

8 Confronting Complex Global Challenges: Comparing the Climate Change and Law of the Sea Negotiations

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Abstract

The United Nations Framework Convention on Climate Change (UNFCCC) features the most important and complex negotiations that the global community has yet addressed. Climate scientists have reached consensus on the significance of climate change, its impacts, and anthropogenic causes. Political leaders and negotiators, though, have yet to achieve consensus agreements on any of the major climate change policy areas, such as extending the Kyoto Protocol, setting and adhering to clear mitigation goals, providing the resources needed to adapt, and developing new institutions, such as the Green Climate Fund.¹

In contrast, consensus on both science and policy was achieved during an earlier international conference that, for its time, was called “one of the most important negotiations to have ever taken place”.² Negotiators at the Third United Nations Conference on the Law of the Sea (UNCLOS III) worked on 25 issues over most of a decade to develop a comprehensive consensus agreement.

This essay compares Law of the Sea (LOS) negotiations with the climate change negotiations. Lauded for its innovative negotiation approach and leadership, UNCLOS III may offer some important insights that climate change negotiators may find relevant to the challenges they face.

To compare the ongoing climate change negotiations with the LOS talks, this essay employs the *Progress Triangle* framework. The commentary examines Climate Change and LOS negotiations in the Progress Triangle areas of substance, relationship, and procedure. The conclusion of the essay fea-

1 Jacobs (2013).

2 Raiffa (1982:276).

tures key findings that emerge from the comparison and possible lessons learned.

A. Introduction

In December 2012, near the close of the two-week Conference of the Parties (COP) climate change negotiations in Doha, Qatar, the co-chairs of the ADP – the Ad hoc Working Group on the Durban Platform for Enhanced Action – presented a draft decision on what the ADP had accomplished and what lay ahead. The Durban Platform had emerged a year earlier at the end of the COP17 climate change negotiations in South Africa as an important compromise among all parties to continue the Kyoto Protocol and to establish a 2015 deadline for a comprehensive climate change agreement.

The Durban Platform co-chairs introduced their draft decision by stating –³

Recalling decision 1/CP.17, which *recognized* that climate change presents an urgent and potentially irreversible threat to human societies and the planet and thus requires to be urgently addressed by all Parties, and acknowledged that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions, *noted with grave concern* the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions reductions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels, and *recognized* that fulfilling the ultimate objective of the Convention will require strengthening of the multilateral, rules-based regime under the Convention ...

The draft decision document subsequently highlighted the two workstreams designated to address a wide range of issues related to both mitigation and adaptation, accounting for matters that had been on the agendas of the Ad hoc Working Group on Long-term Cooperative Action and the Ad hoc Working Group on the Kyoto Protocol.

The Durban Platform for Enhanced Action added to the complexity of the climate change negotiations at an international convention that was already the most complex and controversial international negotiation the world community had yet experienced – the United Nations Framework Conven-

3 UNFCCC (2012).

tion on Climate Change (UNFCCC). While other international negotiations – on trade, natural resources, and human rights issues – feature degrees of complexity and controversy, none seem as involved and as challenging as the climate change talks.

Are any other international negotiations comparable to the climate change meetings in terms of their complexity and/or controversy? This essay offers the Third United Nations Conference Law of the Sea (UNCLOS III) as an international negotiation for comparison. The Law of the Sea (LOS) negotiations, convened by the United Nations (UN) General Assembly in 1973, generated a draft treaty by 1981 and was ready for signature in 1982. This treaty, hailed by former US secretary of state Henry Kissinger as “one of the most important international negotiations to have ever taken place”, emerged from consensus agreements among over 160 parties.⁴ Lauded for its innovative negotiation approach and leadership, UNCLOS III may offer some important insights that climate change negotiators may find relevant to the challenges they face.

To compare the ongoing climate change negotiations with the LOS talks, this essay employs the *Progress Triangle* framework. After presenting the Progress Triangle, the commentary examines the two negotiations in terms of its three dimensions.

B. Comparing Climate Change and Law of the Sea Negotiations

I. The Climate Change Negotiations (UNFCCC)

The nations of the world have been negotiating climate change for the past two decades. Negotiations began formally during June 1992 as part of the UN Conference on the Environment and Development (UNCED), popularly known as the Rio Summit. Over 150 government delegations participated, and they produced the UNFCCC. While some critics have claimed that the Convention was ‘watered down’ to gain the support of the United States (US),⁵ the Convention, through its 26 articles, established an international organisation and template for negotiating specific agreements to combat climate change. In October 1992 the US Senate (the government body for treaty ratification) “voted unanimously to ratify the treaty and commit the

4 Raiffa (1982:276f.).

5 Flannery (2005).

U.S. to join the global effort to “stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.⁶

In the 20 years since its inception, the UNFCCC has added parties (new independent nations) and issues. For example, during the May 2012 climate change negotiation meetings in Bonn, the UN Climate Change Secretariat sponsored a “gender picnic”. UNFCCC executive secretary Christiana Figueres invited delegates (negotiators, observers, media) to the event to recognise the critical roles and contributions of women in the development and implementation of climate policy. As the Women for Climate Justice website reported:⁷

Apart from being a very lively networking event, it [the picnic] also was an excellent opportunity to communicate the various ideas on how to improve gender recognition in the negotiations, in addition to the inclusion of gender and women references in the [negotiation] text. Christiana [Figueres, secretary] asked for ideas on how references can be trickled down to national and local levels and called for the support of non-government organizations (NGOs) to put pressure on governments to integrate gender.

While gender issues were visible at the Bonn session (as they were at the December 2011 17th Conference of the Parties meetings or COP17 in Durban, South Africa), their salience symbolises how the climate change negotiations have changed in the almost two decades of UNFCCC work. Since the first COP and its Berlin Mandate, climate change negotiations have become increasingly complex and controversial. The volume and variety of issues have proliferated, and the number of parties, observer organisations, and media representatives has increased significantly as well.

COP3 in Kyoto, for example, expanded the Berlin Mandate’s call for developed countries’ commitments for mitigation to control carbon emissions by constructing the Kyoto Protocol. The Protocol broadened commitments to include legally binding commitments and mitigation practices, such as clean development mechanisms and emissions trading. The next three COPs refined the Kyoto Protocol by focusing on finance issues and what constituted appropriate mitigation and credit strategies (e.g. carbon sinks from forests and agricultural lands). Parties at the COP7 in Marrakech, Morocco, agreed to establish the Adaptation Fund to help developing countries

6 Moomaw & Hamel (2013).

7 See <http://www.gendercc.net/policy/conferences/road-to-doha.html?L=2>, last accessed 16 April 2013.

cope with the impacts of climate change. This marked a significant expansion of the negotiation agenda since adaptation discussions would include technology transfer, capacity building, finance, and governance issues. At this point the US delegation, although representing the foremost producer of greenhouse gases, was participating only as an observer. President George W. Bush had rejected the Kyoto Protocol and the United States of America was no longer a negotiating party.

Over the past decade the complexity of climate change negotiations has increased through the addition of topics such as REDD (reduction in emissions due to deforestation and degradation), loss and damage, and LULUCF (land use, land use change, and forestry). Procedural reforms have been added as well, such as the Ad hoc Working Group on Long-term Cooperative Action (AWG-LCA, created at COP13 in Bali, Indonesia, and terminated at COP18 in Doha, Qatar) and the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP, initiated at COP17 in Durban, South Africa).

Consequently, at the May 2012 Bonn, Germany, intersession meetings between COP17 and COP18 in Doha, Qatar, UNFCCC, the parties interacted in five major groups. Along with the AWG-LCA and ADP, the Bonn gathering included meetings of the AWG-KP (Ad hoc Working Group on the Kyoto Protocol), the SBI (Subsidiary Body on Implementation) and the SBSTA (Subsidiary Body on Scientific and Technical Advice). COP18 in Doha added two more negotiating bodies: the Conference of the Parties (COP, including all negotiating countries) and the Meeting of the Parties (CMP, created after the Kyoto Protocol took effect in 2005 and including all parties that had ratified the Kyoto Protocol).

As the substantive and procedural complexity of the climate change negotiations increased, so, too, did controversy. At the 2001 Marrakech, Morocco COP, for example, many parties were very upset with the US presidential administration's (George H.W. Bush) dismissal of the climate negotiations and the influence that the actions of the US could have on other major carbon emitters. During the 2009 Copenhagen, Denmark COP, talks about extending the Kyoto Protocol (via a second commitment period) experienced gridlock and the Copenhagen Accord that US president Barack Obama and other select leaders developed was criticised widely by many parties for emerging outside of the UN framework. The subsequent three-

day meeting in Bonn (April 2010) focused solely on procedure in an effort to reaffirm the Framework process and restore confidence in it.⁸

The UNFCCC, when established in 1992, emphasised the principle that the nations of the world should negotiate climate change issues and seek agreement “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”.⁹ The Convention established a procedure or process – “an agreement to negotiate” – for negotiating policies to manage constructively and comprehensively the causes and impacts of climate change. The UNFCCC provides “the overarching international law framework for intergovernmental efforts to address climate change”.¹⁰ Although more than 190 nations endorse the Framework and participate in its negotiations, agreements on specific climate change policies remain elusive.

As COP19 in Warsaw, Poland, approaches, many issues not imagined when the UNFCCC was established in 1992 or when the first COP met in Berlin in 1995 are visible in the climate change negotiations agenda. Matters of financial accountability and transparency, indigenous peoples’ rights, loss and damage, gender, governance, technology transfer, and other specific concerns are now being negotiated, as are the issues related directly to mitigation goals and adaptation mechanisms. The substantive agenda can seem overwhelming to delegates and observers alike, and the procedural details can appear confounding.

II. The Law of the Sea Negotiations (UNCLOS III)

The Third UN Law of the Sea Conference (UNCLOS III) is likely to endure as one of the most significant international diplomatic events in modern history. The seeds of UNCLOS III were planted in 1967, when Dr Arvid Pardo, Maltese representative to the UN, addressed the UN General Assembly about ocean policy. He proposed that the resources of the international seabed and ocean floor should be considered “the common heritage of mankind”, in effect, calling for a new international order of the sea. Pardo contended further that a constitution or charter was required to guarantee that ocean space

8 See IISD (2010).

9 Article 3(1) UNFCCC; Wirth (2009:xxv); Mace (2010:221).

10 Mace (2010:221).

was treated as an ecological whole and used exclusively for peaceful purposes.¹¹

In response to Pardo's vision and concerns for a new economic order, the UN General Assembly called for a new oceans conference (two took place in the 1950s). With much media attention worldwide and high expectations, the UNCLOS III convened in Caracas, Venezuela, in 1974. Almost nine years later, after additional conference sessions in Geneva and New York, a new, comprehensive LOS emerged. On 10 December 1982 in Montego Bay, Jamaica, the United Nations Convention on the Law of the Sea was opened for signature, with 119 nations signing initially. Many additional nations (not including the US) have since signed the treaty convention.

UNCLOS III addressed a complex array of maritime problems. Via three principal committees, representatives of the world's nations considered over 25 substantive agenda items. Major issues included the international regime for the non-national sea bed and ocean floor, the territorial sea, the contiguous zone, international navigation of straits, the continental shelf, the exclusive economic zone, coastal state preferential rights, land-locked nations' rights, preservation of the marine environment, scientific research, technology transfer, archipelagos, and dispute settlement.¹² Among the most volatile conference issues at Caracas and beyond were the related matters of the nature of the international authority for control of the deep seabed and how the resources of the deep seabed should be exploited. In fact, these international sea issues lay at the heart of why the US did not sign the LOS treaty, causing some international leaders to charge that the US bargained in bad faith.¹³

Despite the failure of the US and a few other nations to sign the UNCLOS III Convention, the negotiations stand as one of the most significant international negotiations,¹⁴ an excellent example of international collaborative work and consensus. In his opening remarks to the 17th LOS Institute Conference, Willy Ostreng of Norway's Fridtjof Nansen Institute observed that the completion of the Third UN Conference on the Law of the Sea (UNCLOS III) was "the culmination of the longest, largest, and most ambitious collective effort ever undertaken to promote peace and prevent conflict by agreeing

11 Sebenius (1984); Koh (1986).

12 UN (1974:7–10).

13 Pardo (1983).

14 Raiffa (1982).

on the precise distribution and effective limitation of power among all nations of the world".¹⁵

British analyst R.P. Barston called UNCLOS III "the most ambitious and complex of contemporary attempts at multilateral diplomacy".¹⁶ According to Cameroon's UN ambassador Paul Bamela Engo, the Conference was a "stimulating, ambitious exercise" that represented "the widening of the scope of dialogue on matters of global interest, providing opportunity for effective participation by all nations, large and small".¹⁷ International legal scholar Elisabeth Mann Borgese commented that the emerging new international economic order would rely heavily on the new LOS and its foundation on the principles of ownership, participation, equity, and peace.¹⁸

The Convention resulted from a treaty-making process that involved innovative procedural rules, guidelines that emphasised open communication, and a commitment to fairness. Adopted in 1973, UNCLOS III rules of procedure featured the use of single negotiation texts (SNTs), package deals, and decision by consensus. The Conference structure organised representatives in formal and informal committees to consider specific issues.¹⁹

Consensus decision-making and the package deal approach emphasised interest-based, mutual gains negotiation.²⁰ Adoption of treaty articles and provisions mandated discussion to achieve general agreement without resorting to a vote. By a procedural "gentleman's (sic) agreement", voting only occurred as a last resort. The decision rules required the conferees to exhaust all efforts to achieve consensus before voting on any substantive matters. Prior to a particular vote, a cooling off period allowed negotiators to continue to work toward consensus, either through direct or backchannel means. By delaying voting as long as possible, divergent aspirations could be reconciled, obviating any need for a vote.²¹ During the almost decade-long negotiations, no substantive issues required a majority vote. As legal scholar Milner Ball (1982) has noted, UNCLOS III illustrates "a productive labo-

15 Koers & Oxman (1983:xv).

16 Barston (1980:154).

17 Engo (1985:21).

18 Borgese (1986:131).

19 Zuleta (1983).

20 Fisher et al. (1991); Susskind & Field (1996); Raiffa (1982).

21 Zuleta (1983:xxi).

ratory, working experiments in the form of negotiation, multinational decisions, and transcultural discourse”.²²

UNCLOS III involved a number of unique, changing, and sometimes overlapping coalitions, referred to as “interest groups” in some of the LOS literature. These included the maritime group, the coastal group, the landlocked and geographically disadvantaged group, the Group of 77, regional groups such as the Western European and Others Group, the Group of Five, the environmental group, the territorialists, a boundary limitations group, and so on.²³ These groups were referred to in the statements of delegates published in the Conference minutes, and some of the groups (e.g. the Group of Landlocked and Geographically Disadvantaged States and the Group of 77) produced official position papers and other documents.

The UNCLOS III negotiation process included public and private debate.²⁴ As a process of consensus and conciliation, its success depended “upon the power of persuasion and the willingness to be persuaded”.²⁵ UNCLOS III generated a comprehensive treaty in part through persuasive argumentation. As Ball has noted, “above all, [consensus] depended upon the tentative mutual trust among those who actually believed that arguments count”.²⁶ “The Conference has proven the possibility for accommodating mutual trust, good faith and proleptic belief in the efficacy of argument ... [it] has been a means for impressive multicultural discourse”.²⁷

While the climate science and policy library expands as the UNFCCC negotiations endure, detailed commentaries on the climate negotiations equivalent to the LOS analyses remain to be written. Still, by reviewing UNFCCC and non-government documents, observing UN climate negotiation sessions, talking with negotiators, and examining media accounts, one can compare climate change negotiations with those of the LOS. This comparison can draw on the Progress Triangle framework for areas of substance, procedure, and relationship as a means for doing so.²⁸

22 Ball (1982:463).

23 Beesley (1983:187–188).

24 Ogley (1984).

25 Ball (1982:471).

26 Ball (1985:60).

27 Ball (1982:472).

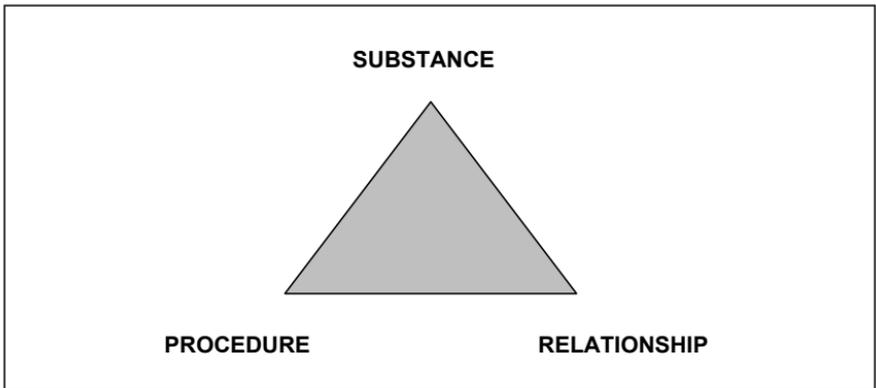
28 Walker & Daniels (2005); Daniels & Walker (2001).

III. Resolving Conflicts and Negotiating Decisions – The Progress Triangle

Negotiation can be viewed as a process that generates tangible improvements in a conflict or decision-making situation, improvements that can be implemented and evaluated.²⁹ Improvements represent progress and, in the case of international negotiations, constitute components of a comprehensive agreement. Therefore, conflict resolution, negotiation, and decision-making on matters of climate or oceans can be thought of as ‘making progress’. As part of improving the situation, progress can include such ideas as reaching consensus, developing mutual gains, learning, resolving a dispute, achieving agreement, and laying a foundation for future negotiations. Progress is a way of thinking about conflict, negotiation, and decision situations that recognises that conflicts are inevitable and ongoing, and that the competent management of those conflicts comes from continual improvements in areas of substance, procedure, and relationship.

Constructive conflict management, then, involves making progress on these three fundamental dimensions of a conflict situation: the substantive, procedural, and relationship dimensions. These dimensions may be viewed as points of a conflict management Progress Triangle, as presented in Figure 1.

Figure 1. The Progress Triangle



²⁹ Daniels & Walker (2001).

Portraying conflict and decision situations as a triangle of three interrelated dimensions – substance, procedure, and relationship – illustrates a number of things about making progress in those situations. First, any conflict or decision situation includes substantive, procedural, and relationship dimensions. Second, the three dimensions overlap and affect one another. A procedural element such as jurisdiction, for example, may become a substantive issue. Third, one can address the conflict or decision situation initially through any of the three dimensions. An education reform policy conflict situation, for example, might feature substantive concerns related to teacher certification and student test scores. A natural resource conflict situation such as salmon recovery might emphasise procedural and relationship factors related to the sovereign status of native peoples. Fourth, progress on one dimension is likely to contribute to progress on the other dimensions.³⁰

Comparing the UN climate change negotiations with the LOS negotiations begins by noting a fundamental structural difference. The climate change negotiations occur within a *framework* that parties have endorsed as an international agreement. That framework, the UNFCCC, was developed in negotiations prior to the Rio Summit in 1992 and signed at that conference. The framework established a secretariat to lead the negotiations and a set of articles that guides the work of the parties. The UN General Assembly created the LOS negotiations by establishing a *conference* to work through ocean and maritime issues. That conference negotiated procedural matters before substantive issues, procedures that guided the eight years of discussions.

IV. Comparing Substance Factors

Negotiations are about substance: the visible issues of a conflict, dispute, or decision situation. Both the climate change and LOS negotiations have addressed a myriad of substantive matters. Table 1 presents a number of substantive areas related to issues, information and texts, for comparing the two international negotiations.

30 Daniels & Walker (2001); Walker & Daniels (2005).

1. Issues

Substantive issues are the tangible or ‘concrete’ topics for negotiation. Climate issues and ocean issues are obviously different (although with some overlap, such as ocean acidification³¹). Climate negotiators work on a wide range of issues related to mitigation and adaptation³², while LOS parties negotiated issues related to resource development, navigation, and ocean health.

Just as the climate change negotiations involve more issues, they represent more complexity than the LOS issues exhibit. Both negotiations have been complex, but the climate issues have changed as new scientific and technical information has emerged, as the number of parties has increased, and as developing countries have become more vocal and better organised. For example, during the mid-1990s the UNFCCC negotiators were concerned primarily with greenhouse gas emissions (GHGs). Both the Berlin Mandate (COP1) and the Kyoto Protocol (COP3) focused on establishing emission reduction targets. The Kyoto Protocol specifically sets legally binding commitments for Annex I (developed) countries. As the UNFCCC website states:³³

During the first commitment period, 37 industrialized countries and the European Community committed to reduce GHG emissions to an average of five percent against 1990 levels. During the second commitment period, Parties committed to reduce GHG emissions by at least 18 percent below 1990 levels in the eight-year period from 2013 to 2020; however, the composition of Parties in the second commitment period is different from the first.

While concerns about GHGs endure and mitigation issues persist, negotiators at more recent COPs (Conferences of the Parties) have confronted an array of issues that were not on the early COP agendas. For example, the decisions coming out of COP16 in Cancun, Mexico, (known as the Cancun Agreements), advanced the following objectives –³⁴

- establish clear objectives for reducing human-generated greenhouse gas emissions over time to keep the global average temperature rise below two degrees

31 See Gonzalez (2010).

32 See IISD (2010).

33 See http://unfccc.int/kyoto_protocol/items/2830.php, last accessed 20 May 2013.

34 See <http://cancun.unfccc.int/cancun-agreements/main-objectives-of-the-agreement/s/#c33>, last accessed 20 May 2013.

- encourage the participation of all countries in reducing these emissions, in accordance with each country's different responsibilities and capabilities to do so
- ensure the international transparency of the actions which are taken by countries and ensure that global progress towards the long-term goal is reviewed in a timely way
- mobilize the development and transfer of clean technology to boost efforts to address climate change, getting it to the right place at the right time and for the best effect
- mobilize and provide scaled-up funds in the short and long term to enable developing countries to take greater and effective action
- assist the particularly vulnerable people in the world to adapt to the inevitable impacts of climate change
- protect the world's forests, which are a major repository of carbon
- build up global capacity, especially in developing countries, to meet the overall challenge
- establish effective institutions and systems which will ensure these objectives are implemented successfully.

These objectives illustrate the complexity and fluidity of climate change issues. In contrast, the law of the sea negotiators worked on a set of issues that remained stable throughout the eight years of meetings. The primary issues of the three LOS committees – international regime for the deep ocean floor, the territorial sea, the contiguous zone, the exclusive economic zone, international military and commercial navigation of straits, the continental shelf, coastal state preferential rights, rights of land-locked nations, the preservation of the marine environment, scientific research, and technology transfer – were established at the outset of the LOS negotiations and remained stable and constant.³⁵ Most of these issues were settled within the first four years of the LOS meetings and new issues were not added.

Issue salience also differs between the two international negotiations. Although a limited number of nations produce significant greenhouse gases, all countries are affected by climate change. Consequently, every delegation has a compelling interest to track issues related to mitigation and adaptation even if some delegations may not participate actively in negotiating all issues.

Such was not the case at the law of the sea negotiations. Some issues – such as military navigation rights, territorial sea designation, and the exclusive economic zone – were not important to land-locked countries. These countries though, along with coastal states, were concerned with the devel-

35 UN (1974:7–10).

opment of resources from the deep ocean floor and the health of the marine environment. Issue jurisdiction is both a substantive and procedural issue. UNCLOS III distributed issues among three substantive committees. As reported on the UN Law of the Sea website:³⁶

The Conference allocated to the First Committee the topic of the international regime of the seabed and ocean floor beyond national jurisdiction, and to the Second Committee the topics of the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, land-locked countries, shelf-locked States and States with narrow shelves or short coastlines and the transmission from the high seas, while the topic of the preservation of the marine environment was allocated to the Third Committee.

While the work of the First Committee took the longest, none of the committees added issues or negotiated on matters assigned to another group. By comparison, significant climate change issues have been discussed by more than one negotiation body. For example, after the parties at COP13 in Bali, Indonesia, created the Ad hoc Working Group on Long-Term Cooperative Action (AWG-LCA), this new group took on issues related to mitigation of greenhouse gas emissions. So, too, did the Ad hoc Working Group on the Kyoto Protocol (AWG-KP). Delegates, both informally and in plenary sessions, voiced concerns about how the work of these two negotiation bodies would be reconciled and what body had jurisdiction or greater influence. When the Ad hoc Working Group on the Durban Platform (ADP) was created at COP17, parties wondered how its work would be related to the efforts of the AWG-LCA and AWG-KP (both of which ended at COP18 in Doha, Qatar).

2. *Information and Texts*

Technical information and the use of negotiation texts have been significant for both the climate change and LOS meetings. In both negotiations, parties have accounted for the best scientific, technical, and financial information available. While the recent climate change COPs have featured side events on the latest scientific information regarding climate change impacts and climate models, there is little debate in these areas. Most of the parties en-

36 See <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>, last accessed 17 April 2013.

dorse the scientific consensus that exists in support of the work of the Intergovernmental Panel on Climate Change (IPCC).

While the IPCC provides fundamental climate science knowledge, negotiators look to universities, intergovernmental organisations (IGOs), and civil society organisations (CSOs or NGOs) for information in such areas as finance, capacity building, technology transfer, sustainable forestry, and human dimensions. Similarly, the law of the sea negotiators turned to non-government organisations and universities to better understand the range of options, particularly in the area of deep seabed development. For example, during the law of the sea negotiations, parties struggled to determine what policy was fair and appropriate for the development of the resources of the deep ocean floor. In 1976, researchers at the Massachusetts Institute of Technology (MIT) began to develop a model about the technology of ocean mining. They presented their report in 1978. Not long thereafter, the soon to be UNCLOS III president, Singapore diplomat Tommy Koh, convened a panel of financial experts to address monetary issues of seabed development. The work of these technical groups was critical to UNCLOS III progress.³⁷

Both the climate change and LOS negotiations have made extensive use of *negotiation texts*. UNCLOS III began without preparatory documents;³⁸ the chairs of the three committees authored single negotiation texts (SNTs). As Hodgson and Smith reported in 1976, “from the second session of the third UN Law of the Sea Conference came single-text documents from the chairmen of each of the three main committees plus an ‘informative paper’ on the settlement of disputes”.³⁹ The single negotiating text was an innovative tool in the international negotiation arena; it provided LOS Conference delegates with a common starting point for discussion.⁴⁰

Similarly, negotiation texts play an essential role in the climate negotiations. The chairs of the subsidiary bodies, the ad hoc working groups, and the contact groups prepare texts on the issues within their domain to focus and guide the negotiation. The facilitators of informal consultative groups will prepare *facilitator notes* for the same purpose. While the parties may disagree over the language in these texts, the texts themselves provide the negotiators with a common reference point.

37 Antrim & Sebenius (1994); Raiffa (1982).

38 Koh (2009).

39 Hodgson & Smith (1976:225).

40 Buzan (1981).

Table 1. Substance Factors

Factor	Climate Change (UNFCCC)	Law of the Sea (UNCLOS III)
Issue Areas	Scientific, technical, financial, legal, human dimensions	Scientific, technical, financial, security, legal
Issue complexity	Multi-faceted and fluid	Multi-faceted and finite
Issue salience or relevance	High for all parties	High for some parties
Issue jurisdiction	Different bodies considering the same issue	Clear issue assignment and differentiation
Technical information (e.g. role of science)	Significant: Intergovernmental Panel on Climate Change	Varied: Massachusetts Institute of Technology model
Texts	Substantial: prepared by chairs and facilitators of working groups, subsidiary bodies, contact groups, and informals	Substantial: use of the single <i>negotiation text</i> method prepared by committee chairs

V. Comparing Relationship Factors

As dispute resolution scholars have noted, in conflict, negotiation, and decision situations relationships matter.⁴¹ The relationships of parties are influenced by a variety of factors, such as history, culture, experience, skill, personality, constituent expectations and home government instructions.⁴² All of these relationship factors can potentially affect any complex international negotiation. The salient relationship factors, though, that warrant climate change and LOS comparisons involve the parties: who they are and how they work together.

1. Coalitions

Both the climate change negotiations and LOS meetings have involved most of the world's national actors: currently 195 countries are involved in the UNFCCC and 160 nations participated in UNCLOS III. While each delegation acts on its national interest, the parties have organised into coalitions. Important negotiations occur within the coalitions – and the coalitions wield significant influence.

41 E.g. Wilmot & Hocker (2010); Lewicki et al. (2011).

42 Lewicki et al. (2011); Wilmot & Hocker (2010); Brett (2007).

UNCLOS III involved a number of unique, changing, and sometimes overlapping coalitions, referred to as *interest groups* in some of the law of the sea literature. These included the maritime group, the coastal group, the landlocked and geographically disadvantaged group, the Group of 77, regional groups such as the Western European and Others Group, the Group of Five, the environmental group, the territorialists, a boundary limitations group, and so on.⁴³ These groups were referred to in the statements of delegates published in the Conference minutes, and some of the groups (e.g. the Group of Landlocked and Geographically Disadvantaged States and the Group of 77) produced official position papers and other documents.

Koh has referred to these coalitions as “interest groups” and noted that they emerged and formed at UNCLOS III.⁴⁴ Although the Group of 77 had formed years earlier as a loosely coupled organisation of non-aligned nations, it figured prominently in the law of the sea negotiations.⁴⁵ Similarly, the G77 and China coalition at the climate change meetings has served as an essential organisation and voice. And like UNCLOS III, the UNFCCC involves numerous coalitions, such as the African Group, the Association of Small Island States (AOSIS), the Least Developed Countries, the Umbrella Group, the European Union, and more. The coalitions have been very influential at both international meetings. They meet regularly at the climate change talks and generally speak as one voice in the plenary sessions of the major negotiation bodies. At the LOS negotiations the coalitions were visible within and across the major committees. At both conferences, national delegations have participated in more than one coalition, such as the land-locked states and G77 at the UNCLOS III, and the Least Developed Countries and the African Group at the UNFCCC. But the coalitions at the climate change talks have been more emergent and fluid. For example, a new coalition of developing country mountain states has emerged at recent COPs, and all of these countries are part of the G77 and China coalition as well. This illustrates that, at the climate change negotiations, coalitions also operate *within* coalitions, with internal coalition negotiation becoming layered. Not surprisingly, reaching consensus on an issue within a coalition, particularly the G77 and China with its 130 plus members, can be as difficult as reaching agreement among all the parties.

43 Beesley (1983:187–188).

44 Koh (2009).

45 Raiffa (1982).

2. Media

In his seminal book, *Conflict Regulation*, Paul Wehr distinguishes between primary and secondary parties.⁴⁶ Media organisations constitute important secondary parties and have been prominent at the climate change negotiations throughout the two decades of talks. Since COP13 in Bali, Indonesia, the number of media credentials approved for the COPs has averaged over 1,000, with about 3,500 media badges given out at COP15 in Copenhagen.⁴⁷ The media report the status and progress of the negotiations daily to regions and countries globally. Media personnel write blogs, conduct interviews, and talk with parties and civil society delegates.

The media presence at the LOS negotiations was, by comparison, much more limited. There was substantial media coverage when negotiators met in Caracas, Venezuela, in 1974, but media interest waned when journalists realised that the negotiations involved a wide range of issues, significant detail, and a slow, incremental, consensus-based approach. Two other media distinctions warrant comment. First, while both the climate change and LOS negotiations have restricted public access and observation, the climate change negotiations are taking place in a media and technology environment unknown in the 1970s. Satellite television, 24-hour news channels and internet saturation combine with issue salience⁴⁸ to produce continual reports about the climate change talks. Second, civil society interest in climate change issues is compelling, and while some non-government organisations played an important lobby and consultation role in UNCLOS III, broad general interest in ocean, coastal, and maritime issues did not exist.

3. Civil Society

While civil society organisations (CSOs, with some referred to as NGOs or non-government organisations) were active in the LOS negotiations, they have been very prominent in the climate change talks. At UNCLOS III, the non-government actors, though not numerous, made important contributions. Koh has noted that NGOs at the law of the sea meetings (1) brought independent experts to meet delegates; (2) helped developing countries to

46 Wehr (1979).

47 See http://unfccc.int/meetings/cop_15/items/5214.php, last accessed 20 May 2013.

48 Sebenius (1993).

close the knowledge gap; (3) afforded delegates opportunities to meet outside the conference; and (4) influenced the domestic positions of countries and their delegations.⁴⁹

The UNFCCC meetings involved a significant number of non-state actors, both NGOs and intergovernmental organisations (IGOs). The UNFCCC website provides the most recent data:⁵⁰

Over 1598 NGOs and 99 IGOs are admitted as observers. The NGOs represent a broad spectrum of interests, and embrace representatives from business and industry, environmental groups, farming and agriculture, indigenous populations, local governments and municipal authorities, research and academic institutes, labour unions, women and gender and youth groups. Constituency groupings have emerged from the above groups to facilitate interaction.

Many of the NGOs affiliate with the constituency groups, something that did not exist in the law of the sea talks. The constituency groups function, in effect, as coalitions of NGOs. For example, the business and industry NGOs participate in BINGO, the environmental NGOs comprise ENGO, and the youth NGOs belong to YOUNGO. Each constituency receives invitations to send representatives to topic-specific meetings (e.g. the Adaptation Fund Board) and to speak at select plenary sessions of the negotiation bodies. By comparison, the civil society organisations have made a much larger and deeper footprint at the climate change talks than they did at UNCLOS III.

4. *Leadership*

Competent and credible leadership is an essential part of progressive and effective work in the public policy arena,⁵¹ whether domestic or international. Leadership approaches, though, can vary culturally. Consequently, leaders in complex international negotiations need to reflect the cultural community of diplomacy,⁵² as well as their own local and national cultures. At both UNCLOS III and the UNFCCC meetings, many leaders have displayed skill and diplomacy. But the leadership positions of the law of the

49 Koh (2009).

50 See http://unfccc.int/parties_and_observers/items/2704.php, last accessed 17 April 2013.

51 Walker & Daniels (2012).

52 Fisher (1989) and (1990).

sea negotiations were more constant and stable than those of the climate change talks. Tommy Koh, president of UNCLOS III from 1980 to 1982, has noted that an unprecedented degree of authority was vested in the four conference leaders – i.e. the UNCLOS III president, and the chairpersons of the three primary committees.⁵³ LOS scholars Lance Antrim and James Sebenius have observed that responsibility for issuing new versions of the negotiating text added a significant new power to the limited authority of the presiding officer. The authority to revise the draft text was, in effect, the power to define the issues to be addressed as the negotiation process.⁵⁴

Although the executive secretary is the chief administrative officer of the UNFCCC, its president changes annually, depending on the nation that hosts the Conference of the Parties. The COP president is typically a cabinet minister from the host country, such as the minister for the Environment or the minister of Climate and Energy. The UNFCCC works closely with the COP presidency and, in doing so, defers some decisions to the COP host. For example, at COP16 in Cancun, Mexico, the COP presidency made the decision to pair ministers from developing and developed countries to facilitate consultations on specific and challenging issues (e.g. finance). This technique had not been done before; some delegations liked it and others were critical, claiming that the Mexican presidency was asserting too much control and was not transparent.

In the UNFCCC process the chairs of the major negotiation groups – the two subsidiary bodies and the working groups – change regularly. All serve at the pleasure of the parties themselves. Some chairs are very skilled: they provide well-received negotiation texts and facilitate meetings competently. Others struggle to maintain the perception of impartiality and fairness. For example, one working group chair at COP18 in Doha was criticised by developed country delegates for marginalising some of the parties and favouring others.

53 Koh (2009).

54 Antrim & Sebenius (1992:101).

Table 2. Relationship Factors

Factor	Climate Change (UNFCCC)	Law of the Sea (UNCLOS III)
Role of Media	Significant and increasing as the talks have continued over time; Copenhagen (COP15 in 2009) being the high point	Significant at the beginning; decreasing coverage over time
Coalitions	Fluid, emerging, overlapping, multiple memberships; essential and influential	Stable and distinct; overlapping, multiple memberships; essential and influential
Civil Society Organisations (CSOs/NGOs)	Numerous and increasing; active participation, integration with some parties, key advisory work, lobbying	Limited numbers; some key advisory work
Leadership	Critical and uneven	Critical and consistent

VI. Comparing Procedure Factors

International negotiations are about substance; parties come together to seek agreements on complex and challenging issues. The ability to generate agreement relies significantly on procedures. Not surprisingly, procedural matters have loomed large at both the LOS and climate change meetings and provide some interesting areas for comparison, as shown in Table 3.

1. Consensus Decision-making and Procedural Rules

Prior to considering the substantive issues, the UNCLOS III delegates negotiated the rules of procedure. Most importantly, the parties resolved to make decisions by consensus. “Reflecting the desire to obtain wide (ideally universal) acceptance of the results of the LOS conference, the decision-making system was designed to avoid votes on matters of substance as much as possible,” Antrim and Sebenius⁵⁵ explain, noting that “committee chairmen were responsible for identifying opportunities for consensus solutions, with the authority to prepare draft texts that, in their judgment, represented a step toward consensus”. UNCLOS III delegates recognised that any treaty needed the support of the major powers, but the developing countries would not accept veto authority akin to the UN Security Council, Consequently,

⁵⁵ Antrim & Sebenius (1992:99-100).

the UN General Assembly adopted a Gentlemen's Agreement at the outset of the LOS negotiations in November 1973, that "the Conference should make every effort to reach agreement on substantive matters until all efforts at consensus have been exhausted." Antrim and Sebenius clarify that "consensus, in the context of the LOS Conference, implied an absence of explicit disagreement rather than total agreement on all of the issues".⁵⁶

Koh has described the Gentlemen's Agreement in more detail, noting that it involved the following: (1) Before taking a vote, the Conference parties must decide that all efforts at reaching agreement have been exhausted; (2) Parties can consider options during a cooling off period; (3) The LOS Conference president will attempt, with assistance from the General Committee, to achieve an agreement; and (4) the parties will receive two days' notice before voting.⁵⁷ Buzan considers the LOS approach to be innovative: "a major international experiment in decision making by consensus".⁵⁸ He has emphasised that UNCLOS III is noteworthy procedurally because of formalised "active consensus" (in contrast to passive consensus); that is, consensus that emerged from active, direct discussion.

The UNFCCC process also operates according to a principle of consensus decisions, but no consensus procedure has ever been adopted formally. Article 7.2.k of the UNFCCC charter does state that the parties "agree upon and adopt, by consensus, rules of procedure and financial rules for itself and for any subsidiary bodies". Consensus decision-making is the norm, but Article 7.3 language indicates the possibility of voting:

The Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention, which shall include decision-making procedures for matters not already covered by decision-making procedures stipulated in the Convention. Such procedures may include specified majorities required for the adoption of particular decisions.

Although a number of analysts believe that the consensus standard is either outdated or an obstacle and that other decision systems warrant review,⁵⁹ proposals for a consensus/voting combination has not gained much traction (e.g. the current Mexico and Papua New Guinea plan). Annto Vihma of the Finnish Institute of International Affairs points out that "The Cancún meet-

56 (ibid.:100).

57 Koh (2009).

58 Buzan (1981:324).

59 E.g. Schwarte & Wei (2011); Schroeder et al. (2012).

ing [COP16 in 2010] also brought to everyone's attention the inconvenient truth that decision-making in the UNFCCC exists in a legal vacuum. The Conference of the Parties has never agreed its Rules of Procedure, and has during its 17-year history operated with draft Rules of Procedure without voting rules, under a general agreement that decisions are taken by 'consensus'.⁶⁰ Similarly, a recent report from the Foundation for International Law and Development (FIELD) contends that "the COP and the CMP have not formally adopted their rules of procedure. However, at all sessions since 1995 a set of draft rules have been applied consistently – with the exception of the disputed rule 42 on voting ...",⁶¹ and some form of voting remains possible if the parties conclude that they have exhausted all means of achieving consensus.

Reflecting on the LOS negotiations, legal scholar Milner Ball has noted that "the most striking characteristic of the Conference is that it has proceeded by consensus. The text has been assembled without a vote".⁶² It remains to be seen if the climate change consensus process can achieve a successful outcome similar to the law of the sea.

2. *Structure*

The UN Framework Convention on Climate Change, the subsequent Kyoto Protocol, and major COP decisions such as the Bali Action Plan have provided structure for the climate change negotiations. The UNFCCC charter established three negotiation bodies: the Subsidiary Body on Implementation (SBI), the Subsidiary Body on Scientific and Technical Advice (SBSTA), and the Conference of the Parties (COP). After the Kyoto Protocol came into force in 2005 (after enough country ratifications) the CMP or Meeting of the Parties (of Kyoto Protocol nations) was established. The Bali Action Plan included the formation of two working groups: the Ad hoc Working Group on the Kyoto Protocol (AWG-KP) and the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA). These two negotiation bodies were terminated at COP18 in Doha (December 2012) as the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) emerged.

60 Vihma (2011:2).

61 Schwarte & Wei (2011).

62 Ball (1982:463).

The UNFCCC negotiation structure can be characterised as fluid, evolving, or unstable, depending on one's point of view. The creation of the AWG-LCA at Bali (COP13) was noteworthy; it provided a forum in which the US could participate actively (the US could only observe at the Meeting of the Parties or CMP since it did not ratify the Kyoto Protocol). The ADP, created at COP17 in Durban, has offered a forum for compromise; this new structure has provided a way for the idea of a second commitment period (or extension of the Kyoto Protocol) to endure.

According to some critics, this structure has favoured large UNFCCC delegations, typically from developed nations, over small delegations. Schroeder and colleagues make the case –⁶³

Different delegation sizes to negotiations reflect different priorities, with some countries less interested than others to push or stall a climate change agreement. It also reflects different capacities; poor countries cannot afford to send large delegations and their level of expertise usually remains significantly below that of wealthier countries. This 'capacity gap' – only partly mitigated through assistance from non-state actors (NSAs) such as the Climate Action Network – limits poor countries' negotiating power and makes their participation in each session less effective. Furthermore, many sessions take place in parallel, span a wide range of issue areas and continue into the night during the final 'push' for agreement at the end of a conference. As a result 'negotiation by exhaustion' constrains smaller delegations much more severely than larger ones.

In contrast, the structure of the LOS Conference remained relatively constant throughout its lifespan. The first session opened in Caracas, Venezuela, with three committees; those committees continued until their work was done. By 1977, most of the work of two committees had been completed, with consensus reached on the majority of the 25 LOS agenda issues. Although deep seabed issues remained, negotiators addressed these issues through the stable committee structure.

Structural modifications did occur, though, within the three-committee design. Between 1977 and 1980 the primary unresolved issues pertained to the deep seabed: access to mining areas, technology, and finances.⁶⁴ Following the 1977 LOS session, Committee I chair Paul Engo of Cameroon prepared an informal composite negotiation text (ICNT) that addressed the seabed issues. A number of developed nations objected to the text and agreed to continue to participate in the negotiations only if (1) the power of the

63 Schroeder et al. (2012:835).

64 Antrim & Sebenius (1992).

committee chairs was reduced, (2) subgroups were formed to work through the remaining issues, and (3) a new LOS president was elected and given significant authority to lead the negotiations (Antrim and Sebenius, 1992). When ambassador Tommy Koh of Singapore assumed the role of LOS president in 1980, he acted as an informal mediator and guided the LOS negotiations to a consensus agreement.

3. *Agendas*

The LOS Conference began without a single preparatory document.⁶⁵ Consequently, the general UNCLOS III agenda was established along with procedural rules when the parties met for the first time. Twenty-five primary issues were distributed among the three committees. The agenda items reflected, according to LOS president Tommy Koh, “the theory of inter-relatedness”. The agenda items were connected in such a way that they needed to be negotiated as part of one Convention.⁶⁶ Koh has observed that the wide-ranging agenda and goal of a single comprehensive treaty or convention combined to generate a lengthy conference.⁶⁷ The agenda – both substantively and procedurally – remained relatively stable throughout UNCLOS III. Some issues were refined and “fractionated” – divided up into specific “sub-issues”,⁶⁸ but no new significant agenda items were added during the middle or later stages of the negotiations.

The reasonably firm and clear LOS agenda enhanced the viability of package deals. The concept of the package deal was salient throughout the LOS discussions. It dictated that the various parts of the Convention (treaty) be considered an entity, “as a single negotiated package, where the laws of give and take presumably had struck a reasonable balance between the participated states considered as a whole”.⁶⁹ Proposed package deals “worked in practice because governments are made up of people” who required persuasion “to accept ideas and principles they had long resisted. That, as much as anything, was what this conference was about”.⁷⁰

65 Koh (2009).

66 (ibid.).

67 (ibid.).

68 Fisher (1969).

69 Evensen (1985:27–28).

70 Sanger (1987:40).

For example, developing countries, led by the G77 coalition, and developed, industrialised nations had different interests and objectives regarding the development and use of the oceans and seas. Consequently, the respective parties worked to reconcile their interests in a “package deal” that featured a “trade off” – trading navigational freedom for concessions in the deep sea bed regime.⁷¹

While the general UNFCCC approach has remained intact, the overall agenda and the more particular agendas of the negotiating bodies have changed frequently throughout the two decades of climate change negotiations. The agenda has expanded, both across and within negotiation bodies. The early COPs focused on mitigation matters, while adaptation issues have become prominent in recent years.

The changing agendas reflect the strength of coalitions, particularly groups like the G77 and China and AOSIS (the Alliance of Small Island States). As voices of developing countries, these and other coalitions have advocated for policies that will help the countries that produce little greenhouse gas, but experience significant impacts from GHG emissions.

The increasingly complex agendas, though, make package deals and consensus harder to achieve. At times parties and observers alike are not sure in what negotiation body a specific issue may be addressed, or an issue appears on more than one agenda. Furthermore, the agendas themselves become the focus of debate, delaying discussion on matters of substance. For example, at the June 2011 two-week intersession meeting in Bonn, Germany, parties debated about the nature of the Subsidiary Body agendas for most of the first week. Until the agenda dispute was settled, no other significant discussions took place.⁷²

Although the package deal was central to the UNCLOS III negotiations, packages and trade-offs, while possible at the climate change talks, are harder to construct and discern. To illustrate: in the aftermath of COP15 in Copenhagen, a climate change meeting with both high expectations and harsh criticism, the parties met in Bonn, Germany, in April 2010 to discuss next steps and procedural reforms. During a briefing meeting with NGOs during the Bonn session, UNFCCC executive secretary Yves DeBoer fielded questions about the possibility of breaking the apparent gridlock over a

71 Kikugawa (1999); Friedheim (1993).

72 See the archival reports of the *Earth Negotiations Bulletin* of the International Institute for Sustainable Development (IISD), available at <http://www.iisd.ca/vol12/>, last accessed 20 May 2013.

number of major issues, such as a second commitment period, finance, and extending GHG decisions to all nations (not just Annex I). Secretary DeBoer was asked if the Parties might combine issues (package) or divide out issues or specific packages (fractionate) so that agreements could be reached on specific items, such as REDD (Reduction in Emissions from Deforestation and Degradation). Secretary DeBoer replied that most of the parties, particularly the developing nations, would not accept such action. For them, he explained, a climate change agreement was “all or nothing”.⁷³ When asked about this “all of nothing” view, a negotiator from an African nation delegation explained that many parties believed that such “fractionation” would allow developed nations to pick and choose their issues, agree on the easiest ones, and then claim to have acted on climate change in the best interest of the global community.⁷⁴

4. *Technology*

The LOS talks took place throughout the 1970s and into the early 1980s, before the advent of personal computers, cell phones and tablets. The parties corresponded by phone, letter, and in face-to-face interaction. During UNCLOS III sessions, negotiators in one committee or subgroup would find out about the negotiations in another committee after the fact and not in real time. LOS sessions were recorded and transcribed, but in the negotiation sessions delegates took notes with pen and paper.

The UNFCCC sessions and the negotiators make use of a variety of technologies, many of which have emerged during the 20 years of meetings and were obviously not available for the LOS talks. During informal consultations, contact group meetings and plenary sessions, delegates can be seen regularly texting on their cell phones or examining a document on their laptop computer or tablet. Monitors throughout the venue show plenary session speakers in real time, and many plenary sessions are streamed live for access on computers.

These technologies have changed the ways in which the delegates negotiate, both at UNFCCC meetings and between sessions. While participating in a UNFCCC event, negotiators can stay in contact with members of their

73 Walker (Fieldnotes 2010).

74 (ibid.).

delegation or coalition via text and access information immediately. When encountering difficult or uncertain situations junior negotiators can receive immediate instructions from senior or lead negotiators on the team.

Tablets, smart phones and laptop computers are now the norm. The UNFCCC meetings have become paperless, with draft texts, the daily programme, facilitators' notes, and other documents (e.g. the daily *Earth Negotiations Bulletin*⁷⁵ by the International Institute for Sustainable Development (IISD)) accessible to parties and observers in a timely fashion.

5. *Size and Site*

The law of the sea negotiations involved approximately 1,000 representatives from 164 nations.⁷⁶ The number of parties and negotiators remained relatively constant for the duration of UNCLOS III. Observer and media participation was modest, with media coverage decreasing as the LOS talks continued.

In contrast, the number of parties, observers and media has increased through the UNFCCC's two decades of work. As new countries have gained independence (e.g. in southeastern Europe), more parties have sent representatives to climate change meetings. Schroeder and colleagues report that —⁷⁷

attendance at the international negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) has changed both in terms of the number and diversity of 'expert agents'. Overall, the number of delegates went from 757 individuals representing 170 countries at the first Conference of the Parties (COP) in 1995 to 10,591 individuals from 194 countries attending COP15 in 2009 (13,482 representatives from 937 observer organizations were able to register for COP15 but many more had been nominated). This is a 14-fold increase (1,400%) in attendees over this time period.

Correspondingly, the number of observer organisers and their representatives has increased.

The two international negotiations differ by site as well. The UNFCCC, following the dictates of the Convention, changes the site of the Conference of the Parties (COP) annually, while holding the majority of its intersession

75 Available at <http://www.iisd.ca/vol12/>, last accessed 20 May 2013.

76 Antrim & Sebenius (1994); Koh (2009).

77 Schroeder et al. (2012:835).

meetings in Bonn, Germany, where the UNFCCC Secretariat is housed. Furthermore, the UNFCCC meetings, particularly the COPs, have become climate multidimensional climate change expositions – with the negotiations, side events, exhibits, and off-site events (such as NGO climate forums) occurring simultaneously.

UNCLOS III was convened in New York City and held its initial meetings in Caracas, Venezuela, where most of the negotiated issues were resolved. The seabed issues, which dominated the talks in the late 1970s, were negotiated in Geneva, Switzerland and New York City. The meetings featured negotiation sessions, but nothing comparable to the climate change gatherings in terms of non-negotiation activities.

Table 3. Procedure Factors

Factor	Climate Change (UNFCCC)	Law of the Sea (UNCLOS III)
Decision-making	Consensus	Consensus
Procedural rules	Negotiated as part of the creation of the UNFCCC; significant modifications throughout; no formal adoption of consensus requirement	A pre-negotiation period; negotiated at the beginning of the UNCLOS III process prior to substantive issues; reasonably consistent throughout
Structure	Negotiation bodies; fluid, emerging, changing; seven negotiating bodies at COP18 in Doha	Negotiation committees, constant and stable; use of some ad hoc subsidiary groups
Agenda	Changing, expanding	Stable, fixed
Technology	Critical to progress on substance and procedure	Limited to what was available during the negotiation period
Size and Site	Increased participation, COP locations change annually	Stable participation, multi-year sites

C. Conclusion

The climate change negotiations of the past two decades and the LOS negotiations of the 1970s endure as the two most complex international negotiations the global community has undertaken. When comparing the two international negotiations, one claim, not surprisingly, is conclusive: The climate change negotiations are more complex than the LOS proceedings overall, as well as in the three areas of substance, relationship, and procedure. More specifically, a number of points stand out:

- Climate change negotiations involve more issues than LOS.
- Climate change negotiations issue agendas, with issues being added over time, and are thus more fluid than LOS.
- At both the climate change and LOS negotiations, the parties rely on technical expertise. This expertise came from delegation staff, UN organisations, and observer organisations and individuals. The climate change negotiators generally trust the IPCC reports; the LOS participants relied on the MIT model.
- The UNFCCC process has involved multilateral negotiations on a wide range of issues pursuant to the Convention that was established in 1992. UNCLOS III was a treaty-making multilateral negotiation.
- Both the climate change and LOS negotiations emphasise consensus. The LOS consensus rule was formalised with a Gentlemen's Agreement that voting would occur only as last resort. The consensus standard has not been adopted formally by the UNFCCC, but consensus is the accepted norm.
- Consensus worked at UNCLOS III, coupled with trade-offs and package deals. Consensus has proved difficult at the UNFCCC meetings, with limited agreement on substantive matters since COP2 at Kyoto, Japan, where the Kyoto Protocol, which set GHG emission targets for Annex I countries, was established.
- UNCLOS III established a clear and stable structure that did not change substantially over eight years. The UNFCCC structure has expanded, adding negotiation bodies that have generated limited agreements which affect the negotiations both substantively and procedurally (e.g. the Bali Action Plan, the Bali Road Map, Cancun Agreements, and the Durban Platform).
- The UNCLOS III issue agenda was set at the beginning of the LOS negotiation process. While issues were refined, no substantive issues

were added. The UNFCCC process has been addressing an ever expanding agenda.

- Leadership was centralised and constant at UNCLOS III, with committee chairs serving multiple years. Committee chairs had significant power and leeway to draft negotiation texts. Working group, subsidiary body, and contact group chairs at UNFCCC meetings may serve more than one year, but many do not. Conflicts have arisen over the chair position, such as the almost two weeks of negotiation to select the co-chairs of the Ad hoc Working Group on the Durban Platform (ADP) at the 2012 intersession meeting in Bonn.
- The climate change negotiations are very public, with significant public interest and media coverage throughout the world. Consequently, the UNFCCC process is subject to scrutiny from both within and without the negotiations. The LOS negotiations generated limited media attention after the 1974 Caracas session. While governments followed LOS progress closely, the general public did not.

This last point was predicted some twenty years ago. Shortly after the creation of the UNFCCC in 1992, Harvard University professor James Sebenius reflected on the challenges climate change negotiators would face. Drawing on his knowledge of UNCLOS III and analysis from his 1984 book, *Negotiating the Law of the Sea*, Sebenius noted that “climate change issues are far more publicly salient” than LOS issues, which he labelled as “obscure”.⁷⁸

In his 1992 essay, Sebenius has offered some ideas as lessons for climate change negotiators to consider. “Given the current and future diplomatic activities dealing with climate change,” Sebenius wrote in 1993, “it becomes more important to explore the deeper implications of the intensive and precedential experience for negotiated responses to the prospect of greenhouse warming”.⁷⁹

A number of lessons from Sebenius remain relevant to understanding the current state of climate change negotiations and what UNFCCC parties might learn from the LOS experience. Sebenius advised climate change negotiators to “expect great pressure to combine issues,” and “since any action

78 Sebenius (1993:197).

79 (ibid.:190).

on climate change will involve shared and parallel sacrifice, it is probably only by linking issues... that many countries will be induced to join”.⁸⁰

Professor Sebenius offered further advice on linkages. “Link issues into packages that promise that sufficient joint gain is attractive to a large number of parties”, and “link with caution”, for “it can be extraordinarily difficult to ‘unpackage’ issues once they have been combined for bargaining purposes”. While encouraging linkages and packaging, Sebenius also cautioned that packages should not be “so broadly comprehensive as to risk excessive complexity and delay”.⁸¹

Sebenius voiced other cautions as well, including the risk of encouraging blocking coalitions. Noting the emphasis on protocols when the UNFCCC was created, Sebenius reflects —⁸²

[P]rotocols have been suggested, seemingly without much explicit analysis of their implications for negotiating success, on a virtually endless number of issues A good way to guarantee an endless negotiating impasse would be to handle all or many of the ... protocols in a comprehensive Law of the Atmosphere package to be agreed upon by consensus Despite joint gains from trades across disparate issues ... a comprehensive climate-change convention might well energize and unify a large set of otherwise separate opposing interests.

Some critics may speculate that “an endless negotiation impasse” has become reality in the UNFCCC process, one that features a significant North-South divide.⁸³ Notwithstanding the passage of two decades, Sebenius’ insights are consistent with conclusions drawn from this essay’s comparative analysis.

International multilateral policy negotiations on any global issue are difficult, none more so than those on climate change. The problems of climate change will never be resolved, nor will all climate changed conflicts be settled through negotiated agreements, but the problems and the conflicts can be managed productively and the climate change situation continually improved. Management and improvement will only occur if the UNFCCC parties can move beyond procedural wrangling and self-interest and find ways to achieve shared goals. Such shared goals and the actions to achieve them need not ignore salient national interests; they can and should respect and

80 (ibid.:200).

81 (ibid.:200f.).

82 (ibid.:206–207).

83 Khor (2012).

incorporate them in ways discovered through collaboration and compromise. Although not as complex as the climate change negotiations, the LOS Conference experience is pertinent. If 164 nations can work together to achieve a multi-issue agreement that establishes an international LOS, hopefully the negotiations on climate change among 194 nations can garner similar success.

In a 2008 Brookings Institution report on climate change, foreign policy, and national security, Campbell and Weitz conclude that the global community –⁸⁴

can expect that climate change will exacerbate already existing North-South tensions, dramatically increase global migration both inside and between nations ..., lead to increasingly serious public health problems, heighten interstate tensions and possibly conflict over resources, collapse agricultural markets and global fisheries, challenge the institutions of global governance, cause potentially destabilizing domestic political and social repercussions, and spur unpredictable shifts in the global balance of power.

While this long list of possible impacts may seem extreme, the effects of climate change on migration, agriculture, and public health are already apparent. Just as UNCLOS III convened to tackle a crisis of the oceans, so, too, has the UNFCCC been convened to confront the climate crisis. The law of the sea negotiators reached agreement in time to manage the problems of the oceans. Hopefully, the climate change negotiators will, too, achieve agreements in time.

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84 Campbell & Weitz (2008:213–214).

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