

Fordham International Law Journal

Volume 39, Issue 3

2016

Article 6

Does Nationality Influence Neutrality? The Ethical Standards and Expectations of International Mediators

Melissa Katsoris*

*Fordham University School of Law

Copyright ©2016 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Does Nationality Influence Neutrality? The Ethical Standards and Expectations of International Mediators

Melissa Katsoris

Abstract

This Comment examines how a mediator's nationality can influence the mediating parties' and communities' perceptions of his neutrality and how cultural differences play a role in the ethical expectations of a cross-cultural mediator. Part I discusses the role of neutrality in cross-cultural mediation and how neutrality is required and interpreted by codified ethical standards for mediators in the United States and in several international organizations. Part II discusses the role of culture in mediation, how culture influences ethical expectations, and the case studies of George Mitchell, a mediator in Ireland and Israel-Palestine, and Lakhdar Brahimi, a mediator in Syria. Mitchell and Brahimi are examples of mediators who worked with cultures that had different ethical expectations of the mediator's role than they were accustomed to in their respective cultures. They both resigned in frustration and experienced great difficulty and public ridicule during their terms. Part III analyzes Mitchell and Brahimi's trials and failures in their mediations, and provides suggestions for mediators involved in cross-cultural mediations. Through this analysis this Comment clarifies the role of neutrality in mediation and how a mediator's nationality influences how mediating parties and their communities perceive his neutrality.

KEYWORDS: Nationality, Ethical Standards, Culture, George Mitchell, Lakhdar Brahimi, Mediation, Mediators

COMMENT

DOES NATIONALITY INFLUENCE NEUTRALITY? THE ETHICAL STANDARDS AND EXPECTATIONS OF INTERNATIONAL MEDIATORS

*Melissa Katsoris**

INTRODUCTION	696
I. NEUTRALITY AND ITS ROLE IN ESTABLISHED ETHICAL STANDARDS FOR MEDIATORS	699
A. The Role of Neutrality in International and Cross Cultural Mediation	699
B. Established Ethical Standards of Neutrality for Mediators.....	704
i. United States	704
ii. Australia	707
iii. International Standards	708
a. United Nations	709
b. International Mediation Institute.....	711
c. World Trade Organization	713
d. International Chamber of Commerce.....	713
II. CULTURE AND NATIONALITY INFLUENCING ETHICAL EXPECTATIONS AND THE CASES OF GEORGE MITCHELL AND LAKHDAR BRAHIMI	715
A. The Role of Culture in Mediation: Individualist vs. Collectivist Cultures.....	716
B. Ethical Behavior in Mediation.....	721
C. The Mediations of George Mitchell and Lakhdar Brahimi.....	724
i. George Mitchell	724

* J.D., 2015, Fordham University School of Law; B.A., Economics and History, 2011, New York University. The Author would like to thank Professor Jacqueline Nolan-Haley for her invaluable guidance, expertise in Alternative Dispute Resolution, and fellowship through the development of this Comment. She would also like to thank the Volume XXXVIII Board of the Fordham International Law Journal, especially Maria Vanikiotis. Finally, the Author would like to thank her family and friends for supporting and inspiring her through everything.

a. Mitchell’s Role in Resolving “The Troubles” in Northern Ireland.....	725
b. Mitchell as the United States’ Middle East Envoy in Israel - Palestine	731
ii. Lakhdar Brahimi as the United Nations’ Special Envoy in Syria.....	736
III. ANALYSIS OF MITCHELL AND BRAHIMI’S MEDIATIONS AND SUGGESTIONS FOR INTERNATIONAL AND CROSS-CULTURAL MEDIATORS.....	742
A. Why George Mitchell Experienced Success and Praise in Ireland and Frustration and Failure Israel-Palestine	742
B. How Lakhdar Brahimi’s Perceived Bias Against The Syrian Government and Cultural Complications Compromised a Resolution for his Mediation in Syria.....	746
C. Recommendations for Mediators Dealing with Cultural Differences and Issues of Neutrality	748
CONCLUSION.....	752

INTRODUCTION

To date, over 200,000 people have died in the Syrian conflict, with about half of the population displaced in the largest forced population migration since World War II.¹ Although such circumstances deserve immediate resolution, Special Envoy Lakhdar Brahimi, with the participation of the United States and Russia, could not manage to facilitate a resolution to this conflict between the Syrian government and opposition, and resigned in frustration in

1. *The Syrian Humanitarian Crisis: Four Years Later and No End in Sight: Testimony Before the H. Foreign Affairs Subcomm. on the Middle East and North Africa and the Subcomm. on Africa, Global Health, Global Human Rights, and Int'l Orgs.*, 114th Cong. (2015) (statement of Deputy Assistant Secretary Kelly T. Clements), <http://docs.house.gov/meetings/FA/FA13/20150212/102953/HHRG-114-FA13-Wstate-ClementsK-20150212.pdf> (“Not since World War II raged across three continents has violence and persecution driven so many people from their homes. . . . So far, the conflict has claimed the lives of over 200,000 Syrians. . . . The Syrian crisis has set unenviable records, producing almost four million refugees, more than any other modern conflict, and forcibly displacing more than seven million internally, the vast majority as a result of the Assad regime’s campaign of destruction.”); *Syria: The Story of the Conflict*, BBC NEWS (Mar. 12, 2015), <http://www.bbc.com/news/world-middle-east-26116868>.

2014.² This failure to reach a resolution in Syria may have been due to misunderstandings, including differing cultural perspectives and the preferences of the mediating parties and their mediator, Brahimi.³

A mediator's nationality and cultural background can influence how he conducts mediations and how the parties of the mediation perceive him and his methods.⁴ In the mediation process a mediator's role is to assist the disputants in communicating with each other, identify and clarify issues, and consider available options in order to reach a consensual agreement that is fair and equitable to the parties.⁵ To achieve these objectives, it is recommended by most codes of conduct for mediators that a mediator remain neutral and impartial.⁶ It is also crucial that the parties involved in the mediation believe that the mediator is trustworthy and neutral with respect to the issues involved in the conflict because this will allow the parties to be comfortable with his guidance and, as a result, come to an uncoerced agreement.⁷

The cultural perspectives of the participants influence the character and circumstances of a mediation.⁸ Differing cultural

2. *Infra* notes 270-83 (explaining Brahimi's mediation between the Syrian opposition and government).

3. *Infra* notes 319-28 (discussing how cultural differences and expectations stymied progress in Brahimi's mediation in Syria).

4. See Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collectivist Paradigms*, MEDIATE.COM (Jan. 2000), <http://www.mediate.com/pfriendly.cfm?id=57> (discussing how individualist and collectivist cultural values influence mediation methods); see also Carrie Menkel-Meadow & Harold I. Abramson, *Mediating Multiculturally: Culture and the Ethical Mediator*, in *MEDIATION ETHICS: CASES & COMMENTARIES* 305-38, (Ellen Waldman ed., 2011); Cheryl Rivers, *Lying Cheating Foreigners! Negotiation Ethics across Cultures*, 12 INT'L NEGOTIATION 1 (2007).

5. Hin Hung, *Neutrality and Impartiality in Mediation*, 5 ADR BULLETIN 3 (2002), art. 7 at 1; Joseph B. Stulberg, *Must a Mediator Be Neutral?*, 95 MARQUETTE L. REV 831 (2012) (viewing "mediation as an efficient tool for facilitating agreement and gaining compliance among disputing persons about future-looking plans").

6. Hung, *supra* note 5, at 1; Rachael Field, *Neutrality and Power: Myths and Reality*, 3 ADR BULLETIN 1, 16 (2000) ("Neutrality is a key concept in the process of mediation, with 'definitions of mediation frequently assert[ing] that the mediator is a neutral intervener in the parties' dispute. For example, one of the most commonly accepted and often cited definitions provided by Folberg and Taylor refers to mediation as a process involving 'the assistance of a neutral person or persons.'"); see also *infra* notes 52-116.

7. Hung, *supra* note 5, at 1; Field, *supra* note 6, at 16 ("This firm connection between neutrality and fundamental definitional aspects of mediation theory is also related to neutrality's 'important legitimising function for mediation.' People are drawn to the mediation process on the basis of the perceived promise that neutrality holds.").

8. Wright, *supra* note 4, at 1; Menkel-Meadow & Abramson, *supra* note 4, at 307 ("Cultural lenses tint virtually every scene we encounter. . . . Experts in intercultural negotiation have identified a series of cultural features that influence disputing style.").

ideologies have the potential to cause an impasse in the mediation if the participants' views diverge on fundamental issues such as individual autonomy and group interdependence.⁹ Cultural experiences also influence the participants' expectations of the mediator's role.¹⁰ Consequently, complications may arise if the mediator—due to his nationality or background—identifies with one party's culture more than another's.¹¹

This Comment examines how a mediator's nationality can influence the mediating parties' and communities' perceptions of his neutrality and how cultural differences play a role in the ethical expectations of a cross-cultural mediator. Part I discusses the role of neutrality in cross-cultural mediation and how neutrality is required and interpreted by codified ethical standards for mediators in the United States and in several international organizations. Part II discusses the role of culture in mediation, how culture influences ethical expectations, and the case studies of George Mitchell, a mediator in Ireland and Israel-Palestine, and Lakhdar Brahimi, a mediator in Syria.¹² Mitchell and Brahimi are examples of mediators who worked with cultures that had different ethical expectations of the mediator's role than they were accustomed to in their respective

9. Wright, *supra* note 4, at 1; Menkel-Meadow & Abramson, *supra* note 4, at 305 (“Occasionally, though, the clash of cultures will lead to ethical conundrums. Although all ethical problems are challenging . . . cross-cultural ethical dilemmas are particularly agonizing because they seem to require a choice between deeply felt cultural traditions. Amid current heightened sensitivities attending changes of Western cultural domination, the act of choosing in this context seems particularly fraught.”).

10. Wright, *supra* note 4, at 4 (“Individualists tend to prefer professional mediators who have specialized training in mediation procedures. In individualist context, the mediator usually is expected to be impartial, with no undisclosed relationship to any disputant. Among collectivists, there tends to be less of a concern about professional credentials and impartiality, but more of a concern that the mediator be an insider, someone who knows the parties or at least the context of their dispute.”); Menkel-Meadow & Abramson, *supra* note 4, at 311 (“When mediators are working with disputants from different cultures, he (Hal Abramson) advises they (1) understand their own culture, (2) research the other culture, (3) bridge any cultural gap, and, when appropriate, (4) consider withdrawal.”).

11. Wright, *supra* note 4, at 4; Menkel-Meadow & Abramson, *supra* note 4, at 311 (discussing the ethical preferences of mediator's and mediating parties depending on their culture and nationality and how to avoid mediator partiality toward one culture over another while performing a mediation).

12. See *infra* notes 178-294 (Mitchell mediated in Ireland and Northern Ireland in 1995 and finished with a resolution called the Good Friday Agreement. He also began mediating in Israel-Palestine in 2009 and resigned after two years without a resolution. Brahimi began mediating in Syria in 2012 and resigned from this mediation in 2014 without a resolution).

cultures.¹³ They both resigned in frustration and experienced great difficulty and public ridicule during their terms.¹⁴ Part III analyzes Mitchell and Brahimí's trials and failures in their mediations, and provides suggestions for mediators involved in cross-cultural mediations. Through this analysis this Comment clarifies the role of neutrality in mediation and how a mediator's nationality influences how mediating parties and their communities perceive his neutrality.

I. NEUTRALITY AND ITS ROLE IN ESTABLISHED ETHICAL STANDARDS FOR MEDIATORS

This Section explores the standardized role of neutrality in mediation and examines what is expected of mediators legally and socially in different cultures. The role of neutrality has proven to be an important element in international and cross-cultural mediation as it has been codified in the ethical standards for mediators in several countries, including the United States and Australia, and in the standards for mediators drafted by international organizations, including the United Nations and the International Chamber of Commerce.¹⁵ Part I.A discusses definitions and interpretations of neutrality and how confidence in a mediator's neutrality has a legitimizing function in mediation. Part I.B examines ethical standards for mediators codified by the United States and international organizations focusing on their requirements for neutrality.

A. *The Role of Neutrality in International and Cross Cultural Mediation*

One of the most commonly accepted definitions of mediation describes it as a process involving "the assistance of a neutral person or persons."¹⁶ The connection between neutrality and the fundamental definitional aspects of mediation theory emphasizes

13. See *infra* notes 178-294 (discussing Mitchell and Brahimí's challenges in gaining momentum with the mediating parties and coming to a resolution in Israel-Palestine and Syria).

14. See *infra* notes 178-294 (discussing the circumstances that Mitchell and Brahimí were under when they resigned from their mediations, Mitchell in Israel-Palestine and Brahimí in Syria).

15. *Infra* notes 49-119 (pointing out the sections of these codified ethical standards that address the importance of neutrality in mediation).

16. Field, *supra* note 6 (pointing out that mediator neutrality is an important part of mediation); Hung, *supra* note 5.

neutrality's "important legitimizing function for mediation."¹⁷ Many people are drawn to mediation because it offers the promise of neutrality, which in turn allows the parties to feel confident in the fairness and legitimacy of the outcome they may reach through mediation.¹⁸

There are many differing opinions about the role of neutrality in mediation.¹⁹ Some writers consider neutrality to be the most pervasive and misleading myth about mediation and argue that it is neither possible nor desirable to attain.²⁰ Some scholars also believe that mediators have considerable power in mediation and that there is evidence that they do not always exercise that power in a neutral way as to the content and outcome.²¹ This virtue of indifference to the outcome is not always beneficial to the mediation because there are times when mediators should intervene and question the parties, which does not draw away from the legitimacy of the mediation at hand.²² Therefore it is not sufficient to claim mediator neutrality to legitimize and praise the mediation process.²³

The Oxford Dictionary defines "neutral" as "not helping or supporting either side in a conflict."²⁴ The Oxford Dictionary also

17. Field, *supra* note 6, at 1; Hung, *supra* note 5 (discussing how neutrality instills confidence and validity in the practice of mediation).

18. Field, *supra* note 6, at 1; Hung, *supra* note 5 (illuminating that parties are attracted to the mediation process because a neutral mediator has the capacity to yield a lasting and valid resolution).

19. See Field, *supra* note 6; see also Hung, *supra* note 5 (explaining how scholars and writers have differing opinions of whether a mediator can be neutral).

20. Field, *supra* note 6, at 1; Hung, *supra* note 5, at 1 ("A neutral mediator has been described by Roger Fisher as 'an eunuch from mars, totally powerless (and totally neutral).' The description may imply that a neutral and impartial mediator should be asexual and without any kind of worldly connection.")

21. Field, *supra* note 6, at 1 (citing HILLARY ASTOR AND CHRISTINE CHINKIN, DISPUTE RESOLUTION IN AUSTRALIA, 102 (1992)); Hung, *supra* note 5, at 2 ("Being 'neutral and impartial' does not mean that a mediator is totally indifferent to the outcome or the process of mediation . . . There will be situations where the mediator will intervene and the question is when should the intervention take place and to what degree.")

22. See *supra* note 21 and accompanying text (acknowledging that when a mediator interjects during a mediation it does not mean that he is not being neutral toward the parties to the mediation).

23. See *supra* note 21 and accompanying text (explaining that having a "neutral" mediator does not guarantee a seamless, fair and valid outcome in the mediation process).

24. *Neutral*, OXFORD ENGLISH DICTIONARY (2014) ("Not helping or supporting either side in a conflict, disagreement, etc."); *Neutral*, MERRIAM-WEBSTER DICTIONARY (2014) ("Neutral: not supporting either side of an argument, fight, war, etc.").

defines “impartial” as “treating all disputants equally.”²⁵ In many mediator codes of ethics, including the United States Model Standard of Conduct and the World Trade Organization (“WTO”) Rules of Conduct, these terms are not well defined or are defined in various and contradictory ways that result in confusion.²⁶ For example, in the WTO Rules of Conduct, the term “impartial” is never properly defined in the text even though it is used several times in the text of the rules.²⁷ The US Model Standards describe that “a mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”²⁸ In contrast, the International Mediation Institute Code of Professional Conduct explains that mediators “shall act in an unbiased manner, treating all parties with fairness, quality and respect.”²⁹ These different standards make it confusing for mediators trying to abide by both codes of conduct.³⁰

Because mediation differs from litigation, which develops over many years with precise checks and balances, such as case law and enforceable statutes, there has been confusion in the standards and laws governing mediation.³¹ Mediation does not have such well-

25. *Impartial*, OXFORD ENGLISH DICTIONARY (2014) (“Treating all rivals or disputants equally; fair and just.”); *Impartial*, MERRIAM-WEBSTER DICTIONARY (2014) (“Impartial: treating all people and groups equally: not partial or biased.”).

26. Hung, *supra* note 5, at 1; Field, *supra* note 6 (“Theoretically, neutrality is a concept with many different elements of meaning and understanding. The broadest sense of the term includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior knowledge of the dispute and/or the parties, the absence of the mediator making a judgment about the parties and their dispute, and the idea that the mediator will be fair and evenhanded . . . neutrality is used more to describe a mediator’s sense of disinterest in the outcome of the dispute, impartiality is said to refer to ‘an even-handedness, objectivity and fairness towards the parties during the mediation process.’”); *see infra* notes 32-41, 56-68 and accompanying text.

27. *See infra* notes 107-11 and accompanying text (acknowledging the shortcomings of the WTO Rules of Conduct).

28. *See infra* note 60 and accompanying text (describing the way the impartiality is defined in the US Model Standards).

29. *See infra* note 104 and accompanying text (explaining how the International Mediation Institute Code of Professional Conduct’s definition of impartiality differs from the US Model Standards by putting an emphasis on “fairness, quality and respect” to achieve impartiality in mediation).

30. *See infra* note 104 and accompanying text (explaining that different standards cause confusion).

31. Hung, *supra* note 5, at 2 (citing ALEXANDER BEVAN, ALTERNATIVE DISPUTE RESOLUTION 34 (1992)); Stulberg, *supra* note 5, at 837 (“We could relax the demanding standard of perfect procedural justice and posit mediation as an instance of ‘imperfect procedural justice.’ In this . . . situation, the desired outcome is still defined and embraced independently of the process—e.g., outcomes mandated by or consistent with the law—but we

developed checks and balances, and aside from several unenforceable codes of conduct, a skilled, reasonable, and trusted mediator is an agent of fairness and legitimacy for the mediation process.³² Therefore, the principle of non-partisan fairness is the foundation and standard for the ethics of mediation.³³ This makes the legal standards for mediators fairly ambiguous because cultures view fairness and neutrality in different ways.³⁴

Mediators may experience ethical difficulties with regard to neutrality when the disputants have dramatically differing cultural conceptualizations of identity, language, infrastructure, and government.³⁵ Where parties' cultural norms and conceptualizations conflict, and where they differ drastically from those of the mediator, facilitating an agreement may become ethically problematic for the mediator.³⁶ Hal Abramson, an experienced cross-cultural mediator, suggests a four-step approach for mediators in cross-cultural negotiations.³⁷ He suggests that when mediators are working with disputants from different cultures they should (1) understand their

acknowledge that the mediation process might have other institutional values, such as party autonomy, that permit parties in some instances to reach outcomes that fail that standard.”).

32. Hung, *supra* note 5, at 2; Field, *supra* note 6, at 1 (“This firm connection between neutrality and fundamental definitional aspects of mediation theory is also related to neutrality’s ‘important legitimizing function for mediation.’”); *see also infra* notes 49-120 and accompanying text.

33. Hung, *supra* note 5, at 2; Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L. J. 467 (2011) (“([Neutrality] is considered a necessary condition not only for conducting proper mediation but also for the very existence of the process called mediation. The absence of neutrality undercuts the foundations of mediation, so that it is no longer mediation but some other process altogether.”).

34. Hung, *supra* note 5, at 2; Zamir, *supra* note 33; *see also infra* notes 156-75 and accompanying text.

35. Menkel-Meadow & Abramson, *supra* note 4, at 307 (“Experts in intercultural negotiation have identified a series of cultural features that influence disputing style. These features reflect different cultural conceptualizations of identity, language, and structure. If disputants bring to the mediation table dramatically differing expectations of how individuals fit into group hierarchies and communicated within and between them, mediation becomes more of a challenge.”); Wright, *supra* note 4, at 1 (“Every mediation has a unique character influenced by the cultural perspectives of its participants. Differences in perspectives may impede an agreement if the participants’ views diverge on such fundamental issues as individual autonomy and group interdependence.”).

36. Menkel-Meadow & Abramson, *supra* note 4, at 307 (“Often stylistic differences require the mediator to constantly explain, reinterpret and reframe. In some situations, the parties’ norms will be so different from both the mediator’s and each other’s that helping forge agreement will prove ethically problematic.”); Wright *supra* note 4.

37. Menkel-Meadow & Abramson, *supra* note 4, at 311; *see* Michael W. Morris & Ho-Ying Fu, *How Does Culture Influence Conflict Resolution? A Dynamic Constructivist Analysis*, 19 SOCIAL COGNITION 324 (2001) (introducing Abramson’s four step approach).

own culture; (2) research the other culture; (3) bridge any cultural gap, and, when appropriate; (4) consider withdrawal.³⁸

Abramson first suggests that a mediator understand his own culture to evaluate his own cultural expectations and biases when entering a mediation.³⁹ By doing this he will come to understand his negotiating style, which his culture significantly influences, and become aware that it is improper to favor his style over another.⁴⁰ Next, the mediator should research both parties' cultures and gain a better understanding of their cultural views of relationships, language, negotiating pace, and structure.⁴¹ Abramson suggests that this will allow the mediator to function more effectively when engaging in dialogue with the parties.⁴²

After considering the cultures of both parties the mediator can try to bridge cultural divides by educating each party about the other's cultural behaviors that may be present in the negotiation.⁴³ This will help them approach each other with a more open and accepting mindset.⁴⁴ Lastly, Abramson suggests that the mediator address whether the end result of the mediation is congruent with his own

38. Menkel-Meadow & Abramson, *supra* note 4, at 311; Morris & Fu, *supra* note 37 (discussing Abramson's four step approach and illuminating the importance of culture in this approach).

39. Menkel-Meadow & Abramson, *supra* note 4, at 311; Morris & Fu, *supra* note 37 (emphasizing how a mediator understanding his own inherent cultural biases can lead to a more neutral and legitimate mediation process).

40. Menkel-Meadow & Abramson, *supra* note 4, at 312 ("If the mediator scrutinizes her own background, she will come to understand that her negotiating style is heavily culturally determined. She will see that predilections for meandering versus strictly cosseted meetings, for vague versus meticulous drafting, or for formal versus informal manners of speech are equally valid choices, and that it would be improper for her to favor one cultural style over another."); *see also* Morris & Fu, *supra* note 37.

41. Menkel-Meadow & Abramson, *supra* note 4, at 312 (for example, because a party is "from Asia, the mediator should inquire into Asian practices and gather as much information as possible about prevailing cultural norms of the area."); *see also* Morris & Fu, *supra* note 37.

42. Menkel-Meadow & Abramson, *supra* note 4, at 312 ("One the mediator gains a better understanding of the buyer's view of relationships, language, negotiating pace, and structure, she can function more effectively as interlocutor."); *see also* Morris & Fu, *supra* note 37.

43. Menkel-Meadow & Abramson, *supra* note 4, at 312 ("At this point, the mediator can attempt to bridge the cultural divide by helping educate each party about the other's culturally driven behavior and help them approach one another with a more open and accepting mind."); *see also* Morris & Fu, *supra* note 37.

44. Menkel-Meadow & Abramson, *supra* note 4, at 312 (for example, "the mediator might explain to the impatient seller (party) that the buyer (party) is working with a different set of goals for the negotiation. She might help the seller see that the buyer's elliptical use of language fits into his larger notion of keeping relations harmonious"); *see also* Morris & Fu, *supra* note 37.

sense of ethics and professionalism.⁴⁵ It is possible that the cultural differences between the parties have already damaged their trust of one another and misunderstandings have reached such a point where the mediator is unable to facilitate common ground between the parties.⁴⁶ In some cases achieving common ground between disputing parties is not enough to gain a successful resolution between them if the person mediating the case is not comfortable or equipped to navigate the parties to this shared objective.⁴⁷

B. *Established Ethical Standards of Neutrality for Mediators*

As explained previously, neutrality and fairness are viewed as important legitimizing aspects in the practice of mediation and have been exemplified in many codes of ethics for mediators.⁴⁸ Several countries, including the United States and Australia, have codified ethical requirements for mediations.⁴⁹ International organizations such as the International Chamber of Commerce (“ICC”), International Mediation Institute (“IMI”), and the United Nations also have codified ethical requirements for mediators.⁵⁰ These requirements have neutrality standards for mediators and ethical guidelines for mediations.⁵¹

i. United States

The United States has codified the Model Standards of Conduct for Mediators (“US Model Standards”).⁵² The goals of these ethical

45. Menkel-Meadow & Abramson, *supra* note 4, at 313 (“In some multicultural disputes . . . the culture clash leads to ethical problems.”); *see also* Morris & Fu, *supra* note 37.

46. Menkel-Meadow & Abramson, *supra* note 4, at 313 (“Working with culturally diverse parties, a mediator needs to consider whether the end result comports with her own sense of ethics and professionalism.”); *see also* Morris & Fu, *supra* note 37.

47. Menkel-Meadow & Abramson, *supra* note 4, at 313 (“In some cases, the question is not whether the mediator can locate common ground, but whether the ground that one or both parties insist on occupying is terrain the mediator feels comfortable sharing.”); *see also* Morris & Fu, *supra* note 37.

48. *Infra* notes 52-116 and accompanying text (discussing the incorporation of standards of neutrality in many different ethical requirements and suggestions for mediators).

49. *Infra* notes 53 and 77 and accompanying text (noting the US Model Standards and Australian Standards).

50. *Infra* notes 78-116 and accompanying text (noting the ICC Mediation Rules, IMI Code of Professional Conduct and UN Guidance for Effective Mediation).

51. *Infra* notes 52-116 and accompanying text.

52. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASSOC. 2005); (AM. BAR ASSOC. 2005); (ASSOC. FOR CONFLICT RES. 2005) [hereinafter US Model Standards] (“The Model Standards of Conduct for Mediators was prepared in 1994 by the American

guidelines are to guide the conduct of mediations, inform the mediating parties, and promote the public confidence in mediation.⁵³ Although the US Model Standards do not have the force of law, unless and until adopted by a court or other regulatory authority, they should alert mediators that the US Model Standards might be viewed as a standard of care for mediations.⁵⁴

Self determination, impartiality, conflicts of interest, and competence are four standards included in this model code that implicate the mediator's neutrality.⁵⁵ The US Model Standards define "self determination" as the act of mediation participants coming to a voluntary uncoerced decision where each party makes free and informed choices.⁵⁶ This standard requires that a mediator not undermine a party's self determination for numerous reasons.⁵⁷ In order to do this, the mediator's country of origin and the people and views of that country must not affect his judgment when mediating.⁵⁸

According to the US Model Standards, impartiality is "freedom from favoritism, bias or prejudice."⁵⁹ The standard of impartiality requires that a mediator not be prejudiced in reaction to a participant's personal characteristics, background, values and beliefs, performance at a mediation, or any other reason.⁶⁰ This standard also requires a mediator to withdraw if he cannot conduct mediations in an impartial manner.⁶¹

Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.").

53. *Id.* at 2 ("These ethical guidelines serve three primary goals: (1) to guide the conduct of mediations; (2) to inform the mediating parties; and (3) to promote the public confidence in mediation as a process for resolving disputes.").

54. *Id.* at 3 ("These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.").

55. *Id.* at 2-4 (outlining the standards in the US Model Standards that acknowledge the importance of neutrality and impartiality in mediation).

56. *Id.* at 3 ("Self Determination is an act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.").

57. *Id.* at 4 ("A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates and egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.").

58. *Id.* (emphasizing the role of the mediator's country of origin).

59. *Id.* ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").

60. *Id.* (listing qualities of mediating parties that a mediator shall not have prejudice against).

61. *Id.* ("If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.").

Under the US Model Standards, mediators are required to avoid conflicts of interest.⁶² The Model Standards indicate that a conflict of interest can arise from a mediator's relationship with the dispute or with a mediation participant.⁶³ The mediator's nationality and his country of origin's relationship with a mediation participant and the dispute can create a conflict of interest that could affect the outcome of the mediation.⁶⁴ An example of this was George Mitchell's mediation in Israel-Palestine from 2009-2011 where the political relationship between the United States, Mitchell's home country, and Israel created a conflict of interest and Palestinian distrust of Mitchell, which stymied progress in this mediation.⁶⁵

The standard of competence, which requires that a person selected as a mediator should possess cultural understanding and impartiality among other qualities, includes concern for cultural biases.⁶⁶ This concern is reflected in the list of necessary qualities of a mediator including cultural understanding, which shows a concern for neutrality in multi-cultural mediations.⁶⁷ These requirements in the US Model Standards exemplify that the United States is making efforts to create mediator standards of neutrality that indirectly recognize and account for cultural differences.⁶⁸

62. *Id.* ("A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation.").

63. *Id.* ("A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.").

64. *Id.* (explaining how a micro example of a conflict of interest being caused by a mediator's relationship with one party in the mediation can be the same on a macro level as well when a country involved in facilitating a mediation can cause a conflict of interest by having a relationship with a country that is a party to the mediation).

65. *Id.*; see *infra* notes 221-65 and accompanying text (describing Mitchell's difficulties mediating in a country where one party, the Palestinians, considered Mitchell impartial because of the relationship between Mitchell's home country and the other party in the mediation, Israel).

66. US Model Standards, *supra* note 52, at 5-6 ("Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence.").

67. *Id.* (highlighting the mediator quality of cultural understanding).

68. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM ARB. ASSOC. 2005) (emphasizing the sections of the US Model Standards that include and illuminate the importance of neutrality and cultural understanding in the practice of mediation).

ii. Australia

The work and theories developed by US professional groups, such as the American Arbitration Association and American Bar Association, provide the basis for the Australian Ethical Standards for Mediators (“Australian Standards”).⁶⁹ The Australian Standards are offered in an educational capacity to provide an ethical and practical framework to assist mediators.⁷⁰ They are merely guidelines for mediators and are not enforceable.⁷¹ The Australian Ethical Standards set forth the same goals for mediation standards as the US Model Standards.⁷² Under the Australian Standards, the mediation process is facilitated by an impartial person whose job is to promote an uncoerced agreement and enable the parties to reach their own agreement.⁷³

The Australian Standards include a requirement that the mediator must avoid partiality or prejudice and conduct that gives an appearance of partiality or prejudice.⁷⁴ If the mediator is unable to act impartially he must withdraw from the mediation.⁷⁵ There is also a

69. ETHICAL GUIDELINES FOR MEDIATORS 2 (LAW COUNCIL OF AUSTRALIA 2011) (“These guidelines are based on the work of four professional groups in the United States: The American Arbitration Association, the American Bar Association, the Society of Professionals in Dispute Resolution, and the Association for Conflict Resolution. They were reworked for Australia in 1996 by members of the Law Council of Australia Expert Standing Committee on Alternative Dispute Resolution. . . . They were further reviewed and updated by the Committee in February 2000 and in February 2006. . . . In its February 2006 review, the Committee adopted some aspects of the Draft European Code of Conduct for Mediators, April 2004 on Independence and Neutrality.”).

70. *Id.* (“The Law Council of Australia has developed these guidelines to serve as a general ethical and practical framework for the practice of mediation. The guidelines are intended to apply to all types of mediation. . . . They are offered in the hope that they will serve an educational function and provide assistance to individuals, organisations and institutions involved in mediation in all practice contexts.”).

71. *Id.* (highlighting that the Australian guidelines are intended for educational and instructional purposes).

72. *Id.* (“The guidelines are intended to perform three major functions: To serve as a guide for the conduct of mediators; To inform the mediating parties of what they should expect; and To promote public confidence in mediation as a process for resolving disputes.”).

73. *Id.* at 4 (“Mediation is a process in which an impartial person – a mediator – facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to the dispute. A mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, and uses creative problem solving techniques to enable the parties to reach their own agreement.”).

74. *Id.* (“Accordingly a mediator must avoid: (i) partiality or prejudice; and (ii) conduct that gives any appearance of partiality or prejudice.”).

75. *Id.* (“A mediator may mediate only those matters in which the mediator can remain impartial and even handed. If at any time the mediator is unable to conduct the process in an impartial manner the mediator should withdraw.”).

criterion that speaks to issues of impartiality associated with a mediator's beliefs coming from their national or cultural backgrounds.⁷⁶ The inclusion of this criterion in the Australian Standards is significant because it acknowledges that cultural biases and conflicts are issues that should be addressed directly in mediation.⁷⁷

iii. International Standards

The following requirements for mediators established by international organizations are guidelines for practice and are not binding for mediators.⁷⁸ The United Nations Guidance for Effective Mediation is used by the Mediation Support Unit ("MSU"), which is a service provider that assists the mediation and facilitation initiatives of the United Nations ("UN"), Member States, regional/subregional organizations, and other relevant partners.⁷⁹ The IMI Code of Professional Conduct provides parties mediating through the IMI with a statement of ethical standards they can expect from mediators from the IMI who chose to adopt these standards.⁸⁰ WTO Rules of Conduct were put in place to strengthen the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and were designed to maintain the integrity, impartiality, and confidentiality of proceedings done under the DSU.⁸¹ Moreover, the ICC Mediation

76. *Id.* at 5 ("Whatever their own views and standards mediators should not only not be partial or prejudiced but should avoid the appearance of partiality or prejudice by reason of such matters as the parties' personal characteristics, background, values and beliefs or conduct at the mediation.").

77. *Id.* (highlighting the acknowledgement of cultural biases as an issue in mediation).

78. *See infra* notes 79-82 and accompanying text (discussing how the later discussed international organization's standards for the conduct of mediators are not codified or binding for mediators).

79. UNITED NATIONS GUIDANCE FOR EFFECTIVE MEDIATION (UNITED NATIONS 2012), http://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf ("The Guidance is disseminated by the Mediation Support Unit (MSU), based in the Policy and Mediation Division of the Department of Political Affairs.").

80. IMI CODE OF PROFESSIONAL CONDUCT, (INT'L MEDIATION INST. 2015) ("The IMI Code of Professional Conduct ("the Code") provides users of mediation services with a concise statement of the ethical standards they can expect from Mediators who choose to adopt its terms and sets standards that they can be expected to meet.").

81. World Trade Organization, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DSB/RC/1 (1996) ("Affirming that the operation of the DSU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU thereby enhancing confidence in the new dispute settlement mechanism; Hereby establish the following Rules of Conduct."); World Trade Organization, Understanding on

Rules provide guidelines for mediation and are only used in mediation proceedings administered by the ICC International Centre for ADR under their procedures.⁸² The following Sections will discuss how these international organizations' guidelines explain and emphasize impartiality and neutrality.

a. United Nations

The United Nations Guidance for Effective Mediation ("UN Guidance") is designed to support professional mediation efforts around the world and provide a reference to mediators.⁸³ It encompasses experiences of mediators working on international, national, and local levels and draws from the participants who have benefited and suffered from successful and failed mediation processes.⁸⁴ The UN Guidance aims to help strengthen mediating parties' understanding of effective mediation.⁸⁵ It is intended to be a resource for mediators, States, and other actors supporting mediation efforts as well as conflict parties, civil society, and other stakeholders in the conflict at hand.⁸⁶

The UN Guidance identifies key fundamentals that should be considered in a mediation effort, including consent, impartiality,

Rules and Procedures Governing the Settlement of Disputes (2015), https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm (The rules and procedures of the DSU apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in its Appendix 1, disputes between Members concerning their rights and obligations under provisions of the Agreement Establishing the WTO and dispute settlements contained in the covered agreements as identified in its Appendix 2).

82. International Chamber of Commerce, ICC Mediation Rules (Jan. 1, 2014), <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/> ("Mediation shall be used under the Rules unless, prior to the confirmation or appointment of the Mediator or with the agreement of the Mediator, the parties agree upon a different settlement procedure or a combination of settlement procedures.").

83. See United Nations Guidance for Effective Mediation, 1 (Sept. 2012), <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf> [hereinafter UN Guidance] ("The United Nations Guidance for Effective Mediation is designed to support professional and credible mediation efforts around the world.").

84. *Id.* ("This concise reference document encompasses the wealth of experience of mediators working at the international, national and local levels. It also draws on the views of beneficiaries of successful mediation processes as well as those who have suffered from failed mediation attempts.").

85. *Id.* ("While all disputes and conflicts are unique and require specific approaches, there are good practices that should inform the approaches of all mediators.").

86. *Id.* at 2 ("the Guidance aims to inform the design and management of mediation processes . . . It emphasizes the need for a good understanding of mediation and an appreciation of both its potential and limits as a means for conflict prevention, management and resolution").

inclusivity, and national ownership.⁸⁷ It also provides indicators that suggest the potential for effective mediation, which include that a mediator be accepted, credible, and well supported.⁸⁸ In the section about consent, the UN Guidance points out that the integrity of the mediation process, security, confidentiality, and the acceptability of the mediator and the mediating entity are important in achieving the consent of the parties.⁸⁹ This section encourages the mediator to use confidence-building measures to build trust between the mediator and the parties and between the parties themselves.⁹⁰ It also stresses that the mediator be consistent, transparent, and even-handed when managing the mediation process.⁹¹

The UN Guidance describes impartiality as a “cornerstone of mediation” and explains that a mediator being perceived as biased can undermine the progress of a mediation.⁹² It also suggests that mediators address the issue of impartiality by: ensuring and demonstrating that the process and treatment of the parties is fair and balanced; being transparent with the parties about the laws and norms that guide their involvement; not accepting support from external actors who would affect the impartiality of the mediation; avoiding association with punitive measures against the parties and minimizing public criticism of the parties as much as possible; and handing over the conflict to another mediator or mediating entity if they feel unable

87. *Id.* at 3 (“To address these issues, the Guidance identifies a number of key fundamentals that should be considered in a mediation effort: preparedness; consent; impartiality; inclusivity; national ownership; international law and normative frameworks; coherence, coordination and complementarity of the mediation effort; and quality peace agreements.”).

88. *Id.* at 5 (“There are some indicators that suggest the potential for effective mediation. First and most importantly, the main conflict parties must be open to trying to negotiate a settlement; second, a mediator must be accepted, credible and well supported; and third, there must be general consensus at the regional and international levels to support the process.”).

89. *Id.* at 8 (“The integrity of the mediation process, security and confidentiality are important elements in cultivating the consent of the parties, along with the acceptability of the mediator and the mediating entity.”).

90. *Id.* at 9 (“Use confidence-building measures at different stages to build trust between the conflict parties and between the mediator and the parties, as well as confidence in the mediation process.”).

91. *Id.* (“Be consistent, transparent and even-handed in managing the mediation process, and respect confidentiality.”).

92. *Id.* at 10 (“Impartiality is a cornerstone of mediation – if a mediation process is perceived to be biased, this can undermine meaningful progress to resolve the conflict. A mediator should be able to run a balanced process that treats all actors fairly and should not have a material interest in the outcome. This also requires that the mediator is able to talk with all actors relevant to resolving the conflict.”).

to sustain a balanced and impartial approach.⁹³ Furthermore, the inclusivity and national ownership sections of the UN Guidance, which follow, explain who should be involved in the mediation process.⁹⁴ Inclusivity increases the legitimacy and national ownership of peace agreements and their implementation, and connects to impartiality by ensuring that the process is not undermined by the exclusion of necessary parties from a mediation or peace process and that different perspectives are included in the process.⁹⁵

The UN Guidance provides guidelines for mediators and fundamental concepts that mediators should address while mediating.⁹⁶ These guidelines also show that the United Nations acknowledges that mediators should be educated and guided in a positive and productive direction when conducting mediations.⁹⁷ The UN Guidance stresses the importance of impartiality for mediators, mirroring the national concerns exhibited in the US Model Standards and Australian Standards.⁹⁸

b. International Mediation Institute

The IMI created the IMI Code of Professional Conduct, which provides ethical guidelines for mediators.⁹⁹ Its introduction emphasizes that without trust in the mediator's integrity—which

93. *Id.* (listing the suggestions for how mediators should address the issue of impartiality).

94. *Id.* at 11-14 (“Inclusivity refers to the extent and manner in which the views and needs of conflict parties and other stakeholders are represented and integrated into the process and outcome of a mediation effort . . . National ownership implies that conflict parties and the broader society commit to the mediation process, agreements and their implementation.”).

95. *Id.* at 11 (“An inclusive process is more likely to identify and address the root causes of conflict and ensure that the needs of the affected sectors of the population are addressed. Inclusivity also increases the legitimacy and national ownership of the peace agreement and its implementation. In addition, it reduces the likelihood of excluded actors undermining the process. An inclusive process does not imply that all stakeholders participate directly in the formal negotiations, but facilitates interaction between the conflict parties and other stakeholders and creates mechanisms to include all perspectives in the process.”).

96. *See supra* notes 83-94 and accompanying text (summarizing the UN Guidance).

97. *See supra* notes 83-94 and accompanying text (highlighting the UN's concern for the education of international mediators).

98. *See supra* notes 52-96 and accompanying text; *infra* notes 103-21 and accompanying text (comparing the UN Guidance to the US Model Standards and the Australian Standards).

99. *See* IMI Code of Professional Conduct, *supra* note 80, at 1 (“IMI Certified Mediators are required to make known to users which code of conduct governs their professional mediation practice. They are not required to select this Code provided they have subscribed to a code, and that they indicate this to users.”).

includes neutrality, independence, impartiality, and fairness—mediation is unlikely to succeed.¹⁰⁰ Section 2.2 focuses specifically on the independence, neutrality, and impartiality of a mediator.¹⁰¹

Section 2.2.1 emphasizes the mediator's duty to disclose, providing that a mediator may not accept an appointment without disclosing anything that would affect her independence, neutrality, or impartiality.¹⁰² Section 2.2.2 explains that the existence of any circumstances affecting the mediator's independence, neutrality, or impartiality, if not disclosed, will imply unfitness to act as a mediator.¹⁰³ Section 2.3.3 requires that the mediator act in an unbiased manner and describes circumstances in which the mediator would be considered biased, and, consequently, would need to withdraw from mediation.¹⁰⁴ Section 2.3.1 also requires that mediators determine if there are any conflicts of interest or potential biases and imposes a duty to disclose them.¹⁰⁵ The IMI's emphasis on trust, neutrality, and disclosure of any biases provides guidance for international mediators on important factors of cross-cultural mediation.¹⁰⁶

100. *Id.* at 1 (exemplifying how the IMI Code of Professional Conduct puts great emphasis on trust in the mediation process).

101. *Id.* at 2 (outlining this section of the IMI Code of Professional Conduct).

102. *Id.* (“2.2.1 Mediators will not accept an appointment without first disclosing anything within their knowledge that may, or may be seen to, materially affect their independence neutrality or impartiality. This duty to disclose is a continuing obligation throughout the mediation process.”).

103. *Id.* (“2.2.2 The existence of circumstances potentially affecting, or appearing to affect, a Mediator's independence, neutrality or impartiality will not automatically imply unfitness to act as a mediator provided these circumstances have been fully disclosed and address to the satisfaction of the parties and the Mediator.”).

104. *Id.* (“2.2.3 Mediators will always act in an independent, neutral and impartial way. They shall act in an unbiased manner, treating all parties with fairness, quality and respect. If at any time a Mediator feels unable to conduct the process in an independent neutral and impartial manner, (s)he will express that concern and will offer to withdraw from the mediation. Such circumstances include: financial or personal interests in the outcome of the mediation; existing past or future financial, business or professional relationship with any of the parties or their representatives about which the Mediator is aware; other potential source of bias or prejudice concerning a person or institution which may affect that Mediator's independence, neutrality or impartiality or reasonably create an appearance of partiality or bias.”).

105. *Id.* at 3 (“2.3.1 Mediators will conduct reasonable inquiries to determine if any interests, conflicts of interests or potential biases may exist. They will have a continuing duty to disclose any interests, conflicts of interests or potential biases that may become apparent during the mediation process.”).

106. *See supra* notes 98-105 and accompanying text (connecting the underpinnings of the IMI Code of Professional Conduct to multi-cultural mediations).

c. World Trade Organization

The WTO created the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (“WTO Rules of Conduct”) as a standard for dispute resolution.¹⁰⁷ These rules, like others previously discussed, require that each person involved in the dispute resolution be independent and impartial and maintain confidentiality.¹⁰⁸ The people involved in the dispute resolution are also required to disclose any information that may affect their independence and impartiality.¹⁰⁹ These rules provide an illustrative list of information to be disclosed.¹¹⁰ The WTO puts great emphasis on the disclosure of biases and importance of impartiality, which are important criteria for international mediators and are similar to the international guidelines of the United Nations and IMI.¹¹¹

d. International Chamber of Commerce

The ICC created the ICC Mediation Rules as a flexible procedure to achieve a negotiated settlement with the assistance of a

107. See World Trade Organization, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DSB/RC/1 (Dec. 11, 1996) (summarizing the intended purpose of the WTO Rules of Conduct).

108. *Id.* ¶ III.2 (“Pursuant to the Governing Principle, each covered person, shall be independent and impartial, and shall maintain confidentiality.”).

109. *Id.* ¶ VI.2 (“[A]ll covered persons described in paragraph VI.1(a) and VI.1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.”).

110. *Id.* at annex 2 (“Each covered person, as defined in Section IV:1 of these Rules of Conduct has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following: (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question; (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question); (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question); (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements); (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).”).

111. See *supra* notes 107-10 and accompanying text (comparing the WTO Rules of Conduct to the mediation standards of other international organizations).

neutral facilitator.¹¹² The ICC Mediation Rules suggest the appointment of a neutral third party, the mediator, to assist the parties in settling their dispute.¹¹³ The rules require the mediator to sign a statement of acceptance, availability, impartiality, and independence, and to disclose any circumstances where the mediator's independence or impartiality would be called into question.¹¹⁴

The ICC must consider certain attributes when appointing a mediator, including nationality.¹¹⁵ The ICC Mediation Rules provide standards for the conduct of mediation.¹¹⁶ They require that the mediator and the parties discuss the manner in which the mediation will be conducted, and that the mediator provide a written note of this and guide the mediation by the wishes of the parties with fairness and impartiality.¹¹⁷

Neutrality and fairness are important legitimizing aspects in the practice of mediation.¹¹⁸ Several countries have created standards to provide guidance and encouragement of these factors in mediations.¹¹⁹ Recognizing the need for clear and unified standards, international organizations have developed ethical codes to guide

112. *See* ICC Mediation Rules, *supra* note 82 (summarizing the purpose of the ICC Mediation Rules).

113. *See id.* at 1 (describing an introductory provision of the ICC Mediation Rules).

114. *Id.* at 2 ("Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them.")

115. *Id.* at 2 ("When confirming or appointing a Mediator, the Centre shall consider the prospective Mediator's attributes, including but not limited to nationality, language skills, training, qualifications and experience, and the prospective Mediator's availability and ability to conduct the mediation in accordance with the Rules.")

116. *Id.* at 3 ("The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.")

117. *Id.* ("After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules. In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality. Each party shall act in good faith throughout the mediation.")

118. *See supra* notes 16-17 and accompanying text (discussing the standards set by the US Model Standards and the Australian Standards).

119. *See supra* notes 16-17 and accompanying text (acknowledging the international appreciation for neutrality).

mediations as well.¹²⁰ These guidelines developed on national and international levels are examples of an acknowledgement of the importance of neutrality in mediation and provide important ethical guidance and criteria for mediators.¹²¹

II. *CULTURE AND NATIONALITY INFLUENCING ETHICAL EXPECTATIONS AND THE CASES OF GEORGE MITCHELL AND LAKHDAR BRAHIMI*

Culture influences theories on mediation tactics and ethics. Part II touches on how a mediator may identify with a party and its ideas based on her own culture and nationality. Part II.A explores how mediation tactics are used in individualist and collectivist cultures. Part II.B analyzes the cultural impact on parties' ethical expectations of mediation and the ethical ambiguity that comes from the differing perspectives of individualists and collectivists when mediating with one another.

Examples of mediators who were embraced and rejected by the mediating parties are presented in Part II.C. The experiences of George Mitchell and Lakhdar Brahimi demonstrate that mediators may be influenced by confidence or skepticism of their nationalities, culture and ethical preferences, and their neutrality in the mediation. Part II.C first describes Mitchell's successful mediation in Ireland and Northern Ireland where he drafted the Good Friday Agreement and dealt with individualistic cultures similar to his own.

Second, Part II.C describes Mitchell's experience mediating in Israel–Palestine where his neutrality was called into question, he dealt with the clash between an individualist Israeli culture and a collectivist Palestinian culture, and withdrew from the mediation without facilitating a resolution. Finally, Part II.C explains Brahimi's experiences mediating in Syria between the Syrian government and the opposition in the context of the Syrian Civil War. There, Brahimi dealt with individualist and collectivist dynamics, especially when the United States and Russia became involved in the talks between the parties, and eventually withdrew from this mediation in frustration and without any settlements or resolutions between the parties.

120. *See supra* notes 78-116 and accompanying text (discussing the standards set by the UN, IMI, ICC and WTO).

121. *See supra* notes 117-18 and accompanying text (emphasizing the commonality of an emphasis on neutrality in the national and international mediations standards discussed previously).

A. The Role of Culture in Mediation: Individualist vs. Collectivist Cultures

The United Nations Educational Scientific and Cultural Organization defines culture as “the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group . . . includ(ing) not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, and beliefs.”¹²² Culture is a lens through which we see the world that can influence our choices and shape how we view the choices of others.¹²³

There are several “poles” along which cultures tend to divide, and which can explain how culture plays a role in mediation.¹²⁴ One pole is a culture’s sense of identity, which divides between individualistic and collectivistic cultures.¹²⁵ Typically, negotiators from individualistic cultures feel less attached to social groups and are more likely to focus on personal goals and preferences.¹²⁶

122. Menkel-Meadow & Abramson, *supra* note 4, at 306; UNESCO, *Mexico City Declaration on Cultural Policies*, World Conference on Cultural Policies, 1 (July 26 – Aug. 6, 1982), http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf (“The Conference agrees: that in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.”).

123. Menkel-Meadow & Abramson, *supra* note 4, at 307 (“Clearly culture today encompasses all those habits of action and thought that link us to the larger communities around us. Thus, culture is not simply what we do; it is the lens through which we see the world. It not only primes our choices but shapes how we view the choices of others.”); Rivers, *supra* note 4, at 4 (“Cultural differences create ethical dilemmas between negotiators because negotiators from diverse cultures perceive certain behaviors as either acceptable or unacceptable.”).

124. Menkel-Meadow & Abramson, *supra* note 4, at 307 (“If disputants bring to the mediation table dramatically differing expectations of how individuals fit into group hierarchies and communicate within and between them, mediation becomes more of a challenge. Often stylistic differences require the mediator to constantly explain, reinterpret, and reframe. In some situations, the parties’ norms will be so different from both the mediator’s and each other’s that helping forge agreement will prove ethically problematic.”); *see also* Rivers, *supra* note 4, at 3-4.

125. *See* Menkel-Meadow & Abramson, *supra* note 4, at 307; Rivers, *supra* note 4, at 3 (“The most common operationalization of culture in negotiation ethics research has been the ‘culture as shared values’ approach, where culture is broken down into one or more cultural value dimensions, such as individualism vs. collectivism.”).

126. *See* Menkel-Meadow & Abramson, *supra* note 4, at 307; Rivers, *supra* note 4, at 12 (“One view is that individualists are interested in themselves, so therefore they are more likely to act in a way that supports individual achievement and be less concerned for others . . . members of individualistic cultures would find deceptive behavior that promotes self-interest as more acceptable than would members of collectivist cultures.”).

Individualists tend to focus on who gets how much and when.¹²⁷ They emphasize the rights and needs of the individual, including self-reliance, freedom and individual achievement.¹²⁸

Collectivist cultures are more interdependent and are bound by a large web of social relations and obligations, and collectivist negotiators apply these values to their practices.¹²⁹ Collectivists place great emphasis on relationship building in negotiations and are concerned about how their decisions will affect goodwill, sympathy, and trust between the parties.¹³⁰ Collectivists are more concerned with family, organizations, and community.¹³¹

To illustrate the different nature of individualist and collectivist negotiators, the example of a sale between these two parties offers a helpful illustration of differences.¹³² We may assume that the individualist will begin the encounter by “getting down to business.”¹³³ She will not be shy about expressing what she needs to complete the sale and she will aim to complete the deal in a memorialized document that includes terms and contingencies of the

127. See Menkel-Meadow & Abramson, *supra* note 4, at 307; Wright, *supra* note 4, at 1 (“Individualism is a social pattern that places the highest value on the interests of the individual When establishing the level of their commitment to others, individualists balance the advantages and disadvantages of cultivating and maintaining a relationship; the level of commitment generally corresponds to the level of perceived benefit. Personal preferences, needs, rights and goals are individualists’ primary concerns, and they tend to place a high value on personal freedom and achievement. Self-reliance and competitiveness are common individualist traits.”).

128. Roger J. Volkema & Maria Fleury, *Alternative Negotiating Conditions and the Choice of Negotiation Tactics: A Cross-Cultural Comparison*, 36 J. OF BUS. ETHICS 381, 384 (2002); Wright, *supra* note 4, at 1 (“Individualists view themselves as independent and only loosely connected to the groups of which they are a part.”).

129. See Menkel-Meadow & Abramson, *supra* note 4, at 307; Wright, *supra* note 4, at 1-2 (“Collectivism is a social pattern that places the highest value on the interests of the group. Collectivists view themselves as interdependent and closely linked to one or more groups. They often are willing to maintain a commitment to a group even when their obligations to the group are personally disadvantageous. Norms, obligations and duties to groups are collectivists’ primary concerns, and they tend to place a high value on group harmony and solidarity. Respectfulness and cooperation are common collectivist traits. When personal goals conflict with group norms, collectivists tend to conform to group norms.”).

130. See Menkel-Meadow & Abramson, *supra* note 4, at 307; Wright, *supra* note 4, at 1-2 (emphasizing what is important to collectivist cultures).

131. See Volkema & Fleury, *supra* note 128, at 384; see Wright, *supra* note 4, at 1-2 (highlighting sociological theory and findings on collectivist cultures).

132. Menkel-Meadow & Abramson, *supra* note 4, at 310; see also Rivers, *supra* note 4, at 4-10 (summarizing an example of how individualist and collectivist cultures behave while negotiating with each other).

133. Menkel-Meadow & Abramson, *supra* note 4, at 310; see also Rivers, *supra* note 4, at 4-10 (explaining the way an individualist typically will approach a transaction).

sale.¹³⁴ By contrast, the collectivist buyer would most likely begin with small talk and perhaps do something social with the individualist party, like have a meal together, before getting to the transaction.¹³⁵ The collectivist buyer will most likely be uncomfortable with the individualist's bluntness and shy away from her direct requests.¹³⁶ The buyer will also frequently check back with his associates to make sure his instincts are in sync with theirs.¹³⁷

Dutch psychologist Geert Hofstede surveyed cultural difference in over 50 countries and found that individualists are predominately found in the United States, Canada, Australia, New Zealand, Israel, South Africa, and most of the countries in Northern and Western Europe, while collectivists are predominant in most of the rest of the world.¹³⁸ The Hofstede study also found that the United States was the most individualist country surveyed.¹³⁹

As shown in the previous example of a sale between individualist and collectivist parties, these two groups differ in several ways that affect their negotiation and mediation styles.¹⁴⁰ One significant difference between these cultures is their contrasting views of the nature of conflict.¹⁴¹ Individualists usually view conflict as a

134. Menkel-Meadow & Abramson, *supra* note 4, at 310; *see also* Rivers, *supra* note 4, at 4-10 (highlighting the typicality of individualists to share their bottom line upfront and memorialize their negotiations).

135. Menkel-Meadow & Abramson, *supra* note 4, at 310; *see also* Rivers, *supra* note 4, at 4-10 (describing the typical behaviors of a collectivist when approaching a negotiation).

136. Menkel-Meadow & Abramson, *supra* note 4, at 310; *see also* Rivers, *supra* note 4, at 4-10 (explaining a collectivist's rejection of "abrasive" individualist behaviors).

137. Menkel-Meadow & Abramson, *supra* note 4, at 310; *see also* Rivers, *supra* note 4, at 4-10 (exemplifying the communal tendencies of collectivists).

138. Wright, *supra* note 4, at 2-3; Malcom Sher, *Recognizing and Validating Diversity in Mediation*, *MEDIATE* (Aug. 2008), <http://www.mediate.com/articles/sherM2.cfm> ("Hofstede . . . labels Americans, people from Israel, South Africa and many of the countries of Northern and Western Europe as 'individualists,' whose social pattern Hofstede contends emphasizes their personal preferences, goals, rights, needs, and interests which tend to be self-reliant and competitive. Conversely, 'collectivists' predominate in much of the rest of Africa and the Middle East, most of Asia, South America, Mexico and parts of Eastern Europe. Often less affluent, they may be more focused on achieving group harmony and solidarity based on a sense of communal duty and responsibility.").

139. Wright, *supra* note 4, at 3 (stating Hofstede's finding about the United States).

140. *See supra* notes 126-37 and accompanying text (referencing the previously discussed example of a transaction between an individualist and a collectivist).

141. Wright, *supra* note 4, at 3-4; Mohammad N. Elahee, Susan L. Kirby & Ercan Nasif, *National Culture, Trust, and Perceptions About Ethical Behavior in Intra- and Cross-Cultural Negotiations: An Analysis of NAFTA Countries*, 44(6) *THUNDERBIRD INT'L BUS. REV.* 799, 805 (Nov.-Dec. 2002) ("Individualistic cultures nurture equality, individual freedom, self-expression, and personal achievement. In an individualistic culture, affiliation with a group is a matter of choice, not compulsion. Finally, because of the popularity of an adversarial approach

natural phenomenon of human interaction while collectivists view conflict as an aberration, thus avoidance is a common, and often preferred, approach to conflict for collectivists.¹⁴²

These differing views on conflict affect the parties' decisions to participate in mediations.¹⁴³ Individualists are usually able to acknowledge conflict and participate in mediation without feeling shame because they view conflict as natural.¹⁴⁴ Contrastingly, for collectivists an acknowledgement of conflict can be considered a "loss of face" and participation in a mediation is unwelcomed.¹⁴⁵

These differences are also reflected in the type of mediator individualists and collectivists prefer and what they expect from a mediator.¹⁴⁶ Individualists usually prefer professional mediators with specialized training and expect them to be impartial with no undisclosed relationship to a party in the dispute.¹⁴⁷ Collectivists prefer that the mediator be an insider who knows the parties or the context of their disputes, and are less concerned with professional credentials and impartiality.¹⁴⁸

in education, business, and politics, presentation of arguments in a logical and persuasive manner is accepted and admired. On the other hand, in a collectivist society, roles are ascribed, and one's primary relationships and loyalties are inherited, in-group, and often lifelong. Conflict is resolved not by challenging the status quo, but by showing concern for continuing harmony, peace, and continuity, as opposed to any abstract notion of justice or fairness. The individualism/collectivism construct has been shown to affect work values, cognition, communication, conflict resolution, and the distributive behavior of people.").

142. Wright, *supra* note 4, at 3-4; Elahee, *supra* note 141, at 805 (acknowledging individualist comfort and collectivist discomfort with conflict).

143. Wright, *supra* note 4, at 3-4; Elahee, *supra* note 141, at 805 (introducing individualist and collectivist attitudes toward entering mediations).

144. Wright, *supra* note 4, at 3-4; Elahee, *supra* note 141, at 805 (acknowledging why individualists are willing to come to the table and participate in mediations).

145. Wright, *supra* note 4, at 3-4; Elahee, *supra* note 141, at 805 (explaining why collectivists are less willing to participate in mediations).

146. Wright, *supra* note 4, at 4; see also Menkel-Meadow & Abramson, *supra* note 4, at 307-13 (introducing the mediator preferences of individualist and collectivist cultures).

147. Wright, *supra* note 4, at 4; Menkel-Meadow & Abramson, *supra* note 4, at 310 ("The seller from the individualist culture . . . will be inclined to want to begin the encounter by getting down to business. She will not be shy in saying what she needs to complete this sale, and she will be aiming to memorialize the deal in a detailed document that considers all contingencies and explicitly provide for remedies if the buyer fails to perform.").

148. Wright, *supra* note 4, at 4; Menkel-Meadow & Abramson, *supra* note 4, at 307 ("Negotiators in collectivist cultures view themselves as more interdependent and bound by a larger web of social relations and obligations. They place greater emphasis on the relationship building aspect of negotiations. Decisions to compromise, hold fast, agree, object, or explain are all made with an eye to how decisions will affect goodwill, sympathy, and trust between the parties.").

Differing perspectives can lead to confusion between collectivists and individualists with regard to ethics in mediation.¹⁴⁹ When a party foreign to the other party in the mediation, either individualist or collectivist, breaches ethical expectations, they often elicit negative emotions from the other party who leaves the mediation appalled, unhappy, angered, and frustrated.¹⁵⁰ These emotions inhibit the cultivation of trust that helps achieve settlements in negotiations and mediations.¹⁵¹

Walter Wright cultivated suggestions for individualist and collectivist mediators when dealing with cultural differences between each other.¹⁵² He explains that if US mediators detect resistance to participate in mediation from people exhibiting collectivist behavior, the mediator should offer modifications to their mediation formats.¹⁵³ If specialized knowledge of the disputant's social context seems to be useful, the mediator should consider referring the matter to another mediator with that knowledge and asking him to serve as a co-mediator.¹⁵⁴ To avoid conflicting expectations among the mediators and negotiating parties, the mediator should voice what he considers to be proper mediator roles and have the parties understand and agree

149. Wright, *supra* note 4; Rivers, *supra* note 4, at 1 (“It is posited that culture directly influences the legal environment, organizational code of ethics, organizational goals, and the perception of the other party, and that culture moderates negotiators’ understanding of each of these situational variables.”).

150. Rivers, *supra* note 4, at 1; Menkel-Meadow & Abramson, *supra* note 4, at 311 (“Differences in how buyer and seller approach language, relate to status differentials, identify as embedded in relational networks, and experience time may breed confusion and turmoil.”).

151. Rivers, *supra* note 4, at 1; *see also* Menkel-Meadow & Abramson, *supra* note 4, at 307-13; Wright, *supra* note 9, at 3-4 (explaining how distrust affects the likelihood of resolution).

152. *See* Wright, *supra* note 4, at 4-7 (introducing suggestions for cross cultural mediations); Rivers, *supra* note 4, at 15-19; INT’L MEDIATION INST., WALTER WRIGHT’S CURRENT POSITION AND BACKGROUND, <https://imimediation.org/walter-wright> (last visited Jan. 29, 2016) (“Walter (Wright) has a strong record of service to the ADR profession. He is former president of the Texas Association of Mediators and the Association of Attorney-Mediators. For six years, he was Chair of the Newsletter Editorial Board of Alternative Resolutions, the newsletter of the ADR Section of the State Bar of Texas. He has received several awards for service, including the Steve Brutsché Award from the Association of Attorney-Mediators (2005), the Frank G. Evans Award from the ADR Section of the State Bar of Texas (2008), and the Susanne Adams Award from the Texas Association of Mediators (2009).”).

153. Wright, *supra* note 4, at 4; *see* Rivers, *supra* note 4, at 17-18 (explaining how a mediator can try to accommodate his conduct to cultural preferences).

154. Wright, *supra* note 4, at 4; *see* Menkel-Meadow & Abramson, *supra* note 4, at 308-13 (suggesting when a mediator should withdraw or step down in a mediation).

to those roles.¹⁵⁵ If agreement on these roles cannot be met it may be best to allow the parties to either find another mediator or to choose a different dispute resolution process.¹⁵⁶

B. *Ethical Behavior in Mediation*

Ethics are the rules, standards, codes, or principles providing guidelines for morally right behavior and truthfulness in specific situations.¹⁵⁷ The term “ambiguous,” meanwhile, is defined as doubtful, questionable, and open to several possible interpretations.¹⁵⁸ When behavior is ethically ambiguous there are multiple understandings of whether it conforms to standards of what is right or wrong.¹⁵⁹ Policies, procedures, and rules are often considered mechanisms for controlling ambiguity and uncertainty.¹⁶⁰

Ethically ambiguous negotiation tactics (“EANTs”) are maneuvers during a negotiation that at least some participants or observers may regard as wrong or as unacceptable behavior according to their cultural and ethical standards and expectations.¹⁶¹ Some examples of EANTs are the promise to reward the other party at some future date, even if there is no intent to follow through on the

155. Wright, *supra* note 4, at 5; see Menkel-Meadow & Abramson, *supra* note 4, at 308-13 (suggesting that the mediator find commonalities between the parties with regard to mediator conduct).

156. Wright, *supra* note 4, at 5; see Menkel-Meadow & Abramson, *supra* note 4, at 313 (explaining when a mediator should let go of the mediation allow the mediating parties to decide where the dispute shall go).

157. Rivers, *supra* note 4, at 3 (citing Lewis, *Defining Business Ethics: Like Nailing Jello to a Wall*, 4(5) J. OF BUS. ETHICS (1985)); Roger J. Volkema, *Demographic, Cultural and Economic Predictors of Perceived Ethicality of Negotiation Behavior: A Nine-Country Analysis*, 57 J. OF BUS. RESEARCH 69, 69 (2004) (“Ethics refers to the moral principles, values, and rules that govern a group of people.”).

158. *Ambiguous*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“doubtful, questionable, and open to several possible interpretations”); *Ambiguous*, MERRIAM-WEBSTER DICTIONARY (2014) (“capable of being understood in two or more possible senses or ways”).

159. Rivers, *supra* note 4, at 4; Volkema, *supra* note 157, at 69 (“By differentiating the effects of these constructs on ethical attitudes and behavior, researchers, policymakers, and practitioners can better understand regional differences in the use of negotiating tactics/behaviors, how attitudes towards those tactics or behaviors might change over time, and the relative effectiveness of a universal code of ethics on different populations.”).

160. Volkema, *supra* note 157, at 70; Rivers, *supra* note 4, at 1-2 (methods of controlling ambiguity).

161. Rivers, *supra* note 4, at 5; Volkema, *supra* note 157, at 70 (“Culture impacts the individuals in a negotiation (their stereotypes, intentions, values), the structural components of a negotiation (e.g., the number of representatives sent to negotiate, the decision-making approach), the strategy employed (e.g., direct or indirect engagement), and the process (bluffing, threats, etc.).”).

promise, and providing statistical misinformation that supports the party's case.¹⁶² Considering that individuals will vary in their ethical behaviors based on situational contingencies, perceived ethicality and the likely use of EANTs have been measured under eight conditions: 1) unspecified context; 2) where the opponent has a reputation as an unethical negotiator; 3) where the country is known for skilled negotiators; 4) where it is a very important negotiation; 5) where there is a time deadline; 6) where the opponent has a reputation as a very good negotiator; 7) where there will be future business relations with the opponent; and 8) where colleagues will learn negotiation details.¹⁶³

Findings from a comparative study between the United States (individualist) and Mexico (collectivist) support the theory that individualists are more approving of EANTs than collectivists.¹⁶⁴ For high-priority negotiations scholars have shown that negotiators from the United States were more likely to use some EANTs.¹⁶⁵ Scholars have also pointed out that when collectivist negotiators pursue relationship goals they view EANTs as a threat to their relationship with the other party.¹⁶⁶

There are alternative studies that support the perspective that collectivists are more approving of EANTs than individualists.¹⁶⁷ In these studies, collectivist Mexican participants scored higher than individualists from Canada and the United States in their likelihood to use EANTs.¹⁶⁸ Individualist US negotiators were also less likely to

162. Rivers, *supra* note 4, at 5; Volkema, *supra* note 157, at 70 (providing examples of EANTs).

163. Rivers, *supra* note 4, at 14; *see* Volkema & Fleury, *supra* note 128, at 381-98 (listing conditions for the likely use of EANTs).

164. Rivers, *supra* note 4, at 12; *see* Volkema & Fleury, *supra* note 128, at 799 ("Based on survey data collected from businesspeople from Canada, Mexico, and the United States, this article shows that trust is culturally embedded and has a negative relationship with the likelihood of using certain questionable negotiation tactics. The study found that Mexican negotiators are less likely to use questionable negotiation tactics in intracultural negotiations as compared to cross-cultural negotiations.").

165. Rivers *supra* note 4, at 17; *see* Volkema & Fleury, *supra* note 128, at 799 (acknowledging US or individualist comfort with EANTs and conflict).

166. Rivers *supra* note 4, at 17; *see* Volkema & Fleury, *supra* note 128, at 799; Menkel-Meadow & Abramson, *supra* note 4, at 148 (acknowledging collectivist discomfort with EANTs and conflict).

167. Rivers *supra* note 4, at 13; *see* Roger J. Volkema, *A Comparison of Perceptions of Ethical Negotiation Behavior in Mexico and the United States*, 9(3) INT'L J. OF CONFLICT MANAGEMENT 218, 218-33 (1998) (introducing different theory about EANTs).

168. Rivers, *supra* note 4, at 13 ("Supporting the 'collectivists are more approving of EANTs than individualists' perspective are the results of three studies. Collectivists

agree with misrepresentation and bluffing EANTs than collectivist Brazilian negotiators.¹⁶⁹

US negotiators under time pressure tend to become competitive and have shown to be influenced by deadlines.¹⁷⁰ There is a divide between long-term cultures, which are usually collectivist cultures that have long-range goals focused on achieving longstanding results, and short-term cultures, which are usually individualist cultures like the United States with temporary goals.¹⁷¹ The organization that belongs to long-term cultures typically has long-range goals and does not set strict deadlines.¹⁷² But, organization from a short-term culture will usually have a hard deadline set for their goals in a negotiation or mediation.¹⁷³

The tactics that individualists and collectivists use in their negotiations reflect their expectations of mediators.¹⁷⁴ Wright suggests that in order to avoid conflicting expectations among mediators and the disputing parties, a mediator should disclose her

(Mexicans) scored higher than individualists (Canada and the U.S.) in their likelihood to use EANTs.”); *see also* Volkema, *supra* note 167.

169. Rivers, *supra* note 4, at 13 (“U.S. negotiators (individualists) were less likely to endorse misrepresentation and bluffing EANTs than Brazilian negotiators (collectivists). In a vast eight country study, Triandis et al. (2001) argued and found that vertical collectivists were more likely to lie in a negotiation situation than horizontal individualists, because the collectivists have a greater distance between themselves and the other party.”); *see also* Volkema, *supra* note 167.

170. Rivers, *supra* note 4, at 18 (“Deadlines were included in Gelfand and Dyer’s (2000) model, and they argue that there may be cultural differences in how time pressure influences negotiation schemas. They give the example that a U.S. negotiator under time pressure might become more competitive, whereas a Scandinavian negotiator under time pressure might become more cooperative. U.S. negotiators have indeed been measured to be influenced by deadlines - when told there is a deadline, their ratings of likelihood of use of the EANT ‘promise good things will happen’ is significantly higher than in an unspecified negotiation situation.”); *see also* Volkema, *supra* note 167.

171. Rivers, *supra* note 4, at 18 (“There are cultural differences in how time pressure influences the use or perceived appropriateness of EANTs and that this area warrants further investigation. Whether or not deadlines are imposed is also likely to differ across cultures. Organizations that belong to long-term cultures (e.g. China or Taiwan) (Chinese Cultural Connection 1987) often have long-range goals and may not set strict deadlines, while an organization from a short-term culture like the U.S. will probably have a definite deadline to achieve its goals.”); *see also* Volkema, *supra* note 167.

172. *Supra* note 171 and accompanying text (summarizing the organization of long-term cultures).

173. *Supra* note 171 and accompanying text (summarizing the organization of short-term cultures).

174. Wright, *supra* note 4, at 4; Menkel-Meadow & Abramson, *supra* note 4, at 311 (referencing the previously discussed expectations that individualists and collectivists have of mediators).

perceptions of proper mediator roles and attempt to ensure that the disputants' understand and agree to those roles.¹⁷⁵ If an agreement on these basic matters cannot be secured, it may be best to find another mediator or choose another dispute resolution process.¹⁷⁶ If disputing parties can understand why there are different ethical expectations across cultures, they can have fewer feelings of anger and mistrust elicited by the use of ethically ambiguous negotiation tactics, and also avoid the use of tactics that might hinder resolution between the parties.¹⁷⁷

The following subsection describes Mitchell's experience mediating between countries with differing cultural perceptions and Brahimí's experience mediating a conflict between parties from the same country but with vastly different political opinions. The tension and lack of compromise between the parties of their mediations led Mitchell to withdraw from mediating the Israel-Palestine conflict and Brahimí to withdraw from mediating the dispute in Syria. Mitchell and Brahimí's experiences reflect on the issues previously discussed about ethical and cultural expectations of certain countries and cultures and how these expectations influence the perception of a mediator based on his nationality and perceived cultural, political, and ethical perspective and preference.

C. The Mediations of George Mitchell and Lakhdar Brahimí

i. George Mitchell

George Mitchell is a coveted mediator, appointed as Special Envoy for Northern Ireland by United States President Bill Clinton in 1995 and Special Envoy to the Middle East by United States President Barack Obama in 2009.¹⁷⁸ Mitchell succeeded in Ireland by

175. Wright, *supra* note 4, at 5; Menkel-Meadow & Abramson, *supra* note 4, at 311 (suggestions to avoid conflicting expectations of individualists and collectivists with regard to mediator conduct).

176. Wright, *supra* note 4, at 5; Menkel-Meadow & Abramson, *supra* note 4, at 311 (discussing mediator withdrawal).

177. Rivers, *supra* note 4, at 2; see Morris & Fu, *supra* note 37 (discussing how cultural open-mindedness and education can lead to resolutions in mediations).

178. *George Mitchell Fast Facts*, CNN (Aug. 27, 2015, 2:38 PM), <http://www.cnn.com/2013/09/19/us/george-mitchell-fast-facts/>; Nicholas Watt, *George Mitchell's patient diplomacy shepherded Northern Ireland to peace. Now for the Middle East . . .*, *GUARDIAN* (Jan. 23, 2009), <http://www.theguardian.com/politics/blog/2009/jan/23/george-mitchell-interview> ("George Mitchell . . . who has been appointed by Barack Obama as his Middle East

facilitating a resolution and drafting the Good Friday Agreement, but failed in Israel-Palestine, withdrawing after two years without a resolution.¹⁷⁹

a. Mitchell's Role in Resolving "The Troubles" in Northern Ireland

The 30-year conflict in Ireland referred to as "The Troubles" began in 1968 and ended in 1998 with the drafting of the Good Friday Agreement.¹⁸⁰ The constitutional status of Northern Ireland was at the heart of the conflict, which the unionist, nationalist, and republican parties in Ireland quarreled over.¹⁸¹ The unionists, who were mostly Protestant and formed the majority in this conflict, wanted Northern Ireland to remain part of the United Kingdom.¹⁸² The nationalists and republicans, mostly Catholics who were the minority, wanted Northern Ireland to become part of the Republic of Ireland.¹⁸³

The road to resolution for this conflict was paved with many deaths, violence, and political turmoil that were eventually overcome through peaceful democratic means.¹⁸⁴ Cross-party talks began in 1996, with the help of President Clinton and Mitchell, which concluded with the Good Friday Agreement.¹⁸⁵ This agreement created a government body comprised of both Catholics and Protestants, called for disarmament, released jailed combatants, reorganized the police force, which was ninety-three percent Protestant at the time, and also stipulated that Northern Ireland remain part of Britain.¹⁸⁶

peace envoy – spent years working painstakingly to shepherd the Northern Ireland peace process.”).

179. See *infra* notes 180-212 and 214-64 and accompanying text (summarizing Mitchell's outcomes mediating in Northern Ireland and Israel Palestine).

180. See generally Joshua Hammer, *In Northern Ireland, Getting Past the Troubles*, SMITHSONIAN MAG. (Mar. 2009), <http://www.smithsonianmag.com/people-places/in-northern-ireland-getting-past-the-troubles-52862004/> (introducing the timeline of the start and resolution of "the Troubles"); *The Troubles: Thirty Years of Conflict in Northern Ireland, 1968-1998*, BBC, <http://www.bbc.co.uk/history/troubles> (last visited Nov. 11, 2015).

181. See *The Troubles: Thirty Years of Conflict in Northern Ireland*, *supra* note 180 (identifying the parties of the dispute in Northern Ireland).

182. See *id.* (explaining the goals and expectations of the unionist party).

183. See *id.* (explaining the goals and expectations of the nationalists and republicans).

184. See *id.* (summarizing the hardships of the Troubles).

185. See *id.* (introducing President Clinton's and Mitchell's role in the mediation process in Northern Ireland).

186. See Hammer, *supra* note 180 (summarizing the Good Friday Agreement).

When Mitchell was appointed as Special Envoy in Northern Ireland, it was debatable whether the Irish welcomed him.¹⁸⁷ British newspaper *The Independent* reported that “when former US Senator George Mitchell was first mentioned as a possible chairman for the Northern Ireland peace talks, David Trimble’s party denounced the idea as ‘the equivalent of an American Serb presiding over talks on the future of Croatia.’”¹⁸⁸ This newspaper also reported that Ian Paisley’s party categorized Mitchell as “a Catholic Irish-American from the same stable as the Kennedys.”¹⁸⁹

In his book *Making Peace*, Mitchell recollects walking into a conference chamber for his first encounter with Reverend Ian Paisley, who had objected to his chairmanship:

When I entered the room and walked toward my seat my attention was drawn to the DUP section by a noisy commotion.¹⁹⁰ There, Dr. Paisley was standing and saying, in a loud voice, “No. No. No. No.”¹⁹¹ He repeated it over and over again, until I was in my seat.¹⁹²

I was extremely uncomfortable. . . .¹⁹³

Although I had read and heard a lot about Paisley and his tactics, this was my first direct exposure to them, and it was

187. See *The Troubles: Thirty Years of Conflict in Northern Ireland*, *supra* note 180 (introducing negative commentary on Mitchell’s presence as a mediator in Ireland during the Troubles); see also *infra* notes 188-93 and accompanying text.

188. David McKittrick, *Profile: George Mitchell – The Man to Bring Peace to Ulster?*, *INDEPENDENT* (July 18, 1999), <http://www.independent.co.uk/voices/profile-george-mitchell--the-man-to-bring-peace-to-ulster-1107249.html>; see James G. Driscoll, *Optimist George Mitchell Believes Northern Ireland Can Achieve Peace*, *SUN SENTINEL* (Feb. 18, 1996), http://articles.sun-sentinel.com/1996-02-18/news/9602180123_1_northern-ireland-sen-george-mitchell-ira-cease-fire (“The American, former Sen. George Mitchell, and his two colleagues made public their recommendations on Jan. 24, urging all-party talks while, simultaneously, some arms could be given up. The report was received well by some, but churlishly by others, among them the myopic John Major of Britain. Sixteen days later, the Irish Republican Army gave its response. A murderous one, it was, ripping apart a London building, killing two news vendors and making Mitchell feel exceedingly bad. The distrustful mind-set not only persists, but dismisses the fervent wish for peace among so many in the six northern counties.”).

189. See McKittrick, *supra* note 188 (acknowledging skepticism of Mitchell and his background).

190. GEORGE MITCHELL, *MAKING PEACE* 50 (1999).

191. *Id.* (Mitchell’s recollection of Ian Paisley’s rejection of his presence).

192. *Id.* (emphasizing Paisley’s rejection of Mitchell).

193. *Id.* (Mitchell acknowledging his own discomfort).

shocking.¹⁹⁴ I was accustomed to rough-and-tumble political debate, but I'd never experienced anything like this.¹⁹⁵

These negative views of Mitchell could have compromised the public's opinion of his neutrality in the mediations he conducted in Northern Ireland.¹⁹⁶ The Irish and Northern Irish opinions of the neutrality of the United States in this matter, however, soon improved and the region began to embrace President Clinton and Mitchell.¹⁹⁷ David McKittrick from *The Independent* expresses Mitchell's acceptance in Northern Ireland, saying:

From the minute he first became involved in Northern Ireland in early 1995, then in the role of Bill Clinton's economic envoy, his American "can do" manner generated both optimism and interest. His style was not that of brash and impatient hubris. Instead, it was obvious from the word go that this was a mature and seasoned statesman, a major player with abilities far in excess of those normally seen in Northern Ireland. In the years that followed it was often embarrassing to watch the mismatch between his consummate skills and some of Belfast's political pygmies.¹⁹⁸

These positive views of Mitchell helped him gain acceptance in Northern Ireland and also may have contributed to his success

194. *Id.* (Mitchell pointing out how he had researched the tactics of a party to his mediation and what it was like experiencing the party's behavior in person).

195. *Id.* (Mitchell acknowledging his unfamiliarity and discomfort with Paisley's behavior).

196. *See supra* notes 187-95 and accompanying text (concluding the negative commentary about Mitchell's attempts to mediate in Northern Ireland).

197. *See* McKittrick, *supra* note 188 ("Bill Clinton, once reviled for giving a US visa to Gerry Adams, is now viewed in Belfast as being much more evenhanded, and has been cheered by both Catholics and Protestants on his visits to Northern Ireland. . . . George Mitchell is a sign of this new approach, the hours he has spent listening to Belfast politicians serving as a symbol of the new recognition of the complexities of the problem."); Richard L. Berke, *George Mitchell: Gray Eminence in U.S., Bright Star for Irish*, N.Y. TIMES (May 6, 1998), <http://partners.nytimes.com/library/world/050698ireland-mitchell.html> ("To the public, Mitchell comes off as a politician who cannot be bought. . . . 'With Clinton, it's all for votes in the Irish community in America,' said Paul Browne, 23, who works for a computer company in Dublin. 'George Mitchell actually cared. He wasn't paid for what he did.'").

198. McKittrick, *supra* note 188; *see* Berke, *supra* note 197 ("Mitchell conceded that the affection here [in Ireland] was far different from anything he had experienced back home. The reason, he said, is that people here have yearned for decades for peace. He said his popularity may also be born of comfort; he has been traveling here regularly now for nearly three years, so he has become a familiar face, and people trust him.").

there.¹⁹⁹ This positivity likely contributed to his ability to execute the Good Friday Agreement because he gained the trust of many Irish and Northern Irish people and gave the impression that he was neutral and unbiased in the dispute.²⁰⁰

During Mitchell's time in Ireland, there were certain aspects of his mediation strategies that were successful during the talks he conducted at Stormont, the Northern Ireland Parliament, in brokering the Good Friday Agreement.²⁰¹ First, Mitchell made a conflict assessment by meeting with all of the stakeholders involved from November 1995 through January 1996 as part of the three-man International Commission on Decommissioning.²⁰² Mitchell's effort to include all relevant parties in his peacemaking process was a practical method to gain the trust and confidence of the people of Ireland and Northern Ireland.²⁰³ As previously discussed, inclusivity is acknowledged in the UN Guidance and by using this mediation method Mitchell legitimized his peacemaking methods in Northern Ireland and reduced the likelihood of excluded parties undermining

199. See *supra* notes 197-98 and accompanying text (summarizing the positive commentary on Mitchell's role as mediator in Northern Ireland).

200. See *supra* notes 197-98 and accompanying text (emphasizing that the trust Mitchell gained from the mediating parties likely contributed to a resolution, the Good Friday Agreement).

201. See Geoffrey Corry, *George Mitchell: Role Model for Mediation*, MEDIATE.COM, <http://www.mediate.com/articles/corry.cfm> (last visited Nov. 11, 2015). See generally Daniel Curran & James K. Sebenius, *The Mediator as Coalition Builder: George Mitchell in Northern Ireland*, 8 INT'L NEGOT. 111, 125-43 (2003) (introducing Mitchell's successful mediation tactics).

202. See Curran & Sebenius, *supra* note 201, at 134 ("Both the U.K. and the Unionist parties had long insisted on decommissioning weapons as an absolute precondition for any talks; Margaret Thatcher, in particular, had been unyielding. Yet without active participation of a broad swath of the Catholic Republicans, a coalition of the center would be impossible. Thus Mitchell needed to keep the unionists in the talks by giving them enough reassurance on this core issue. . . . By July 1997, when it became apparent that the issue was still a stumbling block, Mitchell proposed that the issue of decommissioning be moved from the All-Party talks to an *International Commission on Decommissioning*. In August 1997, he created a *Liaison Subcommittee on Decommissioning* between the All-Party talks and the new Commission. This assured the unionists that the issue was still very much alive but not an impediment to further talks."); Corry, *supra* note 201.

203. See Curran & Sebenius, *supra* note 201, at 129-30; Corry, *supra* note 201; UN Guidance, *supra* note 83, at 11-13 (emphasizing the trust building gains of inclusivity in a mediation process).

his progress.²⁰⁴ Inclusivity also increases the legitimacy and national ownership of the peace agreement and its implementation.²⁰⁵

Second, Mitchell set out what became known as the “Mitchell Principles,” a set of six anti-violence statements that provided an avenue into all-party talks that were pivotal to the negotiation process.²⁰⁶ Mitchell proposed that a commitment to democratic and peaceful methods in resolving issues should be the test for participation in the talks because this would show a willingness to create progress and common ground between the parties.²⁰⁷ By setting up the “Mitchell Principles,” he established parameters for these parties to engage in effective mediations.²⁰⁸ Mitchell was able to get the parties’ productive cooperation in this mediation without ethical ambiguity or confusion by having the parties agree upon a standard for how to conduct the mediation, which led to a positive result.²⁰⁹

Third, he made a deadline of April 9, 1998, the day before Good Friday, which helped the parties make difficult decisions in a timely manner and prevented the negotiations from going on forever.²¹⁰ The mediation tactic of setting a deadline is frequently used by people from the United States and individualist cultures.²¹¹ Mitchell’s use of

204. See Curran & Sebenius, *supra* note 201, at 127; Corry, *supra* note 201; UN Guidance, *supra* note 83, at 11-13 (discussing the part of the UN Guidance that addresses inclusivity).

205. See UN Guidance, *supra* note 83, at 11 (discussing the UN Guidance section for inclusivity).

206. See Curran & Sebenius, *supra* note 201, at 128 (“The precondition to participate in talks required that parties adhere to the ‘Mitchell Principles,’ essential commitments to democracy, dialogue, and non-violence. The violations of these principles were the very means by which extremist parties would later be excluded from the talks. While banal at one level, discussion of adherence to these principles consistently provided procedural common ground, and, more importantly, a set of criteria that would later bind members of a coalition of the center and distinguish them from their more extreme counterparts.”); Corry, *supra* note 201.

207. See Curran & Sebenius, *supra* note 201, at 128 (highlighting Mitchell’s emphasis on the use of democratic and peaceful methods); Corry, *supra* note 201.

208. See Curran & Sebenius, *supra* note 201, at 128; Corry, *supra* note 201; *infra* notes 331-32 and accompanying text (commenting on the effectiveness of Mitchell’s standards).

209. See Curran & Sebenius, *supra* note 201, at 128 (explaining how this tactic of establishing standards yielded positive results for Mitchell’s meditation); Corry, *supra* note 201.

210. See Curran & Sebenius, *supra* note 201, at 136 (“Mitchell, in effect, committed both to a near-infinitely patient approach followed by a powerfully engineered and daring deadline. The deadline served its traditional action-forcing function. Furthermore, it was created in a manner that was directly responsive to Mitchell’s lack of formal powers, an ongoing and significant barrier.”); Corry, *supra* note 201.

211. See Rivers, *supra* note 170, at 18; Wright, *supra* note 4, at 6 (referring back to individualist behavioral statistics).

a deadline was met with cooperation in Northern Ireland probably because Ireland and Northern Ireland are individualist cultures that were more receptive to these tactics.²¹²

Fourth, Mitchell brought the various parts of the negotiations together into a document to serve as a draft treaty.²¹³ The memorializing of the resolution reflected Mitchell's inherently individualist logic of trying to get down to business and put it in writing to reassure its legitimacy.²¹⁴ Last, Mitchell implemented an inclusive process involving the Ulster Democratic Party ("UDP") and the Progressive Unionist Party ("PUP") for the loyalists, and Sinn Fein for the republicans, in which he created an inter-party dialogue and a joint thinking and problem solving process.²¹⁵ Ultimately, Mitchell's methods of inclusivity, established standards for the mediation, and deadlines were met with cooperation in Northern Ireland and led to the resolution, the Good Friday Agreement.²¹⁶

After the Good Friday Agreement was made, Mitchell was praised for his efforts in the mediation.²¹⁷ In 1998 he received an honorary knighthood from Queen Elizabeth II for his role in this agreement.²¹⁸ On March 17, 1999 he was awarded the Presidential

212. See Wright, *supra* note 4, at 3; *supra* notes 170-74 and accompanying text (acknowledging the differing comfort levels of individualists and collectivists with setting deadlines).

213. See Wright, *supra* note 4, at 6 ("Individualists tend to be autonomous decision makers. As such, they are more concerned with how an option affects them than with how it affects others. In a successful mediation, issues are resolved, usually one at a time, and a settlement is documented in a written agreement."); Corry, *supra* note 201.

214. See *supra* note 147 and accompanying text (referring back to the example of an individualist seller creating a deal); Corry, *supra* note 201.

215. See Curran & Sebenius, *supra* note 201, at 127 ("Mitchell pursued a process strategy that stressed and modeled the principles of 'inclusion,' 'legitimacy,' and 'consent.' In many ways—and yet in line with these principles—he took steps that first expanded and then reduced the number of parties involved in the talks to those players that were, at least arguably, capable of functioning in a relatively centrist coalition."); Corry, *supra* note 201.

216. See *supra* notes 197-215 and accompanying text (summarizing the successful methods of Mitchell's mediation in Northern Ireland).

217. See *infra* note 218-20 and accompanying text (summarizing the praise Mitchell received for his success in Northern Ireland).

218. *George Mitchell Fast Facts*, *supra* note 178; Alex Altman, *Middle East Envoy George Mitchell*, *TIME* (Jan. 22, 2009) ("In 1998, Mitchell earned an honorary knighthood for his role in fostering the peace.").

Medal of Freedom.²¹⁹ In April 1999, he was also awarded the UNESCO Peace Prize.²²⁰

b. Mitchell as the United States' Middle East Envoy in Israel-Palestine

The dispute between Israeli Jews and Palestinian Arabs is over the ownership of the regions that were divided into Israel, Gaza and the West Bank after the Arab-Israeli War of 1947-1948.²²¹ Many Israelis argue their claim to the region is based on a divine promise from God and a need for a safe haven from European anti-Semitism during the 1940's.²²² Palestinians claim that they are the rightful inhabitants of this region because their ancestors had been living there for centuries.²²³

The Oslo Peace Accords, signed in 1993, turned Gaza and the West Bank over to the newly created Palestinian Authority, which formed one wing of the Palestinian State.²²⁴ Hamas, a Palestinian Islamic political party, controlled Gaza, and Fatah, a major Palestinian political party, ruled the West Bank.²²⁵ However, many Israeli settlers remained in Gaza.²²⁶ In 2005 Israeli Prime Minister Ariel Sharon withdrew all Israeli settlers from Gaza but kept control

219. Altman, *supra* note 218 (acknowledging an award Mitchell received for his work in Northern Ireland).

220. *George Mitchell Fast Facts*, *supra* note 178; *The Honorable George Mitchell*, US-IRELAND ALLIANCE, <http://www.us-irelandalliance.org/content/23/en/The%20Honorable%20George%20J.%20Mitchell,%20For%20Whom%20The%20Mitchell%20Scholarship%20Is%20Named.html> (last visited Nov. 13, 2015) ("For his service in Northern Ireland Senator Mitchell received numerous awards and honors, including the Presidential Medal of Freedom, the highest civilian honor given by the U.S. Government; the Philadelphia Liberty Medal; the Truman Institute Peace Prize; and the United Nations (UNESCO) Peace Prize.").

221. See *The Origins of the Israeli-Palestinian Conflict*, WASHINGTON REPORT ON MIDDLE EASTERN AFFAIRS, <http://www.wrmea.org/the-origins-of-the-israeli-palestinian-conflict.html> (last visited Jan. 6, 2016); Joel Beinin & Lisa Hajjar, *Primer on Palestine, Israel and the Arab-Israeli Conflict*, MIDDLE EAST RES. & INFO. PROJECT (Feb. 2014), http://www.merip.org/sites/default/files/Primer_on_Palestine-Israel%28MERIP_February2014%29final.pdf (summarizing the Arab-Israeli dispute).

222. Beinin & Hajjar, *supra* note 221, at 1 (explaining the Israeli objectives in this conflict).

223. *Id.* (explaining the Palestinian objectives in this conflict).

224. *Id.* at 9-10 (summarizing the effect of the Oslo Peace Accord on this this conflict between Israel and Palestine).

225. See *id.* at 8 (introducing Hamas and Fatah).

226. *Id.* at 10-11 (pointing out why there was still an issue after the Oslo Peace Accord).

over all border crossings and conducted raids, even though this land was completely in Palestinian hands at that point.²²⁷

In January 2006 Hamas won the Palestinian parliamentary elections ending the Fatah government's control.²²⁸ In June 2007, Fatah moved to carry out a coup to oust Hamas, which was unsuccessful, and led to Hamas' seizure of the Gaza Strip.²²⁹ Israel later declared that Gaza had become a hostile territory, refused to recognize the Hamas government, and tightened its blockade on the flow of goods and people in and out of the territories.²³⁰ Although in 2008 Hamas and Israel reached a six-month truce and seemed to be moving towards negotiation with regard to this dispute and the violence and rocket attacks taking place in Gaza, the conflict continued, and Israel continued to occupy Gaza and the West Bank.²³¹

Mitchell was the Special Envoy to the Middle East from January 22, 2009 to May 20, 2011.²³² He was appointed by United States President Obama in January of 2009, and visited Israel and the West Bank several times.²³³ Contact between Israel and the Palestinians resumed in May 2009, after a stalemate of nineteen months, in the form of indirect "proximity talks" through Mitchell.²³⁴ During these proximity talks, Israeli Prime Minister Binyamin Netanyahu and Palestinian Chairman Mahmoud Abbas were not in the same room, and they spoke through Mitchell, making and listening to demands all brokered through Mitchell as their third set of ears.²³⁵ Mitchell and

227. *Id.* at 14-15 (explaining the removal of Israeli settlers from the Gaza strip).

228. *Id.* at 15 (introducing the conflict between Hamas and Fatah).

229. *Id.* (describing the start of the hostilities at the Gaza strip).

230. *Id.* (explaining Israeli involvement in Gaza and rejection of Hamas).

231. *See id.* at 16 (explaining the continuance of the conflict between Israel and Hamas).

232. *George Mitchell Fast Facts*, *supra* note 178; Altman, *supra* note 218 (introducing Mitchell's presence in Israel-Palestine and his role as mediator there).

233. Steven Lee Myers, *Amid Impasse in Peace Negotiations, America's Chief Middle East Envoy Resigns*, N.Y. TIMES (May 13, 2011), <http://www.nytimes.com/2011/05/14/world/middleeast/14mitchell.html>; *Grim Omens as US Envoy Pursues Mideast Relaunch*, INDIAN EXPRESS (Oct. 9, 2009), <http://indianexpress.com/article/news-archive/print/grim-omens-as-us-envoy-pursues-mideast-relaunch/> ("The missions have been stymied by Netanyahu's refusal to halt settlement construction and by Arab states' reluctance to make peace overtures.").

234. *See History of Mid-East Peace Talks*, BBC (July 29, 2013), <http://www.bbc.com/news/world-middle-east-11103745> ("After taking office, US President Barack Obama was quick to try to restart the peace process. Contact between Israel and the Palestinians resumed in May 2009, after a hiatus of 19 months, in the form of indirect 'proximity talks' through US Middle East envoy George Mitchell.").

235. Sarah Wildman, *Envoy for Israeli-Palestinian Talks*, POL. DAILY (May 15, 2011), <http://www.politicsdaily.com/2010/05/15/envoy-george-mitchell-lays-groundwork-for-israeli->

President Obama's goal in these talks was to have the two States living side by side in peace and security.²³⁶

President Obama and Mitchell's mission was stymied by Prime Minister Netanyahu's refusal to stop construction in Gaza and the West Bank and Hamas' hesitance to make peace offers.²³⁷ Mitchell tried, and later failed, to persuade Israel to freeze construction of settlements in territories claimed by the Palestinians.²³⁸ President Obama's administration persuaded Chairman Abbas to agree to demand a complete settlement freeze as a price for restarting talks.²³⁹

When the freeze didn't happen, Chairman Abbas was embarrassingly stranded and seemed to lack a strategy.²⁴⁰ Doubters in his own party and his rivals were calling for his replacement.²⁴¹ "For months we've done nothing," says a Fatah stalwart who has sometimes been touted as a successor.²⁴² "We have no elections, no reconciliation with Hamas, and no negotiations."²⁴³ We're looking ridiculous."²⁴⁴

palestinianal/; *An Inevitably Edgy Start*, ECONOMIST (May 13, 2010), http://www.economist.com/world/middle-east/displaystory.cfm?story_id=16117248 (pointing out that the parties to this mediation were not willing to face each other and the methods Mitchell employed to accommodate this).

236. See Myers, *supra* note 233; Andrea Stone, *Mideast Envoy George Mitchell Resigns, 'Hit a Brick Wall' on Israeli-Palestinian Peace Talks*, HUFFINGTON POST (May 13, 2011), http://www.huffingtonpost.com/2011/05/13/mideast-envoy-george-mitc_n_861838.html ("In announcing Mitchell's resignation in a statement, Obama called him 'a tireless advocate for peace' whose 'deep commitment to resolving conflict and advancing democracy has contributed immeasurably to the goal of two states living side by side in peace and security.'").

237. *Grim Omens as US Envoy Pursues Mideast Relaunch*, *supra* note 233; Myers, *supra* note 233 (explaining how Netanyahu and Hamas hindered Mitchell and President Obama's mission in Israel-Palestine and progress in this mediation).

238. Myers, *supra* note 233 (explaining Mitchell's efforts to lessen the tension between Israel and Hamas).

239. *The Palestinians and the Peace Process: Will He, Won't He, Join the Dance?*, ECONOMIST (Jan. 28, 2010), <http://www.economist.com/node/15403099?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e>; *Grim Omens as US Envoy Pursues Mideast Relaunch*, *supra* note 233 (President Obama's methods to bring Abbas to the table to participate in a mediation).

240. See *The Palestinians and the Peace Process*, *supra* note 239 (acknowledging Abbas' vulnerability when the construction freeze did not go through).

241. *Id.* ("Doubters in his own party, Fatah, as well as his bitter rivals in Hamas, the Islamist Palestinian movement that runs Gaza, are sneering at his failure to make progress and are calling for his replacement; indeed, he has already said he would resign.").

242. *Id.* (exemplifying Palestinian frustration with Abbas).

243. *Id.* (acknowledging a lack of progress for the Palestinians in this mediation).

244. *Id.* (exemplifying the shame felt by Palestinians after the construction freeze did not go through).

After the freeze did not occur, the lack of progress likely flared Palestinian distrust of the neutrality of the United States and Mitchell.²⁴⁵ Chairman Abbas and Prime Minister Netanyahu later launched talks in Washington in September of 2010 led by Mitchell, lasting three weeks but resulting in no resolution; they also intensified mutual acrimony.²⁴⁶ These political constraints caused great difficulty for Mitchell to create a reconciliation between the parties, which contributed to his decision to resign.²⁴⁷ Mitchell spent the remainder of 2010 trying to get the parties back in a room together without success.²⁴⁸

In December of 2010, Secretary of State Hillary Clinton announced that the administration would conduct proximity negotiations instead of trying to get the parties in a room together and between November 2010 and May 2011 Mitchell made only one trip to the Israel-Palestine region.²⁴⁹ Mitchell said in his letter of resignation that he initially agreed to do what President Obama called “the toughest job imaginable” for only two years.²⁵⁰ Mitchell’s resignation in May 2011 formalized his growing disengagement and frustration with the conflict throughout that year.²⁵¹

United States media hypothesized that Mitchell believed that his patience would help resolve the Arab-Israeli conflict.²⁵²

245. See *supra* notes 238-44 and accompanying text (connecting the negative Palestinian commentary to their distrust of Mitchell).

246. Robert Danin, *George Mitchell Resigns: No Israeli-Palestinian Peace Any Time Soon*, CNN: GLOBAL PUB. SQUARE (May 13, 2011), <http://globalpublicsquare.blogs.cnn.com/2011/05/13/resignation-of-mideast-envoy-george-mitchell/>.

247. See *supra* notes 234-46 and accompanying text; *infra* notes 250-51 and accompanying text (connecting the lack of progress during these talks to Mitchell’s decision to resign).

248. See Danin, *supra* note 246 (“Abbas insisted that only a renewed settlement moratorium would reopen talks, and Netanyahu refused to comply.”).

249. *Id.* (denoting the use of proximity talks and Mitchell’s growing disinterest in this conflict and lack of presence in Israel-Palestine).

250. *Id.*; Ewen MacAskill, *George Mitchell Resigns as US Middle East Peace Envoy*, GUARDIAN (May 13, 2011), <http://www.theguardian.com/world/2011/may/13/george-mitchell-resigns-us-peace-envoy-middle-east>.

251. See Myers, *supra* note 233; MacAskill, *supra* note 250 (“Daniel Levy, co-director of the Middle East task force at the New America Foundation, said of Mitchell’s resignation: ‘Either he has advanced a certain approach that has not been taken up or, basically, that the chances of negotiation are diminishing by the day and he is not hanging about.’”).

252. *US Mideast Envoy George Mitchell Resigns*, NBC NEWS (May 31, 2011), <http://www.nbcnews.com/id/43023549/ns/politics/t/us-mideast-envoy-george-mitchell-resigns/#.U26hO8cmz8B>; see George Mitchell, U.N. Special Envoy for Middle East Peace, Press Briefing on the President’s Trilateral Meeting with Prime Minister Netanyahu of Israel and President Abbas of the Palestinian Authority at the White House Office of the Press

Contrastingly, Israeli analyst Yossi Alpher, the former director of the Jaffee Center for Strategic Studies at Tel Aviv University, commented on Mitchell's mediation methods saying, "The Northern Ireland method of listen, listen and listen doesn't work here."²⁵³ This media commentary acknowledges that Mitchell's methods, in which he had a positive experience in Northern Ireland, were not working in this radically different dispute between two countries and cultures that are extremely different from Ireland, Northern Ireland, and the United States.²⁵⁴

Shlomo Avineri, a political scientist at Hebrew University in Jerusalem, wrote of Mitchell: "He quit because he failed and he failed because he received a mission impossible from President Obama."²⁵⁵ Aaron David Miller, a former Middle East peace negotiator, opined that Mitchell should not be blamed for failing to break the stalemate between Israel and Palestine.²⁵⁶ He goes on to say that:

80 percent of the blame rests with the "inability and unwillingness" of Netanyahu [the Prime Minister of Israel] and Abbas [The President of Palestine] to bridge the gaps on the key issues of settlements, refugees, borders and Jerusalem.²⁵⁷ The other 20 percent . . . rests with the Obama administration "that decided to come out louder, harder and faster than almost any of its predecessors before understanding what the situation was -- what it would take to get negotiations going."²⁵⁸

These media commentaries also acknowledge that the Palestinians were not cooperating with Mitchell's proximity talks and

Secretary (Sept. 22, 2009), http://www.whitehouse.gov/the_press_office/Briefing-by-US-Special-Envoy-for-Middle-East-Peace-George-Mitchell ("I want to make a brief personal comment. I believe deeply, rising out of my past experience, that just as conflicts are created by human beings, they can be ended by human beings, with patience, determination, and dedication. Our aim is to achieve a comprehensive peace in the region that will enable Israelis, Palestinians, and all of the region's people to share a secure, prosperous, and stable future.").

253. *US Mideast Envoy George Mitchell Resigns*, *supra* note 252 (academic commentary on how the mediation methods Mitchell used in Ireland don't work in Israel-Palestine).

254. *See supra* notes 252-53 and accompanying text (pointing out that one method does not work for every mediation).

255. Stone, *supra* note 236; *Peace Deal Impossible Now Says Israel Foreign Minister*, INDIAN EXPRESS (Oct. 8, 2009), <http://indianexpress.com/article/news-archive/print/peace-deal-impossible-now-says-israel-foreign-minister/> ("Israel's foreign minister [Avidgor Lieberman] says there's no chance of ending the Israeli-Palestinian conflict for many years.").

256. Stone, *supra* note 236 (providing an opinion that takes the blame off of Mitchell).

257. *Id.* (placing part of the blame for lack of progress in the talks between Netanyahu and Abbas on the parties themselves).

258. *Id.* (placing some of the blame on the Obama Administration).

President Obama's aggressive approach in Israel-Palestine, which were inherently individualist.²⁵⁹ These commentaries also bring to light the theory that the Obama Administration may not be making progress in Israel-Palestine because it lacks an understanding of the conflict.²⁶⁰

The Jewish Daily Forward reported on Mitchell's resignation:

Mitchell tried to remain optimistic regarding the prospects for peace in the Middle East, and frequently repeated the story about his tenure as peace negotiator for Northern Ireland, where he experienced "700 days of failure and one day of success."²⁶¹ But as his 700th day as Middle East envoy passed, frustration among Mitchell and his team members was evident and on the rise.²⁶² According to activists involved in the process, Mitchell expressed this frustration in private talks, and for the past several months, observers in Washington speculated that his days as special envoy were coming to an end.²⁶³

Mitchell resigned in May 2011 in frustration that may have stemmed from the fact that the methods he had used in Northern Ireland did not yield the same successful result in Israel-Palestine.²⁶⁴ This failure could have also resulted from the Palestinian's lack of trust felt towards President Obama and Mitchell and in the neutrality of the United States and Mitchell in this conflict.²⁶⁵

ii. Lakhdar Brahimi as the United Nations' Special Envoy in Syria

In August 2012 Lakhdar Brahimi replaced Kofi Annan as the United Nations Special Envoy to Syria after the former United Nations Secretary-General resigned from the job.²⁶⁶ Brahimi took

259. *See supra* notes 253-57 and accompanying text; *see also supra* note 133 and accompanying text (exemplifying individualist behavior).

260. *See supra* notes 253-58 and accompanying text (analyzing the previous media commentaries and concluding that this mediation may have lacked progress because of the mediator's lack of understanding of the conflict).

261. Nathan Guttman, *Mideast Envoy George Mitchell Resigns, Amid Frustration, Turf Wars*, FORWARD (May 13, 2011), <http://forward.com/articles/137797/mideast-envoy-george-mitchell-resigns-amid-frustra/>.

262. *Id.* (pointing out Mitchell's frustration in Israel-Palestine).

263. *Id.* (describing Mitchell's frustrations that led to his resignation).

264. *See supra* notes 252-53 and accompanying text (hypothesizing why Mitchell was so frustrated with the lack of progress in his mediation in Israel-Palestine).

265. *See supra* notes 237-45 and accompanying text (hypothesizing that the failure experienced in Israel-Palestine could have resulted from Palestinian distrust of the mediator).

266. Terri Rugar, *U.N. Envoy on Syria Lakhdar Brahimi: A Primer*, WASH. POST (Jan. 24, 2014), http://www.washingtonpost.com/world/middle_east/un-envoy-on-syria-lakhdar-

over where Annan left off for the UN-Arab League peace mission, also known as the six-point plan for Syria that called for military pullback, establishment of ceasefires, and political discourse.²⁶⁷ From 2012 to 2014, Brahimi contributed to the launch of and mediated in the Geneva II Middle East Peace Conference (“Geneva II Conference”) to help end the Syrian Civil War, which has contributed to over 100,000 deaths and the displacement of over nine million people from their homes since the conflict began between the government of President Bashar al-Assad and various groups seeking to oust that regime.²⁶⁸ The goal of the Geneva II Conference was to attain a political solution to the Syrian conflict through an agreement between the Syrian government and opposition to implement the Geneva Communiqué, which calls for the establishment of a transitional government in Syria that would lead to holding elections.²⁶⁹

Although communication between the parties revealed some commonalities, the first round of talks ended on January 31, 2014 with no progress.²⁷⁰ Brahimi said that during these talks he observed some common ground between the parties, which included a commitment to discuss implementation of the Geneva Communiqué to achieve a political solution and a recognition that to do so they

brahimi-a-primer/2014/01/24/c245b376-8531-11e3-bbe5-6a2a3141e3a9_story.html (introducing Brahimi’s role as mediator in Syria); Somini Sengupta, *Few Eager to Talk Peace in Syria, but a Mediator Won’t Stop*, N.Y. TIMES (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/world/middleeast/while-few-seem-eager-to-talk-peace-in-syria-un-mediator-wont-stop.html?_r=0.

267. *Kofi Annan’s Six-Point Plan for Syria*, AL JAZEERA (Mar. 27, 2012), <http://www.aljazeera.com/news/middleeast/2012/03/2012327153111767387.html>; *Text of Annan’s Six-Point Peace Plan for Syria*, REUTERS (Apr. 4, 2012), <http://www.reuters.com/article/2012/04/04/us-syria-ceasefire-idUSBRE8330HJ20120404> (summarizing Annan’s six-point plan for Syria).

268. See generally *‘No Progress to Speak of’ as First Round of UN-Sponsored Syria Peace Talks Ends*, UN NEWS CTR. (Jan. 31, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47052#.VNT3m4dzXG4> (introducing the Geneva II Conference and why it was important for Syria); *Preparations for Upcoming Syria Peace Conference ‘On Track,’ Says UN Chief*, UN NEWS CTR. (Dec. 23, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46812#.VNTt8ldzXG5>; *What is the Geneva II Conference on Syria?*, BBC (Jan. 22, 2014), <http://www.bbc.com/news/world-middle-east-24628442>.

269. See *What is the Geneva II Conference on Syria?*, supra note 268 (summarizing the goals of the Geneva II Conference and introducing the Geneva Communiqué).

270. *‘No Progress to Speak of’ as First Round of UN-Sponsored Syria Peace Talks Ends*, supra note 268; see Anne Barnard & Rick Gladstone, *Syria Denounces U.N. Envoy as ‘Biased’*, N.Y. TIMES (Jan. 10, 2013), <http://www.nytimes.com/2013/01/11/world/middleeast/syria-rebels-raid-air-base-idlib.html> (summarizing the result of the first round of talks).

must agree on an end to the conflict and establishment of a transitional government.²⁷¹ A second round of talks was scheduled in February 2014 and Brahimi explained that this would be a short break to allow the parties to prepare their more detailed positions on the issues raised and the Geneva Communiqué.²⁷²

The second round of the Geneva II Conference ended without progress as well.²⁷³ Brahimi said that his proposed agenda for another round of talks, which would focus first on ending the violence and terrorism and second on creating a transitional government, was blocked by President Assad's representatives.²⁷⁴ He expressed that the Syrian government's stance in this round made the opposition suspicious that the government had no intention to discuss a transitional government at all and he apologized to the Syrian people for the lack of progress.²⁷⁵

To help facilitate negotiations, Brahimi brought the United States, a supporter of the Syrian opposition, and Russia, a supporter of the Syrian government, into the talks between the Syrian parties in Geneva.²⁷⁶ The United States and Russia taking roles in this mediation could have increased pressure on the Syrian parties to come to an agreement.²⁷⁷ Although the United States and Russia were

271. 'No Progress to Speak of' as First Round of UN-Sponsored Syria Peace Talks Ends, *supra* note 268 (Brahimi's observation of the mediation).

272. *Id.* (describing the circumstances of the second round of talks for the Geneva II Conference).

273. Anne Barnard & Nick Cumming-Bruce, *After Second Round of Syria Talks, No Agreement Even on How to Negotiate*, N.Y. TIMES (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/world/middleeast/after-second-round-of-syria-talks-no-agreement-even-on-how-to-negotiate.html> (introducing the failure of the second round of talks); Daniel Boffey, *UN Mediator Blames Bashar al-Assad as Syrian Peace Talks Falter*, GUARDIAN (Feb. 15, 2014), <http://www.theguardian.com/world/2014/feb/16/syria-talks-assad-brahimi-un>.

274. Boffey, *supra* note 273 (Brahimi blaming Assad for a lack of progress in the second round of talks).

275. *Id.* (Brahimi expressed his frustrations with one party, Assad, of the mediation).

276. Barnard & Gladstone, *supra* note 270 ("The efforts by the special envoy, Lakhdar Brahimi, include a planned meeting in Geneva on Friday with top diplomats from the two powers on opposite sides of the Syria conflict: the United States, which supports the insurgency, and Russia, which supports the Syrian government but has increasingly displayed ambiguity about support for President Bashar al-Assad himself."); see Ghassan Charbel, *Brahimi: Geneva I Communiqué Was 'Superficial'*, AL-MONITOR (June 26, 2014), <http://www.al-monitor.com/pulse/politics/2014/06/syria-brahimi-interview-envoy-reasons-failure.html>.

277. Nick Cumming-Bruce & Hwaida Saad, *New Round of Syria Talks Off to a Slow Start*, N.Y. TIMES (Feb. 11, 2014), <http://www.nytimes.com/2014/02/12/world/middleeast/syria.html?ref=lakhdarbrahimi> ("Analysts monitoring the talks say the American and Russian

making strides to keep the talks alive, the issue remains unresolved and the second round of talks in Geneva did not end with an agreement between the Syrian parties.²⁷⁸

This dispiriting finish of the two-week-long rounds of talks called into question their future.²⁷⁹ There were strong hopes and pressures for a resolution because at the time, this conflict had killed more than 135,000 people and displaced 9.5 million from their homes.²⁸⁰ Although the talks were sponsored by Russia and the United States, which support opposing sides, and were backed by dozens of other countries, the added presence and pressure of the foreign countries did not result in a discussion of resolution in Syria.²⁸¹ Brahimi said that the talks had broken down because the Syrian government rejected his suggestion that the parties discuss each side's top demands rather than spend days discussing the government's priorities.²⁸² This rejection of Brahimi's suggestion

involvement could increase the pressure on both sides to move from shadowboxing to matters of substance.”); see Barnard & Gladstone, *supra* note 270.

278. *Brahimi: Syria Peace Talks' Failure Looms*, AL JAZEERA (February 14, 2014), <http://www.aljazeera.com/news/middleeast/2014/02/brahimi-syria-peace-talks-failure-looms-201421318362354985.html> (“High-level Russian and US diplomats have promised to help keep Syria peace talks alive in Geneva as they reached a deadlock, UN mediator Lakhdar Brahimi said. Russian Deputy Foreign Minister Gennady Gatilov and US Under Secretary of State Wendy Sherman ‘promised that they will help both here and in their capitals, to unblock the situation for us,’ Brahimi told reporters on Thursday, according to the AFP news agency, following a meeting with the two diplomats. ‘Until now, we are not making much progress in the process,’ Brahimi said, acknowledging that ‘failure is always staring at us in the face... The Observatory has reported an average of 236 people killed daily since the so-called Geneva 2 peace talks began in late January, bringing regime and opposition representatives to the negotiating table but producing no concrete results.”); see Barnard & Gladstone, *supra* note 270.

279. Barnard & Cumming-Bruce, *supra* note 273 (“The dispiriting finish called into question the future of the talks. Two weeklong rounds have produced no actual negotiations on resolving a conflict that has killed more than 135,000 people and driven 9.5 million from their homes, even though the talks are sponsored by Russia and the United States, which support opposing sides, and backed by dozens of other countries. The meetings have instead focused on what to discuss and how to do so.”); see Laura Rozen, *UN Syria Envoy Brahimi Said to Consider Resigning*, AL-MONITOR (Mar. 6, 2014), <http://backchannel.al-monitor.com/index.php/2014/03/7851/un-syria-envoy-brahimi-said-to-consider-resigning/>.

280. See Barnard & Cumming-Bruce, *supra* note 273 (acknowledging the pressure riding on the talks and a resolution to this conflict).

281. *Id.* (highlighting how the presence of the United States, Russia, and other countries failed to initiate progress towards a resolution).

282. *Id.* (“Mr. Brahimi said the talks had broken down primarily because the Syrian government balked at his suggestion that the negotiators discuss both sides’ top demands in the first two days of negotiations, rather than spending days on the government’s priorities.”).

reflects possible cultural differences and disagreement with mediation methods between Brahimi and the parties of this conflict.²⁸³

While Brahimi was working there, the Syrian government deemed him “biased” in his efforts to facilitate talks between the government and the Syrian opposition.²⁸⁴ The New York Times reported that a statement from the Foreign Ministry in Damascus denouncing Brahimi appeared to be in response to statements he had made suggesting that President Assad must relinquish power and waive membership in any replacement government in Syria.²⁸⁵ There have been other reports of insults toward Brahimi from a pro-Assad newspaper, saying he is “one-eyed and many tongued.”²⁸⁶ Similarly, the Syrian opposition party accused Brahimi of overstepping his role when he had suggested that Assad’s government should have a role in the talks, and complicated his efforts by agreeing to talk peace only if Assad set a deadline to step down from office.²⁸⁷ This media

283. *See id.* (acknowledging how cultural differences between the mediator and the parties may have hindered progress in this mediation).

284. Barnard & Gladstone, *supra* note 270 (“Syria’s government appeared to distance itself from further engagement with the special peace envoy of the United Nations and the Arab League on Thursday, declaring him ‘flagrantly biased’ even as his efforts aimed at a political transition to end the nearly two-year-old Syrian conflict were accelerating.”); *see Syria Calls Joint Envoy Brahimi ‘Biased’*, ALJAZEERA (Jan. 11, 2013), <http://www.aljazeera.com/news/middleeast/2013/01/2013110183349199705.html> (“Syria has denounced international envoy Lakhdar Brahimi as ‘flagrantly biased’ casting doubt on how long the UN-Arab League mediator can pursue his peace mission”).

285. Barnard & Gladstone, *supra* note 270 (“A statement from the Foreign Ministry in Damascus denouncing Mr. Brahimi appeared to be a response to remarks he made to Western news agencies the day before in which he suggested that Mr. Assad must relinquish power and could not be part of any replacement government in Syria.”); *see Syria Calls Joint Envoy Brahimi ‘Biased’*, *supra* note 284 (“The Syrian foreign ministry was responding to remarks by Brahimi . . . a day after he ruled out a role for President Bashar al-Asad in a transitional government . . . (and) said it was surprised at Brahimi’s comments, which showed ‘he was flagrantly biased for those who are conspiring against Syria and its people.’”)

286. Sengupta, *supra* note 266; *see Charbel*, *supra* note 276 (noting the “hired pens” in the Arab region treated Brahimi as an enemy).

287. Sengupta, *supra* note 266 (“The Syrian opposition parties accused him of overstepping his role when he said last month that Mr. Assad’s government should play a role in talks, and then on Sunday they further complicated Mr. Brahimi’s work by insisting that they would talk peace only if Mr. Assad set a deadline to step down, according to Reuters.”); Charbel, *supra* note 276 (Quoting Brahimi: “I received [criticism] from both the regime and the opposition . . . They (the opposition) had heard from major and important states that the conflict was resolved and the departure of Assad was a sure thing. Therefore the opposition viewed the call to negotiations as an attempt to help the defeated. In 2013, after making advances on the ground, the regime (also) felt that the idea of negotiations was an attempt to help the defeated party.”).

commentary expresses the Syrian opposition party's distrust in Brahimi and his neutrality in this conflict.²⁸⁸

On May 13, 2014 Brahimi announced his resignation.²⁸⁹ Brahimi explained an incident that signaled that it was time for him to give up: "I realized that this process was not going to move forward any time soon . . . [n]either Russia nor the US could convince their friends to participate in the negotiations with serious intent."²⁹⁰ UN Secretary-General Ban Ki-moon expressed regret for Brahimi's resignation and explained that Brahimi "faced almost impossible odds."²⁹¹

Differing cultural perspectives between mediators and the parties can lead to confusion about the methods the mediator employs and how both the parties and public perceive him.²⁹² The divide between individualist and collectivist cultures can make determining whether the tactics and methods used by cross-cultural mediators are ethical very difficult and often results in misunderstandings.²⁹³ This ambiguity and misperception was present in Mitchell's mediation in Israel-Palestine and Brahimi's mediation in Syria.²⁹⁴ Part III further explores Mitchell and Brahimi's experiences and explains how cultural differences and ethical ambiguity affected the outcomes of their mediations.

288. See *supra* note 287 and accompanying text (reflecting on negative commentary of Brahimi).

289. Ian Black, *UN Syria Envoy Lakhdar Brahimi Resigns After Failure of Geneva Talks*, GUARDIAN (May 13, 2014), <http://www.theguardian.com/world/2014/may/13/un-syria-envoy-lakhdar-brahimi-resigns> ("Lakhdar Brahimi, the UN envoy for Syria, finally announced his resignation on Tuesday, expressing regret for his inability to forge a coherent international response to the world's worst humanitarian crisis."); Susanne Koelbl, *Interview with UN Peace Envoy Brahimi: 'Syria Will Become Another Somalia'*, SPIEGEL ONLINE (June 7, 2014), <http://www.spiegel.de/international/world/interview-with-former-un-peace-envoy-to-syria-lakhdar-brahimi-a-974036.html>.

290. Koelbl, *supra* note 289 (Brahimi acknowledging the stalemate between the parties).

291. *Syria: UN-Arab Envoy Brahimi Resigns*, UN NEWS CTR. (May 13, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47780#.VCxd4CjEfap> ("In his remarks, Mr. Ban said that for nearly two years, Mr. Brahimi had sought an end to the brutal and still worsening civil war in Syria. Indeed, the 80-year old Algerian diplomat has faced almost impossible odds, 'with a Syrian nation, Middle Eastern region and wider international community that have been hopelessly divided in their approaches to ending the conflict.'").

292. See *supra* notes 122-56 and accompanying text (referring back to theory about mediator preferences based on culture).

293. See *supra* notes 156-75 and accompanying text (explaining the divide between individualists and collectivists on mediation methods).

294. See *supra* notes 259-65, 283 and accompanying text (connecting Mitchell and Brahimi's mediations to individualist and collectivist theory).

III. *ANALYSIS OF MITCHELL AND BRAHIMI'S MEDIATIONS
AND SUGGESTIONS FOR INTERNATIONAL AND CROSS-
CULTURAL MEDIATORS*

Mitchell and Brahimí's experiences, considered in tandem with existing theories on mediator neutrality and ethics, provide a basis for generating suggestions for mediators involved in cross-cultural mediations. Part III.A provides analysis of Mitchell's experiences and explores why Mitchell achieved a successful agreement in Ireland and frustration and ridicule in Israel-Palestine. Part III.B examines Brahimí's experience in Syria and explores possible flaws in his perception of neutrality and possible explanations for why he was viewed as biased.

Taking the lessons learned from the Mitchell and Brahimí experiences, Part III.C provides suggestions for mediators on how to be neutral and gain legitimate trust when mediating cross-culturally. This Section analyzes Mitchell and Brahimí's real life trials and failures to gain trust and a perception of neutrality in their mediations. Subsequently, this Section suggests that a mediator develop an understand of his own culture and the mediating parties' cultures, enhance mutual understanding between him and the mediating parties, draw from lessons learned by other mediators in failed mediations, and proposes that standards for mediators incorporate the role culture plays in the ethical expectations of a mediator.

A. *Why George Mitchell Experienced Success and Praise in Ireland
and Frustration and Failure in Israel-Palestine*

This Section examines how the people of Northern Ireland viewed Mitchell with praise and acceptance when mediating in Ireland, which resulted in a resolution, and how contrastingly Mitchell was met with skepticism and distrust in Israel-Palestine leading to his withdrawal. Mitchell's American nationality and culture likely played a role in the international public's perception of his neutrality and in the methods by which he conducted these mediations. The opposite outcomes reached by Mitchell in Northern Ireland and Israel can be attributed to a variety of factors including how the local populations viewed his role as mediator and how

participants viewed his own nationality as influencing his neutrality and mediation methods.²⁹⁵

In Ireland, some of the negative views of Mitchell explained previously were brought on because of his US nationality and Irish and Northern Irish views of whom the United States was supporting in this mediation.²⁹⁶ Mitchell has addressed this bias saying to the delegates:

I don't bring with me an American plan.²⁹⁷ There is no Clinton plan; there is no Mitchell plan.²⁹⁸ Any agreement will be yours.²⁹⁹ Two years later when I drafted what became the Good Friday Agreement I made sure every word in it had come from them.³⁰⁰

Mitchell made an effort to make the parties confident that the agreement was based on their wants and needs and not on a US agenda, and this attitude may have contributed to the Irish and Northern Irish cooperation with Mitchell.³⁰¹ This method is reflected in the US Model Standards requirement for self determination, which requires that a mediator not undermine a party's ability to come to a voluntary and uncoerced decision where each party makes free and informed choices.³⁰² This method also exemplifies Mitchell's efforts to remain neutral and not let his nationality give the mediating parties

295. See *supra* Part II.C.1 (describing how Mitchell's nationality may have affected his success and progress in his mediations in Northern Ireland and Israel-Palestine).

296. McKittrick, *supra* note 188 ("Once American and above all Irish-American involvement was viewed as pestilential meddling, with the US seen as a source of IRA guns and money. The State Department and the White House were generally Anglophile, but the Senate and Congress were seen as pro-Irish nationalist and sometimes republican."); Corry, *supra* note 201.

297. *Northern Ireland's Good Friday Accord, 10 Years On*, NPR (Apr. 6, 2008), <http://www.npr.org/templates/story/story.php?storyId=89418366>.

298. *Id.* (Mitchell detaching himself and President Clinton from the mediation tactics used in Northern Ireland).

299. *Id.* (Mitchell directing his plans toward the people of Northern Ireland).

300. *Id.* (Mitchell acknowledging his and the US' lack of influence on the people of Northern Ireland and the Good Friday Agreement).

301. See *supra* notes 197-209 and accompanying text (describing how Mitchell's lack of ownership and US detachment from the mediation agreement may have led to success in Northern Ireland).

302. See *supra* notes 55-57 and accompanying text (connecting Mitchell's mediation methods to the US Model Standards); see also *supra* notes 202-04 and accompanying text (demonstrating Mitchell's efforts to make the Northern Ireland process inclusive).

the impression that he was impartial in this peace process.³⁰³ Ultimately, Irish and Northern Irish skepticism of Mitchell and the United States quickly reversed and he and President Clinton were increasingly embraced in the region.³⁰⁴ Mitchell's work in Ireland and Northern Ireland is an example of a mediator overcoming bias in a foreign country and gaining their trust and cooperation in coming to a resolution.³⁰⁵

The acceptance and praise Mitchell received for this mediation could be attributed, in part, to the fact that the United States, Ireland, and Northern Ireland all have individualistic cultures and had an easier time agreeing on negotiation and mediation tactics. When speaking of the Northern Ireland conflict, Mitchell said, "I formed the conviction that there is no such thing as a conflict that can't be ended. Conflicts are created, conducted and sustained by human beings. They can be ended by human beings."³⁰⁶ This quote reflects an individualist notion that conflict is natural with the assumption that people welcome resolution, which is not the view of a collectivist who sees shame in conflict.³⁰⁷

Alternatively, Palestine's rejection of Mitchell's method of mediation reflects collectivist tendencies to avoid acknowledgement of conflict because of the shame associated with it.³⁰⁸ Chairman Abbas' unwillingness to come to the table also reflects a lack of trust in the United States and of the US mediator, Mitchell.³⁰⁹ Collectivists

303. *See supra* note 301. *See generally supra* notes 17-18 (emphasizing the role of neutrality in mediation).

304. *See supra* notes 197-200 (explaining how Northern Ireland embraced Mitchell).

305. *See supra* notes 197-200 and accompanying text (Mitchell exemplifying how a mediator overcame bias in a foreign country).

306. *US Mideast Envoy George Mitchell Resigns, supra* note 253.

307. *See Wright, supra* note 144; Elahee et al., *supra* note 144, at 805 (describing how Mitchell's individualist ideas are not congruent with collectivists).

308. *See Wright, supra* note 144 ("For collectivists . . . even a tacit acknowledgement of conflict could cause a loss of face, and participation in a typical mediation in the United States might be an unwelcome experience. Collectivists might refuse to participate in voluntary mediation, and if mandatory, might resist orders to mediate. If mediation is unavoidable, they might exhibit signs of anxiety and confusion during the process. Collectivists' resistance to mediation, as it is practiced in the United States, is likely to be most pronounced when the other disputants are current or former ingroup members or persons with whom the collectivists wish to maintain or re-establish relationships. Resistance to mediation is likely to be less intense when the other disputants are outgroup members or former ingroup members with whom the collectivists no longer wish to maintain relationships."). *See generally* Menkel-Meadow & Abramson, *supra* note 4.

309. *See The Palestinians and the Peace Process, supra* note 239 ("They are airing a plan promoted by the Palestinian prime minister, Salam Fayyad, to get on with building a state

are less concerned with the credentials of the mediator and more concerned with his familiarity with and relationship to the parties.³¹⁰ In this respect, collectivists perceive neutrality differently from individualists and consider familiarity and their relationship with the mediator more indicative of his neutrality in a mediation than his credentials and professional background.³¹¹

The Palestinians' fear of "losing face" and skepticism of the United States could be reasons why they were unwilling to negotiate.³¹² Daniel Levy, a veteran Israeli peace negotiator who is now at the New America Foundation, comments on the need for change in American negotiation methods between Israel and Palestine: "If they ([US] mediators and the Whitehouse) are not willing to pay the political cost of trying to resolve it – which means not always being Israel's lawyer – then maybe they need to let others in to play a greater role."³¹³ Levy expresses a perception that the United States has motives to help and support Israel, which make the Palestinians distrustful of a US intervention in this conflict.³¹⁴ Perceptions of US biases in favor of Israel may have stymied

that can then be presented for recognition by the UN Security Council in a couple of years. But few Palestinians would risk relying on the Security Council, where the Americans have a veto, to vote for such a state. Should the Americans and Europeans then balk, Mr[.] Fayyad would look as silly as Mr[.] Abbas."); Parrish, Christine, *Sen. George Mitchell on Mid-East Peace Process*, FREE PRESS ONLINE (Nov. 17, 2011) ("Americans have an economic and ideological stake in the Israelis and Palestinians achieving a lasting peace, said Mitchell. 'We have a strong commitment to be involved in the region, in part out of self-interest,' he said. 'The known reserves of oil and natural gas are there and they are essential to our economy. Conflict could cause major disruption with devastating effects on our economy and on other economies. It is in our interest to maintain a degree of stability.' 'Second, we believe in democratic ideals, the right to self-governance and to promote that,' said Mitchell.").

310. *See supra* note 148 and accompanying text (collectivists concerns for comfort and familiarity in a mediator).

311. *See supra* note 148 and accompanying text (referring to the different expectations of individualists and collectivists).

312. *See supra* note 145 and accompanying text (for collectivists an acknowledgment of conflict can be seen as a loss of face and result in collectivist parties' reluctance to participate in mediation); *supra* notes 239-45 and accompanying text (after Obama's administration persuaded Abbas to agree to demand a complete settlement freeze as a price for restarting talks and that freeze did not happen Palestinians began to get frustrated and embarrassed); *supra* notes 246-48 and accompanying text (These political constraints made the talks between Abbas and Netanyahu in Washington in September of 2010 very difficult and after these talks failed Mitchell spent the rest of 2010 trying to get these parties back in the same room).

313. *See Stone, supra* note 236; *Do Get a Move On*, THE INDIAN EXPRESS (Jan. 28, 2010), <http://indianexpress.com/articles/news-archive/web/do-get-a-move-on/> (commenting on how the US may have a bias toward Israel and that they should possibly resolve that bias by changing their methods).

314. *See id.* (acknowledging Palestinian distrust of the United States).

mediation talks led by Mitchell between Israel and Palestine.³¹⁵ Mitchell embodied the US characteristic of having a hard deadline set for an outcome in the Israel-Palestine mediation.³¹⁶ When his expectations were not met, and he had reached his two-year deadline, he resigned from this job.³¹⁷

B. How Lakhdar Brahimi's Perceived Bias Against the Syrian Government and Cultural Complications May Have Compromised a Resolution for his Mediation in Syria

The Syrian government characterized Brahimi as biased after he made suggestions that Assad relinquish power and not be a part of a replacement government in Syria.³¹⁸ Barnard explained that Brahimi could be “sidelined into irrelevance” by Syrian criticism like his predecessor, Annan, by the antagonists in the conflict who show little interest in engaging in mediations.³¹⁹ The Syrian government, in response to his comments about Assad, said that Brahimi “is flagrantly biased for those who are conspiring against Syria and its people,” suggesting a loss of faith in him.³²⁰

315. *See supra* notes 237-45 and accompanying text (hypothesizing about causes for Palestinian distrust).

316. *See supra* notes 170-73 and accompanying notes (referring back to cultural theory).

317. *See* Myers, *supra* note 233 (“In the letter, Mr. Mitchell, 77, said he had initially agreed to do what the president called “the toughest job imaginable” for only two years. He largely abandoned his diplomatic efforts after a failed push last year to persuade Israel to freeze the construction of settlements in territories claimed by the Palestinians.”); Barak Ravid, *Palestinians Made Your Peace Efforts Difficult, Netanyahu Tells Mitchell*, HAARETZ (May 14, 2011), <http://www.haaretz.com/news/diplomacy-defense/palestinians-made-your-peace-efforts-difficult-netanyahu-tells-mitchell-1.361682> (“Mitchell is leaving as peace talks between Israel and the Palestinians have come to a standstill, though he did not mention the matter in his resignation. He said that when he took on the role his intention was to serve for two years and more than that has now passed.”).

318. *See supra* notes 284-86 and accompanying text (referring to commentary on Brahimi).

319. Barnard & Gladstone, *supra* note 270 (“The Syrian criticism of Mr. Brahimi, a veteran Algerian statesman who spent days talking with Mr. Assad and other Syrian officials in Damascus last month, raised the possibility that he, like his predecessor, Kofi Annan, could be sidelined into irrelevance by the antagonists in the conflict, who have shown little or no interest in dialogue as the violence has worsened. At least 60,000 people have been killed in Syria since the uprising against Mr. Assad began in March 2011, the United Nations said last week. Mr. Brahimi told the BBC on Wednesday that Syrians want the Assad family to go after four decades in power. He told Reuters that he saw no place for Mr. Assad in any political transition.”).

320. *Id.* (“Syria’s Foreign Ministry said Thursday in a statement that such remarks were a surprise and showed that Mr. Brahimi “is flagrantly biased for those who are conspiring against Syria and its people.” The ministry statement suggested that Syria’s government had

The Syrian government has a valid point in calling Brahimi biased, considering that the UN Guidance suggests that mediators address the issue of impartiality by treating the parties in a fair and balanced way and minimizing public criticism of the parties as much as possible.³²¹ A mediator's role is to help the parties reach their own agreement.³²² Publicly expressing that Assad should not be in office could call into question Brahimi's impartiality and neutrality in the matter.³²³ Brahimi's difficulties in forming an agreement between the Syrian government and opposition could have stemmed from this Syrian government distrust in his neutrality.³²⁴

Brahimi's mediation could have also been stymied because the Russian, US, Syrian, Arab, and UN parties taking part in the negotiation, coming from many different cultures, were having a hard time reaching an outcome with which they all agreed.³²⁵ The United States, an individualist culture, partnered with the Syrian opposition, were able to acknowledge conflict and participate in the mediation without feeling ashamed.³²⁶ Contrastingly Russia, a collectivist culture partnered with the Syrian government, seemed to consider acknowledgement of conflict as a "loss of face" and this shame stymied their participation in the Geneva II Conference.³²⁷

Mitchell and Brahimi's experiences and failures in Israel-Palestine and Syria are good examples to draw from when making suggestions to and creating guidelines for cross-cultural mediators. The following Section provides suggestions for the inclusion of

lost whatever faith it might have reserved for Mr. Brahimi. Still, it did not specifically declare unwillingness to work with him.").

321. See *supra* notes 92-93 and accompanying text (referring to UN Guidance on impartiality).

322. See *supra* note 5 (referencing the role of a mediator).

323. See *supra* note 285 (illustrating Brahimi's perceived biases affecting negotiating progress in Syria).

324. See *supra* notes 284-86 and accompanying text (acknowledging how lack of trust has affected mediation efforts in Syria).

325. See Sengupta, *supra* note 266 ("Those fighting on the battlefield do not seem eager to talk peace, nor do the powerful countries that support them. Scholars of the region say neither the United States nor Russia, nor the regional powers with a direct stake in Syria, can agree on what an acceptable outcome would be — let alone how to get there."). See *generally* notes 8-11 and accompanying text (discussing the impact of culture on negotiations).

326. See *supra* note 144 and accompanying text (describing the individualist participant's tendencies); *supra* notes 270-83 and accompanying text (showing complications arising from negotiating efforts in Syria).

327. See *supra* note 145 and accompanying text (describing collectivist tendencies); *supra* notes 270-83 and accompanying text (showing complications arising from negotiating efforts in Syria).

cultural factors and methods in guidelines for mediators, such as the ones previously discussed in Part I.B. It also acknowledges that drawing from the experiences of mediators like Mitchell and Brahimi would be useful to help cross-cultural mediators deal with dilemmas involving differing ethical expectations of mediators depending on culture and nationality and how these expectations can affect the way a cross-cultural mediator is perceived.

C. Recommendations for Mediators Dealing with Cultural Differences and Issues of Neutrality

When approaching a cross-cultural mediation, a mediator can make efforts to avoid Mitchell and Brahimi's shortcomings and gain trust and mutual understanding among the mediating parties in order to cause a positive outcome.³²⁸ Initially the mediator should develop an understanding of his own culture and the mediating parties' cultures.³²⁹ Next, the mediator should enhance mutual understanding between him and the mediating parties by discussing their expectations of the mediation and the mediator.³³⁰ The mediator should additionally draw from lessons learned by other mediators in failed mediation experiences.³³¹ Lastly, the mediation guidelines and institutions should acknowledge the role culture plays in the ethical expectations of a cross-cultural mediator and incorporate this into mediation standards.³³²

In order for a mediator to gain success and resolutions in cross-cultural mediations it is pivotal for that mediator to develop an understanding of the parties' cultures, understand how his own culture influences his methods and tendencies, bridge the cultural gap between himself and the mediating parties, and evaluate whether he is the right mediator for the conflict at hand.³³³ Mediators should also acknowledge not only their own individualist and collectivist cultural

328. *See infra* notes 333-37 and accompanying text (explaining how a mediator can gain trust and understanding among the mediating parties).

329. *See infra* note 333 and accompanying text (commenting on mutual understanding).

330. *See infra* notes 335-42 and accompanying text (suggestions on how to enhance mutual understanding).

331. *See infra* notes 343-50 and accompanying text (drawing examples from Mitchell and Brahimi's mediations).

332. *See infra* notes 351-59 and accompanying text (suggestions for including cultural standards to mediator guidelines).

333. *See supra* notes 37-47 and accompanying text (recalling cross-cultural mediation suggestions).

behaviors, but also those of the mediating parties, and make an effort to understand this behavior and come to a common ground with regards to preferences of mediation methods.³³⁴

After the mediator individually develops an understanding of his own and his mediating parties' cultures and expectations, he should make efforts to enhance mutual understanding between himself and the mediating parties.³³⁵ In order to avoid conflicting cultural expectations, the mediator should discuss his ideas of what are proper mediation roles and methods, have the mediating parties do the same, and come to an agreement on what roles and methods would be proper for the mediation at hand.³³⁶ When coming to an agreement on what would be the proper roles and methods to use in the mediation, mediators can also refer to the numerous guidelines established for mediations discussed previously, and choose one of these guidelines to govern their mediation.³³⁷

For example, if a mediator decided to use the UN Guidance to govern his mediation, he and the mediating parties would benefit from numerous suggestions and requirements stipulated in these guidelines.³³⁸ The UN Guidance identifies key fundamentals that should be considered in a mediation effort such as consent, impartiality, and quality peace agreements, providing the mediator with a checklist of things to consider when contemplating and executing a mediation.³³⁹ Suggestions for how to address impartiality are also included in these guidelines, which is a great rubric for mediators to deal with such an ambiguous but crucial issue in mediations.³⁴⁰ The UN Guidance also has inclusivity and national ownership sections that explain who should be involved in the

334. *See supra* notes 152-56 and accompanying text (suggesting a mediator gain additional cultural understanding).

335. *See supra* notes 331-33 and accompanying text (introducing the suggestion of enhancing mutual understanding).

336. *See supra* notes 155-56 and accompanying text (emphasizing the importance of communication between the mediator and the mediating parties).

337. *See supra* Part I.B (recalling the previously discussed standard's for mediators).

338. *See supra* Part I.B.iii.a (exemplifying how to use the UN Guidance as a framework to govern a mediation).

339. *See* UN Guidance, *supra* note 83, at 3 ("To address these issues, the Guidance identifies a number of key fundamentals that should be considered in a mediation effort: preparedness; consent; impartiality; inclusivity; national ownership; international law and normative frameworks; coherence, coordination and complementarity of the mediation effort; and quality peace agreements.").

340. *See supra* note 93 and accompanying text.

mediation, which would be useful for the mediator to ensure that an excluded party does not compromise the mediation.³⁴¹ Such a framework can eliminate some of the guesswork and confusion that can arise for a mediator in a cross-cultural mediation.³⁴²

Additionally, the mediator should draw on the lessons learned from failed mediation experiences.³⁴³ Examining the experiences and failures of other cross-cultural mediators and identifying their mistakes is also a useful way for a mediator to determine what behavior is appropriate for mediating parties from certain cultural and political backgrounds.³⁴⁴ Mitchell seemed to have misstepped in Israel-Palestine by setting a deadline, lacking an understanding of the conflict and culture there, being from a country with an obvious interest in the conflict, and not realizing that a conflict involving a collectivist party would most likely not accept individualist methods that he deemed successful in his past mediation in Northern Ireland.³⁴⁵ Brahimi seemed to have gone wrong in Syria also by setting deadlines, using individualist mediation methods with which he was culturally comfortable but that the collectivist Syrian government rejected, and publicly making suggestions about Assad's current and future role that gave the impression of bias.³⁴⁶

A common mistake made by Mitchell and Brahimi was using methods that they were culturally comfortable with without considering that the parties were not accustomed to these methods.³⁴⁷ To avoid this mistake it would benefit a mediator to reference Hal Abramson's four-step approach to cross-cultural mediation.³⁴⁸ Following this framework, a mediator can bridge the cultural divide by educating the parties about their own cultures and the mediator's culture and discussing what their preferences are.³⁴⁹ The mediator should also consider the ethical problems that may arise during cross-

341. *See supra* notes 94-95 and accompanying text.

342. *See supra* notes 83-98 and accompanying text (summarizing the UN Guidance).

343. *See infra* notes 339-45 and accompanying text (introducing suggestions for examining failed mediations).

344. *See supra* Part III.A-B (highlighting the need for mediators to consider culture and politics in crafting their mediations, in light of past failures in Israel-Palestine and Syria).

345. *See supra* Parts II.C, III.A (recalling Mitchell's mistakes when mediating in Israel-Palestine).

346. *See supra* Parts II.C.ii, III.B (recalling Brahimi's mistakes when mediating in Syria).

347. *See supra* Parts II.C.i.b.-ii.

348. *See supra* notes 37-47 and accompanying text.

349. *See supra* note 43 and accompanying text.

cultural mediations and make sure they are on ethical common ground with their parties to ensure the legitimacy and effectiveness of the mediation.³⁵⁰

Lastly, mediation guidelines and institutions should acknowledge the role of culture in the ethical expectations for mediators.³⁵¹ Mediation guidelines must acknowledge the role culture plays in the ethical expectations of cross-cultural mediators and include standards for this in these guidelines.³⁵² Building upon existing guidelines with examples and explanations of cultural dilemmas and stalemates that a mediator may encounter and providing guidance for how to deal with these problems would greatly benefit the cross-cultural mediator.³⁵³

For example, these guidelines could include some of the individualist and collectivist studies and statistics previously discussed, such as Abramson's four step approach and the previously discussed Ethically Ambiguous Negotiation Tactics, to help a cross-cultural mediator identify the kind of culture and expectations he may be dealing with in a certain country.³⁵⁴ This would help him execute a plan to understand that culture and what will be expected of him.³⁵⁵ This would also help him evaluate whether he would be the right mediator for a certain conflict based on his mediation methods and background.³⁵⁶ Making this evaluation would also allow the mediator to determine whether he would be able to overcome the cultural biases and judgment he may face due to his nationality and culture.³⁵⁷ It would also help him evaluate whether the mediating parties will question his neutrality, which is an important legitimizing ethical factor in mediation, and whether this distrust between him and the

350. See *supra* notes 45-48 and accompanying text.

351. See *supra* notes 347-350 and accompanying text; see *infra* notes 352-54 and accompanying text (introducing cultural suggestions for cross-cultural mediation).

352. See *supra* notes 37-177 and accompanying text (recalling cultural theory for cross-cultural mediation).

353. See *supra* Part II.A-B (suggesting cross-cultural mediators familiarize themselves with cultural theory).

354. See *supra* Parts II.A-B (referencing individualist and collectivist studies and statistics).

355. See *supra* notes 37-177 and accompanying text (commenting on cultural understanding).

356. See *supra* notes 37-177 and accompanying text (referencing knowing when to withdraw from a mediation previously discussed).

357. See *supra* notes 37-177 and accompanying text (emphasizing the importance of mediator's acknowledging culture).

parties would create barriers to resolution that most likely will not be overcome.³⁵⁸ Increased incorporation of cultural issues into standards for cross-cultural mediators could be very beneficial for cross-cultural mediations and possibly lead to more resolutions.³⁵⁹

CONCLUSION

Culture and nationality are important factors in cross-cultural mediations and should be neither neglected nor ignored.³⁶⁰ If cross-cultural mediators had tools to better navigate these cultural differences between themselves and the mediating parties, this would open up the possibility of more successful cross-cultural mediations and the creation of resolutions that would affect many countries and groups of people in a positive way.³⁶¹ Acknowledging these factors and drawing upon the experiences and failures of cross-cultural mediators would bring great improvements to the practice of cross-cultural mediation.³⁶²

358. *See supra* notes 37-177 and accompanying text (incorporating neutrality into the discussion of culture).

359. *See supra* notes 346-53 and accompanying text.

360. *See supra* notes 37-177 and accompanying text.

361. *See* Part III.C (emphasizing the importance of addressing culture).

362. *See* Part III.C (concluding that better acknowledgement of cultural and ethical expectations of mediators would benefit the profession).