

*Special Issue: International Investment Law*

EDITORIALS

Shashank P. Kumar, *A Yearful of Thoughts*

Manu Sanan, *International Investment Law – Questions Riddling an Answer*

ARTICLES

Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*

Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*

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NOTES AND  
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Omar E. García-Bolívar, *Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach*

Mihir C. Naniwadekar, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?*

The logo for the journal 'Trade, Law and Development' consists of the letters 'TL' stacked above '&D' in a large, red, serif font. The logo is enclosed in a thin red rectangular border.

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*Anniversary Editorial*

A YEARFUL OF THOUGHTS

**SHASHANK P. KUMAR\***

I feel honoured and proud writing this Editorial on the occasion of the maiden anniversary of *Trade, Law and Development*. When *TL&D* started a year-and-a-half ago with only the name as a certainty, our goal was rather simple: to somehow compile and publish the first issue. Having had failed to conclude a publishing and distribution agreement, we almost wound up even before we started. Thankfully, like all things life, this too turned out to be a transitory phase. Looking at the response to the publication of the Inaugural Issue online, our proposal for publishing *TL&D* in print was accepted by the Hon'ble Vice Chancellor and Patron of *TL&D*.

By the time of the Second Issue, the idea of a “Special Issue” began to take form. The choice of theme for the anniversary Special Issue was not a difficult one to make, with International Investment Law being a popular subject of discussion within the University. Several recent events (and controversies) contributed to the growing importance and popularity of the subject and made the choice a little easier.<sup>1</sup>

In this Editorial, however, I do not seek to discuss the theme of this Issue (which is discussed by Manu Sanan, the Issue Editor, on pp.9- 18). I instead wish to briefly discuss the ideology and purpose of *TL&D* as they have developed

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<sup>1</sup> The two, and perhaps the most interesting, that immediately come to mind are the global financial crisis and the Philip C. Jessup International Law Moot Court Competition 2010. Whereas the financial crisis raised important questions about the current state of the International Investment Law regime, the Jessup Moot, based on a fictional problem mired with contemporary and controversial issues of International Investment Law, was greatly responsible for the popularity of the subject amongst law students this year.

over the course of the past year, concluding by summarizing the year's work and my comments on the road ahead.

#### PURPOSE AND BELIEFS OF *TL&D*

Coming back to the evolution of *TL&D* over the first year, along with the work on the Special Issue began a phase of discussion by the Staff of the Journal about its scope, purpose, and ideology. Here, I seek to briefly summarize the outcome of such discussions.<sup>2</sup>

To summarize in a sentence before we proceed any further, the purpose of *TL&D* is to *generate and sustain a democratic debate on issues of world trade and law of relevance to the developing world*. It is this purpose that forms the pillar of our ideology and defines our philosophy and scope. Let me now expand upon this statement of the Journal's purpose and discuss the thoughts behind it in greater detail.

At the outset, *TL&D* aims at not only producing and *generating* new debate and discussions, but also strengthening and *sustaining* the discussion on issues that bear contemporary relevance. These complementary aims guide the composition of each issue of the Journal and the selection of our content.

To *sustain* ongoing debates *TL&D* seeks to publish the thoughts and ideas of established academicians, practitioners, jurists and policy makers. I must clarify here that "established" is by no means a reference only to the conventional and popular, but includes those who hold critical and iconoclastic views and justify them consistently and rationally.<sup>3</sup>

Towards the end of *generating* new debate, *TL&D* is committed to providing a forum to students from the developing world, especially India, for publishing their ideas. In addition to sending our call to over 600 law schools in India and around 20 distributed elsewhere over the developing world, almost as an unwritten rule, each issue of the Journal includes at least one quality and thought

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<sup>2</sup> Forums of such discussion ranged from formal regular Board Meetings and Guest Talks to the more informal late night phone conversations and chats on the Hostel balconies.

<sup>3</sup> Several works published in *TL&D* over the past year seek to challenge the existing construct and traditional views of the international legal regime. As excellent examples, see Henning Grosse Ruse-Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection* 1(1) TRADE L. & DEV. 56 (2009); and in this Issue, Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion* 2(1) TRADE L. & DEV. 19 (2010).

provoking work by an Indian student.<sup>4</sup> In addition, by maintaining very high standards of review and editing we hope to ensure that the debate so *generated* bears all the necessary attributes of quality legal scholarship.

Let us now turn to *what* the Journal seeks to generate and sustain. *TL&D* seeks to generate and sustain a *democratic* debate. Amartya Sen perhaps best characterizes the essence of *democratic* when in *The Idea of Justice* he states that:

[D]emocracy must also be seen more generally in terms of the capacity to enrich reasoned engagement through enhancing informational availability and the feasibility of interactive discussion. Democracy has to be judged not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard.<sup>5</sup>

Having had come across the above passage almost at the same time as the publication of the Inaugural Issue of *TL&D* (*The Idea of Justice* was published in July, 2009), I believe that it best sums up our idea of a *democratic* debate at *TL&D*. Borrowing Prof. Sen's terminology, *TL&D* seeks to enhance "informational ability and the feasibility of interactive discussion"<sup>6</sup> on issues of world trade and law in the developing world in an effort to promote the expression and exchange of diverse opinions and viewpoints.

An expression of our resolve towards promoting a *democratic* debate by "enhancing informational ability and the feasibility of interactive discussion" is found in the access policies of the Journal. *TL&D* follows an open access policy whereby all are works are made available on the Journal website free-of-charge immediately upon publication<sup>7</sup> and are licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Unported License.<sup>8</sup> In

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<sup>4</sup> This also serves the end of promoting legal and scholarly writing amongst students of Indian law schools. Some examples of insightful student articles include, *inter alia*: Adarsh Ramanujan, *Conflicts Over "Conflict": Preventing Fragmentation of International Law* 1(1) *TRADE L. & DEV.* 171 (2009); Aditya Gupta, *Border Enforcement of Intellectual Property Rights in India* 1(2) *TRADE L. & DEV.* 260 (2009); and in this Issue, Mihir C. Naniwadekar, *The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?* *TRADE L. & DEV.* 153 (2009).

<sup>5</sup> Amartya Sen, *THE IDEA OF JUSTICE* xiii (Penguin, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> For a brief comment on the need for Indian law reviews to maintain updated websites and archives (and their inability to do so in the past) see Madhav Khosla, *The Curious Case of NLS Journals*, available at: <http://lawandotherthings.blogspot.com/2009/09/curious-case-of-nls-journals.html> (last visited 1 Jun. 2010).

<sup>8</sup> See *Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Unported* available at: <http://creativecommons.org/licenses/by-nc-nd/3.0/> (last visited 1 Jun. 2010).

addition, the Journal is a signatory to the Budapest Open Access Initiative<sup>9</sup> and is archived on the PKP-Open Archives Harvester2 archive.<sup>10</sup> Indeed, one of the main reasons for the in-house online publishing and distribution of the Journal (as opposed to publishing and distributing through established publishing houses) is our commitment towards improving access to research and dissemination of information through our Open Access policy.

Next, the statement of purpose defines the scope of the Journal. *TL&D* seeks to generate and sustain such a democratic debate on issues of *world trade and law*. Apart from pure *trade* subjects such as WTO Law, Investment Law, Law of International Finance, Competition Law and Policy, International Commercial Law and International Arbitration, *TL&D* includes within its scope the subjects of Public and Private International Law, Environmental Law and Regulation, Intellectual Property Rights, Human Rights and Sustainable Development to the extent that these relate to larger issues of *world trade*.

Further, in defining our scope to include *law* we encompass issues not only of public and private international law but domestic and municipal legal issues, as well. In fact, as a Journal published by an Indian university we strongly believe in the need to develop an “inward looking focus”<sup>11</sup> for international economic law teaching in India, specifically, and in the developing world, generally. The need for such an inward looking focus in international economic law teaching in India’s case is succinctly summarized by Seema Sapra in her work on identifying new agendas for international economic law teaching in India:

At present, [international economic law (IEL)] courses in India often do not consider the domestic and international issues that IEL raises from the perspective of the domestic and regional political economy. An inward focus would be useful not only because the domestic environment is where most students will locate their careers, but also because in not doing so, these courses miss out on big substantive questions of how IEL interacts with the domestic political economy of India and on the many fascinating research projects that these questions would offer. In addition, the study of IEL in its interaction with the domestic political economy would also

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<sup>9</sup> The Budapest Open Access Initiative is one of the first major international statements on open access. See *Budapest Open Access Initiative*, available at: <http://www.soros.org/openaccess/read.shtml> (last visited 1 Jun. 2010).

<sup>10</sup> The archive can be accessed at: <http://harvesters.sfu.ca/demo/index.php/index> (last visited 1 Jun. 2010).

<sup>11</sup> See Seema Sapra, *New Agendas for International Economic Law Teaching in India: Including an Agenda in Support of Reform in INTERNATIONAL ECONOMIC LAW – WHE STATE AND FUTURE OF THE DISCIPLINE* 185, 201 (Colin B. Picker *et al.* eds., Hart, 2008) available at: <http://ssrn.com/abstract=1360732> (last visited 1 Jun. 2010).

generate the most useful kinds of research, discourse and knowledge-creation in the Indian context, which could contribute in a significant way to the overall national agenda and efforts for reform and development.<sup>12</sup>

In line with the above reasoning, we encourage and publish research and scholarship on domestic legal issues arising out of international economic relations of India and other developing countries.<sup>13</sup>

Coming to the last aspect of the Journal's statement of purpose – to generate and sustain a democratic debate on issues of world trade and law *of relevance to the developing world*. Our feelings on this are perhaps best captured by a blurb on the webpage of the Trade, Law and Development Group on the social networking website *Facebook*<sup>14</sup> which declares: “We love to hear the Third World shout!”

That however, represents only half of what we love. Not only do we love to hear the Third World shout but we love to hear anyone *concerned* about the Third World shout!<sup>15</sup> In this sense, and to put it more formally, *TL&D* shares its objectives<sup>16</sup> with those of Third World Approaches to International Law (TWAAIL) to the extent that “TWAAIL seeks through scholarship, policy and politics to eradicate the conditions of underdevelopment in the Third World”.<sup>17</sup>

Our previously discussed belief that an “established” author is not just one who is conventional and popular but one who develops a rational and cogent compliments our objective of promoting scholarship and research *of relevance to the*

<sup>12</sup> *Id.* at 201.

<sup>13</sup> See, for example, Aditya Gupta, *Border Enforcement of Intellectual Property Rights in India* 1(2) TRADE L. & DEV. 260 (2009). (Aditya Gupta undertakes a comprehensive analysis of Indian law relating to border enforcement of intellectual property rights, addressing several contemporary issues.)

<sup>14</sup> The site can be accessed at: <http://www.facebook.com/> (last visited 5 Jun. 2010)

<sup>15</sup> Interestingly, the current description of TWAAIL on Wikipedia notes:

Over the years, several Western scholars have been sympathetic to the Third World's position and made important contributions to this body of scholarship, and these include, scholars such as C.H. Alexandrowicz, Richard Falk, Nico Schrijver and P.J.I.M. de Waart. David Kennedy and Martti Koskenniemi have also contributed support in their own work.

See Wikipedia, *International legal theory*, available at: [http://en.wikipedia.org/wiki/International\\_legal\\_theory#Third\\_World\\_Approach](http://en.wikipedia.org/wiki/International_legal_theory#Third_World_Approach) (last visited 10 Jun. 2010).

<sup>16</sup> This shall hopefully be better explored in the Special Issue on TWAAIL that is scheduled for publication in early 2011.

<sup>17</sup> Makau Mutua, What is TWAAIL? in American Society of International Law, PROCEEDINGS OF THE 94<sup>TH</sup> ANNUAL MEETING 31 (2000) at p.31 available at: <http://ssrn.com/abstract=1533471> (last visited 1 Jun. 2010).

*developing world.* We seek to promote scholarship that advances well-reasoned and -researched arguments addressing the concerns of the developing countries.

Let me end this brief discussion by adding just one additional thought on a matter of great importance to student-run law reviews in India. One of the biggest challenges faced by a student-run law review in India is the problem of ensuring *continuity*. Many a periodical has been started by students only to be found gathering dust in the archives after a few years. At *TL&D* we have constantly tried to take steps to avoid such a future by ensuring that the constitution and functioning of the Journal remain *inclusive* and involve students from all years of the undergraduate course. That said, I can only hope that the steps we have taken are sufficient to ensure continuity in publication.

These then, in short, are my thoughts on the purpose, ideology and philosophy of *Trade, Law and Development*.

#### RECENT DEVELOPMENTS

The following is a summary of developments and news in relation to the Journal over the past year:

Yogesh Pai was appointed the new Faculty-in-Charge beginning with the winter semester, 2010. Prior to joining the faculty of National Law University, Jodhpur, Mr. Pai worked at the Centre for Trade and Development (New Delhi) and the South Centre (Geneva). His areas of interest include intellectual property law and international trade. An inspiring teacher and keen thinker, I am sure the Journal will greatly benefit from his guidance and supervision.

Prof. B. S. Chimni, a member of our Board of Advisors and the Chairperson of the Centre for International Legal Studies at Jawaharlal Nehru University, New Delhi, visited the University campus and held a discussion with the staff members of *TL&D* sharing his ideas on TWAIL. Needless to say, it was an inspiring talk.

Inspired by Prof. Chimni's talk and driven by our own beliefs, the Board of Editors chose TWAIL as the theme of the next Special Issue. The issue is scheduled for publication in the first quarter of 2011. Prof. Chimni has kindly consented to be the Consulting Editor for this issue. Meghana Sharafudeen will be the Staff Issue Editor.

The process for reorganizing the Board of Editors and appointing the staff was undertaken in April 2010. It was decided that from Vol.II, Issue 2 onwards *TL&D* shall have a Staff of thirteen students. The Board shall, from now on, comprise of two Editors-in-Chief, one Managing Editor, two Content Editors

and four Associate Editors. In addition, it was decided that the Journal shall appoint four students from the first two years of the undergraduate program at the University as Proofreaders.

The appointment of the Staff members for Vol.II, Issue 2 and Vol.III, Issue 1 was notified on 16 April, 2010. Manu Sanan and Meghana Sharafudeen – two very able final-year Trade and Investment Law Honours students – will be taking over as the Editors-in-Chief of the Journal. Prateek Bhattacharya has been appointed as the Managing Editor. Aditi Patanjali and Gopalakrishnan, R. shall be the Content Editors. In total, the new Staff of thirteen has seven members that have been reappointed and six new appointments.

Finally, I am happy to report that we recently concluded an agreement with HeinOnline under which our entire content will be archived and made available on the HeinOnline database.<sup>18</sup> All works will still continue to be licensed under a Creative Commons license.

#### ACKNOWLEDGEMENTS AND CONCLUDING REMARKS

I would like to end by acknowledging, on behalf of the Board of Editors of the Journal, the efforts of those who have contributed towards the success of *TL&D* over the past year. I want to thank our advisors for providing valuable suggestions and ideas for the development of the Journal; our authors for considering us as a forum worthy of their scholarship; and our readers for giving all our efforts meaning and purpose. None of what has been achieved by *TL&D* in the past year would have been possible without the support of our advisors, authors and readers.

In particular, I wish to thank four individuals without whose support perhaps *TL&D* would not have come into existence. We are grateful to Justice N. N. Mathur (Vice Chancellor, National Law University, Jodhpur) for his espousal of the cause of the Journal and legal writing and scholarship in the University at large. As our Founder-Patron, he continues to lead and guide the Staff of the Journal.

Had it not been for the persistence of Prof. S. Radha Singh (now a professor at National Law University, Delhi) perhaps even the idea for the Journal would not have germinated. She was determined to see the Journal publish its first issue and contributed towards drafting the initial proposal and policies of *TL&D*.

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<sup>18</sup> The HeinOnline archive can be accessed at: <http://www.heinonline.org/> (last visited 1 Jun. 2010).

I must also thank Mr. Bipin Kumar (now a Consultant of Law at the Indian Institute of Foreign Trade, New Delhi) for his selfless dedication towards the cause of international economic law teaching at National Law University, Jodhpur. He was single-handedly responsible for maintaining the quality and popularity of trade and investment law courses at the University and provided the real “food for thought”.

If one were to ask me to come up with one incident that kick-started the whole process of publishing the Inaugural Issue, it would perhaps be an e-mail from Prof. Raj Bhala (Rice Distinguished Professor, School of Law, University of Kansas, Lawrence). The proposal for *TL&D* had been lying around on my desk through the winter of 2008. Having had failed to get submissions, we were set on missing the deadline to publish the Journal by the time the new academic year began (July 2009). In February 2009, Prof. Bhala mailed his manuscript titled *Teaching China GATT* for publication.<sup>19</sup> His was the first manuscript we received. By the end of July we had published the Inaugural Issue. We are grateful to Prof. Bhala for his constant support and encouragement.

Let me conclude by quoting a few lines from Czeslaw Miloszs’ *And Yet the Books*:

[...] I imagine the earth when I am no more:  
 Nothing happens, no loss, it’s still a strange pageant,  
 Women’s dresses, dewy lilacs, a song in the valley.  
 Yet the books will be there on the shelves, well born,  
 Derived from people, but also from radiance, heights.<sup>20</sup>

With this, I thank the current Staff members for their dedication and diligence and wish the new Board of the Journal all success for the future, hoping that *TL&D* continues to be derived from *people, radiance and heights*.

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<sup>19</sup> See Raj Bhala, *Teaching China GATT* 1(1) TRADE L. & DEV. 1 (2009).

<sup>20</sup> Czeslaw Milosz, *And Yet the Books* (Peter Forbes & Robert Hass, trans.) in SCANNING THE CENTURY 512 (Peter Forbes ed., 1999).