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# *The International Tribunal for the Law of the Sea Advises on the Risks and Responses to the Expansion of Jurisdiction*

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***Abstract.*** Relying on Article 138 of the *Rules of the International Tribunal for the Law of the Sea* and an expansive interpretation of the term "matters" in Article 21 of Annex VI *Statute*, the International Tribunal for the Law of the Sea has autonomously established advisory jurisdiction for the full tribunal. In Case No. 21 and Case No. 31, it has continuously expanded the scope of personal and subject-matter jurisdiction by introducing the "sufficient connection" standard. Such expansion of the Tribunal's advisory jurisdiction has given rise to three rule-of-law risks: an unstable legal foundation, the potential abuse of advisory proceedings as a disguised tool for compulsory dispute settlement, and excessive judicial law-making by the Tribunal through advisory opinions. The causes can be traced to three levels: normative, subjective, and institutional. Article 138 of the *Rules of the International Tribunal for the Law of the Sea* itself lacks restrictive elements; some states intend to pursue their own interests through advisory proceedings; and the Tribunal has both a strong desire to expand its powers and room for judicial activism. To regulate the risks of expansion, coordinated efforts are required across four dimensions: theoretical, procedural, substantive, and China's responses. These include reaffirming the guiding effect of the principle of consent of the parties, prudently examining the preconditions for the exercise of advisory jurisdiction, correcting the expansive interpretation of states' rights and obligations, and striking a balance between opposing the Tribunal's excessive expansion of powers and constructively participating in global ocean governance.

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

## 1. Introduction

The practice of the International Tribunal for the Law of the Sea (hereinafter referred to as "the Tribunal") intervening in ocean law affairs through advisory opinions began with the response issued by the Seabed Disputes Chamber in 2011 on the responsibilities and obligations of sponsoring States. What has truly aroused widespread academic attention is the advisory opinion rendered by the full Tribunal in 2015 on the advisory request submitted by the Sub-Regional Fisheries Commission for West Africa. In this case, the Tribunal established for the first time the advisory jurisdiction of the full tribunal, a power not explicitly conferred by the *United Nations Convention on the Law of the Sea* (hereinafter referred to as "the Convention"). Nine years later, in

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May 2024, the Tribunal issued a detailed opinion on the climate change advisory request from the Commission of Small Island States, further extending advisory matters to climate change and ocean acidification issues not explicitly covered by the text of the Convention [1]. From self-empowerment in terms of the source of authority to the gradual expansion of personal and subject-matter scope, the expansionary tendency of the Tribunal's advisory jurisdiction has become increasingly clear.

The practical significance of studying this issue cannot be ignored. There are still long-unresolved disputes between China and several neighboring countries over island and reef sovereignty and maritime delimitation. The low-threshold feature of the advisory system and the open structure of delegated authorization objectively provide an opportunity for neighboring countries to submit mixed maritime disputes to the Tribunal as legal issues by concluding special agreements.

## 2. A realistic picture of the expansion of advisory jurisdiction of the International Tribunal for the Law of the Sea

### 2.1. Source expansion: The entire tribunal establishes its own advisory jurisdiction

The explicit provisions of the Convention on advisory jurisdiction are limited to the Seabed Disputes Chamber. Pursuant to Article 159(10) and Article 191 of the Convention, the Seabed Disputes Chamber may render advisory opinions on legal questions within the scope of its activities at the request of the Assembly or the Council of the International Seabed Authority. Apart from this, neither the main text of the Convention nor Annex VI *Statute of the International Tribunal for the Law of the Sea* (hereinafter referred to as "the Statute") mentions that the full Tribunal enjoys advisory jurisdiction [2].

However, when the Tribunal formulated the *Rules of the International Tribunal for the Law of the Sea* (hereinafter referred to as "the Rules") in 1997, it stipulated in Article 138 that "the Tribunal may render advisory opinions on legal questions if an international agreement relating to the purposes of the Convention so provides for the submission of requests for advisory opinions to the Tribunal". In Case No. 21 (2015), the Tribunal invoked an expansive interpretation of the term "matters" in Article 21 of the Statute, holding that the term is not limited to disputes and sufficiently covers requests for advisory opinions. It also relied on Article 138 of the Rules as a precondition provision, thereby confirming the existence of advisory jurisdiction for the full Tribunal. This interpretive approach was reaffirmed by the Tribunal in Case No. 31 (2024).

Nevertheless, the Tribunal's argument has not gained universal recognition. Many scholars have pointed out that the Tribunal's interpretation of Article 21 of the Statute is overly simplistic and unpersuasive, failing to meet the basic requirements of treaty interpretation under the *Vienna Convention on the Law of Treaties* [3]. From the perspective of international judicial practice, the advisory jurisdiction of the Permanent Court of International Justice, the International Court of Justice, and even regional human rights courts is based on the explicit authorization of basic treaties. The Tribunal's acquisition of advisory power through self-formulated procedural rules has no precedent in the history of international justice.

### 2.2. Personal scope expansion: The opening of the subject of the request

On the basis of the self-established source of authority, the Tribunal has also shown a broad tendency in the scope of submitting subjects. Paragraph 2 of Article 138 of the Rules uses the

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expression "whatever body", stipulating that requests for advisory opinions shall be submitted by "whatever body" authorized by an external agreement or appointed pursuant to such an agreement. This wording does not limit the submitting subjects to international organizations in the usual sense.

The practice in Case No. 31 reflects the consequences of such openness. The submitting subject of this case, the Commission of Small Island States on Climate Change and International Law, is an ad hoc body established by Tuvalu, Antigua and Barbuda through the conclusion of the *Agreement on the Establishment of the Commission of Small Island States on Climate Change and International Law* (COSIS Agreement) during the 26th UN Climate Change Conference in 2021, with only six contracting parties at the time of the advisory request. Some scholars have accordingly pointed out that in theory, any two states can conclude an "other international agreement" related to the purposes of the Convention and thus obtain the qualification to submit a request for an advisory opinion. This uncertainty leaves ample room for the instrumental use of advisory proceedings.

### 2.3. Expansion of matters: With the "full connection" standard as the node

The expansion of subject-matter scope takes the introduction of the "sufficient connection" standard as a key node. In Case No. 21, the Tribunal borrowed the interpretive approach established by the International Court of Justice in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, holding that advisory matters do not need to be directly linked to the specific provisions of the external agreement, as long as there is a sufficient connection with the purposes and principles of the agreement, thereby responding to the concerns of Ireland, the United States and other countries regarding the limitation of subject-matter scope.

This lenient standard has produced a substantive expansion effect in both cases. In Case No. 21, the *Convention on Establishing Minimum Conditions for Access to and Exploitation of Marine Resources in the Maritime Zones under the Jurisdiction of the Members of the Sub-Regional Fisheries Commission* limited the scope of advice to the exclusive economic zones of the members of the Convention, but the Tribunal still answered matters not explicitly mentioned in the Convention, including the obligations of flag States towards IUU fishing in the exclusive economic zones of third parties. In Case No. 31, the COSIS Agreement itself only involves "promoting the definition, implementation and progressive development of international legal rules and principles on climate change" and does not contain substantive activities related to marine environmental protection. However, the Tribunal accepted all advisory matters related to Articles 192 and 194 of the Convention based on the "sufficient connection" standard, thus extending its jurisdiction to most matters not originally covered by the Agreement.

## 3. The triple legal risks arising from the expansion of the International Tribunal for the Law of the Sea's advisory jurisdiction

### 3.1. Legitimacy risk: The legal basis for the tribunal to establish its own advisory jurisdiction is not solid

The Tribunal's expansive interpretation of the term "matters" in Article 21 of the Statute has been subjected to serious methodological challenges. This article stipulates that the Tribunal's jurisdiction "shall comprise all disputes and applications submitted in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". From the perspective of textual position, this article, together with Article 288 of the Convention, is located in the dispute settlement chapter, aiming to regulate the scope of dispute settlement. From

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the perspective of systematic interpretation, "disputes and applications" are listed in parallel with "matters", the former exhaustively covering the two basic types of dispute settlement under the Convention, and the latter does not naturally cover requests for advisory opinions. Some scholars have even clearly pointed out that Article 138 of the Rules, as a procedural provision, cannot in itself provide a substantive legal basis for the advisory jurisdiction of the full Tribunal, a point the Tribunal itself acknowledged in Case No. 21.

As for the theory of implied powers, it is also insufficient to support the Tribunal's argument for expanding its powers. The application of implied powers must follow a strict necessity standard – it must be indispensable to the performance of the core functions of the judicial body. The core function of the Tribunal is to settle disputes in accordance with Article 287 of the Convention, and the advisory function is not necessary for the realization of this core function, so it is difficult to be included in the scope of implied powers. From the perspective of customary international law, the establishment of custom requires the dual elements of state practice and opinio juris. However, in Case No. 21 and Case No. 31, China, the United Kingdom, Argentina, Ireland, Spain, the United States and other countries have clearly opposed or reserved their positions on the advisory jurisdiction of the full Tribunal, which sufficiently indicates that the international community has not yet formed a consensus opinio juris on this issue. The weak legal foundation is bound to affect the acceptance of the Tribunal's advisory opinions in the international community and undermine the Tribunal's own judicial authority and credibility.

### 3.2. Procedural risk: Advisory jurisdiction is likely to be misused as a disguised coercive dispute settlement tool

Lenient review is first reflected in the identification of the "agreement framework". Although the Tribunal requires that advisory matters fall within the framework of the authorizing agreement, the introduction of the "sufficient connection" standard has made this requirement almost a formality. Second, the openness of the concept of "international agreement" itself allows any bilateral or multilateral agreement related to the purposes of the Convention to serve as the basis for triggering a request for an advisory opinion, and does not require the agreement to cover a wide range of international maritime law obligations. This structural openness enables a special agreement concluded temporarily by a small number of states to initiate the entire advisory proceeding.

A more fundamental problem is the marginalization of the principle of consent of the parties. In Case No. 21, the Tribunal invoked the reasoning of the International Court of Justice in the *Advisory Opinion on the Interpretation of Peace Treaties*, excluding the consent of the parties from the preconditions for advisory jurisdiction and treating it only as a consideration in the discretionary stage. In Case No. 31, although the Tribunal acknowledged that it may decline to render an advisory opinion in cases involving disputes between parties, there has been no practice of refusal so far, making it difficult to confirm whether this position constitutes a substantive constraint [4]. This shift from strict "consent as a precondition" to loose "discretionary consideration" actually enables the Tribunal to issue adjudicative opinions on the rights and obligations of third states that have not given their consent. Although the Tribunal has repeatedly emphasized that advisory opinions are not binding, their role as a "authoritative statement of general international law" has been widely recognized by the international community.

The consequence is that advisory proceedings may become a backdoor to circumvent the compulsory dispute settlement mechanism in Part XV of the Convention. Article 287 of the Convention grants States Parties the right to choose dispute settlement procedures, and Articles 297 and 298 stipulate restrictive exceptions. If a state can package a dispute that should be resolved

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through litigation proceedings as a legal question and submit it to the Tribunal by concluding a special agreement, the differentiated dispute settlement framework established by the Convention will face the risk of being hollowed out. For countries like China that adhere to an opposing position in advisory cases, the above risks are particularly realistic.

### 3.3. Substantive risk: Courts use advisory opinions to over-judicially create law

Case No. 31 provides a concentrated sample of this tendency. First, the Tribunal characterized greenhouse gas emissions as "marine pollution" within the meaning of Article 1(4) of the Convention. The Tribunal refined the definition of "marine pollution" into three constituent elements, defining greenhouse gases as substances, interpreting ocean acidification as the direct introduction of substances into the ocean by humans, and interpreting ocean warming as the indirect introduction of energy by humans. It then determined that these have a harmful impact on the marine environment based on reports from the Intergovernmental Panel on Climate Change. Thus, the marine environmental protection regime in Part XII of the Convention has been substantially extended to the field of climate change.

Second, the Tribunal strengthened state obligations through the precautionary approach. When interpreting Articles 194, 206 and other provisions of the Convention, the Tribunal clearly advocated the application of the precautionary approach, advancing the time for the performance of obligations – as long as there is evidence indicating the possibility of harm, state obligations are triggered. In contrast to the Tribunal's previous "evasive" stance on the precautionary principle, this clear statement reflects a distinct tendency of judicial activism.

Third, the Tribunal created new obligations beyond the existing provisions of the Convention. Article 192 of the Convention only briefly stipulates the general obligation to protect and preserve the marine environment. On this basis, the Tribunal developed the "obligation to restore and improve the marine environment" and systematically incorporated obligations of cooperation, technical assistance, monitoring and environmental impact assessment into the framework of marine environmental protection with the help of relevant rules of international climate change law [5].

The above practices of the Tribunal have drawn criticism of judicial law-making and even judicial interventionism. The fundamental mission of treaty interpretation is to explore the common intent of the original contracting parties, and the evolutionary interpretation carried out by the Tribunal in the name of addressing climate change has actually gone beyond the conventional functions of interpreting and applying the law, moving towards the role of law-making and governance. From the perspective of international rule of law, excessive judicial law-making may not only undermine the contracting parties' reasonable expectations of the text of the Convention, but also subordinate other international law-making processes to the activist judgments of individual judicial bodies, impairing the stability and certainty of international law.

## 4. An analysis of the causes of the risk of expanded consultation jurisdiction

### 4.1. Regulatory level: The rules governing the operation of consultative jurisdiction lack restrictive elements

Currently, the operation of the Tribunal's advisory jurisdiction is only based on Article 138 of the Rules as an explicit basis, and this provision itself has a considerable degree of structural openness. From the perspective of authorization mode, Article 138 adopts an "agreement authorization" mode – advisory proceedings can be initiated as long as there is an international agreement related to the

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purposes of the Convention that specifically provides for the submission of requests for advisory opinions to the Tribunal. However, key issues such as what constitutes an international agreement "related to the purposes of the Convention", what qualifications the contracting subjects of the agreement should meet, and to what extent the content of the agreement should involve core issues of the Convention are not defined in the text of Article 138.

Under this open mode, several core elements of advisory proceedings are in a state of uncertainty. First, the scope of submitting subjects is expressed by the concept of "whatever body", without distinguishing between states, international organizations or ad hoc arrangements. Second, the criteria for identifying "legal questions" have been broadly interpreted in both cases, and almost all questions involving the interpretation of international law rules can be included. Third, the limiting element of "within the agreement framework" tends to be virtualized after the introduction of the "sufficient connection" standard.

### 4.2. Subject level: The state intends to use the consultative system for its own interests

In Case No. 21, the member states of the Sub-Regional Fisheries Commission for West Africa are all developing African countries. Faced with the practical dilemma of illegal fishing by fishing vessels of developed countries in their exclusive economic zones, they find it difficult to resolve it through adversarial litigation proceedings and instead seek legal clarification of flag State obligations under the Convention through advisory proceedings. Case No. 31 is more typical. Small island states most directly threatened by climate change are well aware that initiating litigation rulings against major greenhouse gas emitters faces major obstacles at both political and legal levels. In contrast, advisory proceedings have the advantages of not directly targeting specific states, allowing all states to participate in submissions, and leaving ample room for follow-up actions.

There is a subtle tension between the reasonable demands of vulnerable states to use advisory proceedings and the risk of expansion. On the one hand, the low threshold of the advisory system indeed provides an irreplaceable channel for these countries to participate in global ocean governance. On the other hand, without normative constraints, such use may evolve into a strategic operation of packaging sensitive disputes as legal questions. Once this strategy is replicated in more sensitive dispute areas such as island and reef sovereignty and maritime delimitation, advisory proceedings may become a disguised legal game field.

### 4.3. Institutional level: The Tribunal has the will to expand powers and room for judicial activism

The Tribunal's desire to expand its powers is traceable at the subjective level. From Case No. 21 to Case No. 31, the Tribunal's argumentation on the preconditions for advisory jurisdiction has become increasingly brief, and its response to opposing opinions has become increasingly cautious and general. In both cases, the Tribunal followed the practice of the International Court of Justice to weaken the restrictive effect of the principle of consent of the parties, but did not fully consider the differences in functional positioning between the two judicial bodies – the advisory jurisdiction of the International Court of Justice serves the internal United Nations system, while the Tribunal's advisory jurisdiction involves substantive obligations between States Parties to the Convention. This simple transplantation of the International Court of Justice model itself reflects the Tribunal's relatively loose grasp of the boundaries of its own powers.

Objective conditions also leave room for the Tribunal's activism. There are a large number of "constructive ambiguities" in the Convention, leaving room for interpretation on many important

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issues, which provides institutional convenience for the Tribunal to develop rules through advisory opinions. At the same time, the Meeting of States Parties mechanism is relatively weak, lacking timely response and effective checks and balances on the Tribunal's practices. Under such circumstances, the Tribunal has in fact obtained considerable discretionary space.

## 5. Consult on pathways to address the risk of jurisdictional expansion

### 5.1. Theoretical: Reaffirm the guidance and constraints of the principle of consent of the parties

The principle of consent of the parties is the basic criterion for restricting the improper expansion of advisory jurisdiction. The applicable value of this principle in advisory proceedings is not limited to the formal "consent as a precondition", but lies in its inherent "non-circumvention" dimension – advisory proceedings shall not be used to avoid the substantive positions of third states that have not given their consent on the disputed matters. In international judicial practice, the Permanent Court of International Justice explicitly confirmed the application of the principle of consent of the parties in the advisory field in the *Eastern Karelia Case*, thereby eliminating the international community's doubts about the early advisory system.

The Tribunal's downgrading of the consent of the parties to a discretionary factor by following the practice of the International Court of Justice ignores the essential differences between the two judicial bodies. The advisory jurisdiction of the International Court of Justice serves the internal United Nations system, and advisory matters often involve the functions of United Nations organs. In contrast, the Tribunal's advisory jurisdiction concerns the substantive rights and obligations between States Parties to the Convention, and its quasi-judicial nature far exceeds that of advisory opinions requested by United Nations organs. In view of this, the Tribunal should give a higher degree of respect to the principle of consent of the parties when hearing advisory requests, taking "whether the matter substantially involves unresolved disputes between states" as the primary criterion, rather than merely considering it as a discretionary factor.

### 5.2. Procedural: Carefully examine the preconditions for the exercise of advisory jurisdiction

Against the realistic background of the lack of explicit authorization in the text of the Convention, substantive review of procedural conditions is the key to curbing the risk of expansion. The four preconditions set by the Tribunal under Article 138 of the Rules – the existence of an international agreement related to the purposes of the Convention, a submitting subject authorized by the agreement, a legal question, and a matter within the framework of the agreement – all need to be interpreted strictly rather than leniently.

First, the element of "within the agreement framework" should correct the tendency to infinitely expand the subject-matter scope through the "sufficient connection". The Tribunal should return to the normative text of Article 21 of the Statute and require that advisory matters have a substantive connection with the specific provisions of the authorizing agreement, rather than being satisfied with an abstract connection with the purposes and principles of the agreement. Second, the review of the "appropriateness" of the submitting subject should get rid of formalization. When the submitting subject is established by a special agreement concluded temporarily for the purpose of consultation, the Tribunal should particularly prudently assess its representativeness and whether there is a strategic arrangement to circumvent the consent of third states behind it. Third, in the discretionary stage, the Tribunal should strictly screen whether advisory matters substantially involve unresolved

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disputes between states. Although the International Court of Justice adopted a lenient position in the *Advisory Opinion on Western Sahara*, the differences in functional positioning between the Tribunal and the International Court of Justice determine that it cannot simply transplant this approach. In principle, the Tribunal should decline to render an opinion on advisory requests involving disputes between states, or at least exercise necessary restraint on the substantive issues of the disputes in its opinion.

### 5.3. Substantive level: Correct the expansionary interpretation path of state rights and obligations

The substantive response focuses on the content of the advisory opinions themselves. The fundamental task of treaty interpretation is to explore the common intent of the original contracting parties, rather than replacing the authority of the contracting parties with the subjective judgment of the judiciary. In this sense, the Tribunal should return to the interpretation rules established by Article 31 of the *Vienna Convention on the Law of Treaties* – interpret in good faith, in accordance with the ordinary meaning of the terms of the treaty, in the context of the treaty and in the light of its object and purpose.

Specifically, the Tribunal should be cautious in the application of analogical interpretation and avoid forcibly incorporating matters not explicitly covered by the text of the Convention into existing provisions. The invocation of external reference rules should reasonably measure the limits of their application, and it is not advisable to systematically raise the standard of obligations under the Convention with the help of external rules such as the *Paris Agreement*, otherwise it will indirectly impose new obligations on States Parties not stipulated in the treaty text. Fundamentally, the Tribunal needs to find a reasonable balance between judicial activism and judicial restraint, limiting its functions to the conventional category of "interpreting and applying the law" rather than moving towards the role of "law-making and governance". It should be noted that the supply of rules for global issues such as climate change and marine biodiversity should be promoted through conventional international law-making processes – the successful negotiation of the BBNJ Agreement provides a useful reference.

### 5.4. China: Actively guard against the abuse of the advisory system by neighboring countries

For China, responding to the risk of expansion of advisory jurisdiction has special practical urgency. There are long-unresolved disputes between China and several neighboring countries over island and reef sovereignty and maritime delimitation. After the award in the South China Sea Arbitration, China's vigilance against neighboring countries packaging territorial disputes through international legal channels has increased significantly. The low threshold and openness of the advisory system objectively provide a new possible field for such risks.

The response paths can be carried out from the following aspects. First, continue the opposing position in Case No. 21 and Case No. 31, and continuously urge the Tribunal in the written opinions and oral statements of advisory proceedings to strengthen the consideration of the principle of consent of the parties, and emphasize that advisory proceedings shall not be used to resolve disputes between states. Second, prudently conclude maritime bilateral and multilateral agreements to avoid inadvertently triggering the submission channel of advisory jurisdiction in the agreement clauses. Third, establish a professional research team to conduct in-depth research on the advisory opinions issued and likely to be issued by the Tribunal, and timely identify legal risk points that may affect China's maritime rights and interests. Fourth, strengthen the construction of China's maritime

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discourse system, supported by the concept of a maritime community with a shared future, enhance China's voice and influence in the field of international maritime justice through channels such as participating in the Meeting of States Parties, promoting the improvement of the Convention system, and cultivating Chinese judges and international law talents.

## 6. Conclusion

However, in the absence of explicit authorization in the text of the Convention, the Tribunal has autonomously established the advisory jurisdiction of the full Tribunal through autonomous interpretation, and continuously expanded the scope of personal and subject-matter jurisdiction by applying the "sufficient connection" standard, which has subjected the advisory system to multiple tensions of legitimacy, abuse and judicial law-making. Regulating the risks of expansion depends not only on the Tribunal's adherence to judicial restraint and return to the conventional path of treaty interpretation, but also on the international community's efforts to rectify the situation through formal institutional paths such as the Meeting of States Parties mechanism and amendment of the Convention. For China, the expansion of advisory jurisdiction is not a distant theoretical issue, but relates to its vital maritime rights and interests. Striking a balance between opposing the Tribunal's excessive expansion of powers and constructively participating in global ocean governance is a long-term task that China will face in the period to come.

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