Business and Human Rights in the Financial Sector

Banks and Rights

The University of Warwick

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NomoGaia

Guiding Business in Human Rights

#World vs Bank(s)?

Bank funded corporate grabs of indigenous land

Banks Backing Oppressive Governments

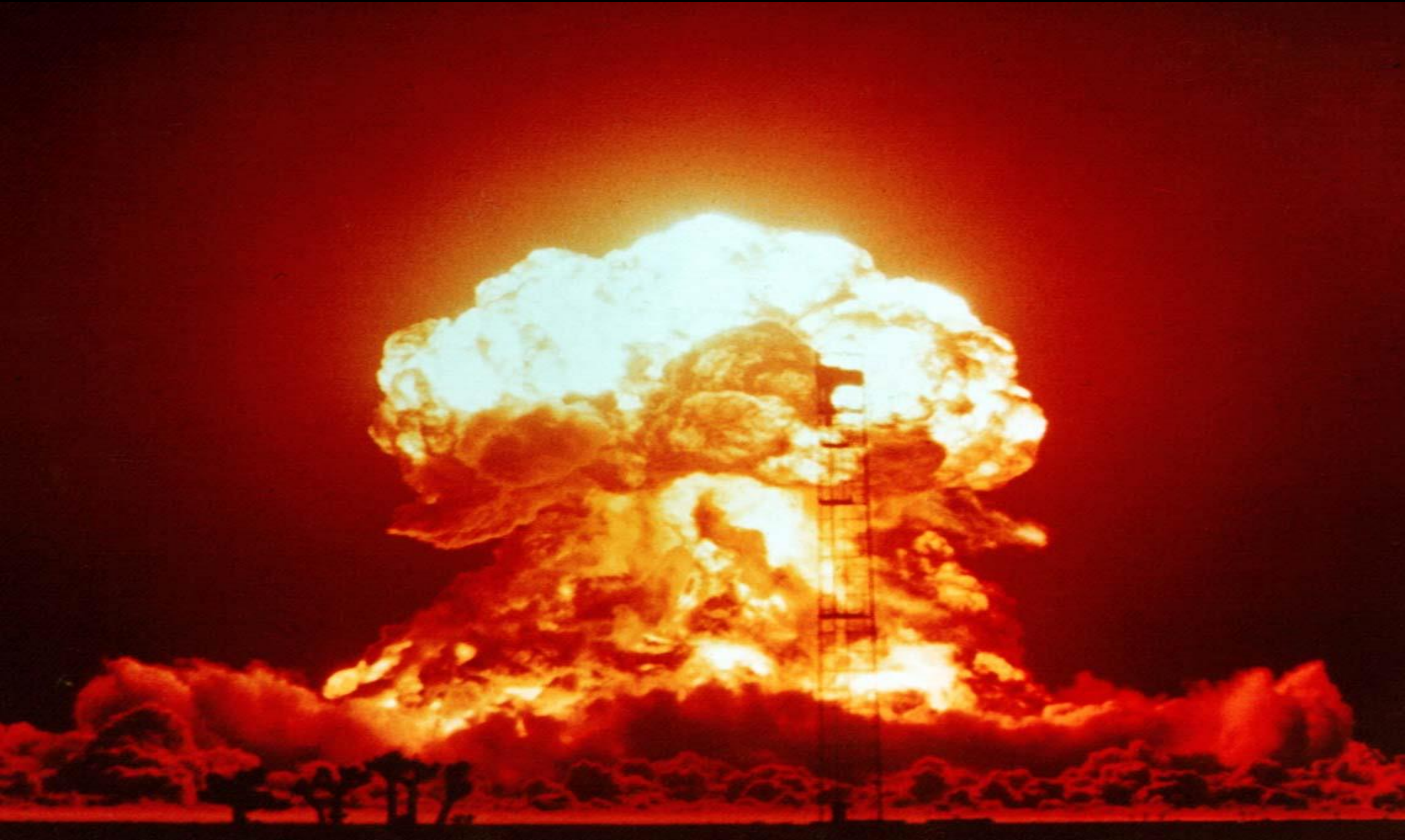
Environmental Injustice (Bank Financed)

Few terms are more loaded than "human rights"

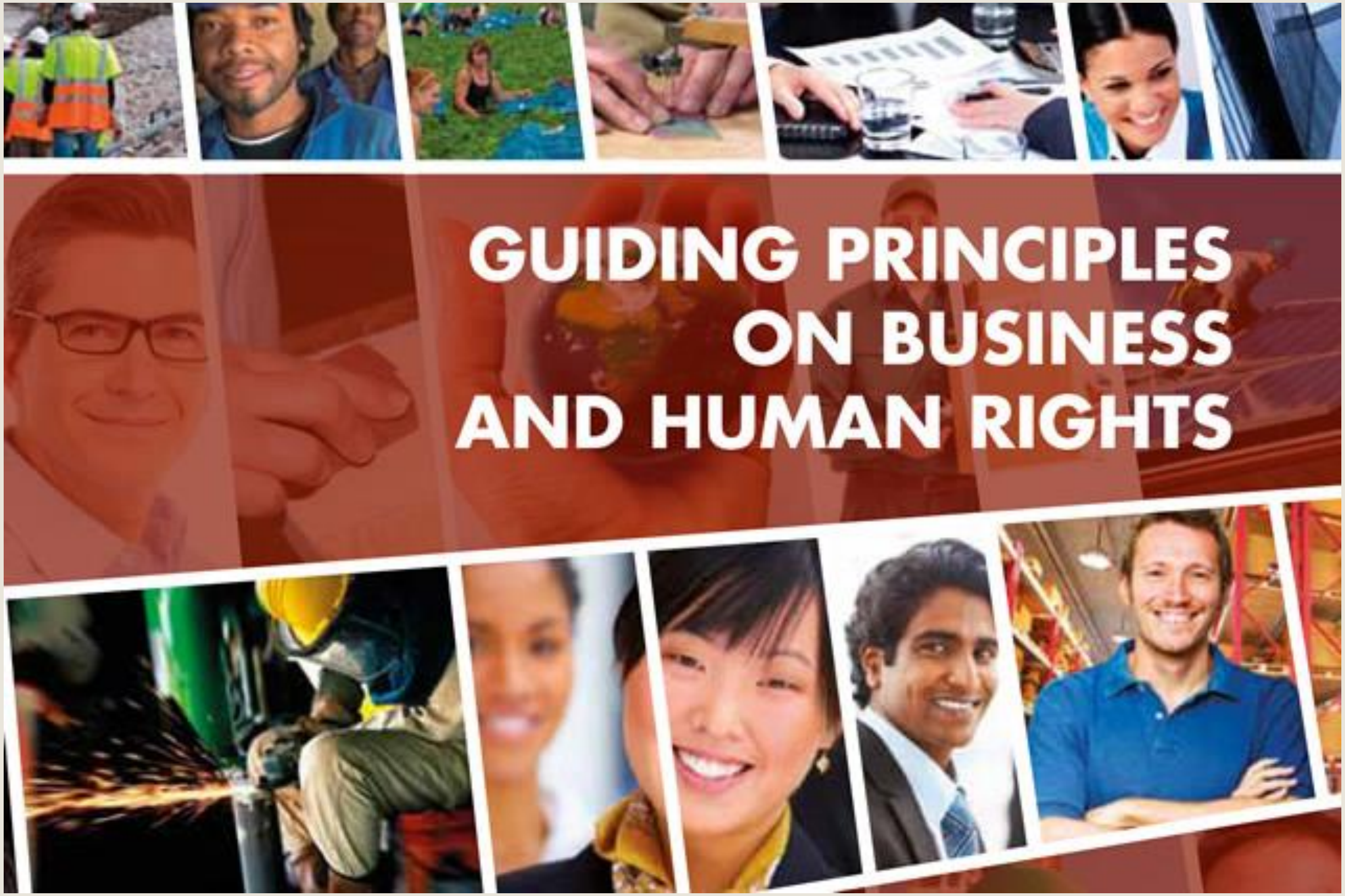
Few Players in the World Economy are More Distrusted

Banks make us question the Capitalist World Order

So what Happens when Banks Meet Human Rights?



How do banks fit in with the new Business and Human Rights Frameworks?



Part I: Introduction to the Business and Human Rights Frameworks

The UN Guiding Principles on Business and Human Rights

Respect, Due Diligence and Remedy

In summary, this framework calls for corporations to:

1. Respect Human Rights

2. Use “due diligence” intended to avoid “infringing on the rights of others and to address adverse impacts” involving the TNC

3. Enhance access for victims of human rights violations to an effective remedy.

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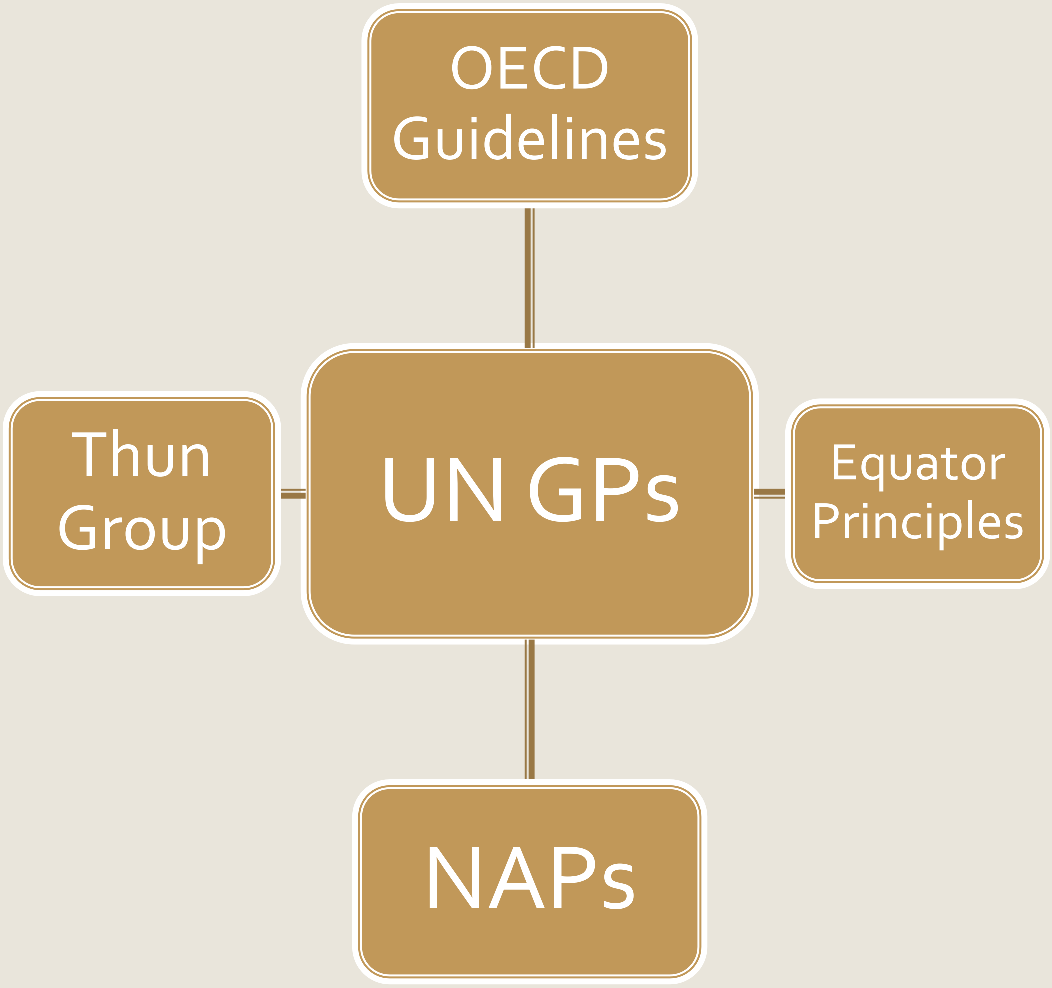
Governance Spread



Equator Principles

"We therefore recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development, including <u>fulfilling our responsibility to respect human rights by undertaking due diligence </u>[as stated in the UN Guiding Prinicples] . . . "

Thun Group

"Implementation of the Guiding Principles across all aspects of banking business will require a comprehensive approach to identify and manage potential adverse human rights impacts and related risks to the bank. <u>Exposure to human rights issues arising from client operations may entail risks to the bank's own operations, such as reputational, legal, operational and financial risks</u>."

OECD: "Common Approaches"

for Officially Supported Export Credits and Environmental and Social Due Diligence (2016 Rev.)

45. Adherents shall give further consideration to the issue of human rights, with the aim of reviewing how project-related human rights impacts are being addressed and/or might be further addressed in relation to the provision of officially supported export credits.

Adherents shall: Share approaches to and experience of, screening and assessing applications for potential severe project-related human rights impacts, reviewing projects where there is a high likelihood of such impacts occurring, and applying relevant due diligence tools and international standards.

Banks' Counter Arguments on Human Rights

- We don't impact rights, we only lend money (we don't touch humans)
- Human Rights Due Diligence is our borrowers job to do at their operations
- Access to remedy is our borrowers responsibility
- We are not the human rights police
- We do not have the leverage to control our borrowers

Guiding Principle 13

"Contribute" and "linked" include empower, which is what banks do

The responsibility to respect human rights requires that business enterprises:
(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Money Has A Supply Chain

Do Banks care if the borrower respects human rights?

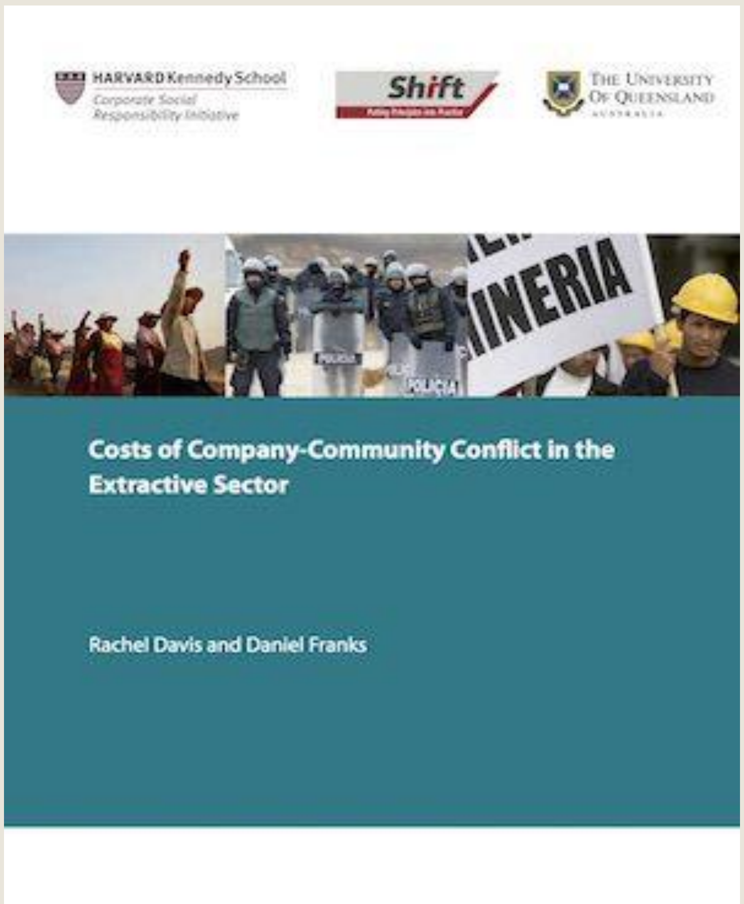
- **Loan Risk**
  - If the human rights violations are so severe that the loan may not be repaid
  - If the project is delayed
  - If human rights blowback raises project costs
- **Reputational Risk**
  - The Bank has its own policies
  - Can the bank itself be attacked? What does it matter?

Two Activists Murdered—Banks back out

If the murder of Honduran activist Berta Cáceres was not enough to convince European development banks to pull their funding from the massive dam project she had protested, the killing of one of her colleagues seems to have done the trick.

Nelson García, who worked with Cáceres before she was shot and killed by unidentified gunmen two weeks ago, was himself shot and killed outside his mother-in-law’s house at lunchtime Tuesday. His murder prompted two European development banks, **Netherlands Development Finance Co., or FMO, and FinnFund, to suspend their funding** of the Agua Zarca hydroelectric project that Cáceres spent a decade protesting.

Do human rights problems really cost money?



The most frequent costs were those arising from lost productivity due to temporary shutdowns or delay. For example, a major, world-class mining project with capital expenditure of between US$3-5 billion will suffer costs of roughly US$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales.

One company had undertaken a systematic review of the potential costs of nontechnical risks connected to its various projects and identified a significant figure – a value erosion of more than $6 billion over a two-year period, representing a double-digit percentage of its annual profits – which it used to attract Board-level attention to these issues.

Do Banks Care? It depends on the Bank

- Many banks sell accounts to the public, they can be sensitive to attacks which make them look insensitive to CSR
- Banks are risk adverse, they have elaborate systems to detect risk, if human rights due diligence improves their risk detector, they will use it
- Will it give them a competitive advantage over other banks?

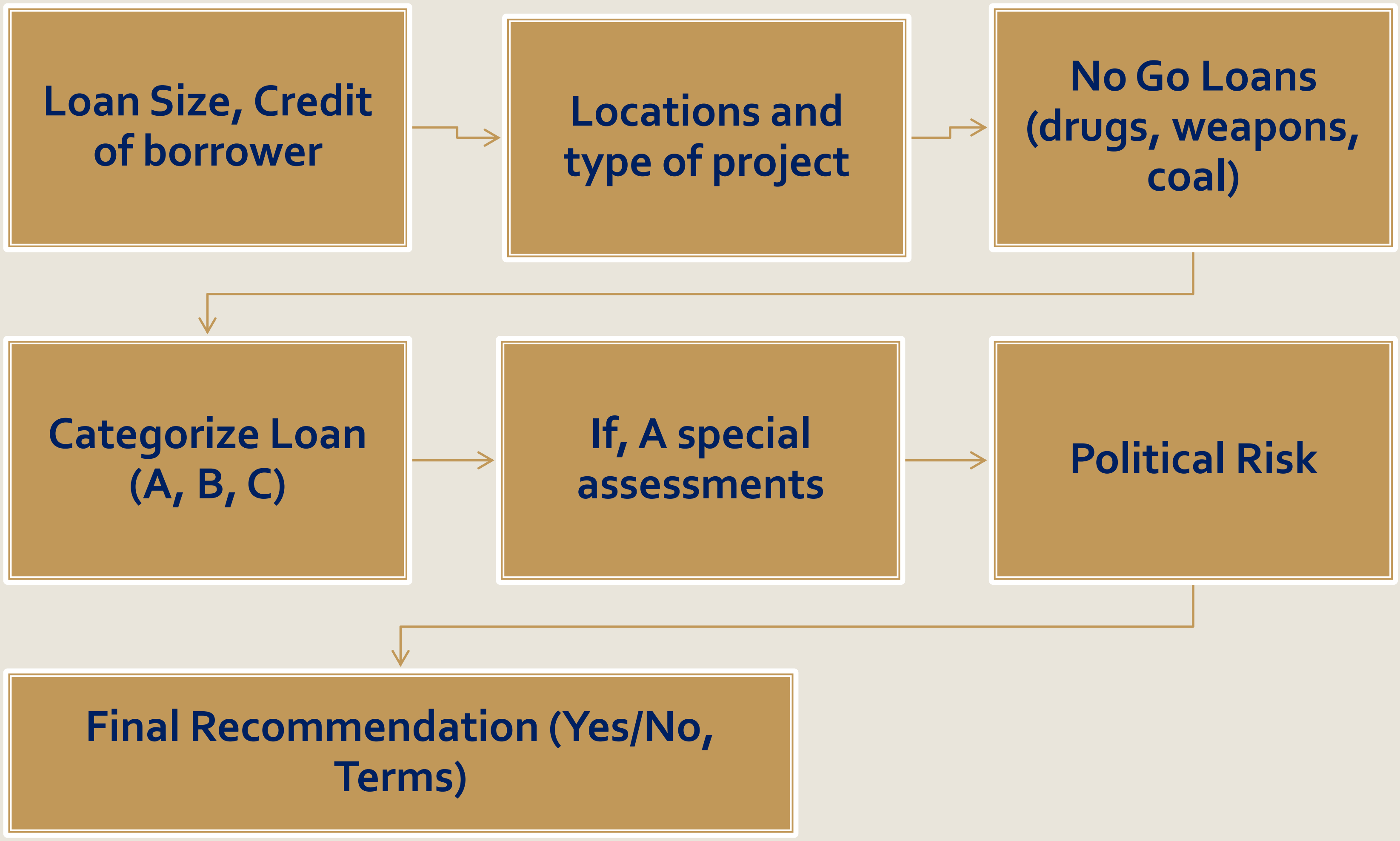
Part II: Banks and the UN GPs Responsibility to Conduct Human Rights Due Diligence

What would a bank do?

The Base Case(s)—Example used

- You are a bank
  - Lending to a corporation
    - Which may be multi-national
    - Or have a single operation
  - Providing
    - General Credit
    - Project Finance
- Your client
  - Operates in under-developed countries (though they may be based elsewhere)
  - Is usually in the mining, oil and gas, manufacturing, agriculture and infrastructure sectors

Example of Bank Underwriting Analysis



BORROWER'S HRDD (NO BANK)

1. May be adequate

2. May be self-serving (biased)

3. May be superficial (poorly done)

4. Likely to be secret (no one requires it to be public)

5. May not be done at all

Borrower's HRDD (with Bank)

1. May be adequate
2. May be self-serving (Bank wants it objective)
3. May be superficial (Bank wants it insightful)
4. Likely to be secret (Bank *will* see, *may* share/publish it)
5. May not be done at all (Bank may require it)

But do the Interests of the Bank and Rightsholders align?

- <u>No</u>
  - The Bank looks at human rights as a risk issue
  - A risk to itself
  - Human rights risks to itself are only those that can spill over into public problems
  - Banks are less interested in low level, persistent human rights abused (role of women, persistent discrimination)
- However, some banks may be starting to care about human rights and seek to respect them as such

Theory: some banks will pursue *some* human rights due diligence

YES BANK

Part III: Banks and Access to Remedy

We are from the World Bank and we are here to help

UN Guiding Principle 29 (Access to Remedy)

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

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Would Banks benefit from access to remedy? Why not?

1. To get information?
2. To defuse tensions.
3. To get out of bad loans.

Do Banks benefit from access to remedy?

1. To get information? (But an get information from claim without a remedy.)
2. To defuse tensions. (But access to remedy can increase tensions.)
3. To get out of bad loans. (But usually too late.)

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<u>No</u>

Why would banks resist human rights grievance mechanisms?

- New remedies put the borrower at risk
- They create bad publicity
- If they arise after the loan is made they do not help underwriting. (Once the loan is made it is generally too late for the bank to act meaningfully.)
- Also, no advantage to the bank

Theory: Banks will not push for access to remedy

IV. Data vs. Theory

What is really happening?

Summary

HUMAN RIGHTS DUE DILIGENCE—THEORY SAYS YES

- Due diligence meshes with Bank Practice
- Risk analysis is music to their ears
- Can improve underwriting processes
- Can gives a bank a competitive advantage
- borrower does most of the work, bank gets the benefit
- Perceived to help banks

ACCESS TO REMEDY—THEORY SAYS NO

- Remedies do not help underwriting
- Only creates more risk
- May embolden project opponents and harm the project
- No upside for the bank

Little Evidence of Banks pursuing Grievance Mechanisms

- FMO -- 2 cases
- World Bank Compliance Advisor/Ombudsman (Pre UN GPs, not human rights based)
- Claim of Itau, but no examples
- Soft claims of a few commercial banks, but no examples
- Not much at all . . .

BankTrack and Survey

- Bank watch NGO
- Survey to 45 banks
- Can get "Yes" 1.0 point, "Partial" 0.5 point or "No" 0.0 point
- Has 12 basic UN Guiding Principles Questions

Banking with Principles?

HUMAN RIGHTS DUE DILIGENCE

Commit to it?
22.0/45 banks (mean 0.49)

Assigns responsibility internally?
13.0/45 banks (mean 0.29)

ACCESS TO REMEDY

Participate in Grievance Mechanisms?
3.5/45 banks (mean 0.08)

Are mechanisms effective?
0.0/45 banks (mean 0.00)

Source: Benchmarking Banks against the UN Guiding Principles on Business and Human Rights, Second edition • June 2016 BankTrack

Banking with Principles?

Top 12 Banks

HUMAN RIGHTS DUE DILIGENCE

Commit to it?
11.0/12 banks (mean 0.92)

Assigns responsibility internally?
9.5/12 banks (mean 0.79)

ACCESS TO REMEDY

Participate in Grievance Mechanisms?
2.0/12 banks (mean .17)

Are mechanisms effective?
0.0/12 banks (mean 0.00)

BankTrack Survey of 45 Banks (2016)

“Several requirements from the UN Guiding Principles are not being met by even ‘front runner” banks.’ These are: . . .and establishing grievance mechanisms that meet the effectiveness criteria of the Guiding Principles. On these three counts, <u>all banks are failing to meet their responsibilities</u>.“

Conclusion: There is a long, hard way yet to go . . .