

# TRANSNATIONAL LAW AND THE IBT COURSE

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## Abstract

*Today business transactions transcending national borders need a new concept, namely transnational business transactions. It deals not only with private, but also with public issues; This in line with the birth of transnational law, as firstly expressed by Judge Jessup Philip in 1956. This article aims to discuss the importance of including the international business transactions ("IBT") course in Indonesia's legal education. It concludes that transnational law, as reflected by IBT is nowadays an important basis to give understanding to the students on how law makes guidance and fence for commercial transactions across the border.*

**Keywords:** *Transnational law, international business transactions, legal education.*

## I. INTRODUCTION

Today all the nations of the world cannot be separated from one another. They have become utterly interdependent.<sup>1</sup> To ensure sustainable developments in various sectors, a country definitely needs the assistance of foreign participation. However, instead of relying on overseas loans, many countries have actively encouraged foreign investments. Likewise, Indonesia is also promoting offshore investments, as confirmed by President Joko Widodo, who has on many occasions mentioned that Indonesia is always interested to invite more foreign investors<sup>2</sup>. As stated by an author all countries, rich and poor, seek foreign capital and its associated technology and know-how as vital elements in

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<sup>1</sup> John H. Jackson et al.(Eds.), *International Economic Relations*. St Paul: West Publishing, 1995,1

<sup>2</sup> See, e.g., *Kompas*. March 23, 2015

their plans for national economic development.”<sup>3</sup>

The data from the Indonesian investment authority, known as *Badan Koordinasi Penanaman Modal* (“BKPM”), show a consistent increase in foreign investments into Indonesia, as described below (in million USD):

2012	24,564.7
2013	28,617.5
2014	28,529.7

The FDI<sup>4</sup> participation as described above is only one example of the common cross-border activities. Another example may include the practice of dispute settlements. Indonesia has been dealing with a number of such cases involving other countries. The Amco, Karaha Bodas, Newmont Mining, Churchill Plc, and National Car are to mention some.

Additionally, being an active trading country, Indonesia is a member of the World Trade Organization (“WTO”), and this entails an obligation to abide by all the rules and regulations established by the WTO. The National Car case mentioned above is only one of the consequences of Indonesia’s accession to such international trade organization.

Not least importantly is that we find a number of other commercial activities at the domestic level which also involve foreign participation, for example the franchise or other licensing schemes.

The above commercial activities, in part, fall under the jurisdiction of public international law. However, it should be noted that public international law is a very soft system<sup>5</sup>. Unlike the national legal system, public international law does not have strong power, for it lacks enforcement authorities. This is especially due to the fact that the power vested in public international law is solely derived from the mandate granted by the national authorities.

<sup>3</sup> Jeswald W. Salacuse, *The Three Laws On International Investment*. Oxford: Oxford University Press, 2013, vii

<sup>4</sup> FDI means foreign direct investment. Portfolio investment is excluded.

<sup>5</sup> See IA hearer, *Starke’international Law*. London: Butterworths, 1994, 16 et seq.

## **II. TRANSNATIONAL LAW**

### **A. The Concept**

Judge Philips Jessup, in his 1956 Storrs Lectures, came with a new concept which essentially combines more than two laws. Jessup writes:

I shall use, instead of ‘intern law’, the term ‘transnational law’ to include all national law which regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules which do not wholly fit into such standard categories.<sup>6</sup>

The term “transnational law” as used by Jessup can be summarized into the following key elements:

- a. public international law
- b. international private law
- c. other rules/national law
- d. transcend national frontiers

The above elements show an “international legal process”, which is referred to by Prof. Harold Koh as “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.”<sup>7</sup>

### **B. Jessup’s Supporters**

Jessup’s view on transnational law was fervently supported by a number of legal scholars such as those from Yale and Harvard Universities. Prof Koh, whose comments were stated above, is one of the active proponents of Jessup. In one of his numerous writings, Prof. Harold Koh in *Why Transnational Law Matters*, states:

Transnational law represents a kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one national system to another. Transnational law is becoming

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<sup>6</sup> Philip Jessup, *Transnational Law* 136 (1956)

<sup>7</sup> Harold H. Koh in Pieter HE Bekker et al (Eds.) *Making Transnational Law Work In The Global Economy*, Cambridge: Cambridge University Press, xvi, 2010

increasingly important because it increasingly governs and influences our lives.<sup>8</sup>

The term "hybrid" as used by Koh is actually proper in that transnational law can be used in either national or international law. We should also note another important point made by Prof Harold Koh, indicating how crucial transnational law that "governs and influences our lives." Furthermore, Koh also highlights the significance of transnational law by commenting "There is much more that can be said, but it should be obvious by now that transnational law clearly matters".<sup>9</sup>

As regards the transnational law, we have to appreciate the contributions made by other scholars who also actively played a part in the development of transnational law. Prof Detlev Vagts of Harvard Law School, for example, has authored coursebooks on translational law, as can be seen from the following remarks cited from his book:

This volume is intended to provide the teaching materials needed for a course in transnational business problems. It was in effect the spin off from the coursebook, **Transnational Legal Problems**, developed from three editions by Professor Steiner and myself.<sup>10</sup>

Outside the US, in Europe, Prof Christian Tietje also writes:

The Transnational Economic Law Research Center, which has, at least in Germany, a unique and outstanding research profile concerning legal questions of economic relevance transcending national frontiers, closely follows Jessup's approach. As outlined in this issue, we are convinced that a modern approach towards legal issues of international economics has to follow the analytical path of Jessup and transnational law.<sup>11</sup>

In China, Prof. Jack Goldsmith describes the development of transnational law as follows:

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<sup>8</sup> Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l L. R. 745 (2006), 745

<sup>9</sup> *Ibid.*, 751

<sup>10</sup> Detlev F Vagts, *Transnational Business Problems*. New York: The Foundation Press, xix, 1986]

<sup>11</sup> Christian Tietje (et.al.)(Eds), *Philip Jessup's Transnational Law Revisited*, Essays in Transnational Law, No 50/Feb 2006, Institute for Economic Law, Martin Luther University, Halle-Wittenberg

Peking University of Transnational Law comes much closer than law schools in other countries (most notably, those in the United States) to Jessup's vision of how transnational law should be studied.<sup>12</sup>

Prof Harold Berman, a distinguished Harvard law professor teaching, among others Soviet law and international trade, proposes a different name for transnational law. He writes:

Let us leave the definition of international law as it is, but let us find a new name ..... We speak of a world economy, not only an international economy or even a transnational economy;..... Similarly we will come, I believe, perhaps even before the twenty first century, to speak of world law.<sup>13</sup>

A number of Prof Detlev Vagts' ex students presented a book to the professor in celebration of his birthday. Pieter Bekker, one of the editors, writes:

The influence of the transnational law school on the academy has been profound and lasting. Today a number of scholarly student-run journals which are devoted to international and comparative feature the word "transnational" in their title.<sup>14</sup>

Even Prof Steiner acknowledges the relatively new trend in transnational law:

Traditional classifications of the many bodies of law and kinds of transactions germane to international life bowed to the new circumstances and to a fresh vocabulary. The term "transnational" emerged as a winner.<sup>15</sup>

Transnational law is nowadays considered a crucial part of the modern legal tools to solve problems in the global world. However, both the traditional public international law and international private law are still needed to provide a basic map of universal law.

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<sup>12</sup> Jack Goldsmith, PKU Transnational L. R. Vol. 1 Issue 1, 2013, 7

<sup>13</sup> Harold Berman, *World Law*, 18 Fordham Int'l L.J. 1617 (1995)

<sup>14</sup> Pieter HE Bekker (et al), Op.Cit,3

<sup>15</sup> Henry J. Steiner in *Ibid.*, 10

### **III. INTERNATIONAL BUSINESS TRANSACTIONS (“IBT”) COURSE AT THE UNIVERSITAS INDONESIA**

The transnational trend has extended to university education. A number of well-known universities have offered courses in transnational law. In fact, this phenomenon has been well predicted by Prof Harold Koh, who remarks, “the study of transnational law will soon also affect and be reflected in all aspects of our legal education”<sup>16</sup>. In light of the above, the Faculty of Law of the Universitas Indonesia (“FLUI”), which has an International Law Department, also offers the IBT. This is in addition to the conventional public international law and international private law, and various courses related to transnational law, such as foreign direct investment and transnational lending, trade-related international investment, trade-related intellectual property rights, management of ocean resources, transnational disputes settlement and transnational negotiation,

The IBT course at FLUI was first introduced by the late Teuku H. Mohammad Radhie, who focused on contracts subject, and designed for undergraduate students (S I level to obtain *Sarjana Hukum* / “SH”), Now it is so taught to the postgraduate or master program (S II level to obtain *Magister Hukum* / “MH”).

I further developed the course by including some issues relevant to Indonesia. This country-specific course design is in line with Prof. Folsom’s view:

Teachers of International Business Transactions disclose an extensive range of ideas regarding what topics are most important to the course. Many use their own materials not only because there are few casebooks and coursebooks in the field, but also, and more often, because of a strongly held commitment to a particular course focus.<sup>17</sup>

In other words, IBT depends heavily on the particular situation unique to a specific country.

The IBT course aims to study the legal aspects relating to com-

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<sup>16</sup> Harold H. Koh, *Why Transnational Law Matters*, 24 Penn St. Int’l L. R. 745 (2006), *Ibid*.

<sup>17</sup> Ralph H. Folsom et.al (Eds), *International Business Transactions*. St Paul: West Publishing, 1991, xxiii-xxiv

mercial transactions transcending national borders, both public international law, and international private law as well as relevant domestic laws. IBT therefore is a course that closely reflects the concept of transnational law. Even though IBT still uses the term “international”, it is mainly attributable to administrative reasons. For sure it wholly represents the concept and meaning of transnational law.

### **A. Postgraduate Program**

IBT that I teach is in the postgraduate program. Hence, the students are still required to master a wide range of laws such as public international law, international private law, contracts, company law and investment law, the courses that were offered in their undergraduate studies. However, as there are also a few students who are not SH, they do not have any prior legal knowledge as mentioned above. Therefore it is bad for them because they could not actively participate in the discussion.

These non SH students come from various disciplines, including from the faculty of engineering, economics, accountancy, literature and even philosophy. I think they are wrong when they believe that one will understand law by directly taking the postgraduate program. If they want to study law, they should attend the undergraduate law program. They must study some crucial basic legal concepts, principles and theories such as the principles of contracts, torts, criminal acts, legal procedures, juristic persons or international treaties.

### **B. IBT Topics**

#### 1. Scope

The scope of IBT covers the issues of flow of goods, investments and licensing.<sup>18</sup> Having taken this course, the students are expected to fully understand the legal aspects of various commercial transactions transcending national boundaries and capable to describe all in scientific writings.

#### 2. Nature

Laws transcend national boundaries. ‘Transcending’ means going

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<sup>18</sup> *Ibid*, 26 et.seq.;

beyond states, and therefore transcendence constitutes a key element of an IBT, without which no transactions would qualify as IBT. Unlike international private law, IBT is also dealing with public aspects of transactions.

### 3. Actors

Actors in IBT are among others transnational/multinational corporations (TNCs/MNCs), States and professionals.<sup>19</sup> An in-depth discussion on the issues of TNCs is conducted in the hope that the students will understand that today virtually all economic activities are almost entirely dominated by TNCs. The students learn in depth about TNCs from PT Muchlinski's book.<sup>20</sup>

States are the most important actors as States are the highest authority in the world where IBT takes place. The power of a State is to be directly exercised by (1) implementing its governing functions (*jure imperii*) (2) playing its role in a private capacity to sign a business contract (*jure gestionis*); or (3) delegating its roles to State-owned enterprises.<sup>21</sup>

These days professionals play an important role as actors in IBT. Let us take a look at a lawyer. As a professional, a lawyer is firstly asked by investors from abroad whether there is a standard law practiced in the destination country. The next question is whether there is a contract law in that country. It is universally understood that the law has the force to protect a person's assets. Given the above, it is obvious that lawyers hold a key position in IBT.<sup>22</sup> In addition to lawyers, other professionals that have a crucial part in IBT may include, inter alia: accountants, financial analysts, notaries, and appraisers.<sup>23</sup>

### 4. Legal systems

The legal system is basic to the operation of law. Generally, there are at least 3 main legal systems, namely the common law, civil law and

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<sup>19</sup> *Ibid.*, , 10 et.seq.; M. Sornarajah, *The International Law On Foreign Investment*. Cambridge: Cambridge University Press, 2010, 65 et.seq.

<sup>20</sup> PT Muchlinski, *Multinational Enterprises And The Law*. Oxford: Blackwell Publishers Ltd., 2007. (tidak ada no halaman)

<sup>21</sup> *Ibid.*, 69; Ray August et.al.(Eds). *International Business Law*. Upper Saddle River: Pearson. 2009, 139.

<sup>22</sup> In particular see, Ralph H. Folsom et.al.(Eds), op.cit, 22 et.seq.

<sup>23</sup> Cf.: Law No 8 Year 1995 on Stock Market, State Gazette 1995 No 64



*sharia* law.<sup>24</sup> Even though Indonesia in general adopts the civil law system, in the field of capital markets the common-law concepts of ownership and trust are governed in the capital market law<sup>25</sup>. More than that according to Gunawan Widjaja, the trust concept has been recognized in the Indonesian civil legal system.<sup>26</sup> Other examples of the prevalence of the common law are the common use of the title CEO to refer to the position of the top officer in a company, and managing director, the terms foreign to the Indonesian company law.<sup>27</sup>

## 5. Choice of law

In parallel with the transnational law, IBT requires the parties to elect a certain jurisdiction. Therefore, it is important that the students be given the theories of choice of law. In addition, as a matter of fact, not all law faculties in Indonesia teach International private law in the undergraduate program<sup>28</sup>

## 6. Personal status

In addition to the choice of law, personal status is also significant in IBT. In the famous Barcelona Traction Light, Power & Co<sup>29</sup>, the International Court of Justice has used the concept of juristic person (*badan hukum*) based on personal status.<sup>30</sup>

## 7. International commercial contracts

Contract is a very relevant subject in IBT. As a continuing legal institution, the IBT class will further explore the application of the contract concepts in the IBT practice, including the controversial issues between developed and developing countries such as the sanctity of con-

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<sup>24</sup> William F Fox, Jr. *International Commercial Agreements*. The Hague: Kluwer, 1998, 17-43

<sup>25</sup> Law no.8/1995, *ibid.*

<sup>26</sup> See Gunawan Widjaja, *Transplantasi Trusts*. Jakarta: Rajawali Pers, 2008, published from his dissertation. (tidak ada no halaman)

<sup>27</sup> Law. No. 40/2007 on Limited Company, State Gazette 2007 No 106

<sup>28</sup> Mathilda Sumampouw, *Pilihan Hukum Sebagai Titik Pertalian Dalam Hukujm Perdjudjian Internasional*. Unpublished disseertaion, 1968; Ray August, Op.Cit., 148; Ralph H. Folsom et.al.(Eds.), Op.Cit, 1136 et.seq.

<sup>29</sup> I.C.J. Reports 1970, 3; see.Ray August, Op.Cit., 175 et.seq.

<sup>30</sup> For local textbook , see Sudargo Gautama, *Hukum Perdata Internasional*, Jakarta, Eresco/Alumni:II/1 (1986); III/1 (1995).

tract, stabilization clause, renegotiation and nationalization as well.<sup>31</sup>

It is worth noting that based on Law no 24/2009<sup>32</sup>, all contracts must be written in Indonesian language. No doubt, we love our own language. But the obligation to use such a language in commercial contracts today, is another story. The Law is idealistic but difficult to implement — realizing that business contracts contain various concepts that are mostly new to Indonesia. In practice various transactions are very much influenced by the practice in the US. Therefore it is a little bit non-sense if one should firstly draft a complicated international contract in Indonesian, then translate it into English. Indonesian language is very simple, it does not have sufficient words to support the Law.

As a matter of fact, the court of west Jakarta in June 2013 has decided that an international contract not written in Indonesian language was invalid and cancelled. The case has been appealed. It is interesting to note that the judge refused the objection raised by the defendant in that the Law cannot be executed because the implementing regulations for the Law has not been issued. The important point according to the judge was that the concept has been contained in the Law.

The course allows the students to draw from their own experience. In general, the students are enthusiastic about the course – except those who do not have their undergraduate program in law. As touched above, these students often have difficulty in the discussion on contract issues.

## 8. Corporate actions

The students are also taught various contemporary corporate legal actions such as merger and acquisitions (“M&A”) involving foreign elements. Nowadays, the M&A plays an important role in IBT.

## 9. Project financing

Project financing is now a common practice among companies to expand their business, even though this financing scheme is not new. The notion of project financing emanates from contemporary financial

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<sup>31</sup> PT Muchlinski, Op.Cit., 582 et.seq. Raph Folsom et.al. Op.Cit, 880 et.seq; William F Fox, Jr. Op.Cit, 224 et.seq.

<sup>32</sup> Law no 24/2009 on the National Flag, Language, Emblem and Anthem State Gazette 2009 No 109

engineering. The most notable distinction between traditional financing and the so-called project financing is that the project financing does not require the borrower to offer its assets as collateral but instead the project itself to secure the loan.

#### 10. Export financing

Export is indispensable to the economic development of all countries in the world. It is therefore important that the course include topics of export financing for the students.<sup>33</sup>

#### 11. Utilization of natural resources

Indonesia has abundant natural resources, and has specific legal schemes of their utilization, for both hydrocarbon and hard minerals. However, the practice of the utilization has been widely criticized as not in line with the majority needs of the people. In the class, the legal aspects of this issue is discussed. The issue of production sharing contracts (“PSCs”) for oil and gas, as well contract of works and government licensing for coal and minerals are the main legal topics.

As illustration, commenting the problems of contracts in natural resources, William Hogan et.al. mention natural resources as “the source of both prosperity and misery.”<sup>34</sup>

#### 12. Licensing

Licensing is an IBT type activity that does not move assets from one country to the other country. Licensing is a current trend in expanding a company business and to the benefit of host countries. However, a licensee must be careful of bad conduct of a foreign licensor who inserts certain clauses in a licensing agreement for the licensor’s own benefits, and not in favor of the licensee. This practice may impede international trade and restrain transfer of technology.<sup>35</sup>

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<sup>33</sup> Ralph H Folsom et. al.(Eds.), Op Cit., 490, et seq.

<sup>34</sup> William Hogan et. al., *Contracts and Investment in Natural Resources*, in William Hogan and Federico Sturzenegger, *The Natural Resources Trap*.Cambridge: The MIT Press, 2010, 26.

<sup>35</sup> Article 40, TRIPs Agreement; Ray August et.al.(Eds), Op.Cit., 493-512; Ralph H Folsom et.al.(Eds), Op.Cit, 28-29

### 13. Dispute settlement

The law serves not only in times of “peace”, but also in times of “war”. This topic allows the students to gain knowledge and practice in the settlement of disputes in different ways. The students are introduced to at least 5 methods of dispute settlement, namely through diplomatic channel, ICJ, IDSID arbitration, WTO Dispute Settlement Understanding scheme and regular arbitration.<sup>36</sup> The 1958 New York Convention is discussed, including the concept of “public policy” and “foreign policy”.<sup>37</sup>

### C. Course Materials and Research

The students are not required to buy text books as they are provided, some from library, some from the lecturer’s collection. In addition to books, they will get hand-outs mostly in the form of law journals published by wellknown US and European universities. Guest lecturers are to deliver their course materials.

Instead of taking mid-semester test, the students are requested to do simple research, including summarizing articles, journals or essays. They will be graded for their works.

### D. All Laws

As in transnational law, we discuss all transactions which by their nature involve various laws, whether international or local. As regards the national law, certain laws such as the company, bankruptcy, investment, immigration, foreign exchanges laws are most frequently discussed. As a result, the students taking IBT must have a good mastery of the above subjects; otherwise, they will have difficulty following the class discussion.

It can be said that IBT is a kind of *capita selecta*. Hence, I make the courses interchangeable, or I occasionally include some other legal issues, for example courses relating to transnational corruption, environment, labor protection and antitrust.

<sup>36</sup> Ray August, Op.Cit., 107

<sup>37</sup> Ralph H.Folsom, Op.Cit., 1132 et.seq. ; in general see *Ibid*, 1058 et. seq.

## **E. Commercial Activities**

Instead of dealing with transnational law in general, IBT at FLUI is only concerned with the commercial nature of the transnational law. Therefore any transactions made by a public institution involving non-commercial transactions are not within the realm of IBT. In relation to this commercial issue as the scope of IBT, one might be reminiscent of Prof Detlev Vagts' remarks on the publication of his *Transnational Legal Problems*:

This volume is intended to provide the teaching materials needed for a course in transnational business problems. It was in effect the spin off from the coursebook, **Transnational Legal Problems**, developed from three editions by Professor Steiner and myself.<sup>38</sup>

## **F. Big Class**

The IBT course is among few classes with a great number of participants. This is a big class with the students from different departments: Economic Law, Transnational Law and International Trade. The IBT course is offered each semester on a twice-a-year basis. On average, around 80-120 students enroll in the course for each semester. Therefore, to ensure an effective learning process, the students are generally divided in two on 3 parallel classes.

The IBT teaching applies the Socratic method, which requires the students to be active. Kindly note that I have been assisted by one assistant and, in addition I got an honor to have two foreign guest lecturers, who are practicing lawyers in a big law firm in Jakarta.

## **II. CONCLUSION**

This article concludes that transnational law is today an important basis to give understanding to the students on how law makes guidance and fence for commercial transactions across the border, as Prof Harold Koh writes: "There is much more that can be said, but it should be ob-

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<sup>38</sup> Detlev F Vagts, *Transnational Business Problems*. New York: The Foundation Press, xix, 1986

vious by now that transnational law clearly matters”.<sup>39</sup> Or in the words of Prof Steiner:

Traditional classifications of the many bodies of law and kinds of transactions germane to international life bowed to the new circumstances and to a fresh vocabulary. The term “transnational” emerged as a winner.<sup>40</sup>

We could say that the concept of transnational law has been accepted all over the world, including through the teaching of IBT. IBT is the reflection of transnational law.

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<sup>39</sup> Harold H. Koh, *Why Transnational Law Matters*, 24 Penn St. Int’l L. R. 745 (2006). *Ibid.*

<sup>40</sup> Henry J. Steiner in Pieter HE Bekker (et al), *Op.Cit.*, 10