Mediation in International Relations

Multiple Approaches to Conflict Management

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Foreword by the President of the Society for the Psychological Study of Social Issues

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5 Formal Individual Mediation and the Negotiators' Dilemma: Tommy Koh at the Law of the Sea Conference
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INTRODUCTION

In 1978, Ambassador Tommy Koh of Singapore was appointed to chair a key negotiating group at the Third United Nations Conference on the Law of the Sea (LOS) that was charged with determining the financial terms and conditions to be applied to firms and countries that would mine deep seabed minerals. Koh faced the problem of how to move the stalled negotiations toward a consensus conclusion. Faced with a group of unwieldy proportion (more than 1000 delegates from more than 150 countries), clashing ideologies, a technically complex and politically divisive issue that appeared zero-sum in nature, as well as formal powers limited to convening and moderating meetings and to formulating compromise proposals, Koh set about developing a strategy that would lead to the adoption by consensus of a text on financial issues. Two years and many meetings later, the negotiating group's completed work became part of the text of the final LOS Convention. Recognizing Koh's remarkable feat, the delegates later elected him to the presidency of the overall LOS Conference.

Mediation in general, and international mediation in particular, have been the subject of considerable study in recent years. Koh's innovative approach, which moved a largely deadlocked process toward a consensus, adds new insights to these investigations. Several elements, some familiar, some fully general, some quite distinctive, were involved in this episode of formal mediation by an individual, including:
THE COURSE OF THE NEGOTIATIONS

Background on Law of the Sea

Since the late nineteenth century, it has been known that portions of the deep ocean floor were covered by fist-sized lumps of minerals, some of which were rich in valuable industrial metals including manganese, nickel, copper and cobalt. Advances in technology for ocean resource exploitation and projections for high growth of mineral demand combined to increase the prospects for economic exploitation of some of the seabed nodule deposits. The UN General Assembly established the Committee on the Peaceful Exploitation of the Seabed (the ‘Seabeds Committee’) as a forum for this debate. In 1970, without opposition, the General Assembly declared the mineral resources of the deep seabed to be the ‘common heritage of mankind’, and proposed the creation of an international regime for the seabed that would ensure ‘equitable sharing by States in the benefits derived therefrom’.

The enormous increases in the use of the oceans for commercial and military transport, fishing, energy production, and scientific research repeatedly led to frictions and conflicts that pointed up the inadequacies of existing international law of the sea. Skilful diplomacy by the Latin American coastal nations, with the support of other coastal developing countries, steered the negotiations toward a comprehensive agenda including much more than limits to jurisdiction (as finally adopted the list of topics included twenty-five separate issues). The General Assembly decided to convene the Third United Nations Conference on the Law of the Sea (LOS) in 1973. As an integral part of their agenda, the participants in these negotiations faced the task of giving substance to the ‘common heritage’ principle.

Procedural Aspects of the LOS Negotiations

To understand the constraints and possibilities inherent in Koh’s formal position, it is necessary to examine the formal procedures of the LOS Conference, which first convened in Caracas in 1973. Its early task was to organize itself and to establish its decision making processes. Three committees were established: Committee I was responsible for seabeds issues, Committee II for navigation, fishing, continental shelf and other traditional uses of the sea; and Committee III was charged with environmental and scientific issues. 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. Committee chairmen were responsible for identifying opportunities for consensus solutions, with the authority to prepare draft texts that, in their judgement, represented a step toward consensus. Votes over matters of substance were to be avoided under the terms of the ‘Gentlemen’s Agreement’.

All parties recognized the futility of any attempts to force, through the power of majority rule, a conclusion to the negotiations that did not have the support of the major powers. Veto power, as provided in the Security Council, was not acceptable to the developing countries. Thus, the ‘Gentlemen’s Agreement’ was adopted by the UN General Assembly on 16 November 1973. The operative paragraph of this agreement states that ‘the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted’. 4

‘Consensus’, in the context of the LOS Conference, implied the absence of explicit disagreement rather than total agreement on all of the issues. The consensus rule complemented the other underlying concept of the conference: the package deal, where the more than two dozen issues were to be resolved in a package agreement in which a party’s losses in one part of the package could be offset by gains in another part. The use of the consensus rule was meant to allow countries to avoid a public and formal vote to accept a disagreeable component of the larger package. While the use of consensus as the decision process had important advantages, it placed a premium upon the skills of the conference leadership who bore the responsibility of preparing the text that would achieve acceptance by consensus.

A traditional interpretation of the role of a presiding officer is as a facilitator of debate and a manager of the agenda. In this role, the presiding officer takes no substantive role; instead he or she aids the parties in reaching their own compromises. The presiding officer, whose function can be understood as that of a mediator, has a number of powers that are usually specified in the rules of procedure that guide the conference or meeting. 5 Normally the presiding officer opens and closes meetings; directs discussions and ensures observance of the rules of procedure; accords the right to speak; puts proposals to vote; and, may, with the agreement of the conference, limit the speaking time, close the list of speakers, close the debate, suspend or adjourn a meeting, adjourn the debate on an item, and the like.

In absence of a prepared draft convention to serve as a basis for the negotiations, it was decided to develop texts during the course of the LOS negotiations. Committee chairmen were assigned the responsibility for preparing a text that they felt could be the basis for further negotiation. The progress of the negotiations could be measured by the sequence of texts issued for the delegates, with seven texts preceding the final version that concluded the negotiations. 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.

After the initial sessions of the Conference it was decided that most of the negotiations would be closed to all but the participating nations and official observers. It was believed that the open meetings inhibited frank discussions that could lead to compromise and resolution. The need for privacy before options and compromises could be discussed also led to the formation of many informal groups that would coordinate positions and prepare proposals.

The efforts of coalitions to negotiate among themselves to establish common positions and proposals had a tendency to restrict the freedom of individual countries to move toward a compromise position. As a result there was a role for respected diplomats to serve as facilitators by making arguments, carrying information between parties, and proposing compromises that the countries and coalitions involved in the negotiations could not.

Although non-governmental organizations could not participate in the negotiations, and were even barred from observing the private sessions, they provided important assistance by providing an independent forum for meetings and discussions, introducing delegates who might be able to assist one another (with over 1000 accredited delegates such assistance was quite important), and exhorting the delegates to continue their efforts to reach a consensus agreement.

**Seabed Negotiations**

Developed countries that expected to mine the seabed had a genuine preference at the outset for a widely-accepted international agreement on the management of deep seabed resources over one composed of a few like-minded mining nations. In the early days of the
LOS negotiations, they argued strongly for a seabed ‘authority’ that would register claims and permit the orderly development of mining. Some revenue from the operations would be shared with the world community in deference to the common heritage principle. In the LOS forum, however, working out the conditions for seabed mining was tightly linked to renegotiation of the legal regimes governing a spectrum of other ocean uses. Important maritime countries saw these non-seabed issues as crucial. Thus, the numerous coastal developing states in particular could exercise real bargaining leverage on the resolution of seabed questions.

At the outset of the LOS negotiations, the major coalition of Third World representatives (the ‘Group of 77’) demanded that an international body be established to be the sole exploiter of seabed resources. With this position directly opposed to the claims registry concept espoused by most of the developed world, negotiations on the subject came to an impasse. By 1976, however, conference participants began to coalesce behind a ‘split-the-difference’ formula espoused by US Secretary of State Henry Kissinger. On one ‘side’ of the proposed system, private and state organizations could mine, while on the other side, an entity, the ‘Enterprise’, would be established to mine directly on behalf of the international community. For the compromise to have meaning, it was necessary to ensure that the Enterprise could in fact carry out seabed mining. Among other things, it needed access to mining areas, technology, and finances. These issues became the subject of the negotiations conducted between 1977 and 1980. In particular, the developed countries agreed that the first integrated operation of the Enterprise would be financed as part of this parallel system compromise.

Financial Negotiations

In 1974, the conference secretariat prepared a report on mechanisms for sharing the benefits of exploitation of the seabed mineral resources. The report identified front end and annual fees, royalties (share of gross revenues) and profit sharing (share of net revenues) as mechanisms that could be applied to seabed mining. A group appointed by the Chairman of Committee I, Cameroon’s Paul Enjo, incorporated the mechanisms into a general structure that was attached to the Revised Single Negotiating Text as a special appendix. However, insufficient information about the economics of seabed mining and disagreements about the appropriate division of benefits between developer and the Seabed Authority meant that the appendix was only an illustrative example without specific details.

When the Informal Composite Negotiating Text was issued two years later the financial terms of contract had not advanced, but negotiations over the two intervening years had illuminated the issues that would be included in future negotiations. Among these were the determination of the fraction of revenues that would be subject to sharing with the International Seabed Authority (the ‘Authority’) when some of the value was added through operations conducted on shore beyond the jurisdiction of the Authority (referred to as the ‘Attributable Net Proceeds’ or ANP), specification of the costs (including depreciation of investment) that would be allowed in the determination of net proceeds, the scheduling of payments over time, and whether the payments would be progressive. Other issues, such as acceptable currencies for payments and special provisions for eastern bloc countries that did not calculate profit, were also identified as subjects for future negotiation. The second set of issues dealt with the financing of the first operation of the ‘Enterprise’, the seabed mining operating arm of the International Seabed Authority, which was expected to cost up to a billion dollars.

The detailed negotiations over the financial provisions related to seabed mining began in earnest in the 1977 New York session and continued for over two and a half years, five sessions, and innumerable meetings of delegates and experts. In addition, informal meetings of regional groups, interests groups, bilateral consultations, and other gatherings were held between sessions of the Conference.

In the 1977 session, proposals were received from the United States and India. The Indian proposal – which included high fixed fees and high royalties – reflected assumption of high profitability for seabed mining. The US proposal had neither royalty nor front end payments. Instead the proposal included a modestly progressive tax on profits. The proposals also differed on the basis for the calculations, with India proposing that shares of revenues and profits should be based on all activities related to the exploitation of the seabed minerals where the US proposal applied only to the activities that took place in the international area and not to activities within national jurisdiction. Financing of the Enterprise was not a subject of discussion at the 1977 session. The US proposal did provide for state financing of up to 10 per cent of the Enterprise’s startup investment through grants with the rest obtained through loans. The Indian proposal did not address the issue of financing and no discussions
were conducted on the subject. The US and Indian proposals did not lead to substantive discussions in 1977. But they did indicate the incompatible positions and expectations of the two parties and the groups they represented.

Although the 1977 session showed little progress on financial issues there were advances in other seabeds issues. A working group chaired by Ambassador Jens Evensen of Norway made progress on several fronts, leading Evensen to submit a proposed compromise to Engo for inclusion into the next revision of the negotiating text. Engo, however, delayed issuing the revised text until after the conclusion of the 1977 session. When the text was issued, it reflected substantial revisions made in secret by Engo and some of his advisors from the Group of 77.

Although, under the rules of procedure Engo had the authority to issue whatever text he viewed would ‘substantially improve the prospects for consensus’, his action was protested by the industrialized countries who criticized both the substance of his proposals and the process by which he produced his text. The United States announced that it would undertake a major review of its interests in the LOS negotiations, making it clear that it was considering alternatives to continued participation in the LOS conference.

After consideration of the ICNT and of the LOS conference as a whole, the United States and other nations decided to return to the negotiations. However, as a condition for participation the industrialized countries, including the United States, demanded and obtained changes in the procedures of the Conference including a reduction in the powers of the Committee chairmen to issue future negotiating texts and a corresponding increase in the power of the senior leadership of the conference. Another change was the distribution of responsibility for the negotiations among several sub-groups. In 1978, the Conference decided to create seven Negotiating Groups to resolve the major outstanding issues, with three of the groups addressing issues in the seabeds committee. Among these groups Negotiating Group 2 (‘NG2’) was given the dual tasks of negotiating the division of any economic benefits of seabed exploitation and of financing the initial operation of the Enterprise. NG2’s charge was widely seen as a ‘make-or-break’ issue for the overall negotiations, with an inherently ‘zero-sum’, or ‘dividing-the-pie’ character.

The Conference selected the Permanent Representative of Singapore to the United Nations, Ambassador Tommy Koh, to be chairman of NG2. Koh had impeccable intellectual and political credentials for this assignment: educated at Singapore, Harvard, and Cambridge, he had been the youngest ambassador ever appointed to the United Nations; he had been dean of the University of Singapore’s Law School in his early thirties; he had been active in the LOS Asian group; and he had been instrumental in the successful negotiations on the crucial straits articles of the draft convention. His appointment significantly raised the political level of the financial discussions, which were widely attended and simultaneously translated into the six official UN languages.

Progress of the Negotiating Group Under Ambassador Koh

As Chairman of NG2 Koh was charged with developing a consensus text that would resolve the financial issues pertaining to private exploitation of the seabed and to financing of the operations of the Enterprise. His power – in many ways representing a devolution to negotiating group level of the presiding officers’ powers described above – to carry out this charge included the right to convene meetings of the negotiating group, to encourage informal activities by Conference delegates and other participants, and, most importantly, to prepare and issue proposals that might further the development of consensus on the financial issues. Thus began his ‘formal individual mediation’.

Geneva, 1978

The consensus process made it important that all countries feel involved in the negotiations so that they had a commitment to the outcome and would accept the consensus. The active involvement of over 150 nations, however, could make the negotiation too unwieldy to reach a consensus. Koh dealt with this problem by establishing a second group, supplementing the ongoing committee of the whole with a more technical ‘Group of Financial Experts’ (GFE). Since the activities of the GFE were reported on a regular basis many delegates were content to let other more technically versed delegates participate in that group. When the size of even the GFE impeded its progress Koh began to convene the group in progressively smaller rooms so that only the more interested or dedicated delegates continued to attend.

The Group of Financial Experts provided a forum for delegations to present proposals, critique the proposals of others, and to argue for or against the changes proposed by Ambassador Koh. However,
it was not capable of crafting new compromise proposals. To fill this gap Koh created his own informal secretariat, first drawing on the economic expertise of the staff supplied by the conference secretariat and the UN Conference on Trade and Development. Koh also enlisted the assistance of a few financial experts from the delegations who had already earned a reputation for intelligence and trustworthiness. Koh's informal staff would assist in the drafting of new proposals, debate the merits of new structures for agreements, and prepare discussion papers for the negotiating group describing potential new formulas and approaches.

In 1976, a small group of MIT researchers interested in the response of the ocean mining industry to governmental regulation, began the development of a model of the technology and costs of a hypothetical venture. The model was first presented for review in early 1978 and then went through a year-long period of review and revision to incorporate the expertise provided by a large number of reviewers from industry, academia and government. The revised model was presented in a report issued in March of 1978.5

A member of the US delegation to the Law of the Sea Conference was involved in the review of the MIT Model and, upon its completion, brought it to the attention of the head of the US delegation, Ambassador Elliot L. Richardson. Rather than attempt to apply the model for the unilateral advantage of the United States, Ambassador Richardson brought the model to Koh's attention. The MIT model increased the substantive content of the financial negotiations and it assisted the group of financial experts to clarify and restructure the provisions of the ICNT.

Koh's next step was to ask the delegations to make proposals for specific figures to be incorporated into a revised text. Several proposals - including ones from the US, the EEC, Japan, India, and the USSR - were put forward, with the US and Indian proposals representative of the opposing positions of the industrialized and developing countries. These proposals revealed that the developed and developing countries were becoming too committed to incompatible positions. Further, the economic assumptions underlying each side's position were radically different. For years, developing countries had heard a variety of technical and financial experts optimistically describe the economic potential of seabed minerals, so they strongly supported a proposal that would ensure that the international community (especially developing countries) received a substantial share of the benefits of seabed mineral development. By contrast, developed countries that expected to mine the seabed were sensitive to the uncertainties of resource evaluations, capabilities of as yet undeveloped technology, and the future of metal markets, based their proposals on much more pessimistic assumptions.

These proposals moved a small way toward the center from the earlier proposals by the US and India, but there was no continued effort to move toward a middle position. The debate centered on defense of the proposals by their sponsors rather than a search for compromise or an exploration of underlying interests.

Jens Evensen, the ambassador from Norway who had played key roles earlier in the conference as a promoter of compromise, stepped into this atmosphere of hardening positions with his own compromise formula. Taking into consideration the arguments that front end payments were too burdensome, he crafted a proposal combining royalties and profit sharing with rates in between those proposed by industrialized and developing countries. His proposal became the focal point for discussion of the delegations in the discussion of structures and rates for the financial terms of contracts. While the delegates did not move toward the provisions in the Evensen proposal the debate became more focused and detailed. By emphasizing the compromise proposal, the discussion was kept focused on how to reach a compromise rather than on arguments defending the extreme positions in the various national proposals.

The 1978 Geneva session produced much more focused discussion of the financial terms of contracts, but at the conclusion of the session Koh was unable to produce a compromise proposal that he felt would have any hope of achieving consensus. As a separate matter, he did suggest that one third of the financing for the Enterprise be provided by states in the form of interest-free loans.

New York, 1978

Although the delegates generally accepted the MIT model as a common basis for assessing the financial outlook for deep ocean mining, they continued to differ on their projections for the future. Different assumptions about the future of metals markets, about technical advances, and about the geological attributes of the seabed mineral deposits resulted in different assumptions of profitability. Thus, developing countries continued to argue for high fixed payments and shares of gross revenues while industrialized countries favored lower
payments based on the net revenues. Developing states argued that they were essential in order to provide sufficient funds to establish the Enterprise.

Early in the session, with the active support of Ambassador Koh, a seminar was held under the auspices of the Quaker and Methodist non-governmental observers for the purpose of reviewing the MIT Model for its value to the conference. Held in the meeting facilities of the church group on a Saturday the seminar was removed from the day-to-day debate. The sponsors were viewed as supportive of the LOS Conference, but not as promoting any particular solution. Koh acted as moderator for the seminar, and his example — along with the extreme negotiating salience of the NG2 issues — spurred wide attendance from both developing and industrialized countries. The United States, however, purposely kept its representation to one delegate to avoid compromising the MIT group which was composed entirely of Americans.

The MIT ‘team’ presented the model, explaining its structure and assumptions, and answering questions from the participants. For most of the seminar the issues remained focused on technical and economic assumptions, but at the end Ambassador Evensen asked the MIT group for an analysis of his Geneva proposal. An analysis had been performed (at Evensen’s request, several days before) and the results were presented. After listening to the analysis Evensen thanked the group and indicated that he might consider modifying his proposal. Similarly, a delegate from India asked for an analysis of his proposal. After hearing the analysis, which showed the heavy burden imposed by the required front end payments, he also indicated that he might reassess his proposal.

Evensen followed the seminar with a visit to MIT with other members of his delegation to assess several possible new proposals. After the MIT group analyzed several proposals for him, Evensen returned to New York to make a new proposal that leaned heavily on the analyses conducted at MIT. After debate in the group of financial experts Koh incorporated the second Evensen proposal, combined with several modifications generally favoring the developing countries, into his first proposal. He explained the reasons for putting the proposal forward in terms of analyses conducted on the MIT model. Debate over Koh’s proposal included criticism of the assumptions used in the baseline case of the MIT model. In response, Koh included a ‘safeguard’ clause that would keep royalty and profit sharing rates at their initial lower levels if the profitability of a mining operation did not rise above a trigger value.

Geneva, 1979
The next session, held in Geneva, was a period of consolidation and testing of new approaches. NG2 met twenty-two times, accompanied by many more meetings of smaller groups. Koh fostered some of the small group activities by establishing an informal secretariat for the negotiating group. Consisting of representatives from the secretariats of the conference and of UNCTAD as well as financial experts from several delegations and one delegate who was also a member of the MIT group, the chairman’s group developed innovative ideas which were presented in staff seminars and papers. When the ideas appeared to offer an improved opportunity for reaching consensus the technical staff would discuss the ideas with members of interest and regional groups. If the ideas generated interest among the groups, Koh would foster support by key individuals and seek to have the idea introduced by a respected delegate.

Koh conducted meetings of the group of financial experts in an interactive manner, with the delegates directing their proposals, arguments, and ideas directly to him. Koh would often engage in a discussion with the delegates in order to explore the details of a proposal or to clarify the points of a criticism.

During the Geneva session, discussion began to focus on the differing outlooks for ocean mining. At the request of Koh’s staff the MIT team developed a number of alternative scenarios based on different assumptions of costs, metal prices, and other factors. A study commissioned by the West German government projected a pessimistic outlook and, in spite of its differences with the MIT model, it was accepted as an alternative scenario. During the Geneva session there was a growing acceptance by all delegations that the financial future for deep ocean mining was difficult to project and that the financial terms of contract should address this uncertainty. Also during this session the delegates showed increasing understanding for the economic issues behind the proposals, most significant was the acceptance that there was a ‘time value of money’ that made early payments more burdensome than payments of the same magnitude made at a later date.

Up to this point in the negotiations, the financial terms of contracts had been treated as a separate issue for bargaining purposes from that
value in evaluating the effect of the proposal under different economic and technical conditions, and noting that the United States was particularly concerned about the effects of proposals on projects that would be at or near the break-even point. Highly profitable projects, while of concern, received less emphasis. In response to requests from other delegations a brief analysis was prepared by members of the MIT modeling team. A related paper, focusing on the design of systems of progressive taxation, was prepared by a member of the UNCTAD secretariat. Both papers were discussed in the Group of Financial Experts and were included in Koh’s periodic reports to the WG21.

The meetings of WG21 were open to observers from all delegations. With the larger, more open group the negotiations took on a more positional aura with delegates making statements of their positions but not attempting to suggest compromises. Responses from industrialized countries showed little flexibility or innovation on the financial terms of contracts, although they did move closer to Koh’s proposal on financing the Enterprise by suggesting that one third of the Enterprise’s capital needs be met through interest free loans.

After the negotiations showed danger of grinding to a halt, Koh brought together a small group of knowledgeable representatives from the United States, Mauritius, Pakistan, and Argentina. From his experience in NG2, Koh understood that these individuals had great understanding of the technical issues involved, but more importantly, that they had earned the respect of their colleagues in their respective groups (the western industrialized countries, African, Asian, and Latin American groups). They came together in an unofficial capacity, with the understanding that they could not make any commitments for other delegations. However, they each recognized one another as being committed to reaching consensus on the financial issues and as having the ability to lead other delegations to a compromise. The unofficial group meet in a number of sessions over three days, with no small degree of speculation among other delegations as to its whereabouts or the progress of the discussions. At the conclusion of their meetings, Koh agreed to put forward their compromise as his draft text and each participant returned to convince his respective group to accept — or at least, not to oppose — the result.

Two sharing schedules were agreed on, one with a low royalty and a low profit share, the other with much higher payment rates in each category. The low schedule would be in effect until the overall cash flow of the operation, accumulated forward at an appropriate real
interest rate, sufficed to recover the preproduction investment costs (also accumulated forward with interest). Higher royalty and profit-sharing rates will then take effect. On the matter of Enterprise finance, an unhappy group of developed countries tacitly acceded to the requirement in the final draft of 50 per cent cash contributions.

1980 and After
In the 1980 Geneva session the Conference issued the third revision of the overall text. This revision was titled 'Draft Convention (Informal Text)' to signify the view that the conference was one step away from completing its work. This expectation was challenged when the United States, under the leadership of newly-elected President Ronald Reagan, announced that it would undertake another national review of the convention after which it might seek significant alterations to the draft convention before it would consider accepting the text. The US review eventually produced a list of recommended changes. Conspicuously absent from the list of changes was any call for major change to the financial arrangements. (Only a reduction in the size of the application fee was sought.)

Thus the agreement reached under Koh’s chairmanship became part of the final LOS treaty. Though the United States, citing objections to various other elements in the seabeds regime, did not join the more than 120 nations that signed the treaty, the financial arrangements mediated by Koh can be understood to have attracted an even wider consensus than among the eventual treaty signatories. Indeed, largely in recognition of Koh’s efforts on what had been thought to have been an intractable issue, the delegates elected Koh to the overall conference presidency when the first president died.

AMBASSADOR KOH’S MEDIATION APPROACH
Global negotiations often differ from bilateral and regional negotiations in the scale of participation and the complexity of the issues they address. The LOS financial negotiations, which involved up to 150 countries in the development of a complex tax code affecting an industry that had yet to engage in deep seabed mining, provide a premier example of the difficulties of such a process.

In the LOS conference, the consensus rule and the ‘gentlemen’s agreement’ was accepted as the process by which agreements would obtain the support and commitment of participants. While the consensus rule and the gentlemen’s agreement provided guidance as to process, there was no clearly defined or detailed means specified to develop an agreement that would be accepted by this mechanism. Koh’s principal task was to develop a negotiating process that would produce a proposal whose substance would meet the needs of the participants and be accepted by consensus.

Although the LOS Conference was by 1977 into its fourth year (and had been preceded by three years of preparation), the negotiations over the financial issues involved in seabed mining had scarcely progressed. The only common ground among the participants was the agreement that private mining operations would be required to make some payments to an international body (the so-called ‘financial terms of contracts’ issue) and that funds would be available to finance the initial operation of the Enterprise (the so-called ‘Enterprise finance’ issue). There was only limited information about the economics of seabed mining available to the participants in the negotiations. Much of that information was ambiguous and could be used to support virtually any position.

Indeed, when Koh took the helm of the financial negotiations they were characterized by extreme proposals (offered by the United States and India), no consensus on mining economics, an adversarial air of mutual suspicion, and frequent ideologically-inspired clashes over the merits of international regulation versus a market-oriented entrepreneurial approach to the deep seabed.

Fundamental Diagnosis of the Negotiating Impasse
To understand this deadlocked situation, and to make sense of Koh’s approach, it is worth stepping back to review some of the essential processes that occur in negotiations, including those at international conferences. In particular, we will describe the more general processes of ‘creating’ and ‘claiming’ value through negotiation.

The lure of joint action lies in the prospect of each party’s doing better than its alternatives to agreement. In most international negotiations, especially those involving technical, economic, and political complexities such as those involving ocean mining, the potential value of joint action through agreement is not obvious at the outset of the process. Thus, ‘creating value’ – that is, reaching mutually beneficial agreements, improving them, and preventing the escalation of conflict – requires an approach often associated with ‘win-win’, ‘integrative’, or ‘variable sum’ encounters. To generate options that
embolden mutual gain, it is helpful for information to be shared, communication enhanced, creativity spurred, learning fostered, joint problem-solving emphasized, and hostilities productively channeled. Many analysts offer guides to ‘creating value’ through cooperative behavior.\(^6\)

Indeed, a key element of the essential process of value creation involves finding a widely accepted ‘formula’ that indicates the broad terms of a mutually beneficial solution.\(^9\) Before proceeding to the more specific, or ‘detail’, phase of the negotiation, the parties involved need to develop a broadly accepted view of the shape and outline of the terms of ultimate settlement. This formula may well change with better understanding of the issues under negotiation as well as changes in views by the participants of the relative importance of different issues. But the financial arrangements of negotiations at the time Koh took the helm contained no collectively acceptable formula, only sharply clashing approaches that embodied very different views.

In part, this state of affairs resulted from the second crucial and linked process involved in international negotiations. Beyond the ‘value creation’ discussed above, crucial aspects of the negotiation process are ‘distributive’, ‘win-lose’, or ‘constant sum’; that is, increased value ‘claimed’ by one party implies less for the others. Although value is created merely by reaching a mutually acceptable accord, the parties’ interests can conflict diametrically over the terms, and, where value can be created beyond simple agreement, that additional value still must be apportioned among the parties. Several broad classes of tactics are typically employed for dealing with the conflictual elements in negotiation, for ‘dividing the pie’, or to use the language of Lax and Sebenius, for ‘claiming value’.\(^10\) Tactics commonly used for this element of bargaining have been the subject of considerable study.\(^11\) Such tactics typically include advantageously shaping perceptions of alternatives to agreement, making commitments to extreme positions, influencing levels of aspiration, manipulating patterns of concessions, holding valued issues ‘hostage’, linking issues and interests for purposes of leverage, misleading other parties, as well as exploiting cultural or other expectations of one’s negotiating counterparts. By means of these tactics a party typically seeks advantage in the ‘division of the pie’.

It is worth noting that the very terms in which the financial negotiations were carried out (that is, ‘dividing the benefits to come from deep seabed mining’) involved an image in many delegates’ minds that was of virtually pure conflict. The issue, as seen by many of the participants in the financial negotiations, was how to claim the maximum potential value. This ‘zero sum’ image, that informed so many of the delegates, stimulated classic hard bargaining approaches for claiming value and tended to relegate to a distinctly secondary role the learning, inventiveness, and communication that would be necessary to realize mutual gains or to ‘create value’.

Indeed, if these two fundamental processes of creating and claiming value were separable in negotiation, it would be possible to analyze and prescribe a separate approach suitable to each task. Unfortunately, in general, creating and claiming value, or expanding and dividing the pie, are tightly bound together in any negotiating process. The manner by which parties create value normally heavily influences the allocation of that value. Approaches that tend to be highly effective in claiming value tend to be highly dysfunctional for efforts to create it. Even more ominously, openness and honest sharing of information aimed at and necessary for creating value can be badly exploited by parties acting as ‘value claimers’. Given these analytic observations, each party tends to reason as follows:

If the other parties are open and forthcoming, I can take advantage of them and claim a great deal of value; thus, I should adopt a value-claiming stance. On the other hand, if the other parties are tough and adopt value-claiming stances, I too must adopt such a stance in order to protect myself. If I am unsure of the real approach of the other side, a tough, adversarial approach appears prudent.

Either way, a strong tendency operating on all parties in a negotiation very frequently leads to the result that competitive moves to claim value individually drive out cooperative moves to create it for all parties. The outcomes of this dynamic include poor agreements, deadlocks, and conflict spirals. This tendency, closely related in structure to the famous ‘prisoner’s dilemma’, was dubbed the ‘negotiator’s dilemma’.\(^12\)

When Koh took over the financial negotiations, these common and unfortunate manifestations of the negotiator’s dilemma had powerfully entrenched themselves. Competitive moves had largely driven out cooperative possibilities. The level of suspicion was high. A wide substantive impasse yawned. An inconclusive, if spirited, clash between exponents of the New International Economic Order and
those preferring market approaches was in full swing. Thus, to make progress in the negotiations, Koh had to concoct a process that could lead to the collective acceptance of a mutually beneficial formula for resolving these issues, and manage this process through the detail phase in a way that productively managed the tension between cooperative moves to create value and competitive ones to claim it. In the broadest terms, Koh's mediation approach to managing this tension involved three thrusts: first, creating value by inventing a process to emphasize new information and understanding; second, creating value by fostering development of a mutually advantageous formula in substance; and thirdly, managing the creating/claiming tension in the process of building consensus around this formula.

Creating Value: Devising a Process to Emphasize New Information and Understanding

Koh needed to create a process that would move away from ideological and positional clashes, and that would emphasize learning and joint problem-solving. The consensus process made it important that all participants felt involved in the negotiations so that they will develop a commitment to the outcome and ultimately accept it. The active involvement of up to 150 nations, however, made for an impossibly unwieldy process. Koh recognized this problem and dealt with it by establishing a second group to supplement the ongoing meetings of the committee of the whole or plenary. This second group was assigned a more technical role as a Group of Financial Experts (GFE). Since the activities of the GFE were reported on a regular basis, and since their meetings were open to all interested parties, many delegates were content to let other more technically versed colleagues participate in that group. When even the size of the GFE impeded its progress, Koh convened the group in progressively smaller rooms to 'shrink' its membership.

The GFE was large enough, however, to provide a forum for delegations to present proposals, critique those of others, and to argue for or against changes floated by Ambassador Koh. However, this group was not readily capable of crafting new proposals that took into account the interests and new information it unearthed. To fill this gap, Koh created his own informal secretariat, drawing on the economic expertise of the staff supplied by the conference secretariat and other UN entities, along with a few trusted financial experts from other delegations. Koh's informal staff helped to draft new proposals, debated the merits of possible new structures for agreement, and prepared discussion papers for the negotiating group that described potential new formulas and approaches. Since these papers were not 'owned' by any delegation and since they were totally informal, they did not usually engender the need for any 'official' response from the delegations and could be reviewed on their technical merits.

In short, Koh structured the process in such a way that the political virtues of openness and inclusiveness could be preserved, while the technical merits of smaller, more expert interactions could be achieved and used as input to the larger deliberations. Since all meetings, however, were nominally open to all delegates, little apparent suspicion or resentment was engendered.

Further, Koh recognized that the negotiations could not easily progress until there was a much better and more commonly accepted understanding of the underlying issues, and of the interests behind the divergent positions of the various parties. Through the introduction of information and expertise from sources outside the participating delegations, as well as his constant reference to and use of the MIT model, Koh was able to develop a more common source of information and analysis. The availability of detailed technical and economic information increased the sense of control felt by many of the countries; as a result, they were more willing to design compromises and discuss those suggested by others. The information provided a common framework for debate which showed causal relationships between the texts of proposals and the interests of parties in the negotiation.

In particular, the MIT model evaluated proposals in clear, non-ideological terms – the amount of money to be paid to an international authority and the discounted rate of return to the miners. The delegates rapidly began to speak in terms of these interests rather than broader, more amorphous and conflict-laden ideological terms that had previously characterized much of the discussion (e.g., the New International Economic Order versus market economics). Further, access to the MIT computer model provided Koh's technical advisors with the capability themselves to develop and analyze possible proposals independently of the various national delegations—thereby retaining an important degree of independence.

Koh developed an activist role for himself in the negotiations. Based on his responsibility for deciding on revisions to the single negotiating text – though the eventual result had to be agreed by consensus – he restructured the debate from one between delegates
to one in which each delegate appealed to him for changes. Rather than appear responsive to positional commitments by the delegates, Koh typically requested explanations of the factual and substantive basis for the desired changes. As such, the delegates felt compelled to discuss their interests and underlying assumptions. This tended to facilitate the development of improved proposals and moved the discussion away from a clash of competing positions. With the assistance of Koh's informal staff, new proposals were developed that moved the negotiating group closer to consensus by incorporating constructive elements of the various suggestions, minimizing the overtly competitive aspects of the negotiation, and enhancing the value-creating activities.

In short, by his complementary use of an informal secretariat, group of financial experts, and the plenary sessions, his elevation of the importance of an outside analytical model, and an activist style that stressed interests over positions, Koh had created a process that emphasized new information in understanding, critical elements in the process of creating value through negotiation that had stalled before his stewardship.

Creating Value: Fostering Development of a Mutually Advantageous Substantive Formula

Managing the Development of a Collective View of an Acceptable 'Formula' for Resolving the Disputed Issues

William Zartman has called special attention to the process by which a group of negotiators comes to envision the overall shape of an ultimately acceptable settlement.10 He refers to this as the 'formula' phase to distinguish it from the 'detail' phase of the process in which more specific accommodations are reached. He does not insist on a linear progression from formula to detail; rather there is often a tentative formula envisioned by a number of participants that gives rise to considerable detailed negotiation, only to be revisited as appropriate.

Koh was especially sensitive to the development of broad views of the outlines of an eventual settlement. In particular, out of a range of potential possible formulas for the financial negotiations, he nurtured the development of a view that the financial terms should ultimately avoid a heavy 'front end load', that they would be profitability-based, and would require a great deal to be given to the international community by successful projects, while borderline operations would have lesser obligations. Later, when impasse threatened the separate negotiations over financial terms and Enterprise finance, Koh responded to emerging views among the delegations by testing a 'formula' whereby the financial terms of contracts would more heavily reflect the views of developed countries, while the Enterprise would be financed by a higher percentage of cash grants, in line with developing country preferences.

In essence, Koh acted as something of a midwife to broad conceptions - first as to the nature of the financial terms of contracts, then as to a potential linkage. These promised joint benefits and appeared capable of attracting more widespread consensus following negotiation over their details, or specific elements, which will now be considered.

Discerning Value-Creating Differences Among the Delegates

As described above, part of the overall sea law negotiations came to concern a system of fees, royalties and profit shares to be paid by future seabed miners to an international entity for the right to mine the deep seabeds. This negotiation was often viewed as inherently conflictual - since its subject was frequently described as 'how to divide the economic pie' expected to result from seabed mining.

Instead, the results of intense coalitional bargaining that was widely predicted to be intractable proved to be an arrangement that effectively exploited differences among the participants in probability, risk aversion, and time preference in order to create a remarkable degree of joint gain. Consider each difference in turn before analyzing Koh's approach toward dovetailing these substantive differences.

First, a great deal of technical and economic uncertainty surrounded the prospects for deep ocean mining. Even after lengthy negotiations and the introduction of much common information a strong divergence of opinion persisted between developed and developing countries about its likely economic profile. Developed countries saw mining providing a new, low-cost source of minerals. They argued that this industry would most likely show attractive if modest economic returns. Many negotiators from developing countries, however, felt that profitability prospects were very good indeed. In short, expectations diverged.

Second, any eventual revenues from seabed exploitation would be divided up among all treaty signatories, and would not represent a major share of any country's national income. Thus, countries signing the treaty could be thought of as a large syndicate that should try to
maximize expected income rather than trying to assure itself a smaller, but steadier stream. Corporate investments in seabed mining operations, however, could represent significant portions of their assets. In particular, managers of the ocean mining division of these companies were concerned about the potential impact of relatively fixed charges such as fees and royalties on the economic success of troubled projects. They seemed willing to share profits at high rates for successful projects in return for 'low end' protection of economically marginal ventures. Attitudes towards risk thus differed.

Finally, there was the question of timing. The companies' private, after-tax discount rates appeared to be higher than those implicitly used by the negotiators from any developing countries, who saw themselves as setting up an enduring system. The welfare of future generations figured heavily in their negotiating statements and in their evaluations of proposals. The two sides' attitudes toward time seemed to differ, with developed countries acting relatively less patiently than the developing countries.

An agreement on the financial terms of contracts question was reached only after two years of difficult bargaining (and the linkage of the Enterprise finance issue; see next section). The outcome dovetails these differences in probability, risk aversion, and time preference. Two sharing schedules were agreed on, one with a low royalty and a low profit share, the other with much higher payment rates in each category. The low schedule would be in effect until the overall cash flow of the operation, accumulated forward at an appropriate real interest rate, sufficed to recover the preproduction investment costs (also accumulated forward with interest). Higher royalty and profit-sharing rates would then take effect.

Negotiations of a single set of rates had proved extremely difficult, with any proposal either being opposed by the developed countries as too high or being opposed by the developing countries as too low. The two negotiated schedules however, used the differences in profitability estimates by giving each side an advantageous tax schedule for the economic outcome it portrayed as likely. Given the developed countries' expectations of high profits, negotiation of low rates from modestly successful projects was no great concession. Similarly, accepting high rates for bonanza projects was tenable for potential mining companies, given their lower profit forecasts. It was critical, however, that the low rates were neither so low nor the high rates so elevated that the ultimate result would be politically or economically unsustainable. The parties knew that they would have to live with and defend the outcome, however the profit uncertainties resolved themselves.

The agreement protects troubled and marginal projects against overly high fixed charges. In return for such lower rates, however, the miners face higher rates for successful projects than would probably have otherwise been negotiable. The signal for switching to the higher rates is based on the 'accumulated' present value of a project's cash flows, that is, inflows and outflows accumulated forward with interest. Therefore, the higher rates apply only to projects whose risk—that the investment and its opportunity costs would go unrecovered—had substantially diminished. Differences in risk attitudes are dovetailed: the international community has a higher expected take, while companies enjoy 'low-end' protection. In effect, contingent high-end premiums are paid for contingent low-end insurance.

Finally, since the economic success of the project can normally be expected to increase over time, the stream of payments should be low at first, then much higher later. This matches the expressed attitude toward the passage of time of the parties during the negotiation. Although this is hardly a claim for larger social optimality, this arrangement accords well with the espoused differences in time preferences among the negotiators.

While it is not likely that any one of these differences by itself would have been sufficient to lead to a negotiated settlement of this set of issues, in combination they reinforce each other in pointing toward a solution. It is remarkable that this negotiation produced a new form of mineral taxation agreement designed to use differences among the participants to fashion joint gains. This novel outcome—heavily influenced by Koh's activist stance toward substantive issues—helped to avert the negotiating impasse on the financial issues in the treaty that was widely predicted.\footnote{Forging Value-Creating Linkages}

Until the 1979 Geneva session, delegates effectively separated the question of Enterprise finance as a negotiating matter from the bargaining over the financial terms of contracts. Many G-77 members conceptually linked the two issues, however, as a result of their desire to finance the Enterprise from private contractors' financial payments. The only prior national proposal's provisions that dealt simultaneously with the two issues was the 1977 US proposal. It suggested that up to 10 per cent of the cost of the Enterprise's first project be contributed in cash by states ratifying the treaty. With this
sum in hand, the US sponsors argued, the Enterprise could secure the balance of its monetary requirements through loans. Six delegations made proposals concerning financial terms of contracts before anyone again approached the question of Enterprise finance. At the first 1978 session held in Geneva, Koh suggested a one-third cash contribution without simultaneously making a recommendation on the financial terms of contacts. Indeed, the subsequent New York session passed without new Enterprise finance proposals; it was not until the 1979 Geneva session that the two issues were generally linked in a bargaining sense. Despite the joint gains embodied in the financial arrangements that were described above, it is quite probable that no settlement could have been reached on either issue had the delegates continued to consider them separately. Virtual impasse threatened each issue.

Ultimately, Koh suggested a level of 50 per cent cash contributions for the enterprise's initial requirements, a proposal that many industrialized countries found unacceptable. By the 1979 New York negotiations, the United States, the European community, and Japan appeared to pull back from their earlier financial proposals while tacitly agreeing to Koh's earlier one-third cash contribution proposal. The compromise outcome ultimately involved relatively flexible financial terms with the first Enterprise operation to be half financed with cash contributions.

The combination of the financial terms of contracts (which Koh had come to realize was of relatively greater concern to developed countries) with the financing of the Enterprise (which had clearly become more important to developing countries) may well have been decisive in creating the possibility of a settlement. Neither issue considered by itself seemed to have a zone of agreement; yet, when the two were effectively joined in a negotiating sense (something that did not happen until late in 1979) a potential zone of agreement, which was not previously evident seemed to open. Koh's clarity in realizing the linkage possibilities represented another major substantive contribution to an outcome that created value for the various sides. 15

Managing the Creating/Claiming Tension: Building Consensus

Having looked at substantive and process contributions to reaching agreement, it is worth seeing how Koh managed to combine process and substance in a way that ultimately achieved the required consensus. Koh managed the negotiations in a dynamic manner tailored to the problems at hand. By retaining the plenary as the decisionmaking body and by keeping the body apprised of progress in the group of financial experts, he maintained the universal participation that was needed to promote consensus adoption of an agreement. By establishing the group of financial experts, and by conducting its meetings in relatively small rooms with an intensity and concentration that caused its membership to be self-limiting, he maintained a group that could focus on the development of a formula for an acceptable agreement. At the same time, however, Koh retained his informal group of technical advisors to develop the details that would fill out the formula.

The process for developing the proposals was matched by a process for obtaining support. Koh, as the moderator of the plenary and of the group of financial experts, directed the discussions at uncovering the interests of parties and at developing new formulas that could better meet the interests of each group.

One recurring theme in these negotiations was the difficulty for the involved coalitions to provide leadership. Among the developing countries, only India made official proposals for the financial terms of contracts, and these were made only in the early stages of the work of Koh's group. The Indian proposals represented one extreme of negotiation, and the G-77, as a unit, was unable to develop a consensus in support of any compromise proposals. Indeed, the difficulty of generating consensus within the G-77 increased the importance of the group of financial experts where delegates could speak in their individual capacities about strengths and weaknesses of possible proposals without formally committing their countries or the G-77 to compromise. Without a source of proposals from the G-77 or individual developing countries, individual delegates, notably Norway's Ambassador Evansen, were crucial to the progress of negotiations and the movement toward a compromise solution.

Large conferences rely on the development of coalitions and interest groups to reduce the complexities involved. To some degree, however, the complexity may only be transferred from the committee of the whole to the internal processes of the coalitions. The difficulty faced by coalitions in reaching agreements in a timely manner thereby increased the importance of individuals as informal spokespersons, whom Koh actively encouraged. Three advantages arose from individuals who played this role. First, there was a reduced need for the time-consuming processes of reaching agreement within coalitions. Second, the frequent hardening of positions developed by internal
processes involving many parties was frequently avoided. Finally, proposals could be used as the basis of discussion without leading to direct confrontation between or among potentially opposing principal parties.

Overall, Koh’s method was analogous to a three-ring circus. First, a small group under his direction was constantly utilized to invent new ideas and suggest means around negotiating impasses. Second, important delegates were invited into an enlarged version of this group to test their reactions to the working ideas. Based on these reactions, the smaller group’s proposals would be modified, and ultimately gain a degree of acceptance or would be rejected by some of the key delegates. Finally, Koh would have promising ideas introduced into larger plenary sessions. He would often ask a prominent member attending the session to raise the idea. In discussion of the idea’s merits, Koh’s summaries would creatively interpret comments in an effort to build ‘momentum’ toward agreement.

Successful proposals typically followed a common path: from increasing familiarity to the delegates, to incorporation into a sense of conventional conference wisdom, to gaining a degree of legitimacy, and finally to inclusion in the draft treaty text. Of course, inclusion did not guarantee a permanent place; a dynamic process of textual change continued throughout the conference.

Thus far, the process described mainly involves the diffusion of knowledge over time about the issues under negotiation. The negotiations were not, however, a process of pure learning and value creation, but naturally involved considerable conflicts of interest and value claiming. When agreement was required on final arrangements, Chairman Koh devised a process far more conducive to distributional negotiations than were the large plenary sessions—in which concessions by one party could be rapidly accepted by others without reciprocal movement.

Interestingly, after two years of negotiation over this set of issues, Koh had been able to discern what might be called ‘patterns of deference’ among the delegates. Within each of the broad geographic blocs, certain delegates had come to be seen as especially knowledgeable about the issues and as sufficiently committed to their respective groups’ interests, that Koh felt a small-scale negotiation among this group of such trusted delegates could bear fruit. Koh chose the delegates informally, and secretly closeted them for several days. Carrying out these final negotiations were diplomats from Argentina, Pakistan, the United States, Mauritius, and, of course, the Chairman from Singapore. The tradeoffs that were made in that five-party negotiation were never explicitly revealed, but instead the results were put forward by the Chairman as his best attempt at consensus, with the hope and expectation that those delegates who had participated in the small discussion would ‘deliver’ their geographic groupings.

Koh’s process opportunism was in no small measure responsible for the result. The ‘consensus’ so achieved was not an overtly positive endorsement of the terms but instead, was, at best, an agreement not to attack them. They survived into the final text and were generally acclaimed by the conference – which subsequently elected Koh as President of the overall negotiations.

BEYOND KOH’S APPROACH TO FORMAL INDIVIDUAL MEDIATION

At first sight, Koh’s diverse actions, however effective, may appear peculiar to this particular mediation effort by this particular individual. And, obviously, to imagine building a theory of formal individual mediation on the basis of a single instance is analytical folly. To generalize beyond this case, therefore, it is necessary to link Koh’s actions to a broader body of theory that offers a reliably powerful diagnosis of why negotiations risk running aground, and how a mediator, using whatever resources are available – in this case, resources deriving from his formal conference position – can lead the process to better outcomes.

To some observers, this might suggest framing the discussion in terms of roles and role conflicts in the context of a formal multilateral process, motivations and personality types of individual mediators, the importance of various psychological resources that mediators might bring to the task, and the like. (One might, for example, seek to generalize from the fact that Koh was of Chinese extraction, was trained in the law, often exhibited a slightly professorial air, and was from an authoritarian but meritocratic Southeast Asian city-state that was rapidly industrializing while retaining its membership in the Group of 77.) While considerable valuable research exists on such topics, most of it remains at the level of careful analytic description, not consistent prescriptive theory. And, unfortunately, relatively little of this research is explicitly linked to a systematic theory of why negotiations often result in less than optimal agreements, impasses,
or conflict escalation. A more powerful, systematic, and explicitly prescriptive framework that meets these criteria is appropriate to permit the analysis to move from the specifics of Koh and the LOS process to wider applications.

Therefore, to generate useful prescriptions from this single case, it and, by extension, Koh’s actions – has been analyzed in broader, negotiation analytic, terms. In particular, the deadlock Koh inherited was interpreted as the result of a tendency inherent in the ‘negotiator’s dilemma’, in which actions by individual actors to improve the outcome from their point of view, or to ‘claim value’, drive out the cooperative actions needed to generate mutual gains, or to ‘create value’. Koh’s actions can thus be understood as specific responses – in accord with well-known principles of great power and generality – of a creative and experienced mediator to an ubiquitous problem: to manage the tension between individual competitive moves productively so as to gain advantage for each side and cooperative actions to solve the joint problems at hand and to create value for all concerned. In the LOS case, these principles included:

(1) recognition of the altogether different requirements of value-creation versus value-claiming, in particular, the need to construct a process conducive to learning, communication, and invention;

(2) the awareness that differences among the participants (e.g., in relative valuation, probabilistic forecasts, risk and time preference, etc.) comprise a centrally important sources of potential joint gain, and that characteristic forms of agreement (e.g., contingent contracts) can realize these joint gains. (This observation strikes at the heart of the common but analytically naive view that process and substance can be fully disentangled – and explains the necessity of dwelling on the substance of the financial issues involved in the LOS case, when a more disembodied process view would economize on readers’ time);

(3) a familiarity with the conditions under which judicious linkage among differentially valued issues may yield mutual benefits and open up a zone of possible agreement, where issues treated separately might remain deadlocked; and

(4) an understanding of the normal, but not mechanical, progression of negotiation from the construction of a mutually acceptable ‘formula’ to negotiating the ‘details’, and, to facilitate this dynamic, the need for mediation tactics that are phase-appropriate.

Regardless of a mediator’s cultural heritage, interpersonal orientation, underlying motivation, professional socialization, or potential boundary role conflicts, it is worth having a clear understanding of the fundamental mediation task and the basic principles involved. The fact that a particular mediator is operating as an individual in a formal role simply affects the personal, organizational, or process resources available to bear on the problem in a contextually appropriate way. Koh’s actions in this case provide ample illustration of these specifics.

In this connection, Koh’s embrace of the MIT model, for example, has little intrinsic theoretical significance, but rather represents the opportunistic means to meet the need for a process with enhanced learning, communication and invention. The specific actions he undertook to raise the salience of the model indeed derived from his formal individual role, but are relatively unimportant. Other mediating entities in other settings – once they diagnosed the fundamental problem – could seek a variety of other contextually appropriate means to the same (strategically necessary) end.

Other productive actions taken by Koh are consistent with these general principles, but are of enough intrinsic interest to highlight in their own rights. For example, consider the formal, time-consuming, and hard-to-reverse process by which sovereign states and political blocs normally arrive at their positions in multilateral conferences. Since this process is antithetical to the requirements of value-creation, Koh’s active use of his formal powers to create an elaborate informal process more appropriate to the creative task is worthy of note. Yet there is more than the informality of the process Koh concocted and the ways it avoided the need for ongoing sovereign or bloc-based decision-making and position-taking. His actions consciously ‘shrunk’ the number of active participants to manageable levels without, for the most part, appearing overtly exclusive. This shrinkage is probably a requirement for large-scale negotiations. Yet, if creating a smaller-scale process is a necessity, so is envisioning the means later to ‘expand’ the results to encompass the larger group. In this connection, the final negotiations were held among individuals whom Koh had chosen in part on the basis of the ‘deference’ apparently shown them by members of important regional groups.
Given this experience, one might conjecture that an effective class of actions for a formal mediator in a multilateral setting may be self-consciously to promote an informal process that can first shrink participation to manageable levels, but that anticipates the later need to expand promising results to include the larger group.

In sum, Ambassador Koh inherited a negotiation that was widely viewed as an adversarial, distributive bargain, one in which the competitive, value-claiming approaches of the participants had often driven out the openness, learning, communication, and inventiveness required to realize the benefits of value-creating cooperation. As a mediator with a key formal position, Koh devised a new process – creating an informal secretariat, a group of financial experts, and bringing in outside expertise and a computer model – that turned the negotiators’ focus toward the nature of the problem and their real interests as opposed to their bargaining positions. Koh’s activist style in moving among plenary, GFE, and informal secretariat meetings made him aware of an able to build momentum toward substantive results – in the design of the financial arrangements and linkage to Enterprise finance – that embodied considerable joint gain. He drew on a keen observation of the participants to suggest novel provisions that exploited differences among the participants in expectations, risk aversion, and time preference. Because the developing and developed country delegates came to place different values on the treaty’s provisions relating to financial terms of contracts and Enterprise finance, Koh facilitated a mutually beneficial issue linkage between these areas that helped to break a deadlock. By drawing on a keen sense of how understanding and familiarity diffused among the delegates, Koh was able to evoke from them an acceptance of a broad ‘formula’ for the negotiation’s outcome. Then by discerning and taking advantage of patterns of deference among the delegates, he constituted an endgame that resolved the ‘details’ of the eventual accord by consensus. While the particulars of Koh’s actions recede in importance with the passage of time, the general principles they illustrate offer valuable guidance of mediators in analogous contexts far removed from ocean law.

NOTES

Both authors were members of the United States Delegation to the Third United Nations Conference on the Law of the Sea. The views expressed are their own and not necessarily those of the organizations with which they are or have been associated.


Haven, Conn.: Yale University Press, 1982).
10. See D.A. Lax and J.K. Sebenius, op. cit.
16. This is not to say that the actual use and effects of the MIT model did not exemplify important principles. For example, it is worth noting that the model had a major role in reducing the 'dimensionality' of the discussion – and increasing its tractability – from a politically and ideologically laden debate over the NIEO v. market principles to a relatively technical negotiation over required rates of return to seabed miners v. payments to the international community.