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CHINESE FOREIGN TRADE LAW CASE STUDIES



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前 言

中华人民共和国已经于 2001 年 12 月 11 日加入了世界贸易组织。自那以来,中国的对外贸易已经受到了这些国际规则的深刻影响,并在未来将继续受到更多的影响。中国的对外贸易法也是如此,它即将进行修改以符合 WTO 的要求。对外贸易法作为旨在管理货物、服务和技术进出口的特别行政法,了解其结构对于理解对外贸易的法律前提是很重要的。此外,理解有组织的国际贸易的历史、目标和达成后者的方式也很重要。本书重点介绍对外贸易法和 WTO;另外,在其附录中还介绍了欧洲联盟是如何达成共同贸易政策以在国际贸易谈判中加重其意见的分量的。

对于从事法律工作的人而言,仅仅有理论知识是不够的。他们每个人都需要知道如何适用法律,也就是如何将他所遇到的案件的事实与法律规范放在一起,这里的法律规范既有可能是一个法律条文,也有可能是一个先例。这一过程也可以被称为法律规范处理或者说如何对待法律规定。本书希望能够从理论和实践两个角度介绍国际贸易法。为了实现这个目标,这本书包括三部分内容:法律适用技术的介绍,中国对外贸易法和国际规则的理论介绍,以及若干则案例分析。每个案例分析都可以单独作为规范处理如何运作的范例,从而展示了法律在实践中的适用过程。

这本书是作为学习用书编写的。本书旨在为至少已经具备了一定法律基础的读者介绍规范对外贸易的特殊法律机制。此外,法律教师还可以拿这本书作为辅助教学工具,其中每个案例分析都可以作为一个教学单元,也可以从中选择案例作为作业要求学生提供解决方案,然后在课堂上讨论。利用这本书的方式有很多种,我希望读者觉得它还有用,也比较有意思。

这本书是以德国技术合作公司(GTZ)法律合作项目北京办公室与中华人民共和国商务部条约法律司在“商务部经济法培训与咨询”合作项目下共同举办的系列课程所使用培训材料为基础编写的。德国技术合作公司代表的是德国联邦经济合作与发展部。它与商务部这一合作项目始于 1997 年,每年安排大约 20 个星期的培训课程,其中在北京大学法学院开设的课程用本

书中这些案例进行了试验教学。此外，中国一些法律草案和法规的草拟与制定也得到了德国技术合作公司提供的咨询服务，比如外贸法，证据法和进出口条例等。

在拟定与执行发展中国家和转型国家法律项目方面，德国技术合作公司已有 20 多年的经验。德国技术合作公司早在 1985 年就开始在中华人民共和国执行法律咨询项目，并从此对中国法律改革提供了持续不断的支持。合作项目的重点是包括劳动法和社会保障法在内的经济法律。从 1999 年开始，德国技术合作公司也开始就行政法提供咨询服务。现在，德国技术合作公司法律合作项目北京办公室与合作伙伴共同执行以下几个项目：

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在这里我想向我的合作伙伴、商务部条法司张玉卿司长表示感谢。此外，我还要感谢以前所有参与并为这本书的最终出版奉献心力的人。其中，商务部的李玲女士、周晓燕女士、赵宏女士，韩亮先生、路焘先生以及王洋女士对历次培训班提供了这些活动的成功所必不可少的支持。最后提及但决非最不重要的一点是，没有我们法律合作项目办公室全体同仁的努力本书是不可能出版的，在此尤其要感谢胡兰、Alexander von Reden 博士、Regine Reim、吴楠、刘巍以及王静等人。

德国技术合作公司法律合作项目北京办公室负责人

葛毅 (Immanuel Gebhardt)

Preface

The People's Republic of China (PRC) has acceded to the World Trade Organization (WTO) on December 11, 2001. Since then, the Chinese foreign trade has been heavily influenced and will become even more influenced by these international rules. So is the Chinese Foreign Trade Law (FTL), which is about to be revised to meet the requirements of the WTO. In order to understand the legal preconditions of foreign trade, it is essential to have an idea of the structure of the FTL as special administrative law aiming at the control of import and export of goods, services and technologies. Furthermore, an understanding of organized international trade's history, aims and means to reach the latter is important. This book focuses on giving an introduction into both FTL and WTO; however, in its annex it also shows how the European Union (EU) pursues a common trade policy giving her opinion in international trade negotiating much more weight.

Theoretical knowledge of the law is not enough for lawyers. Every practicing lawyer needs to know how to apply the law; i.e. how to put the facts of his or her case together with the rule, which may be a legal provision or a precedent. Such procedures could be also referred to as rule handling or how to deal with legal provisions. The present book intends to introduce international trade law both in theory and in practice. In order to accomplish this objective, the book consists of three components: introduction to techniques for implementation of the law, theoretical

introduction to Chinese Foreign Trade Law and international rules, and some case studies. Every case study serves as an example of how rule handling works, and thus demonstrates implementation of the law in action.

The present book has been written as a study book. It has been designed to give readers who have at least basic knowledge of law an introduction into the special legal mechanisms governing the foreign trade. Moreover, law instructors may use the book as a teaching device. Each case study can serve as one teaching unit. Students can be asked to prepare the solution for a case study as homework, and the solution can be discussed subsequently in class. There are various ways of making use of this book. I hope our readers will find it beneficial and enjoyable.

This book is based on training materials developed for a series of courses, jointly organized by the Legal Cooperation Office Beijing of Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH and the Treaty and Law Department of the Ministry of Commerce (MOFCOM) of the PRC in their Joint Project "Training and Advisory Service on Commercial Laws at MOFCOM." GTZ acts on behalf of the German Federal Ministry of Economic Cooperation and Development. This Project commenced in 1997 and arranges approximately twenty weeks of training annually. This includes training courses at the Law School of Peking University where the present case studies have been tested. Moreover, several draft laws and regulations have received advice from GTZ; for example on Foreign Trade Law, Law on Evidence, and Export and Import Regulations.

GTZ possesses more than twenty years of experience in drafting and implementing legal projects in developing countries and countries in transition. In the PRC, GTZ has been implementing legal advisory projects as early as 1985, and it has been supporting legal reform in the PRC

continuously since then. A strong emphasis has been placed on economic laws including labour and social security law, and since 1999 GTZ also provided advice on administrative law. Currently, GTZ's Legal Cooperation Office in Beijing in cooperation with its Chinese partners, implements the following projects:

- Training and Advisory Service on Commercial Laws at MOFCOM
- Advisory Service to the Financial and Economic Committee of the National People's Congress (NPC)
- Advisory Service to the Ministry of Labour and Social Security
- Advisory Service to the Legal Affairs Commission of the Standing Committee of the NPC

For further information regarding our cooperation, please contact GTZ's Legal Cooperation Office in Beijing at Ta Yuan Diplomatic Office Building 1-13-2, No. 14 Liangmahe Nanlu, Beijing 100600, Tel (86) 10-85321401, Fax (86) 10-85321405, E-mail gtznpc@netchina.com.cn or visit our website at www.gtz-legal-reform.org.cn.

I want to thank my partner Zhang Yuqing, Director General of the Treaty and Law Department of MOFCOM. Furthermore, I thank all contributors for their precious participation. MOFCOM's support for our training courses by Li Ling, Zhou Xiaoyan, Zhao Hong, Han Liang, Lu Tao and Wang Yang were essential for their success. Last but not least, this publication would not have been possible without the effort of all members of our Legal Cooperation Office, especially Hu Lan, Dr. Alexander von Reden, Regine Reim, Wu Nan, Liu Wei and Wang Jing.

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