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THE RIGHT TO A HEALTHY ENVIRONMENT: RESOLUTION 76/300'S POTENTIAL IMPACT ON BUSINESSES

GOVERNANCE & SUSTAINABILITY
Part of the Horizon Scanning series

In July, the UN General Assembly ("**UNGA**") passed a resolution recognising the right to a clean, healthy and sustainable environment ("**R2HE**") as a human right ("**Resolution 76/300**"). The move follows similar resolutions adopted by the UN Human Rights Council and the Parliamentary Assembly of the Council of Europe last year, and has been deemed a *"catalyst for accelerated action to achieve the Sustainable Development Goals"* by the UN Special Rapporteur on human rights and the environment.

Below is a summary of both the key provisions of Resolution 76/300 and our reflections on its potential impact, in particular on UK businesses. We also consider how Resolution 76/300 fits within broader legal and behavioural developments surrounding corporate human rights and environmental due diligence.

Summary of main provisions

In recognising the R2HE as a human right, Resolution 76/300 also:

- Notes that the R2HE is related to other rights and existing international law;
- Calls upon *"business enterprises"* (among others) to *"adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices"* with a view to protecting the environment; and
- Affirms that the promotion of a R2HE *"requires the full implementation of the multilateral agreements under the principles of international environmental law"*.

Increasing convergence of human rights and environmental law

Resolution 76/300 is reflective of ongoing growing international recognition of the interconnections between human rights and the environment. For example, the UN Human Rights Council commissioned a study on the relationship between human rights and climate change in 2009 and appointed an independent expert on human rights and the environment in 2012. More recently, the Glasgow Climate Pact arising out of COP26 emphasised the importance of human rights and collaborations across sectors to deliver effective climate action.

Rights-based climate litigation (i.e. litigation based on the impact of climate change on human rights) has also been on the rise in recent years. According to a Chatham House report, although only a handful of rights-based climate cases had been brought before courts prior to 2015, between 2015 and November 2021 40 cases had been brought in 22 countries and before three international bodies. In addition, the Grantham Research Institute on Climate Change and Environment's report on global trends in climate change litigation observed that rights-based climate litigation is playing an increasingly important role in litigation against companies, particularly in light of the development of corporate human rights due diligence laws.

Definitional and causal difficulties with the R2HE

There is currently no universally accepted definition of what the R2HE would specifically entail. This was recognised by representatives of India, China and Iran in relation to Resolution 76/300 – the

representative of India, for example, observed that "clean", "healthy" and "sustainable" are terms that lack an internationally agreed definition. Such a lack of clarity may represent a barrier to the R2HE being incorporated into domestic law, and may cast doubt on its enforceability.

In addition, claims brought before courts on the basis of the R2HE may struggle to prove a causal link between specific acts by identified actors on the one hand, and the violation of the claimant's right to a healthy environment on the other. Although not a rights-based climate claim, the Californian case of *Native Village of Kivalina v ExxonMobil Corporation* is illustrative of this issue: Judge Pro in his concurring opinion expressed the view that the link alleged by the plaintiffs between the defendants' greenhouse gas emissions and the effects of climate change was too "attenuated" for causation to be established.

Potential impact of Resolution 76/300 on UK law and businesses

As noted above, Resolution 76/300 specifically calls business enterprises to action, thereby acknowledging that businesses have a key role to play in ensuring a clean, healthy and sustainable environment. The resolution also makes specific reference to the UN Guiding Principles on Business and Human Rights (the "**UNGPs**"), noting in the environmental context that all business enterprises have a responsibility to respect human rights.

Whilst UNGA resolutions are not legally binding on member states (indeed, the UK made clear when voting that that the recognition of the right would not legally bind states to its terms), Resolution 76/300 has the capacity to influence the legal landscape in the UK:

- **Soft law influence on legislation:** UNGA resolutions and other such "soft law" instruments (i.e. non-binding instruments such as principles, codes of conduct or declarations) may inform domestic law-making and ultimately affect businesses. Soft law norms play important integrating and influencing roles when it comes to law and policy, given their flexibility and evolutionary capacity. They may provide justification for action on the part of states and non-state actors, and thereby influence policy and business practices.

  For example, following publication of the UNGPs, the UK introduced the Modern Slavery Act and amended the Companies Act to require certain companies to report on material human rights impacts as part of their annual reports. More recently, when commenting on Resolution 76/300, the UN Special Rapporteur on human rights and the environment drew parallels with similar processes such as the recognition of the rights to water and sanitation by the UNGA in 2010 – a development which initiated a range of law and policy changes across the world.

  Although unlikely in view of the UK's comments on the non-binding nature of Resolution 76/300, the Environmental Rights Recognition Project had suggested that the government's proposed Bill of Rights presented an opportunity for it to introduce a statutory right to a healthy environment into UK law. The Council of Europe has also recently called on its member states (including the UK) to actively consider recognising, at a national level, the R2HE as a human right. The Council's recommendation stipulates that member states *"should encourage or, where appropriate, require business enterprises to act in compliance with their human rights responsibilities related to the environment"*.

- **Soft law influence on case law**: Soft law instruments may also inform domestic courts' interpretation of existing human rights frameworks:

  Soft law instruments may be directly referred to by national courts. Such was the case in the rights-based climate case of *State of the Netherlands v Urgenda Foundation*, where a Dutch court considered soft law provisions (such as targets agreed under the Paris framework) in interpreting domestic law.

  Soft law instruments may also indirectly influence domestic case law. Under the current UK human rights framework, the courts of England and Wales are required to take into account judgments of the European Court of Human Rights (the "**ECtHR**"). In the recent ECtHR case of *Pavlov and Others v Russia*, Judge Krenc cited Resolution 76/300 as an important development at the international level that the ECtHR must take into account. Judge Serghides in the same case opined that Article 8 of the European Convention on Human Rights (the "**Convention**"), which protects the right to

respect for private and family life, "*necessitates and entails the implicit sub-right to a healthy environment*". He also called for the inclusion of a substantive right to a healthy, clean, safe and sustainable environment in the Convention by way of a new protocol – a development that, in his words, would serve as *"an incentive for stronger domestic environmental laws and a more protection-focused approach by the domestic courts"*.

Resolution 76/300, and comments such as those made by Judges Krenc and Serghides in Pavlov, may well be cited in support of rights-based environmental claims before UK courts going forward. The ECtHR's adherence to the "living instrument" doctrine (according to which the Convention should be interpreted in light of present-day conditions), coupled with the requirement at the UK level to pay heed to ECtHR decisions, may result in the R2HE being recognised by UK courts. Whether, and to what extent, the R2HE could form the basis of rights-based environmental claims against companies, remains to be seen.

Growing pressure on businesses to strengthen human rights and environmental due diligence practices

It should be noted that Resolution 76/300 is only one of many pieces within the human rights and environmental rights jigsaw:

- **CSDD:** The EU's draft Corporate Sustainability Due Diligence Directive ("**CSDD**"), for example, will require in-scope companies (which can include non-EU companies) to take an active role in mitigating their actual or potential adverse human rights and environmental impacts. Whilst the analysis of the directive is beyond the scope of this article, the main messages to be drawn out are that the CSDD:

  1) Will mark a major shift from simply requiring corporate reporting on adverse environmental or human rights impacts, to businesses having to actively address them throughout their whole value chain. It is a further indication of the direction of travel (following on from, for example, domestic French and German due diligence laws) which confirms that businesses are expected and increasingly required to take a more active role when it comes to the environment and human rights. Those who do not act not only face a reputational risk, but also a greater legal and compliance risk; and

  2) Defines *"human rights and environmental impacts"* by reference to rights enshrined under international conventions. If unchanged by the time it becomes law, the draft directive would in essence convert non-binding soft law applicable between states into binding EU "hard law" obligations with corresponding enforcement mechanisms that apply directly to companies. There is likely to be an overlap between the scenarios that Resolution 76/300 aims to protect and those already protected under other international conventions and, therefore, under the CSDD.

  A group of 39 UK investor firms have recently called on the UK government to implement human rights and environmental due diligence legislation, in line with developments at the European level.

- **Beyond regulation:** Even without creating binding legal obligations, Resolution 76/300 sends a clear message to businesses as to what is expected of them – this acts as a further incentive for businesses to take action. For example, businesses could consider attributing even greater importance to the assessment of their environmental and broader sustainability risks in order to meet changing stakeholder expectations.

Conclusion

Resolution 76/300 attests to the international community's growing appreciation of the interdependence between human rights and climate protection, and the importance of safeguarding both as a matter of urgency. While there is little sign that the R2HE will be incorporated into UK law in the immediate future, the government's recognition of the right may nonetheless encourage further pursuit of rights-based climate litigation against corporations going forward. In any event, Resolution 76/300 confirms the direction of travel at the international level and is one of many pieces

indicating to businesses that they must wake up to the role they play in protecting the environment.

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