

## *Special Issue: Trade & Climate Change*

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*Anniversary Editorial*

## A 'HEATED' DEBATE: THE WTO'S CLIMATE QUESTION

**ALI AMERJEE\* & NAKUL NAYAK\*\***

*Everybody talks about the weather, but nobody does anything about it - Mark Twain*

The exponential growth in international trade in the past few decades brought with it prosperity and a new gamut of problems. On the one hand, both developed and developing nations benefitted tremendously due to the integration of the global economy. On the other, increased trade meant rapid consumption of resources, multiplicity in manufacturing processes and the transportation of these manufactured products across borders. The implications of the latter on the environment cannot be overemphasized. The effects of world trade on the climate have been significant. Consequently, climate change has become the foremost challenge facing the global community today.

Mitigating global warming and adapting to its consequences will require major economic investment and, above all, unequivocal determination on the part of policy-makers across the globe. It is estimated that, over the last century, the global average surface temperature has increased by about 0.74° C.<sup>1</sup> Hence, controlling climate change is intrinsic to the sustenance of the human race and other flora and fauna.

The Parties to the Marrakesh Agreement<sup>2</sup> recognized the importance of sustainable development and the protection of the environment. Accordingly, these objectives

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<sup>1</sup> UNEP & WTO, TRADE AND CLIMATE CHANGE, vii, (2009).

<sup>2</sup> Marrakesh Agreement Establishing the World Trade Organisation, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

find mention in the agreement's preamble. Article XX of the GATT serves as further evidence of the international trade regime's commitment to conserving natural resources and protection of the health of all biological life.<sup>3</sup> Article 8 of the SCM Agreement included a list of 'non-actionable' subsidies ('green light subsidies') till January, 2000. Importantly, this list provided exemption for subsidies aimed at assisting domestic industry to adapt to environmental regulation.<sup>4</sup>

The rules of the WTO and the UN Framework Convention on Climate Change (UNFCCC) also work in tandem in this respect. The combination of Article 3.5 of the UNFCCC<sup>5</sup> and Article 2.3 of the Kyoto Protocol<sup>6</sup> provide that measures taken to combat climate change should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. They should be implemented so as to minimize adverse effects, including on international trade, and social, environmental and economic impacts on other Parties. The WTO's Committees on Technical Barriers to Trade and Environment further bolster the efforts of the international trade regime towards sustainable development. In the on-going Doha Round, members went further in their pledge to pursue a sustainable development path by launching the first ever-multilateral trade and environment negotiations.

Yet, it is perhaps our Call for Submissions that best captures the reason we chose Trade & Climate Change as our theme for this Special Issue. In so many words, it was hoped that the Issue provides "an ideal platform for deliberation on the relationship between trade and climate change in the run-up to the proposed 2015 global climate change deal." The timing of the publication could not have been more opportune. With the first week of Lima Climate Change Conference having just concluded, it is hoped that this Issue will bring some much needed perspective to the trade-related aspects of the climate change question.

Despite the proliferation of law and policy on the subject, arriving at Trade and Climate Change as a suitable theme for this Special Issue seemed quite challenging at first. The Board of Editors began brainstorming on the theme as far back as in January 2013. The entire process was exhaustive, with past and current Editors,

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<sup>3</sup> General Agreement on Tariffs and Trade, art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>4</sup> Agreement on Subsidies and Countervailing Measures, art. 8.2.c, April 15, 1994, 1869 U.N.T.S. 14.

<sup>5</sup> United Nations Framework Convention on Climate Change art. 3.5, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

<sup>6</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2.3, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

Consulting Editors and our Faculty-in-Charge, all weighing in with remarkably imaginative suggestions.<sup>7</sup> After discussing and deliberating over several months, it came down to a split in votes. Despite the fractured consensus, a year since, arriving at Trade and Climate Change as the theme for this Special Issue at this time in the global intellectual paradigm, seems only natural.

In earlier staff editorials, much space was devoted to analyzing TL&D's foundational philosophy.<sup>8</sup> The Board takes considerable pride in its self-given responsibility of focusing on issues from a developing country lens. We were acutely aware about the asymmetric balance in prevalence of academic perspectives from the 'global north' vis-à-vis the 'global south', especially on the question of climate change. Accordingly, the Call for Submissions included a caveat that "[p]reference will be given to submissions that espouse perspectives of developing and under-developed countries."<sup>9</sup> At every step of the editorial process, the Board has attempted to suggest changes and provide a "third world approach".<sup>10</sup> We can only hope at this stage of culmination that we have pushed the envelope further in this endeavour.

## I. CONTENTS OF THE SPECIAL ISSUE

This Special Issue encompasses a range of diverse ideas. One would expect this from a theme that espouses, up until recently, two distinct disciplines. Authors have grappled with extant issues, identified novel questions and listed inspired proposals, all culminating into a Special Issue that promises to provoke if not persuade.

Prof. Thomas Cottier, in his guest editorial, identifies three core issues that serve to provide a thought provoking foundation for the rest of the Issue.

On substance, the Issue begins with a crisp article by Dr. Rafael Leal-Arcas, a leading figure on climate change and international trade. Adopting a straightforward approach, Dr. Leal-Arcas lists several trade proposals to address climate change mitigation and expanding on them with aplomb. In particular, one

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<sup>7</sup> On a small aside, the discussions for this Special Issue theme marked a coming of age in the Board about how special issue themes should be arrived at *generally*. Not only was the appropriate theme debated, but a conceptual framework on arriving at themes was created and the considerations behind what makes a special issue *special* were also earmarked.

<sup>8</sup> For an erudite analysis on TL&D's purpose and beliefs, see Shashank P. Kumar, *A Yearful of Thoughts*, 2(1) TRADE L. & DEV. 1, 2-6 (2010) [hereinafter Kumar].

<sup>9</sup> Trade, Law and Development, *Call for Submissions*, <http://www.tradelawdevelopment.com/Uploads/6.1%20Call%20Poster.pdf>.

<sup>10</sup> See Meghana Sharafudeen, *2010-2011: Taking the Road Less Travelled*, 3(1) TRADE L. & DEV. 6, 6-10 (2010).

would do well to study his views on stronger governance of global energy trade and trade support for green energy.

Prof. Kati Kulovesi's article mavericks contemporary notions that climate change policies are problematic from the WTO perspective. She establishes the connection between the WTO and UNFCCC and emphasizes its importance in limiting global temperature rise to 2°C from pre-industrial times. Prof. Kulovesi also argues that though trade bans and border carbon adjustments for PPMs have received considerable attention from academia, no concrete policies have been formulated in that context. She also highlights how renewable energy policies are intrinsic to achieving the 2°C target.

In his landmark article on the proposed environmental goods agreement, Prof. Mark Wu seeks to fill the void in scholarship in the field. First, he establishes the rationale behind why the multilateral approach to the negotiations has transformed into a plurilateral one. Subsequently, he puts forth the conventional explanation to the absence of the developing nations from the negotiations. He buttresses this with his alternative explanation to such an absence and carves out an original analysis based on data from the UN Comtrade database. Prof. Wu also explains why the absence might not be a temporary phenomenon. Further, he elucidates how the potential exclusion of developing nations will be a bane for the environmental goods agreement. Finally, he suggests how more developing countries can be brought into the agreement's fold.

The final article in this Issue has been authored by Prof. Sadeq Z. Bigdeli. Adopting an inter-disciplinary approach, Prof. Bigdeli has provided a unique perspective on the political realities that must be tackled in respecting WTO adjudications on trade and renewable energy, concluding that certain exigencies demand that trade interests must give way to environment interests. He even goes on to incisively analyse the recent Ontario/Canada FIT proceedings, advancing an alternative interpretation to GATT Article III:8, among others.

The sole Note in this Special Issue makes a compelling case for recognizing developing country-led 'sui generis' labelling schemes as a novel method of replacing product carbon labelling schemes. Mahesh Sugathan provides a practitioner's perspective peppered with insights into developing country concerns. Of note is his comparative analysis of the methodologies used in PCF labelling and certification and their shortcomings.

## II. RECENT DEVELOPMENTS

The Board of Editors bid an emotional farewell to our first Faculty-in-Charge, Prof. Yogesh Pai,<sup>11</sup> who left our university earlier this year. Having held the position since the journal's inception, he was a repository of knowledge on the journal's functioning. He was also a source of steady guidance and support for the both of us. His receptiveness to our ideas and calm working style were both reassuring and admirable. On behalf of the entire Board, we express our deepest gratitude for his selfless and tireless contribution to the journal, and wish him well for his future endeavours.

We also heartily welcome Prof. Bipin Kumar as the new Faculty-in-Charge of the journal. Prof. Kumar brings with him a wealth of experience in international economic and commercial laws. Previously, he served as a Consultant at the Centre for WTO Studies (Indian Institute of Foreign Trade) and as the editor of the WTO Dispute Watch. Currently, he is an Assistant Professor at the National Law University, Jodhpur. We are certain that his appointment will bolster our quest for excellence in the global academic sphere.

Visibility and accessibility are key to an open-access journal's success. In the endeavour to keep pace with modern times, where there is an increasing premium on portability of information, the journal has adapted to social media. We have created a new Facebook Page<sup>12</sup> and a Twitter<sup>13</sup> account. It was done in the hope that these tools would extend our reach to more readers across the globe and keep them well informed about our publications and other activities.

The journal already had contracts with HeinOnline<sup>14</sup> and EBSCO Publishing<sup>15</sup> for the distribution of its content. This year, TL&D entered into another non-exclusive license agreement with Thomson Reuters. Accordingly, all our past and future issues will be accessible on the popular research database: Westlaw. The journal's content is now also available on Ulrichsweb and the Open Access Journal Index (OAJI). It is hoped that these developments will go a long way in achieving our stated objective of *delivering* knowledge.

The internal functioning of the journal has also witnessed transformation. The membership of the new Board of Editors for the 2014-2015 academic session has

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<sup>11</sup> Kumar, *supra* note 8, at 6.

<sup>12</sup> Trade, Law and Development, <http://www.facebook.com/tradelawdevelopment>.

<sup>13</sup> Trade, Law and Development, <http://www.twitter.com/TradeLawDev>.

<sup>14</sup> Kumar, *supra* note 8, at 7.

<sup>15</sup> Prateek Bhattacharya & Jayant Raghu Ram, *Settling Trade Disputes: Butter, Not Guns*, 4(1) TRADE L. & DEV. 9 (2012).

been expanded to an unprecedented eighteen editors. This will facilitate smoother functioning considering the large volume of submissions received and the greater workload the journal is experiencing.

One of us (Ali Amerjee) will continue to serve the journal in the capacity of the Editor-in-Chief, whilst the other (Nakul Nayak) has decided to step down and assist the journal as a Consulting Editor. Prakhar Bhardwaj, who previously served as Senior Content Editor, will don the mantle of the other Editor-in-Chief. Aabhas Kshetarpal, a fourth year student specializing in Intellectual Property laws, has been appointed as the Managing Editor. The Board of Editors is also finalizing the 'TL&D Constitution', which will establish the formal framework for the working of the journal.

The journal also received attention from the media. We were interviewed by the prominent online legal news domain Bar & Bench<sup>16</sup> and received mention in the leading business daily, Business Standard.<sup>17</sup> It also gives us immense pleasure to report that TL&D has retained its ranking as the best law journal in India for the third consecutive year by the Washington and Lee University (St. Louis School of Law) Law Library in its annual rankings of law journals.

In keeping with our democratic process for the selection of themes for Special Issues, the Board of Editors voted for their most preferred theme for Volume VII, Issue 1. There was an intense discussion between the editors and several proposals were put forward. Global IP, RTAs, Global Administrative Law and Public Health were themes that were elaborately discussed. In the end, the editors voted by majority for 'Government Procurement' as the theme for the Special Issue next year. There was strong consensus that the amended GPA and global efforts towards reducing corruption in government contracts were of high contemporary relevance.

### III. ACKNOWLEDGEMENTS AND PARTING REMARKS

In the recent past, the journal has witnessed a tough transition phase. Our appointment as Editors-in-Chief was nascent and unprecedented, perhaps reflective of the exigent circumstances. We assumed responsibilities in our

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<sup>16</sup> Shreya V, *The Journalists: The Ed Board — Trade, Law and Development*, BAR AND BENCH Oct. 9, 2014, <http://barandbench.com/content/212/journalists-ed-board-trade-law-development#.VHznNKUcUo>.

<sup>17</sup> T. S Vishwanath, *Much Ado about FDI in Retail*, BUS. STANDARD Apr. 29, 2014, available at: [http://www.business-standard.com/article/opinion/t-s-vishwanath-much-ado-about-fdi-in-retail-114042901447\\_1.html](http://www.business-standard.com/article/opinion/t-s-vishwanath-much-ado-about-fdi-in-retail-114042901447_1.html); Prabhash Ranjan, *FDI in Multi Brand Retail Trading and India's Bilateral Investment Treaties*, 5(1) TRADE L. & DEV., 1, (2013).

penultimate year of undergraduate study, whereas the trend was to appoint final year students. The penultimate year is otherwise the busiest year in an Indian law student's university life. It is peppered with activities such as internships, moot court competitions, recruitment and other academic commitments. Once this broth is garnished with the immense responsibility of leading a journal, the goal becomes audacious. However, we have survived and our largest thanks must go to the current Board. The editors have acted beyond their call of duty and displayed remarkable resilience in spite of the demanding schedules and the exacting standards that TL&D strives for.

We must also thank the Consulting Editors, all of whom are our university's alumni. Their active involvement in the activities of the Board has rejuvenated the spirit of debate within the journal. Their endeavour has always been to best achieve the objectives of the journal. Our discussions with them serve a unique utility - that of informing the Board about the numerous roads towards achieving the same goal. In times of desperation, the advice of the Consulting Editors has been a guiding light on an otherwise uncertain path. The publication of this Issue would have been impossible but for their occasional timely interventions.

July, 2013 saw a change in guard in our University. Justice NN Mathur, who had long served as the Vice Chancellor, bid farewell to our University. In his place, Prof. Poonam Saxena was appointed as the new Vice Chancellor. While there was a change at the helm, there was no variance in the attitude towards TL&D. Prof. Saxena, much like her predecessor, is exceptionally generous to our journal, both in her time and her decisions. We are certain that our relationship with our new Patron will only grow ever stronger. In a similar vein, the new Registrar, Mr. Sohan Lal Sharma, has been very cooperative and ensured that administrative duties of the Board could be wholly delegated to his staff, leaving us with the exclusive responsibility of editing.

Prof. Mark Wu of Harvard Law School graced the corridors of our University as a Visiting Fulbright Specialist in July 2013.<sup>18</sup> The duration of his stay was an exciting period for the journal as we had countless interactions with him, allowing us to grow as a Board. On a personal note, we would most cherish our expeditions with Prof. Wu outside the University. Sipping *chai* and attending cultural concerts gave us the rare opportunity of unravelling the mind of an erudite, yet humble, scholar, allowing us in turn to grow as individuals. Proving to be a gift that keeps giving, Prof. Wu has authored a pioneering article, one that TL&D is indeed honoured to publish.

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<sup>18</sup> Lecture Series, National Law University, Jodhpur, [http://www.nlujodhpur.ac.in/downloads/Lecture\\_Series.pdf](http://www.nlujodhpur.ac.in/downloads/Lecture_Series.pdf).

And finally, we cannot conclude without expressing our gratitude towards the institution that is TL&D. Apart from serving a cause much desired, TL&D also operates unwittingly as a forum for developing close bonds amongst colleagues working towards a collective whole. That intangible bond, running through the fabric of the Board, acts as a great leveller, reorganising the structure of the journal, from a vertical hierarchy to an administrative hierarchy; more characteristic of first-amongst-equals. The democratic framework adopted by the Board is testament to the recognition of equality within the Board. In a world that increasingly seeks to exclude, TL&D bucks the trend. Having come so far and harbouring ambitions of treading much further, if there is one asset to jealously guard, it is this.