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BOOK REVIEW

Rafael Leal-Arcas, *Theory and Practice of EC External Trade Law and Policy* (London: Cameron & May, 2008), ISBN 10:1-905017-650, 606, Hardcover EUR 130.00/USD 208.00

Idem, *International Trade Law and Investment Law: Multilateral, Regional, and Bilateral Governance* (Cheltenham: Edward Elgars Publishing, 2010), ISBN 978-1-84980-319-9, 345, Hardcover EUR 80.00, Paperback EUR 30.00.

*Reviewed by Nikolaos Lavranos**

Dr Rafael Leal-Arcas is a senior lecturer at Queen Mary University of London, who is extremely productive and therefore well known for his excellent publications in the areas of European Union (EU) external relations, World Trade Organization (WTO) law, investment law, and international environmental law.

Proof of his remarkable productivity is these two books, which together have resulted in almost 1,000 well-researched and well-written pages within two years.

Whereas on the face of it both books seem not to have any particular links with each other, the fact is – as will be explained below – that both books indeed complement each other very well and taken together form an excellent holistic analysis of the EU external relations policy, in general, and international trade and investment law, in particular.

The link between both books is further underlined by two developments that have taken place in 2009, which have – rather suddenly – uncovered the actually very close relationship between EU external relations and investment law.

The first development concerns the three judgments of the European Court of Justice (ECJ) in 2009 (Case C-205/06, *Commission v. Austria* [2009] European Court Report (ECR) I-1301; Case C-249/06, *Commission v. Sweden* [2009] ECR I-1335; Case C-118/07, *Commission v. Finland* [2009] ECR I-10889) in which it adjudicated for the first time the relationship between existing bilateral investment treaties (BITs) of Member States and their compatibility with EU law. In these judgments, the ECJ, in short, decided that BITs that do not contain an exception clause that allows a restriction on the free transfer of capital are incompatible with EU law and thus must be modified or terminated. These judgments confirmed again the ECJ's case law that international obligations of the Member States cannot supersede EU law. Or to put it differently,

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international obligations of Member States must be brought into conformity with EU law – even in case of a hypothetical conflict between both.

The second development concerns the entry into force of the Lisbon Treaty, which, *inter alia*, also modified Article 207 Treaty on the Functioning of the European Union (TFEU) (ex Article 133 EC) by adding ‘foreign direct investment’ (FDI) to the common commercial policy of the EU, which is earmarked as an exclusive competence of the EU.

As a consequence of both developments, a new interaction between EU external relations law and international investment law, which previously were rather unrelated legal orders, has been created.

As it happens, both books of Leal-Arcas perfectly present the state of play in both fields in a timely manner.

The first book on the EU’s external trade law and policy is a very exhaustive analysis that ends just before the Lisbon Treaty had been agreed upon by the EU Member States. In other words, it covers the situation up until November 2007. Since the EU external trade law and policy have been developed over the past decades by successive modifications of the relevant treaty provisions, in particular, former Article 113 European Economic Community (EEC) and former Article 133 EC, extensive case law of the ECJ, as well as practice between the EC and Council, a full grasp of the historic developments overtime is essential for understanding the current post-Lisbon Treaty situation.

Accordingly, Leal-Arcas starts off his analysis by introducing the players of EU external trade relations and the problems of the then EEC, subsequently EC and EU, regarding international legal personality (Chapter 2). Chapter 3 is an exhaustive account of the evolution of the EU’s trade policy overtime, starting from the late 1950s until the failed EU Constitutional Treaty. This is followed by the discussion on the distribution of powers between the EU institutions and the Member States (Chapter 4) and the well-known discussion on mixed agreements (Chapter 5).

Chapter 6 analyses the delicate issue of institutional balance in the various phases of negotiation, conclusion, and ratification of trade agreements. Based on this, Chapter 7 turns specifically to the important role of the ECJ and its case law in external trade law and the relationship of trade agreements and EU law, in particular, also WTO agreements. Chapter 8 and 9 finally turn to the Doha Round and the role of the EU in this never-ending negotiation round, while Chapter 10 wraps up the book by some conclusions and recommendations.

In general, one can only praise Leal-Arcas for his very well-researched and clearly written analysis of this complex but so fascinating topic. One of the hallmarks of this book is that it also pays attention to the process in the various EU institutions and between them and the Member States. In other words, he focuses not only on the ‘law in the books’ but also on the ‘law in reality’. This is an important added value because external trade policy consists, to a very large extent, on managing these processes. In fact, the effectiveness of the EU’s external trade policy depends on the successful management of the various complex negotiation processes that constantly take place.

Moreover, the book covers all important aspects, and the references are extensive both regarding academic literature and case law. In short, this book provides a very useful basis for guiding the reader through the murky waters of the EU's external trade policy and practice.

The only minor aspect that one could think of is the fact that the book was completed just before the Lisbon Treaty was adopted and thus does not cover the most recent substantial modifications that were introduced by it. Apart from expanding the exclusive competence of the EU towards 'FDI', it also significantly extended the powers of the European Parliament by introducing the co-decision or ordinary legislative procedure to this policy area.

But in a certain way, the second book on the relationship between international trade law and international investment law provides a useful update. Again, Leal-Arcas chooses to analyse the interaction between two legal orders, that is, the 'classic' international trade law and the unusual 'hybrid' international investment law. In addition, Leal-Arcas takes the 'multilevel' approach by taking a closer look at all three levels, that is, multilateral, regional, and bilateral. As in the first book, it is this holistic approach that gives it added value compared to most other books.

The first part of the book focuses on the international trade law and policy of the EU. Starting from a short introduction into the concept of unilateralism (Chapter 2), he moves on to discuss the rise and fall of multilateralism (Chapter 3) caused in particular by the difficulties to successfully conclude the Doha Round. He then moves on to the intensified bilateralism and regionalism that have been pursued more actively by the EU in recent times (Chapter 4). In small separate chapters, he discusses the trade relationship of the EU with Brazil, India, China, and Russia (Chapters 5, 6, 7). Not surprisingly, he concludes that these countries offer huge trade opportunities for the EU and that trade liberalization agreements in the form of new ambitious bilateral trade agreements are the way forward for the EU. In addition, Leal-Arcas emphasizes the need for the EU to diversify its energy supply in order to reduce its dependence on Russia. In this context, he points out to the Energy Charter, which should be updated. This part of the book sets out the 'theatres' or chessboards on which the EU needs to play an active and intelligent role in order to open up new trade opportunities. Read in combination with the first book, it becomes immediately apparent that these are huge challenges for the EU institutions and the Member States, considering the diverse interests that are at stake.

The second part of the book on international investment law is essentially an introduction into the basics of this legal order, which, in particular, for EU law experts is a rather unfamiliar one. It therefore serves as an excellent basis to understand the scope of the new EU competence on 'FDI', which suddenly has become part of the exclusive competence of the EU. In several small chapters, Leal-Arcas traces back the history and development of international investment law over the past decades (Chapters 8, 9, 10). In particular, he focuses on the need for a multilateral investment treaty, despite the fact that such efforts within the Organization for Economic Co-operation and Development (OECD) failed in the 1990s (Chapter 11). Nonetheless, Leal-Arcas considers it important

to try to create such a common multilateral framework, especially in view of the fact that more than 3,000 BITs, which differ considerably, are currently in force (Chapter 12). This is an interesting discussion since the EU has now the opportunity to develop a common European investment policy (CIEP) when it will soon start negotiating and concluding BITs and free trade agreements (FTAs) with investment chapters with India, Singapore, Canada, and later on Russia and China. Already the first – very diverse – positions taken by the EC, EP, and Council on the CIEP illustrate that this is not going to be an easy task. So, one wonders whether there is sufficient common interest to embark on a multilateral investment treaty on a global level. Obviously, the WTO experience illustrates that it is possible to create a global ‘rule-based’ framework that is more or less generally respected. However, at the same time, failure of the global community to conclude the Doha Round after ten years of negotiations illustrates that the multilateralism approach for a worldwide investment treaty is doomed to fail. In other words, the web of 3,000 BITs may in fact prove to be the better and more viable option, while the idea of a multilateral investment treaty remains illusory.

Finally, the last part of this book discusses the complex issue of choice of jurisdiction for the settlement of trade disputes. More specifically, it compares the WTO and North American Free Trade Agreement (NAFTA) approach in this regard (Chapters 13, 14). It is a pity that Leal-Arcas did not add another chapter on this issue concerning international investment law. This would have further highlighted the additional difficulties that arise in international investment law by the fact that private parties are directly able to litigate against host states. In particular, such a discussion would have revealed the necessity to establish a central investment settlement body of some sort, as well as the need to sort out the position of international arbitral tribunals and domestic courts vis-à-vis such an international investment dispute settlement body.

Despite this minor point, the second book, while being significantly shorter than the first one, is equally well researched and well written. Both books complement each other and taken together cover the very dynamic and complex interaction between EU external trade and investment relations with international trade and investment law. The focus of both books on the history, the relevant players, and the various ongoing processes allows the reader to get an excellent understanding of the reason why the EU’s external trade policy has developed in the way it has and why it functions the way it does. Only with this understanding in mind is it possible to understand and analyse the future EU trade and investment policy post-Lisbon.

In sum, both books are excellent and should be made mandatory reading materials for the relevant courses of EU external trade and investment law and policy. But also, relevant policymakers – in the Member States, as well as in the various EU institutions – could learn a lot and draw inspiration from them on how to deal with the difficult tasks that they are currently facing when developing the future CIEP.

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