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Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking

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**CLASH OF CULTURES: EPISTEMIC COMMUNITIES,
NEGOTIATION THEORY, AND INTERNATIONAL
LAWMAKING**

*S.I. Strong**

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I. INTRODUCTION

In July 2014, the United States Government submitted a proposal to the United Nations Commission on International Trade Law (UNCITRAL)¹ suggesting the creation of a new international treaty

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concerning the enforcement of settlement agreements arising out of international commercial mediation and conciliation.² The Commission sent the proposal to UNCITRAL Working Group II (Arbitration and Conciliation) for further consideration, and the initiative moved forward.³ At the time this Article was published, the instrument was in the drafting stages, although the final form of the document (convention, model law, or advisory statement) was still under discussion.⁴

As important as the U.S. proposal has been to the substantive debate about the need for and shape of a future instrument in this field,⁵

1. See United Nations Commission on International Trade Law, Proposal by the Government of the United States of America: Future Work for Working Group II, U.N. Doc. A/CN.9/822 (June 2, 2014) [hereinafter U.S. Proposal]. The State Department's interest in this subject arose as a result of this author's academic work in this field. See S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL'Y 11, 29-38 (2014) [hereinafter Strong, ICM]; see also *infra* note 62.

2. Although the scholarly community debates the precise meaning of the terms "mediation" and "conciliation," this Article will consider the two to be synonymous for the purpose of this discussion, an approach that is consistent with that taken by UNCITRAL. See United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015), para. 13 n.11, U.N. Doc. A/CN.9/832 (Feb. 11, 2015) [hereinafter WG Report]; UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 [hereinafter UNCITRAL MODEL LAW GUIDE].

3. See Annotated Provisional Agenda, U.N. Doc. A/CN.9/WG.II/WP.139, paras. 12-19 (Nov. 4, 2015) [hereinafter February 2016 Agenda]; see also United Nations Commission on International Trade Law, Annotated Provisional Agenda, U.N. Doc. A/CN.9/WG.II/WP.185 (Nov. 4, 2014); Note by UNCITRAL Secretariat, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation, U.N. Doc. A/CN.9/WG.II/WP.187 (Nov. 27, 2014) [hereinafter Secretariat Note]; Comments Received From States, Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting From International Commercial Conciliation/Mediation—Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, U.N. Doc. A/CN.9/WP.II/WP.188 (Dec. 23, 2014) [hereinafter Initial States' Comments].

3. See Report of the United Nations Commission on International Trade Law on its forty-seventh Session (7-18 July 2014), U.N. G.A.O.R. 69th Sess., Supp. No. 17, at 24, U.N. Doc. A/69/17.

4. At the time of publication, the most recent in-depth discussion of the U.S. proposal took place at the February 2017 meeting of Working Group II. 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). The session was extremely productive and delegates came to agreement on a number of important points. See *id.* The project was also favorably discussed at the forty-ninth session of the Commission in June and July 2016. See United Nations Commission on International Trade Law, Annotated Provisional Agenda, U.N. Doc. A/CN.9/WG.II/WP.197 (July 14, 2016); United Nations Commission on International Trade Law, Note by UNCITRAL Secretariat, International Commercial Conciliation: Preparation of an Instrument on Enforcement of International Commercial Settlement Agreements Resulting From Conciliation, U.N. Doc. A/CN.9/WG.II/WP.198 (June 30, 2016) [hereinafter Secretariat 2016 Note].

5. See Laurence Boule, *International Enforceability for Mediated Settlement Agreements*:

the UNCITRAL deliberations have also uncovered a number of process-oriented issues that raise doubts about certain long-held assumptions regarding the nature of the international legal community and the contemporary approach to the negotiation of international treaties. As a result, the current discussions about the proposed treaty provide a unique opportunity to consider how various theories regarding international relations actually affect the international lawmaking process.

This Article seeks to illuminate a number of truths about the current deliberations at UNCITRAL by applying the concept of epistemic communities to the UNCITRAL negotiation process. This analysis will help various participants, including state delegates, inter-governmental organizations (IGOs), and non-governmental organizations (NGOs), appreciate the dynamics at issue in the treaty deliberations and thereby improve negotiation techniques and outcomes.⁶ In particular, this Article considers how disparities between different epistemic communities involved in the UNCITRAL process could affect the shape and future of the proposed convention and whether the clash of cultures could prove

Developing the Conceptual Framework, 7 CONTEMP. ASIA ARB. J. 35, 65 (2014) (proposing a convention); CPR Institute, *Research Preview Provides Rare Mediation User Data in the International Arena*, 33 ALT. HIGH COST LITIG. 92 (2015) (discussing empirical data supporting a new convention in this field); Ellen A. Deason, *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?*, 22 DISP. RESOL. MAG. 32 (2015) (discussing the current U.S. initiative); Laura A. Kaster, *Will There Be A Vast Worldwide Expansion of Mediation for International Disputes?*, 33 ALT. HIGH COST LITIG. 120 (2015) (describing the current debate at UNCITRAL); Yaraslau Kryvoi & Dmitry Davyenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 BROOK. J. INT'L L. 827 (2015) (discussing the UNCITRAL deliberations); Audrey Hong Li, *Thought on Developing Convention on Enforceability of Settlement Agreements Reached Through Conciliation*, ASIA PACIFIC REGIONAL ARBITRATION 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. 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, ICM, *supra* note 1, 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).

6. This type of analysis has been undertaken in the past, initially with respect to international environmental law. *See, e.g.*, Oran R. Young, *Rights, Rules, and Resources in World Affairs*, in GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE 1, 10 (Oran R. Young ed., 1997); Jutta Brunee & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 31 (1997). However, the concept of epistemic communities has also been successfully used in the context of international trade law and international arbitration. *See* Stephan W. Schill, *W(h)ither Regulation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 888 (2011) (distinguishing between epistemic communities in "private commercial law and arbitration" and public international law); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 71 (2014).

fatal to the development of a new international instrument in this area of law.

Although the current discussion is set within a particular context, the research findings are widely transferable to other settings and apply to international lawmaking on subjects other than dispute resolution and in settings other than UNCITRAL. This type of intellectual cross-fertilization is extremely helpful and moves in both directions. For example, the process of “transgovernmental coalition building” has been successfully studied in a variety of settings but has not yet been discussed in the context of international dispute resolution.⁷ Thus, this strand of international relations theory seems ripe for transference to the world of international dispute resolution.⁸

As a methodological matter, the current analysis adopts a negotiation-analytic perspective rather than a game-theoretic approach.⁹ To some extent, this choice may appear unusual, given the extensive use of game theory in international law and international relations.¹⁰ However, a number of commentators have argued that negotiation theory is more accurate than game theory in describing and anticipating the forces at work in the international lawmaking process.¹¹ This conclusion is based on the fact that negotiation theorists “typically assume intelligent, goal-seeking action by the other players but not full strategic rationality,” as is the case with game theorists.¹² Thus,

7. Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L. 491, 502 (2012) (quoting Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 44 (1974)).

8. This type of analysis has seldom been conducted. See Andrea Bianchi, *Epistemic Communities*, in FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW *1, 1 (Jean d'Aspremont & Sahib Singh eds., forthcoming 2017) (noting that law accounts for only six percent of the references to the concept of 'epistemic communities' by discipline in a citation analysis reflected in Peter Haas, *Epistemic Communities*, in THE OXFORD COMPANION TO COMPARATIVE POLITICS 351, 357 (Joel Krieger ed., 2013)). Notably, this methodology differs from standard cross-cultural analyses, which focus on national differences. See, e.g., Erin Meyer, *Getting to Si, Ja, Oui, Hai and Da*, HARV. BUS. REV. 74, 74-80 (2015).

9. See James K. Sebenius, *Challenging Conventional Explanations of International Cooperation: Negotiation Analysis and the Case of Epistemic Communities*, 46 INT'L ORG. 323, 351 (1992).

10. See *id.*

11. See Antonia Chayes, *International Agreements: Why They Count as Law*, 103 AM. SOC'Y INT'L PROC. 158, 160 (2009) (noting negotiation theory adds another level of complexity to game theory in the context of international treaty negotiation); Sebenius, *supra* note 9, at 325, 351; see also Christian Downie, *Managing Complexity in International Negotiations: Is There A Role for Treaty Secretariats?*, 2-6, http://www.guillaumenicaise.com/wp-content/uploads/2014/08/DOWNIE_Managing-Complexity-in-International-Negotiations.pdf [hereinafter Downie, *Complexity*] (discussing the relationship between game theory and negotiation theory).

12. Sebenius, *supra* note 9, at 350. Game theory “assume[s] that players are fully rational and

negotiation theory incorporates various elements of game theory but takes the analysis to a higher level of complexity.¹³

The Article proceeds as follows. First, Section II introduces the concept of epistemic communities as developed by international relations theorists and considers those principles in light of the current UNCITRAL process. Next, Section III analyzes the role of epistemic communities in the international lawmaking process and discusses how those groups operate pursuant to standard principles of negotiation theory. Section IV then applies both sets of the theories to the ongoing deliberations at UNCITRAL to identify the interests and goals of the different epistemic communities and determine whether and to what extent various areas of divergence and convergence will affect the UNCITRAL deliberation process. Section V concludes the Article by tying together various strands of analysis and identifying several tangible proposals for negotiators at UNCITRAL.

This discussion is set in the context of the current debate about a new treaty on mediated settlement agreements and is therefore most relevant to those involved in that process. However, the Article has much broader ramifications. Not only does the analysis provide important new insights into the theoretical nature of the international legal community, it also offers new ideas about how certain practical problems involving international dispute resolution can and perhaps should be resolved.¹⁴ As a result, the research findings reflected herein are relevant to anyone working in the area of international lawmaking.

II. EPISTEMIC COMMUNITIES AND INTERNATIONAL RELATIONS THEORY

International relations theory defines an epistemic community as a “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”¹⁵ These groups reflect

analyze their actions by equilibrium methods that calculate what each should optimally do given the others’ optimal choice.” *Id.*

13. See Chayes, *supra* note 11, at 160; Downie, *Complexity*, *supra* note 11, at 2-6.

14. Many of the criticisms have focused on the increasing cost and legalism of international commercial arbitration. See David Rivkin, *A New Contract Between Arbitrators and Parties* (Oct. 27, 2015), <http://sccinstitute.com/media/93206/1000973790v2-hkiac-keynote-address.pdf> (constituting a speech from the president of the International Bar Association proposing a new means to reduce costs in international arbitration); Strong, *ICM*, *supra* note 1, at 11.

15. Peter M. Haas, *Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 2-3 (1992) (citations omitted).

(1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity—that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (4) a common policy enterprise—that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.¹⁶

At one time, theorists used this definition to conclude that international lawyers, judges, and commentators comprised a single epistemic community.¹⁷ However, the expansion and diversification of international law has led to various schisms within the group. As a result, experts in international trade law are now considered to be separate from experts in international investment law, while specialists in international dispute resolution are seen as distinguishable from specialists in public international law.¹⁸

The question now arises as to whether the field of international dispute resolution can or should be defined as consisting of two separate and distinct groups, one involving specialists in international arbitration and the other involving experts in mediation. This proposition is based on the ongoing deliberations at UNCITRAL concerning the proposed treaty on mediated settlements, which has seen some participants

16. *Id.* (citation omitted). Epistemic communities may also have share[d] intersubjective understandings; have a shared way of knowing; have shared patterns of reasoning; have a policy project drawing on shared values, shared causal beliefs, and the use of shared discursive practices; and have a shared commitment to the application and production of knowledge.

Id. at 3 n.5.

17. See ANNE-MARIE SLAUGHTER, A NEW GLOBAL ORDER 65-100 (2004); Charlotte Ku, *The ASIL as an Epistemic Community*, 90 AM. SOC'Y INT'L L. PROC. 224, 584 (1996); Andy Olson, *An Empire of Scholars: Transnational Lawyers and the Rule of Opinio Juris*, 29 PERSPECTIVES POL. SCI. 23 (2000) (suggesting that specialists in international law constitute a closed epistemic community); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented But Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL'Y 959, 966 (2009) (stating "that international lawyers and judges constitute an epistemic community" and that "[s]uch an epistemic community or network is capable of overcoming or mitigating many axes or dimensions of fragmentation").

18. See Schill, *supra* note 6, at 888; Robert D. Sloane, *Law at the Vanishing Point: A Philosophical Analysis of International Law*, by Aaron Fichtelberg, 104 AM. J. INT'L L. 549, 554 (2010) (book review); Wagner, *supra* note 6, at 71.

focusing on different issues, concerns, and strategies, depending on whether and to what extent those persons come from an arbitration or mediation background.¹⁹ If such a division does exist, it could affect the negotiation strategies and outcomes at UNCITRAL.²⁰

The process of identifying an epistemic community can be somewhat difficult, since there is no need for members of a particular community to hold a certain set of credentials or be recognized by an official regulatory body.²¹ Instead, epistemic communities are made up of individuals “who have a sufficiently strong claim to a body of knowledge that is valued by society.”²² Groups can develop around shared technical expertise in the hard or social sciences and around common beliefs about various processes or analytic methods used in the members’ professions or disciplines.²³

Some epistemic communities are limited to the national sphere, although groups can take on a transnational tenor as shared ideas spread

19. The author has been part of discussions at both the national and international levels regarding the proposed convention since the idea was first presented to the U.S. State Department in February 2014. Since some of those discussions took place on an unattributed basis (i.e., pursuant to the Chatham House Rule), this Article will not identify specific positions taken by any individuals or groups beyond what is noted in documents that have been made publicly available by UNCITRAL and UNCITRAL Working Group II (Arbitration and Conciliation).

20. See *infra* notes 106-87 and accompanying text.

21. At this point, neither mediation nor arbitration are officially regulated, although there are various initiatives associated with self-regulation and credentialing. See, e.g., Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN. ST. L. REV. 1017, 1021 (2004) (calling for credentialing in mediation); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 968 (2005) (noting “prior service as an arbitrator is the preeminent qualification for an arbitrator-candidate”); 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, 11 n.58 (2014) (noting attempts to credential arbitrators); *How to Become IMI Certified*, INTERNATIONAL MEDIATION INSTITUTE, <https://imimediation.org/how-to-become-imi-certified> (establishing a credentialing program); *Training and Development*, CHARTERED INSTITUTE OF ARBITRATORS (CIARB), <http://www.ciarb.org/training-and-development> (establishing a “ladder of education” in domestic and international arbitration).

22. Haas, *supra* note 15, at 16.

23. See *id.* There is some debate as to whether the concept of epistemic communities can be extended to include lawyers, although most recent research suggests that the term can indeed be extended to members of the legal profession. See Bianchi, *supra* note 8, at 6 (comparing Peter Haas, *Ideas, Experts and Governance*, in *THE ROLE OF EXPERTS IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES: ADVISORS, DECISION MAKERS OR IRRELEVANT ACTORS?* 26 (Monika Ambrus et al. eds., 2014) (suggesting lawyers cannot constitute an epistemic community) and Olson, *supra* note 17, at 23 (“In many respects, the community of international lawyers provides a model example of Haas’s definition of an epistemic community of elites. This community views itself as a guild of accredited specialists engaged in the formation of society’s rules and uniquely qualified to interpret international law.”)); Ku, *supra* note 17, at 584 (concluding groups of lawyers can constitute an epistemic community).

through the community via professional conferences, journals, and other formal and informal collaborations.²⁴ Transnational epistemic communities tend to advance their policy positions more effectively than national groups because transnational communities have larger networks.²⁵

At this point, “it is indisputable that the international arbitration world is an identifiable epistemic community that transcends national borders.”²⁶ Indeed, numerous observers, beginning with Yves Dezalay and Bryant Garth in the mid-1980s, have characterized the international arbitral community as an “insider’s club” made up of knowledgeable specialists.²⁷ Although some scholars believe that the community of arbitration experts developed as a result of economic rather than cultural factors,²⁸ other commentators focus on the growth of various social networks as critical to the creation of an international body of like-minded specialists.²⁹ Certainly, it is true that a globally cohesive set of beliefs and practices has been facilitated and encouraged by the large number of specialty journals and conferences dedicated to international arbitration³⁰ as well as the now-prevalent view of arbitration as the preferred, if not primary means, of resolving international commercial and investment disputes.³¹ As a result, international arbitration clearly

24. See Haas, *supra* note 15, at 17; see also SLAUGHTER, *supra* note 17, at 65-100 (describing the importance of networks in the international legal system). Some commentators have noted that transnational dispute resolution, which would include international commercial arbitration and international commercial mediation or conciliation, “foster[s] epistemic communities that bridge international and domestic legal cultures” and “are especially effective in norm transmission in comparison to State-to-State dispute settlement.” Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT’L L. REV. 685, 727 (2007).

25. See Haas, *supra* note 15, at 17.

26. Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69 (2003). One question that may become important in the future is whether there are two arbitral communities, one made up of specialists in international commercial arbitration and one made up of specialists in international investment arbitration. See Anthea Roberts, *Divergence Between Investment and Commercial Arbitration*, 106 AM. SOC’Y INT’L L. PROC. 297, 297-99 (Mar. 28-31, 2012). However, this point is not relevant to the current discussion.

27. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* (1996).

28. See Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT’L L. 1335, 1345 (2003).

29. See Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT’L L. 387, 389-90 (2014).

30. See S.I. STRONG, *RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES* 71-137 (2009) (noting sources); Rogers, *supra* note 21, at 1016.

31. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 73 (2014). The popularity of international arbitration is undeniable: according to recent estimates, up to ninety percent of all international commercial contracts include an arbitration provision with a similarly

reflects a common “set of causal approaches or orientations and . . . consensual knowledge base” and “shared normative commitments” that arise not as a result of a professional code of conduct but from a “principled approach to the issue at hand.”³² Thus, the field of international arbitration can be said to meet the definition of an epistemic community.³³

At this point, it is unclear whether and to what extent the same can be said of mediation. On the one hand, the field does appear to be populated by an expert group of “true believers,” at least in the United States, where specialists write glowingly of the advantages of mediation over other dispute resolution mechanisms, including arbitration.³⁴ On the other hand, significant questions exist as to the breadth of the mediation community in terms of both geography and subject matter. For example, empirical research suggests that mediation runs a distant second to arbitration as the preferred means of resolving international business matters³⁵ despite a number of efforts to expand the use of mediation in regions outside of the United States³⁶ and in international commercial

high rate (ninety-three percent) of adherence to some form of arbitration in the 3,000-5,000 interstate investment treaties, including bilateral investment treaties (BITs), now in effect. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 5, 9 (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf>; Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT’L L. 7, 37 (2009); S.I. Strong, *Mass Procedures as a Form of “Regulatory Arbitration” – Abaclar v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 300 n.271 (2013).

32. Haas, *supra* note 15, at 19; *see also id.* at 2-3 (listing four core attributes of an epistemic community). This feature is particularly relevant to arbitration and mediation because those fields have developed largely autonomously. Neither mediation nor arbitration can be said to exist “outside” the law, since the state always retains an interest in overseeing various procedural matters, but the amount of autonomy given to parties in mediation and arbitration is often significant. *See* S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 323-50 (2013).

33. *See* Alford, *supra* note 26, at 69; Haas, *supra* note 15, at 19.

34. *See* Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 83 (noting near-universal belief among mediation experts that mediation is the best means of resolving disputes).

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

36. This effort has met with mixed results. *See* Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?*, 37 N.C. J. INT’L & COM. REG. 981, 982-85 (2012) [hereinafter Nolan-Haley, *Primrose Path*] (discussing reception of mediation in Europe pursuant to various measures, including 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); Jacqueline M. Nolan-Haley, *Mediation: The Best and Worst of Times*, 16 CARDOZO J. CONFLICT RESOL. 731, 736 (2015).

and investment disputes.³⁷

One way to resolve this tension might be to conclude that an epistemic community exists, but only with respect to domestic mediation in the United States.³⁸ However, a number of recent initiatives on the international front suggest that an international community of mediation experts may be in existence, even if that group is not as large or as powerful as the international arbitral community. For example, the creation of the International Mediation Institute (IMI) and the development of a Global Pound Conference that puts mediation and conciliation on equal footing with arbitration and litigation suggest that experts in international commercial mediation are growing in international sophistication and influence.³⁹ Similar conclusions can be drawn from the increasing number of journals interested in scholarship concerning international commercial mediation and conciliation,⁴⁰ as well as the creation of several international student moots in this area of law.⁴¹ These types of communal activities are critical to the creation and

37. See Strong, ICM, *supra* note 1, at 14-15. Some studies have suggested that people involved in civil lawsuits prefer mediation to nonbinding arbitration at the early stages of the dispute. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 648-49 (2014).

38. Although the mediation community within the United States does not appear to have described itself as an epistemic community, at least in so many words, the extensive amount of literature on mediation and the increasing sophistication of the process suggests that the necessary expertise and consensus as to the core values of commercial mediation exists. See Strong, *Empirical*, *supra* note 35 (citing literature on mediation and particularly on commercial mediation). A slightly different type of epistemic community is said to exist with respect to inter-state mediation, which arises as a matter of public international law rather than private international law. See RAYMOND COHEN, CULTURAL ASPECTS OF INTERNATIONAL MEDIATION, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION, 107, 111 (Jacob Berkovitch ed., 1996); see also Strong, ICM, *supra* note 1, at 25 (discussing interstate mediation).

39. See IMI, <https://imimediation.org/> (last visited February 21, 2017); Global Pound Conference Series 2016-2017, <http://globalpoundconference.org/>. The Global Pound Conference is being organized by IMI, which may not only help “promote interaction and shared beliefs” within the international dispute resolution community but may also place members of IMI “advantageously with respect to the decision-making and negotiating process.” Sebenius, *supra* note 9, at 362.

40. See, e.g., INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT; JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT; NON-JUDICIAL DISPUTE SETTLEMENT IN INTERNATIONAL FINANCIAL TRANSACTIONS, STUDIES IN TRANSACTIONAL ECONOMIC LAW (Norbert Horn & Joseph J. Norton eds., 2000); STUDIES IN INTERNATIONAL MEDIATION 213-27 (Jacob Bercovitch ed., 2002).

41. International commercial mediation moots are organized by both the International Chamber of Commerce (ICC) and the International Bar Association in conjunction with the Vienna International Arbitral Centre. The development of the international commercial arbitration community has been greatly assisted by the popularity of international mooting competitions for law students. 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

maintenance of an epistemic community, since that is how members of such groups develop and promote their common agendas.⁴²

Empirical, comparative, and historical analyses also support the notion that an epistemic community involving international commercial mediation exists. For example, empirical research suggests that most experts in international commercial mediation reside in England rather than in the United States,⁴³ while a comparative study conducted by the UNCITRAL Secretariat demonstrates the extent to which mediation exists around the world.⁴⁴ Furthermore, the rise of international commercial mediation cannot be considered a recent development, since mediation and conciliation were the primary means of resolving international commercial disputes prior to World War II.⁴⁵ As a result, it may be that the field of international commercial mediation constitutes a nascent epistemic community whose membership is small, particularly in comparison to the international commercial arbitration community, but highly motivated.⁴⁶

While the rise of a new epistemic group focusing on international commercial mediation could initially be seen as benefitting efforts to create a new UNCITRAL instrument on mediated settlement agreements, the situation is actually much more complicated, since “[t]he solidarity of epistemic community members derives not only from their shared interests . . . but also their shared aversions.”⁴⁷ This feature

such competition.”).

42. See Haas, *supra* note 15, at 19.

43. See Strong, *Empirical*, *supra* note 35.

44. See 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) [hereinafter Working Group II Comparative Study]. Similar material has been collected by the World Bank. See WORLD BANK, *INVESTING ACROSS BORDERS* (2012). Mediation and conciliation have long been favored in various Asian cultures. 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).

45. See Eric A. Schwartz, *International Conciliation and the ICC*, 10 ICSID REV.-FOREIGN INVEST. L.J. 98, 99, 107 (1995). The rise of international commercial arbitration in the post-War period can be largely attributed to the success of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention). See United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc E/CONF.26/8/Rev.1 [hereinafter New York Convention]; Strong, *ICM*, *supra* note 1, at 13.

46. Thus, in a recent empirical study of the use and perception of international commercial mediation, only nine percent of the respondents indicated that they had been involved in more than twenty international commercial mediations in the last three years. See Strong, *Empirical*, *supra* note 35, at 26.

47. Haas, *supra* note 15, at 20.

is critically important to the future of the proposed treaty at UNCITRAL because of the way in which the arbitration and mediation communities view each other. For example, supporters of international commercial arbitration often denigrate mediation as a “soft” procedural mechanism that has few benefits and numerous disadvantages.⁴⁸ Conversely, proponents of mediation criticize arbitration as being incapable of providing certain key benefits (such as the preservation of ongoing relationships and the development of integrative solutions).⁴⁹ The apparent absence of common ground and a certain amount of reciprocal ill-will between the two groups not only precludes the possibility of having numerous individuals with influence and standing in both communities, but also could drive the arbitration community to attempt to block efforts at UNCITRAL to adopt a new treaty on international commercial mediation.

III. EPISTEMIC COMMUNITIES AND THE UNCITRAL PROCESS

A. *Epistemic Communities in International Lawmaking Processes*

Recognizing the different factions within the international dispute resolution community can be very useful to state delegations at UNCITRAL, since it can help them develop strategies to manage such conflicts. Before doing so, however, negotiators must appreciate how epistemic communities operate in the international lawmaking process.

Epistemic communities gain political power as a result of their “professional training, prestige, and reputation for expertise in an area highly valued by society or elite decision makers.”⁵⁰ The need for expert assistance is particularly marked in highly technical areas that require international coordination.⁵¹ In those situations, policymakers look to

48. For example, those who do not use mediation often believe it is contrary to the dispute resolution culture in their home countries. See Strong, *Empirical*, *supra* note 35. Furthermore, no studies have yet shown that mediation actually saves parties time and money, which creates some skepticism in the arbitral community about whether mediation is worthwhile. See *id.*

49. See Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Settlement?*, 26 INT’L PRACTICUM 38, 50-51 (2013). The notion of “integrative solutions” (also known as win-win scenarios or “value claiming”) is most closely associated with Roger Fisher and William Ury, authors of the 1981 text, *Getting to Yes*, although the concept actually dates back to the early 1900s. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed., 1992); Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1, 9 (2010).

50. Haas, *supra* note 15, at 17 (noting these elements are supplemented by various “tests of validity”).

51. See *id.* at 1; see also Emmanuel Adler & Peter M. Haas, *Conclusion: Epistemic*

epistemic communities to help state actors fulfill their roles as “uncertainty reducers” and “power and wealth pursuers.”⁵²

These attributes are self-evident in matters involving UNCITRAL. For example, UNCITRAL’s core purpose is to decrease cross-border commercial uncertainty and increase global wealth and prosperity.⁵³ UNCITRAL achieves these ends by relying heavily on technical expertise generated institutionally (for example, through the UNCITRAL Secretariat and various working groups) and through input from external bodies, including the numerous IGOs and NGOs that participate in the UNCITRAL process.⁵⁴ The need for technical expertise is particularly high in fields such as private international dispute resolution, which require an extensive understanding not only of the relevant underlying law but also a detailed appreciation of how various national and international laws interact as a comparative and international matter.⁵⁵

Epistemic communities provide critical assistance to international policymakers by “articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing specific policies, and identifying

Communities, World Order, and the Creation of a Reflective Research Program, 46 INT’L ORG. 367, 371 (1992) (defining “the role played by epistemic communities as one of policy coordination,” which is subsequently defined as “consent and mutual expectation”).

52. Haas, *supra* note 15, at 4. Epistemic communities provide policymakers with useful “depictions of social or physical processes, their interrelation with other processes, and the likely consequences of actions that require application of considerable scientific or technical expertise.” *Id.* (noting the information “is the product of human interpretations of social and physical phenomena”).

53. For example, UNCITRAL’s aim is to increase predictability in international commercial relations while also maximizing cost-efficiency in international commercial transactions and facilitating international trade. *See* G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6594, at pmbl (Dec. 17, 1966) (establishing UNCITRAL); A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS INTERNATIONAL TRADE COMMISSION 1 (2013) <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> [hereinafter UNCITRAL GUIDE].

54. *See* UNCITRAL GUIDE, *supra* note 53, at 6-9; Haas, *supra* note 15, at 10 (describing the United Nations as requiring a high degree of technical expertise); *see also id.* at 32 (noting “the coordinating role of members of international secretariats and of governmental and non-governmental bodies and the channels through which they interact”); C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT’L L. & POL’Y 115, 142-43 (2007) (noting epistemic communities have affected significant change in policy and practice at the United Nations, often through NGOs).

55. This is a field that even judges have difficulty understanding. *See* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 1-24 (2012) (involving a judicial guide published by the Federal Judicial Center, the research and education arm of the U.S. federal judiciary, that is meant to provide assistance to U.S. judges in this area of law).

salient points for negotiation.”⁵⁶ However, epistemic communities do more than simply help create and coordinate international policy;⁵⁷ they also participate in the juris-generative process, which would include initiatives to adopt international treaties such as the proposed convention on enforcement of mediated settlement agreements.⁵⁸

Epistemic communities are often at their best when they are either engaged in the direct identification of state interests for decision makers or highlighting the relevant features of a particular issue so that policymakers may determine whether they have an interest at stake.⁵⁹ As one scholar has noted, “epistemic communities fix the terms of the discourse and shape the way in which we look at international law.”⁶⁰ Once one state has successfully completed this process, that state may influence the actions of other states, thereby multiplying the effect of the epistemic community.⁶¹

This process perfectly describes the process by which the idea for the proposed convention on enforcement of mediated settlement agreements arose and was developed by the U.S. Department of State. The project began as a result of a suggestion made by a participant at a February 2014 meeting of the U.S. State Department’s Advisory Committee on Private International Law.⁶² After considering the matter

56. Haas, *supra* note 15, at 2.

57. The consensual nature of UNCITRAL makes it one of the quintessential examples of international policy coordination. See UNCITRAL GUIDE, *supra* note 53, at 6; Haas, *supra* note 15, at 32. No votes are taken to determine the direction taken by UNCITRAL or any of its constituent bodies. Instead, the chair of the meeting in question (i.e., the full Commission, which meets once a year in June or July, or the various working groups, which meet twice a year) simply gauges the mood of the room when determining whether to move forward and in what manner. See UNCITRAL GUIDE, *supra* note 53, at 7.

58. See Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 322 (2007) (discussing the work of Harold Hongju Koh and Robert Cover, among others); Anne Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 324 (2004) (“The procedures and substantive principles developed over the course of repeated conflicts among the same or successive actors take on precedential weight, both through learning processes and the pragmatic necessity of building on experience. As they become increasingly refined, these procedures and principles are increasingly likely to be codified in informal and increasingly formal ways.”). UNCITRAL and Working Group II have illustrated a keen desire to reflect and incorporate both formal and informal norms relating to international commercial mediation. See Working Group II Comparative Study, *supra* note 44.

59. See Haas, *supra* note 15, at 4; see also Bianchi, *supra* note 8, at 19 (“To fix the boundaries of what international law is and to set the parameters for what is or is not an acceptable argument is no less than making the law.”).

60. Bianchi, *supra* note 8, at 16.

61. See Haas, *supra* note 15, at 4; see also *id.* at 33 (noting “epistemic communities operating through transnationally applied policy networks can prove influential in policy coordination”).

62. See PRIVATE INTERNATIONAL LAW, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/l/c3452.htm>; PUBLIC MEETING ON INTERNATIONAL ARBITRATION AND

internally and consulting with additional experts and stakeholders, the State Department shaped the idea into a form that State Department lawyers believed would most likely meet with international approval. The proposal was formally presented at the July 2014 meeting of UNCITRAL, and deliberations regarding the proposal are now underway in Working Group II, which focuses on matters involving international commercial arbitration and conciliation.⁶³ Various members of the arbitration and mediation communities have engaged in the debate about a new international instrument in this area of law through interactions with their government representatives and direct participation as NGO observers at UNCITRAL.⁶⁴

Epistemic communities do more than influence the creation of new policy initiatives. Instead, as the current deliberations at UNCITRAL show, epistemic communities play an ongoing role in the debate about the shape of various international policy programs. Expert perspectives can enter the process in several ways. First, specialist knowledge may be sought at the institutional level, as occurs when the UNCITRAL Secretariat asks for the views of internal and external experts on various

CONCILIATION, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/229037.htm>. The original suggestion to the State Department was based on information found in a scholarly article written by the current author. Compare Strong, ICM, *supra* note 1, at 11-39 with U.S. Proposal, *supra* note 1. However, the proposition was consistent with work of other commentators that came out shortly thereafter. See Boule, *supra* note 5, at 65; Li, *supra* note 5, at 20; Lo, *supra* note 5, at 135; Wolski, *supra* note 5, at 110. Interestingly, this latter group of authors appear to work primarily in the area of mediation rather than arbitration, which supports the notion that an epistemic community of experts in international commercial mediation is on the rise. See Haas, *supra* note 15, at 4 (“The members of a prevailing [epistemic] community become strong actors at the national and transnational level as decision makers solicit their information and delegate responsibility to them.”).

63. See U.S. Proposal, *supra* note 1; see also *supra* notes 1-4 and accompanying text (discussing UNCITRAL deliberations to date).

64. See, e.g., 81 Fed. Reg. 50,591-92 (2016) (containing notice of a public meeting of the U.S. Department of State Advisory Committee on Private International Law (ACPIL) to discuss the proposed treaty on international settlement agreements). A wide variety of IGOs and NGOs sit in on UNCITRAL deliberations, including generalist organizations like the American Bar Association (ABA), the American Society of International Law (ASIL), the European Union (EU), the International Institute on Conflict Prevention & Resolution (CPR Institute) and the International Law Association (ILA), and numerous international arbitration organizations, including the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), the China International Economic and Trade Arbitration Commission (CIETAC), the International Chamber of Commerce (ICC), the International Council on Commercial Arbitration (ICCA), the New York International Arbitration Center (NYIAC), the Stockholm Chamber of Commerce (SCC), and the Permanent Court of Arbitration (PCA), among others. Although many of the arbitral institutions are tangentially involved in international commercial mediation, at the time of writing only one NGO at UNCITRAL, the International Mediation Institute (IMI), focuses primarily on mediation and conciliation.

technical issues.⁶⁵ Second, epistemic communities may exert indirect influence on the international debate, as occurs when states seek the assistance of stakeholders and national experts in analyzing policy proposals and counterproposals submitted by other states as part of the “transgovernmental communication” process.⁶⁶ Third, state delegations to UNCITRAL are often made up of subject matter specialists who are drawn from other government agencies or from a cadre of well-connected (i.e., elite) academics and private practitioners.⁶⁷

Recourse to expert advisors does not necessarily result in straightforward results, since epistemic communities are not the holders of absolute truths.⁶⁸ Instead, epistemic communities “bring with them their interpretations of the knowledge, which are in turn based on their causally informed vision of reality and their notions of validity.”⁶⁹ As a result, the content of the advice given by any expert consultant varies depending on that person’s perspective, training, and background.⁷⁰ Furthermore, different states react differently to information provided by specialist advisors.⁷¹ Therefore, reliance on epistemic communities does not guarantee a conflict-free negotiation process. To the contrary,

65. See UNCITRAL GUIDE, *supra* note 53, at 7; see also *supra* note 54 and accompanying text (discussing NGOs and the UNCITRAL Secretariat). The preliminary report from an empirical study written by the author was also made available to delegates and was cited by the Secretariat and various governments in their submissions. See Secretariat Note, *supra* note 2, at 6 n.16; Initial States’ Comments, *supra* note 2, at 6 n.7; 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*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. The preliminary report was also discussed orally during the Working Group meeting. See UNCITRAL, WORKING GROUP II, SOUND RECORDINGS OF MEETINGS, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

66. Cho & Kelly, *supra* note 7, at 503 (quoting ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 25-26 (1977)); see also 81 Fed. Reg. 50, 591-92 (2016) (containing notice of a public meeting ACPIIL seeking stakeholder input on the proposed treaty on international settlement agreements); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 513 (1995) (discussing transgovernmental communication in a combined theory of international law and international relations).

67. See UNCITRAL GUIDE, *supra* note 53, at 8; Haas, *supra* note 15, at 13 (contemplating this process in the abstract); see also *id.* at 35 (noting members of an epistemic community “may be found among the respected experts whose names recur on delegation lists to intergovernmental meetings or among those responsible for drafting background reports or briefing diplomats”).

68. See Haas, *supra* note 15, at 21; see also *id.* at 23 (“The primary concern is the political influence that an epistemic community can have on collective policymaking, rather than the correctness of the advice given. While epistemic communities provide consensual knowledge, they do not necessarily generate truth.”).

69. See *id.* at 21.

70. See *id.*

71. See *id.* at 30.

significant debates about the proper course of action can arise both within and between different epistemic communities.

Applying this knowledge to the current deliberations at UNCITRAL suggests a potentially significant divergence of opinion regarding the need for and shape of a new instrument involving international commercial mediation, based on the background of the experts in question. The situation is exacerbated by the fact that most of the debate about the substantive details of the proposed convention is taking place in Working Group II.⁷² Although that Working Group ostensibly focuses on matters involving both arbitration and conciliation (i.e., mediation), historically the group was dedicated to international commercial arbitration, and most of the NGOs involved in Working Group II specialize in arbitration, not mediation.⁷³ Furthermore, most of the members of national delegations to Working Group II have experience in arbitration rather than mediation, although the composition of state delegations can change from meeting to meeting.⁷⁴

The high proportion of arbitration experts in Working Group II is troubling because the arbitration community could use its influence to derail the proposed convention if a sufficient number of arbitral experts view that initiative as contrary to their principles or interests. For example, the arbitration community may find the proposed convention offensive to a belief that arbitration is the best, if not only, way to resolve international commercial and investment disputes.⁷⁵ Alternatively, some specialists in arbitration could perceive the proposed convention as a threat to their financial interests, since the convention is intended to increase the viability of mediation as a means of resolving cross-border business disputes.⁷⁶ If the world of international dispute resolution is framed in distributive terms (i.e., as a zero-sum equation where the increase of mediation decreases the incidence of arbitration), specialists in arbitration could be wary of supporting a procedure that

72. See UNCITRAL GUIDE, *supra* note 53, at 46; see also UNCITRAL, WORKING GROUP II, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

73. For example, only one of the NGOs in attendance (IMI) specializes in mediation. The other IGOs and NGOs focus primarily on arbitration. See *supra* note 64 (listing various IGOs and NGOs).

74. See UNCITRAL GUIDE, *supra* note 53, at 8. At this point, there is little overlap between experts in mediation, including international commercial mediation, and experts in public international law.

75. See *infra* note 122 and accompanying text.

76. See Strong, ICM, *supra* note 1, at 31-32 (noting that a new convention could put mediation and arbitration on equal footing); see also Boule, *supra* note 5, at 65; Lo, *supra* note 5, at 135 (suggesting a new enforcement regime); Madoff, *supra* note 5, at 161-66 (noting the need for a new treaty); Wolski, *supra* note 5, at 110 (supporting a new treaty).

could detrimentally affect their livelihood.⁷⁷

The arbitral community may also harbor some residual antipathy to the proposed convention on mediation because the business community's recent interest in international commercial mediation is often seen to be the result of parties' growing dissatisfaction with international arbitration.⁷⁸ For years, the international commercial actors have bemoaned the increasing cost and delays of international commercial and investment arbitration.⁷⁹ While the arbitral community has attempted to solve the problem through various initiatives intended to reform the arbitral process from the inside, those efforts have not been entirely successful,⁸⁰ and an increasing number of parties have expressed a desire to exit the arbitral system⁸¹ through mediation.⁸²

This sort of crisis is precisely the type of catalyst that can trigger a quantum shift in international policy.⁸³ Indeed, "it often takes a crisis or shock to overcome institutional inertia and habit and spur [policymakers] to seek help from an epistemic community. In some cases, information generated by an epistemic community may in fact

77. See *infra* notes 122, 127-29 and accompanying text.

78. See Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 64-66 (2012) [hereinafter Nolan-Haley, *New Arbitration*].

79. See WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 3-27 (2d. ed. 2012).

80. See *id*; Rivkin, *supra* note 14; Strong, ICM, *supra* note 1, at 11; see also COLLEGE OF COMMERCIAL ARBITRATORS, *PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION* (Thomas J. Stipanowich et al. eds., 2010); ICC COMMISSION, *REPORT ON TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (2012).

81. The concept of exit has been frequently discussed in the context of litigation. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 885-86 (2004); Jay Tidmarsh, *Exiting Litigation*, 41 LOY. U. CHI. L.J. 263, 267 (2010). However, the issue has also been raised in the context of international investment arbitration, where states have exhibited a desire to exit the system by withdrawing from or refusing to enter into bilateral investment treaties. See Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 164, 220-24, 228 (2012); Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 335-47 (2014); Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L. J. 603, 604-05 (2012). Some law and economics analyses have been conducted concerning the choice to proceed in international commercial arbitration versus transnational litigation. See Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 50. However, no known theoretical analyses compare the choice to use mediation versus arbitration, particularly in the international commercial sphere. *But see* Stipanowich & Lamare, *supra* note 21, at 44-54 (conducting an empirical study including international commercial mediation); Strong, *Empirical*, *supra* note 35 (conducting an empirical study focusing solely on international commercial mediation).

82. See Nolan-Haley, *New Arbitration*, *supra* note 78, at 64-66.

83. See Haas, *supra* note 15, at 14 (noting "[d]ecision makers do not always recognize that their understanding of complex issues and linkages is limited"); see also *id.* at 15-16 (discussing how epistemic communities assist with the process of change).

create a shock.”⁸⁴

When considering the possibility of change, it is important to consider the relative sophistication of the field in question, since technical experts are most influential in areas where policymakers have relatively few preconceptions about the area in which regulation is occurring.⁸⁵ This phenomenon may prove problematic with respect to the current U.S. proposal, since UNCITRAL has addressed enforcement of settlement agreements arising out of conciliation on a number of previous occasions, leading some skeptics to suggest that the field is already saturated.⁸⁶ As a result, the views of various experts may not be as persuasive regarding the current debate as they might otherwise have been.

84. *Id.* at 14.

85. *See id.* at 29.

86. *See* United Nations on International Trade Law Working Group on Arbitration, Report of the 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, paras. 105-12, U.N. Doc. A/CN.9/WG.II/WP.110 (Sept. 22, 2002); United Nations General Assembly, Report of the thirty-fifth session of the Commission, U.N. G.A.O.R. Fifty-seventh Sess., Supp. No. 17, paras. 119-26, 172, U.N. Doc. A/57/17 (June 17-18, 2002); United Nations Commission on International Trade Law, Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, paras. 77-81, U.N. Doc. A/CN.9/514 (May 27, 2002); United Nations Commission on International Trade Law, Report of the Working Group on Arbitration on the Work of its Thirty-fifth Session, paras. 38-48, 133-39, 160-61, U.N. Doc. A/CN.9/506 (Dec. 21, 2001); United Nations Commission on International Trade Law, Note by the UNCITRAL Secretariat, Settlement of Commercial Disputes – Draft Guide to Enactment of the UNCITRAL, paras. 66-17, U.N. Doc. A/CN.9/WG.II/WP.116 (Oct. 21, 2001); United Nations Commission on International Trade Law, Note by the UNCITRAL Secretariat, Settlement of Commercial Disputes - Model Legislative Provisions on International Commercial Conciliation, paras. 45-49, U.N. Doc. A/CN.9/WG.II/WP.115 (Sept. 18, 2001); United Nations Commission on International Trade Law, Report of the Working Group on Arbitration on the Work of its Thirty-fourth Session, paras. 153-59, U.N. Doc. A/CN.9/487 (June 15, 2001); United Nations Commission on International Trade Law, Report of the 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); United Nations Commission on International Trade Law, Report of the Working Group on Arbitration on the Work of its Thirty-second Session, paras. 38-40, U.N. Doc. A/CN.9/468 (Apr. 10, 2000); United Nations Commission on International Trade Law, Report of the 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, paras. 34-42, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000); United Nations Commission on International Trade Law, Notes by UNCITRAL Secretariat, Possible Future Work in the Area of International Commercial Arbitration, paras. 16-18, U.N. Doc. A/CN.9/460 (Apr. 6, 1999). However, commentators have criticized UNCITRAL’s failure to address issues relating to the international enforceability of an international settlement agreement in these earlier efforts. *See* PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 234 (2d ed., 2004).

Furthermore, recognizing that change is necessary does not always mean that experts agree on how such change should occur. Therefore, the following section discusses how negotiation theory can both describe and diminish the struggle between the various epistemic communities involved in the current UNCITRAL treaty process.

B. *Epistemic Communities and Negotiation Theory*

Conflicts between different epistemic communities (or different factions of the same epistemic community) can be difficult for policymakers who are seeking expert guidance in a particular policymaking endeavor.⁸⁷ However, conflict is not necessarily a bad thing. Indeed, reliance on a single epistemic community can lead to significant negative repercussions, including the failure to consider potentially helpful interdisciplinary perspectives.⁸⁸

Relatively few commentators have considered how epistemic communities play into standard theories of bargaining.⁸⁹ Instead, most analyses of international law and international relations focus on game theory.⁹⁰ However, application of a negotiation-analytic perspective⁹¹ can overcome problems associated with other theoretic models.⁹²

87. See Berman, *supra* note 58, at 327 (discussing Robert Cover's views regarding global legal processes and "the inevitable conflicts of norms articulated by multiple communities"); see also Bianchi, *supra* note 8, at 17 (discussing different analytical approaches adopted by international arbitrators, as considered further in Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013)); Kali Murray & Ellen van Zimmeren, *Dynamic Patent Governance in Europe and the United States: The Myriad Example*, 19 CARDOZO J. INT'L & COMP. L. 287, 299, 308-13 (2011) (discussing such conflicts in patent law); Frédéric G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection As Common Law*, 34 NW. J. INT'L L. & BUS. 181, 205 (2014) (noting discrepancies in international investment community); S.I. Strong, *The Future of Trust Arbitration: Quo Vadis? in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW* paras. 22.09-22.23 (S.I. Strong ed., 2016) (discussing such conflicts in internal trust arbitration).

88. See Bianchi, *supra* note 8, at 17-18 (discussing how successful integration of different epistemic groups can shape the formation of international law); Haas, *supra* note 15, at 24.

89. See Sebenius, *supra* note 9, at 326.

90. See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 184 (1999) ("As suggested by Robert Putnam, the structure of international negotiations is a two-level game simultaneously played by government representatives at the international level with the representatives of the foreign governments and at the domestic level with representatives of domestic interest groups.").

91. See Sebenius, *supra* note 9, at 325, 351. Negotiation theorists differ from game theorists in that the former "typically assume intelligent, goal-seeking action by the other players but not full strategic rationality." *Id.* at 350 (noting game theorists "assume that players are fully rational and analyze their actions by equilibrium methods that calculate what each should optimally do given the others' optimal choices").

92. For example, negotiation theory can provide a response to "suboptimal 'cooperation' in

Furthermore, reliance on the concept of epistemic communities can be useful not only in overcoming “‘strategic misrepresentation’ of interests and beliefs” that can result in agreements that “fall far short of the Pareto frontier,”⁹³ but also in describing how learning can occur among the state parties during the negotiation process.⁹⁴

Obviously, an epistemic community’s ability to influence policy change increases in direct proportion to the cohesiveness of the group and its access to the relevant policymakers.⁹⁵ However, epistemic communities that are involved in the international negotiation process can also be said to

constitute a de facto natural coalition seeking to build a “winning coalition” of support behind its preferred policy choice. . . . Not only must the epistemic coalition convince a sufficient number of actors to join by various means of inducement, but it must also overcome actual and potential “blocking coalitions” by a variety of standard direct and indirect approaches, including prevention, persuasion, conversion, dividing and conquering, isolating and overwhelming, and simply outmaneuvering and outflanking opponents.⁹⁶

This characterization of the role of epistemic communities in the international policymaking process is critical to a proper understanding of the ongoing deliberations at UNCITRAL because the international dispute resolution community can no longer be described as a single, unitary entity. Furthermore, this view of epistemic communities highlights the need to consider whether and to what extent the arbitral and mediation communities will cooperate during the UNCITRAL deliberations on the proposed treaty on mediated settlements.

the presence of distributional conflict,” termed “cooperation below the Pareto frontier,” which is “a general phenomenon and [which] tends to occur when the cooperative potential of a situation is not realized because of technical or strategic uncertainty, a lack of creativity, blocked communication, or other factors.” *Id.* at 327.

93. *Id.* at 331 (noting that although agreements may arise in some contexts, “the adversarial nature of the process may make potentially valuable learning and joint problem-solving effectively impossible”).

94. *See id.* at 327, 329.

95. *See id.* at 361-62 (noting also that “[t]o the extent that a community falls short of these conditions, policy entrepreneurs may take steps to foster its growth and potential influence”).

96. *Id.* at 352. Epistemic coalitions based on shared beliefs are “less familiar” than coalitions based on “shared material interest, common histories or relationships, identical ideologies, common enemies and the like” but may nevertheless be quite “potent.” *Id.* at 355. It is critically important to understand the effect of coalition-building behavior in multiparty negotiations, such as those that exist at UNCITRAL. Lawrence E. Susskind & Larry Crump, *Editors’ Introduction—Multiparty Negotiation: An Emerging Field of Study and New Specialization*, in 1 *MULTIPARTY NEGOTIATION: COMPLEX LITIGATION AND LEGAL TRANSACTIONS* xxv, xxv (Lawrence E. Susskind & Larry Crump eds., 2008).

Other aspects of the UNCITRAL process also validate this theoretic model. For example, one premise suggests that members of epistemic communities work indirectly, since they tend not to negotiate directly with colleagues in other countries.⁹⁷ This phenomenon is certainly apparent in the ongoing UNCITRAL process, where specialists in arbitration and mediation are not meeting directly to resolve their differences regarding the proposed convention but instead to pass their positions on to state and NGO delegates, who present the arguments on the floor of the United Nations.

However, there are some ways in which the UNCITRAL process defies standard expectations. For example, some theorists have suggested that epistemic communities seldom act as “an overt, cross-cutting bloc that self-consciously coordinates tactics and strategy.”⁹⁸ However, a significant amount of strategic coordination appears to be going on among various NGOs interested in the proposed UNCITRAL convention.⁹⁹

One of the key functions of having epistemic communities involved in international policymaking involves the experts’ ability to help negotiators identify shared interests that will then lead to agreement on various substantive issues.¹⁰⁰ However, epistemic communities also play a critical role in ensuring the success of the final outcome by helping parties see the benefits of continuing to cooperate in the implementation of a particular agreement.¹⁰¹

97. See Sebenius, *supra* note 9, at 352.

98. *Id.* at 353.

99. For example, IMI has been extremely active in supporting the UNCITRAL process through various empirical studies and lobbying efforts. See, e.g., IMI, *How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements* (Dec. 3, 2014), <https://imimediation.org/uncitral-survey-results-news-item>; IMI, *Survey – UN Convention on the Recognition and Enforcement of Mediated Settlement Agreements* (Oct. 16, 2014), <https://imimediation.org/invitation-to-participate-in-survey-for-uncitral>. The notion that epistemic communities do not act strategically may be the result of the assumption that lawyers cannot form epistemic communities. See *supra* note 23. However, it is not surprising that an epistemic community made up completely or primarily of lawyers would be capable of operating in a strategic manner.

100. See Haas, *supra* note 15, at 20; Sebenius, *supra* note 9, at 354-55 (“[E]pistemic communities may frame issues for collective debate, propose specific policies, and identify salient dimensions for negotiations, while excluding others.”).

101. See Sebenius, *supra* note 9, at 354. Thus, it has been said that an epistemic coalition shares a common policy project, which can be interpreted as a proposed agreement. Over time, learning alters the zone of possible agreement, such that the community’s preferred policy is widely seen to embody a greater degree of joint gains and the alternatives to agreement are seen as less desirable. Thus, the conflict of interest . . . inherent in previous perceptions of the zone of possible agreement is reduced, and cooperation becomes not only more likely to be achieved but also more likely to persist

Cooperative efforts within and between the members of various epistemic communities is of course ideal. However, expert groups do not always behave in a supportive manner. Instead, as mentioned previously, some epistemic communities involved in international lawmaking operate as a type of blocking coalition.¹⁰² This is a significant concern for those involved in the proposed UNCITRAL convention, since it is possible that some members of either the arbitration or mediation communities might seek to thwart the forward movement of the U.S. proposal.¹⁰³ The risk of a successful blocking effort rises to the extent that a particular group is well-mobilized and well-situated to influence state delegates.¹⁰⁴

The tension between cooperative and oppositional efforts may be exacerbated or reduced depending on how the particular debate is framed. For example, some epistemic communities may assert a more distributive approach (sometimes referred to as “value-claiming”) while others may adopt more of an integrative approach (sometimes referred to as “value-creating”).¹⁰⁵ Applying these negotiation-oriented principles to the current deliberations at UNCITRAL yield some very interesting results, as the following section shows.

IV. EPISTEMIC COMMUNITIES, NEGOTIATION THEORY AND THE UNCITRAL PROCESS

Although the interests of the international arbitration community may seem to diverge from those of the mediation community, the split is not necessarily fatal to the UNCITRAL process. International policymakers routinely “negotiate with and among multiple epistemic communities” and “enroll their various audiences and allies, emphasizing particular aspects of their plans to members of diverse epistemic communities.”¹⁰⁶ Nevertheless, actual or perceived conflicts between the values and interests of the international arbitration and mediation communities may create difficulties,¹⁰⁷ since “the greater the

once achieved.

Id.

102. *See id.* at 359; *see also supra* note 96 and accompanying text.

103. *See infra* notes 121-22, 152-54 and accompanying text.

104. Sebenius, *supra* note 9, at 360 (quoting Emanuel Adler and Peter Haas); *see also id.* at 359 (noting shortfalls of other theories).

105. *Id.* at 360.

106. Jessica O’Reilly, *Tectonic History and Gondwanan Geopolitics in the Larsemann Hills, Antarctica*, 34 *POL’Y & LEGAL ANTHROPOLOGY REV.* 214, 217 (2011).

107. Part of the problem arises from the fact that epistemic communities are meant to provide expert technical advice to international policymakers, and very little hard data exists regarding the

homogeneity in values, perspectives, and sense of mission, the less conflict of interest there will be and the easier it will be for organizations to reach and sustain agreements on appropriate actions.”¹⁰⁸

The longstanding, politically powerful, and highly cohesive nature of the international arbitration community suggests that it will be able to wield more influence in the UNCITRAL negotiations than the international mediation community. This is particularly due to the relatively high degree of access that arbitral elites have historically had in the international policymaking process at UNCITRAL.¹⁰⁹ However, the persuasiveness of any epistemic community often depends on whether and to what extent the underlying beliefs of that community demonstrate a need for international policy coordination.¹¹⁰ Recently generated empirical research suggests the international legal community (broadly defined) perceives a significant need for a new treaty on the international enforcement of mediated settlement agreements,¹¹¹ which may bode well for the mediation community’s ability to overcome some of the arbitral community’s concerns about the proposed convention. If the mediation community can provide experts in arbitration with a sufficiently compelling account of the need for and benefits of a new treaty in this area of law, the two groups’ combined opinion will be difficult for state actors to resist.¹¹²

use, perception, or form of international commercial mediation. See Haas, *supra* note 15, at 4; Strong, *Empirical*, *supra* note 35. Although the UNCITRAL Secretariat (which can itself be considered an epistemic community) has compiled a number of comparative doctrinal studies regarding the use of mediation in different jurisdictions, that study addresses a slightly different issue. See UNCITRAL GUIDE, *supra* note 53, at 7-9; Working Group II Comparative Study, *supra* note 44.

108. Sebenius, *supra* note 9, at 362.

109. See *supra* notes 63-64 and accompanying text.

110. Haas, *supra* note 15, at 30.

111. See Strong, *Empirical*, *supra* note 35 (discussing results from an international study of over 220 academics, judges, neutrals, practitioners, and parties involved in international dispute resolution).

112. Although a unity of interests and goals is helpful, it does not always guarantee a particular outcome in the international arena. For example, experts have suggested that

[b]inding norms typically emerge when a regime has moved along the continuum from mere coordination to at least a partial convergence of interests and values. For example, the processes of international negotiation leading to the conclusion of treaties are “often characterized by bargaining and coercive moves rather than by persuasion and by appeals to common standards, shared values, and accepted solutions.” Treaty rules that result from such trade-offs, where common interests and values have not been present, are unlikely to act as “causes” of behavior.

Bruneo & Toope, *supra* note 6, at 31 (citations omitted). *But see* Carlos Fernando Diaz, *With Law on Their Minds: Some Reflections on the Nature of Public International Law at the Light of Current Political Science Theory*, 4 ILSA J. INT’L & COMP. L. 1133, 1143 (1998) (discussing permanent and temporary coalitions based on “common values, interests and knowledge”).

Negotiation theory suggests that, when framing this discussion, the mediation community should focus on advancing proposals that maximize areas of convergence between the arbitration and mediation communities rather than areas of divergence.¹¹³ The following analysis therefore seeks to identify the values and interests of the arbitral and mediation communities so as to determine whether and to what extent any commonalities exist.¹¹⁴

In the course of this inquiry, the term “value” will be used to refer to the relevant community’s view about how international commercial disputes should be resolved, while the term “interest” will be used to refer to the relevant community’s views about whether and how to foster use of a particular process (in this case, international commercial mediation and conciliation).¹¹⁵ Thus, in this context, values are intrinsic

113. There is a considerable amount of literature on negotiation theory, although much of it arises in the context of interpersonal relationships rather than intergroup or international relations. *But see* Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 *LAW & SOC. INQUIRY* 503, 510 (2008) (noting some scholars’ attempts to “transpose theories of private bargaining into a social theory of problem solving” (citation and emphasis omitted)); *see also id.* at 505 (noting “negotiation literature presents . . . a well-developed body of ideas about the microworkings of individual and group bargainers who are always imagined to be in interdependent yet voluntary relations with fellow bargainers”). However, negotiation theory has been applied in the interstate context. *See* Christian Downie, *Toward an Understanding of State Behavior in Prolonged International Negotiations*, 17 *INT’L NEGOT.* 295, 299 (2012) [hereinafter Downie, *Prolonged Negotiations*] (noting most theorists focus on one-off negotiations and noting the ways in which long-term negotiations evolve); Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 *GEO. J. INT’L L.* 807, 820-22 (2009) [hereinafter Spain, *International Dispute Resolution*].

114. This methodology is consistent with “interest-based” (i.e., integrative) negotiation. *See* Sebenius, *supra* note 9, at 360. Experts have noted that

[a]n interest-based approach—sometimes called a “problem-solving” approach— involves identification and selection of options maximizing the interests of all the parties. People begin by identifying interests and developing options for mutual gain and then select the best option. contrasts with a traditional, positional—or adversarial— approach, in which each side sets extreme aspiration levels and makes a series of strategic offers and counter-offers intended to result in a resolution as close as possible to that side’s initial aspiration. Typically, each side makes small concessions to maximize its adversarial advantage. An interest-based approach relies more on reason than threat and has the potential to “create value” by identifying and satisfying the interests of all the parties.

John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 *OHIO ST. J. ON DISP. RESOL.* 619, 628 n.29 (2007) (citing, *inter alia*, FISHER ET AL., *supra* note 49, at 4-7, 40-84 and Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. REV.* 754, 794-829 (1984)).

115. Although negotiation theorists recognize that parties can and often should negotiate with an eye on both values and interests, there does not seem to be a universal definition of the terms. *See* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICTS* 64-65 (2003) (discussing types of conflicts).

in nature while interests reflect more of an instrumental character.¹¹⁶ The distinction is important because value conflicts are typically more difficult to resolve than interest conflicts in situations involving “regime formation.”¹¹⁷

A. *Core Values and Interests of the International Commercial Arbitration Community*

The maturity of international commercial arbitration makes it relatively easy to determine the values and interests of this particular group.¹¹⁸ The primary interest of the international arbitration community is clear: the continued predominance of international commercial and investment arbitration as the preferred means of resolving cross-border business disputes.¹¹⁹ Although cynics may perceive this interest as purely personal (claiming, for example, that expert arbitrators and practitioners promote arbitration so as to increase the demand for their skills and thus maximize their own personal gain), many members of the community also support international arbitration as a matter of principle. Indeed, a number of highly regarded specialists in international commercial arbitration have taken the view that arbitration is the best practical method of resolving cross-border business disputes, and that international commercial arbitration promotes world peace, a view that is consistent with the espoused purpose and principles of UNCITRAL.¹²⁰

Although this type of principled approach is consistent with the notion of an epistemic community, the intensity and nature of this particular attitude may make it difficult for these sorts of “true believers” to accept the possibility that mediation may be a better means of resolving some types of disputes.¹²¹ Indeed, persons who have adopted

116. See DAVID S. HAMES, CLOSING DEALS, SETTling DISPUTES, AND MAKING TEAM DECISIONS 91 (2012) (distinguishing intrinsic and instrumental goals in negotiation theory and practice).

117. Young, *supra* note 6, at 10 (noting differences between spontaneous regime formation, imposed regime formation and negotiated regime formation); see also MOORE, *supra* note 115, at 64-65 (discussing types of conflicts).

118. See S.I. Strong, *Arbitration of International Business Disputes – Studies in Law and Practice*, by William W. Park, 29 ARB. INT’L 671, 672-74 (2013) (book review).

119. See BORN, *supra* note 31, at 73.

120. See G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6594, at pmbl (Dec. 17, 1966); UNCITRAL GUIDE, *supra* note 53, at Annex I; Jennifer Kirby, *What is an Award, Anyway?*, 31 J. INT’L ARB. 475, 475 (2014) (noting that one highly renowned international arbitration practitioner was firmly of the belief that international commercial arbitration was “the key to world peace”); see also *supra* note 53.

121. The debate about whether and to what extent mediation is appropriate in cases involving

this perspective may actively oppose the adoption of a new convention relating to international commercial mediation based on a belief that such an instrument is either unnecessary (because of arbitration's dominant status in the area of international dispute resolution) or inefficient (because arbitration is the superior method of dispute resolution and measures that increase the use of mediation simply increase the cost and duration of the dispute resolution process as a whole).¹²²

However, this is not the only way for arbitration specialists to frame their interests. Instead, experts in international commercial arbitration could view the issue more broadly and characterize their interests as being consistent with those of their clients. Thus, if clients prefer to mediate some or all of their disputes,¹²³ any measure that facilitates international commercial mediation, including the proposed UNCITRAL convention, can be seen as a good and necessary measure.¹²⁴

At this point, it is unclear what it will take to convince parties or practitioners of the benefits of mediation in the international commercial or investment setting.¹²⁵ However, recent empirical studies have shown that numerous experts in international dispute resolution believe that a treaty on international commercial mediation that operates in a manner similar to that of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) would be very useful in increasing the attractiveness and use of mediation in the cross-border business context.¹²⁶ This type of empirical support may

cross-border business disputes is ongoing. *See* Strong, ICM, *supra* note 1, at 16-24. However, most experts in mediation agree that mediation is not appropriate for all types of disputes. *See* John Lande & Rachel Wohl, *Listening to Experienced Users*, 13 DISP. RESOL. MAG. 18, 19 (2007); 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).

122. *See* Strong, ICM, *supra* note 1, at 31-32 (discussing how a convention would help put international commercial arbitration and international commercial mediation on a more even footing).

123. Mediation specialists have identified a number of benefits associated with mediation as a general proposition, although it is unclear whether and to what extent those benefits apply in cross-border commercial cases. *See* Strong, Empirical, *supra* note 35.

124. *See* Strong, ICM, *supra* note 1, at 31-32 (discussing perceived need for convention to promote international commercial mediation).

125. Empirical evidence suggests that the major reason why parties and practitioners do not recommend mediation in cross-border business disputes is a lack of evidence about the benefits of the process. *See* Strong, Empirical, *supra* note 35, at 36.

126. *See* New York Convention, *supra* note 45; Strong, Empirical, *supra* note 35 (discussing data regarding the content of future conventions in this field). The New York Convention is widely considered the most successful commercial treaty in the world and provides for the recognition and enforcement of arbitration agreements and awards. *See* New York Convention, *supra* note 45; BORN, *supra* note 31, at 78, 99.

be very useful in convincing the arbitral community of the need for mediation in a properly designed international dispute resolution system.¹²⁷

The international arbitration community's values can also be described in both broad and narrow terms. For example, if the question is considered from a distributive perspective (i.e., as a zero-sum proposition that pits arbitration against mediation), any increase in the use of mediation must necessarily result in an equal decrease in the use of arbitration.¹²⁸ If the debate is framed in these terms, the arbitral community will of course choose to promote arbitration over mediation and will consequently oppose the proposed convention. This type of blocking behavior could have a significant effect on deliberations at UNCITRAL, given the influence of the arbitral community in UNCITRAL and Working Group II.¹²⁹

At one time, distributive analyses were considered the primary, if not exclusive, means of analyzing interstate negotiations.¹³⁰ However, contemporary theorists have come to recognize the value of integrative methodologies wherein parties seek to "create" value rather than simply "claim" value.¹³¹ Framing the UNCITRAL process in integrative (i.e., win-win) terms would require negotiators to consider whether various values could be redefined in a way that would promote various areas of commonality.

That process would require parties to move past superficial analyses and focus on the core values of international commercial arbitration, which are typically considered to include privacy, confidentiality, finality, and an impartial and independent third-party neutral.¹³² International arbitration also respects procedural fairness and

127. See Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 74 ("A conflict, issue, dispute, or case submitted to any institution for managing conflict (including one labeled ADR) exists in the context of a system of rules, processes, steps, and forums. In the field of ADR, this is called dispute systems design (DSD)."). It is possible, if not critically important, to consider dispute system design on an international scale. See Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 46-47 (2010) [hereinafter Spain, *Integration*].

128. See Sebenius, *supra* note 9, at 335 (discussing the difference between "claiming value" (as in win-lose or distributive scenarios) and "creating value" (as in win-win or integrative scenarios)).

129. See *supra* note 67 and accompanying text.

130. See William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 375 (1999) (citing survey indicating that positional (i.e., distributive) bargaining was used entirely or primarily in seventy-one percent of cases).

131. See *id.* (noting that lawyers wanted to use interest-based negotiation more); Sebenius, *supra* note 9, at 360.

132. See BORN, *supra* note 31, at 73-97; Stipanowich & Lamare, *supra* note 21, at 36-38;

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.¹³³ At one time, international arbitration was considered a faster and less expensive alternative to international litigation, although these attributes have recently been questioned as a result of the increasing legalism in the field.¹³⁴

Interestingly, almost all of these values can be met in mediation to virtually the same extent as in arbitration. Mediation is a private and confidential process featuring an impartial, third party-neutral who upholds procedural fairness and party autonomy and who assists the parties in resolving international commercial and investment disputes efficiently and cost-effectively without the need to involve the judicial system.¹³⁵ These shared attributes exist even though mediation is a consensual mechanism rather than an adjudicative one.¹³⁶ The only values that are not currently met in mediation are (1) the desire to obtain a final and binding award, since mediation is considered non-binding unless and until the parties sign a settlement agreement, and (2) the ability to achieve easy, predictable, and relatively inexpensive enforcement of the result of the process (an award in arbitration and a settlement agreement in mediation, if the parties decide to resolve the dispute) across national borders.¹³⁷ However, the proposed UNCITRAL convention promotes both of these two values by establishing an efficient and cost-effective means of enforcing a settlement agreement arising out of international commercial mediation, thereby helping

QUEEN MARY, UNIVERSITY OF LONDON, RESEARCH AT THE SCHOOL OF INTERNATIONAL ARBITRATION, <http://www.arbitration.qmul.ac.uk/research/index.html> (last visited Nov. 14, 2014) [hereinafter QMUL Studies] (containing details regarding five different empirical studies concerning international arbitration); see also EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 13-66 (2010) (discussing theoretical bases of international arbitration).

133. See BORN, *supra* note 31, at 73-97.

134. See *id.* at 86-87.

135. See Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 78-83 (2005) (noting problems inherent in defining mediation).

136. Although arbitration also arises by consent of the parties, the parties are bound to the procedure and to a final, binding resolution of the matter once they consent to the process, which is adjudicative in nature. Mediation, on the other hand, is considered consensual not only because the parties must express their consent to enter into the mediation process but because resolution of the dispute only occurs if the parties agree (i.e., consent) to a particular settlement agreement. Mediators do not impose a particular outcome on the parties, as is the case in arbitration.

137. See Strong, ICM, *supra* note 1, at 31-32 (noting lack of enforcement mechanism in international commercial mediation); Strong, *Empirical*, *supra* note 35, at 47 (noting difficulty in international enforcement of mediated settlements).

parties achieve final and binding resolution of their dispute.¹³⁸

If the issue is framed in this manner, the international arbitration community not only can but also should support the proposed convention as a means of furthering the core values of their epistemic community. While some individuals may continue to oppose the proposed convention based on personal financial concerns, membership in an epistemic community requires the adoption of certain “shared normative commitments” not as a result of external motivations (which would include financial self-interest) but instead as a result of a “principled approach to the issue at hand.”¹³⁹ As a result, the most influential voices in the arbitral community will likely focus on and promote these core, universal values rather than personal considerations.¹⁴⁰

B. *Core Values and Interests of the (International Commercial) Mediation Community*

The relatively recent rise of international commercial mediation as a field of practice and inquiry can make it somewhat difficult to identify the community’s core values and interests.¹⁴¹ Indeed, discussions at UNCITRAL have raised fears that a community of experts in international commercial mediation may not yet exist, since a number of participants in the process have been drawn from the domestic sphere

138. See U.S. Proposal, *supra* note 1. At this point, it is very difficult to enforce a mediated settlement agreement across national borders. See *id.*; Strong, ICM, *supra* note 1, at 31-32 (noting difficult of enforcement of agreements in international commercial mediation).

139. Haas, *supra* note 15, at 19; see also Sebenius, *supra* note 9, at 325 (claiming that “an epistemic community can be understood as a special kind of de facto natural coalition of ‘believers’ whose main interest lies not in the material sphere but instead in fostering the adoption of the community’s policy project”); *id.* at 353 (distinguishing material interests from policy goals).

140. See Bianchi, *supra* note 8, at 17-18 (noting a “plurality of visions quite obviously entails a struggle between different social groups that attempt to impose their own view as the most authoritative and legitimate one. To determine who is entitled to speak authoritatively about international law is certainly a stake that most members of the different epistemic communities at play in international law would consider as worth fighting for”); Haas, *supra* note 15, at 17-18; Sebenius, *supra* note 9, at 325. Every epistemic community considers certain beliefs and practices as reflective of the received or conventional wisdom that distinguishes core members of the community from those on the fringe. See Haas, *supra* note 15, at 17-18 (noting that membership and influence in an epistemic community are determined not only by a person’s “professional pedigree” but also by reference to various “validity tests”).

141. See *supra* notes 34-46 and accompanying text. Commentators have disputed whether a singular theory of mediation exists even within the United States. See Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 40-41 (2002).

rather than the international realm.¹⁴² This phenomenon is potentially problematic given the often significant differences between international and domestic disputes.¹⁴³

The situation is further exacerbated by the fact that the domestic mediation community includes a number of practitioners and neutrals who work frequently in fields other than commercial law.¹⁴⁴ Thus, during the early days of the development of the U.S. proposal, some observers suggested that the proposed convention should incorporate various mechanisms (such as a “cooling off” period between the time of the settlement agreement and the signing of a binding document) that might be useful in certain types of domestic disputes but that are neither necessary nor appropriate in the international commercial context.¹⁴⁵

This is not to say that it is impossible to identify the values and interests of the international commercial mediation community. For example, it may be possible to extrapolate some observations from the domestic realm and apply them to cross-border matters, although that approach must be used with caution.¹⁴⁶ Some assistance may also be gleaned from a number of recent empirical studies on the use and perception of international commercial mediation and conciliation.¹⁴⁷ Together, these resources provide some insights that may prove useful to the UNCITRAL deliberations.

In many ways, the interests of the mediation community can be said to mirror those of the arbitration community, in that experts in mediation would like to see their preferred procedure—mediation—established as the prevalent means of resolving cross-border business disputes, thereby returning mediation and conciliation to the prominence they enjoyed

142. See Strong, Empirical, *supra* note 35.

143. See Strong, ICM, *supra* note 1, at 16-24.

144. Thus, for example, family law mediators face very different dilemmas and use somewhat different procedures than commercial mediators. See John Bickerman, *We Have Met the Enemy . . . And He May Be Us*, 13 DISP. RESOL. MAG. 2, 2 (2007).

145. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 90-92 (2001). Although cooling off periods may be appropriate in family or consumer mediation, where there is a significant power imbalance, such mechanisms are not usually necessary in international commercial of investment matters, where the parties are represented by experienced counsel and operate at arm’s length, particularly since mandatory cooling off periods could have significant financial ramifications in situations where interest on loans or defaults accrues daily. 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) (noting the cost of mandatory “cooling off” or negotiation periods can be astronomical).

146. See Strong, ICM, *supra* note 1, at 16-24.

147. See Strong, Empirical, *supra* note 35; IMI SURVEY, *supra* note 99.

prior to World War II.¹⁴⁸ While cynics might claim that this position is based on self-interest, since an increase in a procedure would lead to an increase in revenue for mediation experts, that allegation appears inaccurate in the face of the mediation community's strongly held belief in the superiority of mediation over other types of dispute resolution.¹⁴⁹ Furthermore, the incidence of international commercial mediation is at this point so small that it would appear unlikely that participants in the UNCITRAL process would support the proposed convention simply as a means of increasing their own personal income.¹⁵⁰

Although the mediation community could frame its interests as only involving the promotion of mediation per se, it is also possible to characterize the community's interests as paralleling those of their clients. Since an increasing number of commercial actors have indicated that they would like to pursue mediation and conciliation of their cross-border business and investment disputes,¹⁵¹ the international mediation community can also promote mediation as a means of fulfilling their client's interests.

These two analyses mirror those used to determine the interests of the international arbitration community. However, early discussions regarding the proposed UNCITRAL process brought another potential interest to light: the mediation community's interest in having the proposed convention reflect the "right" or "best" procedure. This interest was evident in comments from a number of mediation specialists that the relatively undeveloped nature of international commercial mediation meant that it was too soon to consider an international convention of the type proposed by the United States.¹⁵² However, this position was in many ways factually and legally unfounded. For example, there are already numerous types of international instruments relating to international commercial mediation and conciliation, which suggests a certain degree of legal sophistication even if parties have not yet availed

148. See Schwartz, *supra* note 45, at 99, 107.

149. See Hensler, *supra* note 34, at 83 (noting near-universal belief among mediation experts that mediation is the best means of resolving disputes). This belief persists despite the absence (thus far) of any hard empirical evidence of the benefits of mediation in the international commercial context. See Strong, Empirical, *supra* note 35.

150. See Strong, Empirical, *supra* note 35, at 26 (noting that only nine percent of respondents had participated in more than twenty international commercial mediations in the preceding three years).

151. See Strong, ICM, *supra* note 1, at 11.

152. The underlying concern was that the "wrong" process might be embedded into law, thereby freezing the development of international commercial mediation and injuring the field as a whole. Other participants expressed worries about imposing increased formalism on a process that they viewed as intended to be relatively informal.

themselves of the existing procedures.¹⁵³ Furthermore, the adoption of a convention on enforcement of mediated settlements does not require consensus on the shape of the proceedings themselves, just as the New York Convention does not require consensus on the shape of arbitral proceedings.¹⁵⁴ Thus, issues involving the need to foster the “right” type of mediation do not appear to be a sufficiently compelling reason to block the proposed convention and can thus be set aside.¹⁵⁵

Interest identification is not the only task that must be completed. It is also necessary to determine the values of the international commercial mediation community. Unfortunately, several potential difficulties arise in this regard.

The first issue involves problems associated with defining the difference between mediation and conciliation.¹⁵⁶ Although UNCITRAL has previously defined these two terms as being synonymous,¹⁵⁷ participants in the UNCITRAL process have suggested that a more precise definition will be necessary in any future instrument in this area.¹⁵⁸ It is unclear at this point whether that claim has been raised as an obstructionist tactic or whether the concerns are legitimate, particularly

153. For example, UNCITRAL has enacted a model law concerning international commercial mediation and conciliation as well as procedural rules. *See* United Nations General Assembly, Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, G.A. Res. 57/18, U.N. GAOR, 57th Sess., U.N. Doc. A/Res/57/18, (Jan. 24, 2003); United Nations General Assembly, 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 (Dec. 4, 1980). Numerous private institutions have also adopted procedural rules relating to international commercial mediation. *See* 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).

154. *See* New York Convention, *supra* note 45. However, the proposed convention may equalize some of the existing legal disparities between international commercial mediation and international commercial arbitration (namely, those relating to enforcement of the outcome) and could thereby drive parties toward mediation in the same way that the New York Convention drove parties toward arbitration in the post-World War II era. *See id.*; Strong, ICM, *supra* note 1, at 13-14, 31-32.

155. *See supra* note 140 and accompanying text (regarding core and fringe beliefs).

156. The academic debate about this issue has been quite heated at times. *See* Nolan-Haley, *Primrose Path*, *supra* note 36, at 1009-10; Spain, *Integration*, *supra* note 127, at 10-11; 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).

157. *See* WG Report, *supra* note 2, para. 13 n.11; UNCITRAL MODEL LAW GUIDE, *supra* note 2, at 11; U.S. Proposal, *supra* note 1, at 9 (suggesting that any future instrument adopted by UNCITRAL in this field would likely need to include a definition of “conciliation”).

158. *See* U.S. Proposal, *supra* note 1, at 4; United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (New York, 27 June-15 July, 2015), paras. 20-23, U.N. Doc. A/CN.9/861 (Sept. 17, 2015).

given that arbitration has long experienced similar definitional problems without anyone claiming that the New York Convention is thereby invalidated.¹⁵⁹

At this point, the major difference between mediation and conciliation appears to be that conciliation requires an evaluative element, whereas mediation merely permits a certain amount of evaluation by the neutral.¹⁶⁰ Beyond that, the two processes appear to reflect relatively similar values. As a result, this issue can be set aside.

A second concern arises as a result of the relative lack of theoretical and empirical research into the special nature of international commercial mediation and conciliation.¹⁶¹ 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.¹⁶² Nevertheless, a heuristic analysis informed by the available data would suggest some preliminary conclusions.

First, empirical research shows that actual and potential participants in international commercial mediation value the process to the extent it saves them time and money, a goal that is consistent with that of the arbitral community.¹⁶³ Furthermore, survey data indicates that commercial parties value the saving of time and money even over the preservation of existing relationships, which is one of the benefits that has long been theoretically linked to mediation.¹⁶⁴ However, if parties do not really value mediation's ability to maintain commercial relationships, then the mediation community cannot be said to value that attribute either, at least in a paradigm that ties the community's interests to client interests.

159. See S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, *AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 242-43 (2012) (discussing the problems inherent in defining arbitration).

160. See Nolan-Haley, *Primrose Path*, *supra* note 36, at 1009-10.

161. See Strong, ICM, *supra* note 1, at 16-24; see also *supra* note 99 (discussing additional empirical work in this field).

162. See Strong, Empirical, *supra* note 35; Strong, ICM, *supra* note 1, at 16-24. For example, theorists have suggested that settlement is not considered a core interest of mediation. See Creo, *supra* note 21, at 1032. However, empirical studies have suggested that parties to cross-border business disputes are very interested in the efficacy of the procedure. See Strong, Empirical, *supra* note 35.

163. See also *supra* notes 133-34 and accompanying text.

164. See Strong, Empirical, *supra* note 35. During the course of the UNCITRAL deliberations, at least one experienced neutral noted that most of her international commercial mediations involved the break-up of commercial dealings and that the parties therefore had no need to preserve ongoing relationships.

Theoretical analyses have suggested a number of other potential values. For example, a number of experts have suggested that mediation reflects an interest in “connection, voice, and choice” as well as “recognition, empowerment, validation, acknowledgment, apology, opportunity to be heard, facilitated dialogue, engagement with a non-partisan mediator, balance, absence of formal procedures, exploration of risk and consequences, and creation of alternative solutions outside those available within the judicial system.”¹⁶⁵ However, empirical research suggests that these issues are nowhere near as important to international commercial actors as the saving of time and money.¹⁶⁶

Assuming that mediation is indeed a time- and cost-effective means of resolving international commercial disputes,¹⁶⁷ then adopting a convention facilitating the fast and easy enforcement of settlement agreements arising out of mediation would appear to further that interest.¹⁶⁸ Evidence suggests that existing methods of enforcing settlement agreements across national borders are both timely and expensive,¹⁶⁹ which may be one of the reasons why international commercial mediation lost ground to international commercial arbitration in the post-World War II era.¹⁷⁰ As a result, the proposed convention would appear to meet the interests of the international mediation community, which subsequently suggests that the mediation community should therefore support the ongoing UNCITRAL process. While some debate may arise as to what particular processes fall within the scope of the convention and what measures should be used to

165. Creo, *supra* note 21, at 1032.

166. See Strong, Empirical, *supra* note 35 (noting low ratings of a number of purported interests in mediation in the international commercial context).

167. No widespread empirical data is yet available on this point. See *id.* However, anecdotal evidence and case studies have identified some costs savings in the international commercial realm. See Walter G. Gans & David Stryker, *ADR: The Siemens' Experience*, 51 DISP. RESOL. J. 40, 41 (Apr.-Sept. 1996); Michael A. Wheeler & Gillian Morris, *GE's Early Dispute Resolution Initiative (A)*, HARVARD BUSINESS SCHOOL 2-4 (June 19, 2001) (discussing General Electric's domestic dispute resolution strategy, based on the Six Sigma approach); Michael A. Wheeler & Gillian Morris, *GE's Early Dispute Resolution Initiative (B)*, HARVARD BUSINESS SCHOOL SUPPLEMENT 801-453 (June 2001) (discussing the internationalization of General Electric's dispute resolution strategy); F. Peter Phillips, *Speeches Spreading the Word on Business ADR: Assessing Recent Efforts . . . And Looking Forward*, 25 ALT. HIGH COST LITIG. 3, 9 (2007) (discussing corporate “poster boys” for commercial mediation).

168. See Boule, *supra* note 5, at 65; Li, *supra* note 5, at 13; Lo, *supra* note 5, at 135; Strong, ICM, *supra* note 1, at 31-32; Wolski, *supra* note 5, at 110.

169. See U.S. Proposal, *supra* note 1, at 4; Edna Sussman, *The New York Convention Through a Mediation Prism*, 14 DISP. RESOL. MAG. 10, 10-13 (2009).

170. See Schwartz, *supra* note 45, at 99, 107; Strong, ICM, *supra* note 1, at 13-14.

provide effective and fair enforcement across national borders,¹⁷¹ the propriety of the end goal appears clear.

V. CONCLUSION

As the preceding analysis shows, the international legal community has become increasingly diversified in the last few years so as to reflect and respond to the demands of an ever-more globalized world. The international arbitration community has been particularly successful in asserting its presence on the international stage and is now a sophisticated and powerful influence in international policymaking circles. However, the success of the arbitral regime has not insulated the process from a number of criticisms.¹⁷² Indeed, the field of international commercial and investment arbitration is currently facing a number of challenges, including claims that mediation and conciliation can be used to overcome many of the perceived ills of international arbitration.¹⁷³

This Article has not focused on the substance of the debate regarding the relative merits of arbitration and mediation in international commercial and investment matters, although there is a great deal to consider in that regard. Instead, the discussion here has focused on how the clash of epistemic cultures is playing out in the international lawmaking process, particularly with respect to the U.S. proposal for a new UNCITRAL convention on international commercial mediation.¹⁷⁴

Many members of the arbitral community see the U.S. proposal as an existential threat to the hegemony of international commercial and investment arbitration. Indeed, the deliberations at UNCITRAL have not only underscored the severity and significance of mediation's challenge to arbitration as the preferred means of resolving cross-border business and investment disputes, they have also highlighted the schism between the arbitration and mediation communities. However, debate does not need to be divisive to be fruitful. Instead, it is possible for the UNCITRAL process to bring the two groups together, not necessarily to (re)unify the fields of international commercial arbitration and mediation into a single epistemic community but to demonstrate the many commonalities between the two factions.

One of the most valuable functions of an epistemic community is

171. That issue is very much up for debate in UNCITRAL, although it is beyond the scope of the current Article. See Secretariat 2016 Note, *supra* note 4.

172. See PARK, *supra* note 79, at 3-27; Rivkin, *supra* note 14; Strong, ICM, *supra* note 1, at 11.

173. See Strong, ICM, *supra* note 1, at 11.

174. See U.S. Proposal, *supra* note 1.

its ability to educate international policymakers about various interests, goals, and procedures so as to promote the development of an international policy that satisfies the needs of all participants in both the short and long terms.¹⁷⁵ Though helpful, this attribute can be problematic if an expert group relies on hard bargaining techniques to push through an agenda that is largely if not entirely self-aggrandizing. In these situations, the coalition with greater political power or influence in the interstate lawmaking process—in this case, the international arbitration community—might attempt to block reform efforts (such as the new convention on international commercial mediation) that are seen as harmful to the status quo. This type of tactic might be particularly attractive to persons who frame negotiations as a zero-sum analysis, as is typically the case of those who routinely engage in adjudicative processes such as arbitration.¹⁷⁶

However, negotiation theory has shown that distributive models are not the only option available to parties at UNCITRAL. Instead, state delegates can, with the assistance of various epistemic communities, frame various issues in integrative terms and thereby seek to develop an international instrument that maximizes benefits to all participants rather than advantaging one group to the detriment of the other. Indeed, UNCITRAL, as a consensus-based organization, tends to support this type of approach.¹⁷⁷ As a result, it may be in the best interests of both the arbitration and the mediation communities to find a mutually agreeable solution to the crisis in international commercial dispute resolution rather than adopt a zero-sum, distributive perspective.

This approach may not be as difficult as it initially appears, since this Article has shown that the arbitration and mediation communities share a great deal of common ground, ranging from the desire to fulfill their clients' desires to the wish to promote certain core values such as privacy, confidentiality, finality, procedural fairness, party autonomy, and use of an impartial and independent third-party neutral to obtain an easy, predictable, and relatively inexpensive means of resolving disputes

175. See Downie, *Prolonged Negotiations*, *supra* note 113, at 302-04; Sebenius, *supra* note 9, at 327, 329. Epistemic communities can be useful not only in helping to finalize the terms of an international agreement but in ensuring widespread adoption and adherence after the instrument has been adopted. See *id.* at 354.

176. See Jack Coe, *Planning for International Disputes (And What Makes Them Distinctive)*, 5 PEPP. DISP. RESOL. L.J. 385, 393 (2005).

177. See UNCITRAL GUIDE, *supra* note 53, at 6; see also Adler & Haas, *supra* note 51, at 371 (defining "the role played by epistemic communities as one of policy coordination," which is subsequently defined as "consent and mutual expectation"); *supra* note 57.

across national borders.¹⁷⁸ Even more importantly, both communities support the quick and inexpensive resolution of international commercial and investment disputes.¹⁷⁹ These shared beliefs and practices are quite significant and suggest that the two expert groups can find common ground if they are willing to move past the debate about whether adjudicative or consensus-based techniques are preferred or preferable in international commercial and investment disputes as an abstract concern.

In many ways, the debate about the relative merits of arbitration and mediation reflect a value conflict that is inherently difficult, if not impossible, to resolve.¹⁸⁰ While empirical research may eventually shed light on this issue, there is currently no hard evidence supporting a conclusion that one dispute resolution technique is inherently better than the other, at least at a conceptual level.¹⁸¹ Furthermore, the lack of equality in the surrounding legal environments suggests that any comparison between international arbitration and international mediation that is based on current usage levels is inapt.¹⁸² As a result, it appears best to conclude that, all things being equal, parties will prefer arbitration in some circumstances and mediation in others, which supports the development of an international instrument that puts the two procedures on equal footing so that parties can choose the appropriate dispute resolution technique free of any negative externalities.¹⁸³ This sort of incompletely theorized agreement or *modus vivendi* would appear sufficient in the current context.¹⁸⁴

The combination of international relations theory and negotiation theory also offers another interesting proposition for participants in the current UNCITRAL process. Scholars have suggested that epistemic communities typically assert only an indirect influence on the development of international policy, in that experts advise state representatives who then negotiate with other state actors.¹⁸⁵ As this Article has shown, that approach seems to be in operation in the current deliberations at UNCITRAL.¹⁸⁶ However, negotiation theory places a

178. See BORN, *supra* note 31, at 73-97.

179. See *id.*; Strong, Empirical, *supra* note 35, at 49.

180. See MOORE, *supra* note 115, at 64-65; Young, *supra* note 6, at 10.

181. See Strong, Empirical, *supra* note 35.

182. See Strong, ICM, *supra* note 1, at 13-14.

183. See Lande & Wohl, *supra* note 121, at 19; Sander & Rozdieczer, *supra* note 121, at 1-2; Strong, ICM, *supra* note 1, at 13-14, 31-32.

184. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739, 1746-51 (1995).

185. See *supra* notes 65-67, 96 and accompanying text.

186. See *supra* note 99 and accompanying text.

high value on direct communication between the actual parties in conflict,¹⁸⁷ which suggests that the mediation community could make significant inroads in the ongoing effort to promote the proposed convention by engaging directly with the arbitral community, since the two groups are in many ways the source of the current conflict. Indeed, specialists in mediation are particularly well-placed to engage in these types of discussions, given their technical expertise in interest-based negotiation. If the mediation community can convince the arbitral community of the benefits of the proposed treaty and the range of shared interests in promoting a new international instrument in this field, the arbitral community can then join (rather than oppose) efforts to convince state delegates of the need to adopt a new convention on this subject.¹⁸⁸

Such a combined effort would likely have a strong influence on various state delegates and thus could improve the chances that the proposed initiative will succeed. However, different state delegates may interpret and apply expert advice in different ways,¹⁸⁹ which means that a united arbitration-mediation initiative does not guarantee a particular outcome. Furthermore, this analysis has not taken into account the possible influence of other coalitional forces. For example, the current deliberations are experiencing a significant amount of resistance from several states and geographic regions on grounds unrelated to the distinctions between arbitration and mediation. Interestingly, a number of the arguments appear to arise out of differences between the civil law and common law. For example, some civil law countries have expressed concerns that settlement agreements should be considered akin to any other type of contract and should therefore not be considered in connection with various rules of civil procedure. Conversely, many if not most common law jurisdictions view mediation as a dispute resolution mechanism that is on the same conceptual level as both litigation and arbitration and therefore consider mediated settlements to be in many ways analogous to arbitral awards and judicial decisions. These disparities may be the result of various differences in common

187. See Spain, *International Dispute Resolution*, *supra* note 113, at 825-26.

188. See U.S. Proposal, *supra* note 1; Downie, *Prolonged Negotiations*, *supra* note 113, at 312. Interestingly, various members of the mediation community attempted to engage in direct communications with state delegates at the February 2016 meeting of Working Group II through a meeting meant to educate state delegates about mediation. See Hal Abramson & Janet Martinez, Workshop on Conciliation Process (Feb. 2016) (featuring a lunchtime program at Working Group II organized by IMI). However, such efforts could backfire if the arbitral community views such tactics as illegitimate.

189. See Haas, *supra* note 15, at 30.

law and civil law reasoning,¹⁹⁰ or may reflect certain theoretical differences on how to frame private forms of dispute resolution.¹⁹¹ While these issues are beyond the scope of the current Article, they bear further analysis in the future.

Another influence to consider involves groups of repeat or cross-cutting international players. A number of NGO and state delegates are involved in negotiations at several public and private international institutions, including UNCITRAL, the Hague Conference on Private International Law, and the International Institute for the Unification of Private Law (UNIDIT). These individuals are not only engaged in projects that involve several different organizations, they are also active in a variety of areas of substantive and procedural law.¹⁹² Their knowledge, expertise, and influence extends across a wide range of projects, thereby adding another level of complexity to analyses regarding interstate negotiations. While these issues are also beyond the scope of the current Article, it would be interesting to study whether these individuals can be considered to have created an epistemic community of their own and whether these types of repeat players affect international policymaking in a unique and discernable manner.

The analysis in this Article has focused primarily on matters relating to the proposed UNCITRAL convention on international commercial mediation and is therefore of significant importance to members of the international dispute resolution community. However, the discussion regarding the interplay between international relations and

190. 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, 36-39 (2015).

191. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 71-82 (2003) (discussing the juridical nature of international arbitration and distinguishing between four different theories, including the jurisdictional theory, the contractual theory, the mixed theory (sometimes called the hybrid theory) and the autonomous theory).

192. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/home> (last visited Feb. 21, 2017) (listing projects in family law (including child abduction, adoption, maintenance, and protection of adults and children); civil procedure (including access to justice, apostilles, choice of courts, evidence, form of wills and service of process); and substantive law (including choice of law in contracts, securities and trusts), among others); UNIDIT, <http://www.unidroit.org/about-unidroit/work-programme> (last visited Feb. 21, 2017) (listing projects involving international commercial contracts, secured transactions, capital markets, satellite-based services and farming contracts, among others); WORKING GROUPS, UNCITRAL, http://www.uncitral.org/uncitral/en/commission/working_groups.html (last visited Feb. 21, 2017) (listing working groups in micro-small, and medium-sized enterprises; procurement; privately financed infrastructure projects; arbitration and conciliation; international contract practices; international sale of goods; transport law; shipping; electronic commerce; electronic data interchange; international payments; international negotiable instruments; insolvency; and security interests, among others).

negotiation theory is also of interest to a wider audience. Not only does the analysis reflected herein provide useful insights into the international lawmaking process, it also demonstrates the difficulties experienced by many newly formed epistemic communities who wish to “expand from a typically small and de facto natural coalition into a meaningful winning coalition.”¹⁹³ Epistemic communities may experience additional difficulties in the coming years, given the increasing disregard for technical expertise in political debate and discourse.¹⁹⁴ As a result, experts in international law, international relations, and dispute resolution can learn much by analyzing the current deliberations at UNCITRAL concerning a new international treaty involving international commercial mediation and conciliation.

193. Sebenius, *supra* note 9, at 364.

194. See S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 137 (2017); S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. (forthcoming 2018).