

WHAT'S A CROSS-CULTURAL MEDIATOR TO DO? A LOW-CONTEXT SOLUTION FOR A HIGH-CONTEXT PROBLEM

*By John Barkai**

"I am what I am and that's all that I am."¹

INTRODUCTION

As the use of mediation increases, mediators are more likely to be involved in cross-cultural mediation. Even the most skilled and experienced mediator will face new challenges in cross-cultural mediation. Although only a handful of mediators have the opportunity to mediate cross-border business disputes or international political conflicts,² domestic mediators are increasingly likely to be involved in disputes between people who represent distinctly different ethnic, racial, or national origin cultures.³

This article will explore issues facing mediators in cross-cultural conflicts, offer suggestions for conducting cross-cultural mediations, and propose a template of factors that mediators should consider when assisting parties in cross-cultural mediation. The factors will come largely from research by social scientists and anthropologists, particularly Edward T. Hall and Geert Hofstede.

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¹ Parody Song Lyrics Popeye Song, <http://www.amiright.com/parody/80s/ediebrickellthenewbohemians0.shtml> (last visited Mar. 11, 2006). These are words frequently spoken by the children's cartoon character, "Popeye the Sailor Man" from the theme song "What I Am" by Andrew Morse. Just as Popeye's words imply that Popeye cannot change who he is, mediators with low-context communication styles may not be able to adjust their communication styles to work well with high-context communicating parties.

² See JACQUELINE NOLAN-HALEY, HAROLD ABRAMSON & PAT K. CHEW, INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES (2005) for a useful guide to such disputes. See BRUCE E. BARNES, CULTURE, CONFLICT, AND MEDIATION IN THE ASIAN PACIFIC (2006) for a focus on cross-cultural differences for Asian and Pacific cultures.

³ Among the many different levels of culture are national, regional, ethnic, religious, linguistic, gender, generational, social class, organizational, departmental, and corporate levels. See GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 11 (2005) [hereinafter HOFSTEDE, SOFTWARE].

Although my focus is cross-cultural mediation in general, the emphasis of this article is on mediating with Asian parties⁴ in commercial disputes. The Asia-Pacific region has been the primary focus of my ADR interests, teaching⁵, and research for the past twenty-five years. The twenty-first century is likely to be the Asian Century, as the economic power of Asia comes into line with the fact that over one-half of the world's population lives there.⁶ An increasingly larger portion of international trade will involve Asian parties, due to the globalization of business and the increasing production, purchasing power, and population of Asian countries. Increased Asian trade means that there will be many cross-cultural business deal-making and dispute-resolving negotiations, and probably an increased use of mediation by Asian trading partners when business conflicts arise.

Asian negotiation styles in general, and Japanese and Chinese negotiation styles in particular, represent polar opposite approaches to American negotiation styles. These differences are more likely to lead to impasses during negotiation and subsequent mediations with Asian parties, unless mediators understand and adapt to the cross-cultural differences of the parties and use different approaches from those used in domestic U.S. mediations.

⁴ Latin and South American, African, Middle Eastern, and some European parties are also likely to present special difficulties for American mediators because of cultural differences. See RICHARD D. LEWIS, *WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES* (3d ed. 2006) (classifying cultures into three groups called, linear-active, multi-active, and reactive).

⁵ In addition to my full-time law school teaching, for the past fifteen years I have taught annual 1) International Negotiations classes in "Japan focused" and "China focused" Executive MBA programs (called "JEMBA/CHEMBA") at the University of Hawaii, College of Business Administration, 2) courses in Intercultural Negotiations for Asian business people at JAAMS (the Japan American Institute for Management Science), and 3) numerous other executive training programs for Korean, Chinese, Japanese, and Taiwanese executives. The JEMBA/CHEMBA programs are comprised of about one-third foreign nationals from Asia and two-thirds Americans who have extensive experience or interests in Asia. The JAAMS programs are exclusively for Asians, with about eighty percent of the participants from Japan. Furthermore, I have been fortunate to have traveled extensively in the Asian and Pacific regions. I taught in Hong Kong for one semester and have conducted trainings and courses in Australia, Finland, Hong Kong, Hungary, Japan, Korea, and the Federated States of Micronesia.

⁶ If the world was a small village, one-half of the villagers would be Asians. See Dona Meadows, *If the world were a village of 1,000 people*, THE GLOBAL RESEARCH DEVELOPMENT CENTER, www.gdrc.org/uem/1000-village.html (last visited Mar. 11, 2006).

I. CULTURAL DIFFERENCES

A. A Definition of Culture

When working with cultural differences, a natural starting point is to find a workable definition of “culture.” Selecting a single definition is difficult, as it has been suggested that there are over 400 definitions of “culture.”⁷ One useful definition of culture is “the total accumulation of an identifiable group’s beliefs, norms, activities, institutions, and communication patterns.”⁸ Culture is both pervasive and largely invisible. Culture is like the water around the fish or the air around people. Because my approach to cross-cultural negotiation and mediation relies heavily on the work of Geert Hofstede, I am influenced by Hofstede’s definition of culture as “the collective programming of the mind that distinguishes the members of one group or category of people from others.”⁹

Defining culture is just the starting point. The real concern is how cross-cultural differences impact mediation. Understanding cultural differences is critical to developing an approach to cross-cultural mediation. What are the major cross-cultural differences that are likely to impact mediation? Like the multiple and plentiful definitions of “culture,” there are a dizzying array of lists of cultural differences.¹⁰

What is the impact of cross-cultural differences in conflict situations? Cross-cultural differences often result in labeling behavior that is interpreted by a person from another culture as, at a minimum, strange, if not insulting or offending. However, as cross-cultural expert Paul Pedersen says, “[b]ehaviors have no meaning

⁷ Malin Aquilon, *Cultural Dimensions in Logistics Management: A Case Study From the European Automotive Industry*, <http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=published/EmeraldFullTextArticle/Articles/1770020205.html> (last visited Mar. 11, 2006).

⁸ CARLEY H. DODD, *DYNAMICS OF INTERCULTURAL COMMUNICATION* 36 (3d ed. 1991).

⁹ See HOFSTEDE, *SOFTWARE*, *supra* note 3, at 4.

¹⁰ See GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED Values* (1980); CHARLES M. HAMPDEN-TURNER & ALFONS TROMPENAARS, *THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN, AND THE NETHERLANDS* (1993) (noting that Trompenaars’ dimensions are: universalist-particularist, individualist-collectivist, specific-diffuse, achievement-ascription, and neutral-emotional or affective); CHARLES M. HAMPDEN-TURNER, *MAPS OF THE MIND* (1981); Andre Laurent, *The Cultural Diversity of Western Conceptions of Management*, 13 *INT. STUD. OF MGMT. & ORG.* 75 (1983); Shalom H Schwartz & Anat Bardi, *Value Hierarchies Across Cultures: Taking a Similarities Perspective*, 32 *J. OF CROSS-CULTURAL PSYCHOL.* 268 (2001).

until they are placed into a cultural context.”¹¹ Unfortunately, almost all of us interpret the behaviors of people from other cultures as if those people were from our own culture. We also react to these cross-cultural differences as if they were intentional responses to our own behavior or even our existence. The result is that cross-cultural differences can cause a range of responses, from minor annoyances to a high degree of friction and frustration sufficient to put business deals in jeopardy, make disputes more difficult to resolve, or create international incidents. They make us question whether the other party is “playing fair” and whether, in a business context, we want to create or continue a business relationship with someone “like that” from another culture.

Although there is a significant amount of literature about cultural differences in negotiation,¹² and helpful literature about cultural differences in mediation,¹³ almost all of the articles categorize the differences, but do not explain how a negotiator or mediator would overcome these differences. Recognizing and overcoming the problems that result from cultural differences may be the main task of a mediator in a cross-cultural mediation.

¹¹ Paul Pedersen, Lecture to John Barkai’s class (Feb. 15, 2006).

¹² See RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD* (rev. ed. 1997) (focusing on the high-context communication countries of China, Egypt, India, Japan, and Mexico); JESWALD SALACUSE, *MAKING GLOBAL DEALS: WHAT EVERY EXECUTIVE SHOULD KNOW ABOUT NEGOTIATING ABROAD* 58–70 (1991); TERRI MORRISON, WAYNE A. CONAWAY & GEORGE A. BORDEN, *KISS, BOW, OR SHAKE HANDS?* (1994); JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* (2001); PERVEZ N. GHOURI & JEAN-CLAUDE USUNIER, *INTERNATIONAL BUSINESS NEGOTIATIONS* (1996); JOHN GRAHAM & YOSHIHIRO SANO, *SMART BARGAINING: DOING BUSINESS WITH THE JAPANESE* (rev. ed. 1989); JAMES HODGSON, YOSHIHIRO SANO & JOHN GRAHAM, *DOING BUSINESS IN THE NEW JAPAN* (2000); TONY FANG, *CHINESE BUSINESS NEGOTIATION STYLE* (1999); LAURENCE J. BRAHM, *NEGOTIATING IN CHINA: 36 STRATEGIES* (1995); ROSALIE TUNG, *BUSINESS NEGOTIATIONS WITH THE JAPANESE* (1984); RICHARD SACCONI, *NEGOTIATING WITH NORTH KOREA* (2003); FRANK L. ACUFF, *HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD* (1993); GLEN FISHER, *INTERNATIONAL NEGOTIATION: A CROSS CULTURAL PERSPECTIVE* 17–59 (1980); DONALD W. HENDON ET AL., *CROSS-CULTURAL BUSINESS NEGOTIATIONS* (1996); KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION* (1998).

¹³ See Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2 J. DISP. RESOL. 289 (2005); Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT’L & COMP. L. REV. 1, 52 (1996); Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449 (2004); Paul B. Pedersen & Fred E. Jandt, *Culturally Contextual Models for Creative Conflict Management*, in *CONSTRUCTIVE CONFLICT MANAGEMENT* (1996). See also Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collectivist Paradigms*, <http://www.mediate.com/articles/wright.cfm> (last visited Mar. 11, 2006).

B. How Different is Different?

How extreme and important can cultural differences be? When we encounter people from different cultures, their language and nonverbal communication may be different, and they can be very different in other fundamental ways that impact their behavior, view of life, values, the way they see and solve problems, and make decisions. For example, in religion, they may worship other gods, more than one god, or no god.¹⁴ They may read books by starting at what westerners would consider the “back” and ending at the “front.” They may read printed words on a page from right to left, instead of left to right, or even read words in lines down the page, rather than across the page. Even when parties speak the same language and use a relatively similar international driving system to stop at red traffic lights and go at green ones, they might spell the color of those lights in different ways (“color” and “colour”)¹⁵ and drive on the “wrong” side of the road. It is no wonder that cross-cultural negotiation and mediation is challenging.

C. Difficulty in Changing Cultural Perspectives

I use optical illusions in my teaching of conflict resolution.¹⁶ One of my favorite optical illusions about perspective is the bilingual ambigram¹⁷ of “Tokyo,” which I use to begin a discussion about the difficulties of changing a cultural perspective. Most readers of this article probably cannot read the Kanji characters below that say “Tokyo.”¹⁸

¹⁴ Various world religions are estimated at Christians 33%, Muslims 20%, Hindus 13%, Buddhists 6%, Sikhs and Jews less than 0.5% each, other religions 13%, non-religious 12%, and atheists 2%. CIA, *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last visited Mar. 11, 2006).

¹⁵ “England and America are two countries separated by a common language.” George Bernard Shaw, *quoted in* The Quotations Page, <http://www.quotationspage.com/quote/897.html> (last visited Mar. 11, 2006).

¹⁶ See John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets the Devil*, 75 NEB. L. REV. 704 (1996).

¹⁷ An ambigram, “also sometimes known as an inversion, is a graphical figure that spells out a word not only in its form as presented, but also in another direction or orientation.” Ambigram, <http://en.wikipedia.org/wiki/Ambigram> (last visited Mar. 11, 2006).

¹⁸ Do not worry. I cannot read it either.

In class, after showing these Kanji characters¹⁹ and asking, “[w]hat does this say?” (and usually finding that some people in an audience in Hawaii can read the Kanji), I then change the audience’s perspective by rotating the characters 90 degrees to the right.

Again I ask, “[w]hat does this say?” Usually quite a few members of the audience can make out the letters for “Tokyo” in English. Interestingly, those people who can read the Kanji often have the hardest time reading letters in English. Their prior experience and ability to read the Kanji seems to inhibit their ability to perceive English, even if they are native speakers of English. They seem to be locked into the first perceptual view and have a hard time changing. Similarly, the difficulty in changing a cultural perception is common for many mediators, even if they are good at reframing.²⁰

I use Kanji characters to teach a second lesson about cross-cultural conflict resolution. One of my favorite proverbs²¹ related to conflict resolution is included below. When said in Mandarin, an American ear will hear the characters as “tong chuang yi meng.”²²

¹⁹ See J. RICHARD BLOCK & HAROLD YUKER, *CAN YOU BELIEVE YOUR EYES?* 210 (1992).

²⁰ To reframe a statement means to provide a different view or perspective for understanding the statement, usually by taking what initially sounds like a negative character trait, and providing a more positive view of the previously negative trait. One can think of reframing as changing the picture frame. The Tokyo ambigram is actually physically rotated 90 degrees to accomplish a reframing. See JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG & THOMAS STIPANOWICH, *RESOLVING DISPUTE: THEORY, PRACTICE, AND LAW* 275–278 (2005), quoting the work of Ken Bryant and Dana L. Curtis, for more information about reframing. See also MARK D. BENNETT & SCOTT HUGHES, *THE ART OF MEDIATION* 101–104 (2d ed. 2005).

²¹ My favorite conflict quote is from Mary Parker Follett, “[a]ll polishing is done by friction.” See PAULINE GRAHAM, *MARY PARKER FOLLETT PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s* 68 (Beard Books 2003).

²² SCOTT D. SELIGMAN, *DEALING WITH THE CHINESE: A PRACTICAL GUIDE TO BUSINESS ETIQUETTE IN THE PEOPLE’S REPUBLIC TODAY* 127 (1989).

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The Kanji above is a Chinese marital proverb that translates to “[s]ame bed, different dreams.” The proverb explains that when a husband and wife get married (and share the same bed), they may still have different dreams (or interests and goals) for the family. Different dreams or interests are very common in cross-cultural business dealings. For example, the “same bed” can be seen as an international joint venture. “Different dreams” might be represented as Americans wanting high profits (the American interest) and the Asians wanting increased market share for the product (the Asian interest). Hence, negotiating parties from different cultures may have completely different interests based upon their cultural interests and preferences.

D. Popeye’s Problem

Although I write this article with the hope of offering a cross-cultural mediation guide for all mediators, I am sure that I am a bit like “Popeye the Sailor Man” in this situation. Popeye said, “I am what I am and that’s all that I am.”²³ Popeye’s words remind me that I am an American, who is an American-trained mediator, who speaks only one language (English), and who, despite rather extensive travel, has lived outside the United States for less than one year. To use terms further developed later in this article, this means that, in many ways, my behavior is that of the typical American stereotype in that I am an individualist, egalitarian, informal, low-context communicator who makes extensive use of jokes and humor, and uses a rationally-based, problem-solving approach to resolve conflicts.

Because of our culture, myself and most other American mediators have a difficult time (and perhaps a true inability) radically shifting our cultural perspective and behavior ninety degrees or more to see and do mediation differently. This is what I call “Popeye’s Problem”: lacking the ability to be what you are not and consequently not being able to relate to people from other cultures as they might prefer to be related. As Popeye says, “I am what I

²³ See Parody Song Lyrics Popeye Song, *supra* note 1.

am and that's all that I am."²⁴ For cross-cultural mediation, as I will explain in greater depth later, I am a low-context communicator, and I cannot relate or communicate well in a high-context manner. However, as I shall also explain, I believe that reaching wise, desirable, and long-lasting solutions to cross-cultural problems can be accomplished by using a low-context communication approach even with high-context communicating disputants.

Many American mediators generally follow many of the basic negotiation principles from the book *Getting to Yes*,²⁵ without thinking much about how this approach is infused with key American values such as individuality, equality and self-determination, and an infatuation with creative solutions.²⁶ It has been argued that the American model of negotiation and mediation, with its interested-based framework from *Getting To Yes*, is not relevant to cross-cultural negotiation and mediation. As I will argue later in this article, I believe that an interest-based approach to negotiation and mediation is fully applicable to cross-cultural negotiation and mediation. Being American, I have a certain cultural bias in favor of solving problems and mediating in ways that will give a low-context communicator certain advantages over a high-context communicator in mediation.

Although the formal use of the informal process of mediation is only about 30 years old in the United States, mediation is as old as time. Ever since there were three people on earth, it is likely that one of them, at times, mediated between the other two. In traditional societies, wise old men probably mediated in business, social, and religious disputes. Most Asian nations have a long tradition of alternative dispute resolution (ADR) going back long before there was a United States of America.²⁷

There are many references to the early use of mediation in Japan and China. In Japan, it is claimed that mediation was the

²⁴ *Id.*

²⁵ The central ideas of the book are: separate the people from the problem, focus on interests and not positions, invent options for mutual gain, insist on using objective criteria, and understand your BATNA (Best Alternative To a Negotiated Agreement). See ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES* (2d ed. 1991).

²⁶ See GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 436 (2d ed. 2001) for a cultural critique of the *Getting to Yes* principles.

²⁷ However, it is my belief, despite fanciful characterizations that mediation has existed in Asian countries for thousands of years, that, in fact, rather than having some form of mediation, most traditional dispute resolution was more likely to be a non-binding form of arbitration where if the parties did not accept the chief's or village leader's "non-binding" decision, they were expected to leave the village or the island.

primary, traditional method of resolving village disputes, with village leaders serving as mediators.²⁸ Japan has a long history of compromise, mediation, and conciliation. The law of “wayo” (compromise) was developed between 1224–1232 and used in Kamakura era courts (1192–1333). “Naisai” (private settlement) has a long history in Tokugawa or Edo era courts (1603–1867).²⁹ In present day Japan, we hear of “chotei,” “assen,” “wakai,” and “benron-ken-wakai,” as applying to disputes and sometimes involving judges in the compromise and mediation process.³⁰ Mediation has been documented in China for over two thousand years,³¹ and the officially-reported number of mediations suggests that mediation is used much more extensively in China than in the U.S.³²

The belief in and practice of training mediators has been added to the profession by the U.S. and other, usually Anglo, countries. Most of my students at the university, and almost all of the Asian foreign nationals I teach in various executive training programs, would not be qualified to be mediators in Asian countries because they do not have gray hair. Traditionally, both in Asia and elsewhere, one only became a mediator if one was considered “older and wiser.” Today, in the U.S. and other places, it is understood that you can learn many mediation skills through training.³³

²⁸ See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 2* (1984).

²⁹ See YASUOBU SATO, *COMMERCIAL DISPUTE PROCESSING AND JAPAN* (2001).

³⁰ See JOSEPH W.S. DAVIS, *DISPUTE RESOLUTION IN JAPAN* (1996). There may be more mediation in Japan than many people think. Japanese courthouses have “chotei” rooms to conduct mediations at the courthouse. Many Japanese mediations are conducted by three-person mediation teams, which include a judge. However, the judge does not usually attend the mediation sessions. An interesting aspect of Japanese mediation is that, like Japanese trials in court, Japanese mediation has the tradition of being held only one day per month. In other words, if there is no agreement reached in the mediation that takes place in one day, then the next mediation session will take place in one month, and the next session a month after that. While the system is supposedly built around the schedules of the Japanese *bengoshi* (lawyers), such a system can do a lot to encourage settlement.

³¹ See Jerome Cohen, *Chinese Mediation the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966).

³² China is said to have five to ten million mediators. See http://www.allcountries.org/china_statistics/23_6_basic_statistics_on_lawyers_notarization.html; <http://www.yonghegong.com/english/shuzi-en/en-shuzi/rm/htm/biao/22-4.htm> (last visited Mar. 11, 2006). For some reason unknown to me, the number of mediators officially reported in China seems to be decreasing rapidly, although the number of mediations is not decreasing.

³³ If there is an “art and skill” to mediation, it might be said that you can learn the skills of mediation in training, but the “art” of mediation takes years to develop, and most mediators become better mediators with aging and increased experience. However, many school-age-children are taught to be mediators in peer counseling programs in this country and many others.

E. Internationalization

The world is rapidly changing. Today, the world's top four exporting nations are Germany, the United States, China, and Japan.³⁴ When I was born, our country was at war with two of today's three leading exporting nations (Germany and Japan) and the third country (China) probably had few exports at that time. I took Latin in high school and, through my teenage years, the farthest I traveled from home was to New York City for my high-school senior trip. In contrast, my twin daughters, Hope and Leah, took Japanese and Mandarin language classes in the first grade and, by that time, had already traveled to Japan, Hungary, Austria, Australia, and New Zealand.³⁵

CROSS-CULTURAL MEDIATION TOOLS FOR THE FRAMEWORK:
CAUCUSES & THE SOCRATIC METHOD

Although I hope this article will be useful for any cross-cultural dispute, it should be emphasized that we are talking about mediating international commercial disputes. It is not uncommon, when a group of mediators discuss mediation, for the commercial mediator, family mediator, or community mediator to disagree with his or her fellow mediators on what is "appropriate mediation."

Before discussing the cross-cultural differences that will impact negotiation and mediation, it may be useful to discuss some important tools for resolving cross-cultural issues. Perhaps the three most effective tools for mediating cross-cultural disputes are pre-mediation meetings (joint or private), caucuses during mediation, and the Socratic method of questioning. All three of these

³⁴ Germany, the world's leading exporting country, has exports of more than one trillion U.S. dollars. Countries in order of exports are: 1) Germany \$1,016,000,000,000, 2) United States \$927,500,000,000, 3) People's Republic of China \$752,200,000,000, 4) Japan \$538,800,000,000, 5) France \$443,400,000,000, 6) United Kingdom \$347,200,000,000, 7) Italy \$371,900,000,000, 8) Netherlands \$365,100,000,000, 9) Canada \$364,800,000,000, and 10) Hong Kong \$286,300,000,000. See http://en.wikipedia.org/wiki/List_of_countries_by_exports (last visited Mar. 11, 2006) (all data is in U.S. Dollars).

³⁵ However, despite such internationalization of trade, regional trading patterns are still very important. The U.S.'s two largest trading partners are its two adjoining neighbors. America's top trading partners are Canada 23%, Mexico 13.6%, Japan 6.7%, UK 4.4%, China 4.3%. CIA Factbook, <http://www.cia.gov/cia/publications/factbook/fields/2050.html> (last visited Mar. 11, 2006).

tools can be used in any mediation, but they may take on a different form or focus in a cross-cultural mediation.

A pre-mediation face-to-face meeting or phone conversation between the mediator and one or more parties to a mediation is quite common in commercial mediation (and a rarity in community mediation). The meeting can be a joint meeting between the mediator and all of the parties to the dispute, or a private, *ex parte* meeting between the mediator and one party.³⁶ The mediator can have several reasons for such a meeting, such as performing administrative tasks like signing a mediation agreement or confidentiality agreement, ensuring that the right people are at the mediation, developing a working relationship with the parties, and even starting to mediate.³⁷ A party, or lawyer representing a party, may also have reasons for wanting a pre-mediation meeting, such as to determine or reconfirm the mediator's style and approach, to advance the party's case, to use the mediator to educate a resistant or less-experienced party or advocate, to verify that the necessary parties will be attending the mediation, or to ensure that there will be sufficient time available to resolve the case.³⁸

A mediator might hold a non-substantive, "get-acquainted" meeting with the parties or advocates (or both) before the mediation begins.³⁹ Such a meeting could be scheduled as a mediation orientation and might resemble, in part, the introductory, face-to-face joint session of a traditional business mediation where the mediator could discuss a variety of issues related to the forthcoming mediation. A social gathering would be an unusual, if not unheard of, stage of a typical business mediation. However, a cross-cultural mediator's assessment during a pre-mediation meeting might indicate that the substantive issues are much less important than the less explicit, yet equally or more important issues related to such factors as race, harmony, sovereignty, national pride, or a host of other issues. Although Asian business people might see the importance of establishing (or re-establishing) a good working relationship between the negotiators at the mediation, some Americans might be reluctant to spend time in such a pre-mediation stage.

³⁶ However, if the mediator meets with just one of the disputants, the mediator will almost always also meet privately with the other party to appear balanced, impartial, and neutral.

³⁷ See DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 145–147 (2006); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 123–152 (1996).

³⁸ See HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 242–243 (2004).

³⁹ See GOLANN, *supra* note 37, at 149–150.

However, the cross-cultural mediator can call upon the mediator's power⁴⁰ to bring the parties together in a caucus with the intent to re-establish the pre-dispute relationship, or at least to improve the relationship.

My friend and sometime co-teacher, David Day, describes cross-cultural mediation as "put[ting] Humpty Dumpty back together,"⁴¹ suggesting that a fragile, egg-like relationship has been cracked and needs to be somehow repaired. Of course, it is very difficult to put fragile Humpty Dumpty back together again, unless there is an understanding of how the Humpty Dumpty business deal was put together in the first place. Americans think of business deals as simple, negotiated agreements. Much of the rest of the world, on the other hand, thinks of business deals in terms of introductions by mutual friends or business associates, the presentation and receiving of gifts, the calling upon of old favors, the forming of trust-based relationships, business relationships formed in entertainment settings, and business arrangements based upon a handshake, not a written contract.⁴²

A mediation caucus is a private meeting between the mediator and one of the parties to a dispute.⁴³ Caucuses are a common mediation practice. They allow private, *ex parte* communication between a party and a mediator. Such a private conversation between a party and a third-party neutral would be very inappropriate in an arbitration or a trial because the arbitrator or judge decides the case. Caucusing, however, is acceptable in mediation because the mediator has no power to decide the dispute. Caucusing is commonly used in mediation, especially in commercial cases.⁴⁴

⁴⁰ Although a mediator has no binding power to make a decision for the parties, the mediator does have many opportunities to exercise power over the mediation process. See DWIGHT GOLANN, *HOW TO BORROW A MEDIATOR'S POWER, REPRESENTING CLIENTS IN MEDIATION: HOW ADVOCATES CAN SHARE A MEDIATOR'S POWERS* (American Bar Association 2000).

⁴¹ David F. Day, *International ADR Skills and Executive Decision-Making*, 9 HAW. BUS. J. 5 (2005).

⁴² *Id.* at 6.

⁴³ See SHARON C. LEVITON & JAMES L. GREENSTONE, *ELEMENTS OF MEDIATION* 41 (1997), see also CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 355-358 (2005) (discussing never, always, and selectively caucusing approaches to mediation).

⁴⁴ DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 153 (2006).

Although a few mediators claim generally to not use caucuses,⁴⁵ effective cross-cultural mediation will usually benefit from extensive use of caucuses and premeditation meetings because in the caucus, the mediator has an opportunity to meet privately with each party to define the issues for mediation which gives the mediator an opportunity to assess the cultural characteristics of the parties, assess the cultural awareness of each party about the other party's culture, explore the parties knowledge of the culture and values⁴⁶ of the opposing party, serve as interpreter, coach, and teacher, and create an opportunity for parties to re-establish or create social relationships useful for resolving their conflict. Mediators who work with Asian disputants often believe that caucusing is an extremely effective mediation tool because it allows the parties to avoid having or continuing a face-to-face confrontation.⁴⁷ Of course, all mediators make various assessments about the parties and the dispute throughout a mediation, but in a cross-cultural mediation, early assessments made in a pre-mediation meeting can be very helpful and may suggest that other steps need to be taken before the substantive issues are addressed in the mediation.

Especially if one of the parties is not aware of or does not appreciate the importance of cultural differences, a soft, Socratic method approach of teaching through questions asked by the mediator and answers given by the parties can be very effective. For an example of a mediator employing the Socratic method in a non-caucus setting, let me describe a scene from "Everyday Conflicts;

⁴⁵ See Jack Himmelstein, *Using the Non-Caucus Model in the Commercial Context*, Training at the American Bar Association's Section of Dispute Resolution, New York City (Apr. 15, 2004); Robert H. Mnookin, Jack Himmelstein & Gary J. Friedman, *Saving the Last Dance: Mediation through Understanding* (training video) (showing the "mediation through understanding" model of mediation for a commercial mediation without using private caucuses).

⁴⁶ "[T]he main cultural differences between nations lie in values." HOFSTEDE, SOFTWARE, *supra* note 3, at 364. There are differences with regard to values about power and inequality, the relationship between the individual and the group, the emotional and social roles expected from men and women, ways of dealing with the uncertainties of life, and whether one is mainly preoccupied with the future or with the past and present. *Id.* at 364-65.

⁴⁷ JANDT & PEDERSEN, *supra* note 13, developed a series of seventeen hypotheses about creative conflict management and mediation in the Asia-Pacific region. They hypothesized that low-context communication cultures, such as the U.S., would prefer mediation to be face-to-face and that high-context communication cultures, such as Japan and China, would prefer mediation through intermediaries. In this sense, caucusing in mediation might serve to provide or promote harmony, or at least to reduce direct confrontation. *See id.* However, I have also recently heard that some Japanese mediators are beginning to favor not using caucuses so that the parties can engage in limited face-to-face confrontation in a controlled setting with a mediator present.

Everyday Solutions,” a children’s mediation video⁴⁸ where young mediators intervene to help resolve a grade-school playground conflict over the use of a basketball at recess.

In one of the early scenes of the video, the mediators learn that one of the children is reluctant to try mediation. If a direct approach was used, the mediator might say, “look, if you don’t try mediation, you will get in trouble because of this conflict on the playground.” The student/disputant might agree (and therefore try mediation) or might disagree and say, “No way. This is not a problem for me,” and not mediate. In the video, however, the student mediator uses an indirect, Socratic method approach and asks a question, for which in his mind he already has a clear answer. The student mediator asks, “what do you think will happen if you don’t solve this problem?” The disputant answers tentatively, “I’ll probably get in trouble.” The mediator then says, “so what do you want to do?” “I guess I’ll try mediation” says the disputant. In this exchange, the mediator used an indirect approach and allowed the party to come up with the answer himself. This technique could be used equally well with adults in cross-cultural conflicts and could be especially effective in caucuses.

FRAMEWORK FOR THE CROSS-CULTURAL MEDIATION TEMPLATE

A. High and Low-Context Communication

A discussion of cross-cultural factors should begin with the concept of high and low-context communication pioneered by Edward T. Hall.⁴⁹ High and low-context communication differences will probably be the single most important cultural difference in many cross-cultural mediations.

High and low context refers to how people interact and communicate with other members of their culture. In low-context cultures, people communicate directly and explicitly and rely on verbal communication, as opposed to non-verbal communication

⁴⁸ *EVERYDAY CONFLICTS; CREATIVE SOLUTIONS* (CRU Institute 1991).

⁴⁹ Anthropologist Edward T. Hall is considered by many people to be the founder of the cross-cultural communication field. He called this field “intercultural communication.” His work focused on differences between Japan and the United States. His books, *THE SILENT LANGUAGE* (1959), *THE HIDDEN DIMENSION* (1966), and *BEYOND CULTURE* (1976) are classics in the field. Hall wrote *HIDDEN DIFFERENCES, DOING BUSINESS WITH THE JAPANESE* (1987) and *UNDERSTANDING CULTURAL DIFFERENCES* (1990) with his wife, Mildred Reed.

to express themselves. In low-context cultures, the discussion is direct and straightforward, like an arrow. Important issues are explicitly discussed no matter how sensitive the subject matter is. In high-context cultures, the information lies in the context, is not always verbalized, and the talk goes around the points like a circle.⁵⁰ The main issues may only be inferred or not discussed at all. A cultural outsider could easily fail to understand the major issues because they are not stated explicitly. Most observers would say that people in the United States, Canada, Australia, New Zealand and most Northern and Western European countries use direct, explicit, low-context communication and that Asian countries, along with most of the rest of the world, use indirect, implicit, high-context communication.

Even those of us who live in low-context national cultures, such as the U.S., have some experience in high-context subcultures. For example, our homes, our families, family gatherings, and groups of close friends represent high-context subcultures. In these situations, people sometimes use high-context communication within the group. An “insiders’ joke” would be an example of such communication. Every national culture has its high and low context aspects. In high-context subcultures there are clear “insiders” compared to “outsiders.”⁵¹ High-context cultures are more past-oriented and value traditions over change. On the other hand, low-context cultures are more present and future-oriented, and value change over tradition. Individualism is usually a characteristic associated with low-context cultures.⁵²

Israeli Professor Raymond Cohen describes the low-context communication style (and other cultural characteristics as well) of the U.S. in the following manner:

In a nutshell, it is infused with the can-do, problem-solving spirit, assumes a process of give-and-take, and is strongly influenced by Anglo-Saxon legal habits. When theorists posit a universal paradigm of negotiation (usually involving such features as the “joint search for a solution,” “isolating the people from the problem,” and the “maximization of joint gains”), they are in effect proposing an idealized version of the low-context, problem-solving model. Notice the instrumental assumptions of

⁵⁰ Eesti Keele Instituut, <http://www.eki.ee/teemad/kultuur/context/Image132.gif> (last visited Mar. 11, 2006).

⁵¹ See Jennifer E. Beer, *High and Low Context*, available at <http://www.culture-at/work.com/highlow.html> (last visited Mar. 11, 2006).

⁵² See High/Low Context Cultures, available at <http://www.colostate.edu/Depts/Speech/rccs/theory63.htm> (last visited Mar. 11, 2006).

rationality that underlie the paradigm: people are part of the problem, not the solution; each problem can be solved discretely; goals are defined in terms of material, not psychic, satisfactions.⁵³

Cohen describes the high-context communication approach, which is typical of the majority of Asian countries, in the following manner:

[An] alternative model, associated with a nonverbal, implicit, high-context style of communication, predominates in interdependent societies that display a collectivist, rather than individualist, ethos. This paradigm was found to mark the negotiating behavior of the non-Western states examined [China, India, Japan, Mexico, and Egypt]. In contrast to the result-oriented American model, it declines to view the immediate issue in isolation; lays particular stress on long-term and affective aspects of the relationship between the parties; is preoccupied with considerations of symbolism, status, and face; and draws on highly developed communication strategies for evading confrontation.⁵⁴

Cohen describes cross-cultural conflicts in negotiation styles between low-context communicating Americans and high-context communicators from other cultures in the following way:

American negotiators tend to be surprised by their interlocutors' preoccupation with history and hierarchy, preference for principle over nitty-gritty detail, personalized and repetitive style of argument, lack of enthusiasm for explicit and formal agreement, and willingness to sacrifice substance to form. They are frustrated by their partners' reluctance to put their cards on the table, intransigent bargaining, evasiveness, dilatoriness, and readiness to walk away from the table without agreement. Non-Western negotiators tend to be surprised by their interlocutors' ignorance of history, preoccupation with individual rights, obsession with the immediate problem while neglecting the overall relationship, excessive bluntness, impatience, disinterest in establishing a philosophical basis for agreement, extraordinary willingness to make soft concessions, constant generation of new proposals, and inability to leave a problem pending. They are frustrated by their American partners' occasional obtuseness and insensitivity; tendency to see things and present alternatives in black-or-white, either-or-terms; appetite for crisis; habit of springing unpleasant surprises; intimidating readiness for con-

⁵³ COHEN, *supra* note 12, at 216.

⁵⁴ *Id.*

frontation; tendency to bypass established channels of authority; inability to take no for an answer; and obsession with tidying up loose ends and putting everything down on paper. Obviously, these are oversimplified depictions, but they do serve to highlight the main points of abrasion in the low-context-high-context encounter.⁵⁵

The underlying values, which are the basis for differing behaviors, could not be more different for the low-context and high-context approaches.

Many of the most important differences between high and low context communication can be found in the chart below.

Cultural Variations Between Low-Context and High-Context Cultures (according to Edward T. Hall, 1976) ⁵⁶	
LOW-CONTEXT CULTURE	HIGH-CONTEXT CULTURE
Overtly displays meanings through direct communication forms	Implicitly embeds meanings at different levels of the sociological context
Values individualism	Values group sense
Tends to develop transitory personal relationships	Tends to take time to cultivate and establish permanent personal relationships
Emphasizes linear logic	Emphasizes spiral logic
Values direct verbal interaction and is less able to read nonverbal expressions	Values indirect verbal interaction and is more able to read nonverbal expressions
Tends to use “logic” to present ideas	Tends to use more “feeling” in expression
Tends to emphasize highly structured messages, give details, and place great stress on words and technical signs	Tends to give simple ambiguous non-contexting messages
Perceive highly verbal persons favorably	Perceives highly verbal persons less favorably

⁵⁵ *Id.* at 217. Although this book focuses on cultural differences in diplomatic negotiations, the same factors also impact business negotiations.

⁵⁶ Chart entitled Cultural Variations Between Low-Context and High-Context Cultures, available at Deakin University, <http://www.deakin.edu.au/studentlife/counselling/images/highlowculture.jpg> (last visited Mar. 11, 2006).

What can a mediator do if one party is a high-context communicator and the other party is a low-context communicator? Being an American from a low-context culture strongly influences my point of view. I see mediation solutions coming mainly from using a low-context approach during mediation. Misunderstandings can easily arise during negotiations or mediations from poor communication or from not being clear about one wants, needs, or expects. I find it hard to imagine that high-context communication can be very helpful in those situations.

If at least one of the parties is a low-context communicator, I think that the mediator will need to use low-context communication with that party. If the other party is a high-context communicator, the mediator will need to function as a translator.

If the parties employ direct, low-context communication the mediator will work best by also being direct and saying exactly what is meant. For example, if in the mediator's opinion a person offering money is not offering enough money in a mediation to reach a settlement, the mediator could directly say, "That amount of money will not bring us to an agreement. You probably will have to offer more to end this dispute."⁵⁷ When working with parties who are indirect and who use high-context communication, the mediator might say, "Perhaps you should reconsider your offer" or "It might be difficult to reach a settlement under present conditions." The belief is that the high-context communicating parties will understand these communication signals and consider changing their positions.

The mediator might need to act as a translator between high-context and low-context parties. Although there is some risk that high-context communicators might be insulted or otherwise put-off by the low-context communication, without translation and interpretation, low-context communicators may well completely miss the intended, implicit message of the high-context communicators. Mediators can bridge these communication and understanding gaps, usually in caucuses, to clarify the messages and help the parties to save face. Furthermore, the mediator might move quickly to get the parties into a caucus to preserve any "wa"⁵⁸ or harmony.

A mediator could use high-context communication only, e.g., saying something like, "we have a difficult situation here," when there seems to be an impasse. I think, however, the low-context mediator needs to be more proactive and offer a suggestion such

⁵⁷ Such an approach would reflect an evaluative style of mediation.

⁵⁸ See COHEN, *supra* note 12, at 200.

as, “maybe if you were willing to purchase more of one of their other products that you do consider to be reliable, that might take care of some of their other interests.”

People from low-context cultures are usually more willing to openly question and challenge authority. People from high-context cultures are less likely to question and to challenge authority, especially if the other person is more senior or has a higher status. A gentle, but still low-context approach would be to say, “I do not want to appear rude, but do you think that . . .” and thereafter ask the question.

People from low-context cultures are more likely to focus on the facts; people from high-context cultures are more likely to focus on the intuitive or emotional aspects. A high-context party will generally be implicit, indirect, and assume that the mediator and the other party both understand the nuances of the communication just as well as the high-context communicating party does. The high-context party will not provide the mediator with many facts and details to work with. The impact on the low-context party can be both substantial and create impasse. The low-context party is likely to be confused and not understand what the high-context party wants, why they want it, or what their interests are. They do not know what to do to make the situation better. They are operating “in the dark” and need the mediator to translate for them.

When working with a high-context party, the mediator needs to draw out the party by asking questions. In a caucus, the mediator can explain to the high-context party that the other party might not understand the situation unless the mediator and the low-context party working together can be more direct about the high-context party’s ideas about the conflict and their interests. The mediator could also tell the high-context party that he or she does not fully understand the situation and that the mediator needs further clarification. If the mediator is from a high-context culture, to be effective with low-context cultures, the mediator may need to talk more and be more direct. A party from a low-context culture might not understand the nuances of what the mediator is hinting at. This is what we in Hawaii call a “da kine” problem.⁵⁹

⁵⁹ “Da kine” is a Hawaiian pidgin expression used mainly when you cannot think of the correct words to express your idea. The phrase, “Da kine,” is used in place of the missing words. For example, “Mediation is a da kine process.” Here, “da kine,” stands in place of the missing words. The listener has to guess what the missing words are. See <http://www.e-hawaii.com/fun/pidgin/showTerm.asp?letter=D> (last visited Mar. 11, 2006).

A low-context party will generally be direct and explicit. They will say exactly what they mean and will not “beat around the bush” (meaning they will not be indirect). In a mediation, the low-context communication party can be very direct and assertive. A common impact on a high-context party is to feel that the low-context party is aggressive and “pushy” and is always “claiming value.” The mediator should approach the low-context communication with the intent to listen, question, actively listen, and otherwise learn the essentials and gist of what the party is seeking and suggesting. The mediator can then translate this information to the high-context party and present it in a less direct and less aggressive form, perhaps by reframing the information to reduce the negatives in the message that the high-context party will notice just because of the manner in which the message is delivered. If the mediator is from a low-context culture, the mediator has to use some restraint not to overwhelm the high-context party by providing too much information.

B. Geert Hofstede’s Dimensions of Culture

Any serious look at cross-cultural difference is sure to include reference to the remarkable empirical studies of Dutch cultural anthropologist Geert Hofstede. Hofstede is most well-known for his collection, empirical analysis, and books⁶⁰ detailing his work with over 116,000 questionnaires from IBM employees in fifty-three countries from which he formulated four useful dimensions⁶¹ of culture. He later collaborated with Michael Bond⁶² to add a fifth dimension related to Chinese culture. Later research by Hofstede and others have added additional information about other countries, and there is now data available from seventy-four countries and regions of the world. Hofstede’s five dimensions are Power

⁶⁰ See HOFSTEDE, *SOFTWARE*, *supra* note 3; GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2001); JAN GEERT HOFSTEDE, PAUL B. PEDERSEN & GEERT HOFSTEDE, *EXPLORING CULTURE: EXERCISES, STORIES AND SYNTHETIC CULTURES* (2002) [hereinafter *EXPLORING CULTURE*]; GEERT HOFSTEDE & WILLIAM ARRINDELL, *MASCULINITY AND FEMININITY: THE TABOO DIMENSION OF NATIONAL CULTURES* (1998); GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1984) [hereinafter *CULTURE’S CONSEQUENCES*].

⁶¹ “A dimension is an aspect of a culture that can be measured relative to other cultures.” HOFSTEDE, *SOFTWARE*, *supra* note 3, at 23.

⁶² See GEERT HOFSTEDE & MICHAEL BOND, *The Confucius Connection: From Cultural Roots to Economic Growth*, 16 *ORG’L DYNAMICS* 5 (1988).

Distance Index (PDI), Individualism (IDV), Masculinity (MAS), Uncertainty Avoidance Index (UAI), and Long-Term Orientation (LTO). LTO information is only available for thirty-nine countries. Although not without some criticism,⁶³ Hofstede's work sits atop all cross-cultural theories about cultural differences and offers a window for looking at cross-cultural differences in negotiation and mediation.

C. The Power Distance Index (PDI)

The Power Distance Index (PDI) refers to the extent to which less powerful members of a culture expect and accept that power is distributed unequally in a culture.⁶⁴ It is a measure of hierarchy⁶⁵ in a culture. Power Distance is defined from the viewpoint of the less powerful members of a culture. Its central value is "respect for the leader or the elder."⁶⁶ Status is an important issue in a high Power Distance culture. In these cultures, inequalities are expected and desired. Absence of hierarchy is a frustrating situation for a person from a high Power Distance culture.

In low Power Distance countries, equality and opportunity for everyone is stressed. There is a belief that "all men are created equal" and should be treated that way. These cultures are characterized by mutuality and shared initiatives. In low Power Distance work situations, the boss and employee considered almost equals. Subordinates will approach and contradict their boss. There is less dependence on superiors and more interdependence. In low power distance cultures, parents and children, as well as teachers and students, view themselves more as equals.

Low Power Distance countries tend to have higher gross domestic products (GDP) and smaller populations. Power Distance is correlated with the wealth of a nation. Wealthier countries tend to have low Power Distance scores and to come from more northern latitudes.⁶⁷

⁶³ Several of the criticisms, and criticisms of those criticisms can be found at <http://geert-hofstede.international-business-center.com/> (last visited Mar. 11, 2006). See Brendan McSweeney, *Hofstede's Model of National Cultural Differences and Their Consequences: A triumph of faith—A failure of analysis*, <http://geert-hofstede.international-business-center.com/mcsweeney.shtml> (last visited Mar. 11, 2006).

⁶⁴ HOFSTEDE, SOFTWARE, *supra* note 3, at 46.

⁶⁵ EXPLORING CULTURE, *supra* note 60, at 36.

⁶⁶ Paul Pedersen, Lecture to John Barkai's class (Feb. 15, 2006).

⁶⁷ HOFSTEDE, SOFTWARE, *supra* note 3, at 67–68.

Positive words in a high Power Distance culture are “respect, father, master, servant, older brother, younger brother, wisdom, favor, protect, obey, orders, and pleasing.”⁶⁸ These same words have a negative connotation for a low Power Distance culture. The words with a positive connotation for a low Power Distance culture (and negative for high Power Distance Index culture) are “rights, complain, negotiate fairness, necessity, codetermination, objectives, question, and criticize.”⁶⁹

Power Distance scores are high for most Asian (but not Japan), Latin and South American, and Arab, countries such as China, India, Indonesia, Malaysia, the Philippines, and Mexico. Power Distance scores are smaller for Germanic countries. Low Power Distance cultures are largely Anglo cultures, such as the U.S., Great Britain, Australia, New Zealand, Canada, Germany, Denmark, Sweden, Norway, Finland, Netherlands, Switzerland, Austria, and Israel.

Power distance scores for a sampling of countries appear in the chart below.

Power Distance Index – PDI “Hierarchy”⁷⁰					
High Hofstede Score		World Average = 43 World Mean = 39		Low Hofstede Score	
Malaysia	104	Korea, S.	60	U.S.	40
Philippines	94	Taiwan	58	Australia	36
Russia	93	Spain	57	Germany	35
Mexico	81	Japan	54	U.K.	35
China	80	Italy	50	Sweden	31
Indonesia	78			Norway	31
India	77			Israel	11

Quite naturally, differing Power Distance orientations can lead to significant conflicts regarding status, deference, and respect. The high Power Distance interest is seen during negotiations when respect and deference is expected to be shown towards elders and other high status people. Power Distance interests affect the com-

⁶⁸ *Id.* at 98.

⁶⁹ *Id.* at 100.

⁷⁰ The subtitles in quotations are alternative ways of describing the Hofstede dimensions, and are from the work of Geert Hofstede, his son Gert Jan Hofstede, and Paul Pedersen. See GEERT JAN HOFSTEDE, PAUL B. PEDERSEN & GEERT HOFSTED, *EXPLORING CULTURE: EXERCISES, STORIES AND SYNTHETIC CULTURES* 43 (2002).

position of negotiating teams. High Power Distance cultures will use senior people as negotiators,⁷¹ and will expect to be addressed by their formal titles as a sign of respect. There is also an expectation that the opposing negotiator will be of equally senior status or higher. Being asked to meet and negotiate with a person in a inferior position could suggest a lack of respect for the senior. In high PDI cultures, high status people are quickly identified and expected to be given deference. Asians in general and Japanese in particular often start meetings with an exchange of business cards (or “meishi”), partially to allow the other party to read the titles listed on the business cards and to thereby know how to treat the person they are meeting based upon their status.⁷² The impact of this characteristic during the negotiation can be seen as the parties proceed carefully and deferentially so as not to offend a high status person. The effect of this characteristic on the other party will vary depending on whether the focus is on the high status or low status person. To a low Power Distance person, a high status person might appear bossy and rigid⁷³ because they are used to getting their way and not being questioned. A low status person might be seen as cowardly and servile, and not willing to initiate.⁷⁴

Parties from low Power Distance cultures will often attempt to treat everyone equally, from the company president to the lowest ranking person at the meeting. They will appear to be informal and perhaps want to use first names for addressing the other parties (“you can just call me John”). They will expect a lot of “give and take” in the mediation. If a person from a low Power Distance culture is mediating, he or she might appear to be disrespectful, improper, rude, and perhaps even be considered barbarians to a high Power Distance party or the mediator. The high Power Distance people might be even more convinced that they do not want to work with these other people on a long term basis. The key to working with a person from a low Power Distance culture is treating them as equals.

In high Power Distance cultures, the decision-making structure is likely to be highly centralized, and the authority of negotiating teams to make commitments may be limited. In low Power

⁷¹ See David C. Bangert, *Culture and Negotiation*, Univ. of Haw. at Manoa, Program on Conflict Resolution Working Paper Series, 1991–1994.

⁷² By contrast, Americans are more likely to hand out business cards at the end of a meeting. The American has no interest in showing hierarchy and status with the business card. The card is used primarily so that people have information to contact each other later.

⁷³ EXPLORING CULTURE, *supra* note 60, at 43.

⁷⁴ *Id.*

Distance cultures, the negotiator may have considerable discretion in decision-making and may not have to consult superiors before making decisions.

These different approaches to status and hierarchy can easily lead to conflicts. When I was taught to be a community mediator over twenty-five years ago, I was told to ask the parties to allow me to call them by their first names so as to decrease the formality and make everyone feel more comfortable. In some Asian countries, however, only one's closest friends would ever use first names. Therefore, in a cross-cultural situation, a mediator's request to a person from a high Power Distance culture to use first names would increase parties discomfort level rather than put them at ease.

Formality in the informal process of mediation can take on other forms. In the Hawaiian dispute resolution process of Ho'oponopono, the parties usually are encouraged to speak directly to the mediator or "haku," who is a high status elder, and not to speak directly to each other even in joint mediation sessions. Sometimes the formality can be increased by the use of high status language. For example, Japanese parties to a mediation might well call the mediator "sensei," a title used to refer to a teacher but which is used for any person to whom you are trying to show respect.⁷⁵

The status of mediators comes to play in several ways. A serious cultural mistake in cross-cultural negotiations with a negotiator from a high Power Distance culture is the failure to match the status of individuals who are negotiating with each other. It is an insult to not send an equally high status person to a mediation. In other words, if the president of one company goes to meet another company, the second company should also make sure its president is also at the meeting and not send a lower status individual. The same could be said about mediators. It might be important to have a mediator of the same (or higher) status level as the parties.

I encountered an interesting situation with the use of high status mediators when my colleague David Chandler and I conducted three week-long trainings in three different years in the Federated States of Micronesia (in Kosrae⁷⁶ and Pohnpei) in the early 1990s. In the second year of our training efforts, we heard about

⁷⁵ See <http://en.wikipedia.org/wiki/sensei> (last visited Mar. 11, 2006).

⁷⁶ See John Barkai, *Bringing Mediation (back) to Micronesia (1991)* (unpublished manuscript) (on file with the author) (based upon my training experiences in Micronesia with Professor David Chandler).

mediators asking the parties to “do it for me,” or, in other words, to resolve the case for the mediator. At first, I was appalled by such mediator behavior. I thought that party autonomy and individual choice was critical for effective mediation. However, I later came to realize that such behavior might be a very appropriate mediation tactic in a high Power Distance culture. When a person mediates a dispute, their own reputation is at stake. Failure to reach a resolution can be a personal failure for the mediator. In a sense, the Micronesian mediators were “calling in their chips” to get a resolution. Stated another way, these mediators were attempting to “save face.” I can see this same technique being modified in collectivist cultures in appeals by the mediator to do it “for the group” or “for the organization.”

The mediator must be careful to give respect and deference to high status individuals and to not challenge them in ways that would seem inappropriate. When asking tough questions of the high status party, the mediator must make clear that he is not trying to challenge the party. The mediator should treat the high status party with respect. In premediation meetings, the mediator should be sure that rank is matched on both negotiating teams by making sure that parties with equal status will be at the bargaining table. Status issues do not affect only the disputing parties. Mediators from high-status cultures should try to not be offended if they are not treated with the same respect that they would receive at home.

D. Individualism (IDV) v. Collectivism

A second Hofstede dimension, Individualism (IDV), focuses on how much a culture reinforces individual achievement and interpersonal relationships.⁷⁷ It is a measure of the identity of a culture.⁷⁸ Its central value is “respect my freedom.”⁷⁹ Individualism is defined by the extent to which individuals’ behaviors are influenced and defined by others. Individuals look after themselves and their immediate family, and have much less regard for anyone else. The interests of the individual prevail over those of the group. Individualistic cultures value self-sufficiency, personal time, freedom,

⁷⁷ Geert Hofstede, *Culture Dimensions*, <http://www.geert-hofstede.com>, (last visited Mar. 11, 2006).

⁷⁸ *EXPLORING CULTURE*, *supra* note 60, at 35–36.

⁷⁹ Paul Pedersen, Lecture to John Barkai’s class (Feb. 15, 2006).

challenge, extrinsic motivators such as material rewards, honesty, “talking things out,” privacy, and individual rights.⁸⁰

The focus on the individual versus the collective is another “great divide” among world cultures. Typically, Americans think and act individually and respond to individual interests. Asians on the other hand, typically think and act collectively and respond to collective interests. These different focuses can be both a source of friction and also an opportunity to make agreements because the parties may have different interests.

Collectivists act predominantly as members of their group or organization and emphasize obligations to the group. They take responsibility for fellow members of their group.⁸¹ Collectivists represent the majority of the world’s population.⁸² They value harmony more than honesty, and they work to maintain face. They place collective interests over the rights of individuals, and their governments may invade private life and regulate opinions.⁸³ Asians typically think and act collectively and respond to collective interests.

There are other interesting comparisons between these different approaches. There is a tendency for Individualists to be more extroverted and for Collectivists to be more introverted.⁸⁴ Individualistic countries are generally wealthier; Collectivists countries are located closer to the equator.

Positive words for an Individualistic culture are “positive connotation, self, friendship, do your own thing, contract, litigation, self-interest, self-respect, self-actualizing, individual, dignity, I, me, pleasure, adventure, guilt, and privacy.”⁸⁵ These same words have a negative connotation in a collectivist culture. The words with a positive connotation for a collectivist culture (and negative for an individualistic culture) are “harmony, face, obligation, sacrifice, family, tradition, decency, honor, duty, loyalty, and shame.”⁸⁶

Countries that score high on individualism include the United States, Australia, Great Britain, Canada, Netherlands, New Zealand, Italy, Belgium, Denmark, Sweden, and France. Collectivist

⁸⁰ Aaron Marcus, *Cultural Dimensions and Global Web User-Interface Design: What? So What? Now What?*, available at <http://wwmr.org/ip-marcom/hofstede-ad.htm> (last visited Mar. 11, 2006).

⁸¹ See Geert Hofstede Homepage, www.geert-hofstede.com.

⁸² HOFSTEDÉ, SOFTWARE, *supra* note 3, at 74.

⁸³ See Marcus, *supra* note 82.

⁸⁴ HOFSTEDÉ, SOFTWARE, *supra* note 3, at 97.

⁸⁵ *Id.* at 94.

⁸⁶ *Id.* at 96.

countries include many Asian and South and Latin American countries such as China, Singapore, Thailand, Indonesia, Taiwan, South Korea, Pakistan, and Mexico.

Individualism scores for a sampling of countries appear in the chart below.

Individualism – IDV “Identity”					
High Hofstede Score		World Average = 43 World Mean = 39		Low Hofstede Score	
U.S.	91	Spain	51	China	20
Australia	90	India	48	Singapore	20
U.K.	89	Japan	46	Thailand	20
Netherlands	80	Brazil	38	S. Korea	18
New Zealand	79	Germany	35	Taiwan	17
				Indonesia	14

During negotiations, the differences between individual and group values can be a source of conflict and an opportunity to create “joint gains,” because the parties may actually be seeking to fulfill different interests. Individualists will focus on the negotiation task. For Collectivists, building and maintaining a relationship with the groups is the more important task. Insiders are much favored by Collectivist cultures.

If mediators were to apply the aforementioned Humpty-Dumpty analogy and attempt to put the business deal back together again, it would suggest attempting to rebuild the relationship that facilitated making the business deal in the first place. The mediator could start the mediation in a social situation to reacquaint the parties with each other and get them to experience each other out of the normal business relationship. This might include presenting small, appropriate gifts.⁸⁷

There is an important relationship between the communication contexts pioneered by Edward Hall and Individualism. Individualistic cultures are generally low-context communicators who prefer being direct, specific, straightforward, confrontational, and self-disclosing. Collectivist cultures are generally high-context communicators who prefer being indirect, ambiguous, cautious, non-confrontational, and subtle in working through conflict.⁸⁸

⁸⁷ Some gifts might be inappropriate because their color (black, for example) or symbolism (a clock in some Asian cultures represents death).

⁸⁸ HOFSTEDE, *SOFTWARE*, *supra* note 3, at 92; PEDERSEN & JANDT, *supra* note 13, at 12.

People from Collective cultures will be particularly challenged in negotiations and mediations with people from low-context cultures, such as the U.S. Collective cultures thrive on stable relationships. If, during the course of a negotiation or mediation, one of the parties can no longer be part of the process, replacing the party to the negotiation or mediation means that a new relationship will have to be built, and this will take more time.⁸⁹

Status of the parties and sovereignty of the nation are likely to be very important issues for collectivist parties.⁹⁰ Collectivist cultures place a premium on the maintenance of harmony and the absence of discord. Therefore, they would not want to discuss perceptions that may bring conflict out in the open.⁹¹ They also show low interpersonal trust in interacting with anyone not part of the “in” group.⁹² In Individualistic cultures, the negotiation task prevails over relationships; in Collectivist cultures, the relationship prevails over task.⁹³

Decision-making varies markedly across cultures and can have a great impact on a mediation. In some cultures, there is an expectation that a single individual will make the decision (although the individual may welcome the input of others). In other cultures, there is often an expectation of group decision-making. Classically western business teams have individual decision makers and are teams that are given the authority to make the final decision at the bargaining table. On the other hand, some groups, particularly Asians, rely on group decision making. Asian negotiation teams usually do not have authority to make a concession to reach a final agreement. There might have been many rounds of consensus-building that were necessary to reach the initial negotiation demand, and any concession will need to have an organizational decision to support and change the position. Everyone in the affected group has some input, sometimes called the “nemawashi” or “ringi” process.⁹⁴ A mediator should always try to clarify the decision-making procedures for the parties at the mediation. Such clarity eliminates some of the frustration often felt towards authority when dealing with teams without authority.

⁸⁹ Mediators can help to maintain relationships between the parties that allow the mediation to continue. HOFSTEDE, SOFTWARE, *supra* note 3, at 339.

⁹⁰ COHEN, *supra* note 12, at 92; JANDT & PEDERSEN, *supra* note 13, at 12.

⁹¹ BANGERT, *supra* note 71, at 26–27.

⁹² *Id.* at 26.

⁹³ HOFSTEDE, SOFTWARE, *supra* note 3, at 104. *See also* GRAHAM & SANO, *supra* note 12, at 79–84 (regarding “non-task sounding” when negotiating with the Japanese).

⁹⁴ *See* <http://www.bookrags.com/research/ringi-system-ema-05/> (last visited Dec. 2, 2008).

Other groups expect the parties to come to the table with decision-making authority. Not only is the agreement more complicated when the process takes longer, but there also might be a perception of bad faith in the mediation process when one side does not quickly respond to proposals. It also means that although Americans are used to modifying their proposals at the negotiation and mediation table, people with group decision-making styles will only make changes in their negotiating positions after they have had a chance to meet with other people and they will never make changes at the mediation table.

The contrasting Individualist and Collectivist interests will have a great impact at the early stages of a mediation. Individualist cultures have a “task focus” when they want to get down to business quickly. Collectivist cultures prefer to spend their time in rapport activities.⁹⁵ Mediators should consider spending more time early in the mediation attempting to repair relationships or build new relationships if the parties coming to the mediation are not the same parties who negotiated the original deal.

Individualism versus Collectivism will also impact mediator selection. Individualists seek neutral and impartial mediators; Collectivists seek mediators who are already “insiders.” Asians might prefer to have a mediator from the trading circle, the Korean *Kabal* or the Japanese *Kiretsu* Trading Circle. Alternatively, someone from the government might be helpful. A mutual friend who introduced the parties might be the best mediator for Asian cultures. In Japan, this person is sometimes called the “*shokai-sha*.”⁹⁶ The person who introduced the parties might be an appropriate mediator, although it is unlikely that this person would have any formal mediation skills or training.

In Japan, the next best thing to having a mutual friend as a mediator is having a person who knows one of the parties well, even if they do not know the other person at all. Initially, this might sound like a recipe for disaster because of potential bias in favor of the known party, but because it is a mediation, that damage is minimal. I know one negotiator who once purposely selected as a mediator a lawyer who represented his opponent. This negotiator was counting on the fact that the mediator would be able to influence and persuade the opposing party because of their past relationship.

⁹⁵ See JOHN GRAHAM & YOSHIHIRO SANO, *SMART BARGAINING: DOING BUSINESS WITH THE JAPANESE* (rev. ed. 1989).

⁹⁶ *Id.* at 72.

E. Masculinity (MAS) v. Femininity

Hofstede's masculinity dimension focuses on the degree to which a culture reinforces traditional male values and gender, such as achievement, control, power, money, recognition, challenges, assertiveness, aggressiveness, dominance, competitiveness, ambition, the accumulation of money and wealth, independence, and physical strength. The masculine orientation is to achievement outside the home.⁹⁷ Masculinity is a measure of the competitiveness.⁹⁸ Its central value is "win at any costs."⁹⁹ In masculine cultures, males dominate a significant portion of the country's society and power structure.¹⁰⁰

Traditional feminine goals are cooperation, security, pleasant relationships, modesty and caring. In feminine cultures, women are subordinated to male leadership. Using the terminology "assertiveness v. cooperativeness" instead of masculinity v. femininity would probably make this dimension easier to understand in contemporary society and less emotionally charged.¹⁰¹

Other masculine behaviors include being loud and verbal, with a tendency to criticize and argue with others. Such traits are much more predominant in individualistic cultures.¹⁰² Most people would probably agree that Japanese people do not fit the stereotype of being loud and verbal. Feminine behaviors include not raising your voice, making small talk, agreement, and being warm and friendly in conversation.¹⁰³ Positive words for masculine cultures are "career, competition, fight, aggressive, assertive, success, winner, deserve, merit, excel, force, big, fast, tough, quantity, total, power and action."¹⁰⁴ These words have a negative connotation for a feminine culture. The words with a positive connotation for feminine cultures (and negative for masculine culture) are "caring, solidarity, modesty, compromise, help, love, grow, small, soft, slow, tender, and touch."¹⁰⁵

⁹⁷ HOFSTEDE, *SOFTWARE*, *supra* note 3, at 117.

⁹⁸ *EXPLORING CULTURE*, *supra* note 60, at 37 (referring to this dimension as one of gender, but I think "competitiveness" is a better term).

⁹⁹ Paul Pedersen, Lecture to John Barkai's class (Feb. 15, 2006).

¹⁰⁰ See *Culture Dimensions*, *supra* note 77; Marcus, *supra* note 80.

¹⁰¹ Daniel Q. Posin, *Mediating International Business Disputes*, 9 *FORDHAM J. OF CORP. & FIN. LAW* 449, note 62 (2004).

¹⁰² *EXPLORING CULTURE*, *supra* note 60, at 101.

¹⁰³ *Id.* at 103.

¹⁰⁴ HOFSTEDE, *SOFTWARE*, *supra* note 3, at 101.

¹⁰⁵ *Id.* at 103.

Countries ranking high on the masculinity scale include Slovakia, Japan, Switzerland, Mexico, and the Arab World. The United States, China, Germany, Australia, Great Britain, Germany, and Italy are all above average on this scale. The Scandinavian countries are among the most feminine, and Thailand and South Korea are also at the low end.

Masculinity scores for a sampling of countries appear in the chart below.

Masculinity (MAS) “Gender”					
High Hofstede Score		World Average = 50 World Mean = 49		Low Hofstede Score	
Slovakia	110	Italy	70	S. Korea	39
Japan	95	Mexico	69	Thailand	34
Hungary	88	China	66	Finland	26
Austria	79	U.K.	66	Denmark	16
		Germany	66	Norway	8
		U.S.	62	Sweden	5
		Australia	61		

A mediator will probably see the masculinity dimension come to play as part of the familiar interplay between cooperative and competitive negotiation. A culture high in masculinity, like competitive negotiators, will attempt to dominate each other through power tactics, and may be reluctant to make concessions. Cultures low in masculinity, like cooperatives, may be more willing to discuss interests, offer concessions, and in general be more willing to “separate the people from the problem.”

In contemporary negotiation theory, masculine cultures are competitive negotiators and will use and respect competitive negotiation strategies and tactics that might be labeled “hardball,” “hard bargaining,” or “win-lose.”¹⁰⁶ On the other hand, feminine cultures are cooperative, “win-win,” or principled negotiators, and they will use cooperative and Getting-To-Yes type negotiation strategies and tactics. A belief that the strong shall dominate is an important aspect of masculine culture. Masculine cultures will resolve conflicts by fighting and by applying the principle of the stronger person wins while making few concessions in negotiations.

¹⁰⁶ Many of the negotiation techniques attributed to North Koreans will also fit this characterization. See RICHARD SACCONE, *NEGOTIATING WITH NORTH KOREA* (2003).

On the masculinity dimension, Japan is somewhat of an enigma. Because Japan rated highest on the masculinity dimension in the original IBM data,¹⁰⁷ we would expect Japanese negotiators to be hardball, win-lose, and tough. The business entertaining with emphasis on drinking may represent some of the masculine attributes. To outsiders, the Japanese are certainly difficult to negotiate with, but they do not seem to use hardball negotiation tactics at all. Their polite nature is deceptive. The Japanese may well be a “wolf in sheep’s clothing.”

Some observers suggest that Japan’s high masculinity dimension would impact the composition of any negotiation team sent to Japan, implying that Japanese negotiators would feel more comfortable with males than females. However, other anecdotal evidence suggests females can also be successful in Japan.¹⁰⁸

F. Uncertainty Avoidance Index (UAI)

Hofstede’s Uncertainty Avoidance Index focuses on the level of tolerance for uncertainty and ambiguity within a culture and measures the extent to which people feel threatened by unstructured or unknown situations,¹⁰⁹ as compared to the more universal feeling of fear caused by known or understood threats. In some ways, Uncertainty Avoidance represents the importance of truth¹¹⁰ in a culture, as compared to other values. Its central value is “respect the law.”¹¹¹ A high Uncertainty Avoidance culture creates a rule-oriented society that institutes laws, rules, regulations, and controls in order to reduce the amount of uncertainty in the environment. Cultures high in Uncertainty Avoidance will distrust negotiating partners who display unfamiliar behaviors, and will have a need for structure and ritual in the negotiation process.¹¹²

High Uncertainty Avoidance cultures prefer rules and structured circumstances, and are wary of novel situations. Rules are

¹⁰⁷ Slovakia is now rated the highest on masculinity with a score of 110. See HOFSTEDE, SOFTWARE, *supra* note 3, at 120.

¹⁰⁸ See TRACEY WILEN, *DOING BUSINESS WITH JAPANESE MEN: A WOMAN’S HANDBOOK* (1993). A Honolulu Judge, who used to be house-counsel for a Japanese construction company is American born and raised in Japan, and is fluent in Japanese. The Japanese nationals readily accepted her.

¹⁰⁹ See Culture Dimensions, *supra* note 77.

¹¹⁰ EXPLORING CULTURE, *supra* note 60, at 37–38.

¹¹¹ Paul Pedersen, Lecture to John Barkai’s class (Feb. 15, 2006).

¹¹² HOFSTEDE, SOFTWARE, *supra* note 3, at 339.

needed to maintain predictability. One must be busy and work hard. Time is money. Precision and punctuality are important. They cope with anxiety by minimizing uncertainty, attempt to minimize conflict, and choose strategies that offer lower rewards, but have a higher probability of success. What is unconventional is considered dangerous. Business people in these countries prefer management to have precise answers to questions, precise instructions, detailed job descriptions to deal with job complexity, and avoidance of multiple bosses.

High Uncertainty Avoidance is correlated with a high suicide rate, alcoholism, accidental death rate, and number of prisoners.¹¹³ These cultures have a preference for long-term employment.¹¹⁴ They have a greater concern for purity and cleanliness and, curiously, have been found to use mineral water even when tap water is good for drinking.¹¹⁵

Low Uncertainty Avoidance cultures show more tolerance for a variety of opinions and are less rule-oriented. They readily accept change, and take more and greater risks. Businesses may be more informal. Teachers admit that they may not know all the answers. The culture tends to be less expressive and less openly anxious.

Positive words for high Uncertainty Avoiding cultures are “structure, duty, truth, law, order, certain, pure, clear, secure, safe, predictable, and tight.”¹¹⁶ These same words have a negative connotation for a low uncertainty avoiding culture. The words with a positive connotation for low Uncertainty Avoiding cultures (and negative for a high uncertainty avoiding culture) are “maybe, creative, conflict, tolerant, experiment, spontaneous, relativity, insight, unstructured, loose, and flexible.”¹¹⁷

Countries that rank high on uncertainty avoidance are Greece, Portugal, Japan, Spain, South Korea, Mexico, and Belgium. The United States, China, and India are a little below average on Uncertainty Avoidance. Countries low in uncertainty avoidance include the U.K., Hong Kong, Sweden, Denmark, and Singapore.

¹¹³ *Id.* at 170.

¹¹⁴ *Id.* at 182. An example is the traditional Japanese system of long-term employment where a person might well work for only one employer all their working careers. However, this pattern is changing in Japan as more people switch jobs during their careers.

¹¹⁵ *Id.* at 180.

¹¹⁶ *Id.* at 105.

¹¹⁷ *Id.* at 107.

Uncertainty Avoidance scores for a sampling of countries appear in the chart below.

Uncertainty Avoidance Index – UAI “Truth”					
High Hofstede Score		World Average = 64 World Mean = 70		Low Hofstede Score	
Greece	112	Germany	65	U.K.	35
Portugal	104	Thailand	64	Hong Kong	29
Japan	92	Indonesia	48	Sweden	29
Spain	86	U.S.	46	Denmark	23
S. Korea	85	China	40	Singapore	8
Mexico	82	India	40		

Uncertainty Avoidance interests are most likely to arise in situations when parties abandon the status quo and try novel solutions. Although cultures low in Uncertainty Avoidance may be willing to “invent options,” those high in Uncertainty Avoidance are much less likely to change their positions.

Uncertainty Avoiding cultures want to control the ambiguity through rules and regulations and through the use of specialist power. Negotiating teams from high Uncertainty Avoiding cultures are likely to consist of specialists; conversely, teams from low Uncertainty Avoiding cultures are likely to include generalists.¹¹⁸ Uncertainty-avoiding people can become frustrated by the lack of structure. Intentions of high Uncertainty Avoiding cultures are guided by the fear of failure, whereas low Uncertainty Avoiding cultures are motivated by the hope of success.¹¹⁹ Uncertainty Avoiding cultures put a premium on the maintenance of harmony and the absence of discord.¹²⁰ They would be averse to discussing perceptions that may bring conflict out in the open.

G. Long-Term Orientation (LTO) v. Short-Term Orientation (STO)

Long-Term Orientation (LTO) focuses on the extent to which a culture embraces traditional, forward thinking values and exhibits a pragmatic future oriented perspective rather than a conven-

¹¹⁸ BANGERT, *supra* note 71, at 25.

¹¹⁹ *Id.* at 26.

¹²⁰ *Id.* at 26–27.

tional historic or short-term point of view. It is a measure of virtue for a culture.¹²¹ Its central value is “sacrifice for the future.” LTO cultures make long-term commitments and have great respect for tradition. There is a strong work ethic. Long-term rewards are expected as a result of today’s hard work.

LTO cultures tend to respect thriftiness, perseverance, status, order, sense of shame, and have a high savings rate.¹²² Their members tend to make an investment in lifelong personal networks,¹²³ what the Chinese call “*guanxi*,” or personal connections.¹²⁴ There is a willingness to make sacrifices in order to be rewarded in the future. Asian countries score high on this dimension, and most Western countries score fairly low.

In Short-Term Orientation (STO) cultures, change can occur more rapidly because long-term traditions and commitments do not become impediments to change. STO leads to an expectation that effort should produce quick results.¹²⁵ Although it might not seem at first obvious, STO cultures have a concern for saving face.

LTO cultures may experience people from STO cultures as being irresponsible and throwing money away. STO cultures may experience people from LTO cultures as being stingy and cold.¹²⁶

Positive words for LTO cultures are “work, save, moderation, endurance, duty, goal, permanent, future, economy, virtue, invest, afford, and effort.”¹²⁷ These same words have a negative connotation for a STO culture. The words with a positive connotation for a Short-Term Orientation culture (and negative for a masculine culture) are “relation, gift, today, yesterday, truth, quick, spend, receive, grand, tradition, show, image, and ‘the bottom line.’”¹²⁸

The high LTO countries are China, Japan, and other Asian “Tigers,” such as Hong Kong and Taiwan. STO countries are the United States, Canada, Australia, United Kingdom, Philippines, Nigeria, and Pakistan.

LTO scores for a sampling of countries appear in the chart below.

¹²¹ EXPLORING CULTURE, *supra* note 60, at 38–39.

¹²² HOFSTEDE, SOFTWARE, *supra* note 3, at 339.

¹²³ *Id.* at 225.

¹²⁴ See John L. Graham & N. Mark Lam, *The Chinese Negotiation*, 81 HARV. BUS. REV. 82, 85 (Oct. 2003).

¹²⁵ HOFSTEDE, SOFTWARE, *supra* note 3, at 212.

¹²⁶ See HOFSTEDE, PEDERSEN & HOFSTEDE, *supra* note 60, at 43.

¹²⁷ HOFSTEDE, SOFTWARE, *supra* note 3, at 109.

¹²⁸ *Id.* at 111.

Long-Term Orientation – LTO “Virtue”					
High Hofstede Score		World Average = 45 World Mean = 39		Low Hofstede Score	
China	118	Thailand	56	Australia	31
Hong Kong	96	Singapore	48	U.S.	29
Taiwan	87	Netherlands	44	U.K.	25
Japan	80			Philippines	19
S. Korea	75				

The Long-Term or Short-Term Orientation interest will arise in mediation at the pace in which parties approach mediation and their willingness to make the first concessions.

LTO cultures may engage in extended negotiations, especially if the culture has a polycentric time orientation. One is reminded of the stories about the Vietnam Paris Peace Talks, in which the Americans came to Paris and rented hotel rooms for a month for their negotiating team while the Vietnamese bought a house for their negotiating team.¹²⁹

The Hofstede Dimension Scores

The following table shows the Hofstede dimensions scores for seventy-four countries and regions of the world.¹³⁰

¹²⁹ John Barkai & Laurence Brahm, *Investing in Vietnam: An Ancient Land Looks for Modern Money*, LEGAL TIMES, 36 (Jun., 1994).

¹³⁰ HOFSTEDE, SOFTWARE, *supra* note 3, at 43–44, 78–79, 120–121, 168–169, 211. This book also ranks each country on each dimension. Rankings are not reproduced in this article. Of course, the rankings could be calculated by sorting the scores in the accompanying table.

Hofstede Dimensions¹³¹					
Country	PDI	IDV	MAS	UAI	LTO
World Averages	55	43	50	64	45
Arab Countries	80	38	52	68	-
Argentina	49	46	56	86	-
Australia	36	90	61	51	31
Austria	11	55	79	70	-
Belgium	65	75	54	94	-
Brazil	69	38	49	76	65
Canada	39	80	52	48	23
Chile	63	23	28	86	-
China	80	20	66	30	118
Colombia	67	13	64	80	-
Costa Rica	35	15	21	86	-
Czech Republic	35	58	45	74	-
Denmark	18	74	16	23	-
East Africa	64	27	41	52	25
Ecuador	78	8	63	67	-
El Salvador	66	19	40	94	-
Estonia	40	60	30	60	-
Finland	33	63	26	59	-
France	68	71	43	86	-
Germany	35	67	66	65	31
Greece	60	35	57	112	-
Guatemala	95	6	37	101	-
Hong Kong	68	25	57	29	96
Hungary	46	80	88	82	-
India	77	48	56	40	61
Indonesia	78	14	46	48	-
Iran	58	41	43	59	-
Ireland	28	70	68	35	-

¹³¹ See Geert Hofstede Homepage, <http://www.geert-hofstede.com> (last visited Mar. 11, 2006) for an excellent website devoted to Hofstede's work. On this website it is possible to create a table comparing the scores of any two countries. The majority of countries do not have scores for LTO.

Country	PDI	IDV	MAS	UAI	LTO
Israel	13	54	47	81	-
Italy	50	76	70	75	-
Jamaica	45	39	68	13	-
Japan	54	46	95	92	80
Malaysia	104	26	50	36	-
Mexico	81	30	69	82	-
Netherlands	38	80	14	53	44
New Zealand	22	79	58	49	30
Norway	31	69	8	50	20
Pakistan	55	14	50	70	0
Panama	95	11	44	86	-
Peru	64	16	42	87	-
Philippines	94	32	64	44	19
Poland	68	60	64	93	-
Portugal	63	27	31	104	-
Russia	93	39	36	95	-
Singapore	74	20	48	8	48
South Africa	49	65	63	49	-
South Korea	60	18	39	85	75
Spain	57	51	42	86	-
Sweden	31	71	5	29	33
Switzerland	34	68	70	58	-
Taiwan	58	17	45	69	87
Thailand	64	20	34	64	56
Turkey	66	37	45	85	-
United Kingdom	35	89	66	35	25
United States	40	91	62	46	29
Uruguay	61	36	38	100	-
Venezuela	81	12	73	76	-
Vietnam	70	20	40	30	80
West Africa	77	20	46	54	16

East Meets West and the Cultural Dimension Interest (CDI)

The book *Getting To Yes* is the “Bible” for cooperative negotiations and generally a very useful blueprint for mediation. To use the jargon of *Getting To Yes*, most negotiators negotiate over “positions.” However, underlying and undisclosed interests related to Hofstede dimensions may be a sizeable, though unspoken, component of cross-cultural negotiations and mediations. Some people say that its problem-solving approach to conflict resolution is so imbued with American values that the *Getting To Yes* approach is much less useful in a cross-cultural conflict.¹³² *Getting To Yes*’ four core principles: 1) separating the people from the problem, 2) focusing on interests not positions, 3) inventing options for mutual gain, and 4) using objective criteria — strongly reflect American culture from the Hofstede perspective. Hofstede himself suggests that *Getting To Yes* reflects high individualism, medium power distance index, and low Uncertainty Avoidance.¹³³ *Getting To Yes* also may reflect low masculinity in its search for “mutual gain” and a high LTO in its search for enduring agreements. However, these last two factors may be contrary to American culture, which is seen as highly masculine with a STO.

“Separating the people from the problem” certainly reflects an Individualistic perspective.¹³⁴ In Collectivist cultures, there is more of a focus on the ongoing relationships of the parties than on the tasks at hand or the issues being negotiated. In this sense, it may be impossible to “separate the people from the problem.” The people and their relationships are intertwined with the problem and may even *be* the problem.

In high Power Distance cultures, having and maintaining power is a critical interest.¹³⁵ The positions the negotiators take are often linked to hierarchy and power interests. Negotiators may be less concerned with apparent substantive interests than with appearing powerful. They may sacrifice substantive interests to maintain power. Negotiators not only want to be powerful, but they must also look powerful to maintain their status and hierarchy. In this sense, a negotiated solution must not only be good, it must also

¹³² See CULTURE’S CONSEQUENCES, *supra* note 10, at 436, *see also* Catherine H. Tinsley, Jenifer J. Curhan & Ro Sung Kwak, *Adopting a Dual Lens Approach for Examining the Dilemma of Differences*, in *International Business Negotiations*, 4 INT’L NEGOT. 5, 7 (1999).

¹³³ See CULTURE’S CONSEQUENCES, *supra* note 10, at 436.

¹³⁴ *Id.* at 436.

¹³⁵ *Id.*

look good. The parties may assert their high-status power by never “backing down.”

The idea of “inventing options” suggests a willingness to try novel and not-yet-proposed solutions, or at least solutions that are not proposed by one of the parties to the negotiation. Inventing options can be comfortable for someone from a not too large uncertainty avoidance culture such as U.S. However, for someone from a high Uncertainty Avoidance culture, “what is different is dangerous.” Their thinking is that there is little to be gained from trying something new. They have an interest in avoiding uncertain situations.

Striving for “objective criteria” and “mutual gain,” might seem quite child-like for someone from a culture high in masculinity. In such a culture, aggression, competition, and dominance are prime cultural beliefs. They will use a competitive negotiation style and seek “win-lose” solutions. To them, *Getting to Yes* may sound like an approach for the weak. Furthermore, establishing objective criteria may be exceptionally difficult for negotiators from different cultures who hold different values.¹³⁶ What is “fair” to one side may not seem at all fair to the other.

In international negotiations, the negotiators may hold different values,¹³⁷ objectives, and may play the game of negotiation by different rules. However, it is my view that the *Getting To Yes* concept of “interests” can encompass all those different values. For example, a negotiator could be said to have a high Power Distance interest and not a low Power Distance interest, or an Individualist interest and not a Collectivist interest, or a competitive interest and not a cooperative interest, or an interest in the status quo and not a interest in novel approaches, or a LTO and not a STO interest. Vastly different cultural interests still fit what, to me, is within the most critical *Getting To Yes* principle, that of understanding and working with underlying interests. Therefore, I shall refer to interests which seem to have a basis in cultural differences as Cultural Dimension Interests (CDI). I borrowed the term “dimension” from Hofstede’s work because his work is so important for cross-cultural understanding. Understanding, recognizing, and working with CDIs in a cross-cultural mediation may be just as important as engaging the substantive interests.

¹³⁶ *Id.*

¹³⁷ “The main cultural differences between nations lie in values.” HOFSTEDE, SOFTWARE, *supra* note 3, at 364.

Cultural Dimension Interest Chart

Edward Hall's classification of high and low context communication is probably the most discussed cultural difference and Geert Hofstede's five dimensions are probably the most researched cultural differences. I call all of these difference CDI's or "Cultural Dimension Interests."¹³⁸ Calling factors "interests" has the advantage of allowing us to use the interest framework developed in *Getting To Yes*. These cultural interests can impact the mediation independently of the substance of what is being negotiated, whether it is buying or selling computers, agricultural products, financial services, or fighter jets. The impact of the CDI's on the mediation process comes into play in two main ways, either through favored approaches of the parties and mediator or through blind spots and weaknesses of the parties and mediator.

In preparing for a mediation, a mediator might find it useful to construct a CDI chart for some of the issues that might arise in the mediation. The outline for such a chart is included below. The approach is to 1) look for behaviors suggesting the CDI is present, 2) think of suggestions for working with a party who has this interest, and 3) consider suggestions for modifying the behavior of a mediator whose natural inclination is towards this interest.

My approach to assessing and teaching culture differences in mediation has been strongly influenced by my use of the Myers-Briggs Type Indicator (MBTI) in negotiation and mediation. I use the four MBTI functions to determine how each of the functions could impact a party's negotiation approach and tactics. The same approach can be very valuable when looking at cross cultural differences in mediation.¹³⁹

¹³⁸ There are numerous other cultural differences formulations that might impact a negotiation or a mediation. See TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS* 8–11 (2d ed. 1998), RICHARD D. LEWIS, *WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES* (3d ed. 2006) (classifying cultures into three groups: linear-active, multi-active, and reactive).

¹³⁹ Literature on how to treat various Myers-Briggs differences can provide a useful framework for working with the CDI's. See R. Lisle Baker, *Using Insights About Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation*, 9 HARV. NEGOT. L. REV. 115 (2004); Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993); SANDRA S. VANSANT, *WIRED FOR CONFLICT — THE ROLE OF PERSONALITY IN RESOLVING DIFFERENCES* (2003); and John Barkai, *Psychological Types and Negotiations: Conflicts and Solutions as Suggested by the Myers-Briggs Classification* (Nov. 1989) (unpublished manuscript on file with the author).

A Longer List of Cultural Differences

The work of Hall and Hofstede offers a window to cross-cultural differences. Many other researchers and authors have studied and theorized about cultural differences. Many have offered lists of differences. Below is a partial list of contrasting cultural differences that could appear in negotiation and mediation. Not all the differences can be accurately portrayed as either Western or Asian, although I have done my best at such a classification. All of these differences could be considered Cultural Dimension Interests (CDI).

Contrasting Cultural Differences in Negotiation and Mediation	
WESTERN	ASIAN
Low Context (direct) Communication	High Context ¹⁴⁰ (indirect) Communication
Low Power Distance	High Power Distance
Individualism	Collectivism
Low Uncertainty Avoidance	High Uncertainty Avoidance
Masculinity (Assertive)	Femininity (Cooperative)
Short-Term ¹⁴¹ Orientation	Long-Term Orientation
Monochronic Time ¹⁴²	Polychronic Time
Space ¹⁴³ — far apart	Space — close
Risk Takers	Risk Avoiders
Universalism ¹⁴⁴	Particularism

¹⁴⁰ The context framework is one created by Edward T. Hall.

¹⁴¹ *Id.*

¹⁴² See EDWARD T. HALL, *THE SILENT LANGUAGE* (Anchor 1959). See also Hall's Cultural Factors, http://changingminds.org/explanations/culture/hall_culture.htm (last visited Dec. 2, 2008).

¹⁴³ *Id.*

¹⁴⁴ CHARLES M. HAMPDEN-TURNER & ALFONS TROMPENAARS, *THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN, AND THE NETHERLANDS* (1993).

Achievement ¹⁴⁵	Ascription	
Specific ¹⁴⁶	Difuse	
Brief Rapport building time (short)	Extensive Rapport building time (long)	
Aggressive	Passive	
Contract focused	Relationship focused	
Win-lose approach	Win-win approach	
Informal approach	Formal approach	
Show emotions	Hide emotions	
Preference for specific agreement	Preference for general agreement	
Contract is fixed	Re-negotiation is possible	
Individual Decision-making	Group Decision-making	
Logical decision-making	Emotional decision-making	
All equals	One leader	
Face Saving	Face Giving	
Inductive logic	Deductive logic	
Low Government involvement	High Government involvement	
Linear-Active ¹⁴⁷	Multi-Active	Reactive

The Cultural Stereotype Caveat

Cultural stereotypes¹⁴⁸ are both dangerous and useful starting points in preparing for cross-cultural mediation. Cultural stereotypes are like weather forecasts; they are useful. I plan my daily

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ In a linear-active culture, people listen well, never interrupt and show great deference to others' opinions; they do not precipitate improvident action, allowing ideas to mature. They plan, schedule, organize, pursue action chains, and do one thing at a time. In a multi-active culture, people tend to do many things at once, often in an unplanned order, are usually people oriented and extroverted. They are lively, loquacious people who plan their priorities not according to a time schedule, but according to the relative thrill or importance that each appointment brings with it. In a reactive culture, people rarely initiate action or discussion, preferring first to listen to and establish the other's position, then react to it and formulate their own. They prioritize courtesy and respect, listening quietly and calmly to their interlocutors and reacting carefully to the other side's proposals. See RICHARD D. LEWIS, *WHEN CULTURES COLLIDE: LEADING ACROSS CULTURES* xviii (3d ed. 2006).

¹⁴⁸ I prefer the word "patterns" to the word "stereotypes." See DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1991) (referring to male and female "patterns" of speech); WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1982) (describing "powerful" and "powerless" speech patterns as "male" and "female" patterns).

activities around them. However, I also recognize that they often turn out to be inaccurate. Some days, rain is forecasted, but it does not rain. I carry my umbrella with me during the day, but if it does not rain I do not put up my umbrella and walk around with it in the sun.¹⁴⁹ On other days, the forecast is for a dry day, but we have an unexpected afternoon shower. Similarly, not everyone in a country shares the same values and traits or acts the same. We know of wide regional and personal variations in our own country, and we must assume that the same is true in all countries. The person living next door (or even your spouse) may be more different from you in approach to negotiation than a person from Southern California and one from Maine, or between a New Yorker and a person from a small, Southern, rural town. Yet, there is usually some truth in these stereotypes, at least at the national and international level. The mediator's task is to determine if the parties to the mediation fit the stereotype or not. For example, there may be a Harvard MBA at the negotiating table, but the MBA might have been earned by an Asian team member.

CONCLUSION

Cross-cultural mediations are more complex than domestic mediations because of cultural differences. However, mediators who find themselves in cross-cultural mediations can apply some basic principles and strategies to improve the likelihood of success based upon the application of cultural dimension interests (CDI's) to their mediation. The direct application of these ideas can be used as part of a four-staged approach¹⁵⁰ for cross-cultural mediation.

¹⁴⁹ However, Asian women are often seen using umbrellas in the hot sun.

¹⁵⁰ Several writers have created useful, yet overlapping, "Top Ten" lists to be applied to cross-cultural negotiations. My favorite "Top Ten" lists are from Julie Barker, Raymond Cohen, and Jeswald Salacuse.

Julie Barker's Top Ten:

1. Recognize How Culture Affects Bargaining Tactics and Positions and Learn How to Respond Accordingly.
2. Do Your Homework and Understand the Importance of Non-Business Factors, Including Family, Religion, and Historical Influences.
3. Show Respect and Deference to Your Counterparts' Status and Culture in the Negotiations.
4. Be Polite and Dress Appropriately.
5. Be Patient: Prepare for Uncertainty and Delay.
6. Take the Time to Build Personal Relationships.
7. Be Aware of Both the Words and the Context Surrounding the Mediation.

- 1) Learn the cultural stereotypes about the culturally different parties who will come to the mediation,¹⁵¹
- 2) Investigate the actual people involved, as well as the problem,¹⁵²

8. Speak the Basics of Your Counterparts' Language and Choose an Interpreter Carefully.

9. Never Act Superior to Your Counterparts: Always Treat Them as Equals.

10. Avoid Misunderstandings and Stereotyping.

See Julie Barker, *International Mediation-A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L. REV. 1, 52 (1996).

Raymond Cohen's Ten Recommendations for the Intercultural Negotiator:

1. Prepare for a negotiation by studying your opponents' culture and history, and not just the issue at hand.
2. Try to establish a warm, personal relationship with your interlocutors. [negotiation opponents].
3. Do not assume that what you mean by a message — verbal or nonverbal — is what representatives of the other side will understand by it.
4. Be alert to indirect formulations and nonverbal gestures. You may have to read between the lines. Do not lose your temper.
5. Do not overestimate the power of advocacy. Your interlocutors [negotiation opponents] are unlikely to shift their positions in response to good arguments.
6. Adapt your strategy to your opponents' cultural needs.
7. Flexibility is not a virtue against intransigent opponents. (If they are trying to find out your bottom line, repeated concessions will confuse rather than clarify the issue).
8. Be patient. (Bureaucratic requirements cannot be short-circuited).
9. Be aware of the emphasis placed by your opponents on matters of status and face.
10. Do not be surprised if negotiation continues beyond the apparent conclusion of an agreement.

See Raymond Cohen, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD* 225–26 (rev. ed. 1997).

Jeswald Salacuse's top ten ways that culture can affect your negotiation:

1. Negotiating goal: Contract or relationship?
2. Negotiating attitude: Win-lose or win-win?
3. Personal style: Informal or formal?
4. Communication: Direct or indirect?
5. Sensitivity to time: High or low?
6. Emotionalism: High or low?
7. Form of agreement: General or specific?
8. Building an agreement: Bottom up or top down?
9. Team organization: One leader or group consensus?
10. Risk taking: High or low?

Jeswald Salacuse, *Top Ten Ways That Culture Can Affect Your Negotiation*, IVEY BUS. J. (Sep.–Oct. 2004).

¹⁵¹ There are a wide array of books available about cultural differences. See KEVIN SINCLAIR & IRIS WONG PO-YEE, *CULTURE SHOCK! CHINA* (2002); P. SEAN BRAMBLE, *CULTURE SHOCK! JAPAN* (2004).

¹⁵² *GETTING TO YES* teaches us to separate the people from the problem; we also need to research the people with the problem. It would be useful to look at the differences from the perspectives of personalities, Myers-Briggs personality types, and corporate cultures.

- 3) Be flexible and understand that the parties may well act differently than the stereotypes, and that the stereotypes still are useful in planning for the mediation, and
- 4) Use the template to apply a variety of approaches in mediation based upon the Cultural Dimension Interests (CDI's) to resolve the dispute.

