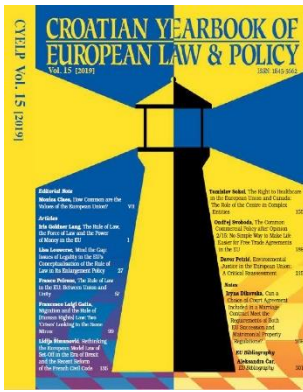




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Ondřej Svoboda

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Book Review: *EU Trade Law*, Rafael Leal-Arcas (Edward Elgar Publishing, 2019, ISBN 9781788977401), 352 pp, £90,00.¹

International trade is currently going through turbulent times. In response to the increasing paralysis of the World Trade Organization (WTO) during the last decade, we have witnessed a rise of megaregional free trade agreements, and their fall, too.² The European Union (EU) plays a crucial role in this development as one of three leading global trade powers and a proponent of the liberal economic order. However, it seems that the EU with von der Leyen's new 'geopolitical Commission' has to adapt to the circumstances, as free trade faces a resurgence of nationalism and protectionism and as the liberal economic order shifts towards a geo-economic order associated with the decoupling of the US and China. Regardless of the political, economic and even security pressures emerging from these developments, the EU trade policy known as the Common Commercial Policy (CCP) is regulated by complex internal rules set by the Founding Treaties of the EU. These rules are the subject of a new book entitled 'EU Trade Law' by Rafael Leal-Arcas, Professor of European and International Economic Law and Director of Research at Queen Mary University of London.

The book is divided into twelve chapters, including an introduction and conclusion. At the beginning, the book takes a chronological approach under a section focused on 'substantive aspects'. Leal-Arcas starts with a description of the EU and its predecessors, the European Coal and Steel Community and the European Economic Community, as an emerging trade actor on the international scene. In the following chapters, he addresses one by one important milestones in the evolution of the CCP: the establishment of the World Trade Organization (WTO) in 1995 and the role of the EU in this international organisation, as well as the Amsterdam Treaty in 1997 (Chapter 3), the Nice Treaty in 2001 (Chapter 4) and the Constitutional Treaty in 2004 before proceeding to the current framework established by the Lisbon Treaty in 2007 (Chapter 5). The chapters provide a well-researched history of the development of the CCP while relying on the rich case law of the European Court of Justice, as well as the *travaux préparatoires*. This provides a well-founded platform to discuss the expanding scope of the CCP as well as changes in decision-making procedures, confronting unanimity and qualified majority voting (QMV) in the Council with their implications in terms of the transparency, simplicity and legitimacy of the CCP.

The latest significant change in the Union's primary law – the Lisbon Treaty – has brought numerous changes in the CCP which are addressed in detail by Leal-Arcas. However, he may have overlooked the constitutional objectives introduced in the Lisbon Treaty in Articles 2, 3 and 21 of the Treaty on the European Union (TEU). These objectives provide normative imperatives for all dimensions of EU external actions, including the CCP. As such, they

¹ The eBook version is priced from £22/\$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

² From several megaregional initiatives, only the Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) have been concluded, overcoming strong resistance in the process.

constitute one of the most significant changes in the Treaty, and trade policymakers have to take them into account. An interesting question, which the author omits, is the question of the legitimacy of these objectives, a subject that otherwise draws the author's particular attention. The incorporation of the objectives into trade instruments may legitimise the CCP as it entails non-commercial values such as human rights, the rule of law and sustainable development.³ Perhaps it is a missed opportunity with regard to later parts of the book discussing the domestic support and legitimacy of EU trade policy.

Procedural aspects are the second general theme taken up by Leal-Arcas. In separate chapters, he deals with issues of mixed agreements (Chapter 6), the negotiation of trade agreements (Chapter 7), their conclusion and ratification (Chapter 8), implementation and dispute settlement (Chapter 9), enforcement (Chapter 10), and the conflict between efficiency and accountability (Chapter 11). Among the most insightful sections of the book is the in-depth examination of mixed agreements. This is a challenging task as the author rightly notes that 'mixed agreements are one of the most distinctive features of the external relations law and practice of the EU as well as one of the most difficult'.⁴ But the chapter provides the reader with an excellent source on this topic. To provide a fuller picture, the rather theoretical part could have been complemented by the recent free trade agreements with South Korea (EU-Korea FTA) and Canada (CETA) as they provide good examples of the Union's mixed agreements in the field of international trade.

In the case of CETA, the Council and the Commission debated the legal nature of the agreement and the scope of the respective competences of the Member States and the Union for several months. Finally, frustrated, the then-Trade Commissioner Cecilia Malmström admitted after several meetings that 'the political situation in the Council is clear, and we understand the need for proposing it as a mixed agreement, requiring Member States be party to the agreement, in order to allow for a speedy signature'.⁵ This frustration on the Commission's side later led to its request for an opinion of the Court of Justice of the European Union (CJEU) in which it argued that the EU had exclusive competence to conclude a Free Trade Agreement with Singapore (EUSFTA). The Council and 25 of the Member States countered with the view that EUSFTA should be concluded as a mixed agreement. The CJEU in its decision concurred with that opinion.⁶

The example of CETA is also discussed in one chapter. The chapter elaborates on the negotiation of trade agreements with emphasis on the examination of the respective roles of the European institutions: the European Commission, the Trade Policy Committee as a specialised body of the Council, and the European Parliament. In this way, Leal-Arcas offers an insight into the EU's internal machinery of conducting the CCP, including complex

³ Ondřej Svoboda, 'The Common Commercial Policy after Opinion 2/15: No Simple Way to Make Life Easier for Free Trade Agreements in the EU' (2019) 15 *Croatian Yearbook of European Law and Policy* 189.

⁴ Rafael Leal-Arcas, *EU Trade Law* (Edward Elgar Publishing 2019) 168.

⁵ European Commission, 'European Commission proposes signature and conclusion of EU-Canada trade deal' (5 July 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1524>> accessed 5 April 2020.

⁶ Opinion A-2/15 *Singapore FTA* ECLI:EU:C:2017:376.

interplays, competence disputes and institutional rivalries frequently affected by cumbersome procedural rules. Still, it would have been useful to have a recent example of a time when the Commission and the Council were able to act swiftly and beyond the usual procedure in the common interest of the Union. For instance, in order to satisfy Belgium's regional Walloon Parliament's opposition to the signing of CETA, both institutions found a flexible solution. They made a last-minute annex to the agreement – the Joint Interpretative Instrument⁷ – which significantly influenced the reading of the agreement.

CETA was finally signed at the EU-Canada Summit on 30 October 2016, but the circumstances where a regional parliament representing less than 1% of the EU population is able to block an agreement proves how relevant Leal-Arcas' reflection is in the last chapter. In that chapter, the author advances the claim that trade policy should be more 'democratic'. A significant shift in this direction came with the Lisbon Treaty, introducing the greater involvement and empowerment of the European Parliament.⁸ Despite the deepening of the trade agenda and its going further into domestic policy-making, Leal-Arcas remains optimistic that the balance between efficiency and accountability is achievable through greater cooperation and coordination between national and supranational levels of EU governance.

Further, the reviewer would like to add three general comments on the book under review. It would be very useful for the reader to have the scope of the study clearly defined. The definition of trade law from the perspective of the EU is stipulated in Article 207 of the Treaty on the Functioning of the European Union (TFEU). But those who expect the book to cover the full scope of the CCP as established in this provision will be disappointed. The focus is predominantly on traditional trade issues, such as trade in goods and services. Questions related to foreign direct investments or intellectual property rights are mostly omitted. Sometimes, the absence of any reference to these areas even leads to factual mistakes. For instance, a specialised Council Committee is introduced as the Trade Policy Committee for Services. But since the Lisbon Treaty entered into force, the Committee has officially become the Trade Policy Committee for Services and Investment in order to take the new competence of the Union into account. The delegates of this Committee thus discuss not only services issues but EU investment policy as well.

In addition, it is difficult to understand why the book, despite numerous references to the case law, omits any analysis or even a reference to the above-mentioned Opinion 2/15 of the CJEU concerning the competence of the EU to conclude EUSFTA. The Opinion sheds light on various blurry areas of the CCP, including investment protection, intellectual property rights, and sustainable development. In this way, the Opinion constitutes another

⁷ Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States [2017] OJ L11/3.

⁸ *De iure*, the European Parliament has only a consultative role in the conducting of the CCP, but with a final say on the ratification of free trade or investment agreements. The power of veto cannot be overestimated. The European Parliament used it in rejecting the Anti-Counterfeiting Trade Agreement (ACTA) in 2012, even though this was negotiated by the European Commission and already approved by most EU Member States.

important landmark in the development of the CCP.⁹ As a consequence, the set delimitation of competences now profoundly affects the ongoing EU trade and investment negotiations as well as any future ones, including the newly emerging UK-EU relations.

Finally, the book would benefit from discussing further one important event, that is, the shift which commenced in 2006 by the EU admitting its re-orientation of the CCP from multilateral negotiations under the framework of the WTO to regional and bilateral ones.¹⁰ Despite their relevance to the current evolution of the CCP, these two topics are missing: the first successfully concluded treaties under this policy shift (the EU-Korea FTA and CETA), and the recent highly contentious negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP).

Notwithstanding the obligatory criticisms, Leal-Arcas' book is highly recommended. It sheds light on many difficult substantive and procedural aspects of the current legal framework of EU trade policy. Leal-Arcas does not shy away from pointing out some of the biggest challenges that the EU faces in terms of legitimacy. Overall, his book represents a valuable contribution to ongoing debates on EU trade law and the topic is pertinent for the current and future development of the multilateral trading system and EU trade policy *per se*.

Ondřej Svoboda, PhD¹¹
Faculty of Law, Charles University in Prague

⁹ See, for example, Marise Cremona 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14(1) European Constitutional Law Review 2.

¹⁰ Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Global Europe – Competing in the world – A contribution to the EU's Growth and Jobs Strategy' (2006).

¹¹ orcid.org/0000-0002-3856-312X. This review was supported by the Charles University, project Progres Q04 'Právo v měnícím se světě'.