

SYMPOSIUM ARTICLE

Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach[†]

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Abstract

Domestic courts enjoy generous attention in international political and legal climate change literature. As a result of the reluctance of national governments to pursue climate protection measures, courts are called on to enforce international climate goals. This article assesses two domestic climate change cases (the *Thabametsi Case* and the *Vienna Airport Case*) in the light of Anthea Roberts' functional understanding of the role of domestic courts in international law. It argues that domestic courts play a pivotal role in linking international obligations of conduct with national obligations of result. This role depends on domestic contexts and, therefore, requires a comparative approach.

Keywords: Climate change litigation, Comparative approach, *Thabametsi Case*, *Vienna Airport Case*, Domestic courts in international law

1. INTRODUCTION

The current international climate change regime draws increasing scholarly interest towards domestic measures that translate international goals into concrete actions and legal decisions at the national and subnational levels. The existing legal literature documents how domestic courts play a prominent role among the diverse actors of the multi-layered climate change regime. This is as a result of a significant number of strategic climate change cases before domestic judiciaries. Civil society and individuals all over the world sue their governments in order to bring about more ambitious climate

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protection measures or use legal remedies to oblige corporations to pay compensation for harm caused by climate change.¹ The claimants seek to bolster their legal arguments by lobbying for the interpretation of national climate change policies and laws in accordance with states' international legal obligations under the United Nations Framework Convention on Climate Change (UNFCCC)² and the 2015 Paris Agreement.³

While the role of domestic courts in international law has been characterized by their ability to 'bring international law home',⁴ the current climate change regime illustrates how complex this role may be. By combining top-down with bottom-up elements, the Paris Agreement⁵ questions the ability of domestic courts to 'wear two hats'⁶ – i.e., to enforce and, at the same time, to 'create'⁷ international law. Under the Paris Agreement each state is obliged to formulate its own mitigation commitments at the national level.⁸ This provision relates to the long-term temperature stabilization goal, but it does not require the parties to hold 'the increase in the global average temperature to well below 2°C above pre-industrial levels'.⁹ In relation to this objective, the Paris Agreement establishes an obligation of conduct, not an obligation of result.¹⁰ If at all, such obligations of result may be found within national legal systems. Domestic constitutional and administrative provisions, inter alia, play a pivotal role in this respect.

Because of the dynamic interplay between international obligations and national legal systems, climate change cases that refer to the Paris Agreement are pertinent for examining the role of domestic courts in international law and discussing the methodological requirements for such an undertaking. Anthea Roberts suggests viewing domestic courts as enforcers and creators of international law.¹¹ To grasp

¹ J. Setzer & R. Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot', 4 July 2019, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, available at: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot>; M. Burger & J. Gundlach, 'The Status of Climate Change Litigation: A Global Review', May 2017, United Nations Environment Program and Sabin Center for Climate Change Law, available at: <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.

² New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

³ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: http://unfccc.int/paris_agreement/items/9485.php.

⁴ H.H. Koh, '1998 Frankel Lecture: Bringing International Law Home', *Faculty Scholarship Series*, Paper 2102, pp. 623–81, available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2883&context=fss_papers.

⁵ Art. 2(1)(a), Paris Agreement.

⁶ A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) *International & Comparative Law Quarterly*, pp. 57–92, at 59.

⁷ *Ibid.*

⁸ Art. 4(2), Paris Agreement: 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions'.

⁹ Art. 2(1)(a), Paris Agreement.

¹⁰ L. Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) *International & Comparative Law Quarterly*, pp. 493–514, at 497.

¹¹ Roberts, n. 6 above.

the ‘co-constitutive process’¹² of law enforcement and law creation, domestic climate change cases should be approached using a comparative method. Roberts and her co-authors define comparative law as a means to ‘identify, analyz[e], and explain similarities and differences in the *interpretation and application* of international law’.¹³ Departing from the common frame of international law, comparative analyses allow for an understanding of the domestication of international norms in different jurisdictions.

Thus far, most of the literature assessing domestic climate change litigation and its importance for the international legal regime focuses on the ability of the courts to enforce international law. The literature follows a governance approach to domestic climate change cases. However, the cases are ‘not about litigants seeking to enforce the Paris Agreement domestically, but testing domestic policies enacted to give effect to international commitments’.¹⁴ The governance approach, therefore, does not provide the appropriate methodological tools to assess the role of domestic courts within the bottom-up approach of the Paris Agreement. Within the regulatory structure of the Agreement the international and domestic levels merge into a hybrid interplay of procedural and substantive obligations. Therefore, the role of domestic courts presupposes a comparative understanding of both the international obligations and the national contexts in which the litigation takes place.

What are the requirements for such a comparative analysis and what can it tell us about the role of domestic courts within the regulatory bottom-up approach of the international climate change regime? This article challenges the scholarly account of the role of domestic courts in international climate change law. It calls for a functional understanding based on Roberts and connects this claim with the methodological prerequisites for a comparative approach that considers national contexts.

Section 2 presents the debate on the role of domestic courts in international law from George Scelle’s functional approach to current discussions about the need for and the requirements of comparative analyses within international law. The debate illustrates the development of the double-sided function advocated by Roberts, placing the courts in a dynamic relationship between international and national law. Section 3 aligns this debate with the role assigned to domestic courts in the international climate change regime. It reveals the governance bias underlying many scholarly contributions. According to the literature in this field, rather than fulfilling a hybrid function of law enforcement and law creation, domestic courts are considered actors in the global governance ‘kaleidoscope’¹⁵ of climate change mitigation.

¹² M.A. Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005) 93(2) *Georgetown Law Journal*, pp. 487–574, at 502 et seq.

¹³ A. Roberts et al., ‘Conceptualizing Comparative International Law’, in A. Roberts et al. (eds), *Comparative International Law* (Oxford University Press, 2018), pp. 3–31, at 7 (emphasis in original).

¹⁴ K. Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30(3) *Journal of Environmental Law*, pp. 483–506, at 492.

¹⁵ Bouwer, *ibid.*, p. 492.

Section 4 assesses the role of the courts based on two domestic climate change cases. The South African *Thabametsi Case*¹⁶ and the Austrian *Vienna Airport Case*¹⁷ both question the significance of the Paris Agreement's climate goals within the decision-making processes of the construction of carbon-intensive projects. The courts refer quite differently to the Paris Agreement's long-term temperature stabilization goal and the steps taken by the legislators in the form of the nationally determined contributions (NDCs). The hybrid function of law enforcement and law creation is so closely connected to and dependent on the national legal system that it gives rise to the question how international law can make sense of domestic judicial decisions. Therefore, Section 5 proposes a comparative approach in order to understand the hybrid role of domestic courts in the international climate change regime since the Paris Agreement.

This article transposes Roberts' differentiation of the double-sided function fulfilled by domestic courts within international law into the realm of international climate change law. However, the bottom-up approach of the Paris Agreement adds another layer to the process of law enforcement and law creation. The role of domestic courts in enforcing and creating international law is determined by their ability to link international obligations of conduct with national obligations of result. This ability depends on national legal provisions and contexts and on the role of courts within their own domestic legal systems.

2. THE ROLE OF DOMESTIC COURTS IN INTERNATIONAL LAW

In an early contribution on the role of domestic courts in the interplay of international and domestic law, George Scelle developed the notion of the *dédoublement fonctionnel*. Once they deal with international provisions, domestic courts act as international courts. Formally, the courts are part of their domestic legal system but, at the same time, they function as the third force in international law.¹⁸ Scelle supported a federal vision of international law and, ultimately, advocated the establishment of international courts.¹⁹ For Scelle, the role of domestic courts as international adjudicative bodies was of only a provisional character.

The subsequent literature followed this functional approach, transplanting it into a dualist vision of international law. According to this line of thinking, domestic courts help to fill the enforcement gap within international law.²⁰ While, in Scelle's thinking,

¹⁶ *Earthlife Africa v. Minister of Environmental Affairs*, High Court of South Africa, 65662/16, 8 Mar. 2017 (*Thabametsi Case*).

¹⁷ *Vienna Airport Case*, Federal Administrative Court (BVwG Wien), W109 2000179-1/291E, 2 Feb. 2017; Constitutional Court (VfGH), E 875/2017-32, E 886/2017-31, 29 June 2017.

¹⁸ G. Scelle, *Précis de droit des gens: Principes et systématique*, Vol. 1: 'Introduction, Le milieu intersocial' (Recueil Sirey, 1932), p. 56.

¹⁹ Note that the *dédoublement fonctionnel* applies to all three branches of government: G. Scelle, 'Le Phénomène juridique du dédoublement fonctionnel', in W. Schätzel & H.J. Schlochauer (eds), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Klostermann, 1956), pp. 324–42, at 331.

²⁰ B. Conforti, 'National Courts and the International Law of Human Rights', in B. Conforti & F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill/Nijhoff, 1997), pp. 3–14; R.A. Falk, 'The Role of Domestic Courts in the International Legal Order' (1964) 39(3) *Indiana Law Journal*, pp. 429–45.

the universality of international law is unavoidable (international law prevails over national law),²¹ domestic courts now become part of the fragile process of implementing international law into national legal systems. From this new perspective scholars were able to question the conditions that allow domestic courts to enforce international law. Their independence from the executive is among the most important factors.²² However, until the 1990s the number of domestic courts engaging with international law was still very limited.²³

References to international law by domestic courts have become more common in recent times.²⁴ Based on this body of cases, the literature called for a descriptive analysis of the jurisprudence. Antonio Cassese asked for an examination of the motivations underlying various judicial decisions.²⁵ About two decades later, Eyal Benvenisti revealed that courts mainly follow domestic institutional considerations when applying international law.²⁶ He stressed that courts use international law to counterbalance the weight of the executive in a globalized world.²⁷ This shift towards legal realism not only views courts as enforcers of international law but concurrently examines their role in the process of fragmentation of international norms. It vests courts with a lawmaking function.²⁸ Hence, the effectiveness as well as the unity of international law is at stake.

Two methodological pathways have been suggested for assessing the role of domestic courts in effectuating and determining international law: international relations, and comparative international law. The former method takes a governance approach to the role of domestic courts. As international problems become global, they necessitate a broad range of actors to play a role in problem solving. Human rights violations, cartels within global markets, and climate change rank among those problems.²⁹ The literature views courts as actors of global governance and examines their ability to fulfil this role.

At the same time, scholars emphasize the legal, political, and cultural contexts within which courts act.³⁰ They reveal the tension between a universal aspiration underlying international provisions and their domestic realization. Karen Knop speaks

²¹ Scelle, n. 18 above, p. 31.

²² B. Conforti, 'Notes on the Relationship between International Law and National Law' (2001) 3(1) *International Law Forum du Droit International*, pp. 18–24, at 21.

²³ E. Benvenisti, 'Comments on the Systemic Vision of National Courts as Part of an International Rule of Law' (2012) 4(1) *Jerusalem Review of Legal Studies*, pp. 42–49, at 48.

²⁴ Y. Shany, 'Dédoublment Fonctionnel and the Mixed Loyalties of National and International Judges', in F. Fontanelli, G. Martinico & P. Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa Law, 2010), pp. 27–44, at 32, 33, 36.

²⁵ A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublment fonctionnel) in International Law' (1990) 1(1) *European Journal of International Law*, pp. 210–31, at 219.

²⁶ E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102(2) *American Journal of International Law*, pp. 241–74, at 242.

²⁷ Benvenisti, n. 26 above, pp. 245 et seq.

²⁸ Roberts, n. 6 above, p. 68.

²⁹ R. Michaels, 'Global Problems in Domestic Courts', in S. Muller et al. (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher, 2011), pp. 165–75, at 167.

³⁰ H.G. Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3(3) *Leiden Journal of International Law*, pp. 77–85, at 79 et seq.; H. Aust, 'The Rules of Interpretation as Secondary Rules: The Perspective of Domestic Courts', in M. Heupel & T. Reinold (eds), *The Rule of*

about the perception of domestic courts as ‘translators’ of international law in the following terms: ‘Just as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation’.³¹ This metaphor accepts the complex interplay of contexts that determine the role of domestic courts. Building on Knop, Roberts calls for a comparative approach to examine the role of domestic courts:

Instead of seeing national court decisions through the prism of whether they enforce or breach international law, the comparative international law lens focuses our attention on the way in which domestic courts nationalize substantive international law in diverse ways, resulting in a hybridity that is ripe for comparative analysis.³²

Within this approach, both directions of influence (from the international level to the national level and vice versa) may be taken into scholarly account. This ‘micro-comparison’³³ allows for a cultural understanding of the jurisprudence³⁴ while at the same time recognizing the dual role of domestic courts in enforcing and creating international law.

3. CLIMATE CHANGE LITIGATION AND THE LITERATURE

There is an extensive body of literature on the role of domestic courts in the international climate change regime.³⁵ However, the contributions refer only rarely to the

Law in Global Governance (Palgrave, 2016), pp. 66 et seq.; A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011), p. 10.

³¹ K. Knop, ‘Here and There: International Law in Domestic Courts’ (1999/2000) 32(2) *NYU Journal of International Law & Politics*, pp. 501–35, at 506.

³² Roberts, n. 6 above, p. 74.

³³ *Ibid.*, p. 60.

³⁴ D.W. Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’ (1997) 2 *Utah Law Review*, pp. 545–673, at 554.

³⁵ See, e.g., H.M. Osofsky, ‘Climate Change Litigation as Pluralist Legal Dialogue’ (2007) 43A(1) *Stanford Journal of International Law*, pp. 181–237; E.A. Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ (2007) 155(6) *University of Pennsylvania Law Review*, pp. 1925–45; W.C. Burns & H.M. Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009); C. Hilson, ‘Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)’ in F. Fracchia & M. Occhiena (eds), *Climate Change: La Risposta del Diritto* (Editoriale Scientifica, 2010), pp. 421–36; J. Lin, ‘Climate Change and the Courts’ (2012) 32(1) *Legal Studies*, pp. 35–57; D. Markell & J.B. Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2012) 64(1) *Florida Law Review*, pp. 15–86; J. Peel, L. Godden & R.J. Keenan, ‘Climate Change Law in an Era of Multi-Level Governance’ (2012) 2(1) *Transnational Environmental Law*, pp. 245–80; J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); M. Wilensky, ‘Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation’ (2015) 26(1) *Duke Environmental Law & Policy Forum*, pp. 131–79; R. Abate, *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Environmental Law Institute, 2016); B. Preston, ‘The Contribution of Courts in Tackling Climate Change’ (2016) 28(1) *Journal of Environmental Law*, pp. 11–7; A. Averchenkova, S. Frankhauser & M. Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017). For a literature review see J. Setzer & L.C. Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) *WIREs Climate Change*, pp. 1–19.

methodological debate in international legal scholarship concerning the role of domestic courts in international law.³⁶ Instead, they focus on the ability of domestic courts to contribute to the global governance challenge of climate change.³⁷ As Elizabeth Fisher states, '[j]udicial reasoning is of less importance than the actual bringing of the litigation and the outcome of such litigation'.³⁸

The underlying motivation of many scholarly contributions is to solve the complex governance problem of climate change. Litigation is viewed through the lens of possible responses to institutional failures within other branches of government.³⁹ In this regard the successful first instance *Urgenda* decision in 2015 sets an 'example for the world'.⁴⁰ Scholars emphasize the effects of domestic court decisions on global governance challenges. Scholarly accounts of climate change litigation and adjudication follow the multi-layered governance perspective established in earlier literature.⁴¹

The roles attributed to courts are varied and numerous. They fill legal gaps between international objectives and national policies, put pressure on governments and corporations, and influence public discourses.⁴² Courts also realize climate justice in individual cases,⁴³ give legal meaning to the provisions of the Paris Agreement⁴⁴ and ensure that governments are held accountable.⁴⁵ Courts stress the urgency of policy changes,⁴⁶ and develop and promote climate change governance.⁴⁷

To illustrate this point, it is helpful to take a look at the literature advocating a sceptical stance towards climate change litigation. For example, in his 2007 contribution Eric Posner questions the ability of the courts to contribute to climate protection.⁴⁸

³⁶ For an exception see P.G. Ferreira, "Common But Differentiated Responsibilities" in the National Courts: Lessons from *Urgenda v. The Netherlands* (2016) 5(2) *Transnational Environmental Law*, pp. 329–51, at 332 et seq. (showing that there has been a comparative discussion in international environmental law but not in international climate change law). An earlier exception is the reference to A.M. Slaughter in Osofsky, n. 35 above, p. 191 et seq.

³⁷ Bouwer, n. 14 above, p. 493.

³⁸ E. Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*' (2013) 35(3) *Law & Policy*, pp. 236–60, at 241.

³⁹ *Ibid.*, p. 240 et seq.

⁴⁰ R. Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34(2) *Journal of Energy & Natural Resources Law*, pp. 143–63, at 161. See also J. van Zeven, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; B. Mayer, '*The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

⁴¹ Peel, Godden & Keenan, n. 35 above, pp. 249, 251 (who draw on D. Bodansky & E. Diringer, as well as on E. Ostrom).

⁴² Peel & Osofsky, n. 35 above, p. 16.

⁴³ Abate, n. 35 above, pp. 1006, 1010.

⁴⁴ D. Estrin, 'Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts – Despite the Paris Agreement', *CIGI Papers*, No. 101, May 2016, pp. 2–26, at 5, available at: https://www.cigionline.org/sites/default/files/paper_no.101.pdf.

⁴⁵ Lord Carnwath JSC, 'Climate Change Adjudication after Paris: A Reflection' (2016) 28(1) *Journal of Environmental Law*, pp. 5–9, at 9.

⁴⁶ Peel, Godden & Keenan, n. 35 above, p. 271.

⁴⁷ Preston, n. 35 above, pp. 13, 15.

⁴⁸ Posner (n. 35 above) starts his article by asking: 'What is the appropriate legal and political strategy for limiting the emission of greenhouse gases?': *ibid.*, p. 1925.

Jacqueline Peel, Lee Godden and Rodney Keenan point towards procedural barriers and view courts as mediators acting indirectly on climate governance.⁴⁹ Others point to the high volume of unsuccessful cases⁵⁰ and warn against backlashes.⁵¹ All of these contributions share the initial governance perspective on domestic courts in the climate change regime and ‘emphasize the actors over the structures’.⁵²

There are several reasons for the focus on domestic courts as actors in global climate change governance. It has been stated that the literature pays particular attention to certain ‘high profile climate change cases’.⁵³ One of the first examples is the academic discussion of *Massachusetts v. EPA* in 2007.⁵⁴ At that time, the Kyoto Protocol was about to enter into force.⁵⁵ Its first commitment period spanned 2008 to 2012. The United States (US) never ratified the Kyoto Protocol and was therefore bound only by the general objectives of the UNFCCC. Domestic courts became new fora in which climate protection efforts could be pursued:

In the US, the refusal of the Bush Administration (January 2001–January 2009) to undertake climate change regulation under existing environmental laws or to support the promulgation of any new climate change laws caused deep frustration and undeniably prompted action through the courts to put pressure on the executive branch to act on climate change.⁵⁶

The search for alternative climate protection drivers was intensified by the role of the US as a major emitter of greenhouse gases (GHGs); this also holds true for Australia.⁵⁷ Moreover, most climate change litigation has taken place in these two jurisdictions. Accordingly, the literature predominantly assesses these two jurisdictions. From its inception the debate was closely focused on common law systems.

The deadlock in international negotiations in relation to the second commitment period of the Kyoto Protocol, from 2009 in Copenhagen to 2012 in Doha, led to a lack of confidence in international law.⁵⁸ At the same time, a growing body of climate change litigation in other jurisdictions provoked scholarly responses. The governance approach to domestic courts thus expanded to other jurisdictions.⁵⁹

⁴⁹ Peel, Godden & Keenan, n. 35 above, p. 272; Lin, n. 35 above, p. 39.

⁵⁰ S. Varvaštian, ‘Climate Change Litigation, Liability and Global Climate Governance: Can Judicial Policy-making Become a Game-changer?’, Berlin Conference ‘Transformative Global Climate Governance après Paris’, May 2016, pp. 1–8, at 4, 5, available at: <https://refubium.fu-berlin.de/bitstream/handle/fub188/18585/Varvaštianxclimatexchangelitigation.pdf?sequence=1&isAllowed=y>.

⁵¹ M. Miller, ‘The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims’ (2010) 109(2) *Michigan Law Review*, pp. 257–89, at 283.

⁵² M. Heupel & T. Reinold, ‘Introduction: The Rule of Law in an Era of Multi-level Governance and Global Legal Pluralism’, in Heupel & Reinold (eds), n. 30 above, pp. 1–25, at 5.

⁵³ Bouwer, n. 14 above, p. 489.

⁵⁴ *Massachusetts v. EPA*, US Supreme Court, 127 S.Ct. 1438, 1446–47, 2 April 2007.

⁵⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 10 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

⁵⁶ Lin, n. 35 above, p. 37; see also Posner, n. 35 above, p. 1944.

⁵⁷ Peel & Osofsky, n. 35 above, p. 3.

⁵⁸ *Ibid.*, p. 10.

⁵⁹ Wilensky, n. 35 above, pp. 175 et seq.

However helpful in assessing governance dynamics regarding climate change, this approach falls short in fully grasping the role of domestic courts within the bottom-up approach of the Paris Agreement. National procedural and substantive rules determine the ability of courts to enforce or create international law. The national provenance of contributions to climate change mitigation requires scholarly attention to understand national circumstances in depth. The following two case studies serve as examples which assess the hybrid function of law enforcement and law creation fulfilled by domestic courts in light of the Paris Agreement's regulatory approach.

4. CASE STUDIES

The South African *Thabametsi Case*⁶⁰ and the Austrian *Vienna Airport Case*⁶¹ have been chosen as they are embedded in very different legal systems and contexts but deal with a similar legal question. In both cases the court considered the international climate goals of the Paris Agreement within domestic administrative provisions. Domestic courts were called to decide on the duty of the competent authorities to interpret administrative law in light of the Paris Agreement's long-term temperature stabilization goal. Both cases illustrate the hybrid function the courts fulfil within the regulatory bottom-up approach of the Paris Agreement. They reveal the complexity of this role and the need for a methodological toolset to understand the domestic contexts within the international legal architecture.

4.1. *South Africa: Earthlife Africa v. Minister of Environmental Affairs*

In the *Thabametsi Case*, Earthlife Africa Johannesburg, an environmental non-governmental organization (NGO), challenged the authorization of a coal-fired power plant in the Limpopo Province in northern South Africa. As is the case today, the country faced adverse climate change impacts in the form of extreme weather events and water scarcity. Even so, the national energy policy increased South Africa's reliance on coal.⁶² At the centre of the case was the National Environmental Management Act (NEMA).⁶³ According to section 24 NEMA an environmental authorization must precede the construction of a power plant. The Act states that 'the potential consequences for or impacts on the environment of listed activities ... must be considered, investigated, assessed and reported on to the competent authority'.⁶⁴ On 25 February 2015

⁶⁰ *Thabametsi Case*, n. 16 above.

⁶¹ *Vienna Airport Case*, n. 17 above.

⁶² Integrated Research Plan for Electricity 2010–2030, available at: http://www.energy.gov.za/files/irp_frame.html; *Thabametsi Case*, n. 16 above, p. 11, paras 25, 26; T.-L. Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30(1) *Journal of Environmental Law*, pp. 145–55, at 145; J.C. Ashukem, 'Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] ZAGPPHC 58 (2017) 65662/16' (2017) 13(1) *Law, Environment and Development Journal*, pp. 35–43, at 41.

⁶³ National Environmental Management Act, No. 107 (1998), *Government Gazette*, No. 19519, 27 Nov. 1998.

⁶⁴ *Ibid.*, s. 24(1).

Thabametsi, the eponymous operator, obtained an environmental authorization from the Chief Director of the Department of Environmental Affairs (DEA). Earthlife challenged this decision, firstly, before the Minister and, secondly, together with the Minister's appeal decision, before the Gauteng High Court in Pretoria. The challenge was based on the ground that, according to the NEMA, the environmental impact assessment (EIA) must consist of 'all relevant factors' relating to the environment.⁶⁵ Interpreted in the light of domestic⁶⁶ and international provisions,⁶⁷ climate change impacts would constitute one such relevant factor. The claimant stressed that the environmental authorization violated the NEMA and should be set aside because the authorities had failed to assess and consider climate change impacts.⁶⁸ Earthlife asked for a new decision based on a climate change impact assessment.

The DEA, as well as Thabametsi as an interested party, argued that there was no express provision to include climate change in the EIA under either domestic or international law. The assessment and consideration of climate change impacts could not constitute a mandatory requirement. They stressed that it was at the government's discretion to decide on climate change measures, as such measures were always to be balanced against South Africa's development needs. The Thabametsi power plant would ensure that the country's energy demands could be met.

In her appeal decision, the Minister accepted the need for a climate change impact assessment but nonetheless upheld the authorization. To her decision she added an amendment obliging Thabametsi to prepare a climate change report.

In its ruling of 8 March 2017 the High Court reviewed the decisions of the Chief Director and the Minister and asked whether there was a duty to consider climate change impacts resulting from section 24-O(1) NEMA. The court took a purposive approach towards the provisions covering EIA and related them to the interpretative principles of the NEMA: namely, sustainable development and the precautionary principle.⁶⁹ It tied the interpretation to section 24 of the Constitution of South Africa,⁷⁰ granting each citizen the right to a clean environment.⁷¹ Moreover, under section 223 of the Constitution, priority is given to any interpretation which is in line with international obligations. The court acknowledged the international legal obligations to consider climate change impacts in national policies,⁷² but also stressed that the international legal regime allows for the development of coal-fired power plants in the immediate future.⁷³ South Africa's NDC envisages a peak in GHG emissions up

⁶⁵ Ibid.

⁶⁶ Environmental Impact Assessment Regulations, *Government Gazette*, No. 33306, 18 June 2010; s. 24 Constitution of the Republic of South Africa, 8 May 1996, amended 11 Oct. 1996.

⁶⁷ The UNFCCC and the Paris Agreement.

⁶⁸ Promotion of Administrative Justice Act (PAJA) of 2000, s. 6(2)(e)(iii), *Government Gazette*, No. 20853, 3 Feb. 2000.

⁶⁹ *Thabametsi Case*, n. 16 above, para 80, p. 32.

⁷⁰ Constitution of the Republic of South Africa, n. 66 above.

⁷¹ *Thabametsi Case*, n. 16 above, paras 80, 81, pp. 32, 33.

⁷² Ibid., para. 83, pp. 33, 34.

⁷³ Ibid., para. 35, pp. 14, 15.

to 2020. Thus, its reliance on coal is anticipated to decrease over a longer timescale. According to the court, the consideration of climate change impacts was necessary to correspond with this peak, plateau, and decline trajectory stipulated by the NDC.⁷⁴

The second question was whether the duty to consider climate change impacts was fulfilled. The court deduced from an interpretation of the Minister's appeal decision that this was not the case. The absence of a climate change impact assessment (admitted by the Minister's amendment to the initial authorization) prevented the Chief Director from balancing all relevant factors.⁷⁵ A general consideration of climate change at the national level would not suffice; the impacts must be assessed specifically in relation to the project in question.⁷⁶ Citing the claimants' representative, the court pronounced that '[i]t is simply impossible to strike an appropriate equilibrium where the details of one of the key factors to be balanced are not available to the decision-maker'.⁷⁷ With regard to the appeal decision, the court concluded that the Minister ought to substitute the initial decision with her own decision based on the climate change impact assessment.⁷⁸ Finally, the appeal decision was set aside by the court, obliging the Minister to issue a new decision.

The court affirmed the duty of the administrative decision maker to consider climate change impacts, but this left room for the authorities to weigh up development needs against climate protection.⁷⁹ Accordingly, the Minister's decision, newly issued after the judgment, granted the construction permit for the power plant even in the light of the climate change impacts subsequently assessed.⁸⁰

4.2. *Austria: Vienna Airport Case*

The *Vienna Airport Case* addressed a similar legal question. In this case, the construction of the third runway of Vienna Airport was challenged before the courts. After a lengthy EIA procedure,⁸¹ the government of Lower Austria, as the competent EIA authority, issued the construction permit in 2012.⁸² According to section 3(3) of the EIA Act (2000)⁸³ this decision included consideration of all relevant legal provisions. If one of them was not met, the permit could not be issued (concentrated procedure).⁸⁴

Citizens' initiatives, neighbours, and the city of Vienna appealed against the decision to the newly established Federal Administrative Court. They argued that the authorities

⁷⁴ Ashukem, n. 62 above, pp. 40, 42.

⁷⁵ *Thabametsi Case*, n. 16 above, para. 100, p. 39.

⁷⁶ *Ibid.*, para. 95, p. 37.

⁷⁷ *Ibid.*, para. 100, pp. 39, 40.

⁷⁸ NEMA, n. 63 above, s. 43.

⁷⁹ *Thabametsi Case*, n. 16 above, para. 35, p. 14. The High Court states: 'South Africa's international obligations anticipate and permit the development of new coal fired stations in the immediate term'.

⁸⁰ Humby, n. 62 above, p. 155. This decision is currently being challenged in a new appeal procedure.

⁸¹ The application was handed in on 1 Mar. 2007 following a mediation procedure from 2001 to 2005: see *Vienna Airport Case* (BVwG), n. 17 above, para. I.1.2., pp. 5, 6.

⁸² Government of Lower Austria, Authorization RU4-U-302/301-2012, 10 July 2012, *Vienna Airport Case*, (BVwG), n. 17 above, para. I.2., p. 8.

⁸³ Federal Environmental Impact Assessment Act 2000, BGBl. No. 697/1993, 14 Oct. 1993.

⁸⁴ G. Kirchengast et al., 'BVerwG versagt Genehmigung wegen überwiegenden Interesses am Klimaschutz' (2017) 3 *Recht der Umwelt*, pp. 121–31, at 121.

had unlawfully failed to consider the climate change impacts of the project. According to section 71(1) and (2) of the Austrian Aviation Act,⁸⁵ the public interests opposing the construction may not outweigh the public interests in having the third runway.

On 2 February 2017, the first instance Federal Administrative Court decided on the interpretation of those ‘other public interests’. The Aviation Act itself does not provide any criteria by which to assess which interests must be considered and how they are to be balanced. The court, therefore, referred to the hierarchy of the Austrian legal system and to the actions taken by democratically elected branches of government.⁸⁶ Austria’s international obligations under the UNFCCC and the Paris Agreement would oblige the authorities to integrate climate change impacts into their balancing of interests in the decision-making procedure of major projects. Austria envisages sectoral emissions ceilings in its 2012 Climate Protection Act, which was revised in 2017.⁸⁷ This Act transposes Austria’s obligation to reduce GHG emissions in sectors that are not part of the emissions trading scheme by 16% in relation to the 2005 baseline until 2020. As a European Union (EU) Member State, Austria did not submit its own NDC under the Paris Agreement, but committed to the EU’s target of a 40% reduction in GHG emissions by 2030 in relation to 1990 baselines.⁸⁸

Importantly, the court not only reviewed the administrative decision but, in accordance with section 28(2) of the Federal Act on Proceedings of Administrative Courts,⁸⁹ substituted the decision. This occurs whenever the initial authorization is unlawful on the ground of a lack of consideration of all relevant circumstances in the decision-making process at the administrative level.⁹⁰ Based on a 128-page assessment, the court concluded that the opposing ‘other public interests’ – namely, climate change impacts – outweigh the public interests in favour of the construction of the runway. It withdrew the construction permit.

According to the Austrian Constitutional Court, which issued its judgment on 29 June 2017, the reasoning of the Federal Administrative Court was unconstitutionally arbitrary. Only six months after the first instance decision, the Constitutional Court concluded that the UNFCCC and the Paris Agreement were not applicable to the case. It stated that in referring to international obligations in its reasoning, the Federal Administrative Court had severely misjudged the legal meaning of those norms.⁹¹ The Constitutional Court concluded that the decision of the Federal Administrative Court violated the claimants’ right to equality before the law.

⁸⁵ Federal Aviation Act, BGBl. No. 253/1957, 12 Dec. 1957.

⁸⁶ *Vienna Airport Case* (BVwG), n. 17 above, para. III.4.5.14., p. 121; A.J. Saiger, ‘Climate Change Protection Goes Local: Remarks on the Vienna Airport Case’, *Verfassungsblog*, 20 Mar. 2017, available at: <https://verfassungsblog.de/climate-change-protection-goes-local-remarks-on-the-vienna-airport-case>.

⁸⁷ Federal Act on Climate Protection (KSG), BGBl. I No. 106/2011, 21 Nov. 2011.

⁸⁸ Intended Nationally Determined Contribution of the EU and Its Member States, 6 Mar. 2015, para. 3, p. 1, available at: <https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx>. See Kirchengast et al., n. 84 above, p. 129.

⁸⁹ Federal Act on Proceedings of Administrative Courts (VwVG), BGBl. I No. 33/2013, 13 Feb. 2013.

⁹⁰ Kirchengast et al., n. 84 above, p. 122; *Vienna Airport Case* (BVwG), n. 17 above, para. III.4.5.2., p. 113.

⁹¹ G. Kirchengast et al., ‘VfGH behebt Untersagung der dritten Piste’ (2017) 6 *Recht der Umwelt*, pp. 252–64, at 253.

While the Constitutional Court agreed on the need to carry out a balancing of interests, it underlined that the specific public interests were to be found in the Aviation Act itself.⁹² The Paris Agreement would not apply at the domestic level, as it generates only international obligations.⁹³ Political statements by democratically elected branches of government could not be treated as law. Constitutional norms with a focus on sustainability⁹⁴ could guide the interpretation of provisions of the Aviation Act only where environmental protection was already foreseen. If this were the case, the Constitution would reinforce the environmental goods protected by the provisions in question.⁹⁵ As the Aviation Act (which entered into force in 1957) did not refer to environmental protection, the Constitution could not guide the interpretation of indeterminate legal norms of this Act. The Constitutional Court found that by including the ‘cruise-emissions’⁹⁶ in the calculation of the adverse climate impacts caused by the third runway, the first instance court did not respect Austrian territory as the ultimate reference for the assessment of emissions and their impacts on the climate.⁹⁷ On the basis of this reasoning, the Constitutional Court annulled the first instance decision and maintained the construction permit of the third runway.

4.3. *The Hybrid Function of Law Enforcement and Law Creation*

The two case studies will be assessed against the backdrop of Roberts’ understanding of domestic courts as law enforcers and law creators in relation to international law. In its present form this hybrid function raises the question whether public authorities ought to consider the climate goals of the Paris Agreement in their domestic decision-making processes, and what their significance is within national legal systems. Both functions are closely interconnected.⁹⁸

Roberts points towards the danger of discussants labelling judicial decisions the outcome of which they support as examples of impartial law enforcement, whereas unwelcome decisions are cast as instances of partial law creation.⁹⁹ The bottom-up approach of the Paris Agreement renders it even more difficult to deduce from international law whether one court correctly enforces international legal provisions whereas another incorrectly fails to do so and, therefore, attributes a partial interpretation of international provisions. As the applicability and substantive meaning of the Paris Agreement’s climate goals depend on national legal provisions, this question may be answered only in light of national law.

⁹² *Vienna Airport Case* (VfGH), n. 17 above, para. 204, p. 59.

⁹³ *Ibid.*, para. 213, p. 62.

⁹⁴ Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Water and Food Supply Safety and Research, BGBl. I No. 111/2013, 11 July 2013.

⁹⁵ Kirchengast et al., n. 91 above, p. 258.

⁹⁶ ‘Cruise emissions’ encompass the whole flight, not just emissions from landing and take-off (LTO emissions).

⁹⁷ *Vienna Airport Case* (VfGH), n. 17 above, para. 204, p. 59.

⁹⁸ A. Tzanakopoulos, ‘Domestic Courts in International Law: The Judicial Function of National Courts’ (2011) 34 *Loyola Los Angeles International & Comparative Law Review*, pp. 133–68, at 135.

⁹⁹ Roberts, n. 6 above, p. 61.

The case studies show that the reference to the Paris Agreement's climate goals necessitates a constellation within the domestic legal system that allows for consideration of international law. None of the claimants directly asked for enforcement of the Paris Agreement's long-term temperature stabilization goal. This can be explained by the character of Articles 2(1) and 4(2) of the Paris Agreement as an obligation of conduct. Rather, the question was whether domestic administrative provisions should be interpreted in a way that includes the Paris Agreement's climate goals. In the *Thabametsi Case*, the 'potential consequences for or impacts on the environment' that needed to be assessed according to the NEMA invited the court to apply an interpretation that is in line with international legal provisions and, accordingly, to integrate consideration of climate change impacts into this domestic provision.

In the *Vienna Airport Case*, the 'other public interests' referred to in section 71(1) and (2) of the Aviation Act led the first instance court to refer to the Paris Agreement. The court saw a lacuna within the Aviation Act. It did not give any guidance on how to interpret the indeterminate legal provision at stake. The court, therefore, referred to other legal provisions, such as the Paris Agreement, for its interpretation. The Constitutional Court, however, took the opposite approach and argued that the reference to climate goals was not possible as long as there was no concrete provision in the Aviation Act that allowed for or required such an interpretive exercise. The Constitutional Court stated that the Paris Agreement, as an international instrument, generated mere international obligations and could not apply within national law.¹⁰⁰ In relation to the constitutional provisions, the claimants at first instance referred to the regional Constitution of Lower Austria, which stipulates climate protection as an objective of provincial governance. However, the Constitutional Court denied its application.¹⁰¹ At the federal level, according to the Constitutional Court, the Constitutional Act on Sustainability may only guide the interpretation of provisions which already have the aim of environmental protection. It cannot add environmental protection as an interpretative principle to other acts.

The examples illustrate that the enforcement of the Paris Agreement takes place within national law and depends on its interpretation. This also holds true for the interpretation of other international obligations. Once the Paris Agreement's climate goals apply at the domestic level, the courts deduce their meaning from the state's NDC. For example, the High Court referred to the peak, plateau, and decline trajectory provided in the South African NDC and thus allowed for consideration of the country's development needs. In the *Thabametsi Case*, the court's affirmation of the duty to consider climate change impacts left room for the authorities to weigh up development needs against climate protection.¹⁰² Accordingly, the Minister's decision issued after the judgment granted the construction permit for the power plant. In Austria, the Federal

¹⁰⁰ *Vienna Airport Case* (VfGH), n. 17 above, para. 204, p. 62.

¹⁰¹ B. Hollaus, 'Austrian Constitutional Court: Considering Climate Change as a Public Interest is Arbitrary – Refusal of Third Runway Permit Annulled' (2017) 11(3) *Vienna Journal on International Constitutional Law*, pp. 467–77, at 472.

¹⁰² *Thabametsi Case*, n. 16 above, para. 35, p. 14.

Administrative Court deduced from the EU's NDC that the aviation sector should reduce its emissions, because otherwise Austria would fail to contribute to the EU's 40% mitigation target.¹⁰³ This interpretation led the court to give special weight to climate protection as one of the 'other public interests' interpreted in light of international climate change law. The Constitutional Court instead followed the appellants' argument that 'the environmental impacts are to be assessed against domestic environmental degradation, not against the global climate'.¹⁰⁴

The courts' functions of law creation and law enforcement depend not only on what the courts do or how they reason. Their hybrid function also depends highly on what national procedural law allows them to do. The Austrian Federal Administrative Court (at first instance) fully reviewed and replaced the administrative decision. In contrast, the South African High Court referred the decision to the Minister. According to section 2(d) and (e)(iii) of the Promotion of Administrative Justice Act (PAJA), the courts review the administrative conduct in its entirety if it is 'materially influenced by an error of law'. However, it is not in the power of the courts to substitute the administrative decision.¹⁰⁵ The judgment of the Austrian Constitutional Court, in turn, highlights the restricted scope of review, characteristic of its role as a constitutional court. It did not delve into the 'fine-tunings'¹⁰⁶ of the climate change assessment but focused exclusively on constitutional norms. The role of the courts within their domestic legal systems determines their role in the international legal order.

Considering the importance of domestic contexts, the following question arises: how can the international legal system make sense of domestic jurisprudence relating to the international climate change regime? The following section advocates a comparative approach to domestic court decisions considering their embeddedness in national contexts.

5. A COMPARATIVE APPROACH TO DOMESTIC CLIMATE CHANGE CASES

It has been shown that legal scholarship on the role of domestic courts in the international climate change regime mainly follows a governance approach. It therefore risks falling short of assessing the courts' double-sided function of law creation and law enforcement as well as discussing the methodological preconditions necessary for understanding this function. The scholarly debate on the role of domestic courts in international law also provides valuable insights into the role of courts in international climate change law. It differentiates their functions and develops the methodological tools to assess them. As illustrated by the case studies, it provokes a range of questions. Is it still possible to frame domestic courts as enforcers and creators of international law once the national legislature has established the state's contributions to the

¹⁰³ *Vienna Airport Case* (BVwG), n. 17 above, pp. 125–6.

¹⁰⁴ *Vienna Airport Case* (VfGH), n. 17 above, para. 30, p. 12.

¹⁰⁵ *Thabametsi Case*, n. 16 above, p. 45, para. 116.

¹⁰⁶ Kirchengast et al., n. 91 above, p. 257.

Paris Agreement's climate goals? Can we still think of the courts as 'translators of international law'¹⁰⁷ considering that international law serves only a goal-setting function combined with procedural obligations?

One possible pathway suggested by Roberts is to approach domestic climate change cases with a comparative method. It helps to explain how different actors interpret and apply international legal norms.¹⁰⁸ The comparison carves out similarities and differences in the process of translation of international law into (sub)national legal orders. These similarities and differences are even more important with regard to the differentiated approach taken by the Paris Agreement. The international climate change regime itself is built on different obligations for different parties. Certainly, the obligations of conduct apply to all parties. However, the states bear common but differentiated responsibilities and NDCs differ from developing to developed countries.¹⁰⁹ While differentiation under the Paris Agreement is subtle, it is clear from its Article 4(4) that developed countries 'should continue taking the lead'.¹¹⁰ Geographical and economic preconditions, therefore, are anchored at the international level. As Article 4(2) of the Paris Agreement connects the obligation of conduct – namely 'to pursue domestic mitigation measures' – with the objectives of the NDCs, the substantive meaning of this obligation depends on domestic contexts. The legal architecture asks scholarship to take account of international law and domestic contexts at the same time.

Following Roberts' suggestion to compare the role of domestic courts, the aim and result of the comparison are as follows. Rather than seeking to fix the 'actual and proper'¹¹¹ role of domestic courts, the comparison explores the contexts that allow domestic courts to link international obligations of conduct with national obligations of result. In this way international legal scholarship can make sense of domestic judicial decisions in the climate change regime and, at the same time, acknowledge the importance of domestic contexts.

The purpose of the comparison, in turn, sheds light on the 'object of juxtaposition, the *tertium comparationis*'.¹¹² The obligations of conduct originating from international law serve as a common frame for comparative analyses. Each party to the Paris Agreement is subject to the duty to prepare, communicate, and maintain its NDC. The comparative perspective assesses the ability of domestic courts to fill this process with substantive requirements. Such an undertaking ought to consider the constitutional and administrative provisions at the national level. The indeterminate legal terms in domestic administrative law, as well as the role of environmental provisions in

¹⁰⁷ See Knop, n. 31 above.

¹⁰⁸ Roberts et al., n. 13 above, p. 7.

¹⁰⁹ Rajamani, n. 10 above, p. 501.

¹¹⁰ Arts 3 and 4(4) Paris Agreement.

¹¹¹ Roberts, n. 6 above, p. 59.

¹¹² M. Mehling, 'The Comparative Law of Climate Change: A Research Agenda' (2015) 24(3) *Review of European, Comparative & International Environmental Law*, pp. 341–52, at 348.

national constitutions, shape the margins open to the courts.¹¹³ Procedural law and the relevance of subjective rights to access the courts need also to be considered. Additionally, legal culture and institutional backgrounds play an important role as they constitute the contexts of jurisprudence.¹¹⁴ The comparative analysis needs to question its own scholarly standpoint. This relates to a discussion of the selected cases and the sources that are used to assess and compare the role of domestic courts in international law.¹¹⁵

A context-sensitive comparison also integrates the courts' motivations and self-conceptions. It may reveal that domestic courts use (weak) international obligations for their own purposes to counterbalance the influence of other courts or branches of government. In this sense, the role of courts is central to the South African legal system. This relates to the current political situation. Because of corruption issues in the executive and legislative branches, increased trust is placed on the judiciary.¹¹⁶ The Austrian case illustrates this point differently. The Federal Administrative Court was established in 2014 as part of a major reform of administrative appeal procedures. Previously, the environmental senate was the competent appeal body in the *Vienna Airport Case*.¹¹⁷ The reform brought in judicial review of administrative provisions for the first time. Much criticism was directed at the three-year-old Federal Administrative Court for its decision, and its competence to substitute administrative acts was challenged.¹¹⁸ In a reaction to this judgment, the Constitutional Court rather surprisingly took over the case instead of denying competence, which would have seen the case referred to the Higher Administrative Court. Moreover, it delivered its judgment within a very short time frame.¹¹⁹ The decision of the Constitutional Court as well as that of the Federal Administrative Court cannot be read without considering the institutional contexts and hierarchy between the two institutions.¹²⁰ The events following the *Vienna Airport Case* highlight the national consciousness of the court's function of creating and enforcing international climate change law by linking international obligations with national law. In the aftermath of the judicial decisions, the National Council (the Lower Chamber of the Federal Parliament) voted for a constitutional change which would integrate the constitutional objectives of economic growth, employment and a competitive economic location into the Constitutional Act on Sustainability.¹²¹ Such changes hamper the court's ability to refer to climate protection

¹¹³ See Sections 4.1. and 4.2 above. In South Africa, where common law influences merge with Dutch-Roman legal traditions, the Constitution plays a pivotal role: F. du Bois, *Wille's Principles of South African Law*, 9th edn (Juta, 2007); U. Kischel, *Rechtsvergleichung* (C.H. Beck, 2015), pp. 682–3.

¹¹⁴ Mehling, n. 112 above, p. 351.

¹¹⁵ Roberts, n. 6 above, p. 88.

¹¹⁶ H.V. Vuuren, 'South Africa: Democracy, Corruption and Conflict Management', Centre for Development and Enterprise & Legatum Institute, 'Democracy Works' Conference Paper, Apr. 2013, pp. 14, 15, available at: <https://www.cde.org.za>.

¹¹⁷ Hollaus, n. 101 above, p. 468.

¹¹⁸ Kirchengast et al., n. 84 above, p. 130.

¹¹⁹ Kirchengast et al., n. 91 above, p. 257.

¹²⁰ For a discussion of institutional contexts see R. Mann, 'Non-ideal Theory of Constitutional Adjudication' (2018) 7(1) *Global Constitutionalism*, pp. 14–53.

¹²¹ Amendment to the Constitutional Act on Sustainability, IA 2172/A (XXV GP), 17 May 2017.

and to link the international obligations of conduct to national obligations of result. International legal scholarship should remain attentive towards these changes and understand national contexts from an international law perspective.

6. CONCLUSION

This article stresses the importance of comparative approaches towards understanding the role of domestic courts in the international climate change regime since the Paris Agreement. The interconnectedness of international obligations of conduct and domestic substantive provisions, as well as domestic institutional and extra-legal contexts, challenges international legal scholarship to consider both levels of lawmaking. Against this background, climate change litigation may become an opportunity to (re)discuss the role of domestic courts in the international legal architecture. The proposed context-sensitive comparison allows for an understanding of the role of domestic courts within the international climate change regime while, at the same time, paying tribute to the bottom-up regulatory approach of the Paris Agreement. Rather than looking at the ‘yes or no’ question of whether domestic courts act in favour of climate protection, it embraces the nuanced conditions for the integration of international law into national legal systems.