chattering class can settle on any agreed meaning or use with definitive specificity. The national security discussion is currently poised on a slippery slope comprising an indistinguishable mix of national defence, civil defence, national economic interest, criminal apprehension, anti-terrorism, suppression of civil unrest and revolt and insurrection, quarantine for epidemic disease, reaction to nuclear weapons proliferation, and the use and a host of other functions and even includes natural and man-made disasters such as hurricanes and oil spills,[18]

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[15]See ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAWS (2005), passim.

[16]Thos. Hobbes, *The Leviathan* [1651]

[17]See, e.g., Stephen E. Sachs, *The Changing Definition of Security*, International Relations, Merton College, Oxford (2003) available at http://www.stevesachs.com/papers/paper_security.html (Feb. 2, 2011).

[18]Hence, it can be argued, and not to the absurd, that all matters which the government cognizes are ones of its own perceptions of national security which implies that the needs of the survival of the government in self-defined catastrophic and systemic failures becomes more important to it than the security of the state in its broadest sense. Thus, the core of this position is that the government in such cases comprises all that which defines the state in each of its elements—including its governed. This would

each supported by political constituencies and all layered with excessive government secrecy. In addition, the notion of security has been linguistically conflated[19] in US political language with the concept of civil safety.[20] This conflation has gone along hand-in-hand with the political language, jargonized by military and technological terms, which perforce affect further the usual and acceptable concepts of war, crime, freedom[21] and liberty.[22] All too often the discussion is shaded by borrowing colourful journalistic language taken as meaningful. Hence, while we fully agree that national security is an important concept – intuitive or defined — the US does not exist merely to serve national security interests privately or publicly. This is true in law, its political positions, or within subsets of its legitimate constituents.

Nonetheless, recognizing national security as important, it should be remembered that some clauses within the UNCLOS 1982 framework can assist in these goals for every state party including the US. We think, for example, that national security must surely encompass resource and energy security, environmental security, and maritime and navigational security, each addressed in UNCLOS 1982. We ask also, perhaps not rhetorically, when has the world not been dangerous? Each age and each state defines its own dangers and looks for cooperative ways to meet them. There is almost nothing in UNCLOS 1982 that is not of some favourable relevance to state sovereignty, state security, or many other matters of vital importance for every state. This must perforce include the US and its government's current but historically deviate fixation on self-defined and perceived rather than objectively real threats. The UNCLOS 1982 basis of global ocean management encompasses five guiding principles that provide a comprehensive international system for ocean governance and rules for access to maritime

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appear to be dangerously anti-Montesquieuian and smacking of Ingalls and secular Hobbesianism. It is wholly antithetical to the plain intent of the framers of the US Constitution which predicated the government's powers *ab initio* on the governed. Further, it begs the question of whether or not any government can properly be in that position within the general framework of sovereignty prevailing since the mid-17th century and has the odour of the mentality of *l'etat c'est moi* where the ego is collective and secular rather than individual and divine, but in each case with zealotry and fervour as to the righteousness of the cause.

[19]See, e.g., LUDWIG J. J. WITTGENSTEIN TRACTATUS LOGICO-PHILOSOPHICUS (Routledge, 2 ed. 2001). In 75 pages of the tautest reasoning Wittgenstein (1889-1951) described the identity of thoughts and facts.

[20]In a pithier version before Wittgenstein, Benjamin Franklin's (1706-1790) character Poor Richard noted "He that's secure is not Safe." BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (Peter Pauper Press 1980) (1748).

[21]Connoting the capacity of a person to act as he wishes as long as his acts are within the prevailing laws he understands.

[22]Connoting the acts of a person permitted by a government and not proscribed, prescribed, or prohibited.

resources;[23] the protection and preservation of the marine environment;[24] marine scientific research;[25] the development and transfer of marine technology;[26] and the settlement of disputes.[27] Those principles would only assist the US or any other state in its proper national security goals. Ignoring them, by any mechanism, including excessively focusing on improper ones or choosing not to accept them as an organising principle along with most other states to help the world understand national security in similar terms, harms any state doing so. Hence, the US is harming itself by not ratifying.

International law, whether customary or expressed in treaties or conventions, generally has a significant influence on national legislation of any state party, including that of the US.[28] This is especially important today in the interdependent global community where states with isolationist tendencies and xenophobic politics are at peril in their acts. In the US context, international law has long been accepted as part of its domestic law.[29] It is unfortunate, however, that the global community's perception often bears little apparent relationship between the US approach to international law, either at the initial level of negotiations and signing, or the second level of advice and consent, and ratification and enablement.[30] At the first level,

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[23]The territorial sea; straits used for international navigation; archipelagic states; the exclusive economic zone; the continental shelf; the high seas; the regime of islands; enclosed or semi-enclosed seas; right of access by land-locked states; and the international seabed area. See supra note 5 at Parts III, IV, V, VI, VII, IX, X, XI.

[24]Global and regional co-operation; monitoring and environmental assessment; international rules and national legislation for the prevention, reduction and control of marine pollution; responsibility and liability; sovereign immunity; obligations under other conventions. Id. at Part XII.

[25]International co-operation; conduct and promotion of marine scientific research; scientific research installations or equipment in the marine environment. Id. at Part XIII.

[26]International co-operation; national and regional marine scientific and technological centres; co-operation among international organizations. Id.

[27]Compulsory procedures entailing binding decisions on the Law of the Sea disputes. Id. at Part XV and Annex V & VI.

[28]Especially in maritime law. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, (2nd ed. 1994). It should also be recalled that the US method for making a treaty or convention an observed part of customary law is convoluted. Under Art. II Sec. 2, Cl. 2 of the Constitution, the President must obtain a majority – not a plurality – of the Senate's consent in order for him or her to ratify a convention or treaty. However, there are at least three other ways to give an instrument the force of law: (1) a treaty-based agreement is a logical extension of an existing treaty; (2) a sole-executive decision under U.S. Const. Art II Sects. 2-3, within the power to appoint and receive ambassadors; (3) a majority approval of both houses of Congress (a so-called Congressional-Executive agreement) based on Congressional prior approval.

[29]*The Paquete Habana*, 175 U.S. 677,700 (1900); *Missouri v. Holland*, 252 U.S. 416; see also, Restatement (Third) of Foreign Relations Law of the United States, Ch. 2 (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); The United States Constitution in its Third Century: Foreign Affairs, 83 AJIL No. 4 (Symposium issue, Louis Henkin, Michael J. Glennon & William D. Rogers, eds., 1989); DAVID GRAY ADLER & LARRY N. GEORGE, THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY (1996).

[30]They range from the US wanting to go it alone with stronger legislation, to intense lobbying by a variety of US national interest groups, for local or parochial or even seemingly perverse political reasons, or

skilled US delegates negotiate international conventions and treaties globally or regionally. At the second and political level, however, such achievements are often watered down or politically distorted for occasionally inscrutable reasons, or disregarded altogether.[31]

As suggested *supra*, any participant in the Convention's lengthy negotiations, taking well over decade, will recall that the US played a pivotal and key role in the rounds. Furthermore, the US delegations negotiated quite skilfully so that in the end they were able to gain almost every objective sought. These ranged from a new regime for straits navigation, almost entirely drafted by US negotiators,[32] to the achieved hallowed provision of freedom of the seas. The latter, in fact, even came with the support from the then-unfriendly Union of Soviet Socialist Republics.[33] Thus, US language can be found in the Continental Shelf provisions, the rules establishing an Exclusive Economic Zone, and in many other areas. The only loss, if even it can be called that, was that US delegates, representing the concerns of mining and oil interests, were not able to achieve the type of provisions they wanted for the development and management of the deep seabed area,[34] a subject not wholly relatable to the important thrusts of the Convention. Unfortunately, this tended to be a deal-breaker at the time, much to the regret of the many other interests represented by the US delegation. Overall this feeling of success was true even for the USCG and USN – the US agencies most affected by day-to-day maritime operations — who also felt that they had accomplished their objectives.[35] The author took this small flaw and made it a fatal deformity of UNCLOS 1982 for his argumentative purposes.

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due to the intense inter-departmental rivalries that plague the US government system, where protection of 'territory' or 'turf' (read: budgets or money) is often paramount. See supra note 12.

[31]One must recall that the US domestic policies and deliberation rules in the legislative branch often trump a serious concern in foreign policy of the executive branch. Further, it seems to be argued that environmental conventions that are developed within the UNCLOS 1982 framework are somehow drafted in isolation rather than with the vigorous participation of US delegations. At IMO meetings such delegations are invariably led by senior USCG officers and lawyers who assert US interests extremely well and often very successfully. However, it is also in this area where the US credibility deficit or gap is most apparent. This is due to the fact, already referred to above, that US negotiators will achieve everything they want and need. Their international counterparts will agree in order that the US will now ratify what has been agreed. This has occurred numerous times at IMO conference in recent years. See for example the Proceedings of IMO meetings that developed MARPOL 73/78; STCW 1978; CLC 1969; 1992 FUND; HNS 1996, etc.

[32]See supra note 11. (Also witnessed by Edgar Gold.)

[33]Joint meetings between US and USSR naval delegates. *See supra* note 5 at Vol. III.

[34]Id. at Part XI.

[35]Edgar Gold & Douglas M. Johnston, "Extended Jurisdiction: The Impact of UNCLOS III on Coastal State Practice," in Thomas A. Clingan,(e d.) *Law of the Sea: State Practice in Zones of Special Jurisdiction* (1982). (Also witnessed by Edgar Gold.)

Even the limited listing *supra* generally illustrates the global reach and interdependence of UNCLOS 1982 provisions. Although some of these provisions are innovative in expression, most, if not all, are based on well-established customary international law or provisions in earlier Law of the Sea agreements, such as the UN Conventions on the Law of the Sea 1958, 1960. The US has accepted some but not all of those Conventions,[36] which contain many identical provisions re-expressed in UNCLOS 1982. Thus, UNCLOS 1982 orders a global legal system covering almost all aspects of ocean governance and management, which can thereby be treated as a codification by a state party in its domestic law. In reaching such a global agreement, all states had to be prepared to negotiate. Thus, each had to give up some parts of its sovereignty[37] as a Benthamite[38] trade-off for the greater good. Nevertheless most states gained much more than they lost with the additional benefit of global legal certainty and guarantees.

E. Deep Sea Resources Require Understanding

The difficulty in deep-sea mineral resources, viewed askance by Captain Pedrozo, must be seen correctly in temporal context. We think it is not an unusual thing for conventions, which often try to deal with technological matters, to be seen as dated and quaint in those selfsame clauses within a few years.[39] Indeed, these statements are probably too carefully written to avoid the error of presupposing that everything has been invented and therefore there is no need for further collaboration. At that time of negotiations, deep seabed mineral resources had only recently been deemed exploitable.[40] On one hand, this was seen as a new resource for global development, but on the other, was accompanied by a fear of a new quasi-colonial race to ocean areas beyond each sovereign's jurisdiction.[41] This then became the catalyst for

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[36]See 13 U.S.T. 2312, T.I.A.S. No. 5200

[37]Id., See also CARTNER, FISKE & LEITER, supra note 10 at § 2.11.

[38]See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Prometheus Books 1988) (1789).

[39]See, e.g., *Pacem in Maribus, A Proposed International Convocation on Frontiers of the Seas to Explore Peaceful uses of The Oceans and the Ocean Floor*," The Centre for the Study of Democratic Institutions, Santa Barbara, California, June 22-July 3, 1970; Elisabeth Mann Borgese, ed., Jovan Djordjevic, "The Social Property of Mankind," Pacem in Maribus, Id.; Elisabeth Mann Borgese, "Ocean Governance and the United Nations," Centre for Foreign Policy Studies, Dalhousie University, Halifax, N.S., August 1996. Elisabeth Mann Borgese & David Krieger, eds, *The Tides of Change: Peace, Pollution, and the Potential of the Oceans* (1975). These matters were and are ideologically and politically tinged and difficult to tease apart. However, these sources tend to give an objective and factual background to the matter.

[40]See, ALEXANDRA POST, DEEP SEA MINING AND THE LAW OF THE SEA (1983).

[41]See supra note 41.

UNCLOS 1982, the principles of which had been informally debated since the International Maritime Organization[42] was founded in 1948. Further impetus was provided by the UN Law of the Sea Conventions 1958, 1960, which had left a number of legal aspects of that informal debate incomplete. In any case, the technology for undersea mineral and hydrocarbon extraction was in its infancy. That which existed was developed by US enterprises who did not wish to transfer it, relinquish it, or be over-regulated in using it. Moreover, there were Cold War vestiges and North-South disputes that added further difficulties.[43] The author seems to forget a basic rule of operating government: it is much easier to modify a process in existence than it is to create the process *ab initio*.

The author placed great emphasis on the Truman Proclamation 2667 (1945) and the Continental Shelf Convention 1958, to which the US is party, as being sufficient to meet all the current US needs. In so doing he uses two arguments which, to our minds, are merely legalistic. Thus he said,[44] as a parser of forms of words, that the difference in context between a coastal state and a state party among separate clauses in narrative usage determines whether or not the US should ratify. This position ignores the fact that UNCLOS 1982 was negotiated by the global community in order to provide a uniform, codified system for ocean management, including the Continental Shelves, for all states. This seems to be made clear by the exceptionally clear definitions contained in it. Thus, most of the world has agreed to go along with a clear Continental Shelf statement in UNCLOS 1982.[45] While the US may, of course, go it alone outside UNCLOS 1982, there is little doubt that a generally uniform global convention reduces uncertainty and confusion for all states parties — as well as it would for the US if it were a party. Acceptance would not only further the rule of law but would also be a step closer to the goal of making maritime law uniform. This elusive goal, of course, has seen some progress in the past 150 years.[46] The US can have a

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[42]IMO, but at that time still called the Inter-Governmental Maritime Consultative Organization or IMCO

[43]See supra note 13.

[44]Id., Pedrozo, 152.

[45]See supra note 5 at Part VI, Arts. 76-85.

[46]For a brief history of the movement in commercial law see M.L. Hendrikse & N.J. Margetson *Uniform Construction and the Application of the Hague (Visby) Rules*, in ASPECTS OF MARITIME LAW: CLAIMS UNDER BILLS OF LADING 37–39 (2008). UNIDROIT is a convention entity (www.unidroit.org) founded on the UNIDROIT Statute, 1940. It has 63 states members. UNIDROIT has prepared many studies and drafts which have become conventions. The Comité Maritime International (CMI or The Comité) is an NGO established in the late nineteenth century. It has a number of state associations. It is on the private side of uniformity of laws. The Comité proclaims itself as the first international organization concerned exclusively with maritime law and related commercial practices. Its "object is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects," www.comitemaritime.org.

great deal of influence on future developments within the UNCLOS 1982 regime if it has the *prima facia* credential of being a party. Unfortunately, isolation only diminishes its influence. Here, there seems to be the face of a neo-isolationist and parochial sovereignty thematically buried in the author's arguments against UNCLOS 1982. However, every state – large or small – gives up some of its sovereignty in accepting any international convention, treaty, or agreement to which it is a party.[47] Every act under customary law may have the same effect albeit less precisely measurable and not as predictable by other states. The treaties of Münster[48] and Osnabrück,[49] further embodied in the instruments from the Congress of Vienna, are the cornerstones of modern state sovereignty and statehood. However, even such treaties were never pristine and precisely geometric in concept. There never has been an ideal sovereign within an ideal state having ideal laws. Like all law, international law is a living and socially-rooted concept making survival of the world body politic more likely. Indeed, that is the impetus for its existence. That body of law, however, can be developed, revised, discarded, changed, and superseded by the well-known mechanisms suggested *supra*. This has a clear implication not addressed by the author to which we wish he had given thoughtful detail.

A seat on the Continental Shelf Commission (CSC) is not an exercise in veto power as the author correctly pointed out. It is far better than that. It is a way to understand intimately and first-hand what other states on the Commission are thinking, planning, and implementing.[50] Without a seat the US has neither eyes nor ears. This means as a matter of practicality that informal networking, so essential in international law, is greatly restricted. Hence such a seat provides the government valuable strategic intelligence for little cost. The collective arguments the author puts forward against the seat are conservative and minimalist and perhaps even non-purposive and deconstructionist. His arguments provide no substantive basis for not being on the Commission. Membership would not harm the US. It would provide a good deal of potential advantage. We believe that it would be better to have a representative at the table who would understand and report on the dynamics of the CSC instead of being excluded and having the government read about the CSC's works in the newspapers. Some of the most important

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[47]Edgar Gold, *From Process to Reality: Adopting Domestic Legislation for the Implementation of the Law of the Sea Convention*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 375-388.

[48]*Instrumentum Pacis Monasteriensis*, *IPM* 1648.

[49]*Id*.

[50]In the context of the American intelligence and security and surveillance culture fostered by the US government we are surprised that the author would not argue in favour of such a seat.

marine resources are being exploited[51] and will be found in the future on the world's continental shelves. US industry is and will continue to be in the capitalised forefront of these developments. A properly codified regulatory system contributed to by the US will be essential to protect US interests. Indeed, as interest and activities in the Arctic Ocean become more and more prevalent by the Russian Federation, Canada and others, the US risks losing valuable positions by not ratifying.

As the author correctly pointed out, deep sea mining is not likely to be a profitable industry in the foreseeable future.[52] We suggest that the inclusion of such specific language was premature when a more generalized expression would have sufficed. Nevertheless, major global mining interests have quickly realized that deep seabed minerals would most certainly be a long-term alternative as land-based sources diminish if the necessary technology to extract them continues to be developed. Moreover, the deep seabed's resources also contain important hydrocarbon reserves as a part of the mineral extraction. An abundance of hydrocarbons is clearly something not in our future and that condition lies squarely within US national security interests. In fact, hydrocarbon resources beyond US jurisdiction are being exploited off the Canadian Atlantic, Brazilian and East African coasts. Development of such resources is also underway in many other regions as well because the oil industry now has the technology for oil and gas extraction from all but the deepest sea-beds. Much of this development is — and more importantly will become — the responsibility of the International Seabed Authority (ISA). Yet the author did not address this at all, and instead rather strangely complained and begrudged a few million dollars a year to support the ISA. This is an agency which will very likely manage potential trillion dollar industries, including petroleum extraction! In short, we are not persuaded that the lack of or delay in deep seabed mining is a good reason for not ratifying, especially when other deep seabed resources are currently being exploited. The same argument for the CSC can be advanced for membership in the ISA. It hurts the US not at all to have someone at the table, especially because the UNCLOS 1982 provisions have been adjusted to accommodate US interests.[53]

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[51]The Russian Federation and Canada each is staking out its claims amid press releases and flag plantings. The assumption seems to be that the International Las of the Sea Tribunal will sort things out later.

[52]Some even consider that this whole initiative was publicised by the CIA beyond its reality as a ruse of gathering manganese nodules from the deep seabed in order to divert attention away from the activities of the GLOMAR EXPLORER while attempting to raise a lost nuclear submarine of the Soviet Union.

[53]See supra note 5.

Grotian freedom of navigation and modern maritime security are different but not unlinkable concepts. Freedom of navigation is the post-Grotian cornerstone of the global trade economy and it is now codified by UNCLOS 1982. That does not mean, however, that it cannot be subjected to reasonable but limited regulation, provided that such regulation conforms to international agreements within the Grotian concepts. What it does mean is that a part of a maritime security system includes a sovereign state's lawful function and responsibility to strongly protect its own territorial waters and to protect the trading vessels flying its flag. Such protection implies the state's ability to enforce its lawful real property boundaries delimiting its waters under its sovereign declarations. It implies the state's ability to protect the chattel boundaries of its trading vessels under laws. Warships are an integral extraterritorial extension of the state and not protected chattel in this sense. Protection of vessels flying the flag suggests protection under its laws within and without its real territorial boundaries. The enforcement of the domestic laws and declarations determining real boundaries is a state function. The protection of the chattel boundaries of a trading vessel is also a state function but is licensed to a private party by its domestic laws. That party is the master who is responsible for enforcing the laws of the flag state aboard. This system of real boundaries protected directly by the state and chattel boundaries protected indirectly by the state underlies the regulation of the freedom of navigation. The state provides the security of either a direct or indirect nature to its real territory and to its trading vessels. Thus, the certainty of a universally regulated freedom of navigation expressed in UNCLOS 1982 linked to an effective state maritime security regime provides the best of both worlds. An owner may not sail a ship without a flag registration. A flag scheme requires a certificated master aboard to enforce the flag state's laws and hence its chattel boundaries as determined by domestic law. However, for the system to work, each must cooperate with the other. It is therefore puzzling and incongruous that the author asserted that claims of territoriality and boundary under customary law are in some way superior to claims affirmed by ratification of UNCLOS 1982. One would think that an affirmative expression of boundaries within an almost universally accepted Convention would reduce any doubt as to the seriousness with which the US or any state takes its real territorial integrity as well as its extraterritorial chattel integrity. Indeed, the present *ad hoc* customary approach[54] in the US

[54]The author maintained that an incomplete patchwork of customary law and a 1950s convention—that for the most part has been incorporated into UNCLOS 1982—is adequate for US. Although this may be true today, our struggle with terrorism has taught us that tomorrow may be vastly different. This leads to the question that if the US follows customary law in many of its acts, as the author has cited and would like to see in the future, what is the harm, in codifying such customary laws expressly in a global treaty

may in fact be difficult to maintain when disputes inevitably arise about both real and chattel boundaries. This seems to be evident in the current piracy situation where the US provides no or at best limited security to its own-flag vessels. It seems to be evident that the defining dispute may well be in the fishing industry, where many of the border and zonal testings and disputes continually occur.[55] The author ignored this important use of the sea in which UNCLOS 1982, rather than customary law, establishes and protects boundaries openly declared and the vessels navigating waters delimited by them.

As to freedom of movement, the author asserted that "what we need more than a membership in another treaty [sic] is a coherent national policy that supports freedom of navigation and a strong navy . . . " This cry has been made by one party or another since the beginning of the US under the current Constitution. Recently, except for the brief halcyon years after the passage of the Merchant Marine Act of 1936 and its World War II *sequelae*, US maritime and naval policies are usually reactionary[56] and *ad hoc* and driven by budgetary and political interests. They should be driven more by truly well and objectively defined national interests.

F. The Attempt to Avoid an Oceanic Tragedy of the Commons and the Environment.

During the UNCLOS negotiations, there was concern by the global community and the US for the greater good to avoid an oceanic tragedy of the

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like UNCLOS 1982? Indeed, almost every commentator on international law has expressed that UNCLOS 1982, much like the Treaty of Vienna, merely expresses customary law as it has been exercised in the past. What then is the problem with expressing this as US national law with the result that there are fewer questions arising as to the legality of US maritime acts?

[55]Recently (2010 and 2011) such testings have gone on between the People's Republic of China and the Republic of Korea and Japan as well as between the Republic of Korea and Japan. Fishing vessels are often used in these matters because they are neither capital ships nor trading ships which allow their status to blur things from acts of warship belligerence or trading regulatory violation to civil acts of boundary trespass although masters and crews are often detained but released after payment of civil fines. In the year 2010, the Vietnamese maritime administration reported informally to Cartner that there had been more that ten incidents of arrest or detention of its flagged fishing vessels per month in waters asserted to be Chinese, Thai, or elsewhere.

[56]They are often uncoordinated and apparently influenced by other private and parochial interests. Although some progress has been made to coordinate all policy functions of the government since 2001, matters of US maritime policy continue to rely on a few presidential speeches, a handful of proclamations, and a small number of laws and amendments to set them. Ratification of UNCLOS 1982 would be a substantial step forward by providing a comprehensive basic globally-accepted document that will assist the US in developing an appropriate and coordinated national maritime policy. It would also very likely eliminate some of the inter-departmental barriers, rivalries, and disputes that often plague US maritime policy-making. We detect some fear in the author's article that the USCG might lose something in such a coordinated and reorganized system. In fact, it may well be that the USCG role may be strengthened and would certainly allow it to more efficiently use its budgets and to manage its many and often unrelatable functions.

commons.[57] Thus a way had to be found to accommodate US interests even on seabed mineral extraction matters. As a result, negotiations continued for a number of years and resulted in a separate agreement responding fully to US objections.[58] This agreement has now been accepted by 140 states — but curiously and strangely not by the US for which it was designed![59] This yet again illustrates the difficulty US negotiators have at critical international meetings when they achieve what is required. This problem moreover undercuts US credibility internationally as a reliable negotiating partner. The world's impression is that the US propounds, urges, uses its bully pulpit, negotiates strongly, and then fails to follow through. A tragedy of the commons may be more difficult to avoid than otherwise without the strong US leadership made possible by its following through with advice, consent, and ratification.

The author admitted that Part XII of UNCLOS 1982 contains far-ranging provisions for the marine environment "that will enhance global environmental security." To us, that immediately begged the question why an environmentally sensitive state such as the US is not part of such a system. Rather than answering the question, however, the author commenced to distinguish the UNCLOS 1982 advantages in this area for a number of political and national security reasons. Unfortunately, most of these distinctions are sieves carrying water. Further, it is difficult if not impossible to respond to incomprehensible assertions such as: "putting the environmental interests ahead of national security interests is a bi-partisan infirmity." The author also asserted that Part XII is 'not fully developed' and relies on additional treaties and agreements. This is, of course, quite correct because UNCLOS 1982 was designed as a global framework or umbrella treaty beneath which other 'competent organizations' such as the International Maritime Organization (IMO) could develop more specific international legislation. In fact, the IMO has done so with enormous success — especially in the area of marine pollution prevention and control.

The author stated, however, that in UNCLOS 1982, the "US can choose to accept or reject based on individual merit." This very much confirms and

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[57]See Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 1968 at 1243-1248. The Ecologist, Whose Common Future? THE ECOLOGIST, 121-210 (1992); S.V. Ciriacy-Wantrup & R.C. Bishop, *Common Property as a Concept in Natural Resources Policy*, NAT. RES. J. 15, 713-727 (1975); See also Thucydides [ca. 460 B.C.-ca. 395 B.C.] *History of the Peloponnesian War*, Bk I, Sec. 141, (Richard Crawley, trans, 1910); Aristotle (384 B.C.-322 B.C.), Politics, Bk. II, Ch. III, 1261b (Benjamin Jowett, trans. 2000); Appell, G. N., *Hardin's Myth of the Commons: The Tragedy of Conceptual Confusions*, SOCIAL TRANSFORMATION AND ADAPTATION (1990).

[58]Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

[59]See supra note 5.

explains to a large extent the US approach to international treaties by regarding them as an *a la carte* menu instead of a comprehensive well thought-out dining. Such an *ad hoc* approach further underlines the deplorable record of US acceptances of many other conventions and UNCLOS 1982. In the author's defence, however, he criticized former President Bush for putting environmental policies above Department of Defence objections. Interestingly, the author underlines his criticism by stating that ". . . these actions by the Bush Administration illustrate a dysfunctional ocean policy focused on gaining political capital in the name of environmental protection rather than advancing US ocean interests in a comprehensive, balanced manner."[60] We believe that US ocean policy today may well be as dysfunctional as suggested by the author exactly *because* it is being managed in a fragmented, parochial way that excludes the global community through policy-thinking such as that advanced by the author and some of his senior peers in the various US government departments. As a result, we believe that because the author's arguments for staying away from UNCLOS 1982 are so completely unconvincing, US ocean policy can only be advanced in a comprehensive, balanced manner if the US were an important—perhaps the most important—component of UNCLOS 1982. It will bring the order in policy the author decried and lamented as being absent.

G. The Real-Politik of Maritime Existence

The above propositions can easily be illustrated. In terms of *real-politik,* in a case or controversy before the court, in which one files a brief as *amicus curiae,* one has no standing except at the grace of the court. Even if that court chooses to read the brief, it may not be persuaded by it, and in some cases such briefs become useful to a party opponent. So it is with the US and UNCLOS 1982. On any matter being considered, the effectiveness of US leadership depends to a great extent on the other members of the global community. The US and the United Kingdom (UK) have long taken the lead in the development of maritime law and safe navigation. Most other states active in the maritime sector have been followers of this leadership. Although historically the UK has better exploited its role for at least two centuries, the importance of the US as a global leader in establishing maritime law has not been fully grasped by the US government since the 19th century. Without ratification of UNCLOS 1982, the US has even less mar-

[60]The author gives away his bias as do many officers of abhorring "politicians."

itime standing in the community of nations,[61] and its contributions will rapidly be marginalized or seen as irrelevant.

Indeed, the US government seems not to fully comprehend or is wilfully blind when other states of the global community disagree or oppose American policies. This is so even when those policies could easily accommodate those concerns expressed through minor changes having no harm or minimal effect on the US. Yet, for purely parochial and domestic concerns, and occasionally superficial chauvinistic political interests suggesting muted sabre-rattling, helpful ideas are often rejected, and sometimes by no discernable path of order or rationality. We suggest too that there is a tinge of latent, and perhaps even patent, xenophobia here. This phenomenon can occur whether or not the idea is related to or far removed from issues of importance to the country as a whole. The results are that good ideas, carefully developed in the international fora, are being wholly derailed. As indicated above, this leads to the embarrassing anomaly of the US leading the charge, then pulling up short before full victory. Increasingly, US delegations at critical international meetings, especially in the maritime sector, suffer from a worsening credibility deficit as other delegations know that whatever they agree with their US counterparts, the United States will probably never implement the resolution.

The US is therefore increasingly not being allowed in the game because it mistakenly believes that its punched ticket from the last game is good for this one. Were the US to ratify UNCLOS 1982 it would be in the current global maritime game with no protest or recalcitrance from any other state on those grounds. It follows that US policy positions unrelated to ratification, as argued by the author, would have more wins and fewer losses with commensurate better understanding of how world trade works. For it is the good order of law which facilitates trade. And trade — not ideology — is the engine that powers the modern, interdependent world. As we are sure the author would agree, trade is more efficient when regulatory uncertainty is reduced. UNCLOS 1982, whatever its minor flaws may be, provides much-needed order in ocean governance and management and removes many of the uncertainties that have existed since the Grotius-Selden debate almost three centuries ago. Indeed, as the author undoubtedly recognizes, the vast majority of global trade moves on the oceans. This is, without question, one

[61]The US has a small trading merchant fleet under its own flag compared to flags of many other states and tends to concentrate its maritime efforts disproportionately on its inland fleet and its needs and security against self-defined external threats. See CARTNER, FISKE & LEITER supra note 10 at §§ 1.0-1.1, 688. However, it can be argued with good evidence that the Republic of the Marshall Islands flag is a surrogate of the US flag. Thus, the actual controlled fleet is several times larger making the US a Class A flag state.

of the principal reasons underlying the existence of UNCLOS 1982 and its predecessors. We ask — and not rhetorically — that if trade is not the fundamental basis for national security, then what is? Global trade will continue in the rest of the world with or without US participation. It will prosper for all states including the US with a predictable, global regulatory system such as UNCLOS 1982. It will suffer, however, when regulatory fragmentation through unilateral action of a state takes place.

The US is constitutionally monistic and not a dualistic state.[62] Ratified treaties and conventions are part of the supreme law of the land. Thus, because of the monistic approach, there is a seamless connection between international and domestic laws, regardless of the policies of the political regime in power. Dualism, however, stands for the proposition that international law is not part of the domestic legal system. Yet the author made dualistic arguments inapposite to US monism. In fact, the US as a monistic state, cannot legally act in some of the ways the author thinks it should act. The argument presented by the author is therefore fallacy.

In his arguments, the author seems to believe that the application of customary law principles[63] will protect the US from some loss of sovereignty and other specified or implied evils if it does not ratify UNCLOS 1982. This claim has no ontological reality. Customary law, while important, is not as good as conventional law and certainly not as efficient in resolving disputes between sovereigns for maintaining global order. Indeed, customary law disputes can and have dragged on for decades. Trade needs more certainty than that. The US, particularly, needs the certainty, and should have the ability to use UNCLOS 1981 as a charter for its subsequent rules on the sea. That charter, being nearly universal, takes away a great deal of the uncertainty in the application of customary law for all cases.

H. The Author's Ultimate Political Argument

The author ultimately argues that the Executive should better articulate, as a matter of national security, the importance of UNCLOS for the US if it wants advice, consent, ratification, and then implementation of UNCLOS 1982. His is a socio-political argument, although we cannot see how mere UNCLOS 1982 ratification makes the slightest difference to US national security. The Convention does not redefine sovereignty, does not permit encroachment on security at sea, and does not affect the inland and coastal

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[62]See id. at § 4.5 61 fn. 60; P.H. Kooijmans, *Internationaal Publiekrecht In Vogelvlucht*, (1994) 82; H. Kelsen, *Les Rapports de Syst`eme Entre le Droit Interne et le Droit International Public* 14 RECUEIL DES COURS 231 (1926).

[63]See CARTNER, FISKE & LEITER, supra note 9 at §2.3.

populations directly in an adverse way. Most of UNCLOS 1982 restates the customary laws that states have followed, sometimes for centuries as Grotian concepts have evolved, but sometimes for millennia, in a succinct and often codified way.[64] As a result, the author has urged a political distinction for a legal status comprising definitions of legal acts. In reality, UNCLOS 1982 would assist the US in defining its expressed laws and therefore help to clarify maritime boundaries and the limits of US jurisdiction for many purposes. This would make such expressions of US national security policy more nearly clear to all states and persons, friend or foe, and to itself. Although these notions may also be expressed in domestic law alone, they will never have the force of international law as recognized by most of the world in arising disputes.

The notion that the territorial sea hinders operational naval forces seems to be a political problem for the coalition of allied navies in special operations rather than a US policy problem. Indeed, the doctrine of hot pursuit is well established in customary international law and further codified in UNCLOS 1982.[65] The author used Iranian smuggling as an example of a difficulty in this area. We suggest that the concepts of blockade and quarantine are still quite valid – even if expensive. It is very difficult for us to see how an effective blockade of territorial waters or the contiguous zone would allow smuggling because one cannot smuggle into one's own territory from one's own territorial sea or *vice versa*. Furthermore, the Iranian situation is much more complex than the focused parochial interests of the US and its allies under the umbrella of non-proliferation and terrorism exportation. Moreover, UNCLOS 1982 also provides a national interest exception to certain aspects of such actions in coastal waters.[66] The argument that the territorial sea is a hindrance also seems curious. Many states have established treaties covering commerce, navigation, and contraband interdiction that permit the other state party use of coastal waters for specified purposes, such as boarding under probable cause with and without notice or if in hot pursuit. Where is the difference whether or not the US is a signatory to UNCLOS 1982 in any of the examples the author supplies? We can find no material disadvantages for US maritime enforcement if UNCLOS 1982 applied in any of the exemplars supplied by the author. Indeed, it might make such

[64]See id. at § 2.3. The author apparently does not envision the difficulty in establishing customary law requiring *opinio juris*—which is often quite hard to do. Id. fn. 20, p. 22. That works two ways but at any rate increases uncertainty which seems to be a peculiar way of conducting foreign affairs for such a fundamental practice as maritime trade.

[65]See supra note 5 at Art. 111.

[66]Id. at Art. 25.

activities more nearly orderly and systematic and palatable to US trading partners.

The author seems to believe that the customary law rule now codified in UNCLOS 1982, under which a vessel flies the flag of one state, and that state has exclusive jurisdiction over its flagged vessels, is somehow improper. It is not as we have alluded, *supra*. The doctrine is not only a cornerstone of international maritime policy but as well is the policy of the US. It is not a bureaucratic or military inconvenience to be got around for self-defined purposes of national security with ill-defined threats derived from distorted perceptions. The author offers no better or alternative system to coordinate the trade activities of all states in a well-known and fairly simple framework. Should land or air forces wish to cross the territory of a state ashore, including the private real property therein, permission is always necessary unless the parties are belligerents. The sea is no different. Thus, the master of a trading vessel holds the warrant[67] or license of the flag state to enforce the laws of the flag state on the vessel. That warrant entitles the master to be the representative of the flag state just as validly as a warranted, licensed, or appointed magisterial person ashore would be. This is a subtle but vital distinction not apparently appreciated by the author in cases where the IMO-designated maritime administration of the state issuing the warrant cannot be reached for the permission of the master's government at a level higher than his. Indeed, in some states the master has a governmental equivalent rank of a mid-level bureaucrat capable of making decisions for the state. A merchant vessel is an item of privately-held chattel under the limited protection of the flag state associated with its flag state as well as its titular

[67]The term warrant is historically based. The master of a ship of the Royal Navy was the highest-paid warranted officer of the ship [his compensation exceeded that of the commanding officer]. Yet he was not commissioned by the Crown, usually from lack of patronage. A warranted officer in the government services lay—and still lies—in the gray social haze between enlisted petty officers and commissioned officers, receiving some of the social courtesies of commissioners but never fully belonging to the commissioned orders. Even if commissioned, these so-called 'tarpaulin' officers were viewed as socially inferior by those who had bought commissions under patronage. The distinction between technical proficiency in operating the vessel while the patronage-commissioned officer in charge tactically fought her became embedded in the class system of the British and Anglo-American culture where commissioners of the Crown or the President tend to see trading vessels as a lesser social species than fighting vessels and hence their commanders are of the same species. Thus, the US government policy as to boarding foreign vessels is subtly influenced by 17th century social attitudes compounded by a good dose of latent xenophobia. The attitude is often seen in sea-service commissioners with Royal Navy and thence US Navy historical antecedents and traditions. *See* CARTNER, FISKE & LEITER, supra note 9 at 5, fns. 16, 21, 23; J. A. C. Cartner & D. Stevenson, *Dogs and Sailors Keep off the Grass* 1 BENEDICTS MAR. BULL. 225 (2003) ("The Coast Guard came aboard with side arms and an attitude. It was Rambo [a cinema character of unbridled weapon-carrying violence]," VADM Jas. C. Card, USCG (Retired), "Coast Guard Marine Safety Analysis: An Independent Assessment and Suggestions for Improvement", Predecisional—Interim Coast Guard Document, 16 Nov. 2007, comments of an anonymous maritime interviewee, 29.)

state. It is not a public vessel and is therefore not an extraterritorial extension of the state as the author seems to confuse in his argument. Reasonably proper probable cause to board is required.[68] As the author knows, the policy of the US Coast Guard is to notify the flag state of its desire to board a vessel. However, if no "special arrangement" is in place or in any case if no response is received within four hours, the boarding will commence – whether protested by the master as flag state warrantee and enforcer by law of flag state law aboard or not.[69] This means that the US ignores customary law, codified in UNCLOS 1982, and the practice followed by most other states when it overrules by the mere ticking of a clock, on implied arguments of bureaucratic efficiency, the lawful and warranted flag state representative aboard who should properly prevail for the necessary time to develop open communications with the flag state. Who is the US to state such a rule applicable to all sovereigns unless it is a purely parochial rule? Although his approach may make sense from other protectionist, chauvinistic, and militaristic perspectives, it remains an arrogant breach of customary and well-established international law and may be seen as merely another expression of petty US aggressiveness, belligerence and bullying in proclaiming its own interests and legitimating them on flimsy grounds.[70] Again, where is the

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[68]By reasonably proper probable cause we mean exactly that. We do not mean the mere subjective and whimsical perceptions and immediate beliefs of an indoctrinated Coast Guard commissioner with some undefined quantum of experience. Such an officer's decision, taken by the Court as dispositive, is founded on the doctrine of the presumption of good faith on the part of the government, and hence its officers. It stretches objective credibility. *See* CARTNER, FISKE & LEITER supra note 9 at 113, fn. 91. See also *Illinois v. Gates*, 462 U.S. 13 (1983) (blurred the distinction between probable cause and reasonable suspicion); *Terry v. Ohio*, 392 U.S. 1 (1968) (the latter now almost indistinguishable from the former). The standard of a reasonable suspicion may be merely the *ex post facto* unjustified hunch of the boarding officer, notwithstanding *Terry*. See *U.S. v. Pearson*, 791 F.2d 867(Ala. 1986). For aliens see, US v. Hidalgo-Gato, 703 F. 2d 1267 (11th Cir. 1983). Aliens have few if any Constitutional rights at the border.

[69]See CARTNER, FISKE & LEITER *supra* note 9 at fn. 102; see also *US v. Barrio Hernandez*, 655 F. Supp. 1069 (US Dist. Ct. Puerto Rico1985). Again, we muse that the author might fear some curtailing of the Coast Guard's liberty of operation with ratification.

[70]Such overreaching and arrogation is classically indicative of a weak government. Thus the behaviour is especially difficult to understand or justify for many. This is principally because the US is attempting to have it both ways which simply does not work in the long run in international law. We also suspect that this is where the author's assertions are really coming from—i.e. UNCLOS 1982 'might' require some reduction in the internal government policy implementing these powers. Nevertheless the choice is quite simple. Either a merchant vessel is recognized as extra-territorial property of the flag state requiring all the courtesies of that status to its warranted representative or it is not. UNCLOS 1982, in our opinions, would assist in regulating what some, including the author, may call freedom of action but which others may call acts of low-grade civil belligerence and aggression with limited recourse against the aggressor state. The expression of control over a nation's vessels has been extant since at least the 14th century and has its foundation in Roman and earlier law. The author complains about that expression of other-state sovereignty but offers no alternative way of replacing a system well-established in custom, practice and expressed international law.

impediment to ratifying UNCLOS 1982? We cannot find it in this argument unless it is implied that by accepting the Convention an arguably unlawful policy and operation would be even more unlawful.[71]

II
CONCLUSION

We can only conclude that the arguments the author has put forth as antagonist to the ratification of UNCLOS 1982 by the US have little or no merit. It seems to us that what the author is proffering is exactly the wrong way to go to meet what we perceive his objective to be: a stable and orderly and effective US maritime policy. Such a framework within UNCLOS 1982 will offer not only stability but some certainty as to US behaviour in the maritime sector. Currently its behaviour is neither certain nor coherent, but with one exception. That exception is the very one-sided, overbearing, and overarching intensity of the security tail wagging the national dog of the police functions of the US. This policy appears to us to affect any existing coherent maritime trade policy in a negative way. Trade, not a *Leviathan*-like governmental control, either positively or by obstructionism, is the ultimate security of a state. This has, once again, been clearly shown by the very recent global financial crisis which fully confirmed the close link between national security, international trade, and the financial sector. Rather than making the state less secure, it seems fairly clear to us that a ratification of UNCLOS 1982 would make the state more secure because it will provide the stability of international certainty for trade and in other maritime matters which the US does not now have. That alone will be the most critical security component and should form the basis for other policy interests. It worries us that a senior and experienced person in an agency that has made such important contributions to the national and international maritime sector seems to espouse views that ignore these economic and political verities. We only hope that the author's views do not represent an official US position being contemplated. Their implementations would be gravely disturbing to what there is of oceanic good order.

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[71]Argument is also made to the Proliferation Security Initiative. However this initiative is simply an expression of a US position on a matter of its national concern that is not necessarily enthusiastically shared by other sovereign states of the global community. UNCLOS 1982 has little or nothing to do with this matter.