IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA **1:15 – CV – 00612**

BUDHA ISMAIL JAM & OTHERS ... **Plaintiffs**

Versus

INTERNATIONAL FINANCE CORPORATION ... **Defendant**

DECLARATION OF RITIN RAI

I, RITIN RAI a Senior Advocate, having an office at C-377, Defence Colony, New Delhi - 24, India state as follows:

1. I currently practice as a Senior Advocate appearing in Courts and Tribunals in New Delhi, with a focus on commercial and corporate disputes. My educational qualifications and legal experience are as follows.

2. After an undergraduate degree in Economics from St. Stephen's College, Delhi University (1992), I completed my Bachelor of Laws (LL.B) from Delhi University (1995). I was enrolled as an Advocate with the Bar Council of India in 1995 entitling me to practice in courts across India. I was subsequently awarded the Radhakrishanan British Chevening scholarship to study for the Bachelor of Civil Laws degree at the University of Oxford (1997) and thereafter, I obtained an LL.M. from the Harvard Law School (1998).

3. After graduating from Harvard Law School in 1998, I passed the New York State Bar Examination in July 1998 and I was admitted as an Attorney in New York State in 1999. I joined Jones Day, Reavis & Pogue (now Jones Day) in Cleveland, Ohio and practiced as an associate in the Business Practice Group from September 1998 to July 2000. I relocated to India in July 2000 to Pathak & Associations (now P&A Law Offices), an Indian law firm and practiced principally in the M&A and cross-border corporate finance areas. In January 2004, I transitioned to a litigation practice and joined the Chambers of Ashok H. Desai, a Senior Advocate and former Attorney General for India. I also began my own practice at that time and now practice independently. I was designated a "Senior Advocate" by the Supreme Court of India in March 2019.

4. I have been requested by EarthRights International, counsel for the Plaintiffs, to make this statement in relation to certain Indian law issues arising out of the claims by Budha Ismail Jam & Others **("Plaintiffs")** against International Finance Corporation **("IFC")**, the Defendant.

5. In order to make this statement, I have reviewed the following documents:

   (i) The class action complaint dated 23 April 2015 filed by the Plaintiffs in the United States District Court for the District of Columbia for damages and equitable relief;

   (ii) The Defendant's Memorandum of Law dated 19 May 2019 in support of its motion to dismiss; and

(iii) The affidavit of Gauri Rasgotra (the **Statement of Gauri Rasgotra**) dated 20 June 2019 containing her opinion of matters on Indian law.

6. In particular, the purpose of my statement is to set out: (a) the scope of immunity enjoyed by IFC with respect to legal proceedings that may be brought against it in Indian courts **[Section I]**; and (b) the Indian legal position in respect of claims founded on the torts of negligence, nuisance (public and private) and trespass **[Section II]**.

7. Insofar as the content of this statement is within my personal knowledge, it is true. Insofar as it is not within my personal knowledge, it is true to the best of my knowledge, information and belief. I verify that the contents of my statement are true and correct.

8. Nothing in this statement is intended to waive privilege in any of the matters to which I refer.

9. Attached to this statement is a true bundle of documents to which I will refer in this statement.

I. IFC'S IMMUNITY TO LEGAL PROCEEDINGS BEFORE INDIAN COURTS

10. India is a party to the Convention on the Privileges and Immunities of the United Nations 1946 and to give effect to the provisions of the Convention, India has enacted The United Nations (Privileges and Immunities) Act, 1947 **["UN Act 1947"]**. According to Section 3 of the UN Act, 1947, if the Government of India considers it necessary or expedient for giving effect to any international agreement, convention or other instrument, it may accord privileges and immunities set out in the Schedule to the Act to any

international organisation, and its representatives and officers.[1] As is clear from a reading of Section 3, this provision has an overriding effect notwithstanding anything to the contrary contained in any other law.

11. India has also enacted the International Financial Corporation (Status, Immunities and Privileges) Act, 1958 **["IFC Act"]** to implement the agreement for the establishment and operation of the IFC. According to Article VI, Section 3 of the Schedule to the Act, actions may be brought against the IFC in a court of competent jurisdiction in territories of a member in which the IFC has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. Article VI, Section 8 grants immunity to all Governors, Directors, Alternates, officers and employees of the IFC from legal processes with respect to acts performed by them in their official capacity.

12. The Government of India in exercise of its powers under Section 3 of the UN Act issued a notification S.O. 2448(E) dated 13 July 2016 extending certain provisions of the UN Act to the IFC. By the application of this

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[1] Section 3 reads as follows:

> ***"Power to confer certain privileges and immunities on other international organisation and their representatives and officers.-***
> *Where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organisation and its representatives and officers privileges and immunities in India similar to those contained in the provisions set out in the Schedule, the Central Government may, by notification in the Official Gazette, declare that the provisions set out in the Schedule shall, subject to such modifications, if any, as it may consider necessary or expedient for giving effect to the said agreement, convention or other instrument, apply mutatis mutandis to the international organisation specified in the notification and its representatives and officers, and thereupon the said provisions shall apply accordingly and, notwithstanding anything to the contrary contained in any other law, shall in such application have the force of law in India."*

notification, the IFC now enjoys "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity",[2] and officials of the IFC shall "be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".[3]

13. As a result of this notification, and the overriding effect of Section 3 of the UN Act 1947 over the provisions of the IFC Act, no action can be brought against the IFC in Indian courts unless IFC expressly waives its immunity in any particular case. As is clear from the statute,[4] this waiver must be *express* and an implied waiver by conduct is not sufficient.

14. The effect of a notification issued under Section 3 of UN Act has been explained by the High Court of Delhi in *M/S Hindustan Engineering & General Mazdoor Union (Regd) & Ors. v. Union of India & Ors.*[5] In this case the petitioners arrayed the International Centre for Genetic Engineering and Bio-technology as the second respondent, in favor of whom the Government of India had issued a notification in the Gazette of India under Section 3 of the UN Act. The Court held that:

> *"The immunity granted is all comprehensive and applicability of any national laws are subject to the waiver of the immunity by respondent No. 2. As respondent No. 2 has not waived the said*

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[2] United Nations (Privileges and Immunities) Act, 1947, Schedule, Art. II, § 2.

[3] Ibid Art. V, § 18.

[4] Schedule, Art. II, § 2 of the UN Act reads as follows:

> *"The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."*

[5] ILR (2000) II Delhi 353.

> *immunity, the clause relating to observance of national laws will be of no help to the petitioners. ... . Once this is the position in law, other arguments advanced by the petitioners which are founded on the premise that respondent No. 2 is under an obligation to obey the laws of this country, also lose their force."*[6]

15. Similar conclusions have been drawn by the Indian courts with respect to different notified organizations in other cases.[7] To the best of my knowledge, IFC has not expressly waived its immunity from the Indian legal process for the present case. As a result, and on the basis of the aforementioned cases, I am unable to agree with the Statement of Gauri Rasgotra insofar as it states that "the Indian courts are obviously the proper forum for their adjudication."[8] I conclude that the Plaintiffs will not be able to bring this suit before the Indian courts including the National Green Tribunal.

II. INDIAN TORT LAW ISSUES ADDRESSED IN THIS STATEMENT

16. The present complaint against IFC is founded, among others, on the torts of negligence, nuisance (public and private) and trespass. In this section, I analyse the different ingredients of these three torts in Indian law, review their applicability to the Plaintiffs' claims, and respond to the Statement of Gauri Rasgotra.

17. It is observed in the Statement of Gauri Rasgotra that Ms. Gauri Rasgotra is "not aware of any case or statute that would permit a lender to be held liable for these torts under the circumstances alleged in the Complaint."

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[6] Ibid ¶ 19.

[7] See, e.g., *Jyoti Sateeja v. International Committee of the Red Cross & Ors.* (2015) 148 DRJ 708; *Bay of Bengal Programme v. P. Natarajan & Anr.* 2002 (1) LLN 365.

[8] Statement of Gauri Rasgotra, ¶ 55.

Based on my reading of Indian tort law and relevant case law, I come to a different conclusion as discussed below. A lender's liability is not based on any "permission" arising from a judicial precedent or statutory provision; a lender will be liable if the court determines that the ingredients of the tort are made out in the facts of a particular case, and the condition/s for attribution are met. It is therefore important to examine the ingredients of the torts that the Plaintiffs have alleged against IFC.

18. The following analysis has been undertaken to fully understand the applicability of Indian tort law to the Plaintiffs' claims *per se*. It should not be construed as a comment on the immunity from legal processes enjoyed by the IFC as has already been discussed in the previous Section.

A. NEGLIGENCE

Tort of Negligence

19. The tort of negligence is recognized in Indian law. In *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat,*[9] the Supreme Court of India adopted the following definition:

> *"**11.** 'Negligence' ordinarily means failure to do statutory duty* or *otherwise giving rise to in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are –*
>
> *(a) a legal duty* on *the part of A towards B to exercise care in such conduct of A* as *falls within the scope of the duty;*
> *(b) breach of that duty;*
> *(c) consequential damage to B."*[10]

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[9] (1994) 4 SCC 1.

[10] Ibid ¶ 11. See also, *Jacob Mathew v. State of Punjab and Anr* (2005) 6 SCC 1, ¶ 10-12.

20. Similarly, in *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum and Ors.*,[11] the Supreme Court of India identified the following contours of negligence:

> "**12.** ... *The question whether duty exists in a particular situation involves determination of law. Negligence would in such acts and omissions involve an unreasonable risk of harm to others. The breach of duty causes damage and how much is the damage should be comprehended by the defendant. Remoteness is relevant and compensation on proof thereof requires consideration. The element of carelessness in the breach of the duty and those duties towards the plaintiff are important components in the tort of negligence. Negligence would mean careless conduct in commission or omission of an act connoting duty, breach and the damage thereby suffered by the person to whom the plaintiff owes. Duty of care is, therefore, crucial to understand the nature and scope of the tort of negligence."*[12]

Analysis of the Claim of Tort of Negligence contained in the Statement of Gauri Rasgotra

21. Although I agree with the ingredients for an action of negligence contained in the Statement of Gauri Rasgotra, I am unable to agree with the conclusion that "under Indian law, no duty is cast upon the lender, under the theory of negligence to ensure that the borrower does not violate environmental norms".[13]

22. The issue of whether a duty of care exists in a particular fact situation is determined on a case by case analysis. In fact, the Supreme Court of India has repeatedly cautioned against limiting the concept of duty of care. It

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[11] (1997) 9 SCC 552.

[12] Ibid ¶ 12.

[13] Statement of Gauri Rasgotra, ¶ 75.

has held that the concept of duty, its reasonableness, the standard of care required cannot be put in strait-jacket.[14]

23. Although in *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum & Ors.*,[15] (a case relied on in the Statement of Gauri Rasgotra) the Supreme Court found, on the facts of that case, that the municipal corporation did not owe a duty of care to the plaintiff's husband who died on account of a tree falling on him, the Court reached a different conclusion in *Municipal Corporation of Delhi v. Sushila Devi & Ors.*[16] In that case too, a branch of a tree owned by the municipal authority fell and resulted in a death. The plaintiffs rested their case not on any statutory duty on the part of the municipal authority but on its failure or negligence to perform a duty under common law. The Supreme Court of India found that "the law is well settled that if there is a tree standing on the defendant's land which is dried or dead and for that reason may fall and the defect is one which is either known or should have been known to the defendant, then the defendant is liable for any injury caused by the fall of the tree"[17] and upheld the decision of the High Court "... holding the Municipal Corporation negligent in performing its duty under the common law and therefore liable in damages to the plaintiffs for the injury caused to the deceased by fall of the branch of the tree and the consequences flowing therefrom".[18]

24. I would therefore place reliance on the Supreme Court's observation in *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum and Ors.*

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[14] *Jay Laxmi Salt Works (P) Ltd v. State of Gujarat* (1994) 4 SCC 1 ¶ 11.

[15] (1997) 9 SCC 552, ¶ 63.

[16] (1999) 4 SCC 317.

[17] Ibid ¶ 13.

[18] Ibid ¶ 14.

that a person is under a duty of care not to create a source of danger to the safety and well-being of public and property that he could reasonably foresee would be potentially affected by such danger[19] as identifying the principle on which a duty of care is founded - viz., foreseeability. If such danger is in fact caused and damage is suffered, a cause of action arises, making the defendant liable to pay damages.[20]

25. In the present fact situation (based on the averments in the class action complaint), it appears that IFC had foreseen that the Tata Mundra project would potentially have adverse environmental and social impacts. It had listed the project as a 'Category A' project which indicates that the project is expected to have significant adverse social and/or environmental impacts that are diverse, irreversible, or unprecedented.[21] The Plaintiffs in the present case were such persons likely to be affected by the foreseen impacts of the project as their lives and livelihoods are dependent on areas located in close proximity to the project. In such a situation, I am unable to conclude that, under Indian law, the lender owed no duty of care to persons likely to be affected by the plant's impacts or that (as Ms. Rasgotra concludes) "no duty is cast upon the lender under the theory of negligence to ensure that the borrower does not violate environmental norms".[22]

26. In the decisions of the National Green Tribunal referred to in the Statement of Gauri Rasgotra viz., *Vitthal Gopichand Bhungase v. The Gangakhed Sugar and Energy Ltd.*,[23] and *Ramubhai Kariyabhai Patel &*

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[19] (1997) 9 SCC 552, ¶ 13.

[20] Ibid ¶ 13.

[21] Complaint, ¶ 129.

[22] Statement of Gauri Rasgotra, ¶ 75.

[23] O.A. No. 30 of 2013.

Ors. *v. Union of India & Ors.*,[24] the Tribunal found industries to be liable for negligence as their actions resulted in pollution in the surrounding areas. However, in both cases the Tribunal does not discuss (or reject) liability of any other party other than the polluting industry. In that respect therefore, the cases do not enable me to reach the conclusion reached in the Statement of Gauri Rasgotra.

27. Although I have not found cases against a lender for acts of the borrower, I am not aware of any statutory provisions or case law pursuant to which Indian law would impose a separate set of rules of tortious liability to lenders' acts. I may refer to three judgments of the Supreme Court of India to support the claim made by the Plaintiffs in the present case and to analyse the manner in which Indian law addresses itself to situations where more than one defendant may be liable.

28. In *Municipal Corporation of Delhi, Delhi v. Association of Victims of Uphaar Tragedy and* Ors.,[25] the Supreme Court was concerned with a case where a fire in a cinema theatre had led to the death of 59 patrons and injury to 103 patrons. The High Court of Delhi had identified the causes that led to the calamity and held the theatre owner, the Delhi Vidyut Board (the state electricity board), the Municipal Corporation of Delhi and the licensing authority responsible for the fire tragedy. The Supreme Court confirmed the liability imposed on the theatre owner. It also found the Delhi Vidyut Board to be negligent in the maintenance of the transformers which led to the root cause of the incident, namely, the starting of the fire, and accordingly held the Delhi Vidyut Board liable. The Court also examined the liability of the Municipal Corporation of Delhi and the

[24] O.A. No. 87 of 2013.

[25] (2011) 14 SCC 481.

licensing authority and in the facts of the case, found that no liability could be affixed on them as there was no close or direct proximity between them and the cause of fire.[26] The judgment is instructive to explain that multiple parties can be held liable if a duty of care exists and if there is causation.

29. The Supreme Court of India in *New India Assurance Company Limited v. Zuari Industries Limited & Ors.*[27] discussed the meaning of 'proximate cause' in the context of a fire causing damage to the property of the plaintiff. The Court while relying on decisions of foreign courts concluded that "proximate cause is not the cause which is nearest in time or place but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source".[28] Although the discussion in this judgment refers to "the" proximate cause, I read the judgment as contemplating the possibility that there can be, in a given case, more than a proximate cause for a particular outcome.

30. The Supreme Court of India has dealt with cases involving composite negligence where injuries have been caused to a claimant by the combined wrongful act of joint tortfeasors. For instance, *Khenyei v. New India Assurance Company Limited & Ors.*[29] was a case arising from an accident caused by the composite negligence of drivers of a trailer truck and a bus. In that case, the Court held that where negligence is caused by joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act are liable jointly and severally.[30] The Court

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[26] Ibid ¶ 55.
[27] (2009) 9 SCC 70.
[28] Ibid ¶ 14.
[29] (2015) 9 SCC 273.
[30] Ibid ¶ 3.

further approved the decision of the Madras High Court in *Palghat Coimbatore Transport Co. Ltd. v. Narayanan*,[31] and held that:

> *"where injury is caused by the wrongful act of two parties, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He has a right to recover the full amount of damages from any of the defendants."*[32]

31. In *Pramod Malhotra & Ors. v. Union of India & Ors.*,[33] a claim was made against the Reserve Bank of India **("RBI")** alleging that it breached its duty of care in issuing a license to Sikkim Banking Limited **("SBL")** despite being aware of deficiencies and irregularities in the functioning of SBL. Depositors of SBL claimed damages on account of this breach of the duty of care. On the facts of the case, the Court declined to impose liability on the RBI holding that "RBI did not have day-to-day management or control on SBL". Further, the relationship of RBI with creditors or depositors of SBL was not such that it would be just or reasonable to impose a liability in negligence on RBI.[34] This case demonstrates that a party may be liable if it is found to be in control of a tortfeasor or if its relationship with the plaintiff is such that it would be just or reasonable to impose a liability in negligence on that party. Thus, although control is an indicia on which liability can be found, even absent control, liability can be affixed depending on the nature of the relationship between the defendant and the plaintiff.

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[31] ILR 1939 Mad 306.

[32] (2015) 9 SCC 273, ¶ 7.

[33] (2004) 3 SCC 415.

[34] Ibid ¶ 25.

32. I note that the Statement of Gauri Rasgotra does not refer to the cases of *Municipal Corporation of Delhi* and *New India Assurance Company Limited*, but refers to the *Pramod Malhotra* case principally to make the point that, in that case, "the court found no liability on the part of the defendant."[35] This is correct but it does not detract from the proposition that a party may be liable if it is found to be in control of the tortfeasor or if its relationship with the plaintiff is such that it would be just and reasonable to find the party liable for negligence. This ultimately is a question of fact and does not detract from the general duty of care identified in *Rajkot Municipal Corporation*. For this reason also, as a matter of law, I am unable to agree with the conclusion contained in the Statement of Gauri Rasgotra that multiple parties "can only be held liable if the root cause of the act could be attributable to them."[36]

33. In fact, applying the settled principles to the present case, notwithstanding wrongs that may also be alleged against any other entity, IFC may be held liable for the damage suffered by the Plaintiffs. From the facts stated in the complaint it appears that the Tata Mundra project would not have been possible without the funds extended by IFC. Not only has IFC substantially funded the Tata Mundra project, it also enabled additional funding for the project; exercised substantial control over its design and construction, including preventive and mitigation measures and continues to exercise substantial control over the project.[37]

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[35] Statement of Gauri Rasgotra, ¶ 71.

[36] Statement of Gauri Rasgotra, ¶ 70.

[37] Complaint Section IV.

34. As stated by me above, I am unable to conclude that no duty of care is cast on a lender to potential plaintiffs in respect of a project financed by a lender. Further, in light of the factors described above, it is not possible to conclude that an Indian court would not find, as a matter of fact, that IFC owed a duty of care to the Plaintiffs in respect of consequences that were foreseeable. The argument gets fortified by the environmental and social action plan which was made a necessary condition to the loan advanced by IFC to Coastal Gujarat Power Limited **("CGPL")**. To the extent the Plaintiffs are able to establish that there was a breach of this duty of care, a Court may find that Indian law affords a remedy and hold IFC liable.

35. I am therefore unable to agree with Ms. Rasgotra's conclusion that "no duty is cast upon the lender under the theory of negligence to ensure that the borrower does not violate environmental norms".[38]

B. NUISANCE

36. Indian courts have found various forms of environmental pollution to constitute nuisance under the law: effluent released from an alcohol factory onto a public street;[39] emission of carbon black from a rubber factory;[40] use of loudspeakers and amplifiers;[41] noise produced by the non-stop operation of the oil mill engines[42] and flour mills;[43] exploitation of groundwater from residential areas for commercial purposes and plying

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[38] Statement of Gauri Rasgotra, ¶ 75.

[39] *Municipal Council, Ratlam v. Vardichand and Others* (1980) 4 SCC 162.

[40] *P.C. Cherian v. State of Kerala* MANU/KE/0090/1981.

[41] *Noise Pollution (V), In Re* (2005) 5 SCC 733.

[42] *Sri Gopal Saha v. Sri Uttam Saha* 2013 (4) GLT 990.

[43] *Datta Mal Chiranji Lal v. L. Ladli Prasad and Anr.* AIR 1960 All 632.

heavy vehicles in the early mornings in residential areas;[44] stench from a toilet;[45] and smoke emitted from a furnace using steam coal.[46]

37. The Supreme Court of India in *Vasant Manga Nikumba v. Baburao Bhikanna Naidu*[47] has held that "nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence".[48] The Court added that nuisance is not capable of precise definition.[49] This was reiterated by the Court subsequently in *State of Madhya Pradesh v. Kedia Leather,* where the Court relied on a statement made in the Halsbury's Laws of England:

> *"even at the present day there is not entire agreement* as *to whether certain acts* or *omissions shall be classed* as *nuisances* or *whether they do not rather fall under other divisions of the law of tort."*[50]

38. For nuisance to be established, the plaintiff has to establish damage – actual or potentially imminent. In *Rafat Ali v. Sugni Bai,*[51] the Supreme Court of India held that suffering of damage must be proved in a case of nuisance unless it can be presumed by law to exist. For the damage to amount to actionable nuisance, it must be substantial or at least of some significance.[52] If the damage is insignificant or evanescent or trivial, it

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[44] *R. Kumaravel Gounder v. The Sub Divisional Executive Magistrate Sub Collector, Hosur* 2012(4) CTC 661.

[45] *Abdul Hakim & Anr. v. Ahmad Khan* AIR 1985 MP 88.

[46] *Mahmood Ilahi v. Smt. Dayawati and Anr.* 1989 (15) ALR 158.

[47] (1995) Supp (4) SCC 54.

[48] Ibid ¶ 3.

[49] Ibid.

[50] (2003) 7 SCC 389, ¶ 8.

[51] (1999) 1 SCC 133.

[52] Ibid ¶ 16.

would not be actionable nuisance.[53] The Court then extracted a passage from the Halsbury's Laws of England wherein it was stated that 'the damage need not consist of pecuniary loss, but it must be material or substantial, that is, it must not be merely sentimental, speculative or trifling, or damage that is merely temporary, fleeting or evanescent'.[54]

39. There is limited discussion in Indian case law on the issue of causation of nuisance. Section 268, Indian Penal Code **("IPC")** holds a person responsible for any act or illegal omission that *causes* injury, danger, obstruction or annoyance to be guilty of public nuisance. Under Section 133 Code of Criminal Procedure **("CrPC")**, the Magistrate issues orders to the person *causing* the nuisance. My review of relevant case law did not reveal a discussion on the meaning and ambit of the word 'cause'. Causation of nuisance could, potentially, include material or significant contribution that facilitated the completion of the acts that caused the nuisance. The acts may have been committed by a different entity but the lender could also be held separately liable for its material contribution in committing the nuisance. In the present fact situation, without IFC's loan CGPL could not have undertaken the acts which are causing the nuisance, and therefore IFC could be held liable as the lender.

40. In Indian law, nuisance is of two kinds: (1) public nuisance and (2) private nuisance. The Supreme Court of India has distinguished between the two in *Rafat Ali v. Sugni Bai-*

> *"Nuisance as understood in law is broadly divided into two classes - public nuisance and private nuisance. The former consists of some acts or omissions which result in violation of rights which*

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[53] Ibid.

[54] Ibid.

> *one enjoys in common with other members of the public. But the latter i.e., private nuisance, is one which interferes with a person's use and enjoyment of immovable property or some right in respect of it."*[55]

41. The distinction between the two lies in the quantum of annoyance, discomfort, and injury.[56] Furthermore, Indian courts while relying on English authorities have held that public nuisance is always a criminal offence; but a private nuisance need not always be.[57] In other words, all acts constituting public nuisance are unlawful acts; those which constitute private nuisances are not necessarily unlawful.

Public Nuisance

42. Public nuisance is defined in Section 268 of the IPC. Section 268, IPC states:

> *"A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.*
>
> *A common nuisance is not excused on the ground that it causes some convenience or advantage."*

43. As can be seen from the definition of public nuisance, to prove that a particular action is a public nuisance, it is not necessary to prove that it hazardous to health. It is adequate to show that it causes annoyance to the

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[55] (1999) 1 SCC 133, ¶ 14.

[56] *Vasant Manga Nikumba v. Baburao Bhikanna Naidu* (1995) Supp (4) SCC 54, ¶ 3.

[57] *Dhannalal and Anr. v. Thakur Chittarsingh Mehtapsingh* AIR 1959 MP 240; *Mahmood Ilahi v. Smt. Dayawati and Anr.* 1989 (15) ALR 158.

public.[58] The statute does not place definitional constraints on who could be the person liable for public nuisance and therefore any person who causes the annoyance falls within the mischief of the statute.

44. In Indian law remedies for public nuisance are found in general laws: the IPC,[59] the CrPC,[60] and the Code of Civil Procedure **("CPC")**;[61] special laws: such as Water (Prevention and Control of Pollution) Act 1974, and the Air (Prevention and Control of Pollution) Act 1981, and local laws: such as the rent control laws and laws governing functions and powers of municipalities. The remedies, depending on the legal provision invoked, could be a penalty in the form of fine or imprisonment; an injunction or restraint order; cancellation or modification of regulatory approvals, etc. These actions can be brought by private parties as well as the State.

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[58] *P.C. Cherian v. State of Kerala* MANU/KE/0090/1981.

[59] IPC, Section 290 and Section 291.

[60] CrPC, Section 133 to 144. These provisions confer powers on a Magistrate to injunct or restrain the public nuisance. The Supreme Court in a landmark judgment in *Municipal Council, Ratlam v. Vardichand* ((1980) 4 SCC 162, ¶ 13) discussed the import of Section 133 CrPC is detail. It held:

> *"Section 133 CrPC is categoric, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the sub-Divisional Magistrate, Ratlam, has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The Magistrate's responsibility under Section 133 CrPC is to order removal of such nuisance within a time to be fixed in the order."*

[61] CPC, Section 91. The suit under this provision may be instituted by the Advocate General, or by two or more persons with the leave of the Court. Such persons need not have suffered special damage due to the public nuisance.

Private Nuisance

45. Indian courts have generally relied on English authorities to define private nuisance and its parameters.[62] The Punjab and Haryana High Court in *Ram Lal v. Mustafabad Oil and Cotton Ginning Factory and Ors.*[63] found that the noise and vibrations emitting from the defendant's machinery had caused damage to the plaintiff's property and amounted to actionable nuisance. The High Court while granting a permanent injunction, enumerated certain principles based on its review of English and Indian case law to determine actionable (private) nuisance. It held that the degree or the extent of the annoyance or the inconvenience is to be considered; and each case depended largely on its own facts as annoyance or inconvenience is difficult to measure exactly.[64] The Court also held that 'a substantial fear or reasonable apprehension of danger, may constitute a nuisance'.[65]

46. The Allahabad High Court has held that the consequences of the activity have to be of substantial magnitude, and cannot be trivial to amount to actionable nuisance. The test applied by the Court was "the test of ascertaining the reaction of a reasonable person according to the ordinary usage of mankind living in a particular society in respect of the thing complained of".[66] Elaborating on the test, the Court held that the

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[62] *Dhannalal and Anr. v. Thakur Chittarsingh Mehtapsingh* AIR 1959 MP 240; *Mahmood Ilahi v. Smt. Dayawati and Anr.* 1989 (15) ALR 158; *Abdul Hakim & Anr. v. Ahmad Khan* AIR 1985 MP 88.

[63] AIR 1968 P&H 399.

[64] Ibid ¶ 25.

[65] Ibid.

[66] *Dr. Ram Baj Singh v. Babulal* AIR 1982 All 285, ¶ 12.

reasonable person does not include "hyper sensitive persons" or "persons attuned to a dainty mode of living".[67] Further, the Court held that while determining whether a particular act is causing discomfort, the location of the property is a relevant circumstance.[68]

47. The judgment of the High Court of Madras in *Pakkle and Ors. v P. Aiyasami Ganapathi and Ors.*[69] highlighted another aspect of private nuisance. It held that interference with some easement or quasi-easement or other right used or enjoyed in connection with land could also constitute nuisance.[70] In that case, the plaintiffs had filed a suit to restrain the defendants from laying salt pans around a tank as the plaintiffs and other villagers used the water from the tank to drink and bathe, and to bathe their cattle, and the defendants' actions were rendering the water unusable. The Court held that even though the plaintiffs did not own the tank (it was owned by the government), the plaintiffs had established a common right to use the tank water, and therefore any interference in the enjoyment of that right would give rise to a cause of action. It ruled in favour of the plaintiff and issued an injunction against the defendant. The Court rejected arguments by the defendant that since there were other persons who were responsible for making the waters of the tank brackish, an injunction against them alone cannot be passed.[71] A similar defence taken by the defendants in *Shanmughavel Chettiar and Ors. v. Sri Ramkumar Ginning Firm* was dismissed by the Madras High Court.[72] The defendants in that case wanted to set up brick kilns and the plaintiff was

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[67] Ibid ¶ 19.

[68] Ibid ¶13.

[69] AIR 1969 Mad 351.

[70] Ibid ¶ 113.

[71] Ibid ¶ 4.

[72] AIR 1987 Mad 28.

seeking an injunction as the kilns were potentially hazardous to his cotton ginning firm situated nearby. The Court ruled in favour of the plaintiff, and also held that it was no defence for the defendants to state that there were other brick kilns in the neighbourhood and therefore they should also be permitted.[73] These cases highlight that multiple defendants may be liable for a particular act of nuisance.

48. The remedy for private nuisance lies in criminal and civil law. In criminal law, while the IPC and CrPC provisions only deal with public nuisance, special and local laws do provide remedy for private nuisance. For example, under Section 43 of the Air (Prevention and Control of Pollution) Act 1981, a complaint may be filed in the Court of the Metropolitan Magistrate or a Judicial Magistrate First Class in case of emissions by units beyond permissible limits. In civil law, the plaintiff may file a suit under the Specific Relief Act 1963 or under Order XXXIX, Rule 1 and 2, CPC, seeking an injunction for abatement of nuisance and/or damages.[74] In *Kuldip Singh v. Subhash Chander Jain & Ors.*, the Supreme Court of India held that "[i]n order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages".[75]

Analysis of the Claim of Nuisance Contained in the Statement of Gauri Rasgotra

49. The Statement of Gauri Rasgotra concludes "that an operator of the plant can be liable for nuisance if it is established that the operator is

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[73] Ibid ¶ 29.

[74] *Kachrulal Bhagirath Agrawal and Ors. v. State of Maharashtra and Ors.* (2005) 9 SCC 36.

[75] (2000) 4 SCC 50, ¶ 9.

continuously releasing polluted air and water in the community".[76] The opinion refers to case law to support the conclusion (contained at paragraph 89) that "there is no legal basis for asserting these claims against a lender, such as IFC...". I discuss the case law mentioned in the Statement of Gauri Rasgotra below:

50. In *Wali Uddin and Anr. v. State of U.P. and Anr.*,[77] the High Court of Allahabad was faced with a claim of nuisance, as the defendant's manufacturing unit was causing noise and leading to cracks in the buildings in the locality. The Court while relying on several English authorities provides various definitions for public and private nuisance and concludes that the nuisance complained of constituted public nuisance. The Court's final verdict – to stay proceedings under the CrPC – was based on the ground that the existence of a public right had to be first determined by a civil court, and the Magistrate could not have proceeded without an appropriate inquiry under Section 137, CrPC. Given the facts, the Court was not required to determine causation or the issue of liability. It appears that the Statement is relying on this judgment principally to provide a definition for nuisance based on English law.

51. The High Court of Gujarat in *Ushaben Navinchandra Trivedi and Anr. v. Bhagyalaxmi Chitra Mandir and Ors.*[78] found that the mere fact that the defendant's movie shocked the plaintiffs' religious sentiments did not amount to an infringement of any legal right and therefore the question of granting an injunction did not arise as it was not clear that the exhibition of the film would be a nuisance. As the Court did not find in favour of the

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[76] Statement of Gauri Rasgotra, ¶ 77.

[77] 1988 AWC 25 All.

[78] AIR 1978 Guj 13.

plaintiffs, the issue of liability was not considered. The Statement appears to rely on this judgment to identify two elements of the tort. Beyond the identification of elements of tort, the relevance of this case to the present matter may be limited as it did not deal with nuisance in the context of damage to the environment or physical discomfort or injury.

52. The Supreme Court of India in *Balwant Singh v. Commissioner of Police & Ors.*[79] was principally concerned with the issue of noise pollution as a form of nuisance. It relied extensively on a previous decision of the Court in *Noise Pollution (V), In re,*[80] and gave orders for strict compliance of the Court's directions in that judgment. The Statement appears to rely on the judgment to the extent that it states that a person affected by nuisance could seek remedy against those who caused such nuisance. The judgment does not discuss the issue of causation or of liability any further, and therefore its relevance to the present matter is limited.

53. The Statement relies on two judgments of the National Green Tribunal. In the first one, *Kehar Singh v State of Haryana,*[81] the applicant filed an application under Section 14 of the National Green Tribunal Act 2010 challenging the construction of a Sewage Treatment Plant in close proximity to a residential area, a temple and agricultural land. Besides causing severe environmental harm and hurting religious sentiments, the applicant claimed that the plant did not have the necessary regulatory approval (commonly known as the environmental clearance under the EIA Notification 2006). The Tribunal found that the plant did fall under the category of projects that required a prior environmental clearance and

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[79] (2015) 4 SCC 801.

[80] (2005) 5 SCC 733.

[81] MANU/GT/0067/2013.

directed it to obtain the clearance before further activities. The judgment does not discuss the law on nuisance. The Statement appears to rely on this judgment to state that the claims had been brought against the operator of the plant, and not the lender. An environmental clearance under the EIA Notification 2006 has to be sought by the project proponent, i.e. the operator, and therefore the applicant may have decided to implead the operator as a party to the case. Whether a lender could have been held liable for the omission on part of the plant's operator to obtain the environmental clearance is a question not addressed at all in the judgment as it was not likely raised in the application. Therefore, this judgment is not relevant to the issue of whether a lender can be liable in a suit for nuisance.

54. The second decision of the National Green Tribunal, in *SK Shetye and Leonardo Rodrigues v Ministry of Environment and Forests*,[82] deals with the operations of a Municipal Solid Waste (MSW) plant and its status of compliance with the relevant Municipal Solid Waste (Management and Handling) Rules 2000. The Tribunal found the plant and the Municipal Council not to be in compliance with the relevant rules, and issued directions for time bound actions by the plant operator and the concerned regulatory agencies. It also directed the parties to deposit costs which would be used for environmental restoration. Although the judgment does not clarify, it follows from the judgment that the parties were directed to pay for the failure to comply with, and ensure compliance of, MSW Rules. This judgment also does not discuss the law on nuisance. The Statement appears to rely on it to the extent the operator of the plant was held liable, and not the plant's lenders. But it is pertinent that the judgment does not

[82] MANU/GT/0060/2014.

discuss the liability of the operator(s) / lender(s), if any, and the lender had not even been sued by the applicants in the first place.

55. From a review of the case law relied on in the Statement, I conclude that the case law does not rule out the lender's liability for the actions of the person or entity causing the nuisance. None of the case law discussed in the Statement substantively dealt with the issue of causation and subsequent liability, and therefore I am unable to agree with the conclusion reached in the Statement of Gauri Rasgotra that "there is no legal basis for asserting these claims against a lender".[83]

56. Although my review of case law of the Supreme Court of India, the High Courts and the National Green Tribunal has not revealed any precedent for lender's liability in case of nuisance caused by a project financed by it, it has also not revealed any precedent that affirmatively excludes such form of liability. The ordinary principles of causation discussed above would apply even to analyse lender liability for the tort of nuisance.

C. TRESPASS

57. Trespass may be committed (1) by entering upon the land of the plaintiff, or (2) by remaining there, or (3) by doing an act affecting the sole possession of the plaintiff, in each case without justification.[84] The present case would fall in the third type of trespass. Criminal trespass is a crime under Section 441 of the Indian Penal Code, but I do not address criminal trespass in this statement.

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[83] Statement of Gauri Rasgotra, ¶ 89.

[84] Justice GP Singh, RATANLAL & DHIRAJLAL: THE LAW OF TORTS (26th edn, LexisNexis Butterworths Wadhwa Nagpur, 2010) 386.

58. In *Abdul Gani v. Saduram*,[85] the Rajasthan High Court while considering whether discharge of filthy water on plaintiffs land amounted to trespass by the defendant, distinguished between nuisance and trespass and held:

> *"Nuisance is usually created by acts done by the defendant on the land in occupation or in some place of public resort, adjoining or in the neighbourhood of the land in occupation of the plaintiff, trespass occurs by entry upon or remaining upon the land in possession of the plaintiff or by placing or projecting any material object upon it in each case without lawful jurisdiction. The present case would have been a pure case of nuisance if the discharge of filthy water had collected on the land of the defendant and caused an unlawful interference with the plaintiff's use or enjoyment of his 'gali' or other property such as by emitting foul smell etc. But since the spout throws water on the plaintiff's land, it amounts to trespass and the tortious act continues as long as the discharge of filthy water or otherwise continues. It is a continuing wrong and until it repairs into a right by prescription, the cause of action continues..."*

59. The judgment was finally in favour of the defendant on the ground of, acquiescence by the plaintiff, and therefore the question of liability did not arise in the judgment. But the point of law in terms of what constitutes trespass was clearly stated.

60. In India, the tort of trespass in actionable *per se* and there is no requirement to show evidence of damage. This is distinguishable from the tort of private nuisance which is actionable only on proof of damage being shown.[86] The Kerala High Court in *HMT Ltd. v. TK Simon*[87] held:

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[85] 1977 WLN 641.

[86] *HMT Ltd. v. TK Simon* 2009 (2) KLJ 545.

[87] Ibid.

> *"If the interference is direct and controlled by the defendant's volition, it is a case of trespass to land. For example, if the defendant were to cross onto the land of the plaintiff or if the defendant were to construct a building in his own property in such a way as to project into the neighbouring land of the plaintiff or if the defendant were to dump garbage or other waste in the plaintiffs land or to cause any physical object or noxious substance to cross the boundary onto the plaintiffs land or discharge filthy water upon the plaintiffs land or erect a sign - board projecting into the super incumbent air space of the plaintiff, then the defendant could be said to have committed trespass to land. This is based on the distinction that the injury caused is direct and not consequential and the defendant had control over the act complained of."*

61. In this case the defendant company was not found liable for the damage caused to the plaintiff's property by a tree growing in the defendant's land due to lack of evidence that the defendant could have anticipated the mishap in any way.

Analysis of the Claim of Trespass Contained in the Statement of Gauri Rasgotra

62. The Statement of Gauri Rasgotra relies on a judgment of the Supreme Court of India in *Laxmi Ram Pawar v. Sitabai Balu Dhotre and Another*,[88] wherein the Court was considering the issue of eviction and whether the definition of occupier under the law applicable to the subject property included a trespasser. The Court considers the definition of trespass, trespass *ab initio*, and continuing trespass and relies on various authorities for the same. It comes to the conclusion that occupier includes trespasser and therefore necessary statutory approval was required before eviction proceedings could commence. The Statement appears to rely on this judgment to make the point that if a complainant can prove

[88] (2011) 1 SCC 356.

encroachment on land owned by him, he can take action against the encroacher – but not the lender. It may be stated that the judgment relied on does not discuss liability for the lender, as the issue did not arise from the facts of the case.

63. The second judgment quoted by the opinion is a judgment of the National Green Tribunal and as the opinion itself states is not entirely relevant to the present fact situation as it deals with physical encroachment. From an extensive review of case law of the National Green Tribunal it appears that the Tribunal is yet to make a pronouncement which deals substantively on the tort of trespass and liability arising from it.

Remarks in Conclusion

64. Based on my review of Indian law, I am unable to conclude that Indian courts are the proper forum or that this suit can be brought against the IFC in India. I am also unable to conclude that Indian law excludes lender liability. If the elements of each tort - negligence, nuisance and trespass - are established in the facts of the case, a lender may be held liable.

65. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed: Ritin Rai

Ritin Rai

Dated: 19 August 2019