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How to Conduct Effective Transnational Negotiations between Nations, Nongovernmental Organizations, and Business Firms

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I. INTRODUCTION

As computers, the Internet, and efficient transportation systems have generated a truly global political and economic world,[1] the extent of governmental and private transnational negotiating has significantly increased. International political entities—such as the United Nations and its affiliates and the World Trade Organization (WTO)—and regional political/economic groups—such as the European Union, the Group of Eight (G-8), the expanded Group of Twenty (G-20), and the North American Free Trade Zone—have increased the number of bilateral and multilateral governmental bargaining interactions. Nongovernmental organizations (NGOs) have become increasingly involved with issues that were previously addressed exclusively through governmental channels. The simultaneous growth of multinational business firms has similarly increased the frequency of private transnational business negotiations.

National and transnational bargaining interactions have many similarities—and certain critical differences.[2] They tend to involve

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1. *See, e.g.*, THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2005).

2. *See generally* VIKTOR K. KREMENYUK, INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES 3 (2d ed. 2002); DONALD W. HENDON, REBECCA A. HENDON & PAUL HERBIG, CROSS-CULTURAL BUSINESS NEGOTIATIONS 9–13 (1996).

the same negotiation stages and many common bargaining techniques, even though identical tactics may be given different names in different countries. Due to cultural differences, the negotiation stages may take longer to develop during transnational interactions, and certain tactics may be more or less acceptable to the different participants involved.

Governmental representatives are significantly affected by stereotypical beliefs regarding their political and economic systems and their national cultures—as well as those of the national groups with which they are interacting. They must be aware of the political constraints under which they frequently operate and, in some instances, of military and security considerations. Private business negotiators are similarly affected by cultural stereotyping. They may also be influenced by the need for governmental involvement in what may seem to be entirely private business transactions.

Verbal and nonverbal communication is an indispensable part of transnational interactions, but written and spoken exchanges may be subject to interpretive difficulties—even when the parties think they are speaking an identical language (e.g., United States, British, Canadian, and Australian negotiators). Similar nonverbal behavior may have different meanings in different cultures. Even though a distinct international bargaining culture may have developed among governmental and corporate representatives who regularly interact with others in European, North and South American, African, and Asian countries, it is rare for most individuals to escape entirely the impact of the cultures in which they were raised and in which they presently reside.[3]

This Article will explore the different types of governmental and business transnational negotiations. Part II will focus on official inter-government discussions. Part III will discuss the involvement of seemingly private citizens in governmental interactions, and Part IV will cover transnational business negotiations. Part V will consider the impact of cultural differences on transnational dealings between governments and private business entities. Part VI will focus on the way governmental and business firm negotiators must prepare for

3. *See* MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH IN INTERNATIONAL NEGOTIATION 73–79 (2001).

such bargaining encounters. Part VII will talk about how parties should initiate transnational interactions through what is called the Preliminary Stage.[4] Part VIII will cover value creation during the Information Stage.[5] Part IX will explore value claiming during the Distributive and Closing Stages.[6] Part X will emphasize the need for value maximizing during the Cooperative Stage.[7] And finally, Part XI will explore cell phone and e-mail interactions.

II. OFFICIAL INTER-GOVERNMENT DIPLOMACY

When countries directly negotiate with one another—"Track I Diplomacy" ("Track I")—their discussions may be carried out through formal channels or through informal "back channel" communications.[8] Formal channels are usually employed for conventional interactions, while back channels are used for particularly delicate talks or when the pertinent governments do not have direct diplomatic relations.[9] The least complicated inter-nation negotiations involve bilateral interactions between two nations (e.g., United States–Mexico; France–Germany; Japan–China). Multilateral talks may include three or four countries or a hundred or more nations. They may be conducted on an ad hoc basis involving various countries with common interests, or through formal organizations such as the United Nations, the World Trade Organization, or the European Union.

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4. The Preliminary Stage is the first part of the interaction with persons on the other side, during which the participants endeavor to establish rapport and the tone for their interaction. *See generally* Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOCACY 271 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987654.

5. "During the Information Stage, negotiators ask open-ended questions designed to discover what items are available for division." *Id.*

6. "During the Distributive Stage, the participants vie for the items that are on the table—value claiming. During the Closing Stage, the parties seek to solidify the terms of their agreement without giving up more than they need to." *Id.*

7. "During the final Cooperative Stage, the participants should work to maximize their joint returns to be certain they have achieved mutually efficient agreements." *Id.*

8. *See generally* Anthony Wanis-St. John, *Back-Channel Negotiation: International Bargaining in the Shadows*, 22 NEGOT. J. 119 (2006).

9. *See* RICHARD H. SOLOMON & NIGEL QUINNEY, AMERICAN NEGOTIATING BEHAVIOR 94–96 (2012).

Bilateral negotiations are usually conducted under ad hoc procedures established by the direct participants reflecting the specific discussions involved. These interactions may concern economic, political, cultural, humanitarian, or military issues. For example, governments may be exploring trade limitations, immigration policies, human rights issues, or regional or global arms limitations. These interactions may involve participants with relatively equal or wholly disparate economic or military power.

Bilateral accords usually require only the approval of the governments directly involved before they become operative. When *executive accords* are at issue, only the approval of the president or prime minister may be required, while *treaties* usually require legislative ratification.[10] Presidents who are concerned about divisive senate debate over politically sensitive bilateral pacts frequently resort to executive agreements that do not necessitate senate approval.

Bilateral agreements generally do not require the approval of other nations before they become effective. In some instances, however, existing treaty obligations may necessitate the consent of trading partners before bilateral trade agreements with other countries can become operative. Bilateral security deals may initially have to be approved by regional groups, such as the North Atlantic Treaty Organization (NATO) or the Southeast Asia Treaty Organization (SEATO), before they can become operative. Bilateral economic agreements may have to be approved by entities, such as the European Union or the North American Free Trade group. Even when the approval of other countries is not required, newly negotiated bilateral arrangements may directly affect the rights of other nations. For example, countries with "most favored nation" (MFN) trading deals may be able to take advantage of more generous terms given to other nations.[11]

Multi-nation interactions are normally more complex than bilateral talks. They tend to involve multiple issues and numerous

10. Executive accords are between heads of state, while treaties are between nations.

11. *See* Gilbert R. Winham, *Simulation for Teaching and Analysis*, *in* INTERNATIONAL NEGOTIATION 465, 472–73 (Victor A. Kremenyuk ed., 2002) (discussing the potential impact of MFN clauses on different tariffs).

parties. It is frequently difficult to know initially which participants will support or oppose the different issues. When many nations are involved, the discussions are usually carried out through existing international organizations, such as the U.N. or the E.U. These interactions tend to have formal agendas and specific approval procedures. Some agreements only have to be approved by the sponsoring entity to become operative, while other accords must be approved by all, or a substantial number, of the participants before they take effect. In some cases, domestic legislation must be enacted to effectuate the policies set forth in non-binding international agreements.

Throughout most of the twentieth century, multilateral discussions tended to be dominated by the United States and the Soviet Union. Less powerful countries often felt ignored. Since the fall of the Soviet Union, many emerging countries have begun to appreciate the increased bargaining power they can generate through formal or informal voting blocks.[12] Nations with common interests endeavor to align themselves in ways they hope will maximize their bargaining influence. Whenever possible, they strive to generate voting rules that treat large and small nations equally. Such rules are generally in place with respect to talks involving established entities like the United Nations. Nonetheless, when multilateral negotiations are conducted on an ad hoc basis, the rules are likely to be significantly influenced by economically and/or militarily powerful countries that adopt weighted voting procedures that diminish the capability of weaker nations to defeat overall accords.

Individuals who represent nations in the international arena must appreciate that they are always acting in an official capacity. No matter how much they may seek to develop individual identities, they continue to be viewed by others as spokespersons for their specific countries. This is true whether they are communicating through formal or informal channels. As a result, U.S. spokespersons tend to be burdened with the stereotypical baggage associated with U.S. representatives. They are likely to be perceived as arrogant, powerful, uncompromising, unsympathetic, and capitalistic. American agents

12. *See* WATKINS & ROSEGRANT, *supra* note 3, at 213–15.

who attempt to dispel these images by disassociating themselves from official U.S. positions may create different problems. Others would be shocked that American agents might undermine the interests of their own country, and would be hesitant to trust such disloyal persons. It thus behooves U.S. representatives to consistently behave in a manner that enhances the underlying interests of their own country.

When meaningful inter-government negotiations are involved, U.S. agents usually have severely circumscribed bargaining authority. They are generally required to confer regularly with the State Department and/or the Defense Department, the White House, the Senate Foreign Affairs Committee, and other entities that have some control over the final terms agreed upon. Their interactions are orchestrated by these entities, which severely restricts their capacity to do anything spontaneously.[13]

Since bilateral and multilateral negotiations usually concern issues of importance to different government agencies, it is critical for the relevant parties to engage in thorough *intra-government* planning prior to the external discussions.[14] To guarantee the development of common objectives, all interested parties must be asked about their respective interests. To generate the projection of unified national positions, bargaining strategy must be addressed. How should the designated negotiators move from where they commence their discussions to where they are expected to end up? If these planning activities are not carried out properly, negative consequences are likely to result. Agents from other nations who sense the lack of a unified approach may try to exploit internal disagreements. In addition, if the final terms agreed upon do not satisfy the needs of the relevant U.S. agencies, dissatisfied officials may endeavor to undermine the accord. They may contact White House, State Department, Defense Department, or Senate officials in an effort to compel the renegotiation of the disfavored provisions. Thus,

13. *See, e.g.*, Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392–93 (2000) (indicating the United States would not approve the rules applicable to the newly created International Criminal Court, since the rules do not comport completely with U.S. interests).

14. *See* JESWALD W. SALACUSE, THE GLOBAL NEGOTIATOR 33–35 (2003) [hereinafter SALACUSE, GLOBAL NEGOTIATOR].

American negotiators must realize that their *intra-government* discussions may be more contentious and protracted than their subsequent *inter-government* bargaining sessions. Persons who seek to avoid this crucial step during their preparation phase usually encounter more difficulties in the long run than individuals who have engaged in careful intra-organizational preparation.

When expansive international conferences are involved, multi-person delegations may be required. When these delegations interact with delegates from other countries, U.S. agents must seek to discover which persons possess real influence with their home governments, which ones are destabilizing participants who may try to hinder progress, and which ones are mediators who will endeavor to accommodate the competing interests involved. They have to think of the means they can employ to induce the mediative agents to neutralize the destabilizers in a manner that enables the influential agents to agree to the desired goals.

Inter-nation negotiations at regional or global conferences frequently take place at various levels. Preconference discussions between and among the key participants are used to define the issues to be addressed and to determine the conference procedures that must be followed. Once the conference begins, plenary sessions are used for formal speeches and public debate. Smaller working groups are usually created to explore the specific topics and to formulate proposals that will ultimately be considered by the entire conference. When such multi-nation talks do not progress well, the participants may request the assistance of neutral intervenors. Intervenors may be chosen because of their formal position (e.g., Secretary General of the United Nations) or because they are experts from nonaligned countries. Skilled negotiators from NGOs may also be asked to interact with persons from similar entities in other nations, to help set the stage for subsequent inter-nation interactions. Such persons can assist the conference participants to reopen clogged communication channels, to get the disputing parties to explore their diverse underlying interests, and to search for alternatives that may simultaneously satisfy the needs of everyone.

When conflicted states distrust one another because of previous violations of trust, it may help to employ "confidence building" measures that induce the parties to move in small reciprocal

increments until they can restore the mutual trust needed to enable them to move toward final accords.[15] During such confidence-building stages, each side agrees to take alternating steps toward an overall resolution that will ultimately culminate in mutually acceptable terms. Once a number of such mutual steps have been taken, and bargaining credibility has been restored, the participants may be able to make the overarching commitments needed to resolve the underlying conflicts.[16]

III. PRIVATE CITIZEN INVOLVEMENT IN GOVERNMENTAL NEGOTIATIONS

Some international conflicts may not respond favorably to exchanges through formal diplomatic channels. The disputants may not trust the governments that are trying to help. To circumvent such difficulties, NGOs have increasingly become involved. For many years, groups affiliated with the Quaker Church (e.g., American Friends Service Committee) have worked in numerous areas to promote human rights and world peace. In recent years, NGOs like Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, the Institute for Multi-Track Diplomacy, and the Carter Peace Institute have provided dispute resolution assistance in areas like Northern Ireland, Cyprus, the Middle East, South Africa, and Rwanda.[17] Such NGOs often work for several years with NGOs from other countries, to set the stage for subsequent nation-to-nation or multi-nation negotiations.

The involvement of NGOs and private citizens in international conflicts has been labeled "Track II Diplomacy."[18] Such private entities are not constrained by political considerations affecting official government institutions. Unlike State Department officials who must always speak for their government, NGOs and private citizens can speak as individuals. They can behave in ways that

15. *See* WATKINS & ROSEGRANT, *supra* note 3, at 167, 270.

16. *See, e.g.*, URI SAVIR, THE PROCESS (1998) (describing the various steps taken by Israel and the Palestinian Liberation Organization as they worked toward the Oslo Accords).

17. *See* Sadat & Carden, *supra* note 13, at 386 n.19.

18. *See* JOHN W. MCDONALD, JR. & DIANE B. BENDAHMANE, CONFLICT RESOLUTION: TRACK II DIPLOMACY 1 (1987).

would be unacceptable for government spokespersons. They do not have to worry about the political consequences of their actions back home.

Groups and individuals engaged in Track II Diplomacy ("Track II") frequently interact with similar organizations in the host nations. They may have to use this approach because of the unwillingness of government officials to recognize their mediative status. They may create cultural or athletic exchanges that allow persons from the disputing nations to get to know each other in mutually beneficial settings. Once beneficial relationships are established, they can begin to address the critical issues affecting them, and government officials may become involved in the formal discussions.

Despite their freedom from government control, NGO representatives are still subject to cultural stereotyping that can influence the way they are perceived. When American citizens travel abroad, it is almost impossible for them to entirely shed their U.S. images. This fact makes it difficult for them to intervene in controversies that meaningfully concern American interests. The disputing parties may find it impossible for such persons to completely ignore the policies of their home government. To circumvent such difficulties, the assistance of private citizens from nonaligned countries may be requested. It is often easier for individuals from such neutral states to earn the trust and respect of the disputing parties.

Experienced Track II negotiators can often affect inter-nation controversies, such as those between Greece and Cyprus, Rwanda and Burundi, and Israel and Syria. In such areas, they may work in parallel with Track I diplomats from their home countries. Although it might be awkward for foreign governments to become involved with the internal affairs of other nations, private organizations do not have to worry about this issue. As a result, agents from such entities can frequently meet privately with government officials from the target countries, who do not view such discussions as infringements on their national sovereignty.

Track II diplomatic efforts are normally carried out in stages. The preliminary step involves the establishment of personal contacts with people or organizations in the target nations. The neutral intervenors work to get leaders from the selected groups to get to know each

other in nonthreatening situations. Once they have developed a minimal level of inter-group trust, the intervenors often create problem-solving workshops that include respected persons from the disputing countries. Cultural differences are explored in an effort to generate mutual respect for the diverse backgrounds involved. When the individuals from the disputing nations begin to feel comfortable with each other, the conciliators start to explore the underlying causes of the conflict involved and search for solutions that might be mutually acceptable.

Joint brainstorming meetings can be employed to induce the disputing parties to begin to work together toward the achievement of common goals. The conciliators often try to get persons from the different nations to place themselves in the shoes of people from the other side, to help them appreciate their perspectives. Once the participants begin to develop possible ways to resolve their differences, these private citizens are encouraged to reach out to their fellow citizens through televised discussions or at public forums. Written materials may also be created and disseminated among the interested parties. This educational approach is especially effective with respect to younger people, who may not recall past wrongs as strongly as the people who lived through them. Once public opinion begins to support the resolution efforts generated through this process, government officials begin to feel pressure to move in the same direction. The private groups have set the stage for formal government involvement in the talks dealing with the underlying issues.

Persons who endeavor to engage in Track II diplomatic efforts must be extremely patient. Most inter-cultural conflicts have taken years to develop, and the disputing parties are unlikely to alter their perspectives quickly. Conciliators who try to rush the healing process are likely to generate further distrust and undermine the settlement efforts. They must begin with minimal objectives and work slowly but steadily toward final resolutions.

IV. TRANSNATIONAL BUSINESS NEGOTIATIONS

As the economy has become global in scope, corporate representatives have had to become more proficient transnational

negotiators. Creation of the North American Free Trade Zone has expanded purchase and sales talks between United States firms and Canadian and Mexican businesses. As the European Union has expanded, American corporations have had to negotiate with EU companies. U.S. firms are increasingly purchasing goods and services from lower wage businesses in South America, Africa, and Asia, and they are endeavoring to sell more to parties in those expanding nations.

Transnational business negotiations are often more complex than interactions within one's own country. Greater distances between bargaining parties frequently necessitate time-consuming travel to foreign nations. Many negotiators feel most comfortable bargaining on their own turf.[19] Individuals who travel significant distances to other countries may experience serious jet lag, and fear that their presence in the other company's territory may be perceived as an indication of their eagerness to generate agreements. They may feel they have to achieve accords before they return home. This is why it is important for them to arrive a day or two before the substantive discussions are scheduled to commence, and they should be somewhat flexible with respect to when they have to return home.

Bargainers who visit foreign countries face other difficulties. They will be away from their families and colleagues for extended periods, and may have to adjust to unfamiliar foods. They have to deal with different cultures and embarrassment when they commit a faux pas. They have to accept hospitality from their hosts, which may create feelings of obligation on their part, and cause them to make excessive concessions. To counteract such feelings, they should provide their hosts with reciprocal hospitality by taking them to nice restaurants and providing them with appropriate gifts.

Transnational business negotiations are generally more protracted than domestic interactions, due to cultural differences and the greater complexity of the issues being addressed.[20] It can be beneficial to divide the discussions into discrete stages. During the pre-negotiation

19. *See* Jeswald W. Salacuse, *Your Place or Mine: Deciding Where to Negotiate*, 8 NEGOT. MAG. 7, 3 (Apr. 2005).

20. *See* FRANK L. ACUFF, HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE AROUND THE WORLD 77–79 (1997).

phase, each side should try to determine whether their contemplated talks are likely to be mutually beneficial. If circumstances seem to be propitious, they can use the pre-negotiation phase to create a formal agenda for their impending discussions. Once this stage is finished, they can address the specific details of their joint venture.

V. IMPACT OF CULTURAL DIFFERENCES AND NEGOTIATOR STYLES ON INTER-NATION AND TRANSNATIONAL BUSINESS INTERACTIONS

Culture consists of such social phenomena as personal beliefs, ideas, languages, customs, rules, and family patterns.[21] These factors provide each society with a set of shared values and beliefs that define the way individuals envision themselves and their social groups. Culture influences the manner in which group members interact with each other, and the way in which individuals from different cultures relate to one another. These considerations are highly relevant for transnational negotiators, since the behavior of the participants is likely to vary significantly depending on their respective cultural backgrounds.[22] Professional cultures also affect multi-country interactions, as diplomats, lawyers, and businesspersons apply different approaches to address similar circumstances.[23]

When Americans bargain with other Americans, they assume similar cultural rules, even when the other parties are from different geographic areas. Verbal expressions and nonverbal signals tend to have common meanings, and the participants are likely to share common values. On the other hand, when Americans bargain with persons from foreign nations, they have to acknowledge the influence

21. *See* Julia A. Gold, *ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2 J. DISP. RESOL. 289, 292–302 (2005); Ilhyung Lee, *In Re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 393–401 (2005); NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 16–24 (4th ed. 2002).

22. *See* TONY ENGLISH, TUG OF WAR: THE TENSION CONCEPT AND THE ART OF INTERNATIONAL NEGOTIATION 95–98 (2010); SALACUSE, GLOBAL NEGOTIATOR, *supra* note 14, at 89–115.

23. *See generally* GUNNAR SJOSTEDT, PROFESSIONAL CULTURES IN NEGOTIATION (2003).

of cultural differences.[24] Positive and negative stereotypes may affect their encounters. Traits may be attributed to participants based on their cultural backgrounds that have no relationship to reality. This could undermine their substantive talks.

Individuals who are planning to conduct negotiations with persons from other countries should initially work to obtain information regarding the national cultures involved.[25] When people study the cultural backgrounds of foreign opponents, they must be careful not to assume that all persons from a particular nation think and behave alike.[26] They only have to consider the different personalities of persons from their own geographic region to realize how diverse individuals are within the same country. Nonetheless, when they initially encounter persons from different cultures, it may be helpful to consider the behavioral generalities attributed to people from their particular cultures. This should provide them with a good place to begin their evaluation of their individual counterparts, and it should help them avoid cultural taboos that could negatively affect their interactions.

Professor William Zartman has suggested that national cultural differences have become less significant over the past few decades, due to the development of an international negotiation culture that is an amalgam of the styles of major industrial nations.[27] Although it is certainly true that State Department officials who represent their respective governments in the international arena and persons who repeatedly negotiate private transnational business arrangements have all been influenced by an international bargaining culture, it is difficult for most persons to entirely shed the subtle, and even overt,

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24. *See, e.g.*, JEANNE M. BRETT, NEGOTIATING GLOBALLY 203 (2001); HENDON, HENDON & HERBIG, *supra* note 2, at 43–76.

25. Two excellent starting points for a negotiator seeking to acquaint herself with another culture are OLEGARIO LLAMAZARES, HOW TO NEGOTIATE SUCCESSFULLY IN 50 COUNTRIES (2008) and TERRI MORRISON & WAYNE A. CONAWAY, KISS, BOW, OR SHAKE HANDS (2006) (discussing the bargaining cultures of over sixty countries).

26. *See* LOTHAR KATZ, PRINCIPLES OF NEGOTIATING INTERNATIONAL BUSINESS 9–10 (2008); *see also* James Sebenius, *Caveats for Cross-Border Negotiators*, 18 NEGOT. J. 121, 122–26 (2002).

27. *See* I. William Zartman, *A Skeptic's View*, *in* CULTURE AND NEGOTIATION 17, 19 (Guy Oliver Faure & Jeffrey Z. Rubin eds., 1993).

influences of their own cultures.[28] Our basic beliefs, customs, value systems, and verbal and nonverbal interpretations continue to be affected by our formative environments and our current surroundings.[29] Our cultural backgrounds affect whether we think we can control our destinies or believe they have been predetermined. Our cultures determine whether we endeavor to resolve problems deductively, inductively, or in some other manner.

Punctuality is more important to Americans than it is to persons from some other cultures.[30] It is generally rude for an American to show up for a business meeting five or ten minutes past the scheduled time, while a thirty or forty-five minute delay would not be uncommon in Latin American or Middle Eastern countries.[31] While Americans tend to separate business and social discussions, counterparts from other nations feel completely comfortable conducting business transactions during social functions.[32]

In many Middle Eastern countries, it is considered extremely rude to display the bottom of one's foot. Individuals conducting business in such areas should be careful not to cross their legs in a manner that displays the soles of their shoes. In some Asian nations, it is disrespectful for persons to talk to someone with one or both hands in their pocket.[33] When Americans interact with people from such cultures, they should be careful to keep both hands out of their pockets.

In Asian countries like Japan, South Korea, and China, businesspersons consider the exchange of business cards to be formal endeavors. They usually have their names and professional information in their own language on one side and in English on the opposite side. When they hand someone a card, that person is

28. *See* WATKINS & ROSEGRANT, *supra* note 3.

29. *See* Jeanne M. Brett & Michele J. Gelfand, *A Cultural Analysis of the Underlying Assumptions of Negotiation Theory*, *in* NEGOTIATION THEORY AND RESEARCH 173, 175 (Leigh Thompson ed., 2006).

30. *See* MICHELLE LE BARON, BRIDGING CULTURAL CONFLICTS 42 (2003); *see also* EDWARD T. HALL, THE SILENT LANGUAGE 158–61 (1973).

31. *See, e.g.*, LLAMAZARES, *supra* note 25, at 10, 141 (discussing Argentina and Panama).

32. *See, e.g.*, ADLER, *supra* note 21, at 226 (advising American negotiators to buck their impulse to engage in strictly task-related discussion with international counterparts, and instead to view lunches, dinners, receptions, etc. as opportunities to continue the negotiating process).

33. *See* LLAMAZARES, *supra* note 25, at 112 (Japan).

expected to hold the card with both hands as they take time to examine both sides. They should then place the card in a prominent place, and never simply deposit it in their pocket or brief case.

The United States has a relatively informal culture, and Americans do not hesitate to establish a first-name relationship with strangers rather quickly. In most European and Asian countries, this is considered improper. Adults, especially older persons, prefer to be addressed by their last names and formal titles. Although many younger persons from these nations are more willing to establish first-name relationships, it is good for individuals to wait until they are asked several times to address them by their first names before they use this approach. When addressing young professional women, it is usually preferable to use *señora* or *frau*, instead of the diminutive *señorita* or *fräulein*, because no male equivalent exists, and the use of such diminutive female terms may be considered sexist.

Spatial and conversational distances vary greatly among persons from different cultures.[34] In America, it is expected that people who do not know each other extremely well stand about two feet apart during formal business talks. In other cultures, such as Middle Eastern countries, eight- to twelve-inch spatial distances are common. The more expansive spatial distances employed by most Americans may cause those persons to be viewed as cold or disinterested by individuals from closer cultures. When people from countries with quite different spatial differences get together, it can be helpful for them to take seats quickly, to diminish the impact of this factor.

Cultures like the United States and England are highly *individualistic*.[35] Persons from such countries value individual independence over group cohesiveness. Firms reward individuals who use autonomous behavior to advance their own self-interests. Societal status is primarily based on individual, rather than group, accomplishments. Private firm managers—unlike their government counterparts—usually possess the authority to make crucial decisions on their own. People from such cultures like to negotiate because it provides them the opportunity to demonstrate their individual skills.

34. *See* HALL, *supra* note 30, at 162–85.

35. *See* TAN JOO SENG & ELIZABETH NGAH KIING LIM, STRATEGIES FOR EFFECTIVE CROSS-CULTURAL NEGOTIATION 20 (2004).

When agreements are achieved, they know they will be carried out, because they possess the authority to bind their firms.

Other cultures, such as Japan and China, have a *collectivistic* orientation.[36] Persons in these countries are defined more by their national, family, and business connections than by their individual endeavors. They are assessed more by the achievements of their countries or organizations than by their own accomplishments. Individuals work together to advance group interests. Mangers have to consult with others when important decisions must be made, with most final determinations made through a consensus process. Individuals from collectivistic cultures often dislike bargaining encounters, because they prefer to avoid conflicts and dislike the loss of face often associated with the give-and-take of the negotiation process.[37] Persons from individualistic cultures tend to have shorter time frames than people from collectivistic cultures, because individualists wish to reap the benefits of their accomplishments expeditiously.

Sociologists distinguish between "high-context" and "low-context" cultures.[38] High-context cultures tend to be group-oriented. They value the establishment and preservation of long-term relationships and the respect for group norms. They employ face-saving mechanisms to avoid embarrassing overt capitulations.[39] They do not like auction bargaining, where the parties begin a distance apart and slowly move toward the center of their opening positions, because of the repeated concessions associated with that process. They communicate more indirectly, to avoid placing others in awkward positions. You usually have to consider the setting to understand the actual meaning of what is being stated.[40] When they say something might be possible, it suggests it is doubtful. When they say something might be difficult, it almost always means "no." They often accept ambiguous contractual language designed to please both sides and avoid the appearance of loss by either party. They are

36. *See id*.; Gold, *supra* note 21, at 296–97.
37. *See* SENG & LIM, *supra* note 35, at 34–35.
38. *See, e.g.*, WILLIAM H. REQUEJO & JOHN L. GRAHAM, GLOBAL NEGOTIATION 57–59 (2008); SENG & LIM, *supra* note 35, at 30–32.
39. *See, e.g.*, RAYMOND COHEN, NEGOTIATING ACROSS CULTURES 56–61 (1991).
40. *See* KATZ, *supra* note 26, at 51–54.

usually patient negotiators who prefer to become well acquainted with opponents before they seek to resolve the substantive issues.

Low-context cultures tend to be individualistic and goal-oriented. Low-context negotiators are primarily interested in the attainment of beneficial and legally enforceable agreements, even when they do not particularly like the persons on the other side. They feel comfortable with the give-and-take of auction bargaining, believing compromise leads to common ground. They prefer direct communication that indicates exactly what they mean. They do not hesitate to say "no" when they are not willing to give in to an opponent's request. They are rule-oriented individuals who hope to obtain accords that explicitly define all of the relevant terms. They believe ambiguous language will only generate future interpretive difficulties.

Individuals feel most comfortable when they interact with persons from same-context cultures. When people from low-context cultures interact with others from high-context cultures, cross-cultural conflicts may arise.[41] The high-context participants may feel that their low-context opponents are being too direct, while the low-context persons may think their opponents are unwilling to directly address the real issues that must be resolved. The low-context negotiators cannot understand why the opposing parties are hesitant to match their concessions, while the high-context participants cannot comprehend why their opponents wish to openly embarrass them. If such participants are unable to accommodate each other's cultural needs, the likelihood of an agreement will be small.

It is usually more difficult to achieve mutually efficient accords during inter-cultural interactions than during intra-cultural encounters. Nonetheless, negotiators from different cultures can enhance their joint gains if certain common values are present: first, it helps if they share a belief in the value of information-sharing, to enable the parties to appreciate each other's needs and interests; second, the ability to deal with multiple issues simultaneously, to permit the participants to generate mutually beneficial trades; third, a desire to improve on any tentative agreement, to allow the parties to continue to explore possible ways they might generate additional

41. *See* BRETT, *supra* note 24, at 20–21.

joint gains. Cultures that do not share these beliefs are less likely to generate efficient agreements.

Is it more effective to be a win-win Cooperative/Problem-Solving negotiator, who desires to work with opponents to generate mutually beneficial agreements, or a win-lose Competitive/Adversarial negotiator, who is primarily interested in obtaining terms favoring her own side? Studies conducted by Professors Gerald Williams[42] and Andrea Kupfer Schneider[43] found that far more Cooperative/Problem-Solvers are considered effective negotiators than Competitive/Adversarials, while far more Competitive/Adversarials are considered ineffective negotiators than Cooperative/Problem-Solvers. This is because you do get more with honey than you do with vinegar. When people begin an interaction in an aggressive and offensive manner, most people want to deny them what they wish to obtain. On the other hand, when people begin in a courteous and cooperative manner, others feel guilty if they do not work to help them achieve what they need.

When Professor Williams and I combined his previous study with one conducted years later by Professor Schneider, we concluded that many highly skilled negotiators are neither Cooperative/Problem-Solvers nor Competitive/Adversarials—they are a hybrid. They combine the best traits from both categories by seeking highly beneficial results for their own sides, but they endeavor to accomplish this objective in a respectful and seemingly cooperative manner.[44] These Competitive/Problem Solvers seek good results for themselves but then work to maximize opponent returns. Ron Shapiro and Mark Jankowski consider such persons to be "WIN-win" negotiators—"big win for your side, little win for theirs."[45] These bargainers appreciate the importance of the negotiation *process*.

42. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 41 (1983).

43. *See* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 189 (2002).

44. *See* GERALD R. WILLIAMS & CHARLES B. CRAVER, LEGAL NEGOTIATING 64–65 (2007). *See also* ROGER DAWSON, SECRETS OF POWER NEGOTIATING 102–03 (3d ed. 2011) (describing the respectful façade and small concessions certain competitive "power negotiators" implement to great effect).

45. RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE 5 (John Wiley & Sons, Inc. rev. ed. 2001).

Individuals who feel the process has been fair and that they have been treated respectfully are more satisfied with objectively less beneficial terms than those who have not been treated respectfully.[46]

In his insightful book *Give and Take*, Adam Grant carefully distinguishes between "givers" and "takers."[47] Although many persons might believe that takers, who like to claim value for themselves, would be the most successful negotiators, he demonstrates why givers tend to do better. Takers are openly selfish, causing opponents to be suspicious and careful not to give them too much. Givers endeavor to assist others, and induce those persons to reciprocate their generosity. Nonetheless, "selfless givers," who simply work to satisfy the needs of others without seeking reciprocity for themselves, tend to do poorly, because they give others far more than they get in return. "Otherish givers" work to advance the interests of others but simultaneously strive to enhance their own gains.[48] These proficient bargainers are similar to Competitive/Problem Solvers, who work to maximize opponent gains—but only after they have obtained what they really want for their own side.

VI. PREPARING THOROUGHLY FOR TRANSNATIONAL INTERACTIONS

Before American government representatives, lawyers, and businesspersons commence bargaining interactions with people from different countries, they should carefully prepare for those encounters. After they have gathered the pertinent economic, legal, and business information, determined their own bottom lines and aspiration levels, and estimated the bottom lines and interests of the *opposing parties*, they should take some time to learn about the cultures of their adversaries.[49] They should explore the national histories and cultural practices of those persons. Foreigners frequently criticize Americans for ignoring such factors. They assume Americans arrogantly believe these topics are irrelevant.

46. *See generally* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010).

47. *See* ADAM GRANT, GIVE AND TAKE 155–85 (2013).

48. *See* HARVARD BUSINESS ESSENTIALS, NEGOTIATION 73 (2003).

49. *See* SALACUSE, GLOBAL NEGOTIATOR, *supra* note 14, at 110–11.

When Americans demonstrate both an understanding of and respect for the histories of other nations and for the diverse cultures associated with those countries, they enhance the probability bargaining interactions will begin beneficially.

Most individuals are very proud of and affected by the historical developments of their own countries.[50] Do they have a history of unbridled capitalism, limited capitalism, socialism, communism, or other system? Is their economic system subject to minimal or expansive government regulation? Is their government democratic, autocratic, plutocratic, or monarchical? Is their government relatively stable or unstable? Has their nation been invaded by people from other countries, and have they been occupied by foreign powers? Persons from nations that have been invaded by major powers, especially those that have been occupied by such parties, tend to be suspicious of seeming economic invaders. American business negotiators should let people from such countries know they plan to create mutually beneficial relationships that will not detract from the autonomy of those parties.

American firm representatives should ascertain how foreign companies operate.[51] Do top executives make final decisions on their own, or must they consult with board members or subordinate groups? Do a minimal number of persons have to be convinced before deals become final, or must a substantial number of individuals give their approval? If many individuals have to give their approval, who are they and how may American negotiators communicate with them? When group decision making is required, it will take longer for a consensus to be achieved, and American representatives must be patient and allow the deciding persons the time they need to conclude the interaction.

United States corporate agents must appreciate the different ways companies from different countries treat their employees. In America, private employers can usually terminate or lay off workers for good cause, bad cause, or no cause, under the "employment-at-will"

50. *See id*. at 117–25.
51. *See* ENGLISH, *supra* note 22, at 225.

doctrine.[52] Only when large employers plan "mass layoffs" do they have to provide the affected workers with sixty-days advanced notice under the Worker Adjustment and Retraining Notification Act (WARN).[53] In most other industrial nations, firms cannot terminate or lay off employees without cause, and they may be required to provide such persons with severance pay. In countries like Japan, many corporations feel a moral obligation to retain employees, except when being forced to deal with extreme economic circumstances. Business leaders in such nations are amazed by the short-term viewpoints of American executives and their willingness to lay off workers whenever it seems economically beneficial. When U.S. agents endeavor to negotiate joint ventures with firms in these countries, they must appreciate these different philosophies before describing the arrangements they are contemplating.

The U.S. government rarely gets significantly involved in the regulation of private business deals. As long as those arrangements do not raise issues under applicable statutes, such as antitrust laws, they do not require government approval. In other nations, however, government agencies may not only have to approve such deals but they may also be required to participate directly in the inter-firm negotiations.[54] When such governmental participation is expected, the American negotiators must ascertain the interests that must be satisfied before formal approval can be achieved. The U.S. firm representatives must recognize that such government entities may not simply focus on business considerations but may also explore more expansive social, environmental, and even political interests. It is thus beneficial to retain local attorneys who are familiar with the applicable legal doctrines and the pertinent administrative requirements. If these areas are ignored, beneficial business arrangements may be thwarted or delayed.

In some countries (e.g., China and India), gifts or gratuities may be given to government administrators, to encourage the expeditious processing of business deal approval requests. These are generally

52. *See* MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SHROEDER & ELAIN W. SHOBEN, EMPLOYMENT LAW TREATIES § 9 (4th ed. 2009).

53. 29 U.S.C. § 2101 (2014).

54. *See* JESWALD W. SALACUSE, MAKING GLOBAL DEALS 103–15 (1991).

not *bribes*. They are merely *facilitation fees* that are not intended to corruptly influence the recipients but merely to encourage them to provide faster processing. As a result, such facilitation payments do not come under the Foreign Corrupt Practices Act.[55] It is usually preferable to have such payments made by local agents who know the government officials involved and understand how such payments are to be made.

The United States has a highly legalistic culture. When American firms interact with other companies, they endeavor to generate binding contractual relationships that are subject to judicial or arbitral enforcement. Each term is explicitly defined. Corporations from different cultures, such as China and Japan, are more relationship-oriented. They seek to create long-term business partnerships based more on mutual trust and respect than on contractual obligations.[56] When bargaining parties initiate their discussions, they use the Preliminary Stage to establish rapport and set the tone for their interactions. In countries like the United States, this phase is relatively short, as the participants move expeditiously into the substantive discussions. When American business agents commence bargaining talks with individuals from countries like China and Japan, they must have a more expansive Preliminary Stage, to enable them to establish mutual relationships with their foreign counterparts. This may take several days, or even longer.

Once the substantive discussions begin, the American negotiators should be careful not to be overly legalistic. If they seek unusually specific contractual language, their adversaries may think this evidences a lack of trust and respect for their companies. They prefer to develop agreements containing relatively general language. When future issues arise, instead of seeking resolution through adjudicative procedures, they expect to use the bargaining process to resolve such matters. This is why they consider long-term, trusting relationships to be so important.

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55. *See* ACUFF, *supra* note 20, at 129.
56. *See* SALACUSE, GLOBAL NEGOTIATOR, *supra* note 14, at 96–97, 103.

VII. INITIATING TRANSNATIONAL GOVERNMENTAL AND BUSINESS DISCUSSIONS DURING THE PRELIMINARY STAGE

When individuals from different cultures commence bargaining interactions, it can be beneficial for them to employ a prolonged Preliminary Stage, to get to know each other and to establish positive relationships.[57] The participants should take the time to explore their respective cultures and to begin to understand each side's idiosyncrasies. During this phase, they should avoid real substantive discussions. Most Americans find this part of the process distasteful, because they are impatient and wish to get down to business quickly. They should appreciate the fact that negotiators who patiently establish affirmative relationships, based on mutual respect for each side's different approaches to bargaining interactions, enhance the likelihood of generating successful deals. Individuals who rush this stage of the process and fail to create trusting relationships may either miss the opportunity to achieve mutual deals or obtain terms less efficient than the ones they might have achieved had they taken the time to establish mutual respect and trust with the opposing representatives.

When American negotiators begin to interact with agents from less legalistic cultures, they should politely explain their need for certain contractual specificity but must also appreciate the lack of trust displayed by demands for total specificity. They must decide which terms should really be covered in detail and which ones may be more generally defined. Such an accommodation should significantly contribute to the likelihood of achieving mutual accords.

When negotiators from different countries interact, language difficulties are likely to arise.[58] Even though most transnational interactions involving Americans are conducted entirely or at least partially in English, misunderstandings may develop. Foreign agents may interpret verbal statements and nonverbal signals differently from their American counterparts.[59] Some cultures process language in a highly "rational," linear manner, while others do so in an

57. *See* ACUFF, *supra* note 20, at 77–79.
58. *See, e.g.*, SALACUSE, GLOBAL NEGOTIATOR, *supra* note 14, at 94–96.
59. *See, e.g.*, COHEN, *supra* note 39, at 112–30.

indirect, emotional, and nonlinear fashion. American negotiators should speak clearly and more deliberately than they might at home, to be certain their messages are comprehended. They should avoid the use of slang expressions that may not be understood by persons who have not resided in the United States for prolonged periods. When opposing parties have confused looks on their faces or ask questions which indicate they are having difficulty understanding what has been said, the U.S. agents should patiently work to express themselves in ways more likely to be understood.

On some occasions, transnational negotiations must be conducted through interpreters.[60] When this is necessary, the U.S. participants should be sure to employ someone completely fluent in the foreign language. This significantly diminishes the risk of avoidable misunderstandings. American agents who are not truly fluent in a foreign language should not try to negotiate in that language. While it would be beneficial for such persons to greet their foreign counterparts in their native language, their efforts to converse in that language during the substantive discussions may create needless difficulties.

VIII. VALUE CREATION DURING THE INFORMATION STAGE

Once negotiators have established some degree of rapport and set the tone for their interaction, they enter the Information Stage, during which they must seek to determine the items they have to share with one another. Each side hopes to discern the primary objectives and underlying interests of the other side. Proficient bargainers begin to look for possible ways to expand the overall pie to be divided, recognizing that in most circumstances, the parties do not value the different terms identically and oppositely. The more successfully the participants are able to expand the pie, the more efficiently they should be able to structure mutual accords.[61]

The most effective way to elicit information from opponents is to *ask questions*. During the initial portion of the Information Stage,

60. *See* HENDON, HENDON & HERBIG, *supra* note 2, at 58–60.

61. *See* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 12–13 (2000).

many persons make the mistake of asking narrow questions that can be answered with minimal replies. As a result, they merely confirm what they already suspect. It is more effective to begin with *broad, open-ended, information-seeking questions,* which induce opposing parties to talk. The more they say, the more they disclose. Only after they believe they have obtained a substantial amount of information through general inquiries should negotiators begin to narrow the focus of their questions to confirm what they think they have heard.[62]

Once individuals have obtained a good deal of opposing party information, they should shift to "what" and "why" questions. The "what inquiries" are designed to ascertain the true objectives of the other side, while the "why inquiries" are used to probe the "underlying interests" reflected in those goals. Questioners should listen carefully for verbal leaks that inadvertently disclose critical information. For example, if someone says they are "not inclined" or "do not want" to do something, it generally suggests they are actually willing to do what is being discussed. They do not feel comfortable lying about their side's true intentions, thus, they truthfully say that they are "not inclined" or "do not want" to do something. Listeners should appreciate that they will most likely move in the desired direction if given sufficient time.

It is vital to appreciate the "underlying interests" of bargaining parties. It might not be possible to provide opponents with the specific terms they are seeking, but it may be possible to satisfy their underlying interests in another manner. Someone may be demanding more cash than this side can afford, but they might accept partial payment in goods or services which this side could provide. A country may not be willing to permit the United States to establish a military base exactly where it would like to put it, but may be willing to accept the base in another location that would be acceptable to the United States. When business partners have reached a difficult point in their relationship, it might be critical for one side to apologize to the other for something it should not have done. It is important to acknowledge that even major executives are human beings with emotional needs. So often, someone who feels they have been

62. *See, e.g.*, DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND PRACTICE 103–04 (2d ed. 2007).

wronged by another really wants to hear that side say it is sorry for what has occurred.

Should bargainers make the initial offer or seek to induce the other side to do so? Many people like to make the first offer, because they believe this will enable them to anchor the bargaining range. This approach may work when the negotiation range is well known by both sides, but it may put them at a disadvantage when the range is less certain. This is because it enables the opposing side to "bracket" their goal by beginning far enough away from this side's opening position to place its target midpoint between the two opening offers. They hope to generate equal concessions that will enable them to end up exactly where they desire. In addition, if one side has miscalculated the actual value of the interaction, whoever goes first will disclose the error and place himself at a disadvantage.

When there are a number of different items to be negotiated, as there usually are with respect to transnational interactions, the participants should endeavor to determine the degree to which each side values the various terms. Most bargainers begin the serious discussions focusing on either the most important terms or the least important terms. If someone begins with five items, four of which are important to this side, it can assume that all five are important to the other side. If they begin with five items, four of which are relatively insignificant to this side, most likely all five are unimportant to the opposing party.

It is usually beneficial to begin the serious discussions with a focus on some of the less significant terms, to enable the participants to begin to reach tentative agreements on some items. When most experts interact, they initial the terms tentatively agreed upon (nothing is final until all of the terms have been resolved), and they reserve the right to revisit a prior item if that becomes necessary during subsequent talks. As bargaining parties tentatively resolve 20, 40, and even 60 percent of the items in question, they become psychologically committed to overall agreements and become more flexible when they focus on the more significant terms.

During the Information Stage, parties frequently over- and understate the value of particular items for strategic purposes. If Side A thinks Side B really hopes to get Item 1, which Side A does not particularly value, Side A may suggest Item 1 is important to it, to

make it seem like a significant concession when it gives that term to Side B. Side A may similarly understate the degree to which it values an item, if it believes Side B does not value that term, to enable it to obtain that item at minimal cost to its own side. Parties may similarly indicate that they cannot agree to something their side is actually willing to accept, to gain a bargaining advantage. Are such misrepresentations unethical? U.S. attorneys are governed by the American Bar Association (ABA) Model Rules, and Rule 4.1 prohibits the knowing misrepresentation of "material law or fact to a third person."[63] Nonetheless, Comment 2 to Rule 4.1 explicitly indicates, "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . . ."[64]

Courts generally allow what is commonly called "puffing" and "embellishment" during bargaining interactions, so long as such misstatements merely pertain to subjective client values and settlement intentions.[65] Similar behavior is accepted by negotiators in other countries. Nonetheless, if parties go further and misrepresent what opponents have the right to rely on, they subject their clients to possible fraud liability—and they seriously risk permanent damage to their professional reputations. It is extremely difficult to negotiate with persons you cannot trust. You have to verify everything they tell you, and you can never be certain they will carry out agreements achieved.

IX. VALUE CLAIMING DURING THE DISTRIBUTIVE AND CLOSING STAGES

Once negotiators are finished "creating value" during the Information Stage, they begin to "claim value" during the

63. THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 95 (2011).

64. *Id.*

65. *See generally* Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. DISP. RESOL. 305–09 (2010).

Distributive Stage.[66] This is an inherently competitive portion of bargaining interactions, as the participants determine how to divide the surplus they have created. The transition from the Information Stage to the Distributive Stage is usually clear, as the participants cease asking each other what they want and begin to talk about what they hope to achieve for their own side. Negotiators should plan their concession patterns carefully, to enable them to articulate principled explanations for all of their position changes. They should generally make each position change smaller than the previous changes, and they should avoid consecutive concessions that are not reciprocated by opposing side position changes. Participants should always be aware of their current non-settlement options, and appreciate the fact that a bad deal is almost always worse than no deal. When it is clear that what the other side is offering is not as beneficial as their non-settlement alternatives, they should politely indicate their willingness to walk away. Once the other side appreciates that they are willing to end the interaction, it will almost always put a more generous offer on the bargaining table, enabling the talks to continue.

During the Distributive Stage, participants employ various techniques to advance their interests. They regularly employ legal, economic, political, and even emotional arguments to further their goals. These assertions should be presented in a seemingly objective and even-handed manner, if they are to appeal to others. Individuals frequently articulate negative threats indicating the adverse consequences that will affect the other side if it does not give in to this side's demands. Skilled negotiators often substitute affirmative promises that are actually more likely to generate opponent position changes. Instead of threatening negative action unless opponents give in, they promise to reciprocate position changes made by the other side. This provides opposing parties with face-saving ways to make concessions.

Silence and patience are critical during the Distributive Stage. When someone makes a concession, he should remain silent awaiting

66. *See generally* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming during Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1, 14 (2010) (encouraging parties not to puff and embellish too much during the Information Stage, and to avoid inefficient item exchanges during the Distributive and Closing Stages).

the other side's response. If he continues to talk, he tends to give up important information, and may even bid against himself by making additional position changes that are not reciprocated by the opposing side. For example, a prospective firm buyer may initially offer to pay the seller $45,000,000, and then suggest $48,000,000 when the other side says nothing in response to this party's opening offer. Such a quick and unreciprocated position change would indicate the buyer is willing to go over $50,000,000, if necessary, to conclude the deal. It takes time for persons to decide to change their existing positions, and good bargainers are careful to provide others with the time they need to realize the need for concessions. During this part of the interactions, participants should always monitor the concession patterns of both sides, to be sure they are not making excessive or unreciprocated position changes.

Near the end of the Distributive Stage, the participants begin to appreciate that an agreement is likely to be achieved, and they enter an especially delicate part of the interaction—the Closing Stage. By the time they have gotten this far, the participants have made a great deal of progress, and they have become psychologically committed to a deal. Many less skilled negotiators move too quickly to conclude the interaction, and they close 60, 70, or even 80 percent of the remaining gap. For example, the individuals in our hypothetical buy-sell interaction may be $5,000,000 apart when they begin to appreciate that a deal is likely to be consummated. The more anxious buyer may end up paying $3,000,000—or even $4,000,000—more, to be sure the deal is finalized. This is why it is critical for negotiators to continue to move slowly and patiently during this part of their interactions. They must appreciate that by this stage, *both sides* wish to achieve accords. They should thus be sure to move slowly with the other party toward the final terms, and avoid excessive position changes by their side. If they can exude exceptional patience, they can frequently induce anxious opposing parties to close most of the gap remaining between them.

X. VALUE MAXIMIZING THROUGH THE COOPERATIVE STAGE

Once a tentative agreement has been achieved through the distributive process, many negotiators erroneously believe the

bargaining process is finished. This is almost never true with respect to multiple-item transnational accords. During the prior stages, the participants have over- and understated the value of different terms for strategic purposes, and various items may have ended up on the inefficient side of the table.[67] I demonstrate this to my negotiation class students by assigning specific point values to each item to be negotiated. If one term is worth 100 points to one side but only 40 points to the other side, it should usually end up on the side valuing it more highly. If it is on the side valuing it at 40 points, that side should offer to trade it for something it values at more than 40 points—and for which the other side values for less than 100 points. Such trades enable the participants to expand the overall surplus and simultaneously improve their respective returns. They should continue this process until neither can gain more without the other side losing something.

When a party decides to move into the Cooperative Stage, it is critical the other side realizes they are making this transition. The moving party should initially acknowledge a tentative accord has been reached and suggest the exploration of possible areas for mutual gain. If someone moves into the Cooperative Stage without an understanding of the opposing side, and suggests modifications that are all worse than what has already been achieved, the other side may think the moving party is being dishonest and trying to take things away from the other side. This might cause the entire deal to unravel. Both sides must appreciate the movement into the Cooperative Stage, to enable them to jointly explore possible ways to improve their respective situations. If none of the offered trades are mutually beneficial, the parties have most likely generated efficient terms that cannot be improved.

Once transnational agreements are achieved, the parties must determine whether the specific terms will be expressed in English or the language of the other country. This issue can be critical when future disagreements arise, because language differences may be outcome determinative. In many cases, the parties may develop official texts in both languages, and specify that mediators and

67. *Id*. at 15–17.

arbitrators who may subsequently be employed to help the parties resolve contractual disagreements be fluent in both languages.

Most American and foreign businesspersons do not like to subject their corporations to foreign laws or to the jurisdiction of foreign courts. They fear local biases will place them at a disadvantage. It is thus common for negotiators to establish their own procedures to resolve such controversies.[68] They usually provide for inter-party negotiations. When such efforts do not produce the desired results, they often designate neutral persons to serve as mediators. If they are unable to resolve the issues through such procedures, they usually require the disputing parties submit the matter to arbitration. They may specify that the arbitration process conform to the dictates of entities like the International Chamber of Commerce, the London Court of Arbitration, or the American Arbitration Association. Such procedures enable parties to resolve temporary disagreements in a relatively amicable manner, which allows them to preserve their underlying business relationships. Since neither side is usually willing to subject their firms to the legal doctrines of other nations, their transnational agreements generally tell arbitrators to apply the doctrines generally applied in the international arena to such business arrangements.

XI. CELL PHONE AND E-MAIL INTERACTIONS

Many transnational negotiations are conducted by way of cell phone discussions and e-mail exchanges, due to the substantial physical distances between bargaining parties. These interactions involve the same stages and bargaining techniques as in-person interactions, but they consist of a series of shorter exchanges and preclude visual contact, except where video phones are available. Some persons treat such interactions less seriously than they would in-person discussions, which can be a major mistake.

When someone contacts the cell phone of an opposing party, they may reach them at a bad time and/or in a poor location. They may be at an athletic event or in a tavern with friends, surrounded by many other people. They might be distracted by what is going on around

68. *See* SALACUSE, GLOBAL NEGOTIATOR, *supra* note 14, at 68–71.

them, and the conversation may be overheard by strangers who have no right to hear the confidential information being discussed. When call recipients answer their phones, the caller should ask if this is a good time to talk. If not, the caller should ask the call recipient to return the call when they are in a more isolated area where they can focus on the matter at hand.

Telephone discussions are less personal than face-to-face interactions, making it easier for participants to employ overtly competitive tactics. It also makes it easier for persons to reject proposals being made by the other side. When very significant talks are involved, it may behoove the participants to schedule in-person discussions in a mutually acceptable location. If this is not possible, they might take advantage of video conferencing that enables both sides to see each other.

Many persons think telephone conversations are less revealing than in-person talks because the participants cannot see each other. They act as if opposing parties cannot perceive their nonverbal signals during these interactions. This is incorrect; many people can perceive nonverbal signals more through telephone lines than in person, because they are listening intently to the voice. They can hear the pitch, pace, tone, inflection, and volume of the speaker. A prolonged pause may indicate a particular offer is being more carefully considered by a recipient who did not hesitate to reject prior proposals. A sigh in response to a new proposal may indicate the recipient of the new offer is confident an agreement will be achieved. The best readers of nonverbal signals I have seen are blind students, who are able to hear things in my voice that I cannot discern myself. Telephone negotiators should listen carefully for verbal leaks emanating from the other side. They should simultaneously be aware of their own verbal leaks and work hard to control the words they are speaking.

It is usually advantageous to be the caller rather than the recipient of the call, because the caller has had the opportunity to prepare for the interaction.[69] If they are caught off guard and do not recall where the parties were when they last spoke several weeks ago, call

69. *See* GEORGE ROSS, TRUMP STYLE NEGOTIATION 212 (2006).

recipients may make the first concession during this interaction, even though they made the last position change during the prior talks. If someone receives a phone call and is not well prepared to negotiate, he should indicate he is busy and will return the call. He should take out the file to review previous developments and then call back the other party, fully prepared to bargain.

A significant number of individuals like to conduct their negotiations primarily through e-mail exchanges, especially younger persons, who have grown up using e-mail, text messaging, and similar electronic means of communication. Most people who endeavor to limit their bargaining communications to e-mail exchanges are not comfortable with the traditional negotiation process. They do not like the amorphous nature of that process and the split-second tactical decision making that must occur during in-person interactions. They forget bargaining involves uniquely personal encounters not easily conducted entirely through written communications.[70]

Individuals contemplating bargaining interactions conducted primarily through e-mail should appreciate how difficult it is to establish rapport with opposing parties through such lean written mediums that lack facial expressions and general body language.[71] It is thus beneficial to initially telephone opponents to exchange some personal information and to establish minimal relationships.[72] People who first create mutual relationships through such oral exchanges are likely to find their subsequent negotiations more pleasant and more efficient. They are also more likely to generate more cooperative behavior, more trusting relationships, and more efficient agreements.[73] If telephone exchanges would be difficult, especially where very different language capabilities are involved, it would be

70. *See generally* Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Application*, 58 J. SOC. ISSUES 109 (2002) (describing the unique advantages and disadvantages of e-communication, and concluding e-communication usually fails to involve the same amount of information exchange gleaned from face-to-face negotiations).

71. *Id.* at 111.

72. *See id.* at 121; Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 237 (2004).

73. *See* Thompson & Nadler, *supra* note 70, at 111.

beneficial during early e-mail exchanges to disclose some personal information designed to enhance the rapport between the parties.

E-mail proposals are often misinterpreted due to the "attribution bias." As recipients evaluate proposals sent by opponents, they frequently read more or less into the stated terms than what was actually intended, because they tend to assume the senders are being manipulative. Their misinterpretations may be compounded by their escalated replies, which may further exacerbate the situation. This explains why e-mail negotiations tend to be less cooperative than in-person interactions.[74] When persons become especially frustrated by unpleasant e-mail exchanges, they may decide to write highly negative replies. It may make them feel better to prepare such responses, so long as they remember to click "cancel" instead of "send" when they are done.

When parties send documents to others in electronic form, they usually inadvertently include critical information that is not obvious on the face of those documents—and which they do not intend to share with the recipients.[75] Every keystroke, deletion, and addition is recorded in the electronic metadata associated with Word files. Recipients who know how to "mine" electronic files for hidden information may be able to determine exactly how documents were prepared and edited, and even uncover editorial comments made by persons who reviewed earlier drafts. Negotiators should use reasonable care when transmitting electronic documents, to prevent the disclosure of metadata containing confidential information. They can employ one of several scrubbing software programs designed to eliminate such metadata from files before they are shared with others. If they are working in recent versions of Word, they can visit Microsoft's *Office* website,[76] which explains how to remove unwanted metadata from Word files. They can alternatively publish

74. *See* Kathleen L. McGinn & Rachel Corson, *What Do Communication Media Mean for Negotiators? A Question of Social Awareness*, *in* THE HANDBOOK OF NEGOTIATION AND CULTURE 334, 341 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

75. *See, e.g.*, Craver, *Negotiation Ethics for Real World Interactions*, *supra* note 65, at 329–30.

76. *See Remove Hidden Data and Personal Information from Office Documents*, OFFICE, http://office.microsoft.com/en-us/excel-help/remove-hidden-data-and-personal-information-from-office-documents-HA010037593.aspx?CTT=1 (last visited Apr. 12, 2014).

to PDF and send the document in that format, which does not contain unwanted information.

XII. CONCLUSION

Communication and transportation advances have created a global, political, and economic world involving increased transnational inter-government and private business interactions. Nations interact with each other through formal channels (Type I Diplomacy) and through seemingly non-governmental entities (Type II Diplomacy). U.S. corporations do business with firms around the world. All of these transnational interactions are significantly influenced by cultural differences. Due to the greater complexity of transnational bargaining compared with wholly domestic interactions, parties must prepare more carefully for such discussions, and use extended Preliminary Stages to establish rapport and positive tones for their interactions. They must use the Information Stage to avoid the disclosure of information they do not wish to share with opposing parties, to identify the basic issues and underlying interests, and to create joint surpluses; and they must use the Distributive and Closing Stages to divide those items between themselves. Finally, the Cooperative Stage should be employed to generate mutually efficient accords. Individuals must carefully conduct bargaining interactions through cell phone talks and e-mail exchanges.