‘Implementing the UN Guiding Principles on Business and Human Rights’
Warsaw, Ministry of Economy conference hall, 25.01.2013
Allerhand Insitute Conference, PANEL I – State Duty to Protect

FILIP GREGOR, Environmental Law Service

Title: Human Rights Due Diligence: Role of States

Abstract: The Guiding Principles suggest due diligence as an operational means for business enterprises to respect human rights, but the specific options available to States to ensure the implementation of business due diligence are not specified.

The Human Rights Due Diligence Project sought to provide an answer to this question by mapping out where and how States already make use of due diligence regulations to ensure that businesses respect established standards. The project ultimately obtained more than 100 examples of due diligence regimes in more than 20 States, ranging from liability mechanisms, to incentive and permitting regimes, to transparency and disclosure mechanisms.

The Human Rights Due Diligence Project has been carried out by Prof. Olivier de Schutter, Prof. Anita Ramasastry, Mark B. Taylor, and Robert C. Thompson on request of the International Corporate Accountability Roundtable, the European Coalition for Corporate Justice and the Canadian Network on Corporate Accountability.

For more information and to download the full Human Rights Due Diligence Report, please see:

http://www.corporatejustice.org/Press-release-Global-Partnership.html?lang=en
or
http://accountabilityroundtable.org/campaigns/human-rights-due-diligence/

Talking points:

- The United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”) affirm that business enterprises have a responsibility to respect human rights, and that States have a duty to ensure that they do so. The Guiding Principles describe the duty of States as including "appropriate steps to prevent, investigate, punish and redress” human rights abuse “through effective policies, legislation, regulations and adjudication." The Guiding Principles suggest due diligence as an operational means for business enterprises to respect human rights, but the specific options available to States to ensure the implementation of business due diligence are not specified.
- The International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ) and the Canadian Network on Corporate Accountability (CNCA) have commissioned a group of international experts - Prof. Olivier de Schutter, Prof. Anita Ramasastry, Mark B. Taylor, and Robert C. Thompson - to map out how States already use due diligence regulations to ensure that the behavior of business enterprises meets social expectations in areas akin to human rights. In other words, the Human Rights Due Diligence Project sought to establish the extent to which the legal systems of States already make use of due diligence regulations to ensure that businesses respect established standards and to describe a range of regulatory options policymakers might use to take the next steps in ensuring businesses respect human rights. The Project ultimately obtained more than 100 examples of due diligence regimes (the “Examples”) in more than 20 States, drawn from a

wide variety of regulatory sectors. The Examples illustrate numerous approaches to the use of regulatory authority in promoting due diligence, as reflected in the Report.

- The principal conclusion of the Report is that States could make far greater use of legal tools to ensure business respects human rights in general and implement due diligence for human rights in particular. States have imposed various obligations to act with due diligence with regard to a range of values such as consumer protection or the protection of the environment, or the fight against money laundering or human trafficking; or they have created strong incentives to encourage companies to design ways of taking these concerns into account.
- Drawing on State practice and international standards, the Report finds the following:

1. First, the Report confirms that the origins of due diligence are neither a creation of the United Nations Human Rights Council nor a voluntary measure for corporate social responsibility. Due diligence originates from legal tools that States are already using to ensure that business behavior meets social expectations, including standards set in law.
2. The Report describes how the concept of due diligence requirements are found in areas of law that are either analogous to or directly relevant to human rights, such as labor rights, environmental protection, consumer protection and anti-corruption.
3. The Report also establishes that due diligence requirements can be used to ensure that business enterprises can be held accountable for violations of law, by, for example, overcoming obstacles to effective regulation posed by complex corporate structures or their transnational activities.

- The options described in the Report indicate at least four main regulatory approaches through which States can ensure human rights due diligence activities by business. Usually these approaches co-exist within the same jurisdictions and legal systems.

1. The first approach imposes a due diligence requirement as a matter of regulatory compliance. States implement rules that require business enterprises to conduct due diligence, either as a direct legal obligation formulated in a rule, or indirectly by offering companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative violations. For example, the courts use business due diligence to assess business compliance with environmental, labor, consumer protection and anti-corruption laws. Similarly, regulatory agencies regularly require business due diligence as the basis upon which to grant approvals and licenses for many business activities.

2. The second regulatory approach provides incentives and benefits to companies, in return for their being able to demonstrate due diligence practice. For example, in order for companies to qualify for export credit, labeling schemes or other forms of State support, States often require due diligence on environmental and social risks.

3. A third approach is for States to encourage due diligence through transparency and disclosure mechanisms. States implement rules that require business enterprises to disclose the presence or absence of due diligence activities and any identified harms that their activities may create, such as the presence of child labor in a company's supply chain. Market participants will then attempt to constrain any identified harms on the basis of a company's disclosures. For example, securities laws, consumer protection laws and reporting requirements for corporate social responsibility operate on the logic that information serves the interests, and will prompt action by consumers, investors, regulators, and people who might be adversely affected by a business activity.

4. A fourth category involves a combination of one or more of these approaches. States regularly combine aspects of these approaches in order to construct an incentive structure that promotes respect by business for the standards set down in the rules and ensures that compliance can be assessed in an efficient and effective manner. For example, administrative rules governing environmental protection, labor rights, consumer protection or anti-corruption may require business due diligence as the bases for a license or approval, and may also require regular reporting disclosure of due diligence activities by business. Enforcement of such rules can combine administrative penalties, such as fines, and criminal law sanctions; and the possibility of civil action.

- The Report is by no means the final word on which regulatory measures are most effective in ensuring respect for human rights. Extensive State practice with respect to due diligence as a method of regulation is not evidence of human rights protection, nor is it evidence of effective enforcement. In addition, no one form of due diligence regulation will suit all business sectors or address every human rights challenge. The report does not attempt to prescribe which particular regulatory options are best for particular human rights risks. The range of specific economic activities, national legal systems, human rights contexts and the range in business structures, operations and relationships is too varied and diverse for detailed prescriptions in one report.
- In the European context, an appropriate first step can be to ask companies to map out the risks of human rights violations in their operations or connected to them by their business relationships and disclose how they manage these risks in their annual reports. The informationon companies due diligence can be vital for the management of the company, as well as for potential investors, public authorities that may do business with such company, and civil society.