# Realizing the Gap Between Rationality and Information

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*Abstract*

*The Online Journal requested that I evaluate Professor Strong's empirical research, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation," reported in 23 Wash. & Lee. L. Rev. 1973 (2016). The purpose of Professor Strong's research is to help "fill the informational gap" about international commercial mediation for the United Nations Commission on International Trade (hereinafter UNICITRAL) Working Group II (Arbitration and Conciliation) so that the Working Group could better assess whether, in fact, there is a need for a new UNCITRAL instrument to enforce global commercial mediation agreements.*

*Professor Strong's research offers insightful nuggets about international commercial mediation that merit further exploration. For example, her research showed that pre-dispute mediation clauses play a central role in incentivizing the increased use of international commercial mediation. In another highlighted contribution, survey respondents reported time and money to be the top two drivers that contributed to their decision to use international commercial mediation. A third insight is that surveyed participants value international commercial mediation for different reasons when they are asked to prospectively opine about its value versus when asked to opine about mediation's value when deciding to use mediation.*

*Although these insights are noteworthy, they do not justify broad application because of methodological weaknesses in the*

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*research. To strengthen future research, I propose three fundamental research design modifications. First, the researcher should take affirmative steps to minimize the U.S.-centric bias around mediation. Second, the sampled pool should be more representative of those stakeholders who might be affected by the passage of the proposed global treaty. Third, the label used to describe this neutral facilitated process should be clearly defined to minimize the debate over whether mediation and conciliation are the same or a different dispute resolution procedure.*

*Table of Contents*



## *I. Introduction*

I have been asked to evaluate Professor Strong's empirical research, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation," reported in 23 Wash. &

Lee. L. Rev. 1973 (2016).[1] The purpose of Professor Strong's research is to help "fill the informational gap" about international commercial mediation for the United Nations Commission on International Trade (hereinafter UNICITRAL) Working Group II (Arbitration and Conciliation) so that the Working Group could better assess whether, in fact, there is a need for a new UNCITRAL instrument to enforce global commercial mediation agreements.[2] As Professor's Strong's title "Realizing Rationality" aptly suggests, the UNCITRAL working group, global legal professionals, and dispute resolution practitioners are struggling to develop a coherent, cohesive, and rational understanding about the emerging practice of international commercial mediation. Moreover, the title of the article holds out the welcomed promise that her research will bring logic and understanding to an underutilized, misunderstood, and seemingly irrational dispute resolution procedure. My comments focus on how Professor Strong's contributions narrow the informational void that exists about international commercial mediation and suggest how additional research modifications might bridge that gap even further.

Professor Strong deserves recognition for undertaking this herculean task. Moreover, her research raises compelling insights about the current practice of international commercial mediation that invites global mediation promoters to rethink their advocacy strategies. I spotlight and applaud those insights. The suggested research modifications address the survey methodology weaknesses that minimize the broad application of her insights into practice. If our field is to build on and strengthen Professor Strong's important contributions, I suggest three fundamental design modifications that should be incorporated in future research.

### *A. The Context of the Proposal*

To provide the reader with context, in July 2014 representatives from the United States government proposed

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

2. *Id.* at 1989.

that UNCITRAL Working Group II consider adopting a global instrument to recognize and enforce international commercial mediation settlement agreements.[3] Since then, deliberations on this matter have been taking place as part of the regularly scheduled biannual UNCITRAL meetings that alternate between New York and Vienna. I was fortunate to be among those who attended one of the several UNCITRAL deliberations held in New York during February 2015. When this proposal was first previewed prior to the UNCITRAL meeting in New York, this U.S. initiated proposal was met with ambivalent enthusiasm, even within the U.S. community.[4] Some enthusiastically endorsed a global enforcement instrument, such as the one proposed, as precisely the elixir international mediation needed to help raise it to the stature of international arbitration.[5] Others, myself included, questioned whether, in fact, there was even a need for another global enforcement mechanism.[6] After all, if the parties so desire, international mediation settlement agreements are already enforceable by converting such agreements to an arbitration award. Moreover, some of us skeptics questioned whether expending energy to promote a global enforcement instrument would obfuscate the more complex issues that most agree contribute to the underutilization of international mediation.[7]

Those of us who work in the global dispute resolution community and have observed UNCITRAL deliberations, appreciate that there are complex contextual reasons that explain, in large part, why international commercial mediation

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3. *Id*.

4. *See* Karl Mackie, *UNCITRAL and the Enforceability of Mediated Settlements*, CEDR BLOG (Feb. 23, 2017), https://www.cedr.com/blog/uncitral-and-the-enforceability-of-mediated-settlements/ (last visited on May 5, 2017 (noting the ambivalence about the necessity and enforceability of an international mediation instrument) ) (on file with the Washington and Lee Law Review).

5. Strong, *supra* note 2, at 1985.

6. *Id.* at 2046. Interestingly, Professor Strong's research indicates that promoting pre-dispute mediation contracts may be an effective way to promote the increased use of global commercial mediations. *Id*.

7 *Id.* at 2015. *See* Mackie, *supra* note 4 (noting some question the necessity and enforceability of an international mediation instrument).

has yet to be understood and embraced by global businesses.[8] First, international commercial mediations often have unspoken, yet ubiquitous, political, cultural, economic and legal tensions that jockey for hierarchy in the midst of the international commercial dispute.[9] Another factor that contributes to the problem is that participants in international commercial mediation often have different legal training that cultivates different legal values and brings different expectations of justice.[10] Additionally, another layer that contributes to confusion in the field is that participants in international commercial mediation might label such a facilitated negotiation differently.[11] For example, some may refer to the dispute resolution procedure as mediation, while others refer to it as conciliation. Each label attaches different values and different expectations about what the process offers.[12] Thus, these dimensional issues contribute to

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8. As one example of the complex contextual issues that surround the discussion about the global dispute resolution treaty, Working Group III had deliberated between 2010 and 2016 on developing a global online dispute resolution treaty. Comm. on Int'l Trade Law, Rep. of Working Group III on the Work of Its Thirty-Third Session, U.N. Doc. A/CN.9/868, 2 (2016) (showing the process of deliberation in regards to Online Dispute Resolution). One issue of contention raised by the EU is whether pre-dispute arbitration clauses are valid. The proposal was submitted to the 27th session of Working Group III. After that, the draft procedure on ODR turned into two tracks. The first document comprises the process of arbitration, and the second document does not. You can find out the framework of the two tracks by reading the following two documents: U.N. Comm. on Int'l Trade Law, Rep. of Working Group III on the Work of Its Twenty-Eighth Cession, U.N. Doc. A/CN.9?WG.III/WP.123, (2013); U.N. Comm. on Int'l Trade Law, Working Group III on the Work of Its Twenty-Eighth session, U.N. Doc. A/CN.9/WG.III/WP.123/Add. 1, (2013).

9. *Id.*; *see also* U.N. Comm. On Int'l Trade Law, Rep. of Working Group II on the Work of Its Sixty-Fifth session, U.N. Doc. A/CN.9/896, (2016) (showing the process of deliberation in regards to International Commercial Conciliation).

10. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. LAW 419, 428–30 (1966) (explaining how the difference in legal education of common law and civil law systems leads to different legal values).

11. *See* Strong, *supra* note 1, at 1980; *see also* NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPCTIVES 15 (2009) (exploring the diversity of mediation regulation applicable to international disputes); 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) (noting that conciliation is often considered to be more evaluative than "pure" mediation).

12. Sgubini, Prieditis, & Marighetto, *Arbitration, Mediation and*

the informational gap that Professor Strong was tasked to fill and must be factored in the design and interpretation of the empirical research.

## *II. Professor Strong's Research and Highlighted Insights*

### *A. The Research Design*

Professor Strong's research was developed to satisfy two goals: First, to take the pulse of current attitudes and behaviors about international commercial mediation;[13] Second, to educate about whether or not a new international convention to enforce international commercial mediation agreements would be helpful.[14] In order to accomplish these goals, Professor Strong conducted a "mixed qualitative-quantitative study" about international commercial mediation[15] in which "private practitioners, in-house counsel, government officials, neutrals, and legal academics" were invited to participate in an anonymous online survey.[16] Potential respondents received invitations to participate through blogs, periodicals, and listservs that attracted an audience interested in international commercial mediation.[17] The invitation to participate was posted from October 8, 2014 through October 31, 2014.[18] Two hundred twenty-one actually participated in the survey.[19]

The survey was written in English and it contained thirty-four questions.[20] Twenty-seven of the questions were close-ended

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*Conciliation: differences and similarities from an International and Italian business perspective*, MEDIATE.COM (Aug. 2004), http://www.mediate.com/articles/sgubinia 2.cfm (last visited June 26, 2017) (explaining the difference between mediation and conciliation as well as other Alternative Dispute Resolution methods) (on file with the Washington and Lee Law Review).

13. Strong, *supra* note 1, at 1998.
14. *Id*. at 2044.
15. *Id*. at 1998.
16. *Id*. at1999.
17. *Id*. at 2004.
18. *Id*. at 2002.
19. *Id*. at 2016–17.
20. *Id*. at 2001–2002.

questions that provided a defined universe of answers from which survey respondents may choose and seven questions were open-ended.[21] Survey participants were not required to answer all thirty-four questions.[22] The survey questioned participants about two phases of the mediation process: the beginning of mediation including agreements to mediate, and the end once there were settlement agreements.[23]

### *B. Highlighted Research Insights*

Professor Strong's findings offer a different vantage point and welcome ideas on how to promote the increased use of international commercial mediation. Her research also offers nuggets of interest about international commercial mediation.[24] I will highlight the findings of three of the research questions about international mediation: what compelled participants into commercial mediation; what additional factors contributed to their decision to mediate; and, prospectively, why would participants use international commercial mediation.

First, Professor Strong 's research showed that pre-dispute mediation clauses play a central role in incentivizing the increased use of international commercial mediation. A majority of those surveyed (59%) reported that the international commercial mediations they participated in took place because of standalone pre-dispute mediation agreements (30%) or multi-tiered dispute resolution agreements (29%).[25] According to those surveyed, respondents participated in international commercial mediations because the original deal-making agreement from which a dispute arose contained a clause that contractually obligated them to resolve that dispute through mediation.[26]

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21. *Id.*

22. *Id.* at 2001.

23. *Id.* at 2049–50.

24. *Id.* at 1981. By way of illustration, Professor Strong notes that before World War II mediation and conciliation the were the favored dispute resolution procedures used to resolve international commercial disputes. However, it is not understood why these procedures became disfavored after the War. *Id.*

25. *Id.* at 2026.

26. *Id.* at 2045.

Astutely, Professor Strong then suggests that if we wish to encourage the use of international commercial mediation, mediation promoters should focus on encouraging drafters of international commercial dispute resolution agreements to include such clauses as a part of their deal making.[27]

This shift of focus, to educating global transactional lawyers to include mediation clauses in their agreements, is a radical departure from the status quo approach where mediation promoters have focused more on educating international commercial lawyers about using mediation once the dispute arises.[28] Inadvertently, this status quo approach has bypassed global transactional lawyers who draft dispute resolution clauses. A reality of global transactions is that the lawyers who draft deals and include mediation clauses are often not the same lawyers who will actually implement the mediation clause. Therefore, as the research suggests, educating global transactional lawyers about the benefits of including mediation clauses in their contracts, is likely to increase the number of people incentivized to use international commercial mediation.

In a second, highlighted contribution of Professor Strong's research, the survey respondents reported that time (28%) and money (36%) were the top two drivers that contributed to their decision to use international commercial mediation.[29] To the surprise of some mediation supporters, survey participants ranked preserving the ongoing relationship fifth (26%) on this survey,[30] and creative resolutions last.[31] Again, these findings challenge the common beliefs and long held values by many dispute resolution supporters who believe that the greatest appeal of mediation to the international commercial business community is the preserving of relationships and the

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27. *Id*. at 2028.

28. *See* Jeremy Gormly, *Transactional Lawyers and Mediation*, KLUWER MEDIATION BLOG (May 1, 2012), http://kluwermediationblog.com/2012/05/01/transactional-lawyers-and-mediation/ (last visited June 24, 2017) (explaining how transactional lawyers are an underutilized resource for the future development of mediation) (on file with the Washington and Lee Law Review).

29. Strong, *supra* note 1, at 2031.

30. *Id.*

31. *Id*. at 2032.

development of creative resolutions.[32] Moreover, when asked what would likely encourage more people to use international commercial mediation, survey participants suggested the need for more quality information about mediation's settlement effectiveness, how the procedure works and the actual costs of mediation.[33] Professor Strong suggests that if saving time and money are strong motivators for using mediation, then the community should develop data to show how much actual time and money is saved.[34]

Some dispute resolution professionals may be jarred by these results and wonder why those surveyed didn't prioritize the *real* benefits of mediation: preserving a relationship and the option of developing unconventional, but more responsive, resolutions. Professor Strong's research encourages a shift in perspective, from that of a dispute resolution professional to one who is involved in international commercial transactions. From this different perspective of international commercial business, we realize that the presenting conflict may be, at first blush, just about time and money. Professor Strong's research also reminds us that litigation is still a heuristic in legal education for what lawyer's do. From this litigation perspective, contracts, time, and money are the drivers. Thus, for some, international commercial mediation is a starkly different dispute resolution procedure than litigation or arbitration, and is less likely to be used unless contractually obligated to do so or there is supporting research that evidences it saves time and money.

A third insight offered by Professor Strong's research is that the surveyed participants value international commercial mediation for different reasons when they are asked to prospectively opine about its value versus when they are asked about the value of mediation at the beginning of a dispute. For example, when survey participants were asked to prospectively consider why they would consider international commercial

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32. *See generally* ROBERT A. BARUCH BUSH & JAY FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (2nd ed. 2004) (explaining how mediation is an opportunity for parties in conflict to strengthen their own capacity to address the conflict and in this empowerment, then appreciate the perspective of the other party).

33. Strong, *supra* note 1, at 2039–40.

34. *Id.* at 2036.

mediation, they ranked preserving the relationship as number one (74%).[35] How interesting that these responses echo the sentiments extolled by mediation supporters. In another example, the surveyed respondents believed that international commercial mediation was suitable for a broad range of cases,[36] Professor Strong optimistically interpreted these answers as evidence about the wide viability of international commercial mediation.[37] However, this evaluator wonders whether such prospective opinions were tinged with hindsight bias and deserved less credence. Another possibility that merits consideration is that only after individuals participate in mediation are they able to value how the process helped to dignify the relationships of all involved.

Thus, Professor Strong's research highlights that parties identify different reasons why they value international commercial mediation depending on whether they are at the beginning of the procedure or at the end of the procedure. Gleaning from the research, when a dispute arises, parties are more likely to opt for international commercial mediation if they are contractually obligated to do so and if they believe mediation will save time and money. However, when asked at the conclusion of a mediation why they thought mediation was beneficial, participants value the human benefits that international mediation offers.

### *III. Recommendations for Strengthening the Research*

Professor Strong's insights are noteworthy and merit further exploration. I do not believe, however, that these insights justify broad application because of the identified methodological weaknesses. To strengthen future research, I propose three fundamental research design modifications. First, the researcher should take affirmative steps to minimize the U.S.-centric bias around mediation. Second, the sampled pool should be more representative of those stakeholders who might be affected by the

35. *Id.* at 2042.
36. *Id.* at 2043.
37. *Id.* at 2044.

passage of the proposed global treaty. Third, when conducting this research, the label used to describe this neutral facilitated process should be clearly defined to minimize the debate over whether mediation and conciliation are the same or a different dispute resolution procedure.

### *A. The Researcher Should Take Affirmative Steps to Minimize Real or Apparent Bias that Mediation is a U.S.-Centric Procedure*

Dispute resolution scholars have opined that international mediation is actually the transmission of U.S.-centric norms and values.[38] Therefore, good research practice dictates when there is such a known bias, whether the bias is real or perceived, researchers should take affirmative steps to structure their research design so that the adverse influence of that bias is minimized and the quality of their research preserved. However, from this reviewer's perspective the research design and methodology used in this research reinforces this U.S.-centric bias.

Several examples substantiate the presence or appearance of this U.S.-centric bias. First and most compelling, the survey that Professor Strong used to collect her research was written only in English. True, for many, English may be considered the lingua franca of the international business community.[39] However, it is unclear if English is also the lingua franca for those who

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38. *Id.* at 2025. Professor Strong disputes this by pointing indicating that some of the respondents in her survey who had international mediation experience also came from other countries, *id. See* Christopher J. Borgen, *Transnational Tribunals and the Transmissions of Norms: The Hegemony of Process,* 39 GEO. WASH. INT'L L. REV. 685, 752-56(2007) (Asserting that transnational dispute resolution can transmit the values and norms of the dominant culture); *see also* Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collectivist Paradigms*, MEDIATE.COM (Jan. 2000), http://www.mediate.com/articles/wright.cfm (last visited June 26, 2017) (cautioning that U.S. mediators trained in mediation models based on U.S. individualist cultural assumptions need to exercise care not to collide with the different cultural expectations of parties from other cultures) (on file with the Washington and Lee Law Review).

39. Tsedal Neeley, *Global Business Speaks English*, HARV. BUS. REV. (May, 2012), https://hbr.org/2012/05/global-business-speaks-english (last visited June 26, 2017) (noting the importance of English as the language of global business) (on file with the Washington and Lee Law Review).

participate in surveys such as the one that served for the basis of Professor Strong's research.

From this evaluator's perspective, this design flaw contributed to Professor Strong's inability to attract a representative group of respondents and compromises the validity of the results. Consequently, 46% of the respondents came from English speaking countries.[40] The breakdown of survey participants causes this evaluator to question whether the fact that the survey was in English interfered with attracting a more globally representative pool. The geographic breakdown of respondents is as follows: 35% from the U.S.; 11% from the United Kingdom;[41] 27% from Europe excluding the U.K., 13% from Asia, 7% from Latin America, 4% from the Middle East, 2% from Oceania and 2% from other regions. Starkly, China, Africa, the Middle East, and Latin America, all with significant roles in global commerce, are not adequately represented among respondents in this survey. Professor Strong does not address this skewed geographical representation as a shortcoming. Instead, she defends that the respondents have experience in international commercial mediation and disprove the bias that mediation is U.S. centric.[42] Going forward, an easy fix for future surveys is to translate the surveys into several languages. Thank you, Google Translate!

A second example of how this research might be interpreted as having a U.S.-centric bias is that Professor Strong, in the more than one-hundred-page substantiation of her research, relied primarily on scholarly articles written by U.S. scholars published in U.S. journals. The global dispute resolution is rich with scholarly work and treatises about conciliation and mediation from outside of the United States.[43] Their inclusion would have strengthened the points Professor Strong sought to substantiate.

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40. Strong, *supra* note 1, at 2019.

41. *Id.* at 2019, 2020.

42. *Id.* at 2025.

43. *See, e.g.,* NADJA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES, (2009) (comparing and contrasting mediation in a global context); Ki M. Rooney, *Conciliation and Mediation of International Commercial Disputes in Asia and UNCITRAL's Working Group on the International Enforcement of Settlement Agreements*, 18 ASIAN DISP. REV. 195–201 (2016) (discussing the nature of commercial conciliation and mediation, their potential as effective dispute resolution tools in Asia and their value to in-

Third, as has been mentioned in this review's introduction, the United States proposed this global treaty. The fact that this proposal was initiated by the U.S. feeds into the existing optic bias that mediation is a U.S. centric dispute resolution procedure. Through this biased lens, there may be those who wonder whether this research is just a veiled attempt to legitimize the export of U.S. values across global settings. Such bias may cause some UNCITRAL reviewers to reactively devalue both the proposal and the supporting research.

### *B. The Research Sample Should Include Be More Representative of Those Stakeholders, Who Influence the Use of International Commercial Mediation as well as Represent UNCITAL's Legal, Political, Economic, Cultural, and Dispute Resolution Purposes*

Dispute system design theorists remind researchers that if you are trying to fully understand why a problem exists, you must survey all the stakeholders affected by the problem.[44] Thus, if one were to apply this logic to the purpose of Professor Strong's research, filling the informational gap about international commercial mediation, those surveyed should include all those who might influence the use of international commercial mediation. The representative sample of stakeholders who could potentially influence the use of international commercial mediation, would include, not only global neutrals and lawyers, but also business people, alternative dispute resolution providers, court systems, and political representatives. These stakeholders represent all of the global regions who might be involved with developing policies and procedures that encourage the sustained use of international commercial mediation. Moreover, since the proposed enforcement instrument has a global impact, the

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house counsel and parties); Jacob Bercovitch & Jeffrey Langley, *The Nature of the Dispute and the Effectiveness of International Mediation*, J. Conflict Resol., Dec. 1, 1993 (analyzing the mediation patterns of 97 international disputes and using the results to create a model to explain the data).

44. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS, 26 (1996) (explaining that dispute system designers should involve stakeholders in design development to ensure that the design addresses stakeholders' interests).

respondents in the survey should reflect that global diversity. Therefore, for the sample of surveyed respondents to be a representative sample of those stakeholders, who could influence the use of international commercial mediation, the representative sample should include representation based on both their role and their geography.

Here, however, the pool surveyed does not include all the stakeholders that could be involved in the development, use, and support of international commercial mediation. Furthermore, the sample Professor Strong used does not include an adequate sample of respondents that represent geographic and role representation that should be included in an adequate sample. The work experience of the respondents is as follows: 28% identified as mediators, arbitrators, or conciliators; 20% as academics; 7% as in-house counsel; and 10% as judges, multiple roles, and institutional settings, including ADR providers.[45] Only 31% of those surveyed reported that they worked in global commercial mediation more than sixty percent of the time.[46] Thus, those in the policy making positions made up only 10% of the respondents.

Adding to my questioning about the adequacy of the pool survey, many of the survey respondents did not have a depth of international dispute resolution experience. For example, only 31% of the survey respondents worked in the international dispute resolution field as a litigator, mediator, conciliator, or arbitrator more than 60% of the time in the past three years.[47] Thirty-seven per cent of surveyed respondents had worked in the field less than 20% of the time in the past three year.[48] However, Professor Strong justifies the fact that more than one third of survey respondents didn't have dispute resolution experience.[49] According to Professor Strong, in the evolving field of international commercial mediation, in some countries, the only mediators with experience are those who have mediated domestic

45. Stong, *supra* note 1, at 2017.
46. *Id.* at 2017–18.
47. *Id.* at 2017.
48. *Id.*
49. *Id.* at 2018.

disputes.[50] Moreover, Professor Strong explains domestic mediation laws and international commercial mediation practice will have a dynamic influence on its others' subsequent development.[51] Although Professor Strong's statements have merit as stand-alone concepts, I do not believe they justify having a surveyed pool with such little experience in international commercial mediation given Professor Strong's stated goals of her research.

Moreover, the percentage of those surveyed doesn't mirror the global representation of the leading countries involved in international commercial business.[52] To repeat what was stated in the previous section: The geographic breakdown of respondents is as follows: 35% from the U.S.; 11% from the United Kingdom;[53] 27% from Europe excluding the U.K.,[54] 13% from Asia, 7% from Latin America, 4% from the Middle East, 2% from Oceania, and 2% from other regions.[55] Yet, the level of participation of those geographically representing a region who responded to the survey does not mirror the prominence of the leading countries cited as dominating international commercial business.[56] Rather, the leading countries in international commercial business include the United States, China, Germany, France, The United

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50. *Id.* at 2018.

51. *Id.*

52. *See International trade statistics 2014*, WORLD TRADE ORG. 26, 28, https://www.wto.org/english/res_e/statis_e/its2014_e/its14_world_trade_dev_e.pdf (last visited on May 8, 2017) (showing the leading countries and regions in international imports and exports) (on file with the Washington and Lee Law Review); *see also, Best Countries for Business*, FORBES.COM (2016) https://www.forbes.com/best-countries-for-business/list/#tab:overall (last visited June 26, 2017) (listing New Zealand and Hong Kong in the number 2 and 3 spots respectively) (on file with the Washington and Lee Law Review).

53. Strong, *supra* note 1, at 2019.

54. *Id.* at 2020

55. *Id.*

56. World Trade Organization, *International Trade Statistics*, 41, 44 (2015) https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf (showing that the value of Asia's merchandise trade was twice that of Europe's and almost as high as North America's). The statistics also show that, for the merchandise trade in 2014, China was the number one exporter of goods and number two importer, Japan was number for both exports and imports, Korea was number seven in exports and nine in imports, and Hong Kong was number nine for exports and seven for imports. *Id.*

Kingdom, Russia, India, Canada, Mexico, and Japan.[57] As stated in the previous section, the fact that the online survey used to attract respondents was conducted only in English may be one reason for this lack of geographic representation.

### *C. Reconcile the Use of the Terms Conciliation and Mediation*

In the design of her research, Professor Strong refrained from distinguishing between the terms "mediation" and "conciliation" even though she acknowledges that "there is a great deal of debate regarding the proper use of the terms 'mediation' and 'conciliation.'"[58] This reviewer believes that such a research design choice compromises the outcome. These terms are often not used interchangeably. Rather, they are culturally laden terms with different meanings. In the UNCITRAL context, the term "conciliation," not mediation, is used[59]

Using the term mediation, without defining it for the purposes of the paper, detracted from the quality and the internal consistency of the research in two ways. First, the use of the U.S.-centric term mediation in a study that is attempting to extract globally relevant information limits the impact of the study. Second, depending on the experience and culture of the particular survey respondents with mediation and/or conciliation, individual respondents are likely to answer the survey questions from their vantage point. Going forward, research should define the term used to describe the third-party facilitated negotiation. Alternatively, research could be designed to have survey respondents choose the label they have had experience with and clarify whether their survey answers were based on their experience with mediation, conciliation or both.

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57. WORLD TRADE ORGANIZATION, WORLD TRADE STATISTICAL REVIEW 14 (2016) https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf (showing that these countries had the largest economies by size of merchandise trade by all being over at least two-hundred-fifty billion U.S. Dollars).

58. Strong, supra note 1, at 1980 n. 19.

59. *See generally* UNITED NATIONS, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE (2002) https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

## *IV. Conclusion*

I offer my comments with humility. I have personally conducted empirical research and retain the scars and wisdom that comes with trying to design empirical research that withstands critique. Professor Strong's research provides dispute resolution professionals and promoters a different and welcome perspective that invites many to rethink the status quo approach of promoting international commercial mediation. The research also helps re-focus the energy of those dispute resolution professionals who are frustrated with the glacial speed at which international commercial mediation has taken hold. This type of empirical research will have an even broader impact if the suggested methodological improvements offered in this article are incorporated.