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978-0-521-19252-1 - 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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MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY

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.

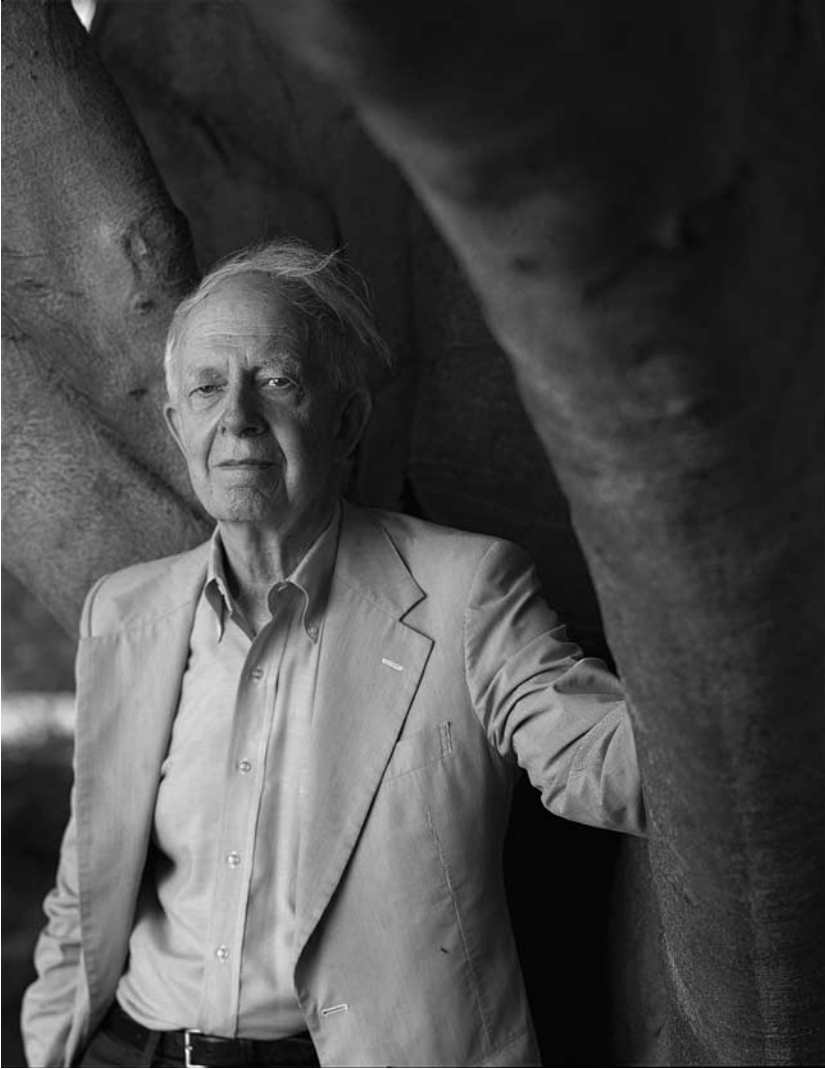
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Professor Detlev Vagts

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DETLEV 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

* Legal Adviser, US Department of State (2009–); US Assistant Secretary of State for Democracy, Human Rights and Labor (1998–2001); Martin R. Flug '55 Professor of International Law (on leave) and former Dean (2004–9), Yale Law School.

¹ See D. F. Vagts, H. J. Steiner and H. H. Koh, *Transnational Legal Problems*, 4th edn. (Westbury, NY: Foundation Press, 1994); D. F. Vagts, W. S. Dodge, and H. H. Koh, *Transnational Business Problems*, 4th edn. (Westbury, NY: Foundation Press, 2008).

² *Restatement (Third) of the Foreign Relations Law of the United States* (1990).

³ H. J. Steiner and D. F. Vagts, *Transnational Legal Problems*, 2nd edn. (Westbury, NY: Foundation Press, 1976).

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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

⁴ See M. Katz and K. Brewster, Jr., *Law of International Transactions and Relations* (London: Stevens & Sons, 1960).

⁵ Steiner and Vagts, *Transnational Legal Problems*, *supra* n. 3, xvii.

⁶ H. H. Koh, Book Review of H. J. Steiner and D. F. Vagts, *Transnational Legal Problems*, 3rd edn. (Westbury, NY: Foundation Press, 1986) and D. F. Vagts, *Transnational Business Problems* (Westbury, NY: Foundation Press, 1986), *International Lawyer*, 20 (1986), 1417–24.

⁷ H. H. Koh, “Transnational Legal Process,” *Nebraska Law Review*, 75 (1996), 181–207.

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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.

⁸ H. H. Koh, "Why Do Nations Obey International Law?," *Yale Law Journal*, 106 (1997), 2599–2659.

⁹ D. F. Vagts, "Military Commissions. The Forgotten Reconstruction Chapter," *American University International Law Review*, 23 (2008), 231–74; D. F. Vagts, "Military Commissions. A Concise History," *AJIL*, 101 (2007), 35–48; D. F. Vagts, "Which Courts Should Try Persons Accused of Terrorism?," *EJIL*, 14 (2003), 313–26.

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¹¹ D. F. Vagts, "International Law in the Third Reich," *AJIL*, 84 (1990), 661–704.

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ABBREVIATIONS AND ACRONYMS

Selected journals and archive collections

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

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General abbreviations and acronyms

AAA	American Arbitration Association
ABA	American Bar Association
ADR	alternative dispute resolution
APEC	Asia–Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
ATCA	Alien Tort Claims Act
BEPA	Bureau of European Policy Advisers
BIA	Bilateral Immunity Agreement
BIT	bilateral investment treaty
CAMA	Companies and Allied Matters Act (Nigeria)
CAS	Court of Arbitration for Sport
CBA	cost-benefit analysis
CCBE	Council of the Bars and Law Societies of Europe
CCP	Common Commercial Policy
CDPC	European Committee on Crime Problems
CEO	chief executive officer
CFI	Court of First Instance
CITES	Convention on International Trade in Endangered Species
DFCR	Draft Common Frame of Reference
DSU	Dispute Settlement Understanding
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	Court of Justice of the European Union; Reports of cases before the Court of Justice and the Court of First Instance
EDC	European Defence Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EMU	European Monetary Union
ERTA	European Agreement on Road Transport
EU	European Union
FCC	Foreign Compensation Commission (UK)
FCSC	Foreign Claims Settlement Commission (US)
FDI	foreign direct investment

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FINRA	Financial Industry Regulatory Authority
FTA	free trade area
FTAIA	Foreign Trade Antitrust Improvements Act
FTC	Free Trade Commission (NAFTA)
GAAP	Generally Accepted Accounting Principles (US)
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
HIL	hegemonic international law
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development (World Bank)
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICM	idealised cognitive model
ICSID	International Centre on Settlement of Investment Disputes
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFI	International Financial Institution
IHL	international human rights law
IHL	international humanitarian law
IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILSA	International Law Students Association
IMF	International Monetary Fund
Incoterms	international sales terms (ICC)
INE	National Institute of Ecology (Mexico)
IOC	International Olympic Committee
IOSCO	International Organisation of Securities Commissions
IRS	Internal Revenue services (US)
ISA	Investment and Securities Act
ISO	International Standardisation Organisation
ITLOS	International Tribunal for the Law of the Sea
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
MIA	Multilateral Investment Agreement
MNC	multinational corporation