MDB ACCOUNTABILITY ANALYSIS

The Immunity Paradox:

How IFC Cannot Be Sovereign and Commercial Simultaneously

Why Cambodia Has Put the Commercial Activity Question Back Before the Courts

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THE CENTRAL CONTRADICTION

The International Finance Corporation has made two incompatible arguments about the nature of its activities. ***In US federal courts:*** IFC's activities are governmental in character — not commercial — entitling it to sovereign immunity from suit. ***Before its own watchdog:*** IFC is a commercial investor in private financial intermediaries — one step removed from end borrowers — and therefore not accountable for downstream harm.

Both cannot simultaneously be true. Cambodia has made the contradiction inescapable.

The International Finance Corporation has spent the past seven years making two incompatible arguments about the nature of its activities.

In United States federal courts, IFC argued that it is not engaged in commercial activity within the meaning of the Foreign Sovereign Immunities Act. Its lending and investment activities are not the acts of a commercial actor — they are the acts of an international organisation performing a public function, entitled to the same immunity from suit that foreign governments enjoy. The DC Circuit accepted this logic in 2021, after the Supreme Court's 2019 ruling in Jam v. IFC removed near-absolute immunity. The Gujarati fishing and farming communities whose livelihoods were destroyed by an IFC-backed power plant received nothing. Seven years of litigation. Nothing.

In its own governance, IFC argued the opposite. When the Compliance Advisor Ombudsman found that IFC had violated its Sustainability Framework through its investments in Cambodian microfinance institutions, IFC told its Board that it "disagrees that the IFC Sustainability Framework applies to the harms presented." The investments in ACLEDA, Amret, Prasac, Hattha Bank, LOLC, and Sathapana were investments in commercial financial intermediaries. IFC was a commercial investor in those institutions — a step removed from the lenders' clients. The Board agreed. The CAO Director General resigned the next day.

IFC claims sovereign immunity as a shield against judicial accountability, and commercial distance as a shield against institutional accountability. The mechanism shifts between forums; the outcome is identical. No accountability. Anywhere.

Cambodia did not create this contradiction. It made it impossible to ignore.

I. What Jam v. IFC Actually Decided — And Did Not Decide

The Supreme Court's 2019 ruling in Jam v. IFC is frequently described as having partially opened the door to accountability for MDBs in US courts. The accurate description is narrower: it established that international organisations do not enjoy near-absolute immunity under the International Organizations Immunities Act. They enjoy the same restrictive immunity that foreign governments enjoy under the FSIA — immune for sovereign acts (jure imperii), not immune for commercial acts (jure gestionis). The test is the nature of the act, not its purpose.

The Court did not rule that IFC's lending is commercial activity. Chief Justice Roberts, writing for the majority, explicitly cautioned that "it should not be assumed that the lending activity of development banks qualifies as commercial activity within the meaning of the FSIA." That caution was obiter dictum — it was not a holding, it did not decide the question, and it is not binding precedent.

On remand, the DC Circuit sidestepped the commercial activity question entirely. It found a different escape route. The FSIA's commercial activity exception requires that the lawsuit be "based upon" commercial activity "carried on in the United States." The Gujarati fishermen's lawsuit was not based upon IFC's Washington lending decisions — it was based upon the Coastal Gujarat Power Limited's operations in Gujarat. CGPL was the direct cause of harm; IFC's role was one causal step back. The courts found the "based upon" requirement was not met — not because IFC's activities were non-commercial, but because they were insufficiently direct. The commercial activity question was sidestepped, not resolved.

Issue	What the courts decided
Is MDB immunity absolute?	No — Jam (2019): same restrictive immunity as foreign governments under FSIA
Is IFC's lending/investment activity "commercial" under FSIA?	Not decided — DC Circuit (2021) found a different escape route; question remains open
Can a claim based on IFC's own Washington decision satisfy the "based upon" test?	Not decided — Jam was based on CGPL's Indian operations, not an IFC Board decision
Has IFC waived immunity through its Articles of Agreement?	No waiver — DC Circuit (2021); Supreme Court denied cert (2022)

Sources: Jam v. IFC, 586 U.S. (2019); DC Circuit No. 20-7097 (July 6, 2021); cert. denied (2022).

II. Why Financial Intermediary Activity Is Commercial

The FSIA defines commercial activity as activity of a kind that a private commercial actor might engage in — distinguished from acts that only a sovereign performs by virtue of its governmental authority. The test is the nature of the act, not its purpose. A government building a naval base is performing a sovereign act. A government operating a hotel is performing a commercial act. A government holding equity in a private bank is performing a commercial act.

IFC held equity positions and loan exposures in ACLEDA, Amret, Prasac, Hattha Bank, LOLC, and Sathapana — private, for-profit financial institutions incorporated under Cambodian company law, operating under Cambodian banking regulation, charging commercial interest rates to their borrowers, reporting profits to shareholders. IFC invested in them to earn a return. It received dividends and interest. It exercised rights as a shareholder. When the investments created reputational risk, it was as a financial investor that IFC had to respond.

No sovereign authority is required to hold equity in a private bank. A private equity fund, a development finance institution operating on commercial principles, any bank with an impact investing mandate performs the same acts daily. These are commercial acts in the FSIA sense — and the Roberts caveat, written with infrastructure development lending in mind, sits considerably less

comfortably over a portfolio of private financial sector equity and debt investments in for-profit commercial lenders.

> **IFC's own June 23, 2026 Board determination argued that its Sustainability Framework does not apply because IFC is "a commercial investor one step removed from end borrowers." That argument is, on its face, a concession that IFC engages in commercial activity. IFC's lawyers wrote those words. The Board adopted them. They are now in the primary record.**

The contradiction constructed in the June 23 determination is now fully visible. If IFC is merely a commercial investor in commercial lenders — too remote to bear E&S obligations to end borrowers — then its financial intermediary activities are commercial within the FSIA's meaning. The characterisation that defeats the accountability claim simultaneously defeats the immunity claim. IFC cannot be a sovereign institution for purposes of judicial immunity and a commercial investor for purposes of accountability. The description must be consistent, and consistently commercial is where the evidence points.

III. The Board's June 23 Decision as US-Based Commercial Conduct

The DC Circuit's escape route in the Gujarat case — that the lawsuit was based on CGPL's Indian operations rather than IFC's Washington lending — is not available for a claim based on the IFC Board's June 23, 2026 decision.

That decision was made in Washington DC by the IFC Board of Directors. It was not a decision by a Cambodian lender. It was not a decision by a third-party commercial entity. It was IFC's own decision — made by its governing body, on its premises, at 2121 Pennsylvania Avenue NW — to declare that its four-year independent investigation found no policy noncompliance, and to endorse a Management Report declining to require any remedial action.

> *The Gujarati fishermen's claim was based upon what CGPL did in Gujarat. A Cambodian complainant's claim would be based upon what the IFC Board did in Washington. These are materially different factual structures, and the legal analysis that follows from them is correspondingly different.*

A lawsuit based on the June 23 decision is not based upon a Cambodian company's operations in Cambodia. It is based upon a Washington institution's Washington decision. The "activity carried on in the United States" test has a direct answer: the Board of the International Finance Corporation voted on June 23, 2026 to deny remedy to 18 complainants whose harm an independent investigation found to be connected to IFC's own policy noncompliance. That vote was cast in the United States.

The claim would also be based on a commercial act — the Board's determination that IFC's commercial investments in private financial intermediaries do not give rise to E&S accountability obligations. A commercial actor making a commercial determination about the scope of its commercial risk management obligations is performing a commercial act in the FSIA sense. Both conditions the Gujarat case failed to satisfy — commercial character and US nexus — are differently presented in a claim based on the June 23 decision.

IV. The Binary IFC Cannot Escape

The June 23 decision has placed IFC in a binary it cannot resolve by invoking a different legal label in each forum.

IF IFC'S ACTIVITIES ARE SOVEREIGN —	IF IFC'S ACTIVITIES ARE COMMERCIAL —
Then IFC bears the obligations that sovereign actors bear. Citizens can access accountability mechanisms. Independent watchdog findings bind the institution. The CAO's conclusions could not be overridden. Sovereign status requires sovereign accountability.	Then the FSIA commercial activity exception applies and sovereign immunity fails. Commercial actors that cause harm through commercial activities are not immune from suit in their country of domicile. Commercial status defeats the immunity claim.

IFC must choose. For twenty-five years it has chosen sovereign status in US courts and commercial distance in its own governance. Cambodia has made that dual position explicit in a single Board determination — the same document that constructs the accountability escape simultaneously undermines the immunity claim. Both shields are invoked in the same case. Both cannot hold.

This is not a novel legal theory constructed to reach a preferred outcome. It is the direct consequence of IFC's own arguments. The Board's June 23 determination is in the public record. Any court examining IFC's immunity claim alongside IFC's accountability escape — in the same case, involving the same investments, the same Board — would find a contradiction that the Jam litigation never surfaced, because the Jam litigation predated the Board's explicit articulation of the commercial-investor-distance argument.

V. The Double Void: What Results When Both Shields Hold

If US courts accept IFC's sovereign immunity claim: no judicial remedy. If the IFC Board accepts IFC Management's commercial-distance argument: no institutional remedy. The result is what this paper calls the Double Void — no independent body capable of providing an enforceable remedy to communities harmed by IFC's activities.

The CAO investigated for four years. The Board overrode the findings. The internal accountability mechanism is neutralised. The Gujarati communities litigated for seven years. The DC Circuit dismissed the case. The judicial accountability mechanism is blocked.

The Double Void is not a theoretical construct. It is a documented institutional reality, confirmed in two separate cases involving different instruments, different countries, and different categories of harm. In Gujarat, a power plant. In Cambodia, microfinance. In both: IFC investment, documented harm, accountability mechanism invoked, no enforceable remedy delivered. One Cambodian complainant died while the investigation was underway.

THE DOUBLE VOID

The Gujarati fishermen spent seven years establishing the Double Void. The Cambodian microfinance borrowers have established it again in four. The void is not a theoretical construct. It is a documented institutional reality — confirmed now by IFC's own Board, in IFC's own words, in IFC's own primary record.

The question is no longer whether MDB accountability has gaps. Cambodia raises the more fundamental question of whether an institution that claims sovereign immunity in court and commercial distance in governance is accountable to any independent body at all.

VI. What This Means

For the courts

The commercial activity question that Jam v. IFC opened and the DC Circuit sidestepped remains open. Cambodia provides a new factual foundation: unambiguously commercial investments in private for-profit lenders; a US-based Board decision as the directly challenged act rather than a third party's operations abroad; and IFC's own explicit characterisation of its financial intermediary activities as commercial, recorded in its own governance documents. The Roberts caveat remains a signal courts will attend to, but it is obiter dictum, and the facts it was written against are not the facts Cambodia presents.

For the new Integrated Accountability Mechanism

The Board should understand what it traded on June 23. The "exhaust internal remedies" argument — that communities should use the internal process before approaching courts, and that courts should defer to a functioning IAM — was IFC's strongest judicial immunity argument after Jam. The Board discarded it. It cannot now invoke an IAM it has demonstrated it will override when findings are inconvenient. The new mechanism's independence is not only a governance preference. It is the precondition for IFC's strongest remaining argument against expanded judicial accountability.

For IFC's shareholders

IFC exists to support private sector commercial development. Its mandate is commercial. Its financial intermediary portfolio is commercial. The legal architecture around that mandate has a gap that the Board's own June 23 determination has widened. Closing the Double Void — by making the new IAM genuinely independent, by resolving the financial intermediary scope question, by creating a remedy framework that does not require Management's agreement to function — is not only the right governance outcome. It is the outcome that preserves IFC's strongest remaining argument against expanded judicial accountability in US courts.

The contradiction Cambodia has made inescapable is ultimately simple. IFC cannot simultaneously tell US courts it is sovereign and tell its own Board it is commercial. One of those arguments must give way. Until it does, the communities who bear the cost of IFC's investments — in Gujarat, in Cambodia, and in the next case that has not yet been filed — have nowhere to go. That is the Double Void. That is what the IFC Board created on June 23, 2026. And that is what the legal community, the accountability community, and IFC's own shareholders should now require it to close.

Sources

Jam v. International Finance Corporation, 586 U.S. ___ (2019); Jam v. IFC, DC Circuit No. 20-7097 (July 6, 2021); Jam v. IFC, D.D.C. 442 F. Supp. 3d 162 (February 2020); cert. denied, No. 21-995 (2022); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2); Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); IFC Board Statement on the CAO Investigation Report on Cambodia Microfinance (June 24, 2026); CAO, Investigation Report, Cambodia: Financial Intermediaries-04 (October 14, 2025); Brar, P., "When Accountability Becomes Optional: The IFC, the CAO, and the Precedent Set in Cambodia" (mdbreform.com, July 2026); Brar, P., "The World Bank Inspection Panel at Thirty-Three: Measuring Accountability Failure" (mdbreform.com, June 2026); EarthRights International, "Budha Ismail Jam et al. v. IFC" (case documentation); SOMO/Bretton Woods Project, "Ending absolute immunity for the IFC: the legacy of Jam v. IFC" (2022).

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Companion Paper When Accountability Becomes Optional: The IFC Board, the CAO, and the Precedent Set in Cambodia | *mdbreform.com/cao-cambodia/*

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