Current Developments in Carbon & Climate Law

Asia and Pacific

Christopher Tung, K&L Gates Hong Kong, China

*Christopher Tung**

As parties prepare for COP23, and advance their Paris Agreement commitments, it is timely to re-examine a foundation principle of climate change law - common but differentiated responsibilities (CBDR). The principle of CBDR has its roots in general principles of equity in international law and is a basis of ensuring fairness between states and its actors in the pursuit of common environmental protection, climate mitigation and adaptation goals. As a multilateral climate agreement, the Paris Agreement inevitably contains a statement of the principle of CBDR (recitals and Article 2(2)).

However, since the first formal casting of the principle of CBDR in the Rio Declaration in 1992, the economic, social and environmental circumstances of the world have changed dramatically. There have been financial and environmental crisis of global and devastating proportions, as well as very substantial economic growth in developing countries such as China, India, Indonesia and Malaysia, and in previously developing countries such as South Korea, which have transitioned to developed country status.

Has the principle of CBDR been too easily invoked by advanced developing countries as a bargaining chip to argue for less stringent and voluntary climate change mitigation and adaptation commitments? Are economic priorities holding back effective and more aggressive climate change actions? Indeed, is a misuse of CBDR not contrary to the principle of sustainable development, which CBDR is meant to be compatible with? This article considers these questions and how the principle of CBDR may be adapted to the economic, social and environmental

reality of today with reference to a number of Asian countries at different stages of development.

Background

The Rio Declaration 1992 is regarded as the first formal statement of the principle of CBDR. Principle 6 states:

‘The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.’

Principle 7 states:

‘States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’

The United Nations Framework Convention on Climate Change 1992 provides:

‘Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.’

‘Article 3(1) The Parties should protect the climate system for the benefit of the present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. According-

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* Christopher Tung is a partner in the Hong Kong office of K&L Gates. For correspondence: christopher.tung@klgates.com

ly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'

'Article 3(2) The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would bear a disproportionate or abnormal burden under the Convention, should be given full consideration.'

The Kyoto Protocol put CBDR in to practice by creating differential and binding emissions reduction commitments on Annex I developed country parties, firstly by making a distinction between developed and developing country parties, with only the former having legally binding commitments and secondly by imposing different levels of binding commitments on developed country parties. The Kyoto Protocol regime therefore provided a reasonably clear top down application of CBDR. A progressive increase and extension of legally binding emissions reduction obligations of the Kyoto Protocol has of course since been frustrated by the lack of international political will and agreement. Nevertheless, had binding emission reduction targets of developed countries continued in the second commitment period of the Kyoto Protocol and increased, and started to impose binding emission reduction targets on advanced developing countries, broader based and more consistent climate change mitigation action and results might have been achieved in comparison with the Paris Agreement.

Accordingly, global climate change action by multilateral agreement now depends heavily on the Paris Agreement. However the Paris Agreement adopts a bare statement of the principle of CBDR (Article 2(2) 'This Agreement will be implemented to reflect equity and the principle of common but differentiated capabilities, in the light of different national circumstances') without any elaboration or development to take into account the very different economic, social and environmental circumstances of 2015 and beyond.

Should the Principle be Modified and Calibrated?

A frequent criticism of the principle of CBDR is that it has no fixed meaning, lacks a detailed description and is used selectively by states to support their own national interests. So the inherent and deliberate

flexibility in the drafting of the principle of CBDR to give states the ability to meet common climate change goals in accordance with their national circumstances and capabilities has given rise to the unintended result of some states using CBDR to justify more limited mitigation and adaptation action, when the ostensible reason for such limited action is to prioritise economic development. This is contrary to the proper application of CBDR and a breach of the principle of sustainable development. Indeed, climate action has regressed in some ways, as the compromises needed to conclude the Paris Agreement left the international climate change law framework with no globally binding emissions reduction targets (in contrast to the Kyoto Protocol), on any state party, developed or developing, effectively leaving states to carry out their own nationally determined contributions (NDCs) in accordance with CBDR.

As mentioned above and by way of example, China, India, Indonesia, Malaysia and South Korea have developed substantially since 1992 (Rio, UNFCCC) and 1998 (Kyoto Protocol), and the reality is that these countries could adopt binding emissions reduction commitments under an international climate agreement, rather than elastic and voluntary actions under NDCs. Irrespective of how an international climate agreement is structured, a restated principle of CBDR would help guide the actions required of different countries that more accurately reflect economic, social and environmental circumstances of today and the future.

How a Restated CBDR Principle Might Apply in Practice

A restated CBDR principle might read as follows:

'It is a shared responsibility of all states to take effective climate change mitigation and adaptation action in accordance with their collective and individual capabilities and national circumstances. These capabilities and circumstances change over time, and appropriate and regular adjustments should be made by a state to the types and level of climate change action that a state is able to take to ensure that the most effective action is taken to protect the climate system consistent with the principles of equity and sustainable development.'

This restated CBDR principle aims to clearly articulate:

- the shared responsibility to act, while also making it plain that this is limited by a state's capability to act and its national circumstances;
- capabilities and circumstances change over time and are not static;
- types and levels of climate change action therefore should be adjusted on a regular basis as appropriate;
- effective climate action must comply with principles of equity and sustainable development, so that matters such as historical and ongoing responsibility for emissions are taken into account (equity) and economic and social development priorities are properly balanced with climate action goals (sustainable development).

Consistent with the restated CBDR principle, parties to the Paris Agreement may be classified into developed (Annex 1), advanced developing (Annex 2), developing (Annex 3) and least developed countries (Annex 4), and required to commit to or choose from different types of binding and non-binding obligations, rather than deciding NDCs entirely by themselves. So for example, based on this re-categorisation, South Korea would be Annex 1, China would be Annex 2, Philippines would be Annex 3 and Bangladesh would be Annex 4.

A new international declaration might be the best way to introduce the restated CBDR principle. Although it is possible that the restatement could take the form of guidance adopted by the COP serving as MOPs under the Paris Agreement (Article 4(11) in relation to the adjustment and enhancing of the level of ambition of a NDC), a reclassification of the parties and the listing of specific binding and non-binding mitigation and adaptation options for NDCs would require an amendment of the Paris Agreement or a further agreement by the parties. This reclassification and range of options would also be able to take into account the equitable responsibility of a party (developed and advanced developing country) to act more aggressively due to a higher contribution to (a) historical emissions; and/or (b) recent and ongoing emissions due to industrial activity (and in some cases accelerated industrial activity).

In the current international political environment, a restatement of the principle of CBDR might be the best that can be hoped for. However, it would be a start to getting Asian and indeed all parties to more carefully consider and take effective climate mitigation and adaptation action that truly reflects their circumstances and capabilities rather than to prioritise economic development at the cost of protecting the climate system.