

2005

A Cosmopolitan View of Transnational Bottom-Up Lawmaking: The Case of Export Credit Insurance

Janet K. Levit

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51 Wayne L. Rev. 1193 (2006).

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**A COSMOPOLITAN VIEW OF BOTTOM-UP TRANSNATIONAL
LAWMAKING: THE CASE OF EXPORT CREDIT INSURANCE**

JANET KOVEN LEVIT[†]

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I. INTRODUCTION

In *Globalization of Jurisdiction*,¹ Paul Schiff Berman offers a compelling, cosmopolitan pluralist approach to jurisdiction. In Berman’s view, jurisdiction is the terrain—a battlefield of sorts—where a multitude of inevitably overlapping and potentially conflicting community-based norms compete for relevance and dominance.² This theory, however, presupposes existing laws and norms; and he presents his theory principally as one of norm application.³ So, in this brief essay, I would like to ask the

[†] Associate Professor of Law, University of Tulsa College of Law. A.B., 1990, *magna cum laude*, Princeton University; M.A., 1994, Yale Graduate School; J.D., 1994, Yale Law School.

1. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. Rev. 311 (2002).

2. See, e.g., *id.* at 325 (noting that “[J]urisdiction becomes the rhetorical site for discussions of multiple overlapping and shifting conceptions of community, and recognition of judgments becomes the terrain on which these alternative conceptions of community vie for persuasive power and legitimacy”); *id.* at 495 (indicating that “Jurisdiction thus becomes the locus for debates about the appropriate definition of community and the articulation of norms.”).

3. In some ways, my view of Berman’s work—as being about norm-application rather than norm creation—is overly simplistic because he repeatedly recognizes that the process of asserting jurisdiction, either through international tribunals, such as Nuremberg, see *id.*

necessarily antecedent question: How do these norms come to be? Or, more precisely, how do such norms gel transnationally prior to assuming their place on jurisdictional battlefields?

II. BOTTOM-UP TRANSNATIONAL LAWMAKING: THE BERNE UNION

My current research examines transnational lawmaking via the technical, somewhat obscure, world of international trade finance.⁴ My interest in this field is not a mere attraction to the arcane, but rather a function of my on-the-ground experiences at the Export-Import Bank of the United States (Ex-Im Bank), a small U.S. government agency that provides financial support to U.S. exporters, and TradeCard, Inc., an internet innovator in the trade finance realm. Through my work, I gained an appreciation for the transnational rules that govern much of the every-day minutiae. These rules are transcendently potent, engendering unwavering, almost instinctual compliance.

Yet, these rules emerge in a manner that is quite distinct from the traditional, top-down account of international law that gains scholarly and popular traction. They do not flow from a state's treaty-based commitments or an inter-governmental institution born from a treaty. They are not the work of diplomats at majestic negotiating tables, and they are not

at 502, or more generally through serving as a locus of debate where "various communities debate different visions of alternative futures," *id.* at 493, may be part of a norm creation process. Even when a tribunal concludes that none of the normative options before it are satisfactory—when it engages in "creative common law interpretation" or when it fashions "creative hybrid solutions" that combine features of competing community-based norms—according to Berman, the parameters of the tribunal's lawmaking exercise are almost always circumscribed or bound by a foundation of pre-existing norms.

4. See Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005) [hereinafter Levit, *Bottom-Up Approach to International Lawmaking*]; Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L. J. 65 (2004) [hereinafter Levit, *Dynamics of International Trade Finance Regulation*].

This essay is based on a presentation at *Law Beyond Borders: Jurisdiction in an Era of Globalization*, a panel at the American Association of Law Schools Annual Meeting in San Francisco on January 6, 2005. In that presentation, I discussed the Berne Union as one of three trade finance case studies that I developed in *Bottom-Up Approach to International Lawmaking*. The discussion of the Berne Union case study in this essay thereby closely tracks the case study as presented in *Bottom-Up Approach to International Lawmaking*. Thus, the page references to *Bottom-Up Approach to International Lawmaking* are, for the most part, not included in this essay. For a lengthier, more detailed discussion of export credit insurance, and the Berne Union as a lawmaking institution, see *Bottom-Up Approach to International Lawmaking* at 144-157.

punctuated with photo-opportunity signing ceremonies that adorn headlines. Instead, they are the product of a largely overlooked lawmaking process, one that I label bottom-up transnational lawmaking.

In this essay, I offer the transnational regulation of export credit insurance as a window into bottom-up lawmaking. Export credit insurance is much like automobile insurance, although the asset the insurance company protects is not a car but rather a trade receivable.⁵ With the backing of an insurance provider, an exporter may extend credit to an importer without significantly adding to its risk portfolio. When liquidity is an issue, the backing of an export credit insurer enhances the exporter's ability to monetize the receivable, either by selling it or borrowing against it. Export credit insurance, therefore, is one solution to a recurring exporter problem—how to extend credit to a buyer who might be thousands of miles away without choking the seller's working capital and concomitant ability to continue producing and engaging in trade transactions. Consequently, export credit insurance is a popular financial intermediation instrument, supporting nearly \$500 billion annually in international trade.⁶

An export credit insurance transaction is inherently transnational and thereby raises a host of cross-border issues that defy effective national regulation. Thus, the viability and growth of the industry depends in great part on the integrity of the export credit insurance rules of the road. Indeed, in 1934, a group of French, Italian, British and Spanish export credit insurers gave birth to such rules in a bar in Berne, Switzerland, a moment marked as the inception of the Berne Union (formally the International Union of Credit and Investment Insurers).⁷ Following World War II, the Berne Union grew in size and role due to a boom in manufactured goods, and attendant need for trade finance, as well as the increased use of export credit insurance as a national trade promotion tool that, according to the post-war liberal consensus, was trade distorting.⁸ Thus, export credit insurers, private and public, began looking to the Berne Union not only to pool underwriting experiences but also for regulatory collaboration toward a "level playing field."⁹ Today, there are fifty-four Berne Union members,

5. See Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 144-46 for a more detailed explanation of export credit insurance.

6. BERNE UNION Y.B. 118 (2005).

7. Peter C. Evans, *The Politics of State-Backed Trade Finance: Competition, Collusion and Redistribution in Official Export Credits* 42 n.149 (2004) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author); see also Hugh Dowell, *A Brief Historical Note—62 Years Ago*, reprinted in Facsimile from Berne Union to Janet Koven Levit (June 22, 2004) (on file with author).

8. See also Dowell, *supra* note 7; see generally Evans, *supra* note 7, at 42-43.

9. See Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 146-48

including private companies (familiar names such as AIG and Chubb), as well as public entities known as export credit agencies or ECAs.¹⁰

At first glance, the Berne Union may appear as a mere trade association; indeed, it serves as a forum for members to develop and disseminate technical and underwriting expertise. Yet, the Berne Union also regulates members' export credit activities. The Berne Union promulgates a General Understanding, which is its codification of practice-based rules that limit the type of insurance policies that members may issue and the terms that such policies may contain.¹¹ The General Understanding essentially divides the international trade universe into seven categories, and, within each category, the General Understanding prescribes specific, technical and at times cumbersome rules to standardize the options that export credit insurers may offer to buyers and sellers in order to attract their business.¹² For some industries, the Berne Union members supplement the General Understanding rules with sector agreements that reflect industry-specific practices or problematic repayment experiences.¹³

The Berne Union expects members to comply with its rules, and my research confirms that members indeed comply.¹⁴ Nonetheless, the Berne Union has pragmatically institutionalized a transparent tolerance for non-compliance. As part of the General Understanding, members promise to notify other members of any deviation from Berne Union rules.¹⁵ This notification must follow a specified format and in certain instances it triggers a reciprocity process whereby members may legitimately derogate from the Berne Union rules in order to match other members' non-compliance. The Berne Union Secretariat documents all notifications, reads the list publicly at General Assembly Meetings, and provides other members with an opportunity to comment. Furthermore, in the rather small,

for a more thorough discussion of the birth and growth of the Berne Union.

10. BERNE UNION Y.B. 158 (2005).

11. See Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 149-151 for a more thorough discussion of the General Understanding.

12. For instance, if an exporter approaches a Berne Union member to insure the export of consumer goods, the General Understanding rules prohibit the member from insuring a receivable with repayment terms in excess of six months, with the "repayment clock" starting to tick on the date that the buyer accepts the goods. If the export had been of consumer durables or parts and components, the Berne Union member would face different limitations on the repayment terms that it could support, with a different "starting point" triggering the transaction's "repayment clock." *Id.* at 150-51.

13. *Id.* at 150.

14. *Id.* at 154-56 nn.119-20 (discussing anecdotal and documentary evidence of widespread compliance with Berne Union rules).

15. See *id.* at 153, 156 for a more extensive discussion of the Berne Union's notification processes.

collegial Berne Union setting, members may also be prone to peer pressure and other informal mechanisms to keep fellow members “in line.”

While the General Understanding does not satisfy the formal definition of “law” to which many traditional international legal scholars cling,¹⁶ these rules nonetheless function as law should in that they are authoritative and effectively binding.¹⁷ Furthermore, since the Berne Union rules successfully facilitate nearly a half trillion dollars worth of international trade annually, it is unsurprising that other, formal lawmaking institutions—notably the OECD, the WTO and the European Union—have appropriated many of them,¹⁸ in essence transforming such rules from soft to hard law.¹⁹

16. “International law” includes: 1) a treaty or other international agreement, as defined in the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 2, U.N. Doc. A/CONF.39/27 (1969), 8 I.L.M. 679 (1969) (“Treaty” means an international agreement concluded between states in written form and governed by international law); 2) customary international law; and 3) general principles of law. THIRD RESTATEMENT OF FOREIGN RELATIONS LAW § 102 (1987); Statute of the International Court of Justice, June 26, 1945, art. 38, Stat. 1055, 33 U.N.T.S. 993 .

17. Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 156-57.

18. In the case of the Berne Union’s General Understanding, OECD countries incorporated many of the technical rules into a “gentlemen’s agreement” among their ECAs, known as the Arrangement on Officially Supported Export Credits. See OECD, *Arrangement on Officially Supported Export Credits*, Doc. TD/PG (2004)(12); Levit, *Dynamics of International Trade Finance Regulation*, *supra* note 4, at 75. While the Arrangement was technically “soft” law, the WTO incorporated the Arrangement’s parameters, based in part on Berne Union rules and frameworks, into the WTO’s Agreement on Subsidies and Countervailing Measures, which is a treaty and thereby would satisfy any definition of “international” law. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, ann. I(k), MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 31 (1994), available at <http://www.wto.org/english/docs>. See Levit, *Bottom-Up Approach to Transnational Lawmaking*, *supra* note 4, at 156-57, 163-67, 172-73 for a further discussion of formal international legal institutions appropriating soft transnational norms; see also Berman, *supra* note 1, at 322, 506 (explaining the cosmopolitan approach and the role of norms and customs).

19. Traditional international legal scholarship contrasts soft law with hard international law. While such legal scholars attempted to define hard international law with legal precision, see *supra* note 16, soft law eludes concrete definition. Instead, soft law includes a myriad of international instruments including communications ranging from informal understandings or conversations to more formalized memorandums of understanding, diplomatic letters, protocols, codes of conduct, or even informal “gentlemen’s agreements.” See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BONDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 25-30 (Dinah Shelton ed., 2000) (discussing different soft law forms, including MOUs, communiqués, minutes, “soft commitments” embedded in formal treaties, declarations, agendas, etc. and proposes a classification scheme for soft law instruments); see also Edith Brown Weiss, *Introduction*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss, ed., 1997) (discussing nonbinding

This Berne Union example offers a glimpse of bottom-up lawmaking at work. The bottom-up lawmaking process starts with a relatively small, homogeneous, yet transnational, group of practitioners, often reminiscent of a private club, which either establishes or appropriates an institutional home. These practitioners, who day-in and day-out must roll up their sleeves and grapple with the technicalities of their trade, create, interpret, and enforce rules, which, in turn, effectively govern such practices. Over time, the informal practice-based rules embed themselves in a more formal legal system and become law, even under the strict formalist definition. Fundamentally, bottom-up international lawmaking is a soft, non-choreographed process that produces hard, legal results. It thus challenges the hegemony of the traditional top-down international lawmaking stories, usually rooted in a state and a treaty, which international legal scholars have relished and embellished over the past several decades.

III. COSMOPOLITANISM AND BOTTOM-UP TRANSNATIONAL LAWMAKING: THE LIMITATIONS OF TRADITIONAL PARADIGMS

After reviewing Professor Berman's work, I realize that many of the foundational insights of a cosmopolitan, pluralist approach to jurisdiction are also quite probative and useful in conceptualizing bottom-up lawmaking. Furthermore, in demonstrating that lawmaking and law application are not inextricably linked to the state's coercive power and historically contingent territorial boundaries, and in revealing the suffocating grasp of international law's rigid taxonomy, both bottom-up lawmaking and cosmopolitanism pave the way for a more robust understanding of transnational law.

A. State-based Lawmaking

Berman's cosmopolitanism exposes as fictitious the state's monopoly on law.²⁰ Bottom-up lawmaking likewise debunks the state's monopoly on

norms); *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PRO. 371 (1988) (discussing the nature of soft law); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 AM. J. INT'L L. 443 (1983).

20. Berman, *supra* note 1, at 492-93.

[A] truly pluralist conception of jurisdiction recognizes that law does not reside solely in the coercive commands of a sovereign power. Rather, law is constantly constructed through the contest of various norm-generating communities. . . .

[A]lthough "official" norms articulated by sovereign entities obviously count as "law," a pluralist framework acknowledges that such official assertions of jurisdiction are only one of the many ways in which normative commitments

lawmaking. The Berne Union's "laws" flow directly from members' practices, and Berne Union members are not traditional state diplomats or state policymakers but rather private insurers or ECA technocrats.²¹

Berman's cosmopolitanism, however, tends to be unnecessarily wedded to state-based enforcement of law.²² In his effort to deflect concerns that he is de-emphasizing the state too much, he may actually have done the opposite and overly privileged the role of the state as sole arbiter of legal enforcement. Bottom-up lawmaking, in contrast, showcases the potency of informal enforcement mechanisms that are wholly separate from the state enforcement power. Bottom-up lawmaking communities are often self-sufficient, self-executing legal systems. Disputes among Berne Union members are not resolved in the national courts of one or both of the disputing members; nor do disputes play out in some type of Berne Union arbitral tribunal that relies on national courts to enforce decisions.²³ Instead, a Berne Union member's violation of the governing rules triggers an internal notice process, whereby the export credit insurer notifies all other members of its intent to violate the General Understanding and thereby implicitly offers all members the opportunity to match, presumably placing them on equal footing to vie for export credit business.²⁴ Like a classic trial or tribunal, the notice-and-match process mediates disputes and restores rights. Yet, in the Berne Union context, there is no third-party decision maker, and enforcement remains an intra-community matter; order is not reinforced through state-based force but rather through the reputation-laced consequences of a member disclosing to fellow members, via the Berne Union, its intent to defect from the rules.²⁵ Interestingly, when more formal lawmaking institutions, like the OECD, appropriate the Berne Union's substantive rules, they also mimic notice-and-match and reputation-based

arise. Accordingly, a more comprehensive conception of jurisdiction must attend to the jurisdictional assertions of nonsovereign communities as well.

Id. (citations omitted); *see also id.* at 528.

21. Levit, *Bottom-Up Approach to Transnational Lawmaking*, *supra* note 4, at 172-73.

22. *See, e.g.*, Berman, *supra* note 1, at 511. "Yet, it is important to recognize that, in order for the legal norms of a non-state community to be enforced, such norms must be adopted by those with coercive power, and abhorrent assertions of community dominion are unlikely to achieve widespread acceptance." *Id.*

23. Levit, *Bottom-Up Approach to Transnational Lawmaking*, *supra* note 4, at 171-72. International commercial arbitration relies on non-state decisionmaking "tribunals" or panels, but its growth and development is linked to states agreeing that their courts would recognize and enforce these awards if needed. *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

24. Levit, *Bottom-Up Approach to Transnational Lawmaking*, *supra* note 4, at 153.

25. *Id.* at 153-56.

enforcement mechanisms, likewise reducing reliance on state-based enforcement of transnational norms.²⁶

B. Geographically Contingent Lawmaking

A cosmopolitan approach to jurisdiction reveals as artificial the seemingly indissoluble marriage of jurisdiction and nation-state-based geography.²⁷ Likewise, bottom-up lawmaking is not an exercise bound by geography. Export credit insurance laws are not moored to the United States, England (where the Berne Union is located) or even the European Union. The Berne Union is an institutional umbrella for a diffuse transnational lawmaking community that transcends national boundaries and roots identity not in a historically contingent nation state but rather in the insulating technicalities and intricacies of an industry.²⁸ Through repeated interaction and cross-fertilization not only at official Berne Union meetings, but also in underlying transactional meetings (i.e., closings), as well as forums such as WTO, OECD, and IMF/World Bank, a transnational cadre of export finance practitioners forge potent ties and constitute a viable lawmaking community.²⁹ Just as this community stands distinct from nation-states, it is importantly distinct from the unitary, universalist and global community, the “utopian” image that often fuels the familiar sovereignty-based backlash to the very essence of international law.³⁰

26. The OECD, in particular the Arrangement on Officially Supported Export Credits, has created an elaborate notice-and-match enforcement system that echoes many of the Berne Union processes. See Levit, *Dynamics of International Trade Finance Regulation*, *supra* note 4, at 109-14 for a more thorough discussion of the Arrangement’s notice-and-match processes.

27. See, e.g., Berman, *supra* note 1, at 476 (stating that “transnational communities are communities of interest that cut across nation-state boundaries”).

28. Levit, *Bottom-Up Approach to Transnational Lawmaking*, *supra* note 4, at 146-53.

29. Although many bottom-up lawmaking communities are non-governmental, these insights are highly reminiscent of those international legal scholars who discuss “transgovernmental networks.” See, e.g., Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997; Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 204 (Michael Byers ed., 2000) for a discussion of transgovernmental networks.

30. This echoes one of Berman’s more subtle, yet important, insights. Notably, he

For Berman, the divorce of jurisdictional decisions and territorial boundaries is the cornerstone of his theory.³¹ Yet, I am concerned that his particular application of this theory may be overly limited. Berman understands jurisdiction as an inter-community struggle between competing normative visions, but he tends to locate this struggle in a court-like tribunal,³² a traditional state-sanctioned court,³³ an inter-governmental tribunal,³⁴ a nongovernmental tribunal, such as an arbitral panel,³⁵ or even a mock tribunal.³⁶ However, the “tribunal” should not hold a natural monopoly over the law application process, as evidenced from the previous discussion of the Berne Union’s informal, decisionmaking and enforcement mechanisms. In gravitating toward the tribunal paradigm, Berman unnecessarily grounds jurisdictional decisions in time and space and inevitably redirects analytic focus to a particular locale, in a particular territory, at a particular moment. This focus on tribunals is therefore in tension with Berman’s core insight that jurisdiction need not be a territorial-based inquiry.

C. *The Taxonomic Boundaries of International Law*

Cosmopolitanism questions mechanical reliance not only on geographic

rejects universalism as the sole alternative to unnecessary atomistic nationhood. Berman, *supra* note 1, at 491-92 (discussing the differences between “universalism” and a cosmopolitan approach, and arguing why the cosmopolitan approach is preferable and more meaningful).

[A]n ongoing system of comprehensive universal jurisdiction poses such a strong challenge to our current notions on nation-state sovereignty that, as a practical matter, it seems unlikely to be adopted widely in the foreseeable future. . . . [A]nd perhaps most important, a universalist conception of jurisdiction tends to presuppose a world citizenry devoid of both particularist ties and the normative discussion about the relative importance of such ties.

Id.

31. *Id.* at 319-22.

32. The following passage is revealing of Berman’s gravitation toward court-like decision-making: “[J]urisdiction must be based on whether the parties before *the court* are appropriately conceptualized as members of the same community, however that community is defined.” *Id.* at 496 (emphasis added).

33. *Id.* at 497-501.

34. *Id.* at 502-04 (discussing the Nuremberg trials, Tokyo trials, and International Criminal Court).

35. Berman, *supra* note 1, at 504-07 (discussing international commercial arbitration, as well as arbitration via several private standard-setting bodies).

36. *Id.* at 507-10 (discussing several mock trials under the guise of formal legal proceedings, including the “Case of Civilization against Hitler,” the “Women’s International War Crimes Tribunal 2000,” and the 1967 “International War Crimes Tribunal” adjudicating the United States’ responsibility for various acts in Vietnam).

boundaries but also on taxonomic boundaries. One of the seductive undercurrents of cosmopolitanism is its rejection of formality in the name of functionality. In Berman's vision, jurisdictional claims are legitimate if they account for the "character" and "substantive ties" between the defendant and the plaintiff's community.³⁷

Bottom-up lawmaking also rejects formulaic, bootstrapping of "law" in favor of a fluid, functional approach to law. Under a strict formalistic definition of law, the General Understanding is neither domestic nor international law. Yet, the General Understanding presents an unsettling paradox, for it functions as well, if not better, than much that we deem law. Furthermore, the Berne Union example offers a fertile lawmaking trajectory along which we may pinpoint moments when certain General Understanding rules cross the magical line segregating "soft law" from "hard law."³⁸ Empirically, the practical impact of this line is merely semantic.³⁹ My research confirms this empirical result in other contexts,⁴⁰ beckoning international legal scholars to contemplate the analytic distinction between law and "everything else" along substantive, rather than rigid, formulaic lines.⁴¹

In the cosmopolitan view, jurisdictional decisions are just one snippet of an "international process of community definition and norm creation."⁴² Bottom-up lawmaking is also a decisively process-oriented approach to the

37. *Id.* at 514; *see also id.* at 526 ("Eschewing the formalistic application of mechanical jurisdictional rules ensures that substantive discussion of both community definition and evolving substantive norms will always take place.").

38. Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 156-57, 172-73.

39. *Id.* at 190-92.

40. Levit, *The Dynamics of International Trade Finance Regulation*, *supra* note 4, at 125-26 (proving through empirical data that compliance with Arrangement on Officially Supported Export Credits was constant in spite of rules becoming hard law via the WTO Agreement on Subsidies at a particular moment in the Arrangement's history).

41. This insight is drawn largely from the work of Professor Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1882 (2002) (arguing that "[r]econciling theory and practice requires a new theoretical approach, based on a revised definition of international law. It should be one that is functional rather than doctrinal. Rather than simply listing what is and is not considered international law, the new definition should describe the characteristics of international law. Instruments that fit that definition should be considered international law. . . . The definition of international law, therefore, should turn on the impact of a promise on national incentives."). *See* Levit, *Dynamics of International Trade Finance Regulation*, *supra* note 4, at 138-41 for a discussion of Professor Guzman's functional theory of international law as it pertains to trade finance.

42. Berman, *supra* note 1, at 495.

law.⁴³ In the case of export credit insurance, the Berne Union, providing institutional centripetal force for a diffuse group of trade finance technicians, gathers and analyzes members' experiences, with the goal of codifying rules that will remain dynamically coincident with practice. Other communities—in this case the OECD, WTO, and EU, attracted to the efficacy of such rules, appropriate the norms and embed them in harder legal instruments. Yet, to conceive of international law in its narrow and formal sense—a WTO treaty signing or a high-profile OECD ministerial gathering—inevitably and arbitrarily segments a particular (and not necessarily consequential) lawmaking moment from an ongoing, iterative lawmaking process. The traditional, seemingly immutable, international legal taxonomy—not just soft versus hard law, but also public versus private law and comparative versus international law⁴⁴—severs and rigidly pigeonholes rich segments of these lawmaking processes, often distorting and truncating their breadth, depth and dynamism.⁴⁵

43. In this sense, both bottom-up lawmaking and cosmopolitanism are related to the transnational legal process school of thought. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW* (1995) for a discussion of transnational legal process; see also Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

44. For some time, this taxonomy organized and fortified international law as a "legitimate" discipline as legal realists challenged the discipline's very existence. See Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193, 198 (1980) (arguing that "[i]nternational law is devoid of any intrinsic significance within the calculus of international political decisionmaking") and Stanley Hoffman, *The Role of International Organizations: Limits and Possibilities*, 10 INT'L ORG. 357, 364 (1956) (arguing that power politics, particularly cold war politics, limit and paralyze international institutions) for classic discussions of legal realism. See generally FRANCIS BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* (1985); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1978) for a further sampling of the realist critique. See Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 189 for a discussion of the relationship between international law's taxonomy and legal realism. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) for an excellent discussion of the history of international legal scholarship and its relationship to political science scholarship, particularly legal realism.

45. Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 189-90.

D. Transparency, Accountability, and the "Democratic Deficit"

Berman notes that issues of transparency, legitimacy and accountability may arise when law is detached from the state; "democratic" state-based lawmaking is ostensibly "participatory" and thus infuses some accountability into the system.⁴⁶ Indeed, my research reveals community-based lawmaking, in this case lawmaking among transnational communities of export credit insurers, as secretive, exclusive, and club-like.⁴⁷ In fact, as occurs in many clubs, secrecy and exclusivity have become a type of normative glue that members perceive as necessarily binding the group. So, while these lawmaking communities have been quite effective legal entrepreneurs, their modus operandi inevitably raises questions of legitimacy and accountability.

Consider for a moment my quest to gain insight into the Berne Union's inner workings.⁴⁸ The Berne Union does not publish the General Understanding, although I knew of the General Understanding as a result of my work with export credit insurance at Ex-Im Bank.⁴⁹ In February 2004, in conducting research for *A Bottom-Up Approach to International Lawmaking*, I began contacting the Berne Union Secretariat via e-mail, fax, phone and overnight courier, requesting more information about Berne Union agreements, rules and understandings. For months, I received no response from anyone at the Berne Union except an administrative assistant, who would not provide me with any information, arguing that the General Understanding rules were the property of the members and the institution did not have the right to disclose them. As a result, I shifted focus and started directly contacting all Berne Union members. This strategy was likewise to no avail because the members claimed that the rules could not be disclosed. I even hired a law student to draft a Freedom of Information Act (FOIA) request⁵⁰ to see if Ex-Im Bank, a U.S. administrative agency, could be forced to disclose the Berne Union rules.

Soon thereafter, I had a significant breakthrough. One Berne Union

46. Berman, *supra* note 1, at 397-99 (noting that non-state-based lawmaking arguably raises questions of transparency, democratic legitimacy and, in the view of some, creates a "democratic deficit").

47. Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 194-99.

48. *See id.* at 151-52 n.107 for a more detailed discussion.

49. As an attorney in the Office of General Counsel at Ex-Im Bank, I often heard export credit insurance underwriters referring to Berne Union rules and categories, but I did not personally work with the minutiae of the General Understanding. Thus, I left Ex-Im Bank with awareness of the General Understanding's existence without detailed knowledge of the General Understanding's contents.

50. Freedom of Information Act, 5 U.S.C.S. § 552 (2006).

member sent me the General Understanding without any confidentiality stipulations.⁵¹ Coincidentally, the Secretary-General of the Berne Union also granted me a telephone interview, during which she discussed the substance of many of the rules, but noted that she could not provide hard copies due to various confidentiality agreements.⁵² The Secretary-General also requested a draft of the article prior to publication, which I provided as a courtesy early in the editing process.

After reading the article, the Secretary-General raised many concerns about the Berne Union discussion, particularly the references to the General Understanding rules and the critique of the Berne Union's secretive lawmaking tendencies. The Secretary-General then reserved "the right to discuss this issue with the editor" unless I agreed to a significant rewrite of the Berne Union sections, including removal of all "verbatim" references to the General Understanding.⁵³ She explained that the member who had sent me the General Understanding (whose identity I have protected) had violated the Berne Union Code of Conduct on Disclosure of Confidential Information and would be subject to sanctions.

Interestingly, some of these protestations and pleadings tugged at my own sense of community because I was once an active, participating member of this niche trade finance community through my tenure at Ex-Im Bank. Furthermore, I consider some who hold leadership roles in the Berne Union to be personal and professional friends. Therefore, instead of rejecting all of this out of hand, I spent the next two weeks painstakingly balancing the changes that the Berne Union requested against the article's integrity and my academic freedom. I ultimately decided not to accommodate all the Berne Union's requests and decided not to share subsequent drafts of the article with the Secretary-General. While the Berne Union has not contacted me since the article's publication in March 2005 (other than to request a copy of the published article), the Secretary-General, in our last phone conversation, dangled what could have reasonably been interpreted as a veiled threat of some type of legal recourse if the final version did not adequately comport with the essence of Berne Union's comments. As all of this was transpiring, the Berne Union, for the first time since I began visiting the Berne Union website in 2003, posted a

51. In fact, that particular Berne Union member, who has asked to remain anonymous, noted that her superiors at this particular ECA had approved the release of the General Understanding because the General Understanding is indeed available to exporters.

52. Telephone Interview with Kimberly Wiehl, Secretary-General, Berne Union (June 21, 2004).

53. Facsimile from Kimberly Wiehl, Secretary-General, Berne Union, to Janet Koven Levit, Associate Professor of Law, University of Tulsa College of Law (Nov. 2, 2004) (on file with author) (this fax contains twenty four pages of comments and edits).

press release acknowledging the importance of transparency to Berne Union values—a somewhat heartening yet ironic postscript to my story.⁵⁴

I recall this story not merely to share my frustration—which at times was great—but rather to highlight the risks and dangers of community-based lawmaking. Of course, when the rules apply merely to the insular, lawmaking community, the lack of transparency should be of minimal concern to outsiders. Yet, questions of legitimacy and accountability inevitably sharpen as rules developed behind opaque, fortress-like walls seep beyond the insular lawmaking community to impact those in other lawmaking communities, creating an “accountability mismatch” or a “democratic deficit.”⁵⁵

What are the possible remedies? One is opening—enhanced transparency in lawmaking and further consultation with stakeholders. Perhaps the press release or even the interview with the Secretary General, indicate that the Berne Union is trying to become more transparent. However, the Berne Union’s unfavorable reaction to my article suggests that progress will be measured and will likely proceed at a glacial pace. Yet imagine the opposite, a world of unfettered opening, where the Berne Union suddenly welcomed outsiders with open arms and published all rules, proceedings and deliberations. This could counterproductively open the

54. Press Release, Berne Union, Three New Members Join the Berne Union (Oct. 2004), available at <http://www.berneunion.org.uk/press%20Release%20October%202004.pdf>. The press release notes that “Berne Union members fully appreciate the importance of communication and transparency, of good governance and of adopting strong ethical values in international trade.” *Id.* The press release also includes a “Berne Union Value Statement,” which reads: “We are committed to operate in a professional manner that is financially responsible, respectful of the environment and which demonstrates high ethical values—all in the best interest of the long-term success of our industry.” *Id.* Interestingly, the Secretary-General was quick to call this press release to my attention, noting in an e-mail dated November 16, 2004, “I have also attached our recent press release, I think it will help you to understand our willingness, albeit on an [sic] step by step basis to be more transparent and especially helpful to see [sic] we now have a Value Statement. I’d be grateful if you could possibly add this information to your conclusions as it is quite a leap forward and confirms your thoughts that we are moving forward.” E-mail from Kimberly Wiehl, Secretary-General, Berne Union, to Janet Koven Levit, Associate Professor, University of Tulsa College of Law (Nov. 16, 2004, 4:36 CST) (on file with author).

In fact, in the period between this essay’s drafting and publication, the Berne Union has revamped its web site in an apparent effort to post more information and enhance transparency. Berne Union: International Union of Credit & Investment Insurers, <http://www.berneunion.org.uk> (last visited November 21, 2005).

55. See Berman, *supra* note 1, at 399 n.350; Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 4, at 200-01 n.311, 312 for additional references and further discussion.

floodgates to outside pressure, scrutiny and demands, conceivably spelling the disintegration of the very practice-based, bottom-up lawmaking processes that have effectively and successfully facilitated an exponential growth in international trade.

Are we trapped in a catch 22? In addressing accountability problems, do we inevitably doom bottom-up lawmaking processes? Some scholars convincingly argue that democratic processes—inputs—are not the sole arbiter of law's legitimacy; effective outputs—norms, rules, or law—may also legitimate law.⁵⁶ And the reality is that bottom-up lawmaking, in this case the Berne Union, has been quite effective. Yet, how can the Berne Union showcase its alacrity and ingenuity behind its currently high and nearly impenetrable walls? The challenge for the Berne Union and other similarly situated lawmaking institutions is to reveal enough so that stakeholders will come to see it as effective, but not so much as to dislodge bottom-up lawmaking from its practice-based roots.

IV. CONCLUSION

At a moment when international law is at the cusp of both notoriety and prominence, I offer bottom-up lawmaking as an alternative to the standard top-down, treaty-based lawmaking stories rooted in detached diplomatic negotiations, choreographed signing ceremonies, and grandiose inter-governmental institutions. Bottom-up lawmaking is modest and quiet, grounded in the practitioner, both public and private, who joins with others similarly situated in avocation (although often quite distant in location) to share experiences and standardize practice, inadvertently triggering a process which ultimately produces "law." Importantly, to embrace bottom-up lawmaking, or cosmopolitanism, is not to condemn well worn international law paradigms—those rooted in the state—as legal relics left to fossilize. It is merely to recognize that they alone do not tell the whole

56. See Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 285-87 (noting that "[t]he legitimacy of governments is not determined solely by the procedures on the input side. Substantive outputs also matter"); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199, 234 (Gregory H. Fox & Brad R. Roth eds., 2000) (stating that "[o]n the other hand, legitimacy may be conferred or attained independent of mechanisms of direct accountability—performance may be measured by outcomes as much as process. Courts, and even central banks, can earn the trust and respect of voters without being 'accountable' in any direct sense"); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 195 (Michael Byers ed., 2000).

story and to offer a more complex, more nuanced, and multidimensional view of law.