A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments

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International law often makes storytellers of onlookers. The stories that gain scholarly and popular traction are of a similar genre, focusing on international law from the "top-down." These top-down international lawmaking stories typically center on a state's treaty-based commitments or an intergovernmental institution born from a treaty, and they tell of state actors making international law and imposing it on others who may have been quite removed, geographically and politically, from the entire lawmaking process.

This Article introduces an alternative story, bottom-up international lawmaking. Bottom-up lawmaking stories do not feature state policymakers but rather the very practitioners -both public and private - who must roll up their sleeves and grapple with the day-to-day technicalities of their trade. On the basis of their on-the-ground experiences, these practitioners create, interpret and enforce their rules. Over time, these initially informal rules embed in more formal legal systems, blossoming into law that is just as real and just as effective as the treaties that typically initiate the top-down processes. Fundamentally, bottom-up international lawmaking is a soft, non-choreographed process that produces hard, legal results.

This Article offers an in-depth exploration of bottom-up lawmaking in the realm of international trade and finance. Most scholarship in this area centers on a group of high-profile, treaty-based institutions - the World Trade Organization, the International Monetary Fund, the World Bank, the North American Free Trade Agreement, and the European Union. Yet, the international trade and finance universe also includes informal rules and institutions, which do not adorn headlines or frequent scholarly presses but nonetheless effectively finance over a trillion dollars of international trade each year. Using a triad of little-known examples from the world of international trade finance, Part II of this Article argues that there are compelling bottom-up international lawmaking stories to tell about this world.

The Uniform Customs and Practice for Documentary Credits (UCP) is a set of transnational rules that commercial banks uniformly follow in their letter-of-credit practices. These rules are not the work of policymakers; they are the creation of private bankers who congregate under the auspices of the Commission on Banking Technique and Practice of the International Chamber of Commerce to draft the rules and offer practice-based interpretations of their meaning. While the UCP is not technically law,

courts in the United States and elsewhere frequently use it to decide letter-of-credit disputes.

The International Union of Credit and Investment Insurers (Berne Union) is a nongovernmental institution, comprised of both private and public export credit insurers, that regulates the way its members conduct their business. On the basis of industry practice, the Berne Union has codified technical rules that circumscribe the nature and scope of members' export credit insurance policies. Over time, formal international lawmaking institutions have appropriated some of these rules, effectively transforming them into hard law. The discussion of the Berne Union rules in this Article is unique not only for offering a bottom-up lawmaking perspective, but also because the rules themselves have never been the subject of any scholarly publication.

The third set of rules discussed in this Article, the Arrangement on Officially Supported Export Credits (the Arrangement), governs official export credit agencies' financing of national exports. The Arrangement is the handiwork of an ad hoc institution, the Participants Group, comprised of government technocrats associated with their home export credit agency. The lawmakers, once again, are practitioners, and the rules are anchored largely in their practical experiences. The Arrangement is not law - the text declares itself to be "gentlemen's agreement." Over time, however, it has become law through incorporation not only into a WTO treaty but also into domestic legal systems, principally the EU.

These bottom-up examples are critically important to international legal scholarship because they challenge prevailing international lawmaking theory and paradigms. Part III of this Article discusses the difficulties that bottom-up lawmaking poses to extant schools of thought on international lawmaking by examining four prominent theories: 1) customary international lawmaking; 2) transnational legal process; 3) transgovernmental network theory; and 4) private lawmaking. Each theory significantly transcends traditional top-down approaches. Furthermore, each theory has already touched upon significant pieces of the bottom-up international lawmaking process. But no single theory explains the collective bottom-up lawmaking phenomenon described in this Article.

This Article then turns from international legal theory to an exploration of how bottom-up lawmaking bears on the international law taxonomy. Over the past several decades, international legal scholars have painstakingly developed a rigid classification scheme, organizing international law around a series of bright-line, dichotomies: hard (binding) international law versus soft (non-binding) international law; public international law versus private international law; and international law versus comparative law. This taxonomy critically organized international law as a coherent, focused discipline, making it more scientific and methodical at a moment when the legal realists fundamentally challenged the discipline's legitimacy. But bottom-up international lawmaking stories resist easy classification. This Article thereby casts doubt on whether the classic either/or classification scheme meaningfully accommodates contemporary bottom-up international lawmaking.

As an alternative route to law, bottom-up lawmaking itself poses an existential problem. Are bottom-up lawmaking processes legitimate routes to law? Part IV explores this question. The homogeneous, club-like groups that drive these bottom-up lawmaking processes are exclusive and operate in secret. The substantive rules that they develop are not rooted in the contractual consent of politicians but rather in the unstated, or understated, commonalities of on-the-ground practice. These rules nonetheless evolve into law that often impacts those well beyond the original lawmaking group. Thus bottom-up international lawmaking proceeds without the accountability normally demanded of democratic lawmaking. Does this democratic deficit delegitimate the law so produced? Some scholars answer this question affirmatively and focus on remedying the democratic deficit through introduction of accountability-enhancing mechanisms. Yet, injecting accountability - through transparency and consultations with stakeholders necessarily destroys the close-knit homogeneity of the lawmaking club that is the powerful engine of bottom-up lawmaking. Some scholars focus instead overshadowing any democratic deficit through showcasing the efficacy and strength of the ensuing law. This later path may prove particularly useful in legitimating bottom-up lawmaking as long as the lawmakers lift the veil of secrecy high enough that outsiders may actually observe legal outputs prior to making efficacy judgments.