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## Realizing Rationality: An Empirical Assessment of International Commercial Mediation

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# Realizing Rationality: An Empirical Assessment of International Commercial Mediation

S.I. Strong\*

## *Abstract*

*For decades, parties, practitioners and policymakers have believed arbitration to be the best if not only realistic means of resolving cross-border business disputes. However, the hegemony of international commercial and investment arbitration is currently being challenged in light of rising concerns about increasing formalism in arbitration. As a result, the international community has sought to identify other ways of resolving these types of complex commercial matters, with mediation reflecting the most viable option. Numerous public and private entities have launched initiatives to encourage mediation in international commercial and investment disputes, and the United Nations Commission on International Trade Law (UNCITRAL) has taken up a proposal from the U.S. Government to consider whether a new treaty involving international commercial mediation is warranted.*

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*As promising as these developments may seem, very little is actually known about how the international community uses and perceives mediation in the cross-border business context. This type of informational deficiency hinders individual and institutional actors' ability to operate in a rational manner. This Article therefore analyzes findings from the first-ever large-scale empirical study on international commercial mediation, providing hard data about current behaviors, beliefs, and practices and testing fundamental theories about the use, nature, and future of this particular process.*

*This Article provides a comprehensive analysis of several core issues. After discussing the theoretical basis for international commercial mediation, the Article analyzes groundbreaking empirical data on the use and perception of international commercial mediation. This information provides parties, practitioners, and policymakers with a critical understanding of how international commercial mediation differs from domestic mediation and helps corporations and institutions make strategic decisions on both an individual and systemic level. The Article then considers various normative issues, including those directly related to ongoing negotiations at UNCITRAL regarding a new international treaty in this area of law. In so doing, the discussion provides unique empirical insights into how the people who are most closely involved with international commercial mediation believe the field should develop.*

*This Article provides the national and international legal communities with critical information about the world's fastest growing dispute resolution device. As the first empirical study dedicated to this particular issue, this Article lays the groundwork for future scholarship and policy work in the area of international commercial and investment mediation. Furthermore, by (dis)proving a number of key theories regarding mediation, the discussion revolutionizes the way this process is conceptualized by legal academics. The broad scope of the analysis makes this material relevant not only to readers in the United States but also to audiences around the world.*

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### I. Introduction

For decades, arbitration has been the primary means of resolving cross-border business and investment disputes.<sup>1</sup> The popularity of arbitration in the international context is undeniable: up to 90% of all international commercial contracts include an arbitration provision,<sup>2</sup> with similar mechanisms in place in approximately 93% of the 3,000–5,000 interstate investment treaties (including bilateral investment treaties (BITs)) now in effect.<sup>3</sup>

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1. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 61–63, 68, 78, 99 (2014) [hereinafter BORN, ICA] (describing the history and increasing recognition of arbitration). Although international commercial arbitration and investment arbitration are similar, the two fields do reflect a number of key differences. See S.I. STRONG, *INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES* 3 (2012) [hereinafter STRONG, GUIDE] (describing key differences based on the origin of their respective authority); Solomon Ebere & Blerina Xheraj, *Nine Years Later: Investment Treaty Arbitration's Contribution to International Commercial Arbitration*, 25 *AM. REV. INT'L ARB.* 85, 85–104 (2014) (providing an analysis of the effects of investment treaty arbitration on international commercial arbitration); Anthea Roberts, *Divergence Between Investment and Commercial Arbitration*, 106 *AM. SOC'Y INT'L L. PROC.* 297, 297–300 (Mar. 28–31, 2012) (focusing “on the growing divergence between commercial and investment arbitration”).

2. Otto Sandrock, *The Choice Between Forum Selection, Mediation, and Arbitration Clauses: European Perspectives*, 20 *AM. REV. INT'L ARB.* 7, 37 (2009).

3. ORGANISATION FOR ECON. CO-OPERATION & DEV. *DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY* 5, 9 (2012), <http://www.oecd.org/investment/internationalinvestment>

International arbitration differs from domestic proceedings in a number of key regards.<sup>4</sup> For example, international commercial and investment arbitration involve important questions of public and private international law and routinely generate awards in the millions and billions of dollars, thereby distinguishing themselves from the relatively minor controversies seen in domestic arbitration as a matter of both fact and law.<sup>5</sup> Indeed, international arbitral tribunals produced 113 awards in excess of one billion dollars in 2011 alone.<sup>6</sup>

Of the two procedures, investment arbitration is more often discussed in the popular and scholarly press. The last few years have seen investor-state dispute settlement (ISDS) discussed extensively in numerous newspaper articles, including those in the *New York Times*, the *Washington Post*, the *Wall Street Journal* and *The Economist*;<sup>7</sup> debated in Congress and around the world during negotiations involving the adoption of the Trans-Pacific Partnership (TPP)<sup>8</sup> and the European Union-United

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agreements/50291678.pdf; S.I. Strong, *Mass Procedures as a Form of 'Regulatory Arbitration'*—*Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 300 n.271 (2013).

4. See BORN, ICA, *supra* note 1, at 73–93 (discussing, inter alia, neutrality of the forum, enforceability of agreements and awards, expertise of tribunals and finality of decisions); STRONG, GUIDE, *supra* note 1, at 3 (stating that international commercial arbitration relies on agreements between the parties, while international investment arbitration is treaty-based).

5. See *Top Arbitration Awards of All Time*, AM. LAW, July 28, 2014 (listing the ten largest arbitration awards, all of which are in the billions); S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 322–70 (2013) (describing differences in grant of jurisdiction and state interests).

6. See Michael J. Goldhaber, *Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of*, AMLAW DAILY (July 6, 2011) (noting the awards included sixty-five commercial matters and forty-eight investment disputes); see also AM. ARBITRATION ASSOC., B2B DISPUTE RESOLUTION IMPACT REPORT: 2015 KEY STATISTICS 3 (2016), [https://ss-usa.s3.amazonaws.com/c/2345/media/5702c0b6ca18b/AAA186\\_2015\\_B2B\\_Case\\_Statistics.pdf](https://ss-usa.s3.amazonaws.com/c/2345/media/5702c0b6ca18b/AAA186_2015_B2B_Case_Statistics.pdf) (noting the average claim in large commercial cases was \$5.7 million, although the median claim in such cases was only \$1.3 million).

7. See Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 463–64 (2015) (citing sources).

8. The TPP was signed by twelve countries, including the United States, on October 5, 2015. See David Nakamura, *Deal Reached on Pacific Rim Trade*

States Transatlantic Trade and Investment Partnership (TTIP);<sup>9</sup> and cited by President Obama in his 2015 State of the Union Address.<sup>10</sup> However, the frequency of international commercial arbitration far outweighs that of investment arbitration, as reflected by the number of proceedings that are filed annually (between twenty and fifty per year in the investment realm as compared to well over 5,000 per year in the international commercial context).<sup>11</sup>

Both procedures involve a unique combination of public and private international law.<sup>12</sup> The primary treaty in the area of international commercial arbitration is the United Nations

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*Pact in Boost for Obama Economic Agenda*, WASH. POST (Oct. 5, 2015), [https://www.washingtonpost.com/business/economy/deal-reached-on-pacific-rim-trade-pact/2015/10/05/7c567f00-6b56-11e5-b31c-d80d62b53e28\\_story.html](https://www.washingtonpost.com/business/economy/deal-reached-on-pacific-rim-trade-pact/2015/10/05/7c567f00-6b56-11e5-b31c-d80d62b53e28_story.html) (last visited Dec. 13, 2016) (describing the progress of TPP and upcoming steps for ratification in Congress) (on file with the Washington and Lee Law Review). The TPP will involve 50% of the worldwide gross domestic product (GDP) and involve countries with a combined GDP of nearly \$20 trillion. See Michael Froman, *Remarks by Ambassador Michael Froman at the Council on Foreign Relations the Strategic Logic of Trade*, 20 L. & BUS. REV. AM. 373, 375 (2014) (noting that this equals one-third of the world's trade); David P. Vincent, *The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?*, 23 MINN. J. INT'L L. 1, 3–4 (2014) (stating that the TPP would “become the largest free trade agreement in the world”).

9. Together, the TPP and TTIP could “govern the investment relations of 65% of the world economy.” Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 696–97 (2014).

10. *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> (last visited Dec. 13, 2016) (discussing the importance of economic treaties) (on file with the Washington and Lee Law Review).

11. See United Nations Conference on Trade and Development (UNCTAD), IIA ISSUES NOTE 1, 1 (Feb. 2015), [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf) (stating “claimants filed 42 known treaty-based ISDS cases” in 2014); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 829–30, 839 (2012) [hereinafter Born, *New Generation*] (noting the lack of numerical precision comes from the confidential nature of international arbitration).

12. See S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 503–04 (2013) (discussing combination of public and private international law in matters involving international arbitration).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which, with 156 states parties, is universally considered the most successful commercial treaty in the world.<sup>13</sup> Investment arbitration typically arises pursuant to one of the thousands of BITs that regulate foreign direct investment<sup>14</sup> and is enforced through a variety of mechanisms, including the Convention for Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which has been ratified by 153 states.<sup>15</sup> International commercial and investment arbitration are both extremely sophisticated procedures that usually result in highly reasoned awards that can run hundreds of pages in length.<sup>16</sup>

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13. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; New York Convention Status, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (listing all parties to the treaty and their respective status). Similar conventions exist on a regional level. See generally European Convention on International Commercial Arbitration, Apr. 21, 1964, 484 U.N.T.S. 364 [hereinafter European Convention]; Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention]; Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 14, 1979, O.A.S.T.S. No. 51, 1439 U.N.T.S. 87 [hereinafter Montevideo Convention].

14. See STRONG, GUIDE, *supra* note 1, at 3 (discussing BITs); Born, *New Generation*, *supra* note 11, at 831–39 (noting other means by which investment arbitration may arise); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVEST. L.J. 232, 254–56 (1995) [hereinafter Paulsson, *Privity*] (stating that 891 BITs were “on record” in 1995).

15. Convention for Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 (1966) [hereinafter ICSID Convention]; see also List of Contracting States and Other Signatories of the Convention, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (listing states); LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 179–80 (2010) (discussing applicability of the New York Convention to investment awards).

16. See S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT'L L. 1, 14 (2015) (providing German awards as an example for “length and thoroughness”).



Despite the maturity of both procedures, the international business community's penchant for international arbitration developed relatively recently.<sup>17</sup> Prior to World War II, most international commercial disputes were resolved through consensual procedures<sup>18</sup> such as mediation and conciliation<sup>19</sup>

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17. See Born, *New Generation*, *supra* note 11, at 826–44 (describing a steady growth in number of arbitrations filed since 1970).

18. Although consent is also central to arbitration, that process requires consent to the use of a particular procedure involving an objective, third-party neutral who decides the outcome of the parties' dispute pursuant to various adjudicative procedures. See BORN, *ICA supra* note 1, at 70 (relying on a comparative legal analysis to create this definition). Mediation and conciliation differ from arbitration in that they not only typically require consent to a particular procedure involving an objective, third-party neutral but also require the parties to consent to the shape of the outcome. See Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 81–82 (2012) [hereinafter Nolan-Haley, *New Arbitration*] (citing the "traditional" definition of mediation as "a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy"). If the parties to a mediation or conciliation do not consent to a particular outcome, the dispute will not settle and will instead be subject to either litigation or arbitration. See generally S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory and International Lawmaking*, 50 AKRON L. REV. \_\_ (forthcoming 2017) [hereinafter Strong, *Epistemic Communities*] (on file with author).

19. Although there is a great deal of debate regarding the proper use of the terms "mediation" and "conciliation," this Article does not attempt to define or differentiate between these terms. See Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 1009–10 (2012) [hereinafter Nolan-Haley, *Mediation*] (noting that conciliation is often considered to be more evaluative than "pure" mediation); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 10–11 (2010) ("One benefit of mediation in the international context is its inclusive and cross-cultural approach to problem solving."); Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation Into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 84–85 (2013) (stating that conciliation provides "diplomatic options for investors and states"). Instead, this Article and the survey instrument used to generate the current data treat the two terms as interchangeable, in accordance with the approach used by the United Nations Commission on International Trade Law (UNCITRAL). See Rep. of Working Grp. II (Arbitration and Conciliation) on the Work of its Sixty-Second Session (New York, 2–6 February 2015), ¶13 n.11, U.N. Doc. A/CN.9/832 (Feb. 22, 2015) [hereinafter WG Report] ("[R]eferring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute . . ."); U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL), MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH

rather than through arbitration.<sup>20</sup> It is unclear why international commercial mediation fell into disuse in the post-War period, although some scholars have hypothesized that the absence of a mechanism facilitating international enforcement of mediation and settlement agreements in a manner similar to that involving arbitration under the New York Convention is to blame.<sup>21</sup>

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GUIDE TO ENACTMENT AND USE 2002, at 11, U.N. Sales No. E.05.V.4 (2004), [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) (noting that “[c]onciliation is being increasingly used in dispute settlement”); Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Settlement?*, 26 INT’L L. PRACTICUM 38, 42 n.25 (2013) (stating that “there is no real distinction between conciliation and mediation”); Howard M. Holtzmann, *Recent Work on Dispute Resolution by the United Nations Commission on International Trade Law*, 5 ILSA J. INT’L & COMP. L. 425, 426 (1999) (arguing that the terms “mediation” and “conciliation” are synonymous); Nolan-Haley, *Mediation*, *supra*, at 1009–10 (stating that some scholars equate the terms). *But see* Proposal by the Government of the United States of America: Future Work for Working Group II, U.N. Doc. A/CN.9/822, at 9 (June 2, 2014) [hereinafter U.S. Proposal] (suggesting that any future instrument adopted by UNCITRAL in this field would likely need to include a definition of “conciliation”).

20. See Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT’L L.J. 578, 614–15 (1991) (noting that conciliation provides a sense of security without fear of prejudicing any proceedings); Jeswald W. Salacuse, *Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT’L L.J. 138, 157 (2007) (providing an example of mediation in 1979); Eric A. Schwartz, *International Conciliation and the ICC*, 10 ICSID REV. FOREIGN INV. L.J. 98, 107 (1995) (noting fewer than fifty-five requests for mediation with the International Chamber of Commerce (ICC) from 1988 to 1994, as compared to over 2,000 requests for ICC arbitration); S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL’Y 11, 12–13, 31–32 (2014) [hereinafter Strong, *ICM*] (noting that prior to World War II, conciliation was the preferred means of resolving international commercial disputes). ISDS did not really arise until the mid-1980s. See Born, *New Generation*, *supra* note 11, at 826–44 (noting that BITs grew increasingly common during the 1980s and 1990s, thereby “encouraging investment in developing markets”).

21. See Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (suggesting that mediation may be more attractive if agreements were “as easily enforceable as international arbitration agreements and awards”). The widespread adoption of the restrictive theory of foreign sovereign immunity may also have played a role in the rise of international arbitration. See Born, *New Generation*, *supra* note 11, at 826–27 (noting that, during the same period, states began enacting more effective legislation for the enforcement of arbitration agreements).

As successful as the international arbitral regime is, it is currently undergoing a number of existential challenges.<sup>22</sup> One concern arises as a result of the cost of international arbitration, which can be astronomical. For example, administrative costs (including arbitrators' fees) and attorneys' fees are said to run anywhere from \$1 million to \$21 million in an investment proceeding.<sup>23</sup> Costs in commercial matters are somewhat more difficult to estimate, given the confidential nature of those proceedings,<sup>24</sup> but can involve between \$400,000 in administrative and arbitrators' fees for a relatively minor \$10 million matter at the International Chamber of Commerce (ICC), to nearly \$1 million for a more typical \$300 million dispute.<sup>25</sup> Attorneys' fees usually run an additional \$1 million to \$2 million, which would be added to the administrative fees.<sup>26</sup>

Cost considerations are particularly acute in international arbitration because of the relatively frequent use of fee-shifting provisions.<sup>27</sup> As one commentator noted, "[i]t is one thing to spend millions of dollars in legal fees, but it is another to learn that one is also required to pay the award, pay for one's own lawyers, pay

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22. See Strong, *Epistemic Communities*, *supra* note 18 (discussing the effect of the proposed convention for the enforcement of settlement agreements stemming from mediation and conciliation).

23. See Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 775 (2011) (noting the need for further analysis regarding costs); see also *id.* at 785 (citing recent figures from UNCTAD).

24. The quasi-public nature of international investment law has led to an increased amount of transparency in investor-state arbitration. See Eberé & Xheraj, *supra* note 1, at 86–94 (contrasting privacy and confidentiality in international commercial arbitration and investment arbitration).

25. See *Cost Calculator*, ICC, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/> (last visited Dec. 13, 2016) (assuming the tribunal consists of three arbitrators) (on file with the Washington and Lee Law Review).

26. See Eric Ordway, *International Arbitration: The Benefits and Drawbacks*, in BEST PRACTICES FOR INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION \*1, \*10 (2007), 2007 WL 6082200 (noting attorneys' fees "for a medium-sized international arbitration can reach \$1 million to \$2 million, while those for large cases can be many times this amount").

27. See Franck, *supra* note 23, at 772 (stating that such costs include expenses of both parties and the tribunal's costs and expenses).

for the entirety of the tribunal's costs, and then pay for its [sic] opponent's lawyers."<sup>28</sup>

A second area of concern involves the increasing amount of time it takes to resolve an international arbitration. Cross-border commercial matters generally require one to two years to complete, while investment proceedings currently take three to four years to conclude.<sup>29</sup> Parties find these delays troubling not only because they extend periods of commercial uncertainty, but because they also increase the amount of interest that accrues on outstanding defaults or loans.<sup>30</sup> These sums can also be phenomenally, even catastrophically, high.<sup>31</sup>

As a result of these and other issues, international commercial actors are seeking more cost- and time-effective means of resolving cross-border business disputes.<sup>32</sup> Mediation has been posited as the most likely option, leading a range of public entities (such as the World Bank, the International Finance Corporation and the European Commission) and private organizations (such as the ICC, the International Institute for Conflict Prevention & Resolution (CPR) and the International Mediation Institute (IMI)) to adopt various initiatives meant to facilitate mediation in the commercial and investment contexts.<sup>33</sup>

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28. *Id.* at 786.

29. *See id.* (noting that multiple investment arbitrations under NAFTA and BITs took four years to resolve); Ordway, *supra* note 26, at \*10 (stating that the more complex an arbitration is, the more time it consumes).

30. *See* Mark Kantor, *Negotiated Settlement of Public Infrastructure Disputes*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 199, 214 (Todd Weiler & Freya Baetens eds., 2011) (“[C]ontinued accumulation of interest expenses, unless checked, will quickly overwhelm the ability of project sponsors to obtain recovery on their investment . . .”).

31. *See id.* (noting, for example, that “if a \$500,000,000 project is financed 75% with debt fixed at 6.5% per annum fixed interest rate, then for every month of delay resulting from a dispute the project must pay more than US\$ 1.3 million (US\$ 1,354,167) per month in additional interest to lenders”).

32. Although international arbitration has become increasingly costly and time-intensive, international arbitration remains vastly superior to international litigation for a variety of reasons. *See* BORN, ICA, *supra* note 1, at 73–93 (listing benefits of international arbitration).

33. *See* Nolan-Haley, *New Arbitration*, *supra* note 18, at 66–67 (listing various initiatives); Strong, *ICM*, *supra* note 20, at 11–15 (describing initiatives of the ICC, the World Bank, and the International Finance Corporation).

However, individual parties remain hesitant to adopt mediation in individual cases.<sup>34</sup>

In many ways, the reluctance of international commercial actors to embrace mediation is understandable, given that very little information exists about the procedure as either a practical or jurisprudential matter.<sup>35</sup> The field of private international dispute resolution is generally considered to be undertheorized,<sup>36</sup> and international commercial and investment mediation is currently the least developed of the various specialties. Although there is a substantial body of theoretical and empirical scholarship concerning domestic mediation,<sup>37</sup> it is unclear whether and to what extent those analyses apply to cross-border business matters.<sup>38</sup> As a result, parties' and practitioners'

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34. See *infra* notes 185–203 and accompanying text (discussing factors affecting parties' decision to use international commercial mediation).

35. See *infra* notes 110–138 and accompanying text (discussing existing doctrine and debate).

36. See EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 2–3 (2010) (noting that, although international dispute resolution lends itself to legal theory analysis, it has not been heavily studied); Franck & Wylie, *supra* note 7, at 467 (stating that most existing scholarship focuses more on “description and critical assessment of positive law solutions,” rather than legal theory). *But see* S.I. Strong, *Constitutional Conundrums in Arbitration*, 15 CARDOZO J. CONFLICT RESOL. 41, 44 n.15 (2013) (noting sophisticated analyses in international arbitration).

37. See Strong, *ICM*, *supra* note 20, at 18–19 (noting that “scholars and practitioners have already identified several ways in which international commercial mediation might be distinguishable from domestic mediation”); see also *infra* notes 110–111 and accompanying text (discussing the existence of empirical studies).

38. See Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel, and Mediators Should Know*, 66 DISP. RESOL. J. 64, 66 (2011) (describing differences between international and domestic mediation). For example, international commercial disputes are not only more complicated than domestic matters, they also feature larger numbers of parties and a variety of cross-cultural concerns. See generally Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. 323, 325 (1998) [hereinafter Abramson, *Time*]; John Barkai, *What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 52–87 (2008); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 53–54 (1999); Gaultier, *supra* note 19, 50–54; Mason, *supra*, at 66; Strong, *ICM*, *supra* note 20, at 18–19; Michael A. Wheeler & Gillian Morris, *GE's Early*

unwillingness to engage in mediation is often based on a desire to avoid engaging in a futile and potentially expensive course of action that yields little in return.<sup>39</sup>

The lack of information about international commercial mediation therefore has immediate ramifications at the individual level. However, problems also exist at the systemic level. The international community is currently considering a proposal from the U.S. Government to the United Nations Commission on International Trade Law (UNCITRAL) calling for the creation of a new international treaty concerning the enforcement of settlement agreements arising out of international commercial mediation.<sup>40</sup> If adopted, this instrument would alleviate some of the inequalities between international arbitration and international mediation and perhaps promote the use of mediation in the international commercial and investment contexts.<sup>41</sup> However, deliberations at UNCITRAL have been hampered by the lack of reliable information relating to the use of international commercial and investment mediation.<sup>42</sup>

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*Dispute Resolution Initiative (B)*, HARV. BUS. SCH., Supplement 801-453 (June 2001) [hereinafter Wheeler & Morris, International] (discussing the internationalization of General Electric's dispute resolution strategy).

39. See Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 [hereinafter Hensler, *Suppose*] (stating that empirical evidence that mediation saves time and money has "failed to materialize").

40. See generally U.S. Proposal, *supra* note 19. The State Department's interest in this subject arose as a result of this Author's academic work in this field. Compare Strong, *ICM*, *supra* note 20, at 29–38 (discussing the enforcement of mediation agreements), with U.S. Proposal, *supra* note 19 (same); see also *Public Meeting on International Arbitration and Conciliation*, U.S. DEP'T OF STATE (Feb. 26, 2014), <http://www.state.gov/s/229037.htm> (last visited Dec. 13, 2016) (noting the genesis of the U.S. proposal) (on file with the Washington and Lee Law Review).

41. See Strong, *ICM*, *supra* note 20, at 31–32 (arguing that the absence of any multilateral or bilateral treaties for the enforcement of mediation and settlement agreements is one area in which the two systems "differ most radically").

42. See WG Report, *supra* note 19, ¶ 56 (noting the need for empirical information in this field); Strong, *Epistemic Communities*, *supra* note 18 ("Although a significant amount of information exists regarding the values of domestic mediation, it is unclear whether and to what extent those principles can be extended to the international commercial realm.").

Legal theorists, including those working in the fields of law and economics and game theory, have long recognized how informational deficiencies hinder rational decision-making.<sup>43</sup> This Article therefore attempts to assist parties, practitioners, and policymakers by presenting and analyzing data from the first-ever large-scale empirical study focusing exclusively on mediation in the cross-border business context. Among other things, the material tests the validity of a number of theoretical assumptions regarding international commercial dispute resolution and thereby helps develop rigorous, fact-based analysis that can be used not only to improve international commercial mediation on a systemic level, but also to assist parties and practitioners in developing their own individual dispute resolution strategies.

The Article proceeds as follows. First, Part II describes the ongoing deliberations concerning a newly proposed convention at UNCITRAL. This discussion not only helps readers understand why the survey is structured as it is but why empirical work is so important in this area of law. Next, Part III outlines the study's methodology, including its purpose, goals, and research parameters, so as to allow readers to evaluate the legitimacy of the research process. Questions of legitimacy are also considered in Part IV, which discusses existing doctrine and scholarship in this area of law and considers how various theoretical constructs are incorporated into the current work. This material also identifies a number of theoretical assumptions about international commercial mediation that are subsequently tested as an empirical matter.

The Article then moves on to the results of the empirical survey. Part V begins the analysis by providing information on the demographics of study participants so as to put the individual

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43. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 429–38 (4th ed. 1992) (arguing that informational deficiencies can lead to increased systematic risk); Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Market, and Human Beings*, 80 CHI.-KENT L. REV. 1091, 1094 (2005) (“The most serious resource constraint is clearly a lack of information, either because no one has the information or because the information is not available to the decision maker.”); Robert B. Wilson, *Strategic and Informational Barriers to Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 108, 108–19 (Kenneth J. Arrow et al. eds., 1995) (discussing economic and game theory).

responses into context. The discussion then turns to the substantive issues raised in the survey, with Part VI addressing current practices and perceptions relating to international commercial mediation and Part VII considering future reform in this area of law. Part VIII concludes the Article by tying together the various strands of analysis and offering a number of forward-looking observations.

Before beginning, it is important to note that although the research presented herein is extremely wide-ranging, there are some limitations. Most notably, this Article does not attempt to determine whether and to what extent mediation is superior to other forms of international dispute resolution, at least as an abstract concern.<sup>44</sup> Not only do most experts believe that disputes should be subject to an individualized suitability screening process based on the particular facts at issue,<sup>45</sup> but there appears

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44. Numerous commentators have attempted to identify the types of disputes that are particularly amenable to mediation, particularly in the domestic context. See generally INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (CPR), ADR SUITABILITY GUIDE, <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/ADR%20Suitability%20Screen.pdf> [hereinafter CPR]; Strong, *ICM*, *supra* note 20, at 16–24 (discussing how to identify the proper dispute resolution mechanism). For example, some researchers have concluded that mediation may be appropriate when

- (1) there is potential for preserving an ongoing relationship,
- (2) the main issue is determining damages and there is not a critical dispute about liability or an issue of principle,
- (3) there is not a need for legal precedent (such as an early case in a set of related claims that would be relevant to later cases),
- (4) there is a lot at stake,
- (5) it makes sense to settle for less than the cost of defense,
- (6) the case is complex, especially if it involves technical expertise,
- (7) the case needs a creative solution,
- (8) a party needs emotional catharsis of having a “day in court” that he or she might not get in traditional negotiation or court itself,
- (9) all the parties are represented by counsel, or
- (10) the parties pay their own attorney’s fees.

John Lande & Rachel Wohl, *Listening to Experienced Users*, 13 DISP. RESOL. MAG. 18, 19 (2007); see also Frank E.A. Sander & Lukasz Rozdieczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to A Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 1–2 (2006) (arguing that mediation can lead to a “Pareto efficient outcome” for both parties).

45. See generally CPR, *supra* note 44. Experts agree that not every dispute is suitable for mediation. See Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L. REV. 281, 295–303 (2013) (describing certain variables that influence the likelihood of mediation



to be considerable debate about whether and to what extent cross-border business disputes are amenable to mediation. For example, one group of commentators suggests that there is nothing about international commercial or investment disputes that precludes the use of mediation.<sup>46</sup> However, another set of scholars argues that the uncertainty involved in certain types of international commercial and investment disputes makes such matters inherently difficult to settle.<sup>47</sup> While the international legal and business communities would certainly benefit from further research on the relative merits of international arbitration and international mediation, such questions are outside of the scope of the current study.<sup>48</sup>

## II. The UNCITRAL Deliberations

The data generated by the current study is directly and immediately applicable to a practical problem that arose recently

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settlements); Nolan-Haley, *New Arbitration*, *supra* note 18, at 63–64 (listing problems in using mediation).

46. See CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 179–80 (1996) (“Acceptance of a solution is motivated . . . by the cost-benefit analysis each party performs, comparing options for agreement with non-agreement alternatives.”); Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* 11, 14 (Jacob Bercovitch ed., 1996) (arguing that mediation is sufficiently versatile to be successful in “all types of disputes”); Gaultier, *supra* note 19, at 44–51 (providing advantages of mediation); Salacuse, *supra* note 20, at 174–82 (describing cases in which mediation was used); Strong, *ICM*, *supra* note 20, at 16–24 (noting that increased complexity is not a bar to mediation); Welsh & Schneider, *supra* note 19, at 77 (claiming that mediation is an “attractive option” in investment disputes).

47. See Perry S. Bechky, *Microinvestment Disputes*, 45 *VAND. J. TRANSNAT’L L.* 1043, 1086–87 (2012) (noting the burdens of high costs, risks, and delays that often accompany settlement); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 *N.C. L. REV.* 1, 72–74 (2007) [hereinafter Franck, *Empirically Evaluating*] (pointing to inconsistent case law and difficulty estimating arbitration costs as sources of uncertainty).

48. Another issue that is not covered herein involves the costs of international commercial mediation, although there is a great deal of interest in that subject. *Infra* note 187 and accompanying text.

on the public international stage.<sup>49</sup> In July 2014, the Government of the United States submitted a proposal to UNCITRAL suggesting the creation of a new international treaty concerning the enforcement of settlement agreements arising out of international commercial mediation.<sup>50</sup> The Commission sent the proposal to UNCITRAL Working Group II (Arbitration and Conciliation) for further consideration, and the initiative is currently moving forward.<sup>51</sup>

One of the issues that arose early in the UNCITRAL deliberations involved the desire by several state delegates to see empirical data concerning international commercial mediation so that they could better understand the existing legal and commercial environment and determine whether there was a need for a new international instrument in this area of law.<sup>52</sup>

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49. See U.S. Proposal, *supra* note 19 (recommending that UNCITRAL develop a convention to address the enforceability of international commercial settlement agreements).

50. See *id.* (identifying several issues to address in order to encourage the use of mediation). The State Department's interest in this subject arose as a result of academic work in this field. See Strong, *ICM*, *supra* note 20, at 29–38 (suggesting creation of a new convention to facilitate enforcement of international settlement agreements).

51. See Annotated Provisional Agenda, U.N. Doc. A/CN.9/WG.II/WP.185 (Nov. 4, 2014) (outlining a schedule for deliberations regarding an instrument concerning the enforcement of international settlement agreements); see also U.N. Secretariat, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.187 (Nov. 27, 2014) [hereinafter Secretariat Note] (detailing UNCITRAL's past work in international mediation and conciliation, questions to address in the future, and results from a 2012 survey about the prevalence of mediation and arbitration in disputes stemming from international investments); U.N. Secretariat, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation—Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, Comments Received from States, Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.188 (Dec. 23, 2014) [hereinafter States' Comments] (providing states' opinions regarding the proposed changes to enforcement of settlement agreements).

52. See U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Its Forty-Seventh Session, at 24, U.N. Doc. A/69/17 (2014) [hereinafter Commission Report] (requesting UNCITRAL Working Group II and the U.N. Secretariat to outline the feasibility and issues of undertaking work in the area of enforcement of international settlement agreements).

Unfortunately, at the point the request was made, no such data existed.<sup>53</sup> The current study was therefore initiated as a means of providing assistance to participants in the UNCITRAL process as they discussed the need, viability, and shape of a new international instrument involving international commercial mediation. A preliminary report containing tentative findings from the study<sup>54</sup> was made available to Working Group II prior to the February 2015 meeting and was cited in papers circulated by both the Government of the United States and the UNCITRAL Secretariat.<sup>55</sup>

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53. See Secretariat Note, *supra* note 51 (relying on data from the preliminary report for its discussion). Following the UNCITRAL meeting, the IMI conducted a brief survey of its members, but that study does not reflect a high degree of scientific rigor. See *How Users View the Proposal for a U.N. Convention on the Enforcement of Mediated Settlements*, INT'L MEDIATION INST. (Dec. 3, 2014), <https://imimmediation.org/uncitral-survey-results-news-item> (last visited Dec. 13, 2016) (providing readers with access to survey results) (on file with the Washington and Lee Law Review); *Survey—UN Convention on the Recognition and Enforcement of Mediated Settlement Agreements*, INT'L MEDIATION INST. (Oct. 16, 2014), <https://imimmediation.org/invitation-to-participate-in-survey-for-uncitral> (last visited Dec. 13, 2016) [hereinafter *Survey*] (seeking business managers and corporate litigation and arbitration counsel to participate in a four-question survey on the need for U.N. enforcement and recognition of mediation settlement agreements) (on file with the Washington and Lee Law Review).

54. See S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report of Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, U. MO. SCH. L. RES. PAPERS NO. 2014-28, Nov. 17, 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302) [hereinafter Strong, *Preliminary Report*] (presenting the underlying empirical data resulting from the survey without intensive analysis). The preliminary report indicated that the findings were still tentative and that a more detailed analysis would be provided in the future. See *id.* at 2 (noting that the forthcoming article would also provide proposals regarding future action in the area of international commercial mediation). This Article represents the final analysis of the survey data.

55. See Secretariat Note, *supra* note 51, at 6 n.16 (citing Strong, *Preliminary Report*, *supra* note 54); States' Comments, *supra* note 51, at 6 n.7 (same); see also U.N. Comm'n on Int'l Trade Law, Working Group II, 2000 to Present: Arbitration and Conciliation/Dispute Settlement, Sound Recordings of Meetings (Sept. 8, 2016), [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html) [hereinafter UNCITRAL Sound Recordings] (noting oral discussion of the preliminary report during the Working Group meeting).

Notably, this is not the first time that UNCITRAL and Working Group II have considered issues relating to the international enforceability of settlement agreements arising out of mediation.<sup>56</sup> However, earlier discussions did not appear to

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56. See Commission Report, *supra* note 50, at 23 (noting the existence of issues regarding enforceability of international settlement agreements). UNCITRAL has considered the possibility of a convention relating to international commercial mediation on numerous occasions in the past, but has declined to pursue such a project. See *id.* (outlining concerns about a previous proposal involving enforcement of international settlement agreements); Secretariat Note, *supra* note 51, at 2–3 (same). UNCITRAL has also discussed enforcement of settlement agreements arising out of conciliation on numerous occasions in the past. See U.N. Secretary-General, *Settlement of Commercial Disputes—Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation*, ¶¶ 105–12, U.N. Doc. A/CN.9/WG.II/WP.110 (Sept. 22, 2002) (noting the existence of a wide variety of enforcement provisions between states); U.N. Comm’n on Int’l Trade Law, Rep. on the Work of Its Thirty-Fifth Session, ¶¶ 119–26, 172, U.N. Doc. A/57/17 (2002) (discussing possible changes to the legal regime regarding international conciliation); Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, ¶¶ 77–81, U.N. Doc. A/CN.9/514 (May 27, 2002) (discussing enforcement provisions of the UNCITRAL Model Law on International Commercial Conciliation); U.N. Comm’n on Int’l Trade Law, Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Fifth Session, ¶¶ 38–48, 133–39, 160–61, U.N. Doc. A/CN.9/506 (Dec. 21, 2001) (summarizing proposals regarding the UNCITRAL Model Law on International Commercial Conciliation); U.N. Secretariat, *Settlement of Commercial Disputes, Draft Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]*, Note by the Secretariat, ¶¶ 66–71, U.N. Doc. A/CN.9/WG.II/WP.116 (Oct. 12, 2001) (examining four different variants of language regarding enforcement provisions of the UNCITRAL Model Law on International Commercial Conciliation); U.N. Secretariat, *Settlement of Commercial Disputes, Model Legislative Provisions on International Commercial Conciliation*, Note by the Secretariat, ¶¶ 45–49, U.N. Doc. A/CN.9/WG.II/WP.115 (Sept. 19, 2001) (recounting the events of the thirty-fourth session of Working Group II and the Working Group’s discussion of the enforceability of settlement agreements); U.N. Comm’n on Int’l Trade Law, Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Fourth Session, ¶¶ 153–59, U.N. Doc. A/CN.9/487 (June 15, 2001) (detailing differences between national laws involving enforceability of settlement agreements); U.N. Secretary-General, *Settlement of Commercial Disputes, Preparation of Uniform Provisions on: Written Form for Arbitration Agreements, Interim Measures of Protection, and Conciliation*, at n.39, U.N. Doc. A/CN.9/WG.II/WP.113/Add.1 (Mar. 9, 2001) (noting gaps in Working Group II’s discussion of enforceability of settlement agreements); U.N. Comm’n on Int’l Trade Law, Rep. of the Working Grp. on Arbitration on the Work of Its Thirty-Second Session, ¶¶ 38–40, U.N. Doc. A/CN.9/468 (Apr. 10, 2000) (summarizing Working Group II’s discussion of

have the urgency of the current proposal, which has the support of numerous states and non-governmental organizations<sup>57</sup> and which is set in the context of increased interest in international commercial and investment mediation.<sup>58</sup> For example, the World Bank, the International Finance Corporation, and the European Union have all launched public initiatives to support mediation in international commercial and investment disputes<sup>59</sup> while various multinational firms, most notably General Electric and

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whether enforceability of settlement agreements should be uniform or left to individual states); U.N. Secretary-General, *Settlement of Commercial Disputes, Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement*, ¶¶ 34–42, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000) (discussing whether and to what extent settlement agreements should be enforceable as contracts between parties); U.N. Secretariat, *Possible Future Work in the Area of International Commercial Arbitration*, Note by the Secretariat, ¶¶ 16–18, U.N. Doc. A/CN.9/460 (Apr. 6, 1999) (suggesting that UNCITRAL consider a uniform provision regarding enforceability of settlement agreements).

57. See UNCITRAL Sound Recordings, *supra* note 53; see also *Settlement of Commercial Disputes: Enforcement of Settlement Agreements Resulting from International Commercial Conciliation/Mediation—Compilation of Comments by Governments, Prepared for the 62nd through 64th Sessions of Working Group II*, UNCITRAL, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/080/44/PDF/V1408044.pdf?OpenElement> [hereinafter Working Group II Comparative Study] (compiling comments from states regarding a uniform approach to enforcing settlement agreements).

58. See Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 [hereinafter European Directive] (promoting legislation among European states that would provide a framework to guide mediation in inter-European disputes).

59. See *id.* (seeking uniform mediation laws among the countries in the European Union); Guiseppe de Palo & Romina Canessa, *Sleeping? Comatose? Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713, 713 (2015) (discussing a study commissioned by the European Parliament in 2014 entitled “Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the E.U.”); Strong, *ICM*, *supra* note 20, at 14 (suggesting “an uptick in commercial actors’ commitment to consensual forms of dispute resolution,” including from the World Bank and the International Finance Corporation).

Siemens, have touted the benefits of mediation from the private perspective.<sup>60</sup>

At the time of writing, the most recent in-depth discussion of the U.S. proposal took place at the February 2016 meeting of Working Group II.<sup>61</sup> The session was extremely productive and delegates came to agreement on a number of important points.<sup>62</sup> The project was favorably discussed at the forty-ninth session of the Commission in June and July 2016, and Working Group II will be considering specific language at its meeting in September 2016.<sup>63</sup> Although there is no way to predict how quickly deliberations will progress through UNCITRAL or how long it will take for countries to ratify or adopt any instrument that is

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60. See Walter G. Gans & David Stryker, *ADR: The Siemens' Experience*, 51 DISP. RESOL. J. 40, 41 (1996) (attributing Siemens' use of alternative dispute resolution methods to lower costs and the preference of its German parent company to resolve disputes "privately and in a non-adversarial manner"); Michael A. Wheeler & Gillian Morris, *GE's Early Dispute Resolution Initiative (A)*, HARV. BUS. SCH., Supplement 801-395 (June 2001) [hereinafter Wheeler & Morris, Domestic] (discussing General Electric's domestic dispute resolution strategy, based on the Six Sigma approach); Wheeler & Morris, International, *supra* note 38, at 801-453 (discussing the internationalization of General Electric's dispute resolution strategy).

61. See Annotated Provisional Agenda, ¶¶ 12-19, U.N. Doc. A/CN.9/WG.II/WP.193 (Nov. 4, 2015) [hereinafter February 2016 Agenda] (summarizing previous deliberations about the enforcement of settlement agreements and identifying upcoming topics of discussion). UNCITRAL continued to meet and negotiate this instrument while this Article was in the production process. See Annotated Provisional Agenda, U.N. Doc. A/CN.9/WG.II/WP.197 (July 14, 2016) [hereinafter September 2016 WGII Agenda] (outlining upcoming topics of discussion); U.N. Secretariat, International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting From Conciliation, Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.198 (June 30, 2016) [hereinafter September 2016 Discussion Points and Draft Language] (identifying relevant points of discussion and suggesting language to be addressed during Working Group II's next session).

62. See U.N. Comm'n on Int'l Trade Law, Rept. of Working Grp. II (Arbitration and Conciliation) on the Work of Its Sixty-Fourth Session, ¶¶ 145-69, U.N. Doc. A/CN.9/867 (Feb. 10, 2016) (summarizing remaining concerns about individual provisions of the proposed instrument). The Author was present at the Working Group meeting.

63. See September 2016 WGII Agenda, *supra* note 61, ¶ 9 (outlining future work regarding international enforcement of settlement agreements); September 2016 Discussion Points and Draft Language, *supra* note 61 (suggesting language to discuss during Working Group II's next session).

eventually produced, it is clear that state delegates have a continuing need for the information contained in this Article as they debate this initiative.<sup>64</sup> The research also provides the international business and legal communities with information that is useful even outside the UNCITRAL process.<sup>65</sup>

### III. Methodology

Methodological issues are critically important in social science research because they are the primary means of measuring the validity of the resulting data.<sup>66</sup> When designing a new study, it is important to consider first whether and to what extent the research question is amenable to empirical analysis.<sup>67</sup>

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64. For example, state delegates have yet to decide what type of instrument would be most appropriate, and this study contains important information in this regard. See February 2016 Agenda, *supra* note 61, ¶¶ 12–19 (noting continued discussion about the proper form of an instrument for enforcing settlement agreements); September 2016 Discussion Points and Draft Language, *supra* note 61, ¶ 54 (suggesting proposed language for an instrument on the international enforcement of settlement agreements).

65. See Strong, *ICM*, *supra* note 20, at 14–15 (identifying the type of information sought by the international business community).

66. See Daniel R. Cahoy, *Editor's Corner: Considerations in the Rise of Empirical Legal Scholarship*, 47 AM. BUS. L.J. v, vii–viii (2010) (discussing the necessity of both basic and complex empirical analysis to ensure high-quality legal scholarship); Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 784–95 (2008) [hereinafter Franck, *Empiricism*] (discussing means of evaluating the validity of empirical research). Rigorous methodology is particularly important in the context of empirical legal research, given the general lack of familiarity among legal audiences regarding the merits of empirical work. See Lee Epstein & Gary King, *Building An Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311, 316–17 (2003) (noting problems with empirical research in law); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 185 (2004) (examining the benefits of establishing more intensive standards for reporting study results, with an emphasis on the ability to replicate studies).

67. See Franck, *Empiricism*, *supra* note 66, at 790 (noting “not all research questions are well-suited to empirical methodologies”). When designing a new study, it is also important to determine whether to follow the methodological approach of previous studies, which will likely generate similar types of research results, or create a relatively new analytical model so as to obtain new types of information. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV.

In this case, experience suggests that the current topic is indeed suitable for empirical consideration.<sup>68</sup>

This conclusion is based on several factors. First, a significant number of empirical studies exist regarding domestic forms of mediation.<sup>69</sup> Although most of these works do not focus

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637, 641 (2014) (recognizing that the uniformity of methodology used in past research has led to a gap in knowledge and an inability to generally apply results to actual disputes).

68. See MATTHIAS SCHONLAU ET AL., CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB 5–18 (2002) (discussing studies on research methodology conducted by the RAND Corporation); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 54 (2002) [hereinafter Epstein & King, *Inference*] (claiming that an ability to consider a different approach to facts and methodology is a key characteristic in successful researchers).

69. Studies address a wide range of issues. See generally Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002) (examining the effect of representation on employment dispute resolution); Dwight Golann, *Is Legal Mediation a Process of Repair—Or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301 (2002) (looking at the effectiveness of mediation); Jeffrey H. Goldfien & Jennifer K. Robbenolt, *What if Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277 (2007) (examining attitudes toward mediation); Deborah R. Hensler, *In Search of “Good” Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231 (Joseph Sanders & V. Lee Hamilton eds., 2001) (noting the effectiveness of various methods of mediation); Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONFLICT RESOL. 777 (2014) (exploring the combined use of mediation and arbitration); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002) (discussing the effectiveness of alternative dispute resolution as evaluated by litigation attorneys); Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131 (examining unaided bilateral settlements in litigation through mediation); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 144–45 (1997) (describing the effect of mediators offering opinions about the merits of cases); Bert Niemeijer & Machteld Pel, *Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN. ST. L. REV. 345 (2005) (noting the ability of Dutch courts to adopt mediation as a form of alternative dispute resolution); Nolan-Haley, *New Arbitration*, *supra* note 18, at 61 (presenting mediation as an alternative to arbitration); Ralph Peebles et al., *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. DISP. RESOL. 101 (analyzing court-ordered mediation of medical malpractice cases); Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and*



on commercial disputes<sup>70</sup> and are therefore of only questionable utility in matters involving international commercial and investment mediation,<sup>71</sup> these studies nevertheless demonstrate that consensual forms of dispute resolution can be studied empirically.

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*Challenges of Determining Mediation Developments in the U.S.*, 13 HARV. NEGOT. L. REV. 131 (2008) (attempting to measure mediation receptivity in the United States); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (examining the effect of apologizing on settlement decision making); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (describing and reporting on the effectiveness of negotiation); James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263 (2013) (explaining mediators' use of persuasion to facilitate an agreement); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004) (describing overall satisfaction with mediation and other alternative dispute resolution methods); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) (researching court-connected mediation of general civil cases); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419 (2010) (examining the effect of representation on mediation).

70. *But see* EWALD FILLER, *COMMERCIAL MEDIATION IN EUROPE: AN EMPIRICAL STUDY OF THE USER EXPERIENCE* (Nadia Alexander ed., 2012) (focusing on the practice of twenty-five commercial mediators); Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161 (2005) (exploring the use of mediation in commercial and construction dispute resolution); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105 (1996) (involving the construction industry); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000) [hereinafter Lande, *Faith*] (analyzing responses of attorneys in domestic commercial practice to determine their perception of mediation); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2014) (comparing the results of a 2011 survey of attorneys' perceptions and experiences with mediation and other dispute resolution methods to a similar survey from the mid-1990s).

71. *See* Strong, *ICM*, *supra* note 20, at 16–17 (discussing differences between domestic disputes and international commercial and investment disputes).

Second, scholars have shown increasing interest in empirical studies relating to international dispute resolution.<sup>72</sup> Although the primary emphasis has been on arbitration rather than on mediation,<sup>73</sup> some research has been conducted on mediation in

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72. See *infra* note 74 (providing examples of empirical studies relating to arbitration); *supra* note 69 (listing examples of empirical studies relating to mediation).

73. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 298 (William M. O'Barr & John M. Conley eds., 1996) (noting competition between states to become desired sites of arbitration); *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 3–15 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter *TOWARDS A SCIENCE*]; Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 *NOTRE DAME L. REV.* 523, 551–52 (2005) (discussing how parties contract for the use of international commercial law over national law to resolve disputes); Franck, *Empirically Evaluating*, *supra* note 47, at 1 (examining investment treaty arbitration); Franck, *Empiricism*, *supra* note 66, at 774 (focusing on investment treaty dispute resolution and international investment law); Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 753, 754 (Peter Cane & Herbert M. Kritzer eds., 2010) (noting an increase in empirical scholarship on international law); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 *AM. REV. INT'L ARB.* 531, 533–34 (2000) (exploring the possibility of an appeal option to reduce the risk of local bias in international commercial arbitration); Loukas Mistelis, *International Arbitration-Corporate Attitudes and Practices-12 Perceptions Tested: Myths, Data, and Analysis Research Report*, 15 *AM. REV. INT'L ARB.* 525, 531 (2004) (discussing major corporations' perceptions of international arbitration); S.I. Strong, *International Litigation—Arbitration*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Jürgen Georg Backhaus ed., 2014); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 *OSGOODE HALL L.J.* 211, 215–16 (2012) (studying possible bias in international investment arbitration); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts*, 2 *WORLD ARB. & MEDIATION REV.* 39 (2008) (discussing the role of national courts in international arbitration). The School of International Arbitration at Queen Mary, University of London, has been particularly active in the area of international commercial arbitration and has conducted a number of studies that have adopted a research methodology that is somewhat similar to that which is used in the current project. See *Research at the School of International Arbitration*, QUEEN MARY U. LONDON, SCH. INT'L ARB. <http://www.arbitration.qmul.ac.uk/research/index.html> (last visited Dec. 13, 2016) [hereinafter *QMUL Studies*] (containing details regarding seven different empirical studies concerning international arbitration) (on file with the Washington and Lee Law Review).

interstate disputes.<sup>74</sup> Again, the content of these studies is not particularly relevant to the question at issue here, but the existence of these works demonstrates that international commercial mediation can be the subject of empirical analysis.

The next question that must be considered when gauging the legitimacy of empirical research involves the extent to which the study addresses a particular research question.<sup>75</sup> In this case, a mixed qualitative-quantitative study was designed to discover more about the use and perception of international commercial mediation in the international legal and business communities.<sup>76</sup>

The study was construed with two specific goals in mind.<sup>77</sup> The first was to discover and describe current behaviors and attitudes relating to international commercial mediation. This information was sought through questions concerning:

- the extent to which mediation is currently used in the international commercial context;
- the means by which mediation is initiated in the international commercial context;
- the reasons why parties do or do not use mediation in international commercial disputes;
- the methods of encouraging parties to use mediation in the

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74. These types of disputes fall into the realm of international relations or peace studies. See Kyle C. Beardsley et al., *Mediation Style and Crisis Outcomes*, 50 J. CONFLICT RESOL. 58, 58 (2006) (focusing on mediation during international crises); Jacob Bercovitch et al., *Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations*, 28 J. PEACE RES. 7, 7–17 (1991) (purporting to identify the determinants of successful international mediation); Bercovitch & Houston, *supra* note 46, at 11–38 (discussing the use of mediation in international conflict management); Molly M. Melin, *When States Mediate*, 2 PENN. ST. J. L. & INT'L AFF. 78, 79 (2013) (examining what drives the decision to engage in state-led mediation).

75. See ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 41 (2d ed. 1998) (noting that research questions should be sufficiently focused without being too narrow).

76. See Franck, *Empiricism*, *supra* note 66, at 785 (suggesting the utilization of a broad set of perspectives to perform qualitative research that will later be analyzed quantitatively).

77. See STRAUSS & CORBIN, *supra* note 75, at 41 (discussing the need for precisely formulated research questions).

international commercial context; and

- the types of international commercial disputes that either are or are not amenable to mediation.

This data is critical because it provides a baseline understanding of current practices and beliefs in this area of law. However, empirical research need not be limited to merely descriptive analyses. Instead, a well-construed study can also address certain normative issues. In this case, the research was intended to help the participants in the UNCITRAL process determine whether and to what extent a new international instrument is needed in this area of law. Therefore, the survey asked respondents a variety of questions relating to:

- the future of international commercial mediation;
- the need for an international convention addressing international commercial mediation; and
- the shape of any future convention addressing international commercial mediation.

The precise methodology chosen to investigate these issues involved an anonymous online survey made available to private practitioners, in-house counsel, government officials, neutrals, and legal academics from around the world.<sup>78</sup> The survey was aimed at a broad range of participants because decisions regarding the selection of a dispute resolution mechanism are

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78. The survey was made anonymous for several reasons. First, participants in international commercial mediation are often bound by an ongoing duty of confidentiality, and requiring respondents to identify themselves might have been seen as a breach of the duty to keep mediation proceedings confidential. See FILLER, *supra* note 70, at 74 (explaining that the confidentiality of the mediation process makes it difficult to gain insight into the procedure). Second, many of the respondents were lawyers, and allowing anonymous responses avoided concerns about possible breaches of the attorney-client privilege. Third, many of those working in the field of international dispute resolution monitor their public statements carefully so as to avoid anything that might bar them from representing a client or acting as a neutral in a future dispute, so allowing anonymity likely resulted in a higher degree of candor from participants. See SCHONLAU ET AL., *supra* note 68, at 16 (noting that respondents may choose not to answer sensitive questions). Anonymity also seemed an acceptable methodological choice based on studies that suggest that allowing respondents to participate on an anonymous basis can increase sample size while also diminishing the likelihood of certain types of measurement errors. See *id.* (explaining that errors may occur when respondents fail to answer particular questions).

typically made by the party to the dispute (which would include both corporate and state entities) in collaboration with inside and outside counsel.<sup>79</sup> As a result, it was important to obtain data from each of these various groups.<sup>80</sup> Furthermore, the world of international dispute resolution is relatively fluid, with individual participants transitioning seamlessly between academia, private practice, corporate employment, government employment, and neutral status over the course of their professional careers.<sup>81</sup> Limiting participation to a single group of professionals would have excluded a great deal of highly significant information, thereby skewing the survey results.<sup>82</sup>

The study also considered it important to include participants from all over the world, since international commercial mediation is by definition international in scope.<sup>83</sup> Anecdotal evidence suggests that the perception and use of different dispute resolution mechanisms can vary significantly across different geographic regions,<sup>84</sup> and it was considered

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79. See Strong, *ICM*, *supra* note 20, at 17–18 (noting the importance of considering the views of both parties and counsel).

80. See TOWARDS A SCIENCE, *supra* note 73, at 9 (explaining that surveys should be sent to individuals who are knowledgeable on the subject of interest).

81. There is also a significant amount of overlap between experts in investment and commercial proceedings. See Roberts, *supra* note 1, at 297–300 (noting that investment and commercial arbitration have often been seen as “two sides of the same coin,” and many individuals specialize in both).

82. Furthermore, it is possible to filter the data to allow analysis of certain subsets of participants.

83. See Working Group II Comparative Study, *supra* note 57 (providing an example of the number of international actors included in the UNCITRAL deliberations).

84. See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 90 (2005) (noting the difference in dispute resolution methods used in Europe and the United States); Gavan Griffith & Andrew D. Mitchell, *Contractual Dispute Resolution in International Trade: The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980)*, 3 MELB. J. INT’L L. 184, 186–87 (2002) (pointing to cultural differences as a factor in choice of dispute resolution methods); Hensler, *Suppose*, *supra* note 39, at 83 (explaining that social and cultural differences affect preferences for peace or conflict); Kim Shi Yin, *From “Face-Saving” to “Cost Saving”: Encouraging and Promoting Business Mediation in Asia*, 32 ALTERNATIVES TO HIGH COST LITIG. 158, 158 (2014) (recognizing “slower than expected” growth of mediation in Asia, despite longstanding traditions of

important to identify these disparities so as to understand both present practices and future possibilities in this area of law.

The survey consisted of thirty-four questions in total, although the use of conditional branching (skip logic) meant that not every participant was provided with an opportunity to answer each of the thirty-four questions.<sup>85</sup> The survey was entirely voluntary, and respondents were allowed to bypass individual questions or even abandon the survey.<sup>86</sup>

Of the thirty-four questions, twenty-seven required participants to choose among a selection of pre-existing answers, with four of those questions allowing participants to explain their answer in a written text box.<sup>87</sup> Seven questions asked participants to provide responses in their own words. All

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consensual dispute resolution methods).

85. Conditional branching, also known as skip logic, automatically directs survey participants to different series of questions, depending on how participants respond to certain preliminary questions. See SCHONLAU ET AL., *supra* note 68, at 30 n.14, 50 (explaining the use of automatic skip patterns to simplify surveys).

86. While surveys that allow participants to skip individual questions can experience certain types of non-response errors, this technique increases the likelihood that respondents will continue on with the survey after facing a difficult question and avoids skewing the data by forcing participants to select a response with which they are uncomfortable. See *id.* at 16–18 (discussing the effect non-response errors can have on the quality of the data). Allowing participants to abandon the survey is consistent with the need to respect the participant's personal autonomy, a key ethical principle in human subject research. But see *id.* at 16 (discussing the possibility of non-response errors).

87. Questions with pre-existing answers followed several different patterns. Some questions were binary (requiring a "yes" or "no" answer) or ternary (requiring an answer of "yes," "no," or "maybe") in nature; some were categorical, which required participants to choose one alternative among several (as in cases where participants were asked to choose their primary form of employment or identify their home jurisdiction); and some were based on the Likert scale, which required respondents to select an opinion from a range of alternatives (such as strongly agree, agree, neither agree nor disagree, disagree, and strongly disagree, and including both positive and negative response options). Other questions with pre-existing answers asked participants to rank all available options or rank a certain number of their top choices from a list of possible alternatives. Ranking questions typically offered participants all or the most common alternatives discussed in the scholarly literature on that particular issue. Ranking questions also typically provided respondents with a follow-up opportunity to identify any additional answers that were not mentioned among the ranked alternatives.

questions were in English, which was considered appropriate given the widespread use of English in the field of international commercial dispute resolution.<sup>88</sup> The survey remained open for responses from October 8, 2014, through October 31, 2014.<sup>89</sup>

Although the research questions at issue here could have been addressed through various types of empirical methodologies,<sup>90</sup> a survey appeared to be the optimal model for

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88. See Ignacio Gómez-Palacio, *International Commercial Arbitration: Two Cultures in a State of Courtship and Potential Marriage of Convenience*, 20 AM. REV. INT'L ARB. 235, 244–45 (Garrett Epps trans., 2009) (noting that English is the predominant language in the field of international commercial arbitration). However, the use of English as the survey language effectively narrowed the survey population from all participants in international commercial dispute resolution (the population of inference) to all participants in international commercial dispute resolution who spoke English (the target population). See SCHONLAU ET AL., *supra* note 68, at 13 (defining “population of inference” as “the population about which the researcher ultimately intends to draw conclusions” and “target population” as “the population of inference minus various groups that the researcher has chosen to disregard”). This distinction could result in sampling errors, since it is not currently known whether and to what extent the opinions of non-English-speaking participants in international commercial dispute resolution differ from the opinions of English-speaking participants in international commercial dispute resolution with respect to the matters addressed in the survey. See *id.* at 15 (discussing these types of sampling errors).

89. Experts in survey design believe that at least a ten-day response period is necessary in most internet and web-based surveys. See SCHONLAU ET AL., *supra* note 68, at 28. Here, the study was open for twenty-three days and generated a survey sample that is adequate for the purpose at hand. See *infra* note 141 (discussing the appropriateness of the sample size). While more responses might have been obtained if the study had been kept open longer, it was necessary to close the survey at the end of October so as to be able to provide preliminary data to the UNCITRAL Secretariat in time to be considered for possible inclusion in papers submitted to delegates to the Working Group II meeting in February 2015. See Secretariat Note, *supra* note 51, at 6 n.16 (noting the availability of the preliminary report for delegates' review). As it turns out, the preliminary report of the research findings was indeed cited in several papers provided to delegates. See *id.* (citing the preliminary report); States' Comments, *supra* note 51, at 6 n.7 (same); see also Strong, *Preliminary Report*, *supra* note 54 (intending to provide a preliminary analysis to UNCITRAL regarding the proposed convention on international commercial mediation).

90. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999) (discussing the need for and types of empirical legal research); Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After the Lawyering Process*, 10 CLINICAL L. REV. 349, 353 (2003) (outlining various types of empirical research in law). For example, one way to reach this information might be through the use of directed or non-directed

several reasons. First, there is a dearth of empirical work available regarding international commercial mediation, and a survey is often the best way to begin empirical research in a particular field.<sup>91</sup> Furthermore, a survey allows the collection of data from a large number of participants who have very diverse backgrounds and who come from many different countries, thereby improving the broad applicability of the inferences to be gained from the research.<sup>92</sup> Use of a survey also allows inquiries on a relatively wide range of related subjects and provides a benchmark for later, more in-depth studies in specific areas of interest.<sup>93</sup> Finally, surveys have been used in a number of highly regarded empirical studies concerning international arbitration<sup>94</sup>

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interviews. *See id.* at 380 (identifying a benefit to methodological observation). Such studies may indeed be undertaken in the coming months. However, one problem of directed or non-directed interviews is that the results can devolve into mere anecdotal evidence if the study is not construed properly. *See id.* (detailing the effect of anecdotal evidence on data); *see also* Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1343 (2002) (admonishing legal studies for a lack of quality empirical work). Case studies are another means of studying social phenomenon, although that particular methodology can have “ideographic consequences” that do not exist in nomothetic research. Bercovitch & Houston, *supra* note 46, at 14.

91. *See* SCHONLAU ET AL., *supra* note 68, at 9 (discussing the use of surveys as pilot studies).

92. *See* Epstein & King, *Inference*, *supra* note 68, at 29–37 (distinguishing descriptive inferences from causal inferences).

93. Self-selecting surveys are often characterized as “convenience” surveys. *See* SCHONLAU ET AL., *supra* note 68, at 9–10, 85–86 (noting that these types of surveys may be most useful in early research). This survey adopted convenience sampling for a number of reasons. The most important of these rationales is that this study is the first in its field, and a convenience sample is an excellent means of “developing hypotheses early in the course of research, identifying various issues surrounding the research subject, defining response categories for multiple-response questions, or collecting other sorts of noninferential data.” *Id.* at 9. Time factors also influenced the decision to use convenience sampling. Because this study was generated, at least in part, to help inform the debate about whether and to what extent UNCITRAL should pursue a new convention in the area of international commercial mediation, a speedy response was necessary if any data was to be produced between the time that UNCITRAL decided to pursue the proposal made by the U.S. Department of State (July 2014) and the time that the UNCITRAL Secretariat needed data to support its report to Working Group II (Arbitration and Conciliation) for the Working Group’s February 2015 meeting (November 2014).

94. *See, e.g.*, QMUL Studies, *supra* note 73 (listing arbitration studies that used surveys).



and have been accepted as a sound method of gaining qualitative empirical data in other areas of international law.<sup>95</sup>

The survey instrument was made publicly available through a website whose address was distributed to the international legal and business communities through various blogs, periodicals, and listservs aimed at specialists in international commercial dispute resolution. Invitations to participate were directed toward potential respondents in all regions of the world and with a wide range of backgrounds, including academia, government, private practice and business.<sup>96</sup>

Although electronic surveys can be problematic in situations where potential participants find it difficult to access the website in question,<sup>97</sup> those types of concerns did not exist in the current study because the target population was extremely likely to have easy access to both computers and the internet.<sup>98</sup> Other potential problems could have arisen with respect to the lack of control over the ultimate distribution of the survey.<sup>99</sup> However, website

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95. See Franck, *Empiricism*, *supra* note 66, at 785 (listing a wide variety of quantitative approaches to analysis).

96. Although the efforts to circulate the survey internationally were too extensive to outline here, invitations were circulated through well-used listservs such as OGEMID (Oil-Gas-Energy-Mining-Infrastructure Dispute Management), ITAFOR (Institute for Transnational Arbitration Latin American Arbitration Forum), CEDR (Centre for Effective Dispute Resolution), the AALS (Association of American Law Schools), and UNCITRAL and posted on various blogs, including those sponsored by [kluwerarbitration.com](http://kluwerarbitration.com) and [kluwermediation.com](http://kluwermediation.com).

97. Lack of computer access can create coverage errors in the data. See SCHONLAU ET AL., *supra* note 68, at 14–15, 29 (addressing concerns about potential respondents lacking internet access).

98. In fact, internet surveys may be particularly appropriate in cases where access to computers is not a problem, since the accuracy associated with electronic means of data collection can minimize concerns regarding data validation, skip pattern errors and transcription. See *id.* at 30 (suggesting that internet-based surveys can help eliminate data errors).

99. For example, some people have suggested that surveys with uncontrolled distribution methods can be problematic because there is no way to verify that all respondents come from the target population. See *id.* at 35 (detailing possible errors caused by uncontrolled survey distribution). Other potential issues involve malicious or repeat responders. See *id.* (“There are ways to try to control multiple access by a particular computer user, but savvy users can fairly easily circumvent those safeguards.”). However, in this case, the survey software precluded the possibility of repeat takers, and the subject

distribution methods have been considered appropriate in cases where, as here, the population in question is electronically connected and is otherwise hard to reach.<sup>100</sup> Finally, some concerns about the validity of the research could be raised by virtue of the fact that the participants were self-selected. However, several studies have concluded that “self-selected respondents give higher-quality responses than randomly selected respondents,”<sup>101</sup> which suggests that the research method used in the current study was appropriate.

Once the data was collected, it was quantitatively analyzed on the basis of counting, ranking, sorting, and intensity of preference.<sup>102</sup> Although regression analyses are currently quite popular in the legal academy,<sup>103</sup> that type of statistical methodology was inappropriate here, given that the study did not

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matter of the survey was not one that would likely attract persons intent on skewing the results. *But see id.* (suggesting that sophisticated users can overcome survey software intended to block repeat responses).

100. *See id.* at 34 (discussing the usefulness of convenience surveys). While it is possible to identify specific known populations within the world of international commercial dispute resolution—for example, neutrals listed with certain dispute resolution providers, private practitioners at certain law firms known to be active in the field, or in-house counsel at Fortune 500 or Fortune 1,000 firms—this study was intended to glean information from a broader and more representative range of participants, including the rising number of generalist practitioners working in the field of international commercial dispute resolution. *See* S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT’L ARB. 119, 129–30 (2009) [hereinafter Strong, *Sources*] (noting that there has been a rapid increase in the number of lawyers who are “ready, willing, and able to take on international commercial arbitration”).

101. SCHONLAU ET AL., *supra* note 68, at 32; *see also id.* at 17 (suggesting that the difference in the levels of candor may be particularly marked for “surveys on sensitive topics or for surveys that contain sensitive questions,” as is arguably the case here, where confidentiality is a concern); *see supra* note 78 (discussing confidentiality).

102. These types of empirical analyses are considered valid for the purposes to which they are being put here. *See* SCHONLAU ET AL., *supra* note 68, at 5–18 (discussing studies on research methodology conducted by the RAND Corporation); Epstein & King, *Inference*, *supra* note 68, at 54 (noting that researchers need flexibility to conduct empirical research).

103. *See, e.g.*, Franck, *Empiricism*, *supra* note 66, at 785 (involving quantitative forms of analysis that studies independent variables in regression form); Franck & Wylie, *supra* note 7, at 468–69 (using regression models to show that outcomes were not random).

seek to establish any causal relationships or conduct predictive forecasting.<sup>104</sup> As some empiricists have noted when considering the validity of outcomes, “research design trumps methods of analysis.”<sup>105</sup>

#### IV. Existing Doctrine and Debate

All good empirical studies are meant to drive a particular field of inquiry forward.<sup>106</sup> However, these studies are never conducted in isolation.<sup>107</sup> Instead, empirical research incorporates and tests certain theoretical assumptions so as to improve the

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104. For example, commentators have noted that

[t]here are two main uses of multiple regression: prediction and causal analysis. In a prediction study, the goal is to develop a formula for making predictions about the dependent variable, based on the observed values of the independent variables. . . . In a causal analysis, the independent variables are regarded as causes of the dependent variable. The aim of the study is to determine whether a particular independent variable *really* affects the dependent variable, and to estimate the magnitude of that effect, if any.

PAUL D. ALLISON, MULTIPLE REGRESSION: A PRIMER 1–2 (1999). Not all methodological models are appropriate for all types of studies. See Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law—A Response to Professor Yackee*, 12 SANTA CLARA J. INT’L L. 303, 314 (2013) (arguing a particular methodological perspective was incorrect because the model did not analyze “BITs with no ISDS clauses at all and BITs with ISDS clauses that limit the arbitral tribunal’s subject matter jurisdiction”); Franck, *Empiricism*, *supra* note 66, at 786 (noting problems that arise when researchers choose methodological approaches that are likely to support already existing normative assumptions).

105. Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17, 27 (2011) (“By research design we mean ‘contemplating, collecting, organizing, and analyzing of data that takes place prior to seeing any outcome data’ . . . Methods of analysis, in contrast, involve the development of a model for outcomes (e.g., linear regression, generalized linear models, machine learning algorithms).” (citation omitted)).

106. See Epstein & King, *Inference*, *supra* note 68, at 56–59 (stating that scholars connect with past research to “avoid mistakes, skip arduous reinventions of existing ideas, and find additional observable implications of their theories”).

107. See *id.* (pointing out that research done in isolation often yields problematic conclusions).

understanding of specific issues.<sup>108</sup> This study adopted this methodological approach and considered existing scholarship during the survey design process as a means of developing appropriate content and identifying various theoretical issues that needed to be tested empirically. It is therefore necessary to provide a brief outline of the legal literature relating to mediation of international commercial and investment matters so as to put the interpretation of the survey results in its proper analytical context.

When reviewing existing doctrine and debate, researchers must consider both theoretical and empirical scholarship.<sup>109</sup> As indicated previously, no large-scale empirical studies have yet been conducted in the area of international commercial and investment mediation.<sup>110</sup> However, empirical work regarding domestic forms of mediation and various types of international dispute resolution were examined during the research design phase.<sup>111</sup>

The theoretical review was more extensive, since a growing number of commentators have begun to write in the area of international commercial and investment mediation.<sup>112</sup> These

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108. See *id.* (providing an example of an appropriate research methodology).

109. See *id.* (showing that this approach benefits researchers by allowing the researchers to better understand the entire spectrum of the research topic).

110. As noted previously, studies conducted recently by IMI are not sufficiently rigorous to be considered scholarly in nature, nor are they anywhere near as detailed as the current research. See *supra* note 53 (noting that the IMID study lacked scientific validity). While this Article was in production, two new studies that are tangentially related to this subject were published. See IMI, 2016 International Mediation and ADR Survey Results, <https://imimediation.org/imi-2016-biennial-census-survey-results> (containing interesting information, albeit in a non-scholarly context); Grant Morris, *From Anecdote to Evidence: The New Zealand Commercial Mediation Market*, 22 N.Z. BUS. L.Q. 10 (Mar. 2016) (focusing on the New Zealand market).

111. See *supra* notes 70–73 and accompanying text (“Although most of these works do not focus on commercial disputes and are therefore of only questionable utility in matters involving international commercial and investment mediation, these studies nevertheless demonstrate that consensual forms of dispute resolution can be studied.”).

112. See, e.g., John M. Barkett, *Avoiding the Costs of International Commercial Arbitration: Is Mediation the Solution?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010, 359, 365–82 (Arthur W. Rovine ed., 2010) (summarizing the international mediation

works can be divided into two separate categories, one aimed at practitioners and one aimed at academics. Practitioner-oriented publications can be further separated into two separate sub-categories, one focusing on questions relating to the internal conduct of an international commercial or investment mediation<sup>113</sup> and another discussing the difficulties associated

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rules of various international institutions); Laurence Boule, *International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35, 64–65 (2014) (proposing a convention); Ellen A. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, 22 DISP. RESOL. MAG. Fall 2015, at 32 (2015) (discussing the U.S. initiative concerning a new treaty); Gaultier, *supra* note 19, at 50–51 (discussing the obstacles, such as cooperation of the parties and cultural difference, facing international mediation); Laura A. Kaster, *Will There Be a Vast Worldwide Expansion of Mediation for International Disputes?*, 33 ALTERNATIVES TO HIGH COST LITIG. 120, 120–23 (2015) (describing the current debate at UNCITRAL); Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 BROOK. J. INT'L L. 827, 829 (2015) (discussing the UNCITRAL deliberations); Audrey Hong Li, *Thought on Developing Convention on Enforceability of Settlement Agreements Reached Through Conciliation*, ASIA PACIFIC REGIONAL ARB. GROUP (APRAG) NEWSLETTER 19, 20 (July-Dec. 2014) (supporting a new convention); Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements*, 7 CONTEMP. ASIA ARB. J. 119, 135 (2014) (suggesting a new enforcement regime); Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 SO. CAL. L. REV. 161, 161–66 (2002) (noting the need for a new treaty); Strong, *Epistemic Communities*, *supra* note 18 (discussing the effect of different cultures on treaty negotiations); Strong, *ICM*, *supra* note 20, at 11 (proposing a new convention); Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research*, 7 CONTEMP. ASIA ARB. J. 87, 110 (2014) (supporting a new treaty). Although the amount of literature concerning international commercial and investment mediation is growing, it remains dwarfed by the number of publications relating to international commercial and investment arbitration. See, e.g., BORN, ICA, *supra* note 1, at 3828–935 (containing extensive bibliography of materials concerning international commercial arbitration); S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES (2009) (same).

113. See, e.g., BÜHRING-UHLE, *supra* note 46, at 180–94 (describing important factors in obtaining settlement); Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 8–9 (1996) (describing the benefits of mediation, especially relating to “non-arbitrable” and “non-justiciable” issues); Mason, *supra* note 38, at 64–70 (describing the many differences that the mediator needs to account for when mediating international

with cross-cultural dispute resolution.<sup>114</sup> While useful in their way, these types of works are not relevant to the current research, which does not consider internal procedures.<sup>115</sup>

Academic scholarship concerning international commercial and investment mediation can also be broken into two distinct sub-categories. The first strand of research considers why parties prefer international arbitration over international mediation.<sup>116</sup> Theorists have posited a number of different hypotheses ranging from a cultural preference for adjudicatory mechanisms<sup>117</sup> to a

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commercial disputes). See generally EILEEN CARROLL & KARL MACKIE, *INTERNATIONAL MEDIATION: THE ART OF BUSINESS DIPLOMACY* (2d ed. 2006).

114. See Harold A. Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 *CARDOZO J. CONFLICT RESOL.* 253, 253–75 (2006) (focusing on the difficulties associated with selecting a mediator who is both trained to deal with cultural differences and equipped to fit the cultural needs of the parties); Barkai, *supra* note 38, at 52–87 (“American negotiators tend to be surprised by their interlocutors’ preoccupation with history and hierarchy, preference for principle over nitty-gritty detail, personalized and repetitive style of argument . . .”); Gaultier, *supra* note 19, at 50–54 (explaining the cultural differences that make cross-border mediation difficult); Don Peters, *It Takes Two to Tango, and to Mediate: Legal, Cultural, and Other Factors Influencing United States and Latin American Lawyers’ Resistance to Mediating Commercial Disputes*, 9 *RICH. J. GLOBAL L. & BUS.* 381, 419–29 (2010) (noting differences in U.S. and Latin American mediation styles and preferences); Daniel Q. Posin, *Mediating International Business Disputes*, 9 *FORDHAM J. CORP. & FINAN. L.* 449, 465–70 (2004) (outlining “four cultural dimensions that seem to explain value differences among cultures that can affect the negotiation and mediation process”); Wheeler & Morris, *Domestic*, *supra* note 60, at 4.

115. See *supra* note 77 and accompanying text (noting that the current research focuses on the beliefs and behaviors surrounding international commercial mediation).

116. See Abramson, *Time*, *supra* note 38, at 323 (“[D]espite the fact that mediation works and that mechanisms for handling international mediations are in place, mediation is rarely used.”); Steven J. Burton, *Combining Conciliation With Arbitration of International Commercial Disputes*, 18 *HASTINGS INT’L & COMP. L. REV.* 637, 637 (1995); Gaultier, *supra* note 19, at 50–51 (discussing why mediation breaks down); Charles L. Measter & Peter Skoufalos, *The Increasing Role of Mediation in Resolving Shipping Disputes*, 25 *TUL. MAR. L.J.* 515, 546 (2002) (discussing mediation in the maritime industry); Schwartz, *supra* note 20, at 99.

117. Some commentators believe that Western legal systems have a cultural predisposition towards adjudicative means of dispute resolution, and that the emphasis on mediation in those jurisdictions comes largely from the academic sector. See Barendrecht & de Vries, *supra* note 84, at 90 (noting the low incidence of mediation in Europe); Griffith & Mitchell, *supra* note 84, at 186–87 (“Historically, individuals from a Western common law background considered

lack of knowledge about the procedures themselves.<sup>118</sup> One notion that is frequently proposed is that users of international commercial and investment arbitration simply do not appreciate the benefits of mediation, which are said to include savings of time and money as well as the preservation of ongoing relationships and the ability to structure a creative settlement that would not be possible in litigation or arbitration.<sup>119</sup>

One problem that exists with respect to this line of scholarship is the underlying assumption that mediation is superior to both arbitration and litigation in most if not all regards and that the sole obstacle to increased use of mediation is a lack of knowledge about the process and its benefits.<sup>120</sup> This

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an adversarial system normal and acceptable, and often preferred an arbitration model, while those from Asian legal systems placed more emphasis on consensus and preventing loss of face, and preferred a conciliation model.”); Hensler, *Suppose*, *supra* note 39, at 83 (theorizing that humans strive for “harmony over conflict and cooperation over contest” because of a variety of factors including social, cultural, and personal circumstances); *see also* Abramson, *Time*, *supra* note 38, at 323 (describing mediation as a “structured negotiation conducted by a specially trained expert known as a mediator”); Barker, *supra* note 113, at 8–9 (theorizing that “parties’ principles and interests, rather than their bargaining positions,” determine settlements); Cymie Payne, *International Arbitration*, 90 AM. SOC’Y INT’L L. PROC. 244, 254 (1996) (discussing how mediators can overcome cultural barriers); Peters, *supra* note 114, at 419–29 (concluding that cultural influences are the “reasons why more identifying, explaining, and assessing the option of mediating makes sense” for both U.S. and Latin American lawyers). However, some commentators believe that support for international commercial mediation is not as high in some Asian nations as generally believed. *See* Yin, *supra* note 84, at 158 (“While mediation is becoming increasingly popular in Asia, its growth is slower than expected, especially in view of Asian history and culture.”). *But see* Madoff, *supra* note 112, at 161–66 (arguing that the popularity of mediation is often affected by the legal environment).

118. *See* Abramson, *Time*, *supra* note 38, at 323 (“Only when disputants gain more experience will we see greater use of mediation.”); Burton, *supra* note 116, at 637 (discussing differences between international arbitration and international mediation); Measter & Koufalos, *supra* note 116, at 546 (suggesting that the academic community does not always believe that the commercial mediation process is “real” mediation); Schwartz, *supra* note 20, at 99.

119. *See* Gaultier, *supra* note 19, at 50–51 (discussing benefits of mediation).

120. *See* Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, 50 DISP. RESOL. J. 34, 41 (1995) (noting that the benefits of mediation are not well known); A. Timothy Martin, *International Mediation: An Evolving Market*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND

assumption has led some authors to conclude that international commercial and investment mediation will increase naturally if and when parties become more familiar with the procedures.<sup>121</sup> However, the absence of any empirical data supporting the superiority of mediation in international commercial and investment disputes makes the overt preference for mediation in the scholarly literature somewhat suspect.<sup>122</sup> Indeed, some observers have suggested the existence of a potential bias toward

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MEDIATION: THE FORDHAM PAPERS 2010, 404, 417 (Arthur W. Rovine ed., 2011) (discussing how, despite the time and cost savings and high success rate, mediation is being used somewhat sparingly internationally).

121. See Langeland, *supra* note 120, at 41 (noting that the continued use of mediation “in international treaty settlement procedures, like GATT, and the institutional inducements should make it more visible and available”); Martin, *supra* note 120, at 47 (“Business will only use dispute resolution tools that they know and with which they are comfortable. That takes time and that is what is slowly happening [with mediation].”).

122. Some industry-specific studies have been attempted, but nothing on a large-scale or generalized basis. See Gaultier, *supra* note 19, at 47–49 (discussing success rate of mediation and issues regarding enforceability); Nicholas Gould, *The Use of Mediation in Construction Disputes*, 27 ASA BULL. 580, 582–88 (2009) (explaining how mediation is commonly used in construction disputes). Part of the problem arises because there is no consensus about what constitutes “success” in mediation. Some people focus on the rate of settlement while others look at the time it takes to finally dispose of a matter, whether through trial or settlement. See Jeffrey J. Dywan, *An Evaluation of the Effect of Court-Ordered Mediation and Proactive Case Management on the Pace of Civil Tort Litigation in Lake County, Indiana*, 2003 J. DISP. RESOL. 239, 252 (focusing on the elimination of backlogs); John L. Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 641 (2007) [hereinafter Lande, *Principles*] (noting various goals policy makers might have in promoting mediation); Thomas J. Stipanowich, *ADR and “The Vanishing Trial,”* 10 DISP. RESOL. MAG. Summer 2004, at 7 [hereinafter Stipanowich, *Vanishing*] (citing sixty-two studies summarized by the Center for Analysis of Alternative Dispute Resolution Systems (CAADR)). Other people consider it important to factor in the reduction of judicial backlogs. See Dywan, *supra* at 239 (discussing an Indiana state court study); Lande, *Principles, supra*, at 641 (noting various goals policy makers might have in developing an ADR system); Stipanowich, *Vanishing, supra* at 8 (focusing on judicial dockets). However, another problem is that proponents of international commercial mediation often fail to take into account the financial ramifications of any process that delays final resolution of high-value international disputes. See Kantor, *supra* note 30, at 214; Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT’L L.J. 603, 659 (2012) (describing variations and obstacles that exist in mediation mechanisms).



consensual forms of dispute resolution among members of the legal academy.<sup>123</sup>

While this Article does not engage with the debate about the substantive merits of international commercial and investment mediation, the study nevertheless tests a number of the theoretical presumptions concerning the purported benefits of the procedure. This type of analysis is vital to the continued development of the field and the ongoing deliberations at UNCITRAL regarding a new international instrument in this area of law.<sup>124</sup>

The second strand of academic scholarship focuses on the legal environment surrounding international commercial mediation.<sup>125</sup> This line of research has become both more expansive and more important in recent years due to the rising number of legal instruments relating to mediation in the cross-border commercial context<sup>126</sup> and increased efforts by both public

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123. See Hensler, *Suppose*, *supra* note 39, at 83 (“The notion that civil litigants with money damage disputes prefer mediation to adversarial litigation adjudication is so ingrained in contemporary legal culture that it is rarely questioned.”).

124. See *supra* notes 50–64 and accompanying text (“The current study was therefore initiated as a means of providing assistance to participants in the UNCITRAL process as they discussed the need, viability and shape of a new international instrument involving international commercial mediation.”); see also *infra* notes 227–268 and accompanying text (stating that the data supports two conclusions: “first, that international commercial actors do not currently use mediation as a routine means of resolving their disputes, and second, that most international commercial mediations that do go forward are initiated pursuant to pre-dispute contractual agreements”).

125. See Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 581–91 (2005) [hereinafter Deason, *Procedural Rules*] (“Some states expedite enforcement by treating certain mediated settlements—typically those of international commercial disputes—as arbitral awards enforceable in summary proceedings.”); Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (noting that the lackluster use of international commercial mediation could be due to the “absence of any multilateral or bilateral treaties” to enforce mediation and settlement agreements); Yin, *supra* note 84, at 158–59 (suggesting legislative responses to problems associated with international mediation).

126. See European Directive, *supra* note 58, at 3–5 (creating a multi-factor legal framework that attempts to promote the use of mediation and that works within the European Union); Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, G.A. Res. 57/18, U.N. Doc. A/Res/57/18, U.N. GAOR, 57th Sess. (Jan. 24, 2003)

and private institutions to promote consensual means of dispute resolution.<sup>127</sup> As a result, commentators have analyzed

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[hereinafter UNCITRAL Model Conciliation Law], [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) (providing a standard mechanism for protecting mediation as a matter of national law); Conciliation Rules of the United Nations Commission on International Trade, U.N. GAOR, 35th Sess., 81st plen. mtg. at 260, U.N. Doc. A/35/52 (1980) [hereinafter UNCITRAL Conciliation Rules], <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf> (creating a set of ad hoc rules for mediation of commercial disputes). Recent years have also seen an increasing number of arbitral institutions adopting rules regarding international commercial mediation. See BÜHRING-UHLE, *supra* note 46, at 180–94 (describing various institutional rules of mediation).

127. See Neil Andrews, *Connections between Courts, Arbitration, Mediation and Settlement: Transnational Observations*, 10 IUS GENTIUM 249, 264 (2012) (noting growing use of multi-tier dispute resolution clauses that include mediation); Barkett, *supra* note 112, at 364 (describing the benefits of international mediation); Deason, *Procedural Rules*, *supra* note 125, at 572–91 (describing various instruments involving international commercial mediation); Gaultier, *supra* note 19, at 38 (“The goal of this article is to analyze the implications of using mediation as a solution for reaching international commercial dispute settlements.”); William A. Herbert et al., *International Commercial Mediation*, 45 INT’L LAW. 111, 111–23 (2011) (analyzing recent changes in mediation processes in the European Union); Mason, *supra* note 38, at 66–70 (analyzing some of the elements that distinguish international mediation from domestic mediation); Nolan-Haley, *New Arbitration*, *supra* note 18, at 66–67 (describing “legal mediation’s advance toward the arbitration practice zone with a specific focus on three dimensions”); Jernej Sekolec & Michael B. Getty, *The UMA and the UNICTRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 175–96 (comparing the UNCITRAL Model Conciliation Law and the Uniform Mediation Act); Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21 J. INT’L ARB. 1, 1–65 (2004) (criticizing certain legal measures that were intended to increase mediation usage); Welsh & Schneider, *supra* note 19, at 77 (discussing investor-state mediation). The international corporate community is particularly supportive of mediation, as reflected by the over 4,000 domestic and international corporations who have signed the CPR Corporate Policy Statement on Litigation, which advocates alternative means of dispute resolution. See generally CPR, Corporate Pledge, [https://www.cpradr.org/Portals/0/About\\_CPR/Pledge/CPR%20Corporate%20Pledge%20on%20Alternatives%20to%20Litigation.pdf](https://www.cpradr.org/Portals/0/About_CPR/Pledge/CPR%20Corporate%20Pledge%20on%20Alternatives%20to%20Litigation.pdf). General Electric and Siemens are two multinational corporations who have publicly advocated early dispute resolution. See Gans & Stryker, *supra* note 60, at 41 (“[Siemens Corporation] is committed to resolving disputes that arise in connection with those businesses through both traditional and non-traditional alternatives to litigation.”); Wheeler & Morris, *Domestic*, *supra* note 60, at 2–4 (discussing General Electric’s domestic dispute resolution strategy, based on the Six Sigma approach); Wheeler & Morris, *International*, *supra* note 38, at 801–53

everything from the European directive on mediation in civil and commercial matters<sup>128</sup> to the UNCITRAL Model Conciliation Law<sup>129</sup> and the UNCITRAL Conciliation Rules.<sup>130</sup>

One issue that is of special interest to the current discussion involves questions regarding the international enforceability of settlement agreements arising out of cross-border commercial mediation.<sup>131</sup> Experience in the domestic realm suggests that voluntary compliance with settlement agreements is declining, thereby increasing the need for legal enforcement mechanisms.<sup>132</sup>

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(discussing the internationalization of General Electric's dispute resolution strategy).

128. See European Directive, *supra* note 58, ¶ 8 (noting the directive applies only to inter-European matters); Matcheld W. de Hoon, *Making Mediation Work in Europe*, 20 DISP. RESOL. MAG. 23, 23–26 (Winter 2014) (examining the E.U.'s mediation directive); Palo & Canessa, *supra* note 59, at 713 (noting that “despite increased awareness of mediation and numerous studies and assessment, which have proved its benefits, mediation still remains largely under-utilized as a method of dispute resolution”); Giuseppe de Palo & Mary Trevor, *Making the European Commission's Mediation Directive More Effective*, 30 ALTERNATIVES TO HIGH COST LITIG. 137, 141–46 (2012) (suggesting ways to increase the use of mediation in the European Union); Nolan-Haley, *Mediation*, *supra* note 19, at 989–1011 (discussing the possibility of mandatory mediation regimes in the European Union).

129. See UNCITRAL Model Conciliation Law, *supra* note 126, at 1–7 (providing a harmonized means of promoting international commercial conciliation); William K. Slate II et al., *UNCITRAL (United Nations Commission on International Trade Law), Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 93–106 (2004) (“UNCITRAL drafted the Model Law on International Commercial Conciliation to assist states in designing dispute resolution procedures intended to reduce the costs of dispute settlement, foster and maintain a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade.”).

130. See UNCITRAL Conciliation Rules, *supra* note 126, at 1–8 (providing a set of ad hoc rules for international commercial mediation); Griffith & Mitchell, *supra* note 84, at 197–99 (describing the benefits of the UNCITRAL Conciliation Rules); Slate et al., *supra* note 129, at 93–106 (“The Rules are meant to govern ‘the conduct of a conciliation’ intended to resolve a dispute or disputes between the parties.”).

131. See U.S. Proposal, *supra* note 19 (“One obstacle to greater use of conciliation, however, is that settlement agreements reached through conciliation may be more difficult to enforce than arbitral awards.”).

132. See Nolan-Haley, *New Arbitration*, *supra* note 18, at 88–89 (citing empirical studies indicating that “the highest number of litigated mediation cases [in recent years] concerned challenges to the enforceability of mediated

Although some authorities have suggested that international settlement agreements are enforceable under the New York Convention,<sup>133</sup> that approach is not available in all cases.<sup>134</sup> Furthermore, efforts to enforce a settlement agreement through the New York Convention or as a standard contract are often costly and inefficient as well as highly unpredictable.<sup>135</sup>

Numerous commentators have suggested that the best way to resolve these sorts of problems is through a new international treaty that would facilitate the enforcement of settlement agreements arising out of international commercial mediation in much the same way that the New York Convention facilitates enforcement of foreign arbitral awards.<sup>136</sup> Such efforts could

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agreements,” at least in the domestic realm).

133. See generally New York Convention, *supra* note 13; Gaultier, *supra* note 19, at 48 (discussing use of the New York Convention for settlement agreements); Christopher Newmark & Richard Hill, *Can a Mediated Settlement Become an Enforceable Arbitration Award?*, 16 *ARB. INT'L* 81, 81–87 (2000); David Weiss & Brian Hodgkinson, *Adoptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements*, 25 *AM. REV. INT'L ARB.* 275, 279–81 (2014) (identifying criteria for application of the New York Convention); Brette L. Steele, Comment, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 *UCLA L. REV.* 1385, 1386–412 (2007) (noting that the New York Convention could apply to mediated settlement agreements, although the fit is imperfect).

134. Significant problems can arise in cases where the parties do not have a pre-existing arbitration agreement or where mediation is a precondition to arbitration. See Newmark & Hill, *supra* note 133, at 81–87 (noting that although numerous arbitral rules and arbitration laws permit the entry of a consent award in situations where the parties settle their dispute during the pendency of an arbitration, there still needs to be an arbitration before those rules and laws apply).

135. See generally New York Convention, *supra* note 13. See also WG Report, *supra* note 19, ¶ 17 (noting that the research discovered that “it was generally more difficult to enforce settlement agreements outside the State in which the agreements were conducted” and “the lack of a harmonized enforcement mechanism was a disincentive for parties to proceed with conciliation”); U.S. Proposal, *supra* note 19, at 2–3 (describing settlement agreements that are reached through conciliation, are enforceable as contracts, but enforcement under contract law is difficult); Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION*, THE FORDHAM PAPERS 2008 at 343 (Arthur W. Rovine ed., 2009) (explaining that difficulties in enforcement “render[] the judgment of diminished utility”).

136. See New York Convention, *supra* note 13 (outlining enforcement of

return international commercial mediation to the same level of popularity it experienced prior to World War II.<sup>137</sup> These discussions are of course highly relevant to the ongoing deliberations at UNCITRAL and to the current study.<sup>138</sup>

### V. Demographics of Participants

Before discussing the data itself,<sup>139</sup> it is useful to describe the demographics of the survey participants so as to demonstrate the validity of the conclusions reached herein.<sup>140</sup> The survey

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foreign arbitral awards); *see also* Boule, *supra* note 112, at 65 (“A mechanism for the international enforcement of MSAs is one way of providing certainty and finality for the parties involved.”); Li, *supra* note 112, at 20 (noting the difficulty in enforcement of settlement agreements from conciliation); Lo, *supra* note 112, at 135 (“A binding instrument in the form of a convention could more quickly achieve global recognition and enforcement of iMSAs.”); Madoff, *supra* note 112, at 161–66 (arguing that legal doctrines encourage parties to engage in mediation); Strong, *ICM*, *supra* note 20, at 27–28, 30–38 (“Therefore, drafters of any proposed treaty on international commercial mediation should likely limit themselves to two basic elements . . . enforcements of the agreement to engage in a particular type of dispute resolution process and enforcement of the end product of the dispute resolution process.”); Wolski, *supra* note 112, at 110 (describing potential provisions in an instrument on international commercial mediation).

137. *See* New York Convention, *supra* note 13 (outlining enforcement of foreign arbitral awards); *see also* Reif, *supra* note 20, at 614–15 (“In the initial years, from 1923–1929, conciliation was quite popular, especially when compared to the number of arbitrations.”); Schwartz, *supra* note 20, at 107; Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (stating that mediation and conciliation were frequently used to resolve “international commercial conflicts in the first half of the twentieth century”).

138. *See* U.S. Proposal, *supra* note 19 (proposing a new instrument to facilitate enforcement of international settlement agreements). Indeed, the current research directly addresses several of the key questions posed by UNCITRAL during the July 2014 meeting. *See* Secretariat Note, *supra* note 51, ¶ 2 (identifying obstacles to international enforcement of settlement agreements).

139. This Article includes a great deal of numerical data arising out of the survey. All of the information provided herein is accurate, although in some cases the reported percentages do not add up to 100%. This phenomenon occurs as a result of rounding the raw data up or down to the nearest percentage point. Any deviations that occur are quite small (in the range of 1%–2%) and arise only rarely.

140. Although all of the demographic data was self-reported, there is no reason to believe that any of the participants falsified their responses,

generated responses from 221 participants with very diverse characteristics.<sup>141</sup> Most respondents (35%) came from private practice, although a significant proportion (28%) indicated that they worked primarily as neutrals (arbitrators, mediators, or conciliators) or academics (20%). A smaller number of participants indicated that they worked as in-house counsel (7%) or in other forms of employment (10%), which included work as judges, in government, in multiple types of types of employment (for example, as both a private practitioner and a neutral) and in institutional settings (such as an arbitral institution).<sup>142</sup>

A majority of survey participants were extremely experienced in dispute resolution, with 56% of the respondents indicating that they had 15 or more years of experience in the field. The remaining participants were relatively evenly distributed in terms of experience. Thus, 14% of the respondents indicated that they had between 10 and 14 years' experience in dispute resolution, 15% had between 5 and 9 years' experience and less than 15% reported less than 5 years' experience.

The survey attracted participants with a range of both domestic and international experience. When asked to identify how much work they had done in the last three years relating to international commercial dispute resolution (which was defined as including litigation, arbitration, mediation, and conciliation in the international commercial context), 17% of respondents indicated that they worked on international matters 81%–100% of the time. Approximately 14% of respondents indicated that

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particularly since the study was entirely anonymous. *See* SCHONLAU ET AL., *supra* note 68, at 17, 32 (noting that “self-respondents give higher-quality responses than randomly selected respondents”).

141. The sample size appears appropriate, given the novelty of the subject matter. Indeed, other international surveys have generated fewer responses and have still been considered valid. *See id.* at 36 (discussing one international electronic survey that only generated eighty responses from fourteen countries on four continents, with 40% of the respondents coming from one country); Mistelis, *supra* note 73, at 534 (involving 103 participants for a study of international commercial arbitration); *see also* SCHONLAU ET AL., *supra* note 68, at 85–86 (describing a study that sent out 19,000 emails and received a very small number of respondents).

142. Those who responded “other” to this question were asked to state their primary form of employment.

they worked in international commercial dispute resolution 61%–80% of the time, 11% worked in the field 41%–60% of the time and 21% worked in the field 21%–40% of the time. Interestingly, the largest group of respondents (37%) indicated that between 0%–20% of their work over the last three years involved international commercial dispute resolution.

Some people might find the fact that more than one-third of the respondents did not have extensive personal experience with international dispute resolution to be problematic. However, that outcome was both expected and welcomed for two reasons. First, the world of international commercial dispute resolution is no longer restricted to a limited number of specialists located in a small number of firms in a few key cities, as was once the case.<sup>143</sup> Globalization has diversified the field of international commercial dispute resolution in a variety of ways, most notably through the increasing number of generalists who are now becoming involved in matters that once would have been resolved entirely by specialists.<sup>144</sup> Because these generalists will influence the way that international commercial disputes are resolved in the future, for better or worse,<sup>145</sup> it is necessary to include such persons in the current survey. Second, in many countries, the only people with significant experience in mediation are those who practice primarily, if not exclusively, in the domestic realm. Although there are some significant differences between national and international commercial disputes, domestic experiences with mediation provide a starting point for discussions about mediation in the international commercial context.<sup>146</sup>

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143. See Strong, *Sources*, *supra* note 100, at 129–30 (“With this rapid expansion in practice opportunities has come a similarly rapid increase in the number of lawyers holding themselves out as ready, willing, and able to take on international commercial arbitrations . . .”).

144. See S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 8 (noting the rise of small to mid-sized businesses in international arbitration due to globalization).

145. See *id.* at 4 (observing that an increasing number of generalist practitioners are entering the international sphere without an understanding of the unique policies and practices that are involved).

146. See Bercovitch & Houston, *supra* note 46, at 14 (discussing practice of mediation); Strong, *ICM*, *supra* note 20, at 16–24 (describing the cultural

Furthermore, domestic laws regarding mediation will both influence and be influenced by any international instrument that may be adopted in this field.<sup>147</sup> As a result, it is appropriate to include specialists in domestic forms of dispute resolution in this study.

The survey enjoyed a wide geographic distribution, with approximately one-third of the respondents coming from both North America and Europe and one-third coming from the rest of the world. The highest number of respondents (35%) came from the United States, with the next highest proportion of respondents (11%) coming from the United Kingdom.<sup>148</sup> This phenomenon could be attributed to language fluency, but there are other possible rationales, including the fact that the United States and the United Kingdom are both home to a large number of specialists in international commercial arbitration (a field that is closely related to international commercial mediation) as well as a relatively large number of experts in domestic mediation.<sup>149</sup> The remaining respondents came from all over the world,

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differences between domestic and international commercial mediation).

147. This type of symbiotic relationship is evident in the world of international commercial and investment arbitration. *See generally* STRONG, GUIDE, *supra* note 1, at 16, 23, 51; *see also* Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 877 (2011) ("The development of the discourse on international investment law therefore reflects both an evolution in the law itself, and changes in the professional, political, and institutional practices involved."). Furthermore, states that adopt a dualist approach to international treaties may alter various international standards during the domestic implementation process. *See generally* S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM & DUALISM 547, 556–69 (Marko Novakovic ed., 2013).

148. This phenomenon does not necessarily invalidate the study. *See* SCHONLAU ET AL., *supra* note 68, at 36 (discussing one international electronic survey where 40% of the respondents came from one country).

149. Two of the other leaders in international commercial arbitration, France and Switzerland, showed more modest participation rates (3.7% each). *See* Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 477–78 (2007) (noting the three most important jurisdictions in the field of international commercial arbitration are England, France, and Switzerland).



including 27% from Europe (excluding the United Kingdom),<sup>150</sup> 13% from Asia,<sup>151</sup> 7% from Latin America,<sup>152</sup> 4% from the Middle East,<sup>153</sup> 2% from Oceania<sup>154</sup> and 2% from other regions.<sup>155</sup>

Half of the respondents (51%) indicated that they had been personally involved in at least one international commercial mediation in the last three years, which was defined as including any matter for which the respondent had prepared, even if the mediation was cancelled before actual proceedings began. The other half of the respondents (49%) had not been personally involved in international commercial mediation during the preceding three years.

The varying levels of experience in the subject pool was neither surprising nor unwelcome. The study was designed with the expectation that not all participants would have recent personal experience with international commercial mediation, since the opportunity to be involved in such matters depends on a number of factors outside any single person's control.<sup>156</sup> Furthermore, participants without recent personal experience in international commercial mediation can nevertheless provide important insights into their own and others' perceptions of the

150. The European participants (excluding the United Kingdom) came from Austria (0.9%), Belgium (0.9%), Croatia (0.5%), Czech Republic (0.5%), France (3.7%), Georgia (0.9%), Germany (2.8%), Greece (4.7%), Hungary (0.9%), Italy (1.9%), the Netherlands (1.9%), Norway (0.5%), Poland (0.5%), Portugal (0.9%), Romania (0.5%), Spain (0.9%), Sweden (0.5%), and Switzerland (3.7%).

151. The Asian participants came from China (1.9%), India (2.3%), Indonesia (0.9%), Japan (0.5%), Malaysia (0.5%), Mongolia (0.5%), Pakistan (0.9%), the Philippines (0.5%), Russia (0.5%), Singapore (1.4%), South Korea (1.4%), Taiwan (0.5%), Uzbekistan (0.5%), and Vietnam (0.5%).

152. The Latin American participants came from Brazil (3.3%), Colombia (0.9%), Costa Rica (0.5%), Ecuador (0.5%), El Salvador (0.5%), Guatemala (0.5%), and Mexico (0.9%).

153. The Middle Eastern participants came from Bahrain (0.5%), Iran (0.9%), Israel (0.9%), Lebanon (0.5%), Saudi Arabia (0.5%), and Turkey (0.5%).

154. The Oceanian participants came from Australia (1.4%) and Fiji (0.5%).

155. The remaining participants came from Canada (1.4%) and Nigeria (0.9%).

156. See de Palo & Canessa, *supra* note 59, at 716 (noting the relevance of "regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties").

procedure and can provide information about usage rates based on their observations.

Nevertheless, some questions are best answered by those with personal experience. Therefore, the study controlled for differing levels of experience by directing some questions only to those respondents who had recent personal experience with international commercial mediation and asking slightly different questions of those respondents who did not have any recent personal experience in the field. In other cases, the survey asked a question of all participants, but subsequent analysis filtered responses by reference to the subjects' level of experience with international commercial mediation. The following discussion identifies those areas where distinctions based on experience have been made.

#### *VI. Analysis of Survey Data Concerning Current Practices and Perceptions*

This study was constructed with two goals in mind.<sup>157</sup> First, the survey aimed to discover and describe current behaviors and attitudes relating to international commercial mediation so as to set a benchmark for further analysis in this field and generate various descriptive inferences.<sup>158</sup> Conditional branching (skip logic) was used to determine whether and to what extent perceptions of international commercial mediation varied depending on the amount of personal experience the respondent had with those procedures. However, no attempt was made to study causality (i.e., whether use of international commercial mediation resulted in certain perceptions regarding the procedure

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157. See *supra* notes 77–78 and accompanying text (stating that two goals were “to discover and describe current behaviors and attitudes relating to international commercial mediation” and to “help the participants in the UNCITRAL process determine whether and to what extent a new international instrument is needed in this area of law”).

158. See Epstein & King, *Inferences*, *supra* note 68, at 29 (noting descriptive inferences are not made “by summarizing facts” but “by using facts we know to learn about facts we do not observe”); see also *id.* at 34 (discussing how to assess the validity of descriptive inferences).

or whether certain perceptions regarding international commercial mediation preceded use of consensual processes).

A number of questions concerning current beliefs and behaviors were directed at all participants, regardless of the extent of their recent personal experience with international commercial mediation. Although it was possible to filter responses to these questions based on the respondent's direct experience, it was not always deemed necessary to do so.

*A. How and When Is Mediation Currently Used in the International Commercial Context?*

*1. Numbers of Proceedings*

The first matter to be addressed by the survey involves the extent to which mediation is currently being used by international commercial actors. This issue, which provides a partial empirical response to scholarship suggesting that international commercial mediation is on the rise,<sup>159</sup> was addressed through a question that was directed only to those respondents who indicated that they had been involved in or prepared for at least one international commercial mediation in the last three years, and asked how many international commercial mediations the respondent had been involved with during that time period, either as a party, counsel, or neutral.<sup>160</sup>

The reaction to this question was in many ways unsurprising. A significant majority of respondents to this question (63%) had been involved in a relatively small number of mediations (meaning one (20%), two (13%), or three (30%)

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159. See *supra* notes 32–34 and accompanying text (noting that “a range of public entities (such as the World Bank, the International Finance Corporation and the European Commission) and private organizations (such as the ICC, the International Institute for Conflict Prevention & Resolution (CPR), and the International Mediation Institute (IMI))” have adopted “various initiatives meant to facilitate mediation in the commercial and investment contexts”).

160. In addition to providing information about the frequency of international commercial mediation in the target population, this question also allowed later responses to be filtered based on the respondents' level of expertise with the procedures in question.

proceedings in the previous three years. Of the remaining respondents, 14% indicated that they had been involved in four to nine proceedings in the previous three years, 12% indicated that they had been involved in ten to fifteen proceedings in the previous three years, and 9% indicated that they had been involved in twenty or more international commercial mediations in the previous three years.

This data suggests that international commercial mediation is still relatively uncommon, although some individuals have a great deal of experience with the procedure. Interestingly, this phenomenon suggests that international commercial mediation may be developing along the same path as international commercial and investment arbitration. At one time, international commercial arbitration was extremely rare, with a significant expansion in the number of proceedings only occurring after the widespread adoption of the New York Convention.<sup>161</sup> Investment arbitration grew at a much slower rate, at least initially, and only became popular within the last ten years.<sup>162</sup> Prior to the adoption of various international treaties providing for enforcement of international commercial and investment awards, mediation was the primary means of resolving cross-border business disputes.<sup>163</sup>

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161. Although the New York Convention was adopted in 1958, widespread adherence did not exist until the 1980s and 1990s. *See generally* New York Convention, *supra* note 13; New York Convention Status, *supra* note 13 (identifying the one hundred and fifty-six countries that have adopted the New York Convention). While statistical evidence regarding the number of arbitral proceedings conducted in any given year is difficult to obtain due to the confidential nature of international commercial arbitration, “the International Chamber of Commerce’s International Court of Arbitration received requests for 32 new arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, 529 arbitrations in 1999, 599 arbitrations in 2007 and 759 in 2012—a roughly 25-fold increase over the past 50 years.” BORN, ICA, *supra* note 1, at 93.

162. *See* Born, *New Generation*, *supra* note 11, at 830–41 (discussing rate of growth of investment arbitration); *see also supra* note 11 (discussing the rise of ISDS). The number of investment arbitrations per year remains much smaller than the number of international commercial arbitrations. *See supra* note 11 and accompanying text (noting that between twenty and fifty investment arbitrations are filed each year as compared to 5,000 international commercial arbitrations).

163. *See* Reif, *supra* note 20, at 614–15 (noting a greater use of mediation

Furthermore, the practice of international commercial and investment arbitration began with a small “insiders’ club” of specialists and has only recently begun to expand to include general practitioners.<sup>164</sup> Finally, in some countries, the use of commercial arbitration began at the domestic level before spreading to the international sphere,<sup>165</sup> while in other jurisdictions, the rising use of international commercial arbitration triggered interest in and use of domestic arbitration.<sup>166</sup> While it is still too early to say whether international commercial and investment mediation will ever become as popular as international commercial and investment arbitration, that outcome may be possible if mediation and arbitration can be placed on a level playing field.<sup>167</sup>

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than arbitration during this period); Salacuse, *supra* note 20, at 157 (discussing the spread of investment arbitration in the late twentieth century); Schwartz, *supra* note 20, at 107 (noting that consensual procedures were utilized far more than arbitration before World War II); Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (explaining that arbitration became popular in cross-border business disputes after World War II).

164. See Roberts, *supra* note 1, at 297–300 (predicting that investment arbitration features specialists in both international commercial arbitration and public international law); Strong, *Sources*, *supra* note 100, at 129–30 (noting an increase in the number of non-specialists in the international commercial arbitration market).

165. For example, “[a] study of domestic commercial arbitration in the mid-20th century United States concluded that a substantial percentage of U.S. commercial disputes were arbitrated (rather than litigated).” BORN, *ICA*, *supra* note 1, at 93 (citing Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 698 (1952)) (noting in 1952 that “preliminary inquiry suggests that if we lay aside first the cases in which the government is a party and second the accident cases, then the matters going to arbitration rather than to the courts represent 70 per cent or more of our total civil litigation”); see also Lande, *Faith*, *supra* note 70, at 227 (suggesting commercial lawyers support mediation). *But see* Barendrecht & de Vries, *supra* note 84, at 90 (citing a survey conducted by the American Arbitration Association (AAA) in 2003 indicating that “only 7% of companies use mediation very frequently and 17% use it frequently—compared to 35% occasionally, 25% rarely, and 16% not at all . . . . Tellingly, many respondents attribute this use of ADR to court-mandated mediation programs (63% of respondents mentioned this as a reason for using mediation)”).

166. See BORN, *ICA*, *supra* note 1, at 60–61 (discussing the rise of international arbitration worldwide).

167. See de Palo & Canessa, *supra* note 59, at 716 (noting obstacles to international mediation); Strong, *ICM*, *supra* note 20, at 28 (discussing

All but one of the respondents who indicated that they had experience with more than twenty international commercial mediations over the last three years were employed as neutrals.<sup>168</sup> However, not all of these highly experienced respondents specialized in international commercial disputes. Instead, the amount of international experience was evenly distributed, with 29% of these participants indicating that over the last three years they had been involved in international commercial matters 81%–100% of their time, 29% indicating that they had spent 61%–80% of their time involved in international commercial matters and 29% indicating that they had spent 41%–60% of their time involved in international commercial matters. A smaller percentage (14%) of respondents indicated that only 21%–40% of their work over the last three years had been international in nature.

Interestingly, most of the people (43%) who had been involved with twenty or more international commercial mediations came from the United Kingdom. Others with experience in twenty or more international commercial mediations came from Italy (14%), Lebanon (14%), Switzerland (14%), and the United States (14%). These results strongly contravene conventional wisdom suggesting that mediation is a U.S.-centric enterprise.<sup>169</sup>

## 2. *How Proceedings Arise*

The survey asked those who had been personally involved in at least one international commercial mediation in the last three years to identify how such proceedings were most likely to arise, in the respondent's experience. This information is important to

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inequalities between the two procedures).

168. The one person who was not primarily employed as a neutral worked as in-house counsel.

169. See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 750–64 (2007) (noting spread of mediation and its relationship to globalization); Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477, 490 (2012) (explaining the rise of "legal imperialism").

academics and practitioners as well as participants in the UNCITRAL process, since it is impossible to know how best to facilitate and encourage a particular procedure unless one knows how the procedure arises most frequently in practice.<sup>170</sup>

The vast majority of respondents indicated that international commercial mediation was most likely to arise pursuant to a contractual mandate, either through a standalone pre-dispute mediation agreement or a pre-dispute multi-tier (step) dispute resolution clause.<sup>171</sup> This conclusion was consistent with anecdotal reports of industry practice.<sup>172</sup> Standalone mediation provisions were named as the top-ranked choice 30% of the time, while tiered dispute resolution clauses were named as the top ranked choice 29% of the time. Furthermore, standalone mediation provisions were named as the second-ranked choice 21% of the time, while tiered dispute resolution clauses were named as the second ranked choice 35% of the time. Together, the intensity of these responses suggests an extremely high probability that mediation is triggered by contract in international commercial matters.

Respondents also ranked other possible means of initiating international commercial mediation. Voluntary adoption of the procedure post-dispute pursuant to a suggestion by counsel was identified as the third most likely option,<sup>173</sup> while voluntary

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170. Existing scholarship does not appear to provide a consensus view on how such procedures arise. See *supra* notes 44–46 and accompanying text (explaining that there is considerable debate over whether cross-border disputes are amenable to mediation).

171. See Sandrock, *supra* note 2, at 8, 32–34 (describing types of dispute resolution clauses).

172. Experts have long recognized that international commercial mediation can arise either through the use of standalone agreements or multi-tiered dispute resolution provisions created either before or after the dispute arises. See Andrews, *supra* note 127, at 264 (noting that “[i]t has become common for a multi-tier dispute resolution clause to provide that mediation should be attempted before proceeding to arbitration or court litigation”); Mason, *supra* note 38, at 66 (explaining that international commercial mediations usually arise pursuant to a pre-dispute dispute resolution clause). International commercial mediation could also arise as the result of a court-mandated mediation program. See *id.* (emphasizing the rarity of this impetus for international commercial mediation).

173. This alternative was selected as the first most likely option by 20% of the respondents. Although this number is smaller than figures relating to

adoption of the procedure pursuant to company policy was the next most likely option. By far the least likely methods of engaging international commercial mediation involved judicial mandates and suggestions from a party.<sup>174</sup>

This question was directed only at respondents with personal experience in international commercial mediation because the intent was to determine actual behavior regarding the procedure rather than mere beliefs about common practices.<sup>175</sup> However, the relatively high number of respondents who had only been involved in one, two, or three international commercial mediations over the last three years makes it likely that some of the responses to this question were based on observation or belief rather than direct experience.<sup>176</sup> While this factor inserts a degree of uncertainty about the nature of the study results, the overwhelming number of responses regarding contractually mandated mediation would seem to overcome any concerns about the validity of the inference drawn from the data, at least on those two points.<sup>177</sup> Similarly, the strength of the survey results regarding the rarity of judicially mandated proceedings suggests that this information should be considered valid, even if some of the responses were based on observation rather than experience, since the intensity of that selection was relatively high.

Information regarding the manner in which international commercial mediation is initiated is important for several

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contractually mandated mediation, the popularity of this choice nevertheless suggests that counsel's opinion can be very influential in decisions relating to the selection of a dispute resolution procedure.

174. For example, 36% of the respondents ranked judicially mandated proceedings as the least likely to arise, while 23% of the respondents ranked proceedings pursuant to party suggestion as the least likely to arise.

175. This emphasis was strengthened by the structure of the question, which specifically asked participants to speak about their own individual experience. See *infra* note 220 and accompanying text (noting that later questions provided participants with the opportunity to provide information about their general perceptions).

176. See *supra* note 160 and accompanying text (noting differences between experience and perception).

177. See Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1434, 1437-38, 1442 (2009) (explaining that ranking is among the various methods of identifying intensity of preferences and is generally considered to create little incentive to lie).



reasons. First, this data demonstrates one way in which international proceedings may differ from domestic proceedings.<sup>178</sup> While some observers may be tempted to suggest that international commercial arbitration can and perhaps should be further developed through an increase in judicial mandates, such measures have met with mixed results.<sup>179</sup> Furthermore, it is unclear whether such efforts would be successful in the international commercial and investment contexts, given that the widespread use of pre-dispute arbitration agreements effectively eliminate the possibility that all but a small number of courts will ever be in a position to send the parties to mediation.<sup>180</sup> This phenomenon suggests that academics and practitioners should exercise caution before concluding that research regarding domestic forms of mediation necessarily applies to cross-border disputes.

Second, these results suggest that those involved in drafting any future international instruments concerning international commercial mediation should focus primarily (though not necessarily exclusively) on proceedings that have been initiated pursuant to a pre-dispute contract between the parties.<sup>181</sup> In so doing, drafters may want to consider how the international community facilitates other types of contracts involving dispute resolution procedures, including both arbitration agreements and

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178. For example, many domestic mediations take place under the shadow of judicial mandates, at least in some countries. See Secretariat Note, *supra* note 51, at 13 (discussing how mediation arises around the world); James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 172 (2001) (noting the influence of judicial mandates to mediate).

179. See de Palo & Canessa, *supra* note 59, at 717–24 (discussing how to increase the use of mediation); Nolan-Haley, *Mediation*, *supra* note 19, at 984–85 (discussing how the European Union has promoted mediation).

180. See *supra* notes 2–3 and accompanying text (noting incidence of arbitration provisions).

181. Thus, some commentators have suggested a dual-pronged approach to enforcement of international commercial mediation, including both agreements to mediate as well settlement agreements arising out of international commercial mediation. See Strong, *ICM*, *supra* note 20, at 32 (noting such an approach would mirror the approach used in international commercial arbitration).

forum selection provisions.<sup>182</sup> Drafters may also want to take into account the fact that standalone mediation provisions and multi-tiered dispute resolution clauses appear to arise in nearly equal numbers. This phenomenon could require some innovative drafting in any new instruments that are developed in this area of law, since standalone and multi-tiered provisions give rise to somewhat different challenges with respect to enforcement<sup>183</sup> and few, if any, international instruments currently in existence consider the special nature of multi-tiered dispute resolution processes.<sup>184</sup>

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182. See European Convention, *supra* note 13 (discussing the enforcement of foreign arbitral awards); Hague Convention on Choice of Court Agreements, *opened for signature* June 30, 2005, 44 I.L.M. 1294 (outlining the enforcement of choice of court agreements); Montevideo Convention, *supra* note 13 (discussing the enforcement of foreign arbitral awards); New York Convention, *supra* note 13 (discussing the enforcement of foreign arbitral awards); Panama Convention, *supra* note 13 (discussing the enforcement of foreign arbitral awards). Pre-dispute contractual provisions are perhaps the most popular means of initiating international commercial arbitration, although a post-dispute agreement (*compromis*) is also possible. See generally GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (2010). Investment arbitration is typically initiated pursuant to a dispute resolution provision in an investment treaty that is extensively negotiated on the interstate level, though investment arbitration may also arise in other manners, including through contracts between the investor and the state. See STRONG, GUIDE, *supra* note 1, at 3 (discussing means by which investment arbitration may arise); Paulsson, *Privity*, *supra* note 14, at 256 (explaining that investment arbitration is “arbitration without privity”).

183. See Strong, *ICM*, *supra* note 20, at 11, 32–34 (discussing possible methods of addressing the various underlying concerns).

184. For example, courts and arbitral tribunals struggle in both the investment and commercial contexts to determine whether multi-tiered dispute resolution clauses create preconditions to arbitration and who is to decide whether that condition precedent has been met. See *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) (finding that the parties typically determine whether a matter is for the arbitrators or the court to decide); George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 43 (2012) (discussing “gateway” issues under U.S. law). In the investment realm, this issue is often framed as one of jurisdiction versus admissibility. See Andrea J. Bjorklund, *Case Comment*, *Republic of Argentina v. BG Group PLC*, 27 ICSID REV. 4, 7 (2012) (discussing the difference between the two concepts); Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 617 (Gerald Aksen et al. eds., 2005) (outlining the different frameworks for whether a challenge pertains to jurisdiction or admissibility).

*B. What Affects Parties' Decision to Use International Commercial Mediation?*

The next issue raised by the survey involves the reasons why parties use mediation in international commercial or investment disputes. There is a considerable amount of theorizing about this particular issue,<sup>185</sup> and it is critical to determine whether and to what extent those hypotheses are correct so as to help both practitioners in the field and participants in the UNCITRAL process determine how they can facilitate and encourage international commercial mediation on either an individual or systemic level.

This question was also directed only to respondents who had indicated that they had personal experience with at least one international commercial mediation in the last three years, based on the desire to identify actual business practices as opposed to beliefs or observations. However, the relatively low number of respondents who indicated that they had been personally involved in a significant number of international commercial mediations in the preceding three years suggests that at least some of the responses to this question were based on observation or belief rather than direct experience.<sup>186</sup> Nevertheless, this information can still be considered useful, based on the intensity of the responses.

The question specifically asked participants to state why, in their experience, parties used mediation in international commercial disputes. In their responses, subjects were required to rank a number of pre-existing alternatives that scholars specializing in domestic forms of mediation have identified as relevant to parties' decision whether to use consensual methods of dispute resolution.<sup>187</sup>

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185. See *supra* notes 118–124 and accompanying text (discussing scholarship considering why parties prefer international arbitration over international mediation).

186. See *supra* note 177 and accompanying text (discussing differences between experience and observation).

187. Possible responses included a cultural disinclination toward litigation or arbitration, a desire for a more satisfactory process, a desire to preserve an ongoing relationship, a desire to save costs, a desire to save time, the complexity of the dispute, the simplicity of the dispute, the expertise of the neutral, and the

As Appendix A shows, the most highly ranked of these options was the desire to save costs (ranked number one by 36% of the respondents), followed closely by a desire to save time (ranked number two by 28% of the respondents). Both of these selections were unsurprising, given the survey's emphasis on commercial disputes.

The third most highly ranked option involved a desire for a more satisfactory process, although the same percentage of people (19%) also chose this item as the fifth most highly ranked option. The fourth most highly ranked option (21%) focused on a cultural disinclination toward litigation or arbitration,<sup>188</sup> and the fifth most highly ranked alternative (26%) involved the desire to preserve an ongoing relationship. This data is intriguing for several reasons. First, proponents of mediation often claim that one of the primary benefits of the procedure involves the ability to preserve an ongoing relationship.<sup>189</sup> However, this feature was only the fifth most important reason why parties used mediation in international commercial disputes, in the experience of respondents who had been involved in at least one such procedure in recent years. This result suggests a potential difference between mediation in the international commercial context and mediation at the national level.<sup>190</sup> Scholars specializing in domestic forms of mediation have also suggested that consensual methods of dispute resolution may be

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possibility of a creative (non-litigation-oriented) remedy. *See supra* notes 117–119 and accompanying text (discussing various theories for why parties prefer international arbitration over international mediation).

188. It is possible that this latter choice may have been more popular if the survey had attracted a higher response rate from Asian nations, which are often said to reflect this particular mindset. *See* Shahla F. Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West*, 28 REV. LITIG. 791, 796–97 (2009) (noting Asian cultures typically prefer mediation over arbitration). However, that hypothesis will have to be tested in later studies.

189. *See* Gaultier, *supra* note 19, at 44–54 (discussing how maintaining a strong business rapport between the parties is a distinct advantage of mediation); Lande, *Faith*, *supra* note 70, at 212 (suggesting that some commercial actors use mediation to help preserve business relationships).

190. The other possible distinction lies between those who are involved with mediation on an academic level and those who are involved with mediation on a practical level.

particularly beneficial in cases involving complex questions of law or fact.<sup>191</sup> However, the complexity of the dispute was ranked as the sixth most important reason to use mediation in the international commercial context, while the simplicity of the dispute was ranked as the seventh most important reason. The relatively low ranking of these options suggests that size and complexity of the dispute are not primary motivating factors for international commercial parties weighing the relative merits of different dispute resolution alternatives.<sup>192</sup> The least important reasons for using mediation in the international commercial setting involved the expertise of the neutral and the possibility of a creative (non-litigation-oriented) remedy. This latter result is particularly noteworthy, since it goes against conventional wisdom suggesting that parties prefer mediation because they can obtain results that would not be possible in adjudicative procedures such as litigation or arbitration.<sup>193</sup>

The survey then invited participants to identify any other reasons why parties might use mediation in international commercial disputes.<sup>194</sup> As Appendix B shows, the vast majority of respondents indicated that no additional rationales existed. However, some participants stated that mediation might be used in order to “save face” or when there were concerns about confidentiality. Other participants indicated that parties might

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191. See Lande, *Faith*, *supra* note 70, at 212 (noting that some domestic counsel believe litigation is a poor way to resolve disputes); see also Gaultier, *supra* note 19, at 44–54 (arguing that, even in cases of great complexity, mediation is both time- and cost-effective). However, the types of complexities found in international commercial disputes may bode against the use of mediation. See Bechky, *supra* note 47, at 1086–87 (describing types of complexities seen in international disputes); Franck, *Empirically Evaluating*, *supra* note 47, at 72–74 (discussing complexity of international investment disputes); Strong, *ICM*, *supra* note 20, at 19 (discussing the complexity of contemporary international transactions).

192. The data showed very little difference between these two options. For example, complexity of the dispute was ranked as the seventh most popular option by 27% of the respondents, while simplicity of the dispute was ranked as the seventh most popular option by 24% of the respondents.

193. See Gaultier, *supra* note 19, at 47 (noting use of creative solutions in mediation).

194. This question used an open text box so that respondents could write in their answers.

use mediation in cases involving a risk of loss in a litigated or arbitrated outcome or if there were concerns about the neutrality of the venue. Still other respondents noted that some courts require parties to attempt mediation before they may proceed in court and that some types of disputes (such as those involving intellectual property) are non-arbitrable.<sup>195</sup> Although these types of individual responses are useful in identifying other potential rationales for international commercial mediation, they should not be given undue weight, since they did not reflect the same degree of intensity seen in the replies to the ranked alternatives. Furthermore, a number of these rationales can be met through arbitration to the same extent as mediation, which provides parties with little incentive to choose mediation over arbitration.<sup>196</sup> The survey then asked participants the opposite question, namely why parties might avoid mediation of international commercial disputes. Respondents were again offered a number of pre-existing options and asked to rank their top five choices.<sup>197</sup>

This question was directed to all participants in the survey, regardless of whether the respondent had any personal experience with international commercial mediation in the last

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195. This latter observation suggested that some participants believed that matters that were non-arbitrable would nevertheless be amenable to mediation. However, it is by no means clear that an issue that is considered non-disposable and therefore non-arbitrable could in fact be resolved through mediation. This is an issue that will have to be further developed and researched in jurisdictions that embrace the notion of non-disposable rights.

196. See Strong, *Epistemic Communities*, *supra* note 18 (discussing overlapping interests and values in arbitration and mediation).

197. The question limited the ranking exercise to the top five alternatives because the list of possible options was quite long. Possible selections included concerns about finding an effective mediator, concerns about how to conduct a mediation effectively, concerns about revealing litigation strategy or evidence, concerns about the cost of the process, concerns about the international enforceability of an agreement to mediate, concerns about the international enforceability of a settlement award arising out of mediation, concerns about the time of the process, counsel's concerns about earning income on the dispute, counsel's lack of experience with mediation, cultural preferences for litigation or arbitration, lack of a desire to preserve ongoing relationship, and lack of experience with mediation. These options were culled largely from the literature on domestic mediation, although a few alternatives were new and were intended to target issues relating to international commercial dispute.

three years.<sup>198</sup> However, there were significant differences in the responses depending on whether the person answering the question had any recent personal experience with the process.<sup>199</sup>

As Appendix C shows, those respondents who had been involved with at least one international commercial mediation within the previous three years chose the parties' lack of experience with mediation as the most likely reason why parties did not use that process in the international commercial context, with counsel's lack of experience with mediation coming in as the second most highly ranked option. This group of survey respondents also stated that concerns about revealing litigation or arbitration strategy was the third most likely reason why parties would avoid mediation in international commercial disputes, with concerns about finding an effective mediator coming in as the fourth most popular option. The data did not clearly identify which option should be ranked in fifth place.

Respondents who had not been personally involved in at least one international commercial mediation in the three years prior to the survey answered this question very differently. As Appendix D shows, according to this group of participants, the most important reason why parties do not use mediation in the international commercial context is because of a cultural preference for litigation or arbitration.<sup>200</sup> This outcome is

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198. The rationale behind this approach stemmed from the fact that parties who had not been involved in an international commercial mediation in the last three years might nevertheless have been involved in a decision not to participate in such proceedings.

199. This phenomenon raises the question of whether the respondents' personal experiences with international commercial mediation cause a change in perception, or whether the perceptions exist prior to the personal experience. The answer to that question is beyond the scope of this survey. *See supra* notes 92, 104 and accompanying text (discussing limits of inferences regarding causality). However, some differences may also be attributed to the fact that the survey asked participants with personal experience in international commercial mediation to provide responses based on their experience. As a result, some of the differences between the two groups may therefore be attributable to differences between belief and behavior. Further research will be required to parse out the nuances of this issue.

200. Approximately 20% of participants identified this option as their first choice, which suggests a moderately high level of intensity. *See Lewinsohn-Zamir, supra* note 177, at 1434, 1437–38, 1442 (2009) (noting ranking is among the various methods of identifying intensity of preferences and suggesting that

somewhat surprising, given that this option was not among the top five choices identified by persons with recent personal experience in international commercial mediation.

What is perhaps even more surprising is the fact that none of the remaining options can be clearly identified as the second, third, fourth, or fifth most popular choice of the respondents answering this question. Instead, the most common answer for all of the other options was "N/A" (not applicable), which is the answer that respondents were to select for any alternative outside of their top five choices. Because participants had to select this option affirmatively (the software system did not insert "N/A" automatically), the only conclusion that can be drawn from the data is that persons who do not have recent personal experience with international commercial mediation have widely disparate views as to why parties choose not to mediate their international commercial disputes.

All respondents were given the opportunity to identify any additional reasons why parties do not use mediation in international commercial disputes.<sup>201</sup> A majority of participants who had recent personal experience with the process indicated that they had no additional rationales to suggest. However, the few members of this group who did provide additional information as to why a party might avoid international commercial mediation mentioned a lack of trust, either with respect to the process, the mediator, or the other party; concerns about the cost of a procedure that did not lead to a final, binding resolution; and the perceived strength of a particular party's claim. Respondents in this group also noted that some parties might believe that raising the possibility of mediation could be seen by their counterparts as a sign of weakness.

A majority of participants who did not have any recent personal experience with international commercial mediation also indicated that they had no additional rationales to suggest. One of the few additional responses to this question noted that

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this method creates little incentive to lie while also demonstrating respect for respondents).

201. This question used an open text box so that respondents could write in their answers.



parties might not need mediation if they are able to negotiate a settlement on their own. Other answers indicated that some parties avoid international commercial mediation because they do not fully understand how mediation operates or because they are adamantly opposed to amicable settlements.

The preceding discussion suggests that any conclusions relating to reasons why parties avoid mediation of international commercial disputes would be tentative at best. Furthermore, the small amount of reliable information that was gathered (namely that members of the international business and legal communities who had recent personal experience with international commercial mediation believed that the two most important reasons why parties avoid mediation were a lack of experience with the procedure by either the parties or counsel) would appear to be largely unhelpful for those involved in considering a new international instrument in this field, since the information suggests that the core problems in this field are primarily remediable only through the passage of time. However, it might also be possible to address some of these issues through increased education about the process and benefits of mediation.<sup>202</sup>

Data relating to the reasons why parties choose international commercial mediation was much clearer. According to the survey, the primary reason why international commercial actors choose mediation is to save time and money. This phenomenon suggests that the best way to encourage parties to use mediation in international commercial disputes would be to ensure a process that is time- and cost-effective and to publish hard data about time and cost savings throughout the international business and legal communities.<sup>203</sup>

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202. See *supra* note 19 and accompanying text (noting that the concept of education is more complex than it seems).

203. However, demonstrating the time- and cost-effectiveness of international commercial mediation may be difficult. For example, empirical studies in the domestic realm suggest that “mediation actually decreases client costs in only about half the disputes in which it is used.” See Strong, *ICM, supra* note 20, at 15–16 (citing empirical studies). *But see* Gaultier, *supra* note 19, at 45–46 (discussing possible savings of time and money).

*C. How Can Parties Be Encouraged to Use Mediation in International Commercial Disputes?*

The questions discussed in the preceding subsection allow certain indirect inferences to be made about how to encourage parties to international commercial disputes to use mediation. This information is critical to efforts to improve the practice of international dispute resolution, both on an individual and systemic level, since the only way to successfully encourage mediation in international commercial disputes is to tie reform initiatives to factors that parties find important.<sup>204</sup> However, this research also attempted to generate data on this issue more directly through questions asking participants about various factors that would make parties more likely to use mediation in international commercial disputes. Subjects were instructed to rank their selections from among a list of prepared alternatives.<sup>205</sup> Responses were again segregated, depending on whether the subject had been involved in at least one international commercial mediation within the last three years.

The first group of responses came from those who had recent personal experience with international commercial mediation. As Appendix E shows, when asked to identify factors that might make parties more likely to use mediation in international commercial disputes, 37% of the respondents in this group

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204. See Strong, *Epistemic Communities*, *supra* note 18 (identifying such rationales); see also *supra* note 52 and accompanying text (noting that several state delegates to UNCITRAL wanted empirical data concerning international commercial mediation to determine whether there was a need for a new instrument in this area of law).

205. Participants were asked which of the following alternatives would be most likely to encourage parties to use international commercial mediation: better information about the conduct of the procedure itself, better information about the cost of the procedure, more confidence regarding the enforceability of agreements to mediate at the place where the procedure is to be conducted, more confidence regarding the enforceability of agreements to mediate across national borders, more confidence regarding the enforceability of settlement agreements arising out of mediation at the place where the procedure was conducted, more confidence regarding the enforceability of settlement agreements arising out of mediation across national borders, and more evidence of the effectiveness of the procedure (i.e., the likelihood of reaching a settlement).

indicated that having more evidence of the effectiveness of the procedure (i.e., more evidence of the likelihood of reaching a settlement) would be the best means of increasing the use of mediation in international commercial disputes. The second most highly ranked alternative focused on better information about the conduct of the procedure, while the third option involved better information about the cost of the procedure.<sup>206</sup>

When asked whether there were any additional factors that would make parties more likely to use mediation in international commercial disputes, most respondents indicated that there were none.<sup>207</sup> However, several participants suggested that mediation might be more widely used if there was a way for the parties to ensure confidentiality or for in-house counsel to convince outside counsel to try consensual means of resolving the dispute. Another respondent indicated that mediation might be more popular if there was a way to initiate proceedings without one party looking weak.<sup>208</sup>

The survey then posed the exact same question to survey participants who did not have any personal experience with international commercial mediation in the last three years.

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206. The remaining selections were, in decreasing rank order, the enforceability of agreements to mediate at the place where the procedure is to be conducted; the enforceability of agreements to mediate across national borders; the enforceability of settlement agreements arising out of mediation at the place where the procedure was conducted; and the enforceability of settlement agreements arising out of mediation across national borders. Although these questions were intended to trigger discussion about various legal issues that might be relevant to the debate about the need for a new treaty in the area of international commercial mediation, they do not appear to have done so, perhaps because the reference was too indirect or because alternatives relating to efficiency, conduct, and cost of the procedure are more commonly discussed by members of the international dispute resolution community. In either case, the rank order of the last four responses does not appear relevant to the current analysis. Fortunately, some of the questions that were posed later in the survey appear to have been more successful in addressing issues relating to how international public law can facilitate and support international commercial mediation.

207. This question used an open text box so that respondents could write in their answers.

208. See ICC Mediation Rules, INT'L CHAMBER COM., art. 3, effective Jan. 1, 2014, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/> (last visited Dec. 13, 2016) (allowing the ICC to propose mediation in certain cases) (on file with the Washington and Lee Law Review).

Interestingly, as Appendix F shows, this group of respondents ranked the listed options in precisely the same order as respondents who had recent personal experience with the process, although the two groups varied slightly in terms of the intensity of their selections.<sup>209</sup>

When asked whether there were any additional factors that might make parties more likely to use mediation in international commercial disputes, the majority of respondents who did not have personal experience with these proceedings also indicated that there were no additional issues to consider.<sup>210</sup> However, the few people who provided supplemental information focused on slightly different issues than respondents with recent personal experience in the field did. For example, respondents without recent personal experience in international commercial mediation expressed concerns about qualified neutrals being “frozen out” of the international market<sup>211</sup> and raised issues relating to the extent to which parties trust institutional providers of dispute resolution services.

The preceding analysis suggests that survey respondents across the board strongly believe that the three factors that are most likely to make parties use international commercial

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209. Those respondents who did not have any recent personal experience with international commercial mediation were slightly more strongly in favor of the top three choices (40%, 37%, 42% for the first, second, and third ranked alternatives) than respondents who had some recent personal experience of the procedures (37%, 33%, and 33%, respectively). The remaining options were ranked by respondents without personal experience in international commercial mediation in the same order as respondents with personal experience in international commercial mediation, but again with slightly more intensity overall (29%, 32%, 36%, and 26% in the first group versus 36%, 33%, 32%, and 32% in the second group).

210. This question used an open text box so that respondents could write in their answers.

211. This issue was raised by a person who did not have recent personal experience with international commercial mediation, which suggests that concerns about qualified neutrals being “frozen out” of the international sphere could be characterized as self-interested in nature. However, there have been concerns in the world of international arbitration about the lack of diversity among neutrals and the problems associated with a relatively small cadre of repeat arbitrators, so this comment could speak to a larger issue. See generally Benjamin G. Davis, *Diversity in International Arbitration*, 20 DISP. RESOL. MAG. 13 (Winter 2014).

mediation are better information about the effectiveness of the procedure (i.e., the likelihood that settlement will be achieved), better information about the conduct of the procedure itself, and better information about the cost of the procedure. To some extent, this data could be interpreted as suggesting that the best way to encourage the use of mediation in cross-border business disputes is through various educational initiatives.<sup>212</sup>

However, these results contain several important implicit presumptions.<sup>213</sup> For example, better information about the effectiveness of mediation will only encourage mediation if those procedures are, in fact, likely to produce settlements. Similarly, better information about the cost of international commercial mediation will only encourage parties to adopt those procedures if they indeed are shown to be cost-effective in cross-border commercial and investment cases.

This analysis suggests that educational initiatives, though important, are not by themselves sufficient to foster international commercial and investment mediation. Instead, national and international bodies wishing to encourage the use of mediation must not only gauge the current effectiveness and cost-efficiency of those procedures but must also take any necessary steps to

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212. Education can take a variety of forms. For example, by merely debating the possibility of a new treaty in the area of international commercial mediation, UNCITRAL is helping to inform the international legal and business communities about the existence and importance of consensual forms of dispute resolution in the international commercial context. Adopting an international instrument on this subject could also have some educational value, even if the instrument is not widely adopted at first. See Julius Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16, 34–35 (1957) (“[B]alanced judgment is called for as between the inspirational and educational value of a code, even when it remains ineffectual, and the danger that abortive codification efforts will undermine existing levels of acceptance of customary international law without substituting anything as good.”).

213. While anecdotal evidence suggests that settlements occur in approximately 85%–90% of the international commercial cases in which mediation is used, that number has not yet been empirically proven. See Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, in ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 381, 381 (Arnold Ingen-Housz ed., 2011) (“Settlement rates in mediation are said to be on the order of 85% to 90% and are achieved long before the traditional ‘court house/arbitration hearing steps’ at a significant savings of cost, time and disruption for the parties.”).

improve the procedure. Only then will parties be inclined to choose mediation to resolve their cross-border business disputes.

*D. What Types of International Commercial Disputes Are Amenable to Mediation?*

Numerous scholars have attempted to identify which types of disputes are most amenable to consensual forms of dispute resolution.<sup>214</sup> Since selection of an appropriate dispute resolution procedure is one of the best ways to ensure a successful outcome,<sup>215</sup> it is critically important to test theoretical assumptions about the types of disputes that are most amenable to international commercial mediation through empirical data. This information is beneficial not only to parties and practitioners who make choices about dispute resolution procedures on an individual, case-by-case basis, but also to participants in the UNCITRAL process who are considering how best to encourage international commercial mediation on a system-wide level.

For this question, the survey did not differentiate between respondents based on their personal experience with international commercial mediation. Instead, the survey asked all participants to consider which types of international commercial disputes are best suited to mediation and to rank their top five choices from among eleven alternatives.<sup>216</sup>

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214. See *supra* note 44 and accompanying text (reviewing the literature concerning the question of which disputes are best suited to mediation).

215. Numerous guides are available to help parties identify the best dispute resolution procedure for any particular dispute. See generally CPR, *supra* note 44; ROBERT J. NIEMEC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 20–47 (2001); Jean-Claude Najjar, *Corporate Counsel in the Era of Dispute Management 2.0*, 15 BUS. L. INT'L 237, 248 (Sept. 2014); Stipanowich & Lamare, *supra* note 70, at 30 (discussing the movement toward appropriate dispute resolution). “Success” in mediation can be measured in numerous ways. See Dywan, *supra* note 122, at 239 (noting that reduction in judicial backlogs is a frequent goal of mediation programs); Lande, *Principles*, *supra* note 122, at 641 (noting various goals policy makers might have in developing an ADR system); Stipanowich, *Vanishing*, *supra* note 122, at 7 (discussing sixty-two studies summarized by CAADRS).

216. The eleven options included disputes involving an ongoing relationship, disputes involving more than two parties, disputes involving only two parties,

As Appendix G shows, an overwhelming number of respondents (74%) identified disputes involving an ongoing relationship as their number one choice, which was consistent with positions taken by academics specializing in domestic forms of mediation.<sup>217</sup> However, this response is somewhat inconsistent with results reported elsewhere in this study. For example, an earlier question asked participants with recent personal experience of international commercial mediation why parties engaged in those procedures.<sup>218</sup> In that case, respondents ranked the preservation of an ongoing relationship as only the fifth most popular reason for engaging in international commercial mediation.<sup>219</sup> Although this discrepancy seems somewhat unusual, one explanation may be that perceptions of international commercial mediation (which was the focus of the current question) do not necessarily match parties' actual behavior patterns (which was the focus of the earlier question). Further research is necessary to confirm the validity of these results and identify the reasons for this apparent disparity between practice and belief.<sup>220</sup>

The second most highly ranked alternative involved disputes with parties from countries or cultures that encourage mediation,

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disputes involving parties from countries or cultures that encourage mediation, disputes involving large amounts of money, disputes involving small amounts of money, disputes involving intangibles, disputes involving non-monetary relief, disputes involving complicated factual or legal issues, disputes involving simple factual or legal issues, and disputes with a high likelihood of parallel proceedings.

217. See CPR, *supra* note 44, at 6 (identifying several studies that cite preservation of relationships as an important reason to engage in mediation); NIEMEC ET AL., *supra* note 215, at 20 (discussing the value of mediation for preserving business relationships).

218. See *supra* note 188 and accompanying text (discussing responses to questions on personal experience with mediation).

219. See *supra* note 177 and accompanying text (discussing responses to questions on reasons to engage in mediation). When the data is filtered to allow only responses from participants with recent personal experience in international commercial mediation, concerns about ongoing relationships still appear as the number one choice, albeit to a slightly lesser degree (69%) than when all responses are tallied together (74%).

220. In order to be valid, empirical research, including social science research, must be reproducible. See Epstein & King, *Inference*, *supra* note 68, at 38 (discussing the scientific method).

although the intensity of this selection was not as high as with the first choice selection.<sup>221</sup> Respondents ranked disputes involving only two parties as their third option, again with a relatively low level of intensity.<sup>222</sup> Although the question asked respondents to rank their top five choices from among the various alternatives, the data did not clearly identify the fourth or fifth most popular options.<sup>223</sup>

Respondents were then asked to identify the types of international commercial disputes that are least amenable to mediation. As Appendix H shows, the survey provided participants with the same eleven options as in the previous question and asked subjects to rank their top five choices.<sup>224</sup> Interestingly, none of the available options clearly placed among the top five alternatives. Instead, the highest percentage of responses for every single option was "N/A," which had to be affirmatively chosen under the software system used in the survey.<sup>225</sup>

Although the "N/A" option had the highest percentage of votes in all cases, that selection was not clearly preferred in all instances. Indeed, "N/A" was only marginally (i.e., one to two percentage points) ahead of some other selections.<sup>226</sup> Despite

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221. Only 23% of respondents chose this option as their second choice.

222. Only 17% of respondents ranked this option as their third choice.

223. For example, the option that obtained the most votes for fourth position involved disputes with parties from countries or cultures that encourage mediation (15%). However, more people (23%) ranked disputes with parties from countries or cultures that encourage mediation in second place. The attempt to identify the fourth and fifth place options was made even more difficult by the fact that disputes with parties from countries or cultures that encourage mediation also received the highest number of votes (15%) for fifth place in the ranking exercise.

224. See *supra* note 216 (outlining options).

225. See *supra* note 201 and accompanying text (discussing the "N/A" alternative).

226. For example, even though 19% of respondents indicated "N/A" for disputes involving more than two parties, 18% of respondents ranked those matters first, meaning those disputes were considered the least amenable to mediation. Similarly, even though 18% of respondents used the "N/A" option for disputes involving complicated factual or legal issues, 16% of respondents ranked those matters first, meaning those disputes were considered the least amenable to mediation. Although it is beyond the scope of the current Article, further analysis of the data (such as the use of weighted voting) may yield some



these difficulties, the data can nevertheless be considered useful, since the absence of any patterns can be interpreted to suggest that members of the international legal and business communities consider a variety of factors when deciding whether to use mediation in cross-border business disputes and that no particular matter can be deemed to be categorically off-limits.

### *VII. Analysis of Survey Data Concerning Future Considerations*

Earlier, this Article indicated that the current study had two aims.<sup>227</sup> The first goal focused on discovering and describing current behaviors and attitudes relating to international commercial mediation.<sup>228</sup> Those matters were discussed in the preceding section.<sup>229</sup>

The study's second goal was to help inform the current debate in the international legal community about the possibility of a new international convention concerning international commercial mediation. In particular, this research project was designed to determine the views of the international legal and business communities on whether an international instrument in this area of law would be useful, and if so, what shape that document should take. These matters are discussed in this section.

#### *A. What is the Future of International Commercial Mediation?*

The empirical evidence generated by this survey supports two separate tenets: first, that international commercial actors do not currently use mediation as a routine means of resolving their

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helpful information. See Mistelis, *supra* note 73, at 543 (describing analytical methodology based on weighted rankings).

227. See *supra* note 77 and accompanying text (describing the dual aims of the study).

228. See *supra* note 77 and accompanying text (describing the first goal of the study).

229. See *supra* notes 157–226 and accompanying text (discussing the study's findings regarding behaviors and attitudes toward mediation in accordance with the first goal).

disputes,<sup>230</sup> and second, that most international commercial mediations that do go forward are initiated pursuant to pre-dispute contractual agreements.<sup>231</sup> Combining these two principles suggests that the international business and legal communities could see an increase in international commercial mediation in the coming years if the number of contracts that include dispute resolution provisions calling for mediation as either a standalone or as part of a multi-tier procedure can be found to be on the rise.<sup>232</sup> This conclusion is quite important to the debate about a new international instrument in this area of law, since a potential increase in the number of international commercial mediations would suggest a heightened need to establish a legal environment that is properly supportive of these procedures.<sup>233</sup>

The best way to study the frequency of mediation provisions in international commercial contracts would be to undertake a survey of transactional lawyers specializing in cross-border business deals, since those people would likely have the best and broadest understanding of contemporary drafting practices. However, transactional lawyers have been known to consult with their dispute resolution colleagues in matters relating to dispute resolution clauses,<sup>234</sup> which suggests that the target population for the current study might have some useful insights on these matters.<sup>235</sup>

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230. See *supra* note 159 and accompanying text (discussing the number of international commercial mediations respondents had been personally involved in over the last three years).

231. See *supra* note 170 and accompanying text (noting a lack of consensus as to other reasons to initiate international commercial mediations).

232. Of course, there would still be something of a time lag before usage rates increased, since there would likely be some delay between the time the parties agreed to engage in mediation in the underlying contract and the time a dispute requiring mediation arose.

233. See *supra* notes 49–64 and accompanying text (noting that international instruments are only adopted if and when a need arises).

234. See Rona G. Shamoon, *Top 10 Mistakes to Avoid When Drafting Dispute Resolution Provisions*, 67 DISP. RESOL. J. 16, 17–18 (2012) (suggesting this sort of collaboration should happen more often).

235. See generally *supra* note 88.

The survey attempted to reach these issues by asking how frequently respondents included or recommended including mediation as part of a dispute resolution clause found in an international commercial contract. As might be expected in a survey that included academics, neutrals, judges, and government officials as well as private practitioners, just under half of the respondents (49%) indicated that this question was not applicable to them.<sup>236</sup>

Of the remaining 51% of the respondents, 19% indicated that during the last three years, they had, on average, included or recommended including a mediation provision in an international commercial contract on ten or more occasions per year. Furthermore, 10% of respondents to this question indicated that they had included or recommended including a mediation clause in an international commercial contract somewhere between four to eight times per year, while 22% of the respondents indicated that they had made between one to three recommendations per year on average. Although these numbers do not provide any insights into the comparative attractiveness of mediation in international commercial matters,<sup>237</sup> the figures nevertheless appear to be relatively robust, particularly given that dispute resolution specialists are not routinely involved during the negotiation phase of a transaction.<sup>238</sup>

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236. Respondents may have indicated “not applicable” because they do not normally assist with transactional matters (as would be the case with persons working primarily as academics or neutrals) or because they had not been asked to provide a clause relating to international commercial mediation in the relevant time period, even though they occasionally provide advice on transactional matters. Further analysis of the data may shed some light on this issue.

237. For example, the survey did not ask respondents to indicate how many opportunities they had to recommend mediation per year or how many recommendations for mediation had been rejected in favor of another type of dispute resolution mechanism. These numbers would have been useful in determining the relative frequency with which respondents were recommending mediation and how responsive other parties were to these suggestions.

238. See Shamoon, *supra* note 234, at 17–18 (“Dispute resolution provisions often get short shrift from transactional lawyers . . . Ideally, a dispute resolution specialist would be brought in during the contract negotiation process . . .”).

The survey also asked participants to indicate the kind of procedure they would prefer if they were to recommend or participate in mediation of an international commercial dispute. A majority of respondents (55%) indicated that their choice would depend on the dispute. However, 32% of the respondents indicated that they would prefer an administered proceeding using institutional rules of mediation, 7% stated that they would prefer an ad hoc proceeding with no formal rule set and 5% stated that they would prefer an ad hoc proceeding using the UNCITRAL Conciliation Rules.<sup>239</sup> The survey did not ask participants to explain their responses, although researchers in this field may wish to do so in the future.

*B. Is There a Need for an International Convention Addressing International Commercial Mediation, and If So, What Shape Should It Take?*

Even before UNCITRAL decided to consider the possibility of a new international instrument in the area of international commercial mediation, commentators had called for a new convention in this field of law.<sup>240</sup> The survey therefore asked several questions relating to the need for international action

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239. See generally UNCITRAL Conciliation Rules, *supra* note 126. Although the UNCITRAL Conciliation Rules have been critically well-acclaimed, they are not often used in practice. See Holtzmann, *supra* note 19, at 425–26 (explaining that parties tend to arbitrate under institutional rules, even though those rules are largely based on the UNCITRAL Conciliation Rules); Slate et al., *supra* note 129, at 94 (noting the effect the UNCITRAL Conciliation Rules have had on international mediation).

240. See U.S. Proposal, *supra* note 19, at 2–3 (proposing a new international instrument concerning international commercial mediation); Boule, *supra* note 112, at 65 (calling for an international mechanism to enforce mediated settlement agreements); Lo, *supra* note 112, at 135 (“A convention on the cross-border enforcement of iMSAs more specifically indicating the obligation of contracting parties to recognize and enforce iMSAs and more clearly defining the types of iMSAs eligible for cross-border enforcement, is needed.”); Strong, *ICM*, *supra* note 20, at 29–38 (describing the features that would be desirable in an international instrument governing international commercial mediations); Wolski, *supra* note 112, at 110 (supporting an international regime for enforcement of international mediated settlement agreements).

relating to cross-border commercial mediation so as to inform the scholarly and practical debate on this subject.

*1. Gauging the Need for a New International Instrument in This Area of Law*

When initially presented with the U.S. proposal for a new treaty concerning international commercial mediation, some delegates at UNCITRAL and Working Group II wondered whether a new international instrument was necessary in this area of law, given that national laws might provide sufficient protection to parties seeking to engage in international commercial mediation.<sup>241</sup> As a result, it appeared necessary for the current research project to test whether domestic laws do in fact provide sufficient protections and incentives for parties interested in participating in international commercial mediation.

One way to investigate this issue would be through a comparative doctrinal analysis of the domestic laws currently in force in various jurisdictions to see whether and to what extent those provisions facilitate international commercial mediation.<sup>242</sup> Following the UNCITRAL meeting in July 2014, the UNCITRAL Secretariat volunteered to compile this information, and a considerable amount of data has been collected.<sup>243</sup> However, useful information can also be gained through a survey of persons who are well-versed in issues relating to international commercial dispute resolution.

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241. See Commission Report, *supra* note 50, at 23 (outlining doubts raised by delegates). These concerns were also raised in February 2015, at the Working Group II meeting. See WG Report, *supra* note 19, ¶¶ 45–59 (discussing issues raised during the Working Group II meeting).

242. See Secretariat Note, *supra* note 51, at 6–8 (discussing a comparative study conducted by the UNCITRAL Secretariat concerning international commercial mediation).

243. See *id.* (noting the timeline of the study). See generally Working Group II Comparative Study, *supra* note 57. Similar material has been collected by the World Bank. See generally Investing Across Borders, WORLD BANK (2012), <http://iab.worldbank.org/data/fdi-2012-data> (last visited Dec. 13, 2016) (on file with the Washington and Lee Law Review); see also generally Secretariat Note, *supra* note 51, at 6–8, Annex I.

In fact, empirical surveys can provide certain types of data, including evidence of party perception and practices, that doctrinal analyses cannot. Information about party perception can be very important to policymakers, since it can not only demonstrate whether and to what extent there is a disconnect between what parties may do and what they actually do,<sup>244</sup> but it can also suggest reasons why parties behave in a particular manner.<sup>245</sup> Popular perceptions about the viability of a particular procedure are particularly important in fields such as international dispute resolution, where parties are allowed to choose from a variety of permissible alternatives. The more policymakers know about these issues the better, since the law can then be tailored to achieve the desired outcome, whether that is to prioritize one process over another or to eliminate any inequalities that may lead parties to prefer one particular option.<sup>246</sup>

The current study asked a number of questions that were intended to gauge the extent to which an international instrument is necessary in this area. These inquiries were broken into two separate series of questions, one relating to the beginning of the process (i.e., agreements to mediate) and one

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244. Law and economics scholars often analyze this issue through the lens of sticky defaults. See Barendrecht & de Vries, *supra* note 84, at 83–84 (discussing defaults in dispute resolution); S.I. Strong, *Limits of Procedural Choice of Law*, 39 *BROOK. J. INT'L L.* 1027, 1030 (2014) (“[S]ome commentators have suggested that it may now be possible to view judicial procedures as ‘sticky default’ rules rather than as immutable and ‘non-negotiable parameters.’”); see also Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *HARV. L. REV.* 1593, 1595, 1647 (2014) (discussing sticky default rules in the context of behavioral law and economics theory, which is a growing field that emphasizes the combination of politics and psychology). The principle of sticky defaults suggests that if it is too costly or difficult to opt out of the existing default regime, parties will be less inclined to do so, even if they have a legal right to the alternate regime. Policymakers can affect party decision-making by altering the incentives to remain with the default regime.

245. See Anne van Aaken, *Behavioral International Law and Economics*, 55 *HARV. INT'L L.J.* 421, 428 (2014) (discussing decision making at the international law).

246. See Strong, *ICM*, *supra* note 20, at 28 (discussing inequalities between international commercial mediation and international commercial arbitration that could lead parties to prefer arbitration).

relating to the end of the process (i.e., settlement agreements arising out of mediation).

*a. Agreements to mediate*

The first issue to consider involved possible difficulties associated with enforcing an agreement to mediate an international commercial dispute. The inquiry began with a question that was intended to set the benchmark for further analysis and asked respondents to indicate how difficult it was to enforce an agreement to mediate a domestic commercial dispute in the respondent's home jurisdiction. Approximately 14% of the respondents indicated that it was impossible or very difficult to enforce such agreements, while 26% said it was somewhat difficult, 39% said it was easy, 12% said that the issue was largely untested, and 7% said that they did not know.

However, the answers changed when the question focused on how difficult it was to enforce an agreement to mediate an international commercial dispute in the respondent's home jurisdiction.<sup>247</sup> Here, the percentage of those indicating that it was impossible or very difficult to enforce an agreement rose to 19%, and the number of those indicating that enforcement was somewhat difficult went up to 30%. Only 20% of the respondents indicated that it was easy to enforce an agreement to mediate an international commercial dispute in the respondent's home jurisdiction. Furthermore, 18% of the respondents indicated that the issue was largely untested, while 10% indicated that they did not know whether such an agreement would be enforceable.

The survey then asked how difficult it would be in the respondent's home jurisdiction to enforce an agreement to mediate an international commercial dispute when the mediation was to take place outside the respondent's home jurisdiction.<sup>248</sup>

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247. Participants were asked to assume for purposes of this question that the dispute involved commercial parties from two different countries and that the mediation was seated in the respondent's home jurisdiction.

248. Participants were asked to assume for purposes of this question that one of the parties to the agreement was based in the respondent's home jurisdiction.

The perceived level of difficulty rose yet again, with 26% of the respondents indicating that enforcement would be impossible or very difficult and 30% indicating that enforcement would be somewhat difficult. Only 7% of those responding thought it would be easy to enforce this type of agreement. Furthermore, 18% of the participants said that the issue was largely untested in their home jurisdiction, with the same percentage of people saying that they did not know how this issue would be handled in their country.

This data is very useful because it suggests that the international legal and business communities believe that it is more difficult to enforce agreements to mediate international commercial disputes than it is to enforce agreements to mediate domestic disputes. While the veracity of this belief could and should be tested by reference to the law as it currently stands, scholars have recognized that "individual and group perceptions about international law shape behavior and model social change more than the positive law itself."<sup>249</sup> Because perceptions about the enforceability of agreements to mediate international disputes have an effect on whether a party is inclined to attempt mediation in the international commercial context, UNCITRAL and other legal institutions seeking to encourage international commercial mediation should take such matters into account when considering whether to pursue additional work in this area of law.

The survey then asked whether participants believed that the existence of an international convention regarding enforcement of an agreement to mediate international commercial disputes would encourage parties in the respondent's home jurisdiction to use mediation in international commercial disputes. Respondents were overwhelmingly in favor of this suggestion, with 68% stating that such a convention would encourage mediation in their countries. Only 12% of respondents thought a convention would not encourage mediation.

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249. Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921, 930 (1999).



The survey also allowed respondents to respond to this question with “maybe,” an option that was chosen by 20% of the respondents. Those who selected this alternative were invited to explain their reasoning in a separate text box. Interestingly, most of the responses to this question did not focus on uncertainty about whether a convention was needed in this area of law but instead discussed the speed with which such a convention could and would be adopted. For example, one respondent indicated that “[a]s with every convention, the effectiveness depends on how many states ratify/accede and how rapidly this is done. It will only help in disputes concerning parties resident in a member state.” Another person noted that “[i]t took decades before the NY Convention ever had an effect on parties choosing international arbitration, and I feel that the same time frame would be needed before a mediation convention would have a similar effect.”<sup>250</sup> However, “[c]onsidering New York Convention and UNCITRAL Model Law on Arbitration [a convention of this sort] seems to be very useful.”<sup>251</sup>

Other respondents indicated that a convention in this area of law might be useful “from a communication and perception perspective,” a view that is consistent with theoretical research in this field.<sup>252</sup> One person who responded along these lines noted that a treaty addressing enforcement of agreements to mediate international commercial disputes “would address one concern held by some parties. It is difficult to know how widespread that concern is, and hence to judge the likely impact of any such convention. I suspect the impact would be fel [sic] credibility and image of mediation than in terms of actual enforceability.”

Respondents also recognized that the need for an international convention was to some extent tied to the strength

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250. See generally New York Convention, *supra* note 13.

251. See generally *id.*; UNCITRAL Model Law on International Commercial Arbitration, U.N. Comm’n on Int’l Trade Law, 18th Sess., Annex I, U.N. Doc. A/40/17 (June 21, 1985), revised by Rep. of the U.N. Comm’n on Int’l Trade Law, 39th Sess., June 17–July 7, 2006, Annex I, art. 34, U.N. Doc. A/61/17, U.N. GAOR, 61st Sess., Supp. No. 17 (2006).

252. See Mertus, *supra* note 249, at 930 (explaining that those coming from a democratic background tend to rely heavily on the creation of institutions to shape behavior).

of a particular jurisdiction's domestic law. Thus, one respondent noted that:

the mediation agreements that we provide all state that the mediation agreement itself is governed by English and Welsh law and thus this mediation agreement is extremely easy for an English court to rule on. I doubt any party would want to remove that governance of the agreement and so although an international convention would add additional protection the main protection would still be the fact that the agreement is governed by English and Welsh law.

However, parties from jurisdictions that offered little or no protection under domestic law saw more of a need for international protection. Thus, a respondent from Pakistan was very much in favor of an international instrument relating to enforcement of mediation agreements precisely because there was little protection available as a matter of national law.

#### *b. Settlement agreements*

The study then turned to issues relating to settlement agreements, which are the types of agreements that are at the heart of the United States' recent proposal to UNCITRAL.<sup>253</sup> The questions in this series followed the same pattern as questions relating to mediation agreements so as to allow a comparative analysis between the front end of the process (i.e., agreements to mediate an international commercial dispute) and the back end of the process (i.e., settlement agreements arising out of international commercial mediation).

The first question in this series was intended to provide a benchmark for further analysis and asked respondents to describe how difficult it was to enforce a settlement agreement arising out of a domestic commercial mediation in the respondent's home jurisdiction. Only 4% of those answering this question indicated that enforcement would be impossible or very difficult in their home jurisdiction, while 18% indicated that it

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253. See U.S. Proposal, *supra* note 19, at 2 ("The United States proposes that the Working Group address the enforceability of settlement agreements resulting from international commercial conciliation.").

would be somewhat difficult. Most respondents (62%) indicated that enforcement of domestic settlement agreements was easy in their home jurisdiction. However, 11% of people stated that the issue was largely untested, while 5% of respondents stated that they did not know how these matters would be resolved.

The survey then asked how difficult it would be in the respondent's home jurisdiction to enforce a settlement agreement arising out of an international commercial mediation.<sup>254</sup> The answers showed a marked increase in the perceived degree of difficulty of enforcement. For example, 9% of the respondents indicated that it would be impossible or very difficult to enforce an agreement to mediate an international commercial dispute in the respondent's home jurisdiction. Approximately 28% of respondents indicated that enforcement would be somewhat difficult, while only 35% of the respondents thought that it would be easy to enforce a settlement agreement arising out of an international commercial mediation seated in their home jurisdiction. Approximately 17% of the respondents indicated the issue was largely untested in their home jurisdiction, and 11% did not know how the matter would be resolved under domestic law.

The third question in this series asked respondents to indicate how difficult it would be in their home jurisdiction to enforce a settlement agreement arising out of an international commercial mediation when the mediation took place elsewhere.<sup>255</sup> The numbers rose yet again, thereby indicating an increase in the perceived level of difficulty. Thus, 15% of the respondents indicated that it would be impossible or very difficult to enforce these types of agreements, while 36% of the respondents stated that enforcement would be somewhat difficult. Only 14% of the respondents thought it would be easy to enforce a settlement agreement in their home jurisdiction when the settlement agreement arose out of an international commercial mediation seated in another country. Approximately 19% of the survey participants indicated that this issue is largely

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254. Participants were asked to assume for purposes of this question that the settlement involved commercial parties from two different countries, and that the mediation was seated in the respondent's home jurisdiction.

255. Respondents were asked to assume for purposes of this question that one of the parties to the agreement was based in their home jurisdiction.

untested in their home jurisdiction, and 17% of respondents did not know how these matters might be handled by their national courts.

Again, this information suggests that the international business and legal communities believe that enforcement of a settlement agreement arising out of an international commercial mediation is more difficult than enforcement of a settlement agreement arising out of a domestic dispute. While the survey only tests the perceptions of the respondents, widespread beliefs about the difficulty of enforcing a settlement agreement arising out of an international commercial mediation are very likely to affect a party's decision whether to engage in mediation.<sup>256</sup> Since UNCITRAL has previously determined that consensual forms of dispute resolution can be used as a means of encouraging international trade, the impression that it is more difficult to enforce agreements to mediate international commercial disputes than agreements to domestic disputes should be considered relevant to the discussion of whether UNCITRAL should undertake a new international instrument in this area of law.<sup>257</sup>

The final question in this series asked respondents to indicate whether they thought the existence of an international convention concerning the enforcement of settlement agreements arising out of an international commercial mediation would encourage parties in the respondent's home jurisdiction to use mediation. An overwhelming majority of respondents (74%) indicated that they thought an international instrument of this type would encourage mediation, with only 8% of respondents taking the contrary view.<sup>258</sup>

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256. See Mertus, *supra* note 249, at 930 (“[I]ndividual and group perceptions about international law shape behavior and model social change more than the positive law itself.”).

257. The United Nations General Assembly has stated that the use of mediation “results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.” See Secretariat Note, *supra* note 51, at 3–4 (citing G.A. Res. 57/18, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, U.N. G.A.O.R 57th Sess., U.N. Doc. A/Res/57/18 (Jan. 24, 2003)).

258. This data was brought specifically to the attention of Working Group II.

Interestingly, 18% of participants responded “maybe” to this question. These respondents were invited to explain their thought processes in a separate text box. The vast majority of answers to this question were exactly the same as those given in response to the earlier question asking whether adoption of an international convention relating to the enforcement of mediation agreements would increase the likelihood that parties in the respondent’s home jurisdiction would use mediation; indeed, several entries simply said “see above.”

## *2. Shape of a Convention Involving International Commercial Mediation*

This research project did more than measure respondents’ views about whether an international convention in this area of law was warranted. The study also considered the scope of any future instrument in this field so as to assist participants in the UNCITRAL process.<sup>259</sup>

Survey participants were told that UNCITRAL is considering a possible new treaty involving international commercial mediation and were then asked whether any instrument that was drafted in this area of law should (1) only address enforcement of agreements to mediate international commercial disputes (i.e., the beginning of the mediation process); (2) only address enforcement of settlement agreements arising out of mediation of international commercial disputes (i.e., the result of the mediation process); or (3) address both agreements to mediate international commercial disputes and settlement agreements arising out of mediation of international commercial disputes. Each approach would obviously offer the international business and legal communities slightly different benefits.<sup>260</sup>

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*See* States’ Comments, *supra* note 51, at 6 (“Furthermore, 74 per cent of the respondents believed that a convention on enforcement of conciliated settlement agreements would encourage the use of conciliation . . .”).

259. Delegates to the February 2015 Working Group meeting discussed issues of scope at length. *See* WG Report, *supra* note 19, ¶¶ 17–59 (outlining the goals, challenges, and questions to be addressed in developing an instrument on international enforcement of settlement agreements).

260. Commentators appear to favor an international instrument that

Survey participants were overwhelmingly (75%) in favor of a convention that addressed both the beginning and the end of the mediation process. Of the other two options, respondents preferred an international instrument addressing settlement agreements arising out of an international commercial mediation (19%) to an international instrument addressing agreements to mediate international commercial disputes (6%).

The survey then asked participants to describe in their own words why they chose one option over another.<sup>261</sup> Although the responses were quite brief, they nevertheless provide a number of key insights into the international legal and business communities' thought processes.

The overwhelming support for a combined treaty meant that the vast majority of comments focused on reasons why any future instruments in this area of law should address both the beginning and the end of the mediation process. Many of the respondents were quite forceful, stating that a dual-pronged convention was "critical" and "a business imperative."

Usually it is impossible to gauge overall intensity for any particular proposition from an open-ended response model. However, in this case, a number of themes were repeated throughout the comments, even though respondents voiced their opinions in slightly different words. This phenomenon suggests

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addresses both the beginning and the end of the mediation process (i.e., agreements to mediate as well as settlement agreements), which would be consistent with the approach taken in various treaties relating to international commercial arbitration. See Strong, *ICM*, *supra* note 20, at 32–38 (suggesting a comprehensive convention addressing the mediation process from beginning to end). However, the U.S. proposal for a new convention in this area of law focused only on the back end of the process, i.e., settlement agreements arising out of international commercial mediation, for strategic reasons. See U.S. Proposal, *supra* note 19, at 2 ("The United States proposes that the Working Group address the enforceability of settlement agreements resulting from international commercial conciliation."); Strong, *Epistemic Communities*, *supra* note 18 ("In July 2014, the Government of the United States submitted a proposal to [UNCITRAL] suggesting the creation of a new international treaty concerning the enforcement of settlement agreements arising out of international commercial mediation and conciliation.").

261. This question used an open text box so that respondents could write in their answers.

that certain propositions enjoy widespread support in the international legal and business communities.

One principle that was enunciated by numerous respondents reflected the notion that addressing both the beginning and the end of the mediation process would “ensure effectiveness,” “give [international commercial mediation] more legitimacy,” and “encourage more general acceptance.” Thus, one respondent stated that if the proposed convention “does not address both issues, its practical effectivity is doubtful.” This result would likely occur because, in the words of another participant, “[t]he enforceability of one without the other will fall short of providing the level of confidence needed for parties to embark in mediation or conciliation.”

The core principles of efficiency, legitimacy, and encouragement of mediation were repeated elsewhere. For example, some respondents indicated that a dual-pronged approach to an international convention would “increase of the confidence of the parties to [sic] the efficiency of the process” and “broaden support for international mediation,” since “both [the beginning and the end stages of mediation] are connected.” Not only would a multi-purpose convention “give more ‘teeth’ to mediation outcome[s],” but “[p]roviding for enforcement of [these] agreements may also improve the use of this dispute resolution method.” Indeed, “[i]n cultures that are not yet used to mediation, adopting legislation that encourage[s] at least a first meeting with a mediator helps develop an understanding of the process and its efficiency.” Another participant was in favor of an instrument that addressed both the beginning and end stages of the mediation process because “[c]oncerns that agreements to mediate or to comply with settlement are among the most significant reasons for avoiding mediation.”

Another theme that was frequently repeated involved analogies between international commercial mediation on the one hand and international commercial arbitration on the other. Thus, one respondent indicated that the proposed convention “should as far as possible be aligned with the regulations of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This will increase the ‘recognition

value' and will thereby decrease the sometimes existing reluctance of using ADR."<sup>262</sup> Another survey participant noted that "[e]xperience [with international commercial arbitration] has show[n] that both components are equally necessary."

Not everyone who favored a dual-pronged approach believed that both elements were equally important. For example, one person stated that "[e]nforcement of settlement agreements is by far the more important, but it would be wasteful not to include agreements to mediate." However, this perspective was countered by a number of respondents who noted that both prongs were "self-evidently" necessary because "[a]bsent enforcement of agreements to mediate, it is very difficult to obtain agreement to participate." As a result, "[t]he Convention should comprehensively address both the issues rather than taking a piecemeal approach."

Some respondents took a more pragmatic view of the situation. For example, one person suggested that addressing both the beginning and the end of the mediation process would be best, unless doing so would unduly delay the adoption of a convention on the enforcement of settlement agreements, which was considered by that person to be the more important of the two procedures.

Although the vast majority of respondents thought that any international treaty in this area should address agreements to mediate an international commercial dispute as well as settlement agreements arising out of an international commercial mediation, 16% of the survey participants thought that it would be best to focus only on settlement agreements. Persons falling into this category of respondents indicated that an international instrument concerning settlement agreements would be useful because there is "not much point in settling if you can't hold someone to it." However, these persons did not believe that a convention on international commercial mediation should address agreements to mediate a dispute because:

mediation requires the support of all parties to be successful.  
Unlike arbitration, which is an alternative to a court,

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262. See New York Convention, *supra* note 13 (discussing enforcement of foreign arbitral awards).



mediators can only facilitate, not command or decide. The parties must do that for themselves. "Enforcement" of an agreement to mediation seems unlikely to be practicable. In [New Jersey], a court can order litigating parties to enter into "good faith mediation" but as a practical matter, if one party regards it as simply a barrier to be overcome, mediation cannot succeed.

While some respondents focused on whether it was theoretically or practically possible to force an unwilling person into mediation, other people simply denied the need for any assistance in this regard. Thus, one participant indicated that "[q]uestions regarding the enforceability of agreements to mediate are not, in my experience, a significant issue. By contrast, the enforceability of settlement agreement is."

Other respondents expressed concerns about whether a multi-purpose convention could be adopted on a widespread basis. For example, one participant stated that:

[e]nforcement of settlement agreements would provide a good incentive to undertake mediation or conciliation. However, enforcement of agreements to mediate or conciliate have attracted strong views by the courts in the jurisdictions that I'm familiar with, and this may be an issue on which different States have different (strong) opinions which may impede the widespread adoption of a convention.

The final set of rationales to consider are those enunciated by the small number of respondents (6%) who believed that any future work in this area of law should focus only on agreements to mediate international commercial disputes and not on settlement agreements arising out of international commercial mediations. In these cases, respondents appeared to believe that settlement agreements arising out of international commercial mediation did not need any additional protection under international law because those agreements could be enforced under domestic law as commercial contracts or because the voluntary nature of settlement agreements precluded the need for any international enforcement mechanism.

When taken in their entirety, these comments provide very clear insights into the views of the international business and legal communities. Virtually all respondents believe that some type of international action is both necessary and useful in this area of law. Although a small minority of people prefer a single-

purpose convention of one type or another, an overwhelming number of survey participants (75%) believe that any future work in this field should address both the beginning and end stages of international commercial mediation. Not only is a dual-pronged approach seen by a vast majority of respondents as being consistent with the structure of various conventions relating to international commercial arbitration,<sup>263</sup> it is also seen as being the most likely means of increasing the use of mediation in international commercial disputes.

### *C. Open-Ended Comments*

The final question in the survey asked participants whether there were any other comments they would like to make about international commercial mediation. The responses were almost universally in favor of further international work in this field, noting that this was a “great trend.” Typical comments included statements like “[a] Convention such as the one being considered is long overdue and would make a dramatic positive difference to the growth of mediation (domestic & international) and to the reduction of cross-border litigation,” and “I think the creation of a convention in this area of law would legitimize international commercial mediation and encourage its use.” Similar sentiments were expressed by those who noted that “[a] Convention would be an excellent idea with little or no downside,” “[t]his [is] the next level of the future,” and “I am all for it and wish everybody else would, too.” Only one person suggested that “we need more experience rather than more legal instruments.”

Conventional wisdom suggests that mediation is a U.S.-centric enterprise and that U.S. parties and practitioners are in some way imposing international commercial mediation on the rest of the world as a type of legal imperialism.<sup>264</sup> However,

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263. See generally European Convention, *supra* note 13; Montevideo Convention, *supra* note 13; New York Convention, *supra* note 13; Panama Convention, *supra* note 13.

264. See Borgen, *supra* note 169, at 750–64 (discussing the perception of “Western imperialism”); see also Kroncke, *supra* note 169, at 490 (“[T]here is a pervasive awareness among practitioners and scholars that their work is considered a form of ‘legal imperialism’ or adjunct to ‘American empire’ by some

the data does not support that proposition. Instead, statements in support of international commercial mediation were made by respondents from a wide variety of countries. Thus, the comment in the preceding paragraph about the current work in this field being a “great trend” came from a respondent in Switzerland, while the sentiment that this work is “long overdue” came from the United Kingdom. Similarly, the statement that there is “little or no downside” to a convention in this area of law came from Brazil, while the phrase “I am all for it and wish everyone else would, too,” came from Croatia. Although support for international commercial mediation varies both within and between countries, the empirical data shows widespread international support for international commercial mediation as a general proposition and for further work in this area by UNCITRAL.

Although respondents strongly favored efforts to adopt a new convention in the area of international commercial mediation, survey participants recognized that the process of drafting an international instrument and winning widespread international adherence might be difficult at times.<sup>265</sup> Nevertheless, most respondents seemed to be of the view that “it will gradually work.”

Some respondents identified specific issues that might require special care when drafting. For example, several participants highlighted the ongoing debate about the meaning of the terms “mediation” and “conciliation.”<sup>266</sup> As a result, one

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disciplines—notably legal sociology, anthropology, and critical history.” (quoting John Flood, *Legal Education, Globalization, and the New Imperialism*, in *THE LAW SCHOOL: GLOBAL ISSUES, LOCAL QUESTIONS* 127, 127–50 (Fiona Cownie ed., 1st ed. 1999)).

265. See Strong, *Epistemic Communities*, *supra* note 18 (discussing negotiation efforts at UNCITRAL).

266. There has been a great deal of debate over the years about the difference between these terms. See Nolan-Haley, *Mediation*, *supra* note 19, at 1009–10 (noting that “there are cultural differences in the interpretation” of the terms mediation and conciliation “that need to be taken into account”); see also Spain, *supra* note 19, at 10–11 (“Mediation is a form of third-party intervention by which an unbiased party convenes disputing parties, facilitates a process for communicating positions and underlying interests, and promotes agreement formation . . . .”); Welsh & Schneider, *supra* note 19, at 84–85 (discussing the implications of expanding the use of mediation depending how it is defined

person noted that “[h]armonisation of the terms mediation and conciliation is needed before venturing into enforcement of settlement agreements. There is a lot of confusion about these two terms, they need to be treated as different. UNCITRAL must use ‘Model Law on conciliation and mediation.’”<sup>267</sup> Another respondent noted that any future conventions in this area “should not be seen as dominated by Anglo-Saxon legal principles,” which reflects the widespread albeit incorrect presumption that mediation is a U.S. or common law-based procedure of recent origin.<sup>268</sup>

Another theme that was repeated several times in the open comment section involved the recognition that international action alone would not be sufficient to make mediation a standard means of resolving international commercial disputes. Thus, one person noted that “[a]side from international conventions there must be a massive information drive on the process an [sic] enforceability of settlement agreements.” Another respondent stated that “[e]fforts should be done and actions should be taken for mediation and conciliation to become better known and for lawyers not to consider ADR as Alarming Drop in Revenue.” Indeed, one person noted that “[p]eople still need to be deeply informed about the process. The main obstacle preventing its use comes from the parties lawyer [sic].”

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relative to conciliation); *supra* note 5 and accompanying text (noting that the study under discussion defined the terms “mediation” and “conciliation” interchangeably).

267. See UNCITRAL Model Conciliation Law, *supra* note 126, (providing a model law for conciliation).

268. See Borgen, *supra* note 169, at 750–64 (discussing advent of mediation); Kroncke, *supra* note 169, at 490 (noting perception of mediation worldwide); Reif, *supra* note 20, at 583 (“Although conciliation has been used in some domestic societies for hundreds of years, on the international level it appeared in the early part of this century . . .”); Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (writing that Western legal systems have preferred adjudicative means of dispute resolution in the years following World War II).

### VIII. Conclusion

Over the last few decades, international commercial and investment arbitration have established themselves as the preferred means of resolving cross-border business disputes.<sup>269</sup> Parties are attracted to these procedures for a variety of reasons, including the way in which arbitration promotes privacy, confidentiality, finality, and use of an impartial and independent third-party neutral who is not prone to the parochialism exhibited by many national courts.<sup>270</sup> Even more importantly, international arbitration provides parties with an easy, predictable, and relatively inexpensive means of enforcing arbitral awards across borders through various international treaties such as the New York Convention and the ICSID Convention.<sup>271</sup>

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269. See *supra* notes 2–3 and accompanying text (discussing the current preference for arbitration over mediation in the international commercial sphere).

270. See BORN, ICA, *supra* note 1, at 82–115 (discussing the benefits of arbitration); see also Strong, *Epistemic Communities*, *supra* note 18 (discussing the benefits of arbitration, which include “procedural fairness and party autonomy as well as the ability to combine common law and civil law procedures, avoid the parochialism of national courts, and obtain an easy, predictable, and relatively inexpensive means of enforcing arbitral awards across borders”).

271. See, e.g., ICSID Convention, *supra* note 15 (establishing the arbitral regime for international investment disputes); see also New York Convention, *supra* note 13 (providing for enforcement of foreign arbitral awards); BORN, ICA, *supra* note 1, at 73–97 (discussing enforcement of international arbitration agreements and awards); REED ET AL., *supra* note 15, at 179–80 (discussing the “recognition, enforcement and execution of ICSID awards”). No such treaties exist in the area of international litigation, which makes the enforcement of foreign judgments expensive, unpredictable, and risky. See S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 51–53 (2014) (suggesting that the popularity of international commercial arbitration is due to the absence of any easy way to enforce foreign judgments). However, the Hague Conference on Private International Law has recently renewed its work on the enforcement of foreign judgments (the “Judgments Project”), which suggests possible developments in this area. See Special Commission on the Recognition and Enforcement of Foreign Judgments, Hague Conference on Private International Law, 2016 Preliminary Draft Convention, <https://assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf>.

At one time, international arbitration was also considered a faster and less expensive alternative to international litigation.<sup>272</sup> However, these attributes have recently been questioned as a result of international arbitration's increasing legalism and the resulting rise in cost and delay.<sup>273</sup> This phenomenon has led many international actors to consider other means of resolving cross-border business disputes.<sup>274</sup> Of the various alternatives, mediation has proven to be the most intriguing, not only because mediation replicates many of the benefits seen in arbitration, but also because mediation is said to be faster and less expensive than arbitration, even in the international commercial and investment contexts.<sup>275</sup>

As a result, the last few years have seen a variety of public<sup>276</sup> and private<sup>277</sup> initiatives meant to encourage mediation in

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272. See BORN, ICA, *supra* note 1, at 86–87 (noting traditional perception of international arbitration).

273. See *id.* (noting international arbitration is now quite costly but is still less expensive than international litigation).

274. See Strong, ICM, *supra* note 20, at 11 (“One of the more popular alternatives is mediation.” (quoting Nolan-Haley, *supra* note 18, at 66–67)).

275. See Salacuse, *supra* note 20, at 174–82 (outlining benefits of mediation in the investment context); see also Strong, *Epistemic Communities*, *supra* note 18 (suggesting that most of the values in arbitration can also be achieved through mediation); Welsh & Schneider, *supra* note 19, at 77 (outlining the benefits of mediation).

276. For example, the World Bank, the International Finance Corporation, and the European Union have all launched public initiatives to support mediation in international commercial and investment disputes. See European Directive, *supra* note 58 (encouraging the use of mediation in the European Union); Strong, ICM, *supra* note 20, at 14 (noting various efforts by public bodies). UNCITRAL's recent efforts regarding a possible international instrument concerning settlement agreements arising out of international commercial mediation also fall into this category of conduct. See U.S. Proposal, *supra* note 19, at 3 (“[T]he United States proposes that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration.”); see also *supra* notes 49–64 and accompanying text (discussing the need for a new instrument on international commercial mediation).

277. For example, over 4,000 corporations have signed the CPR Pledge to engage in early dispute resolution, which includes mediation. See CPR, Corporate Pledge, *supra* note 127 (outlining the content of the pledge and providing a list of companies that have signed on); see also *supra* note 60 and

international commercial and investment disputes. The most ambitious of these efforts involves a possible new treaty at UNCITRAL that would create a simple and inexpensive mechanism for enforcing settlement agreements arising out of international commercial mediation in a manner similar to that used for arbitral awards under the New York Convention.<sup>278</sup> If successful, the new mediation convention would eliminate certain discrepancies in the legal environment surrounding mediation and arbitration and offset any negative externalities that may drive parties to international arbitration despite a preference for a consensual approach to dispute resolution.<sup>279</sup>

As positive as these developments may be, national and international policymakers have been plagued by a dearth of hard data regarding international commercial mediation.<sup>280</sup> Parties and practitioners have also had to make key strategic decisions in the absence of objectively verifiable facts about mediation in the cross-border business context.<sup>281</sup> This situation is of course problematic, since institutions and individuals must have access to reliable and relevant information if they are to behave in a rational manner.<sup>282</sup>

This Article has responded to this gap in knowledge by reporting and analyzing the findings from the first-ever, large-

accompanying text (discussing individual companies' support for mediation).

278. See New York Convention, *supra* note 13 (discussing enforcement of foreign arbitral awards); Strong, *ICM*, *supra* note 20, at 12–13, 31–32 (explaining the need for an international convention on international commercial mediation).

279. See Strong, *Epistemic Communities*, *supra* note 18 (discussing external factors that may affect negotiation of a new instrument in this area of law); see also *supra* note 21 and accompanying text (discussing why arbitration became more popular than mediation in the post-World War II period).

280. See *supra* note 52 and accompanying text (noting UNCITRAL delegates' call for empirical data).

281. See *supra* notes 41, 50 and accompanying text (noting that a lack of information hinders proper decision-making).

282. See POSNER, *supra* note 43, at 429–38 (discussing decision making in the face of uncertainty); see also Rubin, *supra* note 43, at 1094 (“The most serious resource constraint is clearly a lack of information, either because no one has the information or because the information is not available to the decision maker.”); Wilson, *supra* note 43, at 108–19 (discussing negotiation in the face of informational deficiencies).

scale empirical study of international commercial mediation. The study, which was aimed at private practitioners, in-house counsel, government officials, neutrals, and legal academics from around the world, generated quantitative and qualitative responses to thirty-four detailed questions concerning current beliefs and behaviors regarding international commercial arbitration as well as thoughts about the future development of the field. This data will be put to immediate use by state delegations participating in the ongoing treaty negotiations at UNCITRAL.<sup>283</sup> However, the material also provides significant long-term benefits to parties, practitioners, and policymakers in the United States and abroad. For example, the analysis not only tests and in some cases refutes certain theoretical assumptions about how and why parties engage in mediation in the cross-border commercial context, it also challenges conventional wisdom regarding mediation practice (such as the belief that mediation is a U.S.-centric procedure), thereby providing a reasoned response to various biases against mediation at both the national and international levels.

Over the years, the paucity of empirical information about international commercial and investment mediation has allowed numerous misunderstandings to flourish, thereby hindering the development of this particular area of law. By providing hard empirical data and engaging in rigorous qualitative and quantitative analysis, this Article allows decision-makers to operate in a rational and well-informed manner, individually and systemically. Though further empirical and theoretical research in this area of law is warranted, the foundation for such inquiries has now been laid.

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283. The preliminary report of this research has already proved useful in that regard, and it is hoped that the final analysis contained in this Article will continue to assist delegates as they consider their options going forward. See Secretariat Note, *supra* note 51, at 6 n.16 (referring state delegates to the preliminary report of this research); States' Comments, *supra* note 51, at 6 n.7 (relying on the preliminary report to support the proposition that "facilitating enforcement would encourage conciliation"); WG Report, *supra* note 19, ¶ 56 (noting the need for additional information in this area of law); see also Strong, *Preliminary Report*, *supra* note 54.



## Appendices

Space considerations preclude the graphical representation of all of the statistical data presented in this Article. However, the following charts have been compiled to reflect some of the study's more complex results.

## Appendix A

*Experienced participants' explanation for why parties used mediation or conciliation in international commercial disputes*

	1	2	3	4	5	6	7	8	9
A cultural disinclination toward litigation or arbitration	7.9%	4.5%	12.4%	21.3%	10.1%	12.4%	10.1%	13.5%	7.9%
A desire for a more satisfactory process	15.7%	12.4%	19.1%	18.0%	19.1%	7.9%	2.2%	3.4%	2.2%
A desire to preserve an ongoing relationship	18.0%	12.4%	13.5%	12.4%	25.8%	10.1%	4.5%	2.2%	1.1%
A desire to save costs	36.0%	22.5%	10.1%	12.4%	9.0%	6.7%	2.2%	0.0%	1.1%
A desire to save time	11.2%	28.1%	14.6%	10.1%	11.2%	15.7%	9.0%	0.0%	0.0%
The complexity of the dispute	1.1%	2.2%	6.7%	9.0%	3.4%	25.8%	27.0%	19.1%	5.6%

The simplicity of the dispute	0.0%	0.0%	6.7%	3.4%	1.1%	4.5%	23.6%	32.6%	28.1%
The expertise of the neutral	2.2%	6.7%	6.7%	6.7%	3.4%	9.0%	13.5%	24.7%	27.0%
The possibility of a creative (non- litigation-oriented) remedy	7.9%	11.2%	10.1%	6.7%	16.9%	7.9%	7.9%	4.5%	27.0%

## Appendix B

*Experienced respondents' explanation for how mediation or conciliation in international commercial disputes is usually initiated*

	1	2	3	4	5	6
Contractually mandated pursuant to a pre-dispute mediation agreement	30.2%	20.9%	20.9%	14.0%	5.8%	8.1%
Contractually mandated pursuant to a pre-dispute multi-tier (step) dispute resolution clause	29.1%	34.9%	14.0%	11.6%	8.1%	2.3%
Judicially mandated	11.6%	7.0%	16.3%	15.1%	14.0%	36.0%
Voluntarily adopted post-dispute pursuant to company policy	3.5%	8.1%	9.3%	25.6%	31.4%	22.1%
Voluntarily adopted post-dispute pursuant to a suggestion by counsel	19.8%	14.0%	24.4%	11.6%	22.1%	8.1%
Voluntarily adopted post-dispute pursuant to a suggestion by a party	5.8%	15.1%	15.1%	22.1%	18.6%	23.3%

Appendix C

*Experienced respondents' explanation for why parties avoid mediation or conciliation in international commercial disputes*

	1	2	3	4	5	6	7	8	9	10	11	12	N/A
Concerns about finding an effective mediator or conciliator	12.9%	9.4%	10.6%	17.6%	4.7%	10.6%	8.2%	4.7%	2.4%	1.2%	0.0%	0.0%	17.6%
Concerns about how to conduct a mediation or conciliation effectively	8.2%	8.2%	15.3%	10.6%	11.8%	7.1%	14.1%	2.4%	3.5%	1.2%	0.0%	0.0%	17.6%
Concerns about revealing litigation strategy or evidence	9.4%	15.3%	16.5%	12.9%	14.1%	11.8%	4.7%	4.7%	2.4%	1.2%	0.0%	0.0%	7.1%
Concerns about the cost of the process	1.2%	4.7%	3.5%	9.4%	7.1%	9.4%	9.4%	9.4%	11.8%	4.7%	1.2%	5.9%	22.4%

Concerns about the international enforceability of an agreement to mediate or conciliate	5.9%	7.1%	3.5%	3.5%	10.6%	7.1%	11.8%	10.6%	7.1%	7.1%	2.4%	1.2%	22.4%
Concerns about the international enforceability of a settlement award arising out of mediation or conciliation	7.1%	7.1%	10.6%	8.2%	10.6%	9.4%	5.9%	10.6%	7.1%	5.9%	3.5%	0.0%	14.1%
Concerns about the time of the process	2.4%	3.5%	4.7%	3.5%	5.9%	3.5%	11.8%	7.1%	11.8%	9.4%	11.8%	7.1%	17.6%
Counsel's concerns about earning income on the dispute	5.9%	3.5%	4.7%	7.1%	5.9%	8.2%	2.4%	9.4%	7.1%	14.1%	3.5%	4.7%	23.5%
Counsel's lack of experience with mediation or conciliation	7.1%	15.3%	4.7%	10.6%	4.7%	3.5%	1.2%	4.7%	10.6%	8.2%	12.9%	1.2%	15.3%

Cultural preferences for litigation or arbitration	4.7%	14.1%	9.4%	11.8%	7.1%	2.4%	3.5%	4.7%	1.2%	15.3%	11.8%	3.5%	10.6%
Lack of a desire to preserve ongoing relationship	2.4%	3.5%	7.1%	2.4%	4.7%	2.4%	1.2%	2.4%	7.1%	0.0%	17.6%	27.1%	22.4%
Lack of experience with mediation or conciliation	32.9%	8.2%	9.4%	2.4%	11.8%	4.7%	2.4%	3.5%	2.4%	2.4%	1.2%	14.1%	4.7%

## Appendix D

*Inexperienced respondents' explanation for why parties avoid mediation or conciliation in international commercial disputes*

	1	2	3	4	5	6	7	8	9	10	11	12	N/A
Concerns about finding an effective mediator or conciliator	12.3%	9.6%	5.5%	13.7%	9.6%	12.3%	6.8%	2.7%	1.4%	1.4%	0.0%	0.0%	24.7%
Concerns about how to conduct a mediation or conciliation effectively	6.8%	11.0%	12.3%	8.2%	4.1%	12.3%	9.6%	8.2%	1.4%	1.4%	0.0%	0.0%	24.7%
Concerns about revealing litigation strategy or evidence	5.5%	16.4%	13.7%	8.2%	12.3%	6.8%	1.4%	8.2%	2.7%	0.0%	0.0%	0.0%	24.7%

Concerns about the cost of the process	6.8%	0.0%	11.0%	12.3%	8.2%	4.1%	15.1%	5.5%	8.2%	4.1%	1.4%	0.0%	23.3%
Concerns about the international enforceability of an agreement to mediate	5.5%	6.8%	9.6%	5.5%	5.5%	6.8%	4.1%	9.6%	4.1%	5.5%	0.0%	0.0%	37.0%
Concerns about the international enforceability of a settlement award arising out of mediation or conciliation	17.8%	6.8%	6.8%	2.7%	8.2%	4.1%	2.7%	6.8%	11.0%	1.4%	4.1%	0.0%	27.4%
Concerns about the time of the process	0.0%	4.1%	1.4%	12.3%	11.0%	4.1%	6.8%	4.1%	6.8%	15.1%	5.5%	1.4%	27.4%



<b>Counsel's concerns about earning income on the dispute</b>	2.7%	4.1%	5.5%	1.4%	4.1%	4.1%	8.2%	8.2%	4.1%	6.8%	13.7%	1.4%	<b>35.6%</b>
<b>Counsel's lack of experience with mediation or conciliation</b>	4.1%	15.1%	2.7%	6.8%	5.5%	2.7%	5.5%	4.1%	9.6%	5.5%	6.8%	6.8%	<b>24.7%</b>
<b>Cultural preferences for litigation or arbitration</b>	<b>20.5%</b>	8.2%	11.0%	6.8%	5.5%	4.1%	1.4%	2.7%	1.4%	9.6%	6.8%	4.1%	17.8%
<b>Lack of a desire to preserve ongoing relationship</b>	1.4%	5.5%	5.5%	5.5%	6.8%	0.0%	2.7%	1.4%	4.1%	1.4%	12.3%	20.5%	<b>32.9%</b>
<b>Lack of experience with mediation or conciliation</b>	15.1%	9.6%	11.0%	11.0%	11.0%	4.1%	1.4%	0.0%	2.7%	1.4%	1.4%	13.7%	<b>17.8%</b>

*Appendix E*

*Experienced respondents' views on what would make parties more likely to use mediation or conciliation in international commercial disputes*

	1	2	3	4	5	6	7
Better information about the conduct of the procedure itself	29.8%	33.3%	10.7%	6.0%	8.3%	7.1%	4.8%
Better information about the cost of the procedure	7.1%	15.5%	33.3%	11.9%	11.9%	8.3%	11.9%
More confidence regarding the enforceability of agreements to mediate or conciliate at the place where the procedure is to be conducted	8.3%	4.8%	10.7%	28.6%	16.7%	14.3%	16.7%
More confidence regarding the enforceability of agreements to mediate or conciliate across national borders	0.0%	11.9%	7.1%	19.0%	32.1%	16.7%	13.1%

More confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation at the place where the procedure was conducted	6.0%	6.0%	13.1%	13.1%	16.7%	35.7%	9.5%
More confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation across national borders	11.9%	10.7%	10.7%	17.9%	9.5%	13.1%	26.2%
More evidence of the effectiveness of the procedure (i.e., the likelihood of reaching a settlement)	36.9%	17.9%	14.3%	3.6%	4.8%	4.8%	17.9%

Appendix F

*Inexperienced respondents' views on what would make parties more likely to use mediation or conciliation in international commercial disputes*

	1	2	3	4	5	6	7
Better information about the conduct of the procedure itself	27.8%	37.5%	5.6%	11.1%	8.3%	8.3%	1.4%
Better information about the cost of the procedure	5.6%	8.3%	41.7%	9.7%	9.7%	6.9%	18.1%
More confidence regarding the enforceability of agreements to mediate or conciliate at the place where the procedure is to be conducted	9.7%	11.1%	11.1%	36.1%	12.5%	18.1%	1.4%
More confidence regarding the enforceability of agreements to mediate or conciliate across national borders	8.3%	6.9%	15.3%	19.4%	33.3%	12.5%	4.2%

More confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation at the place where the procedure was conducted	2.8%	6.9%	9.7%	13.9%	22.2%	31.9%	12.5%
More confidence regarding the enforceability of settlement agreements arising out of mediation or conciliation across national borders	5.6%	16.7%	6.9%	8.3%	8.3%	22.2%	31.9%
More evidence of the effectiveness of the procedure (i.e., the likelihood of reaching a settlement)	40.3%	12.5%	9.7%	1.4%	5.6%	0.0%	30.6%

Appendix G

*All respondents' views on the types of international commercial disputes that are best suited to mediation or conciliation*

	1	2	3	4	5	6	7	8	9	10	11	N/A
<b>Disputes involving an ongoing relationship</b>	<b>73.6%</b>	14.6%	4.2%	1.4%	3.5%	0.7%	0.7%	0.0%	0.0%	0.0%	0.7%	0.7%
<b>Disputes involving more than two parties</b>	1.4%	13.2%	9.0%	12.5%	10.4%	13.2%	8.3%	2.1%	1.4%	2.1%	2.1%	<b>24.3%</b>
<b>Disputes involving only two parties</b>	0.7%	16.7%	<b>17.4%</b>	11.1%	9.0%	9.7%	8.3%	6.3%	2.8%	1.4%	0.7%	16.0%

Disputes involving parties from countries or cultures that encourage mediation or conciliation	9.7%	22.9%	17.4%	15.3%	13.9%	4.2%	6.3%	2.1%	2.1%	1.4%	0.7%	4.2%
Disputes involving large amounts of money	3.5%	4.2%	6.9%	10.4%	9.7%	12.5%	12.5%	10.4%	4.9%	1.4%	0.7%	22.9%
Disputes involving small amounts of money	2.1%	6.3%	7.6%	8.3%	6.3%	9.0%	15.3%	10.4%	6.3%	4.2%	2.1%	22.2%
Disputes involving intangibles	0.0%	4.2%	6.9%	11.8%	9.0%	5.6%	10.4%	13.9%	11.8%	4.9%	0.0%	21.5%

Disputes involving non-monetary relief	2.1%	9.0%	15.3%	6.3%	8.3%	6.3%	3.5%	12.5%	12.5%	6.3%	1.4%	16.7%
Disputes involving complicated factual or legal issues	2.1%	4.2%	6.9%	9.7%	7.6%	6.3%	2.1%	5.6%	16.7%	15.3%	2.1%	21.5%
Disputes involving simple factual or legal issues	2.1%	2.1%	4.2%	6.3%	7.6%	4.9%	0.7%	2.1%	5.6%	27.1%	13.2%	24.3%
Disputes with a high likelihood of parallel proceedings	2.8%	2.8%	4.2%	5.6%	11.1%	2.1%	3.5%	2.8%	2.8%	1.4%	38.2%	22.9%



## Appendix H

*All respondents' views on the types of international commercial disputes that are the least suited to mediation or conciliation*

	1	2	3	4	5	6	7	8	9	10	11	N/A
Disputes involving an ongoing relationship	9.2%	3.1%	5.4%	9.2%	4.6%	11.5%	3.1%	0.8%	2.3%	3.1%	8.5%	39.2%
Disputes involving more than two parties	17.7%	16.9%	14.6%	12.3%	9.2%	4.6%	4.6%	0.8%	0.8%	0.0%	0.0%	18.5%
Disputes involving only two parties	0.0%	6.9%	8.5%	9.2%	11.5%	10.0%	10.0%	2.3%	1.5%	0.0%	0.0%	40.0%
Disputes involving parties from countries or cultures that encourage mediation or conciliation	0.0%	4.6%	3.1%	3.8%	7.7%	10.8%	10.8%	10.8%	2.3%	3.8%	3.1%	39.2%

<b>Disputes involving large amounts of money</b>	9.2%	9.2%	9.2%	7.7%	9.2%	6.9%	6.9%	6.9%	7.7%	2.3%	1.5%	0.0%	<b>30.0%</b>
<b>Disputes involving small amounts of money</b>	13.1%	8.5%	8.5%	3.8%	5.4%	4.6%	9.2%	6.9%	6.9%	10.0%	1.5%	0.0%	<b>28.5%</b>
<b>Disputes involving intangibles</b>	1.5%	3.1%	9.2%	9.2%	10.0%	3.1%	6.9%	6.9%	10.8%	10.0%	5.4%	0.8%	<b>30.0%</b>
<b>Disputes involving non-monetary relief</b>	3.8%	3.8%	6.9%	5.4%	2.3%	2.3%	3.8%	3.8%	8.5%	12.3%	13.8%	2.3%	<b>34.6%</b>
<b>Disputes involving complicated factual or legal issues</b>	16.2%	13.1%	12.3%	6.9%	6.2%	1.5%	0.8%	0.8%	3.8%	7.7%	11.5%	2.3%	<b>17.7%</b>
<b>Disputes involving simple factual or legal issues</b>	8.5%	7.7%	3.1%	5.4%	4.6%	1.5%	0.8%	0.8%	2.3%	3.1%	10.8%	20.8%	<b>31.5%</b>
<b>Disputes with a high likelihood of parallel proceedings</b>	17.7%	15.4%	6.2%	5.4%	3.8%	2.3%	0.8%	0.8%	1.5%	2.3%	3.1%	16.2%	<b>25.4%</b>



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# NOTES

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