

PLACEHOLDER

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PART THREE

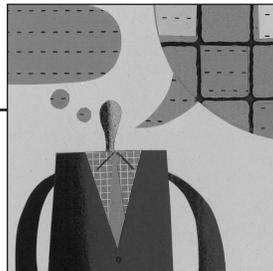
Specific Tools for Cross-Cultural Negotiation

Part Two of this book discussed and provided tools for U.S. negotiators concerning subjects touching almost every negotiation. This part continues to alert U.S. negotiators as to important issues; however, the issues in this part have a more specific application and they might not be present in every negotiation.

This part begins by examining the intricacies in setting an agenda in a cross-cultural negotiation, and it provides a toolbox on how to manage any difficulties encountered during this process. Next, this part examines indirect and non-verbal communication, and it provides tools on issues such as recognizing communication styles and proceeding via the written, rather than spoken, word.

Additionally, this part introduces issues relating to third parties that may be called into a cross-cultural negotiation, such as an interpreter or a mediator.

Finally, this part explores issues arising during or after a negotiation, such as when there is a change in the negotiators or when a negotiated agreement has been breached.



*Collision Course:
Avoiding Clashes on Agenda in
Cross-Cultural Negotiations*

Elizabeth M. Worthing

A b s t r a c t

Agreeing on an agenda is the first step to a successful negotiation. While the process becomes inherently more complicated in cross-cultural negotiations, establishing an agenda can be an opportunity to establish a rapport between the parties and set a precedent for a good working relationship. Despite the vast cultural differences existing worldwide, a willingness to adjust not only prevents these differences from becoming insurmountable problems but also turns these differences into opportunities to work together.

Through learning about different approaches to negotiations, U.S. negotiators can avoid cross-cultural clashes about the agenda.

A well-prepared U.S.-based agenda can be adapted to serve as an excellent starting point for effectively negotiating in almost any setting.

On the other hand, using the agenda of a counterpart and reciprocating could establish a solid foundation on which to build an agreement and a lasting working relationship.

I. Introduction

An agenda is frequently the first agreement reached in a negotiation. An astute negotiator might use this opportunity to establish a rapport between the parties and set a precedent for a good working relationship. For the less astute negotiator, trying to set an agenda could end a negotiation before it even starts. Consider the following example:

The United States and another country, Proposia, would like to conduct a three-week joint exercise next fall in Proposia. About 500 military personnel would be involved from each nation. There is no “status of forces” agreement or any other existing agreement between these forces, necessitating a negotiation for a number of matters. Representatives from both forces meet to discuss these issues.

After the introductions have been completed, the U.S. negotiator begins by saying: “I have identified four distinct issues that need to be discussed. These include...” However, the Proposian counterpart interrupts at this point: “That will be unnecessary as we have prepared a full proposal: The U.S. personnel should observe Proposian domestic laws, should not attempt to convert any Proposians to their religious beliefs, and should avoid socialization with Proposian troops. Also, any problems that arise will be handled by Proposian courts.”

The U.S. negotiator is stunned by this full proposal, despite being willing to agree to parts of it. The U.S. negotiator again suggests discussing each issue individually as dictated by the agenda that the United States prepared. The Proposian counterpart insists that it is necessary to know the entire content of the agreement but that the U.S. negotiator is free to make a full proposal in response. The U.S. negotiator replies that doing so would be impossible.

The negotiators have reached an impasse before the negotiation has even substantially begun. If nothing changes, the parties will leave the negotiating table and both will suffer from not reaching an agreement. The tools outlined in this chapter, however, will equip a U.S. negotiator from avoiding impasse at this stage. A willingness to adjust may prevent these differences from becoming insurmountable problems. A U.S. negotiator can learn about different approaches to negotiations, including those identified in Chapters 2 and 3, and use that newly gained knowledge to avoid cross-cultural clashes about the agenda. Through examining the way that U.S. negotiators are trained to approach agendas and contrasting it against various cross-cultural approaches, it becomes possible to use a U.S.-based agenda as a starting point for effectively negotiating in almost any setting.

II. Prevalent U.S. Approach to Agendas

Most U.S. negotiators recognize the importance of preparing for a negotiation, but they do not always recognize the importance of the agenda. For many, the agenda is simply a list of issues that are jotted down at the end of doing research and preparing for the negotiation. The negotiator does not always consider the order in which he wishes to address the issues or how to handle changes to the agenda by the negotiating counterpart. Once an agenda is set in the U.S. negotiator’s mind, it is not easily changed. Tradition may account for this steadfastness. In the United States, organization tradition is an integral part of business, and therefore negotiation. Indeed, rules even exist on how to run meetings. *Robert’s Rules of Order*, the preeminent text on running a meeting, states that “[a]fter an agenda or program has been adopted by the assembly, no change can be made in it except by a two-thirds vote, a vote of a majority of the entire membership, or unanimous consent.”¹ This inflexibility can be a major roadblock to achieving negotiation goals.

Many U.S. negotiators focus on controlling the agenda as a way to establish dominance and as a way to set the tone of the negotiation. Practitioners’ guides commonly give advice on how to control the agenda.² A negotiator, according to these texts, is taught to begin “the negotiation the way you want to and assert control.”³ Often, the U.S. negotiator will try to be the first to present an agenda because he may believe he gains an advantage and control over the entire negotiation by controlling the agenda.

Under this approach, flexibility is not encouraged. In fact, it is sometimes discouraged: “If you want to be a problem solver, it means setting the style and keeping it set.”⁴ This type of domineering approach may be useful when negotiating with a U.S. counterpart, but in cross-cultural negotiations, a hardnosed approach to the agenda may overtake the objective of the negotiation: reaching a workable agreement.

III. Letting Go

If a U.S. negotiator is too focused on controlling the agenda, he may lose sight of the big picture. The end goal is not to control the agenda, but to get the job done and reach an agreement. Controlling the agenda is not always possible or necessary, and a good negotiator will be able to reach a favorable outcome in any event. Once a U.S. negotiator realizes that a clash could exist between the negotiator's and his counterpart's approach, he should consider reciprocity as an alternative to controlling the agenda.

Reciprocation, in this context, means attempting to adopt the negotiation approach of the counterpart as a means to help facilitate open communication and to get results. A negotiator may worry that reciprocating the approach of one's negotiating counterpart may be considered 'giving in' and that an advantage will be lost. However, as stressed throughout this book, reciprocity is an excellent way to establish a good working relationship during cross-cultural negotiations. As emphasized in Chapter 5, the earlier that this relationship begins and the parties learn to trust one another, the more likely it is that an agreement will be reached.

For U.S. negotiators who are set in their ways, it may be much easier to reciprocate a culturally different approach when discussing the agenda than when deciding substantive issues. 'Giving in' on the procedure puts the U.S. negotiator in the advantageous position of having already made concessions when discussing the substance of the negotiation. A U.S. negotiator can point to these procedural concessions as examples of willingness to cooperate and of how far he has already moved from the original conception of the agreement without ever having adjusted on substance. For this reason, it can be to a U.S. negotiator's advantage to let go of the idea of controlling the agenda and instead to reciprocate to the best of the negotiator's ability.

IV. Potential Clashes & How to Address Them

The following section contrasts some of the negotiation approaches first introduced in Chapters 2 and 3 of this book. As noted in those chapters, the list is not exhaustive. As Professor Jeanne Brett of Northwestern University explains, the nuances of culture can shape a negotiator's strategy and style.⁵ Cultures vary widely and it would be impossible to examine every cultures' approach to negotiation. However, the following sections address some of the different styles found outside of the United States.

While the U.S. approach to setting agendas is far from perfect, the preparation and careful thought that go into an agenda can still be useful. A U.S. agenda incorporates research and issue spotting, creating a wealth of raw information in one document. Once a U.S. negotiator is adept at identifying which negotiation approach is being used, the U.S.-based agenda can be used as a starting point in a variety of cross-cultural negotiations. By examining the potential clashing points between the U.S. approach and a variety of other negotiation approaches, one can see how the U.S.-based agenda can become a useful tool in a cross-cultural negotiation, no matter what negotiation approach is being employed.⁶

A. Community Based

The community-based negotiator is not only motivated by wanting to reach an agreement but also by wanting the final agreement to benefit the community at large. This motivation may contrast sharply if the U.S. negotiator's tendency is to be motivated by monetary and business concerns. In this situation, it is not that a U.S. negotiator is unconcerned about the effect an agreement may have on a community. It is simply that the agreement's effect on the community is not necessarily a "deal breaker."

Despite being somewhat unfamiliar to U.S. negotiators, the community-based negotiating counterpart's desire for public good can be used by a U.S. negotiator to benefit the negotiation. A U.S. negotiator could use the information contained in the U.S.-based starting point agenda to demonstrate a direct benefit to the negotiating counterpart's community. Another option would be to illustrate how *not* discussing the issues in the agenda would negatively affect the community in question. However, as discussed in Chapter 8, one should take care not to sound threatening when discussing possible negative effects.

If the U.S. negotiator is unable to identify a direct effect on the community from the negotiation, the U.S. negotiator can stress that the negotiation will maintain the status quo or that it will, at least, not negatively affect the community. If the U.S. negotiator is aware that the negotiation may negatively affect

the community, he should work with his community-based negotiation counterpart to ascertain what type of benefits the community needs, whether monetary or otherwise, and explore whether providing that benefit can be built into the agreement.

B. Ritual: Haggling

For some cultures there is a ritual, or procedure, that surrounds a negotiation. One common example of a negotiating ritual is haggling. While U.S. negotiators may associate haggling with marketplaces, it is commonly used in a variety of other negotiations. Even in the United States, it is not uncommon to run across haggling. In the United States, haggling is frequently called “positional bargaining.” A basic review of positional bargaining techniques may be beneficial to a U.S. negotiator before attempting to negotiate with a haggler.⁷ Chapter 3 discusses using a reciprocal approach in a variety of settings. Once familiar with positional bargaining techniques, the U.S. negotiator can use the previously prepared agenda to uncover the best starting position, how and when to move between positions, and what position not to go below. The U.S.-based agenda can also be used to justify positions and moving from established positions. Just as before, the U.S.-based agenda is a wealth of information that simply must be framed in a way that is reciprocal to a negotiation counterpart’s approach.

C. Full Proposal

As in the example in the introduction to this chapter, some cultures prefer to negotiate by presenting a full proposal, either initially or in response to their negotiating counterpart’s full proposal. As illustrated above, the clash between the full proposal approach and the U.S.-based agenda has a high probability of deadlock. Instead of insisting upon discussing issues separately, it may be beneficial for a U.S. negotiator to agree to reciprocate the full proposal approach.

A U.S. negotiator can easily use the previously prepared agenda to compose a full proposal. All of the information about what issues the proposal needs to include and approximate outcomes the U.S. negotiator would prefer for each issue is already included in the prepared agenda. The U.S. negotiator simply needs to synthesize the information included in the agenda into a full proposal for the agreement. This adjustment is especially effective if the negotiating counterpart has made the first full proposal. In that case the agenda can be used to help form a response to the initial proposal.

D. Hierarchical

In some cultures, social hierarchy may directly affect a negotiation and its outcome.⁸ This can become a problem if the U.S. negotiator and the negotiating counterpart are not considered to be of the same status. If the negotiating counterpart feels that he is of a higher status than the U.S. negotiator, he may attempt to dominate the negotiation and not make any movements towards a joint agreement. On the other hand, if the negotiating counterpart feels that he is of lower status than the U.S. negotiator, he may not wish to proceed with the negotiation for fear of being pressured into an unfavorable agreement.

If the negotiation is dictated by hierarchy and the U.S. negotiator’s counterpart is considered higher in the relevant hierarchy, the U.S. negotiator may wish to refer to a superior during the conversation. The U.S. negotiator may also indicate that the superior had direct contact with or influence on the agenda presented. Additionally, the negotiator may wish to ask the negotiating counterpart to proceed with this negotiating session, but to schedule future meetings with the proper U.S. equivalent.

If the U.S. negotiator’s counterpart is considered lower in the relevant hierarchy, the U.S. negotiator should be careful not to abuse the apparent power of the situation. When in this situation, the U.S. negotiator may be able to dictate the agenda; however, the astute negotiator will be careful not to push the negotiating counterpart into a “take my ball and go home” situation. If the U.S. negotiator gives clear justification for why certain items are included on the agenda, the counterpart may feel as if power has been equalized between the parties. For more information on the role of status in cross-cultural negotiations, please refer to Chapter 8.

E. Saving Face

In some cultures, the idea of saving face, i.e., avoiding shame or embarrassment, and not causing others to lose face is extremely important.⁹ This is particularly common in Eastern cultures. A negotiating counterpart may never actually say “no” or directly reject an issue, but that does not mean the counterpart agrees with the U.S. negotiator’s formulation of the issues. Therefore, a U.S. negotiator should tread lightly when proceeding with issues that his negotiating counterpart seems quiet or only lukewarm about discussing.

Similarly, the U.S. negotiator should avoid offending the counterpart when rejecting proposed issues for the agenda. A veiled rejection is usually highly effective when dealing with this type of negotiation approach. Such rejection can always be made more direct if the meaning has been lost on the counterpart. An interpreter, too, can be an invaluable resource for a U.S. negotiator attempting to address this type of delicate situation. For more advice on the effective use of an interpreter in cross-cultural negotiations, refer to Chapter 11.

V. Conclusion

Agreeing on an agenda is first step to a successful negotiation. While the process becomes inherently more complicated in the cross-cultural context, setting the agenda can still be an opportunity to establish a rapport between the parties and set a precedent for a good working relationship. Despite the cultural differences around the world, a willingness to adjust not only prevents these differences from becoming insurmountable problems but also turns these differences into opportunities to work together.

Through learning about different approaches to negotiations, U.S. negotiators can avoid cross-cultural clashes about the agenda. A well-prepared U.S.-based agenda can be adapted to serve as an excellent starting point for effectively negotiating in almost any setting. Through letting go of control over the agenda and instead reciprocating to the best of the negotiator’s ability, a U.S. negotiator can establish a solid foundation on which to build an agreement and lasting working relationship.

Toolbox for Negotiators:

Prepare:

- consider what issues you would like to discuss in the negotiation
- complete all applicable cultural research
 - look for clues about what negotiation approach may be used
- complete a U.S.-based agenda, keeping in mind that it will most likely serve as a starting point

Perceive:

- attempt to identify which negotiation approach your counterpart is utilizing
 - remember it may be helpful to allow the counterpart to speak first or make the first proposal in order to have more to observe
- if the negotiation approach is not immediately identifiable, note traits that you can reciprocate

Proceed:

- reciprocate your counterpart’s negotiation approach as much as possible

Endnotes

¹ RONR (10th ed.), p. 360, l. 24-27.

² THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION 46-49 (1996); *see also* DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS 75-78 (1989).

³ GUERNSEY, *supra* note 2, at 47.

⁴ *Id.* at 48.

⁵ JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES 6-7 (2001).

⁶ A U.S. negotiator may sometimes find he is dealing with a negotiating counterpart of a different cultural background, but with a negotiating approach that is strikingly similar to the general U.S. approach. The U.S. negotiator should not feel as though he has to address cultural differences if his counterpart has made it clear that he is comfortable proceeding with the U.S. approach. While there may still be underlying cultural differences, a large number of foreign negotiators are being trained in styles similar to those being taught in the United States. If this is the case, the U.S. negotiator may wish to allow his counterpart to put those skills to the test; however, in this situation, it may serve the U.S. negotiator well to periodically assess whether or not the negotiation has maintained this U.S. approach or switched to a different bargaining approach.

⁷ Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259, 259-63 (1973). The tactics listed in this article are frequently cited as examples of what not to do for U.S. negotiators trained in the methods of alternative dispute resolution. Indeed, the authors of the article do not even advocate their use. *Id.* Although somewhat severe, many of the techniques discussed are useful if the negotiator is participating in a strictly positional, or haggling, negotiation.

⁸ BRETT, *supra* note 5, at 100-04.

⁹ *See* David A. Victor, *Cross-Cultural Awareness*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS: A COMPARISON OF CROSS-CULTURAL ISSUES AND SUCCESSFUL APPROACHES 15, 50 (James R. Silkenat & Jeffrey M. Aresty eds., 1994).

Channels of Information Exchange: Indirect and Non-Verbal Communication

Elizabeth Stanfield

A b s t r a c t

Communicating information accurately and thoroughly is an essential goal of negotiation. The accuracy of information exchanged between negotiators of different cultures can be improved by focusing on the mode of communication, the non-verbal cues of the parties, and questions and issues.

This chapter contains guidelines to choose which type of communication suits which culture. It also includes information about media awareness.

I. Introduction

In his response to a question from an American wire-service correspondent about conditions under which the blockade might be ended, Stalin did not mention the reason given by the Soviets for imposing the blockade in the first place – the new West German currency. Dean Acheson, then U.S. Secretary of State, interpreted this as a signal that “Moscow was ready to raise the blockade for a price.” He therefore signaled back via a Washington press conference that the United States was prepared to negotiate but would prefer using a more private channel.¹

One of the most important pieces of cross-cultural negotiation is communication. Negotiations typically encompass an exchange of information, leading to proposals and culminating in a contract. Communicating information accurately and thoroughly is of primary importance to a negotiation, and communicating across different cultures can challenge the clarity of information presented in a number of ways. Among other difficulties, non-verbal information can be lost in the mode of communication and non-verbal communication can be misinterpreted.

Negotiators can communicate in a variety of ways. Large amounts of data can be sent electronically, and the parties may never need to meet face to face. Paper can be shipped anywhere in the world, and video-phones can add a human element to teleconferencing. However, this relative ease of communication can also have its drawbacks. For example, e-mail can lack tone, and teleconferencing can lack non-verbal cues.

The mode of communication and the way questions and issues are framed are both important. Requests for information or other questions in the negotiation process may be stated in the best way for a particular culture as a tactical way to increase the clarity of communication. Negotiators can also frame issues in the best way for disparate cultures and increase communication effectiveness by paying attention to the culture’s needs.

Along with verbal aspects of communication, non-verbal cues by the counterpart as well as the negotiator can influence a negotiation. These cues may distort the message if used unwittingly. Cues vary from culture to culture, but some general guidelines are available to make the communication between negotiating parties clearer.

Another interesting aspect of negotiation, particularly between different cultures, is the way a negotiated agreement can affect a society. The method of communication through which an agreement is reached can both affect the agreement itself and the way the society views the agreement. In today’s society, large international agreements and negotiations can have an impact larger than that on the parties themselves, depending on how the public perceives the agreement. The public’s perception, then, can then affect the negotiators.

II. Practical Issues of Communication

All negotiations require communication. When parties cannot meet face-to-face, they will have to communicate by other means, such as by speaking over the telephone, faxing, or mailing. Which mode of communication is best for which negotiation may depend on the counterpart’s culture.

A. Properties of Communication

Each method of communication has certain traits that make it suitable to use in certain negotiations. Communication can be immediate and simultaneous, such as phone conversations, or more removed, such as writing letters sent over e-mail or regular mail. Communication methods can also be either rich in detail or pared down to the essentials. Face-to-face conversation is considered high in detail because the parties experience both verbal and non-verbal cues that can help them interpret the message. E-mail conversations, conversely, have fewer accompanying cues.² Text-only conversations, such as e-mail or written communications, can have some detrimental effects. The information is pared down to the essentials, and the parties learn less about each other. Written communications, too, may be more informal, containing lies, curse words, and outbursts. Exchanging at least some information over more immediate methods, such as the telephone, can minimize these problems.³ Text-only communication can also have benefits. More information can be transmitted at one time, such as the content of spreadsheets or reports. Text communications also give the recipient time for each person to logically look at the information.

Similarly, parties who may react physically or emotionally to the presence of the other will have fewer cues on which to react. Finally, communicating in text can minimize anger or class differences.⁴

B. High-Context vs. Low-Context Cultures

The expression “low context” has many meanings. Low-context language assumes that the reader has no prior knowledge of the subject other than the content of the writing. A novice could read a low-context set of instructions and immediately follow them because all of the information is available in the instructions themselves.⁵ A cooking recipe is the quintessential example of a low-context message because the reader need not look any farther than the recipe to prepare the dish.

Low-context cultures are also characterized by a direct approach to communication, with emphasis on logic and clear arguments. Intention and meaning are “best expressed through explicit verbal messages.”⁶ These messages convey thoughts, feelings, and opinions clearly and directly. Cultures that laud individual effort and decisions use low-context language. The American culture is considered a low-context culture when dealing with others. Information and knowledge are generally rewarded more than relationships, which may frustrate members of a high-context culture.⁷

“High context” communication assumes the reader has prior knowledge of the subject matter discussed. A high-context set of instructions to build a motor, for example, might assume that the reader was a machinist and would not explain basic terms or would include diagrams with little accompanying text. If the reader did not have prior knowledge of the subject matter, he may or may not be able to understand the communication.⁸

High-context cultures have an indirect communication style and assume the listener will read between the lines to decode the true meaning of the message. Social norms, rules, and other contexts may also be part of the message. These cultures can be more formal and have a self-effacing style.⁹

In contrast to more individualistic cultures, high-context cultures may reward relationships more than individual effort. High-context cultures or groups are often tight-knit groups already having prior knowledge of a situation. Relationships may already exist in this group, and continued harmony is highly important. However, an outsider may feel lost, not knowing what is going on. A member of a low-context culture may wonder if all the information is being shared, or if he is being “kept in the dark.”¹⁰

C. Non-Verbal Communication

Culture dictates non-verbal communication practices to a high degree. Some gestures or symbols are known only within a particular subculture; some tones of voice are only used within a particular subculture. Therefore, knowing these specific symbols and tones of voice may be helpful to the negotiator.¹¹ Some guidelines on non-verbal communication, however, do exist.

People communicate non-verbally in many different ways. The faces people make can convey disgust, anger, or amusement. Gestures made with the hands or specific body postures can convey emotions, such as fatigue or frustration. Even though the voice is used to communicate information, the tone of the voice is a non-verbal cue, and can convey emotion. Non-verbal cues, however, can confuse negotiators of a different culture if the cultures have conflicting ideas of what these non-verbal cues mean. Breathiness, volume, and tempo of speech are just a few such non-verbal cues signifying different things to different cultures. To Americans, loud voices can mean anger or excitement. People in other cultures use loud voices as the default mode of polite conversation or as a way to express sincerity.

The face, too, can convey many things, particularly the gaze. Some cultures consider direct eye contact as an affront, and others view the same action as merely paying attention to what the speaker says. However, most strong emotions in the face seem universal, such as “happiness, surprise, contempt, disgust, fear, anger, and sadness.”¹²

Another notable non-verbal cue is the space between the people in the discussion. People in some Middle Eastern cultures, for example, tend to prefer to stand close to the person with whom they are talking. Others, such as Australians, may prefer to stand farther away.

Although watching for non-verbal cues is important, the non-verbal cues of the counterpart may not carry the same meanings as within the negotiator’s culture. Avoiding culture-specific non-verbal cues and

maintaining a low physical profile can help a negotiator keep from offending the counterpart. Equally important is explaining and asking about cues that might cause misunderstandings.

D. E-mail and Other Forms of Written Communication

E-mail messages, faxes, and other written forms of communication have the obvious disadvantage of not including non-verbal cues, such as tone. Text-based communications have other drawbacks and advantages. For instance, writings can be formal, with the full force of law. Negotiators in a high-context culture may prefer to reach a consensus before anything is written down. Conversely, people in a low-context culture may prefer written proposals be completed early to explain and specify the information.

E-mail and faxed communications are not considered as formal as other written communications. E-mail, in particular, can be viewed as private communications with no legal merit. Writers, communicating private matters, may inadvertently disclose damaging information. For example, former Federal Emergency Management Agency director Michael Brown sent many e-mail messages while dealing with Hurricane Katrina, and although he expected the messages to be private, he was subsequently questioned about them during a Congressional inquiry.¹³

Sending papers through the mail may be considered more formal than electronic communications. Those in cultures who prefer to reach consensus before writing a contract may not wish to communicate through paper due to the formalities attached to such a form. Conversely, people in cultures valuing information may prefer communicating in paper prior to reaching a negotiated contract.

E. Telephone and Other Verbal Communication

The biggest disadvantage with voice-only communication is the lack of non-verbal cues. Negotiators who rely heavily on non-verbal cues may prefer another communication method. Voice-only communications, too, are rarely recorded and often viewed as informal.

A less-obvious problem with telephone and other voice-only communication is static on the line and other technical difficulties. The counterpart may not understand every word said, especially when the cross-cultural negotiation already suffers from language barriers. In light of these difficulties, telephone communications may be misheard or misinterpreted.¹⁴

When choosing a method of communication, convenience and familiarity may be important factors for a negotiator to consider.¹⁵ Depending on where the parties are physically located, only certain means of communication may be available. Additionally, people in some cultures may not be technologically advanced enough to have video-conferencing or other highly technical means of communication. However, a negotiator can always supplement one method of communication with others to clarify the meaning of the information exchanged.

III. Societal Effects and the Mode of Communication

Negotiations do not always occur between two individuals. Sometimes, the actual parties are large corporations, countries, international organizations, or factions within a country.¹⁶ Such negotiations can have far-reaching effects, like a declaration of peace or war. Often, negotiations of this magnitude are carried out in the public eye. The media can inform both the negotiators and the public about the status of the negotiation.¹⁷ The negotiators, through leaks or press conferences, can inform the public, while the public, through opinion polls and independent reports, can influence the negotiations.¹⁸ The success or failure of a particular negotiation may depend on the public opinion, especially when the negotiation concerns matters of war and peace.¹⁹ Furthermore, the conclusion of the negotiation may be dependent on the participation of the community, such as when the public must ratify any agreement reached.²⁰

IV. Conclusion

Negotiators have many tools at their disposal. One tool is the way parties communicate with each other. Negotiators should strive for the greatest possible understanding between the parties and can use the mode of communication to help with this goal. The following toolbox is a non-exhaustive checklist of ideas negotiators can use when considering the issues discussed in this Chapter.

Checklist of Ideas

- *Fostering greater understanding:*
 - **Patience** – Especially when misunderstandings occur. Misunderstandings are particularly common in cross-cultural negotiation.
 - **Ask questions** – If a message is unclear, ask what the other person meant to communicate.
 - **Explain** – If the other person appears to have misunderstood you, explain why you believe there was a misunderstanding and what you meant by your communication.
 - **Do not assume** – Try not to assume what the other person meant or what the counterpart thought you meant.

Choosing Modes of Indirect Communication

- **Unavoidable** – Sometimes there is no way to communicate other than a couple of basic methods.
- **Supplement** – Supplement your chosen method of communication with other methods. For example, if the negotiation is carried out solely by e-mail, use the phone to supplement, when possible.
- **Determine whether the counterpart is from a low- or high-context culture** – What depth of knowledge do the parties share? Does the counterpart come from a culture that rewards individual efforts or are decisions reached in groups? Does the person value knowledge more than relationships? These questions can help the negotiator determine if the counterpart uses low- or high-context communication and which mode of communication will be most effective.
- **Determine the appropriate density of information.** After determining if the counterpart is from a low- or high-context culture, determine the proper density of the communication. Those in low- context cultures prefer a high density of information, while those in high-context cultures prefer a low density.
- **Formality** – People in high-context cultures prefer formality but less dense information, and they often prefer to reach a consensus before memorializing any agreement in writing. Those in low-context cultures prefer less formal methods of communication and high-density communications.

Dealing With Non-Verbal Cues

- **Observe** – Watch the non-verbal cues of the other person. Try to be aware of what messages such cues are conveying.
- **Refrain from using symbols** – Culture-specific symbols are easily misunderstood.
- **Be cautious when using non-verbal cues** – Try to refrain from using cues such as gestures, unless the observations of the culture indicate that these cues are used.
- **Research** – Research may uncover non-verbal cues, culture-specific symbols, and other cultural indicators.

Endnotes

- ¹ W. Phillips Davison, *News Media and International Negotiation*, 38 PUB. OPINION Q. 174, 180 (1974).
- ² Kathleen L. McGinn & Rachel Croson, *What do Communication Media Mean for Negotiators?*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 334, 338 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).
- ³ *Id.* at 339.
- ⁴ *Id.* at 357.
- ⁵ CYNTHIA GALLOIS & VICTOR J. CALLAN, COMMUNICATION AND CULTURE: A GUIDE FOR PRACTICE 44 (1997).
- ⁶ STELLA TING-TOOMEY, COMMUNICATING ACROSS CULTURES 100 (1999).
- ⁷ GALLOIS, *supra* note 5, at 48-49.
- ⁸ *Id.* at 45.
- ⁹ TING-TOOMEY, *supra* note 6, at 101.
- ¹⁰ GALLOIS, *supra* note 5, at 49.
- ¹¹ TING-TOOMEY, *supra* note 6, at 115.
- ¹² GALLOIS, *supra* note 5, at 57.
- ¹³ H.R. REP. NO. 109-396, Supplementary Report and Document Annex, Staff Rep. for Rep. Charles Melancon, *Hurricane Katrina Document Analysis: The E-Mails of Michael Brown* (2005).
- ¹⁴ Tae-Seop Lim, *Language and Verbal Communication Across Cultures*, in CROSS-CULTURAL AND INTERCULTURAL COMMUNICATION 53, 63-66 (William B. Gudykunst ed., 2003).
- ¹⁵ GALLOIS, *supra* note 5, at 85.
- ¹⁶ Richard Jackson, *Successful Negotiation in International Violent Conflict*, 37 J. OF PEACE RES. 323, 324 (2000).
- ¹⁷ Davison, *supra* note 1, at 182-83.
- ¹⁸ *Id.* at 183.
- ¹⁹ *Id.*
- ²⁰ Frederick S. Pearson, *Dimensions of Conflict Resolution in Ethnopolitical Disputes*, 38 J. PEACE RES. 275, 279 (2001).

*Using an Interpreter During Negotiations:
Ensuring that Everyone has the Chance
to Hear and Be Heard*

Cherish L. Cronmiller

A b s t r a c t

When interpretation services are necessary for a negotiation to proceed, the interpreter becomes a vital component of the negotiation process. Ensuring that the interpreter is competent and prepared for the negotiation increases the likelihood of success. Interpreters may offer some key cultural insights that might otherwise be missed by persons that do not speak the same language as negotiation counterparts. This chapter provides an overview of the types of interpretation, how to choose an interpreter, and best practices to consider when using the services of an interpreter.

I. Introduction

“There is no greater barrier to communication than the inability to use the same language.”¹

When parties do not speak the same language, trying to negotiate effectively becomes secondary to trying to understand each other. Having an interpreter or translator available allows parties to refocus on effective negotiation skills. There are, however, some key considerations when using an interpreter or translator, especially in a cross-cultural context. This chapter will cover the types of interpretation to consider, the qualifications of a skilled interpreter, and what best practices to employ during an interpreted negotiation.

II. Interpreting vs. Translating

“Interpreting” and “translating,” although often used interchangeably, are not synonymous terms. Interpretation refers to the “unrehearsed transmitting of a spoken or signed message from one language to another.”² Translation is “converting written text from one language into written text in another language.”³ Translators have access to various resources and reference materials to help them convert the text. Interpreters, however, must use a number of cognitive skills at once in a short time frame. In other words, interpreting is for the spoken word and translating is for the written word. But as the following example illustrates, both tasks can be equally valuable.

“¡Hombre, ni tengo diez kilos!” A Cuban man used this phrase “in response to a request for a loan and, given the dialect of the speaker and the context of the statement, they can properly be translated as ‘man, I don’t even have ten cents.’ Instead, the court interpreter mistakenly translated them as, ‘man, I don’t even have ten kilos.’” The quote was taken from a wire tape of a defendant’s telephone conversation. “The Spanish word ‘kilo’ can be translated into English as either ‘kilogram’ or ‘cent.’ Which word is the better translation depends on the dialect of the speaker and the context of the statement. First, the word ‘kilo’ is commonly used to mean ‘cent’ among Cuban speakers of Spanish such as the defendant. Next, the context of the situation clearly indicates that the speaker was using the word to mean ‘cent’ not ‘kilogram.’ . . . The discrepancy was discovered when a more experienced interpreter heard the original recording of the defendant’s statement. If the same error had occurred during an interpretation of the defendant’s testimony, rather than a translation of a tape recorded conversation, it probably never would have been discovered unless another interpreter was present.”⁴

This example also illustrates two other key issues discussed later in this chapter—that knowing a particular language is not enough if the translator is not familiar with the specifics of the regional dialect, and that having a system in place to supply a verification of the interpretation/translation can provide added peace of mind in the negotiation context.

Before discussing logistics, this chapter will outline the types of interpretation services available so that a person can effectively select what mode will best suit the given negotiation context.

A. Modes of Interpretation

The three most common modes of interpretation are: simultaneous, consecutive, and summary. During simultaneous interpretation, the message is interpreted continuously with a slight lag behind the speaker. Consecutive interpretation allows the message to be interpreted during the speaker’s pauses. Summary interpretation involves a speaker giving a message and the interpreter giving a paraphrase of the speaker’s message. Summary interpretation is disfavored in negotiations when each word and sentence the negotiator speaks can be vital to the overall message. As such, only simultaneous and consecutive interpretation will be discussed in greater detail.

1. Simultaneous

Having an interpreter, no matter what the mode of interpretation, slows the overall negotiation process. Between these two types of interpretation, simultaneous interpretation can speed up the interpreting process. However, the problem is that often two people are speaking at the same time, so unless interpretation equipment is available, such as headsets and small microphones, the constant speaking of both parties can be disruptive to everyone involved. Peacekeeping negotiations in the field often employ “chuchotage,” or “one-to-one direct translation where the interpreter ‘whispers’ the translation for up

to three persons.”⁵ This method, however, may need to be disclosed to the other negotiating parties to avoid the appearance of impropriety because a counterpart might be inclined to think that the interpreter is whispering secrets or information that should not be overheard.

Though this mode of interpretation speeds up the process, the interpreter must hear an entire sentence, or passage of sentences, in order to fully understand what is being communicated. In each language there are nuances that without knowing or anticipating the following words, an overall meaning could be lost. With such a potential problem in mind, the interpreter has to be able to make corrections as a person speaks and sometimes must anticipate what is going to be said in order to properly construct the interpretation in the other language. If time is a factor or interpretation equipment is available to reduce the possibility of disrupting the speaking party, then simultaneous interpretation is often the better mode to employ.

2. Consecutive

This mode may be preferential when accuracy is essential because the interpreter hears the whole message before interpreting. This type of interpretation is mentally taxing on an interpreter because it requires excellent memory skills of the interpreter or effective note-taking capabilities.⁶ Consecutive interpretation forces a speaker to insert pauses in the communication where pauses may not otherwise have existed in order to give the interpreter time to interpret the message. Of the two processes, consecutive takes substantially more time than simultaneous, but it may result in a more accurate interpretation.

In a simultaneous interpretation, a listening party can more accurately attempt to match what is being said with the counterpart's tone, inflection, facial movements and gestures. Likewise, as the listening party is hearing the interpretation he can also be communicating nonverbally with facial expressions and gestures. The speaking party may feel more confident that the listening party understands and may actually shorten the message with this added reassurance.

A negotiator would be well served by attempting to use both modes during training to see which mode feels more fluid to the interpreter. The training experience may also help a negotiator better assess when to employ a specific mode of interpretation. Equally important, when doing initial preparation with an interpreter, a negotiator might want to ask the interpreter which method she is most comfortable utilizing. The interpreter may only be trained in one mode of interpretation, in which case, the negotiator is left with no choice. Ideally, a negotiator would be able to select an interpreter based on her skill set, but sometimes interpreters are in short supply. Regardless, it is beneficial to understand what makes a qualified interpreter.

III. What Does it Mean to be Skilled? and Where to Find a Skilled Interpreter?

[T]he...interpreter must listen, comprehend, abstract the message from the words and word order of the message, store the ideas into memory, and then set about searching for conceptual and semantic matches to reconstruct the message in the other language, all this within the cultural and linguistic constraints and operating rules of that language. This takes place while the interpreter is listening for the next 'language chunk' to process while simultaneously monitoring his or her own output.⁷

Being an interpreter requires great mastery and skill in performing all the aforementioned tasks. As previously noted, an interpreter should know the applicable regional dialect. If she is not skilled in this area, acknowledging this deficiency is crucial and the interpreter will hopefully feel comfortable asking clarifying questions to the speaker. Further, the interpreter must be able to interpret at the same educational level as the speaker. Likewise, if the speaker will be using subject-specific terminology, it is important that the interpreter be knowledgeable in the pertinent subject. For example, if the speaker is associated with the military and the negotiation pertains to a specific combat mission or military equipment, then the interpreter may encounter terms she has never heard before. Such specifics can be addressed in the preparation with an interpreter, a topic that will be discussed in the next section.

Given the aforementioned skills, a qualified individual is more than merely bi- or multi-lingual. “[B]ilingualism does not qualify a person to interpret any more than the ability to type qualifies a person to be a stenographer.”⁸ Using a friend, neighbor, or even a local interpreter can jeopardize the effectiveness, accuracy and the impartiality of the negotiation due to emotional involvement by such a partic-

ipant. However, there may be situations in which having anyone who can somewhat interpret is better than having no interpretation at all. In such circumstances, knowing where to find potential interpreters can also be useful.

A. Where to Look

The following is a non-exhaustive list of places to consider seeking an interpreter: local courts, government agencies, hospitals, churches, community organizations, and foreign language departments in colleges and universities and private schools. The Army Field Manual: *Civil Affairs Tactics, Techniques, and Procedures*, offers insightful recommendations regarding the criteria to seek in potential interpreters. If the interpreter is local to the community, a negotiator may wish to recognize this person's loyalties. It may be necessary to withhold sensitive information from this person if a negotiator fears that the interpreter may misuse such information. Likewise, a negotiator might seek reassurances from the negotiating counterpart approving of the interpreter used. The negotiator may believe the interpreter to be competent and trustworthy, but the counterpart could know or think otherwise. Asking the counterpart if this interpreter is acceptable, through another interpreter, can easily address this issue.

In order to resolve the local dialect dilemma, a native speaker from the region might be best qualified. As a native, she will also be comfortable with accents and mannerisms exhibited by the speakers for whom she is interpreting. Similarly, a qualified and effective interpreter will be comfortable with the negotiator's primary language. Knowing the language that is being used to interpret is equally important if the person is interpreting from the local to the non-native speaking counterpart or interpreting from the non-native speaking counterpart to the local language. Although assessing a person's ability is difficult, a few techniques can be employed in order to better assess a person's interpretation skills.

B. Testing a Potential Interpreter

There are a few techniques that anyone can use to assess someone's language capabilities. One of the most frequently employed techniques is "back-translation."⁹ A person is asked to translate a text from one language to another and then after at least an hour, or sometimes a day or more, the person is asked to take the translated foreign text and translate it back to the original language. Then a comparison can be made between the original message and the back translation to see how closely the original message has been preserved.¹⁰ Such a test is good for written materials, but this technique could also be utilized by using a voice recording and playing back the interpreted message. For example, a negotiator would articulate a few sentences and the interpreter would interpret the sentences on a recording. The negotiator could wait a few days, or give the negotiator some other tasks, then later play back the recorded message and ask for the interpretation back into the original language to see how well the original message is preserved.

A similar tactic would be to utilize multiple interpreters, and each one could serve as a check for the others. This may also be a consideration for best practices because interpreting is mentally taxing and allowing the interpreters to rotate would keep them sharp mentally. There are a host of other considerations that can go a long way to ensuring a successfully interpreted negotiation that extends beyond the competency of the interpreter.

IV. During Negotiations: Best Practices

Like a well-crafted negotiation, there are similar skills that go into a successfully interpreted negotiation. Hopefully the negotiator will have time to prepare; as discussed in other chapters of this text, preparation can sometimes mean the difference between a successful outcome and a lost opportunity.

A. Preparation

As aforementioned, a negotiator may consider discussing the interpreter's preferred mode of interpreting and explaining which mode would better suit the needs of time and accuracy. The negotiator may want to know if and how the interpreter will be able to disclose and explain the counterpart's demeanor, tone, and mannerisms. The negotiator and interpreter can plan and decide what should be done if she encounters foul language and racial and ethnic slurs. Best practices will include the negotiator reviewing the negotiation process with the interpreter and explaining what the negotiation is about, how the nego-

tiator would like the discussion to proceed, what information will be important to ascertain, and what the negotiator is seeking as an ultimate goal.

The negotiator may want to inquire as to how much the interpreter knows about the culture, whether direct eye contact should be expected, or if it is acceptable to shake hands. Depending upon the environment, a negotiator may need to mentally prepare the interpreter for what she may encounter at the negotiation. The negotiator may want to let the interpreter know if there will be weapons in plain sight, if there is military action in the area, whether there are sick or injured persons in the area, or if sensitive subjects will be addressed, such as killings, rape, or torture. This way, the interpreter can feel mentally prepared so she can focus solely on interpreting and not trying to process extraneous matters in the environment.

If the negotiator uses a standard introduction to negotiations or has an introduction prepared, it would be best to let the interpreter see the introduction beforehand. The interpreter could translate the document and read it to the parties prior to the start of the negotiations. This would help to speed up the process and the negotiator can focus on using facial expressions and gestures while the interpreter is reading. At some point in the introduction, the negotiator could add a question that indicates the other person understands the interpreter. For example, “This is our interpreter, if you understand her, please nod your head up and down to indicate that you understand.”

Finally, the negotiator may ask the interpreter to assist him in learning a few words of the foreign language. As a soldier who returned from Iraq attested, knowing a few words of the native language goes a long way in demonstrating cultural sensitivity by indicating an “interest in the country and its culture.”¹¹ The returning soldier said, “When I would meet an Iraqi, they have such a strong sense of cultural pride that even though I spoke bad Arabic or even almost none ... it always set things off better, even when there was a translator, I would try to give a greeting in Arabic, even if I would do a very bad job of it.” He continued, “That, to them, with their really strong cultural pride ... was kind of a sign to them that I respected their cultural history. The significance of that cannot be overstated—it had almost a magical effect.”¹² Knowing a few words will assist in rapport building with counterparts, but the negotiator can also nurture the negotiator-interpreter relationship by building rapport with his interpreter.

B. Building Rapport with the Interpreter

If the negotiator has a good relationship with an interpreter, the negotiator may feel more comfortable with the interpreting process and in turn, will likely feel more comfortable with the overall negotiation. The Army Field Manual: *Civil Affairs Tactics, Techniques, and Procedures* addresses procedures to help to build a rapport with an interpreter. It states:

The interpreter is a vital link to the target audience. Without a cooperative, supportive interpreter, the negotiation could be in serious jeopardy. Mutual respect and understanding is essential to effective teamwork. [You] must establish rapport early in the relationship and maintain rapport throughout the joint effort. The difficulty of establishing rapport most of the time stems from lack of personal contact.¹³

The manual suggests that the negotiator find out about the interpreter by being genuine towards the interpreter and asking questions about her background, family, culture, and traditions.¹⁴ Knowing more about the interpreter may also help the negotiator understand a foreign culture, thus allowing the negotiation to draw upon culturally specific goals and values to help aid in the overall negotiation. During the negotiation there are a few additional practical matters the negotiator should keep in mind.

C. During the Negotiations

The negotiator can start by considering where each party is sitting and determining the most effective placement for the interpreter. The negotiator’s place may also depend on whether interpretation technology is available or if the interpreter is interpreting for all parties or just a portion thereof. It helps if the negotiator tries to keep the interpreter in a “neutral” position so that it does not appear as though the interpreter is on any “side” of the negotiation. In this way, the interpreter’s appearance may remain more credible to any involved party.

The typical negotiation skills addressed in other chapters should still be effective during an interpret-

ed negotiation. By directing all comments, instructions and questions to the parties, not to the interpreter, the negotiator affirms that the negotiation is coming from the negotiator, not the interpreter. Similarly, the negotiator should avoid using the third person (he, she, they). Instead, it is easier for the interpreter if the negotiator speaks as if she was directly speaking with the counterpart. This is a skill that can be easier said than done. When a person is not directly addressing a party, it can be easy to fall into third person terminology, but practicing these skills during a negotiator's training may help a negotiator better prepare.

Checking with the interpreter before using culturally specific non-verbal gestures will ensure that the meaning of the gesture will transfer appropriately across cultures. In order to make the interpreter's task less rigorous, the negotiator may wish to avoid puns, sports analogies, archaic language, legal terms, or religious terms (i.e., passages from the Bible) and any terms or comments that are too culturally specific. With that in mind, it helps to be patient with the interpreter; words or phrases that are culturally specific may not have an easy translation. If this is the case, the interpreter may need to ask clarifying questions to the negotiator.¹⁵ Again, if the negotiator and the interpreter have a positive relationship, the interpreter should feel more comfortable disclosing that she is having difficulty interpreting a specific term and perhaps an attempt at rephrasing could assist. Rephrasing by the negotiator will likely yield better results than allowing the interpreter to substitute her own interpretation.

If the interpreter is taking notes, the negotiator may want to be sure that the notes are not easily decipherable by anyone else if they contain confidential information.¹⁶ Likewise, the negotiator may want to make provisions to protect the interpreter and ensure her safety. It may be impossible for a negotiator to fully guarantee another person's safety, but to the degree he is able to make the interpreter feel safe and less vulnerable, the interpreter is able to dedicate energy towards interpreting and not worrying about her personal safety.

Finally, a good negotiator will be careful not to assume that any counterpart is wholly ignorant of English. As such, the negotiator would refrain from making "unofficial comments to the interpreter along the lines of 'Now don't interpret this, but...'"¹⁷ In addition to the counterpart deciphering what is being said, the negotiator could be placing the interpreter in an uncomfortable position. If the negotiator is seeking information beyond interpretation from the interpreter, then the negotiator is likely seeking a cultural guide.

D. Cultural Interpreters

Some interpreters go beyond the task of changing the meaning of words from one language to another. Victoria Edwards is a senior policy analyst with the Department of National Defense, Human Resources Military Policy and Planning, and she has written on the role of 'cultural interpreters':

When you are conducting negotiations, an interpreter can be one of your key assets. The intelligence, personality, and street smarts of an interpreter can be crucial in helping you convey your point across linguistic and cultural barriers. The interpreter is your local specialist in public relations. An interpreter can give you suggestions on the best way to proceed with a person from a different cultural background, and may notice nuances that would otherwise be overlooked.

During the discussions the bilingual, bicultural experts help navigate linguistic and cultural nuances. After all, interpreting is not a matter of substituting the words of one language with those of another - it is a skill of conveying messages, with their unspoken assumptions, presuppositions, and subtle emphasis.¹⁸

Edwards points out how much an interpreter can teach a negotiator and how much an interpreter contributes to the success of a negotiation. It is best not to undermine the role of the interpreter because without the interpreter, the counterpart may never understand the negotiator's message. Likewise, if not for the interpreter, the negotiator could not understand his counterpart. All of the work that a negotiator contributes to the process can be wasted if his crafted message is not conveyed; the negotiator cannot formulate tactics if he does not understand the counterpart. Employing the previously discussed techniques of thorough preparation and rapport-building will help the negotiator associate with the interpreter as a cultural guide.

E. A Final Consideration

Finally, there may be situations in which the best practice is to force a counterpart to speak in his non-fluent language (whether by choice or circumstance). In determining if this will be an advantageous tactic, scholar Peter V. DiVasto writes,

First, forcing a subject to wrestle with formulating thoughts in an unfamiliar language greatly reduces the opportunity for over-animated displays of emotion. Second, the mechanics of translating thoughts into English keeps the subject's mind working and thereby increases fatigue. Third, the continued use of English by negotiators sends a subliminal message to the subject that law enforcement is in control of the situation.¹⁹

However, by not negotiating in a counterpart's fluent language, the negotiator could lose the underlying message in the verbal exchange, and the counterpart may not be able to express everything he wanted to convey. The negotiator, then, will be well served to weigh whether the benefits afforded by forcing a counterpart to speak his non-native language are worth what is potentially lost in the exchange.

Questions to ask potential interpreters:

- Do you have any formal training as an interpreter?
- What form of interpretation have you most frequently used and are most comfortable with (simultaneous, consecutive, summary)?
- Do you speak any regional dialects?
- Are there certain situations in which you would feel uncomfortable (certain people, places, presence of weapons, etc.)?
- Have you interpreted in a negotiation context before?
- Can you translate written documents?

During Interpreted Exchanges:

- use short sentences
- use active voice
- look directly at the person(s) with whom you are communicating
- ask open-ended questions to gauge understanding
- summarize/paraphrase what the other party has said, even though it may take more time, to ensure clear communication (“So what I gather is that you want ___”)
- never interrupt the interpreter or speaker
- wait for the interpreter to finish communicating the entire message, take notes if it helps

Modes of Interpretation: Pros and Cons

<i>Mode</i>	<i>Pros</i>	<i>Cons</i>
Simultaneous	Takes less time	Parties tend to focus more on the interpreter
	Can gauge nonverbal responses as counterpart is hearing the message	The overlapping voices can be distracting
Consecutive	Greater accuracy	Mentally taxing on interpreter
	Allows for clarification; effective relay of message	Takes more time; Will have to insert pauses into dialogue

Endnotes

¹ Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 6-7 (1997).

² WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 11-13 (1995).

³ *Id.* at 33.

⁴ Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 176, n.1, n.3, n.5 (1993); see Alain L. Sanders, *Libertad and Justicia for All*, TIME, May 24, 1989, at 65; see also Glen Craney, *Language v. The Law*, 16 BARRISTER, Winter 1989-90, at 20, 22; Susan Garland, *Hispanic Court Cases: The Verdict is All in the Translation*, CHRISTIAN SCIENCE MONITOR, Dec. 7, 1981, at 23.

⁵ Victoria Edwards, *The Role of Communication in Peace and Relief Mission Negotiations*, TRANSLATION J. (2001), available at: <http://essay.studyarea.com/cgi-bin/newsearch.cgi?cs=&q=Camera&ch=http:%2F%2Fwww accurapid.com%2Fjournal%2F20interpr.htm&fm=off> (last visited July 9, 2006).

⁶ Dominguez-Urban, *supra* note 1, at 15.

⁷ ROSEANN DUENAS GONZALEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE 23 (1991).

⁸ Dominguez-Urban, *supra* note 1, at 18.

⁹ *Id.* at 27.

¹⁰ *Id.*

¹¹ Edwards, *supra* note 5..

¹² Interview by Leslie Siegel with CPL Jeff Mussman, in Columbus, OH (Mar. 31, 2006).

¹³ Department of the Army, CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES APPENDIX F-12 (2003), available at <http://www.globalsecurity.org/military/library/policy/army/fm/3-05-401/appf.htm> (last visited July 9, 2006).

¹⁴ *Id.*

¹⁵ Shulman, *supra* note 4, at 175 n.10. For an example of the problems that an untranslatable word can cause for court interpreters, see the movie THE GODS MUST BE CRAZY (Twentieth Century Fox 1984), in which the defendant's language had no equivalent for the word "steal."

¹⁶ "In one case, a UN negotiator's journal containing the notes on several ongoing field negotiations between Bosnians and Serbs was confiscated at a checkpoint." Edwards, *supra* note 5.

¹⁷ Center for Army Lessons Learned, *How To Communicate Effectively Through Interpreters: A Guide for Leaders, News from the Front* (Nov-Dec. 2003), available at: http://www.au.af.mil/au/awc/awcgate/army/using_interpreters.htm (last visited July 9, 2006).

¹⁸ Edwards, *supra* note 5, at; see A.B. Featherston et al., *UNPROFOR: Some Observations from a Conflict Resolution Perspective*, in INTERNATIONAL PEACEKEEPING 179, 179-203 (Michael Pugh ed., Frank Cass Vol. 1 No. 2 1994).

¹⁹ Peter V. DiVasto, *Negotiating with Foreign Language-Speaking Subjects*, (June 1996) available at: <http://www.fbi.gov/publications/leb/1996/june963.txt> (last accessed July 9, 2006).

Cross-Cultural Negotiation in a Multi-Party Setting

Jennifer Hetzel Hallman

A b s t r a c t

Most scholarly research on international multiparty negotiations focuses on conflicts within and among nation-states where negotiations have occurred within the bounds of a previously established treaty or neutral arena, such as the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), or the United Nations. Such treaties and international organizations provide neutral negotiation ground rules on issues such as language spoken, moderator (if any), and basis for agreement (i.e. majority or consensus) to govern negotiations in the event a dispute arises. Because similar neutral structures and forums do not exist for non-nation-state negotiations in the international arena, the pre-negotiation process is both more complicated and more critical than most research in international multiparty negotiations has explored. This chapter serves to open a dialogue on some of the issues affecting non-state actors in multiparty cross-cultural negotiation, including: how to “find neutral” and the cross-cultural nuances of multiparty negotiation strategies.

I. Introduction

While there is a significant amount of literature on multilateral negotiations involving diplomatic international relations between nation-states,¹ scant research exists regarding multiparty cross-cultural negotiations. Many multilateral negotiations occur within the bounds of a previously established treaty or neutral arena, such as the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), or the United Nations.² Thus, the ground rules of the negotiation, such as language spoken, moderator (if any), basis for agreement (i.e., majority or consensus), etc. are pre-determined. Additionally, party representatives and their authority are generally known. However, information and research on multiparty cross-cultural negotiations in smaller settings is not readily available, if it is available at all. This chapter serves to open a dialogue on the issues affecting non-state actors in multiparty cross-cultural negotiation, including how to “find neutral” and the cross-cultural nuances of traditional multiparty negotiation tactics.

II. The Problem

As the previous chapters have noted, signals from a counterpart are easily confused or misinterpreted in cross-cultural negotiations, leading to further mistrust between the parties. However, with additional parties, the opportunities and chances for miscommunication are multiplied.³ With so many parties and interests, a negotiator may lose track of the other parties’ interests or whether concessions have been reciprocated.⁴

Furthermore, multiple cultural values and standards can make the choice of a particular settlement even more complicated. For example, when there is a range of possible settlement outcomes (i.e. more than one solution exists accommodating the overlapping and conflicting interests of the parties), each negotiator will use her own particular standard to provide the basis for her choice among options.⁵ Thus, different cultural and personal standards, which are independent of bargaining, affect the possibilities of settlement. Because such principles can serve as focal points for choosing a resolution, agreement is significantly more difficult when these principles diverge.⁶

Fen Osler Hampson, an expert in multilateral diplomacy, explains that these kinds of cultural or personal differences can influence each negotiator’s expectations regarding the “purpose and value of the negotiation process itself.”⁷ Hampson uses the example of the diverging party perceptions of the American-Soviet arms negotiations in the 1970’s: Americans were not satisfied with a negotiation if it did not conclude with a signed document (i.e., a contract).⁸ However, the Soviets were satisfied if the negotiations did not result in an agreement, as long as their interests were still promoted through the negotiation process.⁹

III. Gaining Perspective on the Problem

While negotiating with more than one other culture is a daunting task, a negotiator may find it helpful to approach the negotiation with the goal of reaching an agreement that embraces each party’s cultural differences, as opposed to in spite of them.¹⁰ A broader perspective on multicultural negotiations could help a negotiator maintain an open mind through the process. For example, literature in cross-cultural management suggests that successful multi-national corporations value cultural diversity at the bargaining table and the “potential contributions of cultural diversity to organizational performance.”¹¹ These multicultural organizations maintain the goals of full structural and informal cultural integration with the absence of prejudice and discrimination, minimization of inter-group conflict, and identification with the organization by members of minority cultures.¹² In the business world, embracing multiculturalism has resulted in enhanced creativity in the problem-solving process and increased creativity in the negotiated outcome.¹³

Once parties have accepted that they will not be able to impose their own culture upon another, they are more likely to listen to other offers being placed on the negotiation table. If ideas are suggested by individuals representing a variety of cultural constituencies, a final solution could be created which addresses the various needs of each of these constituents in a satisfactory manner. Thus, negotiators should be praised for reaching workable agreements incorporating multicultural solutions and outcomes, regardless of whether they fully promote the dominant culture’s ideals.

Research suggests parties to agreements devised in this manner have been more satisfied with the agreements, and the agreements tend to last longer than those in which a decision by the dominant culture is imposed upon individuals from other cultures.¹⁴ This increased satisfaction may be due to the fact that, because all parties participated in the solution to the problem, there is less animosity toward the decision and decision-makers than when a decision is imposed upon an ignored or non-participating group. Additionally, because the parties' various cultural considerations were discussed during the negotiation and incorporated into the agreement, it is less likely that the agreed-upon solution will conflict with other cultural or societal mores. Therefore, individuals who were not present during the negotiation, but whom the agreement may affect, are less likely to have cultural or societal conflicts with the solution if their concerns were represented and respected while the solution was being negotiated.

It is also important to note that organizational flexibility has been a necessary component to maintaining successful multicultural agreements in business settings.¹⁵ Following this example, negotiators should be encouraged to tailor each negotiation to the specific parties, cultures, constituencies, and issues involved in each negotiation rather than following a pre-conceived "cookie cutter" negotiation model or form agreement. Thus, for example, a negotiator should not expect the same negotiation approach and agreement reached in multiparty property disputes between Albanians and Serbians in the former Yugoslavia to succeed in property disputes between Sunnis and Shiites in Iraq.

IV. "Finding Neutral"

Once the negotiator is no longer viewing his role as dealing with a necessary evil, the next step is to consider the best strategy for achieving his goals without aggravating or exacerbating any tensions with or between the other parties. Generally, this strategy will involve maintaining a neutral stance towards the other parties. To create and maintain such neutrality and to avoid overcomplicating a multiparty cross-cultural negotiation, it is even more important to spend as much time as possible preparing for the negotiation. Factors such as who should be invited to negotiate, how the negotiation should be conducted, and the best location or locations for the negotiation to take place can have even more of an effect on the outcome of a multiparty negotiation than in a two-party cross-cultural setting. For ease of comprehension, these considerations can be divided into two general concepts: adding to increase settlement options and subtracting to minimize complexity.

A. Adding to Increase Settlement Options

Because multiparty cross-cultural negotiations are inherently complicated, it may seem counterintuitive to add anything to this already crowded negotiating table. However, in certain circumstances, additional negotiation sessions, locations, participants, or parties can increase the likelihood of settlement by building and maintaining trust among the parties, assisting the negotiators by managing the complexity of the negotiation, clarifying issues and interests, or by providing additional incentives for settlement.¹⁶ Some of these additive strategies, which can be used alone or in combination with others, are detailed below from least to most intrusive.

1. Use of Multiple Sessions/Locations

Because of the notion of "home-field advantage," or where a person is most comfortable on his own turf, it may be difficult to find a neutral location where all parties will feel equally comfortable and confident to negotiate.¹⁷ Therefore, it may appease the parties to offer multiple sessions held in various locations chosen by each party. Offering multiple settings for the negotiations also provides inherent breaks in the negotiation so that parties may relocate to the next setting – whether the next session is hours, days, or weeks later. These breaks can be used to reassess the negotiator's strategy or to regroup a negotiating team; they can also provide an opportunity for shuttle diplomacy or coalition building.

The 1993 Israel-Palestine Liberation Organization (PLO) agreement is an example of other advantages of using multiple locations (in this case, one public and one secret) to conduct negotiations: privacy and diversion. While the world media was focused on the meetings in Washington, key players to the agreement – Israel and the PLO – were able to meet in Oslo without the external pressure of international media scrutiny.

2. Negotiation Assistants

In cross-cultural, multiparty negotiations, the conversation may be difficult to follow due to language barriers, cultural nuances, multiple speakers, varying negotiation tactics, or a combination of all four of these factors. Due to this complexity, a negotiator may want to consider bringing an assistant or team to help him communicate, collect, and synthesize the cultural, substantive, and procedural information being shared in the negotiation. By using a team of negotiators or employing the help of a negotiation or cultural expert, a negotiator can better accomplish all of these tasks in the likely highly charged setting.

a. Additional Team Members

Even in the simplest negotiation, a good negotiator must multi-task: speak, listen, formulate a strategy and tactics, and develop questions to seek more information within a short period of time.¹⁸ In a multiparty negotiation, this is compounded by the inclusion of more participants to whom the negotiator must listen, formulate a strategy, and develop questions. In a cross-cultural multiparty setting, this complexity is further compounded by the myriad of things to consider raised in the previous chapters: perceiving individual or cultural nuances, assessing how one is being perceived, reading non-verbal cues, formulating the appropriate reciprocal approach, and other concerns.

Additionally, the negotiator must determine each party's priorities and interests regarding each issue being discussed. Because of diverging priorities and interests, parties can fall into varying roles depending upon the issue being discussed.¹⁹ To manage such complexity, cross-cultural business negotiators suggest using large negotiating teams to divide responsibilities during the negotiation.²⁰ One such division would be to assign each team member with one or more tasks, such as speaking, taking notes, assessing perceived cultural values and nuances, developing reciprocal approaches, overseeing the interpretation, and other tasks.

However, it may also be possible to assign each team member to one or more of the other parties to "manage" for the head negotiator. In this case, each "manager" would be responsible for all of the previously listed tasks, but only in relation to one or more parties. This approach may be particularly useful in a situation in which a particular team member is more familiar with a particular party (or parties) or a particular language or culture.

While team negotiating can effectively lessen the burden on a single negotiator during the negotiation session, it can also be inefficient. Large groups require internal coordination and consensus.²¹ Each task member or party manager must have an effective way of communicating with the team leader without disturbing the flow of information. Frequent breaks may be necessary to coordinate the team's next step in the negotiation process. Additionally, team negotiating can be cost-prohibitive, both in terms of finances and human resources. However, given the many benefits of dividing negotiating responsibilities and having multiple individuals with whom one can assess misperceptions and negotiation strategies, team negotiation may be beneficial in a multiparty, cross-cultural negotiation.

b. Negotiation Consultant

Another possibility to supplement the skills of a single negotiator or negotiating team is to employ a negotiation consultant. While this individual may not have the substantive knowledge to negotiate a settlement alone, the consultant may have prior experience, special skills or training, or experience working in or with a particular culture to which one or more of the other parties belong. One variation of a negotiation consultant is the cultural interpreter discussed above in Chapter 12. Depending upon the situation, the negotiation consultant could provide real-time advice to the lead negotiator in the negotiation, or he could share his insights and notes with the lead negotiator during break periods.

The expert could either remain "behind the scenes" for the negotiator to consult during breaks in the process, or he could be the agent of the lead negotiator. As an agent, the negotiation consultant retrieves information from the other parties to report back to the lead negotiator and would only make substantive negotiation moves upon the direction of the lead negotiator.²² The use of the expert as an agent also provides the negotiators with an opportunity to conduct further research or to gather further information regarding any issues that have arisen that may have caught the team unaware. In this sense, having an agent creates an inherent "buffer time zone" between the face-to-face information gathering in the negotiation and any final decision by the head negotiator.

3. Inviting More Parties to the Negotiation

Contrary to common perceptions that the more parties, the more opportunities for impasse,²³ inviting additional parties to the bargaining table can increase the likelihood of reaching agreement at times.²⁴ For example, from 1991 to 1993, representatives from Israel, Syria, Lebanon, Jordan, and the PLO engaged in a series of long, intense negotiations in Washington, D.C. under considerable public scrutiny.²⁵ Despite these efforts, it appeared that no progress was in sight to resolve the Arab-Israeli conflict.²⁶ However, in 1993 Israel and the PLO announced that they had reached an agreement on an interim accord over limited self-government for the Gaza Strip and Jericho.²⁷ Much to the world's surprise, this agreement did not come out of the publicly known negotiations in Washington.²⁸ Rather, the agreement was reached in secret negotiations in Oslo.²⁹ *In Pathways to Peace: The Multilateral Arab-Israeli Peace Talks*, Joel Peters, an Associate Research Fellow of the Middle East Programme at the Royal Institute of International Affairs in London, discusses how the multilateral negotiations in Washington allowed the Israel-PLO accord to happen.³⁰ In addition to providing a distraction for international media scrutinizing each detail discussed in the negotiation, the use of additional, regional actors provided more opportunity for joint gains in the region, which, in turn, allowed a settlement to occur. Thus, sometimes adding parties can help settlement occur.

Additional parties are frequently helpful in the context of internal conflicts (conflicts occurring within a locality, region, or state). The late I. William Zartman, a former professor of conflict resolution and international organization whose articles and books are frequently cited in international negotiation literature, argues that in the context of internal conflicts, negotiation, as opposed to winning a war or eliminating the opposition, is the best path for parties to take in order to resolve their differences.³¹ However, as Zartman notes, parties to internal conflicts are generally resistant to negotiations.³² In terms of power, internal conflicts are usually asymmetrical, complicating the dynamics of negotiation.³³ Thus, third parties, mediators in particular, can be used to realign power imbalances. However, mediation can also be an intrusion that is difficult to legitimate in an internal conflict because the use of a mediator could promote a perception of legitimacy to an insurgent group that the government would prefer to avoid.³⁴ In such a situation, perhaps the “mediation” can be termed a multiparty negotiation with an outside organization or entity (which may or may not have an interest in the negotiation) serving to facilitate an agreement by building trust, using neutral wording to rephrase issues, identifying alternative solutions, or testing adversaries' perspectives.

However, third parties can be useful even when the conflict is not internal. Parties to a negotiation who do not have a direct interest in the outcome of the dispute, whether their addition would make them the third, fifth, or tenth parties to the negotiation, are frequently called “third parties” in negotiation literature.³⁵ These third parties, whether they have an indirect interest in the settlement of the dispute or no interest at all, can help parties to assess their interests, choose representatives, identify appropriate parties to be present at the bargaining table, and monitor the implementation of agreements.

a. The Engagement of an Interested Third Party

Negotiators may wish to consider whether to invite a third party with a minor or indirect interest in the dispute (such as a desire that the dispute be settled regardless of how it ends) to play a facilitative role in the negotiation. Interested third parties can be particularly useful to ameliorate power imbalances by providing power or an additional voice to a minority or powerless group, such as those discussed in Chapter 8.³⁶

In determining which outside party might have an interest in the negotiation, it is important to keep in mind that few internal conflicts are purely internal. Most involve some kind of external influence, whether derived from a group which identifies with a neighboring state receiving support from that neighbor — such as Northern Ireland — or a search for an external source of power which creates a proxy war for distant states — such as in Afghanistan or the former Yugoslavia.³⁷ Sometimes, these interested external actors can be useful third party negotiators.

On the other hand, sometimes a military negotiator may be an interested third party to a dispute. For example, in military peacekeeping missions, the military may be requested to settle a dispute between two local warring parties whose conflict has the potential to escalate into regional conflict or civil war. In

these situations, regardless of the specific outcome, the military negotiator has an interest in settling the dispute to maintain peace and security in the region. The parties to the dispute, however, are more likely concerned with settling this specific dispute in their own favor than in finding an agreement that may bring long-lasting peace to the region.

Where a military negotiator (or the military in general) is trusted by all parties as a fair arbiter of disputes, he could build on that reputation to persuade the parties to consider an agreement which serves the broader needs of the region, in addition to their own interests.

However, when the military presence is not welcomed by one or multiple parties, it will be more difficult to find a neutral zone. In this situation, the negotiator must find a way to legitimize his participation in the negotiation (by building trust with each party) or locate an alternate, legitimate negotiator to serve his interests. If possible, it would be helpful to know (either through academic research or personal sources) how conflict is generally resolved in the region and whether the resolution method varies if the conflict is intra-group (within a single culture, i.e., within a family, town, race or ethnicity) or intergroup (involving more than one culture).³⁸ However, time may not exist and resources may not be available to conduct the necessary research and the negotiator will have to build trust with each party to legitimize his presence. To build trust, the interested third party negotiator may consider building trust with each party in individual meetings before the negotiation.³⁹

b. Using an Additional Party as a Neutral Facilitator

In most settings, negotiators may wish to consider the benefits of asking an additional party who does not have an interest in the outcome of the dispute to facilitate the negotiation.⁴⁰ Considering the complexity of multiparty cross-cultural negotiations, the use of a mediator or co-mediators could be helpful in resolving the dispute. Mediators from a culture other than that of the parties, or co-mediators from differing cultural backgrounds, can help set a neutral tone to the discussion. Facilitative mediators can also help organize the multi-faceted components of the negotiation in addition to identifying and clarifying any misinterpretations or misunderstandings among the parties. Unfortunately, finding appropriate third party neutrals can be a time-intensive and cost-prohibitive search. For a more in-depth discussion on the use of mediators in cross-cultural negotiations, see Chapter 14.

B. Subtracting to Minimize Complexity

Despite the advantages listed above regarding adding parties to the negotiation to encourage settlement, the more traditional approaches to multiparty negotiations in a single cultural context involve decreasing the amount of parties, issues, and positions in the negotiation.

1. Fewer Positions: The Use of Coalitions

Coalition-building is frequently cited as a useful negotiation technique in multiparty settings.⁴¹ While it can be useful even in a cross-cultural context, a negotiator will be well served to be aware of the specific problems this tactic could create. As discussed in previous chapters, miscommunication and misperceptions easily breed distrust. Social scientists have suggested that mistrust is also a common psychological effect of coalitions and alliances.⁴² Furthermore, if one is not particularly knowledgeable as to the interrelationships among the other parties and cultures, it is possible to alienate one party by including or failing to include the party in a coalition. Additionally, parties with whom the negotiator's interests may align (those with whom he should build a coalition in a traditional setting) may be opposed to joining forces due to other cultural considerations. Thus, a negotiator must tread extra carefully in coalition-building in this context.

Coalitions are also more likely to lead to another common mistake in multiparty negotiation—the oversimplification of a goal or objective. Fearing the complexity of the negotiation and unable to anticipate every issue which may arise at the negotiation table, negotiators sometimes excessively narrow their objective for the negotiation to an ideological position.⁴³ Getting entrenched in an oversimplified basic goal (such as “increase security using democratic principles”) can later impede the negotiation.⁴⁴ In order

to prevent retreating to such an unproductive tactic when multiple issues arise, a negotiator will want to reassess constantly whether she is needlessly sticking to a pre-determined strategy or goal (so as not to potentially give in on a previously unconsidered issue) or whether more flexibility (or a more subtle approach to the problem) would actually be in her best interest.⁴⁵

Although oversimplification may be more likely to occur when multiple parties' interests are combined into a single coalition strategy, single-party negotiators may also subconsciously engage in such behavior. In multiparty, multi-issue negotiations, particularly if more than one language is being spoken in the room, issues, topics and ideas can be difficult to follow. To avoid becoming needlessly inflexible while continuing to protect one's interests, it may be best for the negotiator to take a few minutes to step away from the bargaining table to reassess his strategy and goals, and perhaps to confer with colleagues or other coalition members.

When it only takes a majority of participants to reach an agreement, coalitions can be a useful strategy. For example, if there are three parties at the bargaining table and the negotiator successfully builds a coalition with another party, the agreement will be reached to the negotiator's liking without the need to convince the third party at the table to agree on the same settlement option. On the other hand, if the negotiator is concerned that coalition building may impede or create an unwieldy agreement (or an agreement that is unlikely to be followed by the non-consenting parties), she may consider negotiating for a requirement that an agreement will not be reached unless there is unanimous consent or a supermajority consensus to a particular settlement option.⁴⁶ Where there are many parties to an agreement, it may be difficult (or impossible) to build a coalition large enough to meet this requirement, thus rendering coalitions powerless. An additional benefit to unanimous consent or high-consensus agreements is that they are more likely to last longer than their majority-consensus counterparts because there are fewer parties who can vote against the settlement option. On the other hand, in a discussion about finding the appropriate consensus to an agreement, Robert Mnookin, Director of the Harvard Negotiation Research Project, notes that a unanimity requirement has the potential to create additional problems to resolution because a single party who opposes the agreement, or thinks he could receive further gains by "holding out" from the agreement, can prevent any agreement from being reached.⁴⁷

2. Fewer Parties: Re-assessing Necessary Participants

Another way to simplify the negotiation and to reduce the amount of interests at the table may be to decrease the number of parties present at the bargaining table. This can be done by only inviting parties who are necessary to the agreement (as opposed to all parties who may have an interest in the outcome of the negotiation) to participate in the negotiation, or by having multiple agreements to which only two parties at a time negotiate. This strategy deserves serious consideration when the negotiator must negotiate with two or more parties who do not share the same approach to negotiation. In such a situation, the negotiator's reciprocal approach to one party may offend or confuse the other parties at the table, especially if the negotiator is not reciprocating with other parties at the bargaining table. Additionally, such confusion could even lead to a lack of trust (or overconfidence)⁴⁸ among the parties who feel they are not being treated in a similar manner to other parties at the negotiation table.

a. Convening Only the Necessary Parties

Negotiators, particularly American-trained negotiators, are frequently taught to include representatives from all groups with a stake in the issue at the bargaining table. While there is merit to this consideration, such advice is based on the principles of representative democracy. In some cultures, it may not be appropriate (or it could be offensive) to include a minority political or social group at the negotiation bargaining table. Additionally, these groups may lack so much power that their presence is more of a hindrance (in terms of the logistical challenge of "finding neutral") than a benefit. In determining who is a necessary participant to the agreement, I. William Zartman warns that leaving out the "major contender" may "produce an agreement but not a solution."⁴⁹ Thus, a necessary party is a party who will be indispensable to a workable solution.

b. Conducting a Series of Bilateral Negotiations

When two or more parties are necessary to an agreement but logistical difficulties or the presence of issues only relevant to some of the parties at the bargaining table abound, a negotiator may consider dividing the issues into a series of bilateral negotiations. Thus, instead of having one agreement with multiple signatories, a negotiator may consider having multiple agreements with only two signatories. Additionally, shuttle diplomacy may be considered in order to minimize the complexity of a multiple parties at a single negotiation table.

V. Conclusion

Most multiparty negotiation literature argues that “multilateral negotiations are fundamentally different from bilateral negotiations.”⁵⁰ However, a negotiator should not take this assumption to mean that other chapters of this book are irrelevant in a multiparty context. Furthermore, what may work in a single-culture multiparty or international multilateral context will not necessarily be applicable in a cross-cultural, multiparty setting. As this chapter discusses, dealing with the multiple parties, issues, positions, languages, and negotiation approaches involved in multiparty cross-cultural negotiations can be overwhelming. Nevertheless, a negotiator can manage this complexity by considering the tips outlined above, such as adding or subtracting parties, positions, or issues to ameliorate the difficulty.

Questions for Cross-Cultural Negotiators to Consider in Multiparty Settings:

- *Who?*
 - Who will most effectively represent your party and come to an agreement?
 - An individual negotiator
 - A cultural or technical negotiation expert
 - A negotiation team
 - A combination of some or all of the above
 - Who should be invited to the bargaining table to best foster agreement?
 - A neutral third party
 - An interested third party
 - Only the most necessary parties
 - All stakeholders
- *How?*
 - Can, or should, the negotiation be a series of two-party negotiations?
 - Are other parties' negotiation approaches so different from each other?
 - If they differ, can I manage the differences effectively while reciprocating the approaches?
 - Could differing reciprocal approaches unnecessarily, and negatively, affect the outcome of the negotiation?
 - Would the negotiation be helpful if frequent breaks were built into the session(s)?
 - Do I know enough about the relationships among all parties to consider coalition building to my advantage?
 - How will the agreement be reached?
 - Majority rule
 - Supermajority
 - Unanimous Consent
 - Should the negotiation be public, private or a mixture of the two?
 - Could external influences, such as the media, hinder settlement?
 - Would negotiations be hindered or helped if the constituencies of the representative negotiators were aware of the negotiations or its details?
 - If I remain neutral as to all or some of the other parties, will that help or hinder my ability to reach my party's short- and long-term goals?
- *Where?*
 - Should multiple sites be used to maintain neutrality and avoid the "home-field advantage?"
 - Is the proposed "neutral" site really neutral?
 - Who proposed the site?
 - Do other neutral organizations such as the International Committee of the Red Cross/Red Crescent, United Nations, etc. also consider this site to be neutral?
 - Will secrecy or access to media be jeopardized in this location?
 - Will all parties feel as safe as possible in this location?
 - Where necessary, is the site amenable to multiple interpreters?

Toolbox for Negotiators

- If possible, consult a personal contact in each culture, or a respected nongovernmental organization working in the area, to assess each party's approach to negotiation and relationship with other parties to the negotiation.
- Maintain a broad perspective that despite the complexity of the negotiation, enhanced creativity in the process and outcome frequently result from successful multi-cultural, multiparty negotiations
- Arrange frequent breaks to reassess one's position, strategy, and comprehension of the situation
- Avoid oversimplifying the situation with the use of stereotypes in order to organize the complexity

Endnotes

¹ See, e.g., ELUSIVE PEACE: NEGOTIATING AN END TO CIVIL WARS (I. William Zartman ed., 1995); FEN OSLER HAMPSON, MULTILATERAL NEGOTIATIONS: LESSONS FROM ARMS CONTROL, TRADE, AND THE ENVIRONMENT (1995); INTERNATIONAL MULTILATERAL NEGOTIATION: APPROACHES TO THE MANAGEMENT OF COMPLEXITY (I. William Zartman ed., 1994); INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES (Victor A. Kremenyuk ed., 2d ed 2002); MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS (2001); PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS & TECHNIQUES (I. William Zartman & J. Lewis Rasmussen eds., 1997); Mary Jo Larson, *Low-Power Contributions in Multilateral Negotiations: A Framework Analysis* 19 NEGOT. J. 133, 133-149 (2003); I. William Zartman, *The Unfinished Agenda: Negotiating Internal Conflicts*, in STOPPING THE KILLING: HOW CIVIL WARS END 20, 20-34 (Roy E. Licklider ed., 1993).

² See e.g., HAMPSON, *supra* note 1; Zartman, *The Unfinished Agenda*, *supra* note 1; WATKINS & ROSEGRANT, *supra* note 1.

³ HAMPSON, *supra* note 1, at 29.

⁴ *Id.*

⁵ *Id.* at 30.

⁶ *Id.* at 30.

⁷ HAMPSON, *supra* note 1, at 30.

⁸ *Id.* at 30.

⁹ *Id.* at 30-31.

¹⁰ See KAMAL FATEHI, INTERNATIONAL MANAGEMENT, A CROSS-CULTURAL AND FUNCTIONAL PERSPECTIVE 161 (1996).

¹¹ *Id.*

¹² *Id.*

¹³ FATEHI, *supra* note 10, at 162.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56-57 (Bruce Patton ed., Houghton Mifflin 1991)(1981)(discussing how to find shared interests in a negotiation, turning differing interests into a workable agreement, and inventing options for an agreement that would satisfy both parties' interests).

¹⁷ See DONALD W. HENDON ET AL., CROSS-CULTURAL BUSINESS NEGOTIATIONS 107-08 (1996).

¹⁸ See generally *id.* 98-99.

¹⁹ Multiparty negotiation literature frequently cites Zartman's five classifications of the roles participants play in multiparty negotiations: leaders (or "drivers"), managers, defenders, blockers (or "brakers"), and followers (or "cruisers"). The leader tries to produce an agreement consistent with her interests. Managers also try to reach agreement, but from a neutral perspective. Defenders tend to have a single interest and are more concerned with the success of their own single issue than with the overall success of the negotiations. Blockers seek to block the agreement as they are solely interested in protecting their freedom from the agreement. Finally, followers will do whatever it takes to seek an agreement. INTERNATIONAL MULTILATERAL NEGOTIATIONS, *supra* note 1, at 5.

²⁰ HENDON, *supra* note 17, at 98-99.

²¹ *Id.* at 99.

²² *see generally id.*

²³ Larson, *supra* note 1, at 133.

²⁴ For an interesting discussion on inviting multiple stakeholders to a negotiation and its effects on consensus and a unified agreement, *see* Lawrence E. Susskind et al., *Multistakeholder Dialogue at the Global Scale*, 8 INT'L NEGOT. 235, 235 (2003).

²⁵ JOEL PETERS, *PATHWAYS TO PEACE, THE MULTILATERAL ARAB-ISRAELI PEACE TALKS* 5 (1996).

²⁶ *Id.* at 1-4.

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ ELUSIVE PEACE, *supra* note 1, at 3.

³² *Id.*

³³ *Id.* at 3-4.

³⁴ *Id.* at 4.

³⁵ GREGORY TILLET, *RESOLVING CONFLICT: A PRACTICAL APPROACH* 47 (Oxford Univ. Press 1999)(1991).

³⁶ Susskind, *supra* note 24, at 240 (noting that inviting additional stakeholders such as international agencies and influential non-governmental organizations can add legitimacy to individual and group interests which may not otherwise have standing or political significance to be discussed during the negotiation).

³⁷ ELUSIVE PEACE, *supra* note 1, at 4

³⁸ Perhaps a religious leader, family elder, or former government official is well respected as an arbiter of disputes within his community. Alternatively, a third party from another region not involved in the dispute may help grant legitimacy to the military negotiator in an inter-group conflict.

³⁹ For an in-depth discussion of trust-building, *see* Chapter 5.

⁴⁰ *See* Chapter 14 for a more in-depth consideration of the use of mediators in multi-cultural settings.

⁴¹ Larry Crump & A. Ian Glendon, *Towards a Paradigm of Multiparty Negotiation*, 8 INT'L NEGOT. 197, 197-234 (2003); *see also* HAMPSON, *supra* note 1, at 29; WATKINS & ROSEGRANT, *supra* note 1, at 116.

⁴² *See* PAUL J. ZWIER & THOMAS F. GUERNSEY, *ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE: A REALISTIC INTEGRATED APPROACH* 168 (2005).

⁴³ HAMPSON, *supra* note 1, at 31.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 154-55 (2001); Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 19-26 (2003).

⁴⁷ Mnookin, *supra* note 46, at 4, 18-26.

⁴⁸ A party may misperceive a negotiator's actions by making a value judgment as to the negotiator's choice of reciprocal approaches. For example, if a negotiator reciprocates one party's approach by haggling and reciprocates another party's face-saving techniques at the same table, the party with whom the negotiator was face-saving may feel that the negotiator is preferring his interests and positions of the party with whom the negotiator is haggling, when in reality, the negotiator is merely trying to treat each party equally, but in their own styles.

⁴⁹ I. William Zartman, *Prenegotiation: Phases and Functions in* GETTING TO THE TABLE: THE PROCESSES OF INTERNATIONAL PRENEGOTIATION 1, 12 (Janice Gross Stein ed., 1989).

⁵⁰ HAMPSON, *supra* note 1, at 7. For a comparison of bilateral and multiparty negotiations, see Mnookin, *supra* note 46.

Chapter 14

Mediation

Andrea Cozza-Lawless

A b s t r a c t

This chapter demonstrates the usefulness of mediation as a tool in furthering cross-cultural negotiations in times of impasse or even as a step prior to negotiation. In addition to improving communication and understanding between negotiators of different cultures, mediation has the ability to counterbalance cross-cultural differences of power, timing, and other difficulties through the use of a mediator. In determining whether to engage in mediation or how best to utilize the process, there are many factors a negotiator should consider that can influence the course of the mediation, and therefore the ability of the parties to resolve the conflict. This chapter addresses those factors and provides a guide for a negotiator about to embark on a cross-cultural mediation.

I. Introduction

Mediation can be used as a continuation of the parties' own negotiating efforts.¹ Due to some of the difficulties with cross-cultural negotiations discussed in previous chapters, the parties, no matter how hard they tried to reach an agreement, may still arrive at impasse. If this occurs, mediation may be a beneficial next step. Mediation allows a third party to intervene and act as a facilitator of communication, reality-checker, or a scapegoat to improve and further the discussions when basic negotiation does not succeed.² Mediation may help in building trust between counterparts and allow parties to vent or express themselves without permanently damaging discussions. Additionally, due to mediation's more flexible and confidential characteristics, it may succeed in overriding significant cross-cultural difficulties, such as a communication breakdown, power imbalances, timing concerns, and procedural difficulties.³

II. Cultural Norms of Mediation

Mediation is practiced differently from culture to culture. Understanding the concept of mediation in a specific culture, as well as when mediation is utilized in that culture for a particular dispute, may be an important step in reaching a successful agreement through this process. Prior to agreeing to participate in mediation, a party may find it helpful to understand the implications and traditions of the practice within the pertinent culture.

In the United States, mediation is commonly used when negotiation counterparts reach impasse.⁴ The preferences in the United States towards "directness, specificity, frankness in stating demands, confrontation, and open self-disclosure when resolving disputes"⁵ are reflected in the U.S. model of mediation.⁶ Although people in the United States employ various models of mediation, the models almost always consist of a meeting or series of meetings run by a neutral third-person who works to assist the parties in reaching agreement.⁷ At the conclusion of the mediation, the mediator usually has little or no additional contact with the parties.⁸ However, during the mediation, the mediator often focuses on the goals of each individual party and assists them in working collaboratively to find the best way to satisfy each individual's needs.⁹ Neutrality is a key aspect of the U.S. model, and the mediator is often chosen due to his lack of personal stake in the outcome.¹⁰ In choosing a mediator, parties in the United States tend to examine the potential mediator's professional background, training, experience, and prior cases mediated.¹¹

Additionally, rules play an important role in the relatively informal process.¹² After the rules are set forth, the mediator often requests that the parties give opening statements. Next, the parties may be able to negotiate between themselves with only minor guidance from the mediator or the parties may rely on the mediator to shuttle back and forth between them if they must be separated. Because the goal is to reach a satisfactory agreement, it is often imperative that people with decision-making authority on behalf of each party are present during the course of the mediation.¹³

In contrast, people in collectivist societies, such as those in Mexico and Iraq, often use mediation as a first step, prior to negotiation, to assist in conflict resolution.¹⁴ Additionally, in collectivist cultures, a mediator is commonly chosen not because of his neutrality, but instead because he is a respected insider.¹⁵ Therefore, he may already be familiar with the background of the issue, and the parties may view him as being able to understand and assist in resolving the conflict. Because of this, the mediator may advise each party on potential resolutions, although he may have had no formal training in mediation or other dispute resolution processes.¹⁶ Often, this type of mediation is conducted without the parties in the same room, and the mediator instead meets informally with parties, individually, through a series of meetings until a satisfactory resolution is achieved.¹⁷

One reason the mediation process differs from culture to culture is because the process is used to accomplish different goals.¹⁸ For example, Joshua Berry observes that Muslim culture highly values honor, so mediation within the culture allows the parties to preserve that honor by settling dispute in a private setting with a close family member or respected community member.¹⁹ In contrast, people in American often utilize mediation as a quicker and less expensive route to a solution than participating in litigation.²⁰ Remaining aware of a counterpart's reasons for agreeing to mediation can often make the process smoother and enable a party to be more efficient at handling conflict.

Due to the significant differences in the understanding and practice of mediation from culture to culture, it may be helpful to develop an understanding of applicable mediation customs and practices to determine if mediation is a viable option. Sometimes having a mediator who is familiar with the conflict is not preferable; however, if that third party assists in continuing discussions where negotiation previously failed and is respected by the negotiating counterpart, using such a mediator may be worthwhile. Specifically, in collectivist societies, utilizing a third party that the counterpart respects may be a beneficial and successful solution to moving past negotiating deadlocks and reaching agreement.

III. Considerations for Choosing a Mediator in Cross-Cultural Disputes

If the parties decide to mediate, they may also decide to develop their own rules and procedures for conducting the mediation, otherwise known as “ad hoc” rules. Some of these rules may cover the selection of the mediator.²¹ The parties could choose to adopt established rules set forth by various international programs, or they can use these rules as guidelines or examples to provide the parties with a procedure for selecting a mediator.²² A mediator with international mediation experience or one who understands cultural differences, who can allay fears of being misunderstood and allow for improved trust and communication between the parties, may be preferable, depending on the circumstances of the individual negotiation.²³

A. The Choice of Mediation Style

The choice of which mediation style to employ can be crucial to the success of reaching a resolution or helping to solve a cross-cultural crisis.²⁴ Choice of style may also impact which mediator the parties choose. There are three basic mediation styles: the role of facilitator, the role of formulator, and the role of manipulator.²⁵ These roles may be viewed as a sliding scale based on the amount the mediator participates in the discussion and helps the parties formulate possible settlement options.

The first style, “facilitation,” is generally not viewed as “typical” because it involves little to no substantive contribution by the mediator.²⁶ “Facilitation” may involve simple things, such as assisting in message communication, providing physical space for negotiations, organizing the discussion order, working with a party to see their counterpart or the problem itself in a new light, and not offering substantive suggestions. The role of the mediator in this style is most often recognized as being “primarily facilitative and diagnostic, but also nonevaluative, noncoercive, and nondirective over outcomes.”²⁷ Often, the primary purpose of this style is to maintain communication and understanding between the parties while assisting them in their negotiation.²⁸

The mediator is more active in “formulation mediation,” and this practice is commonly used in the United States. The formulation mediator may suggest solutions, rephrase or refine the issues, work to defuse high emotions, and attempt to move the parties beyond an apparent impasse.²⁹ This may be particularly helpful when emotions run high or the parties are deadlocked in their negotiation.³⁰ However, under this model, the mediator is not expected to impose or pressure acceptance of a particular settlement.³¹ “Formulation mediation” encompasses a broad range of tactics, contributing to the ongoing debate in U. S. mediation literature regarding the appropriateness of the third party suggesting solutions or evaluating the positions of the parties as opposed to acting more like a facilitator.³²

The third mediation style, “manipulation,” differs quite substantially from the previous two styles. Manipulation is considered by some U.S. scholars to be extremely invasive and therefore not considered a “true” mediation.³³ The role of manipulator involves the mediator offering substantive suggestions and solutions, extending bonuses for acceptance of certain alternatives, as well as using authority to influence a party to enter an agreement, which may not have been accepted without this demonstration of power.³⁴ A manipulative mediator may even act as an advocate for one or more of the parties, depending on the circumstances.³⁵ Studies involving international mediation between governmental parties found that a mediator employing an intrusive style can be more effective in ending high crisis situations as opposed to a more facilitative mediator.³⁶ This U.S.-based research, however, determined whether parties were more committed to the result of their agreement when they were able to have a voice and play a primary role in the outcome of their situation.³⁷ Because of this, these studies may have little predictability for a culture in which the people expect the mediator to play a strong role, such as in the Navajo nation or in China.

The manipulator role may be effective when the mediator is able to offer incentives to encourage parties to reach a resolution and when the mediator has an interest in the outcome. For example, these methods may be valuable in resolving disputes between groups when the United States has an interest in the outcome and may be able to act as a third-party mediator. However, it may also be beneficial when the primary goal is reaching an agreement or it is necessary to employ additional measures to convince the parties to reach a certain solution.

B. Characteristics of the Mediator

Certain mediator traits may also affect the way a mediation progresses, so finding a mediator possessing desired traits is preferable.³⁸ Familiarity with the parties is one key characteristic. If the mediator is familiar with one of the parties, as may be desired by those in collectivist societies, she may feel a bias towards one side over the other, either consciously or unconsciously.³⁹ This bias may provide the mediator with a tactical advantage in influencing and accessing the familiar party, which can assist in obtaining greater concessions and eventually reaching agreement.⁴⁰ However, there exists risk that the bias would encourage the mediator to push the unfamiliar side to make greater concessions as well.

The U.S. negotiator may also be interested in choosing a mediator based on affiliations or lack thereof. For example, a negotiator could consider utilizing a private individual or a mediator associated with a state or other organization. Additionally, many outside mediators have an “institutional base,” whether it is a nongovernmental organization, a state government, or some other body.⁴¹ If so, this body will likely be responsible for “backing” the mediator financially, politically, with support staff, or with other accommodations.⁴² A private “unofficial” mediator is one without official status, and such a mediator generally does not need to answer to individuals other than the parties to the mediation.⁴³ When the mediator belongs to an organization or entity, the mediator’s ability to be free and flexible may be inhibited due to the “internal structure and constituency” of that organization, which could potentially affect the mediation’s course.⁴⁴ Private mediators, on the other hand, lack these constraints and therefore may have expanded entry points, tactics, and approaches.⁴⁵ However, a private mediator may also lack capacity and flexibility to influence the parties through more manipulative techniques.⁴⁶ Mediators working with non-governmental agencies or private groups may have the additional problems of lacking the financial and political support necessary for negotiations to continue moving forward.⁴⁷

When choosing a mediator who is affiliated with an organization, the negotiator will be well served to ensure whether that organization is willing to commit to the time required to complete the mediation. However, time constraints imposed by an organization may be beneficial in some situations because this allows the mediator to set time limits for the process and use those limits to subtly influence the parties into reaching a settlement.⁴⁸ Further, a backing institution may have the added benefit of being able to offer incentives to encourage parties to move past a stalemate or other negotiating stronghold.⁴⁹ These incentives can range from promises of financial assistance to improving the appearance of the party in the international community.⁵⁰

There are additional concerns about mediator characteristics when the mediator is retained by a superpower, such as the United States.⁵¹ These particular mediators may be biased and required to answer to the backing organization or constituents.⁵² For example, during the talks between Israel and Egypt led by President Jimmy Carter at Camp David, political problems would arise any time President Carter attempted to deal with the issue of Palestinian rights because of the American Jewish community.⁵³ According to William Quandt of the Brookings Institution, Carter found he needed to be less public with his statements regarding the issue of Palestinian rights, giving the improper impression that he was feeling domestic pressure and backing down.⁵⁴

Some final items to examine when selecting a mediator are the mediator’s personal and professional background.⁵⁵ Although scholars debate whether nature or nurture is more vital to mediator success, research has demonstrated that both are equally important considerations in choosing a talented, effective mediator.⁵⁶ Nature, or personal characteristics and family ties, may be just as significant as nurture, in this case, the opportunities, education, and experiences of the mediator.⁵⁷ Therefore, a party may want to become familiar with a potential mediator’s background and experiences to best determine whether that mediator will be helpful.

C. Mediation Teams

Because the mediator will usually determine the course of the discussion, at times, a team of mediators may be more effective than a single mediator. Several advantages can be gained from the use of a mediation team. First, a mediation team can include mediators from all parties' cultural backgrounds, thus creating an opportunity to build greater trust among the parties.⁵⁸ Involving such a team demonstrates to the counterpart that a diversity of views and values are important, perhaps opening the door for greater trust and respect.⁵⁹ In addition, mediation teams can bring with them a variety of experiences and backgrounds, which may be helpful in assisting the parties to move past cross-cultural negotiating difficulties.⁶⁰

However, there are risks associated with the use of mediation teams. The possibility exists that a party will work only with a mediator who he feels favors his side.⁶¹ Also, if discussions begin to break down, mediators can pass the blame to each other for the difficulties that have arisen instead of taking personal responsibility and attempting to work towards a potential solution.⁶² Therefore, although mediation teams may be helpful in creating and enacting a variety of workable solutions, the potential for inefficiency and impasse still exist.

IV. Additional Concerns Regarding Mediation

A. Putting Culture on the Table

Putting culture on the table during the mediation may be one way to move beyond the difficult issues involving cultural differences that can further complicate the negotiation. Being aware of cultural issues ahead of time and remaining flexible are ways to deal with these cultural pitfalls; however, the mediator may also choose to discuss the differences in the opening remarks prior to the official start of the mediation.⁶³ Allowing the mediator to place culture on the table in this way can subtly draw both parties' attention to the fact that certain differences exist and that negotiations may be difficult, not because of the parties' intent, but because of deeper cultural differences.⁶⁴ However, in some situations putting culture on the table may be offensive, and the mediator should use discretion in utilizing this practice.⁶⁵ Additionally, as noted above in Chapter 6, a party should never directly reference a stereotype, but may instead reference cultural differences in more general terms.⁶⁶ If a party feels specific cultural issues may be relevant to his negotiation, utilizing private sessions with the mediator, also called caucuses, may allow the parties to discuss sensitive subjects with more privacy.

Another way to place culture on the table is by acknowledging it directly when it arises during the course of a mediation. Instead of discussing it openly in the introduction to the mediation, a party or the mediator might wait until cultural differences are involved in a certain stalemate and raise the issue at that time. This technique may be beneficial to help parties recognize that cultural differences, rather than personal differences, play a role in the failing negotiation. A party who recognizes these differences may request in a private caucus that the mediator suggest ways to reach past these differences or ask the mediator to discuss the situation with the other party privately or with the parties together as a group if the situation is appropriate.

B. Mediation Structure

In some situations, the structure of the mediation plays a role in easing the tension between the parties. For example, mediators can determine the location of the mediation in order to best set the stage for a potential agreement.⁶⁷ Neutral locations far removed from controversial situations, such as Camp David, have been beneficial in increasing privacy and the flexibility of the parties.⁶⁸ When mediations are held within a disputant's home territory or in an area of high conflict, the likelihood of agreement is less than if the mediation is held in the mediator's own territory.⁶⁹

Additionally, the way that the mediation process is structured can play an influential role in the likelihood of reaching agreement.⁷⁰ Participating in social activities together, in addition to the actual negotiating, such as eating meals or sharing in recreational activities, can assist in bringing the parties to a similar level.⁷¹ These additional opportunities for interaction can encourage listening, re-examination of issues, and mutual understanding, thus helping ease tensions and avoiding cross-cultural pitfalls.⁷²

V. Conclusion

In deciding whether to continue negotiation with the assistance of a mediator, a negotiator may wish to consider the counterpart's desire to mediate and the way differences in mediation from culture to culture may affect the current situation. The negotiator may want to analyze what mediation signifies within the counterpart's culture and to understand the reasons underlying the counterpart's hesitancy or desire to mediate. Additionally, discovering the mediator's background and connections may be imperative in determining whether or not mediation is a beneficial alternative for the current situation. A mediator or mediation team may be able to utilize power balances, biases, or structures to assist the mediation. Understanding that the mediator is there to assist the parties in reaching a solution that both sides can accept, whether it be through influence of power or just offering space for the negotiation can help lead to an agreement. The mediator can also bring a great amount of assistance to a situation and provide many alternate ways to come to an agreement. Finally, the mediator's history and connections may play a role in interfering with a party's true best interests.

Toolbox

Potential questions a party entering into mediation should consider:

- 1) What is the pertinent culture's understanding of mediation and how is it used in resolving disputes? How does that differ from mediation within my own culture?
- 2) Why is my counterpart choosing mediation and how will that affect the status of the negotiations?
- 3) What am I trying to achieve through mediation?
- 4) What type of mediation style will help me reach my goal?
Is there a style that will worsen my situation?
- 5) Will an inside mediator help or hurt the situation for me?
- 6) What affiliation may have an impact on the mediator and the mediation?
- 7) What type of power does the mediator bring to the table and how does that affect my counterpart and I?
- 8) How does the mediator's background and experiences impact my situation and that of my counterpart?

Endnotes

¹ Jacob Bercovitch, *Introduction: Putting Mediation in Context*, in *STUDIES IN INTERNATIONAL MEDIATION, ESSAYS IN HONOR OF JEFFREY Z. RUBIN* 3, 5 (Jacob Bercovitch ed., 2002).

² 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, 10-11 (1996).

³ *Id.* at 52-53.

⁴ Joshua F. Berry, Note, *The Trouble We Have With the Iraqis Is Us: A Proposal for Alternative Dispute Resolution in the New Iraq*, 20 *OHIO ST. J. ON DISP. RESOL.* 487, 508 (2005) (citing Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will it Work?*, 26 *N.M. L. REV.* 57, 62 (1996)).

⁵ *Id.* (citing DAVID W. AUGSBURGER, *CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS* 28 (1992)).

⁶ *See id.* at 508-09.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 508; Wright, *supra* note 4, at 60.

¹⁰ Wright, *supra* note 4, at 63.

¹¹ *Id.* at 62-63.

¹² *Id.* at 63.

¹³ *Id.* at 64.

¹⁴ *Id.* at 65.

¹⁵ *Id.* at 65-66

¹⁶ *Id.* at 66.

¹⁷ *Id.*

¹⁸ Berry, *supra* note 4, at 511-12.

¹⁹ *Id.*

²⁰ *Id.* at 512.

²¹ Barker, *supra* note 2, at 15.

²² *Id.* One such set of rules the parties may wish to adopt are the Uniform Mediation Act, complete with the 2003 amendment adopting the UNCITRAL Model Law on Commercial Arbitration. More information on the Uniform Mediation Act and the amendments can be found at the website for the Uniform National Law Commissioners, at www.nccusl.org/Update/ActSearchResults.aspx (last viewed July 7, 2006).

²³ Barker, *supra* note 2, at 18.

²⁴ JONATHAN WILKENFELD ET AL., *MEDIATING INTERNATIONAL CRISES* 69 (2005).

²⁵ *Id.*

²⁶ *Id.* at 70.

²⁷ *Id.* at 71 (citing L. Keashly & R.J. Fisher, *A Contingency Perspective on Conflict Interventions: Theoretical and Practical Considerations*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* (Jacob Bercovitch ed., 1996)).

²⁸ *Id.* at 70.

²⁹ *Id.* at 72.

³⁰ *Id.*

³¹ *Id.* at 72.

³² L. Randolph Lowry, *Training Mediators for the 21st Century: To Evaluate or Not: That is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48, 48 (2000).

³³ WILKENFELD, *supra* note 24, at 73; Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 718 (1997) (citing Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 14 (1986)); *see generally* STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 103 (2d ed. 1992); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 4-5 (1987).

³⁴ WILKENFELD, *supra* note 24, at 73 (citing generally S. Touval & I.W. Zartman, *Introduction: Mediation in Theory, in International Mediation in Theory and Practice* (S. Touval & I.W. Zartman eds., 1985)).

³⁵ *Id.*

³⁶ *Id.* at 100.

³⁷ Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 437 (1999).

³⁸ CHESTER A. CROCKER ET AL., *TAMING INTRACTABLE CONFLICTS, MEDIATION IN THE HARDEST CASES* 15 (2004).

³⁹ Peter J. Carnevale, *Mediating from Strength, in Studies in International Mediation: Essays in Honor of Jeffrey Z. Rubin* 25, 30 (Jacob Bercovitch ed., 2002).

⁴⁰ *Id.*

⁴¹ CROCKER, *supra* note 38, at 78.

⁴² *Id.*

⁴³ A. Paul Hare, *Informal Mediation by Private Individuals, in Mediation in International Relations: Multiple Approaches to Conflict Management* 60-61 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992).

⁴⁴ *see generally* CROCKER, *supra* note 38, 78-81.

⁴⁵ Chester A. Crocker, et al., *Multiparty Mediation and the Conflict Cycle, in Herding Cats, Multiparty Mediation in a Complex World* 19, 29-30 (Chester A. Crocker et al. eds., 1999).

⁴⁶ *Id.*

⁴⁷ Chester A. Crocker, et al., *Rising to the Challenge of Multiparty Mediation: Institutional Readiness, Policy Context, and Mediator Relationships, in Herding Cats: Multiparty Mediation in a Complex World* 665, 679 (Chester A. Crocker et al. eds., 1999).

⁴⁸ CROCKER, *supra* note 38, at 78-79.

⁴⁹ *Id.* at 79.

⁵⁰ *Id.* In discussing incentives, scholar Jeffrey Rubin identified several types of resources and influences related to power that a mediator can use to assist in aiding the negotiation: reward power, which exists when the mediator is able to offer something to the parties as an incentive to reaching agreement; coercive power, which relies on threats to attempt to change the parties' actions; expert power, that depends on the amount of experience and knowledge that the mediator has; legitimate power in authority under law; referent power, that is based on the parties goal to maintain a relationship with the mediator; and informational power, that plays on the information that is conveyed between the parties in the situation where the mediator is the "go-between" between the various parties. CROCKER, *supra* note 38, at 29.

⁵¹ CROCKER, *supra* note 38, at 80.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 75.

⁵⁶ *Id.*; *see also id.* at 196 n.4, stating "[B]oth his Mauritanian background and his long experience in public service in Mauritania and his United Nations were extremely helpful to Ahmedou Ould-Abdallah in his work as the UN secretary-general's special representative SRSG to Burundi."

⁵⁷ CROCKER, *supra* note 38, at 75.

⁵⁸ Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 89-90 (1995).

⁵⁹ *Id.* at 89.

⁶⁰ Elizabeth L. Allen & Donald D. Mohr. *How to Choose the Right Mediator*, 26 VT. B. J. & L. DIG. 27, 27 (2000).

⁶¹ CROCKER, *supra* note 38, at 89.

⁶² *Id.*

⁶³ Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 471 (2004).

⁶⁴ *Id.* 471-72.

⁶⁵ *Id.* at 472.

⁶⁶ Barker, *supra* note 2, at 24.

⁶⁷ Dean G. Pruitt, *Mediator Behavior and Success in Mediation*, in *STUDIES IN INTERNATIONAL MEDIATION, ESSAYS IN HONOR OF JEFFREY Z. RUBIN* 41, 45 (Jacob Bercovitch ed., 2002).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

Chapter 15

Post-Agreement Issues

Matthew Monda

A b s t r a c t

This chapter deals with some issues that arise after the initial agreement is reached.

The first section suggests what a U.S. negotiator can do if he is being replaced, replacing someone, or dealing with a new counterpart. The second section discusses breach of the agreement and ways to remedy the breach without sacrificing the relationship. Both sections are organized by actions to be taken proactively and those that are reactive to the situation.

I. Introduction

As this book has shown, “negotiations” are more than just the discussions needed to reach a single agreement. A negotiation is the aggregate of events and interactions in a relationship between parties with separate interests. To this point, most of the chapters have focused on those events and interactions that take place up to and including the initial agreement between the parties. This chapter focuses on what occurs after that initial agreement is signed.

More specifically, this chapter deals with issues that create problems in the relationship. In an ideal negotiating relationship, the execution of the agreement proceeds as planned and leads to future agreements. When an issue arises that breaks the ideal continuum, both the initial agreement and the relationship become tested. Effectively dealing with these issues can make a failing negotiation successful.

Dealing with post-agreement issues requires both reactive as well as proactive actions. When the unexpected arises, negotiators who can react to the issue by minimizing its negative effect will be successful in maintaining strong negotiating relationships. This chapter will discuss how a negotiator can react effectively to such post-agreement issues.

Negotiators can prepare for many of these unexpected post-agreement issues. Steps can be taken, in anticipation of certain issues to minimize the negative effects or to avoid post-agreement problems altogether. These steps, however, may not be obvious or may be difficult to broach during the initial negotiations. Consequently, this chapter will also explore ways a negotiator can act reactively.

The first category of post-agreement issues involves when one or more of the negotiators are replaced. A new negotiator can signal the end of the relationship if it is not handled correctly. Furthermore, some cultures replace negotiators as an offensive tactic. A negotiator in a cross-cultural negotiation must be prepared to address this possibility.

The second type of post-agreement issue includes the breach of the original agreement. Often in cross-cultural or international agreements, the parties cannot resort to a court to protect the rights of the non-breaching party, and obtaining damages or performance may be difficult. In the United States, contracts commonly deal with a potential breach. Different cultures, however, may be reluctant to discuss this issue before a breach occurs. Also, some cultures vary on their approach to renegotiation, a common way of dealing with breaches.

II. Replacement Negotiators

In cross-cultural negotiations, one or more of the negotiators may be far from home in a negotiation relationship lasting over the course of several years. These factors can create a situation in which a negotiator from one side can no longer continue in the process, leaving the truly interested party, the backing organization, to find a replacement.

As discussed earlier,¹ the relationship forged between negotiators is important to the success of the negotiation. While demands and interests may be based on the positions of the parties, the relationship is usually based on the personal traits of the individuals. Replacing a negotiator can disrupt the relationship even if it does not materially change the issues involved in the negotiation.

A. Active Steps for Dealing with New Negotiators

In some cases, a negotiator’s exit from the negotiation process will be foreseeable. If this is the case, the outgoing negotiator can prepare for the arrival of the new negotiator. This is particularly important if the relationship is strong, but this may be an advantageous tactic even if the relationship is weak.

In either situation, the key is framing the change in negotiators in a way to alleviate any concerns of the counterpart. This begins by framing the negotiation as a relationship existing over the course of time. The exit of the outgoing negotiator and the arrival of the new negotiator are just steps in the ongoing relationship. Successfully framing the transfer as a natural step in the process allows the new negotiator to take advantage of the past discussions without having to restart the process.

An understanding of the way in which the counterpart views time creates an opportunity to frame the transfer in the most advantageous way. The counterpart’s perception of time dictates the negotiating

process, and cultural differences in the perception of time create a potential disconnect between the parties. By understanding the counterpart's perception, the U.S. negotiator can adapt his approach to relate in an appropriate manner.

In *The Military and Negotiation*, Deborah Goodwin suggests there exist two different ways people view time. The individual's perception of time is often a result of culture, and the two most common perceptual time models are sequential time and synchronic time.² The shape of the negotiation is often determined by the perceptual model adopted by the negotiators. In a sequential model, time is viewed on a straight continuum from past to future.³ The negotiator stands in the present, with all points in the negotiation either in front or behind. People who use this model are likely to prefer dealing with one task at a time and preparing thoroughly. In other words, they behave in a "highly structured manner."⁴ When dealing with a negotiator who views time sequentially, planning is important. The earlier a transfer can be "scheduled," the more the counterpart can mentally prepare for the change. Under this model, when the time comes, the new negotiator can be viewed as the next step.

In the synchronic model, past, present, and future are considered "interrelated phases," each affecting the others.⁵ Past events and future considerations shape the actions of the present.⁶ Although this model appears to accommodate flexibility,⁷ it may also result in stagnation. While a counterpart viewing time in the sequential model needs to be made aware of the future, the counterpart using the synchronic model may not have that same need. The arrival of the new negotiator may not surprise the counterpart, but it may slow down the process while the counterpart integrates the new negotiator into the relationship. Including the new negotiator, professionally and socially, in the negotiating relationship can act to begin the integration process before the new negotiator even arrives. If the identity of the new negotiator is known before the switch occurs, the new negotiator could speak on the phone or perhaps even meet the counterpart in an informal setting prior to the new negotiator's official start. For the outgoing negotiator, it is important to bring the new negotiator up to date with the relationship and inform the counterpart of such need. Finally, the outgoing negotiator can act as a contact or remain active in the relationship as an effort to help bridge the past, present, and future.

B. Reactive Steps for Dealing with New Negotiators

Besides communicating with the counterpart, the outgoing negotiator will be well served to communicate with the new negotiator. While it may be more effective to make such communications before the switch, it is something that can be done even when the switch is unexpected. Because not every replacement negotiator will have sufficient time to prepare, this section advises how to make the best of a sudden switch in negotiation partners.

The new negotiator will need to learn the facts and circumstances surrounding the negotiation. In this regard, the new negotiator will benefit from as much information as possible. A good test for the old negotiator is to think about what information would have been useful at the beginning of the process. Full information sharing is best; however, full disclosure carries a risk of the outgoing negotiator overwhelming the new negotiator.

The outgoing negotiator also has to be cautious of how the information is conveyed. A negotiator who has been immersed in a foreign culture may experience a "reverse culture shock"⁸ upon returning home. Unlike the anticipated shock of entering a foreign culture, the potential for reverse culture shock may be counterintuitive. It can occur when success in adapting to a new culture creates a confidence in adapting to the return home as well. Reverse culture shock can also occur because the people back home either do not expect or are not tolerant of the negotiator's changing circumstances.⁹

This reverse culture shock may create communication difficulties for a negotiator returning from a foreign culture. The outgoing negotiator may have adopted the foreign culture's methods of conveying messages without being aware, thus hindering communication to the new negotiator. For instance, while Americans tend to be verbally oriented, Africans tend to be more aware of nonverbal indicators. An African who has spent time in America developing verbal communication skills may not be used to the nonverbal emphasis upon returning home.¹⁰ If the outgoing negotiator is not communicating in a way understandable to the new negotiator, the intended meaning of the communication may become lost.

Anticipating the occurrence of reverse culture shock is the most effective way to cope with the possibility.¹¹ The outgoing negotiator needs to differentiate what aspects of communication are different in the foreign culture. By doing this, the outgoing negotiator can not only communicate effectively to the new negotiator but also use the opportunity to help the new negotiator minimize the initial culture shock.

C. Dealing with New Counterparts

The focus thus far has been on how the outgoing negotiator can ease the transition for both the new negotiator and the counterpart. The counterpart, however, cannot be counted on to take these same steps when a new counterpart is introduced to the negotiation relationship. In this regard, the U.S. negotiator is left to analyze the situation and decide how to proceed.

The U.S. negotiator may be tempted, and the new counterpart may wish, to begin the negotiating relationship from scratch. This is sometimes the correct approach, even though valuable time and energy will be lost. Ignoring the past relationship, however, may not be wise, particularly when delicate negotiations or relationships have become stronger due to the parties' recent efforts.

The U.S. negotiator will likely try to ascertain some information from either the old or the new counterpart and use this information to determine how best to proceed under the new circumstances. If the U.S. negotiator first learns about the possibility of a new counterpart from the old counterpart, the U.S. negotiator might benefit from having additional time to react to the news. The U.S. negotiator may also try to uncover what the new counterpart has learned from the old counterpart. Although the counterparts represent the same party, they do not necessarily know the same information. The more that the U.S. negotiator can confirm the new counterpart knows, the less ground that needs to be made up. Conversely, when the outgoing negotiator has not communicated even basic information regarding the negotiation to the new counterpart, the more likely it is that the U.S. negotiator needs to start back at an elementary level.

Another important strategy is to uncover the purpose of the switch, if possible. In some cultures, the party switches negotiators at a strategic point in the negotiation to capture an advantage.¹² Alternatively, a switch can be necessitated for unavoidable reasons, such as a transfer or even death. The reason for the switch may affect the way the U.S. negotiator reacts to it. When the switch is unavoidable, patience and accommodation may serve the negotiation. When the switch occurs in an attempt to elicit some concession, accommodation may only encourage the behavior and weaken the negotiator's bargaining position. One approach is to recognize the maneuver and refuse to deal.¹³ This, however, runs the risk of ending the negotiation. A more attractive approach may be to respond with the same action by bringing in a new U.S. negotiator. While this may delay negotiations, the risk of termination is lower. Then, the parties can use the latest discussions between the old negotiators as a starting point.

III. Breach of an Agreement or Impossibility to Complete an Agreement

In any agreement, there is a risk that a party will not fulfill its requirements, whether intentionally or not. Even if the party does fulfill what it believes are its obligations, the other party may understand those obligations differently. The added complexities of cross-cultural negotiations make these possibilities greater. Some of those complexities also make a breach more problematic. In the United States, while the parties can solve their problem in a variety of ways, they can always fall back on the court system. This safety net usually does not naturally exist in cross-cultural negotiations. Therefore, it is especially important to deal with the possibility of breach in creative ways.

A. Active Ways to Deal with Breach

The most effective way to deal with a breach of the agreement is to address it in the agreement itself. It may seem counter-intuitive to agree on how to deal with a broken agreement, and for many cultures, it is. Before exploring ways to deal with the breach, the parties have to acknowledge the need to address it.

Trust and confidence in the relationship are usually at their highest when the parties are close to an agreement. Consequently, the parties may be reluctant to suggest the possibility of future discord. Such suggestion may be viewed as a sign of distrust, leading to impasse. Approaching this subject, therefore, requires delicacy. Accordingly, before discussing potential breach, the focus could turn to impossibility of

completion. Impossibility includes any events making one party unable to meet some or all of its obligations under the agreement.¹⁴ How impossibility is treated varies across legal systems. The parties can, however, agree on how to deal with the situation if it arises. They can define what impossibility means in their situation. Addressing impossibility can be framed as a benefit for both parties in that it will avoid conflict if something beyond the control of the parties occurs.

From there, a negotiator can address the possibility of breach. The focus should be on preserving the agreement, not punishing for noncompliance. It is better to focus on preservation while the parties are on good terms, acknowledging that there may be a temporary distrust if a breach occurs. A rational approach to breach is more likely to be conceived during contracting rather than at the time of breach.

Once the idea of breach becomes a negotiable issue, the next step is to decide what needs to be protected from breach. Some aspects of the agreement may not be essential or worth protecting. The focus should be on what the parties deem the most important and most directly affecting the goals of the negotiation.

There are many ways to protect against future breach within the negotiated agreement itself. For instance, force majeure clauses deal with impossibility and can excuse performance in the event of impracticability, “acts of God,” or political disruption. A choice-of-law provision allows the parties to assign a jurisdiction to handle any future dispute. Mediation or arbitration clauses create an alternative procedure for handling disputes. Additionally, a penalty provision can be included to address damages.¹⁵

The above-mentioned clauses may be common in contracts in the United States, but they are not always useful in cross-cultural agreements. For example, the parties can agree to any method of handling the dispute. Creatively addressing the issue can lead to an approach that meets the unique requirements of an agreement. Similarly, a specific adaptation clause can create flexibility that may save the agreement. An adaptation clause allows certain aspects of the agreement to change depending on specified conditions. One adaptation clause could be to choose a method of determining price in a long-term supply contract by tying the price of the goods to the applicable market. This type of clause can help one party avoid being placed in a position in which the cost of breaching the agreement is less than the cost of fulfilling the obligations.¹⁶

Finally, a U.S. negotiator can incorporate into the agreement dispute resolution systems familiar to the counterpart. Some cultures have unique systems that may be more familiar and comfortable to the counterpart. Examples of this include culture-specific variations of mediation and arbitration.¹⁷ By becoming familiar with cultural customs, the U.S. negotiator can offer mutually acceptable dispute resolution approaches based on that culture’s practices. This approach is yet another way to lessen the negative impact of discussing future breach.

B. Reactive Ways to Deal with Breach

When a breach occurs the non-breaching party will often want to enforce the agreement. This may mean resorting to pre-agreed to forms of dispute resolution or, when applicable, seeking specific performance¹⁸ from a court. Even if the agreement addresses breach, and particularly if it does not, both parties may prefer to reenter negotiations rather than to seek a remedy.

Renegotiation can be as flexible as the parties wish. In essence, as little or as much of the past agreement can be reopened for negotiations. One option is to focus on the conditions that have changed. Another, broader approach is to focus on the most important parts of the agreement, which may include more than just the conditions that have changed. If a changed condition makes fulfillment of a mutually beneficial agreement exceptionally difficult for one party, renegotiating only the changed conditions may be the most beneficial way to proceed. If there is deeper unease about the contract, the changed condition may be an excuse to avoid existing obligations and open the negotiation to include a wider array of topics. If this is the case, renegotiating the entire agreement may be easier than trying to focus the negotiations on limited changed circumstances.

Regardless of the approach, renegotiation tends to be different than the normal negotiation process. Generally, renegotiations are more likely to be distributive, “tit for tat” negotiations than interest-based negotiations because the bargaining range of the parties has previously been defined. However, the distributive tone often increases hostility.¹⁹ Additionally, both parties usually have better information dur-

ing renegotiation.²⁰ What may have been a prediction during negotiations may be a fact during renegotiation. Further, the power of the parties may have shifted, creating a renegotiating context that is very different from the original.

Finally, a U.S. negotiator should be aware of varying cultural views of renegotiation. Some cultures may be more open to it, almost to the point of expecting to renegotiate at some point over the course of the relationship. This knowledge can help the U.S. negotiator determine scope and better understand the new context. On the other hand, the counterpart may be from a culture that would prefer to deal with the breach rather than renegotiate at all. By preparing for this situation, even after breach, the U.S. negotiator can be better prepared for either renegotiating the contract or seeking to enforce a remedy for breach.

IV. Conclusion

As this chapter presents, reaching a negotiated agreement is often not the end of the relationship between the parties. Sometimes, reaching an agreement is the first step of a lasting relationship. As in any relationship, the interested parties may change or the obligations imposed on the negotiators may become unbearable, if not impossible, to perform. In these situations, the U.S. negotiator will be well served to prepare for the possibilities of a change in the composition of the negotiators or breach of an agreement. By knowing how to both anticipate and react to these situations, negotiators will be better able to deal with these potential missteps.

Endnotes

¹ See Chapter 5 on trust building.

² DEBORAH GOODWIN, *THE MILITARY AND NEGOTIATION: THE ROLE OF THE SOLDIER-DIPLOMAT* 111 (2005).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 112

⁸ Gary R. Weaver, *The Process of Reentry*, in *CULTURE, COMMUNICATION AND CONFLICT* 220 (Gary R. Weaver ed., Pearson Press 2d rev. 2000) (1994).

⁹ *Id.* at 221.

¹⁰ *Id.*

¹¹ *Id.* at 225.

¹² Henry J. Graham, *Foreign Investment Laws of China and The United States: A Comparative Study*, 5 *FLA. ST. J. TRANSNAT'L L. & POL'Y* 253, 271 (1996).

¹³ *Id.*

¹⁴ WILLIAM J. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES* 19 (Kluwer L. Int'l 3d ed. 1998) (1988).

¹⁵ *Id.* at 166-76.

¹⁶ *Id.* at 89.

¹⁷ Mediation and arbitration systems vary internationally. Chapter 14 of this book deals with mediation. *The Leading Arbitrators' Guide to International Arbitration* also provides an extensive discussion of international arbitration procedures. *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* (Lawrence W. Newman & Richard D. Hill eds., 2004).

¹⁸ Specific performance is a contract remedy under which the non-breaching party seeks the court to enforce the terms of the agreement rather than awarding monetary damages for breach. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 17 (6th ed. 2001).

¹⁹ FOX, *supra* note 14.

²⁰ See *id.* at 224.