17

Closing the Supply-Side Accountability Gap through Climate Litigation

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Governments are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway.[1]

Aren't They Accountable?

Fossil fuel suppliers[2] have consistently escaped accountability for climate change by leaning on domestic policies void of supply-side measures to mitigate climate pollution. They also hide behind a wall of impunity and pose legal defenses that presuppose a fossil fuel market driven by demand only. These actions defy basic economic principles and climate science and contravene customary international law, human rights obligations, and the climate change legal regime.

Despite the scientific consensus that climate change is the existential crisis of our time,[3] governments continue to push for the expansion of fossil fuel exploration, extraction, and production. These measures not only fail to address the crisis but also impede meaningful action to curb greenhouse gas emissions and safeguard the human rights at stake, including the right to life, the right to health, the right to a healthy environment, and intergenerational rights.

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[1] Joana Depledge et al. (eds.), "The Production Gap: The Discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C" (2019) Stockholm Environment Institute et al., <http://productiongap.org/>.

[2] The term "fossil fuel suppliers" encompasses the parties that explore, extract, produce, and supply fossil fuels.

[3] See "Carbon Offsets Are Not Our Get-out-of-jail Free Card", UNEP, June 10, 2019.

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As the youth rise in protest[4] and activism[5] to take back their future, courts around the world are being approached to help fill the impunity gap and close the convenient loopholes created by political compromise and corporate lobbies. Despite significant setbacks in court, some rulings are contributing to real progress toward achieving this goal. The latest of such cases is from the Supreme Court in Norway. Although it was a loss for the plaintiffs, the decision is in some respects a step in the right direction and a warning to the fossil fuel industry. This is because, for the first time, the Supreme Court held that greenhouse gas emissions from Norwegian fossil fuel products that are combusted outside its borders ("exported emissions") must be taken into account when analyzing the climate impacts of fossil fuel extraction and production.

This chapter discusses the efforts to close the supply-side accountability gap using as an example the Norwegian climate case (*People* v. *Arctic Oil*). First, it provides an overview of the case for supplier accountability for exported emissions, referring to previous work by analysts and legal scholars and to jurisprudence from around the world. Then, it examines the push for supply-side accountability in the context of the *People* v. *Arctic Oil* case and other cases. Finally, the chapter concludes with an analysis of principles that can be applied in legal battlegrounds and beyond.

17.1 THE CASE FOR SUPPLY-SIDE ACCOUNTABILITY

This section examines the supply-side accountability gap and why it matters. Climate science has confirmed that anthropogenic greenhouse gas emissions cause climate change. The Intergovernmental Panel on Climate Change (IPCC) has found that "human activities are estimated to have caused approximately 1.0°C of global warming above pre -industrial levels, with a *likely* range of 0.8°C to 1.2°C. Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at current rate. (*high confidence*)."[6] Already, at the current level of warming, climate-fueled extreme weather events are negatively affecting human health, taking human lives, and causing serious and irreversible harm to the environment.

[4] See, e.g., Shuk-Wah Chung, "5 Young Activists That Have Inspired Us This Year," Greenpeace, December 20, 2018.

[5] See Allegra Kirkland, "Two Generations of Climate Activists Dish about Making Powerful People Uncomfortable," *Teen Vogue*, September 27, 2019.

[6] Valérie Masson-Delmotte et al., "Global Warming of 1.5°C: Summary for Policymakers" (2018) Intergovernmental Panel on Climate Change (IPCC) (hereinafter "IPCC 1.5°C Report (2018)" (emphasis in original)).

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Because of the seriousness of the risks associated with climate change and the harms that are already occurring, urgent action is needed to cut carbon emissions. However, current actions (which are "overwhelmingly" focused on addressing fossil fuel demand)[7] are not enough. The UNEP Emissions Gap Report has found year after year that current actions are insufficient as emissions have consistently risen – "even if all unconditional Nationally Determined Contributions (NDCs) under the Paris Agreement are implemented, we are still on course for a 3.2°C temperature rise."[8]

More fossil fuels have already been found than the world can afford to burn.[9] "Carbon emissions from oil and gas in *operating* fields and mines globally would push the world beyond 1.5C of warming and make it impossible to meet our global obligations under the Paris Agreement ... even if global coal use were phased out overnight, and cement emissions were drastically reduced."[10] Fossil fuel supplying governments continue to expand the exploration, extraction, and production of fossil fuels despite the fact that these actions do not comply with the goals of the Paris Agreement.[11]

This difference between planned fossil fuel production and the climate goals is called the production gap.[12] According to the UN, "in aggregate, countries' planned fossil fuel production by 2030 will lead to emissions ... that [are] 53% more than would be consistent with a 2C pathway and ... 120% more than would be consistent with a 1.5C pathway. This gap widens significantly by 2040."[13] Analysts expect that, in 2040, "production levels [will] reach 110% and 210% higher than those consistent with the 2C and 1.5C pathways."[14] This global production gap is even larger than the already significant global emissions gap because curbing fossil fuel production continues to go unaddressed in both the legislature and the judiciary.[15] This is the supply-side accountability gap.

[7] See Fergus Green and Richard Denniss, "Cutting with Both Arms of the Scissors: The Economic and Political Case for Restrictive Supply-Side Climate Policies" (2018) 150 *Climatic Change* 73.

[8] "The Emissions Gap Report 2019" (2019) United Nations Environment Programme.

[9] Ibid. 8 (internal citations omitted).

[10] Jeff Gailus et al., "Oil, Gas and the Climate: An Analysis of Oil and Gas Industry Plans for Expansion and Compatibility with Global Emissions Limits" (2019) Global Oil and Gas Network.

[11] Greg Muttitt and Sivan Kartha, "Equity, Climate Justice and Fossil Fuel Extraction: Principles for a Managed Phase Out' (2020) 20 *Climate Policy*.

[12] See Depledge et al. (eds.), "The Production Gap," above note 1 at 13.

[13] Ibid. at 4.

[14] Ibid. at 14.

[15] See ibid. at 4; see also Muttitt and Kartha, "Equity, Climate Justice and Fossil Fuel Extraction," above note 11.

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In this lacuna in accountability, every major international oil company has approved "new oil and/or gas projects that are not Paris Agreement compliant."[16] Energy analysts at the UN "predict that investment in fossil fuel exploration, extraction and delivery infrastructure could remain at about USD 1 trillion annually through 2040."[17] As a result of increased investment, "global annual oil and gas production is on a trajectory to rise 7% between 2019 and 2024."[18]

It is now clear that the demand-side focus of policymakers is not generating the reductions in greenhouse gas emissions needed to avoid the worst impacts of climate change, and the lack of supply-side accountability is only making the situation more dire. If industry expansion were stopped, oil and gas production would fall by 13 percent in five years and 30 percent in ten years.[19]

As more money and resources are poured into fossil fuel infrastructure, fossil fuel prices decrease, consumers become "hooked," different parts of society become "deeply entangled" in the fossil fuel economy and, consequently, emission reductions are harder to achieve.[20] This lock-in effect is evident when government "plan[s] and projections for fossil fuel production do not align with climate ambitions."[21] Supply-side policies "could allow for greater emission reductions at the same (or lower) cost than demand-side policies alone. They could help reduce carbon lock-in effects, making it easier for lower-carbon alternatives to compete with fossil fuels."[22]

In the case of Norway, 95 percent of the emissions generated by Norwegian fossil fuels occur abroad.[23] These emissions are what are called "exported emissions" or "extraction-based emissions," and they are not taken into account when discussing Norwegian "climate leadership." It is time to address the drill-rig-sized elephant in the room.

[16] Jeff Gailus et al., "Oil, Gas and the Climate," above note 10 at 5.
[17] Depledge et al. (eds.), "The Production Gap," above note 1 at 8 (internal citations omitted).
[18] Jeff Gailus et al., "Oil, Gas and the Climate," above note 10 at 4 (internal citations omitted).
[19] See ibid. at 11.
[20] See Depledge et al. (eds.), "The Production Gap," above note 1 at 13.
[21] Ibid.
[22] Michael Lazarous et al., "Supply-Side Climate Policy: The Road Less Taken" (2015) Stockholm Environment Institute Working Paper No. 2015-13.
[23] The Court of Appeals in *People* v. *Arctic Oil* acknowledged that "it is estimated that up to 5 per cent of the emissions occur in connection with the production and at least 95 per cent in connection with the combustion." *Föreningen Greenpeace Norden* v. *Norway*, 18-060499ASD-BORG/3 at 29 (23.01.2020) (Borgarting Lagmannsrett).

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17.2 THE NORWEGIAN PARADOX

The global carbon emissions from combusting fossil fuels extracted in Norway are about ten times higher than the total carbon emissions generated within Norway.[24] Norway is the world's seventh largest exporter of greenhouse gas emissions.[25] In 2016, then-Norwegian Climate and Energy Minister Vidar Helgesen said that "as long as the world needs oil and gas, we will provide it,"[26] a position reiterated throughout the oral arguments of the state in the *People* v. *Arctic Oil* case discussed below.

At the same time that Norway proclaims its credentials internationally as a leader in the fight against climate change,[27] analysis by the UN Special Rapporteur for human rights and the environment and conclusions by treaty bodies CESCR and CEDAW have found that further arctic oil exploration in Norway is not consistent with its human rights obligations.[28]

As the Norwegian government embarks on new fossil fuel exploration at a time in which governments have found more oil than they can afford to consume if they are to achieve the Paris temperature targets, the question arises: aren't major exporters of greenhouse gas emissions accountable? With the support of a large coalition of civil society members, co-plaintiffs Nature and Youth and Greenpeace Nordic (together with interveners Grandparents Climate Campaign and Friends of the Earth Norway) sued the Norwegian government, taking their case all the way to the Supreme Court and making progress toward closing the supply-side accountability gap.

[24] See Taran Fæhn et. al, "Climate Policies in a Fossil Fuel Producing Country: Demand versus Supply Side Policies"(2017) 38 *Energy Journal* 77.

[25] See Hannah McKinnon et al., "The Sky's Limit Norway: Why Norway Should Lead the Way in a Managed Decline of Oil and Gas extraction" (2017) Oil Change International, <http://priceofoil.org/content/uploads/2017/08/The-Skys-Limit-Norway-1.pdf>.

[26] Mark Lewis, "Paradox Nation: Norway, a Climate Leader Making Money on Oil," AP, August 1, 2016.

[27] See Kelly Eanna, "Norway to Focus Its Aid Budget on Climate Change," *Science Business*, June 20, 2019.

[28] See "Norway Must Resolve Climate Change and Human Rights Paradox, UN Expert Says', United Nations Human Rights, September 23, 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25038&LangID=E>. This view was reiterated in the Special Rapporteur's final visit report, see Special Rapporteur on human rights and the environment, 'Visit to Norway: Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment," UN Doc. A/HRC/43/53/Add.2 (2020); see also UN Committee on Economic, Social and Cultural Rights Concluding Observations, UN Doc. E/C.12/NOR/CO/6 (2020); see also UN Committee on the Elimination of Discrimination against Women, Concluding observations on the ninth periodic report of Norway, UN Doc. CEDAW/C/NOR/CO/9 (2017).

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17.3 THE *PEOPLE* V. *ARCTIC OIL* CASE

The regulation of petroleum activities in Norway is divided into three stages: (1) the opening of a field, (2) the exploration phase, and (3) the production phase.[29] In October 2016, the *People* v. *Arctic Oil* case was filed against the Norwegian government for granting new oil drilling licenses (exploration phase) for the first time in twenty years in a newly opened area in the Arctic.[30] The plaintiffs argued that this drilling violates the right to a healthy environment enshrined in Article 112 of the Norwegian Constitution and contravenes Norway's responsibilities under international law. The plaintiffs claimed that the licensing decision facilitates potentially significant and long-term increases in the combustion of fossil fuels and emission of greenhouse gases, threatening to make a significant contribution to climate change. As the IPCC Special Report reaffirms, global temperature increases of over 1.5 degrees Celsius will have catastrophic impacts on local and global ecosystems through, inter alia, rising sea levels, extreme weather events, and biodiversity loss.[31]

17.3.1 *The Case before the Lower Courts in Norway*

At first instance, the Oslo District Court found that the right to a healthy environment was constitutionally protected but that the state had not infringed on this right. The District Court stated that the Norwegian state is not responsible for the carbon emissions connected to the burning of Norwegian oil and gas outside of Norway. The Court of Appeal in Norway upheld these rulings, except for one important finding. In establishing whether the government has infringed on the right to a healthy environment,

[29] The unofficial translation of the Supreme Court judgment forms the basis for the Supreme Court citations in this chapter, available at: <https://www.xn–klimasksml-95a8t.no/wp-content/uploads/2021/01/judgement_translated.pdf>. See *Nature and Youth et al.* v. *Ministry for Petroleum and Energy*, HR-2020-2472-P at ¶65 (December 22, 2020) (Noregs Hosterett) (hereinafter "*People* v. *Arctic Oil* Supreme Court judgment").

[30] The unofficial translation of the Court of Appeal's judgment in *People* v. *Arctic Oil* forms the basis of the Court of Appeal citations in this chapter. Available at: <https://www.xn–klimasksml-95a8t.no/wp-content/uploads/2019/10/judgement_Peoplevs_ArcticOil_Appeal_Jan2020.pdf>. *Föreningen Greenpeace Norden* v. *Norway* ("*Nature and Youth et al.* v. *Ministry for Petroleum and Energy*"), 18-060499ASD-BORG/3 at 29 (January 23, 2020) (Borgarting Lagmannsrett) (hereinafter "*People* v. *Arctic Oil* Appeal judgment"). The authoritative, Norwegian version can be found here: <https://www.xn–klimasksml-95a8t.no/wp-content/uploads/2020/01/dom.pdf>.

[31] See Masson-Delmotte et al., "Global Warming of 1.5°C: Summary for Policymakers," above note 6.

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all greenhouse gas emissions from Norwegian oil exported abroad must be taken into account.[32] Norway is responsible for these emissions after export because there is a "clear relationship between the production and the combustion" and because the concern for future generations necessitates it.[33] The Court of Appeal found that Article 112 also reinforces Norwegian regulations on impact assessments, which include positive, negative, direct, indirect, and long-term effects, stating that "emissions of greenhouse gases after export of oil and gas fall under this."[34]

17.3.2 *The Norwegian Supreme Court Judgment*

Sitting in plenary (with fifteen voting justices), the Supreme Court heard oral arguments over seven days, via video conference due to the COVID-19 pandemic, and rendered its judgment on December 20, 2020. In its 11–4 ruling against the plaintiffs, the Supreme Court left the door open for supply-side accountability, both in its majority and minority opinion.

Unlike the lower courts, the Supreme Court held that the right to a healthy environment enshrined in Article 112 was not exactly a right but rather a construction between a right and a principle. To be sure, the Article contains positive and negative obligations of the state and has legal substance, but it is not as enforceable as a right; it's more akin to a legal principle. The Article imposes duties on the state to take measures to manage resources for the long-term in a comprehensive manner.[35] The Supreme Court found that Article 112 can be invoked "as an element in the statutory interpretation and as a mandatory consideration in the exercise of discretion"[36] before the courts when addressing environmental problems for which legislators have not taken a position. If the Parliament has considered a matter, Article 112 "must be read . . . as a safety valve," and courts can set aside a decision if the Parliament has "grossly disregarded" its duties to take measures under Article 112. "The threshold is consequently very high."[37]

The Supreme Court found that "there is no basis for climate falling outside of the scope for application for article 112 of the Constitution"[38] and that there should be a combined assessment of the specific licensing decision together

[32] See *People* v. *Arctic Oil* Appeal judgment, above note 30 at 21.
[33] Ibid.
[34] Ibid. at 41.
[35] See *People* v. *Arctic Oil* Supreme Court judgment, above note 29 at ¶¶143 & 87.
[36] *People* v. *Arctic Oil* Supreme Court judgment, above note 19 at ¶145.
[37] Ibid. at ¶142.
[38] Ibid. at ¶147.

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with other emissions. "If activities abroad that Norwegian authorities have directly influenced or could take measures against cause harm in Norway, this must be capable of being included through the use of Article 112."[39] This includes emissions generated by the combustion of Norwegian gas or oil abroad.[40]

Although it is estimated that 95 percent of greenhouse gas emissions from Norwegian oil are generated abroad after export, these were not directly assessed in the licensing decision issues.[41] Although there are no figures on the extent to which emissions will lead to harmful effects in Norway, "there is no doubt that global emissions will also affect Norway."[42] Nevertheless, the Supreme Court ruled that constitutional rights were not infringed, due to the uncertainty of the information and the timing and scope of the assessment.

The Supreme Court translated the uncertainty on the amount of oil and gas that would be found into an uncertainty about climate impacts.[43] As such, this impact assessment could be done at the approval of the extraction stage ("PDO" stage), which the Supreme Court concluded is the "most suitable and appropriate time."[44] At that point, the assessment of "effects of petroleum extraction in the environment, including combustion of emissions after export" could be conducted.[45] The Supreme Court held that there will be no environmental impacts until there are commercially exploitable discoveries.[46] "If the situation at the production stage has become such that approving the production will be contrary to [a]rticle 112 of the Constitution, the authorities will have both the power and the duty not to approve the plan."[47]

The Supreme Court cited the 2020 European Court of Justice (CJEU) decision in *A. and Others* (C-24/19), which found a violation of the EU Planning Directive and held that "member states have a duty to ensure that environmental assessments are made in line with the Directive" and that national authorities and courts have a duty to intervene.[48] The Supreme Court held that because the opening decision and licensing decision have

[39] Ibid. at ¶149.
[40] See ibid.
[41] See ibid. at ¶208.
[42] Ibid. at ¶155.
[43] See ibid. at ¶¶216 and 223.
[44] Ibid. at ¶216.
[45] Ibid. at ¶¶216 and 191.
[46] See ibid. at ¶216.
[47] Ibid. at ¶222.
[48] Ibid. at ¶244.

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not "led to emissions of greenhouse gases," the authorities "will be able to correct – 'remedy'– . . . any deficient assessment."[49]

The majority opinion of the Supreme Court thusly concluded that there were no errors that would invalidate the licenses.[50]

The dissent reached a different conclusion on the uncertainty of information and timing and scope of the impact assessment. It found that the licenses challenged on these procedural grounds were invalid due to the lack of a climate impact assessment.[51] Moreover, despite the uncertainty surrounding the petroleum resources,[52] the dissent found that the law requires the assessment to be "done as early as possible in the process."[53]

The dissenting opinion agreed with the majority that the procedural rules in petroleum legislation must be assessed in light of Article 112 but went further than the majority, stating that the "impact assessment is meant to ensure information for – and create a basis for participation by the population."[54] The dissent placed a greater weight on the fact that political discussions in society and in government could have been different if an impact assessment and evaluation of the climate impacts from exported emissions had been done, even if this had already been discussed at a general level. According to the dissenting opinion, "there is little satisfaction in speculating on how political processes could and would have run, if the impact assessment had looked differently."[55]

Ultimately, through this case, progress has been made in addressing exported emissions in order to hold fossil fuel suppliers accountable for the climate harms.

Now that the case against Norway for an expansion of Arctic fossil fuel production continues before the European Court of Human Rights,[56] the Norwegian State has to answer the question as to whether the

[49] Ibid. at ¶¶244 and 246.
[50] See ibid. at ¶250.
[51] Ibid. at ¶258.
[52] See ¶¶259–88.
[53] Ibid. at ¶269.
[54] Ibid. at ¶255.
[55] Ibid. at ¶278.
[56] The case against an expansion of fossil fuels production in the Arctic continues. Greenpeace Nordic, Nature and Youth and six individual applicants have filed an application against the Norwegian government before the European Court of Human Rights. Particularly the delay in the assessment of climate impacts, in their view, gives rise to an Article 14 discrimination claim. See <https://www.greenpeace.org/norway/people-vs-arctic-oil/>.

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postponement of the assessment of environmental impacts is compatible with the convention.[57]

17.4 OTHER JURISDICTIONS CLOSING THE SUPPLY-SIDE ACCOUNTABILITY GAP

Several courts around the world have found that the climate effects of a fossil fuel project (in terms of greenhouse gas emissions) should be taken into account in the environmental impact assessment stage, which would, as a result, invalidate some projects.[58] Other jurisdictions have also included exported emissions in their analyses. This could mean that the judiciary can play a more active role in bridging this accountability gap. In the 2006 case *Gray* v. *Minister for Planning*, an Australian Federal Court rejected the environmental impact assessment for a coal mine slated for development in Anvil Hill, which would have produced coal for coal-fired power stations in Australia and overseas.[59] It held that the environmental impact assessment for the coal mine failed to take into account the potential greenhouse gas emissions that stemmed from the burning of coal by third parties outside of the control of the coal mine proponents. The court found that there was a sufficient causal link between the coal produced, the combustion of coal abroad, the release of greenhouse gases, and the increase in global warming.

This court also found that the failure to consider these emissions constitutes a breach of the legal requirement to take into account the principle of intergenerational equity.[60]

In 2019, in the case *Gloucester Resources Limited* v. *Minister for Planning*, the court specifically held that combustion emissions from exported resources

[57] "Assuming that the purpose of issuing production licences is ultimately the subsequent extraction of oil and gas: to what degree – factually and legally – may the applicant organisations' arguments concerning the environmental consequences of any specific petroleum production and extraction in continuation of the licences granted in the decision reviewed by the domestic courts realistically be taken into account at any later stages of the administrative process relating to production (such as in connection with approval of plans for development and operation/exploitation of petroleum deposits under section 4-2 of the Petroleum Act)? Will the scope, depth, quality and efficiency of any such subsequent assessment be such as to render unnecessary under the Convention an assessment, prior to the granting of the licences, of the environmental consequences of future extraction of oil and gas?" *Greenpeace Nordic and others* v. *Norway*, Application no. 34068/21. See <https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-214943%22]}>.

[58] See, e.g. *Earthlife Africa Johannesburg* v. *Minister of Envtl. Affairs* 2017 (2) All SA 519 (GP) (S. Afr.) at ¶88.

[59] See *Gray* v. *The Minister for Planning and Ors* [2006] NSWLEC 720 (Austl.).

[60] See ibid. at ¶126.

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must be included in assessments made under Australian law.[61] "In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time …. Wrong time because the greenhouse gas emissions (GHG) of the coal mine and its product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions."[62]

17.5 TWO PRINCIPLES TO CARRY BEYOND THE NORWEGIAN SUPREME COURT

As communities, campaigners, activists, and lawyers gear up for the next big fight to close the supply-side accountability gap, there are two principles to take beyond the Norwegian Supreme Court.

17.5.1 *There Is No Such Thing as Perfect*

Around the world, policymakers, industry lobbyists, and courts have for a long time accepted that climate pollution is predominately a demand-driven problem, and as such, reducing a particular fossil fuel supply project would not have an impact on the overall concentration of climate pollutants in the atmosphere. Perfect substitution, or the "market substitution assumption," is the belief that if a fossil fuel project is rejected, another one will replace it and, as such, approving a project will have no consequence on the environment.[63] This assumption states that the rejection of a project will make no "material difference to global greenhouse gas emissions and resulting climate change" because the global demand will be met by another project elsewhere.[64] The market substitution assumption "allows responsibility for emissions to be continually avoided."[65] This argument also "posits that the extraction of fossil fuels will not actually cause an increase in consumption, because the same quantity of the fuel would be produced elsewhere and eventually transported

[61] See *Gloucester Resources Limited* v. *Minister for Planning* [2019] NSWLEC 7.
[62] Ibid. at ¶699.
[63] See Justine Bell-James and Briana Collins, "If We Don't Mine Coal, Someone Else Will: Debunking the Market Substitution Assumption in Queensland Climate Change Litigation" (2020) 37 *Environmental and Planning Law Journal* 167.
[64] Ibid.
[65] Ibid.

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and consumed, even if the [government] agency did not approve the proposal at issue."[66]

This assumption forms the basis of the "drug dealer defense" in court and in the public eye and has been used by the fossil fuel industry, and often sponsored by governments, to escape moral and legal responsibility for creating and continuing to fuel and profit from the climate crisis. Those raising this defense argue that the supply of climate polluting energy sources will continue to flow from different sources, even if the emissions from a particular project are stopped. This, however, has been deemed by some analysts as "not a true comparison. A drug dealer cannot avoid criminal responsibility by arguing that, should they be charged and removed from the market, another drug dealer will take their place."[67]

The basis for this defense ignores any effect that the restriction of supply can have on price and, in turn, on demand. This perfect substitution argument "defies the basic economics of supply and demand. If there is less availab[ility] of a commodity – such as oil – its price will increase, meaning less of it will be consumed."[68] When it comes to elasticity of supply – the ability of fossil fuel producers to increase extraction in response to an increase in prices – studies have shown that "for oil, each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term."[69]

There are cases that acknowledge that perfect substitution cannot be assumed. In *WildEarth Guardians* v. *United States Forest Service et al.*, the District Court of Colorado dismissed arguments by the respondent agencies that there would be perfect substitution between coal provided by the contested mine and coal mined somewhere else.[70]

In *Gloucester Resources Limited* v. *Minister for Planning*, the court found that there could be "no assumptions made that there would be market substitution by coal from new coal mines in other countries if the project were to be refused."[71] Chief Justice Preston referred to *WildEarth Guardians* and concluded that "the potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a

[66] Michael Burger and Jessica Wentz, "Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review" (2017) 41 *Harvard Environmental Law Review* 109.
[67] Bell-James and Collins, "If We Don't Mine Coal, Someone Else Will," above note 61 at 184.
[68] "The Emissions Gap Report 2019" (2019) United Nations Environment Programme 50.
[69] Ibid. (internal citations omitted).
[70] See *WildEarth Guardians* v. *U.S. Forest Service*, 52 F. Supp.23d 1174 (D. Colo. 2014).
[71] *Gloucester Resources Limited* v. *Minister for Planning* [2019] NSWLEC 7.

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reason to approve a definite development that will certainly cause the unacceptable environmental impacts."[72]

In the *People* v. *Arctic Oil* case, the plaintiffs argued that what is known as "perfect substitution" cannot be assumed, citing several studies. Statistics Norway, for example, found that "only half of any reduction in production volume would be replaced by production in other places."[73] The Stockholm Environmental Institute concluded that "when global oil production increases, so do oil consumption and overall CO_2 emissions."[74] And Oil Change International showed that "by continuing to explore for and develop new reserves, Norway is forcing a more difficult transition on other countries (as well as itself)."[75]

The Norwegian Supreme Court held that "the net effect of the combustion emissions is complex and controversial, as it is related to the global market and the competitive situation for oil and gas …. Cuts on Norwegian oil production could be replaced by oil from other countries."[76] Without discussing these studies, the court found that postponing the climate impact assessment to the PDO stage would be appropriate.

Echoing the words of a fictional character in Brian De Palma's *Scarface* "never get high on your own supply,"[77] major fossil fuel exporting countries enact domestic climate-friendly policies while continuing to profit from feeding the world's fossil fuel addiction through exports. Embedding a perfect substitution assumption in policy and in the judiciary would mean actively betting against the Paris Agreement.[78]

17.5.2 *Betting against the Paris Agreement Is Betting against Ourselves*

International law supports the finding that supplier states are legally responsible for the greenhouse gas emissions stemming from the combustion of their fossil fuel products, even after export.

[72] *Gloucester* at 545, cited in Bell-James and Collins, "If We Don't Mine Coal, Someone Else Will," above note 61 at 169.

[73] Taran Fæhn et. al, "Norsk olje- og gassproduksjon: Effekter på globale CO_2 -utslipp og energisituasjonen i lavinntektsland" (2013) Statistics Norway, <https://www.ssb.no/natur-og-miljo/artikler-og-publikasjoner/_attachment/133792?_ts=140969bb2e8>.

[74] Adrian Down, "Norwegian Oil Production and Keeping Global Warming "Well below 2°C"" (2017) Stockholm Environmental Institute.

[75] McKinnon et al., "The Sky's Limit Norway," above note 25.

[76] *People* v. *Arctic Oil* Supreme Court judgment, above note 19 at ¶234.

[77] *Scarface* (Universal Pictures 1983).

[78] See Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, December 12, 2015, TIAS No. 16-1104.

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17.5.2.1 The No-Harm Principle

Established as a principle of customary international law by the International Court of Justice (ICJ) in the *Pulp Mills on the River Uruguay* judgment,[79] the no-harm principle provides that states have to exercise due diligence in preventing harm by taking all measures possible to reduce the risk of significant transboundary harm.[80] With respect to the climate change regime, the no-harm principle is embodied in the preamble to the UNFCCC. Legal scholars have also argued that this level of due diligence is found in the goals of the Paris Agreement.

17.5.2.2 The Paris Agreement

On December 12, 2015, parties to the United Nations Framework Convention on Climate Change (UNFCCC) reached an agreement to "strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius."[81] The Paris Agreement sets out governmental duties in curbing greenhouse gas emissions and combating climate change. The Paris Agreement preamble acknowledges that "climate change is a common concern of humankind" and places the duty on developed nations to "continue taking the lead by undertaking economy-wide absolute emission reduction targets." In addition, the principle of common but differentiated responsibilities is enshrined in the Agreement.[82]

Analysts believe that "achieving the Paris Agreement goals entails a rapid phase out of fossil fuel extraction, and a dramatic turn from current patterns of investment, policy and subsidies."[83] Efforts to further expand fossil fuel exploration, extraction, and production is therefore not only inconsistent with the Paris Agreement, it also contravenes its very purpose and specific terms.

[79] See *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* [2010] ICJ Reports 2010, < https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>.

[80] See ibid. at ¶¶101 and 187.

[81] "What Is the Paris Agreement?," United Nations Climate Change, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

[82] Including in Articles 2.2, 4.3, and 4.19. See Paris Agreement to the United Nations Framework Convention on Climate Change, Paris, Arts. 2.2, 4.3, & 4.19, December 12, 2015, TIAS No. 16-1104.

[83] Muttit and Kartha, 'Equity, Climate Justice and Fossil Fuel Extraction," above note 11 (internal citations omitted). See also Depledge et al. (eds.), "The Production Gap," above note 1 at 14 (internal citations omitted).

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States have a duty of international cooperation to protect the human rights threatened by climate change.[84] This duty, along with the principle requiring due diligence to avoid causing transboundary harm and the need to achieve the Paris temperature targets, leads to the conclusion that major suppliers of fossil fuels need to take action to curb production.

Between signing and ratifying the Partis Agreement, the Norwegian government granted the licenses that were the subject of litigation in the *People* v. *Arctic Oil* case. The Court of Appeal in the *People* v. *Arctic Oil* case rightly pointed out that the Paris Agreement did not prevent it from taking exported emissions into account in its analysis. Stronger still, as discussed above, the Paris Agreement actually supports considering exported emissions as a result of the principle of common but differentiated responsibilities. The Supreme Court majority and dissent opinions found that there is a duty to assess and evaluate climate impacts, including exported emissions – with the majority finding that it was appropriate to conduct this analysis in the future. However, as climate science indicates, time is not on our side.

Norway submitted an enhanced Paris Agreement target in February 2020, which "sets a target of reducing emissions by at least 50% and towards 55% below 1990 levels by 2030."[85] The Norwegian government represents its actions as "doing *its fair share* for the global goal of keeping global warming below 2°C compared to pre-industrial levels. This is consistent with industrialised countries taking the lead."[86] However, "current policies are projected to lead to emission levels of which [are only] 14-21% below emissions in 1990"[87] and there are no supply-side measures in their NDC. More alarming still, in the context of the COVID-19 pandemic, the Norwegian government doubled down on its bet against the Paris Agreement and presented an economic recovery package that "includes tax relief for oil and gas companies, which economists warn could lead to Norway extracting oil and gas *for a longer period than previously expected*."[88]

[84] See, e.g., United Nations Framework Convention on Climate Change, Preamble, Rio de Janeiro, May 9, 1992, 1771 UNTS 107; see also Paris Agreement, above note 76 at Art. 2.

[85] See "Norway," Climate Action Tracker, <https://climateactiontracker.org/countries/norway/>; see also "Update of Norway's Nationally Determined Contribution," UNFCCC, <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway_updatedNDC_2020%20(Updated%20submission).pdf>.

[86] Ibid. (emphasis in original)

[87] Ibid.

[88] Ibid. (emphasis in original)

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17.6 CONCLUSION

Suppliers who, through their push to expand the fossil fuel industry, delay meaningful action on climate change cannot perpetually hide behind the apparent loopholes in climate accountability. Protecting the rights at stake from the effects of climate change and fulfilling international law obligations means taking exported emissions into account as early as possible and, also taking supply-side measures such as curbing the expansion of fossil fuel production. Failure to fulfill these obligations is not only unlawful but also a bet against ourselves and our children's future.

It is the urgent legal responsibility "and moral obligation of wealthy fossil fuel producers to lead in putting an end to fossil fuel development and to manage the phase-out of existing production."[89] People all over the world are stepping up and have filed over 600 cases to force action on the climate crisis. Domestic courts have and will continue to close the accountability gap in these cases in the future. For now, the *People* v. *Arctic Oil* Supreme Court judgment sends a firm warning to the industry – you can look but you cannot touch.

[89] The Lofoten Declaration states that climate leadership requires managing the decline of fossil fuel production. It has been signed by hundreds of organizations from dozens of countries around the world. <http://www.lofotendeclaration.org/>.

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