10th Anniversary Special Issue: Trade Facilitation

EDITORIALS

Anirudh Gotety & Rakshita Goyal, Facilitating Trade and Removing Barriers: A New Epoch for Multilateral Trade?

Nora Neufeld, Great Expectations: How the World Trade Organization’s Trade Facilitation Agreement Impacts Trade and Trade Cooperation

Maureen Irish, The Trade Facilitation Agreement: Is the Doha Development Round Succeeding?

Mohammad Saeed, Eleonara Salluzzi, Victoria Tuomisto, et al., The ‘Rights’ of the Private Sector in the Trade Facilitation Agreement

Bipin Menon, Trade Facilitation—A Boundless Opportunity for India

Stephen Creskoff, India’s Path to Improved Trade Facilitation and Enhanced Economic Development

Christina Wiederer, The Role of Logistics in Supporting International Trade and Development—A Literature Review

Hsing-Hao Wu, Refining the WTO Trade Facilitation Agreement in the Face of an Uncertain Trade Environment: Challenges and Opportunities
Recent years have seen the World Trade Organization’s (WTO) legitimacy and accountability come under question from various quarters, in no small part due to the stalemate in negotiations. Is the lack of new trade rules affecting the centrality of the WTO and its relevance in the global trade agenda? Does the model of rulemaking need to be updated to respond to current challenges?

The entry into force of the Trade Facilitation Agreement (TFA/the Agreement) on February 22, 2017, allays some of these doubts as much as it betokens a reinvigorated WTO. As the first multilateral agreement entered into since the formation of the WTO, it has the capacity to serve as the blueprint of future rulemaking at the organisation.

The road to the TFA being adopted was beset with hurdles. The proposal for work to be undertaken on trade facilitation at the 1996 Singapore Ministerial Conference was met with scepticism, and uncertainty regarding the need for the WTO to negotiate the issue persisted even after years of discussion.\(^1\) Negotiations were finally launched in 2004 with no foreseen end product in mind.

Trade facilitation is often used to mean the reduction of red-tape in international trade, especially with regards to customs and other trade and border procedures, though the definitions of the term are as multifarious as the organisations concerned with achieving it. Section I of the TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It clarifies and expands the scope of articles V, VIII and X of the General Agreement on Tariffs

and Trade (GATT) 1994. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues and for technical assistance and capacity building in this area. The TFA is expected to yield significant benefits, as showed in studies by organisations such as the World Bank and the Organisation for Economic Cooperation and Development (OECD). One such model suggests an increase of global trade in manufactured goods by USD 377 billion per year. Another model suggests that each 1% saved in the cost of trading could result in a worldwide benefit of USD 40 billion.

Most of the Agreement’s trade facilitation measures have originated elsewhere and include the activities of the World Customs Organization, the trade facilitation recommendations produced by the United Nations Centre for Trade Facilitation and Electronic Business, the International Maritime Organization’s Convention on Facilitation of International Maritime Traffic, and the International Civil Aviation Organization’s Facilitation Annex 9 to the Chicago Convention. The WTO agreement may thus seem familiar, especially to countries who subscribe to these. The discipline of the WTO and the strength of its enforcement and dispute settlement mechanisms, on the other hand, should help ensure that these commitments are more universally and consistently put in place.

The TFA’s unique implementation architecture has received much attention. The requirement to implement the Agreement has been related to the ability to do so. To aid the developing and least-developed countries (LDCs) in achieving this capacity, a Trade Facilitation Agreement Facility has been set up. The implementation of the TFA will thus take place in a phased manner. Developed countries have applied the substantive portions of the TFA from the date it took

---

effect. Developing countries and LDCs have applied only those substantive provisions which they had the capacity to implement from the date of entry into force. For certain other provisions, they have been granted the ability to self-designate their implementation periods and technical assistance needs. The Agreement contains other distinctive features which have not been as widely discussed but may set a substantial precedent for rulemaking at the WTO. For instance, the self-designation and categorisation of measures result in each developing country taking a Member-specific approach to its TFA commitments. While a Member-specific approach to market access commitments has been usual since the original GATT, rules commitments have tended to have a broad application to all Members or, where some differentiation of Members is used, to broad groups of Members based on objective criteria. In this sense, the TFA may have broken the mould for how rules commitments are negotiated.

The proposal for trade facilitation being elected as the theme for the Special Issue had been on the table for the past three years but was vetoed as being too premature. With more than a year having passed since the Agreement’s entry into force in 2017 at the time the theme was being deliberated upon in July 2018, the Board felt it was finally an opportune time to appraise the impact of the TFA and map out the contours of its progress. Moreover, as a journal committed to bringing third world standpoints and concerns to the fore, this theme offered an exciting opportunity to approach this Agreement from their perspective considering the comprehensive special and differential treatment provisions therein.

The decision brought its own set of anxieties. Being a niche area in the field of trade, the pool of authors writing on the same is restricted. It was also felt that not enough ground was available to populate an entire Issue since little progress had been made on the implementation or dispute-front under the Agreement. We hope the final product has been able to overcome these initial reservations.

I. CONTENTS OF THE SPECIAL ISSUE

With this Special Issue, it is our endeavour to bring trade facilitation to the forefront of academic debate and stimulate the production of literature that would effectively equip policymakers to deal with matters pertaining to the new Agreement. With the diverse facets of trade facilitation probed in this Issue and the inspired recommendations presented, we believe the envisaged goal has been achieved to some degree.

Ms. Nora Neufeld, the erstwhile Secretary of the Negotiating Group on Trade Facilitation at the WTO, sets the ground with her editorial, discussing the considerable expectations that were attached to the TFA as a significant achievement.
of multilateral rulemaking and evaluates the progress made in implementation on this touchstone. She crunches ratification figures, maps out implementation notification data, and attempts to assess the TFA’s impact especially in relation to transaction times and costs, increased participation in international trade, and sustained regional and domestic facilitation. What makes the TFA of utmost importance, she concludes, is the way its altered conception of trade cooperation could serve as a model for future negotiations.

As emphasised above, the SDT provisions of the TFA have been hailed as a watershed. Prof. Maureen Irish’s timely and crisp article explores what sets the Agreement apart in this regard: the option developing countries and LDCs have been given to establish their own implementation deadlines and the link between capacity and commitment. This innovative approach may be suitable for adoption in other agreements and may signal a new ray of hope for development at the WTO, which had moved away from the development model of the 1979 Enabling Clause with the Uruguay Round. One would especially do well to study her views on the challenges that could be faced when it comes to these provisions. Trade facilitation is concerned with business’ operational requirements in international trade. As such, trade diplomats are unlikely to be suitably knowledgeable to provide adequate assessment that would yield the full trade facilitation benefits. It is the quality and continued review of implementation that counts and it is the private sector that through research and consultation would be best able to advise.

The TFA, Dr. Mohammad Saeed and his team at the International Trade Centre explain in their article, acknowledges the private sector as a key beneficiary as well as government partner and implementer of trade facilitation reforms and thus provides explicit and implicit rights to traders. Through provisions like customs-lead schemes of authorised operators and post-clearance audit to the requirement for regular consultations, a platform is provided for the private sector to play their part in policy formulation and monitoring of implementation. To boost this participation, they suggest ways of involving economic operators in the trade facilitation policymaking and implementation process, particularly through public-private dialogue (PPD) entrusted in the National Trade Facilitation Committees (NTFCs), as a key way to cooperate and coordinate with public border agencies on the implementation of the TFA.

This Issue would be incomplete without an account of India’s progress with regard to the TFA and the challenges the country could face going forward. Mr. Bipin Menon undertakes this task, informing readers of the provisions India has notified and the implementation mechanism it has adopted. The work plan of the National Trade Facilitation Action Plan (NTFAP) has been highlighted, like the role of the working groups on legislative changes, trade related infrastructure, and outreach.
programmes as has India’s trade facilitation performance as per certain parameters defined by the World Bank. The author then succinctly lays out the major challenges India could face going forward and how they can be tackled to avail of the many opportunities the Agreement offers.

Mr. Stephen Creskoff’s piece fittingly complements Mr. Menon’s article as he explains how and why India is currently lagging behind developed economies as well as middle income economies such as China in measures of trade facilitation performance and in implementation of the provisions of the TFA. He lists proposals to improve India’s performance such as the development of an active public-private partnership dedicated to implementing trade facilitation improvements and legislative reforms of India’s customs regime. This should result in regular and accurate measurements of India’s trade facilitation performance, improved functioning of the National Trade Facilitation Committee, legal reforms necessary to implement all measures required by the TFA, and the improved transparency and functioning of India’s trade regime through the use of modern information technology.

Ms. Christina Wiederer delves into the importance of a rigorous logistics environment (cost, time and complexity involved in import and export activities) for a country’s satisfactory trade performance. This is of particular significance in the context of trade facilitation as it is concerned with processes that can hinder trade once formal barriers such as tariffs have been removed. The TFA can be expected to increase the reliability and predictability of supply chains and thus may support higher logistics performance. Her article thus assesses the current state of knowledge about a country’s logistics environment as an enabler of international trade, with a focus on developing countries, and shows how policymakers can focus their efforts on improving the logistics environment.

The Issue is rounded off with Prof. Hsing-Hao Wu’s perceptive and contemporaneously relevant article. He identifies and critically analyses possible challenges that the increasingly uncertain and protectionist trading environment could pose for the full implementation of the TFA. The potential conflict between trade and public interests like national security, public health and environmental quality that implementation of the TFA could result in is also studied. He ends with astute suggestions for future refinement of the TFA from legal and institutional reform perspectives.

It gives us immense pleasure to present a rich array of literature that represents a nascent analysis of the TFA and leave the reader to peruse the enriching content in the pages that follow.
II. RECENT DEVELOPMENTS

Over the past year, we made efforts to make the functioning of TL&D more democratic and incorporate an open communication channel between the members of the Board. We believe if even the junior-most editors on the Board know how decisions are made, it would help motivate them to contribute their best.

In furtherance of the above and to ensure the core values of TL&D are consistently reflected in its working, we have finalised the internal Constitution of TL&D (something that successive boards have worked on) which we hope the next editorial board will get approved by the University administration. We have included provisions in our constitution which explicitly deal with sexual harassment keeping in line with international best practices. We realise that as an editorial board, it is our responsibility to deal with integrity in all our operations and hope the Constitution will always guide us in this endeavour.

TL&D was honoured to host Prof. Dr. Ernst-Ulrich Petersmann, Emeritus Professor at the European Institute University, Florence for a lecture series on ‘Methodology Problems in International Trade, Investment and Health Law and Adjudication’ in March at the National Law University, Jodhpur campus. During the lecture series, Professor discussed contemporary problems facing the international trading system, especially those posed by the United States in relation to GATT Article XXI and WTO Appellate Body appointments, the contents of which he has discussed in his article for Issue 10.2 of TL&D. He also discussed issues in adjudication of health and investor-state disputes. The lecture series saw enthusiastic participation from students who wanted to know what was really ailing the multilateral trading system and what the way forward was.

In furtherance of the journal’s open access commitments, we have entered into a publishing agreement with SCCOnline, one of India’s leading online legal libraries. With this, TL&D can now be found on HeinOnline, EBSCO, and Westlaw internationally, and on Manupatra and SCCOnline domestically, which makes TL&D one of the best circulated legal journals in India. Sustained readership and visibility are crucial for the growth and continuity of any publication and these initiatives should aid in TL&D continuing to derive encouragement and support through reaching a wider audience.

---

As is tradition, the outgoing Editors-in-Chief choose the succeeding board from applications received by students in the University. We received over three-times the number of applications than there were positions available and had to turn down some extremely promising candidates, which has been the sustained trend for the journal. This imbalance is a testament to the reputation TL&D enjoys and hopefully lives up to. We are, however, extremely happy to hand over the reins for Issues 11.2 and 12.1 to two of the most competent editors on the Board, Ipsita Gupta and Radhika Parthasarathy, who are now final year students at the University.

III. TEN YEARS AND CONCOMITANT CHALLENGES

The past year has been significant for Trade, Law and Development (TL&D). This Special Issue marks TL&D’s tenth year into publication. TL&D began as a germ of an idea back in 2009, to address issues of world trade and law, with an uncertain future ahead of it. To witness its transformation into one of the world’s foremost trade law journals has been thrilling.

This journey, like others, faced its own challenges. As our founding Editor-in-Chief (EiC), Shashank Kumar, pointed out in his editorial in 2010, student-run law reviews in India struggle to ensure continuity. Many such reviews have been started by students only to be found gathering dust in the archives years later. There were times when TL&D’s existence seemed to be in jeopardy, notably at the time of the publication of Special Issue 5.1. The journal, however, managed to persevere as a result of mechanisms put in place 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.

As it aptly said, nothing good ever comes easy and so this tenth year faced its own difficulties

In July, the TL&D website was infested by a virus. It appeared that all the data was wiped from the servers and the website would have to be built again ground up. This entailed getting in touch with someone who could rebuild the website as well as coordinating with the previous Editors-in-Chief for their inputs and the Issues they had worked on. The crisis made us look inwards into the design and features of the website, which are archaic by 2019 standards, and to recalibrate the importance placed on the non-content components of managing a journal. Processes have thus

10 Shashank P. Kumar, A Yearful of Thoughts, 2(1) TRADE, L & DEV. 1 (2010).
been initiated to rejig the website, a task that is being carried forward by the current editorial Board.

Over the last couple of years, the Special Issue has tended to be delayed because of the many challenges that were faced by the Board to release the Issue on time. These included authors withdrawing at the last moment or the lack of manpower as the case maybe. The current Editorial Board of 2018-19 (Board) was able to release the backlog of 2 issues (9.1 and 10.1).

The widespread prevalence of sexual harassment and assault has time and again come to be demonstrated and acknowledged in recent times as part of an international movement. Growing awareness has led to dialogues around the magnitude and urgency of the problem and encouraged many victims, especially women, to come forward with previously unreported incidents. University campuses are no strangers to sexual harassment, though accusations are scarcely levelled due to the social repercussions that generally follow and the often inadequate mechanisms in place to deal with such complaints. The Journal and the University broadly had to contemplate a clear policy for handling such cases when a senior member for this Board was replaced following allegations of sexual harassment. While eradication of sexual misconduct specifically and misogyny generally will take massive, prolonged and concerted overturning of entrenched societal norms, the process could be expedited by ensuring that we do not inadvertently end up enabling perpetrators and create safe spaces for those whom they target. As a journal functioning under the University, our mandate is narrowly defined. However, the Board is under the process of incorporating provisions under its Constitution that could lay down a precedent for how we would deal with such recurrences in the future, if any, and display solidarity with the victim(s).

The change at the top affected the functioning of the Board severely. It came about at a time when Issue 10.2 had not been released and a lot needed to be done to finalise the same. The exit of a senior editor on the Board meant every editor had to take on much more work, both editorial as well as managerial, along with the University coursework that every student is involved in. Former EiC Ali Amerjee has discussed just how taxing these journal commitments are for students, and how often such publications end up languishing due in the absence of the proverbial carrot and stick. We are grateful to the extremely hardworking editors who helped us pull through this crisis and helped save TL&D from a similar fate.

---

Notwithstanding these challenges, the Board has marched into the tenth year with its head held up high and the purpose and beliefs behind its inception guiding us.

The editorial had been a significant fixture in every special Issue since year one. It serves the important function of elucidating why a particular theme has been chosen for the Issue, keeps the readers abreast with developments concerning TL&D and its vision, and gives the outgoing EiCs the occasion to acknowledge the people without whom the success of the journal would not be possible. This editorial incidentally happens to be the first since Issue 7.1. We hope the next Board will continue with this tradition.

IV. ACKNOWLEDGEMENTS AND CONCLUDING REMARKS

There are those without whom TL&D could not have functioned effectively. We are thankful to our Patron, the Vice Chancellor of National Law University, Jodhpur, Prof. Dr Poonam Pradhan Saxena, who has always supported TL&D in its various endeavours. We are grateful to her for being extremely patient with the Journal, especially considering the Issue backlogs we had accumulated.

We separately thank the Registrar of National Law University, Jodhpur, Mr. Sohan Lal Sharma for all the logistical support he has provided. We are extremely thankful to our faculty-in-charge, Dr Rosmy Joan, who has been a pillar of support for the Board. She has always been by our side and has been the board’s rapporteur with the university administration which ensured TL&D could function smoothly. Her support took a significant load off the senior managerial members in the Board which allowed us to focus on the editorial work, something we hope is reflected in Issues 10.2 and 11.1. We would also like to thank Mr. Vinod D, the Head Librarian at the University who has made it a point that students at University have access to the latest materials on international trade law or otherwise.

We are also grateful to our consulting editors, whom we look up to for guidance and support when we need it. We especially thank Mr. Ali Amerjee who has been always been ready and willing to help us out with any issues that we may have faced. Separately, we thank Mr. Prateek Bhattacharya for partially funding the Board’s annual dinner.

We have thanked a lot of people who have been instrumental in TL&D’s success. However, we would be remiss if we didn’t thank the student editors on the Board. The success of the Journal is fully reliant on the quality of work that is put in by our editors. We have some of the brightest minds in the university on the Board. They are efficient, sincere, hardworking, and respond well to feedback. The Board also has to undertake some arduous managerial work in relation to the working of the
journal. For example, our work is not limited to editing articles and communicating with authors and includes maintaining the website and preparing tenders for printing issues of TL&D, among other things. Such tasks would usually be outsourced to the administrative staff of the university in other student-run law reviews. For the successful publication of this Issue, a heartfelt thank you to the entire Board who sometimes worked on short deadlines, patiently attended to our multiple emails and feedback sessions, and turned in some rather insightful work.

Finally, TL&D holds a special place in our hearts and this Issue marks the ends of our respective journeys with TL&D. Apart from the usual college activities—tests, debates, moot court competitions and other extra-curricular activities that we may have chosen to be involved in—TL&D has provided us with another creative outlet. It has allowed us to communicate and work with authors of international repute and build personal relationships with them along the way. Apart from this, working with the journal has bestowed us with skills such as research and drafting which are essential for a young lawyer. TL&D is one of the few things the University is involved in and is known for internationally. It swells us up with pride to see our names on the masthead and to give something back to the University. TL&D completing ten years is a testament to what young students can achieve when they come together and work towards a common goal. We hope the journal publishes many Issue in the years to come, remains dedicated to the cause of disseminating knowledge, and that the students of the University continue to benefit from the many opportunities it offers.