

Special Issue: Third World Approaches to International Law

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The logo consists of the letters 'TL' stacked above '&D' in a large, bold, red serif font.

Trade, Law *and* Development

Vol. 3, No. 1

2011

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Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Anniversary Editorial

2010 – 2011: TAKING THE ROAD LESS TRAVELLED

MEGHANA SHARAFUDEEN*

I look back on the two years since *Trade, Law and Development's* inception with an overwhelming sense of pride as well as a twinge of sadness, for this Anniversary Editorial represents my last direct contribution to the work of the Journal. When I joined the very first Editorial Board as a Content Editor, *TL&D* was just an idea – a dream, really – embraced by a handful of students who wanted to accomplish something unique, and perhaps, significant. Since those early days, the hard work of all the people involved in its development has enabled *TL&D* to grow into the academic journal upholding the highest standards of scholarly tradition it is today.

In this editorial I will not seek to analyze the content of TWAIL as an academic school of thought or introduce the articles and book review that this Special Issue contains. That work has been undertaken in the Guest Editorial by a far more qualified person than I - Professor Bhupinder S. Chimni from the Centre for International Legal Studies at Jawaharlal Nehru University, New Delhi, India, and member of the Journal's Board of Advisors. Prof. Chimni is one of the world's pre-eminent TWAIL scholars and it is our privilege to have him serve as Guest Editor for the TWAIL Special Issue.

I will instead use this Editorial to discuss why the Board chose TWAIL as the subject matter of this Special Issue and the goals we seek to achieve in having done so. Perpetuating tradition, I will conclude by highlighting recent developments over the past year, acknowledging the people who have played a crucial role in *TL&D's* success thus far, and briefly touching upon my hopes for the Journal's future.

WHY TWAIL? : ENHANCING THE *TL&D* CREDO

In the spring of each year *TL&D* publishes a “Special Issue” on a specific area

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of interest in international law relating to trade and development. For the inaugural Special Issue, the Board selected International Investment Law,¹ because it represented a popular and relevant topic in the field of international trade.² True to the Journal's credo, that issue contained articles with a development focus, including, notably, Gus Van Harten's incisive critical analysis of the justifications for the existence of investment treaties.³

With a successful first year under its belt, the Board of Editors began to discuss topics for *TL&D*'s second Special Issue. We found ourselves at a crossroads – we could either choose a relevant topic or we could attempt to push the envelope with our next selection. The consensus was that it was time to put the newly-minted confidence our experiences had given us to use and select a topic that *actively* advanced the Journal's purpose and beliefs as a whole.

It was during this pivotal time that Prof. Chimni visited National Law University, Jodhpur to deliver a guest lecture on developing countries and the World Trade Organization (WTO).⁴ After the lecture, he met the Board for a long and rousing discussion and debate of developing country perspectives on international law. For many of the staff members present, it was their first introduction to the concept of TWAIL.

That meeting was the direct catalyst for the selection of TWAIL as the subject matter of this Special Issue. That decision was taken by the Board because there were three unique characteristics of TWAIL scholarship that we felt tied in perfectly with the goal to use this second Special Issue to actively pursue the Journal's purpose. These three characteristics were TWAIL's extreme *relevance to the developing world*, its *lack of a mainstream presence*, and the *heterogeneous nature of its scholarship*.

Last year's Anniversary Editorial outlined *TL&D*'s purpose and beliefs.⁵ The purpose of *TL&D* is to *generate and sustain a democratic debate on issues of world trade and*

¹ The *Special Issue on International Investment Law* (Vol. 2, Issue 1) is available online at the *TL&D* website: <http://tradelawdevelopment.com/index.php/tld/issue/view/8> (last visited Sept. 8, 2011).

² For a discussion of the "Special Issue" concept and reasons for selecting International Investment Law, see Shashank P. Kumar, *A Yearful of Thoughts*, 2(1) *TRADE L. & DEV.* 1 (2010) [hereinafter *Kumar*].

³ Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2(1) *TRADE L. & DEV.* 19 (2010).

⁴ For a taste of Prof. Chimni's views on the subject, see generally, B. S. Chimni, *The World Trade Organisation, Democracy & Development: A View from the South*, 40 *J. WORLD TRADE* 5 (2006).

⁵ *Kumar*, *supra* note 2, at 2.

law of relevance to the developing world. The 2010 editorial detailed the Journal's efforts to generate new and sustain existing debate by publishing works by students and established authors respectively. With the selection of TWAIL, we sought to enhance our efforts by generating a *new* and *democratic* debate of *relevance to the developing world.*

At the outset, TWAIL seeks to construct and produce an alternative legal edifice for international governance by challenging traditional Western notions of international law.⁶ In doing so, it seeks to generate, through a quintessentially Third World lens, critical analysis of the very framework upon which international legal governance is built. It is further committed to using this scholarship to eradicate conditions of underdevelopment in the Third World.⁷ This perspective directly complements, at a fundamental level, *TL&D's* commitment to addressing issues of international law of *relevance to the developing world.*

In selecting international investment law for the first Special Issue, we realized we had picked a popular, albeit relevant, topic with a plethora of scholarly works accessible through multiple forums. TWAIL, on the other hand, was not nearly so popular. Most students and, in fact, some practitioners specializing in international law were only vaguely aware of what it represented.⁸ Indeed, the very idea of TWAIL scholarship is to introduce TWAIL concepts into mainstream academia. What could be a better way to generate *new* debate⁹ than to provide a wider platform, especially in the developing world, to disseminate TWAILian thought and open it up for discussion?¹⁰ Providing such a forum fit directly with *TL&D's* belief that a truly *democratic* debate must necessarily be one where a variety of voices

⁶ Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533471 (last visited Sept. 11, 2011) [hereinafter *Mutua*].

⁷ *Id.*

⁸ For this purpose, this Special Issue contains a short bibliography – an essential primer on TWAIL, if you will – of works by leading TWAIL scholars compiled by James Thuo Gathii: 3(1) TRADE L. & DEV. 26, 49 (2011) [hereinafter *Gathii*]. A must-read is Makua Mutua's iconic and aptly titled piece "*What is TWAIL?*", *Mutua, supra* note 6.

⁹ I use the term "new" here to indicate concepts new to our readers. TWAIL itself as a phenomenon and a dialogue spans many decades. In the last twenty years or so, the "TWAIL II" generation of scholars have attempted to build upon the foundations laid by "TWAIL I" academics. See further, B.S. Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3(1) TRADE L. & DEV. 14, 19 (2011) [hereinafter *Chimni*]; *Gathii, supra* note 8, at 28.

¹⁰ Amongst the Journal's goals is counted *TL&D's* commitment to the cause of development by contributing to the dissemination of ideas and promoting of free thinking in the developing world. See, *Trade, Law and Development* website, available at: <http://www.tradelawdevelopment.com> (last visited Sept. 9, 2011).

are given *opportunity* to be heard.¹¹

The nature of TWAIL scholarship is not, however, homogenous. Indeed, Professor Mutua concedes that it is "...replete with internal conflicts, incoherencies, and disagreements of content, strategy, and tactics".¹² Even the articles contained within this issue differ in their conception of TWAIL and their views on the correct method for striking an efficacious balance between the critique and reconstruction of international law.¹³

Yet the very fact of this *heterogeneity*, rather than being a flaw, enhances the democratic nature of the debate upon issues TWAIL addresses. Various TWAIL scholars have repeatedly pointed out both the philosophical and empirical dangers of what may be termed "collaborative intellectualism".¹⁴ Consummate statesman Benjamin Disraeli famously once wrote (in an ostensibly tongue-in-cheek fashion) "my idea of an agreeable person is someone who agrees with me".¹⁵ This is certainly a truism of human nature, and part of the reason why TWAIL scholarship, in challenging the traditional and well-established conception of international law and governance, seeks to construct an emphatic presence in mainstream scholarship. It does not, however, seek to construct a homogenous one. If a part of the *TL&D* belief in sustaining and generating democratic debate is actually providing a forum for voices to be heard,¹⁶ an equal part is ensuring that those voices are sufficiently diverse as to generate a *genuinely democratic* debate.

With these aspects of TWAIL in mind, the articles contained in this Special Issue are unique in that they are not limited to the analysis of issues of International Economic Law, as is *TL&D* tradition. Instead, in seeking to present and disseminate a holistic picture of TWAIL pedagogy and the cause of

¹¹ Kumar, *supra* note 2, at 3, citing the definition of "democratic" provided in Amartya Sen's *The Idea of Justice* as representative of the *TL&D* credo: "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." AMARTYA SEN, *THE IDEA OF JUSTICE* xiii (Penguin, 2009).

¹² Mutua, *supra* note 6, at 31.

¹³ For an excellent analysis of the varied approaches utilized in each article, see Chimni, *supra* note 9, at 21.

¹⁴ TWAIL pedagogy usually asserts that collaborative intellectualism is directly responsible for the perpetuation of Western-centric and imperialist thought. On the other hand, for a fascinating argument on how collaborative intellectualism through critical networks can be used to actively resist established neo-liberalist ideology, see Ulrich Oslender, *The Resurfacing of the Public Intellectual: Towards the Proliferation of Public Spaces of Critical Intervention*, 6(1) ACME: INT'L E-J. CRITICAL GEOGRAPHIES 98, available at: <http://www.acme-journal.org/vol6/UO.pdf> (last visited 14 Sept., 2011).

¹⁵ BENJAMIN DISRAELI, *LOTHAIR*, CH. 35 (LONGMANS, GREEN AND CO. 1870).

¹⁶ Kumar, *supra* note 2.

development as a whole, the Board of Editors took the decision to include works by authors in varied fields of international law. In our continued effort to support creative and effective methods of legal education in the developing world (and with the added flexibility and freedom a Special Issue provides) this Issue further uniquely contains a sample TWAILian philosophy rearticulated in graphic art form.¹⁷

While none of the works contained within this Special Issue represent the explicit beliefs of *TL&D* or its Board of Editors, we are proud to be able to provide a forum through which new ideas may be introduced. It is our hope that they will provide, at the very least, food for thought or, more ambitiously, a platform to launch supportive and critical scholarship and debate, especially in the developing world.

Two roads diverged in the “Special Issue” woods, and we – we took the one less travelled. And we can only hope that it has made a difference.

RECENT DEVELOPMENTS

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

In January 2011, Ricardo Ramírez Hernández, current member of the WTO Appellate Body, graciously agreed to become part of the *TL&D* Advisory Board. A lawyer and an academic, Mr. Ramírez Hernández has spent decades representing Mexico in WTO, NAFTA, investment arbitration, and other international trade disputes and negotiations.¹⁸ *TL&D* is privileged to benefit from the unique developing country perspective and practical experience he brings to the table.

Also joining the Advisory Board in May 2011 was Prof. W. Michael Reisman, Myres S. McDougal Professor of International Law at Yale Law School. A pre-eminent academician, lawyer, and arbitrator, Prof. Reisman is truly one of the world’s international law and international arbitration greats.¹⁹ It is an honour to have him associated with *TL&D*. We look forward to working with both Mr.

¹⁷ Mohsen al Attar & Mia Koning, *Education for Emancipation*, 3(1) TRADE L. & DEV. 266 (2011).

¹⁸ A detailed biography for Mr. Ramírez Hernández can be found at the WTO website, *available here*: http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm (last visited Sept. 5, 2011).

¹⁹ A detailed biography for Prof. Reisman can be found on the Yale Law School website, *available here*: <http://www.law.yale.edu/news/WReisman.htm> (last visited Sept. 20, 2011).

Ramírez Hernández and Prof. Reisman and benefiting from their valuable ideas and suggestions.

The Washington and Lee University School of Law's Law Journals Database contains the most comprehensive (albeit unofficial) ranking system that currently exists for legal journals worldwide. The database ranks legal journals by category, country and editing process – peer-reviewed, student-edited, and refereed – and based on various criteria, including impact factor.²⁰ As of 2010, *TL&D* is ranked first among all legal journals in India in terms of impact factor, and internationally, fifteenth in the field of international trade and eighth in terms of student-edited journals in international trade. Despite the limitations of the ranking system,²¹ it is a pleasure to have a holistic and quantitative hallmark by which to measure the progress and growth of the Journal and by which to set aspirational standards.

With the graduation of four members of the *TL&D* Editorial Board (Manu Sanan, Gopalkrishnan R., Aditi Patanjali and I), the Board was reconstituted for Vol. 3, Issue 2 and Vol. 4, Issue 1 and notified on April 29th, 2011. In recognition of the challenging and, more importantly, varied work expected of the post, the position of “Proofreader” has been reconstituted as “Copy Editor”.

The Editorial Board for Vol. 3, Issue 2 and Vol. 4, Issue 1 is as follows: Yogesh A. Pai will continue as Faculty-in-Charge. Prateek Bhattacharya and Jayant Raghu Ram, two final year students who have proven their dedication to the Journal time and again, will take over the reins as joint Editors-in-Chief. Shreya Munoth has been appointed Managing Editor, with Aman Bhattacharya and Lakshmi Neelakantan serving as Content Editors. Along with three Associate Editors, two second year and two first year undergraduate students have been appointed as Copy Editors. The Board consists of six returning staff members and six new appointees. Former Content Editor Gopalkrishnan R. and I will be remaining in limited capacities as Consulting Editors.

In a return to focus on pure international trade law after the Journal's sojourn into TWAIL, Vol. 4, Issue 1 will be a Special Issue on Dispute Settlement at the WTO.

²⁰ The database itself is available online at: <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Sept. 2, 2011). A detailed explanation of the ranking methodology is available at: <http://lawlib.wlu.edu/LJ/method.asp#methodology> (last visited Sept. 10, 2011).

²¹ While the Washington and Lee legal journals database is the most comprehensive of its kind, it is important to note that it has certain limitations, the most notable of which is that sources for citation counts are limited to documents in Westlaw's JLR (primarily U. S. articles) and ALLCASES (U. S. federal/state cases) databases and to citations which follow the Bluebook format.

ACKNOWLEDGMENTS AND CONCLUDING REMARKS

In keeping with tradition, I want to conclude by acknowledging, on behalf of the Board of Editors, the contributions of those who have helped make *TL&D* a successful endeavour over the past year.

As ever, we are grateful to Justice N. N. Mathur, Vice Chancellor of National Law University, Jodhpur and Founder-Patron of *TL&D* for his continued support of our Journal, and for keeping the doors of his office and his mind open to any and all proposals, queries, and requests we lay before him (and there have been many). We also appreciate the contribution of Mr. Ratan Lahoti, Registrar of the National Law University, Jodhpur, in terms of logistical support and publication.

I must also acknowledge Prof. Yogesh A. Pai, *TL&D* Faculty-in-Charge. Prof. Pai has played a pivotal role in the continued quality and strength of the international trade and investment law programme at National Law University, Jodhpur –constantly challenging and motivating his students to set higher standards for themselves. Many current and former Board members (including myself) have been privileged to count ourselves among that number. As Faculty-in-Charge of the Journal, his contributions in terms of time, enthusiasm, and guidance have been both inspirational and indispensable.

Last year, *TL&D* founder and former Editor-in-Chief Shashank P. Kumar authored the Anniversary Editorial, and therefore could not, obviously, thank himself. However, *Trade, Law and Development* was, at its inception, Shashank's brainchild, and without his countless hours of hard work transforming the Journal from an idea in his head to a tangible endeavour, *TL&D* would not exist today, let alone as a success. On behalf of the entire Board of Editors, I would like to offer a long overdue and heartfelt thanks to Shashank for his commitment and passion for legal education as well as his exacting standards and unerring eye for detail. He is the originator of much of the knowledge each generation of *TL&D* staff hones and passes on to future members. He continues to offer guidance, having been an invaluable force in the composition and success of this Special Issue on TWAIL.

Furthermore, the contribution of Prof. Chimni to this TWAIL Special Issue cannot, of course, go unmentioned. From introducing us to TWAIL, to assisting in the construction of this Special Issue and writing the Issue Editorial, his efforts were crucial in bringing together this issue. We are grateful for his time and enthusiastic support.

The biggest thanks each year, however, must always go to our advisors, contributing authors, and readers. We are indebted to our advisors for their guidance and the gift of their experience and time, our authors for placing their

trust in our publication, and our readers for providing our efforts with a purpose and rendering them worthwhile.

And finally, I would like to thank the *TL&D* staff for their sincerity and dedication, and, as full-time students, for putting in without complaint the many man-hours it takes to keep the Journal running.²²

The efforts of this small group of students has often brought to mind one of my favorite quotes from *The Aeneid*, “*possunt, quia posse videntur*”,²³ which roughly translates from the Latin to “they *can* because they *think* they can” (emphasis supplied). In my two years at the Journal, this has been the spirit that has driven our work. I have complete faith in it as a philosophy to take *TL&D* to greater heights in the future as I wish each of you and *TL&D* all the very best.

²² A special mention must go to the new members of the 2011-2012 Board of Editors for assuming the mantle of responsibility early and assisting us in the completion of the Special Issue.

²³ JOHN DRYDEN (TRANSL.), VIRGIL, THE AENEID, Book V, Line 231 (P. F. COLLIER & SON, 1909), available at: <http://www.gutenberg.org/files/228/228-h/228-h.htm> (last visited Sept. 12, 2011).