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COSIS Climate Consultation Case: Background, Controversies, and Real Challenges

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ABSTRACT
This paper explores the climate change crisis faced by small island nations in the context of global climate change and international legal response strategies. By analyzing the limitations of the Paris Agreement, the paper focuses on the climate change consultation case filed with the International Tribunal for the Law of the Sea (ITLOS) by COSIS (the Committee of Small Island States on Climate Change and International Law), jointly established by Antigua and Barbuda and Tuvalu. The article first outlines the background of the case, delves into the controversies over ITLOS's advisory jurisdiction, the legality and standing of COSIS's consultation request, and the potential real challenges faced by the climate consultation case. The consultation case may impact the United Nations climate governance mechanism, while there is also a risk of abuse of ITLOS's advisory jurisdiction. Finally, the paper discusses the implications of the consultation case for the development and improvement of the international climate governance mechanism, ITLOS's advisory jurisdiction, and the legal path for China's climate change litigation.

KEYWORDS
International Tribunal for the Law of the Sea; Climate Change; Advisory Jurisdiction; Small Island States

1 Introduction

1.1 Global Background of Climate Change

In recent years, the continuous emission of large amounts of greenhouse gases has led to a sustained rise in global temperatures, with the trend of global warming becoming increasingly significant. Climate change and its chain reactions have had a profound impact on the global ecosystem and human living environment, becoming a "gray rhino" event in global development. To address global climate change, the international community has taken active action, adopting the United Nations Framework Convention on Climate Change (UNFCCC, hereinafter referred to as the "Convention") in 1992 and the Kyoto Protocol in 1997. In 2015, China, as one of the contracting parties, signed the Paris Agreement together with 177 other contracting parties. The Paris Agreement adopted a flexible emission reduction mechanism of "nationally determined contributions" and set temperature control targets and participation methods[1]. Thus, the international community has essentially formed a global climate governance mechanism.

However, this global governance mechanism is not a panacea. Global climate governance is a complex system project involving multiple regions, countries, fields, and species and has the nature of a global public good. Due to the different historical emission levels of countries, the issue of climate change has a complex historical context. The global climate governance process is characterized by ups and downs, and the achievement of expected emission reduction targets is uncertain.

There is an urgent global need for a more integrated climate governance system. Climate change is a major challenge faced by the world, and achieving low-carbon, green development is an inevitable choice for China's development[2]. China must also quickly break through the current difficulties in climate change litigation and explore a legal path for climate change litigation that fits China's national conditions, contributing Chinese wisdom and strength to global climate change governance.

1.2 Severe Climate Change Crisis Faced by Small Island States

Due to their unique geographical locations and ecological environments, small island states are particularly sensitive and vulnerable to the impacts of climate change. As global warming continues, rising sea levels, ocean acidification, marine heatwaves, and frequent extreme weather events pose significant threats to the territorial security, ecological environment, and socio-economic development of small island states. The Intergovernmental Panel on Climate Change (IPCC) report indicates that global sea levels may rise by 0.3 – 2.5 meters by the end of this century. By the end of this century, sea-level rise is expected to bring catastrophic disasters to small island states, such as island submersion and destruction of coastal ecosystems.

Since the existing climate governance mechanisms are insufficient in addressing the impacts of climate change on vulnerable groups such as small island states, these countries have begun to seek international legal support in order to face the severe challenges posed by climate change and enhance their voice and influence in international climate negotiations.

2 Case Background and Overview

2.1 Case Background

The Paris Agreement, as an important international agreement to address global climate change, has set emission reduction targets for countries and emphasized the principles of international cooperation and common but differentiated responsibilities. However, it still has some limitations when it comes to addressing the difficulties faced by small island states and other vulnerable countries affected by climate change.

The "bottom-up" governance model formed by the Paris Agreement lacks legal binding force and cannot require contracting parties to increase their emission reduction commitments[3]. The Paris Agreement, as a new agenda of the United Nations Sustainable Development Goals following the Convention and the Kyoto Protocol, requires all contracting parties to determine their emission reduction targets voluntarily based on their national conditions. This model changed the "top-down" approach of the Kyoto Protocol, which set mandatory emission reduction targets for developed countries, and reflected the principle of "common but differentiated responsibilities." Both developed and developing countries are required to undertake emission reduction obligations and collectively address climate change. However, the "bottom-up" governance model also means that emission reduction commitments are based on the voluntary actions of countries. Contracting parties have considerable autonomy in formulating their emission reduction contributions, leading them to be conservative in their commitments, prioritizing their national economic development. In particular, developing countries, lacking financial and technological support, are often unwilling to set high emission reduction targets. Meanwhile, developed countries may use the climate mitigation commitments of developing countries as a reference, showing insufficient ambition. Essentially, this is to protect their national interests and leave room for future responses to new climate challenges.

Secondly, climate change, as a global problem involving multiple levels, actors, and dimensions, is one of the most complex systemic issues of our time. Climate governance cannot be effectively addressed through inter-state climate negotiations alone. In recent years, governments around the world have focused on reviving their national economies and find it difficult to make more commitments on climate change issues. The Paris Agreement set a target of keeping the global average temperature increase significantly below 2°C compared to pre-industrial levels and striving to limit it to 1.5°C. This temperature control target has not reached a broad consensus, and the foundation for climate cooperation among major countries is not solid enough. Moreover, this target may not be sufficient to avoid the severe impacts of climate change, such as sea-level rise and extreme weather events, on small island states.

2.2 Case Overview

In 2021, at the 26th Conference of the Parties to the Convention held in Glasgow, UK, Antigua and Barbuda, a small island state in Central America, and Tuvalu, a small island state in the Pacific region, jointly established the Committee of Small Island States on Climate Change and International Law (hereinafter referred to as COSIS) through an international agreement. In December 2022, COSIS requested the International Tribunal for the Law of the Sea (hereinafter referred to as ITLOS) to issue an advisory opinion on the obligations of the contracting parties to the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) in protecting the marine environment from the impacts of climate change (hereinafter referred to as the "climate change consultation case") [4]. The main issues raised were: (i) how to prevent, reduce, and control the harmful impacts of climate change on the marine environment, particularly the pollution caused by anthropogenic greenhouse gas emissions leading to ocean warming, sea-level rise, and ocean acidification; and (ii) how to protect and preserve the marine environment and effectively counteract the impacts of climate change, including addressing challenges such as ocean warming, sea-level rise, and ocean acidification. In May 2024, the tribunal formally issued its advisory opinion. The opinion followed the legal rationale of the "Regional Fisheries Organization Advisory Opinion Case" regarding the tribunal's full-court advisory jurisdiction, holding that Article 21 of the Statute of the Tribunal and the COSIS Agreement granted jurisdiction to the tribunal in this case[5]. The tribunal found that the case did not involve third-party issues. Furthermore, the tribunal concluded that the legal questions raised by the committee were of significant importance, and by answering these questions, the tribunal would effectively support the committee in fulfilling its duties. The tribunal also noted that the questions raised by the committee were specific and clear, and the relevant scientific evidence and information were sufficient and detailed. In addition, the tribunal found that the committee's request did not exceed the scope of its judicial functions but provided an opportunity for the tribunal to clarify certain specific legal obligations of the contracting states and offer clear guidance on the interpretation and application of Part XII of UNCLOS. Therefore, the tribunal concluded that there was no valid reason to refuse to issue an advisory opinion.

3 Legal Basis and Controversies of the Case

3.1 Controversies over ITLOS's Advisory Jurisdiction

Firstly, the United Nations Convention on the Law of the Sea (UNCLOS) and its annexed Statute of the Tribunal do not provide clear and specific regulations on ITLOS's advisory jurisdiction. This omission has left a certain degree of flexibility and discretion for the tribunal in exercising its advisory jurisdiction but has also given rise to numerous controversies. ITLOS has innovatively incorporated Article 138 into its Rules of the Tribunal, thereby independently establishing this jurisdictional function[6]. This move can be seen as a bold attempt, but it has also been widely criticized. Many scholars argue that this approach is actually a significant expansion or overreach of the tribunal's power because it goes beyond the explicit authorization scope of UNCLOS and the Statute of the Tribunal.

In the Sub-Regional Fisheries Commission (SRFC) Advisory Opinion Case[7], ITLOS sought to substantiate the legality and legitimacy of its advisory jurisdiction by conducting an in-depth and meticulous interpretation and analysis of Article 138 of the Rules of the Tribunal, Article 288 of UNCLOS, and Article 21 of the Statute of the Tribunal[8]. In its interpretation of Article 21, the tribunal pointed out that the terms "dispute" and "application" primarily refer to its contentious jurisdiction, i.e., the resolution of disputes between states arising from maritime law issues. However, these terms do not directly determine or encompass the tribunal's advisory function, as there are significant differences in nature, purpose, and procedure between the advisory function and contentious jurisdiction. Nevertheless, the tribunal adopted a broader interpretation of the term "application." In the Statute of the Tribunal, the term "application" is used to refer to various issues and situations that the tribunal may handle. The tribunal argued that this term not only includes disputes but also encompasses the possibility of issuing advisory opinions. Based on this interpretation, the tribunal established the substantive legal basis for its advisory jurisdiction, namely the interconnection between Article 21 of the Statute of the Tribunal and "other agreements" that confer jurisdiction upon the tribunal. The tribunal stated that as long as the relevant agreement explicitly or implicitly authorizes the tribunal to provide advisory opinions, the tribunal has the advisory jurisdiction to handle the matter.

Although ITLOS has confirmed its general advisory function through the above interpretation, the approach it has adopted has not gained unanimous recognition in the academic community. Some scholars argue that the term "application" in Article 21 of the Statute of the Tribunal is ambiguous, and the tribunal failed to fully consider other relevant factors, such as the normative background of the provision, the preparatory work documents of the Statute of the Tribunal, and the general practices of the international legal community. These factors are crucial for accurately understanding the meaning and scope of the term "application," yet the tribunal did not give them sufficient attention in its interpretation.

In the future, ITLOS's advisory jurisdiction may once again be questioned and challenged due to consultation requests from institutions such as COSIS. These institutions may submit similar requests for advisory opinions, and the tribunal will need to exercise greater caution and prudence in considering the legality and legitimacy of its advisory jurisdiction when handling such requests. At the same time, acknowledging the existence of jurisdiction does not mean that it must be exercised in every specific case. When exercising its advisory jurisdiction, the tribunal needs to decide whether to exercise its jurisdiction based on the specific circumstances and characteristics of the case. For example, while confirming its general advisory jurisdiction, the tribunal may decide whether to exercise its jurisdiction in a particular case based on factors such as the nature of the case, the requests of the parties concerned, the tribunal's resource situation, and the general practices of the international legal community. This flexibility and discretion are essential for the tribunal when exercising its advisory jurisdiction and are also important safeguards for ensuring the fairness, objectivity, and effectiveness of its advisory opinions.

3.2 Analysis of the Legality and Standing of COSIS's Advisory Request to ITLOS

Climate change is a global challenge that concerns the common interests of all humanity. It is indeed debatable whether small island states alone should be the consulting entities to address this global issue. After discussing ITLOS's advisory jurisdiction, this section focuses on the prerequisites for submitting advisory opinions stipulated in Article 138 of the Rules of the Tribunal. The article explicitly states that the tribunal has the authority to issue advisory opinions on legal issues clearly defined in "international agreements related to the purposes of the Convention" [9].

Regarding the request submitted by COSIS, the nature of the request must first be analyzed, namely whether it covers one or more issues of a legal nature. In 2011, the Seabed Disputes Chamber clarified that an issue constitutes a legal question when it is raised within the framework of law and touches upon the realm of international law, and thus can be addressed through legal means[10]. The tribunal has also confirmed in relevant advisory opinions that questions raised by similar institutions fall within the category of legal issues. Secondly, it is necessary to delve into another prerequisite mentioned in Article 138 of the Rules of the Tribunal, namely that the purpose of the external agreement conferring jurisdiction must be consistent with the purposes of the United Nations Convention on the Law of the Sea. In similar advisory opinions, the tribunal has dealt with this issue and confirmed the existence of an external agreement conferring jurisdiction upon the tribunal. For COSIS, as an international organization focusing on climate change and international law issues related to small island states, it is explicitly authorized under its agreement to seek advisory opinions from ITLOS on any legal issues within the scope of UNCLOS. This authorization is consistent with the requirements of Article 138 of the Rules of the Tribunal, as COSIS's main areas of work are closely related to the provisions of UNCLOS concerning the protection of the marine environment, the impacts of climate change, and measures to address them. Moreover, the drafters of the COSIS agreement explicitly mentioned UNCLOS in the agreement to highlight its consistency and relevance with the Convention.

Although COSIS appears to meet the prerequisites for submitting an advisory opinion in form, its standing as a consulting entity still needs to be considered. COSIS was established by two small island states, and its characteristics as an international organization are not fully developed. It has a short history, a limited number of members, and its founding documents do not specify a headquarters, establish other relevant institutions, or explain the sources of funding. These factors may affect its representativeness and authority on global and contentious issues.

Furthermore, compared with the advisory procedure of the International Court of Justice, whether to initiate a consultation with the International Court of Justice requires a decision by a vote of the United Nations Security Council, the General Assembly, or a specialized agency. However, ITLOS's acceptance of COSIS's consultation request lacks a similar procedural mechanism.

In summary, although COSIS's request appears to meet the requirements stipulated in Article 138 of the Rules of the Tribunal in form, when making a final judgment, we must also take into account its standing, representativeness, and authority as a consulting entity, as well as whether the procedural mechanism for ITLOS to accept its consultation request is complete.

4 Real Challenges of the Climate Consultation Case

4.1 The "Climate Consultation Case" May Deviate from the United Nations Climate Governance Mechanism

The United Nations has long relied on the "negotiation" paradigm in climate governance, primarily addressing climate disputes through intergovernmental negotiations. However, the emergence of the climate consultation case may break this traditional model, with future climate dispute resolution increasingly depending on climate litigation or arbitration between states. The shift from a "negotiation" to a "judgment" model, where disputes are handled by third-party adjudicatory bodies, poses new challenges to the UN's climate governance mechanism. The current dilemma in climate governance is that the "negotiation" model overemphasizes national sovereignty, making it difficult to push countries to make further emission reduction commitments. Introducing a "rule of law" paradigm, resolving disputes through climate litigation or adjudication, could potentially address the shortcomings of the negotiation model and bring positive change. However, it is crucial to be vigilant about the challenges that climate consultation cases and "climate adjudications" themselves may bring, which could even undermine the achievements made in climate governance over the long term. Under the existing "negotiation mechanism," countries adhere to their voluntary emission reduction commitments, focusing on "nationally determined contributions," and have established a foundation of "reciprocity" and "cooperation," along with mechanisms for supervision and compensation funds.

The climate consultation case faces numerous issues, such as jurisdictional disputes over ITLOS, controversies surrounding the consulting entity itself, and potential opposition from many countries, which may undermine the authority of the advisory opinions. Moreover, climate adjudications between states face many difficulties, such as the difficulty in establishing the "causality" of climate damage and the complexity of "allocating national responsibilities." Additionally, it is necessary to consider whether major powers are willing to comply with international adjudications. Reducing greenhouse gas emissions is a long-term goal that cannot be achieved in the short term and requires long-term cooperation among countries. In the long run, despite the shortcomings of the negotiation mechanism, it must be sustained. Although the "adjudication" mechanism may have some advantages, it should ideally only serve as a supplementary tool to climate negotiations. Especially under the current international situation, the importance of "international cooperation" must be emphasized. Climate governance cannot deviate from the track of international cooperation; it requires joint efforts from all countries and cannot be achieved overnight. It is essential to respect the foundation of cooperation based on reciprocity and voluntariness between countries and to be wary of the potential for "legal battles" over climate disputes between states.

4.2 Abuse of ITLOS's Advisory Jurisdiction

ITLOS's advisory jurisdiction lacks a clear legal basis, and the climate consultation case is seen as an "abuse" of this jurisdiction. As previously mentioned, the United Nations Convention on the Law of the Sea (UNCLOS) does not explicitly stipulate that ITLOS has complete advisory jurisdiction, and its review of matters specified in other "international agreements" is highly controversial. The previous SRFC consultation case already expanded the advisory jurisdiction, and accepting the climate consultation case may further extend this jurisdiction, constituting an "abuse" of advisory jurisdiction.

During the codification of UNCLOS, only the Seabed Disputes Chamber was granted advisory jurisdiction, without conferring complete full-court advisory jurisdiction upon ITLOS. This was not a legislative oversight but rather an intentional decision by the conference not to grant it complete full-court advisory jurisdiction. Judge Tullio Treves pointed out that "allowing requests for advisory opinions without specific authorization in the relevant agreement or permitting states to authorize such requests through agreements would be a very unfair practice." ITLOS embarked on the "path of expansion" through Article 21 of the Statute of the Tribunal and confirmed this expansion in the SRFC consultation case. The emergence of ITLOS's advisory jurisdiction from "nothing to something" has already been questioned by many scholars, and if the tribunal cannot provide a clear procedural framework through the exercise of discretion, the risk of abusing advisory jurisdiction will be evident. However, ITLOS expanded its powers once again and accepted the consultation request from COSIS.

Another purpose of the climate consultation case may be to use Part XII of UNCLOS to bind contracting states, thereby enhancing their emission reduction obligations under the Convention and the Paris Agreement. This purpose has already exceeded the scope of UNCLOS. Moreover, interpreting climate change issues cannot be separated from the interpretation and application of the Convention and the Paris Agreement, which also goes beyond the content of UNCLOS. Therefore, ITLOS's adjudication of the climate consultation case represents another expansion of advisory jurisdiction, with a clear risk of "abuse."

5 Impacts and Implications of the Climate Consultation Cas

5.1 Impact on the International Climate Governance Mechanism

The "bottom-up" model of the Paris Agreement, which relies on nationally determined contributions, lacks binding force. In contrast, ITLOS's advisory opinion, by invoking Articles 192 and 194 of the United Nations Convention on the Law of the Sea, categorizes greenhouse gas emissions as "marine environmental pollution, " thereby providing legal enforceability for climate responsibilities. Moreover, small island states, through the consultation case, advocate the "polluter pays principle," demanding that major emitting countries compensate for damages such as sea-level rise and ocean acidification. This claim provides international legal support for the "loss and damage fund" established at COP27 and prompts developed countries to confront their historical responsibilities.

5.2 Development and Improvement of ITLOS's Advisory Jurisdiction

The COSIS climate consultation case is a significant practice of ITLOS's advisory jurisdiction, manifested in several aspects. Firstly, ITLOS accepted the case based on Article 21 of the Statute of the Tribunal and Article 138 of the Rules of the Tribunal, interpreting "international agreements" to include the COSIS establishment agreement, setting a precedent for future similar cases. Secondly, the case allowed non-member entities (such as environmental NGOs and groups of scientists) to submit "amicus curiae" briefs, enhancing the transparency and scientific nature of the proceedings. Although the advisory opinion is not binding, its authority influences state practice. For example, Australia revised its Marine Protection Act after the case, incorporating carbon emissions into marine pollution regulation.

5.3 Implications for China's Legal Path in Climate Change Litigation

Under the broad framework of the United Nations Convention on the Law of the Sea, China firmly advocates the principle of "common but differentiated responsibilities." This principle profoundly reflects fairness and justice in global climate governance, emphasizing that developed countries, as the main contributors to historical emissions, should bear corresponding historical responsibilities. China opposes any "one-size-fits-all" approach to emission reduction obligations because such an approach ignores the reality of differences in development levels and historical emissions among countries, which is detrimental to the fairness and effectiveness of global climate governance.

Secondly, developing countries face many challenges in addressing climate change, especially small island states, which are more vulnerable to climate change due to their geographical location and level of economic development. Therefore, China can provide renewable energy technology assistance to these small island states through the Belt and Road Initiative, helping them enhance their capacity to cope with climate change and reduce greenhouse gas emissions.

Finally, in future climate change disputes, scientific evidence will play a crucial role. Therefore, there should be a strong emphasis on the preliminary research of "climate attribution science." By conducting in-depth studies on the causes, impacts, and trends of climate change, robust scientific support can be provided for addressing future climate change disputes. At the same time, this will also help guard against potential risks of litigation in international courts in the future, ensuring that rights and interests are fully protected.

6 Conclusion

Through an in-depth study of the climate consultation case, this paper has revealed the complexity and challenges of international legal responses to climate change in the context of global climate change. The consultation case has not only sparked widespread controversy over ITLOS's advisory jurisdiction but also touched upon core issues of the international climate governance mechanism. Although the Paris Agreement provides a basic framework for global climate governance, its "bottom-up" governance model lacks binding force and is insufficient to effectively address the severe challenges posed by climate change.

ITLOS's advisory opinion, by categorizing greenhouse gas emissions as "marine environmental pollution," has provided legal enforceability for climate responsibilities and offered legal support for countries vulnerable to climate change, such as small island states. However, this approach has also raised concerns about the abuse of advisory jurisdiction and potential negative impacts on the international climate governance mechanism. The climate consultation case also holds significant legal and practical implications, offering valuable insights for developing countries like China. Specifically, it underscores the importance of actively participating in global climate governance based on the principle of "common but differentiated responsibilities," and enhancing the capacity to address climate change through means such as technical assistance and scientific pre-research.

In summary, although the climate consultation case faces numerous controversies and challenges, it also brings new opportunities and hope for global climate governance. Moving forward, the international community should continue to strengthen cooperation and dialogue, jointly address the challenges posed by climate change, and promote the continuous improvement and development of the global climate governance mechanism.

References

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[5] ITLOS. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law . Advisory Opinion, 2024, 21 Mayp.42, para. 89.

[6] Article 138 of the Tribunal Rules stipulates that: "1. If an international agreement related to the purposes of the Convention explicitly provides for the possibility of requesting an advisory opinion from the Tribunal, the Tribunal may issue an advisory opinion on a legal question. 2. A request for an advisory opinion shall be made by an agreement authorizing such a request or by any institution authorized by the agreement to submit the request to the Tribunal."

[7] ITLOS. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC). Case No. 21, 2015.

[8] Article 21 of the Statute of the Tribunal stipulates that: "The jurisdiction of the Tribunal shall extend to all disputes and applications submitted to it in accordance with this Convention, and to all applications specifically provided for in any other agreement conferring jurisdiction upon the Tribunal."

[9] itlos Rules, Art. 138.

[10] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case n. 17 (2011), para. 25.