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Rationality Revisited: A Response to Professor Greenberg

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Rationality Revisited: A Response to Professor Greenberg

S.I. Strong*

Abstract

Scholarly debate is meant to improve the legal community's understanding of both the value and the limitations of a particular strand of research. While it is useful to identify areas of principled disagreement, there are times when criticism is not based on different interpretations of law or theory but instead on a misapprehension of the underlying facts or the context in which the initial analysis is placed. In those types of situations, it is necessary for the original author to provide a formal response to keep errors from entering into the legal literature.

This Article provides just such a response to a review of an empirical study of the use and perception of international commercial mediation. While the review in question identifies a number of concerns that are well-taken at the theoretical level, the manner in which those concerns are applied to the original research reflects a number of misconceptions about the nature of the underlying study as well as the realities of international commercial law and practice.

Interestingly, many of the issues raised in the review are typical of the kinds of apprehensions and arguments enunciated by specialists in domestic dispute resolution. As a result, this Article not only sets the record straight with respect to a number of criticisms levelled at the original research but also provides a useful discussion of how the law, practice, and study of international

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commercial mediation differ from that of national mediation. As a result, readers will be better able to gauge the validity of the underlying empirical study and engage with the field of international commercial mediation going forward.

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I. Introduction

It is always an honor when colleagues take notice of one’s research, even if—or indeed, particularly when—such commentary identifies areas of possible improvement. Scholarly research is honed and perfected through such debates and discussion, to the benefit not only of the original author but also of the legal and academic communities at large. A certain amount of disagreement is expected during the course of these dialogues, and normally the most appropriate course of action is for the author whose work is under scrutiny to remain silent and allow the original submission to speak for itself. However, it is occasionally necessary to respond to certain critiques if the failure to do so would allow misleading statements to enter the legal literature.

Such is the case here. Although Professor Elayne Greenberg’s short review, *Realizing the Gap Between Rationality and Information*,¹ of my article, *Realizing Rationality: An Empirical*

1. See Elayne E. Greenberg, *Realizing the Gap Between Rationality and Information*, 74 WASH. & LEE L. REV. ONLINE 47 (2017) [hereinafter Greenberg,

Assessment of International Commercial Mediation,² contains several useful observations, it also includes a number of statements that do not appear to fully appreciate the practical or scholarly context in which the original article was set. Even more troubling, Professor Greenberg's analysis includes a number of recommendations for future research in this field that would, if adopted, be downright dangerous. Thus, it is necessary to respond briefly to her analysis.

This Response does not address all of Professor Greenberg's statements on a point-by-point basis, since there are elements that are well-taken and others on which knowledgeable scholars will simply disagree. Instead, the focus here is on various misunderstandings and misstatements that would mar future research in this field if they were allowed to stand without comment.

Although the primary purpose of this Response is to correct certain errors in Professor Greenberg's analysis, I will also use this opportunity to discuss some core differences between national and international commercial mediation. Many of the issues raised by Professor Greenberg are typical of the kinds of concerns enunciated by specialists in domestic dispute resolution,³ and it may be useful to underscore how the law, practice, and study of international commercial mediation differ from that of national mediation so that readers can better gauge the validity of the underlying empirical study and engage with the field of international commercial mediation going forward.

Realizing the Gap].

2. See S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973 (2016) [hereinafter Strong, *Realizing Rationality*].

3. Though Professor Greenberg is an acknowledged expert in domestic mediation, she does not have extensive experience in the international realm. Indeed, only one of Professor Greenberg's published works appears to address cross-border disputes, and that involves workplace discrimination, not international commercial law and practice. See Elayne E. Greenberg, *Overcoming Our Global Disability in the Workforce: Mediating the Dream*, 86 ST. JOHN'S L. REV. 579 (2012).

This Response follows the structure adopted by Professor Greenberg in her review and begins in Section II with questions about a real or perceived common law or U.S.-centric bias.⁴ Section III turns to concerns about the representativeness of the surveyed population,⁵ while Section IV considers Professor Greenberg's objection to the decision not to differentiate between the terms "mediation" and "conciliation" in the original study.⁶ Finally, the Response concludes in Section V with a few remarks about how scholarship in this field might develop.

II. Does the Underlying Empirical Study Reflect an Appropriately Global Perspective?

Professor Greenberg's first critique of the underlying empirical research is the most troubling, both because of the way it characterizes the methodology used in the study and because of its extremely problematic recommendations for future research in this field. According to Professor Greenberg, the study—which included responses from 221 individuals from 51 countries—nevertheless reflects a U.S.-centric or common law bias because the survey instrument was distributed only in English.⁷ To remedy this purported shortcoming, Professor Greenberg suggests that "an easy fix for future surveys is to translate the surveys into several languages. Thank you, Google Translate!"⁸

The most generous reading of this statement is that it was an attempt to soften criticism through levity. Unfortunately, Professor Greenberg's choice of words suggests that she believes that Google Translate or other computerized translation services are an appropriate means of conducting multilingual empirical research. In fact, any scholar who adopts such a methodology is guilty of professional misfeasance.

4. Greenberg, *Realizing the Gap*, *supra* note 1, at 58.

5. *Id.* at 60–61.

6. *Id.* at 61.

7. *Id.* at 58; *see also* Strong, *Realizing Rationality*, *supra* note 2, at 2017, 2019–20.

8. Greenberg, *Realizing the Gap*, *supra* note 1, at 60.

As someone who is proficient in a second language (Spanish) and who has not only conducted legal work in that language but who has written an entire book on the difficulties associated with achieving bilingual legal fluency, I can say with confidence and with the universal support of the international and comparative legal communities that Google Translate is categorically incapable of properly translating a scholarly survey involving international commercial law and practice into a second language.⁹ Bilingual law and practice involves more than a set of words that can be removed and replaced pursuant to mechanical algorithms; instead, those who seek to engage in legal discourse and analysis across linguistic lines must be skilled comparatists and must exercise a considerable amount of discretion and expertise when translating legal documents.

Two simple examples demonstrate the problems associated with Professor Greenberg's proposal. The first involves the possibility of misleading synonyms, also known as "false friends." According to Google Translate, the Spanish word "notario" is synonymous with the English word "notary." That is indeed the correct word-for-word translation, according to specialist legal dictionaries.¹⁰ However, notarios in Spanish-speaking jurisdictions

9. See S.I. STRONG ET AL., *COMPARATIVE LAW FOR SPANISH-ENGLISH SPEAKING LAWYERS: LEGAL CULTURES, LEGAL TERMS AND LEGAL PRACTICES / DERECHO COMPARADO PARA ABOGADOS ANGLO- E HISPANOPARLANTES: CULTURAS JURÍDICAS, TÉRMINOS JURÍDICOS Y PRÁCTICAS JURÍDICAS* 4 (2016) (discussing difficulties associated with legal translation); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 51 (1998) (describing need to contextualize legal translation); S.I. Strong, *Bilingual Legal Education in the United States: An Idea Whose Time Has Come?*, 64 J. LEGAL EDUC. 354, 358 (2014) (outlining problems with legal dictionaries).

10. There are a number of excellent Spanish-English legal dictionaries on the market. However, parties and practitioners should be careful when choosing which text to use, since not all dictionaries are appropriate for all uses. See Sergio D. Stone, *A Study of Dictionaries in U.S. and Latin American Courts*, 36 COLO. LAW. 115 (2007) (analyzing strengths of various dictionaries), www.aallnet.org/chapter/coall/pubs/lrc/lrc0807.pdf. Furthermore, excessive reliance on bilingual legal dictionaries is itself problematic. See Steven M. Kahaner, *Legal Translation Today: Toward a Healthier State of Reality*, 19 INT'L LEGAL PRACTICUM 80, 80 (2006) (discussing problems of reliance on legal

are important public officials who are typically legally trained (although they are not lawyers per se) and who are responsible for undertaking specific and often complicated procedures involving the sale and purchase of real estate and the creation of wills.¹¹ A notary in an English-speaking jurisdiction is very different and primarily engages in certain ministerial tasks relating to the confirmation of the identity of a person signing a document.¹² Although a notary may also be a lawyer, the vast majority are not.¹³

The failure to appreciate the legal differences between the notaries and notarios can and often does lead to significant problems in practice. Indeed, issues relating to mistranslation of terms are so pervasive that the Texas Secretary of State has a webpage dedicated to explaining the differences between the two functions.¹⁴ Given the problems that lawyers who are already bilingual have in identifying terms that are technically synonymous but functionally inconsistent, it is impossible to believe that those relying on Google Translate would ever become aware of these types of concerns.

The second type of problem with Google Translate involves the algorithm's lack of expertise in highly technical matters such as law. For example, a number of Spanish-speaking countries provide for a particular type of constitutional challenge known as a "tutela" or "acción de tutela."¹⁵ However, those terms come up in Google

dictionaries).

11. See Clifford J. Hendel, *Doing Business in Spain, Including Selecting and Managing Legal Counsel*, 24 INT'L L. PRACTICUM 38 (2011) (discussing role of notaries in Spain).

12. STRONG ET AL., *supra* note 9, at 4.

13. *Id.*

14. See generally Jonathan A. Pikoff & Charles J. Crimmins, *Lost in Translation: Texas Notary Public v. Mexico Notario Publico*, TEX. SEC. STATE, www.sos.state.tx.us/statdoc/notariopublicoarticle.shtml (last visited Aug. 10, 2017) (on file with the Washington and Lee Law Review).

15. See, e.g., Constitución Política de Colombia July 4, 1991, art. 86; see also S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*, 22 DUKE J. COMP. & INT'L L. 47, 54 (2011) (discussing *acciones de tutela*), translated and

Translate as “guardianship” or “action of guardianship,” which is something entirely different.¹⁶

Professor Greenberg is absolutely correct to note that it would be useful to have the survey instrument translated and distributed in different languages. However, to suggest that an entire survey that is full of legal terms of art can and should be translated with so crude an instrument as Google Translate demonstrates a significant lack of appreciation for the realities of international law and practice.¹⁷ There is no way that someone who is not conversationally as well as legally fluent in the second language would ever be able to catch the multitude of errors generated by a mechanical algorithm like Google Translate. Translation of legal documents, including empirical studies, must be undertaken with due care, diligence, and expertise if the research findings are to be valid.

This is not the only problem with Professor Greenberg’s analysis. For example, her recommendation regarding Google Translate is linked to her belief that although “English may be considered the lingua franca of the international business community. . . [.] it is unclear if English is . . . the lingua franca for those who participate in surveys such as the one that served for [sic] the basis of Professor Strong’s research.”¹⁸ This statement not only suggests a lack of familiarity with the international dispute resolution community, it also reflects a failure to appreciate the scope, nature, and purpose of the study in question.¹⁹

reprinted in Spanish as S.I. Strong, *El Arbitraje Internacional en Colombia Desde una Perspectiva Estadounidense*, 15 REVISTA INTERNACIONAL DE ARBITRAJE 144 (2011) (José Andrés Prada Gaviria trans.).

16. See Pauline G. Dembicki, *What You Should Know About Adult Guardianship*, 42 PRAC. LAW. 73, 73 (1996) (defining guardianship).

17. Excessive reliance on bilingual legal dictionaries is also problematic. See Kahaner, *supra* note 10, at 80 (discussing problems with legal dictionaries).

18. Greenberg, *Realizing the Gap*, *supra* note 1, at 58.

19. The latter issue is discussed below. See *infra* notes 37–43 and accompanying text (discussing the survey’s intent to study the use and perception of international commercial mediation in the international legal and business communities). The statement also suggests a failure to read the underlying article carefully, since the survey specifically acknowledged the possibility of sampling

The study was aimed at the international legal and business communities, particularly those segments that are familiar with international dispute resolution. Members of that particular population operate primarily in English, a phenomenon that is likely to continue for the foreseeable future.²⁰ Multinational epistemic groups, including those relating to international commercial arbitration and international commercial mediation, are created through joint research and networking activities,²¹ and the world of international dispute resolution is rife with English-language events and authorities. For example, student moots involving international commercial arbitration and mediation are conducted primarily in English and attract seasoned professionals who act as judges as well as interested law students from around the world.²² These events have routinely been identified as central

errors due to the use of English. Strong, *Realizing Rationality*, *supra* note 2, at 2002 n.88.

20. See Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1169 (2017) (discussing use of English in international arbitral community).

21. See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 718 (2007) (discussing communication in multinational epistemic groups); S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495, 502 (2017) [hereinafter Strong, *Clash of Cultures*] (discussing types of epistemic groups).

22. All of the top student mooting competitions in international dispute resolution are in English, regardless of where they are held. See generally Frankfurt Investment Arbitration Moot, <http://www.investmentmoot.org/> (last visited July 26, 2017) (held in Frankfurt, Germany) (on file with the Washington and Lee Law Review); International Bar Association—Vienna International Arbitration Centre, Mediation, and Negotiation Competition, <http://www.cdrcvienna.org/> (last visited July 26, 2017) (held in Vienna, Austria) (on file with the Washington and Lee Law Review); International Chamber of Commerce, International Commercial Mediation Competition, <https://iccwbo.org/dispute-resolution-services/professional-development/international-commercial-mediation-competition/mediation-competition-application-process/> (last visited July 26, 2017) (held in Paris, France) (on file with the Washington and Lee Law Review); Philip C. Jessup International Law Moot Court Competition, <https://www.ilsa.org/jessuphome> (last visited July 26, 2017) (finals held in Washington, D.C.) (on file with the Washington and Lee Law Review); Willem C. Vis International Commercial Arbitration Moot, <https://vismoot.pace.edu/> (last visited July 26, 2017) (held in Vienna, Austria) (on

to the development of a unified international dispute resolution community.²³ Similarly, academics and practitioners both consult and contribute to a large and ever-growing body of English-language source materials.²⁴ Thus, actual and aspiring experts in international dispute resolution must and do speak English.

This is not to say that all international dispute resolution conferences or all scholarship is conducted in English—for example, Latin American arbitration is a well-known sub-specialty that operates primarily in Spanish—but English is universally understood to be the standard language in the field.²⁵ Indeed, numerous well-regarded empirical studies relating to international dispute resolution have been conducted in English.²⁶

file with the Washington and Lee Law Review); Willem C. Vis International Commercial Arbitration Moot East, <http://www.cisgmoot.org/> (last visited July 26, 2017) (held in Hong Kong) (on file with the Washington and Lee Law Review).

23. See Mark L. Shulman, *Making Progress: How Eric Bergsten and the Vis Moot Advance the Enterprise of Universal Peace*, 24 PACE INT'L L. REV. 1, 5 (2012) (“The Vis Moot is justly renowned for assembling more law students and lawyers in one place at one time than any other such competition.”).

24. Most of the leading journals and treatises on international arbitration are in English. See S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 71–137 (2009) (providing bibliographic information).

25. See Franck et al., *supra* note 20, at 1169 (noting English is the lingua franca of international dispute resolution); Strong, *Realizing Rationality*, *supra* note 2, at 2002 n.88 (noting information from some sub-groups could be missed through use of an English-language survey).

26. See, e.g., Franck et al., *supra* note 20, at 1169 (discussing empirical study of international dispute resolution in English); Susan D. Franck et al., *International Arbitration: Demographics, Precision and Justice*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA CONG. SER. NO. 18, 33 (Albert Jan van den Berg ed., 2015) (same); Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015) (same); Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data, and Analysis Research Report*, 15 AM. REV. INT'L ARB. 525 (2004) (same); 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) (same). The School of International Arbitration at Queen Mary, University of London, has conducted numerous empirical studies involving international dispute resolution and distributes all of its studies in English. See generally *Research at the School of*

Thus, to suggest that the study reflected a common law bias simply because of the language of distribution is inappropriate.

Professor Greenberg also questions the validity of the study based on the claim that the literature survey “relied primarily on scholarly articles written by U.S. scholars published in U.S. journals.”²⁷ Although Professor Greenberg is right to suggest that non-U.S. sources need to be consulted in a study of this nature to ensure an appropriately global perspective, she is incorrect in her claim that the survey under discussion here did not consult non-U.S. sources.²⁸ In fact, the original article not only cites a significant number of non-U.S. authors published in U.S. law

International Arbitration, QUEEN MARY, U. OF LONDON, <http://www.arbitration.qmul.ac.uk/research/index.html> (last visited July 26, 2017) (containing details regarding seven different empirical studies concerning international arbitration) (on file with the Washington and Lee Law Review).

27. Greenberg, *Realizing the Gap*, *supra* note 1, at 58.

28. Professor Greenberg also fails to connect the alleged shortcomings in the literature analysis to any errors in the content of the survey. *See generally id.*

journals,²⁹ it also refers to a wide variety of non-U.S. sources.³⁰ Furthermore, the inclusion of U.S. authorities does not diminish

29. Even a partial list of foreign authors published in U.S. journals demonstrates significant national diversity, as reflected by the authors' professional affiliations. *See generally* Neil Andrews, *Connections between Courts, Arbitration, Mediation and Settlement: Transnational Observations*, 10 IUS GENTIUM 249 (2012) (University of Cambridge, United Kingdom); 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) (University of Wolverhampton, United Kingdom, and White & Case, London, United Kingdom); Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONFLICT RESOL. 777 (2014) (McGill University, Canada; formerly Chinese University of Hong Kong); 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 (2005) (Hague Institute for the Internationalisation of Law, the Netherlands, and University of Tilberg, the Netherlands); Yaraslau Kryvoi & Dmitry Davyenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 BROOK. J. INT'L L. 827 (2015) (University of West London, United Kingdom, and Max Planck Institute for Comparative and International Law, Hamburg, Germany); Bert Niemeijer & Machteld Pel, *Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN. ST. L. REV. 345 (2005) (Vrije University Amsterdam, the Netherlands, and Pelmediation, the Netherlands); Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORD. J. CORP. & FINAN. L. 449 (2004) (University of Nottingham, United Kingdom); Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.*, 13 HARV. NEGOT. L. REV. 131 (2008) (Ludwig Maximilians University, Munich, Germany); Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L L. 7 (2009) (Orrick, Düsseldorf, Germany); Jernej Sekolec & Michael B. Getty, *The UMA and the UNICTRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175 (UNCITRAL, Vienna, Austria, and Chicago, United States); Kim Shi Yin, *From "Face-Saving" to "Cost Saving": Encouraging and Promoting Business Mediation in Asia*, 32 ALT. HIGH COST LITIG. 158 (Nov. 2014) (Providence Law Asia, Singapore). Notably, this list focuses only on foreign authors cited for their work on mediation, not those that were cited for their work on arbitration or international dispute resolution more generally.

30. Even a partial list of foreign sources shows considerable diversity in terms of the place of publication and the affiliation of the authors. *See generally* EILEEN CARROLL & KARL MACKIE, *INTERNATIONAL MEDIATION: THE ART OF BUSINESS DIPLOMACY* (2d edn. 2006) (CEDR, London, United Kingdom, and CEDR, London, United Kingdom); EWALD FILLER, *COMMERCIAL MEDIATION IN EUROPE: AN EMPIRICAL STUDY OF THE USER EXPERIENCE* (2012) (Federal Ministry of Youth and Family Affairs of Austria, Vienna, Austria); OXFORD HANDBOOK OF

the quality of the research; to the contrary, it would have been improper to ignore the considerable body of scholarship from U.S. academics, particularly since those materials are frequently discussed by foreign scholars.

Finally, Professor Greenberg appears to suggest that a possible common law or U.S.-bias exists because the current efforts by the United Nations Commission on International Trade Law (UNCITRAL) to adopt a new international instrument involving international commercial mediation were triggered by a proposal from the United States.³¹ Setting aside the fact that UNCITRAL

EMPIRICAL LEGAL STUDIES (Peter Cane & Herbert Kritzer eds., 2010) (University of Cambridge, United Kingdom, and University of Minnesota, United States); 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 (Jacob Bercovitch ed., 1996) (University of Canterbury, New Zealand); Laurence Boulle, *International Enforceability for Mediated Settlement Agreements: Developing the Conceptual Framework*, 7 CONTEMP. ASIA ARB. J. 35 (2014) (Australian Catholic University, Sydney, Australia); Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Settlement?*, 26 INT'L PRACTICUM 38 (2013) (Abreu Advogadoss, Budapest, Hungary); 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 (2002) (Owen Dixon Chambers West, Melbourne, Australia, and Melbourne Law School, Australia); Nicholas Gould, *The Use of Mediation in Construction Disputes*, 27 ASA BULL. 580 (2009) (Fenwick Elliott, London, United Kingdom); Audrey Hong Li, *Thought on Developing Convention on Enforceability of Settlement Agreements Reached Through Conciliation*, ASIA PACIFIC REGIONAL ARBITRATION GROUP (APRAG) NEWSLETTER 19 (July-Dec. 2014) (CMC Consulting, Shanghai, China); Chang-Fa Lo, *Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements* 7 CONTEMP. ASIA ARB. 119 (2014) (College of Law, National Taiwan University, Taiwan); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012) (Osgoode Hall Law School, Toronto, Canada); Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research*, 7 CONTEMP. ASIA ARB. J. 87 (2014) (Bond University, Gold Coast, Australia). Notably, this list focuses only foreign authors cited for their work on mediation, not those that were cited for their work on arbitration or international dispute resolution more generally.

31. See Proposal by the Government of the United States of America: Future Work for Working Group II, p. 9, U.N. Doc. A/CN.9/822 (June 2, 2014) (discussing a new international convention); Greenberg, *Realizing the Gap*, *supra* note 1, at

has fully embraced the project and is now in the process of drafting the instrument in question (a development that would seem to undercut the notion that international commercial mediation or the study thereof is inextricably linked to the United States or common law jurisdictions),³² it is unclear why or how the pedigree of the UNICTRAL initiative can be linked to the methodology of the study. Furthermore, the idea that the legitimacy of a particular proposal or research study can be attacked solely on the basis of its national origins is contrary to the belief that scholarship can be conducted in an objective manner and without regard to personal, professional, or other inherent attributes. However, that cannot be the case. If the methodology is constructed properly, then the origins of the researcher or the proponent of a particular international initiative are irrelevant.³³

III. Are the Study Respondents Sufficiently Representative of the Relevant Population?

Professor Greenberg's second area of concern involves the representativeness of the surveyed population. She begins by suggesting that "the pool surveyed does not include all the

59.

32. See United Nations Commission on International Trade Law, Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017), U.N. Doc. A/CN.9/901 (Feb. 16, 2017) (noting progress to date on a new international convention).

33. Professor Greenberg's objections may ultimately be based on the fact that I was the one who proposed the idea of an international convention in this area of law to the U.S. Department of State, a fact that I disclosed in the original article. See Strong, *Realizing Rationality*, *supra* note 2, at 1973, 1984 n.40 (noting participation in various UNCITRAL and Working Group II (Arbitration and Conciliation) meetings, as well as the fact that my suggestion to the State Department was based on my previous scholarship in this area of law); see also S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 29-38 (2014). However, the same argument holds true here; the mere fact that I am a common law-trained lawyer cannot be used, by itself, as the basis for a claim that the study reflects a particular bias. The study must be evaluated on its own merits.

stakeholders that could be involved in the development, use, and support of international commercial mediation,” even though the study included mediators, arbitrators, conciliators, academics, in-house counsel and judges as well as those working at dispute resolution institutions.³⁴ In particular, Professor Greenberg expressed reservations based on the fact that only 10% of the respondents indicated that they were primarily employed as policymakers.³⁵

Again, Professor Greenberg’s initial assertion is well-placed: it is indeed necessary for empirical studies to include a diverse range of respondents that reflects the relevant stakeholders. However, the concept of “relevant stakeholders” must be evaluated in terms of both the aim of the study as well as the nature of the relevant population. Two issues must be discussed here.

First, full-time policymakers are relatively rare in the world of international dispute resolution. Instead, policymaking activities—which include initiatives undertaken by national governments, intergovernmental organizations such as UNCITRAL, and non-governmental bodies such as the International Bar Association and various arbitral or mediation institutions—are frequently conducted by private practitioners, academics, and neutrals who assist the comparatively small number of people employed directly by the organizations in question.³⁶ In many cases, full-time employees of policymaking institutions are not the ones making the decisions about the content of the policy; instead, the full-time employees (such as the UNCITRAL Secretariat or the staff of the International Bar Association) serve primarily if not exclusively as administrators supporting the substantive work conducted by the members of the organization. Thus, the policymaking perspective was in fact reflected in the surveyed population.

34. Greenberg, *Realizing the Gap*, *supra* note 1, at 60.

35. *Id.* at 61.

36. See Strong, *Clash of Cultures*, *supra* note 21, at 506, 509 (discussing role of private practitioners, neutrals and academics in development of a new international convention).

Second, the focus of the study was on “the use and perception of international commercial mediation in the international legal and business communities.”³⁷ The people who were most qualified to provide information on these issues were neutrals, counsel and, to a lesser extent, parties and academics.³⁸ As Professor Greenberg acknowledges, these individuals were very well-represented in the study.³⁹ Full-time policymakers, including judges, legislators, and employees at intergovernmental organizations, do not typically have a great deal of first-hand experience with the issues under discussion in this particular study, which both explains and justifies the relatively small number of responses from this group.⁴⁰

Although Professor Greenberg’s focus on policymakers appears puzzling when viewed from the international perspective, her concerns very likely stem from her background in domestic dispute resolution. Most forms of domestic mediation arise through court orders or statutory provisions, which means that policymakers—particularly judges—have an appreciable amount of experience with as well as an interest in mediation.⁴¹ However, international commercial mediation arises almost exclusively as a matter of contract and can therefore be characterized as a much more private form of dispute resolution.⁴² As a result, judges and

37. Strong, *Realizing Rationality*, *supra* note 2, at 1998. While the second section of the survey focused on questions about how any new international instruments in this field should be shaped, the emphasis was on providing policymakers with the views of the international legal and business communities, not on polling policymakers to anticipate how they would act. *Id.* at 1998–99.

38. *See supra* note 26 (listing surveys of essentially the same population used in the current study). Parties are often guided by counsel, who are considered to be expert in procedural matters.

39. *See* Greenberg, *Realizing the Gap*, *supra* note 1, at 60.

40. This conclusion is particularly true given that the respondents were self-selected. *See* MATTHIAS SCHONLAU ET AL., CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB 32 (2002) (noting “self-selected respondents give higher-quality responses than randomly selected respondents”).

41. *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, 985 (2012).

42. *See* Strong, *Realizing Rationality*, *supra* note 2, at 2026 (citing survey responses showing mediation arises almost exclusively from contract in

other policymakers have very little contact with international commercial mediation proceedings, particularly when compared to domestic proceedings. This phenomenon explains why other surveys involving the use and perception of international dispute resolution have focused on precisely the same populations that were the focus of the study at issue here.⁴³

Professor Greenberg had other concerns about the representativeness of the survey population. For example, she questioned the inclusion of domestic specialists in the survey population, even though she acknowledged the rationale enunciated in the original article for this approach, namely that relatively few individuals specialize only in international commercial mediation and that the domestic mediation community will have a significant effect on development of the field.⁴⁴

To some extent, criticism about the inclusion of domestic specialists seems overblown, since the survey analysis was capable of and in fact did distinguish between experienced and non-experienced users.⁴⁵ However, it may be that Professor Greenberg did not fully appreciate why the domestic perspective important to the study at issue here.⁴⁶

To begin with, relatively few individuals work full-time in international commercial mediation, as the underlying study

international commercial cases).

43. See DOUGLAS SHONTZ ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL (2011) (focusing on the same population as the current study); David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, CORNELL/PERC INST. ON CONFLICT RESOL. (1998) (same); Stipanowich & Lamare, *supra* note 26, at 1 (same).

44. Greenberg, *Realizing the Gap*, *supra* note 1, at 60–61; see also Strong, *Realizing Rationality*, *supra* note 2, at 2018.

45. See Strong, *Realizing Rationality*, *supra* note 2, at 2021–22 (noting the ability to filter responses).

46. The second section of the underlying study focused on recommendations to UNCITRAL regarding the shape of any future instrument in the area of international commercial mediation. See *id.* at 1999.

proved.⁴⁷ The scarcity of international mediators means that parties and counsel will often have to rely on domestic specialists, simply as a matter of necessity. Since domestic neutrals will bring their own preferences and practices into the international sphere, it is critical to understand what those beliefs and behaviors are.

Domestic perspectives can also affect the international lawmaking process. For example, domestic experts are often called upon to participate in interstate negotiations as either state delegates or non-governmental observers when there is a shortage of international experts on a particular subject, as is the case with international mediation.⁴⁸ This phenomenon may surprise those who believe that international law is developed by a cadre of full-time specialists employed by national governments and intergovernmental organizations, but the truth is that states rely heavily on external consultants with subject-matter expertise when developing international law and policy in highly technical areas.⁴⁹

Domestic specialists also make their perspectives known to their governments through national consultation processes.⁵⁰ Many states recognize that early consultation with multiple stakeholders is not only wise as a matter of good governance, it is also necessary as a practical matter, particularly in jurisdictions that require international treaties to be implemented into national law through enabling legislation.⁵¹ Numerous examples exist of the implementation process being significantly slowed, if not

47. See Strong, *Clash of Cultures*, *supra* note 21, at 508–10 (discussing makeup of the field of international dispute resolution).

48. *Id.*

49. *Id.*

50. While not every country engages in domestic consultation with stakeholders prior to interstate negotiations, some countries do. See *id.* (discussing public consultation processes).

51. Dualist nations must adopt enabling (implementing) legislation to give domestic effect to any binding international instrument that is eventually adopted. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314–15 (1992). Monist countries consider international law to be immediately and directly enforceable in domestic courts without any additional legislation. *Id.*

entirely derailed, by domestic interests, and states therefore seek to avoid the embarrassment associated with failing to ratify treaties to which they are signatories by soliciting input from domestic interests prior to adhering to a particular instrument.⁵²

Finally, domestic perspectives on a particular practice can enter the international lawmaking process if and when international bodies such as UNCITRAL ask state delegates to provide information on domestic practices relating to the international initiative under discussion. For example, UNCITRAL compiled a comparative study of domestic mediation practices to assist delegates considering the need for a new international instrument involving international commercial mediation.⁵³ While UNCITRAL does not conduct this type of research in all situations, the fact that such measures were adopted in this case demonstrates the relevance of domestic perspectives to matters involving international commercial mediation and underscores the propriety of the methodology adopted in the empirical study at issue here.

Professor Greenberg's final concern about the representativeness of the study involves the claim that the geographic breakdown of respondents did not "mirror the global representation of the leading countries involved in international commercial business," based on data from the World Trade

52. The process surrounding the Convention on the Choice of Court Agreements (COCA) in the United States is one such example. *See* Convention on Choice of Court Agreements, art. 9, June 30, 2005, 44 I.L.M. 1294 (entered into force Oct. 1, 2015); Ronald A. Brand, *Arbitration or Litigation? Private Choice as a Political Matter*, 8 YB. ARB. & MED. 20, 40–41 (2016). After the United States signed onto COCA, the State Department sought to work with the Uniform Law Commission—a body comprised almost entirely of domestic rather than international specialists—to implement the treaty at the state level. *Id.* Those efforts failed, leaving COCA in legal limbo. *Id.*

53. *See generally* United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Mediation/Conciliation—Compilation of Comments by Governments, prepared for the 62nd through 64th Sessions of Working Group II, (2000-2017). Similar material was collected by the World Bank. *See generally* WORLD BANK, INVESTING ACROSS BORDERS (2012).

Organization (WTO).⁵⁴ Although the diversity of the study population cannot be denied, given that the 221 respondents came from 51 different countries, it is true that the majority of respondents came from North America and Europe, despite WTO figures indicating that Asian countries are extremely active in international commerce.⁵⁵ While this discrepancy may look odd at first glance, it is entirely consistent with the reality of international legal practice.

Professor Greenberg's focus on WTO figures is based on two unspoken presumptions: first, that parties are the ones who decide which dispute resolution process to adopt and second, that the aggregated national figures compiled by the WTO provide a reliable estimate about the number of parties engaged in international trade in each jurisdiction.⁵⁶ In fact, the WTO data offers only a very imperfect estimate for the number of potential respondents in each jurisdiction. Because the WTO does not indicate how many individual parties are engaged in international commerce in the various countries, it is impossible to determine whether a small number of parties with high-value products or high-volume business models have increased national trade totals without a commensurate increase in the number of entities engaged in foreign commerce.⁵⁷

Professor Greenberg's approach also fails to appreciate that decisions regarding dispute resolution processes are typically

54. Greenberg, *Realizing the Gap*, *supra* note 1, at 61.

55. See Strong, *Realizing Rationality*, *supra* note 2, at 2017, 2019–20. This emphasis on Europe and North America has been seen in other well-esteemed empirical works. See also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 9 (1996) (focusing primarily on Europe and North America).

56. Professor Greenberg's emphasis on parties may explain her earlier concerns about the use of English in the survey instrument. See *supra* notes 18–26 and accompanying text. However, this survey was not aimed at the parties *per se*, for reasons discussed in the following paragraphs.

57. See Greenberg, *Realizing the Gap*, *supra* note 1, at 61 (citing World Trade Organization, *International Trade Statistics* 41, 44 (2015) https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf). The WTO analysis provides import and export numbers for each country and region as a whole.

made by counsel rather than by parties. This is particularly true in international disputes, since most parties have very little experience with resolving cross-border legal claims. Because most parties follow the advice of counsel on questions of strategy, the better question is whether the survey adequately captures the views of international lawyers and neutrals who work in the area of international dispute resolution.

As it turns out, most lawyers and neutrals who work frequently in the area of international dispute resolution are primarily found in North America and Europe, the two locales that had the highest response rate in the survey.⁵⁸ Although the influence of boutique law firms is growing, the majority of international lawyers work in large multinational law firms. While those firms have satellite offices in other regions, none of the top twenty “law firms that have the biggest global presence and handled the largest, most groundbreaking international, and cross-border matters” in 2016 were headquartered outside North America or Europe.⁵⁹ Thus, the survey population reflected the realities of contemporary practice, as was its goal.⁶⁰

58. See Jan Paulsson, *Arbitration-Friendliness: Promises of Principle and Realities of Practice*, 23 *ARB. INT'L* 477, 477–78 (2007) (citing the top three jurisdictions for international arbitration as France, England, and Switzerland); Strong, *Realizing Rationality*, *supra* note 2, at 2019–20 (noting 73% of the responses came from North America and Europe).

59. See Jacqueline Bell, *Law360 Reveals the Global 20 Firms of 2016*, *LAW360* (June 20, 2016), <https://www.law360.com/articles/807403/law360-reveals-the-global-20-firms-of-2016> (noting all of the top 20 global law firms had “an office in New York, London, Paris, Hong Kong and Beijing”) (last visited Aug. 11, 2017) (on file with the Washington and Lee Law Review); see generally *Dispute Resolution: Global-Wide*, CHAMBERS & PARTNERS, <https://www.chambersandpartners.com/15649/467/editorial/2/1> (last visited Aug. 11, 2017) (on file with the Washington and Lee Law Review).

60. Professor Greenberg’s primary concern involved the relatively low number of respondents from Asia, given the level of international commerce in that region. Greenberg, *Realizing the Gap*, *supra* note 1, at 61–62. Although a number of Asian cities and arbitral institutions hope to become leaders in the field, they still lag behind their European and North American counterparts. See Julian D.M. Lew, *Increasing Influence of Asia in International Arbitration*, 2014 *ASIAN DISP. REV.* 4, 6 (2014) (discussing status of Asia in world of international dispute resolution). This phenomenon is particularly true of the Chinese

IV. Should the Study Have Distinguished Between Mediation and Conciliation?

Professor Greenberg's final concern involved the decision not to differentiate in the survey between international commercial mediation and international commercial conciliation.⁶¹ While it is true that academics continue to debate whether and to what extent the two procedures differ from one another (a phenomenon that was specifically mentioned in the original article),⁶² the reality is that this controversy has little if any effect in actual practice, since parties simply hire a neutral who uses their preferred technique. Furthermore, UNCITRAL has decided to use the two terms synonymously, as have many esteemed commentators.⁶³ Thus, the

International Economic and Trade Commission (CIETAC), which is often considered out of step with international norms, even though it administers large numbers of arbitrations. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 193 (2013) ("Despite recent changes, experienced foreign users remain very skeptical about CIETAC arbitration, particularly in matters involving disputes between Chinese and non-Chinese parties."); Clarisse von Wunschheim, *The CIETAC Feud—Why It's a Mess, and How to Avoid Being Caught in the Middle*, 2013 ASIAN DISP. REV. 78, 78 (discussing contemporary problems with CIETAC arbitration). Furthermore, CIETAC is not perhaps as international as its name might suggest, since approximately two-thirds of its caseload is domestic in nature. See BORN, *supra*, at 192–93 (noting that, of the 1,060 cases filed with CIETAC in 2012, only 331 had an international element).

61. Greenberg, *Realizing the Gap*, *supra* note 1, at 62.

62. See Strong, *Realizing Rationality*, *supra* note 2, at 1980 n.19 (acknowledging the academic debate and noting that the primary difference appears to involve whether and to what extent the neutral helps evaluate the strength of the parties' cases).

63. See UNCITRAL, 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) ("[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 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 (noting that "[c]onciliation is being increasingly used in dispute settlement"); Gaultier, *supra* note 30, at 42 n.25 (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*

suggestion that the research in question is somehow diminished as a result of the decision not to distinguish between the two terms fails to appreciate the norms applicable in international law and practice.

V. Conclusion

Empirical research is difficult and seldom addresses each and every issue that readers find interesting or relevant. Indeed, unanswered questions are often an important impetus for further studies that are conducted either by the original researcher or by others who are inspired to work in the field.

In her review of *Realizing Rationality*, Professor Greenberg has identified a number of areas that would benefit from additional research. Certainly it would be useful to have surveys conducted in other languages, so long as those surveys were conducted in accordance with best practices in legal translation, and to reach regions of the world that were not widely represented in the original study. However, the mere fact that additional work would be beneficial does not diminish the importance of the existing study or the propriety of the methodology adopted therein. Every empirical study is constructed around a particular research question, and the methodology should seek to answer that question in an objective and logical manner.⁶⁴ The survey under discussion here was meant to study the use and perception of international commercial mediation in the international legal and business communities and offer aid to UNCITRAL delegates considering the proposed instrument on international commercial mediation, and that is precisely what it did. While there may be methodological

Trade Law, 5 ILSA J. INT'L L. & COMP. L. 425, 426 (1999) (arguing that the terms "mediation" and "conciliation" are synonymous); Nolan-Haley, *supra* note 41, at 1009–10 (stating that some scholars equate the terms).

64. 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).

concerns regarding the research, they are not the ones identified by Professor Greenberg in her analysis.

Having said that, Professor Greenberg's review has provided a useful opportunity not only to outline the differences between national and international dispute resolution but to identify the unique challenges facing those who conduct empirical research on cross-border dispute resolution. While it is important to consider best practices developed in domestic settings, not all of those techniques are equally applicable in the international context. As a result, scholars must consider the unique elements of international dispute resolution law and practice when seeking to evaluate the validity of a particular research study and to construct their own research models.