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International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans

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International Mediation —A Better
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Commercial Disputes: Guidelines for a
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Mexicans

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I. INCREASING INTERNATIONAL INTERDEPENDENCE

As the level of international business activity increases,¹ nations and their people are no longer independent but interdependent.² Formerly domestic problems are evolving into international ones,³ and previously domestic corporations are branching out and evolving into multinational businesses.⁴

A recent evaluation revealed that thirty-six of the world's top fifty industrial corporations are headquartered outside the United States.⁵ Moreover, out of fifty of the largest commercial banks, Japan has the most with twenty, the United States has four, Germany has eight, and France has six.⁶ As a result, nations must communicate with one another. Their livelihoods depend on it.⁷

A. *New Challenges in the Global Marketplace*

The development of international competition and communication has made the world a global marketplace.⁸ Advancements in technology, transportation, and communication have made international business the "most significant, ever-growing, and predominate aspect of the modern world."⁹ As independent states are becoming more interdependent, however, the number of international disputes is growing.¹⁰ In this modern era of global competitiveness, international businesses must address new challenges, as well as rapid and complex changes.¹¹ Thus, multicultural com-

1. See President Jimmy Carter, Jackson H. Ralston Lecture: Principles of Negotiation (1987), in 23 STAN. J. INT'L L. 1, 2 (1987).

2. See Wilbur Schramm, *With Respect to Intercultural Communication: A Note on the Building of Bridges*, in COMMUNICATING ACROSS CULTURES FOR WHAT?: A SYMPOSIUM ON HUMANE RESPONSIBILITY IN INTERCULTURAL COMMUNICATION 7, 10 (John C. Condon & Mitsuko Saito eds., 1976).

3. See TERENCE BRAKE ET AL., *DOING BUSINESS INTERNATIONALLY: THE GUIDE TO CROSS-CULTURAL SUCCESS* 2 (1995).

4. See GLEN FISHER, *AMERICAN COMMUNICATION IN A GLOBAL SOCIETY* 5-6 (1979).

5. See BRAKE ET AL., *supra* note 3, at 4.

6. See *id.*

7. See Schramm, *supra* note 2, at 10.

8. See Abbass Alkhafaji, *What a Small World After All*, in 1 INTERNATIONAL RESEARCH IN THE BUSINESS DISCIPLINES—THE DILEMMA OF GLOBALIZATION: EMERGING STRATEGIC CONCERNS IN INTERNATIONAL BUSINESS 5, 6 (Carl L. Swanson ed., 1993).

9. *Id.* at 7.

10. See Carter, *supra* note 1, at 2.

11. See generally BRAKE ET AL., *supra* note 3, at 2-25 (discussing these issues and

munications, negotiations, and other dispute resolution processes are becoming a more important part of day-to-day business relationships.¹²

B. Development of Regional Economic Integration Associations

Due to increasing interdependence, many nations have created economic integration associations, perhaps the most notable of which is the European Economic Community (EEC).¹³ Largely in response to the development of the EEC, the United States of America¹⁴ and Canada subsequently formed their own free trade association,¹⁵ known as the Canada-United States Free Trade Agreement.¹⁶ Other nations have followed these examples, created their own economic associations¹⁷ or petitioned the EEC for admittance.

One of the most recent, and largest, economic associations to arise out of the desire to be more globally interdependent is the North American Free Trade Agreement (NAFTA).¹⁸ NAFTA is

their effect on the global marketplace).

12. See Bernard A. Ramundo, *Power and Law in International Negotiation: The Negotiator's Perspective*, 17 WILLAMETTE L. REV. 83, 84 (1980).

13. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, done Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY].

14. For the sake of brevity, this Article uses the shortened but popular title of the United States for the proper and formal title of the United States of America.

15. See Sharon D. Fitch, Comment, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?*, 22 CAL. W. INT'L L.J. 353, 354 (1991).

16. Canada-United States Free-Trade Agreement, done Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 [hereinafter CUSFTA]; see also United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851.

17. See generally James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531 (1993) (discussing some marginally successful or currently defunct economic associations, such as the Latin American Integration Association (ALADI), which replaced the Latin American Free Trade Association, the Southern Common Market (MERCOSUR), the Andean Pact (otherwise known as the Andean Common Market (ANCOM)), the Caribbean Economic Community (CARICOM), the Central American Common Market (CACM), and the Mexico-Chile Free Trade Agreement, as well as some future agreements, such as the Mexico-Central American Free Trade Agreement and the "Group of Three" (G-3), a free trade pact among Venezuela, Colombia and Mexico, none of which have generated the interest and the achievements of the EEC).

18. North American Free Trade Agreement, done Dec. 8-Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA]; see also North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

a free trade association consisting of the United States of Mexico,¹⁹ the United States of America, and Canada, and is considered the first major step towards the achievement of hemispheric free trade.²⁰

Although a free trade agreement is neither as complex nor as encompassing as an economic union, NAFTA brings these three countries closer than ever before in their trade, labor, and environmental relationships.²¹ As a result, business opportunities and subsequent disputes have increased among these three countries, especially between the border nations of Mexico and the United States.

II. ARBITRATION AS AN ALTERNATIVE METHOD OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

Historically, nations have moved away from settling business disputes by force in favor of adjudicative and non-adjudicative forms of dispute resolution,²² including litigation, arbitration, mediation,²³ and negotiation. Many nations are disenchanted with litigation, however, because of the significant problems surrounding the recognition and enforcement of litigated judgments. In addition, many nations generally mistrust the supposed neutrality of foreign legal systems.²⁴ As a result, most nations currently favor

19. For the sake of brevity, this Article uses the informal but popular title of Mexico for the proper and formal title of the United States of Mexico.

20. See Holbein & Carpentier, *supra* note 17, at 532-33.

21. See generally GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 6-10 (1992) (discussing the differences between the EEC and NAFTA, as well as economic unions and free trade agreements in general).

22. See THOMAS PRINCEN, INTERMEDIARIES IN INTERNATIONAL CONFLICT 3 (1992).

23. This Article uses the terms mediation, conciliation, and good offices interchangeably. Technically, a mediator is an active participant in the process and informally makes suggestions to the parties, based on the information that the parties supply. A conciliator has more rights to make formal proposals for resolutions, based upon independent investigation of the dispute. A good officer is not an active participant in the dispute and simply encourages the parties to resume negotiations or provides them with an additional channel of communications. Moreover, conciliation and good offices are primarily used in the resolution of public international disputes, whereas mediation is most often used for the resolution of private international disputes. In practice, however, these distinctions tend to blur, making it very difficult to draw the line among the three different procedures.

24. See Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J.

alternative dispute resolution processes, such as arbitration and mediation, for resolving international disputes.²⁵

A. *Arbitration as the Leading Method of International Commercial Dispute Resolution*

Arbitration became the preferred method for resolving international commercial disputes following the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²⁶ The New York Convention gives binding recognition and effect to arbitral awards and provides for their enforcement in over ninety member countries.²⁷ In addition to the New York Convention, the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention)²⁸ between Mexico and the United States provides a clear legal basis for enforcement of arbitral awards in either country.²⁹

To enforce a litigated judgment, a party must look to each country where the debtor party has property and ascertain whether that country has either a bilateral treaty with the United States or a history of enforcing U.S. judgments. This process leads to unreliable enforcement of judgments in the transnational context, however, because some countries will not enforce U.S. judgments despite a history of enforcement.³⁰ Accordingly, most modern international commercial contracts provide for arbitration instead of litigation, primarily because arbitral awards are consistently enforced under the New York and Panama Conventions.

B. *Obstacles to the Use of International Commercial Arbitration*

Despite the predictability of enforcing international arbitral

717, 724 (1991).

25. See generally Abraham Ribicoff, *Alternatives to Litigation: Their Application to International Business Disputes*, ARB. J., Dec. 1983, at 3.

26. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter the New York Convention].

27. See *Signatories to the 1958 New York Convention (as of January 1, 1993)*, 10 J. INT'L ARB. 105 (1993) (listing over 90 signatories to the New York Convention).

28. Inter-American Convention on International Commercial Arbitration, done Jan. 30, 1975, U.S.-Mex., 14 I.L.M. 336 [hereinafter Panama Convention].

29. See Camp, *supra* note 24, at 723.

30. See *id.* at 724-25.

awards, some aspects of arbitration continue to cause difficulty. Arbitration is a quasi-adjudicative procedure,³¹ whereby the disputing parties present both law and facts to a third-party decision-maker, or arbitrator, who makes an award based on those presentations.³²

International disputes present special problems for adjudicative-type processes because the disputes often involve more than one national legal system.³³ Accordingly, without cooperation between the parties concerning a mutually acceptable forum and choice of law, there is often no predictable place where parties may obtain compulsory jurisdiction, and there is no certainty about the law applicable to the dispute.

In addition to the problems regarding choice of forum and law, many international businesses often perceive adjudicative-type processes as too lengthy, costly, and combative.³⁴ Furthermore, adjudicative-type processes present practical problems involving the voluntary settlement authority of the parties, as well as the preservation of other rights and remedies.³⁵

Other potential disadvantages of adjudicative-type processes include: lack of control over the outcome, the general adversarial nature of the process, and the inflexible and judgmental character of the result. These processes lay blame upon one of the parties instead of creating a face-saving way out of the dispute.³⁶ These problems are particularly prevalent when attempting to preserve amicable, long-term relationships.

People are simultaneously frustrated and disenchanted with adjudicative-type processes such as litigation and arbitration.³⁷ The international community, and specifically international commercial entities, are seeking dispute resolution mechanisms that

31. See Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *FORDHAM INT'L L.J.* 578, 580-81 (1990-1991).

32. See Tobi P. Dress, *International Commercial Mediation and Conciliation*, 10 *LOY. L.A. INT'L & COMP. L.J.* 569, 573 (1988).

33. See generally Camp, *supra* note 24, at 720-22 (discussing the differences between the U.S. and Mexican legal systems and how these differences create substantial uncertainty regarding the definitive and fair resolution of disputes).

34. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 445 (1985).

35. See *id.*

36. See Richard B. Bilder, *International Third Party Dispute Settlement*, 17 *DENV. J. INT'L L. & POL'Y* 471, 490 (1989).

37. See GOLDBERG ET AL., *supra* note 34, at 445.

minimize procedural and ancillary issues, open dialogue between disputing parties, facilitate the development of mutually acceptable resolutions, and maintain cordial business relations.³⁸

III. INTERNATIONAL COMMERCIAL MEDIATION - A BETTER ALTERNATIVE METHOD OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION

One dispute resolution method that achieves many of the goals stated above is mediation, or third-party intervention.³⁹ Linda C. Reif, Assistant Professor at the University of Alberta in Edmonton, Canada, believes that "the international community should make greater use of conciliation [mediation] as a pathway to the settlement of economic and business disputes, rather than automatically taking the more complex arbitration route to dispute settlement."⁴⁰

Mediation is perhaps the dispute resolution method most readily transferable to the international setting because parties may use it to resolve disputes that involve not only questions of law and fact, but also "non-arbitrable" or "non-justiciable" issues that an adjudicative-type process cannot settle.⁴¹ Such issues include intangible feelings, personal interests, and emotional concerns. Whereas a court or arbitral panel is neither equipped to handle nor interested in these issues, a mediator may explore these issues to perhaps bring about a quicker and more creative resolution.⁴² Sometimes the difference between disputes and settlements may be attributed to the parties' principles and interests, rather than their bargaining positions. An apology, a recognition of hurt feelings, or a promise to avoid certain problems in the future may often lead to a resolution. Adjudicative-type processes do not ex-

38. *See id.*

39. Mediation and conciliation are similar yet distinct. Both processes involve a third party whose role is to facilitate communication between the parties. Mediation is generally considered more informal, leaving all decisions and proposals to the parties' discretion. The mediator does not independently investigate the dispute. Conciliation is typically more formal in structure and procedure. The conciliator submits a written proposal to the parties for the resolution of the dispute. As mentioned earlier, this Article uses both terms interchangeably because the goal of this Article is to look at the advantages of third-party intervention in international commercial conflicts.

40. Reif, *supra* note 31, at 579.

41. *See id.* at 583.

42. *See id.*

plore parties' principles and interests because the processes are based strictly on presentations of law and fact.⁴³ Mediation, however, explores a wider and more practical range of issues, and thus is a better alternative method of dispute resolution.

A. *Advantages of International Commercial Mediation*

One advantage of mediation in the international commercial context is that the parties have an opportunity to develop a creative outcome.⁴⁴ In addition, mediation is an informal proceeding, and thus, may be quicker and less expensive if the parties settle.⁴⁵ Furthermore, the parties may schedule mediation on a regular basis.⁴⁶ Moreover, the parties may discuss their positions, and thus, generally feel that their concerns and positions are heard and dealt with fairly, regardless of the outcome.⁴⁷

Another advantage of mediation is that it may resolve virtually any type of conflict. Conflicts are often based on individuals' perceptions that their counterparts are not upholding their duties and responsibilities.⁴⁸ By imposing a neutral third party, mediation may often dispel and change these perceptions and lead to a quick resolution of the dispute.⁴⁹ Once the parties believe that their positions have been accurately heard and discussed, tensions often diminish and a new receptivity develops, thus opening the parties' minds to a creative and consensual solution.

Mediation is also a more cathartic process than adjudicative-type processes. One of the greatest advantages of mediation is that the parties discuss the issues confidentially.⁵⁰ Furthermore, the parties have complete control of the mediation.⁵¹ Moreover, mediation creates a "win-win"⁵² atmosphere and allows for the use

43. See Dress, *supra* note 32, at 572-73.

44. See GOLDBERG ET AL., *supra* note 34, at 246-47.

45. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 377 (1987).

46. See *id.* at 378.

47. See *id.*

48. See Dress, *supra* note 32, at 578.

49. See *id.*

50. See GOLDBERG ET AL., *supra* note 34, at 8.

51. See Dress, *supra* note 32, at 577.

52. A "win-win" solution occurs when both parties are relatively satisfied with the outcome and view it as fair and reasonable.

of creative solutions generated during the mediation.⁵³

With all these advantages, mediation often results in settlement,⁵⁴ thereby reducing the large volume of arbitration and litigation. Mediation may also change an adversarial relationship into a cooperative one, potentially improving the relationship between the parties.⁵⁵ Even if mediation does not lead to a resolution, the parties are no worse off because they may still take advantage of arbitration or litigation. Moreover, they have had the opportunity to narrow the disputed issues and structure the framework for future negotiations. Consequently, parties who wish to maintain a harmonious business relationship and to preserve their contractual and commercial ties often prefer mediation.⁵⁶

B. The Beneficial Role of the Mediator in International Commercial Conflicts

In mediation, the disputing parties invite a neutral third party⁵⁷ to provide an impartial viewpoint and to assist in reaching a consensual solution.⁵⁸ Usually, the mediator has specialized subject expertise that may be helpful in obtaining a more expedient and balanced resolution. The primary goals of the independent mediator are to facilitate communications between the parties, narrow the issues in dispute, help the parties develop a framework for discussion, and provide the parties with a sense of closure if no consensual resolution is reached. The mediator may neither bind the parties nor act as a decision-maker because the mediator is a facilitator not an adjudicator.⁵⁹

Mediation is a better method of resolving international commercial conflicts because the mediator's role is part of a negotiated and evolutionary process that depends on the needs and desires of

53. See Reif, *supra* note 31, at 635.

54. See Robert Coulson, *Arbitration and Other Forms of Alternative Dispute Resolution—General Overview*, 5 AM. REV. INT'L ARB. 6, 7 (1994) (stating that the American Arbitration Association's experience with business mediations indicates that over 80% of cases settle).

55. See RISKIN & WESTBROOK, *supra* note 45, at 379.

56. See Reif, *supra* note 31, at 635.

57. There is usually one mediator in a mediation; however, the parties may decide to have more than one mediator.

58. See Dress, *supra* note 32, at 573.

59. See *id.* at 573-74.

the parties. As an educator, a translator, an agent of reality, an inventor, and even a scapegoat, the mediator has the ability to affect the parties' interaction.⁶⁰ The mediator improves the parties' communication throughout the negotiation process.⁶¹ He encourages the parties to fully participate in the mediation process and helps them focus on an agenda. The mediator further assists the parties in "reality-checking"⁶² their positions, thereby acting as a conduit for a mutually agreed upon resolution.⁶³ The mediator also works to establish a relationship of trust and confidence between the parties and helps to develop a procedure that encourages emotional expression without destructive venting.⁶⁴

An essential element of success in a mediation is that it does not impose a decision. The relaxed informal atmosphere encourages parties to be receptive and flexible in their negotiations.⁶⁵ As a result, the mediator works with cooperative, not competitive, attitudes, perhaps leading to a resolution of the dispute.⁶⁶

Although the mediator is not a decision-maker, he is essential in reducing the differences between the parties. The mediator's perception of the parties' positions and desires often influences the mediation's outcome and effect on the parties.⁶⁷ The mediator may change unrealistic assumptions and provide a new atmosphere of reasonableness. While assisting parties to develop their own creative solutions, the mediator may also persuade them to accept a particular outcome. Thus, the mediator crucially affects whether the parties resolve their dispute in the mediation.⁶⁸

60. See RISKIN & WESTBROOK, *supra* note 45, at 210-12.

61. See PRINCEN, *supra* note 22, at 221.

62. Reality-checking is a method whereby the mediator serves as an agent of reality by questioning the parties and ascertaining each party's weaknesses. The mediator then gently and tactfully attempts to help the parties realize the differences between their unrealistic assumptions and the realities of their particular situations.

63. See Dress, *supra* note 32, at 573.

64. See RISKIN & WESTBROOK, *supra* note 45, at 215.

65. See Dress, *supra* note 32, at 574.

66. See PRINCEN, *supra* note 22, at 221.

67. See *id.* at 225.

68. Mediation has been successful in the area of international public law. Mediators have assisted in conflict resolution, sanction prevention, and armed retaliation avoidance. See Dress, *supra* note 32, at 579. The confidential nature of the mediation allows governments to privately test their positions, thereby reducing the risk of public humiliation. See *id.* Because the mediator may advance informal and non-binding proposals, governments may reach a mutually acceptable settlement more quickly. See Bilder, *supra* note 36, at 481.

C. Integrative Bargaining and the Mediation Process

Negotiations entail both cooperation and competition between the parties. Because each negotiator attempts to protect his interests, trust between the parties is rare. Introducing a neutral third party in the mediation establishes a basis for trust and reduces the parties' needs to vehemently protect their positions.⁶⁹

One way for the mediator to balance the competing interests of cooperation and competition is through integrative bargaining. Integrative bargaining is a more cooperative form of negotiation because it places greater emphasis on the parties' interests thereby creating a "win-win" situation.⁷⁰ Distributive bargaining, in contrast, is a more competitive form of negotiation because it focuses on distributing a preexisting sum of resources, thereby creating a "win-lose" situation.⁷¹ Dispute resolution appears easier through integrative bargaining because it provides more means of reaching a resolution.⁷² The introduction of a mediation may shift the bargaining from distributive to integrative and make resolution more feasible.⁷³

Even though integrative bargaining often leads to resolution, agreements are not guaranteed. When the parties cannot reach a resolution, the mediator performs several functions to break the stalemate. The mediator may gather and provide information, increase communication between the parties, monitor the negotiations, and offer new and creative ideas for settlement options.⁷⁴ Furthermore, the mediator may offer invaluable assistance by tailoring his role to the specific needs of the parties.

Flexibility in mediation often leads to creative solutions,⁷⁵ making mediation a better alternative for resolving international conflicts. Although mediation should not replace direct party ne-

69. See PRINCEN, *supra* note 22, at 9.

70. See RICHARD E. WALTON ET AL., STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS 45 (1994); see generally RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965) (discussing both integrative and distributive bargaining).

71. See WALTON ET AL., *supra* note 70, at 44.

72. See PRINCEN, *supra* note 22, at 36.

73. See *id.* at 37.

74. See Bilder, *supra* note 36, at 484-85.

75. See Daniel Druckman & Christopher Mitchell, *Flexibility in Negotiation and Mediation*, 542 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 19 (1995).

gotiation, mediation may encourage communication between the parties and often lead to a more mutually satisfactory resolution.

D. The Structure of an International Commercial Mediation

Although few absolute rules govern the structure of an international mediation, several general events should occur in all mediations. Typically, a mediation begins with the introduction of the mediator and the parties. The mediator then explains the goals of the mediation and describes the structure of the mediation, which may be tailored to fit the parties' specific needs or left to the mediator's discretion.

In the introduction, the mediator discusses the confidentiality principle.⁷⁶ The parties either verbally agree to this principle or sign an actual confidentiality agreement.⁷⁷ Confidentiality facilitates open and candid discussions between the parties, as it reassures the parties that the information revealed in the mediation will not be used against them in later proceedings. The success of mediation is greatly dependent upon such open discussions.

After the introduction, the mediator asks each party to make an opening statement. These opening statements usually include general facts, legal theories, opinions on liability and damages, and the emotional and mental states of the parties.⁷⁸ At the conclusion of the parties' opening statements, the mediator usually summarizes the essential information provided by the parties, elicits the points in contention, and assists in developing an agenda for the mediation. This summary not only assures the parties that they have been accurately heard and understood, but also facilitates the negotiation process by setting up a mutually agreed upon schedule for discussion.⁷⁹

Once the parties agree upon an agenda, the mediator begins the negotiation process with an open session. During this session, the mediator's primary role is to keep the parties' discussion in line with the agenda. If the negotiations appear unproductive or if

76. Under the principle of confidentiality, all mediation sessions are confidential. Parties may neither publicly disclose nor testify to the content of these sessions. See Dress, *supra* note 32, at 575. This principle also applies to any offers, admissions, or proposals made throughout the mediation. See *id.*

77. See *id.*

78. See *id.*

79. See *id.*

emotions begin to escalate, the mediator adjourns the session and holds private individual meetings with the parties.

These individual meetings are referred to as "caucuses."⁸⁰ The parties are often more honest and candid with the mediator in caucuses because the mediator may not reveal the information provided to the other party without prior consent.⁸¹ Critical information, which is often revealed during these caucuses, may lead to the development of a resolution⁸² or in the very least, provide the mediator with a clearer and more complete perspective of the dispute.⁸³ Armed with this strategic information, but without directly disclosing it, the mediator may identify realistic expectations and feasible alternatives.⁸⁴ This part of the mediation is often referred to as "shuttle diplomacy" because the mediator travels between the parties, attempting to bring them closer to resolving the dispute.⁸⁵

A caucus often produces a resolution to the mediation. If the parties reach a resolution, the mediator brings the parties together to memorialize the agreement.⁸⁶ If the parties do not reach a resolution, the mediator either schedules further mediation if the parties desire or brings the parties together for closure.⁸⁷

Closure is the ultimate goal of the mediation process.⁸⁸ To provide closure, the mediator reminds the parties of their agenda. This reminder enables the mediator to clarify and focus the dispute and eliminate the need for unnecessary fact-finding or unhelpful discussions.⁸⁹ It also allows the parties to feel a sense of closure and provides them with a framework for further negotiations.

At best, mediation may result in a consensual resolution between the parties. This type of resolution is desirable because it is usually viewed as a "win-win" solution. At worst, the parties may

80. See generally *id.* at 576-78 (discussing confidential caucuses).

81. See *id.* at 576.

82. See *id.* at 576-78.

83. See *id.* at 576.

84. See *id.* at 577.

85. See *id.*

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

not reach an agreement. They are no worse off, however, because the mediation process may prove invaluable in narrowing the issues in the dispute and providing guidelines for future negotiations.

E. Institutional Rules Governing International Commercial Mediation

Parties may design their own rules to govern the mediation (also called “ad hoc” rules) or choose from several institutional rules. For example, many international and domestic programs offer direct or indirect conciliation or mediation. For international conventions and organizations, three primary institutions provide conciliation and mediation rules: The United Nations Commission on International Trade Law (UNCITRAL), the International Centre for the Settlement of International Disputes (ICSID), and the International Chamber of Commerce (ICC).

The goal of UNCITRAL is to harmonize and unify the law of international trade.⁹⁰ The UNCITRAL Conciliation Rules (UNCITRAL Rules)⁹¹ apply only if the parties specifically adopt them. The rules are designed for ad hoc proceedings, where no organization specifically administers the case and where the parties, along with the mediator, determine the procedures to be followed. The UNCITRAL Rules are very detailed and complex; however, the parties may modify or exclude any rule by agreement. The rules have extremely broad coverage. They are not limited to business disputes or international relationships.

The ICSID also provides conciliation and mediation rules. The ICSID is an organ of the World Bank and is composed of members of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). The ICSID Rules of Procedure for Conciliation Proceedings (ICSID Rules)⁹² were developed in 1984 to help resolve

90. See Carl August Fleischhauer, *UNCITRAL and International Commercial Dispute Settlement*, *ARB. J.*, Dec. 1983, at 9, 9-13; see also Reif, *supra* note 31, at 615.

91. UNCITRAL Conciliation Rules, in *Report of the United Nations Commission on International Trade Law on the Work of Its Thirteenth Session*, U.N. GAOR, 35th Sess., Supp. No. 17, U.N. Doc. A/35/17 (1980), reprinted in *INTERNATIONAL COMMERCIAL ARBITRATION*, DOC. I.10 (Kenneth R. Simmonds ed., 1991) [hereinafter UNCITRAL Rules].

92. ICSID Rules of Procedure for Conciliation Proceedings, in *ICSID BASIC DOCUMENTS* (1984), reprinted in *INTERNATIONAL COMMERCIAL ARBITRATION*, DOC.

investment disputes. For example, Chapter 11 of NAFTA, which governs private investment disputes, refers opposing parties to the ICSID Rules if they are members of the ICSID Convention or to the UNCITRAL Rules upon the parties' election.⁹³ The ICSID Rules treat mediation as an option for dispute resolution. Thus, the parties may use mediation as either a prerequisite or an alternative to arbitration.⁹⁴

One of the most popular choices for international commercial disputes are the ICC Rules of Conciliation and Arbitration (ICC Rules),⁹⁵ which were enacted in 1988 and amended in 1989. Unlike the UNCITRAL Rules, the ICC Rules are somewhat inflexible because they prohibit the parties from altering or deleting any rule once the process is implemented.⁹⁶ In addition, the ICC Rules are less detailed than the UNCITRAL Rules; however, they do not restrict the mediator beyond the minimum necessary to ensure a fair process.⁹⁷ The ICC is widely recognized as a reputable institution to support the mediation process, whereas UNCITRAL has no governing or administrative body to assist in the mediation process.⁹⁸

Mexico and the United States have two additional provisions for international commercial mediations. Mexico has the Conciliation and Arbitration Rules of Commission to Protect Mexico's Foreign Trade (COMPROMEX),⁹⁹ which were enacted in 1986. COMPROMEX created a permanent institution to assist in the resolution of international commercial disputes. Mediators under COMPROMEX function like arbitrators: they are neutral evaluators who express opinions and make recommendations to resolve the dispute.¹⁰⁰

I.15 (Kenneth R. Simmonds ed., 1991) [hereinafter ICSID Rules].

93. See NAFTA, *supra* note 18, ch. 11, sec. B, art. 1120.

94. See Reif, *supra* note 31, at 605.

95. International Chamber of Commerce, Rules of Conciliation and Arbitration, in ICC PUB. NO. 447 (2d ed. 1990), reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, DOC. III.1 (Kenneth R. Simmonds ed., 1992) [hereinafter ICC Rules].

96. See Reif, *supra* note 31, at 612.

97. See *id.* at 619.

98. See *id.*

99. Conciliation and Arbitration Rules of Commission to Protect Mexico's Foreign Trade (COMPROMEX) (1986), reprinted in INTERNATIONAL COMMERCIAL ARBITRATION, DOC. IV.MEXICO.1.a (Kenneth R. Simmonds ed., 1993) [hereinafter COMPROMEX Rules].

100. See Walter A. Wright, *Mediation of Private U.S.-Mexico Commercial Disputes:*

The United States has the American Arbitration Association Commercial Mediation Rules (AAA Rules),¹⁰¹ which the American Arbitration Association (AAA) promulgated in 1987. AAA is one of the oldest and most respected alternative dispute organizations. With its headquarters in New York City and offices in most major U.S. cities, AAA offers a great convenient program if the mediation occurs in the United States. Moreover, AAA offers parties an opportunity to mediate every pending domestic and international arbitration case without the administrative cost.¹⁰² The AAA Rules are comprehensive, covering all essential elements of a mediation. Much like the ICSID Rules, the AAA Rules enable a reputable institution to assist in the mediation process.

Although parties may use the rules of the various institutions without actually paying for use of the administrative program, they may not avail themselves of the organization's assistance, such as an appointment from the panel of mediators or use of its physical facilities for the mediation, without paying the administrative fees.

Parties should become familiar with the rules governing international commercial mediation. The variety of available rules will probably satisfy any commercial dispute in the international context; however, the parties should also remember that they have the option to design their own ad hoc process.

Regardless of their choice of rules, the parties should always specifically indicate their preference for dispute resolution in their contracts *before* any dispute arises, in order to simplify and streamline the mediation. Otherwise, it may be more difficult for the parties to reach an agreement after a dispute has arisen.

IV. THE INTERCULTURAL EXCHANGE IN INTERNATIONAL COMMERCIAL MEDIATION

When an international commercial mediation convenes, at least two cultures are involved. This cultural interaction may result in cross-cultural conflicts due to serious misunderstandings. Confusion and hostility increase whenever there is an intercultural exchange. Thus, one must understand the unique dynamics in an

Will It Work?, 26 N.M. L. REV. (forthcoming 1996) (manuscript at 5, on file with author).

101. AAA Commercial Mediation Rules (1987), *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION, DOC. IV.US.1.h (Kenneth R. Simmonds ed., 1992) [hereinafter AAA Rules].

102. *See id.*

international commercial mediation and be aware of ways to proactively and reactively resolve such conflicts.

A. *Cross-Cultural Conflicts in International Commercial Mediation*

Cross-cultural misunderstandings make international commercial mediation more troublesome. Accurate communication depends upon a reasonably similar basis of understanding between the communicators.¹⁰³ This basis is complicated in the transnational context because each nation has its own unique beliefs, culture, language, gestures, and negotiation styles.

Because perceptions are culturally developed through life experiences and exposure, a successful mediation depends upon thorough preparation and an understanding of the cultural differences between the parties prior to mediation.¹⁰⁴ The parties may want to choose a mediator with international experience and cultural sensitivity. By selecting an experienced international mediator who both respects and understands cultural differences, the parties may minimize their concerns and frustrations of not being understood or being misunderstood throughout the mediation process.

B. *The Cross-Cultural Communication Process*

Cross-cultural communication exists when an individual from one culture sends a message that an individual from another culture must process.¹⁰⁵ Cross-cultural miscommunication occurs when an individual from one culture misinterprets the message that an individual from another culture intended.¹⁰⁶

The greater the differences between cultures, the greater the likelihood that cross-cultural miscommunications will occur.¹⁰⁷ Such miscommunications may occur through both verbal and non-

103. See GLEN FISHER, INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE 14 (1980).

104. See Dress, *supra* note 32, at 570-71.

105. See Richard E. Porter & Larry A. Samovar, *Basic Principles of Intercultural Communication*, in INTERCULTURAL COMMUNICATION: A READER 5, 6 (Larry A. Samovar & Richard E. Porter eds., 6th ed. 1992); see also NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 52 (1986).

106. See ADLER, *supra* note 105, at 52.

107. See *id.* at 52-53.

verbal messages and may be attributed to the cultural differences between the negotiators.¹⁰⁸

Intercultural miscommunications are among the leading reasons for the failure of international negotiations.¹⁰⁹ As a result, learning more about the differences that arise in the cross-cultural communication process may improve the quality of the intercultural exchange. When the parties begin with a common understanding of cultural differences and their effect on the communication process, they are more likely to share information and come to an amicable resolution. Conversely, a lack of familiarity with another country's culture, customs, and etiquette may weaken a mediation, prevent it from accomplishing its objectives, and ultimately lead to its failure.

Furthermore, it is important to educate others by explaining thought processes, values, and implicit assumptions, in order to assist parties with understanding each other's perspective.¹¹⁰ Thus, a skilled international negotiator becomes a double-agent in the mediation not only by communicating neutral objectives, but also by heightening the parties' awareness of cultural differences.¹¹¹

V. TRAPS FOR THE UNWARY—GUIDELINES FOR A U.S. NEGOTIATOR INVOLVED IN AN INTERNATIONAL COMMERCIAL MEDIATION WITH MEXICANS¹¹²

Although neighbors, Mexico and the United States have very diverse cultures. Thus, a negotiator must utilize a wide range of techniques and presentation skills in commercial mediation between the two countries. Although it is impossible to cover every

108. See Beth Haslett, *Communication and Language Acquisition Within a Cultural Context*, in 13 LANGUAGE, COMMUNICATION, AND CULTURE: CURRENT DIRECTIONS 19, 26 (Stella Ting-Toomey & Felipe Korzenny eds., International & Intercultural Communication Annual Vol. 13, 1989).

109. See Porter & Samovar, *supra* note 105, at 6-9.

110. See FISHER, *supra* note 4, at 119.

111. See Robert T. Oliver, *Basic Issues in Intercultural Communication*, in ETHICAL PERSPECTIVES AND CRITICAL ISSUES IN INTERCULTURAL COMMUNICATION 81, 83 (Nobleza C. Asuncion-Landé ed., 1978).

112. At this portion of the Article, I recognize that any attempt to deal with different cultures brings a certain amount of stereotyping. Although stereotyping conflicts with my recommendations, it is necessary in this particular instance to illustrate the effects of various factors on the cross-cultural communication process through the use of specific examples. The examples used in this Article, however, are over-generalizations, and therefore, it should not be assumed that they apply to individuals in these societies.

aspect of an intercultural exchange, the suggestions provided below may assist a U.S. negotiator in understanding verbal and non-verbal miscommunications that may occur in an international commercial mediation with Mexicans.

A. *The Role of International Commercial Mediation in the North American Free Trade Agreement*

On December 17, 1992, the United States, Mexico, and Canada signed the final text of the North American Free Trade Agreement (NAFTA).¹¹³ On January 1, 1994, NAFTA came into effect,¹¹⁴ significantly impacting market access, investment, intellectual property, trade, and dispute resolution.

NAFTA provides the United States with an opportunity to achieve both its economic objectives, such as expanding its trade and investment base with Mexico and enhancing North American international competitiveness, and its foreign policy objectives, such as achieving a historic reconciliation with Mexico by overcoming lasting tensions from past U.S. incursions.¹¹⁵ Because it creates an open market of over 360 million consumers and over \$6 trillion in annual output,¹¹⁶ NAFTA significantly impacts both the current and future directions of the economies of the United States and Mexico, as well as interaction between these countries.

Increased interaction between the United States and Mexico has led to a parallel rise in disputes between the nations and the need for effective dispute resolution processes. Because Mexico is one of the three most important U.S. trading partners,¹¹⁷ NAFTA significantly impacts both trade and dispute resolution with Mexico.

Mexico's legal culture favors the dispute resolution methods of negotiation and mediation instead of traditional judicial litigation.¹¹⁸ Unlike the U.S. preference for vigorous and litigious en-

113. See Holbein & Carpentier, *supra* note 17, at 533.

114. See *id.*

115. See Judith H. Bello & Alan F. Holmer, *The NAFTA: Its Overarching Implications*, 27 INT'L LAW. 589, 590 (1993).

116. See White House Fact Sheet: The North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1424 (Aug. 12, 1992).

117. See Fitch, *supra* note 15, at 359.

118. See Jeffrey J. Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the "Publicistas,"* 47 U. MIAMI L. REV. 913, 918 (1993).

forcement of laws, Mexico prefers cooperation and personal interaction.¹¹⁹ This difference is one reason that NAFTA heavily encourages mediation and conciliation. Chapter 20 of NAFTA, which outlines the general dispute resolution settlement mechanisms; encourages the use of mediation, both among the member countries¹²⁰ and among private parties involved in international commercial disputes.¹²¹

In addition to chapter 20, NAFTA contains several other innovative chapters on dispute resolution mechanisms, as well as a variety of provisions for the resolution of specific types of disputes. Chapter 11, for example, resolves investment disputes either under the ICSID or UNCITRAL Rules.¹²² While NAFTA does not solely rely on mediation, NAFTA negotiators find mediation to be a useful first step in the process.

Aware of the importance of preserving long-standing relationships and reaching amicable resolutions, NAFTA negotiators developed some of the most sophisticated and advanced dispute resolution methods.¹²³ To encourage goodwill and maintain strong relations, NAFTA's dispute resolution mechanisms encourage consensus and collaboration over speed of resolution.¹²⁴ Because mediation is ideally suited to achieve many of these goals, parties often choose mediation over other alternative dispute resolution methods. As a result, the use of international mediation is on the rise, both in volume and importance.

B. Cultural Differences Between Mexico and the United States in Negotiation Styles

The current rise in the use of international commercial mediation has led to a parallel and growing interest in both the cultural and communicative differences between the United States

119. See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 *LAW & POL'Y INT'L BUS.* 391, 445-46 (1993).

120. See NAFTA, *supra* note 18, ch. 20, sec. B, art. 2007.

121. See *id.* ch. 20, sec. C, art. 2022 (encouraging the use of alternative dispute resolution processes for the settlement of international commercial disputes).

122. See *id.* ch. 11, sec. B, art. 1120.

123. For an overview of developments in dispute resolution, see Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 *INT'L LAW.* 603 (1993).

124. See *id.*

and Mexico and the effect of these differences on mediation.¹²⁵

A historical examination of a country's culture is an important prerequisite to understanding and coping with cultural differences.¹²⁶ Although the United States and Mexico are neighboring countries, Mexico has often treated U.S. action with distrust¹²⁷ due to previous U.S. wars, interventions, and occupations.¹²⁸ This imperialistic history has led Mexico to avoid much of the aid and assistance that the United States has offered.¹²⁹ For example, Mexico has traditionally rejected U.S. economic aid, denied clearance to U.S. Drug Enforcement Agency planes to fly over Mexico and search for drug runners' landing strips, and refused to sign a military assistance agreement with the United States.¹³⁰ Moreover, until NAFTA, there had been no significant trade treaty between the two nations since the late 1940s.¹³¹ In addition to the historical differences between Mexico and the United States, U.S. cultural insensitivity has traditionally separated the neighboring countries.¹³² As business has become more global, however, U.S. negotiators have begun to recognize, understand, and appreciate the importance of these cultural distinctions. According to former U.S. President Jimmy Carter, one of the most important techniques for an international negotiator is to put himself in the other party's shoes in order to better understand the other party's position and to develop a different perspective.¹³³ Although this may be an effective tool for the transnational negotiator, it is only one of many factors that may affect the resolution of a mediation. Unfortunately, many U.S. negotiators never attempt to view their opponent's position in this manner, and therefore, do not gain an advantage.

125. See JESWALD W. SALACUSE, *MAKING GLOBAL DEALS: NEGOTIATING IN THE INTERNATIONAL MARKETPLACE* 52 (1991).

126. See *id.* at 54.

127. See FISHER, *supra* note 4, at 25-26.

128. See RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: COMMUNICATION OBSTACLES IN INTERNATIONAL DIPLOMACY* 36 (1991).

129. See FISHER, *supra* note 4, at 26.

130. See COHEN, *supra* note 128, at 43.

131. See George W. Grayson, *Mexico: A Love-Hate Relationship with North America*, in *NATIONAL NEGOTIATING STYLES* 125, 140 (Hans Binnendijk ed., 1987).

132. See *generally Understand and Heed Cultural Differences*, *BUS. AM.*, Jan. 28, 1991, at 26.

133. See Carter, *supra* note 1, at 10.

Daily events involving the disputing countries may also impact a mediation. For example, at the 1982 UNESCO World Conference in Mexico City, a U.S. documentary discussed the possibility of an insurgency that might overthrow Mexico's government.¹³⁴ The U.S. ambassador to Mexico made a statement that was taken out of context, and thus, appeared to encourage that possibility.¹³⁵ Before the broadcast, there was a spirit of cooperation between the countries; however, the broadcast caused a deep rift between the nations.¹³⁶ Subsequent negotiations stalled while attempts were made to repair the damage caused by the documentary. This broadcast and its effects show that international negotiators must recognize that certain factors beyond their control may affect mediation.

Finally, additional factors that may contribute to a successful international commercial mediation may be discovered through educational awareness and actual experience. A negotiator develops perceptions through life experiences,¹³⁷ and these perceptions always affect his reaction to a given situation.¹³⁸

Intercultural miscommunications occur through both verbal and nonverbal messages. Such miscommunications may be attributed to the parties' cultural differences.¹³⁹ These differences impact the parties' ability to achieve a settlement and the actual terms of the settlement. Therefore, a good negotiator must recognize and be sensitive to the fact that all parties have limited perceptual capabilities, which have been developed through their education and experiences. The negotiator must be aware of various cultural perspectives during discussions, in order to avoid miscommunication during a mediation.

C. The Dangers of Myths and Stereotypes

A common mistake that all negotiators make is perpetuating

134. See Fred L. Casmir, *International Negotiations: A Power-and-Trust Relationship*, in COMMUNICATING FOR PEACE: DIPLOMACY AND NEGOTIATION 40, 41-42 (Felipe Korzeny & Stella Ting-Toomey eds., International & Intercultural Communication Annual Vol. 14, 1990).

135. See *id.* at 42.

136. See *id.*

137. See CHARLES LOCKHART, BARGAINING IN INTERNATIONAL CONFLICTS 41 (1979).

138. See *id.* at 37-38.

139. See *id.* at 38; Haslett, *supra* note 108, at 26.

national stereotypes. Stereotypes are rigid and static over-generalizations of other groups of people.¹⁴⁰ They reduce the level of uncertainty that an individual has towards the unknown and make the world a predictable place.¹⁴¹ Stereotypes help an individual "make sense" of the world, even if these generalizations are inaccurate.¹⁴²

Stereotypes may be helpful or harmful depending on their use.¹⁴³ On the one hand, stereotypes are effective when they are consciously held, descriptive rather than evaluative, accurate as to the societal norm, and based or modified upon actual observation and experience.¹⁴⁴ On the other hand, stereotypes may lead to serious misunderstandings and inhibit effective communication.

Even if a stereotype is appropriately held, it should never be rigidly adhered to as the picture of all individuals.¹⁴⁵ Moreover, a negotiator should never mention a stereotype during a mediation between two cultures, even if the negotiator believes that the stereotype accurately describes a culture.¹⁴⁶ Introducing stereotypes during a face-to-face mediation with an individual from another culture will be counterproductive, exacerbate bad feelings, and create tension between the negotiators.

Some negative stereotypes of Mexicans describe them as dark-skinned, lazy, religious, quick-tempered, emotional, and "backward."¹⁴⁷ Additionally, business myths about Mexico are prevalent. For example, many U.S. businesses believe Mexican investments are doomed to fail, Mexican government officials are corrupt, Mexicans are lazy and illiterate, Mexican business associates are dishonest, and red tape exists all over Mexico.¹⁴⁸

Although people naturally formulate certain ideas about a

140. See OTTO KLINEBERG, *THE HUMAN DIMENSION IN INTERNATIONAL RELATIONS* 33-34 (1965).

141. See Laray M. Barna, *Stumbling Blocks in Intercultural Communication*, in *INTERCULTURAL COMMUNICATION: A READER*, *supra* note 105, at 345, 349.

142. *See id.*

143. *See* ADLER, *supra* note 105, at 58.

144. *See id.*

145. *See id.* at 59.

146. *See* SALACUSE, *supra* note 125, at 55.

147. *See* OTTO KLINEBERG, *TENSIONS AFFECTING INTERNATIONAL UNDERSTANDING: A SURVEY OF RESEARCH* 105 (1950).

148. *See* JAY M. JESSUP & MAGGIE L. JESSUP, *DOING BUSINESS IN MEXICO* 9-14 (1993).

culture, the use of stereotypes in mediation endangers a breakdown in the cross-cultural communication process.¹⁴⁹ Furthermore, the mere existence of stereotypes may hinder a negotiator's objectivity because an individual selectively perceives information that corresponds to the stereotype.¹⁵⁰ Thus, experienced negotiators must realize the danger of stereotypes in order to maintain a professional and amicable relationship with their opponents.¹⁵¹

Instead of using stereotypes, U.S. negotiators should strive to better understand the Mexican culture and customs by familiarizing themselves with the people and the country. Even the slightest knowledge of cultural differences may improve both the international commercial mediation and the relations between the negotiators.¹⁵² Nevertheless, few U.S. negotiators learn about other cultures before mediation, placing them at a disadvantage due to their rigid and incorrect preconceptions.

To achieve greater success in mediation, U.S. negotiators should correct their misconceptions about Mexicans' level of education and intelligence. Many U.S. negotiators falsely believe that Mexicans have a "lower" level of education and intelligence. Although Mexico has a higher illiteracy rate than the United States, this fact does not indicate that Mexicans have less developed thought processes or that they are less valuable to their society.¹⁵³ Furthermore, Mexican negotiators are equally or better educated than their U.S. counterparts. Many Mexicans working in the international arena have studied in the United States, either at the graduate or post-graduate level.¹⁵⁴ Accordingly, most Mexican professionals possess at least a marginal understanding of the U.S. legal and cultural systems. In contrast, U.S. Americans¹⁵⁵ rarely venture outside the United States for their education.¹⁵⁶ While U.S. professionals generally have not had personal contact or experience with Mexican professionals, Mexican professionals are

149. See KLINEBERG, *supra* note 147, at 123.

150. See Barna, *supra* note 141, at 349.

151: See KLINEBERG, *supra* note 147, at 123; see also ADLER, *supra* note 105, at 58.

152. See SALACUSE, *supra* note 125, at 58.

153. See ANDREAS FUGLESANG, ABOUT UNDERSTANDING: IDEAS AND OBSERVATIONS ON CROSS-CULTURAL COMMUNICATION 223 (1982).

154. See FISHER, *supra* note 4, at 102.

155. This Article uses the term "U.S. Americans" to refer to nationals of the United States.

156. See FISHER, *supra* note 4, at 102.

likely to be accustomed to working with U.S. professionals. Thus, Mexicans have an additional advantage in mediations with U.S. negotiators.

Lack of familiarity with another country's culture, customs, and etiquette weakens an international mediation, prevents the negotiators from accomplishing their objectives, and ultimately leads to failure. Therefore, U.S. negotiators must demystify stereotypes, either through education or experience.

D. The Ethnocentric Pitfall

U.S. Americans are often apathetic to exploring cultural differences,¹⁵⁷ primarily because they are accustomed to the overwhelming exposure of their culture around the world. U.S. movies, music, newspapers, books, food, sports, and television shows are prevalent in almost every country.¹⁵⁸ The average Mexico City newspaper contains a greater percentage of news about the United States than the average New York Times reports about all the countries of the world combined.¹⁵⁹ As a result, other nations feel inundated with U.S. culture; however, U.S. Americans remain relatively ignorant about the cultural aspects of other nations.¹⁶⁰

Because examples of U.S. culture are so prevalent worldwide, U.S. Americans often develop an ethnocentric viewpoint.¹⁶¹ Ethnocentrism is an "exaggerated tendency to think the characteristics of one's own group or race superior to those of other groups or races."¹⁶² Unfortunately, U.S. culture has long perpetuated both racism and ethnocentrism and these attitudes still run deep in U.S. society.¹⁶³ Accordingly, any evidence of a superiority complex on the part of the U.S. negotiator may cause unnecessary

157. See *id.* at 25.

158. See *id.* at 71.

159. See John Condon, "... So Near the United States": Notes on Communication Between Mexicans and North Americans, in INTERCULTURAL COMMUNICATION: A READER, *supra* note 105, at 106, 107.

160. See FISHER, *supra* note 4, at 143.

161. See generally EDWARD T. HALL & MILDRED REED HALL, UNDERSTANDING CULTURAL DIFFERENCES 141 (1990).

162. GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 25 (abr. ed. 1984). Ethnocentrism has also been defined as the "unconscious tendency to interpret or to judge all other groups and situations according to the categories and values of our own country." SHARON RUHLY, ORIENTATIONS TO INTERCULTURAL COMMUNICATION 22 (1976).

163. See generally Porter & Samovar, *supra* note 105, at 6.

tensions and perhaps even destroy amicable relations in an international commercial mediation.¹⁶⁴

An awareness of ethnocentrism's impact on a cross-cultural mediation is extremely valuable for the international negotiator. Negotiators should always learn to identify and control their prejudices. These insights may enable the transnational negotiator to avoid the possibility of intercultural conflict and obtain the most optimal results in a mediation.

E. Elements of Verbal Communication

Verbal communications are essential to communication and are vitally related to changing perceptions, transmitting meanings, and molding patterns of thought.¹⁶⁵ Even the best negotiators, however, sometimes forget these basic issues during a mediation. Thus, it is essential to discuss and study elements of verbal communication before a cross-cultural interaction. Such elements include: language barriers, colloquial speech, interpretation issues, and the use of dates, amounts, and symbols.

1. The Language Barrier

The most common factor that impedes the success of a cross-cultural communication is the language barrier.¹⁶⁶ Because language is one of the primary ways that a culture transmits its beliefs, values, norms, and world view, it is critical that negotiators try to overcome the language barrier.¹⁶⁷

It is important for a negotiator to attempt to use an opponent's language and demonstrate familiarity with an opponent's culture. Groups use language to develop and express much of their culture.¹⁶⁸ Language bonds its users, channels perceptions, and gives clues to appropriate behavior.¹⁶⁹ Efforts to familiarize oneself with a counterpart's language will show a commitment to a

164. See FISHER, *supra* note 4, at 145 (noting the dangers associated with U.S. Americans viewing other cultures as "inferior" or "secondary").

165. See Porter & Samovar, *supra* note 105, at 170.

166. See Gladys David Howell, *Intercultural Communication and the Concept of Marginality*, in ETHICAL PERSPECTIVES AND CRITICAL ISSUES IN INTERCULTURAL COMMUNICATION, *supra* note 111, at 104, 108.

167. See Porter & Samovar, *supra* note 105, at 18.

168. See *id.*

169. See Howell, *supra* note 166, at 108.

long and profitable relationship.¹⁷⁰

Unfortunately, most business persons worldwide speak English,¹⁷¹ perhaps because many U.S. Americans never take the time to learn another language. Mexicans also have a particularly strong affection for their own language, more so than English speaking natives.¹⁷² Local folklore, religious rites and passages, and historical tales all remain part of the Mexican language and culture.

Because of the deep rooted love and affection for their own language, Mexicans appreciate any sincere effort to learn even the basics of the Spanish language.¹⁷³ More importantly, a Mexican is more likely to trust and confide in a person who exhibits a genuine interest in the Mexican culture and language.¹⁷⁴ Thus, a basic knowledge of Spanish may create much needed trust, further the relationship within the mediation, and assist in the overall resolution process.

2. Colloquial Speech

Even if the parties have a command of each other's language, they may be unable to convey the nuances and sophisticated thoughts necessary in a critical mediation. Idioms, colloquial speech, expression, slang, and technical words are specific to each culture and nation. The incidents of miscommunication should decrease if each party is encouraged to ask the meaning of unknown words or phrases. In addition, techniques, such as summarizing, paraphrasing, or echoing the other party's sentences, may also clarify intended meanings.¹⁷⁵ The parties should also avoid using business jargon, "buzz words," idioms, slang, and colloquial language as much as possible.¹⁷⁶ Moreover, the parties should use simple examples, rather than complex illustrations.¹⁷⁷

170. See JESSUP & JESSUP, *supra* note 148, at 42-43.

171. See *id.* at 42.

172. See BRAKE ET AL., *supra* note 3, at 117-18.

173. See JESSUP & JESSUP, *supra* note 148, at 43.

174. See JOHN CONDON, GOOD NEIGHBORS: COMMUNICATING WITH THE MEXICANS 54 (1985).

175. See ROBERT E. AXTELL, THE DO'S AND TABOOS OF INTERNATIONAL TRADE: A SMALL BUSINESS PRIMER 229 (rev. ed. 1994).

176. See *id.* at 223.

177. See Gerry Garber, *Gaining Perspective on Foreign-Born Clients*, RECORDER, July 11, 1991, at 5.

Speaking slower, enunciating words, avoiding complicated grammar structure, and eliminating linguistic shortcuts such as contractions may also simplify the communication process.¹⁷⁸ U.S. negotiators should keep in mind, however, that speaking louder has no bearing on the understanding of the other party! U.S. Americans are notorious for believing a loud conversation results in increased comprehension.¹⁷⁹

3. Interpretation Issues

Although English is the most common language used in business,¹⁸⁰ an interpreter may still be required as additional assurance against misunderstandings. The use of an interpreter eliminates any doubt in a party's ability to understand the subtle nuances of a mediation.

In his book *The Do's and Taboos of International Trade: A Small Business Primer*, Robert E. Axtell provides specific suggestions about working with an interpreter. These suggestions include: getting to know the interpreter in advance; reviewing technical terms in advance; speaking slowly and clearly; insisting that the interpreter translate in brief bursts rather than wait until the end of a long statement; using gestures, body language, and visual aids; and being careful with humor and jokes.¹⁸¹

Often, an interpreter does not or cannot translate the true meaning of the words exchanged between the parties. For example, the subjective meaning of the Spanish verb "*discutir*" has a much more confrontational connotation than the English verb "to discuss."¹⁸² Likewise, ideas and concepts that do not exist in the other culture may be difficult to translate.¹⁸³ For example, the Spanish phrase "*no tengo ganas*" is closely related to the idea that a person does not have the interest or desire to do something; however, no direct translation is possible because the idea of "*ganas*" does not exist in the English language.

Geert Hofstede, a pioneer in the cross-cultural communica-

178. See AXTELL, *supra* note 175, at 229.

179. See *id.* at 87.

180. See FISHER, *supra* note 4, at 12-13.

181. See AXTELL, *supra* note 175, at 90-91.

182. See FISHER, *supra* note 103, at 61.

183. See *id.* at 62-63.

tion field, believes that all people have one dominant or preferred language.¹⁸⁴ For more accurate translation, interpreters "should be chosen such that they translate into their preferred language, as it takes greater familiarity with a language to express nuances of meaning than to understand them."¹⁸⁵ Choosing interpreters in this manner will not always solve the translation problem, but it will help minimize linguistic miscommunications.

4. Dates, Amounts, and Symbols

With or without an interpreter, the parties should conduct a special review of any dates, amounts, and symbols involved in a mediation.¹⁸⁶ Different countries express dates in different ways. For example, a U.S. American may express the date April 12, 1990 as 4/12/90. In contrast, a Mexican would interpret 4/12/90 as December 4, 1990. In most European countries and Mexico, the month and day are inverted from the U.S. method of expressing dates.¹⁸⁷ On a global scale, the "U.S. way" of writing dates is the minority approach, and therefore, should be taken into account during mediation.

The parties should also give special attention to the designation of monetary amounts. Traditionally, U.S. Americans use commas where Mexicans use periods. For example, 10,000 to a U.S. American is the equivalent of 10.000 to a Mexican. This difference, if unexpected, may cause confusion.

Communication problems may also arise in the use of currency symbols. The monetary sign for U.S. dollars is generally two vertical lines through an "S," with the possible addition of "USD" to symbolize U.S. dollars. In contrast, the monetary sign for Mexican pesos is one vertical line through an "S," with the possible addition of "NP" to indicate the Mexican nuevo peso. Without the letters "USD" or "NP," the negotiator must pay particular attention to the number of vertical lines through the "S." This difference in currency expressions may drastically alter the amount of money being discussed in a negotiation because there are several hundred "NP" to the "USD."

184. See HOFSTEDE, *supra* note 162, at 28.

185. *Id.*

186. See AXTELL, *supra* note 175, at 92.

187. See *id.* at 222.

In sum, effective verbal communication is critical to the mediation process. Mexicans are likely to view a person who exhibits a sincere interest in the Spanish culture and language as *simpático* (nice and congenial)¹⁸⁸ and trustworthy.¹⁸⁹ To gain that trust at the onset of the mediation, the U.S. negotiator should, at a minimum, learn the basics of the Spanish language, be aware of colloquial speech, take extreme caution in choosing an interpreter for the mediation, and keep a watchful eye on the dates, amounts, and symbols used during the mediation. Careful preparation may bring the parties closer to each other and to an acceptable resolution.

F. Elements of Nonverbal Communication

In addition to verbal difficulties, negotiators engaged in intercultural communications must also consider nonverbal communications.¹⁹⁰ A look, a gesture, or a posture all act to communicate¹⁹¹ and may affect the tone of a mediation. These nonverbal aspects of communication are often the cause of miscommunications.¹⁹²

One of the difficulties with identifying nonverbal miscommunication is that individuals may not be aware of their nonverbal behavior.¹⁹³ Nonverbal communication is usually unconscious, but nevertheless, may influence the interpretation of a statement, as well as the relationship between the parties.¹⁹⁴ Many elements of nonverbal communication overlap and are seemingly interrelated, but they may be divided into the following categories: high and low context cultures, monochronic and polychronic time orientation, cronemics, proxemics, power distance, uncertainty avoidance, individualism and collectivism, and masculinity.¹⁹⁵

188. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY 216 (4th ed. 1987).

189. See CONDON, *supra* note 174, at 54.

190. See Garber, *supra* note 177, at 5.

191. See Porter & Samovar, *supra* note 105, at 7.

192. See CONDON, *supra* note 174, at 59.

193. See Peter Andersen, *Explaining Intercultural Differences in Nonverbal Communication*, in INTERCULTURAL COMMUNICATION: A READER, *supra* note 105, at 286, 286-87.

194. See CONDON, *supra* note 174, at 59.

195. See generally CARLEY H. DODD, DYNAMICS OF INTERCULTURAL COMMUNICATION (2d ed. 1987); Andersen, *supra* note 193; HOFSTEDE, *supra* note 162 (categorizing these distinct factors).

1. High and Low Context Cultures

In cross-cultural communication, one important factor that affects a negotiator's perspective is whether the opponent is from a high or low context culture.¹⁹⁶ In a high context culture, people do not spend much time disseminating information through words; societal norms, expectations, and cultural rules are learned through actions and contextual situations.¹⁹⁷ In contrast, in a low context culture, information is abundant; societal norms, expectations, and cultural rules are specifically explained to members of the group.¹⁹⁸ The United States is a low context society, whereas Mexico is a middle to high context society.¹⁹⁹

In high context societies, information is obtained from the environment, the context, and nonverbal cues.²⁰⁰ Accordingly, Mexican negotiators pay more attention to nonverbal behavior in a mediation, and therefore, are adept at reading nonverbal cues and the environment of the mediation.²⁰¹ People from high context societies expect others to understand unarticulated feelings, subtle gestures, and environmental cues.²⁰² Thus, Mexican negotiators generally do not speak as much as U.S. negotiators;²⁰³ however, Mexican negotiators expect U.S. negotiators to understand messages through contextual clues.

Unlike their Mexican counterparts, U.S. negotiators spend more time evaluating the words spoken during a negotiation.²⁰⁴ High context societies, such as Mexico, often view this reliance on verbal messages as unattractive and unbelievable.²⁰⁵ On the other hand, low context cultures, like the United States, may perceive people from high context societies as reticent, sneaky, and mysterious because such people are not excessively talkative, use redun-

196. See generally Wright, *supra* note 100 (manuscript at 7-15).

197. See DODD, *supra* note 195, at 89-90.

198. See *id.*; see also Porter & Samovar, *supra* note 105, at 19-21; Andersen, *supra* note 193, at 293-94.

199. See BRAKE ET AL., *supra* note 3, at 117, 133.

200. See Andersen, *supra* note 193, at 293.

201. See Porter & Samovar, *supra* note 105, at 21.

202. See Andersen, *supra* note 193, at 294.

203. See Porter & Samovar, *supra* note 105, at 21.

204. See CONDON, *supra* note 174, at 61-62 (citing EDWARD HALL, BEYOND CULTURE (2d ed. 1981)).

205. See Porter & Samovar, *supra* note 105, at 20-21.

dancies, and repeat the obvious.²⁰⁶

In high context societies, formality also plays an important part in the communication process.²⁰⁷ Mexicans consider such formality to be good form and proper behavior because behavior is paramount to the spoken word. Thus, Mexican negotiators exhibit exceedingly polite behavior.

Because Mexico is a middle to high context culture, U.S. negotiators should be cognizant of the characteristics of a high context culture. They should realize that context and behavior may affect a mediation with Mexicans as much, or perhaps even more, than the spoken word. They must understand the need to look behind the words and to analyze the context of the communication. U.S. negotiators who refocus their perspectives may achieve a more successful outcome in mediation.

2. Monochronic and Polychronic Time Orientation

A second variable that may affect communication between people from different cultures is monochronic versus polychronic time orientation. Monochronic time orientation societies generally have a need for closure and for doing one thing at a time.²⁰⁸ Polychronic time orientation societies, however, generally handle a number of things simultaneously and process information without any specific pattern.²⁰⁹ Polychronic individuals may become dysfunctional in situations that demand monochronic performances.²¹⁰ U.S. culture is commonly viewed as monochronic, whereas Mexican culture is viewed as polychronic.²¹¹

The difference in time orientation may be illustrated through the way that cultures develop their thought processes. The U.S. pedagogical approach is analytical and pragmatic, emphasizing underlying concepts and their applications.²¹² In contrast, Mexi-

206. See Andersen, *supra* note 193, at 294.

207. See BRAKE ET AL., *supra* note 3, at 117.

208. See HALL & HALL, *supra* note 161, at 13-15; DODD, *supra* note 195, at 87-88; see also Condon, *supra* note 159, at 111.

209. See HALL & HALL, *supra* note 161, at 13-15; see also Condon, *supra* note 159, at 111.

210. See EDWARD T. HALL, *BEYOND CULTURE* 20-24 (2d ed. 1981).

211. See *id.*

212. See EVA S. KRAS, *MANAGEMENT IN TWO CULTURES: BRIDGING THE GAP BETWEEN U.S. AND MEXICAN MANAGERS* 33 (1988).

cans use deductive reasoning and concentrate on ideas, concepts, and conformity.²¹³

Due largely to their pedagogical development, young Mexicans appear to be more sophisticated and knowledgeable about general subjects and global situations than young U.S. Americans. Nevertheless, young Mexicans often lack original thinking and specialization, which characterize many young U.S. Americans.²¹⁴ In addition, Mexican pedagogy may translate to a seemingly chaotic organization. For example, a U.S. American may be surprised when a young bank teller talks on the phone while waiting for a superior's approval to cash a check.²¹⁵ Thus, U.S. negotiators may be irritated when their Mexican counterparts appear to give them less than their undivided attention.²¹⁶

The difference between monochronic and polychronic societies may also be illustrated through different attitudes toward deadlines. Simply speaking, U.S. Americans have been raised believing that there is great value in planning and scheduling, quick answers, and prompt solutions.²¹⁷ A U.S. American's day is likely to be packed with appointments and deadlines.²¹⁸ In contrast, Mexicans believe in relaxed observation of deadlines and are likely to spend more time evaluating problems before making decisions.²¹⁹ As a result, Mexicans often view the term "deadline" as flexible and factor it in with other priorities.²²⁰ For example, Mexican contracts contain an implied extension for important events.²²¹ In Mexican society, interruptions are routine and delays are to be expected in both business and personal life.²²²

U.S. negotiators should be aware that their aggressive behavior and obvious desire to shorten the negotiation process may be perceived as an effort to conceal motives, thereby creating mistrust

213. See *id.* at 31.

214. See *id.* at 31-33.

215. See Condon, *supra* note 159, at 111.

216. See *id.*

217. See HALL & HALL, *supra* note 161, at 140-41.

218. See BRAKE ET AL., *supra* note 3, at 131.

219. See HALL & HALL, *supra* note 161, at 140-41.

220. See JESSUP & JESSUP, *supra* note 148, at 36.

221. See *id.*

222. See Condon, *supra* note 159, at 111.

during the negotiation.²²³ In addition, the U.S. negotiator's need for quick answers and solutions may actually be a disadvantage in a mediation with Mexicans, who take time to develop both their ideas and solutions.²²⁴ Therefore, patience and sensitivity to these differences are critical to business protocol and mediations with Mexico.

Furthermore, the difference in time orientation may be seen in different views of relationships. Typical of their need for order, compartmentalization, and sequencing, monochronic societies, such as the United States, tend to separate personal relationships from the workplace and other parts of their daily lives. In contrast, polychronic societies, such as Mexico, generally use their background and personal contacts in order to network and further their professional careers.²²⁵

For many U.S. negotiators, the purpose of negotiation is to arrive at a business resolution.²²⁶ Many U.S. Americans often ignore the relationship in a mediation and focus instead on directness and fast results.²²⁷ In contrast, Mexican negotiators view negotiation as the building of a relationship and a resolution as an expression of that relationship.²²⁸ For Mexicans, trust is critical in business. Mutual trust may be established by developing long-term relationships through socializing, sharing backgrounds and feelings, and creating a network of influential individuals who may assist in the relationship.²²⁹ Mexicans always relate to the person rather than theoretical rationales.²³⁰ Thus, U.S. negotiators should attempt to personally interact with their Mexican opponents before delving into the heart of mediations. Too many times, U.S. negotiators rush into business discussions using "strong arm" methods and fail to first nurture the relationship.²³¹ A strong per-

223. See SALACUSE, *supra* note 125, at 65.

224. See HALL & HALL, *supra* note 161, at 141.

225. See *id.* at 6-9.

226. See SALACUSE, *supra* note 125, at 59-60; see also BRAKE ET AL., *supra* note 3, at 133.

227. See BRAKE ET AL., *supra* note 3, at 133.

228. See SALACUSE, *supra* note 125, at 59-60; see also BRAKE ET AL., *supra* note 3, at 133.

229. See BRAKE ET AL., *supra* note 3, at 117.

230. See GLEN FISHER, *MINDSETS: THE ROLE OF CULTURE AND PERCEPTION IN INTERNATIONAL RELATIONS* 54 (1988).

231. See *Understand and Heed Cultural Differences*, *supra* note 132, at 26.

sonal relationship may determine whether or not important deadlines are met, thereby making or breaking the business relationship.²³²

Mexican negotiators often mistake U.S. negotiators' professionalism as rudeness or obnoxiousness; however, U.S. negotiators may view the Mexicans' graciousness and politeness as a lack of professionalism. Such misunderstandings may lead to a breakdown in communication during the mediation.

Therefore, the mediator and/or the parties should try to cultivate a good rapport throughout the mediation. Moreover, U.S. negotiators should build flexibility into their schedules before entering into a mediation with Mexicans, thereby limiting timetable conflicts once the mediation begins.

3. Cronemics

Another element that may affect cross-cultural communication is the difference between cultures in their attitudes toward punctuality. Cronemics is the study of how people define, use, and communicate time in their societies.²³³ In Mexico, time is considered relative and little emphasis is attached to time commitments.²³⁴ This attitude is known as the "mañana syndrome."²³⁵ As a result, Mexicans are famous for their late arrivals and departures. Mexican invitations generally indicate an arrival time, for which it is socially impolite to arrive punctually, but rarely specify a departure time, as it is socially unacceptable to request guests to leave.²³⁶ Mexican *fiestas*, or "parties,"²³⁷ tend to continue until the sun rises or the guests fall asleep, whichever comes first.

Mexicans' lack of punctuality is also prevalent in business. It is common for meetings to begin as much as an hour later than the appointed time. These delays, although not unusual to Mexicans, are often insulting to U.S. Americans and represent a misunderstanding between two very different cultural clocks.²³⁸

232. See BRAKE ET AL., *supra* note 3, at 116.

233. See Andersen, *supra* note 193, at 287.

234. See KRAS, *supra* note 212, at 60.

235. See JESSUP & JESSUP, *supra* note 148, at 34-36.

236. See KRAS, *supra* note 212, at 60.

237. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY, *supra* note 188, at 129.

238. See DODD, *supra* note 195, at 189.

For U.S. Americans who have grown up with such phrases as “time is money” and “the early bird gets the worm,” it is often difficult to understand the Mexican mentality. U.S. Americans place a high value on time, efficiency, and progress.²³⁹ Punctuality in the United States is not only of the utmost importance in business, but is also integrally tied with social etiquette and politeness.²⁴⁰ As a result, U.S. business persons tend to minimize formalities and “get down to business.”²⁴¹

Further, many U.S. Americans view the “mañana syndrome” derogatorily, suggesting that it is a deficiency of the Mexican people.²⁴² This imprecise concept of time, however, is neither a sign of Mexican rudeness nor of procrastination; it is simply part of their accepted societal norms and a different way of prioritizing their lives.²⁴³ For Mexicans, social and familial concerns often take priority over business obligations.²⁴⁴ This more relaxed approach to business may be somewhat trying to U.S. negotiators, and it may take time to become accustomed to the difference.

Mexican attitudes towards time commitments are now beginning to change in most business arenas, especially in Mexico City.²⁴⁵ Mexican professionals realize that major industrial nations are unaccustomed to *siestas*, the traditional three-hour lunches that are part of their country’s culture.²⁴⁶ They also realize that they are losing business due to their more comfortable, but slower, life-style.²⁴⁷ Accordingly, they are relegating the traditional three-hour lunches to the occasional “wine and dine” of a client or to the celebration of a special achievement and almost completely ignoring the idea of *siesta*. Most Mexican professionals have now conformed to the time commitment pressures of the business world. Nevertheless, it is still culturally acceptable in Mexico to take a long lunch, be late for a meeting, or keep a client waiting for a long

239. See FISHER, *supra* note 230, at 52.

240. See HALL & HALL, *supra* note 161, at 141.

241. See SALACUSE, *supra* note 125, at 65.

242. See JESSUP & JESSUP, *supra* note 148, at 34.

243. See *id.*; see also KRAS, *supra* note 212, at 60; BRAKE ET AL., *supra* note 3, at 116.

244. See JESSUP & JESSUP, *supra* note 148, at 34.

245. See CONDON, *supra* note 174, at 67.

246. See JESSUP & JESSUP, *supra* note 148, at 34-35. In most Latin and European countries, people customarily have their heaviest meals, which may take up to four hours, at mid-day.

247. See CONDON, *supra* note 174, at 67.

period of time.²⁴⁸ Thus, a U.S. negotiator should be aware of the Mexican attitude toward time and realize that it is simply part of Mexican culture, rather than any discourteous intention on the part of Mexicans.²⁴⁹

4. Proxemics

Cultures also have different attitudes toward interpersonal space, which may affect cross-cultural communication.²⁵⁰ Proxemics is the study of how people communicate through their use of interpersonal space and distance.²⁵¹ Spatial relationships are an essential part of the communication process. They may set or accent the tone of the communications and sometimes overwhelm the words being spoken.²⁵²

Cultures that display a considerable amount of interpersonal closeness, such as Mexico, have been labeled "contact cultures" because people are traditionally more expressive with their bodies and conduct conversations at much closer distances than non-contact cultures, like the United States.²⁵³ In Mexico, physical contact and hand gestures are prevalent.²⁵⁴ In contrast, U.S. Americans prefer to maintain their private space and are uncomfortable with conducting business closely.²⁵⁵

A U.S. negotiator unfamiliar with these cultural differences may find his Mexican counterpart to be overbearing, perhaps even annoying, and having a "pushy" attitude.²⁵⁶ In contrast, Mexicans may perceive U.S. Americans who often back away and distance themselves as distant, cold, and unfriendly.²⁵⁷

In a mediation between the United States and Mexico, this divergent use of space may unnerve a negotiator when his counterpart breaks the acceptable cultural distance barrier.²⁵⁸ By under-

248. See DODD, *supra* note 195, at 236.

249. See EDWARD T. HALL, *THE SILENT LANGUAGE* 26-31 (1959).

250. For a section devoted exclusively to the use of space in the communication process, see *id.* at 187-209.

251. See Andersen, *supra* note 193, at 287.

252. See HALL, *supra* note 249, at 204.

253. See *id.* at 209; see also Andersen, *supra* note 193, at 289.

254. See BRAKE ET AL., *supra* note 3, at 118; see also CONDON, *supra* note 174, at 60.

255. See BRAKE ET AL., *supra* note 3, at 133-34.

256. See CONDON, *supra* note 174, at 60.

257. See HALL, *supra* note 249, at 209; see also FISHER, *supra* note 103, at 56.

258. See FISHER, *supra* note 103, at 54.

standing that Mexicans use physical contact as a sign of trust and confidence, U.S. negotiators should realize that accepting an *abrazo* (a hug)²⁵⁹ is an honor,²⁶⁰ not a violation of personal space. Understanding different cultural norms may help change a potentially adverse situation into a positive one, thereby assisting in the resolution of the mediation.

5. Power Distance

Power distance is another factor that may affect an international mediation. Power distance is the measure of interpersonal power as seen by the less powerful of two parties in an interaction.²⁶¹ The unequal distribution of power is evidenced in a variety of forms, including physical and mental characteristics, wealth, social status, political and educational systems, and general power.²⁶² In a society, the most important indicators of power distance are geographical latitude, population size, and wealth.²⁶³ Countries with warmer climates, larger populations, and lower national wealth typify high power distance societies.²⁶⁴ In contrast, countries with cooler climates, smaller populations, and greater national wealth characterize low power distance societies.²⁶⁵ Thus, Mexico exemplifies an extremely high power distance culture, and the United States is recognized as a relatively low power distance culture.²⁶⁶

Generally, high power distance countries are more comfortable with disparity of power and hierarchies in their societies. Low power distance countries, however, question the legitimacy of different levels of power and strongly attempt to de-emphasize any stratification or inequality in their societies.²⁶⁷ Accordingly, Mex-

259. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY, *supra* note 188, at 46.

260. See FISHER, *supra* note 103, at 56.

261. See HOFSTEDE, *supra* note 162, at 70-71.

262. For numerous summaries, graphs, and data supporting the proposition that power distance may be evidenced through a variety of forms, see *id.* at 92-107. See also Andersen, *supra* note 193, at 292.

263. See HOFSTEDE, *supra* note 162, at 95-97.

264. See *id.*

265. See *id.*

266. For data that illustrates the placement of the United States and Mexico on the issue of power distance, see *id.* at 77 fig. 3.1. See also BRAKE ET AL., *supra* note 3, at 118-19, 134.

267. For a general discussion supporting the principle that the existence of hierarchies and inequality are essential to the idea of power distance, see HOFSTEDE, *supra* note 162,

ico places a high value upon hierarchies and rank within the business context.²⁶⁸ Leadership is autocratic and authoritative. It is based upon the values of age, sex, connections, and experience.²⁶⁹ Subordinates rarely question their leaders; therefore, it is important to show proper deference and respect to the senior members of a Mexican negotiating team during a mediation.

Moreover, face saving is extremely important to Mexicans.²⁷⁰ Mediation may enable parties to save face in numerous ways. First, the mediator may diffuse potentially explosive situations involving the authority or attitudes of senior negotiators. Second, the mediator may preserve hierarchical levels, thereby protecting the pride, respect, and self-esteem of the negotiators. Finally, the confidential nature of the mediation process allows senior negotiators to make judgment concessions and still maintain credibility.

Power distance may also be exhibited through social etiquette. Although Mexicans are generally warm people, protocol is very important.²⁷¹ The initial contact may affect the rest of the mediation because first impressions are often lasting with Mexicans.²⁷² On the one hand, a well-mannered negotiator fosters respect, which may result in a successful mediation. On the other hand, an ignorant and rude negotiator does not foster respect, which may directly contribute to the breakdown of a mediation.

In the business context, a traditional handshake is appropriate. In a more formal environment, however, Mexicans may exchange hugs and/or kisses on the cheek as both an initial greeting and later salutation.²⁷³ In addition, Mexicans favorably look upon polite remarks, such as "please," "thank you," or "pleased to meet you," that are made with a smile, whether they are in English the Spanish equivalent *por favor, gracias, or mucho gusto*.²⁷⁴

The use of precise and required titles also characterizes Mexican social etiquette. Although the traditional way to address a man in Mexico is *Señor*, or "Mr.," a Mexican attorney holds the es-

at 70-73.

268. See BRAKE ET AL., *supra* note 3, at 118.

269. See *id.* at 118-19.

270. See *id.* at 119.

271. See FISHER, *supra* note 230, at 54.

272. See KRAS, *supra* note 212, at 36.

273. See *id.* at 37; see also JESSUP & JESSUP, *supra* note 148, at 240-41.

274. See KRAS, *supra* note 212, at 36.

teemed title of *Licenciado*.²⁷⁵ It is very important to recognize this title and give it proper respect and deference. Unlike the English equivalent “Esquire,” which is seldom used in the United States, the title *Licenciado* is considered the proper and polite manner to address a Mexican attorney and should be used instead of *Señor*. In addition, some attorneys hold their doctorates in law or are notaries,²⁷⁶ and therefore, the negotiator should accord them the proper titles of *Doctor* and *Notario*, respectively.²⁷⁷

Furthermore, another aspect of Mexican social etiquette is the use of pronouns in the Spanish language,²⁷⁸ in particular, the use of “you” in referring to either an individual or a group. The Spanish language has two distinct pronouns for the English pronoun “you,” *tú/vosotros* and *usted/ustedes*.²⁷⁹ The *tú/vosotros* form is generally reserved for intimates, such as family and friends, and should be avoided in the business context. In contrast, the *usted/ustedes* form is the proper, formal manner for addressing a business associate in both conversation and correspondence. Thus, it is important to use the formal *usted/ustedes* form until it has been indicated that the *tú/vosotros* form is acceptable.

Moreover, another feature of Mexican etiquette is reluctance to respond directly to a query.²⁸⁰ Many Mexicans consider it rude and extremely bad manners to tell someone “no” or “I don’t know” if they do not have the answer to a specific question.²⁸¹ Therefore, Mexicans often try to say something that will please the other person.²⁸² This reluctance may exasperate U.S. negotiators. In mediation, a Mexican’s aversion to acknowledge ignorance or

275. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY, *supra* note 188, at 55.

276. Notaries hold a very different position in Mexico than in the United States. In Mexico, notaries are some of the most important and esteemed members of the legal profession. Most legal obligations may not be performed in Mexico unless a Mexican notary has notarized the document. Therefore, these positions are both highly regulated by law and extremely sought after by young Mexican attorneys. Generally speaking, these positions are awarded through personal and professional contacts or through many years of working for a notary before he retires.

277. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY, *supra* note 188, at 110, 172.

278. See KRAS, *supra* note 212, at 36.

279. See THE UNIVERSITY OF CHICAGO SPANISH DICTIONARY, *supra* note 188, at 232-33.

280. See COHEN, *supra* note 128, at 113.

281. See FISHER, *supra* note 103, at 56.

282. See CONDON, *supra* note 174, at 42.

inability to refuse something may cause the mediation to go in circles and perhaps continue indefinitely. In order to come to a final resolution, U.S. negotiators must overcome this problem by moving their Mexican counterparts through polite expressions of encouragement.

Finally, power distance may be exhibited through personal appearance, which also contributes to crucial first impressions with Mexicans.²⁸³ It is often through one's appearance that both power and respect may be recognized and acknowledged. Generally, Mexicans, as well as U.S. Americans, expect business people to be both well-groomed and well-dressed.²⁸⁴

In Mexico, the traditional business attire for men is a suit or a jacket, but Mexican society imposes stricter standards on women. Women should dress conservatively and avoid pantsuits or revealing clothing.²⁸⁵ These suggestions may seem archaic and offensive to U.S. women; however, U.S. women have advanced in the professional world far beyond their counterparts in other countries.²⁸⁶ Although it may be difficult for U.S. women to adjust to a more rigid system, a good U.S. negotiator should defer to the adage "when in Rome, do as the Romans do."

6. Uncertainty Avoidance

Another element that may affect cross-cultural communication is uncertainty avoidance. Uncertainty avoidance measures a society's adaptation to its uncertain future.²⁸⁷ Because uncertainty avoidance may drastically affect tendencies toward rigidity, intolerance, traditionalism, superstition, racism, and ethnocentrism,²⁸⁸ differences in uncertainty avoidance may significantly alter the way that parties communicate in transnational commercial mediation. Mexico and the United States differ in their views toward uncertainty and their methods of coping with uncertainty through technology, law, and religion.²⁸⁹ Mexico is a high uncertainty avoidance society, whereas the United States is a relatively low

283. See KRAS, *supra* note 212, at 39.

284. See *id.*

285. See AXTELL, *supra* note 175, at 85.

286. See *id.*

287. See HOFSTEDE, *supra* note 162, at 111.

288. See *id.* at 112.

289. See *id.* at 110.

uncertainty avoidance society.²⁹⁰

Generally, a high uncertainty avoidance culture is uncomfortable with the unknown, and therefore, prefers a structured and stable society. On the other hand, a low uncertainty avoidance culture tolerates ambiguity quite well and is more comfortable with risk-taking and broad guidelines.²⁹¹ Accordingly, Mexican negotiators are more likely than U.S. negotiators to prefer a mediation with clear rules.²⁹² In addition, Mexican negotiators are less likely than U.S. negotiators to take risks in a mediation.

High uncertainty avoidance societies also tend to be more nationalistic than low uncertainty avoidance societies.²⁹³ For example, Mexicans have a deeply rooted attachment to their country. They are intensely patriotic, nationalistic, loyal, and extremely proud of their long and rich history.²⁹⁴ Atypical of a low uncertainty avoidance culture, U.S. Americans are also very patriotic, and as mentioned earlier, ethnocentrically tout their society as “superior” to other nations.²⁹⁵ This “superiority complex” may cause extreme tension in a mediation between Mexico and the United States and may break up even the best-intentioned mediation. A mere hint of a condescending U.S. attitude may strain the relationship between the negotiators, resulting in a more difficult mediation.

Perhaps the most prevalent example of this “superiority complex” is that people in the United States refer to themselves as simply “Americans.” Mexicans may take great offense to this term.²⁹⁶ Although this reference may seem innocent to U.S. nationals, the word “American” (or *Americano/a*) applies to all

290. For data that illustrate the placement of the United States and Mexico on this issue of uncertainty avoidance, see *id.* at 122 fig. 4.1. See also BRAKE ET AL., *supra* note 3, at 120, 135-36.

291. For a general discussion, including charts and summaries, of the translation of uncertainty avoidance into various aspects of daily life, see HOFSTEDE, *supra* note 162, at 132-43.

292. See William B. Gudykunst, *Toward a Theory of Effective Interpersonal and Intergroup Communication: An Anxiety/Uncertainty Management (AUM) Perspective*, in 17 INTERCULTURAL COMMUNICATION COMPETENCE 33, 66 (Richard L. Wiseman & Jolene Koester eds., 1993).

293. See HOFSTEDE, *supra* note 162, at 141.

294. See JESSUP & JESSUP, *supra* note 148, at 47-48.

295. See KRAS, *supra* note 212, at 34.

296. See CONDON, *supra* note 174, at 83. The nationals of Canada, as well as Central and South America, may also take great offense to the term “American.”

people living in the Americas—North, Central, and South. The exclusive appropriation of the term “American” by people in the United States insults the nationals of every other country in the Americas. Some consider the term “North American” (or *Norteamericano/a*) to be slightly more deferential; however, it may cause an affront to Mexicans because Mexico is also considered part of North America.²⁹⁷ Therefore, a U.S. negotiator should take special care not to affront a Mexican negotiator by the use of such terms.

In addition, most people in the United States are ignorant that the proper and formal title of Mexico is the United States of Mexico (*los Estados Unidos de México*). Although the shorter and more popular use of “Mexico” instead of the “United States of Mexico” does not offend most Mexicans, a U.S. negotiator should remember this distinction. In extremely formal circumstances, the negotiator may even want to give proper deference and use the formal title of the United States of Mexico.

Moreover, many Mexicans are still sensitive about past U.S. wars, interventions, and occupations in old Mexico, which at one time included modern-day California, Texas, Arizona, and New Mexico.²⁹⁸ Mexicans often remember these events with extreme vividness and animosity toward the United States. As a result, many Mexicans have confronted U.S. negotiators concerning past U.S. interventions against Mexico.²⁹⁹ Mexicans consider these incursions as affronts to the people and territorial integrity of Mexico.

One of the most notable incidents occurred in the late 1840s when General Winfield Scott invaded Mexico City and flew the U.S. flag over Mexico’s National Palace.³⁰⁰ Six young Mexican cadets, who chose to kill themselves rather than surrender,³⁰¹ wrapped themselves in the Mexican flag and flung themselves to their death from the *Castillo* (Castle) on the hill. Mexicans consider these young cadets patriotic heroes for dying rather than surrendering to U.S. imperialistic forces. Many Mexicans remain ex-

297. See *id.* The term “North American” may also cause an affront to Canadians because Canada is also part of North America.

298. See JESSUP & JESSUP, *supra* note 148, at 44.

299. See CONDON, *supra* note 174, at 11.

300. See JESSUP & JESSUP, *supra* note 148, at 27.

301. See *id.*

tremely bitter about this particular incident, which resulted in U.S. appropriation of the territories presently known as California, Texas, Arizona, and New Mexico. To commemorate this event and as a symbol of national pride, a large monument in honor of the six cadets, called *Los Niños Héroes* (The Boy Heroes), is located at the base of Chapultepec Park in Mexico City.³⁰²

One observer noted that a Mexican cannot spend more than two hours even in a friendly interaction with a U.S. American before referring to some past U.S. intervention against Mexico.³⁰³ Therefore, in an international commercial mediation, these memories often become exacerbated, and the mediation may become a test of national pride, much to the surprise of the U.S. negotiator.³⁰⁴ If this situation occurs, the U.S. negotiator should try to diffuse this bitterness by showing extreme sensitivity to past U.S. military actions against Mexico and expressing respect for the sovereignty of Mexico and its people, while attempting to refocus on the issues involved in the present mediation.

7. Individualism and Collectivism

A comparison of individualism and collectivism is one of the major variables used to explain cross-cultural communication differences.³⁰⁵ In general, a highly individualistic country views the individual identity and private life as the ideal, whereas a highly collectivistic country has a familial orientation that emphasizes the need for strong group, network, and organization identity.³⁰⁶ Individualistic societies consider the rights of an individual as more important than the rights of the collective group.³⁰⁷ They expect people to look primarily after themselves and their immediate families. In collectivistic cultures, however, individuals belong to larger familial groups and look after each other in return for abso-

302. *See id.*

303. *See* FISHER, *supra* note 103, at 40.

304. *See* COHEN, *supra* note 128, at 36.

305. *See* Gudykunst, *supra* note 292, at 65; *see also* Wright, *supra* note 100 (manuscript at 7-15).

306. For the general proposition and summary that low individualism societies have a strong collective orientation, *see* HOFSTEDE, *supra* note 162, at 171-73 figs. 5.6-5.8. *See also* ADLER, *supra* note 105, at 18.

307. For a general discussion of individualism in society, *see* HOFSTEDE, *supra* note 162, at 149-52.

lute loyalty from the group as a whole.³⁰⁸ The United States is an individualistic culture, whereas Mexico is a collectivistic culture.³⁰⁹

Differences between individualistic and collectivistic cultures may be illustrated through differing views on family, church, and business relationships. The United States has weakened protection and support for the extended family, the church, and business organizations. Mexico, on the other hand, has powerful personal, religious, and business alliances.³¹⁰ In Mexico, family and religion take precedence over almost every aspect of an individual's life, including business.³¹¹

Characteristic of a collectivistic culture, Mexicans consider family sacred.³¹² The idea of family extends not only to the nuclear family, but to all branches of the family tree, including non-blood members.³¹³ In the Mexican family, traditional roles persist: the father is the authority figure, the mother is the caretaker, and the children are the cherished jewels.³¹⁴ This strong sense of family unity creates a different perspective from the fractured family units that dominate U.S. society. As a result, Mexicans often grow up more secure and supported,³¹⁵ depending on larger social groups for both moral and physical support.³¹⁶

Because of their upbringing, younger Mexican professionals are less independent, and therefore, unaccustomed to solving problems. Generally, Mexicans have a decision-making style that is highly centralized and proceeds from top to bottom, such that true authority rests in the superior.³¹⁷ More seasoned Mexican professionals, however, are extremely comfortable and confident with decision-making because they have spent many years studying the mistakes and successes of their superiors.

In contrast, U.S. Americans grow up more self-sufficient and

308. See Gudykunst, *supra* note 292, at 66.

309. For data that illustrates the placement of the United States and Mexico on the issue of individualism, see HOFSTEDE, *supra* note 162, at 158 fig. 5.2. See also BRAKE ET AL., *supra* note 3, at 119-20, 134-35.

310. See Zamora, *supra* note 119, at 440.

311. See BRAKE ET AL., *supra* note 3, at 119; see also KRAS, *supra* note 212, at 27-30.

312. See JESSUP & JESSUP, *supra* note 148, at 37.

313. See *id.*

314. See *id.*

315. See KRAS, *supra* note 212, at 27-29.

316. See Zamora, *supra* note 119, at 440.

317. See FISHER, *supra* note 103, at 28; see also Zamora, *supra* note 119, at 448-49.

independent.³¹⁸ They expect to gain wealth and power from hard work without the support of a larger social group.³¹⁹ Moreover, in the United States, people are more likely to be geographically mobile and have less permanent relationships.³²⁰

Another element of Mexico's collectivistic society is the Roman Catholic Church's domination of religion and influence over both the people and the government.³²¹ Unlike the U.S. constitutional requirement for separation of church and state, Mexico embraces the Church and its edicts, resulting in substantial interdependence between the Church and the Mexican government.

As a result, a U.S. negotiator should be aware of the attitudes that develop from Mexicans' religious beliefs because they may influence both the form and substance of a mediation. To begin with, numerous religious holidays may be added to the mediation schedule. In addition, a Mexican may take offense to certain language, such as taking the Lord's name in vain, or to certain concepts, such as abortion or homosexuality. In fact, it is probably wise to remain apolitical in transnational situations because these subjects may raise tensions and emotional levels.

A final illustration of collectivism in Mexican society is the desire to base negotiations on the personal relationship between the negotiators.³²² A U.S. negotiator must understand this cultural characteristic and attempt to cultivate good personal rapport, if not a friendship, with his Mexican counterparts. Traditional Mexican lunches or invitations to informal social occasions outside the negotiations may assist in the development of both confidence and trust.³²³ These emotional and social relationships often satisfy Mexicans' collectivistic needs and lead to a positive outcome in an international commercial mediation. As a result, a U.S. negotiator's social, rather than negotiation, skills often influence the resulting settlement.

A willingness to invest more time in developing a relationship outside the business atmosphere is of greater value to a Mexican negotiator than a U.S. negotiator and may be critical to a success-

318. See KRAS, *supra* note 212, at 27-29.

319. See Zamora, *supra* note 119, at 440.

320. See ADLER, *supra* note 105, at 19; see also HOFSTEDE, *supra* note 162, at 169.

321. See KRAS, *supra* note 212, at 30.

322. See COHEN, *supra* note 128, at 106.

323. See JESSUP & JESSUP, *supra* note 148, at 34-35.

ful mediation.³²⁴ Therefore, a U.S. negotiator should be more attentive to the human relationship with his Mexican counterpart, rather than concentrating only on strategy and tactics. Although strategy in a mediation is important, a U.S. negotiator must be aware that a show of thoughtfulness or concern or a willingness to invest time in developing a more personal relationship may yield a more successful result in a mediation with Mexicans than the most sophisticated negotiation techniques.

8. Masculinity

The interpersonal factor of masculinity also may affect cross-cultural communication. Masculinity compares an assertive male patterned society to a nurturing female patterned society and the effects of such patterns on nonverbal communication.³²⁵ In high masculine societies, gender roles are differentiated, and strength, assertiveness, competitiveness, and ambitiousness are the ideal.³²⁶ On the other hand, in low masculine societies, affection, compassion, nurturance, and emotionality predominate.³²⁷ Unlike the other nonverbal elements, Mexico and the United States are very similar in this area. Mexico is rated as a relatively high masculine society, and the United States is rated as a medium to high masculine society.³²⁸ Accordingly, these two societies share some perceptions in this area. Nevertheless, they also have a disparity of viewpoints that may affect an international commercial mediation.

Mexico is a country born out of, and often ruled by, the concept of *machismo*.³²⁹ *Machismo* is the idea that a man's pride is essential to his character and is integrally tied to his manly reputation, and more importantly, his authority.³³⁰ Due to *machismo*'s large pride element, a U.S. negotiator should avoid "strong arm" tactics, such as walking out or imposing one's will on other parties.

324. See Grayson, *supra* note 131, at 144.

325. See HOFSTEDE, *supra* note 162, at 176-77.

326. See Andersen, *supra* note 193, at 291. For supporting data and summaries comparing various traits of low and high masculine societies, see HOFSTEDE, *supra* note 162, at 205-08 figs. 6.4-6.6.

327. See Andersen, *supra* note 193, at 291.

328. For data that illustrates the placement of the United States and Mexico on the issue of masculinity, see HOFSTEDE, *supra* note 162, at 189 fig. 6.1. See also BRAKE ET AL., *supra* note 3, at 120, 135.

329. See BRAKE ET AL., *supra* note 3, at 120.

330. See CONDON, *supra* note 174, at 31.

It would be detrimental for a U.S. negotiator to enter a mediation with an arrogant attitude and insist that his demands are superior to those of a Mexican negotiator.³³¹ Such an attitude may exacerbate the Mexican's need to retain his pride and may ultimately lead to a breakdown in the mediation.³³² Instead, the U.S. negotiator should emphasize and strengthen the relationship with his Mexican counterpart.

Experts on Mexican culture, such as former Ambassador to Mexico John Jova (1974-1977), stress the need to avoid ultimatums in negotiations with Mexicans.³³³ Jova believes that ultimatums are one of the most detrimental tactics that U.S. negotiators use with Mexicans. He strongly recommends a more collaborative attitude in any type of negotiation.³³⁴

In addition, masculinity affects parties' negotiation styles in a mediation. Generally, a U.S. negotiator is more accustomed to making reasonable concessions in a negotiation. In contrast, a Mexican negotiator is more likely to remain entrenched in his position³³⁵ because compromise is tied carefully to the concepts of honor and *machismo* for Mexicans.³³⁶ Moreover, Mexico's high uncertainty avoidance also contributes to the fact that Mexican negotiators are less prepared to compromise.³³⁷ As a result, although a U.S. negotiator may be satisfied with the compromises made in a negotiation, a Mexican negotiator may feel that his dignity and integrity have been compromised.³³⁸

Accordingly, Mexicans are generally more rigid in their bargaining positions and not as accommodating as their U.S. counterparts.³³⁹ While U.S. negotiators are generally more open and ready to engage in bargaining, Mexicans do not see the advantage in frankness and are extremely wary of making concessions.³⁴⁰

331. *See id.* at 32.

332. *See* Casmir, *supra* note 134, at 52.

333. *See* COHEN, *supra* note 128, at 109.

334. *See id.*

335. *See id.* at 88.

336. *See* FISHER, *supra* note 103, at 48.

337. *See* HOFSTEDE, *supra* note 162, at 129.

338. *See* FISHER, *supra* note 103, at 48.

339. *See id.*; *see also* COHEN, *supra* note 128, at 88.

340. *See* Susan A. Hellweg et al., *Cultural Variations in Negotiation Styles*, in *INTERCULTURAL COMMUNICATION: A READER*, *supra* note 105, at 185, 187-89; *see also* FISHER, *supra* note 103, at 48.

This difference may amount to a technical disadvantage for a U.S. negotiator unless he conforms his position to the particular situation. As a result, a U.S. negotiator not only must be collaborative to avoid the *machismo* of a Mexican negotiator, but also must be firm to effectively combat the more intractable nature of a Mexican negotiator.

One way to balance these competing needs and interests is to analyze and implement the most appropriate form of bargaining necessary to achieve a resolution. Traditionally, there are two prevailing schools of thought regarding the structure of bargaining. One tactic is to open "extreme but soft," where the opening offer is an extreme figure but the negotiator is willing to make large concessions. The other option is to open "reasonable but firm," where the opening offer is a more reasonable figure and the negotiator makes small concessions.³⁴¹

Mexicans usually take the "reasonable but firm" position. Therefore, a U.S. negotiator should carefully consider his reaction to a Mexican's position, as well as ways to maximize his position throughout the negotiation.³⁴² The ultimate goal is to move from the typical competitive bargaining positions of adversaries to joint activities that promote problem solving.³⁴³ One step in this direction is to invite a neutral intermediary to the negotiations, as in mediation. This neutral third party may assist the parties in achieving a resolution through techniques such as integrative bargaining.³⁴⁴

Moreover, a U.S. negotiator should assess each negotiation individually and determine whether to present a competitive or cooperative stance. If the U.S. negotiator desires a more competitive structure or wants to be viewed as a "tough negotiator" to perhaps gain the respect of the Mexican negotiator, the U.S. negotiator may want to counter with a "reasonable but firm" figure. On the other hand, if the U.S. negotiator want to be viewed as

341. For a discussion of both "hard" and "soft" bargaining positions, see P. Terrence Hopmann, *Two Paradigms of Negotiation: Bargaining and Problem Solving*, 542 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 31-41 (1995).

342. For a general discussion on how Mexicans usually position themselves in the bargaining process, see JESSUP & JESSUP, *supra* note 148, at 128-34. See also FISHER, *supra* note 103, at 48.

343. See Hopmann, *supra* note 341, at 41.

344. See PRINCEN, *supra* note 22, at 37.

more cooperative, he should open “extreme but soft” to allow for larger concessions. As a result, the Mexican negotiator may view the outcome in a more favorable light. The danger of the “extreme but soft” position, however, includes possible exploitation by the opposing side. Rather than reciprocating, the Mexican negotiator may achieve greater gains at the expense of the U.S. negotiator.³⁴⁵ In addition, although a U.S. negotiator may feel that progress has been made with a compromise, a Mexican negotiator may feel that his dignity and integrity have been compromised.³⁴⁶

A “win-win” situation is most important in a long-term relationship because it earns both the respect and goodwill of Mexican negotiators.³⁴⁷ One way to achieve this outcome is to negotiate on the merits of the issues, rather than adopting either “hard” or “soft” bargaining stances.³⁴⁸ Parties must be flexible and find ways to reconceptualize the issues to create additional opportunities for resolution.³⁴⁹

These conceptual changes may be more important than actual changes in bargaining positions.³⁵⁰ These changes are most likely to occur when a third-party mediator is introduced into the process.³⁵¹ Mediation is perhaps the best way to promote the problem-solving approach.³⁵² Adding a third party encourages this cognitive change, thereby assisting the parties in formulating new perceptions, eliminating unrealistic expectations, and emphasizing the development of mutually advantageous agreements.³⁵³

Thus, when long-term business relationships are at stake, consensual solutions and mutually advantageous outcomes are paramount. Only when both parties are better off in the long-run will the relationship flourish. Because mediation has the greatest potential for resolving international conflicts through cooperative and problem solving approaches, it has been viewed as a better alternative for settling private international commercial disputes.

345. See Hopmann, *supra* note 341, at 41.

346. See FISHER, *supra* note 103, at 48.

347. See JESSUP & JESSUP, *supra* note 148, at 133-34.

348. See Hopmann, *supra* note 341, at 41.

349. See *id.*

350. See *id.*

351. See *id.* at 42.

352. See *id.*

353. See *id.*

VI. TOP TEN TIPS TO AVOID CROSS-CULTURAL MISCOMMUNICATION

10. Avoid Misunderstandings and Stereotyping
9. Never Act Superior to Your Counterparts: Always Treat Them as Equals
8. Speak the Basics of Your Counterparts' Language and Choose an Interpreter Carefully
7. Be Aware of Both the Words and the Context Surrounding the Mediation
6. Take the Time to Build Personal Relationships
5. Be Patient: Prepare for Uncertainty and Delay
4. Be Polite and Dress Appropriately
3. Show Respect and Deference to Your Counterparts' Status and Culture in the Negotiations
2. Do Your Homework and Understand the Importance of Non-Business Factors, Including Family, Religion, and Historical Influences
1. Recognize How Culture Affects Bargaining Tactics and Positions and Learn How to Respond Accordingly

VII. CONCLUSION

With the implementation of NAFTA, there has been an increasing amount of interdependence between the United States and Mexico. This new level of interaction calls for new avenues of dispute resolution, such as international mediation. Therefore, U.S. negotiators should consider the cultural differences with Mexicans. If a greater understanding is fostered between the United States and Mexico, a stronger and more improved relationship between the border nations may soon follow.

In the area of international dispute resolution, voluntary forms of settlement are often more appropriate than adjudicative approaches in order to maintain lasting international relationships.³⁵⁴ Unlike adjudicative methods, mediation allows the parties to have complete control over the process and direct contact between the parties. It also affords the parties an opportunity for optimal creativity in their solutions.

The direct, confidential, and consensual nature of mediation

354. See Reif, *supra* note 31, at 597-98.

often overcomes many of the cultural, substantive, and procedural problems that plague adjudicative dispute resolution processes. In addition, the negotiators, as well as the mediator, are permitted to adjust their roles based on their needs and desires, thereby allowing the parties to create the most cooperative and effective process possible. Finally, mediation may help preserve an amicable relationship between the parties while facilitating the communication process towards an eventual resolution.

To reach a successful outcome, the parties, their representatives, and the mediator should attempt to understand the cross-cultural aspects that may affect the communication process during the mediation. Although it is impossible to analyze all the cultural differences that exist between Mexico and the United States, this Article has identified some essential differences, as well as some of the most common problems that occur in mediations between the United States and Mexico. Once armed with this knowledge, the parties may avoid many of the misunderstandings that inhibit the development of a consensual solution. In the future, mediation may be the preferred method of dispute resolution in international conflicts because it may resolve both justiciable and non-justiciable issues through a consensual and non-binding process, thereby circumventing the problems that plague adjudicative methods in the international arena.

VIII. OTHER HELPFUL MATERIALS FOR A U.S. NEGOTIATOR INVOLVED IN AN INTERNATIONAL COMMERCIAL MEDIATION WITH MEXICANS

1. FRANK L. ACUFF, *HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD* (1993).
2. KARE ANDERSON, *GETTING WHAT YOU WANT: HOW TO REACH AGREEMENT AND RESOLVE CONFLICT ANY TIME* (1993).
3. JOHN C. CONDON & FATHI S. YOUSEF, *AN INTRODUCTION TO INTERCULTURAL COMMUNICATION* (1975).
4. KENNETH CUSHNER & RICHARD W. BRISLIN, *INTERCULTURAL INTERACTIONS: A PRACTICAL GUIDE* (2d ed. 1996).
5. G.O. FAURE & J.Z. RUBIN, *CULTURE AND NEGOTIATION* (1993).
6. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING*

AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

7. ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE: THE GETTING TO "YES" WORKBOOK* (1995).
8. ALVIN L. GOLDMAN, *SETTLING FOR MORE: MASTERING NEGOTIATING STRATEGIES AND TECHNIQUES* (1991).
9. TRENHOLME J. GRIFFIN & W. RUSSELL DAGGATT, *THE GLOBAL NEGOTIATOR: BUILDING STRONG BUSINESS RELATIONSHIPS ANYWHERE IN THE WORLD* (1990).
10. P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979).
11. GEERT HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (1991).
12. MICHAEL KUBLIN, *INTERNATIONAL NEGOTIATING: A PRIMER FOR AMERICAN BUSINESS PROFESSIONALS* (1995).
13. DR. CANDACE BANCROFT MCKINNISS & DR. ARTHUR NATELLA, JR., *BUSINESS IN MEXICO: MANAGERIAL BEHAVIOR, PROTOCOL, AND ETIQUETTE* (1994).
14. J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (2d ed. 1991).
15. ROBERT A. MORAN & WILLIAM G. STRIPP, *SUCCESSFUL INTERNATIONAL BUSINESS NEGOTIATIONS* (1991).
16. ROBERT T. MORAN & JEFFREY ABBOT, *NAFTA: MANAGING THE CULTURAL DIFFERENCES; HOW TO BENEFIT FROM THE ECONOMIC AND CULTURAL INTEGRATION OF NORTH AMERICA* (1994).
17. ROBERT A. PASTOR & JORGE G. CASTANEDA, *LIMITS TO FRIENDSHIP: THE UNITED STATES AND MEXICO* (1989).
18. FREDERICK B. PIKE, *UNITED STATES AND LATIN AMERICA: MYTHS AND STEREOTYPES OF NATURE AND CIVILIZATION* (1992).
19. ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* (1989).
20. DONALD B. SPARKS, *THE DYNAMICS OF EFFECTIVE NEGOTIATION: A WIN/WIN APPROACH TO GETTING WHAT YOU WANT* (2d ed. 1993).
21. O.C. "RUSS" TIRELLA & GARY D. BATES, *WIN-WIN NEGOTIATING: A PROFESSIONAL'S PLAYBOOK* (1993).
22. I. WILLIAM ZARTMAN & MAUREEN R. BERMAN, *THE PRACTICAL NEGOTIATOR* (1982).

23. GETTING TO THE TABLE: THE PROCESSES OF INTERNATIONAL PRENEGOTIATION (Janice Gross Stein ed., 1989).
24. INTERCULTURAL AND INTERNATIONAL COMMUNICATION (Fred L. Casmir ed., 1978).
25. INTERNATIONAL CONFLICT RESOLUTION (Ramesh Thakur ed., 1988).
26. INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES (Victor A. Kremenyuk ed., 1991).
27. MANAGING CULTURAL DIFFERENCES: HIGH PERFORMANCE STRATEGIES FOR A NEW WORLD OF BUSINESS (Philip R. Harris & Robert T. Moran eds., 3d ed. 1991).
28. NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES (Daniel Druckman ed., 1977).
29. THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS (I. William Zartman ed., 2d ed. 1978).
30. TOWARD INTERNATIONALISM: READINGS IN CROSS-CULTURAL COMMUNICATION (Elise C. Smith & Louise Fiber Luce eds., 1979).
31. *First Annual International Business Symposium: Comparative Perspectives on Private, Commercial Dispute Resolution: Canada, Mexico and the United States*, 7 FL. J. INT'L L. 362 (1992).

