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DECEPTIVE RESULTS: WHY MEDIATION APPEARS TO FAIL BUT ACTUALLY SUCCEEDS

*Scott Sigmund Gartner**

INTRODUCTION

Mediation is one of the most prevalent and commonly touted forms of international conflict management.¹ Yet, compared to other forms of peacemaking such as bilateral negotiation, international disputes that receive mediation are less likely to result in peace agreements, and mediated agreements are more likely to fail.² Furthermore, data seem to suggest the opposite of what is commonly believed about specific types of mediation.³ For example, scholars and policymakers frequently champion civil war mediation by regional governmental organizations.⁴ Yet, more than half of all civil war peace agreements reached through regional governmental organization mediation fail *in less than a week*.⁵ Assessing a wide array

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¹ Jacob Bercovitch & Scott Sigmund Gartner, *Is There Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 34 INT'L INTERACTIONS 329, 330 (2006).

² *See id.* at 342.

³ *See* Scott Sigmund Gartner, *Signs of Trouble: Regional Organization Mediation and Civil War Agreement Durability*, 73 J. POL. 380, 380 (2011).

⁴ *Id.*

⁵ *Id.* at 380, 387-88.

of factors affecting civil war peacemaking, regional organization mediation is *the best predictor of agreement failure*.⁶

Why does mediation seem to have such poor results? It is a problem of deceptive appearances. A concept called “selection effects” exerts powerful negative influences on what we observe; ostensibly suggesting that mediation in general—and regional governmental organization mediation in particular—produce poor conflict management outcomes. In reality, appearances deceive; both mediation overall, and regional governmental organization mediation in particular, effectively lead to peace.

MEDIATION

Two aspects of international dispute mediation are critical for understanding these deceptive results: (1) participation in mediation and adherence to mediated outcomes is voluntary; and (2) mediation is costly.

A. Voluntary

International dispute mediation is a completely voluntary process—no judge can order belligerents or a third-party mediator to participate. The third-party mediator must be willing to offer assistance, and the belligerents must be willing on their own accord to accept the third party’s offer to mediate.⁷ Unlike binding arbitration, mediation does not require a commitment in advance to accept an outcome. Adherence to a settlement reached through mediation requires the voluntary agreement of the disputants.

B. Costs

Mediation costs are “considerable.”⁸ The costs of mediation vary with the type of actor. For example, in a civil war, governments

⁶ *Id.* at 387-88.

⁷ Molly M. Melin, Scott Sigmund Gartner & Jacob Bercovitch, *Fear of Rejection: The Puzzle of Unaccepted Mediation Offers in International Conflict*, CONFLICT MGMT. & PEACE SCI. (forthcoming 2013).

⁸ KYLE BEARDSLEY, THE MEDIATION DILEMMA 22 (2011).

take a dim view of appearing to increase the stature of insurgents by sitting with them as apparent equals at the peacemaking table.⁹ Insurgents might be concerned that they lack any control over mediation outcomes given their power asymmetry with a standing government.¹⁰ Mediators' costs include: (1) forgoing other peace efforts; (2) damage to reputation from failure; (3) political costs; and, (4) operational expenses.¹¹ Belligerents look at the human, economic, and diplomatic costs of additional violence, their likelihood of victory, and the various costs of mediation when considering conflict resolution.

The voluntary and costly attributes of mediation combine to create powerful *process* and *selection* effects—dynamics essential for understanding mediation outcomes.

PROCESS AND SELECTION EFFECTS

The distinction between process and selection effects represents a critical innovation in studies of dispute resolution.¹² Mediators can choose among a wide variety of tools when working to resolve disputes.¹³

Process Effects. Process effects reflect choices made during conflict management that *directly influence* outcomes, such as mediator

⁹ Molly M. Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 INT'L INTERACTIONS 249, 254 (2009).

¹⁰ BEARDSLEY, *supra* note 8, at 154.

¹¹ Leslie G. Terris & Zeev Maoz, *Rational Mediation: A Theory and a Test*, 42 J. PEACE RES. 563, 563-83 (2005). *See generally* Jacob Bercovitch & Gerald Schneider, *Who Mediates? The Political Economy of International Conflict Management*, 37 J. PEACE RES. 145, 145-65 (2000).

¹² *See* Scott Sigmund Gartner & Jacob Bercovitch, *Overcoming Obstacles to Peace: The Contribution of Mediation to Short-Lived Conflict Settlements*, 50 INT'L STUD. Q. 819, 820, 822, 835-36 (2006).

¹³ *See* Kyle Beardsley, [Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution](#), 2 PENN ST. J.L.& INT'L AFF. 57 (2013); Molly M. Melin, [When States Mediate](#), 2 PENN ST. J.L.& INT'L AFF. 78 (2013); Stephen E. Gent, [The Politics of International Arbitration and Adjudication](#), 2 PENN ST. J.L.& INT'L AFF. 66 (2013) (explaining how similar types of choices also affect other dispute resolution methods, such as arbitration and adjudication).

strategy. For example, during the negotiations with Egyptian President Sadat and Israeli Prime Minister Begin, U.S. President Jimmy Carter guaranteed U.S. funding for military bases to both countries, a move that greatly contributed to the successful Camp David Peace Accords. Carter's guaranty is an example of a process effect—an action that directly influences the mediation outcome. Process effects have a clear, causal effect on conflict management results—they shape dispute resolution success and failure.

Selection Effects. Selection effects identify specific populations of cases that have particular conflict management traits. For example, imagine there are two types of disputes: *hard* (difficult to resolve) and *easy* (open to resolution). Difficult to resolve disputes typically involve higher levels of violence, greater stakes and more intransigent belligerents than easy to resolve disputes. While a great mediator might achieve success in a hard dispute and a poor mediator may fail to settle an easily resolvable dispute, on average, hard disputes are less likely to result in peacemaking success than easy ones. Thus, identifying the dispute's type (hard or easy) helps to predict the likely outcome of any conflict resolution. Selection effects identify a dispute's type. They distinguish the population to which disputes belong; but unlike process effects, they do not directly affect the conflict management process. Rather, selection effects signal the conflict's likely type and thus its odds of a peaceful outcome.¹⁴

The difference between selection and process effects can be illustrated by comparing a student clinic and university hospital.¹⁵ The clinic refers serious cases to the hospital. The hospital treats the high risk cases—those with a greater chance of resulting in a fatality (*selection effect*). The hospital has superior medical resources and provides better treatment (*process effect*). Given a serious illness, students go to the hospital, even if its mortality rates are higher. Students thus take into account (likely without thinking about it)

¹⁴ Scott Sigmund Gartner & Molly M. Melin, *Assessing Outcomes: Conflict Management and the Durability of Peace*, in THE SAGE HANDBOOK ON CONFLICT RESOLUTION 564, 564-79 (Jacob Bercovitch et al. eds., 2009).

¹⁵ This example is drawn from Scott Sigmund Gartner & Aimee A. Tannehill, *Negotiating with the Dragon: The People's Republic of China and International Dispute Settlement Duration*, 12 TAMKANG J. INT'L AFF. 69, 69-99 (2008) (Taiwan).

selection effects; they recognize that the population of patients at the hospital is sicker and more likely to die than the population of patients at the clinic. Without consideration of the influence of selection, one would erroneously determine that the life-saving abilities of the clinic are superior to that of the hospital, when in fact the opposite is true.¹⁶

SELECTION EFFECTS AND MEDIATION

Because mediation is costly, belligerents try to avoid it. Disputants who talk between themselves and resolve their differences on their own do not have to bear the costs of mediation. Thus, bilateral negotiation between disputants represents the most efficient, low cost, conflict resolution mechanism. If bilateral negotiations fail or their differences make them unwilling to work together (for example, Sadat and Begin refused to be together in the same room after their first meeting at Camp David), then disputants who want a peaceful resolution process can turn to a third-party mediator. As a result, mediators work on tougher cases than those bilaterally negotiated; disputes that, as a result of the selection process, are less likely to result in peace. Mediation itself, however, has positive process effects. An identical dispute would be more likely to result in peace if it is mediated than if it is not. But in reality, disputes are not distributed randomly or evenly, among conflict resolution processes—mediators get the hardest cases, which are more likely to result in peacemaking failure.

¹⁶ Cf. Lori Guevara, Cassia Spohn & Denise Herz, *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344, 344-45, 347-48, 366 (2004). Selection effects commonly manifest in legal contexts. For example, juvenile defendants who are not defended by a lawyer are *more* likely to have their charges dismissed and *less* likely to receive a secure confinement disposition than youth who retain lawyers. A defendant's lawyer does not have a negative effect on the case's outcome; rather, declining counsel signals a low likelihood of conviction and a low stakes case—selection effects. *Id.*; see also Michael Alexander Roach, *Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects Essays on Heterogeneous Treatments of Defendants within Legal Institutions* (June 2011) (unpublished Ph.D. dissertation, Northwestern University).

When the nature of the dispute is taken into account, analyses show that international dispute mediation has a positive process effect on reaching durable agreements.¹⁷

SELECTION EFFECTS AND REGIONAL GOVERNMENTAL ORGANIZATIONS

One way to develop a better understanding of how mediation exerts deceptive selection effects is to look at a specific type of mediation. For example, consider civil war mediation by regional governmental organizations. The Organization of American States, The African Union, and The Arab League represent examples of regional governmental organizations. Today, “regional organizations are the most common type of IOs [International Organizations] in the world system.”¹⁸ As the number of regional organizations has increased, so has their role in conflict management, and specifically as mediators. Comparing the periods shortly before and after 1980, the frequency of regional mediation almost doubled.¹⁹

This increase is not surprising given widespread beliefs that regional organizations represent the ideal mediator type.²⁰ These beliefs draw on four core arguments. First, regional organization member states frequently share political, economic, social, and cultural features with the disputants. Bercovitch and Houston argue that regional organizations are more likely to achieve conflict resolution outcomes than other types of mediators because they, “mediate within the same cultural and value system—and this, it seems, promotes agreement more than any other factor.”²¹ United

¹⁷ See Gartner & Bercovitch, *supra* note 12, at 822-23.

¹⁸ Jon C. Pevehouse, *With a Little Help from My Friends? Regional Organizations and the Consolidation of Democracy*, 46 AM. J. POL. SCI. 611, 616 (2002).

¹⁹ See Scott Sigmund Gartner, *Civil War Peacemaking*, in PEACE AND CONFLICT 2012 71-84 (J. Joseph Hewitt et al. eds., 2012).

²⁰ See T.H.Y. Nguyen, *Beyond Good Offices? The Role of Regional Organizations in Conflict Resolution*, 55 J. INT'L AFF. 463, 484 (2002).

²¹ Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 11, 27 (Jacob Bercovitch ed., 1995) (stating a counter to this argument, however, is that regional organizations often contain their own super or regional powers with super or regional interests that can

Nations Security Council Resolution 1809 states, “regional organizations are well positioned to understand the root causes of armed conflicts owing to their knowledge of the region which can be a benefit for their efforts to influence the prevention or resolution of these conflicts”²² Second, neighboring states have a greater stake in peacemaking than outsider states or the U.N. and “must live with the consequences of their work,” which generates higher levels of commitment and trust.²³ Third, disputants are less likely to view mediation offers from regional governmental organizations as stealth colonization efforts. Finally, regional governmental organization charters frequently encourage third-party peacemaking, making them willing mediators. For example, Article 84 of The Charter of the Organization of American States directs the Permanent Council to assist members in the “peaceful settlement of their disputes.”²⁴ For example, the OAS successfully mediated the Belize-Guatemala conflict in 2000—a dispute originating from the independence of Spain in 1839 and which the U.N. failed to resolve.²⁵

There are also aspects of regional organization conflict mediation that are unattractive to belligerents. Given the inherent advantages of a sitting government, insurgent success in civil war requires support from neighboring states.²⁶ The comparatively small

skew mediation. For example, consider the roles of: Nigeria in The African Union, Egypt in The Arab League, and the U.S. in The Organization of American States).

²² S.C. Res. 1806, U.N. SCOR, 63rd Year, U.N. Doc. S/RES/1809, at 1 (Apr. 16, 2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Coop%20w%20Reg%20Orgs%20SRES1809.pdf>.

²³ John Paul Lederach & Paul Wehr, *Mediating Conflict in Central America*, 28 J. PEACE RES. 85, 97 (1991). See also Marie Olson & Frederic S. Pearson, *Civil War Characteristics, Mediators, and Resolution*, 19 CONFLICT RESOL. Q. 421 (2002).

²⁴ The Protocol of Amendment to the Charter of the Organization of American States, “Protocol of Buenos Aires” art. 84, Feb. 27 1967, 21 U.S.T. 607, 721 U.N.T.S. 324, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf.

²⁵ MONSTERRAT GORINA-YSERN, AM. SOC’Y OF INT’L LAW, OAS MEDIATES IN BELIZE-GUATEMALA BORDER DISPUTE (2000), <http://www.asil.org/insigh59.cfm>.

²⁶ Dylan Balch-Lindsey, Andrew J. Enterline & Kyle A. Joyce, *Third-Party Intervention and the Civil War Process*, 45 J. PEACE RES. 345, 345 (2008); Salehyan, *Ideal, No Shelter Here: Rebel Sanctuaries and International Conflict*, 70 J. POL. 54 (2008).

size of regional groups ensures all members have influence, accentuating concerns over bias.²⁷ As a result, governments fighting civil wars abhor including regional organizations in dispute negotiations because it provides their insurgent's benefactors influence in the conflict management process. Similarly, rebels recognize that the government they threaten likely plays a major role in the regional organization. Additionally, some states in the organization likely have their own insurgency problems and thus want to come down hard on rebel groups in order to deter challenges at home.²⁸

Given these disincentives, civil war belligerents prefer to avoid mediation by regional organizations and only select them in the most dire circumstances. As a result, regional organizations mediate particularly deadly and intractable civil wars—those less likely to result in durable peace agreements. When these selection effects are controlled for, however, and the intensity of civil wars are taken into account, mediation by regional organizations has a positive process effect on peacemaking.²⁹

POLICY IMPLICATIONS

Just like the best hospitals get the sickest patients and lose the most lives, the best peacemakers get the most violent and intractable disputes that produce the worst peace outcomes. However, when we take into account the deadly nature and known difficulty of resolving those international disputes selected for mediation, we see that mediation generally, and mediation by regional organizations specifically, facilitate the creation of robust peace agreements.

²⁷ See Isak Svensson, [Research on Bias in Mediation: Policy Implications](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

²⁸ See Navin A. Bapat, *The Internationalization of Terrorist Campaigns*, 24 CONFLICT MGMT. & PEACE SCI. 265 (2007). This problem is complicated further by the frequent shifting preference for violence among ethnic groups. See, e.g., Victor Asal & Jonathan Wilkenfeld, [Ethnic Conflict: An Organizational Perspective](#), 2 PENN ST. J.L. & INT'L AFF. 91 (2013).

²⁹ See Gartner, *supra* note 3.

Selection effects have two critical policy implications. First, selection influences how we should evaluate mediation failure. Some ineffective mediation is likely the result of poor mediators and weak peacemaking strategies. But other disappointing results, especially when generated by mediators and strategies thought to be highly effective, are likely misleading and result from selection effects. For example, the Camp David Accords mediated by President Carter in 1978 have led to a peace between Egypt and Israel that has lasted for more than thirty years—in contrast to the five wars fought between the two countries in the thirty years prior to the Accords. But the Accords did not bring comprehensive peace to the region. After Camp David, mediators found it difficult to make further progress in this dispute. The Oslo Accords between Israel and the Palestinians have not operated as effectively as the Camp David Accords. Some might claim that these other mediators lacked Carter's mediation skills. It is critical to remember, however, that the Arab-Israeli dispute remains extremely intractable. While the dispute's violence and salience help it to attract the best global mediators they also form the conditions that make peace elusive. It would be wrong to equate failure to obtain peace in these disputes with the failure of mediation generally or the ineffectiveness of any specific mediators. Rather, we need to keep in mind that the intractable, violent, and globally important nature of the Arab-Israeli dispute both attracts mediation and makes it difficult to resolve—an apt illustration of selection effects. Given that the top mediators get the toughest cases, it is vital that we keep selection in mind when evaluating mediation efficacy.

Second, potential mediators need to recognize that they face a trade-off. They can choose to mediate disputes that are likely to be resolved—but bilateral negotiations may work equally effectively in these disputes. Or, potential mediators can choose persistent disputes that are not likely to result in durable peace or civil wars that are especially challenging to resolve.³⁰ These are the disputes that most require third-party assistance—they are both the most violent and the least likely to be resolved through the independent actions of the

³⁰ See David E. Cunningham, *Who Should Be At The Table? Veto Players and Peace Processes in the Civil War*, 2 PENN ST. J.L. INT'L AFF. 38 (2013); J. Michael Greig, *Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*, 2 PENN ST. J.L. INT'L AFF. 48 (2013).

disputants—but are also the disputes that are most likely to result in failed mediation outcomes. Resolving these more intractable disputes requires a frustrating pattern of peacemaking efforts.³¹ Thus, mediators need to assess the value of mediation efforts based on the challenge of the task they face, not only on what they can achieve.

These perspectives should not, however, suggest pessimism about mediation and peacemaking. Mediation of previously persistent disputes does not necessarily result in failed peacemaking. For example, the Colombian government has battled the insurgent group FARC (Fuerzas Armadas Revolucionarias de Colombia) since 1964. On March 1, 2008, Colombia attacked a FARC encampment in Ecuador, expanding the war and enflaming a long-simmering regional dispute. Viewing the attack as an illegal violation of its sovereignty, Ecuador cut diplomatic ties with Colombia. Colombia accused the Ecuadorian and Venezuelan governments of financially supporting FARC. Tensions intensified when Ecuador and Venezuela sent troops to the Colombian border.³² The OAS intervened rapidly to diffuse tensions by calling an emergency session and sending a commission to visit the countries and investigate the attack. The OAS determined that Colombia did in fact violate Ecuador's sovereignty and territorial integrity. Colombia issued an apology and the countries resumed diplomatic relations. The OAS launched the Mission of Good Offices in Colombia and Ecuador which works to maintain peaceful relations between the two countries.³³ Thus,

³¹ Birger Heldt, *The Lack of Coordination in Diplomatic Peacemaking*, 2 PENN ST. J.L. & INT'L AFF. 9 (2013).

³² See *Neighbors Cut Ties With Colombia*, BBC NEWS, Mar. 4, 2008, <http://news.bbc.co.uk/2/hi/americas/7276228.stm>; Simon Romero, *Columbia is Flashpoint in Chavez's Feud with U.S.*, N.Y. TIMES, Mar. 5, 2008, <http://www.nytimes.com/2008/03/05/world/americas/05venez.html?pagewanted=all>; LAURA CARLSEN, FOREIGN POLICY IN FOCUS, THE ANDEAN CRISIS (John Feffer ed., 2008), http://www.fpif.org/articles/the_andean_crisis.

³³ See *Columbia and Ecuador*, OAS PEACE FUND, <http://www.oas.org/sap/peacefund/ColombiaAndEcuador/> (last visited Apr. 10, 2013); *Crisis Deepens as Venezuela Closes Colombia Border*, AFP, Mar. 4, 2008, <http://afp.google.com/article/ALeqM5iWzIEd06o1UoIdZxy17wkp18uz4g>; TATIANA WAISBERG, AM. SOC'Y OF INT'L LAW, COLUMBIA'S USE OF FORCE IN ECUADOR AGAINST A TERRORIST ORGANIZATION: INTERNATIONAL LAW AND THE USE OF FORCE AGAINST NON-STATE ACTORS (2008), http://www.asil.org/insights080822.cfm#_edn1.

despite an enduring dispute, a non-governmental actor and a violation of sovereignty—all factors known to make disputes more intractable—mediation worked.

For those of us who participate in, study, or encourage peacemaking efforts, the results frequently seem grim. But we should not let mediation's seemingly poor results dissuade us from promoting peacemaking. Rather, using selection effects we need to handicap the odds of mediation success and failure. Like many of the best hospitals, best conflict management practices may at first appear to be hazardous, but an understanding of the process and its challenges demonstrates their value and shows that appearances can indeed be deceptive.