This tribute to Professor Detlev Vagts of the Harvard Law School brings together his colleagues at Harvard and the American Society of International Law, as well as academics, judges and practitioners, many of them his former students. Their contributions span the entire spectrum of modern transnational law: international law in general; transnational economic law; and transnational lawyering and dispute resolution. The contributors evaluate established fields of transnational law, such as the protection of property and investment, and explore new areas of law which are in the process of detaching themselves from the nation-state, such as global administrative law and the regulation of cross-border lawyering. The implications of decentralised norm-making, the proliferation of dispute settlement mechanisms and the rising backlash against global legal interdependence in the form of demands for preserving State legal autonomy are also examined.

The editors of this volume represent three generations of Professor Detlev Vagts’ Harvard students: Rudolf Dolzer (LLM 1972, SJD 1979), Pieter H. F. Bekker (LLM 1991) and Michael Waibel (LLM 2008). Vagts’ profound impact on academics and practitioners worldwide is evidenced by the background and geographical breadth of the contributors, twenty-three of whom have studied at Harvard Law School.
MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY

Essays in Honour of Detlev Vagts

Edited by

PIETER H. F. BEKKER,
RUDOLF DOLZER
and
MICHAEL WAIBEL
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FOREWORD: THE TRANSNATIONALISM OF
DETLLE VAGTS

HAROLD HONGJU KOH*

Before meeting in person, scholars often meet in print. And so it was that, more than three decades ago, I met Detlev Vagts, Harvard’s Bemis Professor of International Law, in the pages of *Transnational Legal Problems*, a book we later came to co-author.¹ I had seen him from a distance long before, when I was a Harvard law student. Although I never took his class, I often saw him sitting in his office deep in the stacks of the Langdell Library, usually with his door open, absorbed in a book he had pulled from the shelves. Someone told me that he was the son of a German scholar who had fled Nazi Germany. I heard from another that he was a man of great moral fiber, who would occasionally preach at Harvard’s Memorial Church or speak with passion at contentious faculty meetings.

But I did not come to know Vagts’ mind until I had graduated from law school, and started teaching International Business Transactions at night as an instructor at George Washington University Law School. As a young international lawyer in Washington in the 1980s, one day I found myself spending my whole day with Vagts the scholar: conducting research during the day as a Justice Department lawyer leafing through the *American Journal of International Law (AJIL)*, for which he wrote and later served as Co-Editor-in-Chief; ducking out of work at lunchtime to attend a public session of the American Law Institute regarding the *Restatement (Third) of the Foreign Relations Law of the United States*,² of which Vagts was Associate Reporter; then teaching at night from the 2nd edition of *Transnational Legal Problems* by Steiner and Vagts.³ I came to appreciate the startling breadth of

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Vagts’ knowledge of law, spanning public and private international law, international dispute resolution, comparative law, military law, the law of development, professional responsibility, securities regulation, and corporate law. He seemed the complete transnationalist legal scholar.

When I began to teach from *Transnational Legal Problems*, a totally revised version of the Harvard casebook first developed by Milton Katz and Kingman Brewster,4 I began to realize that Vagts’ view was revolutionary. Instead of accepting the formalistic divide that created a 2 × 2 matrix between public and private, domestic, and international law, his casebook “exploded the matrix”: it cut across issue areas ranging from international human rights to trade, environment, international business transactions, and the law of US foreign policy. All transnational legal issues, he and his co-author Henry Steiner reasoned, “occupy different positions on a spectrum between the extremes of ‘national’ and ‘international’ law, or on one between ‘private’ and ‘public’ law.”5 Just before I started teaching full-time, I was asked to write a book review of *Transnational Legal Problems*.6 A few months later, to my amazement, I received a letter from Detlev Vagts, saying that he had read the book review and wondering whether I might join the authors as their junior member.

When I finally met Detlev Vagts in the flesh, he struck me – from the start, and ever since – as a supremely gentle, wise, and gracious man. He revealed a wry sense of humor and an unshakeable sense of decency. Over annual lunches at the American Society of International Law Meetings, we would discuss each round of revisions. In between, I learned from both his humanity and his work ethic, which led him, like clockwork, to send me drafts of each of his chapters long before my own had been revised.

During the same time, in my own scholarly work, I began more fully to appreciate what Detlev Vagts had brought to international legal theory. Vagts and Steiner inaugurated what I have since called the study of “transnational legal process”: the theory and practice of how public and private actors interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law.7 Transnational legal process focuses on the

5 Steiner and Vagts, *Transnational Legal Problems*, supra n. 3, xvii.
transnational, normative, and constitutive character of global legal process: *transnational*, in the sense of cutting across historical private–public, domestic–international dichotomies; *normative*, in the sense of illustrating how legal rules generated by interactions among transnational actors shape and guide future transnational interactions; and *constitutive*, in the sense of dynamically mutating from public to private, domestic to international and back again in a way that reconstitutes national interests.\(^8\)

After September 11, 2001, Vagts’ scholarship reaffirmed his unwavering commitment to the rule of international law. He challenged expedient resort to a military paradigm in a time of terror,\(^9\) and reminded us of the role of international lawyers as guardians of ethical professional behavior in international dispute resolution.\(^10\) From my current post, I am particularly moved by Vagts’ depiction of the role of international lawyers in Nazi Germany, an object lesson for any government legal adviser.\(^11\)

This sweeping *Festschrift*, edited by Detlev Vagts’ devoted former students and friends Pieter Bekker, Rudolf Dolzer, and Michael Waibel, unites the varied subject matters of Vagts’ life’s work under the title of *Making Transnational Law Work in the Global Economy*. The editors bring together works by many of Vagts’ most illustrious colleagues and students under three headings: International Law in General; Transnational Economic Law; and Transnational Lawyering and Dispute Resolution. The chapters in this collection highlight the key leitmotifs of Vagts’ career: the critical role of the transnational lawyer, the function of transnational law in the global economy, and transnational law and institutions as tools for the peaceful resolution of disputes. Although the chapters that follow are varied, they grow out of a common inspiration: the admirable accomplishments of a student of legal process, a mentor of integrity and principle, and a seminal scholar of transnationalism.

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ABBREVIATIONS AND ACRONYMS

Selected journals and archive collections

AFDI  L’Annuaire français de droit international
AJIL  American Journal of International Law
AVR  Archiv des Völkerrechts
BSK  Basler Kommentar
BYBIL  British Year Book of International Law
CJTL  Columbia Journal of Transnational Law
CMLR  Common Market Law Reports
EJIL  European Journal of International Law
EuR  Europarecht
GYIL  German Yearbook of International Law
HILJ  Harvard International Law Journal
ICLQ  International & Comparative Law Quarterly
ILDC  International Law in Domestic Courts
ILM  International Legal Materials
ILR  International Law Reports
IP  Internationale Politik
Iprax  Praxis des Internationalen Privat- und Verfahrensrechts
Iran–US CTR  Iran–US Claims Tribunal Reports
JR  Juristische Rundschat
JZ  Juristen Zeitung
NJW  Neue Juristische Wochenschrift
RabelsZ  Rabels Zeitschrift
RADIC  African Journal of International and Comparative Law
RdC  Recueil des Cours
RGDIP  Revue générale de droit international public
RIAA  Reports of International Arbitral Awards
RIW  Recht der Internationalen Wirtschaft
SIZ  Schweizerische Juristenzeitung
YJIL  Yale Journal of International Law
ZaöRV  Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

xxx
### General abbreviations and acronyms

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
</tr>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
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<tr>
<td>ADR</td>
<td>alternative dispute resolution</td>
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<tr>
<td>APEC</td>
<td>Asia–Pacific Economic Cooperation</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>ASIL</td>
<td>American Society of International Law</td>
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<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
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<tr>
<td>BEPA</td>
<td>Bureau of European Policy Advisers</td>
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<tr>
<td>BIA</td>
<td>Bilateral Immunity Agreement</td>
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<td>BIT</td>
<td>bilateral investment treaty</td>
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<tr>
<td>CAMA</td>
<td>Companies and Allied Matters Act (Nigeria)</td>
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<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<tr>
<td>CBA</td>
<td>cost-benefit analysis</td>
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<tr>
<td>CCBE</td>
<td>Council of the Bars and Law Societies of Europe</td>
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<tr>
<td>CCP</td>
<td>Common Commercial Policy</td>
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<td>CDPC</td>
<td>European Committee on Crime Problems</td>
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<tr>
<td>CEO</td>
<td>chief executive officer</td>
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<tr>
<td>CFI</td>
<td>Court of First Instance</td>
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<td>CITES</td>
<td>Convention on International Trade in Endangered Species</td>
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<td>DFCR</td>
<td>Draft Common Frame of Reference</td>
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<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECB</td>
<td>European Central Bank</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>ECR</td>
<td>Court of Justice of the European Union; Reports of cases before the Court of Justice and the Court of First Instance</td>
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<tr>
<td>EDC</td>
<td>European Defence Community</td>
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<tr>
<td>EEA</td>
<td>European Economic Area</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EMU</td>
<td>European Monetary Union</td>
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<td>ERTA</td>
<td>European Agreement on Road Transport</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCC</td>
<td>Foreign Compensation Commission (UK)</td>
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<td>FCSC</td>
<td>Foreign Claims Settlement Commission (US)</td>
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<td>FDI</td>
<td>foreign direct investment</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>FINRA</td>
<td>Financial Industry Regulatory Authority</td>
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<td>FTA</td>
<td>Free trade area</td>
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<td>FTAIA</td>
<td>Foreign Trade Antitrust Improvements Act</td>
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<td>FTC</td>
<td>Free Trade Commission (NAFTA)</td>
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<td>GAAP</td>
<td>Generally Accepted Accounting Principles (US)</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>HIL</td>
<td>Hegemonic international law</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<td>IBRD</td>
<td>International Bank for Reconstruction and Development (World Bank)</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICM</td>
<td>Idealised cognitive model</td>
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<td>ICSID</td>
<td>International Centre on Settlement of Investment Disputes</td>
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<td>ICT</td>
<td>International Criminal Tribunal</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IFI</td>
<td>International Financial Institution</td>
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<td>International human rights law</td>
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<td>International humanitarian law</td>
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<td>International Investment Agreement</td>
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<td>International Law Association</td>
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<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>International Law Students Association</td>
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<td>International Monetary Fund</td>
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<td>Incoterms</td>
<td>International sales terms (ICC)</td>
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<td>INE</td>
<td>National Institute of Ecology (Mexico)</td>
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<td>IOC</td>
<td>International Olympic Committee</td>
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<td>IOSCO</td>
<td>International Organisation of Securities Commissions</td>
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<td>IRS</td>
<td>Internal Revenue services (US)</td>
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<td>ISA</td>
<td>Investment and Securities Act</td>
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<td>ISO</td>
<td>International Standardisation Organisation</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
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<td>MIA</td>
<td>Multilateral Investment Agreement</td>
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<td>MNC</td>
<td>Multinational corporation</td>
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