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A Recent Development in the Law-Making Process of International Organization: Single-Text Procedure

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Introduction

The so-called group of 77, composed of no less than one hundred and twenty developing countries, occupy more than two-third majority in the United Nations. Once they unite, they can adopt any kind of resolutions as they like as many times as they want. Such resolutions are legally not effective. Although such resolutions are non-binding, the dominant majority control in the law-making process of international organization is a matter of concern.

In order to cope with this crisis, consensus method has increasingly been used since the early 1960's, when the huge group of new states from Africa joined the United Nations. Although the consensus method has many advantages, particularly in harmonizing group interests, it also has certain inherent disadvantages. One of the most glaring disadvantages is that it is time-consuming. One of the useful methods, invented in the Third United Nations Conference on the Law of the Sea to expedite the consensus process, is the single-text procedure. This new procedure has been applied effectively in several instances, but it has not been widely studied. The purpose of this article is to

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investigate the problems of the consensus method and to examine the usefulness of the sinle-text procedure.

I. Problems in the Traditional Law-Making Process

At the time of the establishment of the International Law Commission(ILC) for the purpose of progressive development of international law and its codification, states severely criticized the traditional convention method based on the unanimity rule.(1) The failure of the 1930 Codification Conference, concerning territorial waters, nationality and state responsibility, was not only due to the unanimity rule but also to the unacceptability of certain provisions because of insufficient consultation between the Preparation Committee and the member states. Delegates did not have any concise documentation besides a loose piece of Basis of Discussion.(2)

Delegates wasted breath arguing whether a certain item was ripe for codification. They disagreed on certain customary rules because of political interests. Diverse national interests were not provided in the draft because progressive development of international law through legislation was prohibited. A two-third majority rule was required for draft convention in the preparatory committees, but this was not linked to the unanimity rule in the final stage because there was no method to persuade the blocking third or other powerful minorities to give up their positions. For example, the one-month period was indeed too short to cover the delicate subjects.

Based on the observations submitted by the governments, the League of Nations Assembly adopted a new procedure for the progressive codification of international law on September 25, 1931. This new procedure provided for a double checking period by governments and a double drafting period for the

(1) The rule of unanimity was provided in Paragraph 1 of Article 5 of the Covenant of the League of Nations that "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting."

(2) *See, e. g.*, Bases of Discussion for the Conference for the Codification of International Law Drawn up by the Preparatory Committee, League of Nations Document C. 74. M. 39. 1929.

Committee of Experts. Unfortunately, this dream of the League of Nations was never realized.

At the outset the United Nations attempted to wipe out all the defects in the traditional law-making process. For the purpose of progressive development of international law as well as its codification, the United Nations, on November 21, 1947, created the permanent body of the International Law Commission (ILC), composed of fifteen eminent international jurists (General Assembly Resolution 174 II). Five were from the permanenent members of the Security Council, four from Latin America, three from Western Europe, two from Asia, one from Eastern Europe and none from Africa. Because no rule of procedure was provided in the Statute of the ILC, the Commision decided to use the rules of procedure for the committees of the General Assembly. In accordance with Rule 126, decisions were to be made by a majority of the members present and voting. There the phrase "members present and voting" meant members casting an affirmative or negative vote; members who abstained from voting were considered as not voting.

At its first session in 1949, the ILC selected seven topics of immediate concern, namely: 1) regime of the high seas, 2) regime of territorial waters, 3) nationality, 4) treaties, 5) diplomatic intercourse and immunities, 6) consular intercourse and immunities, 7) arbitral procedure, and one sub-topic relating to state succession in respect of treaties. The ILC's first task was to codify the existing customary law on the law of the sea.(3) It also put emphasis on the progressive development of international law by legislation with regard to the new regime on the continental shelf and other items of new development. Under the leadership of Special Rapporteur Mr. François, the ILC drafted and circulated articles to the governments for review. The ILC then revised them, taking into account the comments made by the governments. In 1956, after one hundred seventy meetings over a seven-year period on the topic, the ILC

(3) The ILC then appointed Mr. François as Special Rapporteur in charge of the topics on the law of the sea, taking account of his previous experiences in handling the issues relating to the territorial waters in the 1930 Codification Conference.

completed its monumental Draft Articles Concerning the Law of the Sea and recommended the General Assembly to convene a conference.

In accordance with the recommendation, the First UN Conference on the Law of Sea met in Geneva from February 24 to April 27, 1958. The Conference adopted four Conventions based on the Draft Articles by a two-third majority rule without much revision. It took five to eight years for the Geneva Conventions to take effect. Most of the seventy states, which became independent after the Conference, did not want to accede to the Conventions. So far forty-five states ratified the Convention on the Territorial Sea and Contiguous Zone; fifty-six states ratified the Convention on the High Seas; thirty-five states on the Convention on Fishing and Conservation of the Living Resources of the High Seas; fifty-three states on the Convention on the Continental Shelf; and thirty-four states on the Optional Protocol Concerning the Compulsory Settlement of Disputes.

Although these Conventions are still effective, many of the provistons became already obsolete or highly controversial before they even took effect. In fact, since the mid-1960's, there were movements to revise the Geneva Conference at a new conference, dealing particularly with the extended zones of national jurisdiction and the international zones of the common heritage of mankind.

Significantly, proponents of a new conference no longer relied on the ability of the ILC and decided to abandon the ILC-convention method. New states no longer trusted the old traditional jurists on the ILC. Those new states from Asia and Africa complained about the composition of the ILC. They were not satisfied with the allocation in 1956 of three seats out of twenty-one to Asia and Africa.

Although four seats out of twent-five were allocated to Africa in 1961, this reshuffle did not greatly increase the credibility of the ILC. After abandoning the ILC-convention method, Africans have continuously been very interested in further increase of their proportionality. Proponents of a new conference thought that the ILC-convention method would no longer be effective in the

progressive development of international law dealing with complicated issues interwoven by political and economic problems. They believed that these issues could be better resolved by politicians harmonizing mutual interests through negotiation. Proponents were also concerned about the possibilities of a lack of ratification and thought that the traditional voting rule would no longer be effective in harmonizing group interests. They noted that because of the majority rule, many valuable ideas had been drained out of the ILC. In fact, some of the vital interests of nations were ignored in the 1958 Geneva Conference as a result of this majority rule.(4) For these reasons, the proponents came to brood over a new system of decision making.

II. Adoption of the Consensus Method

The consensus method came to a head in the late 1950's when it was certain that the Western powers would no longer be numerically superior in the United Nations and when the traditional parliamentary system based on the majority rule broke down.(5) Some idealists, such as Professor Louis B. Sohn of Harvard Law School, proposed a weighted voting rule based on population or the Gross National Product.(6) However, realists persuaded the new group of members from Africa into adopting the consensus method, which is quite similar to the traditional African *palaver* method. Indeed, the consensus method has been used in traditional societies in Asia and in the Arabic world. In the Islamic

(4) The voting rules of the 1958 Conference on the Law of the Sea were as follows:
1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting.
2. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.
3. If the question arises whether a matter is one of procedure or of substance, the President of the Conference shall rule on the question. An appeal against this ruling immediately be put to the vote and the President's ruling shall stand unless overruled by a majority of the representatives present and voting.
See UN Conference on the Law of the Sea, *Official Records*, Vol. 1, at xxxiii(1958).

(5) Consensus is a decision-making process without voting in the effective absence of objection to the decision with regard to the subject matter with a common spirit of understanding. The word consensus is derived from the Latin words "con" (together) and "sentio" (feel).

(6) *See* G. Clark and L.B. Sohn, *World Peace Through World Law —Two Alternative Plans*, at 399-402 (3d ed., Cambridge, Mass., 1966).

world, *Ijmaa* (consensus) has been one of the four sources of law.(7) In Korea, I there have rarely seen any voting at village meetings.

The consensus method was firstly tried in 1959 in the modern international conference by the shrewd jurists of the ILC. The traditional ILC method, wherein a few members had spoken on the particular subject, discussion was closed and vote taken, was abandoned. Each member was still encouraged to present his views, but vote was no longer taken. Instead, members continued discussion with utmost patience in order to achieve at consensus. After a lengthy debate the Drafting Committee would usually find consensus or at least a majority opinion. If a member disagreed on a draft, debate can be resumed. Some members, such as Mr. François, who had been working since the 1930 Codification Conference, was uncomfortable with this new consensus method, because the ILC could ironically save time by eliminating the time-consuming debate. However this consensus method was still strongly advocated by Mr. Tunkin, from the Soviet Union, and Sir Fitzmaurice, from the United Kingdom.

The consensus method have also been used in the Non-Aligned Conferences since 1961 in order to boost unity, solidarity and cooperation among non-aligned nations. The consensus method was formally incorporated in 1964 in addition to the normal majority voting procedure in the rules of procedure of the two main organs of the UNCTAD (United Nations Conference on Trade and Development): *i.e.*, the Conference and the Trade and Developmne Board. The rules of procedure envisaged the possibility of applying a special conciliation procedure which may be started only after the completion of the debate on a given issue before voting.(8) A conciliation commission, was established on an *ad hoc* basis and it was composed of representatives of states particularly interested in any keenly important question under discussion. However, this semi-formal conciliation procedure was not popular and was replaced by the consultation

(7) The Arab philosopher Al Ghazali defined the Ijmaa as "the agreement of the community of Muhammad, particularly on a matter involving religion." In Islam, however, religious matters are often related to legal, political, economic and social matters. *See* Henri Lacouste, *La politique de Ghazali*, Vol. I, at 245-46, *passim* (1970).

(8) *See* General Assembly resolution 1995 (XIX).

method. The results of consultations among contact groups were made known to a plenary meeting by the chairman of each group.

The consensus method became increasingly popular and in practice the habitual working method of the General Assembly. It also became a useful method of discourse between East and West. For example, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the Declaration on Means of Strengthening International Security were adopted through long painstaking negotiations between East and West. Since 1964 the Security Council also began to use the consensus method in adopting resolutions on the Cyprus question, Arab-Israeli war, and the Congo question.(9) The consensus method has also been quite useful in the North-South dialogue at the UNCTAD and later in adopting the 1974 Declaration and Program of Action on Establishment of a New International Economic Order in the General Assembly (General Assembly Resolutions 3201, S-VI, and 3202, S-VI).

The concept of consensus is still unclear. Originally it meant to create "harmony among the different organs and other parts of the body." In modern international parlance, it is "[a] decision-making procedure, exclusive of voting, in which an absence is noted of any objection presented as an obstacle to the adoption of the decision in question.(10)" The search for a definition of consensus would be unfruitful. Consensus is different from unamimity. Where consensus proved to be impossible, majority rule still applies. During the process of consensus, participants may express reservations, or indicate that in the event of a vote the participant in question will have abstained or may declare that he dissociate himself from consensus.

Consensus is more than adopting a text by applause. It is both a procedure and a formula for ultimate compromise that becomes a joint stance through consultation. Many times, it is time-consuming to arrive at a convergence of views by negotiations. The consensus process can be expedited by the effective

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(9) The consensus procedure could be more effective in the Security Council than in the General Assembly in that in the former one can easily predict the outcome of any voting.

(10) Gérald Antoine, "Linguistic Aspects of Consensus," *in* B.K. Sélassié, ed., *Consensus and Peace* 58 (1980).

role of a mediator. After a long debate with mutual tolerance, if a perceptive presider quickly finds that a general understanding on the issue has emerged, he will state, "I understand that the draft before the meeting commands general support." If such support does not in fact exist, he will simply state, "I understand that it is the desire of the meeting to adopt the text without a vote." The former is full consensus, which would be as much as unanimity; the latter a pseudo-consensus, which takes the place of what would have been adopted by a divided vote. For example, the 1974 Program of Action for the Establishment of a New International Economic Order adopted at the sixth special session of the gerneral Assembly in New York was a case of pseudo-consensus. Following its adoption, a number of delegations, including the United States and the then nine EEC members, put on record their reservations regarding several parts of the Program of Action.(11)

In the mellowing stage, a full consensus may look like unanimity, but this is the outcome, not the process. In most instances, consensus is different from unanimity. Unanimity is a rule that provides an automatic brake by any member of the minority. Needless to say, the unanimity rule handicapped the decision-making process in the League of Nations and doomed it to frustration at vital points in history, notably at the crisis of the Manchurian dispute. Unanimity is not widely used in international conference. Consensus. on the other hand, is based on hope; it is the fruit of a long series of dialogue by tolerating frustrations. A unanimous vote implies agreement on basics or, at any rate, an absence of deep divergence among participants. On the other hand, consensus implies a very considerable convergence of opinions as well as the existence of profound divergence, or even conflicting opinions and interests that initially seem irreconcilable in many cases. Consensus thus amounts to the result of patient efforts, mutual concessions, give-and-take, after usually long and arduous negotiations. This signifies that the actual weight of consensus depends on the conditions in which it comes about. In a consensus, all gradations are possible,

(11) Johan Kaufmann, *United Nations Decision Making* 128 (1980).

ranging from sincere adhesion of all those concerned to a negotiated document that would satisfy all parties including some minority group who are more or less indifferent to the subject matter of negotiation.

There are many positive sides of consensus. The consensus method is effective in adopting resolutions in the General Assembly. Overwhelming majority of these resolutions are recommendations and not binding decisions. Since most of the decisions are made at informal meetings, participants can be more frank and flexible. This contributes to the efficient decision-making of a functional organization as a member of a group-interest instead of wasting time in waiting for nitty-gritty instructions from his governments. When it is applied in the process of codification and progressive development of international law, the consensus method would better guarantee universal observance of adopted rules. New states and minority groups can also contribute to the formulation of the content of rules, if they effectively argue for their positions.[12]

The consensus method is not always a necessity nor a panacea. As experience has shown, the consensus method may not be suitable for making a draft which needs clarity and precision, and for formulating a concrete program of action. Resolutions adopted by consensus are "frequently nebulous and equivocal, and often include only provisions which are nothing more than general declarations."[13] Abusive reservations to such declarations will further reduce the practical value of the text. The consensus method may also create the danger of giving up any constructive action for long periods if a minority group effectively frustrates the will of an overwhelming majority.[14] If there would be no possibility of resorting to voting, the consensus procedure may lead to the baffling of any progress in the work of the organization. Any political manipulation in the consensus process will be dangerous. Participants must be honest and sincere; the chairman or the mediator must be patient and optimistic.

(12) Halina Okularczyk, "Consensus in the Decision-Making Process of the United Nations Organs," 1 *Studies on International Relations* 121, 146-47 (1973).

(13) *Ibid.*, at 147.

(14) *Ibid.*, at 148.

Consensus is a painstaking decision-making process by concerted efforts toward the goal of harmonization of group interests.

III. Consensus through the Single-Text Procedure

The consensus method was first formally incorporated in 1974 in the rules of procedures in the Third UN Conference on the Law of the Sea (UNCLOS III). Significantly, a certain set of technical innovation relating to consensus achieved at this Conference.(15) The most notable development was the single-text procedure. A single negotiating text is one in which single draft articles, as opposed to sets of alternative texts, are provided for all issues on the agenda. In the 1974 Caracas session and the earlier part of the 1975 Geneva session, the Conference inherited "a massive jumble of alternative texts," accumulated for the past six years, from the Seabed Committee. The Chairman of the Conference at that time, Mr. Amerasinghe, suggested that three Chairmen of each Committee draft an informal negotiating text. These texts were to be informal and would not bind anyone, including the author. The idea was to transform the Informal Single Negotiating Text (ISNT) incrementally from a negotiating text to a negotiated one.(16) The principal agency in this transformation was to be the Chairman, who retains the power to produce new revised texts on the basis of negotiations at the sessions. In the 1976 New York session, set of Revised Single Negotiating Texts (RSNT) was produced by using the similar methods.(17)

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(15) The consesus method was incorporated in the following Declaration or the so-called Gentleman's Agreement made by the President of the Conference and endorsed by the Conference at its 19th meeting on June 27, 1974.

> Bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance, the Conference should make every effort to reach agreement on substantive matters by wayof consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.

See the UNCLOS III Rules of Procedure, UN Document A/CONF. 62/30/Rev. 2, at 8-10, 17(1976).

(16) UN Document A/CONF. 62/WP. 8, Parts I-IV(1975).

(17) UN Document A/CONF. 62/WP. 8/Rev. 1/Parts I-III(1976); *also* UN Document A/CONF. 62/WP. 9/Rev. 1/Part IV(1976).

In 1977, all the revised texts from the three Committees were gathered and labeled as the Informal Composite Negotiating Text (ICNT).[18] In 1978, two major developments appeared. First, seven Negotiating Groups were set up in order to deal with the hard-core issue. These seven Negotiating Groups largely replaced the three Committees as the dominant, formal working structures. The Chairman of each Negotiating Group performed the same consensus-building function with no direct power to amend the ICNT. The second development was to upgrade the ICNT by attaching highly restrictive conditions to its revision. The President or Chairman of a Committee was no longer permitted to make any revisions. The revision of the ICNT should be the collective responsibility of the President and the chairmen of the main Committees, acting together as a team headed by the President. The Chairman of the Drafting Committee and the Rapporteur-General should be associated with the team. Thus the President and the three Committee Chairmen provided a central machinery by not only handling the work of the specialized negotiating groups, but also coordinating the final stage of consensus-building in relation to the remaining hardcore problems.

However, this new process did not move swiftly. In April, 1979, the ICNT was revised.[19] Another revision was produced after the first meeting in 1980.[20] A third revision was made in September, 1980. This was titled Draft Convention on the Law of the Sea (Informal Text).[21] This informal text became a formal Draft Convention in August, 1981. Then the Conference had to make the final breakthrough due to the United States' review concerning the delicate issues on the sea-bed mining. However, even with the opposition of the United States and some others, most provisions of the negotiated text became in the 1982 Montego Convention on the Law of the Sea.[22]

We should recognize the achievement of the Conference. It took almost a

(18) UN Document A/CONF. 62/WP. 10(1977).
(19) UN Document A/CONF. 62/WP. 10/Rev. 1(1979).
(20) UN Document A/CONF. 62/WP. 10/Rev. 2(1980).
(21) UN Document A/CONF. 62/WP. 10/Rev. 3(1980).
(22) UN Document A/CONF. 62/122 (1982).

decade to produce the 320 Articles and the numerous provisions in eight Annexes. Most of the provisions were newly legislated through the consensus process and the package-deal between interest groups. Bargains and trade-offs existed between North and South, and between coastal states and land-locked or geographically disadvantaged states. These provisions were so perfectly interwoven that the text appeared to be an indivisible whole. Thus this kind of harmonization of interests was a great achievement, compared with the 1958 Geneva Convention.

Since most of the interest of the minoirty groups have been respected, it appears that this new convention will receive more ratification than the 1958 Geneva Conventions. As reservation is not permitted in principle, most of the provisions of the Conventions may be more applicable, compared with the Geneva Conventions, wherein reservations were generally allowed.

Had it not been for the use of the single-text procedure, the Conference could not have been as successful. Although there were several unqualified chairmen, such as Mr. Engo from Cameroun who wielded his power for his own group's interest, most of the chairmen were excellent mediators. For example, informal compromise-groups such as the Evensen group contributed much in building up the consensus in the Second Committee which produced the RSNT.(23) Thus the consensus process in the UNCLOS III was expedited by using the single-text procedure.

IV. Development of the Single-Text Procedure

Since its successful use in the UNCLOS III, the single text procedure has been used on several other occasions. It has have been used in the UNCITRAL (United Nations Commission on International Trade Law). Perhaps the most famous use of this procedure in bilateral negotiations was by the United States at Camp David in September, 1978 during the mediation between Egypt and Israel.(24) The United States' mediator Cyrus Vance listened to both sides'

(23) Barry Buzan, "'United We Stand...': Informal Negotiating Groups at UNCLOS III," 4 *Marine Policy* 183, 194(1980).

(24) Professor Roger Fisher at Harvard Law School was working for Mr. Cyrus Vance the then

problems and interests, and prepared a rough single-text draft to which no one was committed. Then he asked for criticism for further revision, until he felt it could be improved no further. He repeated this process for thirteen days with as many as twenty-three drafts. Then the United States prepared a final negotiated text that was ready for recommendation. At the final recommendation by President Carter, Israel and Egypt eventually accepted. Indeed, it worked effectively in "reducing the uncertainty of each decision, and preventing the parties from getting increasingly locked into their positions."(25) The same single-text procedure was also used by Algerians in mediating between the United States and Iran in the Hostage Crisis.

The single-text procedure is a sort of panacea which can be applicable in most dispute settlement processes. Basically, it is a mediation process. The single-text is a great help for bilateral negotiations involving a mediator. It is almost essential for large multilateral negotiations. For example, one hundered fifty-nine members of the United Nations cannot effectively discuss one hundred fifty-nine different proposals. It is particularly useful in making mutual concessions. Indeed, it contributes very much in simplifying the time-consuming and complicated process of getting consensus.

In the single-text procedure, the most crucial point is the mediator's role. First, He must first of all have a reputation for impartiality and fair-dealing. Of course, he must have sufficient support from his own government to allow performance of a major task not directly tied to the furtherance of national policy. He should also be equipped with large capacity for work and the necessary diplomatic skill to handle delicate matters. He must also have the personal prestige to command the respect of contending senior delegates, and sufficient knowledge of the subject to enable him to devise workable and

Secretary of the U.S. Department of State, at the time when the latter was playing a mediator under the mandate of President Carter. Professor Fisher got the idea of the single-text procedure from Professor Louis B. Sohn at Harvard Law School, who was then working for the UNCLOS III. Interviews with Professors Roger Fisher and Louis B. Sohn in November 1981.

(25) Roger Fisher and William Ury, *Getting to Yes* 121-22 (1681).

acceptable compromises.

The first step that the mediator should take is to collect all possible information through a brain-storm session. Each participant discloses his needs and problems. This can be done effectively in a very informal way. Participants' sincere cooperation is vital. First, they must disentangle potentially manageable problems from the substantive problems. Then they should generate, without any commitment from anyone, multiple options. Various standards of fairness, such as law, precedent, reciprocity, or expert opinion, should be established. In this way, a promising option on which to work can be selected.

Then the mediator suggests, "We will prepare a draft text, nonbinding, unofficial, and wholly without prejudice to the position of any party. This will not even be our position or recommendation. It will simply be a vehicle for exploring the interests and needs of the parties."(26) He drafts a text of a possible agreement, trying to accomodate the interests and needs of all the parties. Afterwards, he asks each party to point out which interests are not met by the draft, and in what way they are not met. He then re-drafts the text in the light of what he has learned, presents the re-draft, and asks for comments. In this repetitious process, only the mediator keeps and revises the draft. He may use the Cathedral method by which he can search for the real intents of the parties concerned. He should invent options for mutual gain. When he feels strongly that the draft cannot be improved any further and that the parties are close to accepting it, he freezes the draft. He then prints it in an official form in order to make it difficult for the parties to amend when presenting it for acceptance.

This single-text procedure can be widely used in both bilateral and multilateral negotiations whether they are national or international. It can be used even in arbitrations, national courts as well as in the World Court. A skillful president-judge may reduce dissenting or separate opinions and perhaps, depending upon his skill, he may achieve a unanimous decision. Thus, The competent role of a

(26) William Ury, "The Single-Negotiating-Text Procedure: A Working Guide," an unpublished three page memo, at 2 (1979).

chairman and the concerted, sincere, and cooperative efforts of the participants are essential elements in developing a single-negotiating-text into the final single-negotiated-text. It is desirable that the techniques of the single-text procedure be further developed and widely used in the law-making process of international organization.

Conclusion

Thus far, I have shown certain problems of the prevailing consensus method in the law-making process in international organization, and presented that the most effective means of expediting the slow consensus process is to implemet the single-text procedure. In spite of its usefulness, it has not yet been widely introduced in international organization. We should make efforts to develop the single-text procedure for better and wide application I hope that the single-text procedure will contribute very much toward better and quicker achieving consensus in the law-making process of international organization as well as in the peaceful settlement of international conflicts.