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A tragedy of juridification in international development finance

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ABSTRACT

This article criticises the growing reliance on environmental and social (ES) policies by development finance institutions (DFIs), and the increasing use of corresponding accountability mechanisms to challenge development projects. The concept of *juridification* is used to explain this phenomenon and shows the crucial role of global civil society in expanding the reach of ES policies and accountability mechanisms. Linked to the competition between DFIs in the "marketplace" of international development finance, juridification also enables legal avoidance practices by the DFIs. The article shows that juridification in international development finance is "tragic" because the expansion of ES policies further marginalises the affected groups needing legal protection.

RÉSUMÉ

Cet article critique le recours croissant des institutions de financement du développement (IFD) à des politiques environnementales et sociales, ainsi que leur recours à des mécanismes d'imputabilité pour remettre en cause les projets de développement. Le concept de *juridification* explique ce phénomène et révèle le rôle crucial joué par la société civile mondiale dans l'élargissement de la portée des politiques environnementales et sociales et des mécanismes d'imputabilité. La juridification est liée à la compétition entre les IFDs sur le marché de la finance internationale du développement. Elle facilite également le recours des IFDs à des pratiques d'évitement légal. Cet article démontre que la juridification est "tragique" pour le développement international, parce que l'expansion des politiques environnementales et sociales amplifie la marginalisation des groupes touchés qui nécessitent une protection légale.

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Introduction

For decades after the Second World War, international development cooperation was driven by perceived differences in global standards of living and motivated by lofty goals, such as poverty reduction. Since the beginning of the 1990s, this narrative

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started changing. More and more institutions, donors and borrowing states, started adopting the language of compliance with standards contained in international instruments adopted by international organisations, such as the World Bank or the International Labour Organization.[1] As part of this process, development finance institutions (DFIs) established internal environmental and social (ES) standards along with corresponding accountability mechanisms.[2] Today most DFI-funded development projects must adhere to a range of complex international normative frameworks on issues such as the environment, human rights, as well as trade and investment. These frameworks define what development initiatives are acceptable, their successes and failures, and how the exercise of power in this field can be scrutinised.

We argue that this process is an example of "increased density of law" (Habermas 1985, 357) and that the growing use of legalistic mechanisms to resolve political conflict resulting from international interventions can be understood as *juridification*. While there are many legal frameworks that govern international development, this article focuses on the rise of DFIs' internal ES policies, coupled with their corresponding project accountability mechanisms. We explain key drivers for this shift, as well as its consequences, by focusing on the interaction of three concepts borrowed from sociology ("juridification"), political economy ("marketplace"), and law ("legal avoidance"). Overall, our aim is to provide a systemic critique of factors driving the rise in compliance-based governance in international development finance, and in doing so, to challenge and complement other explanatory accounts that shed light on the same phenomenon.

Our analysis highlights an overlooked fact that juridification is habitually promoted by prominent NGOs, and some smaller grassroots organisations working directly with affected people. For this article, we term these juridification-promoting organisations "global civil society".[3] On the "receiving end" of this demand for more ES standards and greater accountability, is the institutional system of development finance which, we argue, is characterised by the competition amongst the DFIs for primacy, access to funds and institutional survival. The interaction between these two groups of actors – global civil society and DFIs – is key in shaping the internal normative frameworks that govern development finance.

Against this background, we use the metaphor of a tragedy (Christodoulidis 2015) to frame the core themes of our article along three lines. Firstly, in a break with recent contributions on legalisation in international relations (Abbott et al. 2000), and transformations in international institutions (e.g. Sinclair 2017), we focus on global civil society as a protagonist, striving to invoke the counter-hegemonic potential of rules-based governance against the imposition of top-down visions of development (de Sousa Santos and Rodríguez-Garavito 2005, 10). Through theoretical insights on juridification, we show how global civil society, in resisting development-induced commodification of social relations, often demands for more enhanced rules and processes, and thus more accountability of DFIs. Generally, global civil society tends to believe that juridified development is better than development based on the contractual model of bargaining between powerful actors such as states, investors and DFIs. This belief in the positive impacts of juridification renders our protagonist a "tragic" one, that is, incapable of recognising the crucial role she plays in perpetuating the negative consequences of juridification.

The second tragic aspect is that, due to the growth of funding sources, and especially the expanding role of private actors (Cotula and Tan 2018), the system of international

development finance increasingly relies on the self-referential logic of economic bargaining and efficiency. We argue that this engenders the dynamics of a "marketplace". As a consequence, DFIs tend to evolve their internal policies to entice powerful stakeholders, while adopting sophisticated strategies of *legal avoidance* to quell the efficacy of the ES policy adopted. This dynamic channels juridification demands made by global civil society into rules internal to DFIs, which are largely procedural and usually unable to offer an effective scrutiny of institutional decision-making. Accordingly, we show that legal avoidance can result in serious unintended consequences. Instead of promoting rule-based governance in development finance, juridification and subsequent legal avoidance may reduce spaces for peaceful political contestation, and further entrench institutionalised practices that favour the interests of global and national elites, rather than the needs of the communities in which development projects take place. This is the second tragedy of juridification in international development: these dynamics ultimately disempower the groups affected by development projects, whom global civil society is allegedly trying to support and protect.

Finally, the third element of the tragedy unveiled by our article concerns the limited field of vision of the main character, global civil society. The tragic consequences of its decisions are only visible to the *audience* overseeing the play (Christodoulidis 2015).[4] In the final section we adopt the third person perspective, which takes into account the dynamic of the marketplace, to identify more promising ways of triggering the counter-hegemonic potential of law than relying on the self-referential logic of DFIs' internal accountability. In doing so, we also challenge the idea that further internal juridification of the DFIs is "better than nothing", and that despite all its flaws, juridification remains a step in the right direction towards a better and more accountable development governance, as many scholars and NGOs suggest (Hunter 2003; Fourie 2009). While we acknowledge that ES standards create *some* advantages to *some* communities in a short term, we urge to take seriously the negative impacts of this process in the long run and at a systemic level. Ultimately, this calls global civil society to rethink its engagement with some of the "solutions" currently available to marginalised communities affected by development interventions.

Juridification in international development finance

Juridification through ES standards and accountability mechanisms

Generally, ES policies of DFIs set out rules and processes that govern development projects. These policies are usually binding on the staff of each DFI, and they can also exert normative effects on the borrower entities due to their conditional nature (Dann and Riegner 2019). Groups negatively affected by development projects arising from alleged breaches of ES standards by the DFI's staff can under certain conditions resort to DFIs' accountability mechanisms, which generally lead to an internal review of the project. Not all accountability mechanisms are based on a compliance review against specific regulatory standards. For instance, the International Finance Corporation's (IFC) Compliance Advisory Ombudsman also operates according to more discretionary alternative dispute resolution processes (IFC 2013).

Table 1. ES policies and accountability mechanisms of selected DFIs.

DFI	Distinct ES policy	Accountability mechanism (AM)	AM created	Independent organ (a)
Global and regional with strong international presence				
International Bank for Reconstruction and Development and International Development Association (the World Bank)	Y	Inspection Panel	1993	Y
Inter – American Development Bank	Y	Independent Consultation and Investigation Mechanism	1994	Y
International Finance Corporation (IFC)	Y	Compliance Advisory Ombudsman	1998	Y
Asian Development Bank (ADB)	Y	Accountability Mechanism	2003	Y
African Development Bank	Y	Independent Review Mechanism	2004	Y
European Investment Bank	Y	Complaints Mechanism; European Ombudsman	2008(b)	Y
European Bank for Reconstruction and Development (EBRD)	Y	Project Complaint Mechanism (PCM)	2009	Y
Green Climate Fund	Y	Independent Redress Mechanism	2014	Y
New Development Bank	Y	Compliance procedure	n/a	N
United Nations Development Programme	Y	Social and Environmental Compliance Unit and Stakeholder Response Mechanism	2014	Y
Asian Infrastructure Investment Bank (AIIB)	Y	Project-affected People's Mechanism	2018	N
Regional and sub-regional				
Black Sea Trade and Development	Y	Independent Accountability Mechanism	2009	Y
Caribbean Development Bank	Y	Office of Integrity, Compliance and Accountability	2015	Y
Development Bank of Latin America	N	n/a	n/a	
Central American Bank for Economic Integration	Y	Environmental and Social Corporate Responsibility System	n/a	N
East African Development Bank	N	n/a	n/a	
Islamic Development Bank	N	n/a	n/a	
Pacific Islands Development Bank	N	n/a	n/a	
West African Development Bank	Y	Policy and Grievance procedure	n/a	N
Trade and Development Bank of Common Market for Eastern and Southern Africa	Y	Grievance procedure	n/a	N
Eurasian Development Bank	N	n/a	n/a	
National				
Japan International Cooperation Agency and Japan Bank for International Cooperation	Y	Examiners for the Environmental Guidelines	2003	Y
US Overseas Private Investment Corporation	Y	The Office of Accountability	2005	Y
Deutsche Investitions- und Entwicklungsgesellschaft (DEG)	Y	Independent Complaints Mechanism (c)	2014	Y
Department for International Development (UK)	N	Complaints procedure	n/a	N
USAID	Y	Administrative Grievance Procedure	n/a	N

Sources: official websites of each institution.

(a) Intended as a separate specialist organ (with its own institutional structure or composed of independent experts). This organ functions outside the general administrative processes within an institution in order to ensure its relative independence.

(b) The date of signing MoU between the EIB and European Ombudsman aimed to "improve stakeholder protection" in the activities of the EIB.

(c) A joint mechanism of FMO (Netherlands) and Proparco (France)

Table 1 is a non-exhaustive list of DFIs for which we ascertain the existence of ES policies, accountability mechanisms and their position within the structure of each institution.

Whilst not all institutions have adopted ES policies, the newest and more sizeable DFIs, such as the New Development Bank, the Green Climate Fund and the AIIB have all enacted some form of ES framework. This suggests that ES standards and accountability mechanisms are becoming ubiquitous in development finance and continue to gain significance among established as well as new DFIs.

Arguably, the growth of ES rules and forums for submitting individual complaints does not mean that the system of development finance is becoming more accountable. Instead, our analysis suggests that it creates a *resemblance* of accountability. Its reliance on the "rules-plus-enforcement" structure, typical of western domestic legal systems appears to promote the attainment of better decisions, more order, and fairer consequences for people affected by development projects. However, because accountability mechanisms lack appropriate institutional checks and balances (Jokubauskaite 2019), or adequate representation at the level of rule-making (Houghton 2019), the system mimics the process of juridification in domestic legal systems, but fails to replicate key elements of their legitimacy, such as democratic deliberation, access to remedy or due process. Thus, it begs further explanation why global civil society continues to promote the idea of institutional accountability through ES policies and mechanisms.

The literature on international development has thus far paid little attention to theoretical frameworks that might explain such a trend. One can identify studies on specific actors, such as NGOs (Wenar 2006) or DFIs (Buntaine 2015; Park 2015; Balaton-Chrimes and Haines 2015) and on the legal nature of specific ES policies and accountability mechanisms (Fourie 2009; Jokubauskaite 2018). Some theorists of international relations recognise a link between accountability and enhanced legitimacy of international institutions (Buchanan and Keohane 2006), while some legal theorists argue these institutionalised forms of accountability represent emerging global administrative law (Kingsbury, Krisch, and Stewart 2004, 34), or instances of informal international law-making (Berman 2012). The concept of juridification that we adopt here enables a deeper and more comprehensive understanding of what drives these normative frameworks, as it examines the dynamics occurring between different social actors operating in the system of international development.

Juridification was first introduced in sociology by "systems theory" scholars who proposed that legal systems and organisations are "self-referential" and that law, being a unique and "autopoietic" social system, can expand into other social domains according to its own communicative code (Luhmann 2004, 79–84). While ES policies are not "law" in a formal doctrinal sense, and accountability mechanisms do not represent a form of "judicialisation" as theorised by some scholars (Fourie 2009), they nonetheless share the binary "legal/illegal" code that characterises legal systems. ES frameworks, with their focus on compliance, aim at verifying whether a given authoritative behaviour is "in-or-out" of established institutional requirements – which therefore justifies using the analytical framework of juridification in this instance.[5] We suggest that this approach offers a helpful explanation for the mushrooming of ES policies and mechanisms and their expansion in terms of reach and significance, and the way these frameworks now operate at the systemic level.

Furthermore, the concept of juridification captures the tendency to perceive social relationships between the self and others according to legal paradigms of subjectivity, capacity, and action (Blichner and Molander 2008, 47). In this approach, individuals and groups develop self-perceptions as addressees of certain rules, and/or persons with certain entitlements. Thus, for example, demands by groups negatively affected by DFI-funded development can be framed as entitlements emanating from social and/or environmental obligations. However, these entitlements and the subjectivity of affected groups now become accorded to them through DFI ES policies, rather than simply by virtue of them being human, or exposed to an arbitrary exercise of power, or having suffered harm. Here, our focus on juridification exposes the juridical and institutional framing that transforms affected people into, simultaneously, subjects with limited entitlements, and also objects governed by the rules of international development finance.

Juridification as "welfare interventionism"

Going back to the origins of the concept of juridification, Teubner (1998) and Habermas (1985) focused on the phenomenon of "legal expansion", noting that juridification makes not only a quantitative, but also a qualitative change. Teubner called this phenomenon "regulatory law"; with national labour and social protection laws seen as prime examples of this process. Regulatory law signifies a transition from formal to "material" modes of law (Teubner 1998, 397).[6] Because of this shift, formal law (mainly based on contracts as means of exchange) is increasingly replaced with legal patterns of material entitlements for certain social groups (e.g. ES standards that set entitlements for indigenous people in project finance). Accordingly, while juridification can result in a quantitative proliferation of norms and institutions, it also leads to more welfare-oriented standards, even when the overall number of formal rules remains similar, thereby slowly transforming the core quality of law. In this way, law assumes a more interventionist role in society, under the demands by social forces (Teubner 1998).

Polanyi also explained the social quest for welfare laws and interventionist mechanisms. He suggested that, as labour, land and money are turned into fictitious commodities (Polanyi 1957, 71–81), society is pushed towards greater reliance on self-regulating markets, which in turn become increasingly "disembedded" from their social foundations. Thus, the destabilisation of societies where these markets are situated sets the ground for the counter-movement from people who physically experience the outcomes of the disembedded market in their daily lives, such as peasants, workers and the landless. This counter-movement demands for greater embedment of the market, to render it less disruptive of the social relationships and structures. Hence, according to Polanyi, society and market constantly fluctuate between commodification and embeddedness ("double movement"); between the fiction of a free, self-regulating market, and a rebound of the social reality where the market operates (Cotula 2013). Some rules foster the realisation of markets, whilst others attempt to connect them back to the social realities. Arguably, ES policies and accountability mechanisms in international development are expected to do the latter.

Polanyi's "double movement" is a metaphor that unveils some key characteristics of juridification in the DFIs. It explains a persistence of global civil society to have more welfare-oriented rules, especially in the areas of transparency, participation, indigenous

peoples' rights, and social and environmental protection more generally. Empirical research has shown that all the landmark ES policies, accountability mechanisms and other relevant "interventionist" policies were first and foremost pushed and demanded by the civil society (Cernea 2005; Van Putten 2008). There is, then, a relationship between the aggressive push for the neoliberal agenda by the DFIs, which dis-embeds the market or "delegalizes" the regulatory sphere (Teubner 1998, 398–399), and the subsequent reaction by civil society in demanding more rules, accountability and, thus, social embeddedness of the market.

The "dark side" of juridification

Claiming that juridification is caused solely by the movement of counter-hegemony is, however, reductive. The critical literature also identifies various benefits of juridification to power holders.

For instance, juridification can be a strategy of evading responsibility, by passing it "down the ladder", away from the organs that make the rules and strategic decisions in the first place (Haines and Sutton 2003). With an increased use of accountability mechanisms, fundamental problems stemming from general development strategies can be attributed to the non-compliance with ES policies, and the failure by mid-level management to observe the multiple rules applicable in this set-up. This diverts attention and resistance efforts away from the scrutiny of high-level policies and officials, towards everyday operational decision-making. For instance, Shihata (2000, 1–3), a key proponent of the World Bank's Inspection Panel, noted that a rationale for its establishment was to ensure the efficient management and control over *staff*. Indeed, mid-level management's involvement in the Inspection Panel process is akin to a respondent in a legal dispute, with the President and members of the World Bank Board of Directors having discretion to assess, ignore or influence the outcomes of any accountability process. Thus, they themselves are not held to account for their role in spearheading a given development programme, or approving funding for a specific project.[7]

Juridification also comes with a growing institutional discretion to monitor, oversee, and trigger changes in existing social structures.[8] For instance, in its ES framework the World Bank has included the long-advocated requirement of a free, prior and informed consent from Indigenous communities (potentially) affected by development projects (World Bank 2017). But in doing so, it has also expanded its discretion to monitor, assess, and ultimately influence the decision-making processes within the affected Indigenous communities.[9] In the following section we discuss other benefits of juridification to decision-makers such as the enhanced legitimacy for DFIs that comes as part and parcel of adopting "state of the art" ES frameworks, which in turn enable DFIs to survive, compete and gain primacy in the marketplace.

A critical question here is whether juridification is a one-way, irreversible process (Teubner 1998, 398–399), or whether it can be tamed or even inverted by the power holders, as Blincher and Molander (2008, 49) suggest. This question matters because, if juridification can be stopped or reversed (Kouroutakis and Ranchordas 2016), then it may be possible for DFIs to develop normative frameworks that halt juridification however, if one accepts Polanyi's insight that the self-regulating market can never materialise, then, as long as DFIs advance a neoliberal development agenda, there will be a

quest for welfare interventionism and thus demands for new rules to counteract the impact of market forces on ecosystems and communities. Moreover, DFIs will be keen to respond to these demands in order to expand their authority, so as to avoid other authorities, such as governments and courts, from appropriating this space.

Juridification, therefore, cannot be stopped, but only "tamed" by hegemonic actors through sophisticated techniques such as *legal avoidance*. McBarnet (1988, 114) defined legal avoidance as a socio-legal phenomenon whereby the subjects to regulation "create strategies weakening the law by legally avoiding it". In development context, DFIs and their accountability mechanisms adopt such techniques, which diminish the counter-hegemonic potential of the rules they enact (Cabrera and Ebert 2019). To put it in Teubner's terminology, we observe a range of strategies by DFIs that *channel* the interventionist demands by the global civil society, instead of bringing juridification to a halt. Legal avoidance transforms the interventionist logic of juridification into a particular type of (new) regulatory rules. In later sections we highlight several of such strategies of legal avoidance by DFIs. But before that, the next section explains how at the systemic level, social dynamics among DFIs create favourable conditions for juridification and for legal avoidance to take place.

The marketplace of international development finance

In this section we again borrow from Polanyi's account, to show how the system of international development finance functions as a "marketplace" that features various "market patterns" (Polanyi 1957, 59–70). The policy jargon of international development finance is fraught with market-focused discourses, which indicates the presence of this marketplace. For instance, DFIs must be *fit for purpose* (Hybsier 2015) and adjust their operations according to the *demand of clients* (Gulrajani 2016). *Value for money* is an important factor that donors take into account when they *offer* funding to development institutions (Bailey and Pongracz 2015). Development institutions are also considered to be *effective* if they demonstrate their *comparative advantage* to other institutions with respect to a specific development area or a project (Streck 2001, 85).

While discourses in policy do not create actual markets, as understood by classical economics, they are still revealing of the way in which institutions and actors understand their social realm to work. In this sense, international development finance resembles a "marketplace" with its peculiar social dynamics. We find the distinction between "market" and "marketplace" (Dale 2010, 17) in Polanyi's criticism of orthodox economists to be crucial here: in primitive forms "[a] market is a meeting *place* for the purpose of barter [exchange] or buying and selling" (Polanyi 1957, 59, emphasis added). Actors in this place do not necessarily act on a price-based equilibrium between demand and offer, but according to the particular social context. The "marketplace" of international development finance can be understood as a fictional space and as a metaphor, which encompasses and describes the social dynamics among development finance actors. We offer the following outline of the participants and dynamics in the "marketplace" of international development finance.

Donor and borrowing states "meet" in this imaginary space to implement their respective development strategies as means of exchange. There are also other actors in the marketplace: for instance, private sector entities participate in co-financing, form

public-private partnerships or, at times, own or run specific projects. Local authorities and municipalities also engage with DFIs and their agencies to reshape their geographies in alignment with international development blueprints (Eslava 2015). All these actors must select certain DFIs to source or channel finance, but also to oversee the implementation of related projects and programmes.

In their role as financial and political intermediaries, DFIs participate in this marketplace and in the generation of development outputs (typically development projects or programmes). Here a "market pattern" (Polanyi 1957, 60) emerges in that the bundle of international law obligations, soft-law principles and the ES policies of DFIs, narrow the possibilities for these institutions to generate viable development outputs, because of the need to comply with all the set aims, requirements and procedures, in alignment with the broader strategies of development set by donor and recipient countries. Therefore, a fictitious scarcity of development projects is generated, in a similar vein in which Polanyi (1957, 75–76) identified the transformation of labour, land and money as fictitious commodities in society. It is on this relative scarcity that the competition among DFIs is created.

Rather than pursuing profit as a typical financial intermediary in a market, the involvement of DFIs in the marketplace is aimed at increased legitimacy, leading to institutional expansion and rising prominence. This is attained by appealing more to donors, borrowers or private investors in the processes of exchange vis-à-vis other competing institutions, which could also mobilise the same financial resources for similar development outputs in the same geographical areas. Therefore, DFIs have to please their donors and the general public, because the former provide them with the baseline funds for institutional survival, while the latter fuels (but can also undermine) the trust of actors in financial markets.

This image of development finance as a "marketplace" departs from the more established ways of understanding donor proliferation that, for instance, is outlined by Steinwand (2015). Rather than focusing on development finance *within recipient states*, we see DFIs and other actors interacting with each other *at a systemic level*. If a DFI is unable to appeal to the main actors of the marketplace, its development strategy and programming will not be "selected" for generating a specific development output. Conversely, when the institution displays all state-of-the art features to perform its functions, it will show that it is "fit for purpose" by having a "comparative advantage" against the other institutions. This understanding of the social context of DFIs, struggling for the attainment of a partially scarce development output in the marketplace, reveals another role for ES standards and accountability mechanisms: they are necessary tools for each DFI to position itself advantageously and be successful in the marketplace in sourcing more financial resources from donors and financial markets, regardless of the underlying principles and goals that these policies seek to attain.

Thus, juridification can be financially beneficial to DFIs. Internal ES policies and accountability mechanisms are perceived by financial markets, rating agencies and private investors as risk mitigation measures, intended to ensure the sustainability and financial return of development projects. DFIs that lack such policies and mechanisms are mostly bilateral agencies which find financial backing from states of origin, and governments which are not yet sensitive to the inclusion of ES standards in their aid activities.[10] However, for DFIs that need to borrow from financial markets, juridification may

facilitate the lowering of interest rates of financial products offered, thus giving those DFIs a comparative advantage over less regulated DFIs vis-à-vis other financial sources and intermediaries (Humphrey 2015).

It is risky for DFIs to adopt rules that challenge, or radically alter the existing patterns of behaviour in the marketplace. This could compromise their reputation as being too partisan, unpredictable and thus unfit for future partnerships. DFIs, therefore, observe one another and refer to each other's rules, practices and interpretations of existing international legal obligations whenever a new impetus for further juridification is sent from global civil society. A clear example here is the open recognition of similarities between ES policies, via explicit cross-referencing (e.g. "common approach" by the World Bank 2017: para 9; also, AIIB 2016: para 10).

Global civil society also populates the marketplace, by claiming to represent groups affected by development projects. This relationship is important to civil society organisations, because affected groups are often entitled to participate in consultations during project deliberation, and to benefit from DFIs' ES policies and accountability mechanisms. Nonetheless, affected people tend to remain only at the margin of the marketplace, since their access to ES mechanisms often depends on their relationship with the global civil society – usually due to limited expertise or financial, linguistic, cultural and other social barriers (Cerrato and Ferrando 2020). Global civil society, on the other hand, can enter into exchanges in the marketplace (usually with concerned donors), predominantly based on their claim to know and represent affected people.

Indeed, it is generally accepted in the marketplace that DFIs need to decide on their development approach by listening to affected people and conducting consultations "in the field", in order to be seen as providing realistic development outputs. Nonetheless, DFIs must also be careful to retain a sense of autonomy and respect for their mandate, and to never forget that their key partners and funders are in the marketplace, rather than "in the field". Hence, on one hand, a friendly attitude towards civil society, and especially an ability to show that their quest for more rules had been satisfied, is an asset for the institution. On the other hand, if engagement with civil society is not carefully managed, it can readily become an obstacle to realising development outputs. Thus, the adoption of new rules and standards pushed by global civil society is welcome to the extent that it fits within the confined ideological boundaries of the marketplace.

As a metaphor, marketplace enables us to contextualise juridification better than other theories currently engaging with similar problems of institutional complexity (Krasner 1982; Gehring and Faude 2014). It is able to explain how and why the links amongst various distant and seemingly unrelated institutions are maintained and developed. It also shows that all the actors participating in exchanges in the marketplace share narratives and patterns of behaviour (some visible and some hidden). This set up, we argue, creates fertile ground for practices of legal avoidance to occur.

What's the tragedy? Legal avoidance in practice

Strategies of legal avoidance by the DFIs

While the phenomenon of legal avoidance is well-known in the field of tax law, we claim that instances of legal avoidance are also evident in the creation, application and

enforcement of ES policies. For instance, one tactic of legal avoidance is to express commitment to an emerging norm or shared value (e.g. equality, human rights, transparency) through instruments of weak, vague or uncertain normativity. This allows DFIs and other actors in the marketplace to show their sympathies to the cause in question, however to continue with "business as usual", as the approach of DFIs towards international human rights law shows. For decades, prolonged debates on the relationship between human rights obligations and development (Alston and Robinson 2005) stirred little reaction from the DFIs. The issue resurfaced lately, with civil society organisations demanding recognition of human rights in the recent iteration of the World Bank's ES framework (Cabrera and Ebert 2019). In response, the World Bank included the aspiration to protect human rights in the mission statement of its ES framework, but not in the substantive provisions (World Bank 2017). Arguably, the adoption of more normative commitments in this rhetorical manner makes it more difficult for global civil society to demand the achievement of substantive changes represented by such commitments.

Another strategy of legal avoidance continuously employed by the DFIs is to use management tools instead of actionable standards. For instance, environmental groups have long been pushing the World Bank to introduce a "cap" on greenhouse gasses emissions generated by its projects. In response, the Bank has agreed to *account for* its carbon footprint, rather than committing to a cap (World Bank 2017, ESS 3, para 16). Here, the strategy of legal avoidance entails channelling environmental demands through DFIs' procedural commitments, instead of creating substantive standards for DFIs.

Due to the prevalence of this managerial approach, voluminous documentation, meetings and reporting have to be produced for any development project to take place. This, in turn, justifies the expansion of the bureaucratic machinery, but also demands a greater capacity, as well as more training needs by global civil society to engage with the system. This dynamic is beneficial to some civil society organisations, because it continues to justify their role as representatives of affected groups. Meanwhile, the political spaces to have a meaningful policy debate about development trajectories appear to be shrinking and are being replaced by procedural "box ticking" exercises based on the standards of technical assessment (Jokubauskaite 2019). As a result, people affected by development interventions and exposed to this kind of exercise, are more likely to lose faith in the emancipatory potential of dialogue and regulatory solutions. Depending on the project, such loss of faith might result in peaceful struggles against unjust and exploitative practices. In other cases, however, it can also lead to violence and social disruption (Jokubauskaite 2019).

Accountability mechanisms as means of legal avoidance?

Accountability mechanisms have a powerful function in juridification, because they transform internal ES policies of DFIs into rules with external effects (Jokubauskaite 2018, 2019). However, depending on the project as well as the stringency of specific ES policies, accountability mechanisms can also become a means of legal avoidance by the DFIs. A cursory analysis of the caseload of these mechanisms helps to illustrate this claim.

A total of 758 complaints investigated by 11 accountability mechanisms were examined in 2016 in an independent study (CIEL et al 2016). Eighty-one per cent of all complaints submitted to these accountability mechanisms have never reached the resolution stage and were "dropped" within the procedural stages of complaint procedures (Table 2). A great proportion of claims were dismissed during the admissibility stage (57.5%), and 23% were suspended. These data alone do not evidence that DFIs' accountability mechanisms lead to practices of legal avoidance, as to verify such a claim empirically would require extensive qualitative research. Yet, these numbers show that affected people have to jump through many procedural hoops in order to successfully present their grievances. This seems to echo the managerial approach discussed in the previous section, whereby ES policies and mechanisms can guarantee access to a process, but not to satisfactory standards of protection, or tangible outcomes for the people complaining about a given development project.

Altogether, the study of accountability mechanisms highlighted above shows that most of these mechanisms may lead to legal avoidance because of their narrow mandate to only scrutinise compliance with ES standards of a single development institution, over a limited period of time, based on a limited set of entitlements (e.g. those concerning indigenous peoples, which do not cover peasants or rural communities), and according to specific procedural boundaries.[11] Also, they have limited capacity to follow-up on their decisions, and, thus, limited authority in enforcement – which impedes the potential of long-term and systemic change in development practices as a result of these processes of accountability (Jokubauskaite 2019). Similarly, because of their independence from one another, accountability mechanisms do not formally affect each other in the interpretation of ES standards and their application. Given the dynamics of competition in the marketplace of international development finance, this is an increasingly salient point, because of the capacity of borrowers to switch funders,

Table 2. Number of complaints received and resolved by accountability mechanisms (sample).

Institution	Accountability mechanism	Complaints received	Resolved cases
African Development Bank	Independent Review Mechanism	15	5
Asian Development Bank (ADB)	Accountability Mechanism	89	12
European Bank for Reconstruction and Development (EBRD)	Project Complaint Mechanism (PCM)	72	9
European Investment Bank	Complaints Mechanism; European Ombudsman	81	9
Inter - American Development Bank	Independent Consultation and Investigation Mechanism	84	9
International Finance Corporation (IFC)	Compliance Advisory Ombudsman	211	46
The World Bank (International Bank for Reconstruction and Development)	Inspection Panel	91	30
US Overseas Private Investment Corporation	The Office of Accountability	12	4
Deutsche Investitions - und Entwicklungsgesellschaft (DEG)	Independent Complaints Mechanism	4	1
Japan International Cooperation Agency and Japan Bank for International Cooperation (JBIC)	Examiners for the Environmental Guidelines	1	1
Organization for Economic Co-operation and Development (OECD)	Guidelines for Multinational Enterprises	360[a]	45

Source: CIEL et al. 2016.
[a]Based on OECD 2016.

or at least to increase the proportion of co-financing from the less "demanding" funding sources in terms of accountability standards and mechanisms.

While the study above opens up to the hypothesis that DFIs practice legal avoidance through their accountability mechanisms, the following section illustrates how avoidance has actually taken place in a specific context.

Case study on legal avoidance: EBRD-funded hydro power plants in Georgia

The case that we draw upon to buttress the claim that accountability mechanisms have been used by DFIs as a means of legal avoidance, refers to a chain of complaints under the EBRD's accountability mechanism, the PCM. These concerned three hydropower plants projects in Georgia. The first project, approved by the EBRD in Paravani and co-financed by the IFC, was subject to a complaint in 2011 by a local NGO. Key concerns involved the impacts on the river's ecosystem, the risk of flooding of a nearby village, and the lack of assessment of alternative options to the project (Green Alternative 2011). In 2014 the PCM found the EBRD non-compliant with its ES Policy for failing the assessment of risks on the ecosystem and for not disclosing relevant information to stakeholders. However, PCM's recommendations were limited to suggesting regulatory amendments and staff training to the EBRD, as well as proposing to the EBRD management to put together a plan of information disclosure (EBRD PCM 2014).

Following this, a new complaint was filed by the same NGO concerning a hydropower plant project in Dariali, approved by the EBRD in 2014. It denounced the EBRD for using a similar approach to the Paravani project, with specific concerns about the river flow regime, and the lack of assessment of alternatives. It also raised concerns about a risk of landslides, and the running of the project within a national park (Green Alternative 2014). In 2017 the PCM found, again, non-compliance by the EBRD with its ES policy for not having sufficiently included in its assessment geological risks, including risks of landslides. The PCM did not consider the previous Paravani case to determine non-compliance, due to a lack of a "formal system of precedent" in the PCM mechanism (EBRD PCM 2017a, 31).

While no recommendation of institutional reform was made, the PCM invited the EBRD to include additional factors related to the project in the ES Impact Assessment, and to disclose information on the river flow. The PCM later closed the complaint on the basis of on-going training of staff, a new Guidance Note on hydropower projects (EBRD 2016), and the running of "information meetings" and monitoring activities. (EBRD PCM 2017b). In reaction to the first report, the complaining NGO disapproved of the recommendation to conduct "detailed geomorphological monitoring" and criticised its disclosure as sufficient means to address the risk of mudflow on an affected settlement (Green Alternative 2017). Lastly, in February 2018, the inhabitants of a village filed a complaint under the PCM about another EBRD-funded hydropower plant project, Shuakhevi HPP,[12] which involved the construction of two dams and diversion tunnels against strong opposition from local groups and civil society (CEE Bankwatch 2015). The complaint referred to a number of issues, similar to those raised by the Paravani project (Rabati Settlement of Makhalakidze Village 2018; CEE Bankwatch 2015).[13]

From the claims outlined above, we discern key techniques of legal avoidance, this time applied to specific projects, rather than to ES policies generally. Firstly, the PMC

is reluctant to address repeated inadequate risk assessment approaches used by the EBRD, based on its determination of the irrelevance of previous complaints for similar projects, even for interpretative purposes. This legal avoidance technique keeps each claim isolated, fragmenting resistance efforts amongst different complainants, and increases the complexity in technical and bureaucratic expertise required to engage with complaints procedure. This reveals the "darker side" of juridification, which enables the diffusion of institutional accountability by keeping each instance of breach of standards in isolation from the other. It also places accountability on the mid-level staff, rather than on the highest level of decision-making of the EBRD, which continued approving projects with similar problems in the same country.

The "lessons-learned" approach of the PCM also illustrates legal avoidance. As the cases show, the outcomes have been regulatory amendments, additional guidelines, more transparency and monitoring during the project, with more substantive "remedial changes" not considered, such as a suspension or a fundamental re-consideration of the project.

To these unsatisfactory outcomes, the complainant NGO understandably responded with critiques of the very techniques used, calling for increased independent assessment and transparency, and for an expanded competence of the PMC to second-guess national court decisions. But in doing so, it has also embraced the logic of juridification and legal avoidance, while also being unable to fulfil expectations of remedy from those living in the affected villages and areas.

This case study reflects the paradoxical, if not tragic, consequences of juridification in international development finance: as global civil society continues to rely on ES standards and accountability mechanisms, this not only quells their efforts for resistance under the law but leads them to call for further juridification of ES standards and mechanisms.

The perspective from "the audience": is this really a tragedy?

To revisit the main metaphor of this article, a tragic protagonist cannot see potential negative consequences of her actions due to excessive self-confidence (Christodoulidis 2015). In our role as "audience", a salient question is whether, rather than a tragedy, ES frameworks are indeed a "better-than-nothing" solution, offering at least a means of inclusion into the process of development and, possibly, into the marketplace for some affected communities. In this final section we explain why the tragedy described in this article should matter to those interested in a better and fairer governance of development finance.

A realist counterpoint to our argument could be that ES policies and accountability mechanisms are only "soft law". Therefore, these norms and processes are potentially less significant than what we portray them to be. However, it is important to remember that the first policies and mechanisms ever adopted (the World Bank's "Operational Manual" and Inspection Panel) were created in the midst of a legitimacy crisis of the DFIs, reflected in the "50 years is enough" campaign (Kapur et al. 1997). This historical context indicates that internal juridification is a bearing structure that creates a political "breathing space" for the DFIs to claim and maintain legitimacy, and to insist on their authority as "development experts" (Kennedy 2016). Without juridification, DFIs would be more exposed to the allegations of furthering neoliberal or neo-colonialist agendas. Thus, they would be less likely to sustain their legitimacy in a political

climate which increasingly claims to protect democracy, self-determination, the environment, and human rights.

Furthermore, our analysis shows that, although not being law in a formalistic sense, ES policies are normative in that they shape expectations, subjectivities and behaviour of actors in international development finance. These effects of soft law at the international level were identified by Newman and Posner (2018). Their analysis of international financial regulations shows that although non-binding rules might not induce immediate compliance; they often have long-term structuring and distributional effects, which reshape the discourse and institutional terrain in which they operate (Newman and Posner 2018, 19–29). We make a similar observation, when we highlight the systemic and distributional effects of juridification as they limit the political space for meaningful deliberation.

As to the idea that ES safeguards and accountability mechanisms are a plausible tool in the array of resistance strategies, a claim can be made that ES policies invoked under accountability mechanisms can lead to payments of adequate compensation, or even a partial re-consideration of the project (Fourie 2009). Moreover, the possibility of engaging in accountability processes can inspire political mobilisation at the local level (Jokubauskaite 2019). While we recognise this potential, we nonetheless stress that the current system channels the already scarce energy and resources from affected groups, which perpetuates their marginalisation in the marketplace of international development finance. More specifically, juridification and legal avoidance in development finance leads to specialisation and bureaucratisation, which require more resources and efforts to enable mobilisation, as well as detailed knowledge of the ES standards and process. This not only adds a layer of needed expertise, which prominent NGOs are better positioned to fulfil rather than the members of the affected groups, but also diverts resources which could be spent, instead, on a fairer and more inclusive project design.

Moreover, even if "successful" (in terms of passing procedural stages), a complaint usually only opens a *dialogue* with the relevant DFI; rather than providing a concrete resolution to grievances. However, such dialogue does not need to occur under the legal framing of the DFIs. Resources and expertise could be channeled towards other means of engagement, within or outside of law. In fact, there are compelling reasons to believe that political action in the guise of peaceful demonstrations or even civil disobedience can also induce dialogue (Horowitz 2016), in a similar manner to claims in front of accountability mechanisms. This is because most, if not all, DFIs are concerned with protection of their reputation and public trust, which can be seriously damaged by popular mobilisation. However, direct political action does not come with biases nor the logic of the marketplace, whereby DFIs can use the very existence of the accountability process to legitimize their development intervention.

The call from the audience here is that the dynamics of the marketplace have material implications for global civil society. NGOs active in this area should either prioritise alternative means to express bottom-up resistance (e.g. human rights frameworks, judicial review, popular mobilisation), or they should try and deploy the logic of the marketplace strategically, to further enhance the voice of affected groups. For instance, they could mobilise the competition among the DFIs to argue for allocation of more public funds to those DFIs that have subscribed to more substantial human rights protection. In the context of growing competition among DFIs, such blunt comparisons might create more opportunities for external scrutiny of the internal logic of the marketplace.

Conclusion

We have argued that internal juridification of DFIs sustains a "marketplace" of international development finance, where affected groups are marginalised and DFIs avoid accountability through tactics of legal avoidance. We have also highlighted the tragic implication of counter-hegemonic action that calls for more rules and more refined accountability mechanisms, as spearheaded by the global civil society, arguing that this dynamic compromises the very qualities of law that affected groups often try to invoke. Ultimately, the choice to engage with the process of internal juridification of DFIs is morally and politically loaded, and civil society entities advising local groups should always carefully consider such engagement, by also acknowledging its broader repercussions at a systemic level.

Notes

1. International development is not the only area where such an increased use of regulatory instruments has been observed. This was termed the "legal turn" in global politics; see generally, Abbott et al. (2000).
2. With the term "development finance institution" (DFI) we refer to institutions established under any legal system, including international law, which source and channel financial resources to recipient countries for the realisation of development projects. With a term "accountability mechanism" we describe the independent bodies and processes within DFIs, tasked with assessing project compliance with internal ES policies and enabling complaints by affected individuals or groups. The focus in this analysis is mostly on the multilateral DFIs.
3. Though we acknowledge that not all NGOs and grassroot organisations do. In this article we employ a "thin" understanding of global civil society, by including only NGOs at the national and transnational level which claim to represent the interests of people affected by development projects. For a thicker understanding see, for instance, Falk (1998), who refers to global civil society as "the field of action and thought occupied by individual and collective citizen initiatives of a voluntary, non-profit character both within states and transnationally" (100).
4. Christodoulidis (2015) builds his notion of a tragedy on the account by Berthold Brecht.
5. Blichner and Molander (2008), refined the concept of juridification by identifying five dimensions: (a) constitutive juridification; (b) law's expansion and differentiation; (c) conflict resolution through law; (d) increasing judicial power; and (e) legal framing. While in international development we can ascertain all five dimensions, our focus with regards to ES standards and accountability mechanisms is on the (b) (c) and (e) types.
6. Teubner here refers to Max Weber's distinction between formal and material qualities of modern law.
7. Ferguson (1994) calls development an "anti-politics machine" that reimagines political issues as having "technical solutions to technical problems". Arguably, internal juridification advances this process of depolitisation by empowering experts and transforming questions of social (in)justice and (re)distribution into the issues of compliance with technical ES regulations, both domestically and at the level of DFIs.
8. More generally, building on Max Weber's theory, "law and development" scholars had argued that governance by rules enable modern capitalism (e.g. Thomas 2006). The side effect of this increased reliance on abstract rationality of law is the growing power of bureaucracy. Critical scholars had noted this dynamic manifesting domestically (Thomas 2006); whereas we also see it taking place internationally, at the level of DFIs.
9. The idea of institutional self-empowerment was also proposed by David Kennedy (2005), who also criticizes the attitude of international humanitarian law and human rights activists

(akin to our "global civil society") for insufficient awareness of their power and negative consequences that follow from their good deeds.
10. For instance, China's International Development Cooperation Agency currently lacks such standards (Kitano 2018, 97).
11. This echoes Kennedy's argument (2016) about expert rule, whereby experts have significant power and discretion, but tend to justify their (non)involvement based on the selective interpretation of their limited mandate.
12. Also supported by the ADB and the IFC.
13. At the time of writing the case is undergoing a Compliance Review under the PCM.

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