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CROSSING BORDERS INTO NEW ETHICAL TERRITORY: ETHICAL CHALLENGES WHEN MEDIATING CROSS-CULTURALLY

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I. INTRODUCTION

No mediator wants to be charged with cultural imperialism when mediating private international disputes. And yet, mediators run this risk whenever the mediator resists doing what the parties want done. This cultural challenge is different than what mediators customarily encounter. Instead of the gap arising between the parties (See Graph

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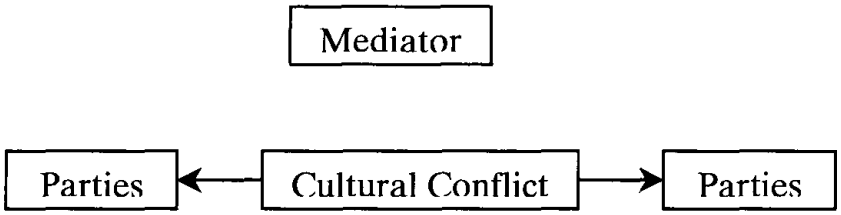
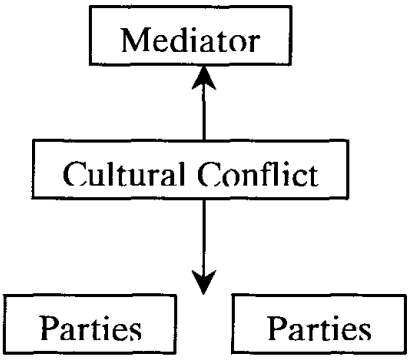
1), the gap is between the mediator and the parties (See Graph 2). In this article, I will consider how a mediator might ethically bridge mediator-parties gaps while generally avoiding the harsh charge of cultural imperialism. Through a hypothetical in which a mediator's values clash with the values of the parties, I will develop a four step approach for international mediators.

Graph 1



Graph 2



I found myself investigating this subject thanks to the persuasive powers of Ellen Waldman who convinced me to prepare a commentary on a difficult hypothetical dilemma for her upcoming book on mediation ethics. She assured me that it would be a fascinating exercise and would not take too long. Well, she was right about it being fascinating. But, it has been a lengthy and tumultuous undertaking. In this article, I will describe the ups and downs of the journey, summarize the approach that emerged from the trip, and then apply the approach to some familiar cultural conflicts between mediators and participants.

II. THE CHALLENGE FOR THE MEDIATOR: A CROSS-CULTURAL DISPUTE

This dispute is a distressing one with an acute cultural overlay. And, despite the obvious unfairness to one party, at least from a

Westernized point-of-view, it was not an easy dilemma to resolve. Here is the dispute and the challenge for the mediator:

A Muslim woman asked her Imam at her Mosque for advice on obtaining a divorce from her husband. As part of the process of counseling, the Imam met with both spouses and advised them about the principles of Islamic law that they should follow in dissolving their marriage contract or nikkah. Both spouses want to resolve their conflicts Islamically and in accordance with Quranic principles.

Their Imam advised them that a husband can ask for and obtain a divorce for any reason (talaq). However, he is obliged to support his children until they reach the age of majority and provide for the wife's needs for a "waiting period" of seclusion, if the wife remains in the husband's home to observe the waiting period (the iddath, which lasts three menstrual cycles to check that the wife is not pregnant). In addition he is obliged to pay his wife the amount stipulated in the marriage contract (the mahr) that she must receive if the marriage ends. The marriage contract provided for $40,000.

A wife cannot receive a divorce without her husband's consent. If she initiates the divorce, she forfeits her right to the mahr although the obligation of the husband to support his children continues until each child reaches eighteen years old.

The Wife is pressing for divorce and the Husband is resisting giving consent. The Wife, who has little means to support herself, is deeply unhappy in the relationship, especially since her Husband took a second wife, which he is entitled to do Islamically. The Imam advised them that the husband cannot force his wife to continue with him and should not unreasonably withhold his consent—but that giving consent would release him from any obligation to pay his wife the mahr.

The Wife, who is distraught and humiliated, says that she wants permission for an Islamic divorce from her Husband in order to move on with her life. The Husband says that he will not grant her request unless she forfeits her mahr and any other financial support for herself and agrees to give up custody of each child at puberty. The Husband insists that he wants custody of their six-year-old son when he turns seven years old. He wants custody of their thirteen-year-old daughter when she turns fifteen years old. When reaching the stated age, the Husband told the Wife that the child would be taken into the care of the Husband's female relatives.

At the mediation, the Wife capitulates and says she will waive all rights to financial support and agree to his requests regarding the transfer of custody at the given ages so long as the Husband grants her

request for a divorce. Having extracted these concessions, the Husband seems pacified. The Wife and Husband are heading toward this agreement. Such an agreement would be broadly supportable under Islamic law principles and within the norms of the Iranian community in which the parties live.[1] What should a western mediator do?

For the mediator, this is a cross-cultural conflict with a twist.[2] Instead of the cultural conflict arising between the parties, the conflict arises between the mediator and the parties. It is in this peculiar context that this hypothetical presents one overarching and challenging feature: The parties agree to a Rule that when applied by these parties results in a mediated agreement that is unfair based on the Mediator's westernized values and may even violate western domestic law.

Consider the way the Husband's power over granting a divorce was being used to extort a one-sided agreement, at least from a westernized point-of-view. A western Mediator would likely view such an agreement as grossly unfair where the unemployed Mother waives needed financial support and relinquishes rights to her children in return for the Husband consenting to the divorce. Under westernized common law and statutory laws, such a one-sided agreement also is likely to be invalid and unenforceable due to the unclean hands of the withholding Husband and the duress suffered by the Mother who wants the divorce.[3]

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1. This hypothetical stems from a forthcoming book by Ellen Waldman; in the book there is a second disturbing feature not analyzed here. The Wife seems to be a victim of psychological abuse, at least when viewed through a mediator's Western lens. PRACTICAL ETHICS FOR MEDIATORS (Ellen Waldman ed., Jossey-Bass, forthcoming 2008). However, after researching the techniques that mediators use to screen for abuse as well as ancient and modern Islamic marriage practices, I realized that analyzing this additional cultural issue would lengthen considerably the paper without further illuminating the methodology.

2. Let me orient this discussion by placing it into the broader context of bridging cultural differences in mediations. Mediators more typically face cultural conflicts between the disputing parties or their representatives, and they employ various approaches to help participants bridge any cultural gaps. *See, e.g.*, HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS 173–81 (2004) (Five Steps: Develop Cultural Framework, Understand Own Culture, Learn Other Culture, Be Open Minded, and Bridge Gap). In this article, the five steps are reduced to three (Know Own Culture, Learn Other Culture, and Bridge Gap) with a new fourth step added on (Assessing Whether to Withdraw). In contrast with a mediation that fails due to an impasse between the parties and the parties terminating the mediation, the conflict here is between the mediator and the parties and the mediator is weighing whether to withdraw.

3. *See* Lisa Zornberg, *Beyond the Constitution: Is the New York* Get *Legislation Good Law?*, 15 PACE L. REV. 703, 726–27 (1995) (describing New York cases that held agreements void when the husband withheld permission for a Jewish divorce (withheld giving a *get*) in order to extort unduly favorable terms); *see generally* Nancy A. Welsh, *The*

This culturally shaped family mediation starkly raises an old issue in new packaging: Should a mediator withdraw when the mediator encounters a rule, practice, or emerging agreement that the mediator thinks is unfair? In this dispute, the new packaging entails an objectionable foreign cultural rule and its impact on the resulting mediated agreement. Without this cultural overlay shaping the parties' behavior and resulting agreement, I suspect that many western mediators would withdraw from the mediation, as will be explored later.[4] With the cultural overlay, however, it is less clear what a mediator might do. In analyzing what a mediator might do, I will suggest a four step approach for proceeding ethically and for avoiding the charge of cultural imperialism.

III. BRIDGING CULTURAL CONFLICTS BETWEEN MEDIATOR AND PARTIES: A METHODOLOGY

Cross-cultural mediators live under the constant threat of cultural imperialism charges. Mediators do not want to be guilty of parochial ignorance and arrogance when objecting to what might be a cultural practice. Mediators want to avoid claiming that they are right and the parties wrong. In order to reduce this risk, cross-cultural mediators should approach mediations with a healthy respect for cultural pluralism and a clear understanding of the other cultural practice. This sequence of four initiatives is designed to guide mediators along this pathway.

First, a cross-cultural mediator should understand his or her own cultural practices.

Second, the mediator should research the other cultural practice to be sure that the mediator understands its terms and its rationale.

Third, the mediator should try to bridge any cultural gap between the mediator and parties by posing questions to the parties to be sure that the parties are making informed and voluntary decisions free of coercion.

Fourth, if the mediator cannot bridge the gap and finds the practice to be fundamentally abhorrent, then, as a last resort, the mediator should consider withdrawing if the mediator concludes that the practice violates an internationally recognized norm or compromises the mediator's impartiality or the mediation process.

Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 HARV. NEGOT. L. REV. 1, 59–78 (2001) (summarizing legal approaches for overturning settlement agreements).

4. *See infra* Part III.A.

A. Understand Own Culture

A mediator inescapably views a dispute through his or her culturally shaped lens, whether conscious of it or not. And, a mediator must be self-aware of this perspective in order to distinguish universal behavior and other cultural behavior from the mediator's own cultural views when reading a dispute. Developing self-awareness requires doing some research. I have found it helpful to read articles and books that describe cultural categories like forms of communicating in different cultures and describe American culture for foreigners (and it is especially fascinating to read how others view your own culture). When it comes to mediator ethics in the United States, the Model Standards of Conduct for Mediators[5] provide the primary cultural lens through which mediators see their disputes. So, I began this journey by re-acquainting myself with the Model Standards and especially the values that they reflect.

These ethical standards emerged from a long standing and heated debate over whether a mediator ought to be responsible for the resulting agreement.[6] During the early development of the modern field of mediation, Larry Susskind argued for broad responsibility, at least for environmental disputes. He thought that the mediator among other goals "ought to accept responsibility for *ensuring*... (2) that agreements are as fair and stable as possible, and (3) that agreements reached... set constructive precedents."[7] However, Susskind realized it may be "difficult to retain the appearance of neutrality and the trust of the active parties."[8] In the same journal, Josh Stulberg replied that compromising the commitment to neutrality compromises the principled basis for the mediation service. The guiding principle of neutrality clarifies what parties can expect from a mediator and gives parties confidence to share sensitive information and to trust mediator advice. He then highlighted some of the daunting challenges faced by a mediator who tries to implement Susskind's activist vision for an environmental mediator.[9]

This fundamental debate was resolved formally when the Model Standards of Conduct for Mediators in the United States vested

5. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).

6. *See* Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 4–6 (1981).

7. *Id.* at 18 (emphasis added).

8. *Id.* at 47.

9. *See* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86–88, 110–16 (1981).

mediators with the responsibility of ensuring a fair process, not a fair result, under the assumption that a fair process will result in a fair result from the point-of-view of the parties.[10] The Model Standards implements this vision by establishing as the primary obligation of mediators to tenaciously preserve party self-determination as to process and outcome.[11] The Model Standards define self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[12] In support of this obligation, the Standards further oblige mediators to conduct an impartial[13] and quality process that includes promoting procedural fairness and party competency.[14] In short, as long as mediators follow these ethical standards, the parties can arrive at whatever result that they choose to adopt.

These principles reflect the values of the mediation culture in the United States.[15] These principles give mediators a rationale for avoiding becoming entangled in judging the fairness of the result. However, these principles of party self-determination, impartiality, and quality process still offer much for mediators to ponder and evaluate, as this hypothetical illustrates.

In view of these principles and without the cultural overlay, the mediator might withdraw from the mediation. The one-sided agreement is unlikely to be viewed as an agreement that the wife entered into voluntarily, consistent with the principle of party self-

10. However, the underlying debate over whether mediators should assume more than process responsibility has persisted. *See generally* James R. Coben, *Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 66, 78–84 (2004) (providing an excellent summary of the debate, relevant literature, and open questions).

11. Standard I provides that "A mediator shall conduct a mediation based on the principle of party self-determination." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I (2005).

12. *Id.* Professor Coben expanded this brief definition of self-determination based on a number of practice principles that were summarized by Professor Nancy Welsh as follows:

> [T]he parties are at the center of the mediation process; the parties are the principal actors and creators within the process; the parties actively and directly participate in the communication and negotiation; the parties choose and control the substantive norms to guide their decision-making; the parties create the options for settlement; and the parties control whether or not to settle.

Coben, *supra* note 10, at 71.

13. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II.

14. *Id.* Standard VI.

15. *But see infra* Part IV (comparing American principles with the principles found in the codes of ethics in other countries).

determination.[16] The agreement is so problematic that it would likely be held invalid and unenforceable because of the unequal bargaining relationship.[17] This westernized view of the emerging agreement may also poison the mediator's view of the Husband, and as a result, compromise the mediator's ability to maintain his or her impartiality.[18] Further, the combination of these two possibilities may make it difficult for the mediator to meet his or her obligation to conduct a quality process.[19] In the face of these types of problems, the Model Standards instruct the mediator to "take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation."[20]

Frequently, nonmediators object to the Model Rule's focus on process. They are concerned about the mediation process giving its imprimatur to an unfair outcome. Are there any circumstances, I am often asked, when a mediator might worry about substantive fairness of an outcome? It turns out that for family cases like this one a different approach is encouraged. The Model Standards of Practice for Family and Divorce Mediation adopted by the ABA[21] require a mediator to "consider suspending or terminating the mediation" when the mediator "reasonably believes" the agreement to be "unconscionable" or when parties are using the mediation to "further illegal conduct" or to "gain an unfair advantage."[22]

Therefore, both of these model ethical codes provide ample justifications for a mediator to withdraw. But, in a dispute laden with non-westernized practices and behavior, the mediator should take additional steps before deciding whether to withdraw. The mediator needs to research the other culture and try to bridge any cultural gaps, if the mediator wants to avoid the charge of cultural imperialism.

B. Research Other Culture

A mediator cannot help bridge a cultural gap without learning and understanding the cultural practices of the parties. Researching culture is not easy to do, as anyone who has tried knows only too well.

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16. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.

17. *See id.* Standard I, VI (discussing some of the reasons why the one-sided agreement would likely be held invalid and unenforceable).

18. *Id.* Standard II.

19. *Id.* Standard VI.

20. *Id.*

21. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2001).

22. *Id.* Standard XI.

In the face of sometimes difficult to find materials that may reveal amorphous, as well as conflicting information, the mediator needs to become acquainted with the terms of a practice as well as its rationale. Learning about someone else's culture can be a treacherous inquiry because the mediator is trying to understand a practice that not only might be contrary to his or her own, but also abhorrent—based on the mediator's cultural upbringing. This inquiry is vital if the mediator wants to avoid the charges of ethnocentrism and cultural imperialism. The inquiry can be an uncomfortable, if not repulsive, one however, because the mediator must be open to the possibility that what appears, in abstract, to be an offensive practice, may turn out to be tolerable when understood in context.[23]

For example, it may feel offensive to be open to investigating a practice of arranged marriages involving payment, a practice apparently condemned in the United Nations Report of the Committee on the Elimination of Discrimination Against Women,[24] but you might find it helpful to learn a justification for the payment practice as explained by one commentator: "The payment of *mahr* (dower), which involves payment or preferment, is a central feature of the marriage contract in Islam and, as a measure intended to safeguard [a woman's] economic position after marriage, [the mahr is offered to the bride]."[25]

It also may feel repugnant to be open to investigating a practice that gives men a right to a greater share of property, a practice also apparently condemned in the Convention on the Elimination of All Forms of Discrimination Against Women.[26] But you might find it helpful to learn how it is justified, as the same commentator explained that in Islam, men have financial obligations to others that are not shared with women so men need a disproportionate amount of assets to meet those other obligations.

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23. *See generally* Bharathi Anandhi Venkatraman, Comment, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the* Shari'a *and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 2000–03, 2006–07 (1995) (discussing attempts to understand cultural bias in light of the Women's Convention).

24. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, REPORT OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN para. 44 (2006). This Report was prepared to guide interpretations of the Convention on the Elimination of All Forms of Discrimination against Women. *Id.* para. 247.

25. Venkatraman, *supra* note 23, at 2001 (first alteration in original) (citations and internal quotation marks omitted).

26. Convention on the Elimination of All Forms of Discrimination Against Women art. 16(h), Dec. 18, 1979, 1249 U.N.T.S. 13 (entered in to force Sept. 13, 1981) [hereinafter CEDAW].

Of course, neither of these explanations provides the final word. These explanations offer leads that can give the mediator a line of challenging research to pursue.

For the hypothetical, a mediator would need to learn the cultural explanation for a practice that confers on the Husband the exclusive power over approving a divorce and therefore the potential to extract a one-sided divorce settlement.

Although my preliminary research uncovered some insights, more research is needed in the actual case.[27] The Egyptian government explained that:

> [W]omen are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.[28]

C. Bridge Any Cultural Gap

With some understanding of the cultural context of the practice, the mediator should next proceed with a sophisticated party self-determination inquiry. As a threshold matter, I assume that the parties have legal counsel. I also assume that the parties were encouraged to seek counsel from a trusted family member or friend so that each party has the benefit of a support system that each party

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27. For example, an academic researcher learned that because the Husband pays a marriage gift called the *mahr* to the bride as well as maintenance, including food, clothing, and shelter, for the duration of the marriage and for a period of time after any divorce, the wife cannot divorce the husband without the husband's permission. *See* Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 20–23 (1982).

28. CEDAW, *supra* note 26, Egypt's Reservations to art. 16, *available at* http://www2.ohchr.org/english/bodies/ratification/8.htm. Article 16 addresses equality of men and women in matters relating to marriage, family relations, and dissolution of marriage. *Id.*

trusts.

The mediator might give the Wife and Husband an opportunity to express their reactions to the Rule and to consider its rationale, benefits, and drawbacks. Then, the mediator might follow-up with clarifying and reality-testing questions. This is not a simple inquiry, giving rise to the old adage that it can be easier to describe what to do than to actually do it. But, it is an essential inquiry if mediators want to seriously pursue party-self-determination. One of two basic scenarios might emerge for the mediator to pursue: the Wife accepts the Rule or the Wife objects to it.

Under the first scenario, if the Wife understands and accepts the Rule despite the disadvantageous trade-offs that it can produce when dissolving the marriage, at least she is making an informed choice to follow the Rule and live with its consequences. Formal consent under these circumstances, however, should not end the inquiry as succinctly emphasized by one insightful commentator on culture and international human rights. She explained that the most difficult situation is when

> those who do it and those who endure it offer no objection. . . . But this surely does not mean that nothing may be done. First, there is an abiding suspicion that things are not what they seem in such examples. Are they *really* just as happy? Does the fact that they have no other way of life open to them make a difference? In short, a good deal more information is needed about the conditions those persons face and the sources of our knowledge about those conditions. Second, intervention comes in degrees, not wholesale. . . . [Look for ways to] increase their range of choice . . . . It is one thing to embrace a way of life when none other is available, an entirely different one to cling to it when alternatives present themselves.[29]

The mediator can test consent by tempting the Wife with options. It turns out that the Wife has an alternative if the mediation is taking place in New York State. There is a state law designed to diminish the ability of a husband to extort an unduly favorable settlement under a religious rule that gives the power to divorce to the husband.[30] The

29. Kory Sorrell, *Cultural Pluralism and International Rights*, 10 TULSA J. COMP. & INT'L L. 369, 408–09 (2003).

30. N.Y. DOM. REL. LAW § 253 (McKinney 1999). Although the law was designed to address the exploitive withholding of the *get* by husbands in Jewish divorces, the legislation was drafted neutrally so that it would apply in a similar situation in other religions. *Id.* Even though this law is constitutionally suspect and controversial, it seems to have been effective in reducing the unequal bargaining positions of the parties. Zornberg, *supra* note 3, at 756–62.

mediator might inquire whether the parties or attorneys are aware of the applicable law. (How a mediator might delicately initiate this inquiry is beyond the scope of this article.) Through their attorneys, the parties would learn that New York law authorizes a court to consider whether the Husband exploited a barrier to remarriage when the court determines the distribution of marital property and appropriate maintenance.[31] Therefore, the Wife would have an option for ameliorating the influence of the Rule and a choice to make. She could agree to the onerous terms, or to turn to or threaten to turn to the secular courts to reduce her unequal bargaining power. This may not seem like a real choice for someone who wants to preserve her standing in her own religious community. But it gives the Wife an opportunity to choose which value is more important to her—preserving her standing in her community or improving the terms of divorce.

I found this part of the journey to be unsettling because how easy it can be to justify a self-determination result: The parties knowingly selected the rule and chose to follow it. Despite the alternative offered by secular courts, the Wife would probably pursue the religious divorce. The substantive result may be unfair by westernized standards, but not necessarily unfair based on the values adopted by the Wife.

I was unexpectedly aided in my journey by a visit to my office by a bright, articulate, reflective, and extremely distraught female law student. She wanted to talk about her separation and divorce. Her arranged marriage was a disaster; after less than a year, she had moved out the day before. As a practicing Muslim woman born in the U.S. who is determined to live within the customs and practices of her religion, she was deeply upset. To proceed with the divorce would make it difficult to remarry within her Muslim community and to continue with the marriage would make her life painfully miserable—a reality that even her parents recognized. As she told me her choice, I was starkly reminded about our limited role as mediators who persevere to honor the principle of party self-determination. All mediators can do is conduct a process where the parties can make an informed choice, regardless of how personally painful the choice may be to one of the parties and how unfair the result may seem to the mediator.

Under the second scenario, if the Wife, a dedicated member of her religious community, objects to the Rule and its consequences,

31. N.Y. DOM. REL. LAW § 236B(5)(h) (McKinney Supp. 2008).

then the conflicting values between the mediator and one of the parties disappear. The mediator can no longer be accused of imposing his or her values on the parties when those values are being asserted by one of the parties. The cultural values now coincide between the mediator and the Wife, giving the mediator a shield from the charge of cultural imperialism,[32] although not from the charge of partiality.[33] The mediator no longer needs to bridge a cultural conflict between the mediator and the parties. The mediator can now return to the familiar territory of trying to bridge a gap between the parties.

D. Assess Whether to Withdraw

Even in the face of the parties consent or apparent consent, the mediator may still find the practice so personally abhorrent that the mediator may want to withdraw. But, how can a mediator withdraw and avoid the charge of cultural imperialism?

1. Assess Whether Cultural Practice Violates Internationally Recognized Norms

I next pursued the grand inquiry in cultural studies—the search for universal norms, against which the mediator could judge the practice. How to identify these norms is the subject of numerous articles, books, and much debate.[34] Rather than exploring the challenges and highly contested nuances of agreeing on universal norms, I attempted a shortcut, although one with its own hazards, by researching ratified international treaties as a source of norms. Recalling that ratification means approval in accordance with a country's domestic political process, a ratified treaty arguably reflects the values of the ratifying country, shared values of the ratifying countries, or universal values if widely adopted. Then, if the practice, in this case the Rule, violates an international treaty ratified by the parties' country or countries with similar cultures, the mediator could defend against the charge of imperialism by withdrawing, not on the basis of a violation of his or her own cultural norms, but based on the violation of an independently recognized norm.

With this promising approach in mind, I started researching international treaties, reading articles on international human rights,

32. *See* Sorrell, *supra* note 29, at 412–13.

33. *See infra* Part III.D.2 (considering how to handle threats to impartiality).

34. *See* Sorrell, *supra* note 29, at 370–71; Guyora Binder, Comment, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 211 (1999).

and consulting with human rights professors. I quickly learned about two international treaties with surprisingly relevant and specific provisions.

First, I read the Universal Declaration of Human Rights that was adopted by the United Nations General Assembly and learned that even Iran among other Muslim countries voted for it.[35] And it gets even better because Article 16 (1) is right on point. It provides that, "[t]hey [men and women] are entitled to equal rights as to marriage, during marriage and *at its dissolution*."[36] But, then this pathway turned bumpy. The Universal Declaration turns out not to be a treaty ratified by member nations. It is more of an enabling legislation.[37] Fortunately, it led to an impressive treaty on point.

In the Convention on the Elimination of All Forms of Discrimination Against Women, Article 16 provides that the "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . (c) The same rights and responsibilities during marriage and at its dissolution."[38] This treaty was ratified by one hundred and eighty-five countries.[39] Now, that is an impressive level of agreement—except, unfortunately, Iran did not ratify the treaty nor did the United States![40] Not ready to give up, I next checked to see if any countries in Iran's neighborhood had ratified the treaty and discovered that many did, including Egypt, Iraq, Jordon, Lebanon, Saudi Arabia, and Syria.[41] New hope! But then I noticed these small footnotes called reservations and quickly secured copies of each footnote. Each of these countries either generally or specifically opted out of Article 16(c). The reservations opted out, for example, when the terms violated "norms of Islamic Law" (Saudi Arabia)[42] or were

35. United Nations Dep't of Pub. Info., *The Universal Declaration of Human Rights: DPI Press Kit*, Dec. 1997, U.N. Doc. DPI/1937/A, *available at* http://www.unhchr.ch/udhr/miscinfo/carta.htm.

36. Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (emphasis added).

37. *See* Nausheen Hassan, Note, *U.S. Involvement in the Sanctions Against Iraq: A Potential Basis for a Legal Claim by Iraqi Women?*, 11 S. CAL. REV. L. & WOMEN'S STUD. 189, 211 (2001).

38. CEDAW, *supra* note 26, art. 16(c).

39. *See* Office of the United Nations High Commissioner for Human Rights, http://www2.ohchr.org/english/bodies/ratification/8.htm (last updated Feb. 15, 2008).

40. *Id.*

41. *Id.*

42. CEDAW, *supra* note 26, Saudi Arabia's Reservations to art. 16(c).

"incompatible with the provisions of the Islamic Shariah" (Syria).[43]

This promising pathway failed. It did not reveal universal norms, but instead, revealed unambiguously the lack of universal agreement for the principle of equality in the dissolution of marriage. This inquiry failed to discover a principled source of internationally recognized standards that could be the basis for withdrawing from the mediation.

2. Assess Whether Still Impartial or Conducting a Quality Process

At last, I reached the final step in this journey. If the Rule does not violate a universal standard, is there any other principled basis for withdrawing? A mediator might withdraw under Standard II of the United States Model Code if the mediator could no longer be impartial because the mediation is being conducted under a Rule that violates the mediator's personal values.[44] Threats to impartiality arise anytime the mediator becomes conscious of something unfair in the mediation that is impacting on one of the parties.[45] This is familiar territory for mediators, and mediators know to withdraw when the mediator thinks he or she can no longer be evenhanded. The mediator also might withdraw under Standard VI if the mediator feels that this unfair Rule compromises the quality of the mediation process.[46] Of course, if the mediator's decision to withdraw is based on his or her own cultural value, the decision would expose the mediator to the ultimate charge of cultural imperialism—the charge that the mediator is claiming that "my cultural value is better than your cultural value." However, the mediator would reach this result as a last resort after respectfully and diligently researching the other cultural practice and confronting fully his or her own value to determine whether the implicated value is so fundamental that the mediator could not mediate a case in which it is violated.

Despite these concerns, I suspect that many westernized mediators would not withdraw. Instead, they would likely rely on the common refrain that "it is the parties' process"—as I and others have often declared—"so we should defer to their choice." Nevertheless, in this particular case, I would likely withdraw, so I thought.

Withdrawal was the direction I was going until my research assistant innocently asked what would happen next. "Would what

43. *Id.* Syria's Reservations to art. 16(c).
44. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005).
45. *See id.*
46. *Id.* Standard VI.

would happen after withdrawal be better than the mediator continuing," she inquired. Yes. She queried what their BATNA[47] would be if the negotiation in the mediation was prematurely halted.

To work through her inquiry, I ventured down two different pathways. I first wondered whether the BATNA would provide a fair (or at least a fairer) process. If it would, a decision to withdraw would seem easy to make. The parties would be relegated to a better process, and the Wife would have the opportunity to possibly improve her situation.

The second pathway entailed the opposite inquiry—whether the BATNA would not likely lead to a better process. If it would not, a decision to withdraw would negatively impact on the disadvantaged party. If the mediator withdraws, the wife would lose access to help by a third party with expertise in dispute resolution, a third party who might be culturally sensitive to this unequal power dynamic, and who might be able to help the parents negotiate further details within the parameters of the agreement. A mediator who continues with the mediation might be able to help the parties negotiate valuable details that might benefit the children including addressing such issues as visitation by the non-custodial parent and education plans for the children.

This was the most difficult decision moment for me. After trying to research the wife's BATNA[48] and much cogitating, I thought I still would withdraw if faced with this dilemma. I would not want the mediation process (or me) to be associated with such an unfair mediated result. I would want to avoid conferring the imprimatur of mediation on a process and result that violated such a core value of

47. BATNA (best alternative to a negotiated agreement) is a term coined in the widely-used book, *Getting to Yes*. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–106 (Bruce Patton ed., 2d ed., Penguin Books 1991) (1981) (focusing on what happens when the parties leave the negotiating table).

48. I realized that I needed more information before I could research the parties' BATNAs. It would have been helpful to know the name of the parties' local community and the Mosque of the Mullah because I learned that Islamic religious dispute resolution is not yet well developed in the United States. It seems that the current processes rely heavily on private conciliation and decision making by local Mullahs and Imams of each Mosque, although a more formal private arbitration process, shaped by diverse religious and secular views, is emerging, especially in Canada. *See* Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 440, 464–65 (2006); Nicholas Pengelley, *Faith-Based Arbitration in Ontario*, 9 VINDOBONA J. INT'L COM. L. & ARB. 111, 114–15 (2005); Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, HIIRAAN ONLINE, Dec. 21, 2005, http://www.hiiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm.

fairness—even when my definition of fairness was shaped by distinctively westernized values. This is what I had concluded in two presentations of the paper and in what I thought was my final draft. Thanks to challenges by colleagues and friends, however, I discovered that I was so determined to withdraw that I had become blinded to the significant benefits of continuing for the parties. I am now inclined to continue to mediate.[49] If both parties want to continue with me and the mediation, I think I should try to mediate the best agreement which the parties are willing to enter into so long as the agreement is not illegal.

When conferring with others, I was repeatedly asked why these parties would hire a western, non-Muslim mediator. I suspect many parties would not. They would probably prefer a Muslim mediator, and they would have many choices these days. The next section considers less extreme and more likely cultural conflicts that may arise in the routine practice of private international mediation.

IV. APPLYING THE METHODOLOGY TO ORDINARY CROSS-CULTURAL DISPUTES

A conflict between a core cultural value of a mediator and the culture of the participants is surely rare, but less fundamental conflicts can more frequently arise. This section will illustrate how the approach outlined in this article can help a mediator in more ordinary commercial cases avoid the charge of cultural imperialism.

Conflicts may arise in a variety of ways. Here are several examples. A conflict may arise when parties request a western mediator to switch roles to arbitrate, and the mediator is reluctant to do so. A conflict may also arise when a western mediator prefers a detailed settlement agreement and the parties are ready to settle based on general principles. And a conflict may arise when a western mediator does not hear a clear agreement on each term (low context communicator), and the parties think that they have reached an agreement (high context communicators).

Let us examine how two of these examples may arise in a routine

49. One non-ADR colleague, Fabio Arcila, with a deep commitment to human rights asked: "Is there ever an occasion when the culture is so foreign to you that you will not be able to achieve sufficient cultural competence and therefore should decline the appointment?" Interview with Fabio Arcila. Clearly, the standard practice of mediators is to decline appointments when lacking competence. This inquiry raised the prospect that some cultures may be so foreign that even diligent research will be insufficient. That is an interesting possibility for further study. (This exchange took place on January 30, 2008. Fabio Arcila is a law professor at Touro Law Center.).

international dispute and how each one might be resolved.

Example 1: What should a western mediator do when both Chinese-American parties request that the mediator switch roles to arbitrate the dispute? This request raises a widely-recognized cultural difference between the attitude of the West and China toward a neutral switching role.

Step 1. Understand Your Own Culture

U.S. mediators are reluctant to switch roles to arbitrate because each role is so different with each one calling for vastly different responsibilities and approaches. Mediators and parties are especially concerned that the mediator's neutrality when switching to arbitrate may be compromised or appear compromised due to what happened during the mediation. The mediator may have learned information that should not be used when arbitrating or may appear to have pre-judged some issues during the mediation.[50] Nevertheless, U.S. mediation rules and the Model Standards of Conduct of Mediators permit neutrals to switch roles—but only if the parties consent.[51]

Western concerns about neutrals switching roles can be gleaned from the detailed requirements that must be satisfied before switching roles. The U.S. Model Standards require the mediator to secure consent, to inform parties of the implications of the change in role, and to understand the different duties and responsibilities of the additional role.[52]

Step 2. Research Other Culture

Even though the current code of conduct for mediators in China also requires the consent of the parties,[53] the underlying attitude toward switching roles is markedly favorable, as can be discerned from the prior code of conduct for mediators in China, Chinese mediation rules, the China International Economic and Trade Arbitration Commission's (CIETAC) webpage, and CIETAC's arbitration rules.

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50. Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1, 3–4, 7 (1999).

51. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI (2005).

52. "A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards." *Id.* Standard VI.A.8.

53. *See* CCPIT/CCOIC CODE OF CONDUCT FOR MEDIATORS art. 9 (2005) (P.R.C.) ("A mediator shall not act as an arbitrator in the subsequent arbitration proceeding for the same dispute dealt with in the mediation procedures, unless otherwise agreed by the parties.").

The 1992 China Council for the Promotion of International Trade (CCPIT) Ethical Code for Conciliators did not even regulate conciliators switching roles to arbitrate; it only barred conciliators from acting as "arbitration agents of either party in subsequent arbitration proceedings."[54] The 1992 CCPIT Rules of Conciliation, however, did address the issue and did so favorably by approving conciliators arbitrating, unless "opposed by the parties."[55]

Several years ago, the introduction to CIETAC's website commented favorably on the practice of arbitrators mediating by pointing out that:

> Many years of practice has indicated that the combination of arbitration and conciliation can make good use of the advantages of both arbitration and conciliation, so as to settle disputes more efficiently and turn hostility into friendship. It also may save parties expenses and help to maintain the friendly relations and cooperation between them. *This practice in Chinese arbitration has received world wide attention and approval.*[56]

Today, even though the Introduction still reflects a favorable attitude toward combining processes, it now highlights that the practice is consensual:

> The CIETAC arbitration is marked by its unique combination of arbitration with conciliation, an advantageous mixture of the merits of both, which not only resolves disputes, but also renews positive business and personal relations between the parties.
>
> This combination is possible during the arbitration proceedings with the parties' consent. Also, the arbitrators may, at any time during the proceedings, play the role of conciliators in an attempt to resolve the dispute. Either party may end the combination at any time if it thinks it is no longer necessary or will be fruitless.[57]

The current Arbitration Rules of CIETAC also construct a

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54. *See* CCPIT/CCOIC ETHICAL CODE FOR CONCILIATORS § 12 (1992) (P.R.C.).

55. "If conciliation fails, the conciliator(s) may be appointed by one of the parties as arbitrator(s) in the subsequent arbitration proceedings, unless such appointment is opposed by the other party." CCPIT RULES OF CONCILIATION art. 21 (2000) (P.R.C.).

56. *See* JACQUELINE M. NOLAN-HALEY, HAROLD I. ABRAMSON & PAT K. CHEW, INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES 139 (2005) (emphasis added). Unfortunately, the author (me), did not note the year that this language was on the CIETAC webpage. This quote was found on the website around 2004. The introduction has since been modified.

57. *See* CIETAC, Introduction, www.cietac.org.cn/english/introduction/intro_1.htm (last visited on Apr. 16, 2008).

supportive pathway for combining conciliation and arbitration.[58]

This favorable Chinese attitude toward combining roles has been confirmed in my conversations with CIETAC arbitrators and mediators. They seem mystified by the western preference to keep the roles of mediators and arbitrators separate when the goal is to settle disputes.

Step 3. Bridge Any Cultural Gap

This gap might be bridged by the mediator pursuing a line of inquiry with the parties that helps them make an informed choice to authorize the mediator to switch roles to arbitrate.

The mediator should pose such questions as:[59] Do the parties feel confident that the mediator has had adequate training and experience to switch roles to arbitrate?; Do the parties feel secure that the confidentiality agreement will bar admitting information in the arbitration that was generated in the mediation?; Do the parties think that the mediator as arbitrator might be influenced by information learned during the mediation?; Did the mediator offer any evaluations that may convey the appearance of prejudging an important issue in the arbitration or may contaminate the arbitrator's view of an issue that may be decided in the arbitration?; and Did the mediator's use of caucuses (such as the ex-parte sharing of information by one party that could not be responded to by other party) compromise the appearance of neutrality when arbitrating?

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58. Article 40, Combination of Conciliation with Arbitration, states:

> 2. Where both parties have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings.
>
> 3. The arbitral tribunal may conciliate the case in the manner it considers appropriate.
>
> . . .
>
> 7. Where conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award.
>
> 8. Where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

CIETAC ARBITRATION RULES art. 40 (2005) (P.R.C.), *available at* http://www.cietac.org.cn/english/rules/rules.htm.

59. For a fuller discussion of these types of questions, see Abramson, *supra* note 50, at 7–17. Even though the article examines protocols for an arbitrator who might mediate, the list of protocols can be adapted to the reverse situation-when a mediator might arbitrate.

Step 4. Assess Whether to Withdraw

Even if the parties consent to the mediator switching roles, the mediator can still consider whether to decline the request. Unfortunately, there are no internationally recognized standards to guide the mediator. One possible source might have been the UNCITRAL Model Law on International Commercial Conciliation. Although approved by the UN General Assembly, the Model Law has not been widely adopted.[60] The Guide to its Enactment and Use states that the Model Law is "essentially neutral"[61] on the subject of conciliators arbitrating, but an examination of the Model Law connotes otherwise. The structure of the Model Law conveys an unfavorable attitude by providing for a default rule that bars the practice unless overruled by an agreement of the parties.[62]

With no internationally recognized source for guidance, a mediator still might decline to arbitrate based on familiar disqualification considerations such as whether he or she may not appear impartial when arbitrating in view of what happened during the mediation.[63] The mediator also might decline because he or she may not feel qualified to arbitrate. Otherwise, if the parties so consent, the mediator presumably would agree to arbitrate.

Example 2: What should a U.S. mediator do when both Asian parties are ready to sign an unsettlingly vague agreement?

Step 1. Understand own Culture

The mediator must first become aware of his or her cultural upbringing in which the mediator as a lawyer was taught to draft detailed contracts that anticipate most contingencies.

Step 2. Research Other Culture

The mediator learns that the parties are from a culture in which business deals and settlement agreements are built on relationships, not detailed contracts. If something goes wrong, the parties do not think about breach but instead think about how to fix the problem.

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60. UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION (2002), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html.

61. UNITED NATIONS COMM'N ON INT'L TRADE LAW, GUIDE TO ENACTMENT AND USE OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION art. 12 cmt. (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.

62. "Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship." *Id.* art. 12.

63. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005).

Step 3. Bridge Any Cultural Gap

A conflict can arise because the mediator may become concerned that such a relationship-based settlement agreement may fall apart at the implementation stage due to vague obligations or unclear consequences. The mediator can bridge this gap by asking questions that help the parties make an informed choice to enter into a vague agreement. Rather than measuring the adequacy of the agreement against what a U.S. attorney would do, the mediator would assess the agreement's adequacy based on what both parties are willing to sign.

Step 4. Assess Whether to Withdraw

The practice of relationship-based agreements does not appear to violate any internationally recognized standards, and presumably these conflicting values between the mediator and the parties do not compromise the mediator's impartiality. Nevertheless, if the mediator thinks that the parties have not reached a sufficiently clear agreement even after completing the Step 3 bridging the gap inquiry, the mediator might consider withdrawing on the grounds that the mediator believes that the participants' conduct jeopardizes the quality of the mediation.[64] At this juncture, the mediator would be withdrawing based on his or her cultural view of what constitutes an adequate agreement, and in doing so, would be making an informed choice to be culturally imperialistic.

V. CONCLUSION

When crossing borders, mediators are crossing into new ethical territory. Ethical issues can arise due to differences in culture between the mediator and the parties. In order to navigate this new territory, mediators need to be aware of their own culturally shaped behavior and perspective and be open-minded and nonjudgmental when proactively learning about other ways of behaving. And, mediators should diligently search for ways to bridge any gaps between the mediator and the parties before confronting the difficult possibility of withdrawing. By conscientiously following the four steps outlined in this article, mediators should be able to avoid the charge of cultural imperialism, except when the mediator decides to be imperialistic.

64. *Id.* Standard VI.