



英美法案例精选丛书  
英文版

International Law  
(2nd Edition)

# 国际法

(第2版)

边永民 编著



对外经济贸易大学出版社  
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## 国际法 (第 2 版)

### International Law (2nd Edition)

边永民 编著

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## 第二版总序

近年来,随着全球经济一体化进程的加快和我国对外贸易总量的大幅攀升,我国与外国主体间的贸易摩擦和经济纠纷呈现不断上升的态势,与此同时,随着我国大国地位的日益显现,在有关国际组织的法律岗位上,我国应当有数量更多、职位更高的代言人。凡此种种,都对培养能够服务于我国利益的高端国际化法律人才提出急迫的需求;与此同时,也会引发这样的问题:我国的大学在培养此类人才方面应当发挥什么作用?

毋庸置疑的是,能够服务于我国利益的高端国际化法律人才必须是学贯东西的人才,必须具有我国国内法律教育的背景,懂得中国国情和精通中国的法律。因此,作为他们成才的第一步,必须在中国的法律院校接受教育。这就决定了,我国的法学院在培养此类人才方面是可以有所作为的。

接下来的问题是,中国的法律院校应如何在学生接受国内教育的阶段,特别是在大学本科阶段,为他们后来成为高端国际化法律人才,在知识储备和能力培养方面奠定良好的基础?实践证明,高端国际化法律人才在其接受教育的过程中,必须在基础英语、法律专业英语、中国法知识、外国法知识,以及交叉学科知识等多个方面积累知识和扩展能力。由此为今后的出国深造,特别是在特定的专业法律领域的成功发展,奠定坚实的基础。

因此,对法律专业英语的学习是培养高端国际化法律人才的重要环节。进一步说,随着近年来我国法律事务中涉外内容的增加,即使对一般的法律工作人员来说,要胜任日常的工作,通常也需要在相当的程度上具备法律专业英语的能力。

本系列教材是很好的适合于在我国法律院校开展法律专业英语教学的教材。首先,本系列教材是以英美法为内容的教材。目前,英美法不仅

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在解决国际商事争端的法律体系中明显地占据着主导地位,并且 WTO 争端解决机制的运作模式也是以英美法为基础进行设计的。其次,本系列教材是案例教材。采用这套教材,有助于推动案例教学和法律教学改革地开展。最后,本系列教材自 2007 年出版以来,已经为一些法律院校采用。实践证明,这套教材的编写和使用对于我国国际化法律人才的培养已经起到了一定的作用。其效果之一是,由于这套教材中的案例大都是精选的为美国法学院的教材所采用的经典案例,在国内学习过此套教材的学生,借助原来学习的基础,在后来去英美法国家留学的过程中,往往能驾轻就熟,获得较好的成绩。

本系列教材第二版中的各个教材对第一版作了不同程度的改进和完善,进一步提高了质量。在这一版付梓之际,我谨代表作者们对使用本教材的各位教师表示衷心的感谢,并希望在我国的法律院校中,有更多的教师加入我国国际化法律人才培养的教师行列。

对外经济贸易大学

法学院 院长

王 军

2012 年 7 月

# 第一版总序

自 1984 年设立国际法专业以来，对外经济贸易大学法学院（原国际经济法系）已经走过了 20 个年头。在 20 年的时间里，经过几代人的努力，在培养懂法律、懂经贸和熟练运用外语（英语）的综合型人才、满足国内市场和国际市场的人才需求的道路上，对外经济贸易大学法学院已成为国内外经贸法律教育中一个具有自己特色和风格的人才培养基地和输送站。

对外经济贸易大学法学院的教学特色体系是从“国际商法”开始的，为了适应国际经贸全球化的发展潮流，我们希望，从对外经济贸易大学法学院走出的人才能够从国际化的视角理解和把握我国的法律，并且客观地认识不同国家的法律、国际法律之间的相互作用和影响。为此目的，我院几代教师编辑的教材，包括案例教材，都在强调具有国际化视角的教学和比较研究的重要性。

对外经济贸易大学法学院以独特的教学方法——案例教学和双语教学为代表，旨在通过引导学生对“原汁原味”的英文案例的阅读和研讨，学习不同国家在国际商贸领域的法律原理和规则，也通过对经典案例事实和纠纷场景的分析，帮助学生认识现实生活中经贸活动的规律和特点。

我们多年的教学实践已经证明：案例教学对于培养学生发现和归纳问题、分析和处理问题的综合能力，对于培养学生在错综复杂的事实和现象中分清真伪和主次、结合事实和法律推理的能力有直接的促进作用。

除了国际商法以外，对外经济贸易大学法学院国际法专业的另一个教学和研究方向是以 WTO 法律为主的国际经济法（公法）。本套英文案例选编丛书包含了这样两个方面的内容。

我院鼓励教师在教学、科研和法律实践中全面拓展才能和发掘潜力，同时，我们强调：教师的工作应以教学为中心，科研和法律实践应为提升

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教师的专业素质、提高教学水平而服务。参与本套丛书编写的同志都是我院具有多年教学经验的中青年教师,本套丛书是他们在对自己的教学心得的积累和总结的基础上精心编辑而成的,是他们对多年摸索的教学方法的总结;本套丛书也是我院几代人的教学成果的延续,更是我院“211工程”建设成果的组成部分。

20年来,我们欣慰地看到:对外经济贸易大学法学院的教学风格和特色也得到国家和社会的认可,早在20世纪七、八十年代,我院就经批准设有可招收国际经济法专业方向的硕士点和博士点;我院的“国际商法”教材和案例教材也广为流传;2002年我院的国际法专业被评为国家重点建设学科,现又增设了博士后流动站;学生和教师的规模日益扩大。我衷心希望:我院有更多的教师和学生加入案例教学和双语教学的尝试和探索中来,保持和发展特色,早日走上国际人才培养和学科全面发展的道路。

对外经济贸易大学法学院

沈四宝

2004年7月

# 前 言

本书是为了促进国际法的英文教学而编选的。国际法最早起源于欧洲，英文和法文一直是学习国际法的重要甚至不可缺少的工具。阅读英文案例，对于理解国际法和在实践中适用国际法都有很大帮助。

本书编选的案例具有很强的多样性。首先案件的裁决机构十分广泛：本书收集了多个国际性司法机构的案例，诸如国际法院、国际常设仲裁法院、欧洲人权法院、海洋法法庭、审判前南斯拉夫战犯刑事法庭和临时仲裁庭裁决的案例。编者希望在向读者介绍案例的同时，也让读者有机会了解这些解决纠纷的国际机构，了解这些机构为和平解决国际争端、维护国际法和正义所作的贡献。但限于篇幅，编者所编选的案例很难充分体现这些机构的作用和成就，编者只是希望为读者打开一个小小的窗口，如果读者对某一机构的工作感兴趣，应该通过更多的资料来窥其全貌。同时编者还编选了国内法院判决的涉及国际法问题的案例，这些案例能够使读者了解国内法院的法官在审理案件时运用国际法规则的情况，国际法绝不是只在国际层面才被应用的一种规范。编者作为研究国际法的学者，很盼望我国的国内法院也能很好地处理和解决涉及国际法问题的纠纷，期望国际法发挥更大的作用。其次，本书编选的案例既有法院判决的，也有仲裁解决的。就仲裁而言，既有利用常设仲裁机构解决的案件，也有采取临时仲裁的方式解决的案件。

本书编选的案例基本上是按照《国际法》教材的章节顺序编排的，这样编排是为了配合教学内容，但其缺点是编者不得不把案件硬性归类到某一题目下。虽然编者采取了这样的编排方法，但绝不意味着某一个案例只涉及或主要涉及某一个国际法问题，恰恰相反，几乎每一个案件都涉及多个国际法问题；有时多个案件都涉及某一个国际法问题，例如国家责任问题是很多案件都涉及的。希望读者能够不受编者的这种编排的限制，既能



看到有关案例之间的类似之处，也能看到单一案例所包含的不同的复杂问题。

编者在编写案例时，尽力保留了案例判决书或裁决书的原始风格。读者可以看到不同机构判决书或裁决书的不同书写风格，例如海洋法法庭的裁决书就与国际法院等机构的判决书的写法很不相同。在本书编选的判决书里有关国际法的论证中，除了常见的引证条约和习惯规则外，还有一些在我国的国内判决书中很少看到的引证，例如有的引述了知名法学家的观点，有的引述了外国法院或国内法院的观点，还有的引述了非政府组织的观点。编者并无意推荐这些方法，唯愿介绍，让读者了解国际法不同于国内法的证明方法。

本书于2005年第一次出版，本次再版补充了一些新的案例，同时对原有案例进行了删减。此外，原版中的个别案件，在尘埃落定几十年后，又纷争再起，典型的如柬埔寨与泰国之间的隆端寺案以及匈牙利与斯洛伐克之间的GABČÍKOVO-NAGYMAROS工程案，这些新的材料，编者在再版编写时，给予了说明和补充。

一个国际法争端的解决，其耗时耗力耗财通常会超过普通的国内法纠纷，然而，设想这些国际纠纷，如果不能通过司法途径解决，或者导致战火燃烧，或者两国交恶，积怨寻仇，其可能消耗的时间、精力和财富都不是一场法律诉讼所能够望其项背的。所以，编者盼望有更多的有志之士能够研究和发展国际法，使之能为世界的安宁与和平作出贡献。

我的学生赵志莘、李婧舒和魏庆坡在编写过程中各帮助整理过一个案例，在此致谢。书中的错误和疏漏都是本人之责，敬请读者指正。

边永民

2012年初夏于北京望京花园

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# 第一章

## 国际法上的国家

### 案例 1      **Accordance of International Law of the Unilateral Declaration of Independence of Kosovo**

2008 年 10 月 8 日，联合国大会就“科索沃临时自治机构单方面宣布独立是否符合国际法”，请求国际法院发表咨询意见。国际法院在审理该案件时，请联合国及其会员国就提请法院咨询的问题发表书面意见，同时也邀请科索沃独立宣言的撰写人提交书面材料。包括中国在内的三十六个国家提交了书面陈述，十四个国家对其他国家和组织的书面陈述发表了书面评论。科索沃临时自治机构单方面宣布独立的宣言撰写人在法院设定的时限内提交了书面材料。二十九个国家及单方面宣布独立的宣言撰写人参加了法院的公开听讯程序。

On 22 July 2010, the International Court of Justice gave its Advisory Opinion on the question of the Accordance with international law of the unilateral declaration of independence in respect of Kosovo.

The Court begins by recalling that the question on which the advisory opinion has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations

(hereinafter the General Assembly) on 8 October 2008. It further recalls that that question reads as follows: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

#### **I. Scope and Meaning of the Question**

The Court observes that the question posed by the General Assembly is

clearly formulated.

The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It notes that the question does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.

## **II. Factual Background**

The Court continues its reasoning by indicating that “[t]he declaration of independence of [Kosovo adopted on] 17 February 2008 must be considered within the factual context which led to its adoption”. It briefly describes the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo (UNMIK). It then gives a succinct account of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

## **III. The Question Whether the Declaration of Independence is in accordance with International Law**

In this part of its Advisory Opinion, the Court turns to the substance of the request submitted by the General Assembly. It recalls that it has been asked by the latter to assess the accordance of the declaration of independence of 17 February 2008 with “international law”.

### **A. General international law**

The Court first notes that during the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the

practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law.

The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.

B. Security Council resolution 1244 (1999) and the UNMIK (United Nations Mission in Kosovo) Constitutional Framework

The Court then examines the legal relevance of Security Council resolution 1244, adopted on 10 June 1999. It notes that within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. It recalls that resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations.

### **1. Interpretation of Security Council resolution 1244 (1999)**

First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo.

Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes: to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis.

Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo.

### **2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder**

The Court then addresses the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a

specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary for the Court to determine precisely who issued that declaration.

(a) The identity of the authors of the declaration of independence

The Court turns to the question whether the declaration of independence of 17 February 2008 was an act of the “Assembly of Kosovo”, one of the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.

It notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called “final status process”. Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo. Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs (d), (e) and (f), deals with final status issues only in so far as it is made part of UNMIK’s responsibilities to “[f]acilitat[e] a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords” and “[i]n a final stage, [to oversee] the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement”.

The Court observes that this conclusion is reinforced by the fact that the authors of the declaration undertook to fulfill the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence), and expressly and solemnly declared Kosovo to be bound



vis-à-vis third States by the commitments made in the declaration. By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General.

The Court asserts that certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words “Assembly of Kosovo” appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase “We, the democratically-elected leaders of our people . . .”, whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as “the democratically-elected leaders of our people” immediately precedes the actual declaration of independence within the text (“hereby declare Kosovo to be an independent and sovereign state”; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

The Court notes that the reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he