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WTO法的规则与法理

(双语版)

冯汉桥◎编著

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前 言

世界贸易组织(WTO)的官方语言是英语、法语和西班牙语,其中英语使用最为普遍,最及时、准确的 WTO 信息主要是英文信息。这意味着,只有理解英语环境下的 WTO 法,才能更好地掌握和运用它。但是,由于 WTO 法本身的复杂性和法律英语的专业性,如果采用全英语的方式进行学习,对于我国绝大多数大学生、研究生、实务工作者而言,会觉得十分困难,很容易丧失学习兴趣和信心。如何更好地理解 and 掌握 WTO 英语,双语环境应该是一个不错的选择。

本书作者从 2001 年以来一直在高校承担 WTO 法的双语教学任务,也接触和使用过一些相关教材和著作,深感现有教学和研究资料的不足。由此,作者从 2004 年开始收集资料,准备编写一部能够适应教学和实务工作需要的双语著作。但是,在实际写作中,我深感此项任务的难度,多次想放弃,但一种责任感又让我重新开始此项工作。最后,经过反复修改,终于完成了此稿。

为了使内容更具有地道 WTO 英语的特点,除了作者根据需要进行一些写作外,本书参考了世界贸易组织(WTO)和联合国(UN)的一些非限制性官方文件,在 WTO 和 UN 所允许的范围内加以运用,其意在传播 WTO 法的知识。在此,对相关机构表示感谢。

本书共分八章,总体按 WTO 法的基本结构进行组织。正文主体为英文,每一章均以脚注的形式配有对有一定难度或重点的段落、术语的中文翻译(以下画线标示),以帮助读者化解相关难点问题。在正文中,每个一级标题下均配有对此部分内容具有引导性或概括性的中文说明,并配有能够反映本部分内容关键知识点的“关键概念”(key concepts),以便读者对此部分的基本知识和核心概念有一个迅速的了解,减轻阅读的困难。在一些章节

后,还配有涉及中国案例的专题讨论。最后一章较为全面地介绍了“中国—汽车零部件案”,以期能使读者加深认识,并能理论联系实际。

本书适于作为国际贸易、法学等相关专业的本科、研究生阶段世界贸易组织法相关双语课程的教材或参考书,也可用于国际贸易实务人士了解 WTO 法的基本规则与法理。

本书的出版,得到了湖南工业大学教务处和湖南工业大学法学院的大力支持,也得到了 2012 级至 2014 级法学院国际法方向研究生李维、张伶俐、韩超平同学,以及于光荣教授的一些启示和帮助,在此一并表示感谢。

由于本书作者水平所限,错误和不当之处必然有之,热诚欢迎各位读者、专家、学者批评指正。

2014 年 12 月

PREFACE

With China's accession to the WTO on December 11, 2001, WTO law is becoming more and more important for China, especially for businesspersons, legal counsels or civil servants. For undergraduates in China, in particular for those major in economics or in law, it is definitely necessary to understand the WTO legal system at least in general sense. For some international trade-oriented majors, an in-depth study may be needed. So, what's the best way to learn the WTO law?

Till now, almost all the textbooks for undergraduates or postgraduates published in China concerning the introduction of the WTO law were written in Chinese, and the teachers so were teaching WTO law in Chinese. Under this condition it is difficult for the Chinese college students to grasp the true meaning of this legal system and to improve their abilities of analyzing and solving practical problems arising from the explanation of the provisions of the WTO document.

To learn WTO law under English environment is difficult, but necessary. The reasons for that include: all the official documents are published or issued in English, Spanish or French, mostly probably the original version is English; the working language at most time is English; sometimes the ambiguity of Chinese version of legal document can be avoided by comparing it with English version, and *vice versa*.

To teach the WTO law in bilingual environment may be the best way to make Chinese college students understand the system better and quicker. In this way, the students could know the original and commonly used nomenclature and concepts in WTO law both in English and in Chinese. This may help them to understand these terms and concepts better and reduce the difficulty in the learning, because the WTO legal system is far different from Chinese legal system in that it has developed under foreign language (mainly English) environment. In the mean time, they can improve their English skills which are very important in their future careers. But, among other things, good bilingual textbook is a prerequisite condition for the success of a bilingual course. As one of criteria for good book, it should meet the demands and conditions of the Chinese college students. But unfortunately we have not found this kind of textbook in the list of public publications in china till now.

The author believes we should do something for the learning of WTO law in China. The cut-in point we have chosen is to provide a bilingual textbook which, because of its selection and reorganization by Chinese authors, should be fit for Chinese students to understand easily while without prejudice of its accuracy of original language.

This bilingual book includes 8 chapters. The first chapter outlines the main features of the WTO; chapter 2, chapter 3 introduces the relatively full-developed legal system concerning trade in goods; chapter 4, chapter 5 deal with rules concerning trade in service and trips respectively; the chapter 6 and chapter 7 are the introduction to the procedural regulations of dispute settlement and trade policy review, in which the DSU are stressed in order to be compatible with our objectives which mainly are to raise the ability to know the procedural rules of dispute settlement well in practice and to overcome the special difficulties; chapter 8 provides a relatively detailed introduction of the Panel report entitled "China-Measures affecting imports of automobile parts", which issued by DSB on 18 July 2008, and a brief introduction of the case. This case is the first one that has almost gone through the whole procedures of WTO dispute settlement procedures.

Compared with full English version ones, the main advantage of this bilingual book is that, not only it is written in pure English, but also it has a number of notes and translations to explain the special difficult issues or jargons. Those sentences we think difficult to understand will be underlined and given a Chinese translation for reference. This would have great help in understanding the relevant WTO concepts or theories, which seemed very difficult for the beginning learner. In order to make it easier for readers to understand the text, an introductory preamble in Chinese is embedded ahead of the main text in every chapter.

This book is expected to be used in the bilingual courses, which are necessary for schools of higher learning here in China. Because English can be regarded as common language in international communication, it's almost impossible for international practitioners to deal with real problems arising from international trade without knowing general English terms in trade law. This book is also suitable for readers like would-be international traders, administrative officers, etc. who need to know WTO in their work.

Some materials in this book are selected from or reference to WTO or UN unrestrictive public documents. Here I sincerely appreciate the help they have provided.

Trying to do something for the improvement of WTO education in China, the Author regards this book just as an experiment or precursor. The difficulty of compiling the textbook is enormous, I just do my best to avoid mistakes, but we cannot make sure it is perfect; therefore, the authors sincerely welcome and appreciate any opinions or comments on this book.

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CHAPTER 1 GENERAL INTRODUCTION TO THE WTO AND WTO LAW

第一章 WTO 与 WTO 法概述

1. The History of GATT 1947 and Its Rounds of Trade Negotiation

1. GATT 1947 的发展历史及其贸易谈判回合

WTO 的前身是于 1948 年 1 月 1 日依《临时适用议定书》生效的《关贸总协定》(GATT 1947),其创始成员有 23 个。由于 1948 年联合国贸易与就业大会所通过的《哈瓦拉宪章》未能生效,GATT 1947 一直作为唯一的管理全球贸易的协定,适用到 1995 年 1 月 1 日 WTO 协定生效之日。GATT 通过多轮多边贸易谈判,不断推进国际贸易的发展和贸易规则的完善,其中乌拉圭回合谈判涉及面最广,谈判时间也最长,取得的成果也最为丰富,包括正式成立世界贸易组织(WTO)。GATT 协定经过修正与补充,仍为 WTO 体制下的一个基本协定,称为 GATT 1994。

Key Concepts 关键概念	
The Bretton Woods Conference	布雷顿森林会议
ITO Charter	国际贸易组织宪章
GATT 1947/GATT 1994	关贸总协定 1947/关贸总协定 1994
Trade Negotiation Round	贸易谈判回合
consensus	协商一致

1.1 The Conclusion and Development of GATT

1.1 GATT 的缔结与发展

During World War II, Participants in The Bretton Woods Conference^①in 1944

① 布雷顿森林会议,指在 1944 年 7 月美国新罕布什尔州(Bretton Woods, New Hampshire)召开的联合国国际货币与金融会议。在这次会议上,通过了设立国际货币与开发银行(世界银行,IBRD)与国际货币基金(IMF)的协议,这些协议于 1946 年生效,由此建立布雷顿森林国际货币金融体制。

recognized a post-War need to reduce trade barriers in order to foster freer trade. The goals for such institutions were as much political as economic-the prevention of war and the establishment of a just system of economic relations. The International Bank for Reconstruction and Development (IBRD, or World Banks) and the International Monetary Fund (IMF) were the resulting institutions of the meeting. However, it was recognized at that time that an international organization to regulate trade was a necessary complement to the IMF and the IBRD. After the second world war, over 50 countries, including the original 23 GATT countries, were working on a draft charter for an international trade organization (ITO Charter) which would have been a specialized agency of the United Nations^①. The charter was intended to provide not only world trade disciplines but also rules relating to employment, commodity agreements, restrictive business practices, international investment and services.^② Although the ITO Charter was finally adopted at a UN conference on Trade and Employment in Havana in March 1948, ratification in national legislatures proved impossible in some cases. In 1950, with the United States government announced that it would not seek Congressional ratification of the Havana Charter, which means ITO was dead before being effective.

Alongside the ITO Charter negotiation, tariff negotiations were opened among the 23 founding “contracting parties”^③ in 1946. This first round of negotiations^④ resulted in 45,000 tariff concessions^⑤ affecting \$10 billion, about one-fifth of world trade. The value of these concessions was protected by early acceptance of some of the trade rules in the draft ITO Charter^⑥. Together-tariff concessions and rules taken from ITO Charter-they became known as the General Agreement on Tariffs and Trade (GATT) and entered into force in January 1948 by a “Protocol of Provisional Application” after eight named governments, among which the US government had used the president’s power to

① 联合国专门机构。

② 该《宪章》不仅要为世界贸易提供一套纪律,还意在为就业、商品协议、限制性商业行为、国际投资与服务提出一些规则。

③ 创始缔约方。

④ 第一回合谈判,这是 GATT/WTO 为不断推进多边贸易体制所创立的一种谈判方式,即多边的、全面的与分阶段的谈判方式。

⑤ 关税减让,即各国所做出的削减关税的承诺。

⑥ 《国际贸易组织宪章》,即 1948 年在古巴哈瓦那联合国贸易与就业大会上通过的,后来未能生效的关于建立国际贸易组织的宪章,也叫《哈瓦那宪章》。

make executive agreement, signed the Protocol before November 15, 1947.^① With a number of amendments to it occurred, the GATT has become the only multilateral instrument governing international trade ever since, till the establishment of WTO in 1995.

1.2 The Provisions and Institutions of GATT 1947

1.2 GATT 1947 的内容与机构设置

In fact, GATT 1947 has three parts. First and foremost is the General Agreement itself and its 38 articles. Secondly, some associated agreements covering anti-dumping^② and subsidy rules and other non-tariff or sectoral issue^③ added at later stages, particularly at the end of the Tokyo Round (1973 – 1979). Although membership of these agreements is much more limited than for the General Agreement^④ (GATT) - ranging from less than twenty to about forty - the members nevertheless account for the vast majority of world trade in the relevant areas. Finally, the GATT system is completed by the Multi-Fibre Arrangement (MFA)^⑤ which is a negotiated exception to the normal disciplines of the General Agreement affecting the textiles and clothing sector.

Most countries have a diplomatic mission in Geneva, sometimes headed by a special ambassador to GATT, whose officials attend meetings of the many negotiating and administrative bodies at GATT headquarters. Sometimes expert representatives are sent directly from capitals to put forward their governments' views on specific questions. The most senior body of GATT is the Session of Contracting Parties^⑥, usually held annually. Ministerial-level meetings are rare in GATT years, they have been limited to major developments in the Uruguay Round.

Between Sessions, the Council of Representatives^⑦ is authorized to act on both routine and urgent matters. The Council meets about nine times a year. Its agenda usually contains a variety of items like bilateral trade disputes, new accessions, waivers,

① 议定书中提到的对其生效有决定作用的八个国家是: Australia, Belgium, Canada, France, Luxembourg, Netherland, the United Kindom, and the United States.

② 反倾销。

③ 非关税问题与贸易部门问题。

④ 《总协议》,即《关税与贸易总协议》。

⑤ 《多种纤维协定》,是在原 GATT 下议定的,规定在纺织品与服装领域可以背离其一些基本原则。

⑥ 缔约方全体大会。

⑦ 代表理事会。

and reports of working parties. Major GATT standing committees^① exist to administer each of the Tokyo Round agreements; to pursue matters of special interest to developing countries; to look at the situation of countries using trade restrictions to protect their balance-of-payments (BOP)^②; to administer the Multi-Fibre Arrangement; to handle tariff questions and to look after the GATT budget.

If some special issues appear (such as requests for GATT accession; to verify that agreements concluded by members are in conformity with GATT obligations; or to study issues on which contracting parties may wish later to take a joint decision), working parties may be set up when necessary. In addition, panels can be established by the council and other bodies to provide judgments on trade disputes.

Reaching decisions by consensus^③, not by vote, is an obvious feature of GATT decision-making mechanism. On the rare occasions that voting takes place, each contracting party has one vote and a simple majority is required. In the case of waivers^④-authorization, in particular cases, to depart from specific obligations in the General Agreement-a two-thirds majority^⑤ is required, comprising more than half the contracting parties.

1.3 Multilateral Trade Negotiation(rounds) Under the Auspices of GATT

1.3 GATT 管理下的多边贸易谈判(回合)

The biggest leaps forward in international trade liberalization have come through a series of multilateral trade negotiations, or trade rounds, sponsored by GATT. They have held eight such Rounds in all. The eighth round, the Uruguay Round, was launched in Punta del Este, Uruguay, in September 1986. ⑥

They are often lengthy-the Uruguay Round took seven and a half years-but trade rounds can have an advantage. They offer a package approach to trade negotiations that can sometimes be more fruitful than negotiations on a single issue. The package

① 常设委员会。

② 支付平衡,反映一国总体进出口额是否平衡及一国的对外支付能力情况。

③ 协商一致,即不采取投票方式而是以协商一致同意方式决策。

④ 豁免,即在一定条件下经授权可以不履行 GATT 下的义务。

⑤ 三分之二多数。

⑥ 国际贸易自由化取得最大突破的方式,是通过在 GATT 主持下的一系列多边贸易谈判,称“回合”,GATT 一共举办了八个谈判回合。第八回合,也称“乌拉圭回合”,于 1986 年 9 月在乌拉圭的埃斯特角发动。

approach^①to negotiations has a number of advantages. First, participants can seek and secure advantages across a wide range of issues. Secondly, concessions which would otherwise be difficult to defend in domestic political terms, can be made more easily in the context of a round than if bilateral relationships between the major trading nations are allowed to dominate. Finally, overall reform in certain politically-sensitive sectors of world trade is more feasible in the context of a global package.

While reduction of tariffs were the main concerns in the early trade rounds, the later rounds began the process of revising, reinterpreting or extending the original articles of the General Agreement, together with tariff cut. For example, the Kennedy Round reached agreement on a new GATT Anti-dumping Agreement. The Tokyo Round went much further-a further revision of the GATT anti-dumping code was also secured.

GATT/WTO Trade Rounds

Date/place(name)	contents	Countries
1947/ Geneva	Tariffs	23
1949/ Annecy	Tariffs	13
1951/ Torqua	Tariffs	38
1956/ Geneva	Tariffs	26
1960 – 1961/ Geneva (Dillon Round)	Tariffs	26
1964 – 1967/ Geneva (Kennedy Round)	Tariffs & antidumping	62
1973 – 1979/ Geneva (Tokyo Round)	Tariffs, non-tariffs and “framework” agreements	102
1986 – 1994/ Geneva (Uruguay Round)	Tariffs, non-tariffs, service, IP, dispute settlement, creation of WTO, etc.	123
2001 – (Doha Agenda)	Agriculture, Non-agricultural Market Access, Development, Services, Rules (anti-dumping, subsidy, regional trade agreements), Trade & Environment, TRIPS, Dispute Settlement, Trade Facilitation, Electronic commerce, etc.	142 (increasing with the accessions of new members)

① 一揽子解决方案。