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The Risks and Regulations Regarding the Expansion of the Advisory Jurisdiction of the International Tribunal for the Law of the Sea

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Abstract. The United Nations Convention on the Law of the Sea only explicitly grants the Sub-tribunal for Submarine Disputes of the International Tribunal for the Law of the Sea with advisory jurisdiction. However, the entire tribunal has, through expansive interpretations of Article 21 of the Statute of the International Tribunal for the Law of the Sea and Article 138 of the Rules of the International Tribunal for the Law of the Sea, independently established the advisory function and extended the advisory jurisdiction to global issues in the "Advisory Opinion on Climate Change of Small Island States". This expansion raises threefold legal risks: the lack of treaty authorization and customary international law basis for the tribunal's advisory power; the weakening of the "adequate connection" standard and the principle of state consent, which raises the concern that the advisory procedure may be transformed into a disguised form of compulsory jurisdiction; and the judicial legislation tendency through evolutionary interpretation and incorporation of external rules may undermine the stability and predictability of international maritime law. The expansion risk stems from the convergence of normative openness, strategic preferences of states, and the will of institutions to expand power. The regulatory path should take into account three levels: institutional empowerment, procedural constraints, and substantive restraint: by improving the mechanism of the Conference of the Parties to gather state consent, strengthening the principle of state consent and the review of advisory matters, correcting the treaty interpretation path and limiting the boundary for the invocation of external rules.

Keywords: International Tribunal for the Law of the Sea, advisory jurisdiction, jurisdiction expansion, principle of state consent

1. Introduction

In 1982, the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention") only explicitly granted the Sub-tribunal for Disputes over the Seabed of the International Tribunal for the Law of the Sea with advisory jurisdiction. It did not mention whether the entire tribunal had the same powers. However, in 2015, the entire tribunal, taking the "Case of Consultative Opinion of the Sub-regional Fisheries Commission" as an opportunity, through an

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expansive interpretation of Article 21 of the Statute of the International Tribunal for the Law of the Sea (hereinafter referred to as the "Statute") and Article 138 of the Rules of the International Tribunal for the Law of the Sea (hereinafter referred to as the "Rules"), established the advisory function on its own in cases where the treaty did not explicitly authorize it. The "Consultative Opinion on Climate Change for Small Island States" released in May 2024 took this process to a new height - extending the subject from regional permanent international organizations to an institution formed by several countries through a temporary agreement (COSIS), and the consultation matters expanded from regional fishery governance to global climate issues involving all the contracting parties of the Convention [1].

The expansion of the tribunal's powers is not merely a legal dispute. Although the advisory opinions have no legal binding force, their factual influence as authoritative legal statements has become increasingly prominent, which may undermine the principle of national consent that should be the basis of the advisory procedure, weaken the effectiveness of the optional dispute settlement mechanism in Part XV of the Convention, and pose potential pressure on core maritime rights and interests in our South China Sea and other areas.

Regarding this issue, the academic community has separately conducted valuable discussions on the legal sources of advisory jurisdiction, the legal disputes in the climate change advisory case, and the development and reflection on the obligation of marine environmental protection [2]. However, there is still a lack of typological sorting of expansion risks, and the institutional construction of regulatory paths needs to be further deepened. This article intends to use the "risk - regulation" as an analytical framework, successively sketching the practical picture of expansion, examining the threefold aspects of risks, tracing their causes, and proposing a comprehensive regulatory path covering China's response.

2. The practice scenario of the expansion of the advisory jurisdiction of the international tribunal for the Law of the Sea

2.1. The explicit establishment and limited practice of jurisdiction in Maritime Dispute settlement forums

The advisory function of the Sub-tribunal for Maritime Disputes is based on clear treaty grounds. Article 159, Paragraph 10 of the Convention stipulates that at least one-fourth of the members of the Maritime Court may, in writing, request the Assembly to seek the Sub-tribunal's opinion on whether a proposal complies with the Convention; Article 191 further stipulates that the Sub-tribunal, upon request by the Assembly or the Council, shall provide an advisory opinion on legal issues arising within its jurisdiction [3]. In 2011, the Sub-tribunal provided an advisory opinion on the "Responsibility and Obligations of the Guarantor State" requested by the Nauru Ocean Resources Company through the Council of the Maritime Court. This was the only instance of advisory practice by the Sub-tribunal to date.

It is worth noting that even in cases where the treaty explicitly authorizes, the exercise of the Sub-tribunal's advisory jurisdiction is still subject to three restrictions: the request must be made by the Assembly or the Council of the Maritime Court, the proposed issue must be a legal issue, and the advisory matter must fall within the "jurisdictional scope" of the Assembly or the Council. This "clear authorization + strict limitation" institutional model constitutes a reference benchmark for observing subsequent expansions.

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2.2. The judicial self-creation of jurisdiction for the entire court's consultation: Marked by Case No. 21

In March 2013, the West African Subregional Fisheries Commission submitted a request for advisory opinion to the court regarding the obligations of third countries in respect of illegal, unreported and unregulated fishing activities within their exclusive economic zones. Twenty contracting states of the Convention and the non-contracting state of the United States submitted written opinions. Among them, China, Argentina, the United Kingdom, and other countries explicitly denied that the court had the jurisdiction to make an advisory opinion. In April 2015, the court still issued an advisory opinion and defended its jurisdiction through two-step reasoning: the first step was to expand the meaning of the word "matters" in Article 21 of the Convention, arguing that if the word only referred to "disputes", it would lose its independent meaning in terms of the literal sense, and thus should include the advisory request; the second step was to invoke Article 138 of the Rules, arguing that as long as there was an "other international agreement" that met the requirements of Article 21 and Article 138, the court would have jurisdiction to make an advisory opinion in the specific case.

This reasoning of the court has drawn widespread criticism from the academic community. From the perspective of the normative level, the Rules are procedural documents formulated by the court based on Article 16 of the Convention, and their function is to elaborate on the existing functions rather than to create new jurisdictional powers; if procedural rules can independently become the substantive basis for jurisdiction, it may break through the authorization framework of the basic treaty. The court also avoided analyzing Article 288 of the Convention in the advisory opinion - this article is located in Part XV "The Settlement of Disputes", only stipulating jurisdiction over disputes, without explicitly or implicitly mentioning advisory jurisdiction.

2.3. Further expansion of the scope of court-wide consultation: New developments in Case No. 31

If Case No. 21 completed the creation of jurisdiction "from non-existence to existence", then Case No. 31 further extended this power in terms of both the subject and the matter dimensions.

In terms of the requesting subject, the request in Case No. 21 came from the permanent organization under the regional convention concluded by the member states of the West African sub-regional fisheries commission, while the legal basis of Case No. 31 was the "Agreement on Establishing the Committee on Climate Change and International Law of Small Island States" (COSIS Agreement) reached by Tuvalu and Antigua and Barbuda during the 26th United Nations Climate Change Conference in 2021, with only nine small island countries as the contracting parties. This situation where several countries temporarily form an international organization to request consultation opinions reflects the trend of the "authorization by agreement" model being further strategically applied.

In terms of the consulting matters, Case No. 21 mainly concerned regional fisheries governance, with its impact limited to the countries in specific waters of West Africa; Case No. 31, on the other hand, targeted the global issue of the legal obligations of the contracting parties of the Convention to protect the marine environment in the context of climate change, and the impact of the consultation opinions has exceeded the scope of specific countries or regional organizations, involving all contracting parties of the Convention. The court indeed extensively discussed the interpretation of Part XII of the Convention and its application in the context of climate change in the consultation

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opinions, which made the actual influence of the consultation opinions more far-reaching than that of Case No. 21.

3. Legal risks associated with the expansion of the jurisdiction of the international tribunal for the Law of the Sea

3.1. Legitimacy dimension: The dual absence of the legal basis for the court-wide consultation jurisdiction rule

From the perspective of treaty authorization, neither the Convention nor Annex VI (the Protocol) explicitly grants the court full court advisory jurisdiction. In Case No. 21, the court obtained jurisdiction by expanding the interpretation of the term "matters" in Article 21 of the Protocol, but this interpretation faces fundamental doubts: Firstly, if "matters" is interpreted to cover a broader range of all matters related to the sea, it will seriously violate the interpretative rules of Article 31 of the Vienna Convention on the Law of Treaties - this broad interpretation may lead to suspicion that judicial institutions abuse advisory jurisdiction, undermining the neutrality of the court. Secondly, Article 138 of the Rules only stipulates the procedural conditions for the court to exercise advisory jurisdiction, and itself cannot be the legal basis for advisory jurisdiction; in Case No. 21, the court also had to admit this, recognizing that Article 138 is merely a "procedural regulation". Thirdly, the theory of "implied powers" also fails to support the creation of full court advisory jurisdiction - advisory jurisdiction belongs to the primary jurisdiction alongside litigation jurisdiction, while "implied powers" are limited to the basic necessity of assisting existing functions and cannot be used to expand the capacity of international organizations, nor can they be the legal basis for primary jurisdiction.

From the perspective of customary international law, the relatively consistent international practice regarding advisory jurisdiction is to grant specific judicial institutions through the conclusion of treaties. In the absence of explicit authorization by a fundamental treaty, the practice of international judicial institutions obtaining advisory powers through interpretation or inserting relevant provisions in internal procedural rules has no precedent. From the perspective of legal certainty, the consent of states to the advisory jurisdiction of the court stems from the prior authorization of the treaty signatory states, rather than the recognition that this power is an inherent function of the institution. In Cases No. 21 and No. 31, several states still explicitly opposed the court's advisory jurisdiction, so it is difficult to consider that a consensus legal certainty has been formed at present.

The dual lack of legitimacy will lead to direct consequences: The legitimate doubts of contracting states regarding the nature of the court's activities will evolve into a trust deficit, damaging the judicial authority and credibility of the court, and thereby weakening its actual effectiveness in international maritime governance.

3.2. Program dimension: The consultation process has been distorted into a covert form of forced dispute resolution, raising concerns

Firstly, the preconditions for review are overly lenient. The four conditions stipulated in Article 138 of the Rules - the existence of an international agreement related to the purposes of the Convention, the authorization to make a request, the issue being of a legal nature, and the matter falling within the framework of the agreement - have all been broadly interpreted in judicial application. Particularly typical is the court's invocation of the "full connection" concept from the "Case of the

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Legality of the Use of Force by a State in an Armed Conflict" of the International Court of Justice, arguing that the consultation matter does not need to be confined to the interpretation and application of the specific terms of the agreement, as long as it has a sufficient connection with the purposes and principles of the agreement. This has granted itself an extremely broad interpretation space.

Secondly, the principle of state consent has been marginalized in the consultation process. In the subsequent practice of the International Court of Justice, the restrictive role of this principle has been gradually weakened, and it is only considered as a discretionary factor for judicial appropriateness. The International Tribunal for the Law of the Sea has followed this approach. In Case No. 21, the court completely denied the application of the principle of state consent in the consultation process at the discretionary stage; in Case No. 31, the court's attitude was somewhat relaxed, acknowledging that the possible reason for refusing to issue a consultation opinion was that the disputing states did not agree to the consultation request, but since the court currently has no practice of refusal, it is uncertain whether this condition can truly constitute a restriction.

Thirdly, the identification of whether the consultation matter involves a dispute between states is rather cursory. Based on the "authorization of the agreement" model, countries with common interests may temporarily conclude an agreement to request a consultation opinion and disguise the real dispute under the guise of matters outside the agreement.

The superimposition of these three risks means that the status of the consent of the parties as the legal basis for international jurisdiction is essentially undermined in the consultation process. The consultation jurisdiction may evolve into a "lightweight" compulsory jurisdiction that circumvents the preconditions for litigation jurisdiction, thereby impacting the procedural choice rights granted to contracting states by Part XV of the Convention.

3.3. Entity dimension: Judicial legislation exceeds the reasonable boundary of treaty interpretation

The first approach is to expand the scope of treaty regulation through evolutionary interpretation. The court refined the definition of "marine environmental pollution" into three constituent elements, legally characterizing human emissions of greenhouse gases into the atmosphere, and ultimately citing the report of the Climate Committee to determine that greenhouse gas emissions constitute "marine environmental pollution" in the context of the Convention. This effectively opens a "window of opportunity" for the marine environmental protection system of the Convention to transition into a climate change system.

The second approach is to incorporate external rules to raise the obligation standards. When interpreting the obligations of states under Article 192 and Article 194 of the Convention, the court explicitly introduced the risk prevention path and required contracting states to consider the impacts of climate change and ocean acidification when formulating conservation and management measures.

The third approach is to create new obligations not present in the Convention text. Article 192 of the Convention originally merely stipulated the general obligations of states to protect and preserve the marine environment. In its advisory opinion, the court expanded the interpretation to include the obligation to "restore and improve the marine environment", which has no corresponding expression in the Convention text and constitutes a typical manifestation of "judicial legislation".

The deep impact of judicial legislation lies in that the ultimate mission of the court's interpretation should be to explore the common intentions of the original contracting states. If the court fails to find a reasonable balance between judicial activism and judicial restraint, it may face a

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legitimacy crisis due to excessive legislation and undermine the certainty and predictability of international rule of law.

4. Analysis of the causes of the expansion of the advisory jurisdiction of the international tribunal for the Law of the Sea

4.1. At the normative level: The restrictive elements governing the operation of the consultation jurisdiction are lacking

The expansion of jurisdiction in court consultations is primarily rooted in the openness of the norms themselves. This "agreement authorization" model lacks clear restrictive elements in four aspects.

Regarding the consultation requesters, the norms do not impose substantive limitations on the types of entities. Under the "agreement authorization" model, the state can temporarily enter into agreements with other countries with common interests to seek consultation opinions. It is difficult to prevent abuse by restricting the types of entities.

Regarding the consultation matters, the introduction of the "adequate connection" standard actually nullifies the substantive threshold of the matter review. The court believes that as long as the consultation issue is related to the purpose and principles of the agreement, it does not have to be limited to the interpretation or application of the specific terms of the agreement. Thus, it grants itself extremely broad interpretation and discretion.

Regarding the consent of the states, Article 138 of the Rules does not explicitly list the consent of the contracting states as a prerequisite for jurisdictional authority for consultation. The court only considers it as a discretionary factor and conducts a rather simple and cursory review and interpretation of whether the consultation matter involves a dispute, making the boundary of the operation of jurisdictional authority for consultation more ambiguous.

It is worth noting that the "constructive ambiguity" of the Convention itself objectively exacerbates the openness of the norms. In fields such as marine environmental protection, a large number of provisions use open terms such as "international rules and standards generally accepted through the establishment of a general international organization or a general diplomatic conference". This legislative technique leaves a broad space for the court's expansion of interpretation.

4.2. At the core level: The strategic preferences of the state in utilizing the consultation system

The normative openness needs to be transformed into actual expansion through the actions of the subjects. In the field of international litigation, the available tools in a country's "toolbox" often vary depending on its comprehensive strength. Some small countries have a structural reliance on international judicial means. Compared to the litigation procedure, the consultation procedure holds special appeal for small countries. Firstly, the threshold for initiating is low. The initiation of the litigation procedure requires the clear consent of both parties to accept the jurisdiction of the court, while in the "agreement authorization" model, the consultation procedure only requires the requesting party to enter into an agreement with several cooperating countries to initiate, bypassing the complex process of negotiating jurisdictional consent with the opposing party. Secondly, its factual influence is strong. Consultation opinions do not have legal binding force in theory, but as authoritative legal statements, they have a similar "soft law" effect to judgments in fact - once the court issues a consultation opinion, it will inevitably have a practical impact on the subsequent actions of the state and international organizations, and the court cannot completely ignore its

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existing position when facing similar issues that have received consultation opinions before. Thirdly, the litigation risk is low. In the consultation procedure, there are no strictly defined "parties", the requesting country does not have to bear the risk of losing the case, nor does it have to bear the burden of evidence presentation and high litigation costs. For small countries with limited resources, it is a more economical choice.

The negative effects of this strategic preference cannot be ignored. The reasonable use of international judicial means by small countries to safeguard their legitimate rights and interests should be recognized. However, competing against a larger power cannot violate the basic principles of international law, and cannot abuse international judicial means to create "political farces or provocations under the guise of law". Under the open framework of "agreement authorization", the consultation system is particularly likely to become a judicial tool for some countries to solve disputes and secure their own interests.

4.3. Institutional level: The convergence of the will to expand the jurisdiction of the courts and the trend of judicial activism

As a relatively young international judicial institution, the International Tribunal for the Law of the Sea has a relatively low case acceptance rate. Over the years, it has mainly handled cases involving quick release and temporary measures, and has not been prominent in disputes that may involve the core interests of countries in matters such as maritime delimitation. Moreover, the Convention has not granted the tribunal a special status in the application and interpretation of international maritime law, resulting in a de facto judicial competition relationship with the International Court of Justice and arbitration tribunals [4].Under this competitive situation, the tribunal has an inherent motivation to expand its jurisdiction to enhance its judicial competitiveness. Frequent mutual learning among international judicial institutions has exacerbated this phenomenon - the International Court of Justice has downplayed the mandatory condition of the principle of state consent from the "East Karelia Principle" to a discretionary factor. This practice has directly demonstrated a direct influence on the International Tribunal for the Law of the Sea.

5. Regulatory approaches for expanding the jurisdiction of the international tribunal for the Law of the Sea

5.1. Institutional regulation: Achieving formal authorization through the Convention framework

The fundamental solution to the legitimacy crisis must rely on formal institutional approaches. From a theoretical perspective, the most direct way is to amend the text of the Convention to explicitly authorize the courts' jurisdiction to provide advisory opinions - this is also the suggestion made by our country in the written opinion of Case No. 21. However, the amendment procedure stipulated in Article 312 of the Convention requires a meeting of the contracting states and reaching an agreement through consensus as much as possible, while the simplified procedure in Article 313 requires unanimous consent from all contracting states. This path is less feasible in practical conditions.

In the context of the difficulty in amending the Convention, improving the mechanism of the contracting states' meeting might be a more realistic alternative. Based on this foundation, it is possible to consider establishing a consultative committee as an affiliated institution of the contracting states' meeting, composed of experts with appropriate qualifications and expertise, to

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undertake functions such as directly providing advisory opinions, collecting and registering "other international agreements", and preliminarily reviewing the relationship between these agreements and the Convention. It should also regularly report and make recommendations to the contracting states' meeting. This arrangement aims to obtain the prior explicit consent of the contracting states of the Convention through a multilateral platform, to construct the court's advisory jurisdiction through institutional adjustment, and avoid the legitimacy disputes caused solely by the courts' self-expansion of power.

It is worth noting that Article 47 of the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction (BBNJ Agreement) passed in 2023 stipulates that the Conference of the Parties can request the court to provide advisory opinions on specific legal issues. The authorization is limited to the scope of clear consent from all parties, which precisely confirms the basic principle that "the advisory function must be based on the consensus of the contracting states".

5.2. Regulatory procedures: Strengthening the principle of national consent and the access review of the consultation process

First, enhance the binding force of the principle of state consent. In the consultation process, the court should elevate the principle of state consent from a mere discretionary factor to a substantive constraint. Second, modify the interpretation standard of "adequate connection". When determining the jurisdiction of consultation, the court should reasonably define whether the consultation matter falls within the framework of the agreement, rather than relying on the "adequate connection" between the agreement's purpose and principles to unreasonably expand the scope of subject-matter jurisdiction. This transformation means that the court must return to conducting substantive review of the interpretation or application of the specific terms of the agreement, strictly limiting the consultation matter to the working functions of the requesting party. Third, strengthen the substantive review of the relevance of disputes. The court must clearly distinguish its functional positioning from that of the International Court of Justice - the court is not the main judicial body under the United Nations Charter. Its consultation function should be more prudent in terms of scope and influence compared to the International Court of Justice. During the discretionary stage of jurisdiction, the court should strictly distinguish whether the consultation matter involves dispute resolution between states to avoid the abuse of consultation jurisdiction as a disguised form of compulsory jurisdiction.

5.3. Entity regulation: Correcting the treaty interpretation approach and limiting the application of external rules

Specifically, the court must strike a balance between evolutionary interpretation and textual fidelity. The ultimate mission of treaty interpretation is to uncover the common intentions of the original contracting parties. The court's use of analogical interpretation to create rights and obligations not explicitly stipulated in the Convention for the contracting parties has constituted an improper overstep of the state's legislative authority.

Furthermore, the court must carefully define the boundaries for the invocation of external rules. The open-ended terms such as "general accepted international rules and standards formulated by the competent international organizations or general diplomatic conferences" in the Convention provide room for the incorporation of external rules. However, this does not mean that the court can indiscriminately elevate the obligations of the Convention based on treaty rules like the Paris

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Agreement. The court should reasonably assess the scope and limits of the application of external rules to avoid adding rights or obligations to the contracting parties and maintain the stability and predictability of international rule of law.

5.4. China's response: Multi-dimensional strategy choices based on the status of a maritime power

As a signatory to the Convention and a major maritime power, our country should adopt a stance that is both firm and flexible when responding to the expansion of the court's advisory jurisdiction.

At the theoretical level, we should continue to uphold the consistent position taken in cases 21 and 31, insisting on opposing the universal advisory jurisdiction enjoyed by the entire court. The legal basis for this stance is not limited to the lack of explicit authorization for the court's advisory jurisdiction - a deeper consideration lies in the fact that our country has island sovereignty disputes with almost all of its neighboring maritime countries. The low threshold for initiating the consultation system combined with the court's tendency to expand its jurisdiction makes it possible for neighboring countries to package their mixed maritime disputes with China as "legal issues" and request advisory opinions, thereby exerting pressure on China's core interests in the South China Sea.

At the practical level, we should strengthen our response in three specific directions. Firstly, we should continue to actively participate in the written and oral procedures of the consultation, urging the court to consider the principle of consent of the parties, and providing full explanations on the specific concepts and rules of the Convention related to the consultation issues. Secondly, we should deeply analyze the potential impact of the published advisory opinions on our core interests - especially we need to pay attention to the phenomenon that the court repeatedly cited the "South China Sea Arbitration Case" viewpoints in the "Consultation Opinion on Climate Change of Small Islands", and strengthen the detailed and forceful argumentation and refutation of the illegality of the "South China Sea Arbitration Case".

In the long term, we should focus on building a maritime discourse system that is favorable to ourselves. On one hand, we should deepen the research and interpretation of the specific rules and concepts of the Convention, and interpret the maritime rules in line with China's interests and the basic principles of international law, leading the Convention towards a more fair and reasonable direction [5].

6. Conclusion

The expansion of the advisory jurisdiction of the International Tribunal for the Law of the Sea is essentially the result of the combination of three factors: openness, national strategic preferences, and the will of the institution to expand its powers. Although this process objectively responds to the actual needs of global marine governance, it also brings legal risks in three dimensions: legitimacy, procedure, and substance. The construction of regulatory paths cannot rely solely on the self-restraint of the tribunal; instead, it requires the use of the Conference of the Parties to the Convention mechanism to gather national consent, strengthen procedural constraints to curb the abuse of power, and correct the interpretative path to avoid judicial legislation. For China, it needs to firmly oppose the tribunal's universal advisory jurisdiction, prudently respond to the risks of abuse in the surrounding areas, and lead the direction of rules through discourse construction, so as to transform the concept of the marine community of common destiny into a Chinese solution for promoting the fair development of international marine law.

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