

**Hauser Globalization Colloquium Fall 2008:  
Global Governance and Legal Theory**

NYU Law School

Professors Benedict Kingsbury and Richard Stewart  
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)  
Wednesdays 2.15pm-4.05pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- August 27- Teaching Session: Introductory Class (course instructors)
- September 3- No class (legislative Monday)
- September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor  
Topic: The Concept of (Global) Administrative Law
- September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi.  
Professors Stewart, Kingsbury, and members of the international law faculty.
- September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)  
Topic: Toward Global Checks and Balances
- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and  
Eran Shamir-Borer (NYU)  
Topic: Global Constitutionalism and Global Administrative Law (two papers)
- Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm*  
Speaker: Neil Walker, Edinburgh  
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder  
of normative orders  
*Background reading: Constitutionalism Beyond the State*
- October 8- Speaker: Meg Satterthwaite (NYU)  
Topic: Human Rights Indicators in Global Governance
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law  
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking  
Commission and the Transnational Regulation of Letters of Credit**
- October 22- Speaker: Jack Goldsmith, Harvard Law School. *Pollack Room, Furman Hall 900.*  
Topic: Law for States: International Law, Constitutional Law, Public Law (paper  
co-authored with Daryl Levinson)  
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO  
Appellate Body
- October 29- *[The IILJ will convene jointly with JILP a conference on International Tribunals, on  
Wed Oct 29, 9am-6pm, at the Law School. Global governance issues will feature. Students should  
attend this conference during the regular Colloquium time slot, and are welcome to attend other  
parts of the conference also. See the IILJ Website for details.]*
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA)  
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU)  
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)  
Topic: Global Administrative Law: Conceptual and Theoretical Problems
- November 26- Student paper presentations [may be rescheduled, due to Thanksgiving break]
- December 3- Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

**BOTTOM-UP LAWMAKING THROUGH A PLURALIST LENS:  
THE ICC BANKING COMMISSION AND THE  
TRANSNATIONAL REGULATION OF LETTERS OF CREDIT**

*Janet Koven Levit\**

*The international lawmaking stories that gain scholarly and popular traction are generally of a similar “top down” genre, centering on state-based policymakers and contemplating treaties or intergovernmental institutions. Yet, much international law surfaces from the “bottom up,” from day-to-day private and commercial practices. This Article deploys core legal pluralism insights to narrate a rich bottom-up lawmaking tale that features private bankers, who have coalesced for decades under the auspices of the International Chamber of Commerce’s Banking Commission to “codify” letter-of-credit practices in the form of the Uniform Customs and Practices (UCP). The UCP, however, is not mere self-regulation but rather a potent determinant of hard law, in this instance a multilateral treaty and Article 5 of the Uniform Commercial Code. This Article argues that bottom-up lawmaking sculpts the legal landscape as much as any treaty or diplomatic conference and thereby challenges prevailing international legal theory.*

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## INTRODUCTION

International law is happening all around—in the shadows and in the trenches, in boardrooms and backrooms, on cocktail napkins and in codes of conduct, and, as this Article recounts, in the “trade finance” shops of money-center banks. Yet, international legal scholars largely neglect these normative moments in favor of the glitz and public drama of treaty-signing ceremonies, “grand openings” of international institutions, and high-level diplomacy. Consequently, the international lawmaking stories that gain scholarly and popular traction are generally of a similar “top-down” genre,<sup>1</sup> centering on state-based policymakers and contemplating treaty-based commitments or an intergovernmental institution born from a treaty.

This Article offers “bottom-up transnational lawmaking” as a novel window into some of these overlooked subterranean processes. In particular, this Article focuses on the technical regulatory framework governing letters of credit as an entrée to a potent bottom-up lawmaking undercurrent. Bottom-up lawmaking is a soft normative process that produces hard legal results. At least initially, bottom-up lawmaking echoes normative development within private legal systems: unofficial, or informal, lawmaking communities,<sup>2</sup> with members joined by avocation rather than location, coalesce around shared

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<sup>1</sup> A review of the table of contents from the *American Journal of International Law* from 1950 to the present reveals that articles on formal treaties, the intergovernmental institutions that treaties constitute, diplomatic agreements, and the incorporation of treaties into U.S. law overwhelmingly dominate scholarly discourse.

<sup>2</sup> Throughout this Article, I use the terms *unofficial* and *informal* lawmaking communities interchangeably, although I recognize that some might argue that the International Chamber of Commerce is a bureaucratic, overly formal organization and thus inappropriately labeled “informal.” As a point of definitional clarity, this Article uses the terms *informal lawmaking community* and *unofficial lawmaking community* to refer to a transnational group, often institutionalized, which is neither constituted by treaty nor other legally binding instrument, thereby lacking direct authority to make legally binding law. This Article employs the term *treaty* as defined in the Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 (“[T]reaty’ means an international agreement concluded between States in written form and governed by international law.”). As such, this Article employs but does not endorse the formality of the legally “binding” versus “nonbinding” dichotomy. “Binding international law” includes: (1) a treaty or other international agreement, as defined in the Vienna Convention on the Law of Treaties, *supra*; (2) customary international law; and (3) general principles of law (a true third category). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Alternatively, non-binding international norms are often described as “soft law.” See *infra* note 3.

While the formal definitions of international law are archaically rigid and not particularly useful in conceptualizing the transnational legal landscape, the arguments in this Article hold without eschewing such definitions. See, e.g., Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT’L L.J. 65, 114–18 (2004).

practices and perceived self-interests; these groups “codify” norms that not only embody extant practices but also condition future practice in furtherance of the groups’ interests; thereafter, such groups engage in a continuous, iterative interpretive loop designed to assure coincidence between stated norms and evolving practices, interests, or both. Yet, at a certain moment, the norms escape the group confines and embed in a more formal legal system. Through bottom-up, transnational lawmaking, practice-based norms enter official legal structures; fundamentally, the bottom-up lawmaking process draws informal, community-based norms (often referred to in international legal scholarship as “soft law”)<sup>3</sup> into officialdom. Thus, practices and interests gel as norms, and norms ultimately become law.

Scholars and policymakers should not underestimate bottom-up lawmaking’s impact on the international economic landscape. In the instant example, bottom-up lawmaking processes sculpted a regulatory framework that today manages over \$1 trillion annually in international trade.<sup>4</sup> Yet, bottom-up lawmaking occupies a space in what has been and, for the most part, what continues to be an international scholarly chasm. Historically preoccupied with legitimating international law as “law,” showcasing international law’s potency and efficacy, and debunking naysayers’ recurrent equating of international law and geopolitical power, international legal scholarship has, for the most part, been of a “top-down,” state-centered nature. Thus, the international legal academy under-studies, and certainly

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<sup>3</sup> “Soft law” includes a myriad of international instruments or, more inclusively, communications ranging from informal understandings or conversations to more formalized memoranda 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-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 25–31 (Dinah Shelton ed., 2000); see also Edith Brown Weiss, *Introduction to INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS I* (Edith Brown Weiss ed., 1997) (discussing nonbinding norms); *A Hard Look at Soft Law*, 82 AM. SOC’Y INT’L L. PROC. 371 (1988) (scholarly panel discussion of the nature of soft law); Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT’L L. 443 (1983).

<sup>4</sup> Commercial letters of credit (“L/Cs”) facilitated an estimated \$1 trillion in annual trade in 2006. T. D. Clark, *Revised Credit Rules Impact International Business*, INDUS. MARKET TRENDS, Jan. 16, 2007, [http://news.thomasnet.com/IMT/archives/print/2007/01/revised\\_credit\\_.html](http://news.thomasnet.com/IMT/archives/print/2007/01/revised_credit_.html); see also Keith A. Rowley, *Anticipatory Repudiation of Letters of Credit*, 56 SMU L. REV. 2235, 2236 n.7 (2003) (citing statistics estimating that in the second quarter of 2002 there were over \$280 billion outstanding in letters of credit); Anand Pande, *The Future of Documentary Trade: Reducing Discrepancies in Letters of Credit*, FIN. ASIA, Apr. 2003, at 21, 21 (citing statistics estimating commercial L/Cs facilitated \$1 trillion in annual trade in 2002).

undertheorizes, the jurisgenerative role of informal or unofficial “lawmaking” communities.<sup>5</sup>

This scholarly neglect is rather ironic. The international legal system—constitutionally decentralized, diffuse, anarchic, and eclectic—presumably offers fertile ground for the study of such unofficial lawmaking. Yet, it is not international, but rather domestic legal scholars who have long been grappling with modes of “ordering” in the absence of “law.”<sup>6</sup> Domestic legal systems, rigid and hierarchical in structure, would presumably offer fewer glimpses of such “informality” or “unofficial law” within a more formalized legal system. Yet, on the domestic plane, “social norm” and “private legal system” scholarship is a burgeoning and vogue field.<sup>7</sup>

The time has arrived for international legal scholars to grapple rigorously with the role of unofficial lawmaking communities on the transnational legal landscape. This Article offers legal pluralism as the lens and the transnational regulation of letters of credit as the landscape. By not only deprivileging the state’s role in the lawmaking project but also recognizing the permeability and malleability of boundaries between lawmaking communities, the legal pluralism literature fills, in part, the gulf between top-down international lawmaking, on the one hand, and a cordoned-off private legal system, rooted in social norms, on the other.

Legal pluralism is, in itself, not a normative theory;<sup>8</sup> instead, legal pluralism is a roadmap for thick description and narrative. As Part I of this Article recounts, the legal pluralism literature, which has only recently resurfaced in discrete pockets of international legal academia, focuses

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<sup>5</sup> Admittedly, some international legal scholarship grants lip service to such informal communities when offering broad, inclusive definitions of such terms as “transnational actor,” *see, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2626 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)) (transnational actors include “nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals”), or “international organization,” *see, e.g.*, Joseph Jupille & Duncan Snidal, *The Choice of International Institutions: Cooperation, Alternatives and Strategies* (July 7, 2006) (unpublished manuscript, on file with author), available at <http://sobek.colorado.edu/~jupille/research/20060707-Jupille-Snidal.pdf>. *See also generally* David Zaring, *Choice of Form in International Regulation* (Jan. 12, 2007) (unpublished manuscript, on file with author).

<sup>6</sup> *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>7</sup> *See infra* notes 14–20 and accompanying text.

<sup>8</sup> *But see* Paul Schiff Berman, *Global Legal Pluralism*, 80 *S. CAL. L. REV.* 1155 (2007) (arguing that the insights of legal pluralism suggest that multiplicity is jurisgeneratively beneficial and that institutions should be designed to accommodate such multiplicity or “hybridity”).

scholarly gaze on four critical insights: (1) *multiplicity*—law embodies eclectic multiplicity, with a multitude of actors engaged in normative activity in distinct communities; (2) *fluidity*—norms traverse lawmaking communities, often crossing from informal to official realms; (3) *interface*—such normative movement brings informal and official lawmaking communities into contact, and such moments of “interface” are not only potently complex but also norm-generating opportunities in and of themselves; and (4) *reconstitution*—over time, the dynamics of repeated interface transformatively reverberate *within* informal lawmaking communities, altering their texture, efficacy, and lawmaking capacity.

The remainder of this Article employs these core pluralist insights to narrate a bottom-up lawmaking tale which stars private lawmakers, in this case private bankers, who have coalesced for decades under the auspices of the International Chamber of Commerce’s (ICC’s) Commission on Banking Technique and Practice (Banking Commission) to “codify” industry norms in the form of the Uniform Customs and Practice for Documentary Credits (UCP). The UCP, however, is not mere self-regulation but rather a potent determinant of hard law, in this instance domestic law, the Uniform Commercial Code (UCC) revised Article 5 (Article 5), and international law, the United Nations Commission on International Trade Law’s (UNCITRAL’s) Independent Guarantees and Stand-by Letters of Credit Convention (UNCITRAL Convention). Thus, as Part II of this Article recounts, the UCP is a fruitful example of bottom-up lawmaking, of law that surfaces from a type of subterranean, private lawmaking community. In recognizing the Banking Commission’s jurisgenerative stature and in tracing normative movement between informal and formal spheres, Part II utilizes two of legal pluralism’s core insights: multiplicity and fluidity.

Part III focuses on the interfaces, the touch points, between an unofficial lawmaking community and officialdom. Indeed, as legal pluralists anticipate, the Banking Commission, UNCITRAL, and domestic legislators (in this case, the architects of Article 5) are increasingly entangled in a dynamic web that is at once wrought with tension in its competitiveness and mutually reinforcing in its complementarities. While the Banking Commission lends UNCITRAL and domestic lawmakers technical expertise and a wellspring of trade experience, official lawmakers help legitimate the Banking Commission’s normative role by opening “transparency windows” and increasing the Banking Commission’s “accountability capacity.” Yet, at the same time, these moments of interface bear the specter, and reality, of trespass; despite the Banking Commission’s



attempts to negotiate new boundaries around its vaunted sphere of autonomy, many of these trespasses remain unresolved, leaving the Banking Commission with a reservoir of insecurity about its place within the trade-finance field.

Part IV uses the ICC's October 2006 release of the UCP 600 as a vehicle to gain longitudinal perspective over the fate and evolution of the Banking Commission and its norms. Legal pluralism suggests that interface and relationships, over time, will change the complexion of individual normative communities. Indeed, interface-spawned defensiveness and insecurities effectively blind the Banking Commission to evolving trade finance practices, particularly practices pertaining to corporate-based and online letters of credit ("L/C"). The UCP, therefore, becomes detached and dislodged from its practice-based roots, and the Banking Commission becomes increasingly preoccupied with institutional survival at the expense of the trade-finance community's interests. This trend, if not reversed, bodes doom for the Banking Commission's future as a bottom-up lawmaker.

Thus, legal pluralism offers a vehicle for rich, thick description, and this Article offers a dynamic portrait of bottom-up lawmaking in action and, ultimately, devolution.<sup>9</sup> This Article, however, is one part of a broader project. In ultimately juxtaposing several legal pluralism-driven descriptions and narratives, as the one at the heart of this Article, I hope to construct a portrait of socio-legal reality that permits (1) *normative assessment*—what type of transnational lawmaking process is "better" or "worse" vis-à-vis certain metrics (i.e., legitimacy, efficacy, efficiency, democracy)?; (2) *normative prescription*—given the normative assessments, what are the preferred paths at critical, decisionmaking moments?; and (3) *prediction*—when might we expect to see a (certain type of) "top down" as opposed to a "bottom up" lawmaking process? Thus, plurality opens the door to candid and nuanced reality.

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<sup>9</sup> While descriptive work is the preferred methodology in many disciplines, it is somewhat disfavored today among legal scholars, who are trained in identifying problems (disputes) and crafting solutions (through generally applicable legal rules and dispute settlement). See, e.g., Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 523 (discussing continued perceptions that only prescriptive work may qualify as "true" legal scholarship).

## I. BOTTOM-UP TRANSNATIONAL LAWMAKING AND LEGAL PLURALISM

A. *What is Bottom-Up Lawmaking?*

The story that this Article tells is representative of a phenomenon that I refer to as *bottom-up transnational lawmaking*. Fundamentally, bottom-up transnational lawmaking is a soft, sometimes unchoreographed and spontaneous, normative process that produces hard, legal results. The process of norm creation begins with the informal, day-to-day experiences and concerns of practitioners who, in grappling with the technicalities of their trade, seek standardization and harmonization as a means to anchor and promote their business. The group then translates these practices into organic norms, which, in turn, govern such practices. The lawmaking group also establishes interpretive, procedural, and remedial rules designed to maintain their flexibility and proximity to actual group practice. Yet, at a certain point, the norms escape the group's confines, seep into more formal legal systems, and become hard "law." In previous work, I attributed this hardening phenomenon to efficacy, a type of comparative advantage inherent in normative efforts rooted in technical experience and practice.<sup>10</sup> Yet, as this Article's story will demonstrate, the informal lawmaking group may also *advocate* for the official acceptance or adoption of their norms as a means to legitimate, universalize, and institutionalize market share.

I have told the bottom-up lawmaking story in a variety of contexts—from trade finance to climate change—using a variety of lawmaking communities, some populated with private actors and some with low-level bureaucrats, some "tightly knit" and others more diffuse.<sup>11</sup> Yet, at its core, these diverse bottom-

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<sup>10</sup> 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, 172–73 (2005) [hereinafter Levit, *A Bottom-Up Approach to International Lawmaking*] (noting that norms cross the divide between soft-law and hard-law, but not explaining in any robust way the push or the pull); Janet Koven Levit, *A Cosmopolitan View of Bottom-Up Transnational Lawmaking: The Case of Export Credit Insurance*, 51 WAYNE L. REV. 1193, 1197 (2005) (noting that rules from bottom-up lawmaking communities have been so effective at greasing trade that formal lawmaking institutions "have appropriated many of them").

<sup>11</sup> In a previous article, I documented the cadence of bottom-up lawmaking in the context of three trade-finance communities. See Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 10 (describing bottom-up lawmaking processes in the regulation of letters of credit, export credit insurance, and export credit guarantees); see also Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008). In other work, I located this bottom-up lawmaking phenomenon in worlds beyond international trade finance. Janet Koven Levit, *International Law Happens (Whether the Executive Likes It or Not)*, in SELA 2006: EL PODER EJECUTIVO (Roberto Saba ed., Editores del Puerto 2007) (published in Spanish) [hereinafter Levit, *International Law Happens*] (exploring bottom-up

up lawmaking stories share two defining characteristics. First, the *bottom-up* label grounds the normative process in practitioners, both public and private, including those motivated by altruism and those motivated by profit, who join with others similarly situated in avocation to share experiences and standardize practices toward shared goals. *Practitioner*, as used in the bottom-up lawmaking context, is a deliberately broad term, used loosely to describe those on the ground, armed with intimate knowledge of their niche trade, interest areas, or both, who constitute norms rooted in nitty-gritty technicalities rather than the winds of geopolitics and diplomacy.

Second, bottom-up transnational lawmaking joins two interrelated sub-processes: (1) an informal process of norm creation, reminiscent of the way that norms solidify within private legal systems; and (2) a hardening process, whereby such informal norms embed in official legal systems, perhaps at the prompting of the informal group or because the norms offer attractive legal solutions to collective action problems. While the first necessarily precedes the second, the two processes become iterative, inextricably linked in a loop of interpretation, assessment, and alignment. Thus, while not a very sophisticated image, bottom-up lawmaking evokes an international lawmaking landscape that resembles a giant game of Tinkertoys, where the “hubs” are the various types of lawmaking communities, some informal and some formal, connected by a complex network of “spokes” or “joints.”<sup>12</sup> Bottom-up lawmaking is a process of creating an informal hub and then linking that hub to official, established lawmaking communities.

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lawmaking as an alternative to state-made law in climate change regulation, as well as human rights and corporate social responsibility); see also Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007) (same); Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 10, at 173 n.197 (describing bottom-up lawmaking in other areas pertaining to international trade, as well as safety standards, intellectual property regulation, and the development of standards governing arbitration proceedings). Others have also eloquently documented bottom-up lawmaking processes, without necessarily embracing the same label. See, e.g., Michael Barnett & Liv Coleman, *Designing Police: Interpol and the Study of Change in International Organizations*, 49 INT'L STUD. Q. 593 (2005) (examining and explaining normative organic development in Interpol); Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001) (describing bottom-up-like evolution of a regime governing domain names). While this Article focuses on the role of private lawmakers in constituting public law, it enjoys kinship with those that examine the role of private agreements in promoting compliance with public law. See generally Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

<sup>12</sup> I borrow the appropriately descriptive term “joints” from Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 280 (2004).

*B. What Isn't Bottom-Up Lawmaking?*

Bottom-up lawmaking is the antithesis of top-down lawmaking. It is not the world of jet-setting diplomats or Rose Garden signing ceremonies. Nor is it the world of Eric Posner and Jack Goldsmith,<sup>13</sup> who conceive of international law in instrumental terms, as one of many tools that the President may deliberately deploy in furtherance of the “national interest.” In the traditional top-down approach, state elites enact rules (typically formal, treaty-based rules) that govern the practices and behavior of those subject to the rules; in this account, law’s subjects are often quite removed, physically and metaphysically, from the lawmaking process. In contrast, a bottom-up approach to law focuses on the ways that practices and behaviors of various actors inform and constitute rules, which, in turn, govern such practices and behaviors. The drama in these cases is how the informal, practice-based rules escape relatively confined groups and “bubble-up” to become “law.” Whereas top-down lawmaking is a process of law internalized as practice, bottom-up lawmaking is a process of practices externalized as law. Thus, the rhythm of bottom-up lawmaking debunks the perceived hegemony of its top-down foil.

While bottom-up lawmaking is not top-down lawmaking, it is likewise not mere self-regulation. Onlookers may initially dismiss stories like the one developed in this Article as unexceptional examples of private, self-regulatory behavior. From the range of Shasta County, California<sup>14</sup> to the diamond bourses of New York<sup>15</sup> to the tuna courts in Tokyo,<sup>16</sup> many legal scholars and economists discover discreet “private legal systems.” These scholars argue that private, “closely knit” homogeneous micro-societies often create their own norms that, at times, trump state law and, at other times, fill lacuna in state regulation, but nonetheless operate autonomously and beyond the reach of

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<sup>13</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 14–17 (2005) (rejecting the assumption that states comply with international law for noninstrumental reasons).

<sup>14</sup> This is a reference to the study of social norms among ranchers and farmers in Shasta County, California that formed the core of Robert Ellickson’s classic work, *Order Without Law: How Neighbors Settle Disputes*, *supra* note 6.

<sup>15</sup> See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Opting Out of the Legal System*] (discussing the system of “private lawmaking” in the New York Diamond Dealers Club); see also Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (markets for the purchase and sale of cotton); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (National Grain and Feed Association).

<sup>16</sup> See Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313 (2006).

officialdom.<sup>17</sup> An equally important insight is that potent nonlegal enforcement mechanisms linked to social group dynamics, such as reputational standing and gossip, are as integral as legalistic mechanisms (for example, binding arbitration) to maintaining “order without law.”<sup>18</sup> This literature also provides a useful taxonomy: constitutive, procedural, substantive, interpretive, and remedial rules.<sup>19</sup> In this scholarly paradigm, a private legal system stands as an alternative to, often in opposition to, the state’s official legal apparatus; as long as the private legal system is truly closed, offering members not only substantive norms but also clear interpretive rules and enforcement mechanisms, then the system maintains autonomy from the state.

Unlike private legal systems, which are largely self-contained and confined, bottom-up lawmaking is a process that traverses legal communities, charting a route that links unofficial “law” to officialdom. Thus, while private lawmaking or private legal system scholarship may offer insight into the ways in which group members constitute, interpret, and enforce norms *among group members*, it does not contemplate, explain, or conceptualize the normative ties between lawmaking communities. As many private legal system scholars are critical of state incursions in private life, because they see themselves as offering a preferable alternative to state law, their analyses often fail to contemplate the extent to which the state, or official lawmaking institutions, borrow from such private law or the extent to which the private lawmaking group lobbies the state to adopt its norms.<sup>20</sup> Accordingly, such scholars often do not contemplate normative movement, particularly from the unofficial to official realm, and thus ignore the jurisgenerative energy of inter-community interaction. Indeed, this Article’s lawmaking example suggests that, on a transnational plane, a relatively private form of lawmaking may be an interim step on a bottom-up lawmaking process.

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<sup>17</sup> See ELLICKSON, *supra* note 6, at 177–78. For example, despite formal California legal rules to the contrary, informal norms in Shasta County make an animal owner (usually a rancher) liable for the trespass (and ensuing damage) of his animals, except that Shasta County residents essentially absorb *de minimus* damage, maintaining instead a mental accounting of the damage, on the belief that what goes around comes around. See *id.* at 53–55.

<sup>18</sup> See Bernstein, *Opting Out of the Legal System*, *supra* note 15, at 138–40 (discussing nonlegal enforcement mechanisms).

<sup>19</sup> This Article borrows the substantive, procedural, remedial, interpretive norm taxonomy from Robert Ellickson. See ELLICKSON, *supra* note 6, at 132–36 (developing taxonomy by splitting norms and rules into the categories of substantive rules, remedial rules, procedural rules, constitutive rules, and controller-selecting rules).

<sup>20</sup> *But see* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 403–12 (2003) (arguing that the rules that come from private lawmaking groups, like the ICC Banking Commission, are technically law).

### C. *A Legal Pluralism Lens*

From a bottom-up lawmaking perspective, legal pluralism fills the theoretical chasm between traditional, state-driven international lawmaking and private self regulation. Legal pluralism, at its core, is “a situation in which two or more legal systems coexist in the same social field.”<sup>21</sup> As a colorful and “multi-scalar” patchwork of autonomous or semi-autonomous lawmaking communities,<sup>22</sup> some of which enjoy the “official” imprimatur of the state and others that do not, the international legal topography is ripe for pluralist analysis. Paradoxically, international legal scholars, until recently, have largely neglected the legal pluralism literature. Indeed, this Article argues that a pluralist lens enhances and refines many international lawmaking narratives, including bottom-up lawmaking.<sup>23</sup>

Historically, legal pluralism evolved from socio-legal and anthropological exploration of relationships among legal communities, focusing particularly on the fate of “indigenous” norms in colonial societies. These “classic” legal pluralists focused on the ways that unofficial communities interface with hierarchically “dominant” officialdom and documented the ways that “indigenous” law withstands the pressure of superimposed legal structures.<sup>24</sup>

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<sup>21</sup> Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988).

<sup>22</sup> See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y. REV. 719 (1973).

<sup>23</sup> Although beyond the scope of this Article, some international relations scholarship that is reminiscent of the legal pluralism literature would also enrich bottom-up lawmaking narratives. International relations scholars contemplate multiplicity and interface under the rubric of “linkage” (issue-area linkage and institutional linkage), see generally David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002), and “nesting” (tight linkages that completely engulf one international organization in another), see Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362 (2006); see also Vinod K. Aggarwal, *Reconciling Multiple Institutions: Bargaining, Linkages, and Nesting*, in INSTITUTIONAL DESIGNS FOR A COMPLEX WORLD: BARGAINING, LINKAGES, AND NESTING 1 (Vinod K. Aggarwal ed., 1998); Jupille & Snidal, *supra* note 5. Other international relations scholars recognize that norms are fluid, moving from one sphere to another; these scholars contemplate “pathways to cooperation” that, like bottom-up lawmaking, chart a route from “soft” to “hard” law. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 50 (Eyal Benvenisti & Moshe Hirsch eds., 2004). International relations scholars also recognize that interface and overlap, while often mutually supportive and reinforcing, may also be the source of friction and conflict. See, e.g., Raustiala & Victor, *supra* note 12, at 300–02 (discussing diplomatic tensions resulting from legal regimes for plant genetic resources); see also Alter & Meunier, *supra*, at 378 (discussing risks of overlap in context of transatlantic trade friction).

<sup>24</sup> Classic legal pluralism, see, e.g., Merry, *supra* note 21, at 872, and juristic legal pluralism, see, e.g., John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 7 (1986), focused on colonial systems, exploring the type of vertical, hierarchical pluralism that emerges when imperial powers superimpose their law on societies with preexisting, indigenous legal systems. See Griffiths, *supra*, at 7. For

Sally Engle Merry differentiates “new legal pluralism” from its “classic” predecessor.<sup>25</sup> New legal pluralists, in postmodern fashion, shift scholarly gaze from colonial to industrial societies, focusing on the relationship between “dominant” groups (presumably those groups with hold over the state’s official lawmaking apparatus) and subordinate groups (religious, ethnic, and cultural minorities; immigrants; informal social networks; and institutions).<sup>26</sup> These new legal pluralists relish the “‘dark side’ of the majestic rule of law” and the “subversive power of suppressed discourses”: “the ‘asphalt law’ of the Brazilian *favelas*, the informal counter-rules of the patchwork of minorities, . . . the disciplinary techniques of ‘private justice,’ the plurality of non-State laws in associations, formal organizations, and informal networks.”<sup>27</sup>

Classic and new legal pluralists share razor-sharp focus on the “local” and generally do not transpose their insights on a grander, transnational plane. However, an emerging cadre of “global legal pluralists” analyzes the international legal landscape as a dynamic, multidimensional patchwork of vertical, horizontal, and even diagonal relationships between and among disparate legal communities. This scholarship, while gaining momentum,

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examples of such studies, see BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Rowman & Allanheld 1985) (1926) (examining interaction between European law and tribal law on the Trobriand Islands); SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000); and Leopold Pospisil, *Modern and Traditional Administration of Justice in New Guinea*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 93 (1981) (discussing relationship of Dutch colonial law and indigenous legal system in Kapauku Papua). See also Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 YALE L.J. 323 (1993) (noting persistence of “Roma” gypsy law within official, “host” societies). Thus, pluralism—in any of its classic, “new” or “global” forms—guides analysis to the connections, the links, between legal systems, with a particular focus on the relationship between “official” or “state” law and unofficial or informal “law” (often more comfortably referred to as norms). In fact, Merry sees this as a limitation of legal pluralism, noting that “[a] legal pluralist analysis tends to emphasize changes that occur through interactions between social fields but not those taking place within a social field.” Merry, *supra* note 21, at 891.

<sup>25</sup> Merry, *supra* note 21, at 872.

<sup>26</sup> In canvassing the “new legal pluralism” literature, Merry highlights studies that explore the interface between disparate legal systems. For instance, scholarship that focuses on “disputing” and “dispute strategies” should be understood as describing “the dynamics of the symbolic radiation and imposition of state law, its appropriation within other normative orders, and forms of resistance to its penetration.” Merry, *supra* note 21, at 882 (discussing the work of Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981), Sally Falk Moore, *Individual Interests and Organisational Structures: Dispute Settlements as ‘Events of Articulation,’* in SOCIAL ANTHROPOLOGY AND LAW 159 (Ian Hamnett ed., 1977), LAURA NADER & HARRY F. TODD, *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* (1978), and Julio L. Ruffini, *Disputing over Livestock in Sardinia*, in *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES*, *supra*, at 209); see also Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>27</sup> Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443 (1992).

remains in a rather incipient state and divides roughly into two groups: (1) macro, conceptual treatment of global legal pluralism;<sup>28</sup> and (2) pluralist narratives involving the micro-crevices of the transnational topography.<sup>29</sup>

While this Article joins the global legal pluralism literature, offering the regulation of letters of credit as a deep case study, it enriches the existing literature in two important respects. First, it focuses on a corner of commercial regulation that international legal scholars, whether pluralist or of another bent,

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<sup>28</sup> Paul Schiff Berman urges scholars and policymakers to conceive of “hybrid legal spaces,” an endemic feature of global legal pluralism, as loci of jurisgenerative contestation; thus, from an institutional design perspective, Berman suggests that hybridity is a feature to be “managed” but not necessarily quashed. Berman, *supra* note 8; see also Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005). See generally Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002). Sally Engle Merry argues that metaphors of “space” and “geography” offer scholars a meaningful framework to rationalize the complex normative cacophony that legal pluralism presents; Merry also suggests that sociolegal-style application of that framework will bear important normative and theoretical fruit. See Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. L. POL. & SOC’Y 149, 161 (2008) (“Thinking of these interactions through the metaphor of geography highlights the dynamics of borders and contiguity, places where there is intersection and movement across, engagement and redefinition at the edges, the possibility of negotiation and adaptation. It also suggests that there are spheres of closure and refusal, where barriers are erected and the influence of other legal orders and conceptions is resisted.”). For a geography-infused approach to legal pluralism, see Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 26A STAN. ENVTL. L.J. (SPECIAL ISSUE) 181 (2007). See generally Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005) (grappling with the definition of “law” within a global legal pluralism framework and arguing, through a conflict-of-laws lens, that the “state” and “state law” hold a distinct place within a pluralist landscape); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 963 (2005) (“[The] international legal order can be strengthened by the emergence of an international legal pluralism”).

<sup>29</sup> See, e.g., Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT’L L. 1 (2007) (exploring the complex interaction and interface between parallel court systems—one established by the United Nations and another maintained by the government of Serbia—in post-conflict Kosovo and drawing lessons from an extreme example of legal pluralism that may be applicable in other post-conflict societies); Osofsky, *supra* note 28 (noting that a multi-scalar analysis of climate change litigation examines not only national efforts to regulate (and litigate) in response to global warming (as in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)) but also state and local efforts, as well as supra-national litigation); see also, e.g., Balakrishnan Rajagopal, *The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT’L L. 345 (2005) (recounting the saga over a large hydro-electric dam project over the Narmada River, and examining complex, contested, multi-scalar interactions between local and transnational movements and official legal institutions); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (examining the interface between international human rights systems, particularly human rights treaties, and domestic common law courts).



have generally left unexplored altogether.<sup>30</sup> Furthermore, while legal pluralists uniformly acknowledge the normativity of “soft” law and “informal” lawmaking communities, thereby reconceiving of “the state” or “officialdom” as one of a multitude of lawmaking communities within any particular social sphere, most *global* legal pluralist studies still fixate on “official” legal structures (with an admittedly expanded view of “officialdom” to include governmental action at the sub-state, state, and international levels). Thus, the residual magnetism of the classic, “top down” lawmaking paradigm pulls even global legal pluralists toward case studies where official lawmakers and legal institutions—courts, legislatures, city councils, and intergovernmental organizations and networks—are the dominant actors.

Nonetheless, legal pluralism, whether in its “classic,” “new,” or “global” form, collectively offers four critical insights that refract this Article’s bottom-up transnational lawmaking narrative: multiplicity, fluidity, inter-community interface, and intra-community reconstitution. The first is multiplicity without rigid hierarchy. Legal pluralism recognizes that law happens in multiple settings, in multiple forms, and as a result of the actions and decisions of multiple “actors.” Equally important, legal pluralists do not privilege the “state” or “officialdom,” envisioning the lawmaking universe as a rather messy, amateurish collage rather than an inflexible pyramid.

The second is fluidity, and concomitantly, permeability of boundaries. Norms are fluid, traveling from one lawmaking community to another, inevitably crossing borders that legal scholars often depict as sacredly impenetrable. This Article focuses on a particular normative path, one that

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<sup>30</sup> The UCP occasionally and fleetingly appears in international law or international relations scholarship, but it is not featured or explored in any depth. *See, e.g.*, Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 306 (2001); David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 316 n.91 (2006); *see also* Claire Kelly, *Legitimacy and Law-Making Alliances* 8 (Brooklyn Law Sch. Legal Studies Research Papers, Research Paper No. 93, 2008), available at <http://ssrn.com/abstract=1083831>. *But see* Snyder, *supra* note 20, at 390–91; Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681, 715 (1996–97).

Indeed, a rather niche group of commercial law scholars has followed letter-of-credit law, particularly Article 5 of the UCC, and has noted the prominence of transnational regulatory efforts, but these scholars have not conceptualized such efforts within an international lawmaking framework. *See, e.g.*, James G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 NW. J. INT’L L. & BUS. 215 (1995) [hereinafter Barnes, *Internationalization*]; James G. Barnes, *Nonconforming Presentations Under Letters of Credit: Preclusion and Final Payment*, 56 BROOK. L. REV. 103 (1990); James G. Barnes & James E. Byrne, *Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449 (1995); Richard F. Dole, Jr., *Warranties by Beneficiaries of Letters of Credit Under Revised Article 5 of the UCC: The Truth and Nothing but the Truth*, 39 HOUS. L. REV. 375 (2002); Rowley, *supra* note 4; James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 NW. J. INT’L L. & BUS. 189, 190 (1995).

traverses informal and official spheres, although legal pluralism certainly conceives of multidirectional paths joining a myriad of lawmaking communities. Thus, what appears as formal law—a statute, a treaty, a court decision—is often deeply rooted in social norms, business practices, or individual behaviors. And a “snapshot” approach to law not only masks the underbrush but also statically discounts a dynamic, vibrant *lawmaking* undercurrent.<sup>31</sup>

Third, pluralists understand that fluid norms—norms that run from one group to another—effectively draw communities into shared normative spaces (or, hybrid legal spaces),<sup>32</sup> creating unavoidable interplay and intercourse, which this Article labels “interface.” Thus, legal pluralism fundamentally grapples with the endemic complexities of “interpenetrating communities,”<sup>33</sup> and this Article focuses on a particular genre: the interaction between “officialdom” and informal normative communities. What is the nature of such interface? Here the answers are quite varied depending on the socio-context. The moment of interface—the moment when normative communities “recognize” that benign, autonomous coexistence within a particular “social field” is no longer possible or desirable—triggers behaviors that are mutually reinforcing, defensively self-protective, or both. As the “interface” itself is often complex and multifaceted, these two seemingly polar reactions are not mutually exclusive. In fact, as this Article’s example will demonstrate, interface will often yield both offensive and defensive reactions.

“Mutual reinforcement” occurs when interfacing communities conceive of their “social field” as capacious and expansive, with endless possibilities to be realized only through synergistic cooperation that respects and develops each community’s respective “comparative advantages.” Thus, interface may occur when one community “asks” another for help, perhaps in the form of expertise or capacity. A normative community that assumes such a posture would relish these interactions as jurisgenerative opportunities, and thus offer to share norms, expertise, and resources. To such a community, normative overlap is not trespass but rather deliberate reinforcement. Redundancies do not highlight weakness but rather radiate strength. And to duplicate competencies

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<sup>31</sup> This is an insight that the transnational legal process scholars generally recognize and celebrate. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996); Koh, *supra* note 5, at 2626.

<sup>32</sup> See generally Berman, *supra* note 8.

<sup>33</sup> I attribute this term to Osofsky, *supra* note 28, at 184 (citing Myres S. McDougal et al., *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807, 808–09 (1988)).

is not to encroach but rather to buttress. Thus, as normative communities interface, such intercourse and overlay become mutually constitutive and reconstitutive.<sup>34</sup>

Yet, when interfacing communities conceive of their field as crowded and finite, they tend to view their interaction in zero-sum terms, prompting “defensive self-protection.” In such instances, these communities equate their “sphere of autonomy” with legitimacy, power, authority, or a combination of the three. Thus, interface—an inherent “breach” of autonomy—sparks insecurity and competition, breeding defensively reactive behavior. In this account, communities might strategically create, or embellish, comparative advantages as an emboldening maneuver, an effort to fortify (and perhaps enlarge) their “sphere,” regain autonomy, and repel further incursions.<sup>35</sup> Likewise, interfacing communities may redraw the contours of their respective boundaries, harnessing jurisdictional doctrines or other competency-allocating mechanisms as a means to define away the incursion into their sphere and thus regain autonomy. Additionally, a normative community may see, or come to view, interface as an opportunity for “conquest,” and one legal system may capture (in whole or in part) the other normative order, either through unwelcome appropriation of competing norms or “jurispathic” behavior.<sup>36</sup>

Interface entails moments of cooperation and contestation; of relationship and resistance; of synergy and tension; of reassurance and insecurity. These interactions, however, are not static or momentarily combusive. Thus, pluralists also offer a fourth critical insight. The lawmaking enterprise involves a temporal as well as a spatial dimension: normative communities do not merely collide episodically but are in relationship over time. Thus, spatial collisions—interface—draw lawmaking communities into ongoing relationship with each other, sparking an iterative dynamic that, over time, reverberates profoundly and complexly, not only at the “joints” but also *within* each lawmaking community. Intercommunity contact thereby yields intracommunity change and reconstitution; some of these changes so

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<sup>34</sup> See Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115 (1984) (discussing overlap between state law and various social forms); Stuart Henry, *Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative*, 19 LAW & SOC'Y REV. 303 (1985) (examining mutually constitutive relationships between community justice programs and broad social structures); see also Weyrauch & Bell, *supra* note 24, at 398 (noting subtle, but powerful, interactions between private law of Gypsies and state law).

<sup>35</sup> See Weyrauch & Bell, *supra* note 24, at 394 (discussing demands for “unwavering group loyalty” as a response to perceived external threats to private lawmaking).

<sup>36</sup> See Cover, *supra* note 26, at 40–42 (discussing jurispathic behavior of courts).

dramatically alter the community's fabric as to curtail norm-making proclivity and capacity.

These four pluralist insights—multiple norm-generating communities; fluid norms, which travel between communities; mutually reinforcing, yet defensively competitive, intercommunity interface; and iterative, intracommunity evolution and reconstitution—refract the story that the remainder of this Article will tell.

## II. THE ICC BANKING COMMISSION AND THE UCP: A TALE OF BOTTOM-UP LAWMAKING

This Part recounts a story of commercial bankers, connected via a common technical language and an informal “good old boys” network, coalescing in an unofficial lawmaking community. Within the Banking Commission, they pooled expertise and anecdotal experiences, giving birth to the UCP. The UCP is a living compilation of group norms and practices, intentionally designed by those who issue L/Cs not only to maintain coincidence with commercial banking practice but also to discourage emerging practices that might ultimately undermine bankers' perceived interests. Thus, Banking Commission members continually interpret, reinterpret, and refine their rules. Acutely aware that the UCP does not and, given the scope of L/C practice, could not offer L/C users a true closed legal system, the Banking Commission seeks validation from official lawmakers and, in turn, assurance that any domestic or international regulatory efforts will coincide with, rather than undermine, Banking Commission norms. Unsurprisingly, Banking Commission norms escape the confines of the relatively insular group and embed in official legal structures.

Section A of this Part provides background on L/Cs and their critical role in injecting liquidity into the international trading system. Section B looks deeply into the Banking Commission's rules, processes, and interpretive services, and section C tracks how these rules seep into domestic legal systems—with particular emphasis on Article 5 of the U.S.'s UCC—and the United Nations Commission on International Trade Law (UNCITRAL). This Part thereby honors legal pluralism, acknowledging multiplicity by validating the Banking Commission as a bona fide lawmaking community and documenting fluidity by tracing the movement of Banking Commission norms from unofficial to official realms.

*A. The Trade Finance Instrument: Letters of Credit*

L/Cs are one solution to a recurring exporter conundrum. For instance, consider a U.S. company, perhaps John Deere, which, with the hope of increasing its market share in South America, actively pursues wholesale buyers in regions flush with agribusiness. At a trade fair, the John Deere sales representative meets a little-known proprietor from the Argentine Pampas who appears as a promising prospect. However, when the sales representative delivers the prospective transactions to corporate headquarters in the U.S., management hesitates to authorize “open account” transactions,<sup>37</sup> primarily because John Deere has not previously transacted with the Argentine importer; the importer is “private” and relatively small, without a publicly accessible credit report (e.g., from a company like Dun and Bradstreet); and the Argentine economy has been unpredictably volatile during the past decade. Thus, John Deere is unwilling to bear the risk of the importer’s default, which would concomitantly diminish liquidity and working capital while the trade receivable is outstanding. The Argentine importer is likewise hesitant to send John Deere cash in advance.<sup>38</sup> In cash-in-advance transactions, the importer not only bears the risk of seller non-performance (i.e., the seller failing to ship the goods) or sub-par performance (i.e., the seller shipping goods that are of lower quality or quantity than set forth in the sales contract) but also must contend with the liquidity constraints endemic to surrendering cash prior to receiving conforming goods. Of course, if this conundrum is not resolved, a significant slice of the international trading system would grind to a standstill.

One resolution is for the transacting parties—in this case John Deere and the Argentine importer—to “hire” a bank as a risk-shifting intermediary, and the letter of credit ostensibly serves this function. An L/C,<sup>39</sup> as illustrated in

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<sup>37</sup> In an open-account transaction, the exporter performs (ships the goods) upon the importer’s promise to pay at some point in the future, usually in 90 or 180 days, thereby creating a trade receivable. An open-account transaction is “[a]n arrangement between the buyer and seller whereby the goods are manufactured and delivered before payment is required.” CHARLES DEL BUSTO, ICC GUIDE TO DOCUMENTARY CREDIT OPERATIONS FOR THE UCP 500, at 19 (1994) (ICC Pub. No. 515). Generally, an exporter offers an open-account transaction to maintain competitiveness, recognizing that other potential suppliers will likely offer credit terms to “sweeten” the deal; furthermore, an open-account relationship is an indicia of trust that helps cement loyalty and long-term commercial relationships that are proving critical in today’s fast-paced, rapidly growing global economy. See *infra* notes 243–43 and accompanying text.

<sup>38</sup> On the other end of the spectrum, the cash-in-advance transaction requires an importer to pay for goods as a precondition of the exporter’s shipment.

<sup>39</sup> For a very accessible description of the intricacies of letters of credit, see DEL BUSTO, *supra* note 37. The commercial letter of credit stands distinct from the standby letter of credit, which is effectively a

*Figure 1*, is a contract on behalf of an exporter (beneficiary), in which a bank (issuing bank), usually with some relationship to the importer (applicant), promises to “pay” for the goods, i.e., release funds to the exporter’s bank (advising or confirming bank),<sup>40</sup> once it receives documentary evidence that the underlying sales transaction has proceeded as the exporter and importer had planned and described with specificity in the “letter.”<sup>41</sup> If the *documents*, not the underlying transaction itself, satisfy all the conditions in the L/C, then the issuing bank will pay the advising or confirming bank as stipulated in the L/C.<sup>42</sup> The most fundamental L/C legal principle is one of independence of the L/C—the contract between the importer and the issuing bank—from the underlying sales transaction—the contract between buyer and seller.<sup>43</sup> In other words, the issuing bank’s obligation to pay is purely *documentary*; if the documents ostensibly indicate that the exporter has performed, then the bank must pay the exporter and has no obligation to (in fact is not supposed to) investigate whether the underlying transaction in fact has proceeded as the documents indicate.

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performance guarantee. See ICC, PUB. NO. 590, INTERNATIONAL STANDBY PRACTICES ISP98 (1998) [hereinafter ISP98]. For a description of standby letters of credit, see Rowley, *supra* note 4, at 2244–45.

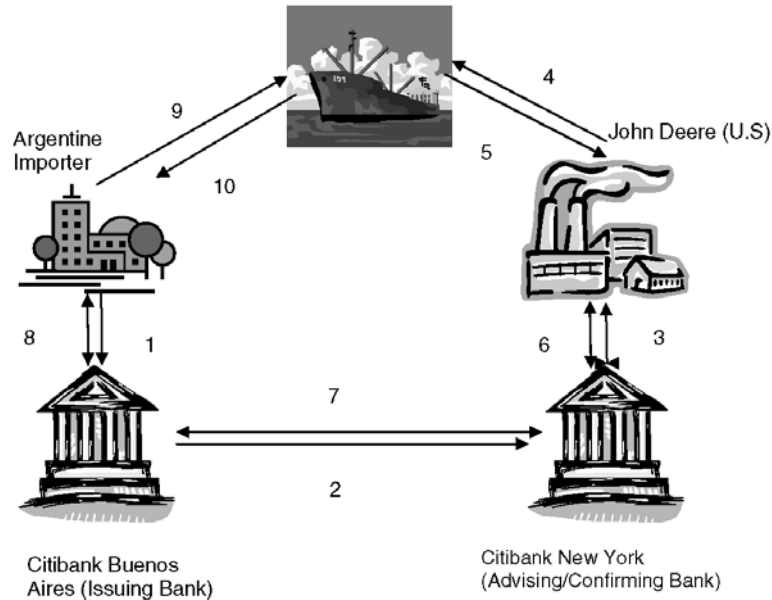
<sup>40</sup> An advising bank, on behalf of the beneficiary, acts as an intermediary between the issuing bank and the beneficiary. See DEL BUSTO, *supra* note 37, at 24. A confirming bank also acts on behalf of the beneficiary as an intermediary between the issuing bank and the advising bank, but the confirming bank also offers an independent promise to pay the beneficiary upon presentation of compliant documents regardless of whether the issuing bank pays; this is a costlier transaction. See *id.* at 44 (“An irrevocable Confirmed Documentary Credit gives the Beneficiary a double assurance of payment, since it represents both the undertaking of the Issuing Bank and the undertaking of the Confirming Bank.”).

<sup>41</sup> The “letter” typically requires the seller to deliver goods (possibly with specified quality assurances) usually to a shipping company at a certain port by a certain date, at which point the goods are loaded on a ship or other mode of transportation and the classic international trade documents—bill of lading, purchase order, packing list, commercial invoice, insurance certificate, and customs documents—are sent (usually via regular or express mail but rarely electronically) to the issuing bank. See DEL BUSTO, *supra* note 37, at 47 (providing an example of an irrevocable confirmed documentary credit).

<sup>42</sup> While the issuing bank must decide whether these conditions have been met prior to releasing funds, the bank’s scope of review is limited to *documents*. In this sense, the L/C is called a “documentary credit,” with the bank’s compliance decisions linked not to the underlying transaction itself (or the exporter’s actual performance) but rather to the documents that accompany the transaction. For an excellent description of how L/Cs work, see Snyder, *supra* note 20, at 390–91; and see also DEL BUSTO, *supra* note 37; and FRANS P. DE ROOY, DOCUMENTARY CREDITS 19 (1984).

<sup>43</sup> See, e.g., Roy Goode, *Abstract Payment Undertakings and the Rules of the International Chamber of Commerce*, 39 ST. LOUIS U. L.J. 725, 731–35 (1995); see also ICC, PUB. NO. 500, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS art. 3 (1993) [hereinafter UCP 500].

**Figure 1: Letter of Credit Transaction**



1	Argentine importer (applicant) approaches Citibank Buenos Aires (BA) to open an L/C in favor of John Deere. The L/C stipulates that as long as John Deere ships by a prescribed date (as noted in the L/C and evidenced by a bill of lading) and has an inspection certificate through which a third-party corroborates that the goods match the description in the sales contract, Citibank BA will release funds to John Deere via Citibank New York (NY).
2	Citibank BA transmits the proposed L/C to Citibank NY.
3	Citibank NY transmits the L/C to John Deere, the beneficiary, who must now decide whether the terms of the L/C are acceptable.
4	If the terms of the L/C are acceptable, John Deere sends the goods to the shipping company.
5	In return, John Deere receives the documents that Citibank BA will ultimately examine (in this case a bill of lading and inspection certificate).
6	John Deere sends the documents to Citibank NY.
7	Citibank NY sends the documents to Citibank BA. If the documents match the terms of the L/C, then Citibank BA sends the money to Citibank NY, who credits John Deere's account. At this point, John Deere is paid.
8	If the documents match the terms of the L/C, Citibank BA concurrently sends the documents to the Argentine importer.
9	The Argentine importer takes the documents to the shipping company.
10	In exchange for the documents (the bill of lading is title bearing), the shipping company "delivers" the goods to the Argentine importer.

L/Cs thus forge a compromise, at once mitigating some of the risks and replicating some of the benefits of open-account and cash-in-advance transactions. Through an L/C, a bank, on behalf of trading partners, assures payment for goods, conditioned only upon the exporter's compliance with the terms set forth in the L/C itself. Thus, the L/C transforms the seller's risk of shipping goods without cash in hand from that of buyer default to bank fraud or default, generally considered a more limited and quantifiable risk.<sup>44</sup> An L/C transaction may demand payment prior to the importer's physical receipt of the goods and thus, in this sequence, present the performance risk specter of a cash-in-advance transaction. Yet, in an L/C transaction, the importer retains significant control over where, when, and how payment will take place as long as it carefully stipulates the conditions of payment in the L/C itself; thus, the buyer's risk that the seller will not perform is substantially less than if it had sent cash in advance.<sup>45</sup>

An L/C may also be a financing tool, alleviating some of the liquidity-constraining features of open-account trade. Instead of the issuing bank paying the beneficiary upon "sight," it might pay the beneficiary at some point in the future, usually not more than 180 days; L/C trade may thereby replicate many of the "deferred payment" advantages of an open-account transaction.<sup>46</sup> As opposed to an open-account transaction, where the value of the trade receivable is linked to the creditworthiness of the corporate importer, an L/C-backed receivable is presumably of greater value as its creditworthiness is now linked to a bank. A trade receivable backed by an L/C from a reputable bank strengthens the exporter's ability to sell the receivable at a discount to a bank (or factoring company) or use the receivable as security to borrow immediate working capital or enhance general liquidity.

#### *B. Normative Development Within the ICC Banking Commission*

From the vantage point of L/C end-users (exporters and importers), L/Cs become attractive risk mitigation and financing tools only if L/C practices are perceived as predictable and consistent. Specifically, in order for international

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<sup>44</sup> The seller's risks are bank insolvency and dishonesty, risks that the seller can mitigate by requiring that the issuing bank be a large, reputable, money-center bank, or by asking a local bank to serve as a confirming bank. See DEL BUSTO, *supra* note 37, at 20 (discussing disadvantages to seller).

<sup>45</sup> The buyer's risk is also that the documents do not accurately reflect the underlying transaction, either due to fraud or other unintentional mistakes. See DETLEV F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 307-10 (3d ed. 2003).

<sup>46</sup> See DEL BUSTO, *supra* note 37, at 92 (explaining settlement by acceptance using a time draft).



trading partners to embrace the L/C as a preferred payment and financing mechanism, exporters and importers must have confidence that commercial banks will determine whether documents comport with L/C dictates (and thus determine whether to release payment to the exporter) in a manner that fairly reflects commercial expectations and practice. Effective regulation is one means to align expectations of the marketplace and day-to-day bank practice. Indeed, the L/C field is highly regulated, with technical rules governing minute questions. These rules, however, do not originate from a treaty, an intergovernmental organization, or domestic regulators. Instead, they are the work of a small group of commercial bankers, primarily from large, money-center banks, under the auspices of the ICC's Banking Commission.

The Banking Commission is neither a governmental organization nor an inter-governmental organization.<sup>47</sup> Under the umbrella of the ICC, a self-professed "private international organization,"<sup>48</sup> the Banking Commission "serve[s] as the global forum and rule-making body for the international trade finance community."<sup>49</sup> In 1933, the Banking Commission approved and published the Uniform Customs and Practice for Documentary Credits (UCP),<sup>50</sup> the first set of rules designed to regulate L/C practice.<sup>51</sup>

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<sup>47</sup> Some rather broad definitions of "international organization" might encompass the ICC, although the scholarship that adopts such broad definitions generally ignores such private organizations in the rigors of analysis. See *supra* note 23 and accompanying text.

<sup>48</sup> Guy Sebban, *Foreword to ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS: 2007 REVISION*, at 3 (2007) (ICC Pub. No. 600) [hereinafter UCP 600]. The ICC champions the "global economy as a force for economic growth, job creation and prosperity." ICC, What is ICC?, <http://www.iccwbo.org/id93/index.html> (last visited Apr. 6, 2008). The ICC's home is Paris, yet its tentacles reach into most countries through National Committees, organizations that are affiliated with the ICC as a type of quasi-branch office. *Id.* A company can become a member of the ICC via affiliation with a National Committee. ICC, ICC Membership, <http://www.iccwbo.org/id97/index.html> (last visited Apr. 6, 2008). For example, the U.S. Council for International Business (USCIB) serves as a National Committee for the United States. ICC, United States, <http://www.iccwbo.org/id15324/index.html> (last visited Apr. 6, 2008). For other National Committees, see ICC, ICC Worldwide: National Committees, <http://www.iccwbo.org/id100/index.html> (last visited Apr. 6, 2008). As evident from the list, National Committees are extant in Organisation for Economic Co-Operation and Development (OECD) and most other developed and industrialized countries. Compare *id.* (directory of National Committees by country), with OECD, Member Countries, [http://www.oecd.org/countrieslist/0,3351,en\\_33873108\\_33844430\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/countrieslist/0,3351,en_33873108_33844430_1_1_1_1,00.html) (last visited Apr. 6, 2008). Alternatively, a company can become a direct member by paying a hefty fee (€1500 to €3000, depending on the size and scope of the company's business). ICC, ICC Membership, *supra*.

<sup>49</sup> ICC, Commission on Banking Technique and Practice, <http://www.iccwbo.org/policy/banking/id2424/index.html> (last visited Apr. 6, 2008).

<sup>50</sup> DE ROOY, *supra* note 42, at 10. The UCP did not gain widespread acceptance until 1951 when it was amended and "brought into line with the developments which had taken place in trade over the intervening two decades." *Id.*

Approximately every decade thereafter, the Banking Commission has revised the UCP to maintain its consonance with banking practice, publishing the UCP 500, the sixth UCP incarnation, in 1993.<sup>52</sup> On October 25, 2006, the Banking Commission voted unanimously to approve the UCP 600,<sup>53</sup> which became effective in July, 2007.<sup>54</sup>

The UCP's *raison d'être* is to codify "international banking practices, as well as to facilitate and standardise developing practices" for the trade finance community.<sup>55</sup> The UCP is a thick, technical document,<sup>56</sup> reading like a foreign language to most without trade-finance expertise, delineating an array of substantive rules: (1) *definitional rules*—rules that establish the unequivocal independence of documentary credits vis-à-vis the underlying sales contract;<sup>57</sup> (2) *standard of review*—the standard that banks will employ in examining

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<sup>51</sup> As global commerce grew in the post-War years to redress war-related devastation and destruction, the L/C ascended to prominence in the United States, which was capturing an increasingly large share of the export market vis-à-vis Europe. *Id.* at 9. Additionally, exporters and importers who had not enjoyed longstanding trading relationships began trading on an unprecedented scale. *Id.* Recognizing the utility of standard international banking practices and rules, and anxious to assure international acceptance of its own L/C practices, ROLF A. SCHÜTZE & GABRIELE FONTANE, DOCUMENTARY CREDIT LAW THROUGHOUT THE WORLD 11 (2001) (ICC Pub. No. 633), U.S. money-center banks began lobbying the ICC in the mid-1920s for codification of rules that would reflect such practices, DE ROOY, *supra* note 42, at 10. Interestingly, several prominent law review articles were a significant impetus to this lobbying effort. See, e.g., Philip W. Thayer, *Irrevocable Credits in International Commerce: Their Legal Nature*, 36 COLUM. L. REV. 1031 (1936); see also WILBERT WARD, AMERICAN COMMERCIAL CREDITS (1922).

<sup>52</sup> ICC, PUB. NO. 82, UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS (1933); ICC, PUB. NO. 151, UNIFORM CUSTOMS AND PRACTICE FOR COMMERCIAL DOCUMENTARY CREDITS (1951); ICC, PUB. NO. 222, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962); ICC, PUB. NO. 290, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1975); ICC, PUB. NO. 400, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1983) [hereinafter UCP 400]; UCP 500, *supra* note 43.

<sup>53</sup> ICC, Banking Commission Approves Revised Rules on Documentary Credits (Oct. 25, 2006), <http://www.iccwbo.org/iccjcde/index.html>.

<sup>54</sup> UCP 600, *supra* note 48.

<sup>55</sup> Charles del Busto, *Preface* to UCP 500, *supra* note 43, at 4; see also Guy Sebban, *Foreword* to UCP 600, *supra* note 48, at 3 (noting that the UCP was designed to "create a set of contractual rules that would establish uniformity in [letter of credit] practice, so that practitioners would not have to cope with a plethora of often conflicting national regulations").

<sup>56</sup> The penultimate version that expired on July 1, 2007, the UCP 500, contains 49 substantive articles. The version currently in force, the UCP 600, is "streamlined" with 39 articles occupying a mere thirty-two pages.

<sup>57</sup> UCP 500, *supra* note 43, art. 3(a) ("Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s) . . . . Consequently, the undertaking of a bank . . . is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary."); see also UCP 600, *supra* note 48, art. 4(a) (similar wording).

documents and deciding whether to honor (pay) the credit;<sup>58</sup> (3) *procedural rules*—the time frame during which banks must either (a) examine documents and decide whether to “honor” or “dishonor” them or (b) forego their right to “dishonor” the credit (the “preclusion principle”);<sup>59</sup> (4) *document-specific rules*—the standard practices for banks’ examination of particular international trade documents;<sup>60</sup> and (5) *remedial rules*—allocating liability for payment and reimbursement among banks and relieving banks from most liability for

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<sup>58</sup> UCP 500, *supra* note 43, art. 13 (noting that banks should use “reasonable care[] to ascertain whether [documents] appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the . . . documents . . . shall be determined by international standard banking practice as reflected in [the UCP]”). The UCP 600 modifies this “standard of review” in two important ways. First, the UCP 600, like its predecessor, reiterates that banks must examine documents to determine “whether or not [they] appear on their face to constitute a complying presentation.” UCP 600, *supra* note 48, art. 14(a), but explicitly embraces the notion of “functional” compliance, noting that “[d]ata in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.” *Id.* art. 14(d). Second, in explicitly linking the UCP to ICC, PUB. NO. 645, INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS (ISBP) (2003) [hereinafter ISBP], as the “necessary companion to the UCP for determining compliance of documents with the terms of letters of credit,” Gary Collyer, *Introduction to UCP 600*, *supra* note 48, at 12, the UCP 600 “defines” “international standard banking practice,” a critical term which the UCP 500 uses, although leaves undefined. The Chair of the Drafting Group, Gary Collyer, believes that this is the most important feature of the UCP revision. E-mail from Gary Collyer, Technical Adviser, Banking Commission and Chair UCP 600 Drafting Committee, to Janet Levit, Professor of Law, University of Tulsa College of Law (Jan. 10, 2007, 06:10 CST) [hereinafter Gary Collyer, Jan. 10, 2007, e-mail] (on file with author).

<sup>59</sup> The UCP 500 requires banks to examine documents “without delay but no later than the close of the seventh banking day”; otherwise, such banks are precluded from dishonoring the credit. UCP 500, *supra* note 43, art. 14(d). As banks are in the money business and as time is money, it is not surprising that many banks interpreted this clause as creating a seven-day payment window and consistently deferred payment until the seventh day. See DOCDEX Decision No. 215, *reprinted in* COLLECTED DOCDEX DECISIONS 1997–2003: DECISIONS BY ICC EXPERTS ON DOCUMENTARY CREDIT DISPUTES 58, 61 (Gary Collyer & Ron Katz eds., 2004) (ICC Pub. No. 665) [hereinafter COLLECTED DOCDEX DECISIONS]. Banking Commission opinions and Document Credit Dispute Resolution Expertise (DOCDEX) decisions subsequently clarified that the payment window is the earlier of a “reasonable time” or “seven days” and, depending on the facts and circumstances surrounding a particular credit, that a “reasonable time” is sometimes much shorter than seven days. *Id.* Of course, this reading opened a cumbersome interpretive minefield involving case-specific “reasonableness” inquiries. In the name of expedience, as well as a streamlined and more certain process, the UCP 600 eliminates the “reasonable time” language and grants banks five days to examine documents (and, as necessary, send a notice of discrepancy). UCP 600, *supra* note 48, art. 14(b).

<sup>60</sup> For standards regarding transport documents, see UCP 500, *supra* note 43, art. 23 (marine/ocean bill of lading); *id.* art. 24 (non-negotiable sea waybill); *id.* art. 25 (charter party bill of lading); *id.* art. 26 (multimodal transport document); *id.* art. 27 (air transport document); *id.* art. 28 (road, rail, or inland waterway transport documents); *id.* art. 29 (courier and post receipts); *id.* art. 30 (transport documents issued by freight forwarders); *id.* art. 31 (“on deck,” “shipper’s load and count,” name of consignor); *id.* art. 32 (clean transport documents); *id.* art. 33 (freight payable/prepaid transport documents). For standard practice regarding insurance documents, see *id.* arts. 34–36. For standard practice regarding issuing banks’ treatment of commercial invoices, see *id.* art. 37.

payment upon documents that may, in hindsight, present issues of “form, sufficiency, accuracy, genuineness, falsification or legal effect.”<sup>61</sup> The UCP, in packaging these rules, allows parties to an L/C transaction to reference the UCP and thus import all of these rules in wholesale fashion. As such, the Banking Commission intends for the UCP to be the preferred “law of the [L/C] contract.”<sup>62</sup>

The Banking Commission also drafts and approves specialized sets of rules to complement the UCP. For instance, in June 2002, the Banking Commission supplemented the UCP with the eUCP, purportedly designed to answer legal questions arising from the inevitable and irrepressible march toward the electronic transmission of documents in an L/C transaction.<sup>63</sup> While parties to a standby (as opposed to a commercial)<sup>64</sup> L/C may incorporate the UCP “to the extent to which [such rules] may be applicable,”<sup>65</sup> the Banking Commission collaborated with the Institute of International Banking Law & Practice, Inc. (IIBLP), a think tank,<sup>66</sup> International Financial Services Association (IFSA), a U.S. based trade association,<sup>67</sup> and UNCITRAL to “codify” rules specifically tailored for standbys and to publish the International Standby Practices

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<sup>61</sup> *Id.* art. 15. Generally, a bank that pays a credit in reliance on a falsified document—such as a falsified invoice or bill of lading that “on the face of the document” nonetheless appears legitimate—is not liable to the buyer for such payment. However, the UCP 500’s language and structure raised some persistently vexing questions in allocating liability when a beneficiary used the L/C as a financing instrument. The UCP 600 resolves this ambiguity by clarifying the issuing bank’s reimbursement obligations in light of clearer, more precise definitions of terms such as “negotiation” and “nominated bank.” See UCP 600, *supra* note 48, art. 2. In particular, the UCP 600 explicitly states that when an issuing bank “nominate[s]” a bank, it “authorizes that nominated bank to prepay or purchase [the L/C’s] draft accepted or a deferred payment undertaking incurred by that nominated bank,” *id.* art. 12(b), and reiterates that “[a]n issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation . . . whether or not the nominated bank prepaid or purchased before maturity.” *Id.* art. 7(c); see also *id.* art. 8.

<sup>62</sup> See generally Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. (SUPP.) 209 (2006) (discussing contracts with no governing laws).

<sup>63</sup> The ICC launched the eUCP in March 2002. ICC, ICC Issues Guide to the eUCP (Nov. 25, 2002), <http://www.iccwbo.org/iccbjib/index.html>. The eUCP is an electronic counterpart to the more familiar UCP 500, born from the growing use of electronic media to transfer information in international trade and banking. *Id.* The eUCP operates as a supplement to the UCP 500 and does not revise existing UCP 500 guidelines. INTERNATIONAL CHAMBER OF COMMERCE, UCP 500 + eUCP 53 (2002).

<sup>64</sup> The commercial letter of credit stands distinct from the standby letter of credit, which is effectively a performance guarantee. See ISP98, *supra* note 39. Standbys are “issued to support payment, when due or after default, of obligations based on money loaned or advanced, or upon the occurrence or non-occurrence of another contingency.” *Preface to id.* at 5. Standby credits, like commercial L/Cs, are “documentary,” in that the default or non-occurrence of an event is predicated on one or more prescribed documents, as set forth in the standby itself.

<sup>65</sup> UCP 500, *supra* note 43, art. 1.

<sup>66</sup> See Institute of International Banking Law & Practice, <http://www.iiblp.org/>.

<sup>67</sup> International Financial Services Association, <http://www.ifsaonline.org/eweb/StartPage.aspx>.

(ISP98).<sup>68</sup> Finally, the Uniform Rules for Demand Guarantees (URDG) define standards that guarantors should follow in deciding whether to honor a “demand guarantee,” a guarantee based on the presentation of a “written demand.”<sup>69</sup>

While the Banking Commission is a rulemaking group, it also is an interpretive body.<sup>70</sup> Notably, the Banking Commission has issued over 600 advisory “opinions” in response to on-the-ground, UCP-related questions from bankers, freight forwarders, exporters, and importers.<sup>71</sup> While Banking

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<sup>68</sup> ISP98, *supra* note 39. The Institute of International Banking Law & Practice jointly owns, with the ICC, the copyright to the ISP98.

<sup>69</sup> ICC, PUB. NO. 458, THE UNIFORM RULES FOR DEMAND GUARANTEES [hereinafter URDG], reprinted in GEORGES AFFAKI, ICC UNIFORM RULES ON DEMAND GUARANTEES: A USER’S HANDBOOK TO THE URDG (2001) (ICC Pub. No. 631). “A demand guarantee . . . is an irrevocable undertaking issued by the guarantor . . . upon the instruction of the principal . . . to pay the beneficiary any sum that may be demanded by that beneficiary up to a maximum amount determined in the guarantee, upon presentation of a demand conforming with the terms of the guarantee.” *Id.* at 13.

<sup>70</sup> The Banking Commission issues a hierarchy of interpretive material. On top are Banking Commission-approved documents with Commission-wide ratification. See Comm’n on Banking Technique & Practice, ICC Banking Commission Approved Documents/Publications (July 8, 2003), <http://www.iccwbo.org/id533/index.html>. The Banking Commission also issues “recommendations,” which are practical, educational guides for those, principally the document checkers, whose core business is UCP compliance. See, e.g., COMM’N ON BANKING TECHNIQUE & PRACTICE, DISCREPANT DOCUMENTS, WAIVER AND NOTICE (2002) (creating a step-by-step flow chart for document checkers at issuing banks concerning the application of article 13 (Standard for Examination of Documents) and article 14 (Discrepant Documents and Notice)). These “recommendations” are for “educational purposes only” because they are not ratified by the Banking Commission as a whole and therefore are not “binding.” See Comm’n on Banking Technique & Practice, ICC Banking Commission Approved Documents/Publications, *supra*. The Banking Commission is also a prolific publisher of guides, studies, and handbooks that do not bear any official Banking Commission approval (other than publication) but nonetheless are instructive. See, e.g., DEL BUSTO, *supra* note 37; 2004 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE (James E. Byrne & Christopher S. Byrnes eds., 2004); JAMES E. BYRNE & DAN TAYLOR, ICC GUIDE TO THE eUCP (2002) (ICC Pub. No. 639); CHARLES DEL BUSTO, CASE STUDIES ON DOCUMENTARY CREDITS UNDER UCP 500 (1995) (ICC Pub. No. 535).

<sup>71</sup> ICC, PUB. NO. 399, OPINIONS (1980–1981) OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 1(1982) [hereinafter OPINIONS (1980–1981)] (“[T]he Banking Commission devotes a considerable part of its efforts to the important task of considering queries raised regarding the interpretation of the various provisions of Uniform Customs and Practice, and giving its opinions for the guidance of interested parties.”); see also ICC, PUB. NO. 371, DECISIONS (1975–1979) OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1980); ICC, PUB. NO. 434, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 1984–1986 (1987); ICC, PUB. NO. 469, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) 1987–1988 (1989); ICC, PUB. NO. 494, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) 1989–1991 (1992); ICC, PUB. NO. 565, OPINIONS OF THE ICC BANKING COMMISSION (1995–1996): RESPONSES TO QUERIES ON UCP 400, UCP 500, AND URC 322 (1997); ICC, PUB. NO. 596, MORE QUERIES AND RESPONSES ON UCP 500 1997: OPINIONS OF THE ICC BANKING

Commission opinions are rather brief, and the analysis is often opaque, they are reminiscent of judicial opinions, weaving alleged facts,<sup>72</sup> the UCP rules, previous opinions, additional interpretive material, and naked logic to reach rational answers to practitioner questions. In addition to query-specific opinions, the Banking Commission issues official policy statements to address recurring themes and problems that surface during the opinion-writing process.<sup>73</sup> The Banking Commission has also culled opinions and policy statements, translating recurring conclusions and themes into a “practical complement” to the UCP, the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP).<sup>74</sup>

While Banking Commission opinions are advisory, Documentary Instruments Dispute Resolution Expertise (“DOCDEX”) draws the Banking Commission into a more traditional dispute resolution practice.<sup>75</sup> DOCDEX is a relatively new, specialized arbitral tribunal,<sup>76</sup> allegedly born from bankers’

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COMMISSION 1997 (1998) [hereinafter MORE QUERIES 1997]; ICC, PUB. NO. 613, OPINIONS OF THE ICC BANKING COMMISSION 1998–1999: QUERIES AND RESPONSES ON UCP 500, UCP 400 AND URC 522 (2000); ICC, PUB. NO. 632, ICC BANKING COMMISSION COLLECTED OPINIONS 1995–2001 ON UCP 500, UCP 400, URC 522 & URDG 458 (2002).

<sup>72</sup> The Banking Commission Technical Adviser emphasizes that, through the opinion writing process, the Banking Commission does not engage in any independent fact finding and answers queries only via reference to the facts and documents before it. E-mail from Gary Collyer, Technical Adviser, Banking Commission and Chair UCP 600 Drafting Committee, to Janet Levit, Professor of Law, University of Tulsa College of Law (Dec. 20, 2006, 17:23 CST) [hereinafter Gary Collyer, Dec. 20, 2006, e-mail] (on file with author).

<sup>73</sup> Procedurally, Banking Commission members must ratify an opinion or policy statement prior to its becoming an official Banking Commission document. Gary Collyer, Jan. 10, 2007, e-mail, *supra* note 58. The Banking Commission drafts policy statements following an onslaught of queries on a particular topic or to preempt an emerging practice, which is inconsistent with the intent of the Banking Commission when it drafted the UCP. For example, following the UCP 500’s debut, the Banking Commission also issued “position papers,” which, like policy statements, are a type of advisory opinion independent of any specific query but are pointed at banks for incorrectly appropriating and applying the UCP 500. *See* Comm’n on Banking Technique and Practice, Policy Papers Numbers 1, 2, 3, 4 on UCP 500 (Sept. 1, 1994), <http://www.iccwbo.org/id357/index.html>; *see also* Comm’n on Banking Technique and Practice, The Determination of an “Original” Document in the Context of UCP 500 Sub-Article 20(b) (July 12, 1999), <http://www.iccwbo.org/id415/index.html>; Comm’n on Banking Technique and Practice, Transferable Credits and the UCP 500 (Oct. 30, 2002), <http://www.iccwbo.org/id522/index.html>.

<sup>74</sup> Maria Livanos Cattai, *Foreword to ISBP*, *supra* note 58, at 3. The ISBP provides a compilation of “standard banking practice for all parties to a documentary credit” that is consistent with the UCP and the “Opinions and Decisions of the ICC Banking Commission.” ISBP, *supra* note 58, at 8–9. The document also fills a “needed gap between the general principles announced in the rules and the daily work of the documentary credit practitioner.” Cattai, *supra*, at 3.

<sup>75</sup> DOCDEX is a highly specialized documentary credit subsidiary of the ICC’s world-renowned arbitration center. ICC, DOCDEX Dispute Resolution Services, <http://www.iccwbo.org/court/docdex/id4493/index.html> (last visited Apr. 8, 2008).

<sup>76</sup> *See* ICC, What Is ICC DOCDEX?, <http://www.iccwbo.org/court/docdex/id4493/index.html> (last visited Apr. 6, 2008); ICC RULES FOR DOCUMENTARY INSTRUMENTS DISPUTE RESOLUTION EXPERTISE art. 1.2,

complaints “that many judges, arbitrators and lawyers have difficulty understanding the intricacies of everyday letter of credit practice.”<sup>77</sup> DOCDEX distinguishes itself from other arbitral tribunals by offering disputing parties not only a relatively inexpensive<sup>78</sup> and expeditious process<sup>79</sup> but also a pool of arbitrators with extensive, yet technical, documentary credit expertise.<sup>80</sup> While arbitrators, rather than the Banking Commission members, actually decide individual cases, the Banking Commission maintains effective control because the Banking Commission’s “Technical Advisor” must approve all decisions prior to issuance to assure conformity with the Banking Commission’s interpretation.<sup>81</sup> Since its inception, DOCDEX has issued

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available at <http://www.iccwbo.org/court/docdex/id4526/index.html> (last visited Apr. 6, 2008) (follow “English” hyperlink) [hereinafter “DOCDEX RULES”] (“DOCDEX is made available by the International Chamber of Commerce (ICC) through its International Centre for Expertise (Centre) under the auspices of the ICC Commission on Banking Technique and Practice (Banking Commission).”).

<sup>77</sup> ICC, Service Launched for Resolving International Letter of Credit Disputes (Sept. 26, 1997), <http://www.iccwbo.org/ficcbf/index.html>; see also DOCDEX RULES, *supra* note 76, art. 1.1 (“[DOCDEX’s] objective is to provide an independent, impartial and prompt expert decision . . .”). E-mail from Gary Collyer, Technical Advisor, Banking Commission and Chair UCP 600 Drafting Committee, to Janet Levit, Professor of Law, University of Tulsa College of Law (Dec. 21, 2006, 7:28 CST) [hereinafter Gary Collyer, Dec. 21, 2006, e-mail] (on file with author).

<sup>78</sup> See DOCDEX RULES, *supra* note 76, 12 app. (noting that fees for disputes concerning L/Cs under \$500,000 are \$5,000, inclusive of administrative expenses and “arbitrator” fees; the fee is up to \$10,000 if the L/C in question exceeds \$500,000). Although DOCDEX is certainly more expensive than the Banking Commission’s gratis opinion-writing services, it is significantly less than the fees for the ICC’s general arbitration services, which are deemed rather steep. See ICC, Costs of Arbitration, <http://www.iccwbo.org/court/arbitration/id4088/index.html> (last visited Apr. 6, 2008).

<sup>79</sup> DOCDEX follows a somewhat streamlined version of rules that a number of arbitral institutions issue, offering both initiator and respondent an opportunity to present, in written form, arguments, and evidence. See DOCDEX RULES, *supra* note 76, arts. 2–3. These rules also delineate procedures for the appointment of arbitrators (experts), *id.* art. 6, and for the issuing of decisions, *id.* art. 8. These arbitrators must submit a draft of the decision within thirty days of the receipt of the parties’ documents. *Id.* art. 7.4. The overall process takes on average around two to three months. ICC, What Is ICC DOCDEX, *supra* note 76.

<sup>80</sup> See DOCDEX RULES, *supra* note 76, art. 6.1 (“The Banking Commission will maintain internal lists of experts having profound experience and knowledge of the applicable ICC Rules.”); see also Gary Collyer, Dec. 20, 2006, e-mail, *supra* note 72 (noting that all DOCDEX arbitrators must be nominated by ICC National Committees). Unlike the Banking Commission opinion-writing process, DOCDEX arbitrators contemplate the L/C documents themselves and therefore examine decide disputes vis-à-vis facts specific to particular cases. Gary Collyer, Dec. 21, 2006, e-mail, *supra* note 77 (“For a DOCDEX case, the experts will see all the paperwork not just the summary that has been compiled by the initiator or respondent. For opinions, we have a single sheet outlining facts for which there may or may not be any substance. The response to opinions are very carefully conducted to ensure that the response only goes to the question asked based on the facts that have been provided (whether those facts are right or wrong).”).

<sup>81</sup> DOCDEX RULES, *supra* note 76, art. 8.1. DOCDEX is administered through the International Centre for Expertise under the auspices of the ICC Banking Commission. *Id.* art. 1.2. Once the “appointed experts” arrive at a decision, a “Technical Adviser” of the Banking Commission must approve it, assuring conformity with the applicable ICC rules governing documentary credits. *Id.* art. 8.1. In addition, the arbitrators rely heavily on Banking Commission opinions in reaching their decisions.

approximately 65 opinions,<sup>82</sup> and the ICC has published the first 34 decisions in book form.<sup>83</sup>

*C. The UCP's "Ascendance": From Informal Norms to Hard Law*

If the story were to stop here, the Banking Commission would deserve hearty congratulations for having created an elegant private legal system, rooted in the UCP, and an elaborate interpretive apparatus. So, should the ICC's prime Paris-based real estate simply join Shasta County, 47th Street, and the Tokyo's Tsukiji district as colorful examples of a private legal system in action? Is the Banking Commission little more than an instance of robust self-regulation? The private legal system literature is undoubtedly useful in understanding how the UCP came into being, how private actors transformed practices and behaviors into group norms, and even the role of reputation and good name in maintaining the integrity of the group and its norms. Yet, the Banking Commission's normative activities are only a slice of the story.

Exporters and importers almost always incorporate the UCP into their L/Cs, and most banks will not issue an international L/C unless it is explicitly subject to the UCP.<sup>84</sup> The UCP's legal status certainly did not preordain this on-the-ground transcendence. The UCP itself is not technically either international or domestic "law."<sup>85</sup> Thus, the UCP is the mere "law of the contract," nakedly exposed to legal preemption. Just as the UCC precludes courts from enforcing contract clauses which are "unconscionable,"<sup>86</sup> official lawmakers, at both the domestic and international level, could legislate

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<sup>82</sup> Gary Collyer, Dec. 20, 2006, e-mail, *supra* note 72.

<sup>83</sup> See generally COLLECTED DOCDEX DECISIONS, *supra* note 59 (compiling the first 34 decisions that the DOCDEX panels released).

<sup>84</sup> SCHÜTZE & FONTANE, *supra* note 51, at 10 ("Today the rules are the acknowledged standard for financial institutions and trade organizations. Banks in the vast majority of countries have declared their formal adherence to the UCP."); Rowley, *supra* note 4, at 2242 & n.39; see, e.g., DE ROOY, *supra* note 42, at 206 (specimen of letter of credit).

<sup>85</sup> The UCP is not a treaty because it is not an "agreement concluded between states," see *supra* note 2, nor is it customary international law, for custom remains the province of state lawmakers and usually is relegated to general norms, as opposed to specific, technical rules, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) & cmt. b (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation . . . . 'Practice of States' include diplomatic acts and instructions as well as public measure and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states."). Most international legal scholars would classify the UCP as mere "soft" international law, primarily because it does not fit into any of the "hard" international law categories. See *supra* note 2.

<sup>86</sup> U.C.C. § 2-302 (2005).



comprehensive L/C codes that at once supersede and undermine the UCP's hegemony.

Consider the "preclusion principle"—the UCP 600 currently provides banks a five-day window during which to "honor" a credit or affirmatively identify "discrepancies."<sup>87</sup> If a bank does not do either, then the bank "passively" decides to "honor" (in other words, loses its ability to dishonor).<sup>88</sup> Through this rule, commercial bankers, via the Banking Commission, presumably balance institutional resources (i.e., banks' labor-constrained capacity to check documents) against market demands (exporters desire to be paid sooner rather than later). What would happen if U.S. legislators, at the behest of a group of small-to-medium sized banks that could not process documents expeditiously, successfully lobbied to extend this "preclusion" window to ten days, while Latin American and Asian countries ratified a treaty in which they pledged to adopt local laws that would reduce the window to three days? First, these legislative decisions would strip harmony and uniformity from the L/C regulatory system. Second, such decisions would spark conflict-of-laws-related maneuvering and disputes.<sup>89</sup> Additionally, exporters would likely flock to Asian and Latin American banks, reducing demand for Banking Commission members' (primarily U.S. and European money-center banks) L/C-related products. In this scenario, the Banking Commission cedes its role as the "global forum and rule-making body for the international trade finance community,"<sup>90</sup> and, indeed, places the L/C business of its disciples at risk.

The Banking Commission is also acutely aware that it has not created a closed, comprehensive legal system for L/C users and that the gaps in its regulatory structure heighten the probability that official lawmakers will fill the void. For instance, the UCP dodges the issue of documentary fraud. Other than reiterating that L/C transactions are *documentary* and that banks have no obligation to investigate the underlying veracity of trade documents,<sup>91</sup> the UCP leaves unanswered vexing questions: under what circumstances would a suspicious document that nonetheless complies with the terms of the L/C provide banks with a reason to "dishonor" payment under an L/C? Clearly, it

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<sup>87</sup> See *supra* note 59 and accompanying text.

<sup>88</sup> See *supra* note 59 and accompanying text.

<sup>89</sup> For instance, if an L/C is issued by a Brazilian bank, with a confirming U.S. bank, on behalf of a Brazilian exporter, would Brazilian law or U.S. law apply?

<sup>90</sup> ICC, Commission on Banking Technique and Practice, *supra* note 49.

<sup>91</sup> UCP 500, *supra* note 43, arts. 9, 15; UCP 600, *supra* note 48, arts. 5, 7.

would not make sense to condone willful blindness on the part of banks, but what constitutes fraud? And when is a bank justified in raising fraud as a shield to payment? The Banking Commission deliberately strays from providing answers, perhaps because doing so would create tensions among members that would ultimately undermine consensus-driven decisionmaking. Thus, the Banking Commission leaves the task to domestic legislatures and international lawmaking institutions dedicated to harmonizing local trade law.

Furthermore, the Banking Commission had not, until it established DOCDEX in 1997, offered L/C users any dispute resolution mechanism (as opposed to the opinion-writing interpretive outlet).<sup>92</sup> DOCDEX, in theory, offers the requisite enforcement mechanism; yet, its belated arrival, coupled with the “nonbinding” nature of its decisions,<sup>93</sup> conspire against DOCDEX, leaving Banking Commission’s legal system relatively permeable.

Because the Banking Commission’s legal system is incomplete, the Banking Commission has turned to official lawmaking communities, both on a domestic and international plane, for recognition, ratification, and approval. Due to the fact that the UCP has been successfully transcendent in practice, these official lawmaking outlets warmly welcomed the Banking Commission’s arrival. The UCP thereby seeps into international law, domestic statutes, and administrative regulations.

### *1. Transnational Plane*

UNCITRAL strives for harmonization of domestic trade law, including law governing international payment mechanisms, as a means to reduce “obstacles” to the flow of international trade.<sup>94</sup> As a U.N. Commission, UNCITRAL is an “official” lawmaking community that pursues its mandate via model laws, which states may adopt, or conventions, which, upon

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<sup>92</sup> Some scholars would argue that a private legal system can be “complete” or “closed” even in the absence of institutionalized dispute resolution outlets. Indeed, some private legal system scholars convincingly argue that nonlegal enforcement mechanisms, particularly reputation, may be just as potent as traditional, court-like enforcement (either courts or arbitral tribunals). Yet, unlike the diamond burses or other geographically circumscribed merchant associations, the L/C-related “industry” is diffuse, geographically and functionally, including not only commercial bankers but also exporters, importers, and logistics providers. Thus, nonlegal, reputational sanctions inevitably play a more limited role in maintaining order in the L/C business than among niche merchant businesses and thus cannot, alone, counteract lack of traditional enforcement mechanisms.

<sup>93</sup> See DOCDEX RULES, *supra* note 76, art. 1.4 (nonbinding unless parties agree otherwise).

<sup>94</sup> See UNCITRAL, Origin, Mandate and Composition of UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Apr. 6, 2008).

ratification, will presumably influence the shape of domestic law. As the Banking Commission's broad goals generally align with UNCITRAL's aspirations, the Banking Commission has forged a relationship with UNCITRAL. In particular, the Banking Commission has sought UNCITRAL's endorsement of each UCP incarnation, and UNCITRAL has granted each request, "[c]ommend[ing] the use of the [UCP] in transactions involving the establishment of a documentary credit."<sup>95</sup> While UNCITRAL's endorsement does not alone transform the UCP into "hard" international law, UNCITRAL's commendation lends the credibility of an established, intergovernmental institution to the Banking Commission's rulemaking efforts.

Additionally, UNCITRAL's Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL Convention)<sup>96</sup> not only incorporates the substance of several UCP provisions almost verbatim<sup>97</sup> but also defers to "standards of international practice of independent guarantees or stand-by letters of credit."<sup>98</sup> While relevant "standards of international practice" clearly include the ICC's URDG (which the ICC was finalizing parallel with the UNCITRAL Convention's drafting process),<sup>99</sup> as well as the ISP98 (which was not yet drafted at the time of the Convention's drafting),<sup>100</sup> the UCP also explicitly applies to standby letters of credit "to the extent that they may be applicable,"<sup>101</sup> and thus are part of such standards of international practice. By

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<sup>95</sup> U.N. Comm'n Int'l Trade Law [UNCITRAL], *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Seventh Session*, ¶ 230, U.N. Doc. A/49/17 (July 15, 1994) [hereinafter *Report 1994*]; *Report of the United Nations Commission on International Trade Law on the Work of Its Seventeenth Session*, [1984] 15 Y.B. U.N. Int'l Trade L. Comm'n 19, U.N. Doc. A/39/17 [hereinafter *Report 1984*]; *Report of the United Nations Commission on International Trade Law on the Work of Its Eighth Session*, [1975] 6 Y.B. U.N. Int'l Trade L. Comm'n 15, U.N. Doc. A/10017 [hereinafter *Report 1975*].

<sup>96</sup> United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 2169 U.N.T.S. 190 (entered into force Jan. 1, 2000) [hereinafter UNCITRAL Convention].

<sup>97</sup> Note that UNCITRAL deliberated over and drafted the UNCITRAL Convention from 1988 to 1995; the UCP 400 was in effect until January 1, 1994, when the UCP 500 came into effect. Thus, both of these documents influenced the UNCITRAL Convention's drafting. Compare, e.g., UCP 500, *supra* note 43, art. 14(a)–(d) (discrepant documents notice), with UNCITRAL Convention, *supra* note 96, art. 16 (examination of demand and accompanying documents); compare also UCP 500, *supra* note 43, art. 48 (transferable credit), with UNCITRAL Convention, *supra* note 96, art. 9 (transfer of beneficiary's right to demand payment); UCP 500, *supra* note 43, art. 49 (assignment of proceeds), and UNCITRAL Convention, *supra* note 96, art. 10 (assignment of proceeds).

<sup>98</sup> See UNCITRAL Convention, *supra* note 96, art. 14 ("In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit."); see also *id.* arts. 5, 16 (referring to "standards of international practice").

<sup>99</sup> See URDG, *supra* note 69.

<sup>100</sup> See ISP98, *supra* note 38.

<sup>101</sup> UCP 500, *supra* note 43, art. 1.

borrowing UCP language and by referencing standard practice, which includes the UCP, the UNCITRAL Convention transforms some UCP provisions from soft to hard international law.

## 2. *The Domestic Plane*

### a. *Statutes, Legislation, and Codes*

On the domestic level, the UCP has entered into domestic letter of credit law. In some instances such efforts have been quite successful. Some countries, by statute, subject all documentary credits to the UCP.<sup>102</sup> In other countries, domestic law explicitly incorporates the UCP or grants deference to it when it is the chosen law of the documentary credit.<sup>103</sup> In other instances, the UCP becomes a type of default law, explicitly complementing (i.e., filling gaps) domestic statutes.<sup>104</sup> Other domestic statutes echo UCP provisions, sometimes explicitly and sometimes in their overarching, rather generic, consistency with the UCP.<sup>105</sup> Notably, with the assistance of Banking Commission representatives, the Chinese Supreme Court recently adopted a “code” governing letter of credit disputes, not only pledging to honor the parties’ “agreed on application of any international customs, usages, practices or any other rules” but also anointing the UCP as the governing default law absent explicit agreement by the parties.<sup>106</sup>

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<sup>102</sup> E.g., Hungary, Decree No. 6/97, § 14 (The provisions of the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce, Paris shall be binding for documentary credits), reprinted in SCHÜTZE & FONTANE, *supra* note 51.

<sup>103</sup> This is the case with the UCC. See *infra* notes 107–12 and accompanying text.

<sup>104</sup> For example, the following statutes are compiled in SCHÜTZE & FONTANE, *supra* note 51: Bolivia, Decreto-Ley No. 14379 (“Any issue not covered by this paragraph shall be governed by the Uniform Customs and Practices for Documentary Credits in their prevailing version.”); Egypt Law No. 17/1999 (“The Uniform Customs and Practice for Documentary Credits by the International Chamber of Commerce shall apply unless the articles of this section contain special provisions.”); Honduras Commercial Code Article 910 (“National and international customs shall apply to every issue that has not been covered by the parties’ agreement or by the foregoing provisions.”).

<sup>105</sup> These laws are uniformly more general and less inclusive than the UCP 500. For general background, see the following laws, which are all compiled in SCHÜTZE & FONTANE, *supra* note 51: Bahrain, Law No. 7/1987; Colombia, Decreto-Ley 410/1971; Bulgaria Commercial Code, arts. 435–441; Czech Republic, Law No. 513/1991; Slovakia Commercial Code, §§ 682–691; United Arab Emirates, Law No. 18/1993. These statutes do not explicitly reference the UCP, and thus subsequent UCP revisions, to the extent that they conflict with the local statute, will not automatically become a part of local law.

<sup>106</sup> ICC, Department of Policy and Business Practices, Commission on Banking Technique and Practice, The People’s Supreme Court of China’s Recent Judicial Interpretation on L/C Law and Practice (Apr. 11, 2006) (on file with author).

Yet, nowhere in the world is the UCP's influence on domestic L/C law more explicit and more pronounced than in Revised Article 5 (Letters of Credit) of the United States' Uniform Commercial Code (Article 5).<sup>107</sup> First, Article 5 creates a clear, conflict-of-laws hierarchy that privileges the UCP when an L/C is explicitly made subject to it, even when the UCP overlaps or conflicts with respective UCC provisions.<sup>108</sup> Second, in repeatedly deferring to "standard practice," and in clarifying in the official comments that the UCP is the most significant arbiter of "standard practice," Article 5 imports much of the UCP (even in the rare cases where the L/C itself is not subject to the UCP).<sup>109</sup> Third, Article 5 explicitly borrows language and concepts from the UCP.<sup>110</sup> Fourth, in its prefatory note, the Article 5 Drafting Committee linked

<sup>107</sup> See generally White, *supra* note 30, at 190; see also Barnes, *Internationalization*, *supra* note 30.

<sup>108</sup> U.C.C. § 5-116 (c) states:

Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser . . . (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules [rules of custom and practice] govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

U.C.C. § 5-116(c) (1995). U.C.C. § 5-103(c) identifies the following sections as nonvariable: U.C.C. § 5-103(d) (dealing with independence of letter of credit obligations from underlying transaction); U.C.C. § 5-102(9)–(10) (definition of 'issuer' and 'letter of credit'); U.C.C. § 5-106(d) (perpetual letter of credit expires 5 years after issuing); U.C.C. § 5-114(d) (assignment of proceeds). At this point in time, the nonvariable provisions are consistent with UCP 500 and the recently released UCP 600.

<sup>109</sup> U.C.C. § 5-108(a). ("[A]n issuer shall honor a presentation that, as determined by the standard practice . . . appears on its face strictly to comply with the terms and conditions of the letter of credit."); U.C.C. § 5-108(e) ("An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."). "Standard practice" includes "international practice set forth in or referenced by the Uniform Customs and Practice, [as well as] other practice rules published by associations of financial institutions, and . . . local and regional practice." U.C.C. § 5-108 cmt. 8 (1995); see also U.C.C. § 5-101 cmt. (2002) ("The Uniform Customs and Practice is an international body of trade practice that is commonly adopted by international and domestic letters of credit and as such is the 'law of the transaction' . . ."); U.C.C. § 5-103 cmt. 2 (2002) ("Particularly with respect to the standards of performance that are set out in Section 5-108, it is appropriate for the parties and the courts to turn to customs and practice such as the Uniform Customs and Practice for Documentary Credits, currently published by the International Chamber of Commerce as I.C.C. Pub. No. 500 (hereafter UCP). Many letters of credit specifically adopt the UCP as applicable to the particular transaction. Where the UCP are adopted but conflict with Article 5 and except where variation is prohibited, the UCP terms are permissible contractual modifications under Sections 1-302 and 5-103(c).").

<sup>110</sup> U.C.C. § 5-108(c) states: "Except as otherwise provided[,] . . . an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given." U.C.C. § 5-108(b) essentially defines timely notice as notice within a "reasonable time

the revision process to the “need for uniformity,” noting that the use of letters of credit in the U.S. as a “major instrument in international trade,” depends in great part on U.S. law that is “in harmony with international rules and practices.”<sup>111</sup> Finally, those individuals most involved in Article 5’s revision were also integrally involved in the concurrent revisions to the UCP (which ultimately culminated in the Banking Commission’s release of the UCP 500).<sup>112</sup> The normative impact of this cross-fertilization and overlap, even at the level of the individual, should not be underestimated or ignored, especially in an arena where rulemaking assumes a decidedly club-like feel.<sup>113</sup>

*b. Domestic Court Decisions*

As the UCP has profoundly impacted domestic statutes and codes, many courts in the U.S. and elsewhere rely on the UCP, and even Banking Commission interpretive material, in deciding *L/C* cases.<sup>114</sup> Consider the following illustrative case. A U.S. exporter entered into a contract with a Chinese importer for the sale of a hazardous chemical.<sup>115</sup> The importer opened an *L/C* at the Bank of China in favor of the exporter and chose the UCP 500 as

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after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents.” This section, which had no analog in the original version of Article 5, explicitly echoes the preclusion principle as set forth in UCP 500, *supra* note 43, art. 14(d)(i), (e). See Table of New Provisions, Revised Article 5 of the UCC, at 2 (indicating that U.C.C. § 5-108(c) had no predecessor in the original article 5).

<sup>111</sup> *Prefatory Note* to U.C.C. Revised Article 5 (1995) (“Letters of Credit are a major instrument in international trade, as well as domestic transactions. To facilitate its usefulness and competitiveness, it is essential that U.S. law be in harmony with international rules and practices, as well as flexible enough to accommodate changes in technology and practices that have, and are, evolving. Not only should the rules be consistent within the United States, but they need to be substantively and procedurally consistent with international practices.”).

<sup>112</sup> One aspect of this maze that I find particularly interesting is that the same personalities emerge and re-emerge in recounting the ICC’s letter-of-credit practices. Anyone who even briefly peruses the *L/C* world will undoubtedly stumble upon these individuals. For instance, when I tried to contact DOCDEX via the e-mail address that is on the ICC’s website, I received a response from an individual who is both the technical advisor to the Banking Commission, as well as an active participant in the ICP 600 drafting committee. This individual is also a principal at a private consulting firm that trains banks and bankers on the ins and outs of UCP practice—this consulting firm is currently poised to provide in-depth training on the new UCP 600 and thus capitalize upon the principal’s intimate relationship with the ICC.

<sup>113</sup> See generally Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264 (Roger B. Porter et al. eds., 2001).

<sup>114</sup> See generally KING TAK FUNG, *LEADING COURT CASES ON LETTERS OF CREDIT* (2004) (ICC Pub. No. 658).

<sup>115</sup> *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff’d*, 288 F.3d 262 (5th Cir. 2002).

the governing law.<sup>116</sup> Unfortunately, the L/C had several technical typographical mistakes.<sup>117</sup> When the Bank of China received the documents, it reviewed them, identified the discrepancies, and ultimately denied payment under the L/C;<sup>118</sup> the exporter then sued the Bank of China for payment. The question before the court was whether the Bank of China breached its legal obligation to pay the exporter upon receipt of documents that complied in substance, but not in technicality, with the terms of the L/C.<sup>119</sup> In answering this question, the court stated unequivocally that the UCP was the controlling legal standard because local law, Article 5, identifies “standard practice” as the arbiter of the documents’ compliance with the L/C’s terms,<sup>120</sup> and because the UCP was “standard practice” when the parties affirmatively chose it to govern the L/C.<sup>121</sup> Notably, in deciding that the Bank of China had breached its obligations under the L/C, the court’s analysis is exclusively UCP-centered,<sup>122</sup> analyzing not only the UCP’s text but also Banking Commission opinions.<sup>123</sup>

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<sup>116</sup> *Id.* at 942.

<sup>117</sup> The mistakes included: (1) listing the name of the beneficiary incorrectly; (2) misspelling the destination port; and (3) assigning the wrong L/C number in the beneficiary’s faxed certified copy. *Id.*

<sup>118</sup> The Bank of China sent a telex which stated: “We are contacting the applicant [JFTC] of the relative discrepancy [sic]. Holding documents at your risks and disposal.” *Id.* at 943. The Bank of China sent a subsequent telex several days later which noted that the UCP creates a “definite undertaking” by the issuing bank to pay the beneficiary (in this case Voest-Alpine) as long as the documents comply “with the terms and conditions of the credit”; in this case “the discrepant documents may have us refuse to take up the documents according to article 14(B) of UCP 500.” *Id.*

<sup>119</sup> *Id.* at 946.

<sup>120</sup> *Id.* at 944; *see also* TEX. BUS. & COM. CODE ANN. § 5.108(a), (e). The Texas approach is consistent with the current version of the UCC. The case in question deals with the Bank of China’s refusal to pay in the face of discrepant documents, and the U.C.C. clearly defers to “standard practice,” U.C.C. § 5-108(e), in unpacking the precise contours of the obligation.

<sup>121</sup> *Voest-Alpine*, 167 F. Supp. 2d at 944.

<sup>122</sup> *E.g., id.* at 944–45 (“If the Issuing Bank . . . decides to refuse the . . . documents, it must give notice to that effect . . . no later than the close of the seventh banking day following the day of receipt of the documents.”) (quoting UCP 500, *supra* note 43, art. 14(d)(i)). The court then held that a failure to comply with the UCP’s notice provisions divests the issuing bank of the right to refuse payment on the basis of discrepant documents. *Id.* at 945 (citing UCP 500, *supra* note 43, art. 14(e)). The Court appropriately noted that the UCP 500 does not “mandate that the documents be a mirror image of the requirements or use the term ‘strict compliance’”; nor does it “provide guidance” on the types of discrepancies that “would justify a conclusion on the part of a bank that the documents are not in compliance with the terms and conditions of the letter of credit.” *Id.* at 946.

<sup>123</sup> For interpretive assistance, the court significantly turned to an opinion of the Banking Commission which interpreted the UCP 500’s standard for examining documents. *Id.* at 948–49 (citing Banking Commission opinions and policy statements, OPINIONS OF THE ICC BANKING COMM’N 1995–1996, *supra* note 71, at 38, holding that “duplicate” or “triplicate” bills of lading and packing lists may be deemed “original” documents as long as they bear original signatures).

While this is just one emblematic case, it is generally indicative of the way that U.S. courts draw the UCP into their analysis.<sup>124</sup>

*c. Administrative Regulations*

On a regulatory level, the UCP serves as a safe harbor for permitted bank activities within the United States. Historically, U.S. bank regulators limited the circumstances under which U.S. banks could issue guarantees;<sup>125</sup> in contrast, regulators have always allowed banks to issue commercial L/Cs.<sup>126</sup> As globalization, economic growth, and increasingly complex transactional structures fuel demand for risk shifting and financing mechanisms, U.S. businesses and investors increasingly seek “guarantee like” support from U.S. banks, energizing the standby letter of credit business. Standby credits are the functional equivalent of a guarantee in the guise of an L/C; like an independent bank guarantee, standby credits anoint banks as independent, third-party intermediaries, pledging to make certain payments in the event of documentary proof of prescribed transactional shortcomings.<sup>127</sup> Such “payment upon receipt of facially compliant documents” is highly reminiscent of traditional letters-of-credit, and thus, standbys adorn all the classic L/C trappings.

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<sup>124</sup> See, e.g., *W. Int'l Forest Prods., Inc. v. Shinhan Bank*, 860 F. Supp. 151, 153 (S.D.N.Y. 1994) (referring to Banking Commission opinions to determine whether “strict compliance” requires an original, rather than duplicate, document); *Atari, Inc. v. Harris Trust & Sav. Bank*, 599 F. Supp. 592 (N.D. Ill. 1984), *aff'd sub nom. Racinowski v. Chrans*, 785 F.2d 312 (7th Cir. 1986) (applying UCP in face of conflicting provision of UCC); *Ultra Scope Int'l, Inc. v. Extebank*, 599 N.Y.S.2d 361, 364 (N.Y. 1992) (looking at Banking Commission decisions to determine what the term “stale” means in an L/C); see also, e.g., Dale Joseph Gilsinger, Annotation, *Validity, Construction, and Application of the Uniform Customs and Practice for Documentary Credits (UCP)*, 56 A.L.R. 5th 565, 602–05 (1998) (citing *Fidelity & Deposit Co. v. FDIC*, 54 F.3d 507 (E.D. Mo. 1990); *Newport Indus. N. Am. v. Berliner Handels und Frankfurter Bank*, 923 F. Supp. 31, 29 U.C.C. Rep. Serv. 2d 936 (S.D.N.Y. 1996); *Bergerco Canada, a Div. of ConAgra, Ltd. v. Iraqi State Co. for Food Stuff Trading*, 924 F. Supp. 252, 29 U.C.C. Rep. Serv. 2d (CBC) 943 (D.D.C. 1996), *rev'd on other grounds*, 129 F.3d 189 (D.C. Cir. 1997); *Carol Ruth, Inc. v. Provident Life and Acc. Ins. Co.*, 1995 WL 130530 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir. 1996); *Western Int'l Forest Prods. v. Shinhan Bank*, 860 F. Supp. 151, 24 U.C.C. Rep. Serv. 2d 998 (S.D.N.Y. 1994); *Knac Agencies v. Masterpiece Apparel, Ltd.*, No. 94 Civ. 1073 (LMM), 1994 WL 582590 (S.D.N.Y. Oct. 21, 1994), related reference, No. 94 Civ. 1073 (LMM), 1997 WL 51519 (S.D.N.Y. Feb. 7, 1997); *Landmark Bank v. Nat'l Credit Union Admin.*, 748 F. Supp. 709 (E.D. Mo. 1990); *Cooperative Agricole Groupement De Producteurs Bovins De L'Ouest v. Banesto Banking Corp.*, No. 86 CIV. 8921 (PKL), 1989 WL 82454 (S.D.N.Y. July 19, 1989), *aff'd*, 904 F.2d 35 (2d Cir. 1990); *Waidmann v. Mercantile Trust Co. Nat'l Ass'n*, 711 S.W.2d 907, 2 U.C.C. Rep. Serv. 2d 252 (Mo. App. 1986)).

<sup>125</sup> See 12 C.F.R. § 7.1017 (2007) (national bank as guarantor or surety on indemnity bond).

<sup>126</sup> See Vin Maulella, *Can U.S. Banks Issue Guarantees?*, 8 DCINSIGHT (2002).

<sup>127</sup> See *supra* note 64 and accompanying text.



Because standbys so closely resemble independent guarantees, bank regulators began facing inevitable questions of form over substance. If a bank issues a “standby” L/C, are there nonetheless circumstances when, given standbys’ functional kinship with guarantees, regulators would deem the bank to have forayed into restricted guarantee activities? Thus, both the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) now explicitly permit national banks and federal savings associations to issue “letters of credit” and other “independent undertakings” that are “within the scope of the applicable laws or rules of practice recognized by law.”<sup>128</sup> In flagging examples of applicable “rules of practice,” OCC and OTS recognize the UCP, ISP98, and the UNCITRAL Convention and therefore immunize any financial instruments made pursuant to them from prohibitory regulation.<sup>129</sup>

### III. INTER-INSTITUTIONAL INTERFACE

Bottom-up lawmaking is a normative march between communities, and moments of interface are endemic to its path. These moments, however, are wrought with multifaceted complexity. As informal, practice-based norms permeate more formal lawmaking communities, the iterative process produces positive synergies. On the one hand, informal rules and institutions spark jurisprudential creativity by official lawmaking institutions, enhancing the quality of deliberations on substantive issues as well as the effectiveness of ensuing legal rules. In turn, formal lawmaking institutions become a vehicle to heightened transparency and accountability.

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<sup>128</sup> 12 C.F.R. § 7.1016 (2007) (national banks); *id.* §§ 560.50, 560.120 (2007) (federal savings associations). Of course, the term “independent undertaking” is borrowed from the UNCITRAL Convention and, is itself, the combustible product of a dialectic between the ICC, UNCITRAL and domestic legal systems.

<sup>129</sup> *Id.* § 560.120 n.1 (2007); *Id.* § 7.1016 n.1 (2007) (“Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co., 1/800/328-4880); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 500) (available from ICC Publishing, Inc., 212/206-1150; [http:// www.iccwbo.org](http://www.iccwbo.org)); the International Standby Practices (ISP98) (ICC Pub. No. 590) (available from the Institute of International Banking Law & Practice, 301/869-9840; <http://www.iiblp.org>); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law, 212/963-5353); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Pub. No. 525) (available from ICC Publishing, Inc., 212/206-1150; <http://www.iccwbo.org>); as any of the foregoing may be amended from time to time.”).

Interface also has a darker underside. In traversing the invisible, somewhat amorphous line that demarcates informal from formal law and concomitantly segregates normative communities, bottom-up lawmaking also sets the stage for competitive, turf-protecting behavior. While the interactions between lawmaking groups—the ICC and UNCITRAL or the ICC and domestic lawmakers—are, on the surface, mutually reinforcing and reaffirming, the subtleties often reveal a degree of jurisdictional defensiveness and competitiveness that may, ultimately, neutralize or undermine the synergies.

#### A. *Mutually Reinforcing Relationships*

##### 1. *The Banking Commission as Muse*

This Article has already documented a directional flow: informal norms “ascend” to hard law, with official institutions engaged in wholesale, partial, or conceptual normative borrowing. This description, however, discounts the evocative and constitutive roles that Banking Commission norms played at critical combative moments. Indeed, in the past several years, the international scholarly community has been searching for an appropriately descriptive metaphor for interaction among discrete, yet overlapping, international legal communities. The “dialogue” metaphor, omnipotent in international legal scholarship,<sup>130</sup> is amorphously loose, too weak to describe the strong normative interplay at the heart of this Article’s bottom-up lawmaking example. Yet, the competing “dialectic” image connotes a degree of Socratic opposition, conflict, and questioning that simply never surfaced as official lawmakers contemplated the UCP’s substantive norms.<sup>131</sup> Indeed, both UNCITRAL and domestic lawmakers seemed prepared to accept and embrace the UCP’s norms without much questioning.

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<sup>130</sup> Some scholars argue that “transnational judicial dialogue” appropriately captures the phenomenon of courts’ cross-citing foreign judicial decisions, or looking toward foreign law and practice as support for a particular judicial outcome. See Waters, *supra* note 29. Transgovernmental network scholarship is premised, although not always explicitly, on dialogue, discourse, consensus, and ultimately regulatory “harmony” among similarly situated mid-level regulators. See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003). Other scholars use the dialogue metaphor to capture the interplay between different levels of government—to capture the relationship between state and substate actors and, in turn, the relationship between national or subnational actors and supranational or intergovernmental systems of governance. See Osofsky, *supra* note 28.

<sup>131</sup> See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

Perhaps the image of a “muse” more precisely captures the substantive role that Banking Commission rules played in both the Article 5 revision effort, as well as the drafting of the UNCITRAL Convention. The muse is both iterative and inspirational. In the instant example, norms generated in commercial bank conference rooms did not merely seep into official law—they became the baseline catalyst, the reference standard against which official lawmakers draft and evaluate ensuing law. In international relations parlance, the “muse” relationship may simply be a very strong version of “path dependence,”<sup>132</sup> perhaps distinguishable only in terms of color and imagery. Regardless of the terminology, the Banking Commission undoubtedly engaged in much more than “conversation” with official institutions; and neither UNCITRAL nor the Article 5 drafters ever questioned the value and utility of the UCP. Thus, the UCP formed a core which radiated creative energy and indelibly shaped the substantive path of official law.<sup>133</sup>

Consider the relationship between the Banking Commission’s rules and the UNCITRAL Convention. Banking Commission rules sparked UNCITRAL’s lawmaking efforts. Prior to engaging in any creative work, indeed prior to deciding whether UNCITRAL should embark on such a lawmaking project, UNCITRAL analyzed and reacted to, both in a broad, macro sense and on a micro, article-by-article level, the Banking Commission’s then working draft of the URDG (as it related to independent guarantees) and the then current version of the UCP (400) (as it related to standby credits).<sup>134</sup> Following such analysis, the UNCITRAL Working Group identified those issues ripe for legal

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<sup>132</sup> See, e.g., Raustiala & Victor, *supra* note 12, at 279 (defining “path dependence” as the degree to which “extant arrangements” will “constrain and channel the process of creating new rules”).

<sup>133</sup> While the Banking Commission rules sparked creative energy vis-à-vis the Article 5 and UNCITRAL drafting processes, and thus served as a type of muse, the normative influence among between these three lawmaking communities was not always unidirectional. For instance, the default rule in the UCP 400 was that a credit which was silent on the issue of revocability was deemed to be revocable. UCP 400, *supra* note 52, art. 7(c). In examining this provision, the UCC redrafters suggested that this presumption was out of sync with practice because reasonable expectations of the parties to a commercial letter of credit would favor irrevocability. *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 BUS. LAW. 1521, 1566 (1990). In part in response to UCC-related discussions which highlighted the inconsistency between rule and practice, the UCP 500’s default rule is one of irrevocability. UCP 500, *supra* note 43, art. 6(c).

<sup>134</sup> The Secretary-General, *Report of the Secretary-General on Stand-by Letters of Credit and Guarantee*, [1988] 19 Y.B. Comm’n Int’l Trade L. 58–61, U.N. Doc. A/CN.9/301 [hereinafter *Secretary-General Report 1988*] (reproducing the ICC’s Draft Uniform Rules for Guarantees in initiating discussions regarding what ultimately evolved into the UNCITRAL Convention).

harmonization<sup>135</sup> and started a protracted (five-plus year) process of analyzing each substantive issue—from the definition of “independent undertaking” to fraud to choice of law—against the backdrop and through the lens of the analogous Banking Commission rule.<sup>136</sup> Throughout the process, UNCITRAL consciously sought consistency and harmony with UCP rules; thus, the UCP served as a backstop to channel UNCITRAL’s normative efforts in a mutually reaffirming direction.<sup>137</sup> From start to finish, the Banking Commission norms were the creative heart of UNCITRAL’s work.

Likewise, the UCP played the role of muse vis-à-vis the Article 5 revision effort. The UCP precepts substantively infused the ABA Task Force Report which initiated the Article 5 revision and thereby cast the overarching framework and the terms.<sup>138</sup> Furthermore, in discussing the relationship between the UCP and Article 5, the ABA Task Force, like the UNCITRAL drafters, pledged, as a preliminary drafting principle, to avert conflicts with the

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<sup>135</sup> See generally *Report of the Working Group on International Contract Practices on the Work of Its Nineteenth Session*, [1989] 20 Y.B. Comm’n Int’l Trade L. 189–94, U.N. Doc. A/CN.9/316 [hereinafter *Report of the Working Group 1989*].

UNCITRAL views its mission as one of legal harmonization. See UNCITRAL, *Origin, Mandate and Composition of UNCITRAL*, *supra* note 94. Sometimes its harmonization efforts assume the form of model laws—other times they take the form of treaties (conventions). For most of its deliberations vis-à-vis “independent undertakings,” the working assumption was that the end product would be a model law. During the drafting process, however, as the urgency of harmonization became increasingly apparent, the drafters decided to shift to a treaty format which would become binding upon states once ratified.

<sup>136</sup> *Report of the Working Group on International Contract Practices on the Work of Its Nineteenth Session*, [1991] 22 Y.B. Comm’n Int’l Trade L. 343, U.N. Doc. A/CN.9/345 (contemplating whether to include a preclusion rule in the UNCITRAL Convention, examining the UCP’s approach to preclusion as the base line).

<sup>137</sup> UNCITRAL, Working Group on International Contract Practices, *Report of the Working Group on Its Nineteenth Session*, ¶¶ 20–21, U.N. Doc. A/CN.9/374 (June 23, 1993) (requiring consent of issuer prior to beneficiary transferring rights under an independent guarantee in order to assure consistency with the UCP “to which many stand-by letters of credit were subject”).

<sup>138</sup> *An Examination of U.C.C. Article 5 (Letters of Credit)*, *supra* note 133, at 1538 (describing guiding principles and guidelines, highlighting the need to “respect and accommodate legitimate letter of credit practice”); *id.* at 1544 (Honorary Chair of the Banking Commission noted that the ABA Task Force “appreciated that both types of credit [commercial and stand-by] nevertheless fall within the globally accepted rules of the International Chamber of Commerce . . . inspired originally by the U.S.A.”). In addition, the Task Force conducted an article-by-article analysis of the then current version of Article 5 and, in completing this analysis, compared each provision to the UCP analog. See, e.g., *id.* at 1547–48 (exploring non-documentary conditions through the lens of UCP 400 art. 3 & 4); *id.* at 1554 (exploring whether there is a meaningful difference between “drafts/demands” and “documents,” noting that the UCP does not distinguish between these categories); *id.* at 1567 (exploring revocability questions against the backdrop of UCP 400 article 7(c)); *id.* at 1573 (analyzing time and effect of establishment of a credit against the backdrop of UCP 400 article 12); *id.* at 1577 (amendments vis-à-vis UCP 400 article 10(d)); *id.* at 1578 (duties and liabilities of advising and confirming banks); *id.* at 1599 (discussion of preclusion rule reflecting on UCP 400).

UCP whenever possible.<sup>139</sup> The accounts of those intimately involved in Article 5's revision identify the UCP as the primary inspiration and impetus for normative change.<sup>140</sup>

## 2. *Pathway to Transparency and Accountability*

Bottom-up lawmaking communities are sometimes suspect in terms of transparency and accountability, minimum bedrock principles that "legitimate" legal outcomes. Indeed, the Banking Commission's structure and processes breed neither transparency nor accountability.<sup>141</sup> For instance, the Banking Commission does not post the UCP on the ICC web site, nor does it make the rules accessible via commercial services such as Westlaw and FindLaw.<sup>142</sup> Instead, ICC Publishing houses aggressively market and sell the UCP<sup>143</sup> (and some cynics have even suggested that UCP revisions are timed to meet the ICC's revenue demands).<sup>144</sup> Thus, to gain access to Banking Commission

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<sup>139</sup> *An Examination of U.C.C. Article 5 (Letters of Credit)*, *supra* note 133, at 1560; *see also id.* at 1544 (noting that the Task Force appreciated that both types of credit fall within the UCP) (Introductory Comment, Bernard Wheble, Honorary Chair, Commission on Banking Techniques and Practice of the International Chamber of Commerce).

<sup>140</sup> *See Barnes, Internationalization*, *supra* note 30; White, *supra* note 30, at 190 ("The UCP had an enormous influence on the revision of Article 5. Nothing else, not American common law, local practice, the law of another country, or even the UNCITRAL draft, had anything like the influence the UCP had. In fact, the UCP may have had a greater influence on the redraft of Article 5 than existing Article 5 of the UCC.")

<sup>141</sup> "Transparency" entails access to information about decisionmaking processes and the substantive content of decisions. Accountability refers to the ability of all interested and impacted parties to either directly influence decisions or indirectly influence decisions by disenfranchising undesirable decisionmakers. Transparency is usually a necessary, but insufficient, predicate to accountability.

<sup>142</sup> E-mail from Ronald Katz, Policy Manager, Commission on Banking Technique and Practice, to Janet Levit, Professor of Law, University of Tulsa College of Law (Jan. 15, 2007, 12:38 CST) [hereinafter Ronald Katz, Jan. 15, 2007, e-mail] (on file with author).

<sup>143</sup> The representative from ICC Publishing, Rachele Bijou, briefed the Banking Commission as early as May 2006 on plans for the UCP 600 release, noting that the book version would be "available in early November, assuming that the rules were approved at the October Banking Commission meeting." Bijou also noted that all Banking Commission members would receive "complimentary copies" of the UCP 600, both in book and leaflet form, and that the ICC would make an "intranet version available for banks and companies at very competitive prices." ICC, Department of Policy and Business Practices, Commission on Banking Technique and Practice, Executive Summary of Semi-Annual Meeting (May 16–17, 2006).

<sup>144</sup> The person who offered this cynical comment requested that the comment remain off the record. However, some on-the-record comments reveal similar sentiments. When asked whether "limiting dissemination of these rules through the ICC Bookstore" conflicted with the ICC's self-professed goal of "creat[ing] a set of contractual rules that would establish uniformity," E-mail from Janet Levit, Professor of Law, University of Tulsa College of Law, to Ronald Katz, Policy Manager, Commission on Banking Technique and Practice (Jan. 15, 2007) (on file with author) (quoting Guy Sebban, *Foreword* to UCP 600, *supra* note 48, at 3), the ICC responded that the National Committees depend on UCP sales for up to 50% of annual revenues and that "UCP is a copyrighted publication and will remain so," Ronald Katz, Jan. 15, 2007, e-mail, *supra* note 142.

rules, one must surmount financial<sup>145</sup> and logistical hurdles.<sup>146</sup> And, even upon physically obtaining the UCP, it has historically been so technical, dense, and difficult to read that even those who work in trade finance purchase CliffsNotes-like summaries and attend specialized classes.<sup>147</sup> Certainly, there are international institutions, both formal lawmaking institutions and less formal trade-association-like institutions, which would score worse on a transparency meter.<sup>148</sup> However, by all accounts, the Banking Commission is rather opaque.

The Banking Commission also scores poorly in terms of accountability (i.e., the ability of those subject to law to control the course of law). The ICC protects the identity of Banking Commission members because “our members don’t want to be contacted by people outside for a number of reasons.”<sup>149</sup> Banking Commission rules allow non-ICC members to “observe” only *one* meeting as guests; yet, ICC membership via National Committees (and at a rather steep price)<sup>150</sup> is the only ticket to subsequent Banking Commission

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<sup>145</sup> At ICC Books USA, the current price of the UCP 600 is \$27.50 plus shipping. ICC Books USA, <http://www.iccbooksusa.com/index.cfm?fid=0&bookid=148> (last visited Feb. 13, 2007). From ICC Business Bookstore, the UCP 600 is €24. ICC Business Bookstore, <http://www.iccbooks.com/Product/ProductInfo.aspx?id=456> (last visited Feb. 20, 2007).

<sup>146</sup> Even though the ICC Banking Commission approved the UCP 600 on October 25, 2006 (and promised to release the document in early November), the ICC did not release the UCP 600 (even for sale) until early December. At that time, I tried ordering a copy through my library, which did not arrive until mid-January 2007. In the interim, the ICC web site contained a note which read: “During the holiday season some orders may be subject to a slight delay. Service will return to normal early January. We thank you for your understanding. Season’s Greetings, The ICC Publications Team UCP 600. Temporarily out of stock. Please check back January 15th.” The University of Tulsa Law School librarians recount their travails in trying to physically acquire the UCP. E-mail from Courtney Selby, Collection Development Librarian, University of Tulsa College of Law, to Janet Levit, Professor of Law, University of Tulsa College of Law (Jan. 8, 2007, 3:44 PM CST) (on file with author).

<sup>147</sup> During my tenure at the Export-Import Bank of the United States, an institution devoted solely to financing trade of U.S. exports, management sent several attorneys and underwriters, who day-in and day-out grappled with the technicalities of trade finance, to a class devoted solely to the UCP 500 because management considered it to be one of the most enigmatic, opaque, and impenetrable texts. See AM. INST. OF BANKING, LETTERS OF CREDIT IN INTERNATIONAL TRADE WORKSHOP 85–94 (1998).

<sup>148</sup> In several articles I have recounted my travails with the Berne Union, the informal, bottom-up lawmaking community that regulates the export credit insurance industry. See, e.g., Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 10, at 151 n.107.

<sup>149</sup> See E-mail from Ronald Katz, Policy Manager, Commission on Banking Technique and Practice, to Janet Levit, Professor of Law, University of Tulsa College of Law (Apr. 20, 2004) [hereinafter Ronald Katz, Apr. 20, 2004, e-mail] (on file with author).

<sup>150</sup> Membership through the U.S. national committee costs a minimum of \$5,000 per year and may be significantly more depending on revenue and budget. See U.S. Council for International Business, <http://www.uscib.org/index.asp?documentID=721> (last visited on January 31, 2007). Direct ICC membership

meetings.<sup>151</sup> While there are National Committees in approximately ninety countries, many developing countries in Africa, Asia, and the Americas do not have National Committees and thus offer local businesses no simple vehicle for ICC membership and, concomitantly, Banking Commission membership.<sup>152</sup> And National Committees are not solely gatekeepers of ICC membership; National Committees also nominate members of the UCP Drafting Group,<sup>153</sup> as well as “experts” to serve on DOCDEX arbitration panels.<sup>154</sup> Thus, Banking Commission membership rules and policies regarding “outside” participation essentially disenfranchise those without access to a National Committee channel to critical Banking Commission “lawmaking” activities. Likewise, the very decision to place the UCP, and revision efforts, within the Banking Commission, effectively minimizes the input from other constituent communities, including exporters, importers, the insurance industry, and logistics providers.<sup>155</sup>

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is available, but infrequently used. ICC direct membership is also quite expensive, currently €1,500 annually for local members. See ICC, ICC Membership, *supra* note 48.

<sup>151</sup> See E-mail from Ronald Katz, Policy Manager, Commission on Banking Technique and Practice, to Janet Levit, Professor of Law, University of Tulsa College of Law (Jan. 16, 2007) (on file with author) (“The rule is that non-members of ICC can participate in one meeting as a guest. After that, to continue to participate, you would have to become a member of ICC. There is a US national committee called USCIB that handles memberships.”). National Committees appoint Banking Commission members on the basis of interest and expertise, resulting in a Commission dominated by commercial bankers. Ronald Katz, Apr. 20, 2004, e-mail, *supra* note 149.

<sup>152</sup> See ICC, ICC Worldwide: National Committees, *supra* note 48. L/C practice differs from region to region, and indeed, bankers from the Middle East and Asia have complained that the UCP does not address their regionalized concerns, particularly those that pertain to L/Cs as financing instruments. See generally LC Views: The Open LC Community For and By LC Specialists, <http://www.lcviews.com/index.htm> (last visited Feb. 20, 2008). Even for those countries with National Committees, the Banking Commission makes decisions by weighted, block voting, with all members from the same country casting a collective vote. Delegations either have one, two, or three votes. The delegations with three votes are China, Italy, Japan, Germany, the United States, the United Kingdom, and France. The number of votes is correlated with the dues that the ICC receives from the respective countries. No matter how many representatives a National Committee sends to the ICC meetings, and no matter how many direct members there are from countries that do not have National Committees, all members from the same country must vote the same way. See Ronald Katz, Apr. 20, 2004, e-mail, *supra* note 149; see also ICC, COMM’N ON BANKING TECHNIQUE & PRACTICE, EXECUTIVE SUMMARY OF SEMI-ANNUAL MEETING (Oct. 24–25, 2006).

<sup>153</sup> Gary Collyer, Jan. 10, 2007, e-mail, *supra* note 58.

<sup>154</sup> Gary Collyer, Dec. 20, 2006, e-mail, *supra* note 72.

<sup>155</sup> See Stephan, *supra* note 30, at 715 (noting that the UCP 500 revision was drafted by law professors specializing in banking law and bankers, without any representation from transport, insurance, exporters, and importers) (citing Ross P. Buckley, *The 1993 Revision of the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT’L L. & ECON. 265, 267 (1995)); see also ICC, How ICC Works, <http://www.iccwbo.org/id96/index.html> (last visited Apr. 6, 2008); INTERNATIONAL CHAMBER OF COMMERCE, UCP 500 + EUCEP 3–4 (2002) (listing the members of the Working Group on the UCP Supplement for

However, the ICC's interfacing with UNCITRAL has created "transparency windows" and enhanced "accountability capacity." While the Banking Commission does not post minutes of its meetings or deliberations on its web site, UNCITRAL posts summaries of its meetings and has organized them, when appropriate, as "travaux preparatoires" for each official UNCITRAL text. As the "ICC Observer" (a Banking Commission representative) participated in most of the deliberations leading to the UNCITRAL Convention, the ICC's Observer's comments provide fresh insight into the Banking Commission's priorities and thought processes.<sup>156</sup> Also, in requesting UNCITRAL's endorsement of the UCP, the Banking Commission wrote a "defense" of the UCP, which UNCITRAL has posted, and which explains the evolution of the UCP in a more transparent way than any information available on the ICC's web site.<sup>157</sup> Furthermore, as UNCITRAL has been called upon to comment on various drafts of Banking Commission rules, the attendant UNCITRAL reports offer a view of the attendant rules' evolution.<sup>158</sup> Thus, the interface with UNCITRAL establishes an incrementally transparent window into the Banking Commission's mentality, including comments, feedback, and on-the-record rationalization of affirmative and negative decisions.

Furthermore, UNCITRAL has repeatedly expressed "concern" with the ICC's essential monopoly over access to Banking Commission rules. In particular, UNCITRAL notes that the ICC's "restrictive approach" to distribution of its rules is "detrimental to the objectives of the harmonization of law" and "the aim of securing judicial recognition and other forms of legal support" for such rules.<sup>159</sup> Thus, when UNCITRAL "endorses" an ICC text, it

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Electronic Presentation). *But see infra* note 258 and accompanying text (describing the vehement reaction of Chair of UCP Drafting Group when accused of not including such constituencies in the process).

<sup>156</sup> *Report of the Working Group* 1989, *supra* note 135, at 184–200 (ICC Observer's article-by-article explanation of the ICC's Uniform Rules on Demand Guarantees).

<sup>157</sup> *See, e.g., Note by the Secretary-General: Bankers' Commercial Credits and Bank Guarantees*, [1975] 6 Y.B. Comm'n Int'l Trade L. 137–38, U.N. Doc. A/CN.9/101 [hereinafter *Secretary-General Note* 1975] (discussing progress of work on guarantees).

<sup>158</sup> *See, e.g., Note by the Secretariat: Stand-by Letters of Credit and Guarantees: Tentative Considerations on the Preparation of a Uniform Law*, [1989] 20 Y.B. 200–03, U.N. Doc. A/CN.9/322.

<sup>159</sup> UNCITRAL, in contemplating (and ultimately granting) endorsement of the UCP 500, expressed concern that the ICC's protective, monopolistic stance toward ICC rules was inconsistent with ICC goals:

In the discussion that preceded the adoption of the above resolution, the concern was widely expressed in the Commission [UNCITRAL] that a strict application of the copyright held by ICC in UCP, . . . at least as regards governmental and teaching uses of the text, was inappropriate for such a uniform legal text designed for worldwide use. It was widely felt that a restrictive approach that affected even governmental and teaching functions was detrimental to the



publishes not only its endorsement but also the text itself. Today, when all UNCITRAL endorsements are available at the click of a link on UNCITRAL's website,<sup>160</sup> UNCITRAL has essentially made the ICC's closely held rules available to the public at large (or at least the subsection of the public who can navigate with ease on the Internet).

The Banking Commission's relationship with UNCITRAL also patches some of the accountability deficits inherent in its rulemaking processes. In particular, UNCITRAL serves as a conduit between a Banking Commission membership that is skewed toward industrialized countries and UNCITRAL's general, and more universal, membership.<sup>161</sup> Interestingly, UNCITRAL has expanded the Banking Commission's "accountability capacity," literally serving as a logistical back office for each UCP revision. In particular, UNCITRAL sends UCP-related questionnaires to representatives from (primarily developing) countries that do not have National Committees and thus are not represented on the Banking Commission; essentially, UNCITRAL serves as a proxy National Committee for developing countries.<sup>162</sup> And the ICC consciously appreciates its relationship with UNCITRAL as creating "an important bridge to those countries that were at the time unable to participate directly in the work of the ICC."<sup>163</sup>

Likewise, the Banking Commission became more accountable through its interactions with lawmakers on the domestic plane. In channeling the UCP, via its synergistic link to Article 5, first through the ABA Task Force that triggered the Article 5 revision process, then through the Drafting Committee, then through the American Law Institute (ALI) and National Conference of

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objectives of the harmonization of law and dissemination of information at odds with the aim of securing judicial recognition and other forms of legal support for the text.

Report 1994, *supra* note 95, ¶ 231.

<sup>160</sup> See UNCITRAL, Texts of Other Organizations Endorsed by UNCITRAL, [http://www.uncitral.org/uncitral/en/other\\_organizations\\_texts.html](http://www.uncitral.org/uncitral/en/other_organizations_texts.html) (last visited Apr. 6, 2008).

<sup>161</sup> *Secretary-General Report* 1988, *supra* note 134, at 48 ("In support of ICC's efforts in obtaining comprehensive information on the practice and needs in this field, questionnaires, reports and draft rules prepared by ICC and sent to its National Committees have been transmitted to Governments and to banking and trade institutions not represented in ICC for their comments. The replies were then forwarded to ICC, in some cases by the secretariat. This kind of assistance was rendered in connection with ICC's efforts to prepare uniform rules on contract guarantees and its work in preparing the 1974 and 1983 revisions of UCP."); see also *Report* 1984, *supra* note 95, at 18; *Report* 1975, *supra* note 95, at 14.

<sup>162</sup> See *Secretary-General Note* 1975, *supra* note 157, at 137.

<sup>163</sup> Comm'n on Banking Technique and Practice, ICC Endorsement of the UNCITRAL Convention on Independent Guarantees and Stand-By Letters of Credit (June 21, 1999), <http://www.iccwbo.org/id420/index.html>.

Commissioners on Uniform State Laws (NCCUSL), and finally through state legislatures, the Banking Commission, via the UCP, “engaged” with constituents well beyond those who actually participate in Banking Commission drafting sessions. For instance, while Banking Commission members disproportionately represent the largest, European commercial banks, the ABA Task Force actively consulted a trade association which represented over 530 U.S. banks, many of which were not Banking Commission members and thus not privy to UCP-related deliberations but nonetheless issue, advise, negotiate, and confirm L/Cs.<sup>164</sup> One of the conspicuous accountability deficits in the Banking Commission’s rulemaking activities is the absence—silence—of representatives from the beneficiary and applicant communities. In contrast, the ABA Task Force solicited input from “applicants” (importers) and “beneficiaries,” (exporters) although in a more informal, ad hoc way as “there are no organized trade groups” collectively representing their interests.<sup>165</sup> While the link between such consultations and the Banking Commission drafting room is admittedly attenuated, the coincidence of such consultations with a UCP revision (the revision that culminated in 1993 with the UCP 500), coupled with the cross-pollination of individuals involved not only in the UCC but also the UCP revisions,<sup>166</sup> heightens the possibility that such input meaningfully shapes evolution of Banking Commission rules.<sup>167</sup>

#### *B. Competitive Relationships: Trespass and Spheres of Autonomy*

Through the bottom-up lawmaking process, the Banking Commission engaged with other, official lawmaking communities and successfully entrenched the UCP as hard law. The inter-institutional interplay, while, in

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<sup>164</sup> *An Examination of U.C.C. Article 5 (Letters of Credit)*, *supra* note 133, at 1536. Many of these banks were also not members of the U.S.’s National Committee, the gatekeeper of Banking Commission membership.

<sup>165</sup> *Id.*

<sup>166</sup> *See supra* note 112 and accompanying text.

<sup>167</sup> Similarly, notice-and-comment rulemaking provided opportunities not only for banks but also for trade associations, law firms, and private businesses to comment on proposed regulatory changes that would allow U.S. banks to issue “independent undertakings” as long as such undertakings conformed with international practice (including, but not limited to, ICC rules). *See supra* notes 128–29 The commentary on the advisability and scope of a “safe harbor” offered potential “feedback loop” for those who were not able to participate directly in the drafting and revising of the UCP and other ICC rules, including exporters and importers. *See* Office of the Comptroller of the Currency, Interpretive Rulings, 61 Fed. Reg. 4849, 4852–53 (Feb. 9, 1996) (discussing comments regarding the sets of rules (ICC, UNCITRAL and otherwise) that legitimately reflect international practice). Granted that this feedback mechanism is post hoc; however, given that the ICC revises its rules periodically, this feedback may, perhaps, permeate the Banking Commission’s interpretive activities, as well as find its way into future incarnations of ICC rules.

one sense, positively synergistic, also fueled competitive turf battles, which decreased the Banking Commission's sense of institutional security within the normative complex.

Indeed, legal pluralism offers a useful lens for organizing and understanding complex interface. While each normative community exists within a perceived "sphere of autonomy," the specter of trespass is an inherent feature of interface. Prior to interface, the Banking Commission finds spatial security in three "spheres of autonomy": substantive (the Banking Commission holds a monopoly on the regulation of *commercial* L/Cs); functional (the Banking Commission produces "contract rules" and the other institutions promulgate "law"); and interpretive (the Banking Commission is the resident "expert" in interpreting, but not adjudicating, the UCP). Yet at the moment of interface, official lawmakers commit trespasses on each sphere. The Banking Commission responds both offensively, by aggressively repelling the trespass, and defensively, by either retreating to a redefined sphere or fortifying the boundaries of its existing sphere. In each instance, however, the Banking Commission is left with latent, residual trespass, which ultimately undermines its sense of security within its "social field."

### *1. Substantive Spheres*

#### *a. Spheres of Autonomy*

The Banking Commission, UNCITRAL, and the UCC drafters operate concurrently within the realm of document-based "independent undertakings" (commercial L/Cs, stand-by credits, and demand guarantees). In drafting the Convention, UNCITRAL forayed for the first time into the realm of "independent undertakings," hoping to bring both standby letters of credit and demand guarantees (but not commercial L/Cs) under its jurisdictional umbrella. By its terms, the UCP applied to both commercial and standby letters of credit, although the UCP's sterling reputation flowed from its close-to-universal use in the commercial L/C business. As long as UNCITRAL did not trespass on its core, commercial L/C competency, the Banking Commission apparently was comfortable with UNCITRAL venturing into the "independent undertaking" field. Thus, the two institutions drew lines, albeit permeable lines, around their substantive spheres, with the Banking Commission retaining its autonomy over the regulation of commercial L/Cs.<sup>168</sup>

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<sup>168</sup> See *Report of the Working Group* 1989, *supra* note 135, at 184–85.

*b. Trespass*

However, toward the end of the UNCITRAL Convention drafting process, UNCITRAL decided to expand the Convention's substantive reach.<sup>169</sup> While the Convention would be "mandatory" for standbys and demand guarantees,<sup>170</sup> in a last hour shift of course, parties to a *commercial letter of credit* could "opt in" to the Convention.<sup>171</sup> Thus, UNCITRAL, via the Convention, encroached upon the Banking Commission's sphere.

*c. Banking Commission Response*

This jurisdictional breach appears to have infused competitive tension into the relationship between the Banking Commission and UNCITRAL. In response to UNCITRAL's decision to "regulate" commercial L/Cs, the ICC observer shed any guise of diplomatic nicety, arguing vociferously that this opt-in provision, and concomitant foray into the realm of commercial L/Cs, interferes with "well-established international practice" and "constituted a threat to the stability" of such practices.<sup>172</sup> Furthermore, the Banking Commission has delayed for more than three years in endorsing the Convention.<sup>173</sup> And, the Banking Commission seems to have redoubled efforts

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<sup>169</sup> *Report of the Working Group* 1994, *supra* note 95, at 75.

<sup>170</sup> Of course, the Convention is only "mandatory" for stand-bys and demand guarantees in countries that have ratified the Convention. In such countries, stand-bys and demand guarantees will be automatically governed by the Convention unless the parties "opt out" of the Convention. See UNCITRAL Convention, *supra* note 96, art. 1(3).

<sup>171</sup> UNCITRAL Convention, *supra* note 96, art. 1(2) ("This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention."); see also UNCITRAL secretariat, *Explanatory Note* to UNCITRAL Convention ¶ 16, available at <http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf> (noting that the "opt into" provision for commercial L/Cs was "included in particular because the Convention provides a set of rules that parties to commercial letters of credit may wish in their own judgment to take advantage of, in view of the broad common ground between commercial and stand-by letters of credit, and in view of the occasional difficulties in determining whether a letter of credit is of a stand-by or commercial variety").

<sup>172</sup> Summary Record of the 548th meeting, A/CN.9/SR.548, May 2, 1995, reprinted in 19 YEARBOOK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 256-58 (1995); see also UNCITRAL, Working Group on International Contract Practices, *Report of the Working Group on International Contract Practices on the Work of Its Twenty-Third Session*, ¶¶ 11-13, U.N. Doc. A/CN.9/408 (Feb. 15, 1995). An ICC observer "expressed concern" over the Working Group's decision to make the draft available to cover "commercial letters of credit," and, in response, the Working Group assured the ICC that "no provisions of the draft Convention were in conflict with UCP" and that, if the ICC had such strong concerns, it should have expressed such views "at earlier points" so that the ICC's comments "would have been more usefully considered" *Id.*

<sup>173</sup> The ICC did not endorse the Convention until June 21, 1999; the United Nations General Assembly approved the UNCITRAL Convention on December 11, 1995. See Comm'n on Banking Technique and

to retain its footprint in UNCITRAL's core competencies, concluding both the ISP and UDRG, covering respectively standbys and demand guarantees, and aggressively promoting worldwide use of the UDRG.<sup>174</sup>

## 2. *Functional Spheres: Competing Normative Roles*

### a. *Spheres of Autonomy*

In this normative complex, the UNCITRAL Convention and UCC Article 5 are "law";<sup>175</sup> and the UCP, as well as other Banking Commission rules, are "voluntary industry codes," each serving a separate, yet complementary, function.<sup>176</sup> Given that both the UCC and the UNCITRAL Convention

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Practice, ICC Endorsement of the UNCITRAL Convention on Independent Guarantees and Stand-By Letters of Credit, *supra* note 163.

<sup>174</sup> See AFFAKI, *supra* note 59; see also EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON OCTOBER 24–25, 2006, at ¶ 11 (discussing guarantees and promotion of URDG); EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON MAY 16–17, 2006, at ¶ 7 (same); EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON OCTOBER 24–25, 2005, at ¶ 4 (same).

<sup>175</sup> UNCITRAL is an organization dedicated to "modernizing and harmonizing laws dealing with international trade." See UNCITRAL secretariat, *Explanatory Note to UNCITRAL Convention*, *supra* note 171, ¶ 1 n.2. For much of the Convention's drafting, the UNCITRAL Working Group assumed it would draft and approve a model law, which domestic legislatures could adopt, although it ultimately decided on a Convention, which would be effective upon ratification and perhaps less susceptible to local amendment and change. Thus, the Convention should be viewed as a composite of the types of provisions that UNCITRAL hopes would be found in municipal statutes and codes. Article 5 of the UCC is the most comprehensive municipal codification of L/C law and, thus, exemplifies the type of local efforts that UNCITRAL intended to prod (or perhaps supplant upon ratification). Thus, while the UCC revision occurred on a domestic plane and the UNCITRAL Convention unfolded in a transnational space, functionally, they serve similar, although not identical, ends.

<sup>176</sup> The UNCITRAL Working Group incessantly insists that the Convention will be a relatively skeletal composite of "mandatory rules," which intentionally serve a different purpose than the Banking Commission's more practical and technical, yet voluntary, "contract rules." *Note by the Secretariat: Independent Guarantees and Stand-By Letters of Credit*, [1991] 22 Y.B. Comm'n Int'l Trade L. 373, U.N.Doc. A/CN.9/WGII/WP.71; *Report of the Working Group on International Contract Practices on the Work of Its Fourteenth Session*, [1991] 22 Y.B. Comm'n Int'l Trade L. 312, U.N. Doc. A/CN.9/342. There are even some within UNCITRAL that are mortified at the thought of UNCITRAL interfacing with a non-lawmaking institution, and even more mortified with notion of UNCITRAL endorsing a nonlegal text. *Report of the Working Group 1988*, *supra* note 135, at 184 ("[T]he view was expressed that this [reviewing a text prepared by another organization] should not constitute a precedent for the future, in particular since the organization in question was non-governmental and since the text had not yet been finalized by that organization itself.").

Likewise, in revising the UCC, the drafters, especially at the beginning of the process, relegate the Banking Commission to the status of a trade group that dabbles in voluntary rules that parties may or may not incorporate into their L/Cs. See *An Examination of U.C.C. Article 5 (Letters of Credit)*, *supra* note 133, at 1558–61.

privilege “party autonomy” as a guiding principle,<sup>177</sup> parties to an L/C are free to choose their own contract rules, presumably the UCP, with the domestic statutes addressing back-stop questions that demand official imprimatur.<sup>178</sup> Thus, in theory, the various sets of rules functionally supplement each other, with the UCP as the thick, technical, trade-code that adds contour and shape to the UCC’s and the UNCITRAL Convention’s legal skeleton.

*b. Trespass*

While these labels—mandatory law versus voluntary contract rules—ostensibly delimit normative spheres, the functional distinctions are not nearly as clean.<sup>179</sup> First, if the UCC and UCP purportedly fill different, yet supplementary, roles, why does the UCC essentially echo and replicate many UCP provisions?<sup>180</sup> The answer, of course, is that it is difficult to draw a clear line demarcating “contract” rules from “statutory” or “mandatory” law. While the UCC’s provisions on fraudulent documents, and court injunctions in the face of fraudulent documents, clearly lie on the “statutory,” “mandatory” side of the divide,<sup>181</sup> and rules prescribing the hours during which document should be presented to a bank<sup>182</sup> or the information that must appear on a “road, rail or inland waterway transport document,”<sup>183</sup> fall on the technical, trade-code side, other issues, like the preclusionary rule,<sup>184</sup> clearly fall in a gray area. Clean functional distinctions betray a rather blurry reality.

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<sup>177</sup> See *id.* at 1538–39 (discussing general, guiding principles including party autonomy and accommodation of commercial expectations of parties); *Report of the Working Group* 1988, *supra* note 135, at 195.

<sup>178</sup> Some questions which the official statute must answer include: At what point does suspicion of fraudulent documents, or forged documents, justify a bank in withholding payment to a beneficiary? What is the statute of limitations on bringing an L/C-related claim? If the parties do not choose a “law” to govern the L/C or a forum to hear an L/C dispute, what is the default rule?

<sup>179</sup> The following discussion will focus in great part on the UCC, however many of the arguments apply to the UCP’s relationship with the UNCITRAL Convention as well.

<sup>180</sup> Why, for example, is it necessary for the UCC to develop a standard for reviewing documents when the UCP already provides such a standard? Compare U.C.C. § 5-108 with UCP 500, *supra* note 43, art. 13, and UCP 600, *supra* note 48, art. 14. And, given that the UCP has painstakingly developed a preclusionary rule (including a time frame during which document checkers must either accept or reject documents) based on bank practice, Banking Commission opinions, and DOCDEX decisions, why does the UCC also include a preclusionary rule instead of simply deferring to the UCP and its technical expertise? Compare U.C.C. § 5-108 (b)–(c) with UCP 500, *supra* note 43, arts. 13(b), 14(d)(i), and UCP 600, *supra* note 48, art. 14(b).

<sup>181</sup> See, e.g., U.C.C. § 5-109 (fraud and forgery).

<sup>182</sup> UCP 600, *supra* note 48, art. 33; UCP 500, *supra* note 43, art. 45.

<sup>183</sup> UCP 600, *supra* note 48, art. 24; see also UCP 500, *supra* note 43, art. 28 (road, rail, or inland waterway import documents).

<sup>184</sup> See *supra* note 59 and accompanying text.

The landscape becomes all the blurrier when statutory schemes effectively transform transnational “trade usage” or “trade practice” into statutory mandate. In its blanket form, the UCC explicitly proclaims that “trade usage” will “supplement or qualify terms” of any agreement governed by the UCC, including an L/C.<sup>185</sup> Thus, the UCC rather explicitly and pervasively converts “trade usage” into statute, variable only upon agreement of the parties. In a slightly weaker form, both the UCC and UNCITRAL anoint applicable “standards of practice” as the interpretive lens for particular legal rules.<sup>186</sup> Thus, in appropriating “contract rules” and importing them into statutes and codes, lawmakers further cloud purported functional distinctions between “law” and “trade” rules.

Finally, in the U.S. in particular, the distinction between the UCP as “law” and the UCP as a mere “trade code” breaks down for historic reasons. Until 2000, the banking lobby in New York, the state which hosts most U.S.-based trade finance banks and, thus, the locus of most domestic L/C business, successfully convinced the legislature to opt-out of Article 5 of the UCC (known as a “nonconforming amendment”), instead, the New York legislature anointed the UCP as “governing law” whenever the parties explicitly incorporate the UCP.<sup>187</sup> In practice, all New York banks confirming or issuing an L/C required that the L/C incorporate the UCP; thus, this “nonconforming amendment” essentially displaced Article 5 and transformed the UCP into New York’s legal code for L/Cs. As this Article discusses below, the specter of these “nonconforming amendments” shaped the Article 5 revision process in significant ways. Nonetheless, from 1954 to 2000, the UCP effectively became the sole and unambiguous L/C law in New York, and while the New York legislature changed course in 2000 in response to Article 5’s revision,

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<sup>185</sup> See U.C.C. § 1-205(3) (2001) (“A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.”); see also U.C.C. § 1-303(d) (2005) (“A course of performance or course of dealing between the parties or usage of trade . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”).

<sup>186</sup> See *supra* notes 98, 109 and accompanying text.

<sup>187</sup> The UCP likewise applies if “course of dealing or usage of trade” favors UCP principles. The nonconforming amendment, adopted not only in New York but also in Alabama, Arizona, and Missouri, was codified in the original Article 5 at U.C.C. § 5-102(4): “Unless otherwise agreed, this Article 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce.” See James E. Byrne & Lee H. Davis, *New Rules for Commercial Letters of Credit Under UCP600*, 39 UCC L.J. 301 (2007).

well worn perceptions regarding the UCP's status are so deeply ingrained in bankers', lawyers', and judges' psyches that the UCP's status as "law" in New York will likely remain unchanged in practice.

*c. Banking Commission Response*

As the functional roles allocated to L/C institutions—the Banking Commission as arbiter of trade codes and UNCITRAL and UCC drafters as *lawmakers*—become muddled, so did their hierarchical relationship. "Law" and "trade codes" stand in clear, prescribed hierarchy, with the former superior to the later; yet, when the distinction between "law" and "trade code" blurs, so too does hierarchical clarity. In reaction, the three institutions attempted to redefine and reassert stature and thus diffuse inter-institutional tensions, regain clarity, and minimize trespass.

This struggle for hierarchy is evident in the Banking Commission's incrementally assertive, self-professed conception of its own role within the normative complex. Notably, for the first time in the UCP's history, the Banking Commission explicitly refers to the UCP 600 as a set of "rules."<sup>188</sup> With previous UCP releases, the Banking Commission has been conspicuously silent and vague in assigning a label to UCP norms, apparently satisfied with conscious ambiguity.<sup>189</sup> Yet, at a moment of encroachment, the Banking Commission opts for clarity that simultaneously fortifies its normative stature.

Likewise, many of the interfaces between the Banking Commission and UNCITRAL, on the one hand, and domestic lawmakers, on the other, can be recast as attempts to reassert and redefine respective positions in the normative hierarchy. Thus, in UNCITRAL Convention deliberations, the question of "linkage" to the UCP and other Banking Commission rules is a recurring refrain—should the Convention's text explicitly reference the UCP, the URDG, or both and thus effectively import these "codes" as law? Or, should the text simply allude to international practice?<sup>190</sup> In the end, the text of the

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<sup>188</sup> UCP 600, *supra* note 48, art. 1 (noting that the UCP "are rules that apply to any documentary credit ('credit') . . . when the text of the credit expressly indicates that it is subject to these rules").

<sup>189</sup> *See, e.g.*, UCP 500, *supra* note 43, art. 1 (stating that the UCP 500 "shall apply to all Documentary Credits . . . where [it is] incorporated into the text of the Credit").

<sup>190</sup> *Report of the Working Group on International Contract Practices on the Work of Its Seventeenth Session*, [1992] 23 Y.B. Comm'n Int'l Trade L. 331, U.N. Doc. A/CN.9/361. Contrast this source with the Commission's thoughts at the beginning of the session that an UNCITRAL text might indeed reference not only the ICC Uniform Rules for Guarantees but also the UCP. *Report of the Working Group 1988*, *supra* note 135, at 195.



UNCITRAL Convention does not impart stature to Banking Commission rules by naming them in the Convention.<sup>191</sup> So, in terms of a “competitive normative struggle” between UNCITRAL and the Banking Commission, UNCITRAL seems to have emerged in a dominant position, and the Banking Commission is left with a lingering reservoir of insecurity.

During the revision of UCC Article 5, the Banking Commission, through the U.S. Council on International Banking (USCIB),<sup>192</sup> lobbied aggressively not only for explicit textual homage to the UCP but also for a UCP-UCC choice-of-law regime that privileged the UCP. In the end, the USCIB effectively dangled the specter of fresh nonconforming amendments, particularly anathema for uniform lawmakers, and the USCIB prevailed on both fronts.<sup>193</sup> Thus, Article 5 now references the UCP in its text, explicitly proclaiming that liabilities of various parties to an L/C are “governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject.”<sup>194</sup> Furthermore, in the event of a conflict between the UCC and UCP, Article 5 expressly resolves such conflicts in favor of the UCP, excepting only a few “nonvariable” UCC sections.<sup>195</sup> The USCIB and, by extension, the Banking Commission, was apparently satisfied with the normative hierarchy that the UCC establishes and thus did not advocate for nonconforming amendments; notably, New York adopted the Article 5 revisions in essentially unblemished form on November 1, 2000.<sup>196</sup>

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<sup>191</sup> However, the UNCITRAL Convention indeed anoints “international practice” as an interpretive lens for certain Convention provisions. See UNCITRAL Convention, *supra* note 96, art. 5 (principles of interpretation); *id.* art. 13 (determination of rights and obligations); *id.* art. 14 (standard of conduct and liability of guarantor/issuer); *id.* art. 16 (examination of demand and accompanying documents).

<sup>192</sup> The U.S. Council on International Banking (USCIB) was subsumed by IFSA following Article 5’s revision. The USCIB played a major role in the Article 5 revision; some have even described its role as defining and pivotal. See White, *supra* note 30, 194–95. The USCIB should not be confused with the U.S. National Committee to the ICC, which is the U.S. Council on International Business (USCIB).

<sup>193</sup> See generally *id.* at 194.

<sup>194</sup> U.C.C. § 5-116(c).

<sup>195</sup> *Id.*

<sup>196</sup> 2000 N.Y. Laws c.471 § 1. In adopting the revisions to Article 5, New York did make a few changes. First, in U.C.C. § 5-108(e) (Issuer’s Rights and Obligations), the Code reads: “An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the Issuer’s observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.” U.C.C. § 5-108(e). The New York legislature eliminated the last two sentences, apparently dissatisfied with the notion of a court determining the observance of standard practice and wary of evidence of standard practice outside the rubric of the UCP and its accompanying interpretive material. N.Y. U.C.C. Law § 5-108(e) (2000). Second, New York eliminated the

However, the hierarchy that the Banking Commission (via the USCIB) advocated may paradoxically destabilize and ignite renewed Banking Commission insecurity. As noted above, until 2000, New York law excluded from Article 5's ambit all L/Cs which referenced the UCP.<sup>197</sup> Thus, in the most significant L/C jurisdiction in the country, perhaps in the world, the UCP and UCC stood as a parallel, albeit intimately related, legal systems. In fighting for recognition and prestige, the Banking Commission effectively "nested" itself within the UCC,<sup>198</sup> and, while presumptively gaining in terms of statutory recognition and concomitant legitimacy, the UCP effectively ceded some "independence."<sup>199</sup> Thus, New York courts now interpret the UCP through the lens of the UCC and, as will be discussed in some detail below,<sup>200</sup> read the UCP against an explicit and implicit backdrop of UCC rules regarding interpretive hierarchies and competencies,<sup>201</sup> as well as implied warranties and obligations.<sup>202</sup> Thus, the unintended consequence might be a new source of institutional insecurity.

### 3. *Interpretive Spheres*

#### a. *Spheres of Autonomy*

The Banking Commission and domestic courts have both assumed roles in interpreting the UCP. Through its rather prolific issuing of opinions and other interpretive material, as well as its very recent foray into DOCDEX arbitration, the Banking Commission attempts to maintain the vitality of its rules by

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Code provision granting attorneys fees and other expenses to the prevailing party. *Compare* N.Y. U.C.C. Law § 511 (remedies) *with* U.C.C. § 5-111(e) (same).

<sup>197</sup> *Supra* note 187 and accompanying text.

<sup>198</sup> *See supra* note 23 and accompanying text.

<sup>199</sup> Granted, the UCC explicitly resolves questions of hierarchy and order that beset nested international legal systems (as opposed to domestic systems); where the UCP or future versions of the UCP address the same substantive issue, the UCC defers to the UCP. However, in areas where the UCP is silent, such as fraud, forgery, and warranties, the UCC governs, even for an L/C that adopts the UCP. From a uniform lawmaker's perspective, the UCC redraft was a resounding success, achieving universal harmonization (national). The redrafting process did not necessarily demote the UCP, but it effectively promoted the UCC in that the UCC is now a vital part of New York law.

<sup>200</sup> *See infra* note 212 and accompanying text for discussion of expert testimony case.

<sup>201</sup> U.C.C. § 1-205 (Trade usage shall be used in interpreting agreements and shall be an issue for the court when "embodied in a written code or similar writing.").

<sup>202</sup> U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); *see also id.* § 5-110 ("If its presentation is honored, the beneficiary warrants: (1) to the issuer . . . and the applicant that there is no fraud or forgery of the kind described in Section 5-109(a); and (2) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement . . .").

assuming an interpretive, at times bordering on adjudicative, role. Of course, there are competing adjudicators, namely domestic courts, and when a domestic statute, like the UCC, appropriates the UCP, domestic courts also will interpret the UCP.

Given this overlap, is there a way to avert a clash? The Banking Commission, seemingly concerned about perceived overstepping from the vantage point of L/C end-users, as well as domestic lawmakers, created some self-limiting rules. For instance, the Banking Commission recently issued a policy statement clarifying that the Banking Commission's opinions are merely advisory and that the Banking Commission will not respond to "queries" that "relate[] to a matter currently under consideration by the courts";<sup>203</sup> in other words, the Banking Commission will defer to local courts in the face of active or pending disputes.<sup>204</sup> Furthermore, DOCDEX decisions are nonbinding on local courts, unless the parties choose otherwise,<sup>205</sup> although the Banking Commission expects that "any court called upon to hear a case involving a credit would give great weight to any DOCDEX decision entered into evidence."<sup>206</sup> The Banking Commission, through these sphere-delimiting, self-regulatory efforts, has essentially recast its "interpretive" role into that of an "expert" in the application of L/C rules,<sup>207</sup> and, as discussed above, domestic courts in fact use Banking Commission interpretive material to elucidate and resolve disputes.<sup>208</sup> Thus, the two institutions allocate responsibilities—courts still decide cases and find facts and the Banking Commission serves the role of legal expert in a rather technical legal niche.<sup>209</sup>

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<sup>203</sup> ICC, ICC Banking Commission Guidelines for Dealing with Queries that Could Be the Subject of Court Action, <http://www.iccwbo.org/policy/banking/id2425/index.html> (last visited Apr. 6, 2008) ("The Banking Commission will only respond to the facts in any query as they are presented to the Commission. If the facts do not reflect the actual circumstances of the case or dispute, that is not a matter for the Banking Commission, but for the courts or other legal bodies to decide, if the dispute later results in a court action.").

<sup>204</sup> *Id.*

<sup>205</sup> See DOCDEX RULES, *supra* note 76, art. 1.4; ICC, Service Launched for Resolving International Letter of Credit Disputes, *supra* note 77 ("The non-binding nature of the basic procedure is intended to provide banks with the alternative to litigation of a highly-reliable expert system which is nonetheless not obligatory."). Nonetheless, the ICC hopes that "any court called upon to hear a case involving a credit would give great weight to any DOCDEX decision introduced into evidence." *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> In fact, the Technical Adviser to the Banking Commission described the role of DOCDEX decisions court cases is that of "expert testimony" and notes that a court in Singapore has already used a DOCDEX decision in this manner. Gary Collyer, Dec. 20, 2006, e-mail, *supra* note 72.

<sup>208</sup> See *supra* notes 114–24 and accompanying text

<sup>209</sup> See Michaels, *supra* note 28, at 12 (discussing allocation of functional roles between courts, including one court serving as an expert for the other court).

*b. Trespass*

This “clear” division of interpretive competencies emerges as rather murky in practice. Generally, U.S. courts, following the UCC, interpret contractual relationships against the backdrop of “trade usage,” and when such “trade usage” is “embodied in a written trade code,” interpretation of that “written trade code” will be “for the court,” rather than a jury.<sup>210</sup> Revised Article 5, in accord with the UCC’s guiding principles, grants “courts” interpretive jurisdiction over “the issuer’s observance of standard practice.”<sup>211</sup> In a recent New York Supreme Court Appellate Division case, the court excluded expert testimony in an L/C case because “interpretation” of a written code (in this case the UCP) is “for the court” and to use expert testimony in attempting to illuminate the UCP would be to offer, contrary to well-settled contract principles, “extrinsic evidence” and “to usurp [the court’s] function as the sole determiner of law.”<sup>212</sup> As such, the court essentially eliminates the role of “expert” in cases where the UCP is a written manifestation of “trade usage,” which include most cases that arise under Article 5. Who, presumably, would most frequently be called upon as an “expert”? Banking Commission members or affiliates. And, if “expert testimony” is deemed extrinsic evidence, why aren’t Banking Commission opinions and publications, such as the *ISBP*, “extrinsic” as well? Herein lies the trespass.

*c. Banking Commission Response*

The Banking Commission has responded, directly and indirectly, to the New York Supreme Court’s perceived encroachment on its interpretive role. IFSA and IIBLP, two trade and think-tank type groups that essentially operate as the Banking Commission’s tentacles within the U.S.,<sup>213</sup> filed a post-decision amicus brief requesting that the court clarify and qualify its decision.<sup>214</sup> In particular, the amici asked the court to relegate its conclusions vis-à-vis expert testimony to the rather dubious qualifications of the plaintiff’s “expert” in this particular case and retreat from any language that connotes generally that

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<sup>210</sup> U.C.C. § 1-205(2); *see also* revised U.C.C. § 1-303(c) (“The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.”).

<sup>211</sup> U.C.C. § 5-108(e).

<sup>212</sup> *Blonder & Co., Inc. v. Citibank, N.A.*, 28 A.D.3d 180, 183 (2006) (citing U.C.C. § 1-205).

<sup>213</sup> *See supra* notes 66–67 and accompanying text.

<sup>214</sup> Brief of the International Financial Services Association and the Institute of International Banking Law & Practice, as Amici Curiae, *Blonder & Co. v. Citibank, N.A.*, 28 A.D.3d 180 (5th Cir. 2006) (No. 5170) (on file with author).

expert testimony, as a matter of law, is “extrinsic evidence” that a court will never consider in interpreting the UCP.<sup>215</sup> The New York Supreme Court Appellate Division has not modified its original decision. Thus, as with the other examples in this section, unresolved trespass leaves the Banking Commission in an unsatisfactorily precarious state.

Yet, the Banking Commission’s actions and decisions have also trespassed on the courts’ traditional adjudicative role. In the past decade, the Banking Commission has explicitly carved a broader and stronger interpretive role, creating deliberate, turf-wrangling overlap with domestic courts. For instance, when the Banking Commission first published the UCP, it warned that interpretive opinions have no binding legal effect and should not be cited by courts as binding.<sup>216</sup> More recently, the Banking Commission has explicitly condoned, and even encouraged, courts’ use of its opinions in deciding L/C cases.<sup>217</sup>

Additionally, the sudden, rather belated, arrival of DOCDEX may also be cast as the Banking Commission’s attempt to assert its interpretive role.<sup>218</sup> In a very obvious sense, DOCDEX closes a significant opening in the Banking Commission’s legal system. Prior to DOCDEX, the Banking Commission offered no dispute resolution mechanism, and thus, domestic courts (or perhaps general arbitration tribunals) resolved live disputes. DOCDEX certainly completes (or comes close to completing) the Banking Commission’s legal system, offering L/C users a “full service” dispute resolution outlet that rivals domestic courts.

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<sup>215</sup> *Id.* ¶ 28 (noting that “the statements of the Appellate Division . . . will be used to discourage and undermine relevant and qualified expert testimony and may encourage courts to rely on their own skills or general knowledge in interpreting its [the UCP’s] provisions and standard international letter of credit practice”); *see also id.* ¶ 43 (“It is the opinion of the IFSA and the Institute that a duly qualified and expressed expert opinion is important to a court in the interpretation of the terms and conditions of a letter of credit in light of standard international letter of credit practice including applicable rules of practice such as the UCP.”).

<sup>216</sup> *See Forward to OPINIONS (1980–1981), supra* note 71, at 1 (“Such opinions do not, of course, have legal force.”).

<sup>217</sup> The recent volumes of Banking Commission opinions do not address whether or not the opinions are “legally binding” but rather explain how and for what purpose the opinions should be used, namely creating internationally uniform assessments of “a set of documents’ acceptability,” thereby harmonizing expectations and enhancing market stability. *MORE QUERIES 1997, supra* note 71, at 3. In fact, the Banking Commission recently noted that courts use official Banking Commission documents to resolve live disputes. *Id.* (noting that the Banking Commission decision on what constitutes an original document “has been used successfully in court cases involving disputes regarding the question of originality”).

<sup>218</sup> DOCDEX rules are, in one sense, sphere-delimiting—they declare DOCDEX decisions to be non-binding on local courts, unless the parties choose otherwise. *See supra* notes 205–06 and accompanying text.

Thus, via DOCDEX, the Banking Commission responds to trespass on its interpretive sphere by creating stronger overlap rather than retreating into a niche interpretive sphere. And there is evidence that the Banking Commission uses DOCDEX to attract (or maintain) disciples by strengthening its comparative advantage vis-à-vis domestic courts.<sup>219</sup> In eighty-seven percent of all reported DOCDEX decisions the “initiator” or “plaintiff” wins;<sup>220</sup> in U.S. courts, substantially fewer similarly situated plaintiffs prevail.<sup>221</sup> While there may be many explanations for this disparity, including technical competence and fluency with the UCP, the underlying message to aggrieved L/C users is simple—“come to me.” Thus, in the face of trespass on its interpretive role, the Banking Commission responds by fortifying its sphere (founding DOCDEX) and aggressively competing with its rivals (using DOCDEX arbitration as a magnet to attract adherents).

#### IV. LONGITUDINAL PERSPECTIVE: BANKING COMMISSION CHANGE AND RECONSTITUTION

As Part III illustrates, mutually reinforcing synergies play out amidst complex territorial resistance. In addition to this spatial dimension, legal pluralism acknowledges a critical longitudinal dimension. Part IV explores the fate of this Banking Commission over time, examining not only how it internalizes complex interactions with official lawmakers but also how it reacts to its perceived inadequacies and outside, environmental pressures. And just as moments of interface are complex, the passage of time reveals multifaceted, and sometimes contradictory, change within the original bottom-up lawmaking community.

This Part explores how, over time, the unofficial and official interfaces at the heart of the bottom-up lawmaking story yield significant change within the Banking Commission. On account of its interface with UNCITRAL and domestic lawmakers, the Banking Commission began mimicking their approaches to transparency and accountability, which, in turn, gradually shifted the Banking Commission’s institutional consciousness in favor of such

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<sup>219</sup> This is an insight prompted in great part by Laurence R. Helfer & Graeme B. Dinwoodie, *supra* note 11, at 173.

<sup>220</sup> This number is based on a review of all published DOCDEX cases, the thirty-four cases that DOCDEX decided between 1997 and 2003 and published in COLLECTED DOCDEX DECISIONS, *supra* note 59.

<sup>221</sup> This number is based on a review of all letter-of-credit payment “dishonor” cases published in 2005 and 2006. This number is also consistent with the cases published in the BUSINESS LAWYER. See, e.g., James E. Barnes & James E. Byrne, *Letters of Credit*, 61 BUS. LAW. 1591 (2006).

legitimacy-enhancing measures. Also on account of interface and the defensive insecurities left in its wake, the Banking Commission, over time, assumes a strategic, defensively self-preserving posture, adorning blinders that allow it to begin pursuing an institutional agenda palpably independent from the collective interest of the trade finance community. Thus, the Banking Commission example lends support to the fourth pluralist insight—change within lawmaking communities stems from the interactions and interfaces endemic to lawmaking on a crowded, social field.

A. *Shifting Consciousness: Transparency, Accountability, and Legitimacy*

As Part III described, the moment of interface opened “transparency windows” and enhanced the Banking Commission’s “accountability capacity.” Additionally, over time, interface subtly shifted the Banking Commission’s institutional consciousness vis-à-vis transparency and accountability. Through engaging with UNCITRAL and the various institutions involved in the redraft of Article 5, the Banking Commission increasingly mimics these institutions in their approach to transparency and appears to have internalized (or at least started to internalize) transparency and accountability as desirable institutional norms. In terms of transparency, the Banking Commission seems a bit less “uptight” about public dissemination of its norms. Perhaps UNCITRAL’s critique of the ICC’s use of copyright protection to hinder worldwide dissemination of the UCP, even for governmental and educational uses,<sup>222</sup> explains why the ICC has been relatively forthcoming regarding my research related requests.<sup>223</sup>

From an accountability perspective, the UCP 600 revision process was more inclusive than previous revisions, soliciting not only ad hoc input from National Committees but also institutionalizing the Consulting Group as a

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<sup>222</sup> See *supra* note 159 and accompanying text.

<sup>223</sup> Ronald Katz, Jan. 15, 2007, e-mail, *supra* note 142 (“Ms Levit, normally we do not send out electronic versions of the UCP for obvious reasons, but since you are an academic and are using it for academic purposes, I am attaching it. Please do not forward this text to anyone else and do not reproduce it for others in hard copy.”). The ICC’s posture toward my requests feels decidedly more open than my interactions with the ICC less than three years ago in conjunction with my initial, bottom-up lawmaking article. See Telephone Interview with Ronald Katz, Policy Manager, Commission on Banking Technique and Practice, International Chamber of Commerce (June 24, 2004) [hereinafter Ronald Katz, June 24, 2004, telephone interview] (noting that certain Banking Commission information was not available to the public). But, of course, these personal requests were only made after the ICC, at an institutional level, was rather recalcitrant. See *supra* note 142–46 and accompanying text.

formal advisory body to the Drafting Group.<sup>224</sup> The Consulting Group was considerably larger, and decidedly more diverse, geographically and professionally, than the Drafting Group;<sup>225</sup> in contemplating the UCP 600 redraft in tandem with the Drafting Group, the Consulting Group held the Drafting Group accountable for substantive decisions in tension with the Consulting Group's recommendations.<sup>226</sup> Unsurprisingly, this drafting group-advisory group structure mimics the structure of the Article 5 redrafting effort.<sup>227</sup> Furthermore, the vehemence with which the Drafting Group countered accountability-related criticisms, in particular allegations that the Drafting Group did not consider and incorporate National Committee and other constituent comments,<sup>228</sup> reveals a Banking Commission that has started to

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<sup>224</sup> From its membership, the Banking Commission appoints a working group (or task force) to draft (or redraft) the UCP (Drafting Group). In the most recent UCP revision, the Banking Commission also appointed a larger, more inclusive Advisory Group. The Drafting Group, comprised of ten members of the Banking Commission (four commercial bankers, one lawyer for a commercial bank, two representatives from SWIFT, three representatives from banking-related trade associations) and the Technical Advisor to the Banking Commission (Chair, Gary Collyer) works in conjunction with a Consulting Group, comprised of forty-one experts from the banking, transport, insurance, and legal sectors. Gary Collyer, *Introduction to UCP 600*, *supra* note 48, at 13–14; *see also* GARY COLLYER, *THE ORIGINS OF THE UCP REVISION* (on file with author). Compare the revision process that gave birth to the UCP 500, which did not have a Consulting Group but simply revised through a ten-person Working Group. *See Preface to UCP 500*, *supra* note 43, at 4–7.

<sup>225</sup> UCP 600, *supra* note 48, at 65 acknowledgements.

<sup>226</sup> The Consulting Group actively participated in Banking Committee discussions of the UCP revision and played a critical role in debates and resolution of core substantive issues. *See EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON OCTOBER 24–25, 2006*, at ¶ 10 (reporting that the Co-Chair of the Consulting Group noted that “he appreciated the contribution, input and debate that the Consulting Group had during the last three or so years” and that “[i]t had met at each of the Banking Commission meetings for the morning of the first day, and in addition had exchanged a number of comments by email”); *EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON MAY 16–17, 2006*, at ¶ 11 (describing the Chair of Consulting Group's presentation to the Banking Commission, which included a critique of several key provisions in the Drafting Group's then current draft); *see also EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON OCTOBER 24–25, 2005*, at ¶ 7 (John Turnbull, Co-Chair of UCP Consulting Group, presentation of Consulting Group's views vis-à-vis Drafting Group's proposed revisions).

<sup>227</sup> *Prefatory note to U.C.C. Revised Article 5 (1995)* (noting that the UCC drafting process engaged not only the Drafting Committee but also twenty Advisers and twenty Observers, representing a more balanced “cross-section of interested parties.”).

<sup>228</sup> Apparently, National Committees had expressed concern that the UCP 600 Drafting Committee did not consider their comments. In a strong, resounding rebuke, Gary Collyer, the Chair of the Drafting Group, retorted that, “Every single comment had been read and been thoroughly considered in the more than 50 days the Drafting Group had met. Some 50 countries had submitted comments, and it was a question of looking at the overall view on an issue rather than the view of one or even a few national committees.” *Executive Summary, Commission on Banking Technique and Practice, Meeting on May 16–17, 2006, Vienna, Austria*, ¶ 11. In support of this rhetorical statement, Mr. Collyer presented a PowerPoint, which included an issue-by-issue break-down of how national committees “came out” on various issues. *See PowerPoint: UCP Revision—Current Issues* (presented by Gary Collyer, May 17, 2006, Vienna, Austria), *available at*



internalize accountability as the critical link to the perceived legitimacy and acceptance of its lawmaking efforts.

*B. Myopic Defensiveness: Is There a Top to the Bottom-Up?*

From the Banking Commission's perspective, the period between 1990, when it embarked on its last significant UCP revision, and the present is one of mounting institutional insecurity. As explained in Part III, by virtue of the bottom-up lawmaking process, the Banking Commission engaged other, formal lawmaking institutions, which began crowding a space over which the Banking Commission once held a virtual monopoly. Thus, competitive, and unresolved, inter-institutional tensions become a source of deep insecurity for the Banking Commission, only to be compounded by dramatic changes in the market for trade finance products as evidenced by a significant shift from letter-of-credit to open-account transactions. The question that this section explores is whether these pressures fundamentally change the Banking Commission's lawmaking complexion. Indeed, over time, the Banking Commission loosens its ties to the organic practices and behaviors of its constituents and thereby plants the seeds for ultimate devolution of the bottom-up lawmaking process. Thus, in this instance, bottom-up lawmaking is an inherently self-limiting process, and the Banking Commission may have reached, or at least will soon be knocking on, the top.

*1. Misalignment of Interests, Norms and Practices*

Bottom-up lawmaking, at its core, is a process of periodically aligning and realigning a community's (in this case a trade's) interests, norms, and practices. Historically, UCP revisions have been realignment opportunities. In response to some misalignment, whereby on-the-ground bank practices deviate from UCP rules or "trade finance" interests,<sup>229</sup> the Banking Commission restates its norms to coincide with industry interests, prescribing a cocktail of existing practices and desired practices in the guise of a new version of the

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<http://www.coastlinesolutions.com/ppt/UCP%20Revision-Current%20Issues.ppt> (last visited Feb. 20, 2007). Likewise, at the Banking Commission meeting where member would be voting on the final UCP 600 draft, Mr. Collyer further noted, "On average, something like 40 or more national committees actively responded to every draft, which surpassed the Drafting Group's expectations. The Drafting Group had diligently looked at every comment that had some in." EXECUTIVE SUMMARY, COMM'N ON BANKING TECHNIQUE & PRACTICE, MEETING ON OCTOBER 24-25, 2006, at ¶ 10.

<sup>229</sup> See *supra* note 49 and accompanying text.

UCP.<sup>230</sup> Indeed, from 1993, when the Banking Commission introduced the UCP 500, to the present moment, there has been a growing misalignment between commercial bank L/C practices, UCP rules, and broader trade-finance-industry interests. The manifestation of this misalignment has been a dramatic exodus from L/C-backed (bank-intermediated) international trade, with some estimating a forty percent decline in use L/C use.<sup>231</sup> In its place, the open-account transaction, a transaction historically deemed too insecure and risky to support much international trade, has become ubiquitously vogue.

How has the Banking Commission responded to this misalignment? Is the Banking Commission's freshly minted UCP revision, the UCP 600, a mere regeneration of the bottom-up lawmaking process? Or, does the UCP 600 reveal a Banking Commission that has morphed into a different type of lawmaking community? Is bottom-up lawmaking a perpetual loop? Or does there appear to be a "top" to the "bottom up"? On its face, the UCP 600 is a familiar and unexceptional response to perceived misalignment, appearing at first glance as the fruit of yet another round of the Banking-Commission-led bottom-up lawmaking. Yet, in contemplating the UCP 600 revision through a pluralist lens, asking how inter-institutional interface and overlap in a particular "field" reverberates within normative communities, the UCP 600, its affirmations and its silences, offers evidence of change within the Banking Commission.

Through a pluralist lens, the UCP 600 is not a complete realignment of interests, rules, and practices; it is only a partial realignment, based on a skewed, artificially narrow, and myopically self-serving definition of the trade finance industry's "interests" and "practices." The intercommunity interfaces, trespasses, and overlap, symptomatic of a rather crowded trade finance "field," prophetically condition the way that the Banking Commission defines such "interests" and "practices." In particular, the mounting reservoir of insecurity on account of the UCC's and UNCITRAL's steadfast "encroachments" lead the Banking Commission to assume a defensively hardened posture toward the possibility of new "entrants" into the Banking Commission's space (or "social field"). Thus, the Banking Commission becomes willfully blind to much market and technological innovation that has spawned a host of non-bank

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<sup>230</sup> See *supra* note 52 and accompanying text for UCP revisions.

<sup>231</sup> Whereas, historically, L/Cs accounted supported approximately twenty-five percent of short-term international trade, the percentage has decreased to a mere fifteen percent. See U.S. Council for International Business, Banking Committee Profile, <http://www.uscib.org/index.asp?DocumentID=809> (last visited Apr. 6, 2008).

trade-finance intermediaries. This myopic daze “enables” the Banking Commission to cling to a rather antiquated, self-serving conception of the trade finance community’s “interests” and their evolving “practices.” The UCP 600 is a mere tweaking of trade finance norms, lacking adequate peripheral vision to address “trade finance community” interests as opposed to mere “money-center commercial bank” interests. Thus, the UCP 600 does not fundamentally realign interests, practices and norms, as its previous incarnations have, and the Banking Commission, haunted by institutional trespass and concomitantly fixated on self-preservation, becomes disturbingly handicapped in its ability to perpetuate the bottom-up lawmaking cycle.

*a. Endogenous Sources of Misalignment*

One source of misalignment was endogenous to the Banking Commission: the UCP 500 rules became increasingly less effective in lubricating L/C-backed international trade. Some Banking Commission rules appeared to be flawed or unworkably ambiguous, becoming sources of friction, transaction costs, and attendant inefficiencies. Additionally, some commercial banks appeared to be manipulating the UCP in order to capture additional rents.

As already noted, the L/C is a type of conditional payment guarantee,<sup>232</sup> conditioned only upon the documents’ conforming to the terms of the L/C, and the classic rationale for L/C use is thus “risk mitigation” or “payment assurance.”<sup>233</sup> However, if the exporter presents “nonconforming,” or discrepant, documents, the bank is not legally bound to honor the credit. Indeed, in recent years, and particularly since the UCP’s 1993 incarnation, discrepancies have been the norm rather than exception in L/C presentations.<sup>234</sup>

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<sup>232</sup> See *supra* note 42 and accompanying text.

<sup>233</sup> An exporter hedges the risk of importer default by interposing a bank’s conditional guarantee, and, because the exporter essentially “controls” compliance with the conditions embedded in the credit (i.e., the seller through performance and careful document preparation can assure compliance with the terms of the credit), the bank’s conditional guarantee is the functional equivalent of a hard guarantee.

<sup>234</sup> See Ronald J. Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494, 2495 (2000) (“When I spoke anecdotally to bankers and lawyers familiar with the industry, they uniformly claimed that sellers ordinarily do not present documents that conform to the requirements of the letter of credit.”). While the actual percentage of discrepancies belies precise calculation, bankers consistently report that a majority of beneficiaries present, at least initially, discrepant documents in attempting to trigger payment under an L/C. See Vincent M. Maulella, *Documentary Credit Decisions, Developments, and Directions*, BUS. CREDIT, Nov.–Dec. 2000, at 40. (“[M]ost global markets still report that over 60 percent of documents presented under Letters of Credit are found discrepant on first examination.”); see also Mann, *supra*, at 2495 n.3 (reporting that anywhere from fifty to seventy percent of documents are discrepant upon initial presentation to a bank).

These discrepancies range from the minute and ostensibly inconsequential (i.e., spelling errors and punctuation mistakes)<sup>235</sup> to those that call into question the seller's (beneficiary's) ability to perform (late shipment, late presentation of documents, presentation of documents after an L/C has expired).<sup>236</sup>

In one respect, the number of discrepancies could be viewed as indicia of the UCP's success. The UCP 500 required that banks examine documents to determine whether they "appear, on their face, to be in compliance with the terms and conditions of the Credit" and with "one another."<sup>237</sup> Given that the UCP's requirement of "facial compliance" is a less-than-precise standard for document review, discrepancies may indeed indicate that commercial-bank document checkers, in identifying nitty-gritty errors, believe that they are honoring the UCP mandates. In a more cynical vein, since the UCP only requires bankers to assess documentary compliance through the lens of "international standard banking practice," and since international standard banking practice does not necessarily demand "slavish conformity" or "oppressive perfectionism,"<sup>238</sup> the vast number of discrepancies may indicate strategic maneuvering and rent-seeking behavior<sup>239</sup> on the part of issuing banks and applicants (buyers).<sup>240</sup>

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<sup>235</sup> See, e.g., *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940, 942 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002); DOCDEX Decisions Nos. 205, 206, 208, 215 & 226, *reprinted in* COLLECTED DOCDEX DECISIONS, *supra* note 59; Banking Commission Opinions 64, 129, 166, 174, 209, 246 & 565.

<sup>236</sup> Maulella, *supra* note 234, at 40 ("[T]hree of the more common discrepancies are late shipment, late presentation, and credit expired.").

<sup>237</sup> UCP 500, *supra* note 43, art. 13(a).

<sup>238</sup> U.C.C. § 5-108 cmt. 1 (citing *New Braunfels Nat'l Bank v. Odiome*, 780 S.W.2d 313 (Tex. Ct. App. 1989); *Tosco Corp. v. Fed. Deposit Ins. Corp.*, 723 F.3d 1241 (6th Cir. 1983)) (elaborating upon the "strict compliance" standard of review (a "higher" standard than that set forth in the UCP, that the UCC imposes on bankers, noting that "strict compliance" does not require "slavish conformity to the terms of the letter of credit" nor "oppressive perfectionism")); see also DOCDEX Decisions Nos. 203, 213 & 221, *reprinted in* COLLECTED DOCDEX DECISIONS, *supra* note 59.

<sup>239</sup> Banks receive fees for discrepant documents and for asking applicants (importers) to waive discrepancies.

<sup>240</sup> This, indeed, is the belief of at least one member of if the Banking Commission who was also a member of the UCP 600 Consulting Group: "Little did the drafters of the first UCP in 1933 realize that they were leaving a legacy that would, one day, convert the L/C from a payment vehicle into a means to avoid payment. Instead of a tool and a technique for the settlement of trade transactions, the UCP provisions would be frequently misused, misinterpreted and manoeuvred as a mechanism for raising unwarranted disputes and disagreements." Pradeep Taneja, *UCP 600: "A Document Restoring the Credibility of L/Cs,"* <http://www.iccbooks.com/Home/CredibilityofLCs.aspx> (last visited Apr. 6, 2008). The beneficiaries indeed waive most discrepancies, albeit often after using such discrepancies as a carrot to renegotiate the terms of the underlying transaction.

Nonetheless, the prevalence of discrepancies, which lead to banks' dishonoring of the credit or, alternatively, delaying payment while the parties either waive or renegotiate the discrepancies, undermines the L/C's payment assurance role. A discrepancy-riddled L/C is far from an assurance of payment and, indeed, may become a vehicle for nonpayment. Thus, under the UCP 500, on-the-ground L/C practice—the day-to-day decisions of document checkers in the low-on-the-totem-pole trade-finance dungeons of commercial banks—was no longer moored to the industry's overarching goals (mitigating risk for exporters by creating a reliable payment assurance mechanism) and interests (preservation of a vibrant and growing L/C industry). And, those who employ letters of credit to grease trade, namely exporters and importers, have become wary of their use.<sup>241</sup>

*b. Exogenous Sources of Misalignment*

In a world of rapid, technology-driven globalization, the L/C increasingly strikes as a Byzantine remnant of a time long gone. "Letters" and paper-based documentary trails have long given way to electronic media and instantaneous communications. And, in many global industries, automation replaces relatively inefficient and expensive human labor. Meanwhile, the L/C functions hauntingly similar to the way it operated in medieval times, with human checkers comparing paper-based documents against literal "letters" and, on the basis of such checking, releasing, or not releasing, payment. The L/C's evolution, sluggish and glacial, has proceeded essentially impervious to broader technological forces. The strength and pace of recent market developments, not only in the trade finance market but also in global commerce, leave the Banking Commission's traditional fiefdom increasingly incongruous and out of sync with the environment in which it operates.<sup>242</sup>

First, the classic L/C does not sync well with the fast-moving, hyper-competitive global economy. In the current environment, tolerance for inefficiency, delay, and friction of the type that discrepancies inject into the system—or even the mere five days during which human document checkers perform their task—may translate into loss of competitive edge and business. Additionally, manufacturers increasingly invest in "closer working

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<sup>241</sup> *Id.*

<sup>242</sup> As will be discussed further, I attribute this notional of institutional "congruence" with the broader environment to Michael Barnett & Liv Coleman, *supra* note 11, at 600.

relationships with their vendors,”<sup>243</sup> with “fewer and more strategic trading partners,”<sup>244</sup> often cementing relationships with longer-term distributorship and service level agreements. Thus, the classic L/C story of a seller shipping to a distant, unknown buyer rings archaic; relationships, loyalty, and reputation offer the necessary “assurances” of “payment,” and the L/C becomes an unnecessary and costly redundancy.

In addition, the trade-finance market is becoming increasingly “plural” and diverse, as innovatively efficient, automated and supple forms of trade finance emerge.<sup>245</sup> For instance, export credit insurance products, coupled with increased capacity in the export credit insurance industry, offer exporters a relatively efficient and inexpensive risk mitigation tool to couple with open-account transactions and thereby replicate many of the “payment assurance” benefits of the L/C structure.<sup>246</sup> Furthermore, as exporters and importers increasingly automate their supply chains, demand for attendant automation of the financial supply chain has spawned growth in alternative, Internet-based trade finance instruments.<sup>247</sup>

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<sup>243</sup> Lara L. Sowinski, *The L/C is Spent*, WORLD TRADE, Dec. 2002, at 42.

<sup>244</sup> John Stockton, *Trade Banks Simplify Administration of Open Accounts*, WORLD TRADE, May 2005, at 55, 56 (interview).

<sup>245</sup> Simon Vaughan Johnson, Head of Global Transactions, Banking, HSBC/CCF, Opening Remarks, Department of Policy and Business Practice, Commission on Banking Technique and Practice, Meeting, October 24–25, 2005 (on file with author) (“These days, he said, are over now. We were witnessing instead a certain level of disintermediation, and currently some 80% of trade is conducted on open account, because once you know your trading partners and their markets, it is easier that way.”).

<sup>246</sup> See generally BERNE UNION YEARBOOK (2005); Richard Barovick, *The Changing World of Trade Finance*, WORLD TRADE, Apr. 2004, at 18. Exporters traditionally considered export credit insurance a relatively inferior payment assurance mechanism, particularly because insurance is deemed a “conditional” product. Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 10, at 144–46. However, given the L/C discrepancy rates discussed above and the concomitant diminution in the L/C’s payment assurance function, export credit insurance has become a viable substitute for the L/C.

<sup>247</sup> Additionally, the Internet revolution has spawned several companies who strive to harness electronic media to discover more efficient and less labor-intensive alternatives to the letter of credit. TradeCard is an online provider of financial settlement products (including products that function much like letters of credit) for international trade transactions. However, TradeCard does not run its transactions through a bank; instead a patented software program checks the documents and an export credit insurer essentially provides a “guarantee” in the face of buyer default. For more information, see Trade Card Financial Supply Chain, <http://www.tradecard.com>. TradeCard has a few competitors, including Bolero, see <http://www.bolero.net/>, AIG product, AIGTradeCredit.com, see <https://www.aigtradecredit.com/>, and introduced by CIT, see Electronic Trade Acceptance Draft, <http://www.cit.com/main/financial-solutions/trade-finance/commercial-services-intl/5-electronic-trade-acceptance-draft.htm>. Gabriel Kahn, *Financing Goes Just-in-Time*, WALL ST. J., June 4, 2004, at A10; Caroline Van Hasselt, *Dump L/C Headaches Overboard*, TREASURY & RISK MGMT., June 2004, at 45, 46 (discussing other competitors).

Thus, within the trade finance market, traditional commercial banks, and their L/Cs, cede ground to export credit insurance and Internet-based innovators. These market trends converge to create a very “remains of the day”-like feel about the L/C business and the Banking Commission’s future role within the trade finance regulatory landscape.

2. *The UCP 600: A Bottom-Up Lawmaking Moment of Re-Alignment?*

The convergence of such endogenous (the UCP rules are not working efficiently) and exogenous (rapid market and technological change) sources of “misalignment” undoubtedly sparked a type of “save the L/C” panic within the Banking Commission and thereby prompted the UCP revision. Is the UCP 600 simply a re-ignition of the bottom-up lawmaking cycle? Or, have such endogenous and exogenous pressures inextricably changed the normative process from one that is organically “bottom up” to one that more closely approximates its “top down” foil? The Banking Commission remains equipped to redress the endogenous sources of misalignment, but unwilling (or, given some of its self-constraining rules, unable) to confront the exogenous sources. The consequence in this instance may be devolution of the bottom-up lawmaking process.

On the surface, the Banking Commission’s UCP 600 project is reminiscent of prior regulatory efforts—a harnessing of written norms to bridge a growing chasm between on-the-ground practices and the “interests.” In this account, the UCP 600 is the manifesto of a healthy bottom-up lawmaking process, wholly consistent with the Banking Commission’s past history of revising the UCP approximately once a decade.<sup>248</sup> In analyzing the UCP 600 through a pluralist lens, in attending to the ways that interface heightens the Banking Commission’s insecurity over its “place” on an already crowded plane and how, in turn, such insecurity shapes institutional judgment and mission, the UCP 600 appears strikingly dislodged from its bottom-up, practice-based roots. And the bottom-up lawmaking process seems to have reached a plateau, or perhaps a peak.

a. *The UCP 600 as a Classic Bottom-Up Lawmaking Exercise*

On one level, the UCP 600 effectively redressed endogenous sources of misalignment, in particular the UCP’s ambiguities and rent-seeking behaviors

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<sup>248</sup> See *supra* note 52

that accounted for a groundswell of discrepancies. Indeed, discrepancies, potentially emblematic of the extent to which on-the-ground practices diverged from the UCP's overarching intent, became a focal obsession of UCP deliberations.<sup>249</sup> And the UCP revision offered the Banking Commission a classic bottom-up opportunity to assess the extent to which its rules were the source of such discrepancies.<sup>250</sup> Toward this end, the Banking Commission, through the Drafting and Consulting Groups, culled its rather extensive reservoir of "practice" and experiential data.<sup>251</sup>

In so doing, the Banking Commission recognized that certain ambiguities or tautologies in the UCP, or, alternatively, rigidly formalistic interpretation of its rules, may have accounted for a sharp rise in discrepancies and "excused" rent-seeking behavior on the part of commercial banks. Thus, much of the UCP revision may be viewed as a way to create rules that would not allow such manipulative behavior: in particular, the Banking Commission sought (1) to remedy ambiguities by clarifying particularly problematic parts of the document; and (2) to eschew rigid formality in favor of practical functionality.

In terms of clarity, or resolving ambiguity, the UCP 600 made a conspicuous turn toward unencumbered, plain language; even for those with experience in the trade finance industry, the previous versions were, at best, clunky and, for most, impenetrable.<sup>252</sup> In addition, the UCP 600 defines terms, such as "international standard banking practice," that previous versions of the

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<sup>249</sup> Comments within Banking Commission meetings that the purpose of the redraft was to "move the credit back to a payment instrument and avoid more large scale shifts to open account rather than letters of credit." Banking Commission Documents 470/1068 (Oct. 24–25 Banking Commission meeting). "If the process was made more difficult and created more discrepancies, people would look for alternatives to letters of credit." Banking Commission Documents 470/1068 (May 2006 Banking Commission meeting) (comments by John Turnbull).

<sup>250</sup> The Insight Interview: Ole Malmquist Candid Views from a Member of the UCP Drafting Group (on file with author) ("I think a lot of the proposed changes are things that have already changed in practice.").

<sup>251</sup> Reportedly, the Drafting Group, in conjunction with a Consulting Group, reviewed and synthesized all the Banking Commission opinions (over 600 reported), as well as position papers, policy statements, DOCDEX decisions, significant municipal court decisions, and over 5000 comments from over 40 ICC National Committees in achieving some type of consensus around a new version of the UCP. Gary Collyer, *Introduction to UCP 600*, *supra* note 48, at 11.

<sup>252</sup> A comprehensive, line-by-line comparison of the documents for language simplicity and clarity is beyond the scope of this project. However, on first impression, the UCP 600 is quite clear, and much smoother and simpler to read than its predecessor. For instance, a simple, yet important provision establishing the independence of documentary credits, now reads: "Banks deal with documents and not with goods, services or performance to which the documents may relate." UCP 600, *supra* note 48, art. 5. The analogous UCP 500 provision reads, "In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performance to which the documents may relate." UCP 500, *supra* note 43, art. 4.



UCP left dangling.<sup>253</sup> The UCP 600 also clarifies some ambiguities in previous UCP versions that potentially chilled L/C-based financing via banks.<sup>254</sup> Furthermore, the UCP 600, favors bright-line, black-letter rules. For instance, the revision clarifies a persistent and recurring source of confusion over the preclusion doctrine, particularly the window during which a bank must either pay the credit or notify the exporter of discrepancies and its intent to dishonor the credit.<sup>255</sup>

The UCP revision also explicitly reoriented the standard of document review, eschewing “rigid formalism” in favor of “functional” compliance.<sup>256</sup> As already noted,<sup>257</sup> some banks have interpreted the UCP 500’s somewhat tautological, unclear standard of review as condoning dishonor on the basis of typographical errors, transposing of words or numbers, and other minor cross-document “discrepancies.”<sup>258</sup> The UCP 600 attempts to avert paradoxically rigid and self-serving, yet industry-defeating, application of the rules and encourage a practical orientation, functionally centering on whether the documents meet the overall intent and expectations of the parties who entered into the credit.<sup>259</sup>

*b. The UCP 600 as Residual Defensive Self-Protection*

In the account offered above, the UCP 600 is a success—the Banking Commission seemingly aligns document-checker practices, UCP rules, and industry expectations to repair the threat of mounting discrepancies. Yet, this account is artificially positivistic, exploring only affirmative Banking

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<sup>253</sup> See *supra* note 58 and accompanying text.

<sup>254</sup> See *supra* note 61 and accompanying text.

<sup>255</sup> See *supra* note 59 and accompanying text.

<sup>256</sup> See *supra* note 58 and accompanying text.

<sup>257</sup> See *supra* notes 238–40 and accompanying text.

<sup>258</sup> Consistently, although often to no practical avail, the Banking Commission has reiterated that the standard of review is not a rigid, onerously formal, bright-line standard but rather a reasonable, practical standard. For reference to Banking Commission opinions and DOCDEX decisions that resolve disputes on the basis of hyper-technicalities in favor of a rational, functional approach, see for example DOCDEX Decision No. 203, *reprinted in* COLLECTED DOCDEX DECISIONS, *supra* note 59 (discussing various Banking Commission opinions (“queries”) that adopt a similar approach).

<sup>259</sup> UCP 600, *supra* note 48, art. 14(c). While the UCP 600 reiterates that banks must examine documents to determine “whether or not [they] appear on their face to constitute a complying presentation,” the UCP now adds that “[d]ata in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.” *Id.* art. 14(a), (d).

Commission decisions as ultimately “codified” in the UCP 600 and ignoring two critical “roads not taken.”

First, the Banking Commission decided that corporate-based L/Cs would fall outside the scope of the UCP. Within the Drafting Group, the deliberations on corporate L/Cs centered on the term “Issuing Bank.”<sup>260</sup> The Drafting Group flirted in early UCP 600 drafts with alternate terms, “Issuer” or “Issuing Party,” as a nod to the mushrooming reality of corporate-issued L/Cs.<sup>261</sup> However, the Banking Commission, comprised of trade-finance-oriented, commercial bankers, refused to condone, in any way, the burgeoning corporate-L/C practice and decided to use the UCP as a vehicle not only to preserve commercial banks’ monopoly on L/Cs but also to attempt to delegitimize their use.<sup>262</sup> Thus, the UCP 600 embraces the term “Issuing Bank” and thereby excludes corporate-issued L/Cs from its reach.<sup>263</sup> Of course, in using the UCP as an exclusive, defensive shield, rather than an inclusive, offensive sword, the Banking Commission misses an opportunity to draw corporate-issued L/Cs into the Banking Commission’s normative and interpretive ambit. This “lost” opportunity offers “corporates” ripe incentive to congeal in their own, self-regulatory mode, perhaps triggering a competitive bottom-up lawmaking process that will further crowd the trade finance field.

Second, the Banking Commission chose not to revise the eUCP (other than some semantic revisions so that the terminology meshes with the revised UCP 600 text).<sup>264</sup> As noted previously,<sup>265</sup> the eUCP is a narrowly crafted document, addressing problems endemic in the electronic *transmission* of documents, yet ignoring the use of electronic media (as opposed to commercial bank employees) in the *checking* of documents.<sup>266</sup> When asked why it left the eUCP essentially untouched, the Banking Commission consistently retorted that the

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<sup>260</sup> Gary Collyer, *Responses to 9 “Key Issues” Help Shape the UCP 600*, available at <http://www.coastlinesolutions.com/news1.htm> (last visited Apr. 6, 2008); see also Minutes of October, 2005 Banking Commission meeting (on file with author).

<sup>261</sup> Minutes of October, 2005 Banking Commission meeting (Gary Collyer, Chair of the Drafting Group, noting that “there were around three quarters of a million letters of credit being issued by corporates, utilizing the UCP”) (on file with author).

<sup>262</sup> Minutes of October, 2005 Banking Commission meeting (on file with author). The National Committees rejected the Drafting Group’s initial recommendation which would have drawn corporate-based L/Cs into the UCP’s rubric by referring to “Issuers” rather than “Issuing Banks”; instead, they hoped that exclusion would quash the practice. *Id.*

<sup>263</sup> UCP 600, *supra* note 48, art. 2 (definitions).

<sup>264</sup> See *supra* note 63.

<sup>265</sup> See *supra* note 63 and accompanying text.

<sup>266</sup> See *supra* note 247 and accompanying text.

eUCP had not been used in commercial-bank-issued L/Cs and thereby extrapolated from such lack of use that the e-commerce revolution had not (at least not yet) transformed L/C practice, as it had transformed many other areas of transnational commerce.<sup>267</sup> Thus, from the Banking Commission's myopic perspective, as commercial banks apparently do not use the eUCP in practice, any effort to redraft the eUCP would be a waste of its resources.

In arriving at such conclusion, the Banking Commission embraces a narrow view of L/C practice that turns a blind eye to a growing reality—the use of electronic media to create efficient, less-labor-intensive L/C proxies that disintermediate banks. These “new age” L/Cs offer end-users the benefits of a classic L/C (payment assurance and financing opportunities) without the inefficiencies inherent in commercial banks' reliance on human document checkers. As with the advent of corporate-issued L/Cs, the Banking Commission missed an opportunity to embrace and regulate such practice. Instead of concluding lack of practice from lack of eUCP use, the Banking Commission should have concluded lack of eUCP use because of misalignment with practice. Yet, to do so would have conceded a significant L/C-role for entities other than traditional commercial banks, which, given the Banking Commission's institutional insecurities, was apparently a prohibitively daunting proposition.

Indeed, one consequence of this myopia has been some “molecularization”—emergence of competing bottom-up lawmaking communities.<sup>268</sup> Companies like TradeCard and Bolero, online alternatives to the L/C which could have been drawn into the UCP framework through a more aggressive eUCP revision, now draft their own “membership rules,” adapting the UCP's goal (consistent and predictable decisionmaking in international payment mechanisms) to the reality of automated functionality and corporate-initiated financing.<sup>269</sup> The IIBLP, a U.S.-based trade association, appears to be asserting greater autonomy, most notably by founding an arbitral tribunal that competes directly with DOCDEX, perhaps spawning its own competitive

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<sup>267</sup> The ICC Banking Commission claims that it would be open to participation from companies like TradeCard but, at the same time, calls such companies “non believers” (in the letter of credit). See Ronald Katz, June 24, 2004, telephone interview.

<sup>268</sup> This Article borrows the “molecularization” image from David V. Snyder, *supra* note 20, at 442.

<sup>269</sup> See, e.g., TradeCard Membership Agreement, <http://www.tradecard.com/languages/EN/documents/TradeCardMembershipAgreement.pdf> (last visited Feb. 20, 2007).

lawmaking community.<sup>270</sup> Finally, IFSA, a think tank that has historically worked in close tandem with the Banking Commission, has started issuing its own L/C-related opinions and interpretive material,<sup>271</sup> which courts have started to rely on in lieu of, or in addition to, the UCP and Banking Commission opinions.<sup>272</sup> While these examples are admittedly isolated and limited in scope, they are indicative of trade finance landscape, increasingly crowded not only with official lawmaking communities but also with unofficial groups that may rival, and ultimately displace, the Banking Commission's stature and role, despite its defensive posturing.

In the end, the Banking Commission's decisions regarding corporate-based and online L/Cs—decisions that are out of sync with the exogenous sources of misalignment—punctuate that “practice” is not only a dynamic concept, shifting with the interests and expertise of the group members, but a contingently “subjective” concept, defined by the bottom-up lawmaking community itself. And in this instance, institutional design and procedural frameworks lend an objectively neutral guise to the Banking Commission's subjective project. The Banking Commission certainly believed that it was fulfilling its time-worn role of aligning “practices” and rules in furtherance of trade finance interests. Indeed, as it had done with all previous revision efforts, the Banking Commission reviewed its “evidence of practice”—opinions, DOCDEX decisions, and membership anecdotal experience—to correct the mismatches between rules and reported practice.

Yet, the Banking Commission's own jurisdictional rules—rules that it set against the backdrop of contested, turf-protective interface—effectively circumscribe its “evidence of practice” and, thereby, the breadth of its normative enterprise. For instance, the Banking Commission has issued a policy statement where it declares that it will only issue opinions, and DOCDEX will only hear cases, on L/Cs issued by *banks* (as opposed to

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<sup>270</sup> Notably, the IIBLP assumed the lead on the ISP98 drafting project, with the ICC taking a conspicuous secondary role. Likewise, the IIBLP founded an arbitral tribunal, the International Center for Letter of Credit Arbitration (ICLOCA) that, like DOCDEX, offers specialized dispute resolution services, but, unlike DOCDEX, issues decisions that are presumably binding. See ICLOCA RULES FOR ARBITRATION (1997), available at <http://www.iiblp.org/files/uploads/Misc/ICLOCA%20Rules%20of%20Arbitration.pdf>.

<sup>271</sup> See, e.g., *IFSA Statement of Practice: Reasonable Time for Examination & Notice of Dishonor, in L/C RULES & LAWS: CRITICAL TEXTS* (James E. Byrne ed., 3d ed. 2004).

<sup>272</sup> See *DBJJJ, Inc. v. Nat'l City Bank*, 123 Cal. App. 4th 530 (2004); see also Brief of Amicus Curiae—International Financial Services Association, In Support of Appellee and in Support of Affirmance, *Voest-Alpine Trading USA Corp. v. Bank of China*, 288 F.3d 262 (5th Cir. 2002) (reproduced in 2002 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 472 (James E. Byrne & Christopher S. Byrnes eds., 2002)).

corporates) and *governed by the UCP* (which, by definition, does not apply to corporate-based L/Cs).<sup>273</sup> As Banking Commission opinions and DOCDEX decisions become the Banking Commission's "evidence of practice," this jurisdiction-limiting rule effectively excludes from the Banking Commission's data bank of nonbank L/C practices and thereby skews the Banking Commission's perceptions of corporate L/Cs (as well as their prevalence). Likewise, in locating UCP revision efforts in the Banking Commission, and in relying on Banking Commission members for evidence of practice, the Banking Commission largely excludes nonbank constituencies—including online providers and corporate issuers—from its anecdotal reservoir of practice.<sup>274</sup> Thus, when it came time to revise the UCP, Banking Commission rules and institutional structures, reflective of defensive insecurities, conspired to relegate practices, such as corporate issuance of L/Cs or online L/C alternatives, as malignancies on practice rather than part of L/C practice itself.

### 3. *Knocking on the Top of the Bottom-Up?*

Over time, the Banking Commission abandons some of its reflexively organic roots in favor of institutional survival. The Banking Commission thus morphs from a collective of practices, behaviors and day-to-day experiences to a strategic institution, with an independent identity, highly sensitive to exogenous pressures and intensely self-protective. The inter-institutional rivalries that bottom-up lawmaking sparked, as well as the UCP's latent discrepancy-breeding inadequacies, fuel Banking Commission insecurity about its future stature and role. Additionally, exponential shifts in the trade finance market reduce the Banking Commission to an outlier in its own land. In response, the Banking Commission adorns blinders and retrenches, burrowing itself behind the defenses of its recently, yet imperfectly, "closed" legal system and pursuing business "as usual," impervious to an unfamiliarly daunting trade finance landscape. For a lawmaking entity that, at one time, was an embodiment of socio-legal reality, this "avoidance" strategy inevitably spells

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<sup>273</sup> Comm'n on Banking Technique and Practice, *When a Non-Bank Issues a Letter of Credit* (Oct. 30, 2002), <http://www.iccwbo.org/id525/index.html>.

<sup>274</sup> For example, TradeCard notes that it has never been invited to participate in letter-of-credit-related deliberations. Telephone Interview with Barry Lites, General Counsel, TradeCard, Inc. (July 9, 2004) (stating that TradeCard has never participated in Banking Commission deliberations; nor has it ever been invited to do so).

doom, or at least “hard time” for the Banking Commission’s future bottom-up lawmaking prospects.<sup>275</sup>

The rhythm of bottom-up lawmaking is rather simple and straight forward—community-based practices constitute rules which in turn inform law; and evolving practices restyle rules, which ultimately reshape law. Over a decade that coincided with periodic institutional interface, where a series of “trespasses” left the Banking Commission increasingly defensive and insecure about its place on the trade finance landscape, the Banking Commission came to define “practice” in a way that curtailed peripheral vision. In the instant example, this rather narrow, self-referential conception of practice is perhaps self-destructive. Bottom-up lawmaking may thereby plant seeds for its own destruction as the process begins to enter a rapidly constricting spiral, rather than a healthy and regenerating loop.

#### CONCLUSION

A pluralist lens grants lawmaking status to an unofficial group, like the Banking Commission; traces normative movement, in this instance from the Banking Commission to official lawmaking communities; identifies interface as a critical, yet complex, moment, embodying both mutual reinforcement and defensive self-protection; and acknowledges ways in which interface reverberates within communities over time. Thus, legal pluralism offers a critical framework for organizing and narrating bottom-up lawmaking stories. While thick description is independently valuable, it also reveals normative and predictive axes that will usefully frame a broader scholarly agenda.

This Article’s story may yield predictive energy. In understanding why the Banking Commission sought validation from UNCITRAL and domestic lawmakers, and in understanding why UNCITRAL and domestic lawmakers found the Banking Commission’s regulatory efforts attractive, this Article suggests circumstances that may be ripe for bottom-up lawmaking. The Banking Commission looked beyond its confines because it was not a closed legal system—it did not provide substantive answers to some vexing L/C-

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<sup>275</sup> I attribute many of the insights in this section to a typology that Michael Barnett and Liv Coleman developed in a recent article on normative development within Interpol. Barnett and Coleman predict institutional behavior in the face of institutional insecurity, on the one hand, and incongruence with the broader environment, on the other hand. They create a metric of strategic responses, ranging from acquiescence to defiance. Barnett & Coleman, *supra* note 11, at 601.

related questions (most notably fraud) and did not, until 1998, offer L/C users any dispute resolution outlet. UNCITRAL and domestic lawmakers, somewhat in awe of the UCP's transcendence and the Banking Commission's expertise, welcomed the Banking Commission as muse. Of course, this analysis begs further questions: under what circumstances will ostensibly self-regulatory communities create a truly closed legal system? Does the type of expertise that official lawmakers found attractive endemically relegate bottom-up lawmaking to the underbrush, to those hyper-technical, "low politics" issues? Obviously, there is much comparative work to be done in answering such questions that this Article merely brings into focus.

This Article's description also has normative implications. On its face, bottom-up lawmaking raises questions of "legitimacy," particularly "input" or "procedural" legitimacy. In their unofficial status, these groups are immune from any official oversight or many procedural protections demanded of official lawmakers. Additionally, as these groups tend to use secrecy and exclusivity as a way to breed cohesion, they often are black boxes. Some international legal scholars, including myself, have been alarmed at the reality of law flowing from such opaque and unaccountable groups.<sup>276</sup> In response to my work, many have questioned the legitimacy of a lawmaking process so firmly rooted in closed, secretive, and club-like groups;<sup>277</sup> in fact, one scholar has labeled the "bottom-up lawmaking" project a "dangerous" threat to "democratic principles."<sup>278</sup> My answer, thus far, has been quintessentially legalistic, although less than satisfactory—calls for transparency and concomitant inclusiveness, with the recognition that meaningful transparency may be elusive. Perhaps, the answer, at least in part, to the legitimacy critique is not a matter of legalistic control or taming; instead, the answer may lie in the endemic nature of the processes themselves. In interacting with official lawmaking institutions, an inherent part of the bottom-up lawmaking process, the Banking Commission expanded its capacity to reach out to otherwise under-represented constituencies and opened a more transparent window into

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<sup>276</sup> See, e.g., ALFRED C. AMAN, *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 556, 601 (1999); see also, e.g., Janet Koven Levit, *The Private Origins of Transnational Law*, 14 IND. J. GLOBAL L. ST. (forthcoming 2008) (exploring the "legitimacy" critique vis-à-vis bottom-up lawmaking communities).

<sup>277</sup> See Levit, *International Law Happens*, supra note 11, at 31.

<sup>278</sup> Professor Owen Fiss, Globalization and Executive Power, Remarks at Yale Law School's Southern Cone Faculty Research Seminar: Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), *Executive Power*, Bogota, Colombia (June 9, 2006), in SELA 2006: EL PODER EJECUTIVO, supra note 11.

its processes. Thus, “legitimacy” may be a self-executing feature of such lawmaking processes and, perhaps, should not unduly preoccupy legal scholars.

This Article also suggests that there is a top to the bottom-up—that bottom-up lawmaking may also be self-limiting, which, perhaps, further mitigates the “legitimacy” critique. Organic lawmaking communities seemingly evolve into strategic institutional actors, assuming interests and identities independent of their members, often severing their ties to the technical practices that offered entrée to the “lawmaking” business in the first place. In the Banking Commission’s example, interface-induced, institutional insecurity and dramatically alienating market shifts converged in a reclusive strategy. And, as the Banking Commission seemingly retreats, maintaining focus on an artificially narrow, self-constructed universe of “practice,” alternative groups offer disaffected constituencies sanctuary.

Indeed, Robert Cover’s statement that “[w]e inhabit a nomos—a normative universe”<sup>279</sup> is no less relevant for the transnational space than it is for the domestic. The future of international lawmaking is undoubtedly peppered with law that percolates from the bottom, up. International legal scholarship should embrace this reality, or, perhaps it, like the Banking Commission itself, will meet limits of its relevance and utility.

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<sup>279</sup> Cover, *supra* note 26, at 4.



