

全国高等院校法律英语专业统编教材
法律英语证书 (LEC) 全国统一考试指定用书

法律英语 精读教程

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Legal English
Intensive Reading Course

张法连 主编



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北京大学出版社
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前 言

法律英语是法律科学与英语语言学有机结合形成的一门实践性很强的交叉学科,是 ESP(English for Specific Purposes)最重要的分支之一。法律英语是以普通英语为基础,在立法和司法等活动中形成和使用的具有法律专业特点的语言,是指表述法律科学概念以及诉讼或非诉讼法律实务时所使用的英语。当今世界的发展日新月异,经济全球化进程突飞猛进,国际交流合作日益加强,涉外法务活动空前频繁。十八届四中全会提出要加强涉外法律工作,运用法律手段维护国家的发展利益。经济全球化过程中我们所面临的很多问题其实都是法律问题,而这些法律问题中的绝大多数又都属于涉外法律的工作范畴,所有这些工作都需要法律工作者通过专业外语完成。国家急需明晰国际法律规则、通晓英语语言的“精英明法”复合型人才,法律英语的重要性日益彰显,掌握专业外语已经成为法律人必备的职业素质。法律英语证书(LEC)全国统一考试的成功推出和中央政法委、教育部“卓越法律人才计划”的顺利启动无疑把法律英语的学习和研究推向了高潮。

法律英语是高校英语、法学等专业教学改革的新方向。随着高校英语专业教学改革不断深化,国内许多高校在外语院系开设了法律英语课程,有的院系设置了法律英语方向,有些高校大胆创新,开始尝试设置法律英语专业,收到了良好的社会效果。2013年高等教育出版社出版发行《法律英语专业教学大纲》,标志着法律英语专业的诞生,给高校外语院系设置法律英语专业指明了方向。本套教材正是以该大纲为重要依据编写而成。

美国法是英美法系的典型代表,其法律体系完整、内容丰富,既有传统的普通法,又有新兴的成文法;既有统一的联邦法,又有各州的法律。同时,美国法在世界范围内影响深远,学习研究美国法意义重大,这不仅表现为许多国家都在研究美国的法律规则,借鉴其成熟做法,还表现为许多国际公约也参照美国法的理念、原则、规则制定。因此,本书作为法律英语专业的精读教材,主要介绍美国法,希望学生通过学习权威、实用的美国法律知识,掌握地道、纯正的法律英语。一般的语言教材都会系统地讲授语法知识,但本书认为法律英语的学习者应当已经完成了基础阶段的普通英语学习,系统掌握了英语语法等基础知识并具有了一定的词汇量。

本套教材共包括《法律英语精读教程》(上、下)、《法律英语泛读教程》(上、下)、《法律英语写作教程》《法律英语翻译教程》《英美法律文化教程》和《法律英语视听说》,以及配套学习使用的《英美法律术语双解》。

编写本书的过程中,编者参考了大量的美国原版法学书籍,包括美国法学院教材及大量判例,力求实现教材内容的权威性和丰富性。本书引用了许多极具代表性的英文案例。英美法系是判例法系,无论是法官还是律师都特别注重对判例的研究,因此学习美国法不能绕过案例,通过研究案例更有利于掌握标准的法律英语,也更容易掌握美国法的精髓。本书选取了几十个经典案例,以期最大程度地展现美国法原貌。

本书力求内容丰富,可读性强,几乎涉及了法律英语的听、说、读、写、译的各个方面。本书在每部分或各章后面都附有相关的练习题,以期帮助学生检查自己对基础美国法知识和英美法律文化知识以及法律英语读写基本能力的掌握程度。教材在编写上遵循由总述到具体、由浅入深的原则,基本上达到《法律英语专业教学大纲》提出的目标要求。

精读教程上下册共有三部分。第一部分是英美法律文化知识简介。语言是文化的载体,法律文化知识是法律英语学习过程中不可或缺的内容;第二部分是必修内容,分别对美国六个主干部门法(美国宪法、合同法、侵权法、财产法、证据法、刑法\刑事诉讼法)和 WTO 法基本内容进行概括介绍并选取典型案例诠释有关知识点。第三部分是自选学习内容,这是为了贯彻《法律英语专业教学大纲》“6+1”学习内容的指导思想而编写的,包括美国的民事诉讼法、知识产权法、美国商法和中国法律制度的基本介绍,学生可根据自己的实际需要自由选择使用。这三部分内容自成体系,又浑然一体。学习本教材不一定要严格按前后编写顺序进行,教师完全可以根据学生的具体情况挑选合适的内容安排教学。本教材可供学生一学年使用,也可供学生三个学期使用。

成书过程中,我们参考了大量国内外有关资料,在此谨对原作者表示谢忱。参加本书编写工作的还有甘肃政法学院唐丽玲教授、山东管理学院侯雪丽教授、聊城大学胡朝丽副教授、河南工业大学杜巧阁副教授、广西民族大学鲁学武副教授和华东政法大学董翔博士等。感谢法律英语证书(LEC)全国统一考试指导委员会将本套教材指定为复习应考 LEC 的参考用书。

各位教师或同学在使用本书的过程中有什么问题,欢迎及时与编者联系: zhangbook16@yahoo.com。

编者

2016年3月于中国政法大学

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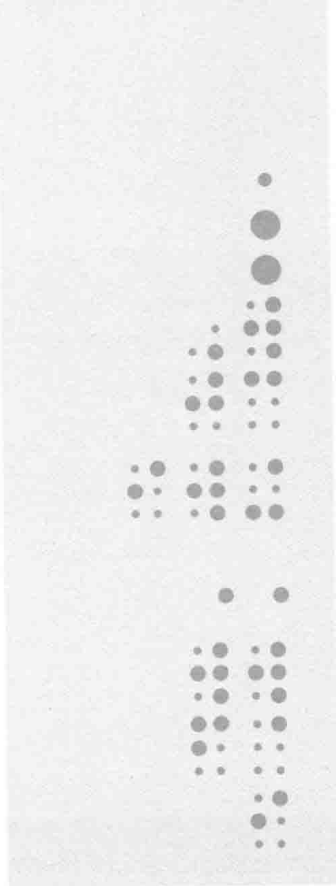
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导读

世界贸易组织 (World Trade Organization, WTO) 创立于 1995 年, 是经济全球化发展最重要的国际组织, 旨在追求开放的边界 (open borders), 确立最惠国原则 (most-favoured-nation principle) 以及各成员国之间的非歧视性待遇 (non-discriminatory treatment), 并保障其各项经济活动的透明性。与此同时, 世界贸易组织承认各成员国的特点和它们之间的差异, 强调将实施开放市场的国际政策与根据经济增长发展需要制订的国内政策相结合, 关注提高人们福利、减少贫困并营造和平稳定的社会环境。世界贸易组织认为在向国际贸易开放国内市场的同时, 针对各国国情的不同, 设计正当的例外和适当的灵活性的政策, 将对可持续发展 (sustainable development) 产生积极贡献。

世界贸易组织目前有 164 名成员, 其中 117 个是发展中国家或独立关税区。2001 年, 经过 15 年之久的谈判, 中国成为世界贸易组织的正式成员国。

世界贸易组织及其前身组织“关税及贸易总协定”(General Agreement on Tariffs and Trade, GATT) 建立了一个强大的国际贸易体系, 是当前处理国家间贸易规则的唯一全球性国际组织, 其核心即“世界贸易组织协定”(WTO agreements)。“世界贸易组织协定”就各成员国政府对商品和服务的国际贸易的法律权利进行规制, 要求他们对知识产权进行保护并设定最低保护标准。“世界贸易组织协定”由加入国际贸易的国家谈判和

签署,并通过该国议会批准生效,从而以法律为原则帮助货物生产者、服务提供者、出口商和进口商开展国际贸易业务。自成立以来,世界贸易组织已经形成了一套强力、有效的国际贸易争端解决机制。

该部分课文通过对世界贸易组织机构、职能、法律理论、原则和发展的了解,精选世界贸易组织协定原文的阅读,由浅入深地熟悉世界贸易组织法的基本要素,掌握相关法律概念和用语。

世界贸易组织

Chapter 1

Understanding the WTO^①

The World Trade Organization (WTO) began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. It did not take long for the General Agreement to give birth to an unofficial, de facto international organization, also known informally as GATT. Over the years GATT evolved through several rounds of negotiations. The last and largest GATT round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation. Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and intellectual property.

Over the past 60 years, the WTO and its predecessor organization the GATT have helped to create a strong and prosperous international trading system, thereby contributing to unprecedented global economic growth. The WTO currently has 164 members, of which 117 are developing countries or separate customs territories. WTO activities are supported by a Secretariat of some 700 staff, led by the WTO Director-General. The Secretariat is located in Geneva, Switzerland, and has an annual budget of approximately CHF 200 million (\$180 million, €130 million). The three official languages of the WTO are English, French and Spanish.

WTO is an organization for liberalizing trade. It is a forum for governments to negotiate trade agreements, a place for them to settle trade

① See <https://www.wto.org>, accessed on 20 December 2016.

disputes, and it operates a system of trade rules. Indeed, the WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development. The WTO also provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application. The current body of trade agreements comprising the WTO consists of 16 different multilateral agreements, to which all WTO members are parties, and two different plurilateral agreements, to which only some WTO members are parties. WTO membership means a balance of rights and obligations.

Decisions in the WTO are generally taken by consensus of the entire membership. The highest institutional body is the Ministerial Conference, which meets roughly every two years. A General Council conducts the organization's business in the intervals between Ministerial Conferences. Both of these bodies comprise all members. Specialised subsidiary bodies (Councils, Committees, Sub-committees), also comprising all members, administer and monitor the implementation by members of the various WTO agreements.

As a place where member governments go, to try to sort out the trade problems they face with each other, the first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the GATT. The WTO is currently the host to new negotiations, under the “Doha Development Agenda” launched in 2001. Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. But the WTO is not just about liberalizing trade, and in some circumstances its rules support maintaining trade barriers—for example to protect consumers or prevent the spread of disease. More specifically, the WTO's main activities include:

- negotiating the reduction or elimination of obstacles to trade (import tariffs, other barriers to trade) and agreeing on rules governing the conduct of international trade (e.g. antidumping, subsidies, product standards, etc.)
- administering and monitoring the application of the WTO's agreed rules for trade in goods, trade in services, and trade-related intellectual property rights

- monitoring and reviewing the trade policies of our members, as well as ensuring transparency of regional and bilateral trade agreements
- settling disputes among our members regarding the interpretation and application of the agreements
- building capacity of developing country government officials in international trade matters
- assisting the process of accession of some 30 countries who are not yet members of the organization
- conducting economic research and collecting and disseminating trade data in support of the WTO's other main activities
- explaining to and educating the public about the WTO, its mission and its activities.

At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.

The system's overriding purpose is to help trade flow as freely as possible—so long as there are no undesirable side-effects—because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be “transparent” and predictable. The WTO also helps to settle disputes. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation, which certainly is the purpose behind the dispute settlement process written into the WTO agreements.

I . Principle of the Trade System

The WTO is the primary organization in the field of economic globalization and is the only global international organization dealing with the rules of trade between nations, whilst the WTO agreements govern the rights of governments to regulate international trade in goods and services and requires them to protect intellectual property. The WTO also has an active dispute settlement system which, since 1995, has produced a substantial jurisprudence.

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities.^① They deal with; agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. But a number of simple, fundamental principles run throughout all of these documents. These principles are the foundation of the multilateral trading system, which affirm the trading system should be

- without discrimination—a country should not discriminate between its trading partners (giving them equally “most-favoured-nation” or MFN status) and neither should it discriminate between its own and foreign products, services or nationals (giving them “national treatment”);
- freer—barriers coming down through negotiation;
- predictable—foreign companies, investors and governments should be confident that trade barriers (including tariffs and non-tariff barriers) should not be raised arbitrarily; tariff rates and market-opening commitments are “bound” in the WTO;
- more competitive—discouraging “unfair” practices such as export subsidies and dumping products at below cost to gain market share;
- more beneficial for less developed countries—giving them more time to adjust, greater flexibility, and special privileges.

i. e. The WTO’s founding and guiding principles remain the pursuit of open borders, the guarantee of MFN principle and non-discriminatory treatment

^① See Mitsuo Matsushita, “A View on Future Roles of the WTO: Should There Be More Soft Law in the WTO”, *Journal of International Economic Law*, Vol. 17, Issue 3 (2014), pp. 701–[i].

by and among members, and a commitment to transparency in the conduct of its activities. The opening of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development, raise people's welfare, reduce poverty, and foster peace and stability. At the same time, such market opening must be accompanied by sound domestic and international policies that contribute to economic growth and development according to each member's needs and aspirations. A closer look at these principles:

1. Trade Without Discrimination

This principle consists of two parts, MFN and national treatment, i. e. treating other people equally, and treating foreigners and locals equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. This principle is known as MFN treatment, which sounds like a contradiction. It suggests special treatment, but in the WTO, it actually means non-discrimination—treating virtually everyone equally. Each member treats all the other members equally as “most-favoured” trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same “best” treatment to all the other WTO members so that they all remain “most-favoured”. MFN status did not always mean equal treatment. The first bilateral MFN treaties set up exclusive clubs among a country's “most-favoured” trading partners. Under GATT and now the WTO, the MFN club is no longer exclusive. The MFN principle ensures that each country treats all its fellow members equally.

MFN is so important that it is the first article of the GATT, which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group—discriminating

against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners—whether rich or poor, weak or strong.

Imported and locally produced goods should be treated equally—at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of “national treatment” (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these. National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

2. Freer Trade through Negotiation

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT’s creation in 1947—48 there have been nine rounds of trade negotiations. At first these focused on lowering tariffs (customs duties) on imported goods. As a result of the negotiations, by the mid-1990s industrial countries’ tariff rates on industrial goods had fallen steadily to less than 4%. But by the 1980s, the negotiations had expanded to cover non-tariff barriers on goods, and to the new areas such as services and intellectual property.

Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through