

Mediating Cross-Cultural Power Imbalances—

Maintaining “Fairness” By Complying with Cultural Expectations

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Table of Contents

I.	<u>Introduction</u>	1
II.	<u>Definitions</u>	3
	A. Culture.....	3
	B. Power-Distance Index.....	4
	C. “Fairness”.....	4
III.	<u>Cultural Approaches to Mediating Power Imbalances</u>	7
	A. The Low PDI Approach	8
	B. The High PDI Approach.....	10
	C. Who’s Right?.....	11
IV.	<u>Analysis – Cultural Considerations for Mediating Cross-Cultural Power Imbalances</u>	12
	A. Problems Specific to the Low PDI Mediator	12
	B. Useful General Considerations	15
V.	<u>Conclusion</u>	16

I. Introduction

Mediation is becoming increasingly prevalent as a method of settling disputes in the United States, as well as internationally.¹ As such, the frequency of mediations that involve more than one culture is also increasing.² To date, most of the research on cross-cultural mediation is generalized,³ although some authors are beginning to write more specific articles.⁴ As markets continue to globalize, use of international mediation will almost certainly continue to increase, and the research on cross-cultural mediation will expand. This paper provides a

¹ Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in An International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT’L & COMP. L. REV. 1, 3 (1996).

² It is important to note that cross-cultural considerations are useful to more than international mediations. In a large, diverse country such as the United States, mediation will often involve more than one culture. As such, the discussion in this paper should prove useful to “domestic” mediations, as well as international mediations.

³ In that it makes general observations rather than specific recommendations. John Barkai, *What’s a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 46 (2008).

⁴ E.g. Barkai, *supra* note 3.

preliminary look at a particular aspect of culture, “Power-Distance,”⁵ and provides some guidance for mediators mediating intercultural power imbalances.

The focus of this paper is the effect a party’s Power-Distance Index (PDI) can have on mediation. After discussing the issue generally in Parts II and III, Part IV addresses some of the issues most likely to confront a mediator from a low PDI culture that is mediating a dispute involving one or more parties with a high PDI. It is the main thesis of this paper that in such a situation, the low PDI mediator should be very careful to respect the parties’ cultural approaches to power imbalance. Failure to observe the cultural dimensions of power distance in this situation is likely to produce an outcome that is inconsistent with the parties’ cultural expectations.⁶ Put another way, this paper argues that a mediator imposing his or her own cultural beliefs of “fairness” by trying to “level the playing field” in such a situation disregards the cultural background of the parties, which is culturally insensitive, ethnocentric, and “unfair.”

Part II begins this discussion by defining the core terms used throughout the paper. Part III then discusses the two opposite cultural extremes relating to power distance’s effect on mediation. Part IV analyzes the role of the mediator where parties have differing PDIs, and focuses on problems a low PDI mediator (such as from the United States) may face when one or more parties are from a high PDI culture. Part B of Section IV will suggest some general considerations that will help a mediator recognize and overcome those problems. Finally, Part V will provide a brief Conclusion.

⁵ See *infra*, Part II.B, for definition and discussion of power-distance.

⁶ This paper defines “fairness” as meeting the parties’ cultural expectations. See *infra*, part II.C, for discussion.

II. Definitions

A. Culture

There are many definitions of culture, and not all of them have the same meaning.⁷ For example, culture can be defined by one's nationality or ethnicity.⁸ But defining culture by nationality assumes that people from the same nation are of the same culture. For a nation such as the United States, this is simply too broad a statement because there are many cultures within the U.S. The same problem exists for defining culture by ethnicity. It is very possible that two people of the same ethnicity will have starkly different cultures—for example, a Chinese person who has lived his or her whole life in the United States will almost certainly have a different set of values than a Chinese person who has lived exclusively in China.

Cultural anthropologist Geert Hofstede has researched the topic of what defines culture extensively. In 1980, he published a study on cross-cultural differences that remains a leading work in the area.⁹ In this research, he recognized that there were many ways to define culture, and any particular culture had many aspects. He identified four basic characteristics of culture to use to compare particular characteristics of cultures, and he then scored countries in each category based on extensive research of their populations. This research, and the ranking of countries' characteristics, allows cross-cultural comparison at a general level. The four characteristics were: individualism / collectivism; masculinity / femininity; uncertainty avoidance; and power-distance index.¹⁰ This paper focuses on the power-distance index of countries and how that factor can influence mediations.

⁷ Barkai, *supra* note 3, at 45.

⁸ See GEERT HOFSTEDÉ & GERT JAN HOFSTEDÉ, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND, 11 (McGraw Hill, 2005).

⁹ GEERT HOFSTEDÉ, CULTURES CONSEQUENCES : INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES, (Sage Publications, 1980) (hereinafter HOFSTEDÉ 1980).

¹⁰ Long-term outlook is today the fifth characteristic, but was not in the original study. Barkai, *supra* note 3, at 62.

B. Power-Distance Index

Power-Distance refers to the extent to which a culture accepts differences in power among its members.¹¹ Members of a low PDI culture are generally uncomfortable with power being distributed unequally, and they tend to believe that all people are equal.¹² Such cultures are characterized by ease of upward mobility, and of a refusal to accept authority figures merely because they are authority.¹³ By contrast, high PDI cultures accept unequal power distribution within their culture, and embrace and expect it.¹⁴ These cultures tend to accept the decisions of figures of authority, and show much respect and reverence for those in higher positions of power.¹⁵ As will be discussed in Part IV, the PDI of a person will significantly effect how that person expects to be treated in mediation.

C. “Fairness”

In essence, this paper deals with the question of “what is fair?” This is a notoriously difficult question, and though individuals have written entire books seeking to answer it,¹⁶ there remains no clear answer. This is proven by the fact that what is considered fair depends on who is asked. This indicates that what is considered “fair” depends on one’s perception, which depends on that person’s culture and life experiences. Thus, there are many different understandings of what is “fair.”¹⁷ This paper does not argue that a fundamentally fair approach to mediating power imbalances exists. Instead, it argues that mediators should strive not to

¹¹ HOFSTEDE 1980, *supra* note 9, at 65.

¹² Barkai, *supra* note 3, at 63.

¹³ Barker, *supra* note 1, at 39-40.

¹⁴ Barkai, *supra* note 3, at 63.

¹⁵ See Barker, *supra* note 1, at 40-41 (discussing necessity of using proper titles to show respect in Mexico, a high PDI culture).

¹⁶ E.g. JOHN RAWLS, A THEORY OF JUSTICE (Belknap, 1971).

¹⁷ For example, a recent article in the Conflict Resolution Quarterly argues that even promoting social harmony is a cultural preference. See Morgan Briggs, *Mediation, Power, and Cultural Differences*, 20 CONFLICT RESOL. Q. 287 (2003). That article points to research that shows some cultures (albeit few) enjoy quarreling, and do not necessarily believe that social harmony should be preferred to quarrels. See *id.*

impose their own perceptions of fairness on members of other cultures that are not likely to share that understanding of fairness. The following paragraphs demonstrate that there is no fundamentally fair way to mediate a power imbalance, and conclude that the “fairest” approach is to simply not disrupt the disputants’ views of fairness.

First, many western researchers believe that power imbalances should be neutralized in order to achieve a fair mediation.¹⁸ While there is much debate on how a mediator can best achieve this, there is little debate over the basic premise that equal is better.¹⁹ This makes sense in a low PDI culture. For one, research has shown that members of a low PDI culture generally prefer to be involved in the decision making process, even if the ultimate decision is out of their hands.²⁰ Further, members of low PDI cultures tend to believe that everyone is equal, and one person should not have greater decision-making authority in a mediation than any other.²¹ It is unacceptable to members of this culture that one party’s interests be subrogated to the interests of a more powerful party.²² Thus, to be “fair” to a low PDI culture, the decision must generally involve both parties equally.

In direct contradiction to this, members of high PDI cultures tend to believe that power imbalance in society is natural, and even socially desirable.²³ This may be difficult for members

¹⁸ See e.g., Jordi Agusti-Panareda, *Power Imbalances in Mediation: Some Common Assumptions*, 59 DISP. RESOL. J. 24 (May/July 2004) (Arguing mediation can adequately deal with power imbalances) & Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 CONFLICT RESOL. Q. 135, 136 (Winter 2001) (“[t]here is general consensus that the most extreme cases of power imbalance should not be mediated at all . . .”).

¹⁹ See e.g. Gewurz, *supra* note 18, & Agusti-Panareda, *supra* note 18; but c.f. Briggs, *supra* note 17 (considering the possibility that even the desire to resolve conflicts is nothing more than culture).

²⁰ See Brockner et al., *Culture and Procedural Justice: The Influence of Power Distance on Reactions to Voice*, 37 J. EXPERIMENTAL & SOC. PSYCHOL. 300, 313 (2001).

²¹ Barkai, *supra* note 3, at 65-67.

²² See e.g., Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. Rev. 577, 605-606 (2008) (Discussing various articles that argue for or against facilitative or evaluative mediator styles, but implicitly agreeing that power imbalance is undesirable). See also Agusti-Panareda, *supra* note 18, & Gewurz, *supra* note 18.

²³ Barkai, *supra* note 3, at 63.

of a low PDI culture to understand. A very clear explanation of the argument for maintaining power imbalance between members of a society is contained in a basic theory of Confucianism.²⁴

Confucianism teaches that there are proper relationships between people, and there will be harmony in a society if all individuals maintain their role within each relationship they encounter.²⁵ The five fundamental relationships are: parent and child; husband and wife; elder sibling and junior sibling; elder friend and junior friend; and ruler and subject.²⁶ Each party to any of the five relationships has a proper role in that relationship,²⁷ and a duty to maintain that role.²⁸ For example, a subject has a duty of loyalty to the ruler, and the ruler has a duty in return of benevolence.²⁹ If each party to each relationship maintains their role, and performs it well, there will be social harmony *because* these various power imbalances are maintained.³⁰ One nuance that may help the low PDI person accept this as “fair,” is that every person will enter into various roles of each of these relationships as they progress through life—everyone experiences both sides of most of these relationships.³¹ Thus, to be “fair,” this culture would not require that

²⁴ This paper does not assume that people in China (or any other high PDI culture) are Confucianist. While there is evidence that Confucianism has historically had a great impact on the formation of Chinese culture, Confucianism is used here because it provides a neat explanation of the argument that social harmony is promoted by power imbalance.

²⁵ LIVIA KOHN, *DAOISM AND CHINESE CULTURE*, 13-14 (Cambridge, 2001). Further, “the notion of humanity as forming one body with the universe has been so widely accepted by the Chinese, in popular culture as well as elite culture, that it can very well be characterized as a general Chinese world view.” Tu Wei-Ming, *The Continuity of Being: Chinese Visions of Nature*, in J. BAIRD CALLICOTT, *NATURE IN ASIAN TRADITIONS OF THOUGHT*, 74 (1989).

²⁶ HUSTON SMITH, *THE WORLD’S RELIGIONS*, 175 (Harper-Collins, 1991). Note that the word “and” is used as joining the two sides of relationship as opposed to “to.” This is intentional, and represents the reciprocal nature of these relationships.

²⁷ This is known as “li,” in the social sense. Kohn, *supra* note 25, at 13. The duty that is probably most familiar to a westerner is filial piety, owed by a child to a parent. What is less frequently acknowledged in the west, however, is that the parent has a return duty of love.

²⁸ This duty is to society, not to the other party.

²⁹ This is the concept of *shu*, which means “mutuality,” and is “most important” to these relationships. Kohn, *supra* note 25, at 13. *See also* Smith, *supra* note 26, at 176.

³⁰ Kohn, *supra* note 25, at 13-14. It is worth restating that there is more to it than mere power distribution, and mutuality is crucial to achieving this harmony. *See generally id.* at 12-15; *see also* Smith, *supra* note 26, at 154-196 (giving a broad overview of Confucianism generally).

³¹ Kohn, *supra* note 25, at 13.

a decision involve both parties equally. Rather, to be fair, the decision must maintain the proper relationships between the parties.

If one culture believes that neutralizing a power imbalance in mediation is necessary to achieve fairness, and another culture believes that the power imbalance must be maintained to achieve fairness, then there is an irreconcilable difference of opinion. If two definitions of fairness are fundamentally at odds, then neither of them can be said to be intrinsically fair.³²

The final step is to acknowledge that if both definitions “fairness” are possible, and depend merely on who is asked, then what is fair is simply relevant to the parties. If fairness is relevant, there can be no “fundamental fairness.” Based on this line of reasoning, this paper argues in Part IV that a mediator should be concerned not with what is ultimately a fair result, but what is fair *to the parties*.³³ This will, in some situations, require that power imbalances be maintained.³⁴

III. Cultural Approaches to Mediating Power Imbalances

This section discusses generally how cultures with differing PDIs will respond to, or engage in, mediation. The countries used in this section as examples are the United States as the low PDI culture, and China and Mexico as the high PDI cultures. What is important to the analysis in this section is not what country a culture comes from, or with which culture a party identifies. While research shows that members of certain cultures can generally be expected to

³² The possibility that one culture is “wrong” should be acknowledged here. While that possibility is not beyond the realm of possibility, it is significantly beyond the scope of this paper. This paper stops here and assumes that neither culture is wrong, and both views of fairness are legitimate.

³³ This raises the immediate possibility that the result agreed to by the parties may seem unfair to the mediator. This issue is addressed below in Part IV.

³⁴ See Brockner et al., *supra* note 20, at 306 (finding that people respond least favorably when the treatment is at odds with their cultural expectation). This agrees with a definition that “fairness” is achieved by alignment with a person’s expectations. See *id.* at 301 (“It is when the lack of voice violates cultural norms that people respond unfavorably.”).

have higher or lower PDI scores,³⁵ what is important here is the relative PDI of the actual people involved.

A. The Low PDI Approach

Members of a low PDI culture generally consider everyone they interact with as equal to themselves.³⁶ This is evidenced in the United States by the fact that anyone can become President³⁷ and all men are created equal.³⁸ Similarly, there is a feeling that anyone can become the head of a company, and simply holding that title does not lead one to expect great recognition and reverence from others. This leads members of a low PDI culture to treat everyone the same, “from the president to the lowest ranking person at the meeting.”³⁹ Social research supports the generalization that people in the United States tend to perceive everyone in a company as equals. A study published in 2001 showed that members of the U.S. believed more strongly than members of a high PDI culture that their superiors should consult them before making a decision that would impact the company they both worked for.⁴⁰ While this study focused on the relationship between PDI and the extent to which one expected to be involved in decisions,⁴¹ the results clearly supported Hofstede’s PDI description that low PDI cultures do not place great reverence in those in higher positions of power.⁴²

Once it is recognized that members of a low PDI culture expect to be involved in decisions, it should come as no surprise that research done by members of low PDI cultures

³⁵ See generally HOFSTEDE 1980, *supra* note 9.

³⁶ Barkai, *supra* note 3, at 63.

³⁷ So long as they meet minimal qualifications set out in the U.S. Constitution.

³⁸ The Declaration of Independence makes this the *law* of the U.S.

³⁹ Barkai, *supra* note 3, at 65.

⁴⁰ Brockner et al., *supra* note 20, at 306.

⁴¹ This was called “voice” in the study. See *id.*

⁴² See *id.* at 313.

tends to agree that mediators should try to neutralize power imbalances.⁴³ Similarly, there appears to be a general consensus that mediation is not appropriate for resolving disputes between parties of greatly disparate power.⁴⁴ Even the article that argues that mediation is appropriate in high power imbalance disputes does so on the premise that mediation is capable of balancing the power imbalance just as well as arbitration or litigation.⁴⁵

These facts bring to light two important facts about low PDI cultures in mediation. First, the low PDI person will have more faith in the process if they feel their voice has been heard. Not only is this supported by the Brockner study,⁴⁶ but this was in fact the conclusion of a separate study published in 2000.⁴⁷ That study concluded that “those low in power distance consistently care more about how they are treated by authorities.”⁴⁸ In other words, being treated “fairly”⁴⁹ was an important factor for a low PDI person to feel they were treated fairly. Second, low PDI cultures generally believe that mediation must be done on an “equal playing field.” There is of course variation amongst mediators on this point, and the extent to which they try to neutralize the power imbalance will vary.⁵⁰ However, generalizing for the purposes of this paper, lower PDI people consider all parties to the mediation equal and are likely to try to neutralize power imbalances.

⁴³ See e.g. Gewurz, *supra* note 18, at 136 (“One contentious issue . . . is the question of mediation’s strengths and weaknesses in dealing with power imbalance”); see also

⁴⁴ *Id.*; but c.f. Agusti-Panareda, *supra* note 18 (arguing that mediation is effective at dealing with power imbalances to achieve a “fair” outcome).

⁴⁵ Agusti-Panareda, *supra* note 18, at 30.

⁴⁶ Which found that having a voice is more important to members of low PDI cultures. See Brockner et al., *supra* note 20.

⁴⁷ Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict across Cultures*, 6 PSYCHOL., PUBLIC POL’Y, & LAW 1138 (2000).

⁴⁸ *Id.* at 1146.

⁴⁹ This is likely to require being treated as an equal for a low PDI person.

⁵⁰ See Exon, *supra* note 22, at 605-607. It seems possible, and perhaps even likely, that the mediators that do not attempt to neutralize the power imbalance have a higher personal PDI than those that try to level the grounds. This topic does not appear to have been researched as of yet.

B. The High PDI Approach

In contrast, a high PDI culture will generally have a very different approach to power imbalances in mediation. China, for example, has a very low PDI compared to the United States.⁵¹ As might be expected, mediation is different in China than in the United States. The most important difference for the purposes of this paper is that Chinese people are not concerned with the two things Americans feel most strongly about—voice and a level playing field.⁵² First, the same empirical research that concluded that voice was important to low PDI persons found that voice was less important to high PDI persons.⁵³ It found that, in the corporate setting, Chinese employees responded more favorably⁵⁴ than low PDI persons that were not consulted by superiors on decisions.⁵⁵ This strongly coincides with the evidence that unequal power distribution is the norm in China.⁵⁶

Secondly, parties with a high PDI will not generally expect to be treated equally to others.⁵⁷ The higher status person will expect to be treated with dignity and respect,⁵⁸ and the lower status person will expect to be treated with benevolence.⁵⁹ This power imbalance embodies Confucian traditions⁶⁰ that the highest achievement is to rightly conduct oneself in

⁵¹ HOFSTEDE 1980, *supra* note 9.

⁵² See Brockner et al, *supra* note 20, at 302, and also Barker, *supra* note 1, at 40 (“Generally, high power distance countries are more comfortable with disparity of power and hierarchies in their societies.”).

⁵³ See Brockner et al. *supra* note 20, at 306.

⁵⁴ As measured by “organizational commitment.” *Id.*

⁵⁵ *Id.*

⁵⁶ HOFSTEDE 1980, *supra* note 9, and Barkai, *supra* note 3, at 63.

⁵⁷ HOFSTEDE 1980, *supra* note 9, and Barker, *supra* note 1, at 39-41.

⁵⁸ Barker, *supra* note 1, at 39-41 (Discussing the importance of using proper titles to show respect to Mexican negotiators).

⁵⁹ At least, that is, according to the Confucian model as discussed above in Part II.C. The law review articles that discuss mediation and PDI emphasize that high PDI cultures require respect for more senior members, but they fail to discuss what the lower status members require of their more senior counterparts. See e.g. Barkai, *supra* note 3, and Barker, *supra* note 1.

⁶⁰ As well as Legalist and Maoist philosophies. Kevin C. Clark, Note, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP DISP. RESOL. L.J. 117, 126-127 (2002).

every societal relationship.⁶¹ Thus, in high PDI cultures such as Mexico and China, power imbalances are “expected and desired.”⁶²

C. Who’s Right?

The above comparisons of cultural approaches to power imbalances in mediations are not intended to provide argument for or against either culture. An interesting article by Morgan Brigg makes a strong argument that dispute resolution itself is merely a cultural preference.⁶³ The first paragraph of Brigg’s article points out that mediation “subordinates conflict to harmony.”⁶⁴ In other words, western society prefers harmonious interactions amongst its members. But, as the article argues, this is simply a cultural preference.⁶⁵ To prove this, the article cites research that some societies enjoy fighting and quarreling.⁶⁶

This is relevant to the discussion above of the different approaches taken by cultures with different PDIs because it gives an extreme result of how deeply culture influences peoples’ beliefs of what is desirable, or “fair.” By recognizing that even the basic value of promoting harmony may be nothing more than a cultural preference, it becomes easier to recognize that an equal playing field is also simply a cultural preference. This paper therefore suggests that the savvy mediator will adjust their mediation strategies based on the cultures of the parties involved. This is important not only to achieve agreement,⁶⁷ but also to ensure that both parties keep faith in the mediation system.⁶⁸

⁶¹ This is the embodiment of Chun Tzu, or the gentleman, which is considered the highest order of man. Kohn, *supra* note 25, at 15.

⁶² Barkai, *supra* note 3, at 63.

⁶³ Brigg, *supra* note 17, at 289.

⁶⁴ *Id.* at 287.

⁶⁵ *Id.* at 287-289.

⁶⁶ *Id.* at 289.

⁶⁷ The author admits favoring harmony over conflict.

⁶⁸ This paper assumes mediation is useful, and mediators should work to maintain its integrity.

Finally, after taking the position that neither approach to PDI is inherently right or fair, this paper argues that the best result is to conform to the parties' expectations with regard to PDI.⁶⁹ The next section discusses problems that are likely to arise and possible solutions to those problems.

IV. Analysis – Cultural Considerations for Mediating Cross-Cultural Power Imbalances

A. Problems Specific to the Low PDI Mediator

This section raises some of the problems a low PDI mediator is likely to face when mediating a power imbalance between parties of varying PDIs. It should be noted that there are many possible combinations of PDIs, and parties' relative power, in this setting. With three parties (two disputants and a mediator) and an assessment of each party as either "high powered" or "low powered," there are eighteen possible combinations of PDIs and power levels of the parties. Instead of discussing each possible combination individually, this section raises general problems that are likely to arise and addresses what is probably the most difficult combination.

The first problem a mediator faces is determining the PDI and relative power of the parties involved. As a preliminary step, the culture of the parties can be discerned by asking the parties about their backgrounds. The mediator may then use the information received to match the parties with a country on Hofstede's PDI scale.⁷⁰ While this would be helpful, it is merely a preliminary step because there can be wide variation between individual members of any culture. Another possible way to determine relative PDIs of the parties would be for the mediator to actually give assessments to the participants. For example, the scenario used in the Brockner study could be given to the parties before the mediation in order to inform the mediator of the

⁶⁹ This is supported by the theory embodied in the Brockner study, that people respond less favorably when cultural norms are violated. See Brockner et al., *supra* note 20, at 301.

⁷⁰ As a more crude method, there is evidence that certain indicators of power distance include: latitude, population size, and wealth. Barker, *supra* note 1, at 39-40. Warmer, larger, poorer countries tend to have higher PDI scores, and vice versa. *Id.*

parties PDIs. Though these methods would be helpful and provide some guidance, the mediator should constantly watch for indicators of PDI, and continually adjust their approach accordingly.⁷¹

Another dilemma facing any mediator mediating where there is a power imbalance is whether to neutralize that power imbalance. While it is generally agreed that low PDI parties will expect some degree of neutralization, that neutralization is likely to be offensive to higher PDI disputants.⁷² In contrast, if the mediation involves high PDI cultures, it may be considered offensive to the parties to try to disrupt the social relationships.⁷³ This paper recommends simply that the mediator be aware of these issues, and adjust their actions to meet the parties expectations as best they can.

A particularly difficult situation arises where the parties reach an agreement that the mediator believes to be “unfair.” For example, if a low PDI mediator is mediating between two high PDI disputants of unequal status and power, and the disputants reach an agreement that seems to the mediator to favor the higher powered party, the low PDI mediator will likely be tempted to disrupt the agreement. In such a situation, it is crucial that the mediator consider the possibility that he or she considers the agreement unfair because of his or her culture. Many agreements reached by two high PDI parties may seem “unfair” to a low PDI mediator, but it is completely possible that the reason the mediator finds the agreement unfair is because the mediator’s cultural beliefs of fairness do not align with the parties. The recommendation in this scenario is not simply to approve an agreement that seems unfair if the parties have a higher PDI

⁷¹ One author compares making such cultural generalizations to using a weather report. Barkai, *supra* note 3, at 86-87. The weather report can be used to help plan one’s day, but it would be ridiculous to carry an umbrella if it isn’t raining, just because the weather report called for rain. *Id.*

⁷² See *supra*, parts III.A and III.B. Neutralizing power imbalances also necessarily raises questions of maintaining impartiality. See generally Exon, *supra* note 22. Because there is substantial literature debating this, it is not taken up here.

⁷³ See *supra*, parts II.C and III.B.

than the mediator,⁷⁴ but to consider the cultural context of the agreement in making the fairness assessment.

Finally, what is probably the most difficult situation may arise as follows—a low-powered, high PDI disputant is set against a high-powered, low PDI disputant. In this situation, the cross-cultural aspects of the dispute may be the most prevalent and important. The reason is that the low-powered high PDI party is likely to be taken advantage of by the high-powered low PDI party. This is so because (1) the high-powered low PDI party will probably try to get the best result for himself irrespective of the interests of the other party,⁷⁵ and (2) the low-powered high PDI party may feel it his or her social duty to maintain the power imbalance.⁷⁶ The resulting problem is that the high-powered low PDI person lacks the cultural understanding of mutuality that is central to the “fair” functioning of the high PDI culture.⁷⁷ Thus, this party does not believe they have a duty of any kind to the other party. Rather, this party’s low PDI culture encourages him or her to treat everyone as if they were equals. This cultural norm will likely be manifested as a belief that the other party “can defend himself.” This directly contradicts the cultural understanding of the high PDI party, who believes it is the higher-powered person’s duty to make a “fair” or benevolent decision, and it is his own duty to accept that decision. The result is, the high-powered low PDI person benefits because the cultural interaction in this situation favors the low PDI person—it enables him to get what he wants at the expense of the high PDI party.

The mediator confronted with this final situation has a difficult cross-cultural task at hand. How can the mediator achieve fairness, if fairness is meeting the expectations of both

⁷⁴ If, for example, the agreement would violate the law of the country in which the mediation occurs, it should not be approved, regardless of cultural justifications.

⁷⁵ Because the low PDI person will have no sense of duty to treat the other party with benevolence.

⁷⁶ This is the concept of *li* discussed above in the context of Confucianism.

⁷⁷ See *supra*, parts II.C and III.B.

parties? This paper proposes two possible solutions. First, and perhaps the better solution in this case, the mediator could have a frank discussion of cultural differences with the parties, and explain the cultural issues at play. That discussion will likely be extremely difficult, especially if the parties are not particularly receptive to other cultures. The problem is compounded by the fact that the parties the mediator is trying to educate on cross-cultural differences are in conflict with each other. This will tend to make them less understanding of any justification for the other's behavior. This would be a facilitative approach. A second option may be for the mediator to try to achieve a "fair" result by balancing the cultural differences in the result he or she advocates. This would be an evaluative approach, in that the mediator is evaluating what is a fair outcome. Without getting into the debate over which approach is better, it seems that both options would be viable, and the mediator is confronted with a very difficult situation. It is enough to say that meeting the expectations of both parties in this situation will be extremely difficult.

B. Useful General Considerations

Perhaps the most useful consideration for a cross-cultural mediator is awareness.⁷⁸ Learning the basics of cultural differences and working during the mediation to remain alert to those differences is an important strategy to successfully mediating cross-cultural power imbalances. Maintaining this awareness certainly requires the mediator to be aware of his or her own cultural biases. Through recognizing his or her own cultural vantage point, and learning the value of and reason behind other points of view, the mediator can more accurately recognize cultural impediments to successful mediation. By acknowledging the various aspects and

⁷⁸ See Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, 24 OHIO ST. J. DISP. RESOL. 535, 537 (2009). See also Barker, *supra* note 1, at 52, and Barkai, *supra* note 3, at 88.

influences of culture, the mediator can refrain from attributing his or her own culture to others and recognize there is usually more than one version of “fairness.”

In addition to this basic consideration, a number of simple suggestions are useful.⁷⁹ First, the mediator should try to “learn the cultural stereotypes” about the culture of the parties and the parties themselves.⁸⁰ This is merely a first step, though, and the mediator must “be flexible and understand that the parties will not fit neatly within a stereotype.”⁸¹ The mediator should “investigate the actual people involved” and adjust their approach accordingly.⁸²

Finally, the mediator must be willing to confront his or her own cultural programming. If it becomes evident that his or her culture does not coincide with the cultures of the dispute, the mediator must be able to refrain from interjecting his or her cultural values into the dispute before him or her. The mediator controls the process of the mediation, not the substance, and keeping his or her own culture out of the way will almost certainly facilitate the negotiations between the parties. And, it will help align the result with the cultural expectations of the parties, not those of the mediator, which will make the entire mediation fairer to the parties.

V. Conclusion

The purpose of this paper is first and foremost to raise awareness of how PDI can influence mediators and mediations. If it has refrained from arguing for any “right” answer to any of the questions raised, and has instead attempted to show that there is almost always more than one “fair” answer. In raising cultural awareness, the central theme has been to show that “fairness” depends almost entirely on perception, and maintaining parties’ cultural expectations regarding power imbalances is the fairest result in this context. Finally, this paper has tried to

⁷⁹ Barkai, *supra* note 3, at 87-89.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

show that cross-cultural issues are extremely fluid, because every individual is unique regardless of the similarities they may share with their culture. Therefore, the most effective mediators will consciously anticipate the cross-cultural issues that will arise, but remain flexible to maneuver through them.