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PERSPECTIVE

Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies

*Danian Zhang**
*Kenji Kuroda***

I. INTRODUCTION

Despite the continuing economic frictions between Japan and the United States, Japan remains one of the most attractive markets for U.S. business and attorneys. The United States is Japan's main trading partner, and Japan is the United States' second largest trading partner after Canada. In addition, Japanese firms rank fourth in foreign direct investment in the United States, while U.S. companies are the biggest foreign direct investors in Japan.¹

Recently, Japanese companies have become increasingly aggressive

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¹ The flow of trade and investment between the two countries is matched by a flow of people and ideas. Approximately 550,000 Americans visit Japan each year, while 2.1 million Japanese travel to the United States. In addition, there are 20,000 Japanese students attending universities in the United States, and 1800 Americans study in Japanese universities. More than 102,000 Japanese

in the U.S. market. As the value of the yen soars, Japan's trade surpluses continue to mount. Japanese companies used to be the "duck hunters" of the global mergers and acquisitions game, hidden away and waiting for targets to approach. Now, Japanese companies are initiating takeovers of foreign companies and pursuing foreign targets on their own.² Japan's transformation from passive hunter to strategic predator brings new challenges as well as new opportunities to U.S. businesspeople and lawyers.

With regard to legal services in Japan, U.S. lawyers are excited not only because of the economic boom and concomitant internationalization in Japan, but also because the Japanese Diet has passed a bill facilitating legal practice by foreign attorneys. The law was promulgated to meet the increased demand for foreign legal expertise and services. Japanese companies perceive U.S. attorneys as a source of ready expertise in certain areas of foreign investment. Such transactions include those in which U.S. attorneys have long been involved, but which are relatively new to Japanese companies, such as hostile takeovers, project financings, and English language draftsmanship.

Yet while U.S. lawyers and businesspeople may try to negotiate and cooperate with their Japanese counterparts, they generally must deal with the legal or non-legal staff members of a Japanese company. This is largely due to the fact that the number of Japanese lawyers who specialize in international business transactions is very limited, and the majority of these lawyers spend the bulk of their time on litigation.³ Moreover, most large companies in Japan use their own company staff to negotiate with foreign companies.

This Article discusses various negotiation styles and tactics unique to the Japanese company staff in international transactions. The authors also intend to offer some suggestions as to how one might bridge the differences between U.S. and Japanese negotiators. We hope that this Article will be useful for those who have participated in or will participate in business negotiations with Japanese companies.

now live in the United States, and 70,000 Americans live in Japan. *Born to be Wed*, *ECONOMIST*, Feb. 4, 1989, at 32.

² Wall St. J., Nov. 10, 1988, at A18, col. 1.

³ Ramseyer, *Lawyers, Foreign Lawyers and Lawyer Substitutes: The Market for Regulation in Japan*, 27 *HARV. INT'L L.J.* 459, 508 (1986). While over 600,000 lawyers practice in the United States, there are less than 13,000 lawyers practicing in Japan. Of the Japanese lawyers in Tokyo, only approximately 500 specialize in international business transactions. *Id.*

II. CULTURAL INFLUENCE ON NEGOTIATION STYLE: STEP-BY-STEP NEGOTIATION AND THE *RINGI* SYSTEM

When Japanese companies negotiate between themselves, there is no barrier to their cultural understanding. Conversely, when the negotiations are with U.S. businesspeople or lawyers, cultural barriers certainly exist. To solve this problem, both parties must be aware of each other's cultural background and the effects that cultural differences have on negotiation style.

To understand the Japanese negotiation style, some knowledge of Japanese cultural tradition is necessary. Japanese society is ethnically homogeneous. Order and harmony are highly respected and regarded as prime virtues of the society. Japanese people not only share a common language and culture, but they also have gradually adopted common social values. Regional and occupational differences do exist, but the country as a whole is intrinsically far more unified than any Western industrialized nation.

The concept of order can be traced back to Confucianism, a system of ethics and philosophy introduced from China which has exerted a strong influence on social values in Japan for centuries. In *The Great Learning*, Confucius instructed his students that: "Their persons being cultivated, their families were regulated; their families being regulated, their states were rightly governed; their states being rightly governed, the whole kingdom was made tranquil and happy."⁴ This philosophy suggests the hierarchy of order which establishes a vertical relationship in a society, *i.e.*, each person is positioned in a rank subordinate to the one above him or her, with the emperor at the top. As a result, order and social harmony are achieved when each person acknowledges and behaves according to the requirements of his appropriate rank.⁵

This Japanese tradition is reflected in company negotiation style. One distinctive feature of the Japanese style is step-by-step negotiation, which is based upon the hierarchy of order within a particular company. The general practice is that, whether at home or in a foreign country, a Japanese company always begins the negotiations with lower ranking company staff who are responsible for the projects involved. Following

⁴ CONFUCIUS, THE GREAT LEARNING. Confucius (Chinese Kung-Tzu, 551 B.C.-479 B.C.) was China's most famous teacher, philosopher, and political theorist. His ideas have influenced the civilizations of all of eastern Asia. *The Great Learning* is one of his great classics in Chinese literature.

⁵ The basic social requirement that each individual adhere to his proper rank or hierarchy can be found in the Japanese concept of *giri*, which means the duty or obligation of one person to behave in certain prescribed ways toward another to whom he or she is subordinate.

this stage, the middle ranking managers in charge of relevant sections of the company will follow up and continue to negotiate with the foreign party. Finally, the senior executive of the company will appear and make a final decision or sign the agreement.

By adhering to this negotiation style, Japanese companies do not have to make all of their decisions during one negotiation session. As a result, an agreement reached in talks with a lower ranking company employee which may seem final to the U.S. participant is usually considered by the Japanese company to be a temporary arrangement subject to further negotiation by higher ranking executives and managers.

This negotiation style is so well-known among the Japanese that they take it for granted that an agreement formed at the first stage can be altered or even reversed at later stages. By contrast, U.S. negotiators often are entrusted with decision-making power regardless of their positions in their companies. Accordingly, U.S. negotiators, especially those who are unaccustomed to the Japanese style or are unaware of this difference between the two styles, often will make the mistake of either expecting too much from the lower ranking Japanese company negotiators or of becoming frustrated by what they see as foot-dragging by their Japanese counterparts.

For instance, suppose that lower ranking representatives of a Japanese company, after several months of negotiation for a joint venture agreement with a U.S. corporation, discover through consultation with their lawyers that they unwittingly had accepted a number of disadvantageous terms and conditions due to their carelessness or lack of experience. At this point, the Japanese company's legal staff or higher ranking executives may seek to reverse or renegotiate the unfavorable terms on the ground that they are the only ones who possess the final decision-making power, even though they realize that their own staff may have agreed on other terms and conditions. Confronting such a situation, the U.S. negotiators may become frustrated and may even terminate the deal with the Japanese company.

Therefore, it is wise for U.S. negotiators to ask their Japanese counterparts at the beginning of a negotiation how much power they have and what specific matters they can decide by themselves. In addition, if it is possible, the U.S. negotiators should try to obtain confirmation from the Japanese negotiators when an agreement is reached on each major issue in the negotiation in order to ensure that their consent is final.

The notion of harmony is another important social value. The spirit of harmony is expressed in the virtue of *wa*, which underpins group structure in Japan. The objective of *wa* is to achieve harmonious social

relationship on a horizontal basis. The Japanese believe that an individual is not self-sufficient and that each person's life is only made meaningful and useful to the society when he or she is put in an appropriate position to perform a portion of a collective task. Harmony, therefore, stems from proper participation by individuals in group activities. In order to achieve this, Japanese companies often invest considerable time and money to build the appropriate morale among their employees. Thus, Japanese groups often have identifying symbols, such as a company song, uniform, or group flag. This traditional team approach is also reflected in the Japanese negotiation style.

One distinctive characteristic of this negotiation style is the consensual decision-making process which has been adopted by Japanese companies in their business negotiations. In Japan the process is often referred to as *nemawashi* and *ringisei*.⁶ With an awareness of these two concepts, one may have a better understanding of some aspects of Japanese international business negotiations.⁷

The term *nemawashi* describes the practice or preference of Japanese negotiators to "engage in informal talks with other negotiators prior to formal meetings."⁸ This communication, according to Japanese tradition, serves to prepare a better surrounding and the "soil" to ensure the continued health of a new "plant."⁹

Ringisei describes the process discussed above where business proposals devised by lower ranking company employees are presented to middle level company officials in charge of the relevant sections of the company and eventually are submitted to top level senior executives for final decision.¹⁰ This process, although long and complicated, offers a unique opportunity for company officials to share their personal responsibility and achieve consensus within the company. The process also allows for alteration and modification, which are necessary to elicit and maintain group support.¹¹

Under this *ringisei* or *ringi* system, the employee submits his or her original plan in writing, known as "*ringi-sho*," to the next higher level and obtains approval from his or her superior in ascending order. A final executive decision is made only after all those in charge of the related

⁶ Van de Velde, *The Influence of Culture on Japanese-American Negotiations*, 7 FLETCHER F. 395, 396 (1983) [hereinafter Van de Velde].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

sections of the company have given their approval. The importance of the matter determines at which level the final decision should be made.

Japanese corporations as well as government offices continue to use the *ringi* system because it has certain advantages over other less complicated decision-making processes. For example, written approval of a plan clearly shows who is responsible for a project and how much responsibility each person shares in a project. In addition, since all individuals involved have approved the plan, and all of the modifications and compromises have been made within the company, the plan can be carried out very effectively down the line. Recognizing the different decision-making styles of U.S. and Japanese companies, one corporate manager in the United States commented, "we make a decision overnight, then spend five years implementing it. In contrast, it takes the Japanese five years to make a decision but they implement it overnight. If you are looking for a quick fix, don't even consider it."¹²

In Japanese companies, there are many kinds of intra-company meetings which are held to exchange and transfer information from person to person or section to section for the purpose of facilitating the process of collective decision-making. U.S. negotiators should be advised to keep in mind that this peculiar decision-making system can be used by Japanese companies as a weapon in negotiation.

As a consequence of step-by-step negotiation style and the collective decision-making system, Japanese corporations strongly prefer that negotiations take place in their home country rather than in a foreign country. This is because the Japanese negotiators, especially those of lower rank, must refer all important issues to their superiors or get a consensus through *ringi* from other company staff. If, however, a Japanese company does agree to negotiate in a foreign country, its negotiation tactics will still incorporate the *ringi* system.

In summary, the above-mentioned negotiation styles derive largely from cultural behavior patterns. Though individual talent and ability are highly prized in Japanese society, more emphasis is placed on being a member of the group as a whole. It is also important to remember that three primary features of Japanese management style—namely in-house unions, life-time employment, and seniority ranking—support the continuance of the step-by-step negotiation style and collective decision-making system.

While Japanese culture places more importance on social identity and group participation, American culture stresses individualism.¹³ U.S.

¹² Wall St. J., Sept. 22, 1989, at R28, col. 3.

¹³ Van de Velde, *supra* note 6, at 395.

negotiators often are critical of the slow-moving Japanese process. As a result, cultural differences may make negotiations between Japanese and U.S. companies more difficult.

III. LONG-TERM RELATIONSHIPS

As in its domestic negotiations, the Japanese company in international negotiations is seeking a long-term relationship characterized by friendship, trust, and respect between the negotiating parties.¹⁴ When a Japanese company negotiates an agreement with a foreign party, it will not only look for profits but also will strive to achieve a business relationship based on the spirit of *wa*.¹⁵ The Japanese believe that an agreement encompasses a moral as well as a legal obligation. In many cases, when a Japanese company seeks to reach an agreement with a foreign party, it will stress the importance of establishing goodwill and a good working relationship more than the agreement itself.¹⁶

Since the main objective of a contract to a Japanese corporation is to establish a relationship with the other party, the Japanese believe that it is not necessary for the contract to be too specific.¹⁷ Japanese company staff believe that if problems arise in the future, the strength of the relationship and the goodwill that supports it will solve them.¹⁸ Thus, the objective of Japanese conflict resolution clauses, unlike that of corresponding (usually arbitration) clauses in contracts drafted by U.S. firms, is to preserve *wa*. Moreover, even if the contract is consulted later by the Japanese, it may be interpreted flexibly. Japanese may also strongly expect that they will not be held to clauses which become unfavorable due to unforeseeable changes in circumstances.

Another situation in which the objective of a Japanese company is to establish a strong long-term relationship is the employer-employee relationship in a Japanese company. At the beginning of employment in a Japanese company, extensive training focuses on group consciousness and company pride. As mentioned above, workers sing the company song, display company insignia lapel pins, and introduce themselves as members of a specific company, rather than describing themselves according to their individual jobs. Company loyalty is freely expressed in public as well as in private.

In Japan, the relationship between a company and its employee is

¹⁴ J. GRAHAM & Y. SANO, *SMART BARGAINING* 20 (1984) [hereinafter J. GRAHAM & Y. SANO].

¹⁵ See E. HAHN, *JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM* 31 (1984).

¹⁶ *Id.* at 34.

¹⁷ *Id.*

¹⁸ *Id.*

not merely a contractual one in which the employee works for the company and receives a salary in return. Rather, a Japanese company is inclined to offer a long-term commitment to its employees and their families, which is reciprocated with a long-term commitment by the employee to the best interests of the company.¹⁹ This kind of long-term relationship is based on the employee's loyalty to, and trust and confidence in, his company. Hence, when the Japanese sign employment contracts, they understand the unwritten implications that go along with their employment status.

The situation may be very different when a Japanese company negotiates a joint venture with a foreign partner. For example, a Japanese company may be wary from the outset when dealing with a U.S. company. In such a case, the Japanese company tends to believe that the non-Japanese business relationship is loose or "dry" because the venture often is based on mere profitability and the economic benefits each party may realize.²⁰ Once these conditions cease to exist, the foundation of the venture will begin to collapse.²¹ The Japanese do not like to see a foreign partner in a joint venture able to terminate a contract and walk away easily because this will affect not only the interests of the Japanese employees but also the reputation of the Japanese company.

In contrast, the Japanese believe their own business foundations to be solid and "wet" because their business relationships are established on a long-term basis, and they are developed on a personal level and thus are not based entirely on profitability.²² U.S. companies may be unwilling, however, to accept the proposition that U.S. corporate management focuses too narrowly on profitability and is thus too short-sighted. One major difference between U.S. and Japanese companies has been noted, though: while U.S. companies are set up mainly for consumers, Japanese companies are established primarily for producers and manufacturers.

For these reasons, a Japanese company is likely to take longer to develop a business relationship with a foreign company. As the vice president of Dentsu Corporation (Japan's largest advertising agency) said: "Twenty years in Japan isn't long enough to develop personal contacts."²³ Thus, commentators have suggested several ways for U.S. companies to improve their ability to nurture long-term relationships with

¹⁹ Most companies try to establish connections with a few selected schools (which may include professional schools, high schools, and colleges) so that they have a stable resource from which to recruit permanent employees.

²⁰ R. TUNG, BUSINESS NEGOTIATIONS WITH THE JAPANESE 56 (1984) [hereinafter R. TUNG].

²¹ *Id.*

²² *Id.*

²³ *Id.*

Japanese firms: (1) employ patience in negotiating with the Japanese; (2) rotate U.S. businesspeople in Japan less frequently so that the Japanese company staffs and customers can truly get to know these individuals; (3) maintain frequent contacts with one's customers; (4) socialize with the Japanese outside of office hours; and (5) exchange gifts.²⁴

IV. LANGUAGE: A BARRIER AS WELL AS A WEAPON FOR JAPANESE NEGOTIATORS

Business transactions are vulnerable to misunderstanding and confusion, and when business goes international, the potential scope of mutual incomprehension increases considerably. One source of confusion is language.

The Japanese language is unique. Although many written Japanese characters are borrowed from Chinese, the spoken language contains no similarities to any other language, even Chinese. Moreover, there are various degrees of formality so that the language will differ depending upon whether someone is speaking to an equal, a superior, or a subordinate. Consequently, it is very difficult for foreigners, and particularly Americans, to become proficient enough to negotiate in Japanese.²⁵

When a U.S. businessperson negotiates with a Japanese counterpart, the whole negotiation process will usually be conducted with the assistance of an interpreter. Generally speaking, Japanese negotiators are hesitant to negotiate with Americans in English because they feel embarrassed or disadvantaged if they talk face-to-face with a native English speaker. In addition, since many Japanese company staff members are able to understand spoken English, they can think matters over while the interpreter is translating. Bargaining through an interpreter can certainly slow down the negotiation process, however, since both Japanese and foreign negotiators will want to be sure that their message is adequately translated and understood by the other party.

It should be noted that since Japan is becoming more and more involved in international business, many staff members of the large Japanese business firms are able to speak English. Thus, some Japanese companies do conduct negotiations with Americans directly in English. While it seems disadvantageous for the Japanese to do this, they may take advantage of their limited English ability and use it as a negotiation weapon in various ways.

First, Japanese companies may choose to have non-legal staff with

²⁴ *Id.*

²⁵ *Contract Seeing Double*, PHP, Oct. 1983, at 20 [hereinafter *Contract Seeing Double*].

limited English ability conduct their negotiations. While legal staff members in Japanese corporations often are able to negotiate international contracts with U.S. negotiators, they sometimes are not willing to do so. This is because they are reluctant to argue with well-trained, native English-speaking U.S. attorneys who use complicated legal terminology. The legal staff might also fear that they will lose more points in the negotiation than non-legal staff would, or that they will end up with a long and complicated contract which is not desirable to the Japanese company officials. Moreover, the legal staff of a Japanese company is so limited in number that it is impossible for them to participate in all of the company's international negotiations. Finally, it is difficult for the Japanese legal staff to use language effectively as a weapon because it is less credible for them to say that they do not understand English legal terms.

As a result, Japanese corporations sometimes intentionally use their non-legal staff in international negotiations. While intelligent, their English is not good enough to allow U.S. negotiators to use complicated legal terms and theories. The Japanese non-legal staff often will say to American negotiators that they do not understand legal technicalities and emphasize that their ideas and proposals are more understandable and practical. Since the Japanese disapprove of long and complicated contracts, the companies try to use the non-legal staff as a way to either restrain boilerplate language or force U.S. negotiators to explain legal concepts in plain and simpler English words. This tactic may cause the U.S. negotiators to concede some less important issues voluntarily. Therefore, when U.S. negotiators believe that a proposal made by Japanese company representatives is legally wrong, they should not give up their position readily.

Japanese non-legal staff members with limited English ability also expect U.S. negotiators to write down the important issues in a negotiation. This provides the Japanese negotiators with additional time to think before they respond to proposals. Additionally, the U.S. negotiators will be required to speak very slowly and repeatedly so as to enable the Japanese representatives to understand them. By listening to repeated explanations, the Japanese negotiators may be able to figure out the real intent of their U.S. counterparts on various points so that they are better prepared to negotiate on those points. In short, by using their limited English ability wisely, Japanese negotiators may attempt to cause U.S. negotiators to concede as much as possible and make the contract as short as possible.

A second tactic that a Japanese negotiator may use is to pretend not to understand English. In particular, Japanese negotiators sometimes

will feign having a problem understanding English when they do not want to accept a proposal made by the U.S. negotiators or when they wish to maintain their own position in the negotiation. If a Japanese negotiator pretends not to know English (or not to know it well), U.S. negotiators sometimes will speak among themselves in English, believing the Japanese negotiator does not understand what they are saying. The Japanese negotiator can learn much from these "whispered" discussions.

A third tactic used by some sophisticated Japanese negotiators is to intentionally misunderstand or twist the meanings of English words in order to compel U.S. negotiators to give up on a particular request. Japanese negotiators may also pretend to give a straight answer to a question raised by the U.S. negotiator, but the answer is in fact distorted or irrelevant to the real question.

For example, a U.S. negotiator may request proof that the Japanese company representative who signed or will sign the contract has been given the appropriate authority by a power of attorney. This may require the company to produce a board resolution which authorizes a particular person in the company, such as the president, senior executive, or representative director, to issue power of attorney to the assigned negotiator who will sign the contract.

When the Japanese negotiators feel it is troublesome to get the board resolution for some reason, they sometimes present a certificate of signature on the power of attorney authenticated by a notary public or the Chamber of Commerce as a substitute to prove their authority to sign the contract. Foreign negotiators may find out later, however, that the certificate of signature only certifies that the signature on the power of attorney is genuine. It may not in fact certify that the person who issued the power of attorney is entitled to do so on behalf of the Japanese corporation. In other words, Japanese negotiators may intentionally confuse the issue by using an erroneous certificate to show proof of authority to sign the contract.

This twisting technique frequently occurs even between Japanese negotiators. Under some circumstances, Japanese negotiators will twist the meaning of the words of the U.S. negotiators to their own design rather than pretend that they do not understand them. By using this tactic, Japanese negotiators attempt to show, at least on the surface, that they are willing to cooperate. In effect, though, they are subverting the process so that the U.S. negotiators may eventually give up some requests.

A language problem may also arise due to the existence of different connotations and interpretations of particular words. For instance, the

English word "contract" generally is translated into Japanese as *keiyaku*. Yet *keiyaku* has a narrower meaning than the word contract as it is used in the United States as a legal term. While contract is used in the United States to mean a legally enforceable promise or a set of promises with accompanying duties and rights, *keiyaku* implies just part of the process of negotiation, namely, the promissory stage, in which two parties agree to work together to create a mutually advantageous relationship.²⁶ The implications of a transaction created by a *keiyaku* is unclear to Americans because much of the negotiation and most of the details of the transaction are intended to be filled in later. As discussed above, many Japanese negotiators deplore specificity and verbosity in contracts because they believe that it is like making an arrangement for divorce when preparing for marriage. Such an agreement may well hurt the goodwill between the parties.²⁷

To repeat a medical metaphor, U.S. negotiators regard a contract as a life-saving device to cure a sick relationship should the original healthy relationship deteriorate.²⁸ On the other hand, Japanese company norms and social values require that the relationship be kept well at all times.²⁹ Hence, while in the United States the function of a contract is to anticipate potential issues or disputes, the contract in Japan is just a "symbolic expression" or "reflection" of a good relationship.³⁰

V. NEGOTIATIONS UNDER CHANGING CIRCUMSTANCES

The Japanese increasingly are involved in international business transactions, and their negotiation style and tactics change with the changing circumstances. Many Japanese companies dealing on an international level have turned to contracts that are detailed and concrete.³¹ In international contexts, Japanese companies have grown remarkably sophisticated over the last two decades. Most have realized that the rules of the game are different in the international arena, and they know that they cannot hope to grasp inherently the thoughts of their foreign partners as they can their fellow Japanese. For example, a great number of large Japanese companies recently have retained U.S. attorneys for legal advice on complicated contract matters related to large projects.

Japanese companies have also changed their outlook in the area of

²⁶ *Id.* at 30.

²⁷ R. TUNG, *supra* note 20, at 45.

²⁸ Wagatsuma & Rosett, *Cultural Attitudes Towards Contract Law: Japan and the United States Compared*, 2 UCLA PAC. BASIN L.J. 76, 84 (1983).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Contract Seeing Double*, *supra* note 25, at 30.

mergers and acquisitions. The basic reaction to mergers and acquisitions, let alone the hostile takeover, is negative in Japan. With the recent worldwide expansion of Japanese investments, however, international mergers and acquisitions are no longer regarded as taboo for Japanese corporations.³² Buying foreign companies is attractive to Japanese companies not only because the high yen permits relatively cheap purchases of foreign companies, but also because it provides market access.³³ Shigeju Kita, a general manager at Yamaichi Securities, the first large Japanese firm to specialize in mergers and acquisitions, has predicted that the Japanese will be "facilitators in a global industrial restructuring."³⁴ Many Japanese multinationals now are preparing their "shopping lists," aiming at the major U.S. and European markets.³⁵ Kasuichi Hayashi, an administrator at Sumitomo Electric, noted: "That's the way of business in other countries, so we have to accept it."³⁶

Despite this new confidence, Japanese companies still hesitate to engage in hostile takeovers. Japanese companies believe that unfriendly acquisitions are inconsistent with Japan's notion of what the corporation is all about—the paternalistic, cooperative effort of many employees for the collective good.³⁷

In order to facilitate international business transactions, both Japanese and U.S. companies are trying to find ways to overcome their cultural gap. The most recent examples of such efforts are the appointments of Japanese and American co-chairmen at both Yamaichi International (America)³⁸ and Nomura Securities' U.S. securities unit.³⁹ In this way, the Japanese companies are attempting to gain acceptance in the U.S. market as full-fledged U.S.-style investment companies without worrying too much about the different management styles in the two countries.

While negotiating with Japanese company staff members, one should pay close attention to the individual character, type, and role of the Japanese negotiators.⁴⁰ As discussed above, though Japanese social

³² Wall St. J., Nov. 10, 1988, at A18, col. 1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ N.Y. Times, March 2, 1989, at 28, col. 5.

³⁹ Wall St. J., Oct. 3, 1989, at C1, col. 3.

⁴⁰ Americans often incorrectly assume that the most vocal Japanese participant is the most powerful. As a matter of fact, the opposite may well be true. U.S. negotiators should also note that when a Japanese negotiator presents a *meishi* that states his or her title and then explains that his or her position is analogous to a company vice president in the United States, the Japanese representative does not necessarily have analogous authority.

values emphasize group ties, a positive concept of the individual is not entirely lacking. Some U.S. negotiators have noticed that Japanese negotiators with experience living or working in the United States will usually adjust their negotiation style and appear to understand the U.S. approach. Some have found that Japanese executives living in the United States for only six months begin to reflect the communication style of U.S. negotiators unconsciously.⁴¹ Thus, it is wrong to stereotype Japanese negotiators.

Furthermore, there are important differences in negotiation style across industries in Japan. For example, negotiation with Japanese bankers will almost always proceed in the traditional manner.⁴² Nonetheless, common tactics among Japanese negotiators, particularly when they are negotiating in a foreign country, can be identified. First, Japanese negotiators quite often use their health as an excuse for short negotiations. Generally speaking, it is better for negotiators to be in good health when they engage in difficult negotiations. It is somewhat disadvantageous for even a healthy and strong negotiator to fly from one side of the world to the other, changing climate and culture, and negotiate a long and complicated contract in a foreign language.

Japanese negotiators may sometimes turn this to their advantage, however, when they feel they need to suspend or terminate the negotiations. For example, when U.S. negotiators urge proposals which the Japanese side is not willing to accept, a Japanese negotiator may say that he feels bad because of jet lag or that he is allergic to the local food and water and is thus unable to negotiate that day. The Japanese negotiator also may ask the U.S. negotiator just to consider the proposal or argument made by the Japanese side and not to debate on it. Furthermore, when the Japanese negotiator feels cornered, he may claim a headache and inability to concentrate on complicated provisions in the contract.

Secondly, Japanese negotiators sometimes use their tight schedules as an excuse to suspend or terminate negotiations. The Japanese are known for their diligence, and Japanese negotiators take advantage of this reputation by setting tight schedules and creating time constraints for negotiations so that they can effectively prevent U.S. negotiators from spending too much time presenting particular arguments. Japanese believe that this is very fair. In addition, Japanese negotiators may try to make a contentious issue ambiguous when they feel that it serves their ends. For instance, Japanese negotiators will say that they do not have enough time to discuss an issue because they must go back to Japan for

⁴¹ J. GRAHAM & Y. SPANO, *supra* note 14, at 20.

⁴² *Id.*

another important meeting, or they propose to go with a compromise plan. In this way, the Japanese negotiators may succeed in chopping off at least part of the U.S. negotiators' argument.

Third, Japanese negotiators sometimes suspend negotiations based on their lack of decision-making power on certain crucial issues. For example, a Japanese negotiator might say that the senior manager's consent is required on a particular matter. This gives the U.S. negotiators the impression that the Japanese side takes the issue seriously and might risk defeating the deal itself if pushed.

Fourth, Japanese negotiators sometimes suspend negotiations because the pending issues have to be decided by *ringisei* or by the board of directors. As mentioned above, *ringisei* is known even among foreign negotiators as a peculiar and time-consuming system. When Japanese negotiators resort to this last means, they expect that the U.S. party will understand that the issue involves a fundamental policy on the Japanese side, and unless the U.S. party concedes something or proposes more favorable terms, the Japanese negotiator might have to scrap the deal. Under such circumstances, if the U.S. party holds firm to its position, and the Japanese party still wants to keep the deal, the Japanese negotiator will probably return to the negotiation table with a changed *ringi*, namely a proposal with new conditions. This means that the position of the Japanese company remains the same, but the negotiators can compromise if the U.S. representatives understand and cooperate on other issues.

Finally, negotiation tactics may vary depending on whether a Japanese firm wants to invest in the United States or a U.S. firm wants to invest in Japan. In the former case, it is more likely that the Japanese negotiators will adapt more or less to the approach of the U.S. negotiators. In the latter case, especially when the participating Japanese party is a small- or medium-sized firm with little experience in international dealings, traditional Japanese negotiation style will probably prevail.

VI. THE LAWYER'S ROLE IN NEGOTIATION

Traditionally, the Japanese have viewed lawyers with disdain. The Japanese are suspicious when lawyers are involved in negotiations, since in Japan lawyers are usually retained for litigation purposes.⁴³ Japanese

⁴³ Japan has impressed many foreign investors with its unique social phenomenon which "combin[es] . . . rapid industrialization and extremely few litigated cases and lawyers." Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC. REV. 219, 220 (1987). Some Japanese commentators try to explain this phenomenon in terms of the Japanese "traditional legal consciousness" that regards litigation as

companies prefer to resolve problems among themselves or through mediation or arbitration.

Most contracts between Japanese companies in their domestic transactions are reached without the participation of outside lawyers. Since Japanese firms have been expanding their international activities rapidly in the last two decades, many companies have felt the need, however, to obtain a lawyer's expertise in certain cases. Japanese firms also seek legal advice from foreign lawyers when they want to invest in a particular country. Moreover, Japanese companies sometimes send their promising legal or non-legal staff abroad to study and practice law or management.

Recently, Japan has relaxed its controls on foreign lawyers practicing in Japan. Under the new Foreign Lawyers Law,⁴⁴ foreign lawyers who apply for practice certification in Japan are not required to have any knowledge of Japanese culture, society, or law, nor are they required to pass any examinations other than those which are necessary for the applicants to obtain certification in their home country. U.S. lawyers with experience in business transactions with Japanese companies are quick to point out, however, that effective representation of Japanese clients requires ability beyond mere legal proficiency. These lawyers recognize that the business transactions that occur between the United States and Japan are accompanied by a cultural interfacing which, no less than the legal problems, deserves attention in order to facilitate a productive and harmonious business relationship.

VII. GOVERNMENT REGULATION AND INTERVENTION

In addition to the problems associated with direct negotiation, a lawyer involved in negotiations with a Japanese company must consider Japanese government regulations pertaining to foreign investment and international contracts. Several important provisions apply to contracts between Japanese companies and foreign entities.

First, under Japan's Antimonopoly Act,⁴⁵ all international agreements must be submitted for review within thirty days after they are exe-

counterproductive and destructive to social harmony. This view is accepted both at home and abroad. *Id.*

⁴⁴ Law Concerning Special Measures Relating to the Treatment of Legal Business by Foreign Lawyers, Law No. 66 of 1986. For a detailed discussion of the legislation, see Note, *Japan's New Foreign Lawyer Law*, 19 LAW & POL'Y INT'L BUS. 361 (1987); Finn, *Foreign Lawyers: Regulation of Foreign Lawyers in Japan*, 28 HARV. INT'L L.J. 123 (1987).

⁴⁵ Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade of Japan, Law No. 54 of 1947, as amended, *reprinted in JAPAN MINISTRY OF FINANCE, GUIDE TO ECONOMIC LAWS OF JAPAN* 595 (1979) [hereinafter Antimonopoly Act].

cuted.⁴⁶ The Fair Trade Commission (“FTC”), which was established under chapter VIII of the Act, is the Japanese government agency responsible for the review of all international agreements.⁴⁷ The Japanese party is responsible for submitting the international agreement to the FTC.⁴⁸ If the FTC finds that the agreement contains any terms which may constitute a restraint of trade or unfair business practice, it has the power to require the contracting parties to amend their agreement.⁴⁹ Moreover, if the contracting parties are in violation of the Antimonopoly Act, and they refuse to accept the regulatory directions of the FTC, the FTC may impose penalties against the parties or commence criminal proceedings.⁵⁰

Secondly, foreign investors in Japan will encounter the Japanese Foreign Exchange and Foreign Trade Control Law (“FECL”),⁵¹ which is not designed to attract foreign investment. Under the FECL, a foreign investor must give prior notice of direct domestic investment transactions and may not execute them until the notification has been accepted and the mandatory waiting period has expired.⁵² Moreover, the Japanese government is empowered to order alterations to the transaction or suspend it entirely. Under the FECL, the government also may impose restrictions on the importation of technology into Japan.⁵³ Both parties to a joint venture must file reports with the Ministry of Finance concerning licensing agreements which involve, for example, a transfer of rights to technology or industrial property.⁵⁴

The Japanese government also issues “administrative guidance” (*gyosei shido*) to Japanese companies.⁵⁵ Since most Japanese companies continue to view the nation as the family state, they are willing to subordinate their interests to those of government bureaucrats. Consequently, Japanese companies may often welcome this active form of government intervention.

⁴⁶ *Id.* art. 6(2); Higgins, *Japanese Fair Trade Commission Review of International Agreements*, 3 *LOY. L.A. INT'L & COMP. L. ANN.* 43, 44-45 (1980) [hereinafter Higgins].

⁴⁷ Higgins, *supra* note 46, at 45-46.

⁴⁸ *Id.* at 47.

⁴⁹ *Id.* at 46; McArthur, *Joint Ventures in Japan*, *U.B.C. L. REV.* 471, 488 (1986) [hereinafter McArthur].

⁵⁰ Antimonopoly Act, *supra* note 45, art. 96; Higgins, *supra* note 46, at 46; McArthur, *supra* note 49, at 488.

⁵¹ Foreign Exchange and Foreign Trade Control Law, Law No. 228 of 1949, as amended [hereinafter FECL].

⁵² *Id.* art. 27.

⁵³ McArthur, *supra* note 49, at 487.

⁵⁴ FECL, *supra* note 51, art. 29; McArthur, *supra* note 49, at 488.

⁵⁵ See Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 *BUS. LAW.* 1259, 1264 (1972).

Although in theory the administrative guidance by the Japanese government is strictly unofficial, and the Japanese company has the discretion to decide whether to follow it or not, the bureaucracy can exert much pressure through such guidance. If a Japanese company refuses to follow the government's guidelines, it may find itself in trouble later. Ultimately, the government may use its powers, often in an unrelated field, to discipline an uncooperative company.⁵⁶ Therefore, administrative guidance has the special characteristic of being officially voluntary but unofficially binding. Through administrative guidance, the government can intervene in company business affairs in order to settle disputes between various industries and to coordinate their relationships. This kind of intervention is nonexistent, however, between the Japanese government and foreign parties.

VIII. CONCLUSION

Incomplete knowledge and misperceptions regarding the negotiation style and tactics of Japanese companies will lead to difficulty, frustration, or even failure in the negotiation process. This is because the United States and Japan have different cultures, languages, and negotiation styles.

Although Japan is a Western industrialized nation, it is a country where people still maintain strong traditional beliefs that have been embedded in Japan for centuries. These include the traditional concepts of order, hierarchy, seniority, and social harmony, which in turn have formed the unique Japanese negotiation styles of step-by-step negotiation and consensus decision-making or the *ringi* system. With the expansion of Japanese business activities into the international arena, however, Japanese negotiators may adjust their tactics to achieve their objectives.

While Japan and the United States are sure to develop their economic relationship further, the gaps and differences in culture, language, and negotiation style can be narrowed or bridged if negotiators actively seek to recognize, understand, and tolerate these differences. By being aware of each other's differences, the parties will be able to negotiate fair agreements and find workable solutions.

⁵⁶ *Id.*