INTERNATIONAL DECISIONS

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ICJ—extended continental shelf—exclusive economic zone—customary international law—state practice forming a basis to determine opinio juris

QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICAR. V. COLOM.) *At* https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf.
International Court of Justice, July 13, 2023.

The International Court of Justice (ICJ) judgment on the question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast[1] has ended the long controversy about the rights to exploit resources where an exclusive economic zone within 200 nautical miles of a coastal baseline overlaps with an extended continental shelf.

The ICJ concluded that the continental shelf is subservient to the exclusive economic zone. Accordingly, an opposing state is not entitled to exploit the extended continental shelf in an area within 200 nautical miles of the coastal baselines of another state.

The ICJ's conclusion is consistent with the relevant provisions of United Nations Convention on the Law of the Sea (UNCLOS) and the corresponding rules of customary international law. It has the advantage of simplicity but diminishes the status of extended continental shelf claims when compared to other zones of maritime jurisdiction.

However, the reasoning of the majority rests on an unsatisfactorily brief analysis of customary international law that could possibly have been avoided by recourse to a more conventional approach to the identification of *opinio juris* or the interpretation of the relevant provisions of UNCLOS. The strongly worded dissents are rightly critical of the process taken by the majority in reaching its conclusion.

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The decision of July 2023 is the culmination of more than two decades of litigation. In proceedings commenced in 2001, the ICJ initially considered that Nicaragua's claim to

[1] Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment (Int'l Ct. Just. July 13, 2023), *at* https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf [hereinafter Judgment]. For an earlier discussion of the decision, see Matei Alexianu, *The* Nicaragua v. Colombia Continental Shelf *Judgment: Short But Significant*, 27 ASIL INSIGHTS (Sept. 29, 2023), *at* https://www.asil.org/insights/volume/27/issue/9.

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delimitation of its extended continental shelf area was premature[2] because Nicaragua had not yet submitted final information to the Commission on the Limits of the Continental Shelf (CLCS). Following submission of that information in 2013, Nicaragua commenced this further proceeding seeking delimitation of its continental shelf.

Nicaragua contended that it was entitled to delimitation of its extended continental shelf, based upon a natural prolongation, in an area of intersection with Colombia's entitlement to an exclusive economic zone within 200 nautical miles of the Colombian coastal baselines.

> The proceedings were characterised by an unusual turn of events. On 4 October 2022, the ICJ of its own motion resolved that it would not immediately proceed to any scientific issues of natural prolongation. Instead, the ICJ limited the first stage of oral proceedings to two questions of law that the ICJ itself formulated: *first*, "[u]nder customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?" and *second*, "[w]hat are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea [(which set out the criteria by which the limits of the continental shelf are to be determined)] reflect customary international law?"[3]

Nicaragua contended that there was an overlap between its own entitlement to an extended continental shelf and the independent entitlement of Colombia to a continental shelf within 200 nautical miles of Colombia's coast. Nicaragua contended that in those circumstances the ICJ should proceed to an equitable delimitation (para. 40).

In response, Colombia argued that, "as a matter of customary international law, a State may not claim a continental shelf beyond 200 nautical miles from its baselines that encroaches on another State's entitlement to a 200-nautical-mile exclusive economic zone and continental shelf measured from its mainland coast and islands" (para. 31). The majority of the ICJ held that a constraining rule of customary international law, including the necessary *opinio juris*, prevented a state from making a claim to an extended continental shelf if that claim was within 200 nautical miles of the coastal base lines of an opposing state (para. 77). The majority commenced by noting that, before proceeding to any question of delimitation, it was first necessary to establish whether there were in fact two or more competing and overlapping entitlements to maritime zones requiring delimitation (para. 42).[4] That question was to be determined by reference to customary international law, since Colombia is not a party to UNCLOS. However, the majority still focused on UNCLOS to decide the issue, on the ground that its provisions both reflected and might help to develop customary international law (para. 46).[5]

[2] Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 ICJ Rep. 624 (Nov. 19).

[3] Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Order, 2022 ICJ Rep. 563 (Oct. 4).

[4] That proposition being consistent with the decision of the Court in: Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 ICJ Rep. 206, para. 193 (Oct. 12).

[5] *Citing* Continental Shelf (Libya /Malta), Judgment, 1985 ICJ Rep. 13, para. 27 (June 3); *see also* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 ICJ Rep. 3, para. 73 (Feb. 20).

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Notably, UNCLOS contains intersecting provisions on the rights of coastal states in relation to the exclusive economic zone in Part V, and the extended continental shelf regime established in Part VI. Article 56(3) expressly deals with the legal relationship between the two concepts, and as previously found by the ICJ, represents a statement of customary international law.[6] It provides that exclusive economic zone rights are to be exercised in accordance with Part VI. Article 76 in Part VI establishes coastal states' rights to a continental shelf.[7] The extent of the continental shelf is defined in two distinct ways. The first is solely by reference to a distance criterion within 200 nautical miles from coastal baselines. The second is by reference to the natural prolongation to the outer edge of the continental margin determined through the mechanism set out in Article 76(4)–(6).

Many extended continental shelf claims beyond 200 nautical miles intersect with other claimed zones of maritime jurisdiction. There had been limited consideration by international tribunals of the resulting issues prior to the decision of the ICJ.[8] The jurisdictional possibilities in a so-called "grey area" range from a division of jurisdiction such that the grant of exclusive water column rights are allocated to the state exercising exclusive economic zone rights with continental shelf sea bed rights allocated to the other, to the possibility of all rights being granted to one state to the exclusion of the other.

Nicaragua sought to rely on the decision of the International Tribunal for the Law of the Sea (ITLOS) in *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*[9] and the decision of the arbitral Tribunal in *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*[10] (the *Bay of Bengal* Cases). There, the Tribunal had identified a "grey area" in which continental shelf rights and water column rights might be treated independently, as the consequence of an adjusted equidistance line. The majority expressly rejected that contention, finding that those decisions were not applicable to a situation of competition between an exclusive economic zone and extended continental shelf (para. 72).

The majority noted that the distance-based regime of the exclusive economic zone described in UNCLOS exists both in treaty and as a matter of customary international law (citing the *Libya/Malta Continental Shelf* case[11] and its 2022 judgment in *Nicaragua v. Colombia*[12]) (para. 69). It follows that each coastal state is absolutely entitled, as of right, to assert the rights associated with the exclusive economic zone within that zone measured from its coastal baselines.

[6] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 ICJ Rep. 266, para. 57 (Apr. 21).

[7] *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, *supra* note 2, para. 118.

[8] The issue was raised, but not determined, in: Delimitation of the Maritime Boundary in the Gulf of Maine Area (ICJ Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Vol. V, at 477–78, paras. 243–45); Arbitration Between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them, Award of 11 April 2006, XXVII RIAA; Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, Decision (ITLOS Apr. 28, 2023).

[9] Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4, paras. 225–40 (Mar. 14).

[10] Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Award of 7 July 2014, XXXII RIAA, paras. 336–46.

[11] *Continental Shelf (Libya /Malta)*, Judgment, *supra* note 5, at 33.

[12] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Judgment, *supra* note 6, para. 57.

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The majority then turned to the two distinct methods by which a state may be entitled to claim rights of exploitation over a continental shelf, applying the methodology approved in its decision in *Libya/Malta* (para. 75). It was significant that both customary international law and Article 76(1) distinguished between the distance and natural prolongation methods.

The Court then considered the practice of states before the Commission on the Limits of the Continental Shelf (CLSC), noting in particular that: "in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State" (para. 77).

Subsequently, the majority considered that the practice of those states, by electing not to assert outer limits of intersecting continental shelves, was indicative of *opinio juris,* and thus capable of generating a rule of customary international law. The majority very briefly rejected arguments to the contrary, which are canvassed in more detail in the dissenting opinions of Judge Tomka and Judge Charlesworth.

The majority formulated the constraining rule of customary international law as follows:

> In view of the foregoing, the Court concludes that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State. (Para. 79.)

It followed that a process of equitable delimitation was not required; because a state was not entitled to make any claim to an extended continental shelf within 200 nautical miles of the coastal baselines of another state, there were no overlapping claims capable of delimitation (para. 82).

* * * *

The majority's process of reasoning, resting as it does upon an identified rule of customary international law based upon a weak foundation of *opinio juris* is controversial, yet its conclusion is ultimately correct. It proceeds from a sound understanding of maritime jurisdiction and the relevant provisions of UNCLOS.

The historical development of seabed rights originally favored natural prolongation theories. The legal zone of the continental shelf was one that originated in customary international law, and its earliest treaty regimes distinguished between the deep seabed and the natural prolongation of the continental shelf.[13]

However, that historical position has been affected by the more recent development in both treaty and custom of the simplified distance-based exclusive economic zone rights that does not rely upon natural prolongation. The exclusive economic zone entitles a coastal state to exercise exclusive sovereign rights in respect of the exploration and exploitation of the resources of the seabed within that zone,[14] and that zone is measured solely in terms of distance from the coastal baseline. The concepts of natural prolongation and depth of exploitation are entirely irrelevant to the existence of exclusive economic zone rights.

The *travaux préparatoires* of UNCLOS suggest that little or no attention was paid to the particular problem that arises when an extended continental shelf claim intersects with an

[13] *See, e.g.*, Convention on the Continental Shelf, Art. 1, Apr. 29, 1958, 499 UNTS 311.

[14] Other than in respect to sedentary marine species.

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exclusive economic zone.[15] However, construction of the provisions of UNCLOS, interpreted by conventional principles of treaty interpretation, lends itself to the solution ultimately adopted by the majority and does not require the identification of the rule of customary international law found by the majority.

First, Article 56(3) of UNCLOS requires that the exclusive economic zone rights described in Part V must be exercised in accordance with the continental shelf rights described in Part VI. That may seem to suggest that continental shelf rights prevail over inconsistent exclusive economic zone rights. But that is a chimera.

In fact, as the majority noted, Article 76(1) defines the continental shelf by reference to two separate methods (para. 75). Of present significance, every coastal state is absolutely entitled to a continental shelf within 200 nautical miles as measured from the coastal state base lines.[16] Interpreting the treaty holistically, the inclusion of distance-based criteria defining the continental shelf powerfully suggests that there should be consistency between Article 76 and the grant of equivalent seabed rights attributable by Article 57 to the exclusive economic zone in the same area.

That conclusion is entirely consistent with the reasoning of the ICJ in *Libya v. Malta*.[17] There, the proposition that the exclusive economic zone always carries with it rights to a continental shelf within 200 nautical miles was unequivocally confirmed in a frequently cited passage[18] (para. 34).

The majority further emphasized that the negotiating history of UNCLOS supported the proposition that the extended continental shelf, to which effect is given in Article 76, was intended to relate only to the "Area" otherwise beyond national jurisdiction because the work of the CLSC was focused upon preventing the continental shelf from encroaching on areas which are the "common heritage of mankind" (para. 76).[19] It could not therefore extend into areas of the exclusive economic zone.

Arguably, the majority did not need to go further. The judgment could have rested on the proposition that the relevant provisions of UNCLOS must be read, textually and contextually, as being inconsistent with the assertion by coastal states of extended continental shelf rights based upon the theory of natural prolongation in areas within the exclusive economic zone of an opposing coastal state. Given that the ICJ had already, and definitively, determined in its 2022 Judgment that Articles 56, 58, 61, 62, and 73 of UNCLOS reflect customary international law,[20] it was not necessary to go further and seek to identify a separate constraining rule

[15] Noted by the majority at paragraph 70, the implication being that it was not considered possible.

[16] *See generally* Malcom D. Evans & Nicholas A. Ioannides, *A Commentary on the 2023* Nicaragua v. Colombia *Case*, EJIL:*Talk!* (Aug. 4, 2023), *at* https://www.ejiltalk.org/a-commentary-on-the-2023-nicaragua-v-colombia-case.

[17] *Continental Shelf (Libya /Malta)*, Judgment, *supra* note 5, para. 31. Although, given the significance of the Court's decision in *Libya v. Malta*, as Judge Tomka notes in his dissent (diss op., para. 6), it would have been possible for the Court to reach the same conclusion at an earlier stage in the proceedings, which is no reason to reach the alternative conclusion in 2023.

[18] "Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf." Relied upon by the majority at paragraph 70.

[19] Citing UN Convention on the Law of the Sea, Art. 136, Dec. 10, 1982, 1833 UNTS 397; Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 ICJ Rep. 100, para. 109 (Mar. 17).

[20] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Judgment, *supra* note 6, para. 57.

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of customary international law weakly founded upon the practice of restraint found in the written submissions of states to the CLSC (para. 77).

While the four dissenting opinions challenge the conclusion of the majority, they are, respectfully, largely unpersuasive. The natural and ordinary reading of the operative provisions of UNCLOS (discussed above) leads to the conclusion that extended continental shelf rights are not properly capable of extending within 200 nautical miles of an opposing state. Once that conclusion is reached in relation to the operation of UNCLOS, it must necessarily also follow in relation to the rules of customary international law that are identical to the treaty provisions. To permit that conclusion to be applicable to relations between states parties to UNCLOS, but not to relationships governed only by custom, would be not only arbitrary but also inconsistent with the prior acceptance by the ICJ of the customary legal basis of the exclusive economic zone.

Judge Tomka notes that it is a feature of maritime jurisdiction that zones may overlap, and that in those areas of intersection, delimitation takes place (diss. op., Tomka, J., para. 13). Judge Tomka finds that the existence of exclusive economic zone rights within 200 nautical miles does not affect the possibility of an extended continental shelf based on natural prolongation extending into the area of an exclusive economic zone (diss. op., Tomka, J., para. 67).

However, an intersection of competing zones is difficult to reconcile with the relatively plain operation of the relevant provisions of UNCLOS and the overwhelming significance of the universal customary status of the distance-based exclusive economic zone. As Judge Iwasawa makes clear (sep. op., Iwasawa, J., para. 4), it is also impossible to reconcile with the decision of the Court in *Libya/Malta*, denying any continuing operation of natural prolongation theories within an area 200 nautical miles from a coastal baseline (para. 39).

Judge Charlesworth proceeds from the basis that both UNCLOS and customary international law permit the possibility of overlapping entitlements, and in those circumstances the traditional two stage approach leading to a process of delimitation is required (diss. op., Charlesworth, J., para. 6). Judge Charlesworth notes that the concepts of the exclusive economic zone and of the continental shelf remain legally distinct (diss. op., Charlesworth, J., para. 19). The nuanced difficulty with that analysis is that although distinct, the institutions of the exclusive economic zone and the continental shelf are linked, expressly, by Article 56(3). That linkage must have some legal effect. The express grant of continental shelf rights to each coastal state in a distance consistent with the equivalent grant of exclusive economic zone rights in the same area is overwhelming as to the intention that within that 200 nautical mile zone, the coastal state may exercise both the rights appertaining to the seabed and water column.

The criticisms of the reasoning of the majority in relation to the identification of the constraining customary rule are powerful (para. 77). Judge Tomka describes it as "disquieting" (diss. op., Tomka, J., para. 1). It is the analysis of state practice in the form of submissions made to the CLCS and the identification of *opinio juris* derived from those submissions that is the most problematic part of the majority's reasoning.[21]

[21] *See also* Keshav Somani, *The ICJ's Judgment in* Nicaragua v. Colombia*: Back to the Basics*, OPINIO JURIS (Aug. 16, 2023), *at* https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics.

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The reasoning of the majority on this significant issue is brief, and opaque. At paragraph 77, the majority said:

> [I]n practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State. The Court considers that the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation.

They further said:

> Taken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law. In addition, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*, which is a constitutive element of customary international law. Indeed, this element may be demonstrated "by induction based on the analysis of a sufficiently extensive and convincing practice.[22] (Para. 77.)

Judge Tomka notes that, in fact, the practice of states before the CLSC is either not uniform or can be explained on the basis of motivations other than the belief required by the rule of *opinio juris*. Judge Tomka also notes that a number of international disputes have involved states asserting rights to extended continental shelf rights within 200 nautical miles of the base lines of opposing states. Each criticism is well founded.[23] The criteria upon which rules of customary international law are to be based have been understood for many years since the Court's decision in the *North Sea Continental Shelf* Cases to have required two elements; that of state practice that was to be "extensive and virtually uniform," and a mental element of *opinio juris*, described as "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[24] Despite the inherent ambiguities and uncertainties in that approach, it had been understood that the second element requires the identification, with some precision, of the motivation for the practice of states.[25]

* * * *

The practical consequences of the decision are profound. The nature of extended continental shelf claims is such that many will intersect with maritime zones claimed by others, meaning that the process of delineation very often leads to a related delimitation process.[26] The

[22] Judgment, *supra* note 1, *citing* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 ICJ Rep. 246, para. 111 (Oct. 12).

[23] *See also* Hilde Woker, *Preliminary Reflections on the ICJ Judgment in* Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia) *of 13 July 2023*, EJIL:*Talk!* (July 21, 2023), *at* https://www.ejiltalk.org/preliminary-reflections-on-the-icj-judgment-in-question-of-the-delimitation-of-the-continental-shelf-between-nicaragua-and-colombia-beyond-200-nautical-miles-from-the-nicaraguan-coast-nicaragua-v-co.

[24] *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, Judgment, *supra* note 5, paras. 74–77.

[25] Draft Conclusions on Identification of Customary International Law, Conclusion 9, UN Doc. A/CN.4/SER.A/2018/Add.1, II(2) Y.B. Int'l L. Comm'n, at 102 (2018).

[26] Coalter G. Lathrop, *Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States Before the Commission on the Limits of the Continental Shelf* in *International Maritime Boundaries*, *in* International Maritime Boundaries 4143 (D.A. Colson & R.W. Smith eds., 2011).

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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.

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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).