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# *Controversial Issues in the Law of the Sea and Existing Resolution Strategies*

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***Abstract:*** The establishment of a maritime community of shared future requires a commitment to legal governance of the oceans. However, the lack of codified maritime law and customary international legal norms presents significant challenges to this endeavor. In order to overcome these challenges, countries must adhere to legal frameworks in governing the oceans and foster global cooperation to establish a maritime legal environment that is based on the principles of equity, fairness, and sustainability. Furthermore, the uneven distribution of maritime rights and duties within the global marine community due to limitations in the scientific, technological, and The financial capacity of smaller States is a major obstacle to achieving the goal of establishing the rule of law in the oceans. This paper highlights the challenges involved in constructing a maritime community of shared future, and proposes various strategies to address these difficulties. These tactics encompass utilizing bilateral and regional pacts, enhancing the legal standing of customary global standards, reinforcing the United Nations structure, and collaborating with nations promoting the principle of equal sovereignty. By adopting these strategies and working together towards a common goal, The ideal establishment of the rule of law for the oceans and seas can be achieved, promoting a maritime community of shared future. Despite the potential benefits of establishing a global maritime legal framework, certain maritime hegemonic powers may pose obstacles to this objective, given their reluctance to embrace international maritime legal standards due to political considerations and the influence of Eurocentrism and Cold War ideologies. It is imperative that such powers be engaged in constructive dialogue, to overcome these obstacles and promote a shared vision for a sustainable, equitable, and cooperative global maritime community.

***Keywords:*** the international law of the sea, maritime legal environment, UNCLOS, customary law

## 1. Introduction

The planet Earth, home to humans, is comprised of four major material spheres: the atmosphere, hydrosphere, lithosphere, and biosphere. The hydrosphere, mainly consisting of oceans, covers more than 71% of the Earth's surface, underscoring the importance of the ocean to human survival and development. Given the unprecedented challenges faced by the world today, ocean affairs have become a focus of concern for all countries due to their direct impact on global human survival and development.

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On October 18, 2017, the Communist Party of China convened its 19th National Congress. proposed the path of peaceful development and the creation of a community with a shared future for humanity, followed by a constitutional amendment in March 2018, which revised the development of diplomatic relations, economic, and cultural exchanges with other countries towards building a community with a shared future for humanity [1]. On April 23, 2019, during the 70th anniversary celebration of the founding of the Chinese Navy, the importance of the ocean in sustaining life, connecting global communities, and promoting development was emphasized [2]. The oceans serve as a medium to connect people worldwide as a community with a shared destiny, with the welfare and security of all nations being closely interconnected. Hence, the establishment of a maritime community centered around a common destiny is of significant importance to the overall aim of building a community with a collective future for mankind, and necessitates the involvement and dedication of all countries.

From a logical perspective, the creation of a community with a shared future for humanity necessitates the simultaneous establishment of a maritime community of shared destiny, which in turn requires a robust maritime rule of law. Reasonable management of the ocean, regulation of behavior, pursuit of order, and emphasis on the rule of law are critical to maintaining the security of marine space, protecting the marine environment and ecology, and ensuring sustainable use of marine resources. The rule of law is the effective means to create and maintain order, and a disorderly ocean can lead to catastrophic consequences for humanity.

However, the international community currently faces a more significant lack of maritime rule of law than on land, mainly due to the less developed nature of the ocean environment. Promoting the development of international maritime rule of law is essential to maintain peace and stability. Constructing a theoretical framework for maritime rule of law necessitates the existence of sufficient and appropriate international maritime law, including both customary and treaty law, as well as the willingness and capacity of all countries to govern the seas in accordance with the law. Nonetheless, the international community still lacks the necessary legal norms to ensure maritime rule of law, and the willingness of countries to promote lawful governance of the seas is limited. Additionally, many nations lack the technical and financial capabilities required for effective implementation of such governance. Addressing these challenges is crucial to promote the development of international maritime rule of law. Strategies to address these difficulties include leveraging bilateral and regional agreements, elevating the legal status of customary international norms. Through collective efforts, the desired establishment of the rule of law for the oceans can be achieved, fostering a maritime community of shared future.

## 2. The Issue of Insufficiency in International Maritime Law

The establishment of a legal system is an essential aspect of the pursuit of the rule of law. Even if the legal system is not perfect and requires gradual improvement, it remains the standard path of legal development. However, the contemporary international community faces a predicament of legal inadequacy. Despite increased recognition and efforts to address this issue since its inception, the four conventions of the Law of the Sea completed at the UNCLOS I in 1958 were considered to have significant flaws. The UNCLOS II was convened in 1960 to address these issues, but it ended in failure without completing any legal documents. It was not until 1973 that the UNCLOS III was held and continued for nine years, culminating in the most comprehensive Convention on the Law of the Sea (UNCLOS) in 1982. However, the current UNCLOS still does not adequately meet the requirements of the international community for maritime rule of law.

Naturally, written laws are subject to the law of obsolescence, whereby legal provisions become outdated due to the progress of time on the day of their completion through debate and voting. Therefore, a legal system cannot solely consist of written laws but must also include customary law,

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the application of abstract legal principles, and the use of relevant precedents to satisfy the needs of the societal rule of law. Unfortunately, contemporary maritime laws for humanity suffer not only from the dearth of written maritime laws but also the inadequacy of customary maritime laws, along with the scarcity of relevant legal principles and precedents.

## 2.1. Examples of Insufficiency in Written Maritime Law Norms

Currently, the global community is facing a crucial phase of significant adjustment, transformation, and growth. The competition among major powers is expanding beyond conventional land territories and extending to both tangible and intangible new realms, such as deep sea, outer space, cyberspace, and polar regions. In the realm of international maritime law, there are numerous critical and cutting-edge legal issues that warrant exceptional attention and comprehensive examination by scholars. Specifically, the prevailing disputes and conflicts within the international community highlight the insufficiencies of codified maritime laws, particularly the norms outlined in the United Nations Convention on the Law of the Sea.

### 2.1.1. Unclear Terminology for Distinguishing Islands and Rocks

The “Convention” uses vague language or does not provide any provisions on certain controversial issues. For example, the definition of islands and rocks is unclear. Article 121(1) of the Convention provides a broad definition of islands as naturally formed land areas surrounded by water and above water at high tide, without imposing any further limitations. Article 121(3) of UNCLOS further specifies the definition of islands by stating that rocks which are unable to support human habitation or economic activity of their own shall not be entitled to an EEZ or continental shelf.In other words, according to the Convention, rocks are considered a broad category of islands with inferior conditions. However, the Convention does not clearly define the terms “economic life” or “sustain human habitation.” For example, would fishing activities or collecting bird eggs by fishermen on an island be considered as sustaining human habitation or economic life? What if a country like Japan artificially reinforces a submerged Okinotori Reef (also known as Douglas Reef) that barely provides conditions for human habitation and installs a solar-powered vending machine for drinks, allowing visitors to purchase beverages with coins? Would this small rocky reef be considered as an island with a well-defined definition.

The ambiguous wording of the Convention has also resulted in absurd interpretations by arbitrators in the South China Sea arbitration case initiated by the Philippines on July 12, 2016. The arbitral tribunal interpreted the requirement of the Convention’s Article 121 that rocks cannot sustain human habitation or economic life as necessitating a long history of human habitation in natural settlements and dwellings [3]. The aforementioned alteration in the phrasing of the Convention resulted in a shift from a “can or cannot” requirement to one based on a historical determination of whether a particular geographic feature has been subject to continuous human habitation or sustained economic activity. The outcomes of the arbitral tribunals, which relied on this revised interpretation of the Convention, not only failed to bring about a resolution of the disputes, but also generated confusion within the international community, potentially fueling additional conflicts. At present, China is being pressured by the United States and Japan to accept the ruling of the South China Sea arbitration (a decision which China retains the right to refuse), while these same countries themselves continue to assert illegal claims to EEZ and continental shelves surrounding islands or rocks in the Pacific Ocean that do not conform to the standards laid out in the arbitration ruling. It is thus likely that persistent disputes will continue to arise in the future.

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### 2.1.2. Lack of Standardization in the Length of Baselines

The determination of the length of straight baselines has been a subject of debate in the field of international maritime law. Straight baselines are used to establish the outer limits of a coastal state's maritime rights and were initially conceived during a dispute between the UK and Norway over fisheries [4]. The concept of straight baselines was subsequently recognized as a legal norm in the 1958 Convention on the Territorial Sea and the Contiguous Zone after discussions at the ILC and the UNCLOS I [5]. The 1982 Convention reinforced this norm. While straight baselines provide a solution to the difficulties associated with traditional baselines for coastlines with indentations and islands, their determination can lead to overlapping claims of territorial seas, EEZ, and continental shelves.

Article 7 of the Convention establishes the legal framework for straight baselines, but it does not provide uniform criteria or standards for their length. Additionally, the maximum length of straight baselines that can be claimed is not specified. While Article 47(2) places a limit on the length of baselines for archipelagic states, this provision applies only to a small number of island states that are entirely composed of islands. Non-archipelagic states, which are numerous, have established their own straight baselines according to their own economic and jurisdictional interests, resulting in variations in their length.

The International Law Association (ILA) conducted extensive research meetings on this topic in 2018 but failed to reach a consensus [6]. Whether international legislation will be enacted in the future to establish standards for the length of straight baselines remains uncertain.

### 2.1.3. The Issue of Third-party Dispute Settlement Mechanisms

International judicial institutions, such as the ICJ, are recognized for their adherence to fundamental principles of impartiality and fairness, and their significant role in interpreting and enforcing international law. These institutions not only facilitate the resolution of disputes but also impact the evolution of international law, creating a crucial arena for competition and rivalry among major powers. In recent years, international judicial mechanisms have gained momentum, with an increasing number of agreements mandating the resolution of disputes through judicial means, and states facing mounting pressure to accept the jurisdiction of international judicial bodies, particularly in areas such as human rights, the environment, and maritime law. The concept of universal jurisdiction is expanding, and there is a growing trend to include human rights abuses as crimes under the doctrine of "universal jurisdiction," and to limit the scope of judicial immunities, leading to an increase in criminal prosecutions against current or former leaders of countries.

However, there are currently three sets of contradictions that are in sharp conflict with one another, namely the issues of "state sovereignty and global governance", "non-interference in internal affairs and the responsibility to protect", and "national jurisdiction versus international jurisdiction". The expansion of international jurisdiction is resulting in the rise of "mixed jurisdictional areas of domestic and international", which deeply affects the decision-making space and behavioral patterns of states [7]. As a result, international judicial institutions, such as the ICJ, the ICC, the UNCLOS, the European Court of Human Rights, and the Inter-American Court of Human Rights, are increasingly relied upon to address sensitive and contentious international issues, either directly or indirectly. This trend has brought to light growing concerns about power struggles, power expansion, and abuse of power among these institutions. Calls have been made for the United Nations General Assembly to establish auxiliary bodies with independent criminal investigation powers to address these issues [8].

Therefore, it is necessary to enhance our country's influence in international judicial activities, in conjunction with the international situation and the current status of China's development. As one of

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the directions for joint efforts by the government and academia, breakthroughs can be sought from multiple perspectives, such as talent cultivation, system construction, and mechanism innovation. It is also important to attach great importance to the research methods of international law, whether it is theoretical research or legal practice, and give considerable attention to the study of international judicial cases, which is an issue that has not been given sufficient attention in the past.

As the trend of international or regional judicial institutions' involvement in international hotpots or sensitive issues continues to grow, new developments have arisen in the dispute settlement mechanism under the UNCLOS. The International Tribunal for the Law of the Sea and other third-party dispute resolution institutions or mechanisms have shown a tendency to exceed their authority, expanding their jurisdiction beyond the interpretation and application of relevant conventions in resolving inter-state maritime disputes, and abusing their power [9]. Several emerging trends in the dispute settlement mechanism of the Convention on the Law of the Sea are noteworthy. Firstly, there is a growing tendency of judicial institutions to exceed their authority and jurisdiction by resolving disputes beyond the scope of the Convention. Secondly, some judicial arbitration institutions disregard the right of the parties to choose their own procedures, ignoring Article 286 of the Convention and failing to respect the parties' right to choose their own procedures. Thirdly, there is an increasing trend of expanding power, where institutions like the International Tribunal for the Law of the Sea unilaterally expand their power, which is not provided for in the Convention, and has been questioned by several countries. These trends were evident in the South China Sea arbitration case, but are not limited to it and have implications for the entire dispute settlement mechanism of the Convention on the Law of the Sea. Therefore, it is crucial to conduct further research to better understand and address these issues.

## 2.2. Insufficiency in Customary Law Norms

Customary law is not only an indispensable part of international law but also plays a significant role in filling gaps in written law. No written law can cover everything. UNCLOS paragraph 8 establishes that matters not specifically addressed in the convention should be regulated by the norms and principles of general international law, which encompasses both customary and written international law, as stated in its preamble.

Customary maritime law has an extremely important position in maritime affairs, but so far it has not received sufficient respect in maritime affairs. Generally, it is still hoped to define the boundaries of various rights and obligations by written law [10]. This has led to disputes and use of customary maritime law in the field of maritime law, which has not been given enough attention, resulting in slow development of legal norms.

For example, various countries have expressed their opinions on the issue of archipelagic waters for non-archipelagic countries. Archipelagic countries emphasize the need for the overall management of archipelagos that have existed for a long time, and many countries including China have expressed their understanding and support for this position. At that time, many countries also advocated that the archipelagic waters of non-archipelagic countries should be given the same legal status because they also have a need to maintain their integrity. However, under the influence of time pressure and interest exchange, the Conference on the Law of the Sea only established a system for the archipelagic waters of archipelagic countries, and did not further address the issue of archipelagic waters for non-archipelagic countries.

After nearly thirty years, UNCLOS has not been able to solve this problem, and customary maritime law has not been established either. The demands of the aforementioned countries have never been truly realized, but these non-archipelagic countries have interpreted Article 7 of UNCLOS from a flexible perspective when delimiting their territorial sea baselines for their offshore archipelagos. They establish straight baselines outside their archipelagos and manage the waters and

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land of their offshore archipelagos as a whole. Some countries directly call the waters within the straight baselines archipelagic waters, while others consider them as internal waters. However, these positions are not conducive to the freedom of navigation needs of the international community.

## 3. Other Subjective Conditions of Insufficiency

Promoting the rule of law in the ocean is a complex process that requires joint efforts from countries around the world. However, there are many objective and subjective conditions that hinder the achievement of this goal. These conditions include technological capabilities, financial resources, and the attitudes of traditional maritime powers. These issues must be addressed in order to achieve the goal of ocean rule of law.

Firstly, technological capabilities play a critical role in the maritime domain. In the contemporary era, the level of technology determines a state's ability to maintain a leading position in maritime affairs. While developed countries possess advanced technological capacities for exploring and exploiting ocean resources, many small and poor countries encounter significant challenges in participating in these activities. For example, according to Article 76 of the Convention, a coastal state must have certain technological capabilities to establish the outer limits of its continental shelf. It must accurately determine the precise location of the foot of the continental slope, the outer edge of its natural prolongation of its land territory into the sea, and the specific position of the 2,500-meter depth contour. Only then can the state progressively determine the outer limits of its continental shelf. However, many small and poor countries face significant difficulties in meeting these technological requirements, which can impede their ability to promote the rule of law in the ocean.

Secondly, financial resources are also an important issue. The rule of law in the ocean requires all coastal states to exercise sovereignty and manage their territorial waters. However, some small or poor countries lack sufficient financial resources to build their naval forces, making it difficult for them to implement harmless passage controls in their territorial waters. Therefore, it is necessary to strengthen international cooperation and help these countries improve their maritime security capabilities through technical and financial assistance. Only in this way can these countries better safeguard their territorial sovereignty and maritime sovereignty and promote the process of ocean rule of law.

Finally, the lack of subjective will is a major obstacle to the construction of ocean rule of law. Prior to the 20th century, Western maritime powers with strong naval forces roamed the world, establishing countless territories wherever their warships sailed. However, this bullying and aggressive behavior on the seas is no longer acceptable today. As mentioned earlier, the preamble of the Convention and many of its articles emphasize the principle of peaceful purposes and have always regarded decolonization as one of its original tasks. Unfortunately, some Western powers still cling to their outdated ways or cannot let go of European centrism or Cold War thinking. They continue to display their military power on the seas, constantly threatening the use of force, or directly withdrawing from international conventions in order to seek a position of maritime hegemony. This is truly the greatest obstacle to promoting the rule of law in the ocean.

## 4. Conclusion

With the rapid development of the ocean economy, the international community is facing a series of challenges in protecting and managing marine resources. On the basis of the continuous improvement of human society, the international community needs to take action in the following areas.

Firstly, when faced with the limitations of codified maritime law, states should contemplate utilizing bilateral agreements or regional (or sub-regional) multilateral agreements (or arrangements)

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to directly address extant maritime disputes. This approach has been successfully employed in the world's oceans, yielding comparatively favorable outcomes.

Secondly, the international community can make good use of customary law to solve difficulties. By organizing seminars, sorting out practical experience and shaping it into international consensus, the international community can promote the consensus into the international legislative draft of the International Law Commission, gradually forming future written international treaties, thereby playing a great role in promoting maritime law and resolving international disputes.

Thirdly, a fair and effective international judicial and quasi-judicial (arbitration) procedure is essential. However, the impartiality and impartiality of arbitrators need to be guaranteed. Chinese judges have always had a relatively fair performance, but some major Western countries still use Eurocentric or Cold War thinking to attack the interests of Asian, African, and Latin American countries, including China. This requires the international community to make extra efforts to respond.

Finally, for the issue of the lack of capacity of many small countries, the international community has no choice but to continue to actively support the ocean technology transfer system, strengthen their capabilities, promote human wisdom and the power of good, provide fair and reasonable technical and financial assistance, and establish new mechanisms when necessary to promote the reasonable development of maritime law. Many actions and ideas under the ocean technology transfer system should be strengthened rather than gradually weakened.

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