DEVELOPMENT DISASTERS: ACCOUNTABILITY AND REMEDY IN INTERNATIONAL DEVELOPMENT PROJECTS

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International development projects have a history of creating problems on the ground. Debates about the benefits of top-down development, the need for community buy-in, and the importance of community participation in development have been ongoing and have focused on how to prevent environmental and social harms to local communities. More recently, the conversation has shifted to focus more on the importance of providing remedy for harms, with a focus on development finance institutions (DFIs). DFIs have embraced internal, independent mechanisms to provide a process for accountability when a community suffers harms, but those mechanisms are not externally enforceable. They rely on the DFI, which caused the harm in the first place, to voluntarily comply with the accountability mechanism's findings and recommendations. Much like development projects themselves, this produces mixed results. Most importantly, while the DFI might stop or change what it is doing, it will rarely pay individual community members for the harms they suffered.

What if there were a way for communities to use a domestic legal system to sue a DFI for the harms that the community suffered because of the development project? This Comment seeks to articulate the tort duty that DFIs owe to affected

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communities. This Comment argues that a DFI owes a duty of reasonable care to a community when the project has a development purpose and the institution plays a significant role in the design, approval, or implementation of the project. Reasonable care, akin to due diligence, requires the institution to follow its own environmental and social policies and comply with industry standards. This Comment considers these issues.

Development projects provide stable electrical grids, business opportunities, agricultural expertise, and other benefits. Shouldn't a legal system incentivize these projects to engage in strong environmental and social practices as well? At the very least, shouldn't a development institution provide remedy to individuals when a project causes death, loss of livelihood, or displacement?

TABLE OF CONTENTS

INTRODUCTION

My world's on fire, so is yours. Between climate change, a global pandemic, and the concerning rise of authoritarian leadership, international development seems like a problem of a bygone era.[1] Yet, in its modern form, it is an ongoing disaster. The story of international development over the last seventy years includes narratives of displaced peoples, neocolonialism, and unintended consequences.[2] Development organizations, such as the World Bank Group (World Bank)[3] and the United Nations (UN) Development Programme,[4] have taken some steps

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1. *See* Henry Fountain, *Climate Change Affected Australia's Wildfires, Scientists Confirm*, N.Y. TIMES (Mar. 4, 2020), https://www.nytimes.com/2020/03/04/climate/australia-wildfires-climate-change.html (explaining how climate change affected the Australian wildfires); Tim Horley et al., *The World Is Experiencing a New Form of Autocracy*, ATL. (Mar. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/03/new-authoritarianism/607045 (describing how authoritarian-leaning leaders use "legal measures to subvert constitutional constraints on their power"); Anne C. Mulkern, *Fast-Moving California Wildfires Boosted by Climate Change*, SCI. AM. (Aug. 24, 2020), https://www.scientificamerican.com/article/fast-moving-california-wildfires-boosted-by-climate-change [https://perma.cc/ST8H-ZETX] (describing how climate change increased the devastation of the California wildfires); *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19* (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020 [https://perma.cc/A3J5-YXXH] (announcing that the WHO declared COVID-19 a pandemic).

2. *See* Robert H. Wade, *Boulevard of Broken Dreams: The Inside Story of the World Bank's Polonoroeste Road Project in Brazil's Amazon* 5–6 (Grantham Research Inst. on Climate Change & the Env't, Working Paper No. 55, 2011), http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/02/WP55_world-bank-road-project-brazil.pdf [https://perma.cc/6ZWV-3MB5] (describing the Polonoroeste Road project as "forest colonization in the tropics" and demonstrating how it destroyed rainforests and displaced Indigenous peoples).

3. The World Bank is comprised of five organizations: the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID). *About the World Bank*, WORLD BANK GROUP, https://www.worldbank.org/en/about [https://perma.cc/33LH-CDGZ]. This Comment focuses primarily on the IFC, which is the private lending arm of the World Bank. *Id.*

4. The UN Development Programme's goals are to promote sustainable development and to eradicate poverty, inequalities, and exclusion in roughly 170 countries and territories. *About Us*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/content/undp/en/home/about-us.html [https://perma.cc/LN6H-DBBW].

to address these inherent problems by implementing environmental and social standards.[5] International development is, at its core, a public undertaking; yet, it has been privatized through project finance structures that have created more corporate opportunities.[6] As international development has evolved and continued to cause serious environmental and social harms, civil society organizations have pushed for stronger accountability mechanisms and opportunities for communities to receive remedy for the harms they have suffered.[7]

The work of the International Finance Corporation (IFC) demonstrates the intersection between public-oriented goals for development projects and privately funded models, which can muddle accountability for the projects' consequences. The IFC is the private sector lending arm of the World Bank.[8] As an entity focused on the private sector rather than the traditional arena of public-sector development, the IFC occupies a unique space that raises important questions of responsibility and accountability. Since the mid-1990s, development organizations have created independent accountability systems, such as the IFC's Compliance Advisor Ombudsman (CAO), to address the unintended consequences of development.[9] Individuals from affected communities can bring complaints to the CAO, which determines whether the IFC complied with IFC environmental and social standards.[10]

But what recourse does a community have when the IFC fails to come back into compliance with its environmental and social

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5. *See, e.g.*, *Environmental and Social Framework*, WORLD BANK GROUP, https://www.worldbank.org/en/projects-operations/environmental-and-social-framework [https://perma.cc/LF6F-X93G] (describing the World Bank's Environmental and Social Framework, which includes policies that apply to both the World Bank and to borrower-clients to whom the IFC lends money); *see also Sustainable Development Goals*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/content/undp/en/home/sustainable-development-goals.html [https://perma.cc/D4K9-7HSU] (summarizing the UN Development Programme's Sustainable Development Goals, which are the 2012 reformulation of the Millennium Development Goals).

6. *See, e.g.*, *infra* note 8 and accompanying text.

7. Benjamin K. Sovacool et al., *Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel*, 50 DEV. & CHANGE 867, 875 (2018).

8. *About IFC: Overview*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new [https://perma.cc/E4BA-K6GQ].

9. *See infra* Section I.B.1.

10. *See infra* Section I.B.1.

standards and policies? For example, in 2015, a fishing community in Gujarat, India sued the IFC in a U.S. court for failing to comply with its own standards.[11] A group of farmers in Honduras sued the IFC for similar reasons in 2017 in a class action.[12] Both lawsuits alleged that the IFC was liable to the affected communities for breaching the IFC's Performance Standards—which are also the industry standard—for environmental and social due diligence.[13] As these claims illustrate, a classic negligence theory may be the most effective way to establish a system of accountability that can provide a remedy to the individuals whom a development project has harmed.[14]

This Comment seeks to articulate a workable negligence standard to hold development finance institutions (DFIs) accountable for environmental and social harms to affected communities.[15] This Comment proposes the following standard: when a financial institution provides a loan for the purpose of a development project, it owes a duty of reasonable care to the affected community for the environmental and social harms that the DFI's project causes the community to suffer when the DFI plays a significant role in the design, assessment, approval, or implementation of the project.[16] In the development context, the lender often takes a more active role in project implementation than in traditional lending contexts.[17] This Comment seeks to answer the question of under what circumstances a DFI, like the IFC, is liable in U.S. courts for harms caused to local communities by the DFI-financed projects.

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11. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 767 (2019).

12. Complaint at 2, 5, 86–91, Doe v. IFC Asset Mgmt. Co., No. 1:17-cv-01494-UNA (D. Del. Oct. 24, 2017) [hereinafter *Doe* Complaint].

13. Class Action Complaint for Damages and Equitable Relief at 1–3, Jam v. Int'l Fin. Corp., 442 F. Supp. 3d 162 (D.D.C. 2020) (No. 1:15-cv-00612) [hereinafter *Jam* Complaint]; *Doe* Complaint, *supra* note 12, at 83, 86–91; *see infra* note 46 and accompanying text.

14. *See infra* Section II.B.

15. *See infra* Section II.A.

16. *See infra* Section II.A.

17. *See* Vinay Bhargava, *The Role of International Financial Institutions in Addressing Global Issues*, *in* GLOBAL ISSUES FOR GLOBAL CITIZENS 405 (Vinay Bhargava ed., 2006), http://documents1.worldbank.org/curated/en/390361468319746301/pdf/374520 Global0i1OR0OFFICIAL0USE0ONLY.pdf (discussing the multiple roles of international financial institutions in furthering development goals, which include policy advice, program management, environmental and social safeguards, and other components that go beyond the traditional role of the lender as the institution that solely provides financing); *see also infra* Section I.C.2.

Part I of this Comment first explains the rise of environmental and social standards in business. It then discusses how financial institutions, like the IFC, internally assess and manage environmental and social risks as a core part of their mission and purpose. Next, Part I addresses the situations that led to the cases that the fishing community in India and activists in Honduras filed against the IFC. Finally, Part I explores general tort principles and current U.S. law on when a lender owes a duty of care to a third party. Part II then argues that financial institutions owe a duty of care to the communities affected by the projects that they finance when the project has a development purpose and the lender plays a significant role in defining and ensuring the implementation of the project's environmental and social standards. DFI-financed projects are by definition for a development purpose, and Part II explores how this duty applies to DFI-financed projects. This Comment concludes that the IFC owed a duty to the communities in both India and Honduras, and that the IFC breached its duty of reasonable care because it ignored violations of its environmental and social standards throughout the projects' lifetimes.

I. BACKGROUND

Over the last few decades, civil society organizations have increasingly called for accountability in international development and international development finance.[18] As early as 1978, the World Bank responded to this concern by establishing internal policies that limit the environmental impacts of World Bank-financed development projects.[19] As development projects continued to cause disastrous results around the world, civil society organizations pushed harder for lenders to adhere to standards that would prevent forced resettlement, death, environmental degradation, and morally unacceptable labor practices.[20]

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18. SHADES OF GREEN: ENVIRONMENTAL ACTIVISM AROUND THE GLOBE 204–05 (Christof Mauch et al. eds., 2006).

19. *World Bank Group Archivists' Chronology 1944–2013*, WORLD BANK GROUP LIBRARY & ARCHIVES DEV. 199, http://pubdocs.worldbank.org/en/186241442500110286/PDF-World-Bank-Group-Archivists-Chronology-1944-2013.pdf [https://perma.cc/CQV3-QEB7]. These policies were not a focus of the organization at the time, but they nonetheless existed.

20. Projects like the Narmada dam in India and the Polonoroeste Road project in Brazil were early examples of severe environmental and social consequences. *See* Wade, *supra* note 2, at 6, 19–20 (demonstrating how the Polonoroeste Road project destroyed rainforests and displaced Indigenous groups); SHADES OF GREEN: ENVIRONMENTAL

As financial institutions have found ways to provide appearances of redress to communities, the systems still often fall short of actually providing a remedy for harms to communities. This Part first briefly discusses the development of more robust accountability and remedy systems in development. It then explains the IFC's environmental and social standards, as well as current pending cases against the IFC, before discussing negligence jurisprudence in other lending contexts in which courts have established a duty of care for a lender in a negligence action.

A. *Rise of Environmental and Social Standards in Business and Development*

Theoretically, corporate entities should respect human rights because it is the right thing to do, but international law, in its current form, is only binding on states.[21] Mechanisms for requiring corporate entities to care about human rights or forcing them to comply with the requirements of international law do not exist in the traditional international legal system.[22] Similarly, no treaty requires businesses to respect environmental rights, nor are there binding international agreements that require states to implement environmental regulations for businesses.[23] However, various actors, ranging from the UN to businesses themselves, have taken steps to try to address this gap, particularly in a globalized economy. The UN Human Rights Council

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ACTIVISM AROUND THE GLOBE, *supra* note 18, at 204; Sovacool et al., *supra* note 7, at 875 (delineating how the Narmada dam project submerged 37,000 hectares of land, permanently displacing 245 settlements of mostly Indigenous people).

21. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (AM. LAW. INST. 1987).

22. *See id.* (noting that international law applies only to states and intergovernmental organizations).

23. While the Paris Agreement, which contains both binding obligations and voluntary commitments for states, was a major step forward in international environmental law, it is not binding on businesses; however, businesses have started to make voluntary commitments that align with the Paris Agreement's goals. *See, e.g.*, David Hodari & Adriano Marchese, *BP Wants to Become Carbon Neutral by 2050, but Doesn't Say How*, WALL ST. J. (Feb. 12, 2020), https://www.wsj.com/articles/bp-wants-to-be-carbon-neutral-by-2050-11581517147 (describing BP's pledge to reduce its own emissions but failure to explain how it will achieve its goals). *See generally* Maria L. Banda, *The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement*, 42 HARV. ENVTL. L. REV. 325, 325 (2018) (explaining how the Paris Agreement contemplated a role for the private sector in addition to creating binding obligations on states for climate governance and establishment of sustainable practices).

adopted the United Nations Guiding Principles on Business and Human Rights (the "Ruggie Principles") in 2008.[24] These principles were a straightforward framework that called for three things: "protect, respect, and remedy."[25]

Reflecting debates in the 1990s over global supply chains and human rights, the Ruggie Principles note that, under international law, states have a responsibility to protect citizens from human rights abuses by third parties, including businesses.[26] This "protect" model, which applies to states, is based on the modern international legal rule of state responsibility, where states, as parties to human rights treaties, are legally bound to protect their citizens from the human rights abuses that companies commit.[27] The "respect" model applies to businesses, and it encourages them to respect human rights under a "due diligence" model of corporate responsibility; due diligence requires that businesses have a human rights policy, conduct impact assessments, and monitor compliance with the Ruggie Principles.[28] Finally, the Ruggie Principles propose that, when a company's conduct harms citizens, states and corporations should provide "effective access to remedy" in the form of both judicial and non-judicial grievance mechanisms.[29] In the U.S. context, providing access to state judicial mechanisms—not just corporate-run, independent accountability mechanisms—requires the development of common law negligence to encompass harms caused by development actors.[30] The Ruggie Principles also note that the existence and creation of both organization-run non-judicial mechanisms, such as the IFC's CAO or the World Bank Inspection Panel, and state-run non-judicial mechanisms, should not replace

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24. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008). The Ruggie Principles are primarily focused on human rights, but states use them in the environmental context as well because of the significant overlap between environmental and human rights, especially in the development context. *Cf. infra* Section I.B.2.

25. Ruggie, *supra* note 26, at 6.

26. *Id.* at 9.

27. *Id.* at 7–8.

28. *Id.* at 17–19.

29. *Id.* at 22 ("Expectations for States to take concrete steps to adjudicate corporate-related human rights harm[s] are expanding.").

30. *See infra* Part II (proposing a negligence-based framework to apply in cases in which communities allege harm by development organizations).

federal or local courts.[31] The United States endorsed the Ruggie Principles in 2010.[32] The framework of the Ruggie Principles is a useful starting point in any analysis of a development actor's standard of care in human rights and environmental issues.

In addition to the Ruggie Principles, the Equator Principles (EPs) are another framework that international financial institutions look to for guidance on environmental and social policies and standards.[33] The EPs are a global banking initiative that financial institutions first created in 2003 and updated for a fourth time in November 2019.[34] By 2020, 111 financial institutions had adopted the EPs.[35] The EPs borrow directly from the IFC Performance Standards,[36] and many financial institutions that partake in project finance have adopted the IFC Performance Standards as their own due diligence standards.[37] The ten EPs are as follows: (1) review and categorization; (2) environmental and social assessment; (3) applicable environmental and social

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31. *See* Ruggie, *supra* note 26, at 22 (contextualizing "access to remedy" as multi-faceted at multiple levels but emphasizing that judicial remedies are not replaceable).

32. *United States Endorses Ruggie Principles on Responsibility of Businesses and Transnational Corporations to Respect Human Rights*, 105 AM. J. INT'L L. 792, 792 (2011). While an endorsement is not a binding legal commitment, it can signal what kind of regulations the private sector should be preparing for. In other words, it puts the private sector on notice to find ways to address human and environmental rights issues.

33. *The Equator Principles*, EQUATOR PRINCIPLES, https://equator-principles.com/about [https://perma.cc/H64R-TNKZ]. The EPs were created specifically for and by private financial institutions, which shows how pervasive the idea of environmental and social standards has become in both private and public sector development projects. *See id.* The Organization for Economic Co-operation and Development (OECD) Guidelines provide another example of how environmental and social standards are accepted in the investment community. *See generally* Org. Econ. Co-operation & Dev., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011 ed. 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/P4GV-T8HG].

34. *See A Strengthened Equator Principles, and New Leadership for the Association*, EQUATOR PRINCIPLES (Nov. 18, 2019), https://equator-principles.com/ep-association-news/a-strengthened-equator-principles-and-new-leadership-for-the-association [https://perma.cc/PBV6-5NUT].

35. *EP Association Members & Reporting*, EQUATOR PRINCIPLES, https://equator-principles.com/members-reporting [https://perma.cc/44AP-V7V7]. *See generally The Equator Principles* (July 2020 Update), https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf [https://perma.cc/S52Z-6B88] [hereinafter *The Equator Principles, Updated*] (providing the current version of the EPs).

36. *See infra* note 52 and accompanying text (providing the IFC Performance Standards).

37. *The Equator Principles, Updated*, *supra* note 37, at 10.

standards; (4) environmental and social management system and EP action plan; (5) stakeholder engagement; (6) grievance mechanisms; (7) independent review; (8) covenants; (9) independent monitoring and reporting; and (10) reporting and transparency.[38] The fifth principle, stakeholder engagement, specifically refers to a requirement for "good faith" negotiations with affected communities, workers, and other stakeholders, including additional steps that an institution must take when one of the stakeholders is an Indigenous community.[39] Principle six, grievance mechanisms, requires the corporate-created mechanism to be "scaled to the risks and impacts of the [p]roject," which implies that effective grievance mechanisms should be contextualized and project-specific.[40] It further provides that "[g]rievance mechanisms should not impede access to judicial or administrative remedies."[41] By noting the existence of judicial and administrative remedies for the harms that stakeholders experience, the EPs imply that certain harms should be taken to a judicial or administrative tribunal.[42] Compliance with the EPs is based on an independent monitoring and evaluation process, in which an external consultant determines whether the project complies with the standards in the EPs.[43]

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38. *Id.* at 1.

39. *Id.* at 12–13. The term "stakeholder" has recently been trending as the conglomerate of persons and entities that stand to benefit from the corporate enterprise. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/DQ6B-LEPT]. In a 2019 Business Roundtable publication on the purpose of a corporation, the term stakeholder was used where "shareholder" has traditionally been used. *See id.* (incorporating the Business Roundtable's full "Statement on the Purpose of a Corporation"). *But see Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL INSTITUTIONAL INV. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/D5KY-S6RW] (arguing that corporate management should put shareholder obligations before any obligations to "stakeholders"). Some have seen this as a shift towards focusing on the triple bottom line rather than solely on increasing profit. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans,' supra* note 42 (collecting quotes from various CEOs about Business Roundtable's statement's focus on the corporate purpose of serving society as a whole).

40. *The Equator Principles, Updated*, *supra* note 37, at 13.

41. *Id.*

42. *See id.*

43. *Id.* at 16–17.

While the Ruggie Principles provided one of the first frameworks for accountability in project finance and development, many international financial institutions have adopted the IFC Performance Standards as the industry standard of accountability in private sector project finance, in the form of the EPs or the Performance Standards themselves.[44] In sum, financial institutions have invoked the purpose of development in widely accepting environmental and social standards for their investments; the relationship between climate stability and economic stability is simultaneously becoming increasingly clearer. Yet, the question still remains: why are economic risks to lenders remediable in court while environmental and social risks to affected communities are not?

B. IFC's Approach to Sustainable Development

The IFC's principal purpose is to "end extreme poverty and promote shared prosperity in every country."[45] One of the ways in which the IFC achieves its purpose is by issuing direct loans for private sector projects in developing countries.[46] The project eligibility criteria requires that projects meet the IFC's internal environmental and social policies "as well as those of the host country."[47]

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44. Steven Herz et al., *The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remedying Violations?*, CENTER FOR INT'L ENVTL. L. 2 (2008), https://www.ciel.org/wp-content/uploads/2015/05/Ruggie_Submission.pdf [https://perma.cc/MTL9-8J9A] (noting that a number of actors in the industry have adopted the IFC Performance Standards, in whole or in part, as their environmental and social standards). By 2008, over sixty international financial institutions, including the major development banks, had adopted the Performance Standards. *Id.* Currently, both public and private banks have adopted the EPs, which are based on the Performance Standards, including Citigroup, Inc.; Fidelity Bank, PLC; Royal Bank of Scotland; Credit Suisse; and Nippon Life Insurance Company, to name a few. *EP Association Members & Reporting*, *supra* note 37.

45. *About IFC: Overview*, *supra* note 8.

46. *Loans*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/products+and+services/loans/loans [https://perma.cc/Z8AK-GRMZ]. In 2019, the most recent fiscal year with available data, the IFC provided more than $19 billion in financing for private sector development. *Solutions*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions [https://perma.cc/K3M6-UL4W].

47. *How to Apply for Financing*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/how-to-apply-for-financing [https://perma.cc/D8XP-NQLY].

The IFC's policies are codified in the IFC Performance Standards, which the IFC established in 2006 as part of a new sustainability framework that applied to all IFC-financed projects.[48] The unveiling of the sustainability framework signaled to private sector actors that a shift toward more robust environmental and social accountability was coming, and private financial institutions began adopting similar sets of standards.[49] The IFC updated the Performance Standards most recently in 2012; in their current form, the Performance Standards consist of the following eight principles: (1) risk management; (2) labor; (3) resource efficiency; (4) community; (5) land resettlement; (6) biodiversity; (7) Indigenous people; and (8) cultural heritage.[50] The IFC has a duty to ensure that IFC borrower-clients fulfill their obligation to use the Performance Standards to manage environmental and social risks as a way to "enhance[]" development opportunities.[51] The Performance Standards are incorporated into the loan agreement between the client and the IFC.[52] Taken as a whole, the Performance

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48. *Performance Standards*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards [https://perma.cc/LH9V-5ANW]; *see also Former Environmental and Social Safeguards and Supporting Materials*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/safeguards-pre2006 [https://perma.cc/CEW9-6J8H] (combining a myriad of "[s]afeguard [p]olicies" into a single framework that brought all environmental and social policies under the same umbrella).

49. Press Release, Int'l Fin. Corp., IFC Celebrates One Year of New Environmental and Social Standards: Standards Emerge as Sustainability Benchmark in Project Finance (May 14, 2007), https://ifcext.ifc.org/ifcext/pressroom/IFCPressRoom.nsf/0/01CF0FE4C946FC26852572DB0056CC4F?OpenDocument [https://perma.cc/KS7U-RVCN].

50. *Performance Standards on Environmental and Social Sustainability*, INT'L FIN. CORP. (Jan. 1, 2012), https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h [hereinafter "*Performance Standards*"].

51. INT'L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 (2012), https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk [https://perma.cc/37D6-ES6B] (explaining that managing environmental and social risks through the Performance Standards enhances development opportunities but failing to explain precisely what constitutes a development opportunity or who benefits from enhancing them).

52. *E.g.*, IFC-CGPL Loan Agreement (Apr. 24, 2008), Sched. 1 (Common Terms Schedule), 5.2(z) [hereinafter Loan Agreement], https://earthrights.org/wp-content/

Standards address major global issues such as climate change, gender, and human rights.[53]

This Section first reviews the requirements under each Performance Standard, and it then considers how the IFC has failed to enforce the borrower-client's requirement to comply with those standards in two projects: the Tata Mundra coal-fired power plant project in Gujarat, India and the palm oil project in Honduras.

1. IFC environmental and social standards

The Performance Standards themselves encompass a broad range of environmental and social concerns.[54] The IFC requires borrower-clients to comply with the Performance Standards throughout the implementation of a development project as part of the contract for receiving a loan.[55] As a development organization, the IFC has a duty to ensure that the borrower-client meets the Performance Standards, and the IFC uses its position as a DFI not only to provide funding for projects but also to guide how borrower-clients implement them.[56] The Performance Standards provide some assurance to the affected community that the development project will protect and respect their livelihood, culture, and land.

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uploads/IFC-Loan-Agreement.pdf (prohibiting the borrower and its agents from taking action that would result in resettlement, loss of livelihood, or material changes to the environmental requirements and management plan); *see* Press Release, Int'l Fin. Corp., IFC Invests in India's Coastal Gujarat Power, Expanding Access to Electricity (Apr. 8, 2008), https://ifcext.ifc.org/ifcext/pressroom/IFCPressRoom.nsf/0/86ED0EF54D3C3B7885257426004D8AF8?OpenDocument [https://perma.cc/Z8QV-MSRN] (explaining the IFC's priority to invest in renewable energy and "highly efficient coal-fired" energy projects, and that the IFC viewed the Tata-Mundra Project as a precedent-setting project for using best available technologies and "higher environmental and social standards" in "developing countries").

53. *Performance Standards*, *supra* note 52, at ii.

54. International organizations have always taken the stance that they are not bound by international human rights laws because they are not states, and thus, not bound by the laws of state responsibility. Thus, the IFC always refers to "social" policies, even though these policies seem to look a lot like human rights norms. *See generally World Bank: Human Rights All but Absent in New Policy*, HUM. RTS. WATCH (July 21, 2016, 9:55 AM), https://www.hrw.org/news/2016/07/21/world-bank-human-rights-all-absent-new-policy [https://perma.cc/QD4Q-W6J5] (explaining the World Bank's refusal to adopt human rights legal obligations in its most recent policy updates).

55. *See supra* note 54 and accompanying text.

56. *See infra* Section II.A.1. The IFC provides both financial assistance and capacity building support to its borrower-clients as part of fulfilling its development mission.

The first Performance Standard ("PS1") is a procedural guarantee, and it requires that the IFC's client establish a system for assessing and managing environmental and social risks.[57] It applies to all projects that pose any environmental or social risks.[58] PS1 articulates the core spirit and purpose of the Performance Standards.[59] It emphasizes the importance of risk management as a "dynamic and continuous process initiated and supported by management" between "the client, its workers, [] [affected] communities[,] . . . and . . . other stakeholders."[60] It requires that the risk management system include a project-specific policy that defines the environmental and social objectives, articulates the process for assessment and management for that project, and affirmatively states that the project will comply with local laws and regulations.[61] PS1 also requires that the client identify the risks and impacts of the project, including risks and impacts along the supply chain, as well as identify vulnerable groups that the project will disproportionately affect.[62] The client must also establish management programs that will include environmental and social action plans to avoid and mitigate risks, and the client must institute an organizational structure that provides the roles and authority necessary to implement the Performance Standards as set out in the assessment and action plans.[63] PS1 requires borrower-clients to plan for emergencies and mitigate disaster risks; establish monitoring and review processes for environmental and social compliance at the project level; engage with stakeholders throughout the lifetime of the project, particularly through consultation with affected communities; and establish a grievance mechanism for affected communities.[64]

The second performance standard ("PS2") notes that labor is important to the success of any development project and that job creation is often one of the purposes of a project.[65] It addresses the requirements for working conditions: PS2 establishes human resources

57. *Performance Standards*, *supra* note 52, PS1, at i-ii; *id.* at 2.
58. *Id.* at i-ii.
59. *Id.* at 1.
60. *Id.*
61. *Id.* at 2.
62. *Id.* at 3–4.
63. *Id.* at 5.
64. *Id.* at 6–9.
65. *Id.* PS2, at 1.

policies and procedures; the process for supporting labor organizing; and the process for ensuring non-discriminatory employment practices, among other requirements.[66]

The third performance standard ("PS3") addresses pollution and resource efficiency.[67] PS3 dictates how to use and manage hazardous materials, pesticides, and pollutants, stating that clients "will avoid the release of pollutants[,] or, when avoidance is not feasible, minimize and/or control the intensity and mass flow of their release."[68] PS3 thoroughly covers pollution to air, water, and land, and it requires the client to factor in existing ambient conditions when determining pollution risks.[69] The language of the standard includes economic feasibility as a factor that the client may consider in evaluating most of the risks addressed in PS3.[70]

Performance Standard 4 ("PS4") acknowledges the links between project activities, climate change vulnerability, post-conflict areas, and community health and safety.[71] PS4 requires the client to avoid or minimize impacts on ecosystems, such as impacts that would limit access to freshwater, increase exposure to hazardous materials, or create structural deficiencies.[72] PS4 also includes risk assessment procedures, such as "reasonable inquiries" into security personnel's relationship to past abuses of community members.[73] It also requires action to prevent violent acts by security personnel, and, when necessary, to report violence and abuse to public authorities.[74]

Performance Standard 5 ("PS5") addresses the problems that arise from land acquisition and involuntary resettlement for communities in which projects take place.[75] PS5 requires clients to avoid physical or economic displacement, and it requires the client to provide both full compensation and additional assistance to the people being resettled,

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66. *Id.* at 2–3.
67. *Id.* PS3, at 1.
68. *Id.* at 3.
69. *Id.*
70. *See, e.g.*, *id.* at 1–3 (recognizing the economic feasibility factor in the context of resource efficiency).
71. *Id.* PS4, at 1. This performance standard is one of the only ones that the IFC explicitly defines using human rights principles. *See id.*
72. *Id.* at 2.
73. *Id.* at 3.
74. *Id.*
75. *Id.* PS5, at 1.

even in cases of voluntary resettlement.[76] Performance Standard 6 ("PS6") aims to protect and conserve biodiversity and to maintain the benefits of "ecosystem services."[77] PS6 requires that PS1's risk identification process include identifying risks to biodiversity such as habitat loss, overexploitation, and pollution, and PS6 requires the client to manage the risks based on a priority finding using both conservation techniques and biodiversity offsets.[78] The system of compromises that PS6 requires can be summed up as "like-for-like or better," meaning that the techniques and offsets have to be a tradeoff between similar species or habitats.[79]

Performance Standard 7 ("PS7") defines Indigenous peoples and requires clients to avoid adverse impacts to them by exploring alternative project options and requiring Indigenous groups' participation and the disclosure of information to them throughout the project's lifetime.[80] The IFC requires the client to obtain free, prior, and informed consent (FPIC) only in certain circumstances, and the client must consider mitigation measures to address risks to Indigenous communities, including looking into how the Indigenous community should benefit from the project.[81] Finally, Performance Standard 8 ("PS8") requires the client to protect both tangible and intangible cultural heritage through consultation, ensuring community access to the site when applicable, and avoiding the removal of cultural heritage, whether tangible or intangible, except when it is absolutely necessary.[82]

Collectively, on paper, the Performance Standards require that clients adhere to a robust set of standards as part of the IFC's goal to fund environmentally and socially sustainable projects. By contractually requiring clients to follow the Performance Standards, the IFC knows that risks to affected communities and the environment will be avoided,

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76. *Id.* at 4–6.

77. *Id.* PS6, at 1 (using "[e]cosystem services" to mean the "benefits that people, including businesses, derive from ecosystems").

78. *Id.* at 2–3, 5–6.

79. *Id.* at 2–3, 2 n.4.

80. *Id.* PS7, at 2–3. This Performance Standard is generally seen as forward progress for FPIC and Indigenous rights by bringing it to the private sector, even though the Performance Standard only *mandates* FPIC in specific circumstances. *Id.* at 1.

81. *Id.* at 5–6.

82. *Id.* PS8, at 2–3.

or at the very least, mitigated throughout the project's lifetime, as the project aims to achieve its development purpose.[83]

The IFC's independent accountability mechanism—the Compliance Advisor Ombudsman (CAO)—enforces the Performance Standards.[84] As such, the CAO provides a place for affected communities to raise complaints about IFC-funded projects.[85] The CAO investigates whether the IFC has complied with its environmental and social policies, and the CAO assesses compliance based on a "due diligence" standard.[86] Once the CAO determines that an investigation into compliance is warranted, the CAO hires an independent expert to conduct the fact-finding investigation.[87] If the result of the investigation is that the project is compliant with IFC policies, the case is closed; if the

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83. *See supra* note 54 and accompanying text.

84. *Our Mandate*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org [https://perma.cc/88SC-88WR]. In 1993, the World Bank led the industry in creating an independent accountability mechanism (IAM), the Inspection Panel, for its International Bank for Reconstruction and Development (IBRD)-financed public sector projects. WORLD BANK GROUP, THE INSPECTION PANEL: ACCOUNTABILITY AT THE WORLD BANK 11 (2018). The World Bank Inspection Panel now provides a complaint mechanism for communities affected by IBRD and International Development Agency (IDA) projects, and it was the first IAM in the industry. *Id.* IBRD and IDA are the public-sector lending arms of the IFC, and they loan money to governments to carry out "development" projects. *Who We Are*, WORLD BANK GROUP, https://www.worldbank.org/en/who-we-are [https://perma.cc/4F8F-ND7L]. One of the purposes of an IAM is to create a space for the people affected by development projects to bring complaints when a project causes economic, environmental, or social harm to the affected community, which contravenes the purpose of the development organization. Philipp Dann & Julia Sattelberger, *The Concept of Accountability in International Development Co-Operation*, *in* DEVELOPMENT CO-OPERATION REPORT 2015 69–73 (2015) https://www.oecd-ilibrary.org/docserver/dcr-2015-11-en.pdf?expires=1600308601&id=id&accname=guest&checksum=C91C1BF21DB93BD44BF36F154BAB26EE.

85. *Who We Are*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/about/whoweare [https://perma.cc/R6HY-P72E]. The CAO also has a dispute resolution function, in which it works with the affected community and IFC's client when issues are raised as to the project's compliance with environmental and social standards. *Our Roles*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/about/ourroles [https://perma.cc/75TM-DLPR]. The CAO's third function is to advise World Bank management on environmental and social standards. *Id.*

86. *How We Work*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/howwework [https://perma.cc/S9AM-YLGS].

87. *Compliance*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/howwework/compliance/index.html [https://perma.cc/EEV8-A2XC].

investigation finds that the project is noncompliant, the case remains open and the CAO assumes a monitoring and evaluation role until the IFC takes actions that bring the case back into compliance.[88] For example, in the Tata-Mundra power plant project, which became the subject of the *Jam* litigation, the "action plan" that the IFC's client proposed after the CAO found that the project was not compliant included a series of commitments to undertake data collection on the marine environment and ambient air quality.[89] The CAO findings and the resulting action plan did not provide any redress for the ongoing harms, such as displacement and loss of livelihood, that the community suffered.[90] The CAO report and the IFC's subsequent actions only provided commitments to measure pollution and continue ongoing studies of the environmental and social effects of the project.[91] The CAO provides oversight for IFC projects and their compliance with the IFC Performance Standards, but it does not provide any amount of meaningful or effective remedy to affected communities when they are significantly or irreparably harmed by the projects that the IFC finances.[92]

2. Current lawsuits against the IFC

In *Jam v. International Finance Corp.*,[93] the plaintiffs, members of a fishing community, alleged negligence, nuisance, and breach of contract, among other counts, against the IFC.[94] The lawsuit arose from an IFC-funded coal-fired power plant development project, the Tata-Mundra project in Gujarat, India ("Tata-Mundra").[95] In 2008, the IFC approved a $450

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88. *Id.*

89. *Statement by Jin-Yong Cai Regarding CAO Audit of Tata Mundra*, OFF. COMPLIANCE ADVISOR OMBUDSMAN (Nov. 25, 2013), http://www.cao-ombudsman.org/cases/document-links/documents/IFCCGPLStatementandActionPlan.pdf [https://perma.cc/6PYK-EN3Z].

90. *Id.*

91. *Id.* Here, social effects include health effects to individuals living in local communities.

92. *See Compliance*, *supra* note 88 (stating that CAO investigations are closed once the IFC takes action assuring that the project is in compliance).

93. 442 F. Supp. 3d 162, 179 (D.D.C. 2020) (dismissing with leave to amend).

94. *Jam* Complaint, *supra* note 13, at 46, 71–72, 77 (alleging harms that include loss of livelihood for the fishing community). The economic loss rule in tort does not bar these claims because the physical harm to the fish and marine environment is a physical injury to the fishing community's proprietary interest. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1020, 1032 (5th Cir. 1985).

95. *See Jam* Complaint, *supra* note 13, at 12, 16.

million loan for the Tata-Mundra power plant.[96] The IFC initially categorized the project as a "Category A" project—which represented its expectation that the project would have significant adverse environmental and social impacts.[97] The IFC, in its initial appraisal of the project before approving the loan, identified that "improper mitigation or insufficient community engagement" could trigger "unacceptable environmental impacts."[98] These environmental impacts included air pollution and substantial effects on the marine environment, and the IFC itself was aware of them from the beginning of the project's lifetime.[99]

The loan agreement between the IFC and the power company required the IFC to review the project's compliance with IFC's Performance Standards as part of each disbursement of funds.[100] The Performance Standards themselves were incorporated into the loan agreement as loan obligations that the IFC could enforce against the borrower.[101] To demonstrate that the IFC owed a standard of care to the plaintiffs, the plaintiffs relied on the IFC's Performance Standards in conjunction with the IFC's status as the gold standard in international development finance because of its commitment to environmental and social risk management.[102]

Under the International Organizations Immunities Act (IOIA), which the U.S. Congress passed in 1945, the IFC was considered

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96. *Id.* at 1, 15.

97. *Id.* at 12. When awarding funding to a project, the IFC categorizes projects that have "potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented" as "Category A;" projects that have "potential limited adverse environmental or social risks and/or impacts that are few in number, generally site-specific, largely reversible, and readily addressed through mitigation measures" as "Category B;" and projects that have "minimal or no adverse environmental or social risks and/or impacts" as "Category C." *Environmental and Social Categorization*, INT'L FIN. CORP., https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/es-categorization [https://perma.cc/PF8C-UT8W].

98. Budha Ismail Jam v. IFC*: An Indian Fishing Community Takes on the World Bank*, EARTHRIGHTS INT'L, https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/#timelineff69-1a905f26-f4b6 [https://perma.cc/ZVH7-AZXG].

99. *Jam* Complaint, *supra* note 13, at 12–13.

100. Loan Agreement, *supra* note 54, at Art. V; *id.* at Sched. 1 (Common Terms Schedule), §§ 4.2(q), 4.1(i).

101. Loan Agreement, *supra* note 54, at Sched. 1 (Common Terms Schedule), § 5.2.

102. *Jam* Complaint, *supra* note 13, at 27–28, 40–41, 44.

absolutely immune from suit in U.S. courts.[103] The question of the IFC's immunity was litigated up to the United States Supreme Court.[104] In February 2019, the Supreme Court ruled that immunity under the IOIA is not absolute, but that it is limited to the same immunity that foreign governments enjoy under the Foreign Sovereign Immunities Act[105] (FSIA).[106] In other words, sovereign immunity would apply unless an exception to immunity under the FSIA is met.[107] This decision theoretically opened the courthouse doors to providing a judicial mechanism for holding international organizations themselves accountable to the communities their projects have harmed.[108] However, in February 2020, the District Court for the District of Columbia dismissed the case on remand, finding that the commercial activities exception to the FSIA did not apply to the project in *Jam* because the gravamen of the complaint was not activity that took place in the United States or that had "substantial contact" with the United States.[109] After the court dismissed the case, the plaintiffs filed a motion to amend the complaint on March 12, 2020.[110] The IFC filed its

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103. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 764–65 (2019).

104. *See id.*

105. Pub. L. No. 94-583, 90 Stat. 26 (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2018)).

106. *See Jam*, 139 S. Ct. at 764–65.

107. *See id.*

108. *See id.*

109. Jam v. Int'l Fin. Corp., 442 F. Supp. 3d 162, 167, 177 (D.D.C. 2020). Under the FSIA, the commercial activities exception applies to conduct that is "based upon" the international organization's commercial activity in the United States. 28 U.S.C. § 1605(a)(2) (2018). Here, the court determined that the gravamen of the complaint was the IFC's "active involvement in '[p]roject design and management'" and the IFC's "fail[ure] to enforce the conditions of the loan agreement designed to protect the environment and local population." *Jam*, 442 F. Supp. 3d at 175, 177. The court then found that the allegations were not sufficient to show that enough of these processes happened in the United States for purposes of the FSIA. *Id.* at 178. However, the court noted that the complaint could have alleged that the IFC's "direct involvement" with the gravamen of the complaint occurred in the United States; it just had not done so. *Id.* at 177. The court provided an example in which harms to an affected community *would* fall within the commercial activities exception, with sufficient contacts with the United States, so as to show the most straightforward example of when the IFC would be subject to suit in U.S. courts. *Id.* at 172–74.

110. *Jam*, 442 F. Supp. 3d at 167; Plaintiff's Motion to Amend the Complaint Under Rule 15 or, in the Alternative, Under Rules 15 and 59(e), Jam v. Int'l Fin. Corp., No. 1:15-cv-00612-JDB (D.D.C. Mar. 12, 2020).

opposition to the plaintiffs' motion to amend the complaint on March 26, 2020.[111] The court denied the plaintiffs' motion to amend the complaint in August, and in October, the plaintiffs filed a notice of appeal.[112]

In another case against the IFC, a group of Honduran farmers sued the IFC in a class action that included wrongful death and crimes against humanity claims.[113] Similarly to the *Jam* complaint, the *Doe* complaint alleges that the IFC negligently approved and disbursed its loan to the client.[114] In 2009, the IFC approved a $30 million loan to Dinant, a palm oil company, in Honduras.[115] The first of two $15 million disbursements was made after a destabilizing coup d'état.[116] When the IFC disbursed the funds, it knew of ongoing land disputes over Dinant's properties.[117] In 2011, the IFC invested $70 million, with a 10% ownership stake, in Banco Ficohsa, a Honduran Bank.[118] Between 2011 and 2014, Dinant received around $40 million from Ficohsa, and the IFC knew that Ficohsa had previously loaned to Dinant and would continue to do so.[119] The IFC waived its internal policies to make the investment into Banco Ficohsa.[120] The IFC's internal policies would have otherwise required divestment from Dinant, which was listed on an IFC watchlist.[121] In 2013, a CAO audit of the 2009 loan to Dinant reported that the IFC flagrantly violated its own policies.[122]

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111. Memorandum in Opposition to Plaintiff's Motion to Amend the Complaint Under Rules 59(e) and 15, Jam v. Int'l Fin. Corp., No. 1:15-cv-00612-JDB (D.D.C. Mar. 26, 2020).

112. Notice of Appeal at 1, Jam v. Int'l Fin. Corp., No. 1:15-cv-00612-JDB (D.D.C. Oct. 7, 2020).

113. *Doe* Complaint, *supra* note 12, at 1.

114. First Amended Class Action Complaint at 1, 101, Doe v. Int'l Fin. Corp., No. 1:17-cv-01494-JFB-SRF (D. Del. 2018).

115. *Id.* at 3.

116. *Id.*

117. *Id.* at 4.

118. *Id.* at 22.

119. *Id.* at 107.

120. *Id.*

121. *Id.* at 51–52, 107.

122. OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN, CAO AUDIT OF IFC INVESTMENT IN CORPORACIÓN DINANT S.A. DE C.V., HONDURAS 5, 10 (2013), http://www.cao-ombudsman.org/cases/document-links/documents/DinantAuditCAORefC-I-R9-Y12-F161_ENG.pdf.

In 2017, Honduran farmers, proceeding under pseudonyms, filed suit against the IFC in the District Court of Delaware.[123] The case was stayed in 2018 pending the Supreme Court's resolution of the question of the IFC's immunity under the IOIA in *Jam*.[124] Following that decision, the IFC renewed its motion to dismiss the case in *Doe*.[125] The court closed the *Doe* case in February 2020 "for administrative purposes with leave to reopen" the case.[126] The parties have since submitted periodic status reports per the court's request.[127]

C. Establishing a Duty of Care in Other Lending Contexts

A financial institution may be liable in tort for harms to a third party when the lender knows of potential harms to third parties and fails to use reasonable care to avoid such harms.[128] Before exploring the current jurisprudence on the specific contours of the duty that a financial institution owes a third party in other contexts, it is necessary to state a few general rules of tort law.[129]

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123. *Doe* Complaint, *supra* note 12, at 1.

124. Order at 1–2, Doe v. Int'l Fin. Corp., No. 1:17-cv-01494-JFB-SRF (D. Del. June 1, 2018).

125. Defendants' Renewed Motion to Dismiss or Transfer the First Amended Complaint at 1, Doe v. Int'l Fin. Corp., No. 1:17-cv-01494-JFB-SRF (D. Del. Apr. 22, 2019).

126. Oral Order, Doe v. Int'l Fin. Corp., No. 1:17-cv-01494-JFB-SRF (D. Del. Feb. 18, 2020).

127. *See, e.g.*, Joint Status Report at 1, Doe. v. Int'l Fin. Corp., No. 1:17-cv-01494-JFB-SRF (D. Del. Oct. 6, 2020).

128. *See* Pemberton v. Nationstar Mortg., LLC, 331 F. Supp. 3d 1018, 1047, 1051 (S.D. Cal. 2018) (finding that the statute did not create a private right of action and did not bar mortgagors from asserting claims under the unlawful prong of California's Unfair Competition Law); Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 620 (Cal. 1968) (holding that the defendant had a duty to exercise reasonable care to prevent construction and the sale of seriously defective homes to purchasers); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (applying a balancing test and holding that the "plaintiff should be allowed recovery despite the absence of privity"); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 6 cmt. f ("[T]he duty of reasonable care is ordinarily limited to risks created by the actor's conduct. The conduct that creates the risk must be some affirmative act, even though the negligence might be characterized as a failure to act.").

129. This Comment only addresses the question of whether a financial institution owes a legal duty to the public who may be foreseeably harmed by the projects the financial institution funds, and it is beyond the scope of this Comment to reach the questions of causation and damages. The scope of this duty, as addressed in this Comment, is limited to a financial institution's direct lending activities. The group

1. General principles of negligence

A successful negligence action requires that the defendant owe a duty to the plaintiff, that the defendant breached that duty, that the defendant's conduct caused the plaintiff's injury, and that there was an injury that can be compensated through a payment for damages.[130] A party cannot contract itself out of tort law.[131] Contracts create duties on the parties that would otherwise not exist; tort law establishes the duties of "all the world to all the world."[132] Under the doctrine of nonfeasance, a party is not liable in tort for simply breaking a promise, though the injured party could sue under contract law.[133] However, long-recognized exceptions, such as common carriers and public utilities, demonstrate that a party whose purpose is to serve the public may be liable under tort law when that party "has undertaken the duty of serving the public."[134] Further, under the doctrine of misfeasance, an injured party can recover under either a tort action or a contract action when a party "misperforms" a promise.[135] The availability of recovery in tort is based on the existence of a legal duty, which is determined by examining "whether the defendant has gone so far in

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who can recover in court for a breach of this duty is limited to those who actually suffer damages.

130. RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965) (summarizing duty as an "invasion" on an interest that is "protected against unintentional invasion").

131. *See generally* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 424–26 (2015) (explaining the doctrines of misfeasance—sometimes also referred to as malfeasance—and nonfeasance and that, while contract and tort are sometimes mutually exclusive, there are also instances where contract law does not bar recovery in tort).

132. Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873).

133. SCHWARTZ ET AL., *supra* note 132, at 424.

134. *Id.*; *see* Nevin v. Pullman Palace-Car Co., 106 Ill. 222, 231 (1883) ("Can it be possible that the common carrier, the ferryman, the inn-keeper, and even the blacksmith on the roadside, are all, by reason of the public character of their business, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while, at the same time, this company is entirely relieved from the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public.").

135. SCHWARTZ ET AL., *supra* note 132, at 425.

his performance, as distinguished from mere preparation for it, as to have undertaken a tort duty."[136]

When a party to the contract performs, the party has a duty to third parties in certain circumstances. "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[137] As far back as the early 1900s, common law negligence had expanded to include the failure to exercise reasonable care to protect others from reasonably foreseeable risks.[138] Under the *Palsgraf* understanding of foreseeability, proximate cause, and duty, an actor has a duty to prevent harm to foreseen third parties by taking reasonable care.[139] Reasonable care is defined as "that of a reasonable [person] under like circumstances."[140] The "circumstances" may include knowledge, custom, and the reasonableness of the person's conduct, among other

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136. *Id.*; *see also* Baccus v. AmeriPride Servs., Inc., 179 P.3d 309, 314 (Idaho 2008) ("A duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking. The placement of safety mats in slippery areas is clearly a safety-related undertaking; the workers relied on AmeriPride's delivery of the mats; and plaintiff's fall-related injury is surely the *primary* injury that the mats were intended to prevent, which means that the injury was obviously foreseeable.").

137. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010).

138. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054–55 (N.Y. 1916) (finding that the defendant, a car manufacturer, had a duty to exercise reasonable care in inspecting tires that it bought from a reputable tire manufacturer); Junkermann v. Tilyou Realty Co., 108 N.E. 190, 191–92 (N.Y. 1915) (finding that, as a matter of law, the amusement park owner had a duty to exercise reasonable care to the public because the purpose of the park was public use). Both of these cases emphasize that, when an actor undertakes conduct with a purpose to benefit the public or provide a public service, the actor owes a duty to the public to protect them from harm. *See MacPherson*, 111 N.E. at 1054 ("[D]anger is not to be expected when the vehicle is well constructed."); *Junkermann*, 108 N.E. at 191–92.

139. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928). While foreseeability can be a determinative part of whether or not an actor owes a duty to another party, it is beyond the scope of this Comment to address the conflicting outcomes of the *Palsgraf* opinion. Because a risk assessment is part of financing development projects, the question of whether harms to the community were foreseeable has not come into question in this context. *See infra* Section II.

140. RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965).

things.[141] For example, when an actor "undertakes a course of conduct [that] a reasonable [person] would recognize as requiring [knowledge]," an actor is required to use that knowledge to determine whether the conduct creates a risk of harm to others.[142]

"Customs of the community" may also factor into the determination of whether a party owed a duty to another, and what that duty was.[143] Courts have used industry custom as a factor in establishing "the common practices of a relatively small group of persons who engage in particular activities."[144] Court-recognized customs include the prevailing industry standards that are "reasonably safe and appropriate for the business."[145] "When . . . a custom has prevailed in the trade or in the calling, or certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that a manufacturer or [anyone] else employing men has fallen below the required standard."[146] Thus, when the industry, or a critical mass of the industry, adopts a custom to avoid harm to the public, that custom may provide evidence of the duty to the public.[147] Other examples of contexts in which custom has factored significantly into establishing a

141. *Id.* §§ 289–296 (discussing the multitude of factors that should be considered when determining the standard of care that an actor must use in its conduct).

142. *Id.* § 290 cmt. f.

143. *Id.* § 295A.

144. *Id.*

145. Garthe v. Ruppert, 190 N.E. 643, 646 (N.Y. 1934) (rejecting custom as evidence of the standard of care for keeping bathrooms clean at a brewery when only one example of a different cleaning standard was suggested to demonstrate industry custom).

146. *Id.*

147. *See* Sprecher v. Roberts, 248 N.W. 795, 797 (Wis. 1933) (rejecting jury instructions that characterized the custom of tying ladders to buildings to prevent the ladders from falling onto public sidewalks and roads as conclusively establishing a duty, but acknowledging that custom is a factor to be considered in determining whether the defendant owed a duty of care to the public).

standard of care include methods of maritime navigation,[148] equipment used for oil drilling,[149] and industry standards for investment.[150]

Finally, the core purpose of the common law system provides another data point to inform how tort law analyzes duties that parties owe each other. The common law, "by reason of its elasticity, . . . adjusts and molds itself to meet the constant changes in the affairs of life, and . . . it never hesitates to apply old rules to new cases, when it is clear they come within the reasons or principles of such rules."[151] Tort law provides an enforcement mechanism for the continuously developing landscape of public and social policies.[152] Courts frequently note that the determination of a duty, while mired in legal doctrines, is ultimately a case-by-case determination of whether public policy supports, or prohibits, the legal conclusion that a duty existed between an actor and an injured party.[153] However, public policy can also provide a reason to limit findings of liability—for example, against financial institutions—that would otherwise provide redress to plaintiffs, as a means to encourage or discourage behavior.[154] While financial

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148. RESTATEMENT (SECOND) OF TORTS § 295A cmt. a (AM. LAW INST. 1965) (acknowledging that customs can exist within small groups of individuals who engage in specific activities, such as mariners, and that the main factor in determining whether custom can be used to prove that a duty existed is whether the custom was widely known within the industry).

149. McCormack v. Noble Drilling Corp., 608 F.2d 169, 174 n.8 (5th Cir. 1979) (concluding that the expert's discussion of non-customary, safer methods for drilling were relevant and supported the jury's finding of negligence, even though the defendant adhered to industry custom). In other words, the defendant's adherence to industry custom is generally not dispositive, and custom, if the basis for a finding that a duty existed, must be examined based on whether it in fact created reasonably safe conditions. *Id.*

150. *See infra* Section II.A.

151. Nevin v. Pullman Palace-Car Co., 106 Ill. 222, 230 (1883).

152. SCHWARTZ ET AL., *supra* note 132, at 1–2 (outlining the major purposes of tort law, which include peacefully vindicating rights, deterring wrongful conduct, and "encourag[ing] socially responsible behavior," and acknowledging that "tort law evolves to meet changing circumstances").

153. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7 cmt. a (AM. LAW INST. 2010).

154. Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 556 N.E.2d 1093, 1096 (N.Y. 1990) ("[I]t is 'the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree.' . . . The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied.").

institutions are often shielded from liability for public policy purposes, courts have also found financial institutions liable based on a negligence theory.[155]

2. Specific case illustrations

Some jurisdictions—California the most thoroughly—have addressed the issue of financial institutions' liability when they fund development projects that cause harm.[156] In doing so, those courts have consistently used a six-factor test, the "*Biakanja* factors," to determine whether the lending institution owed a duty of care to the plaintiffs.[157] The six factors are as follows:

> (1) the extent to which the transaction was intended to affect the plaintiff[;] (2) the foreseeability of harm to the plaintiff[;] (3) the degree of certainty that the plaintiff suffered injury[;] (4) the closeness of the connection between the defendant's conduct and the injury suffered[;] (5) the moral blame attached to the defendant's conduct[;] and (6) the policy of preventing future harm.[158]

Analysis of duties of financial institutions also turns on the line between "traditional lending," for which financial institutions are not liable for harms caused by their actions, and activities that are outside the scope of traditional lending, for which financial institutions may

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155. *See infra* Section I.C.2. Generally speaking, corporations are limited liability entities that shield themselves, and their shareholders, management, and directors, from accountability in the courtroom. *See generally* John Armour et al., *The Essential Elements of Corporate Law: What Is Corporate Law?*, Discussion Paper No. 643 (2009). The law supports the notion of limited liability to encourage competition as a matter of economic policy. *Id.* at 6, 9.

156. *See* Rowland v. JP Morgan Chase Bank, No. C 14-00036 LB, 2014 WL 992005, at *8–9 (N.D. Cal. Mar. 12, 2014). While no court system has addressed lending practices for international financial institutions, California, seemingly because of precedent like *Connor*, has addressed the issue more thoroughly than other states.

157. *See, e.g.*, Pemberton v. Nationstar Mortg., LLC, 331 F. Supp. 3d 1018, 1056 (S.D. Cal. 2018). *But see* Editors, Comment, *Indirect Liabilities of Construction Lenders in a Development Setting*, 127 U. PA. L. REV. 1525, 1529 (1979) (arguing against level of participation and economic benefit as the main factors for determining liability and arguing that capacity to control the contractor is a threshold requirement for indirect lender liability). While ability to control the contractor might be a factor to consider, *id.*, this Comment argues that the "control" test is wrapped into the question of whether the lender was participating in non-traditional lending activities, which involves more control over the project and the contractors.

158. *Pemberton*, 331 F. Supp. 3d at 1056 (quoting Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)).

be liable for the harms their activities cause.[159] Courts have not agreed on a concrete definition of what constitutes traditional lending.[160] The following case illustrations exemplify courts' application of the *Biakanja* factors and distinction between traditional and non-traditional lending.

a. The Connor *rationale*

Connor v. Great Western Savings & Loan Ass'n[161] was the first case to hold financial institutions indirectly liable to plaintiffs under a negligence theory.[162] While courts have subsequently interpreted *Connor* narrowly, they have not entirely foreclosed the possibility that a lender is liable in specific circumstances for the harms its activities cause.[163] In *Connor*, the plaintiffs were a group of homeowners who bought homes that were part of a housing development project.[164] Great Western provided significant financing for the housing development; under the

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159. Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 616, 619 (Cal. 1968). Subsequent courts have construed this holding narrowly, but court opinions and the amended statute continue to provide an exception for when "loss or damage is a result of an act of the lender *outside the scope* of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property." CAL. CIV. CODE § 3434 (West 2020) (emphasis added); *see, e.g.*, *Rowland*, 2014 WL 992005, at *8–9 (discussing the development of cases on what constitutes a traditional lending activity).

160. *See Rowland*, 2014 WL 992005, at *8–9 (collecting cases in which courts have defined "traditional lending" to illustrate the lack of harmony across courts).

161. 447 P.2d 609 (Cal. 1968).

162. *Id.* at 616.

163. *See* Union Oil Co. v. Oppen, 501 F.2d 558, 569–70 (9th Cir. 1974) (finding that the oil company owed a duty to the fishermen, a non-contracting party, to avoid "negligent diminution of aquatic life"); *Pemberton*, 331 F. Supp. 3d at 1059 (holding that a general duty to taxpayers was plausibly pled); Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 56 (Ct. App. 1991) (finding no duty to the homeowner for an appraisal but stating the rule so as to only include traditional lending activities). *But see* Rowland v. JP Morgan Chase Bank, No. C 14-00036 LB, 2014 WL 992005, at *8–9 (N.D. Cal. Mar. 12, 2014) (finding no negligent lending because the bank did not engage in activities or conduct beyond the scope of traditional lending). State legislatures have also continued to include exceptions in state civil codes for non-traditional lending activities. *See, e.g.*, CAL. CIV. CODE § 3434 (West 2020) (including an exception for "loss or damage [resulting from] an act of the lender outside the scope of the activities of a lender of money"); NEV. REV. STAT. § 41.590 (2020) (including an exception for "loss or damage resulting from . . . some other action or activity of the lender than the loan transaction"). Neither the District of Columbia nor Delaware has a statute that addresses the issue.

164. *Connor*, 447 P.2d at 611.

terms of the loan agreement, Great Western had the right to withhold each disbursement until the construction company had satisfactorily performed the work in accordance with the terms of the agreement.[165] The plaintiffs alleged that Great Western breached an independent duty of care to the plaintiffs because the plaintiffs were supposed to benefit from the housing development, and they were ultimately harmed by defective construction.[166]

The California Supreme Court used the *Biakanja* factors to determine that Great Western, as the lender, owed a duty to the plaintiffs due to the harms the housing developer caused.[167] Under the first factor, Great Western's transactions depended on having buyers for the homes, so the transactions were intended to affect the home buyers.[168] In addressing the second factor, the court found that "Great Western knew or should have known" that one of the developers had never developed a project of this magnitude and that the other developer did not have a lot of capital, which would encourage cutting corners in construction; thus, the risks were foreseeable.[169] The court barely addressed injury, the third factor, which did not require significant analysis because the homes were damaged.[170] Great Western financed the development of the tract and "controlled the course it would take," so the injury was closely connected with Great Western's conduct, per the fourth factor.[171] The court found that substantial moral blame on the part of the lender, the fifth factor, existed first because it knew that home buyers are "ill-equipped . . . to discern such structural defects," and second, homes—often the "only shelter [a homebuyer] has"—are a different kind of investment.[172] Finally, the court found the sixth factor weighed in favor of finding liability, reasoning that "[r]ules that tend to discourage misconduct are particularly appropriate when applied to an established industry."[173]

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165. *Id.* at 615.
166. *Id.* at 611.
167. *See id.* at 617, 621 (citing Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958)) (holding that the Great Western only owed a duty to members of the public who bought homes, not the public at large).
168. *Id.* at 617.
169. *Id.*
170. *Id.* at 617–18.
171. *Id.* at 618.
172. *Id.*
173. *Id.*

The court addressed Great Western's counterarguments by noting that arguments concerned about increased housing costs and disincentivizing development are meritless because "there is no enduring social utility in fostering the construction of seriously defective homes."[174] Thus, the rationale in *Connor*, even when narrowly construed, is based on the logical and straightforward principle that lenders who play an active role in the design and implementation of a project should not be entirely shielded from liability in court for any harms or damages that arise from the undertaking of that project.[175] Rather than extending the shield of limited corporate liability, the court found that the lender had a "duty to [the homeowners] . . . to exercise reasonable care to protect them from seriously defective construction—whether caused by defective plans, defective inspection, or both."[176]

Following *Connor*, thirty state courts have cited to the opinion, and nine federal district courts outside of California have cited to it.[177] The Ninth Circuit has mentioned the opinion in seven cases, all in California;[178] the D.C. Circuit cited the case favorably in a footnote in 1970,[179] and the Seventh Circuit also mentioned *Connor* in an opinion

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174. *Id.*

175. *See id.* at 619–20 ("Given th[e] traditional [fiduciary duty to shareholders], a lending institution should have been farsighted enough to make such provisions for potential liability as would enable it to withstand the effects of a decision of normal retrospective effect.").

176. *Id.* at 620.

177. *See, e.g.*, Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353, 373 (E.D.N.Y. 1972); Rudolph v. First S. Fed. Sav. & Loan Ass'n, 414 So. 2d 64, 68 (Ala. 1982). Of the twelve federal district court opinions outside of California, two opinions are negative. *See* Gibson v. Credit Suisse AG, 2016 WL 4033104, at *11 (D. Idaho July 27, 2016), *aff'd sub nom.* Land v. Credit Suisse Grp. Sec. (USA) LLC, 720 F. App'x 860 (9th Cir. 2018); Wright v. United States, 428 F. Supp. 782, 788 (D. Mont. 1977), *aff'd*, 599 F.2d 304 (9th Cir. 1979). Of the 165 state court opinions (forty-two outside of California), thirty are negative (nine outside of California), representing ten states. *See, e.g.*, State v. Tyonek Timber, Inc., 680 P.2d 1148, 1152 (Alaska 1984); DeBry v. Valley Mortg. Co., 835 P.2d 1000, 1002 (Utah Ct. App. 1992) (distinguishing *Connor* by noting that it involved unusual facts).

178. *E.g.*, Resolution Tr. Corp. v. BVS Dev., Inc., 42 F.3d 1206, 1214 (9th Cir. 1994).

179. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1076 n.24 (D.C. Cir. 1970) (citing *Connor*, 447 P.2d at 609) (establishing the warranty of habitability in D.C. property law and noting that "Chief justice Traynor's excellent opinion [in *Connor*] utilizes tort doctrines to extend liability to the immediate seller").

in 1995.[180] The Ninth Circuit's most recent opinion, albeit unreported, noted that the general rule is that "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money."[181] The Ninth Circuit affirmed the district court's dismissal of the negligence claim, relying primarily on the lack of facts in the pleading that alleged that the lender "exercised control over [the borrower's] business, or shared profits from the success of [the borrower's] business. Because [the lender] acted only as a lender, [the lender] had no duty 'to disclose its knowledge that the borrower's intended use of the loan proceeds represent[ed] an unsafe investment."[182]

b. Finding a duty under the Biakanja *factors in other cases*

Courts have used the *Biakanja* factors to determine whether a lender owed a duty to another party, following the rationale set forth in *Connor*. In one recent California case, a lender had a duty of reasonable care to a borrower when:

> (1) a loan modification [wa]s intended to benefit the borrower[;] (2) it [wa]s foreseeable that failures in the timeliness or accuracy w[ould] harm the borrower[;] (3) "the bank h[eld] all the cards" in a loan modification process[;] and (4) imposing a duty of care on the lender would reign in 'dual tracking,' mitigate the lender's incentives to mis- or under-inform borrowers, and further the California's [l]egislature's object in passing the California Homeowner Bill of Rights.[183]

However, in a different case, a lender did not owe a home buyer a duty of reasonable care when (1) the purpose of the appraisal was to protect the defendant's interests; (2) the foreseeability of harm to the plaintiff was too remote because the plaintiff was in a better position than the defendant to know the value of the property and the plaintiff

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180. Mirhoseini v. Trimedyne, Inc., No. 94–2828, 1995 WL 72342, at *2–4 (7th Cir. Feb. 22, 1995).

181. Bradshaw v. SLM Corp., 652 F. App'x 593, 595 (9th Cir. 2016) (quoting Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 56 (Ct. App. 1991)).

182. *Id.* at 595 (quoting *Nymark*, 283 Cal. Rptr. at 57) (last alteration in original).

183. Clinton v. Select Portfolio Servicing, Inc., 225 F. Supp. 3d 1168, 1173–74 (E.D. Cal. 2016). *Contra* Morgan v. U.S. Bank Nat'l Ass'n, No. C 12–03827 CRB, 2013 WL 684932, at *3 (N.D. Cal. Feb. 25, 2013) ("Some courts have found that a lender undertakes a duty of care when it offers a loan modification . . . . The more persuasive reasoning, however, is that, even where a lender offers a loan modification, that is nothing more than a renegotiation of loan terms.").

had lived in the home for two years already; (3) the court assumed injury, but (4) the conduct and the injury were too attenuated; (5) the plaintiff was in a position to "protect himself from loss," so there was no moral blame on the lender; and (6) a strong policy interest existed to support financial institutions and prevent liability for conventional money lenders.[184] While many of the factors resulted in the same conclusion, the two cases differed in foreseeability of harm and moral blame on the defendant, a difference that led to opposite outcomes.

While most of the factors need no further explanation, the intent to affect the plaintiff can be direct or indirect. When an oil company conducts exploration and drilling offshore, it owes a duty of reasonable care to the local fishermen to protect aquatic life, even though the fishermen are neither in privity to any agreements nor direct beneficiaries of the oil company's activities.[185] However, most courts continue to stress that "in *ordinary* lender-borrower situations, the relationship is a debtor-creditor relationship governed by the contract, and . . . additional tort duties of care will not be imposed."[186]

In a more recent case in the Southern District of California, a family sued a mortgage company for breaching a duty to taxpayers to report interest accurately.[187] Applying the *Biakanja* factors, the court found that the mortgage company owed a duty of care to taxpayers because (1) the transaction was intended to affect the plaintiffs because they relied on Tax Form 1098 when reporting their taxes; (2) harm was foreseeable because the plaintiffs had no control over how the mortgage company reported interest, and borrowers, tax preparers, and the IRS rely on these reports; (3 and 4) "there is a 'dollar for dollar' connection between the amount of misreported interest and the[] injury"; (5) the mortgage company did not have moral blame simply because it was a "sophisticated financial institution whose very business it is to correctly service loans"; and (6) the policy of preventing

184. *See Nymark*, 283 Cal. Rptr. at 58–59 (alleging negligent appraisal of plaintiff's home).

185. Union Oil Co. v. Oppen, 501 F.2d 558, 568, 570 (9th Cir. 1974).

186. United States v. Wells, No. 96-1028-JTM, 1998 WL 47799, at *4 (D. Kan. Jan. 30, 1998) (emphasis added). *But see* Dougherty v. Bank of Am., 177 F. Supp. 3d 1230, 1258 (E.D. Cal. 2016) (finding a duty of reasonable care in handling loan modification applications).

187. Pemberton v. Nationstar Mortg., LLC, 331 F. Supp. 3d 1018, 1059 (S.D. Cal. 2018) (finding that the plaintiffs had plausibly pled that the mortgage company had a duty to taxpayers in addition to the IRS at the motion to dismiss stage).

future harm favored a finding of liability because the mortgage company could prevent harm by "merely reporting deferred interest."[188] In sum, while courts have avoided imposing liability in many cases, they have left open a fairly wide door in which liability should be imposed on lenders based on the *Biakanja* factors.[189]

c. Finding a duty because conduct was outside the scope of traditional lending activities

The question of whether a lender is acting outside the traditional scope of lending activities often arises in the context of real estate appraisals. The basic scenario is that the lender provides a loan to a home buyer, then a third party conducts an appraisal.[190] In one Vermont case, a homeowner's roof caved in a week after the appraisal, and the home buyer unsuccessfully sued the lender for negligent appraisal when the appraisal was part of the required terms of the loan.[191] The court relied on reasoning that an appraisal conducted for the purpose of assessing economic risks or securing collateral is within the scope of traditional lending activities, and the lender is not liable for the appraiser's negligence, even when the buyer also relies on the appraisal.[192] However, other states have found lenders liable for negligent appraisals, even when an employee of the lending institution conducts the appraisal. For example, in Iowa, a lender was liable for the negligent appraisal because the appraiser should have reasonably expected the buyer to rely on the appraisal to reaffirm the value of the home.[193] Based on the appraisal line of cases, traditional lending activities include conduct that a lender undertakes to ensure its own assets are safe and to fulfill its obligations under contracts.

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188. *Id.* at 1057–59.

189. *See infra* Part II (exploring the width of this door more thoroughly).

190. Hughes v. Holt, 435 A.2d 687, 688–89 (Vt. 1981).

191. *Id.* at 688–89.

192. Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 58–59 (Ct. App. 1991) (applying the *Biakanja* factors to find that the lender owed no duty of care to the plaintiff); *see also Hughes*, 435 A.2d at 688–89 (ruling that the lender was not liable for negligence when the appraiser overlooked termite damage and a house collapsed because there was no duty to the buyer when the bank did not go beyond its role as a lending agency).

193. Larsen v. United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281, 284–88 (Iowa 1981) (finding liability under classic negligence principles, although the alleged cause of action was misrepresentation).

Outside of the appraisal context, a few examples illustrate the scope of traditional lending activity. When two borrowers in California sued a bank for lending them money to pursue a risky ranching venture that included purchasing a breeding herd and establishing a maintenance fund to maintain the herd, the lender's involvement only included providing money to buy the herd and to establish the fund.[194] Thus, the lender was not involved in the ranching enterprise, and the lender's involvement fell "far short of the *extensive control* and shared profits which give rise to liability."[195] Kansas courts take a strict approach to barring negligent lending claims; lenders in Kansas are not subject to special duties to third parties, and lenders have no duty to police the loan outside of a contractual obligation, even after the lender is informed of substantial defects in construction.[196]

Outside of the finance context altogether, third parties have alleged similar tort claims. In *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP*,[197] plaintiffs sued an architect for construction design defects and negligent design that made homes unsafe for significant portions of the year.[198] The court found that:

> [A]n architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a *principal architect* on the project—that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction.[199]

In this case, the architects conducted inspections and reviews, and they took on a role that went far beyond the standard role of an

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194. Wagner v. Benson, 161 Cal. Rptr. 516, 519–20, 522 (Ct. App. 1980) (affirming jury verdict of no negligence and remanding for reconsideration of attorneys' fees only).

195. *Id.* at 521 (emphasis added).

196. Daniels v. Army Nat'l Bank, 822 P.2d 39, 43 (Kan. 1991) (finding that the lender had no duty to inspect the construction project absent a contractual obligation); *see also* Boyd v. U.S. Bank Nat'l Ass'n, No. 06-2115-KGS, 2007 WL 2822518, at *15 (D. Kan. Sept. 26, 2007) (finding no duty to police the administration of the loan without a contractual obligation to do so). Kansas courts have continued to find that all conduct is "ordinary" or "traditional," but they do not deny outright that non-traditional conduct would not be subject to additional liability. *Boyd*, 2007 WL 2822518, at *15.

197. 327 P.3d 850, 852 (Cal. 2014).

198. *Id.* at 852.

199. *Id.* at 852.

architect in a building project.[200] This involvement showed their role as principal in the project, and they had a duty of care to future homeowners.[201] Further, the limiting principle that keeps this ruling from being "limitless financial exposure" for the architect is that the architect is only liable to the class that the project was supposed to protect: future homeowners in the development site.[202] While architects are not lenders, they are similarly protected from liability through limited liability structures—yet the court still found that the architect had a duty to third parties.[203] In sum, specific circumstances, such as taking on a principal role in the design or implementation of a project that goes beyond lending money, can fall outside of the scope of traditional lending; thus, liability should be extended to enable plaintiffs to recover from financial institutions for environmental and social harms that result from the development projects that the institutions finance.[204]

II. ANALYSIS

Based on the foregoing principles and precedents, financial institutions that fund international development projects are liable in tort for the environmental and social harms caused by the projects that they finance. Combining general tort principles and negligent lender jurisprudence with the robust industry standards for financing development projects and the ultimate goal of development, the path forward for defining accountability in international development is clear. This Part first explains the contours of a rule for when a financial institution has a duty to an affected community, and it then articulates the standard of care that courts should impose. Finally, this Part applies that rule to the current cases against the IFC.

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200. *Id.* at 860.
201. *Id.* at 860–61.
202. *Id.* at 861.
203. *Id.* at 852. In *Beacon*, the architecture firm was a limited liability partnership. *Id.* at 850.
204. Many of the cases discussed above refer to relationships between a lender and a borrower. As explained in Section I.C.1, the doctrine of misfeasance does not require that a third party be in privity of contract to pursue recovery under a tort theory of liability when the mis-performance of a contract harms that third party. Thus, liability in many of those cases could have extended to a third party when appropriate under the facts of a given case.

A. *The Rule*

When a financial institution provides a loan for the purpose of a development project, it owes a duty of reasonable care to the affected community for the environmental and social harms that the financial institution causes to the community when it plays a significant role in the design, assessment, approval, or implementation of the project.[205] This Section first addresses the two key elements of lender liability in the development context—project purpose and significant role. Then, this Section explores the standard of care to which financial institutions should be held when they have a duty to avoid harms to the public.

1. *Purpose of the project*

The purpose of the project element combines the first two *Biakanja* factors, and it requires (1) that the lender intends the project to benefit the affected community in any way and (2) that the lender has constructive knowledge of the risks of harm to the community that is to receive the benefit.[206] The first *Biakanja* factor examines "the extent to which the transaction was intended to affect the plaintiff."[207] In the development context, this factor should be re-conceptualized as requiring intent to benefit the plaintiff in any way.[208] Because development projects often have public goals that may include bringing electricity or jobs to

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205. *See supra* Section I.C.1 (explaining why contract law does not bar recovery in tort).

206. Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 617 (Cal. 1968); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); *see* cases cited *supra* note 139 (finding a duty to the public when a purpose of the conduct included a benefit to the public or a public service). For example, the ultimate purpose for which the public will use a car is to travel from one place to another, so car manufacturers have a duty to the public to manufacture safe cars for their use. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054–55 (N.Y. 1916) ("If danger was to be expected as reasonably certain, there was a duty of vigilance."). Similarly, a project's purpose might be to benefit a region by providing stable electricity, and the financial institution undertakes a course of conduct to fund, advise, and oversee the construction of a power plant, knowing that the construction and operation of the power plant create risks to the community where it is built. *See Performance Standards*, *supra* note 52, at i. The lender has a duty to the public to avoid all physical harms to the public, even if the harm is unrelated to the ultimate purpose of the project, such as loss of livelihood for fisherfolk because of pollution into the ocean from the power plant's operation. *See id.* PS1, at 2–3.

207. *Connor*, 447 P.2d at 617; *see* Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 58–59 (Ct. App. 1991).

208. The development purpose element does not exclude projects that have both a development purpose and a commercial purpose.

a community, supporting health and education initiatives, or strengthening the agricultural productivity of a region, engaging in an inquiry as to the extent of the intent to affect the plaintiff is a futile exercise because development inherently involves an intent to benefit the public.[209] While tort law imposes no general duty to the public, there are cases in which courts have found that a business that is in essence a public utility has a duty to those who it may harm.[210] Much like a public utility or a common carrier, development finance institutions have held themselves out to the public as providing a public service: development itself.[211] Thus, development finance institutions satisfy the purpose of the project element any time they provide financing for a project. However, the "intent to benefit the plaintiff" element only requires that the loan be provided for a development purpose. It would not be satisfied by just any loan from any financial institution for any project.[212] Limiting the extension of liability to projects with a development purpose supports the policy goals of development, such as ending poverty, by providing a more robust system of accountability, while still encouraging competition through principles of limited corporate liability outside of the international development context.

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209. *See supra* note 135 and accompanying text (explaining that common carrier and public service providers owe a duty to the general public because of the nature of their business). While some jurisdictions impose a higher standard than reasonable care on businesses serving the public good, this Comment argues that financial institutions lending money for a development purpose, which certainly is a public purpose, owe a duty of reasonable care to the public. *See infra* Section II.A.3; *see also* SCHWARTZ ET AL., *supra* note 132, at 57, 211.

210. *See* Fisher v. Greensboro Water Supply Co., 38 S.E. 912, 914 (N.C. 1901) (holding that a water company breached its duty to provide enough water to the city's customers to protect against fires). *But see* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928) (finding that a water company only had a contractual duty, not a tort duty, to provide water to the city residents).

211. *See About IFC: Overview*, *supra* note 8.

212. *See supra* Sections I.A-B (describing the Ruggie Principles, the EPs, and the IFC Performance Standards, which are specifically designed for the unique challenges of development, including local community input, sustaining biodiversity, and managing risks sustainably for both the borrower-client and the affected community); *see also About IFC: Overview*, *supra* note 8 (noting the World Bank's goals to "end extreme poverty and promote shared prosperity" and the IFC's focus on "developing" countries and the challenges that international development presents). While this rule could be applied to private banks (e.g., Bank of America) for project finance lending, this Comment focuses solely on development finance institutions (World Bank, International Monetary Fund, Inter-American Development Bank, etc.).

The second part of this element is that a lender must have constructive knowledge of the potential effects on the plaintiffs. While the second *Biakanja* factor focuses on an amorphous foreseeability requirement, constructive knowledge is a clearer standard that works effectively in the development context because a lender undertakes a risk assessment as part of the decision to invest, and, per industry standard as set forth in the IFC Performance Standards, identifying environmental and social risks is part of assessing risks before investing and part of creating a risk management system.[213] In *Pemberton v. Nationstar Mortgage LLC*,[214] just as the mortgage company knew, or at the very least should have known, that taxpayers relied on the mortgage company's interest reporting on Tax Form 1098, an affected community relies on the lender's risk identifications and assessments to know that community members' lives and livelihoods will not suffer significant harm from the project.[215] Like the homeowner who had been living in his home for two years when the home was appraised—and therefore, was better situated than the lender to know the value of his home—communities understand the environmental and social value of the places where development projects happen—the communities themselves.[216] However, the lender is generally better situated, purely by nature of the power dynamic between the lender and the community, to assess the combined economic, environmental, and social risk analysis because the lender has more access to information on the profits, risks, and benefits that will come from the project.[217] Thus, the lender's constructive

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213. *See* Pemberton v. Nationstar Mortg., LLC, 331 F. Supp. 3d 1018, 1059 (S.D. Cal. 2018); Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 617 (Cal. 1968) (finding that the lender should have known that the borrower would cut corners in construction because the borrower was operating without much capital); *id.* at 625 (Mosk, J., dissenting) (focusing on the lack of foreseeability when a lender "*simply* provid[es] funds" (emphasis added)); *supra* note 140 and accompanying text (describing why *Palsgraf* is not at issue in this argument).

214. 331 F. Supp. 3d 1018 (S.D. Cal. 2018).

215. *See Pemberton*, 331 F. Supp. 3d at 1033; *Performance Standards*, *supra* note 52, PS1, at 1, 3–4; *supra* text accompanying notes 62–66 (discussing risk assessment and management in PS1).

216. *See* Nymark v. Heart Fed. Sav. & Loan Ass'n, 283 Cal. Rptr. 53, 54 (Ct. App. 1991).

217. Lenders tend to be large international organizations or commercial banks with the knowledge and resources to both inform themselves and thoroughly assess the risks of their investments. *See, e.g.*, *supra* note 3 and accompanying text. Communities are not. Money aside, development often comes with a complex array of political, racial, and systemic power dynamics. *See supra* note 2 and accompanying text.

knowledge is a fair and necessary line to draw in understanding when a lender owes a duty to a community.

2. Significant role

The second element in establishing that a development lender owes a duty to a community is whether the lender played a significant role in the project. This inquiry includes the core *Connor* rationale, which requires that the lender play a role beyond that of a traditional lender.[218] If a lender only assesses environmental and social risks as part of its process for assessing its own risks in taking on a project, then it is acting within the scope of traditional lending activities and would not be liable to the community for harms because it did not know of the possible harms.[219] However, if a lender assesses environmental and social risks to the community, requires the borrower to set up risk management systems for the risks to the community, and conditions subsequent disbursements on proper management of the environmental and social risks, then the lender acts outside the scope of "traditional lending" because that level of involvement signals to the community that it can rely on the risk management system to protect against severe or irreparable harms to the community.[220] Beyond establishing a significant role, the requirement for a robust risk assessment and management system further demonstrates that the lender must have had constructive knowledge of the risks to the community before and throughout the lifetime of the project.[221]

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218. *See Connor*, 447 P.2d at 616.

219. *Nymark*, 283 Cal. Rptr. at 57–58; Hughes v. Holt, 435 A.2d 687, 689 (Vt. 1981). For example, evaluating increased flood risks during and after construction could be considered part of evaluating traditional business risks. *See Nymark*, 283 Cal. Rptr. at 56–57 (discussing the traditional lending analysis). But categorizing projects according to their risk to the community and requiring community consultation, both for the lender and for the borrower-client, shows that the lender should have known that there was a risk of harm to the community, and thus, should be liable. *See id.* at 57 (citing *Hughes*, 435 A.2d at 688–89).

220. *See* Larsen v. United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281, 287 (Iowa 1981) (finding that the defendant owed the homeowner a duty of reasonable care because, even though the appraisal was primarily for the benefit of the defendant, the defendant should have known that the homeowner would reasonably rely on the appraisal).

221. *See supra* text accompanying notes 62–66 (discussing the IFC's requirement that the borrower-client establish risk assessment and management systems). While the Performance Standards impose obligations on borrower-clients, the lender plays a role

Requiring that the lender play a significant role also comports with the principles and limits of expanding tort liability to third parties.[222] As with the principal architects who owed a duty to the discrete class of future homeowners because the architects conducted inspections and reviews of the building throughout the construction process, lenders that play a significant role in project design or implementation also owe a duty to the community in which a project takes place.[223] Determining whether a lender's role is outside the scope of traditional lending activities includes a factual inquiry into the lender's actions in each case. Simply providing money, as the lender did in the risky ranching venture, is not sufficient to establish a role beyond "traditional lending."[224] Some level of "extensive control," as compared to lending in its traditional context, is required.[225] Finally, returning to the core principles of tort, requiring that the lender play a significant role is supported by the long-established principle that an actor owes a duty to another to protect others from foreseeable harms caused by the actor's conduct.[226] By requiring a significant role in the project, the rule ensures that the lender is a principal actor in the project who has the power both to control the acts of other actors and to prevent, or fail to prevent, harm to a community.

3. Defining the standard of care

The existence of a duty is only one part of the inquiry—creating a workable approach to lender liability in the international development context also requires defining the contours of the lender's duty to the community. Reasonable care, the conduct of a reasonable person under the circumstances, is the default rule that courts have used to define the duty that a lender owes to a third party when courts find that the lender does have a duty.[227] Based on general tort principles, industry custom,

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in ensuring that borrower-clients follow the Performance Standards appropriately and by advising and approving modifications throughout the lifetime of the project. *See Performance Standards*, *supra* note 52, PS1, at 5.

222. *See supra* Section I.C.1.

223. *See* Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP, 327 P.3d 850, 860 (Cal. 2014).

224. *See* Wagner v. Benson, 161 Cal. Rptr. 516, 519, 521 (Ct. App. 1980).

225. *Id.* at 521.

226. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010).

227. RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965).

and the jurisprudence discussed above, courts should adopt a standard of reasonable care.

Following industry custom is one indicator for using reasonable care.[228] In the development context, industry standards are fairly clear because most development banks, and even some commercial banks, have adopted the IFC Performance Standards.[229] Courts can determine whether a lender used reasonable care by evaluating the lender's use and enforcement of the Performance Standards.

A standard of reasonable care, measured by the enforcement of the Performance Standards, still permits the lender to maintain some discretion over how to apply the Performance Standards in a way that best fits the context of the type of project, project location, and project risks. Because the IFC's application of the Performance Standards varies between different types of projects, the lender may use its knowledge of the project's context to decide which Performance Standards to include as obligations in the loan agreement.[230] For example, the way the Performance Standards apply to a mining project is different from the way the Performance Standards apply to the construction of a power plant or the development of sustainable agricultural practices.[231] Thus, it is important to

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228. *See supra* Section I.C.1. However, custom alone is not sufficient to define the standard. *See* McCormack v. Noble Drilling Corp., 608 F.2d 169, 173–74 (5th Cir. 1979) (affirming a jury verdict of negligence when industry custom was one relevant factor that may be considered with all the other evidence and the defendant did not follow industry custom to prevent diminution of aquatic life); Garthe v. Ruppert, 190 N.E. 643, 646 (N.Y. 1934) ("When, however, . . . certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that a manufacturer or [anyone] else employing men has fallen below the required standard."); Sprecher v. Roberts, 248 N.W. 795, 797 (Wis. 1933) (stating that ladder-tying custom is relevant as evidence and may be the "basis for an inference of negligence," but by itself is not conclusive).

229. Herz et al., *supra* note 46, at 1.

230. This is current IFC practice. Due to the nature of projects, not all Performance Standards always apply. *See Performance Standards*, *supra* note 52, at ii.

231. *See* Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 AM. SOC'Y INT'L L. PROC. 477, 481 (2010) (explaining that accountability should be reflective and context-specific). For example, not every project involves land or resources that are controlled by an Indigenous group, PS7, or that involves "culture heritage" under PS8. *See Performance Standards*, *supra* note 52, PS7, at 1, PS8, at 1. PS5, which addresses resettlement issues, would require different considerations based on the community, including the livelihood and size of the community. *Id.* PS5, at 1. While the basic principles of the Performance Standards remain the same across all

allow some flexibility in the Performance Standard framework when the practical considerations of projects, affected environments, and affected communities vary widely between projects.[232] However, this project-specific contextual approach cannot allow for discretion in preventing foreseeable harm. It simply allows for the legal standard to be reasonable care in ensuring that the Performance Standards are implemented, and it does not allow the IFC to ignore its duty to prevent harm to affected communities.

A breach of this reasonable care standard, which the violation of Performance Standards or a CAO finding may demonstrate, is an actionable negligence claim that an affected community can bring in court.[233] A lender's violation of enforcing the Performance Standards, such as failing to know of and prevent the use of forced labor, which is prohibited by PS2, or failing to avoid resettlement under PS5, would be a clear breach of the standard of reasonable care.[234] In particular, a lender's failure to avoid environmental and social harms after an independent accountability mechanism finding of noncompliance with the Performance Standards would also be a clear signal that the lender did not act with reasonable care in implementing the project.[235] Thus, the standard follows the default rule of reasonable care, and enforcement of the Performance Standards, which are reflective of industry custom, provides strong evidence to demonstrate that a lender acted, or failed to act, with reasonable care.

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projects, the particulars of how risks are managed are contextual, and a sustainable project requires some flexibility.

232. *See Performance Standards, supra* note 52, PS1, at 5; Weiss, *supra* note 232, at 477.

233. *See, e.g.*, *Jam* Complaint, *supra* note 13, at 67–69 (alleging negligence and negligent supervision based on the IFC's breach of the Performance Standards).

234. *See Performance Standards, supra* note 52, PS2, at 5, PS5 at 1.

235. *See* RESTATEMENT (SECOND) OF TORTS § 295A (AM. LAW INST. 1965); *Performance Standards, supra* note 52, at i (explaining the priority to "avoid, minimize, and . . . compensate/offset for risks and impacts to workers, Affected Communities, and the environment"); *supra* note 65 and accompanying text (describing the IFC's action plan requirement to ensure that the client-borrower avoids and prevents harm to communities throughout the lifetime of a project); *supra* notes 144–50 and accompanying text (explaining the use of custom in negligence litigation).

B. Applying the Rule

The rule can be applied to the two pending cases against the IFC for harms to communities in India and Honduras.[236] To reiterate, the rule is as follows: when a financial institution provides a loan for the purpose of a development project, it owes a duty of reasonable care to the affected community for the environmental and social harms that the financial institution causes to the community when the institution plays a significant role in the design, assessment, approval, or implementation of the project.[237]

1. Powerplant project in India

In India, a community of fisherfolk sued the IFC for negligence based on air pollution and pollution to the marine environment that the community members depended on for their livelihood.[238] The first question is whether the IFC provided a loan for the purpose of development, such that (1) the lender intended the project to benefit the public in any way and (2) the lender had constructive knowledge of the risks of harm to the plaintiffs. The second question is whether the IFC played a significant role in the project. Finally, the third question is whether the IFC acted with reasonable care in its administration and implementation of the loan agreement.

First, the IFC did provide the loan for the purpose of development. Because the IFC intended that the project would benefit the public by providing sustainable power and jobs to the community, the IFC intended to provide a benefit to the public, which included the plaintiffs.[239] The IFC explicitly stated that the project was part of a "Clean Energy Investment Framework" and that this project addressed India's energy gap that left people in rural areas without access to

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236. *See supra* Section I.B. For purposes of this application, this Comment assumes that a court has jurisdiction over the lawsuit, and the IFC is not immune from suit because the lawsuit falls within the commercial activities exception to the FSIA. 28 U.S.C. § 1605(a)(2) (2018). This Comment also assumes that the current version (2012) of the Performance Standards applies to all of IFC's projects.

237. *Supra* Section II.A.

238. *Jam* Complaint, *supra* note 13, at 18, 21 (alleging that the Tata-Mundra power plant polluted the environment, harming members of the community).

239. *See* Press Release, Int'l Fin. Corp., *supra* note 54 (explaining that the Tata-Mundra plant was intended to provide affordable power to industrial users, agricultural users, and 16 million domestic consumers in addition to creating 5,000 construction jobs and 700 jobs once the plant was operational).

electricity.[240] The IFC conducted its environmental and social risk assessment prior to deciding to invest in the project, and the IFC labeled the project "Category A," meaning that the project posed a significant risk of irreparable harm if steps were not taken to mitigate the harms.[241] When the IFC designated the project as a high risk "Category A" project, it acknowledged that there were problems with the project, such as the "adequacy of . . . the cooling system," which filters waste before it is discharged into the ocean; the "large volume of sea water intake" that the design of the plant required; and the marine impacts of the plant's operation.[242] The "Category A" decision demonstrates that the IFC not only had constructive knowledge, but it also had actual knowledge that the project posed a significant risk of harm to the environment, which IFC knew the plaintiffs depended on for their livelihood.[243]

Second, the IFC played a significant role in the project. The IFC acted beyond the role of a traditional lender when it approved changes to the design and management plans throughout the construction process and required compliance with its Performance Standards for each disbursement of the loan.[244] The IFC made at least nine supervision visits to the project site between 2008 and 2012, and failed to take steps to prevent, avoid, or mitigate harms to the community that it knew were ongoing.[245]

Finally, the IFC breached the standard of reasonable care. The CAO report found severe noncompliance with the Performance Standards, which are the industry custom for the DFI community.[246] The IFC's

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240. *Id.*

241. *Jam* Complaint, *supra* note 13, at 12–13.

242. *Id.* at 41.

243. *Id.* at 12–13.

244. *Id.* at 16–17; *see* Loan Agreement, *supra* note 54, §§ 5.01–.02. The categorization process is a way for the IFC to describe the magnitude of risks before it decides to fund a project. However, the IFC imposes additional, specific monitoring and supervision requirements to both "Category A" and "Category B" projects so that the IFC plays a more significant role in supervising and advising those projects to comply with its sustainability framework through more involved approval processes. *Interpretation Note on Environmental and Social Categorization*, INT'L FIN. CORP. 2 (2012), https://www.ifc.org/wps/wcm/connect/f873da60-4adf-4fa0-83ec-729227aa5511/Interpretation+Note+on+E+and+S+Categorization.pdf?MOD=AJPERES&CVID=mUtZ0yc [https://perma.cc/SVB9-GRHW].

245. *Jam* Complaint, *supra* note 13, at 16–17.

246. *See supra* notes 144–51 and accompanying text; *supra* Section II.A.3.

management, who was required to take steps to bring the project back into compliance after the CAO issued its findings, failed to create or enforce an effective action plan that addressed the harms and prevented future harms.[247] Currently, the CAO website still lists the project as non-compliant.[248] Thus, the IFC failed to act with reasonable care when implementing and advising the loan for the Tata-Mundra project because it violated the Performance Standards when it approved design changes that the IFC knew would cause certain and unmitigated harm to the affected community and the environment the community depended on for its livelihood.

2. Palm oil in Honduras

In *Doe v. International Finance Corp.*, the IFC made a loan to Dinant, a palm oil company in Honduras in 2009, and Dinant, per the IFC's advice, hired security personnel to take the land for the expansion of the palm oil plantation.[249] In this process, the security personnel killed members of the community who opposed Dinant's claims to contested land.[250] Their family members, along with other members of the community, sued the IFC for wrongful death, negligent infliction of emotional distress, negligence, and a few intentional torts.[251] As in *Jam*, the first question is whether the IFC provided a loan for the purpose of a development project, such that (1) the lender intended the project to benefit the local community in any way and (2) the lender had constructive knowledge of the risks of harm to the plaintiffs. The second question is whether the IFC played a significant role in the project. Finally, the third question is whether the IFC acted with reasonable care in its administration and implementation of the loan agreement.

The IFC provided the loan for the purpose of a development project. The IFC intended the loan to support agribusiness development in

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247. *India/Tata Ultra Mega-01/Mundra and Anjar*, OFF. COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171 [https://perma.cc/FY5U-EUD3]; *Jam* Complaint, *supra* note 13, at 1.

248. *India/Tata Ultra Mega-01/Mundra and Anjar*, *supra* note 249.

249. *Doe* Complaint, *supra* note 12, at 1, 3–5.

250. *Id.* at 5.

251. *Id.* at 118–20, 123. Acknowledging the horrific circumstances of the deaths and injuries that led to this case being filed, this Comment focuses only on the negligence claim and the key facts relevant to establishing that the IFC owed a duty to the plaintiffs and that the IFC breached that duty.

Honduras.[252] When the IFC provided the loan in 2009 to Dinant, the IFC had constructive knowledge, if not actual knowledge, of the risks to the plaintiffs because PS4 explicitly required that a lender inquire into past relationships between security personnel and the community, and the IFC was required to conduct that assessment.[253] Here, Dinant, following IFC's advice, hired security personnel that had a history of using physical violence within this specific community, which the IFC had a duty to know, per PS4.[254]

The IFC played a significant role in the project implementation process. It provided supervision and advice throughout the loan process, which included assessing and overseeing the management of risks associated with the project, such as the land disputes or hiring of security personnel.[255] The IFC was required to ensure that the borrower-client adhered to the Action Plan, which was the agreement that implemented the Performance Standards.[256] Dinant's compliance with

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252. *Id.* at 29–30 (referencing the IFC's need to increase the agribusiness portfolio); *see* INT'L FIN. CORP., WHERE INNOVATION MEETS IMPACT: IFC ANNUAL REPORT 2010 15–16 (2010), https://www.ifc.org/wps/wcm/connect/16494d0c-77b8-474a-bafd-f8f8a928ff8c/AR2010_English.pdf?MOD=AJPERES&CVID=iYNAdVZ [https://perma.cc/3L3B-3MJJ] (explaining the strategic priorities in 2010, which included private sector growth in agribusiness, and stating that the IFC's model of combining advice with investment maximizes development outcomes); INT'L FIN. CORP., THEIR/OUR STORY: CREATING OPPORTUNITY WHERE IT'S NEEDED MOST™: IFC 2009 ANNUAL REPORT 66 (2009), https://www.ifc.org/wps/wcm/connect/publications_ext_content/ifc_external_publication_site/publications_listing_page/annual+report+2009 (explaining that the IFC's investment priorities in 2009 shifted to rural populations and to serve the poor in less-developed regions); WORLD BANK, WORLD DEVELOPMENT REPORT: AGRICULTURE FOR DEVELOPMENT 3 (2008), https://openknowledge.worldbank.org/bitstream/handle/10986/5990/WDR%202008%20-%20English.pdf?sequence=3&isAllowed=y [https://perma.cc/32TH-3HH6] (contextualizing the agriculture sector as a source of growth for the national economy); *id.* at 144 (explaining the particular hardships of smallholder rural farmers in Honduras, Nicaragua, and Peru); *see also* WORLD BANK, THE WORLD BANK ANNUAL REPORT 2009: YEAR IN REVIEW 21 (2009), https://openknowledge.worldbank.org/handle/10986/4354 (explaining the World Bank's strategic focus on supporting food and agriculture development around five focus areas, which included raising agricultural productivity).

253. *Performance Standards*, *supra* note 52, PS4, at 4–5.

254. *Doe* Complaint, *supra* note 12, at 69; *Performance Standards*, *supra* note 52, PS4, at 4–5. This Comment does not explore the possible legal claims under a theory of negligent hiring, but negligent hiring would be another possible form of legal recourse.

255. *Doe* Complaint, *supra* note 12, at 83–84.

256. *Id.* at 80.

the Action Plan was reported annually, in accordance with the loan agreement, and the IFC had the right to refuse disbursement based on Dinant's non-compliance with the Action Plan.[257]

Finally, the IFC breached its duty of reasonable care to the plaintiffs. By failing to corroborate information from the borrower-client on the implementation of the loan, failing to address the deaths and physical violence that were a result of the IFC's failure to inquire into the security company's ties to the military and history of violence against the community, and affirmatively waiving internal policies to continue investing in the borrower, the IFC did not act with reasonable care towards the community because it failed to enforce the Performance Standards.[258] The project had a development purpose, the IFC had constructive knowledge of the risks of harm, and the IFC played a significant role in the implementation of the loan. Thus, the IFC owed a duty of reasonable care to the affected community, which it breached by failing to take any actions that would prevent, mitigate, or compensate harms to the plaintiffs.

Both of these cases illustrate that lender liability in the development context is a fact-based inquiry. The facts of these cases, and the failure of the CAO to provide remedy for the plaintiffs in both cases, also illustrates the need to extend a classic negligence theory into the seemingly modern context of international development. Ultimately, the test outlined above provides a way to evaluate the duty that a DFI owes to the community affected by the projects that it finances. It provides what independent accountability mechanisms have yet been unable to give to communities, despite their best efforts: a real remedy.[259]

CONCLUSION

When a financial institution provides a loan for a project with a development purpose, and the financial institution plays a significant role in implementing the project, it has a duty to avoid harms to the public. Imposing liability in this way is not new. For centuries, tort law has provided a remedy for harms when one actor conducts themselves

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257. *See id.* at 33–34.

258. *Id.* at 86–88.

259. Independent accountability mechanisms have been successful in other ways, such as in providing a space for dispute resolution between the client and the community, but they have not been able to provide true remedies to communities that have been harmed by development projects. *See* Weiss, *supra* note 232, at 482.

in a way that creates a risk of harm to another actor.[260] More recently, with the expansion of financing and lending, courts have used tort to provide remedy for individuals when a lender is heavily involved in the design or implementation of projects.[261] Combined, these two legal trends offer ample reason and legal justification for U.S. courts to provide a remedy for the communities harmed by DFI-financed projects because all other remedies have ultimately failed to provide redress for the plaintiffs.

We live in a globalized, interdependent world where large corporate entities often have more power than sovereign governments themselves. Development is becoming increasingly privatized. Development organizations, like the World Bank, are preaching standards without practicing them. The world is both on fire and flooding as climate change continues to target the poor and the vulnerable. Yet, we need technology. We need lights to turn on, phone batteries to be charged, computers to connect us, and transportation to get us from one place to another. Development is not going away, and the risks of harm that come with development are not going to sink into the ocean with the island nations or burn off in a forest fire. Land will become scarcer. There must be a way to allow development to move forward without sacrificing the lives and livelihoods of the world's most vulnerable. The answer, in many ways, seems fairly simple: accountability in development finance. Hold lenders accountable to the standards they set for themselves as an industry. More importantly, hold lenders accountable to the communities that their actions harm. If there was ever a duty of "all the world to all the world," then this is it.[262]

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260. *See supra* Section I.C.1.
261. *See supra* Section I.C.2.
262. Holmes, *supra* note 133, at 660.