Climate Protection and Environmental Impact Assessment: could climate protection be seen as an "overall public interest"?

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1. Introduction

Climate change is a fact. So is the necessity to limit global green house gas emissions. Thus, 195 states have signed the Paris agreement and committed themselves to holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels. All member states of the European Union have signed and ratified the Paris Agreement and are therefore bound to its aim. In order to achieve the long-term temperature goal set out in the agreement parties have to aim to reach global peaking of greenhouse gas emissions as soon as possible and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century. So far the facts, in reality many states still find it difficult to effectively cut their emissions in green house gases. At least in Europe, all states agree in principle to the goal of reducing CO₂ emissions but when it comes to deciding about new infrastructure measures or factories there seem to be very often arguments why these cases are necessary for development and thus more important than climate protection. As a result, many states do not meet their obligation under international law regarding emission reduction. However, there are raising objections to this pattern and civil society, non-governmental organizations, as well as single citizens start opposing this behavior and, among other measures, started various lawsuits trying to force governments and/or administrative bodies to respect the relevant state's commitment to climate protection under international law.

This paper elaborates whether “climate protection” could be interpreted as an “overall public interest” within the Environmental Impact Assessment. The analysis focuses on a famous case in Austria, the enlargement of the Vienna International Airport and the respective court rulings but also compares this case with the Urgenda lawsuit in the Netherlands.

2. The case: enlargement of Vienna International Airport

Vienna International Airport is the biggest airport in Austria, with about 25 Mio passengers per year and a current growth rate of about 8 percent per year. Thus, already in 1998 the airport issued its "Masterplan 2015", which included the decision to build a third runway in order to meet future demands.

2.1 Pre-Proceedings

Knowing that the idea to increase flights to and from the airports would lead to massive resistance from the local population, the airport managers tried to appease the relevant stakeholders by finding common solutions before starting the official administrative proceedings. So, in 2000 a mediation process was started aiming at finding a good compromise with neighbors and municipalities in question. This biggest mediation process in Europe included 50 parties and took 5 years of negotiation. In 2005 a mediation contract was signed, deciding on the exact location of the new runway and limiting night flights (between
23.30 and 5.30) to a maximum of 3.000 or about half of the former number of night flights in order to guarantee night’s rest for neighbors. However, this limitation would only come into force fully, if the third runway were built until 2010. As this did not happen, the maximum amount of night flights was limited at 4.700, until a final decision on the third runway will be taken.

2.2 Environmental Impact Assessment

After this rather lengthy mediation process, the formal application to issue a permit for a third runway was started in 2007. Consequently, the developer prepared an environmental impact assessment report, consisting of 32 file folders and submitted it to the relevant authority, the Provincial State Government of Lower Austria (Landesregierung Niederösterreich). The Environmental Impact Assessment was inter alia based on the Austrian Aviation Act and of course on the Austrian Law on Environmental Impact Assessment. The Austrian Aviation Act commits that permits for civil airports (which is the category applicable for Vienna International Airport) have to be issued, if the projects seem suitable from a technical point of view, the developer seems reliable and a secure management of the airport seems guaranteed, the developer has sufficient financial means to secure the payment of public obligations and there is no contradiction to other public interests (emphasis added). The latter clause proved to be the most discussed throughout the whole proceedings.

Finally, in 2012 the Provincial State Government issued an affirmative permit, but several parties, mainly neighbors and citizen’s initiatives appealed against this decision. So, the second instance body, the Federal Administrative Court (Bundesverwaltungsgericht) had to decide on the case and found that the project could not be permitted, due to its effects on the environment.

2.3 Findings of the Federal Administrative Court

When deciding on the eligible legal provisions, the Federal Administrative Court ruled, that inter alia the Charter of Fundamental Rights of the European Union was applicable. In concreto it referred to Article 37, which states that, “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. The Federal Administrative Court also cited the Austrian Federal Constitutional Law on comprehensive environmental protection and sustainability, saying “the Republic of Austria (Federal State, Provincial States and Municipalities) support comprehensive environmental protection”. Furthermore, the Federal Administrative Court quoted the Constitution of the Province of Lower Austria, namely Article 4/2 that rules, “Lower Austria has to provide for the maintenance of environment, nature and landscape. Special importance has to be given to climate protection.” Of course, also the Aviation Act and the Law on Environmental Impact Assessment and other legal provisions were found to be applicable.

The focus of the Federal Administrative Court’s discussion was the question of the public interest. On one hand it found a public interest, stated in the Aviation Act, in having sufficient flights at Vienna International Airport and promotion of economical growth including the guarantee of existing and creation of future jobs in the region. On the other hand the Federal Administrative Court evaluated the potential rise in greenhouse gas emission, as counteracting the public interest in reducing greenhouse gas emissions and environmental protection. For the latter argument the Federal Administrative Court also referred to Austria’s obligation under the Kyoto Protocol to the United Nations Framework Convention on Climate Change as well as under the Paris Agreement and of course also to national regulations on climate protection. When contrasting these competing public interests the Federal Administrative Court found that climate protection outweighs economic growth, as Austria has obligations under international and European law to effectively cut its greenhouse gas emissions. As the building of the third runway would lead to an increase in greenhouse gas
emissions of approximately two percent of Austria’s total CO₂ emissions, and as Austria has not managed to significantly reduce its relevant emissions within the last years, another huge project counteracting to these obligations under international law could not be approved.

Furthermore, the Federal Administrative Court stressed the duties under the Austrian Federal Constitutional Law on comprehensive environmental protection, to provide a sustainable environment for future generations, which would also be contradicted by the project.

This judicial verdict, rendered in February 2017, was met with applause by the complainants of the case, but also by many international and Austrian environmental NGOs, citizens and administrative bodies for the protection of the environment.\textsuperscript{xiv}

However, the developer decided to challenge this verdict and appealed to the Austrian Constitutional Court (Verfassungsgerichtshof), arguing for violation of the right of equality before the law. The Constitutional Court agreed, accusing the Federal Administrative Court of arbitrariness.

2.4 Findings of the Constitutional Court\textsuperscript{xv}

In June 2017 the judges of the Constitutional Court concluded that the Federal Administrative Court had applied the Aviation Act in an incomprehensible way, interpreting the law incorrect. \textit{In concreto} it was of the opinion that climate protection was not to be seen as a public interest under the Aviation Act and should therefore not be taken into consideration for the decision whether to grant a permit. As for the Kyoto Protocol and the Paris Agreement the Constitutional Court decided that both could not be applied directly, but only by means of implementation into national legislation. It argued further, that international aviation was excluded from the Kyoto Protocol and not explicitly mentioned in the Paris Agreement and thus was not to be seen under the obligations of national states but the United Nations respectively under its specialized agency, the International Civil Aviation Organization (ICAO).

Consequently, the Federal Administrative Court had to revise its decision on basis of the Constitutional Court’s opinion and in March 2018 rendered the permit for the erection of the third runway on Vienna International Airport. \textsuperscript{xvi}

3. Discussion of the legal arguments of the two courts

In the following chapter an analyses of the arguments taken by the two courts will be given and their content will be discussed. The case was widely debated in Austria, not only within the scientific and legal community, but also within society as such. For weeks media kept contributing to the topic and still arguments are being exchanged.\textsuperscript{xvii} The latest developments being plans by the current government to include the target of “competitive industrial location” in the Austrian constitution, as a counter-part to the aim of “comprehensive environmental protection”, as well as a new law supporting the industrial location by excluding certain “projects of overall public importance” from the necessity of an Environmental Impact Assessment. However, most of the discussion did not center on the content of the arguments, but rather on the alleged contradiction between environmental protection and industrial development and on the issue whether it was within a court’s domain to decide about fulfillment of greenhouse gas reduction targets or whether this was to be seen as a mostly political decision and should thus be taken by elected bodies.

3.1. Formal arguments

First, it should be documented that the Constitutional Court issued a very sever judgment on the Federal Administrative Court's legal conclusions, defining them as arbitrary and as a
violation of the right of equality before the law. Understandably, this caused a lot of discussion within the Austrian legal community as well as within society.

Second, it should be mentioned that within the duration of this special case’s legal procedure a major re-organization of Austria’s administrative procedure had been taking place, establishing the Federal Administrative Court as responsible second instance body for Environmental Impact Assessments. Thus, many stake-holders criticized the Federal Administrative Court simply for taking the decision of weighing these two different public interests of climate protection and economic development arguing that such decisions should be taken only by political, but not by an administrative body. In fact, the Court was absolutely acting within its domain. xviii

3.2. Contents of the arguments

Concerning the Aviation Act:

A central argument of the Constitutional Court focused on the definition of “public interest”. It claimed that the interpretation of this term must lie within the interests mentioned in the relevant administrative law, in this case the Aviation Act. This act lists some public interests, but also includes a broader clause, talking about “other public interests” which must not be in contradiction to the issuance of a permit for a civil airport. According to the Constitutional Court the Federal Administrative Court was wrong to include climate protection within this clause, as it is no interest under the Aviation Act, especially as the original Aviation Act was enacted in 1957. This argument seems to be out of the ordinary, as it is undeniably a very open clause, which must be interpreted not only within the specific law, but also regarding higher-ranking legal provisions, especially regarding the Austrian Constitution. As there is an explicit constitutional law about comprehensive environmental protection and sustainability (see chapter 2.3), it must be clear that this target provision must be respected when interpreting possible “other public interests”. This opinion is confirmed by the fact that the Constitutional Court has come to the same conclusion in comparable cases. xix

If you followed the opinion of the Constitutional Court that only public interests as defined in the Aviation Act were to be considered, this would result in the awkward situation that the broad definition within the Aviation Act of “other public interest” would not be interpreted according to the Austrian Constitution but only within a non-constitutional law, thus revising the hierarchy of legal norms. xx

Also, the new bill of the federal government to include the target of “competitive industrial location” in the Austrian constitution seems unnecessary, if only the relevant law and not the constitution would serve as the frame for interpretation. Noted should be further, that the province of Lower Austria soon after the judgment of the Constitutional Court altered its Constitution by including the target of “competitive industrial location”. Again, this does not seem necessary, if the aim of climate protection, which had already been stated in its Constitution before, should not be used for interpretation.

As for the argument that international climate protection treaties, as Kyoto and Paris, are not directly applicable and thus should not have been taken into consideration by the Federal Administrative Court, it must be stressed, that the Federal Administrative Court did not do that. It simply included these treaties into its reflection on the importance of climate protection as a public interest, which has been done by other high courts in Austria before. xx

Another argument can be found in Article 37 Charter of Fundamental Rights of the European Union, which states that, “a high level of environmental protection must be integrated and ensured with the principle of sustainable development”. This Fundamental Rights catalogue is mainly directed towards the bodies of the European Union and member states courts, when interpreting cases with connection to European Union Law. One could argue, that Environmental Impact Assessment is strongly linked to European Law; however, there is an even stronger bond. In 2012 the very same Constitutional Court decided that the Charter of
Fundamental Rights has to be included in the legal norms determining the compatibility of laws with the Austrian Constitution. How could this be reasonably be limited just because the law in question does not explicitly state environmental protection or climate change (maybe because it is simply from a time when these issues were not seen as important yet – like in the case in question) and “further public interests” mentioned in the law was not allowed to include further public interest (like even mentioned in the Constitution and the Charter of Fundamental Rights) but only further public interests specially mentioned in the respective law.

As a side note it should be clarified that the Aviation Act does indeed refer to the protection of human health. It does so not within the context of permission of airports, but within the issue of items dropping from planes, still in a broad interpretation this could be seen as a public interest stated by the law and thus as an indicator that the “other public interests” must be interpreted including human health, which certainly is affected by climate change.

Concerning the Law on Environmental Impact Assessments:

Surprisingly, neither the Federal Administrative Court nor the Constitutional Court did examine the case closer under the protected factors within the Austrian Law on Environmental Impact Assessments, although the proceedings for permission of the construction of the third runway were within a legal process under exactly this law. Both Courts lengthy discussed the possible interpretation of “other public interest” under the Aviation Act, but did not refer to the factors protected under the Law on Environmental Impact Assessment, without an interconnection to the Aviation Act.

When taking a closer look at this law, one finds that the aim of Environmental Impact Assessments are defined as determining, describing and assessing the direct and indirect effects of a project on listed factors. The factors most important for the case in question are: human health, biodiversity and climate, but also other factors mentioned such as water, air and landscape could be affected by climate change. Undeniably, three factors listed in first place will be directly as well as indirectly affected climate change. So, as a first result, protected factors under the Austrian Law on Environmental Impact Assessment are certainly affected by the construction of a third runway at Vienna International Airport, because this construction will lead to an intended increase in flights to and from Vienna and thus to a rise in CO₂ emissions.

Of course, these protected factors are based on the EU Directive on Environmental Impact Assessment, which lists in its Article 3, again among other, human health, biodiversity and climate, as the factors on which effects of a project must be assessed.

Under § 17 of the Austrian Law on Environmental Impact Assessment the competent authority needs to make sure that (inter alia) “the pressure caused by emissions is to be kept as low as possible on the protected factors. In any case emissions have to be avoided that endanger the life or health of human beings, as far as this is not already foreseen within the relevant administrative laws to be taken into consideration.” So, even if one would come to the decision that “other public interests” of the Aviation Act do not have to be interpreted according to the constitutional aim of environmental protection, there would still be this paragraph of the Austrian Law on Environmental Impact Assessment to be examined.

It firstly talks about making sure that emissions posing a danger for protected factors are to be kept as low as possible, and then clarifies that in any case emissions endangering life or health of human beings have to be completely prevented. As a result, applicability of this legal clause can be argued, as climate is listed among the protected factors, which results in the obligation to keep emissions harming the climate as low as possible.

As the predicted emissions, caused by construction of a third runway will amount to 1,8%-2% of Austria’s annual total greenhouse gas emissions, these are to be classified as significant factor within Austria’s CO₂ end result.
4. The Urgenda climate law suit against The Netherlands\textsuperscript{xxvii}

In 2015, campaign group Urgenda (for: urgent agenda) and 886 Dutch citizens sued the Dutch government in the Hague District Court for a stronger 2020 national emission target. It was the first court case in the world in which citizens tried to force their government before a court to increase its efforts against dangerous climate change.

4.1. Formal arguments

The Urgenda foundation, having its base in the Dutch Research Institute for Transition at Erasmus University Rotterdam, challenged the Dutch state to take further action against global warming by reducing the greenhouse gas emissions in the Netherlands.

The Dutch government argued that Urgenda and the citizens claiming were not entitled to sue the government because of lack of legal basis. Indeed, the Court did recognize, that individuals, such as those who Urgenda was representing, as well as Urgenda itself could not directly call on international environmental treaties relevant in the case. However, it admitted that international obligations of the state, European Union treaty provisions and guidelines could indeed play a role in filling open norms of national law. It also stressed the importance of the principle of endangerment and of equity, emphasizing that the needs of future generations must be taken into account.

Also in this case the question arose whether the matter of how much climate protection a state is supposed to provide is suited to be decided by non-elected judges. The Dutch Court argued that Dutch law doesn’t know an absolute separation of powers, in this case between the executive branch and the judicial branch. It reasoned that there was rather a division of responsibilities with the goal to achieve a balance between these powers and that judges must, independently of any political agenda, restrict themselves to their domain, the application of the law. Further, it said, that in the case in question, since the severity of the danger increases the legal duty of the government, there were also fewer reasons for such restraint by the court.

4.2. Contents of the arguments

The claimants argued that the Dutch government needed to respect the findings of the Intergovernmental Panel on Climate Change (IPCC), a scientific body established by the United Nations Environmental Program, but also an intergovernmental organization, having 195 countries as member states, including the Netherlands.\textsuperscript{xxviii} According to the IPCC, to reach the aim of the Paris agreement to control temperature increases to 2 Degrees Celsius above pre-industrial levels, the concentration of greenhouse gas emissions in the atmosphere will have to be stabilized at a level of 445-490 ppmv (parts per million by volume) CO\textsubscript{2} equivalents. Therefore, Annex I countries (including the Netherlands) must reduce their emissions by 80-95% compared to 1990.\textsuperscript{xxix}

Urgenda argued that the Netherlands were a party to the United Nations Framework Convention on Climate Change and thus were obliged to reduce greenhouse gas emissions to prevent the undesired consequences of climate change. It also reasoned that the Netherlands were parties to the Kyoto Protocol as well as to the Paris agreement and therefore had to fulfill concrete reduction limits under these international law treaties.

Urgenda furthermore pointed out that the Dutch constitution reads in its Article 21 “it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment”.

Its actual claim centered that the Netherlands to fulfill their duty under international, European and national climate protection law, needed to reduce its CO\textsubscript{2} emissions by 25% to
40%, compared to 1990, by 2020. As the Netherlands after 2010, however, took on a reduction target of 20%, which is expected to result in a total reduction of 14%-17% in 2020, Urgenda found that the Dutch reduction target was therefore below the standards deemed necessary by climate science and international climate policy. So, in principle there was no different opinion on the basis decision that CO₂ emissions needed to be reduced, but only different point of views on the level and/or timeframe of reduction.

In addition, Urgenda brought also up the international-law “no-harm-principle”, meaning that no state has the right to use its territory, to cause significant damage to other states. It also elaborated on the fact, that the sooner action preventing further greenhouse gas emissions is taken, the cheaper this counter measures are going to be.

The court followed Urgenda’s arguments and ruled that the Dutch government had a duty of care to mitigate as quickly and as much as possible. It agreed that with the current reduction level the Netherlands would not meet their reduction targets under international law and therefore the proposed reduction of 14%-17% had to be qualified as not sufficient, as the state has a duty to protect the living environment. The Court further considered that within the mentioned range of 25%-40% a decrease to the lower boundary is the minimum that is in principle required. Thus, the Netherlands had to meet a reduction target of at least 25% by 2020 compared to 1990.

As for the argument of the Dutch government that the Netherlands were only a small state that did not contribute a lot to the total increase in greenhouse gas emissions worldwide, the Court ruled that the Netherlands as Annex 1 country under the Paris Agreement should be taking a leading role in combating climate change. It focused on the fact, that climate change is a global problem and therefore requires global accountability, concluding that even if the total of the Dutch emissions is small compared to other countries, this does not affect the obligation to take precautionary measures in view of the state’s obligation to exercise care. In addition, it found that also due to the undisputable fact that the Dutch per capita emission are one of the highest in the world the Netherlands were under a more strict obligation to reduce greenhouse gas emissions.

The argument of the Dutch government that the state would risk to loose competitiveness as a business location due to a higher reduction path, was rejected by the court, indication that several neighboring states, like the United Kingdom, Denmark and Sweden, had implemented stricter national climate policies without indications that this created an unlevelled playing field for business in those countries.

5. Comparison of the cases

The cases presented have been the most discussed “climate change suits” at administrative level in Europe, both being pioneers in their field. However, the Austrian case has been revised by the Austrian Constitutional Court, and also the Dutch case has been appealed meanwhile.

5.1. Formal arguments

From a formal point of view there are quite some differences between the cases in question.

The case in the Netherlands is a suit by a civil-society-body against the government. The Austrian case arose within an administrative proceeding that is in the process of a permission procedure. To be precise the procedure was an Environmental Impact Assessment, which is handled as an own administrative procedure in Austria, deciding about all necessary permissions for the relevant project. However, it should be noted that also within the Austrian case discussed, but also for many other Environmental Impact
Assessments in Austria, NGOs and civic associations did play a vital role in appealing against the permission for the construction of the additional runway.\textsuperscript{xii}

Both countries are highly affected by the effects of global climate change. The Netherlands because of its low-lying coastal area and Austria because of its position within the Alps, which leads to a higher temperature rise than in countries averagely affected by climate change. Obviously, this is an additional motivation for citizens to become active and challenge decisions by their governments and/or administrative bodies.

### 3.2. Contents of the arguments

Both cases are in a way similar concerning the argumentation of the opponents.

The dispute between Urgenda and the Dutch government did not concern the need for mitigation, but rather the pace, at which the State needed to start reducing greenhouse gas emissions. Also, in the Austrian case the amount of greenhouse gas emissions resulting from the project can be found within the main arguments of the finding of the Federal Administrative Court. So, in fact, it could be interpreted as motivating the state to set further action in combating climate change by making clear that with the current efforts being clearly not sufficient no further projects leading to significant emissions are licensable.

Both claimants stressed the importance of international climate protection treaties, mainly Kyoto und Paris and the respective states’ obligation under these pacts, knowing that they did not provide for subjective rights of individuals. Still, both courts accepted these arguments. Also, in both cases a comparison between the agreed climate protection measures (mostly greenhouse gas emission reductions) and the actual efforts undertaken by the state was made and found that as these did not seem sufficient, more cautious approaches needed to be taken.

Too, the state’s responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction were mentioned in both judgments.

### 6. Findings

This chapter will draw conclusions, firstly, on the importance of climate protection within international and European Law and, as a second step of interpretation, for Environmental Impact Assessment procedures in Austria.

#### 6.1. Increasing importance of climate protection in International and European Law

International law has for a long time dealt with the issue of environmental protection and climate change.\textsuperscript{xii} From the Rio Framework Convention on Climate Change 1994 to the Kyoto Protocol and then the Paris Agreement in 2016 states worldwide have understood the necessity to slow down temperature rise caused by climate change.

The European Union has a strong focus on environmental protection, mentioning this also in its founding treaties. Environmental protection as an aim of the European Union can be found in Article 3 EU Treaty. Also the Treaty on the Functioning of the European Union has a special clause clarifying the objectives of the union policy on the environment. It lists among others: preserving, protection and improving the quality of the environment, protecting human health and promoting measures at international level to deal with regional or worldwide environmental problems and in particular combating climate change. From this follows, that climate protection can be marked as having a very high importance within the EU environmental protection system, which can also be confirmed by the Union’s active part in the international climate protection treaties. The European Union not only is a party to the Kyoto and Paris contracts, but also has taken an active and leading part within both instruments.
Also the Charter of Fundamental Rights of the European Union calls upon the principle of sustainability and asks for a high level of environmental protection and the improvement of the quality of the environment to be ensured.

The European Commission has declared energy policy and climate as one of its 10 priorities. As a result, the European Union has decided on an overall climate and energy package, to ensure that the EU meets its climate and energy targets for the year 2020. One of the three key targets is in close connection to the cases in discussion, as it aims at a 20% cut in greenhouse gas emissions from 1990 levels until 2020. Further aims are set as follows: By 2050, the EU should cut greenhouse gas emissions to 80% below 1990 levels. Milestones to achieve this are 40% emissions cuts by 2030 and 60% by 2040. xxxiv

Climate protection has generally been given increasing weight in European legislation, as can be seen by the fact, that “climate” has already been defined as protected factor by the first Environmental Impact Assessment Directive by the EU in 1985. xxxv This continued also with the latest revision of the Directive in 2014, re-defining protected factors that need to be protected by Environmental Impact Assessments. xxxvi This Directive made it obligatory to take climate change aspects into consideration much more than has been common practice hitherto. This is true in particular with regard to risks of accidents or disasters related to climate change, climate protection aspects such as greenhouse gas emissions and any impacts relevant to adaptation, resulting from the projects in question. xxxvii

6.2. Environmental Assessment procedures in Austria: could climate protection be seen as an “overall public interest”?

Also in the international level Austria has bound itself to reduce its emission of CO₂ equivalents. It is member state to the Kyoto Protocol as well as to the Paris Agreement and of the Intergovernmental Panel on Climate Change. Under Kyoto Austria was obliged to cut its greenhouse gas emissions by 8% in comparison to the basis year 1990, but the distribution within the “Bubble” formed by the member states of the European Union bound Austria to reduce 13%.

Under the Paris agreement Austria, like all other EU countries, has committed itself to reduce its greenhouse gas emissions by 40% until 2030, again in relation to 1990 emissions level. xxxix

Austria is until now not able to apply to its reduction limits. In contrary, during the last year’s national greenhouse gas emissions have begun to rise again. In 2016 total greenhouse gas emissions have increased at 1,3 % from 1990 levels, the sectors mainly responsible for the rise being industry and traffic. A closer look shows, that emissions from sectors not bound by the emissions-trading-system increased, in comparison to 2015 by 2,7% in 2017. Taking this into account it seems obvious that Austria should react as soon as possible to meet its reduction aims as required by European and International law.

What’s more, Austria, like the Netherlands, is a country highly affected by climate change. Because of its geographical position in the middle of Europe close to the Alps, a global temperature rise of 2 degrees Celsius would lead to a local temperature increase of 2-3 times as much in Austria, xl leading to the effect, that Austrian population, fauna and flora, will be over proportional affective by climate change. That climate change poses sever danger to humans, animals and plants has been proven by various studies and must be considered a fact by now. xli As for the argument that climate change can be also tackled by adaption measures, it has to be clarified that also the IPCC reported that mitigation is generally better than adaption. xlii

As for the examination whether a project would have significant effects on the climate within the Environmental Impact Assessment it should be clarified that climate was from the beginning of EU legislation within the protected factors, but has gained significantly
importance by Directive 2014/52/EU. This directive not only calls upon member states to ensure that environmental protection is improved and that in order to ensure a high level of the protection and human health, environmental impact assessments should take account of the impact of the whole project in question but also stresses that environmental issues like climate change have become more important and should therefore also constitute important elements in assessment and decision-making processes.\textsuperscript{xliii} It also states clearly that climate change will continue to cause damage to the environment and compromise economic development. In the regard the Directive sees it as appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change.\textsuperscript{xliv}

In fact, this is exactly what the Federal Administrative Court in Austria has done. One of its key arguments against the construction of the third runway was, that it would generate a significant amount of CO\textsubscript{2} emissions and was thus not licensable.

By acting like it did the Federal Administrative Court acted also in accordance with principle of sustainability, as proclaimed in the Austrian Federal Constitution, calling for decisions which should take into consideration not only needs of present, but also of future generations.

As debated in chapter 3.2., also the Austrian Constitutional Law on comprehensive environmental protection and sustainability must be taken as a means to interpret open definitions in laws on a lower hierarchical level, like the term "other public interest" in the Aviation Act. Otherwise the whole system of the Austrian legal structure would be absurd. This opinion is also confirmed by the fact that meanwhile the Province of Lower Austria has added a constitutional clause about the importance of being a competitive industrial location to the provincial constitution and the Federal Austrian government has issued a bill aiming at including a similar provision in the Austrian Federal Constitution. If the constitutions (on federal as well as provincial levels) were not to be seen as scale for interpretation of unclear legal formulations, these efforts would not have been undertaken.

As for the arguments that if certain projects were not to be permitted in a specific country, then other countries would welcome the projects and greenhouse gas emissions would still be generated, but only in another state, two things need to be clarified. Firstly, every country is responsible for its own emissions in the first place and it can hardly be seen as evident, that other countries would willingly ignore their reduction targets and take on all rejected projects from their neighboring states. Secondly, according to the general "no-harm-principle" under international law countries must refrain from supporting projects within their territory, which would lead to negative effects in other countries. So also from this point of view, projects including vast amounts of emissions should not be permitted.

Also, the dispute on the issue of competitiveness of the industrial location seems not to be too relevant in Europe. On a formal basis one can also argue with the no-harm-principle. On a more practical approach it can be stressed, that all member states of the European Union have agreed to reduce their emissions according to the EU road map and are thus in comparable situations.

In total, there seem to be many arguments that due to recent developments, climate change has to take a special role in general politics, the more within Environmental Impact Assessments. Also in view of intergenerational fairness it should hence be considered as an "overall public interest" within Environmental Impact Assessment procedures, at least in countries that are highly affected by climate change, according to the "no-harm-principle" by all countries.
i https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en, 09072018, 10072018
iv Luftfahrtgesetz, BGBl. Nr. 253/1957 idF. BGBl. I Nr. 80/2016
v Bundesgesetz über die Prüfung der Umweltverträglichkeit, BGBL. I Nr. 89/2000 idF. BGBl. I Nr. 95/2013
vi As the issue of environmental/climate protection was only started within the jurisdictional proceedings this article does not further develop on the first instance’ reasoning.

x Niederösterreichische Landesverfassung 1979, LGBl. 0001-21
xi Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11. December 1997; C.N.XXVII_7.a
xiii Bundesgesetz zur Einhaltung von Höchstmengen von Treibhausgasemissionen und zur Erarbeitung von wirksamen Maßnahmen zum Klimaschutz, BGBI. I Nr. 106/2011
xiv Inter alia Donat, Martin et al. (2017) „Stellungnahme zum Urteil des BVwG zur dritten Piste“, Recht der Umwelt, 3/2017
xv Inter alia Aichinger, Philipp (2017), „Keine Anmaßung des Gerichts“, die Presse, 12.02. 2017;
Hiltgartner, Karin (2018), „Ein Staatsziel ist kein Verfahrensbeschleuniger“, der Standard, 18.06.2018
xvi Inter alia Thienel, Rudolf (2017), „Nur Gerichte sichern unsere Freiheit“, Die Presse, 24.02.2017
xvii Meanwhile the project’s opponents have filed another legal remedy against the Constitutional Court’s decision, which has to date (July 2018) not been decided.

xx Inter alia Aichinger, Philipp (2017), „Keine Anmaßung des Gerichts“, die Presse, 12.02. 2017;
Hiltgartner, Karin (2018), „Ein Staatsziel ist kein Verfahrensbeschleuniger“, der Standard, 18.06.2018
xxiii Verfassungsgerichtshof, 14.02.2012, U 466/12 U, 18.06.2017
xxiv § 1, Bundesgesetz über die Prüfung der Umweltverträglichkeit, BGBL. I Nr. 89/2000 idF. BGBl. I Nr. 95/2013
xxvi Bundesverwaltungsgericht, GZ W109 2000179-1/291E, p 77
xxvii C/09/456689/HA ZA 13-1396, 24.06.2015
xxviii https://www.ipcc.ch/pdf/ipcc-faq/ipcc_members.pdf, 05072018
xxix IPCC (2013), Fourth Assessment Report, AR5/2013
xxx There have also been civil law suits against companies because of their contribution to greenhouse gas emissions and thus climate change. The most famous probably being the Case Huaraz against RWE. Huaraz is a city in Peru, represented by Mr. Saul Lliuya a farmer from Huaraz (assisted by the NGO Germanwatch). RWE is a German Energy company, claimed to be Europe’s biggest energy company, responsible for about 0,47% of global greenhouse gas emissions. The claims are based on damages because of melting glaciers resulting in a thread of flooding to Mr. Huarez land. The first instance court decided that the claim was not within its filed of jurisdiction, but the second instance court (Oberlandesgericht Hamm: Az. 5 U 15/17 OLG Hamm) accepted the claim, which is still pending, in November 2017.
xxxi For a global overview on climate cases refer to, United Nations Environment Programme, 2017, The Status of Climate Change Litigation
In fact, there is still a claim against the project running, as some claimants did appeal to the Highest Administrative Court (Verwaltungsgerichtshof).

For more detailed information refer to Gupta, Joyeeta (2010), “A history of international climate change policy”, Institute for Environmental Studies, VU University, Amsterdam


New: population and human health, biodiversity; old: human beings, fauna and flora


Austrian Panel on Climate Change (2014), Austrian Assessment Report 2014,


IPCC (2007), Mitigation of Climate Change

Directive 2014/52/EU (6), (22), (7)

Directive 2014/52/EU (13)