

EXTREME POWER IMBALANCE
IN MEDIATED NEGOTIATION

by

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ABSTRACT

Multi-issue, multi-party conflicts in the public sector can be resolved by supplementing traditional dispute resolution processes with mediated negotiation. Mediated negotiation involves face-to-face dialogue among disputants with the help of a nonpartisan facilitator. It enables disputants to identify or invent areas of overlapping interest that can serve as the basis for voluntary, mutually accepted settlement. Bargaining power is a person's ability to reach a negotiated settlement that satisfies both his and his adversary's interests.

This analysis examines how negotiators and mediators deal with extreme power imbalance. Three obstacles to negotiation in situations of extreme power imbalance are: the perception of weaker parties that negotiation would be futile; the perception of stronger parties that their power is absolute; and a maldistribution of critical resources such as information, technical expertise, and negotiating skills.

Although practitioners have a wide range of ideas about how negotiators and mediators should approach situations where power is extremely unbalanced, conclusions can be developed regarding ways to foster negotiation while protecting the interests of disputants: disputants can use a mediator to help them evaluate the costs and benefits of negotiation relative to nonsettlement; mediators can help parties gain access to technical resources for analysis, training in negotiation, critical information, and funds for expenses; and mediators can help diffused parties to combine their resources into efficient coalitions for negotiating.

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Introduction

Disputants in public policy conflicts have three broad choices for addressing their differences. They can avoid the dispute, contend against one another (typically in courts, administrative agencies and legislatures), or negotiate. Negotiation is an exchange of information for the purpose of reaching a voluntary settlement.

Disputants move into and out of these three responses to conflict; they are not really as distinct as they appear. Nevertheless, distinct advantages of negotiation have led recently to numerous mediated negotiations (negotiations with the assistance of a neutral facilitator) over public policy disputes.

Negotiation enables disputants to solve problems without turning control over to outside parties (Susskind, Bacow and Wheeler, 1983). If negotiation is entered into voluntarily and settlement is adopted without coercion, then the opportunities for satisfaction with the outcome can be enhanced (Susskind and Ozawa 1983:260; Talbot 1983:95; Susskind and McCreary 1985:368; Wondolleck 1985:348-352; Susskind, Bacow and Wheeler 1983:56-85, 151). If all parties that will be affected by a settlement are represented in a negotiation, the outcome can provide a better balancing of the parties' interests than decisions made without all affected parties (Wondolleck 1985:349-350, 352; Susskind, Bacow and Wheeler 1983:151, 205, 260). If unforeseen changes occur or other compliance difficulties arise, a principled negotiation process (Fisher 1981; Patton 1983) -- which leaves relationships among disputants intact

or improved -- offers a more ready vehicle for correction than judicial or administrative enforcement (Susskind and McCreary 1985:366, 371, 372; Susskind, Bacow and Wheeler 1983:204, 259-260). Finally, negotiation enables disputants to resolve their differences in creative ways (Susskind and McCreary 1985:366, 369, 370; Wondolleck 1985:352). Parties may do better than simply splitting their differences; they might discover ways to increase or maximize their joint gains (Raiffa 1982; Susskind, Bacow and Wheeler 1983:24, 75-76; Buckle and Thomas-Buckle 1986).

Extreme imbalances of power pose a special challenge to negotiators and mediators. In situations where power is extremely unbalanced, the stronger party considers its gains outside of negotiation to dwarf gains it could achieve by negotiating. The benefits of negotiation are considered meaningless by the much more powerful party compared to its substantial unilateral winnings. Similarly, the losses that a much weaker party incurs against its opponent are great; any gains (reductions in loss) available through negotiation with a much stronger party are considered inconsequential by comparison.

In this thesis I describe how disputants can deal with extreme power imbalances. I show what disputants themselves could do, and how mediators could help. Information on how some negotiators and mediators think about the sources of bargaining power and ways to deal with extreme power imbalances were used in developing recommendations for practitioners facing extreme imbalances.

Selection of and access to the practitioners followed from research directed by Prof. Michael Wheeler of the Program on Negotiation, Harvard Law School. That research selected environmental dispute resolution practitioners for a series of "debriefing" interviews (Wheeler 1985). Separate interviews for this thesis made use of the working relationship that was established with those practitioners.

Negotiators and mediators can change the distribution of power when extreme power imbalances block successful negotiation. The underlying purpose of changing the distribution of power is to change disputants' assessments of the potential value of contention and avoidance relative to negotiation. In general, negotiators and mediators can empower both sides in an extremely imbalanced power relationship by increasing the perceived value of negotiation and/or decreasing the perceived value of its alternatives.

The recommendations made in the final chapter follow from a discussion of the nature of bargaining power (chapter one) and the unique circumstances of extreme power imbalance and the problems it engenders (chapter two). In chapter three, summaries and analyses are presented of practitioner interviews.

We focus primarily (although not exclusively) on the ideas of environmental dispute resolution practitioners. However, the processes that practitioners use in resolving environmental disputes have developed from and have influenced dispute resolution in diverse fields. It is becoming increasingly difficult to define certain disputes as

"environmental" and others as "labor," "international," "community," "criminal," "organizational," "interpersonal" or otherwise. Although the thesis is confined for the most part to environmental dispute resolution practitioners and cases, it has also been possible to draw from more generalized theories of dispute resolution. If the analysis and recommendations have any applicability at all, it may be to all disputes in which power is extremely unbalanced.

CHAPTER ONE: BARGAINING POWER

Most people have an intuitive idea about the sources of bargaining power. Difficulty arises, however, when we try to define or describe the ways in which bargaining power is accumulated and applied. This difficulty stems partially from the fact that bargaining power is constantly changing as a result of what disputants do as well as events beyond their control. Our objective in this chapter is to develop a picture of bargaining power for negotiators in multi-party, multi-issue conflicts.

There are various perspectives on bargaining power. For example, one view is that power flows into the hands of the negotiator who can "create doubts" (Colosi 1983). Another view is that bargaining power stems from resources that parties possess whether or not they negotiate. These resources include money, consultants, authority, experience, and access to technical and legal expertise. Commitments to follow through on threats are frequently thought to give a party bargaining power (Schelling 1980). Finally, a fourth view is that power in negotiation belongs to those who can integrate their negotiating partner's interests with their own (Fisher 1983).

A description follows of some sources of bargaining power. It is followed by a consideration of how power can be distributed in negotiation, the problems that can arise when power is extremely unbalanced, and the things that negotiators and mediators do to correct those problems.

SOURCES OF NEGOTIATING POWER

Resources that are Independent of Bargaining

It seems as though all sorts of resources can be used to influence the outcome of a negotiation. A party can use experts or its own analyses to convince others of certain facts and therefore certain conclusions. Knowledge and experience accumulated away from the bargaining table can influence negotiators at the table. Money can be used to purchase other resources, or it can be used directly as an incentive for settlement.

Sam Gusman (1984) describes a negotiation (between the National Agricultural Chemical Association and a coalition of church and environmental organizations) over reduction of pesticide misuse in Third World countries. According to Gusman, negotiators with first hand knowledge about developing countries exercised bargaining power over those without the knowledge.

First hand knowledge, based on experience, is a source of bargaining power that parties acquire separately from what happens at the negotiating table. People without this knowledge had greater uncertainty about whether their assumptions and proposals made sense. The knowledge of what was actually occurring inside the countries, and therefore of what might work, was often decisive in coming to some conclusion (Gusman 1984).

In a water pollution control case at the Holston River, EPA Region IV

and the Tennessee Eastman Company were able to negotiate an agreement about the conditions of a water pollution discharge permit (Susskind, Bacow and Wheeler 1983). The company and EPA viewed their differences as primarily technical and sought to resolve them out of the public eye. The company, in particular, wanted to avoid publicity until questions over EPA's technical approach were resolved by company and agency specialists.

The negotiating power of both parties stemmed in large part from resources that had been developed independently of the bargaining. The company was able to exert power through its technical expertise (consultants and internal scientific staff). EPA's negotiating power stemmed in part from its statutory authority, particularly its mandate to notify the public of its intent to issue a permit for the company.

In another case, Montana Power Company and the Northern Cheyenne Indians generated an agreement which stipulated that the Northern Cheyenne would drop legal challenges to the company's proposed Colstrip power plant. In exchange, Montana Power agreed to provide the Northern Cheyenne with hundreds of thousands of dollars worth of job training scholarships, bus service, air quality monitoring funds, capital for the tribal bank, funds for a community relations project, law enforcement funds, and planning funds (Susskind, Bacow and Wheeler 1983).

Montana Power Company's financial resources played a significant role in the Colstrip settlement. Resources that it possessed separate from the negotiation enabled it to control the terms of settlement by underwriting the cost of social, cultural, economic and environmental programs for the

Northern Cheyenne.

The sources of power illustrated above could have been used in other ways than for negotiation. For example, Montana Power could have used its financial resources to underwrite litigation or lobbyists, rather than incentives for the Northern Cheyenne. Tennessee Eastman's technical expertise could have been used to convince a judge instead of its opponent, EPA. In the same case, EPA's authority could have been exercised only through the formal permit process, but it chose to negotiate as well. The knowledge used by negotiators in the Third World pesticide case could have been used in a public relations campaign.

Creating Doubts

Colosi (1983) suggests that when opposition to settlement is strong, a negotiator may be able to exert power towards settlement by making his opponents uncertain about their resistance. If a negotiator can identify which assumptions, problem definitions, positions or proposed solutions are blocking settlement, he can move negotiations toward settlement by raising doubts in his opponents' minds over those ideas.

Colosi offers an example of a community coalition which opposes the establishment of a home for the mentally retarded in its neighborhood on the grounds that such a home would make the neighborhood less safe. He says that an advocate of the home might exercise negotiating power by raising doubts in the community negotiator's mind over the extent to which community safety is endangered by the home. The advocate could

suggest that additional numbers of sincere, capable adults would contribute to community safety, rather than undermine it. The advocate could ask the community to look at the abilities of the retarded adults as well as their problems.

The advocate for the home is trying to make the community uncertain only about its opposition. He is *not* trying to make the community uncertain about the abilities of mentally retarded adults or about community safety. In fact, his negotiating power depends as much upon his ability to establish new convictions in the other negotiator's mind as it does on his ability to raise doubts.

Perhaps this is actually how one "creates doubts." A negotiator has to listen to his opponent's arguments in order to understand how those arguments block settlement. He has to identify which of his opponent's assumptions, problem definitions, positions or proposed solutions are blocking settlement and are susceptible to doubt. He has to do something to create that doubt -- provide counter examples, cite experts, introduce and interpret new data, simulate alternative futures -- and then he has to establish new convictions in his opponent's mind which will lead to a settlement.

Negotiating power depends upon much more than *doubt* (i.e., uncertainty and disbelief). The way to establish new conviction in an opponent's mind is to show how settlement will satisfy his interests.

Commitment

A negotiator conveys his own strong intentions, and can influence the range of options from which his partners have to choose, by making commitments. (Fisher 1983; Schelling 1980).

In a case described by Robert Golten (1984), parties in a dispute over use of land in Wyoming made commitments to carry out threats in order to influence settlement. The dispute involved land that is critical habitat for antelope and a valuable coal reserve. Four parties -- environmentalists (represented by National Wildlife Federation), a rancher who owns the surface rights, a coal company that owns the underground coal and a federal agency -- were negotiating uses for the land.

Prior to the negotiation, the rancher erected a fence that prevented antelope from gaining access to the habitat. Several antelope died. The rancher later removed the fence, but because he demonstrated that he would go to such lengths, Golten said, the environmentalists tried to be "especially reasonable" in the negotiation.

National Wildlife Federation filed suit to designate the land unsuitable for coal development. If successful, this would have placed about fifty million tons of coal out of the rancher's and coal company's reach. Golten explained that the environmentalists' ability to maintain this kind of legal pressure on the coal company and rancher contributed to those parties' willingness to negotiate.

The rancher's fence and the environmentalists' lawsuit are examples of commitments to carry out threats in the event that a mutually satisfactory settlement was not reached. The threats were, respectively, to kill antelope and to tie up coal reserves.

Commitments are "trip wires" set up by disputants to warn the other side that the fulfillment of a threat is near (Schelling 1980). The environmentalists and the rancher did not want to carry out their threats. The threats would not have satisfied either party's interests. Their commitments (the fence and law suit) demonstrated, however, that they might go through with killing antelope or eliminating coal development. If believed, commitments to carry out a threat can engender negotiating power by leading the other side to reevaluate (raise) its estimates of the costs of not settling.

A positive commitment (Fisher 1983) was made by the manager of a large sewage treatment district, the Washington, D.C. Suburban Sanitary District, during a negotiation over the state of Maryland's Nutrient Control Strategy for the Patuxent River. The manager, representing upstream counties, promised to institute a program of land treatment (an alternative desired by downstream counties to traditional sewage treatment facilities) if the other parties allocated to his district a certain share of riverwide nutrient loadings allowance (Schneider and Sachs 1983).

Promises and threats must be understood and believed by disputants if they are to work. The rancher believed that the environmentalists would

freeze coal reserves through legal action. The environmentalists believed that the rancher would kill more antelope. The negotiators in the Patuxent River case believed that the Washington Suburban Sanitary District would institute a land treatment project.

Elegant Solutions

Roger Fisher (1983) suggests another kind of negotiating power, the power of a "good solution". Fisher says that a negotiator can exercise negotiating power by making proposals which reconcile the interests of all the disputants.

A negotiator that proposes an elegant solution defines areas where he and his partners share interests. For example, EPA used the power of an elegant solution in its negotiation with the Town of Jackson, Wyoming and Teton County over the siting of a new sewage treatment plant (Susskind, Bacow and Wheeler 1983). EPA's primary interest was to bring Jackson's sewage treatment system into compliance with the Clean Water Act. The town proposed to locate a new plant in an undeveloped area of the county on the grounds that this was an efficient way to serve future development in the area. Teton County opposed the proposal because it believed that the new plant would encourage intensive development in a rural, agricultural area. EPA proposed that Jackson be allowed its remote site and the county be allowed to restrict the annual number of out-of-town sewer taps. By satisfying the interests of both local governments in its proposal, EPA was able to get an agreement that it too found acceptable.

CHAPTER TWO: POWER IMBALANCE

Unequal distributions of power do not necessarily prevent negotiation. Negotiation among disputants whose power is unequal can occur as long as the disputants believe that there are opportunities for negotiation, as well as conflict, in their relationship and sufficient resources are available around the table to support negotiation. Extreme imbalances of power occur, and negotiation will be blocked, when these conditions are not met. Stronger disputants in extremely unbalanced relationships gain so much from competition, and weaker parties lose so much, that they see little potential value in negotiation.

Even if perceptions are changed, resources in an extremely unbalanced power relationship may be so maldistributed that negotiation cannot occur. Disputants and mediators in situations of extreme power imbalance need to change both the perceptions of competition relative to negotiation and the distribution of resources in order for negotiation to occur.

Successful negotiation is possible among disputants whose power is unbalanced. As long as disputants can find areas where they can settle, and consequently do better for themselves than through contention or avoidance, their imbalance does not have to block successful negotiation.

For example, the Denver Water Board had greater negotiating power than the environmentalists it opposed in a complex multi-issue, multi-party mediated negotiation. Nevertheless, bargaining occurred and

the outcome and process were successful on a number of counts. (Susskind, 1981; Susskind and Ozawa 1983; Burgess 1983; Bacow and Wheeler 1984).

In the 1970s, the Denver, Colorado Water Board (DWB) proposed to extend the water treatment system serving metropolitan Denver. The extension, called the Foothills Project, was a water treatment facility, dam and reservoir on the South Platte River. Environmentalists and several federal agencies opposed the project in administrative and judicial proceedings. Project opponents claimed that Foothills could be replaced by less costly water conservation measures, that it would spur growth and exacerbate air pollution problems, that it would harm wildlife habitats and recreational lands, and that completion of Foothills would be a step toward completion of another controversial DWB project, the Two Forks Dam and Reservoir. The business community and most political leaders and officials in the region supported the project as a way to meet future water demand.

The dispute was ultimately settled with the services of a mediator, Congressman Tim Wirth. Under the settlement, construction of the project was allowed at the site proposed by DWB in exchange for mitigation measures designed to maintain stream flows and protect the environment, payment by DWB of environmentalists' attorneys fees, a water conservation program, a commitment to open DWB planning to public participation, a commitment to internalize the costs of environmental mitigation in future DWB projects, termination of lawsuits, a statement by DWB recognizing the right of the environmentalists to have challenged Foothills, and a commitment by federal agencies to conduct a DWB systemwide environmental

impact assessment.

DWB had more negotiating power than the environmentalists. Its primary interest -- construction of Foothills -- was achieved. The environmentalists were not as effective as DWB: they could not stop Foothills. They also did not gain as much as DWB through settlement, since by settling they were assuring DWB that Foothills would be built. The environmentalists gained promises of future access to DWB decision making, mitigation of project impacts, and compensation. These were not the environmentalists' primary interests, however.

The difference in power between the parties did not preclude a satisfactory negotiation. The disputants were satisfied with the outcome (Burgess 1983). Each gained more from negotiation than they probably would have from litigation alone (Susskind and Ozawa 1983). The negotiation took less time than other alternatives probably would have, considering the probability of each side continuing the dispute until all avenues were exhausted (Susskind and Ozawa 1983). It is also likely that the Foothills negotiation contributed to the acceptance of negotiation by disputants in subsequent regional water projects proposed by DWB (Burgess 1983; Kennedy and Lansford 1983).

There were some shortcomings in the Foothills process and outcomes, but these only limit the success. They are not evidence that the negotiation was unsuccessful. The settlement was severely criticized by the judge presiding over the Foothills case trial (Burgess 1983). He refused to sign a proposed Consent Decree based upon the negotiated

settlement. This made implementation somewhat tenuous. In fact, the environmentalists have cited seven violations of the agreement (Bacow and Wheeler 1984). A faction of the environmental coalition later contested the Foothills settlement in court (Susskind and Ozawa 1983). Regional water users and ratepayers had no opportunity to participate in the Foothills mediation at all (Susskind 1981). As a result, their interests -- economical and adequate water supplies for the future -- were overlooked in the settlement (Burgess 1983). On the basis of these oversights and failures, the Foothills negotiation cannot be called an unqualified success. Nevertheless, the parties feel better off and an opportunity was created for continued negotiation (hopefully even more successful negotiation) on DWB projects.

The Foothills negotiation, like others, was comprised of divergent and convergent interests. While EPA and the environmentalists wanted to stop Foothills, DWB wanted the project to proceed. When it became clear that Foothills could not be stopped, the environmentalists and DWB shared an interest in the conditions under which the Foothills project would be built and operated. They ultimately saw more value in settlement than in continued competition.

Successful negotiation can occur among disputants that are unbalanced with respect to their power as long as the disputants believe that their interests would be better served by a negotiated settlement than by its alternatives.

When disputants believe that their power is extremely unbalanced,

avoidance and contention will dominate the relationship. If a party thinks that it is much weaker it will consider any gains through settlement to be meaningless when seen against its competitive losses. If a party thinks that it is much stronger than its opponent, it will consider the gain that is possible through negotiation to be meaningless in view of its great gains in competition. As a result, cooperative opportunities in a potentially mixed-motive situation are not exploited for the benefit of both parties.

Disputants who perceive an extremely unbalanced power relationship lack the desire to enter negotiations. This is true for disputants who see themselves as being very powerful as well as for those who consider themselves very weak.

A party that considers itself to be much more powerful than other disputants believes that it already has all that it wants. It sees no potential for further gains through negotiations. It may fear that negotiations would undermine its advantage, causing it to concede unnecessarily to its weaker adversaries. For example, a negotiation between the Montana Power Company and the Northern Cheyenne Indian Tribe could not begin as long as each side felt much more powerful than the other (Susskind, Bacow and Wheeler 1983). Montana Power had proposed to construct two new 700-megawatt coal-fired electric powerplants at its existing generating facilities at Colstrip, Montana. The new plants were opposed by the Northern Cheyenne on the grounds that they would adversely affect air quality on tribal lands.

Each party thought that it was in an unbalanced power relationship, but each considered itself strongest. Montana Power had constructed two power plants at the site in the past, with little opposition. It considered its proposal to add to those facilities to be even less contentious. The Northern Cheyenne believed that it possessed the power to stop construction through provisions of the Federal Clean Air Act. Court and regulatory victories for each reinforced each side's perceptions of extreme superiority and blocked negotiation.

Perceptions of extreme weakness have also led disputants to reject negotiations. A lack of resources (money, time, and information) was one reason offered by environmentalists for their objection to a regulatory negotiation over low level radioactive waste standards (the other reasons centered around the suitability of the rule for negotiation). The environmentalists felt that without adequate resources they lacked negotiation power. EPA dropped the rule as a candidate for regulatory negotiation after it became clear that environmentalists would not participate (Fish 1984).

In an interview for this presentation, Howard Bellman described a negotiation that became deadlocked after a community realized that it could not evaluate the technical aspects of a landfill proponent's proposals. The community perceived an extreme imbalance between their own and their opponent's technical abilities. They lost confidence mid-process in their ability to negotiate. Parties in another dispute over oil and gas leasing in the Palisades area of Wyoming and Idaho believed that they could not continue negotiating because of an extreme

imbalance of bargaining power. The developers were prepared and authorized to negotiate, but the U.S. Forest Service negotiating team lacked authority to make decisions needed to reach an agreement, lacked expertise in the issues, and lacked internal cohesion (Wondolleck 1983). The negotiation ended without settlement and the dispute was taken back to the courts.

Social psychologists draw a distinction between the power of a disputant and the disputant's competitiveness ("motivational orientation") (Rubin and Brown 1975). This helps them in studying the effects that different degrees of negotiating power and competitiveness have upon the effectiveness of negotiators. It also helps them in studying the interaction between motivational orientation and bargaining power. They have found in experiments where motivational orientation and bargaining power could be manipulated by researchers that parties with greater bargaining power tend to behave exploitively against parties with less bargaining power. Furthermore, they have found that parties with less bargaining power tend to submit to this exploitation unless they can withdraw from the relationship or enter into a coalition.

In situations of extreme power imbalance, the exploitative tendencies of the stronger party are probably exacerbated. The stronger party sees no benefit in negotiating because it believes can achieve so much outside the process. Similarly, the weaker party believes that its great losses will not be meaningfully reduced through negotiation. The motivation to negotiate is eliminated, or blocked, in extremely unbalanced power relationships.

CHAPTER THREE: PRACTITIONER RESPONSES TO EXTREME POWER IMBALANCE

Extreme imbalance of power is a problem that practitioners in dispute resolution face regularly. The purpose of this chapter is to introduce a collection of ideas about extreme power imbalance being applied by mediators and negotiators with experience in environmental dispute resolution. Six practitioners were interviewed in order to understand how they view and deal with two key problems:

- (1) What should a disputant do if his negotiation power is much less than his opponent's power?

- (2) What should a mediator do in a dispute where the distribution of power among the parties is extremely unbalanced?

Summaries of the information gathered in the interviews are presented in this chapter. The summaries are based on transcripts edited by the interviewees. They have been further edited to include only information on how negotiators and mediators deal with extreme power imbalance. In order to be understandable, some ideas needed to be presented with related assumptions about sources of bargaining power, or the objectives of negotiation and mediation. Some interviewees illustrated their points with detailed cases, others with anecdotes, and still others conveyed personal theories of practice without much elaboration or evidence. My criteria for inclusion in the summary was quite broad: a practitioner had to say it, and I had to find it relevant to the two problems into which I was seeking insight.

An analysis follows each summary. After identifying salient propositions, I describe how a suggested tactic or strategy might work, what its limitations might be, whether alternative approaches (that are less expensive, more effective, fairer or more durable) might exist, and what the relationship of the idea is to others raised in the summaries.

A very helpful guide to organizing my thoughts on these ideas was *Getting To Yes* (Fisher 1981), especially the chapter on BATNA. The BATNA concept, and the idea of "changing the game," appear to encompass all the meaningful ideas raised by the practitioners for negotiators. Suggestions for mediators fell under either BATNA or an area not explored in *Yes*, providing access to technical information.

Robert J. Golten

Robert Golten is an attorney who represents the National Wildlife Federation (NWF) in litigation. He works out of the Natural Resource Clinic at the University of Colorado Law School in Boulder, Colorado.

Golten says he has been successful at developing negotiating power by taking the initiative to develop proposed solutions, appealing to his opponents' interests and maintaining a credible threat to litigate. He has predicated his willingness to negotiate upon receipt of technical assistance from his opponents. He thinks mediators have a responsibility to help weaker negotiators by encouraging stronger parties to not be exploitive and by ensuring that weaker parties receive any technical resources that they are promised.

Golten used his experience as the NWF's negotiator on the Metropolitan Denver Water Roundtable (Kennedy and Lansford 1983) to illustrate negotiating power and the role of the mediator when power is extremely unbalanced. According to Golten, as long as the environmentalists were *not* negotiating, they had much less power than the development interest they opposed. While the environmentalists were not negotiating, the Denver Water Board (DWB) was ignoring the interests of the environmentalists. However, said Golten, the power shifted once the negotiation began. Only through negotiation was NWF able to get DWB to consider modifications to its development project.

For example, the environmentalists were challenged during negotiation to produce a technical proposal for meeting Denver's water needs. Although the environmentalists wanted no dams at all, they felt that the development interests could not dissuaded from building dams. NWF developed a solution that included other dams, but not the dam the environmentalists objected to more: Two Forks. Said Golten, "we had to understand what their needs were and we had to play to them, but we did so with a lot of intelligence and energy."

Golten explained what he thinks a mediator should do if one party appears to be much less powerful. There are situations, he said, where one side does not have the skill, the energy or the ability to "stay up" in a negotiation. The mediator has to "prop up the negotiator a little in that case." He suggested that the mediator talk and reason with the more powerful side to make sure the side strikes a reasonable pose and and a reasonable bargain. If the more powerful party over-reaches, said Golten, then the parties together are going to have a very fragile agreement. As soon as the powerless party gets some power, or gets angry, then the agreement is going to fall apart, he said.

NWF is participating in the Corps of Engineers' systemwide EIS review of the Denver Water Board's future plans. NWF agreed to stay in this process -- and to stay out of court -- in return for \$65,000 for technical assistance. After a year, said Golten, the money had not been provided although it was desperately needed. NWF's technical expert had been using money borrowed from the personal resources of allies at the table. The mediator was responsible for ensuring that the process did not

fall apart, said Golten, but he "would not or could not" get NWF the money that NWF was promised. Nevertheless, NWF continued to negotiate in order to protect its interests in Denver Water Board planning.

Analysis of Golten

Four propositions about dealing with extreme power imbalance are relevant to the foregoing summary. First, negotiation provides power to an extremely weaker party by making opponents aware of the party's interests. Second, weaker disputants can build power by predicating their involvement in a negotiation upon receipt of technical assistance. Third, mediators must enforce agreements among parties in which technical assistance is promised. Fourth, mediators can protect extremely weaker parties by reminding stronger parties that exploitation and coercion will produce a fragile agreement.

National Wildlife Federation (NWF) felt ignored by the Denver Water Board (DWB) prior to the Water Roundtable. Once in negotiation, however, NWF felt much more powerful. Was it the negotiation process that empowered NWF? How did it get into the Roundtable in the first place?

The power that litigation gave NWF should not be discounted. Litigation enabled NWF to raise the cost to DWB of ignoring environmental interests. Litigation made the parties interdependent. Litigation stopped DWB from ignoring NWF's demands.

The Roundtable is a method by which DWB, NWF and others can do

something about their interdependence. It complements the power (the attention or recognition) that NWF derives from litigation. Once in the process, NWF discovered that it needed still greater resources in order to participate effectively. Since it is too costly (in terms of litigation and delayed water projects) for DWB to ignore NWF, NWF was able to obtain a promise from the Roundtable (primarily DWB) to provide NWF with technical assistance.

This could have provided further power to NWF, but the promise was not kept. The mediator responsible for the Roundtable negotiations was probably faced with a dilemma: Should the mediator advocate for NWF's technical assistance (and potentially alienate NWF's opponents who, for some reason, have not upheld their commitment), or should he continue to manage the process without the technical assistance (until NWF shows greater need for it)?

One response is that mediators should not introduce new resources into a negotiation unless there is a definite need. Mediators needlessly alter the negotiating dynamics, some people might say, by infusing resources when there is no obvious threat to the process. Mediators provide resources (assistance) as a correction. Another response is that mediators can prevent problems from occurring in a complex negotiation. Mediators can enhance negotiation by using their professional judgment in deciding when and how to intervene in a dispute.

The Roundtable mediator apparently operated under the first view, that his role is corrective rather than preventive. Howard Bellman's

approach in a landfill case (described below) was similarly corrective (one party was already unable to negotiate for lack of technical resources). The Roundtable mediator, and the other Roundtable negotiators, apparently believed that whatever mutual interests the parties shared in the process, it was not jeopardized by NWF's lack of supplemental technical assistance. Neither was it immediately jeopardized by NWF's resentment or disappointment in not getting what it was promised. Perhaps these feelings will surface later.

Even if mediators have no obligation to provide technical resources to parties who claim to need them, they have an obligation to enforce process groundrules. Groundrules are an important protection to all disputants, especially the less powerful. Mediators can change obstinate, exploitative negotiations into "new games" with new, principled rules. By not providing the technical assistance, as agreed, or not explaining why the assistance was not forthcoming, the Roundtable mediator was not fulfilling his function as introducer and enforcer of process rules.

Finally, a mediator can protect a much less powerful party by reminding its opponent that exploitative or coercive agreements are fragile. Mediators can suggest that power will change, over time or even in response to new motivations. If weaker parties become angered by an excessively unfair settlement, a mediator can suggest, they will find a way to retaliate. The purpose of this message is to change the expectations of stronger parties in order to foster negotiation and, hopefully, a more durable settlement.

Jeffrey G. Miller

Jeffrey Miller is former U.S. Environmental Protection Agency Acting Assistant Administrator for Enforcement. Since 1981 he has been a partner in the Washington, DC law firm of Bergson, Borkland, Margolis, and Adler.

Miller described extreme power imbalance in the context of environmental enforcement cases. He describes a case in which a citizens' group overcame an extreme imbalance of power by affirming in court its right to bring a "citizen enforcement action" against a polluter. In rare circumstances, he said, companies have overcome extreme imbalance by soliciting help from members of Congress (who have authority over enforcement agencies) or state officials (who are the peers of federal enforcers and also have credible technical expertise). He does not have enough experience with mediators to provide information on how they respond to extreme power imbalance.

Miller said that in enforcement cases, the bargaining power of the government derives from its ability to impose sanctions upon violators. The government may also derive power by using the media to inform the public about health and environmental dangers posed by a violator.

The usual countervailing power on the corporate side, he said, is the power of information: companies usually have more specific information about their own compliance problems than the government. Companies often try to convince the government that enforcement is unreasonable, given what they know about the compliance problem. A company can also use the

media to publicize layoffs and place blame on government enforcement actions.

Miller said that in most enforcement situations, the government's power to impose sanctions is greater than the company's power to resist. Government can force a party to change its general behavior, but no private party can do that to the government. Private parties can only try to defend themselves. The only questions that are open to companies are how much, how long and to what extent government sanctions will apply.

However, he said, a company might be able to obtain negotiating power by asking people with authority over a regulatory agency to intervene on the company's behalf. This is unusual, he said, but it has taken several forms. The partisan intervenor might be a Senator or Representative with authority over the agency's budget or with authority to propose amendments to the statute at issue. State officials responsible for implementing EPA policy or who have expertise to contradict EPA's arguments have also been used by companies (as witnesses in court or administrative proceedings or in formal and informal communications with the agency) to gain power in a negotiation. Miller gave no examples.

Generally, community groups gain bargaining power through the courts or the media, Miller said. Citizens have a right to take "citizen enforcement" actions against violators under several environmental statutes, including the federal Clean Water Act. In one case, a transit authority was unresponsive to the demands of a community group to control pollution from a subway construction project. Runoff from the project was

polluting a local stream. The transit authority did not consider the local group a legitimate force. Its management was unaware that citizens could bring enforcement suits, said Miller.

In order to increase its bargaining power, Miller said, the group went to court. It acquired a temporary injunction against the subway construction project. The judge's decision also affirmed the group's right to bring a citizen enforcement action. It interrupted the transit authority's construction schedule, raised the costs of the project, and compelled the transit authority to negotiate with the community group.

Analysis of Miller

The negotiating power of the citizen group was based on its right to bring an enforcement action, but that power was empty as long as the transit authority was ignorant of the law.

The citizen group overcame the extreme power imbalance that was created by the transit authority's lack of awareness. They changed the distribution of power by getting a judge to affirm their authority.

Once the citizen group's power was affirmed. The transit authority reassessed the benefits of negotiation relative to continued rejection of the group's authority. The transit authority decided that the subway project could be built faster and cheaper if it negotiated.

The citizen group's new power was probably only useful for negotiating. Had they used the injunction and affirmation of their authority to, say, stop permanently the subway project, their opponents probably would have sought additional power (perhaps a countersuit) to protect the project. The reason the citizen group's suit was successful is because it was used to develop sufficient power to negotiate, and not to prevail over the interests of its opponent.

What other ways might the citizen group have developed its negotiating power? An individual trusted by the transit authority and the citizens might have been asked to explain the citizen group's enforcement authority to the transit authority. Information about the citizen group's authority might have been conveyed in other inexpensive ways, such as by mailing an environmental law text book with the relevant pages paper-clipped and highlighted. Recourse to the court was not the only way, but perhaps it was the most effective.

Luckily, the only costs to the citizen group in going to court were court-related. The transit authority apparently did not resent the injunction sufficiently to cause it to punish or retaliate against the citizen group with a suit of its own. Again, this is probably because the citizen group sought to affirm its enforcement authority in order to negotiate.

It is probably true, as Miller says, that companies involved in extremely unbalanced power relationships with federal enforcement officials can enter into coalitions with members of Congress or state

officials. A coalition between an influential legislator and a company could change EPA's choice of action if enforcement options less desirable to the legislator-company coalition were associated with potential budget cuts or changes in agency mandate. Similarly, a state-company coalition could change an EPA enforcement decision if options disliked by the coalition were made less credible or harder to implement. Either coalition could raise the cost to EPA of unilateral action relative to negotiation.

Howard Bellman

Howard Bellman is Secretary of the Wisconsin Department of Industry, Labor and Human Relations. He is a former mediator with the Institute for Environmental Mediation, Madison, Wisconsin.

Negotiated settlements will be unequal, Bellman says, reflecting the power parties have away from the table. Nevertheless, Bellman lists three ways for less powerful negotiators to develop negotiating power: improving alternatives away from the table, promising future cooperation, and making threats. He does not think mediators should protect weak parties, but he recounts a situation where he, as a mediator, assisted a less powerful party in overcoming its lack of technical expertise. This was justified, he explained, because the party's shortcomings were hindering the negotiation.

Bellman identified economic resources, political office (i.e., authority), the ability to prevail in litigation, and the ability to shape public opinion as relevant sources of power prior to negotiation in environmental cases. Because there are many ways for parties to exercise power outside of negotiation, Bellman said, most parties in negotiation can extract concessions. However, some parties will be able to extract larger concessions than others because they have superior power away from the table.

Weaker parties can increase their power by bargaining slowly while developing alternatives away from the table. Bellman also said that

parties could increase their power during negotiation by linking future cooperation to favorable outcomes and threatening animosity in reaction to pressure to accept an unfavorable settlement.

In spite of the ways he identified that parties can increase their power, Bellman said that the outcomes of a negotiation are proportional to the distribution of power prior to negotiation. A mediator cannot protect one side because the side appears to be losing more than it deserves, he said. A mediator's job is to get parties to think objectively about their power, to make parties aware of the fact that their accomplishments in negotiation reflect their power away from the table. Weaker parties in negotiation have to be helped to see the necessity of scaling down their demands, developing priorities and coming to grips with what might happen if they do not reach a negotiated settlement.

Bellman said that he has helped groups to improve their knowledge of an issue being negotiated. This increased their power, but was necessary in order to help them overcome reluctance to negotiate. He said that sometimes a party will not make proposals or accept concessions until it is satisfied with its own understanding of an issue. For example, when a neighborhood fighting a landfill could not afford a consulting engineer and, in the absence of professional advice could not evaluate a compromise being offered by their opponents, Bellman convinced the landfill proponents to give the neighborhood several thousands dollars to hire an engineer who would review the proponent's proposals.

Analysis of Bellman

Bellman offers four propositions relevant to dealing with extreme power imbalance. First, he says that weaker parties can gain power by building up their alternatives to settlement while negotiating slowly. This enables a weak party to stall undesirable settlement while also postponing undesirable consequences of nonsettlement.

If a good alternative can be developed before opponents become frustrated with the pace of negotiation, the weaker party will have increased its power for subsequent bargaining. However, parties who negotiate slowly in order to develop their alternatives might undervalue the potential that negotiators have for increasing their bargaining power at the table. They might also overestimate their ability to resist settlement while their alternatives are inferior.

Second, weaker parties can increase their power at the bargaining table either by promising future cooperation in return for an acceptable settlement or by threatening animosity in return for a coerced settlement. This builds power by changing an opponent's expectations: a more powerful opponent learns that there will be costs to coercion and rewards to voluntary settlement. It also enables a weak party to increase its power at the bargaining table through negotiation, supplementing possible efforts to develop alternatives to settlement.

Third, mediation can change the distribution of power in extremely unbalanced power relationships. The effectiveness of mediation in dealing

with extreme power imbalance sometimes depends upon correcting a maldistribution of resources. If technical resources are so poorly distributed that one side cannot evaluate its opponent's proposals, then mediators can change the distribution of power by providing access to technical resources.

Instead of introducing new resources, Bellman *redistributed resources* in order to save the landfill negotiation. Redistribution is only possible, however, if the parties are aware of their interdependence. When a mutual goal (i.e., settlement) is considered important, redistributing power becomes less threatening to the more powerful side. A prerequisite to redistribution, then, is interdependence.

Fourth, the role of the mediator is not to redistribute power *per se*. Mediators do not deal with extreme imbalances of power in order to protect weaker parties. Weaker parties and stronger parties are helped by mediators to reach settlement. Rather than always redistributing resources, mediation also entails lowering parties' expectations about what they will accomplish in negotiation.

A mediator can (and should) accept responsibility for the quality of the agreements he plays a role in generating. Settlements reached between parties in an extremely unbalanced power relationship do not have to place both sides on par with one another but the interests of both sides must each be served. This is something a mediator can foster. Tradeoffs can be based on principled decision rules suggested by the mediator, for example. Unrealistic expectations of either side (not just the weaker)

can be changed by mediator coaching on principled negotiation. This protects the weaker party, but not at the expense of the stronger. It protects both sides in a mutually satisfactory agreement.

Susan Carpenter and John Kennedy

Susan Carpenter was Acting Director with Accord Associates, Boulder, Colorado. John Kennedy is Accord's Executive Director.

Carpenter and Kennedy deal with extreme power imbalances when the imbalance obstructs negotiation. They solicit the help of outside parties who have influence over obstructionists, such as constituents, investors, employers and peers. They ask weaker negotiators if they are aware of the distribution, but Carpenter and Kennedy said that they never advise parties to develop power away from the table.

Carpenter and Kennedy find that negotiation is hindered when a party steadfastly believes that it has much more (or much less) power than the others. In response, they have encouraged negotiations by making explicit each parties' ability to cause harm, articulating the uncertainty in the diffused distribution of power, and encouraging parties to compare negotiation with alternative processes.

Carpenter and Kennedy described situations where an extremely unbalanced power distribution threatened to block negotiation. In one, the Metropolitan Denver Water Roundtable, (Kennedy and Lansford 1983) staff of the Denver Water Board would not release certain information over which it had control. Carpenter and Kennedy believed that the Water Board's opponents could not negotiate without the information. The mediators went above the heads of the staff members by asking the Water Board Commissioners to make possible the release of the information. In

other situations, higher-ups may be the source of the obstacle, said Carpenter and Kennedy, instructing their representatives to participate but not to cooperate in negotiations. Carpenter and Kennedy said that mediators can speak to influential peers of the obstructionist in order to foster negotiation.

Using the media, a mediator can generate publicity which can counteract obstructive uses of power, said Carpenter and Kennedy. For example, a mine manager might play a tough role against a regulator, they said, but publicity might inform the mine manager's investors of the reason for the impasse. This would motivate them to speak to the manager about negotiating more productively.

Carpenter and Kennedy explained that if one party in a negotiation is obviously weaker in all respects, a mediator can only check to see that the party understands its disadvantage and how it might increase its power. They have never encouraged parties to strengthen their position away from the bargaining table. Instead, they raise questions -- what type of power a party has and how leverage might be increased -- and allow the parties to provide the answers.

Analysis of Carpenter and Kennedy

Three propositions are raised in the preceding summary. First, mediators overcome obstacles posed by extreme power imbalanced by changing the way disputants look at their power relationship. Any diffusion of power is emphasized to remind stronger parties that

exploitation and coercion can have negative consequences. The potential for negotiation to generate superior outcomes relative to alternative processes (e.g., avoidance, contending) is raised to encourage parties to remain in negotiation. Mediators try to change the way the parties perceive their relationship.

Second, mediators solicit help from the constituents and employers of negotiators who perceive themselves to be much stronger than their opponents. This is one of the more direct, active ways of dealing with extreme power imbalance. Parties who are asked by mediators to help in overcoming obstacles are stakeholders. If negotiation does not produce a successful outcome, these stakeholders would be adversely affected. The mediators are actually expanding participation (temporarily) to deal with an issue of wide-ranging consequences.

Negotiators might resent being overruled by their superiors. They may blame the mediator for causing embarrassment or trouble within the negotiating team. One way to prevent this is to inform the negotiators before their superiors are involved. This gives the negotiators a choice.

The news media can be used to widen the audience for a negotiation. This can change the distribution of power by making more powerful parties unwilling to exploit their less powerful opponents in full view of the attentive public. On the other hand, an audience might lead disputants to grand-stand. Concessions are sometimes easier to offer in smaller, non-public settings. Neither sunshine nor shade work all the time. A mediator probably has to determine who the audiences each negotiator

would be most influenced by (and in what direction) before changing the openness of a negotiation in order to change the power relationship.

Third, and finally, mediators raise questions to weaker disputants in order to encourage them to think about the sources of power that are available to it. This is a consulting or a coaching role. It helps to change disputants' perceptions and expectations about negotiation relative to its alternatives. One caveat raised in connection with this idea is that a mediator should not actually advise a weaker disputant on developing its alternatives to settlement or undermining its opponent's alternatives. The warning probably stems from concern about the neutrality of such advice. Another concern might be that such advice will lead to contentious behavior.

It is hard for a mediator to justify specific advice to a negotiator on, say, suing opponents. A resource can be redistributed among disputants (see Bellman) when a specific maldistribution is hindering collective efforts, but positive interdependence and the development of power away from the table appear incompatible.

If there was a way to counsel disputants on building power away from the table without encouraging contention, perhaps mediators could give such advice. Maybe that would take the form of specific advice about improving one's own alternatives to settlement but only general advice about reducing an opponent's alternatives. Advice about reducing an opponent's alternatives should be placed in a negotiating (not a contending) context.

Thomas Colosi

Thomas Colosi is Vice President of National Affairs for the American Arbitration Association in Washington, DC.

Colosi says that disputants who are extremely weak can either accept the "lamb's share" of a settlement, enter into coalitions in order to negotiate from greater power, or pursue their interests in litigation or arbitration. Mediators should not change the distribution of power among disputants, Colosi says, although they may challenge ("create doubts" in the minds of) parties who refuse to settle. When mediators "create doubts," says Colosi, they should only use information provided by the parties.

Colosi explains that before negotiation begins, disputants try to determine who is stronger in their particular conflict. They do this through confrontation. For example, in the labor sector, a union might call a work stoppage to test its ability to pull its members out of production.

When a party learns through confrontation that it is stronger than its opponent in some ways and weaker in others, it negotiates to convince its opponents that its strengths are the more relevant ones in their dispute. Each party tries to persuade the other to accept its perceptions of the distribution of power. They do this, says Colosi, by "creating doubts."

Negotiators who do not have sufficient power to "create doubts" have three options, according to Colosi. They can accept the "reality" that in negotiation the "lamb gets the lamb's share;" they can enter into coalitions with other weak parties in order to increase their negotiating power; or they can use litigation or arbitration. The potential for weaker parties to win through litigation and arbitration encourages negotiation by making stronger parties doubtful about their strength over the long run.

The purpose of negotiation is settlement, says Colosi. Parties are sometimes hindered from settling by the way one or both parties perceive their power relationship. This is not an extreme power imbalance, but a disagreement between the parties over who has more power (and in what areas). When parties are unable to agree what each party is capable of doing relative to the other, a mediator is needed.

Mediators help parties in reaching settlement by "creating doubts." A mediator advocates to one side, or both, the perceptions about power held by the opponent. A party is challenged to suggest a way that settlement can be reached without accommodating his opponent's perceptions. The mediator's objective is for the parties to adopt similar perceptions, and consequently to settle.

Colosi thinks that mediators should help disputants to "recapture" the exchanges they would have had if the mediator's assistance was not needed. Colosi discourages mediators from introducing elements (other than themselves) into negotiations. In general, when mediators create

doubt, Colosi believes they should only use arguments raised by the disputants. Specifically, when mediators become involved with disputants who disagree about power, Colosi says, the only valid perceptions of how that relationship should be structured are those of the parties.

If mediators try to change a distribution of power (for example, by introducing his own perceptions when creating doubts), Colosi says, stronger parties will resist (they may try to assert their power against weaker parties) and weaker parties will become unrealistic about their limitations. Colosi warns that weaker parties might attempt risky exercises of their empty, "mediator-inspired" power. However, he gives no examples of when this has ever actually happened.

Analysis of Colosi

Colosi offers three propositions about dealing with extreme power imbalance. First, much weaker parties can change the distribution of power by forming coalitions. Second, weaker disputants can also change the distribution of power by using (or threatening to use) litigation and arbitration. Third, mediators can "create doubts" in a much stronger party's mind about his ability to prevail in the long run -- but only if the weaker party gives the mediator information to use in creating those doubts.

Unfortunately, Colosi provides no cases to illustrate or substantiate his opinions. However, his first two propositions are supported by common sense and the other practitioners (Miller on coalitions in enforcement

cases and Golten on litigation).

Coalitions enable weaker parties with common interests to combine resources against a common opponent. Litigation gives a weaker party the power of legal right and authority (if it wins) and the threat of extended conflict (raising its opponent's cost of nonsettlement). Both can give a much less powerful party the ability to capture the attention of negligent opponents. An opponent is thus forced to reevaluate his original estimate of the benefits and costs of negotiation, relative to alternatives.

Colosi's third proposition is comprised of two parts, one acceptable and one not. Mediators can change the minds of disputants who consider themselves too powerful to negotiate productively. However, there are good reasons why mediators should introduce whatever information they have at their disposal.

When a mediator creates doubts, he is trying to change a disputant's perceptions (in our discussion, about distribution of power) and expectations for settlement. A disputant who considers himself too strong to negotiate productively needs to be convinced that he is not omnipotent; that negotiation might favor his interests. A disputant who thinks of himself as too weak to negotiate can be shown unnoticed strengths and opportunities.

Mediators should not be bound in creating doubts by the information provided by disputants. The information may not be accurate. Mediators

may have relevant experiences to draw from and could warn or assist less experienced parties of possibilities that might not have occurred to them. Mediators may be able to introduce technical resource people who could provide information that all sides could use. A mediator's disinterested position may give him a perspective that neither party (emotionally involved in the dispute) can obtain.

When assisting extremely unbalanced parties to reach agreement, a mediator who creates doubts should be fostering wise settlement. Since he is changing a situation (from impasse or conflict into settlement), he has responsibility for the implications of that change. To the extent that the doubts a mediator creates is based on information he knows is true and accurate, a mediator can be confident that he is not misleading disputants.

CONCLUSION

Specific ways that practitioners have changed distributions of power and contributed to successful negotiation are:

- Mediators went over the heads of negotiators (solicited help from the employers and constituents of the negotiators) who thought that their control of information gave them absolute power.
- A mediator convinced a negotiator's opponent to pay for technical assistance which the negotiator could not afford.
- Negotiators won an injunction against a polluter and affirmed their authority to enforce federal water pollution control laws.

These examples illustrate principles that negotiators and mediators need to know in dealing with extreme power imbalance.

- * A disputant can change an extremely imbalanced distribution of power by:

- improving his alternatives to negotiation;
- making his opponent's alternatives to negotiation less desirable;
- using a mediator to help "change the rules of the game."

* A mediator can foster negotiation among disputants in an extremely unbalanced power relationship by:

- changing parties' perceptions and expectations of negotiation relative to alternatives;
- helping parties acquire access to technical assistance.

There are other ways that practitioners can deal with an extremely unbalanced power distribution. These are suggestions for which no specific cases were available but which still seem likely given the foregoing analysis. They are:

- A weaker disputant can predicate his participation in a negotiation upon the receipt of technical assistance.
- Mediators can enforce agreements that promise technical (or other) assistance to weaker negotiators.
- Weaker disputants can seek allies whose interests they share in order to form a coalition for negotiating.
- Mediators can highlight the potential that each party has for causing some harm to the other. They can warn stronger parties that exploitation produces fragile agreements.
- Mediators can solicit the involvement of peers of negotiators in order to convince negotiators to bargain in good faith. They can

focus wider attention on the negotiations for the same reason by inviting the media to observe the process.

- A weaker disputant can negotiate slowly while building its power away from the table.

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