国家社科基金
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后期资助项目

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Studies on International Legal Regime of Technology Transfer for Combating Climate Change

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序 一

十分高兴地见到马忠法博士关于国际技术转让法律制度研究的第二本专著在国家社会科学基金后期资助下顺利出版。六年前我为他的第一本专著《国际技术转让法律制度理论与实务研究》作序，现在他又远隔重洋邀请我作序，我欣然同意。国际技术转让是国际经济法领域的一个重要课题，但国内这方面的研究与该领域其他主题相比，显然不充分：研究者不多，专著也较为少见。马忠法博士在多年研究的基础上进一步将研究对象限于“应对气候变化的国际技术转让法律制度”，既有现实意义，也有一定的理论意义，特别是他颇有创建地系统阐释了“私法行为公法化”这一理论，并将其充分运用于自己整部专著的分析之中。通读本书，我认为作者在以下几点值得我们关注和思考：

1. 气候变化是当今世界面对的重大挑战之一，尽管目前还有极少数不同的声音，但因为人类自身行为导致全球变暖已是一个不争的事实。今年夏天北半球多数地方持续多日的高温打破历史纪录及本世纪以来多数年份出现的极端气候，都在向人们昭示气候变暖带来的可怕影响和灾难。对此，人类需要共同努力，各国之间需要合作，来共同应对气候变化这一全球性的公共问题。马忠法博士适时地在这样的背景下研究这一课题有着重大现实意义不言而喻。正如作者在书中所言，人类已经在共同寻求解决全球变暖问题，但目前的策略将重点集中在各国减排指标分配上，这似乎有些本末倒置，因为温室气体排放是人们行为的结果而非原因，原因主要是人类技术的不当使用。人类现在拥有很多环境友好技术，如果能够将这些技术在公平合理的条件下，让人类分享并充分发挥该类技术的作用，则其效果会远大于各国在减排指标分配上的争议。我认为作者这一观点可谓抓住问题的要害：如果发达国家及其国内的私人企业愿意在适当条件下转让技术，温室气体减排会大大减少将变成现实。作者基于这样一个理论来展开本书的研究，我认为是有独到之处的。如果国际社会能够在应对气候变化策略方面如作者所言进行适当调整，将是人类之大幸。

2. 本文作者在广阔的历史视野中系统论证了“私法行为公法化”理论并将其作为本书论证的理论基础，反映了作者对国际贸易领域某些问题长期思考所带来的，也能够引起我们深思的结论。国际贸易向来是很难将国

家利益与私人利益分割开来，相关法律制度和政策制定的目的是公共利益还是私人利益也很难做出区分；但不可否认的是，私人部门在国际贸易的国内立法和国际规则形成中的重要影响是长期存在的。作者论证的这一理论不仅对于国际技术转让法律制度的完善有着积极意义，对于其他领域的国际贸易制度也有着参考价值，尤其让我们对发达国家的国际贸易政策制定中私人部门的作用有所认识，并借此拿出相应的对策，如不能仅将眼光集中在政府（尤其是发达国家政府）身上，而更应激励私人部门主动参与技术转让和其他国际贸易活动、发挥它们在技术转让等贸易活动中应有的积极作用。

3. 本书在分析现有应对气候变化技术转让法律制度存在不足的基础上，指出产生这种不足的主要原因是发达国家私人掌握主要技术及其国内法律制度过度保护私权利的特点使发达国家的承诺（以政府间条约约定的权利义务为形式）难以实现，即在那些政府机构是私人利益集团代言人的国家中，政府的承诺常常不被追求私人利益最大化的跨国公司所认可和执行。这一观点与“私法行为公法化”理论融为一体，道出了国际技术转让困境的本源，可谓抓住了问题的关键。对此，像中国等发展中国家在认识到这一点基础上，可以对症下药，拿出具体有效的措施，在应对气候变化策略谈判中占据主动。

4. 作者在研究的基础上提出制定世界贸易组织框架下的国际技术转让协定，具有一定的前瞻性。针对联合国体系下解决气候变化问题所处的困境，提出这一设想有积极意义。作者在书中充分论证了这一点，并基于现有条约或其他国际法文件的相关规定，设计出具体框架和条文，体现出作者较强的创新意识。任何国际制度的诞生，都经历过事先预想的阶段，我们希望作者的这一设想能够尽快变成现实，既为世界贸易组织规则增加丰富内容，又利于人类有效应对气候变化。

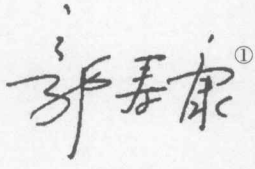
5. 作者提出中国不可能长期以“历史与现实的公平”及“共同但有区别责任”等为由来应对发达国家在气候变化方面对中国提出的诉求，而需依环境友好技术来化解压力。为此，他认为应发挥我国政治法律制度方面的优点，完善国内相关法律，促进或吸引跨国公司等私人主体主动转让技术，以既利于我国的引进消化吸收再创新的策略，又为国际层面的应对提供支撑。这一论点也颇为现实并具有新意。

此外，本书的逻辑结构严谨，资料参考丰富翔实，引用大量前沿的外文资料，引注得当充分，反映了作者具有严谨的写作态度和较强的学术功底。

总之，本书既是应对气候变化方面的一部力作，也是技术转让法律制

度方面少有的系统之作;较其前一部专著而言,研究更为深入和系统。但学无止境,我希望作者能够进一步加强本书有关方面的研究,如完善"私法行为公法化"理论,以形成更为完整的体系,同时能够将本书草拟的"国际技术转让协定"进一步雕琢,以期一旦进行相关谈判,能为我国相关部门提供参考。当然,学以致用,学术研究要为现实服务,我更希望本书的出版能够引起有关方面的注意,为应对气候变化做出积极贡献。

是为序。



2013 年 12 月 10 日

① 中国人民大学教授,联合国教科文组织版权与邻接权教席主持人,兼任澳大利亚迪肯大学、北京师范大学、北京外国语大学教授,中国人民大学知识产权教学与研究中心第一任主任,联合国 WIPO 仲裁员,国际版权学会执委,ATRIP 创始会员、执委。

序 二*

Climate change has been a critical global issue for more than 20 years, and international community has been exerting great efforts to try to find effective measures to address it. Under such a situation, Dr. Ma Zhongfa has conducted the research on the issues concerning the regime on international technology transfer of combating climate change for a long time, which reflects his keen perception on topic selection. It is known that most scholars and officials have attached more importance to the distribution or allocation of emission targets of greenhouse gases (GHG) among the developed and in-transition countries, and to the issues on whether developing countries shall assume the obligations of mitigating GHG emissions while the issues on technology transfer may be neglected to a certain degree. Just as Dr. Ma emphasizes in his book that this strategy for addressing climate change is just the one that we put the cart before the horse, for emission of GHG is the result, not the cause, which was really generated by inappropriate utilization of technologies, and we shall reconsider the current strategies to fight against climate change. On the basis of his detailed analysis of the present provisions in different international legal documents, the drawbacks of the current regime, and roots for such shortcomings, the author points out that the private sectors hardly act in consistence with the promises that their home country governments have made, and as a result, the relevant international obligations concerning technology transfer are seldom performed in reality. Considering the facts that most environmentally sound technologies (ESTs) are held by private sectors, he suggests that, in order to make private sectors actively participate in transferring ESTs, according to the theory of "public legalization of private and commercial conducts" in international trade, on basis of the common interests of human beings, technology transfer should be linked with international trade regime, and an international technology transfer agreement

* 本序言由牟鹏飞(上海海事法院法官)译,马忠法校。

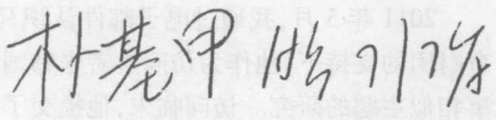
under the WTO should be concluded to enhance the consistence between the promises of developed country governments and the acts of technology transfer activities conducted by their domestic private sectors with help of the WTO dispute settlement mechanism. This view is brand new as far as I know.

In the book, the author put forward the theory of "public legalization of private and commercial conducts" in international trade on the foundation of analyzing historical and contemporary materials, which also quite impresses me. The core of the theory is that the acts of private sectors have been changed into the will of states in specified ways, which produce impacts on or intervene international trade with purpose of maximizing their own benefits. Its essence is that the private sectors expand their interests in the name of protecting national interests. This idea may be a breath of fresh air in the field of international trade and may bring much enlightening for us.

This book contains about 500,000 words and more than 400 references, and there are many sections which convey the author's reflections of the issue on legal regime of international technology transfer, and I just make comments on above mentioned points, which may be the most important in the book. I believe that after reading the book, the readers can get much from it.

I began to know Dr. Ma in May, 2011 by email and in August of that year, with the financial support by the Korea Foundation for Advanced Studies (KFAS), he came to conduct the research on the similar topic as a visiting scholar under my supervision at Korea Law School. By the end of visiting, he submitted a paper entitled *Consummating the International Legal Institution of EST Transfer for Combating the Climate Change*. I know that during his staying in Korea, he nearly spent most of his time in the libraries (the one of our Law School and the one of KFAS) or attending academic conferences concerning the topic. Because of his diligence and achievement, he was awarded a Certificate of Appreciation to recognize the exemplary conduct of research through the KFAS Library and valuable contribution towards academic advancement by the KFAS in August 2012. When he asked me to write a preface for the book, I pleasantly accepted for two reasons: one is that the book is the continuation of his research in Korea, which will demonstrate the friendship between the scholars from Korea and China; the other is that this topic is really worth of showing great attention to in post Kyoto Protocol era.

We are living in an era in which we need to reconsider our countermeasures of addressing climate change. The value of this book lies in giving the reader a real insight into the important issue of today that are urgent to seriously reconsider to effectively save our earth and future, and it can help us in this aspect.



Professor of International Law,
Korea University, School of Law
Member of the UN International Law Commission
November 16th, 2013.

译文如下：

自气候变化成为全球重要议题后的二十余年来，国际社会一直在为寻找有效应对措施而努力。在这种形势下，马忠法博士已从事与应对气候变化国际技术转让相关问题的研究多年，体现出他在论题选择上的敏锐洞察力。众所周知，绝大多数学者和官员把大部分注意力放在温室气体排放目标在发达国家与转型国家间的分配以及发展中国家应否履行温室气体减排义务等问题上，而在一定程度上忽略了技术转让。正如马博士在其书中所强调的，这种应对气候变化策略是一种本末倒置的做法，因为温室气体排放是结果而非原因，它是由技术的不当使用导致，我们应重新考虑当前的应对气候变化策略。在对各种国际法文件现有规定、现行制度缺陷及缺陷根源进行详细分析的基础上，作者指出，私人部门的行为鲜有与其国家所作的承诺相一致，使得相关国际技术转让义务难以在现实当中履行。考虑到多数环境友好技术掌握在私人部门的事实，他建议，为使私人部门积极参与到环境友好技术的转让中来，根据国际贸易中的“私法行为公法化”理论，在人类共同利益的基础上，应把技术转让与国际贸易制度密切联系起来，制定世界贸易组织（WTO）框架下的国际技术转让协议，借助WTO争端解决机制促使发达国家私人部门技术转让行为与其政府承诺相一致。这是一种全新的观点。

作者在书中基于历史和当代材料的分析提出了国际贸易中的“私法行为公法化”理论，这也给我留下了深刻的印象。该理论的核心在于私人部

门行为常以特定方式成为国家意志，其自身利益最大化的目标对国际贸易产生影响或干预，其实质是私人部门以保护国家利益之名扩张自身利益。这种观点是国际贸易领域的一缕清新空气，或能给我们以启迪。

本书全文五十余万字，四百多个参考文献，多个章节反映出作者对国际技术转让法律制度问题的思考，我仅就上述或许是全书最重要的几点稍做评论。我相信读者读完此书后必将获益更多。

2011 年 5 月，我通过电子邮件认识马博士。同年 8 月，在韩国高等教育财团的支持下，他作为访问学者来韩国高丽大学法学院在我的指导下从事相似主题的研究。访问临末，他提交了一篇约三万字、题目为《完善应对气候变化的环境友好技术转让国际法律制度》的英文论文。在留韩期间，他把大部分时间花费在了两个图书馆（高丽大学法学院的图书馆和韩国高等教育财团的图书馆）或参加与主题相关的学术会议上。由于他的勤奋和成就，他于 2012 年 8 月获得韩国高等教育财团颁发的嘉许状，以肯定他通过韩国高等教育财团图书馆进行研究的模范行为以及对学术进步做出的重要贡献。当他要求我为本书作序时，我基于两个原因愉快地答应了：一个是该书作为他在韩国研究的后续成果，见证了中韩两国学者的友谊；另一个是该主题在后京都议定书时代确应得到重视。

我们生活在一个需要重新审视应对气候变化措施的年代。本书的价值在于使读者深入思考在今天为拯救我们的地球和未来而亟须重新考虑的重要议题，并且在这方面它确能给我们以帮助。

朴基甲
高丽大学法学院国际法教授
联合国国际法委员会委员
2013 年 12 月 16 日

摘　要

气候变化给人类带来诸多的不利影响和灾难，直接威胁到人类的生存和发展，而环境友好技术则是人类应对气候变化的关键。20 世纪 90 年代以来在人类关注环境的基础上，人类日渐在国际层面重视气候变化应对的措施和策略，并通过一系列会议及其形成的文件来调整、规范各国和相关主体的行为。这些措施主要涉及温室气体减排（目前主流观点主要集中于绝对减排）、适应气候变化、技术开发和转让及资金机制四个方面。其中，技术转让居于核心地位：前两个措施最终要依赖技术来解决，而资金机制也主要围绕技术转让等而设置；而由于各国经济、技术发展水平的不平衡及发达国家掌握绝大部分的环境友好技术，使技术转让成为必不可少的路径。在技术转让领域，国家间的合作及私人部门的积极参与成为近几年来的国际会议热议及国际条约等国际法文件涉及的重大论题，如各种国际环境会议形成的决议、一般多边环境保护条约、世界贸易组织框架下的有关协议及《联合国气候变化框架公约》和《京都议定书》等均有环境友好技术转让的规定。尽管这些规定是零散的，未形成统一、系统化的条约，但对调整国际间的技术转让在理论上应该能起到积极作用。然而，国际技术转让并未出现人们预期的结果。发达国家国内均关心环境友好技术的创新、获得及它们在国内的转让和应用，并大多试图完善相应的法律制度促进技术转让。但在国际上，这些国家出于国家单元利益的考虑，技术转让和分享被设置了障碍。因而，虽然《联合国气候变化框架公约》和《京都议定书》已生效多年，但相关技术在全球应对气候变化领域并未充分、顺畅地转让，发展中国家技术依然较为落后；这直接影响人类共同应对气候变化的效果。

上述结果由以下问题所致：现有相关国际条约或国际法律文件规定的内容自身存在缺陷，如条款过于原则、模糊和抽象等，它们使发达国家政府的承诺与其国内私人行为难以一致，有关国际义务也就难以得到真正履行；发展中国家技术转让诉求难以在条约中得到反映；国际技术转让法律制度领域缺乏强制制裁机制；发达国家国际国内知识产权制度的差异构成技术转让的重大障碍；发达国家技术出口管制与对外贸易制度扭曲技术转让路径；现有技术转让的具体制度如清洁发展机制、专利许可制度等未能

发挥应有作用，等等。而产生这些问题的原因有多种；不过，从国际法角度看，西方国家意志主导下的国际贸易制度中的“私法行为公法化”、国内过分保护私权利的政治法律制度及多数环境友好技术掌握在跨国公司等私人手中是技术转让不畅的根本原因：它在形式上表现为国家承诺与私人营利行为之间的冲突，而实质上却是不同主体（国家与国家、各私人部门）之间的利益之争。此外，发达国家强调知识产权国际保护、注重保护私人利益等法律制度、技术转让主体在转让活动中不同地位所带来的障碍及发展中国家自身存在不利因素等也是上述问题产生的重要原因。上述原因带来的国家间协调气候变化领域技术转让制度的现实是：“巴厘岛路线图”未能执行、哥本哈根会议目标未能实现、坎昆协议和德班“一揽子决议”在技术转让法律制度方面无所作为及多哈会议与华沙会议仍无实质进展。这就使现有技术转让制度面临更大危机，进而加剧了全球气候变化的进一步恶化。

在后《京都议定书》时代，针对国际贸易中“私法行为公法化”现象，依据人类共同利益需求和国家公共职能，应将技术转让与贸易制度直接挂钩，向“制定 WTO 框架下的国际技术转让协定”方面努力，以利用 WTO 争端解决机制，促使发达国家的政府承诺与其国内跨国公司等私人部门的技术转让与合作行为一致。利用现有合理规定，我们可以设计出该协定如下基本内容：序言、一般规定和基本原则、各成员方境内法律的实施、当事方义务的内容（含限制性条款）、对发展中国家的优惠待遇、国际合作、国际常设机构（WTO 框架下的技术转让理事会）、争端解决和其他（如协定的修改、各国执行情况的评审程序）等九部分。

中国虽在引进技术方面取得一定成绩，但在环境友好核心技术的创新和转让方面与中国国家的综合实力和现实需求之间仍有较大差距。中国特定的政治、法律制度利于其在气候变化国际应对方面形成优势。面对挑战，它不可能长期以“历史与现实的公平”及“共同但有区别责任”等为由来应对发达国家，而需依环境友好技术来化解压力。为此，我们应完善国内技术转让法律制度，或制定统一的技术转让法，或协调现有相关规定，以促进、鼓励私人（特别是跨国公司）转让技术。在国际层面，应加强与各国合作，提升本国清洁能源技术创新能力；抓住西方国家在应对气候变化国际义务履行方面的要害——技术转让义务一直未予履行，倡导并积极推动国际技术转让协定的制定，为能够引进环境友好技术并进行消化吸收再创新创造条件；以既履行自己在减排方面积极努力的国际义务，又向其他发展中国家转让技术，在国际上树立和维护负责任大国的形象。

基于上文的核心观点，本书由引言、五章和结束语共七个部分构成。

它们的内容分别简要陈述如下：

“引言”旨在介绍和阐述本课题研究的背景、意义、研究现状、研究架构和目标及研究方法等；重在说明人类社会面对气候变化这一重大挑战及现有技术转让法律制度在该方面的一定负面作用，强调该课题研究的时代意义和理论意义，明确研究的目标和路径。

第一章“应对气候变化的国际技术转让法律制度基本理论”针对引言部分提出的问题，进行相关理论的探讨，核心内容是分析和研究应对气候变化的环境友好技术转让所涉及的国际贸易中的私法行为公法化理论；具体论及该理论发展的历史渊源、基本内涵、在国际贸易领域中的体现和发展趋势及其对国际技术转让的影响等。该章的目的在于为完善应对气候变化的国际技术转让相关法律制度提供理论支持。

第二章“应对气候变化的国际技术转让法律制度及其实践”对现有有关气候变化的国际法文件[含联合国气候变化框架公约、京都议定书、一般多边环境保护条约、有关环境保护宣言、21 世纪议程、历次成员方大会(COP)决议等]对环境友好技术转让规定进行归纳和分析，以揭示该方面制度的形成、发展、现状、内容及其规律；并就有关实践进行探讨和评析。该章主要为后文就现有相关制度不足的分析及其完善路径探求提供实证依据。

第三章“应对气候变化国际技术转让法律制度的不足及其原因”在前一章基础上，研究现有应对气候变化技术转让法律制度的不足及其成因，重点探讨了阻碍技术转让的根本原因，目的在于为完善制度提供明确努力的方向和目标。

第四章“完善应对气候变化的国际技术转让法律制度路径”针对国际层面问题及原因，运用“私法行为公法化”之理论，提出国际层面的应对之策，从近期和远期两个角度探讨；其中重点论述远期对策，即将技术转让之义务与国际贸易制度密切联系起来，制定 WTO 制度下的国际技术转让协定，并论述了提出该设想的原因，论证并拟出了该协定的基本框架和内容，分析了实现该设想所面对的困难等。

第五章“中国应对气候变化技术转让法律制度的现状与对策”评述我国现有相关政策、法律制度的现状、不足及其原因，分析中国从国际社会获取环境友好技术及在此基础上形成创新能力存在的问题，并从国际国内两个角度分析探讨中国在该方面的法律制度完善的路径和方法。

结束语是本书的简要总结，并就有关问题的进一步研究提出展望。

关键词：应对气候变化　私法行为公法化　环境友好技术　国际技术转让　法律制度

Abstract

Climate change has been bringing in many adverse effects and disasters, which is directly threatening human survival and development. Since the 1990s, on the basis of the concern for the environment, the international community has increasingly attached more importance to measures and strategies for tackling the problem of climate change. The international legal documents developed at a series of conferences, which include different declarations and other legal documents on protecting the environment, general multilateral environmental treaties, and specialized treaties on addressing climate change, have adjusted and regulated the acts of states and other relevant subjects, mainly private sectors. Environmentally-friendly technology is the key to the solution of containing climate change. However, since most of these technologies are in the control of developed countries, and given the imbalance regarding economic development and technology levels among different countries, technology transfer is now an essential path to share these technologies and to bring them into full play to combat climate change. In the field of technology transfer, transnational cooperations, together with the active participation of other private sectors, has recently been a major topic discussed heatedly at international conferences, and many international treaties and other documents have been involved. For example, provisions regarding environmentally-friendly technology transfer can be seen almost in all kinds of environmental international conference decisions, multilateral treaties on environmental protection, agreements under the WTO framework, the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Although these fragmented provisions have not formed a unified and systematic treaty, to a certain degree, they have played a positive role in adjusting international cooperation on technology transfer both theoretically and practically. Nevertheless, the regime of technology transfer has not produced an expected achievement and there have been few successful technology transfer cases on addressing climate change. Domestically,

developed countries are concerned about the innovation and acquisition of environmentally-friendly technology as well as its transfer and application in their own territories, and these countries are trying to improve corresponding legal systems. On the contrary, in the international community, these countries have paid more attention to their own national interests and security, and thus imposed barriers to technology transfer and sharing through the protection system of intellectual property rights. Despite that the United Nations Framework Convention on Climate Change and the Kyoto Protocol have been in force for years, the related technologies have not been transferred fully and smoothly through the world, and the technological level in developing countries is still lagging behind, which has directly influenced the effects of global efforts on tackling the problem on climate change.

There are many causes leading to the above results. In the perspective of international law, the root cause of the poor technology transfer lies in the "public legalization of private and commercial conducts" in the international trade system which is dominated by the will of Western countries, the domestic political and legal system of these countries which overprotects the private rights, and the control of most environmentally-friendly technology by the private sectors-such as international companies. Besides, the existing international treaties and international legal documents have their own defects, for instance, their provisions on technology transfer are too abstract and generic, the demands and wills of developing countries have hardly been addressed in the Convention, and mandatory sanction mechanisms are lacking in the current international legal regime of technology transfer. Furthermore the differences between the domestic and international intellectual property regimes in developed countries have constituted a big obstacle to technology transfer, as the technology export control policy and the foreign trade system of developed countries have distorted the regular technology transfer, and the existing specific mechanisms on technology transfer have seldom played their due roles. Owing to these defects, the private sectors hardly act in accordance with the promises that their home country governments have made, and as a matter of course, the relevant international obligations are seldom performed in reality. The Bali Road Map failed to be carried out, the Copenhagen Conference did not achieve its goal and the Cancun Agreement and the

Durban Package Outcome did nothing effective to the technology transfer legal system. All of this inactivity has led the technology transfer system to a greater crisis, and goes against the justified global response to climate change.

In the Post-Kyoto era, in view of the "public legalization of private and commercial conducts" in international trade, on the basis of the common interests and needs of mankind and state public functions, it is necessary to connect technology transfer with international trade regime and make efforts in the direction of "concluding an international technology transfer agreement under the WTO framework," so as to enhance the consistence between the promises of developed country governments and the acts of technology transfer and cooperation activities conducted by their domestic private sectors with the impact of the WTO dispute settlement mechanism. With reference to the existing reasonable provisions, the fundamental content of the technology transfer agreement may be designed as follows: preface, general provisions and the basic principle, obligations of the parties involved (including restrictive clauses and compulsory license), the implementation of national laws, preferential treatment to developing countries, international cooperation, dispute settlement and so on.

Though China has achieved considerable success in the introduction of technology, the innovation and transfer of core environmentally-friendly technology is still lacking, compared with its national comprehensive strength and actual demands. China's specific political and legal system would help to form its advantages in tackling climate change globally. In the face of challenge, China cannot always respond to the challenges or criticism on the issue of addressing climate change launched by developed countries with such reasons as "historic justice" (greenhouse gas accumulation in history by developed countries), "reality justice" (per capita emissions of GHGs in current time) and "common and differential responsibilities" in the long run. Instead, it ought to defuse the pressure with environmentally-friendly technologies. Therefore, it is necessary to consummate the technology transfer legal system, either by laying down a unified technology transfer law or by coordinating the present related provisions to encourage the private sectors (especially the international companies) to transfer technology; meanwhile, taking the crucial weak points of western countries in dealing with climate