decision has ramifications for numerous unresolved maritime boundaries in which extended continental shelf claims extend to within 200 nautical miles of the baselines of another coastal state. Each of those extended continental shelf claims is now suspect in those areas of intersection. To take but one example, Australia's long-standing but controversial claims to an extended continental shelf extending to the margin of the Timor Trough within 200 nautical miles of the coast of Timor Leste are now impermissible.[27] Other areas affected by the decision include Arctic boundaries between the United States of America and Russia[28] and various contested claims of China in the area of the South China Sea.[29]

The decision has the overwhelming advantage of simplicity. It ensures that within 200 nautical miles of a coastal baseline, the coastal state may exploit to the full extent the resources of the seabed and water column, without regard to competing claims of other states to an extended continental shelf based upon natural prolongation. Delimitation will henceforth only be required within 200 nautical miles in cases of intersection with another state's equal entitlement to an exclusive economic zone in the same area.

CHRISTOPHER WARD
3VB Barristers, London;
6 St. James Hall Chambers, Sydney
doi:10.1017/ajil.2024.12

Austrian Constitutional Court—Organization of the Petroleum Exporting Countries (OPEC)—immunity and inviolability of international organizations—European Convention on Human Rights (ECHR)—right of access to a court—Waite and Kennedy v. Germany

X v. OPEC. Judgment No. SV 1/2021 (SV 1/2021-23). ECLI:AT:VFGH:2022:SV1.2021. *At* https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_SV_1_2021_vom_29._September_2022.pdf (German) and https://www.vfgh.gv.at/downloads/VfGH_SV_1_2021_OPEC_EN.pdf (English).
Verfassungsgerichtshof (Constitutional Court of Austria), September 29, 2022.

The judgment of the Austrian Constitutional Court (*Verfassungsgerichtshof*; hereinafter Court) in *X v. Organization of the Petroleum Exporting Countries (OPEC)*[1] constitutes the first time in which this Court has declared parts of a treaty to be unconstitutional, and one of a few cases in which a European court has granted a challenge based on the *Waite and Kennedy* doctrine. Developed by the European Court of Human Rights (ECtHR), the doctrine concerns the permissibility of restricting the right of access to a court in disputes concerning "civil rights" (as a part of the right to a fair trial under European Convention

[27] *See generally* Madeleine J. Smith, *Australian Claims to the Timor Sea's Petroleum Resources: Clever, Cunning, or Criminal?*, 37 MONASH U. L. REV. 42 (2011).
[28] The Eastern Special Area, which is the subject of the June 1, 1990 Agreement.
[29] *See* Alexianu, *supra* note 1.
[1] An unofficial English translation of the Constitutional Court's judgment may be found in Martin Baumgartner, Philipp Janig, Viktoria Ritter, Maximilian Weninger & Stephen Wittich, *Austrian Judicial Decisions Involving Questions of International Law*, 27 AUSTRIAN REV. INT'L & EUR. L. 321, 332 (2022).

on Human Rights (ECHR) Article 6(1)) through granting jurisdictional immunities to international organizations.[2] In September 2022, the Court found that parts of the Headquarters Agreement between Austria and OPEC, which bar employees from suing OPEC before Austrian domestic courts, violated Article 6(1) of the ECHR and were thus unconstitutional. Should the judgment come into full effect, OPEC would lose its jurisdictional immunities and the inviolability of its headquarters seat within the Austrian domestic legal order. Importantly, the judgment illustrates the continued impact of *Waite and Kennedy* on international organizations.

* * * *

The case stems from an employment dispute between OPEC and a former employee, who sought a civil judgment that their termination was unlawful. The applicant was employed as an internal auditor at OPEC until 2017, when they were terminated by decision of the OPEC secretary general. The applicant's lawsuit before the Vienna Labor Court (*Arbeits- und Sozialgericht Wien*) was dismissed due to the jurisdictional immunity of OPEC.[3] Likewise, a subsequent challenge with the Austrian Constitutional Court was unsuccessful for procedural reasons.[4] In 2020, the applicant's second civil lawsuit before the Vienna Labor Court was dismissed due to OPEC's immunity. Simultaneously with their appeal against the 2020 decision of the Labor Court, the applicant petitioned the Court to declare certain provisions of the OPEC Headquarters Agreement (OPEC-HA) to be unconstitutional, as a violation of their rights under the ECHR,[5] which has the status of constitutional law in Austria. The applicant argued that the jurisdictional immunities of OPEC and its property (OPEC-HA, Art. 9) interfered with their right of access to a court in light of the *Waite and Kennedy* doctrine. Given that there was no reasonable alternative means within the organization to pursue their rights, that interference was disproportionate and unlawful. In addition, the inviolability of the headquarters seat (OPEC-HA, Art. 5) would prevent an effective service of process, as OPEC could not be compelled by the court to receive any documents. The applicant further argued that, according to the case law of the ECtHR, enforcement proceedings were an integral part of the right to fair trial, making the immunity from execution of OPEC's property (OPEC-HA, Art. 10) also unconstitutional. Moreover, the power to make regulations applicable to the headquarters seat that supersede Austrian domestic law (OPEC-HA, Art. 4(1)) was the basis for OPEC Staff Regulations, which had denied them the aforementioned rights (Margin Numbers (MN) 7–16).

[2] Waite and Kennedy v. Germany (GC), App. No. 26083/94, ECHR 1999-I, paras 50–73 (Feb. 18, 1999); Beer and Regan v. Germany (GC), App. No. 28934/95, [1999] ECHR 6, paras 40–63 (Feb. 18, 1999).

[3] OPEC Headquarters Agreement, Art. 9, *at* https://www.vfgh.gv.at/downloads/VfGH_SV_1_2021_OPEC_EN.pdf [hereinafter OPEC-HA] ("OPEC and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case OPEC shall have expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.").

[4] Case No. SV 1/2019 (Constitutional Court (Verfassungsgerichtshof) Nov. 25, 2020) (Austria). For an unofficial English translation, see Jane Alice Hofbauer, Philipp Janig, Viktoria Ritter, Markus Stemeseder & Stephan Wittich, *Austrian Judicial Decisions Involving Questions of International Law*, 25 Austrian Rev. Int'l & Eur. L. 255, 273 (2020).

[5] More specifically, they invoked the right of access to a court (ECHR, Art. 6(1)), the right to an effective remedy (ECHR, Art. 13), and the right to property (ECHR First Additional Protocol, Art. 1). European Convention on Human Rights, Nov. 4, 1950, ETS 5, *at* https://www.echr.coe.int/documents/d/echr/convention_ENG.

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While OPEC did not participate in the proceedings (MN 21), the Austrian federal government submitted a statement requesting that the application should be dismissed or, alternatively, rejected. With regard to admissibility, the Austrian federal government argued that the application was construed too narrowly, as it failed to challenge a separate provision of the Headquarters Agreement that explicitly provided for the "extraterritoriality" of the headquarters seat (OPEC-HA Art. 3(1)[6]) and did not address the absolute immunity that OPEC enjoyed under customary international law, which had the same legal force as statutory legislation.

The Court rejected both arguments by the Austrian federal government. In the Court's view, the sole addressee of OPEC-HA Article 3(1) was the federal government and that the provision only contained "a declaratory reference to the inviolability of the headquarters seat provided for in Article 5 of the Headquarters Agreement" (MN 40). Further, the Court determined that the provision did not by itself preclude Austria from exercising jurisdiction (MN 39–40). The Court also rejected the Austrian federal government's argument regarding customary international law, holding that:

> [i]t cannot be assumed that there exists a general practice accepted as law (cf. Article 38 paragraph 1 point b of the Statute of the International Court of Justice . . .) which obliges Austria to accord immunity to an international organization of which Austria is not a member even if no reasonable alternative remedy for settling employment disputes is available. (MN 42.)

Therefore, the Court considered that no customary international law existed that would affect the admissibility of the application. However, it dismissed the applicant's challenge of OPEC's regulatory power within the headquarters seat and of its immunity from execution as the matters were immaterial for deciding the underlying civil proceedings.

On the merits, the Court reaffirmed the relevance of the *Waite and Kennedy* doctrine. In particular, the Court affirmed that the right of access to a court applied to employment disputes with international organizations, such as OPEC. Their jurisdictional immunities in principle pursued a legitimate aim by ensuring the proper functioning of such organizations, free from unilateral interferences of the host state, such as Austria. When it comes to the proportionality of such a restriction, the ECtHR in particular takes account of whether the affected individual had "reasonable alternative means" other than domestic courts, to pursue their "civil rights." While those means do not have to meet all the requirements of a fair trial, the restriction will become disproportionate if they are "manifestly deficient." According to case law, such means may include internal court-like institutions, the ILO Administrative Tribunal, or arbitral proceedings. The Court found that the OPEC Statute provided for no such "reasonable alternative means" that protect the rights of (former) employees. Therefore, the granting of jurisdictional immunities to OPEC by Austria disproportionately restricted the applicant's right of access to a court in employment disputes, in violation of ECHR Article 6(1). While the Court did not provide reasoning concerning the lack of "reasonable alternative means," the applicant considered that the only existing internal

[6] OPEC-HA, *supra* note 3, Art. 3(1) provides that "[t]he Government recognizes the extraterritoriality of the headquarters seat, which shall be under the control and authority of OPEC as provided in this Agreement."

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mechanism was lodging a complaint with the secretary general pursuant to Article 13.1 ("Complaints and Appeal") of the OPEC Staff Regulations.[7]

The applicant argued that this procedure fell short of the requirements of ECHR Article 6 in several ways. First, the secretary general remained the sole deciding authority, as he was not obliged to refer a complaint to the Personnel Committee; second, he was also not bound by its report, as the Committee's power was limited to "observing and reporting"; third, the secretary general was neither an "independent" body, nor impartial in the present case, as he was responsible for the termination of the applicant's employment in the first place. Fourth, the procedure foresaw neither a right to be heard nor an obligation by the secretary general to give reasons for their decision. The Court itself found that no "reasonable alternative means" existed in the case of OPEC, without providing any explanation of why OPEC's internal mechanisms did not reach that threshold.

The Court further declared unconstitutional the provisions that provided for the inviolability of OPEC's premises (OPEC-HA, Art. 5(1)) and the impermissibility of the service of legal process within the headquarters seat (OPEC-HA, Art. 5(2)), which were "inextricably linked" with the question of jurisdictional immunities. Relying on its previous decision,[8] the Court held that the service of legal process constituted sovereign acts, which were impossible without OPEC's consent. Thus, even though Section 11(2) of the Service of Documents Act (*Zustellgesetz*)[9] foresaw that service should occur through the Ministry of Foreign Affairs as an intermediary, and the Ministry itself stated that such service regularly occurs in practice without any issues, the Court considered that OPEC-HA Article 5 prevented an effective pursuit of legal claims by the individual.[10]

With regard to the dispute giving rise to the application, these provisions will become inapplicable. However, beyond that case, the Court has declared that they will remain in effect until September 30, 2024, to allow the federal government to negotiate a new solution with OPEC.

* * * *

The judgment of the Court is noteworthy for four reasons.

First, it is the first time that the Court declared (parts of) a treaty unconstitutional, since it was granted the authority to do so in 1964.[11] Prior to this case, close to thirty such challenges

[7] "Any complaints by a Staff Member who thinks that he/she has been unfairly treated as regards the application of the provisions of these Regulations or the terms and conditions of his/her employment, or that he/she has been subjected to unjustifiable treatment by his/her superior, may be submitted to the Secretary General, copy to the superior and to the Director, Support Services Division within three months from the date of such treatment. The Secretary General may refer the complaint to the Personnel Committee for observation and report. The Secretary General shall take appropriate measures within three months." OPEC-HA, *supra* note 3, Art. 13.1. The OPEC Staff Regulations are reproduced verbatim in MN 4 of the judgment.

[8] This is the aforementioned first challenge of the applicant in the present case, which was dismissed for being too narrow, due to the failure to also explicitly challenge OPEC-HA Article 5.

[9] For an unofficial English translation, see https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1982_200/ERV_1982_200.html.

[10] Case No. SV 1/2019, *supra* note 4, MN 44–46, 63. For an unofficial English translation, see Hofbauer, Janig, Ritter, Stemeseder & Wittich, *supra* note 4, at 255, 273.

[11] *See* Federal Constitutional Law (Bundes-Verfassungsgesetz), Art. 140a, Federal Law Gazette No. 59/1964 (as amended) (Austria).

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were brought to the Court.[12] While some of these cases likewise concerned the immunity of international organizations (specifically of OPEC and the International Atomic Energy Agency) in light of the *Waite and Kennedy* doctrine, they all were dismissed on procedural grounds.

Second, the application of the *Waite and Kennedy* doctrine to the facts of the case involves a novel aspect, namely the emphasis the Court placed on ensuring an effective legal service. Neither the ECtHR itself, nor other domestic courts applying the doctrine appear to have conceptualized inviolability as a bar to the right of access to a court under ECHR Article 6.[13] When it comes to the finding that no "reasonable alternative means" were available to the applicant—at the core of any analysis under the *Waite and Kennedy* doctrine—the judgment of the Court appears uncontroversial. The applicant had no possibility to request a review by a body other than the secretary general and the lack of any legal reasoning by the Court suggests that nothing close to a "reasonable alternative means" existed.

Third, the judgment affects the legal relations between Austria and OPEC beyond this case. The repeated challenges before the Court have led to efforts to reshape OPEC's legal framework for processing employment disputes allowing Austria to comply with its international obligations under both the Headquarters Agreement and the ECHR. This includes ongoing negotiations on a protocol amending the Headquarters Agreement.[14] Moreover, the OPEC Conference (of which Austria is not a party) revised the OPEC Statute in November 2020, which now foresees the establishment of "appropriate modes of settlement" for disputes "of a private law character" and employment disputes (Art. 6A).[15] According to OPEC's Annual Report of 2019, such a "new Internal Dispute Resolution Mechanism was created and incorporated into the OPEC Staff Regulations, in line with the principles of the European Convention on Human Rights."[16] More recent Annual Reports likewise refer to the new Internal Dispute Resolution Mechanism and ongoing efforts to improve it.[17] However, given that the OPEC Staff Regulations are not publicly available, it is not possible to evaluate who may avail themselves of this new Mechanism and whether it would qualify as "reasonable alternative means" for the purposes of the *Waite and Kennedy* doctrine.

The case may be seen in light of a trend in Austrian practice to bring its commitments to international organizations it hosts in line with its obligations under ECHR Article 6. The 2021 Austrian Headquarters Law for the first time provides that the federal government may grant immunities only "to the extent that this does not contradict Austria's obligations under

[12] A full list of cases can be found at https://www.ris.bka.gv.at/Vfgh (insert "B-VG Art140a" in the field "Norm" and select "Entscheidungstexte (TE)" for the full text of decisions) (in German).

[13] In principle, the right of access to a court entails that states have to ensure effective service of process. However, in the context of state immunity, the ECtHR already reprimanded Austria for its strict understanding of legal service constituting sovereign acts, requiring consent of the foreign state to be effective—an understanding that is also at the heart of the Constitutional Court's reasoning in the present case. *See* Wallishauser v. Austria, App. No. 156/04, paras. 61–73 (ECtHR July 17, 2012).

[14] *See* Annual Report by the Office of the Legal Advisor of the Austrian Foreign Ministry; Helmut Tichy, Konrad Bühler & Pia Niederdorfer, *Recent Austrian Practice in the Field of International Law: Report for 2022*, 78 Zeitschrift für Öffentliches Recht 113, 132–33 (2023).

[15] OPEC Statute (2021), *at* https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC%20Statute.pdf.

[16] OPEC, *Annual Report 2019*, at 44 (2020). The Annual Reports may be found at https://www.opec.org/opec_web/en/publications/337.htm.

[17] OPEC, *Annual Report 2020*, at 54 (2021); OPEC, *Annual Report 2022*, at 44 (2023).

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international and human rights law" and that "particular attention shall be paid to the existence of effective legal protection mechanisms."[18] The year prior, the Headquarters Agreement between Austria and the OPEC Fund for International Development (a separate international organization) was amended through a protocol, *inter alia*, providing for arbitration in disputes with a private party, while employment disputes "shall be settled by an effective dispute resolution mechanism pursuant to [the Fund's] internal regulations which protects the rights of the employees."[19] According to legislative materials, this specifically serves to ensure compliance with the right to a fair trial enshrined in the ECHR as well as the Charter of Fundamental Rights of the European Union.[20] Similarly, other Headquarters Agreements concluded by Austria after the *Waite and Kennedy* judgment provide for an obligation of the international organization to establish "appropriate methods of settlement,"[21] generally submitting to arbitration in disputes with a private party[22] or excluding employment disputes from jurisdictional immunities.[23] The present case underscores the necessity of such efforts of the federal government and legislature, in light of the Court's power to review the constitutionality of Headquarters Agreements on the basis of the ECHR.

Fourth, the Court's reasoning is noteworthy with regard to its finding on whether OPEC would enjoy immunity under customary international law. From a domestic legal perspective, any finding that customary international law entitles such organizations to immunity not only would have led to the dismissal of the present case[24] but also would have shielded *all* other Headquarter Agreements from scrutiny by the Constitutional Court. This follows from the fact that, unlike for treaties, the Court still lacks the authority to review the constitutionality of customary legal norms. As discussed above, the Court found that no practice

[18] Headquarters Law, Sec. 10(3). For an unofficial English translation, see https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2021_1_54/ERV_2021_1_54.pdf. For a brief summary of the Headquarters Law from the perspective of the Office of the Legal Advisor, see Helmut Tichy, Konrad Bühler & Pia Niederdorfer, *Recent Austrian Practice in the Field of International Law: Report for 2021*, 77 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 153, 173–75 (2022).

[19] Protocol Between the Republic of Austria and the OPEC Fund for International Development Amending the Agreement Between the Republic of Austria and the OPEC Fund for International Development Regarding the Headquarters of the Fund, Sec. 8, *signed* Oct. 9, 2019, *entered into force* Aug. 1, 2020, UNTS Reg. No. 21269.

[20] See the comments to Section 8, concerning Article 9(2), at https://www.parlament.gv.at/dokument/XXVII/I/5/fname_773609.pdf (in German). *See also* Helmut Tichy, Konrad Bühler & Pia Niederdorfer, *Recent Austrian Practice in the Field of International Law: Report for 2020*, 76 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 247, 264–66 (2021) (further noting an increasing practice to generally exclude civil claims stemming from car accidents from jurisdictional immunity).

[21] Agreement Between the Republic of Austria and the Organization for Security and Co-operation in Europe (OSCE) Regarding the Headquarters of the Organization for Security and Co-operation in Europe, Art. XVIII, Sec. 36, *signed* June 14, 2017, *entered into force* June 1, 2018, Federal Law Gazette III No. 84/2018.

[22] Agreement Between the Republic of Austria and the International Criminal Police Organization (ICPO-INTERPOL) Regarding the Seat of the INTERPOL Anti-Corruption Academy in Austria, Art. 5(4), *concluded* July 17, 2007, *entered into force* June 1, 2008, 2525 UNTS 189; Agreement Between the Republic of Austria and the International Anti-Corruption Academy (IACA) Regarding the Seat of the International Anti-Corruption Academy in Austria, Art. 5(4), *concluded* Oct. 10, 2011, *entered into force* Aug. 1, 2012, 2862 UNTS 269.

[23] Abkommen zwischen der Republik Österreich und dem Ständigen Sekretariat des Übereinkommens zum Schutz der Alpen über dessen Amtssitz, Art. 5(1)(d), *concluded* June 24, 2003, *entered into force* Apr. 1, 2004, Federal Law Gazette III No. 5/2004.

[24] In order for an application to be admissible, it has to explicitly challenge all norms that create the unconstitutionality of a situation, allowing the Court to fully rectify the situation without going beyond the application.

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existed that would oblige Austria as a non-member to grant immunity to OPEC "even if no reasonable alternative remedy for settling employment disputes is available" (MN 42).

The Court's approach is peculiar in how it framed the pertinent norm to be established. The arguably most obvious approach would have been to assess whether international organizations enjoy immunity under customary international law in principle[25] and, if so, to then determine whether an exception existed in light of *Waite and Kennedy*. This was notably the approach of the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*, where it addressed an argument based on the *Waite and Kennedy* doctrine in the context of state immunity. In rejecting the plea, the ICJ took note of a lack of state practice that would establish such an exception, rather than the other way around.[26] However, the Constitutional Court did not take this general norm/exception approach. It rather assessed whether under customary international law international organizations were granted immunity in the specific scenario addressed by *Waite and Kennedy*. In doing so, it framed the norm to be established in an extremely narrow fashion as only state practice and *opinio juris* relating to that scenario became relevant for the assessment. That essentially shifted the burden of proof: instead of the applicant potentially having to provide support that an exception from jurisdictional immunities arose in customary law, it required the existence of state practice and *opinio juris* that immunity was granted also in the very specific sets of cases *Waite and Kennedy* concerns.[27]

PHILIPP JANIG
University of the Bundeswehr Munich
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[25] This is of course disputed and has been both confirmed and rejected by other domestic courts. For a comprehensive review of relevant practice, see Michael Wood, *Do International Organizations Enjoy Immunity Under Customary International Law?*, 10 INT'L ORG. L. REV. 287 (2013) (considering that no such norm existed).

[26] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 ICJ Rep. 99, para 101 (Feb. 3) ("The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.").

[27] Given that *Waite and Kennedy* stems from the European human rights system makes it additionally questionable whether such an exception could exist under general customary international law. *See also* Human Rights Committee, General Comment No. 32, Art. 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, para. 18, UN Doc CCPR/C/GC/32 (Aug. 23, 2007) (noting that the failure to allow access to a tribunal would not be a violation of the right to fair trial if "based on exceptions from jurisdiction deriving from international law such, for example, as immunities"). There is little support for similar practice in other regions. See, however, the *Cabrera* doctrine of the Argentinean Supreme Court under domestic law. Raúl E. Vinuesa, *Argentina*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 19–23 (August Reinisch ed., 2013).