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**A/CN.4/SR.2771**

**Summary record of the 2771st meeting**

Topic:  
**Unilateral acts of States**

Extract from the Yearbook of the International Law Commission:-  
**2003 vol. I**

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(Chair), Mr. Rodríguez Cedeño (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Mr. Economides, Ms. Escameia, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Ms. Xue, Mr. Yamada and, *ex officio*, Mr. Mansfield (Rapporteur).

*The meeting rose at 6 p.m.*

## 2771st MEETING

*Tuesday, 8 July 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET, continuing his comments from the previous meeting, recalled that he had expressed doubts about the methodology used by the Special Rapporteur and wondered how the Special Rapporteur could tie his monographic studies in with the ultimate objective of the exercise, namely the preparation of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will. For his own part, he had suggested the use of a detailed table with, horizontally, the various categories of unilateral acts and, vertically, the legal issues that needed to be addressed. If common elements were found in the various categories, then general rules applying to unilateral acts could be developed as the very substance of the draft articles.

2. The sixth report (A/CN.4/534) was an attempt to go in that direction, but it was not sufficiently rigorous. Horizontally, the category of recognition was proposed, but the question was whether there was really a single category of unilateral acts, a homogeneous unit that could be called recognition. He thought not. The category must be more clearly delineated, something the report failed to do.

3. The Special Rapporteur referred frequently to concepts that he rightly described as similar to recognition, such as acquiescence and acceptance. The three were by no means equivalent, however. Plainly, the horizontal categories had to be further refined. In addition, it was by no means certain that acts of non-recognition must be addressed simultaneously with recognition. The subject deserved further consideration, but, *a priori*, non-recognition seemed to be more closely related to a quite different category, namely protest.

4. The Special Rapporteur devoted much attention to the classic issue of whether recognition of States was a declarative or constitutive act, rightly concluding that it was purely declarative. But what was true of recognition of States was not necessarily true of recognition of other entities. The Special Rapporteur had given an interesting analysis at the previous meeting of Guatemala's statement in 1991 in which it had recognized that Belize had the right to self-determination.<sup>2</sup> In fact, however, that had been an acknowledgement of the existence of a legal rule, not recognition in the legal sense of the term. Acknowledgement itself could probably not be ranked as recognition. If ever it could, then Guatemala's statement had been declarative, not constitutive.

5. In paragraph 90 of his report, the Special Rapporteur wrote that in some cases, for instance the *Eastern Greenland* case, the constitutive theory of recognition had been argued. True, but there was nothing surprising about that, since the State was a fact and had an existence in international law regardless of how it was viewed. On the other hand, extension of a State's territorial jurisdiction, which had been at issue in the *Eastern Greenland* case, raised an entirely different question: it flowed, or could flow, from recognition by other States, as was demonstrated in the *Eastern Greenland* and *Temple of Preah Vihear* cases, but there, recognition of territorial jurisdiction did not have, and could not have, the same effects as recognition of a State.

6. All of this implied that totally different concepts could not be lumped together, as he feared the Special Rapporteur had a tendency to do, and that even if recognition was an individual category, it produced different effects depending on its object. Those effects varied according to parameters other than the object as well, one of them being the addressee's reaction. The addressee could make use of recognition, and that very proposition—that use could be made of a unilateral act—was the primary foundation for the notion of the unilateral act, as ICJ had recalled in the all-too-famous *Nuclear Tests* cases.

7. If the addressee said nothing and did nothing, however, the option of making use of a unilateral act was merely a virtual one, a possibility, and the State that had given the recognition was much freer to go back on that act than if the beneficiary had used it as the basis for taking certain measures that it would otherwise not have taken. In such cases, the question of estoppel came up, but that did not mean the act was bilateralized, as the Special Rapporteur wrongly suggested in paragraph 119 of his report. The act remained unilateral, but the will of the State was ensnared more firmly than when there was

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2770th meeting, footnote 5.

no reaction. In the international order, every expression of will by a State—whether by a treaty, a unilateral act or other means—was an ensnarement of that will. Yet the reaction of the addressee was probably also a unilateral act, and that changed the parameters as well as the effects of the act. Even if the addressee of the act of recognition remained passive, the author of the act could reverse it, but the whole situation changed, depending on the object of recognition. Recognition of States, however, was a poor choice for the Special Rapporteur to dwell on, as it involved too many specific problems to be used as a basis for drawing conclusions.

8. It was surprising that, in discussing recognition of States, the Special Rapporteur had made no reference whatsoever to the classic distinction between *de jure* and *de facto* recognition. It was an interesting distinction in that it posited various levels of the State's capacity to go back on its recognition, *de jure* being definitive, whereas *de facto* was conditional. When the Special Rapporteur affirmed in paragraph 52 of the report that recognition could not be conditional, he was following Strupp,<sup>3</sup> whose arguments were proved wrong later in the report.

9. He questioned the wisdom of focusing on recognition of States, which was a unique institution that had been extensively studied and which produced by virtue of its object—the State—effects too specific to permit generalization. It would have been better to look at other objects of recognition and to use recognition of States as a counterpoint for comparison of other kinds of recognition. He had expressed the fear that Mr. Sreenivasa Rao might become the García Amador of liability, and now Mr. Rodríguez Cedeño seemed to be courting the same danger with regard to unilateral acts. Mr. García Amador, the first, and talented, Special Rapporteur on State responsibility, had never discovered the angle from which to come to grips with the topic. Similarly, Mr. Rodríguez Cedeño produced stimulating reports but failed to provide any proposals for future action. Where was the Commission going with the topic?

10. Perhaps the cumulative effect of the monograph category-by-category approach taken in the sixth report would serve as a trigger, as the brilliant ideas of Special Rapporteur Ago had in the context of State responsibility.

11. Mr. MELESCANU said he agreed with Mr. Pellet that the Commission had to give serious thought to how it would proceed with the topic. The subject was a difficult and delicate one, as important to international law as reservations to treaties, aiming as it did at the codification of one of the fundamental sources of public international law. It was not surprising, then, that the Special Rapporteur was running into so much difficulty.

12. As to the table suggested by Mr. Pellet, the Commission could certainly try to work on individual categories, but it should do so only with a specific purpose: to derive from them rules that applied generally to unilateral acts. What were the common elements in the various unilat-

eral acts? For example, on the basis of the very interesting distinction between *de facto* and *de jure* recognition one could draw conclusions about the legal effects of those two categories of recognition. Another possible question to address was whether the establishment of diplomatic relations should be deemed to constitute implicit recognition. It was certainly a solemn legal act, and even if the State had not made a formal declaration of *de jure* recognition, it had established a legal situation whose legal effects could hardly be denied. Finally, recognition of States was an act in which political considerations played a very important role, even to the extent of being used as a means of exerting political pressure.

13. Mr. PAMBOU-TCHIVOUNDA said he was still undecided about a question raised by Mr. Pellet: namely, when a State had taken a certain stance, whether through recognition or protest, was it ensnared to such an extent that it could not go back to its initial position? Mr. Pellet had given the example of an addressee who reacted to an act of recognition and had suggested that, in such circumstances, the author of the act could not revert so easily to its original position. He had doubts about that, however, and about the extent to which the *Eastern Greenland* case could be generalized to provide a legal basis for prohibiting an author of an act from returning to its original position.

14. As for *de facto* recognition, while the establishment of diplomatic relations could be considered equivalent to recognition, nothing prevented a State from suspending diplomatic relations unilaterally. In such cases, did the act of recognition come to an end as well?

15. With respect to Mr. Pellet's comments on the case of Guatemala and Belize, it was somewhat difficult to understand why a State should adopt such a weak, neutral position. Had Guatemala's unilateral act *vis-à-vis* Belize been intended solely for the purposes of acknowledging the right to self-determination? Surely there must have been more to it than that?

16. Mr. ECONOMIDES said that preparing an analytical table on unilateral acts as a starting point for discussion would entail a great deal of effort, possibly with rather disappointing results. The question at issue was exactly which unilateral acts the Commission should study. The original criterion established by the Commission some years ago had been to consider all unilateral acts that created international obligations *vis-à-vis* another State or States, the international community or subjects of international law. The Commission would greatly simplify its task if it examined the various categories of acts on the basis of that criterion. The objective was not the study of unilateral acts *per se*, but their study as a source of international law.

17. Mr. DAOUDI endorsed Mr. Pellet's remarks regarding the table. It was not solely the responsibility of the Special Rapporteur to find a way of furthering the progress of work on the topic. The Commission as a whole must help him find a suitable approach for developing a set of rules on unilateral acts in public international law. Only through research could the Commission establish whether such general rules existed. The purpose of the table was to find elements in common among the different categories of acts. However, the crux of the matter lay in defining

<sup>3</sup> K. Strupp, *Grundzüge des positiven Völkerrechts*, 5th ed. (Bonn/Cologne, Röhrscheid, 1932), quoted by J. F. Williams in "La doctrine de la reconnaissance en droit international et ses développements récents", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 44 (1933), p. 210.

the *instrumentum* or procedure whereby an act or declaration of will gave rise to State responsibility. That could not be done by studying the contents of individual acts or categories of acts. A treaty was the product of the will of two parties, whereas a unilateral act was a declaration by a subject of international law that gave rise to international obligations. The subject undertook those obligations of his own will, not the will of others. As to the point raised by Mr. Pambou-Tchivounda, in the case of an international legal act whereby a subject of international law undertook certain obligations of his own will, revocation entailed international responsibility, for without the latter there would be no legal act.

18. Mr. PELLET said that the case of Guatemala and Belize was far more complex than his earlier remarks had implied. The Special Rapporteur had referred to Guatemala's recognition of the right to self-determination, whereas in his view it was merely an acknowledgement. He did not agree with Mr. Pambou-Tchivounda that such a position was neutral or insipid. A State's retraction of a statement that was in effect a legal absurdity was of significance, since it allowed the State in question to re-enter international legality. In the report the Special Rapporteur applied a very broad concept of recognition. By way of example, when a State surrendered at the end of a war, was that tantamount to recognition that the country had lost the war? He did not believe so, but the concept of recognition given in the report implied otherwise, and that irked him.

19. Mr. Melescanu had said that the subject of unilateral acts was as important as that of treaties. That was not true in quantitative terms, since there were far fewer unilateral acts. However, such acts were certainly more mysterious since they involved only one sovereign State. Mr. Pambou-Tchivounda was justifiably intrigued by the problem of retraction. It must be possible for a State to undo what it had done under certain circumstances. One example was the border dispute between Burkina Faso and Mali prompted by a statement by the Head of State effectively accepting that Burkina Faso should extend its borders halfway into Mali's territory. The relevant regional African commission having decided that Mali was in the wrong, the lawyers acting for Burkina Faso, including himself, had attempted to ensnare Mali by pointing out that since the Head of State had made such a statement he should be taken at his word. ICJ, however, in its judgment in the *Frontier Dispute* (Burkina Faso/Republic of Mali) case, recognizing that the Head of State had spoken out of turn, had decided that the circumstances of the case should be taken into account. It had, of course, been the right decision, but there was no denying that the Head of State had said what he had said. The example illustrated that everything hinged on circumstances, and there were indeed circumstances in which States were ensnared by their own will and could not always find a way out. States should be reminded that they must not do exactly as they pleased. It was one of the objectives of the topic under study, the question at issue being exactly when States should not do so.

20. He did not concur with Mr. Daoudi: it was far more difficult to find an *instrumentum* for a unilateral act than for a treaty. On the other hand, he was more persuaded by Mr. Economides' remarks that it was important to know when States wished to undertake obligations. The exist-

ence of a formal *instrumentum* would help, but it was not necessary.

21. As to the comments on the establishment and suspension of diplomatic relations, he would stress that *de facto* recognition was not the same as implicit recognition. *De facto* recognition was provisional, and there was no binding legal act involved, whereas under a unilateral act a party signified its willingness to undertake certain obligations. The establishment of diplomatic relations might be considered as recognition equivalent to a legal act, but no more than that. Hence he did not understand why the Special Rapporteur kept reverting to the subject. Moreover, when diplomatic relations had been established, which implied recognition, and were subsequently suspended, the recognition could not be retracted. It was an interesting point, since it showed that States could not make one statement and then counter it by an act to the contrary. However, it was an interesting point for the sake of argument alone, and it did not fall within the scope of the Commission's study.

22. He was not wedded to the idea of a table. Nonetheless, it was important for the Commission to refrain from issuing different instructions to the Special Rapporteur every year. Basically, he was not in favour of monographs, unlike members of the Working Group. However, if monographs were going to be used, they should be prepared in accordance with a certain methodology. What really bothered him was the prospect of the Drafting Committee's starting its work that afternoon, when it was clear from the debate that it was premature to do so.

23. Mr. GAJA said that the Special Rapporteur had attempted to comply with the Commission's request to provide an analysis of the main unilateral acts before adopting some general conclusions. As a member of the Working Group, he had been in favour of such an approach, which was intended to examine specific and common elements of the acts in question. However, the sixth report had not yielded the desired results. The analysis should have focused on relevant State practice for each unilateral act: for instance, with regard to recognition, its legal effects, the requirements for its validity and questions such as revocability and termination. State practice should have been assessed so as to decide whether it reflected only specific elements or some more general principles relating to unilateral acts.

24. The main aspects of recognition were dealt with in the report, but on the basis of theoretical and abstract propositions. Moreover, the examination of State practice was very limited. While he welcomed the initiative referred to by the Special Rapporteur for collecting information on State practice, it was regrettable that the Commission would have to take decisions without such material to hand at the present session.

25. The analysis of State practice would not provide all the answers, particularly since distinctions between the various acts were not clear-cut. However, it would have been useful for discussion on whether recognition was a form of acceptance or acquiescence or something else—a matter on which, as Mr. Pellet had observed, the report remained unclear.



26. By way of example, paragraph 96 of the report identified the legal effects of recognition following Anzilotti's textbook,<sup>4</sup> but made no reference to State practice. Subsequent references were made to another textbook. He was surprised that no reference was made to what was generally considered the main work on recognition by Verhoeven.<sup>5</sup> Verhoeven concluded that recognition had no legal effect whatsoever. Clearly, that opinion was only tenable if the effects of recognition were separated from those of acceptance.

27. ICJ tended to understand "recognition" as being a form of acceptance or acquiescence, as was clearly shown in two passages to which the report referred in the section on legal effects. Thus, in the *Arbitral Award Made by the King of Spain on 23 December 1906* case, mentioned in paragraph 100 of the report, the Court had held that Nicaragua had "recognized the award as valid" [p. 213] and had also referred to Nicaragua's "acceptance". Even more clearly, in its judgment in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court had had acceptance in mind when it considered the wording of a treaty provision in which the parties stated that they recognized the border in question. Clearly, no unilateral act had been involved, so it was not a good example for the purposes of the report, apart from the use of the word "recognition" rather than "acceptance" in relation to the States' attitude. A third example was provided by a passage in the judgment in the *Delimitation of the Marine Boundary in the Gulf of Maine Area* case, in which the Chamber constituted by the Court had said that acquiescence was "equivalent to tacit recognition manifested by unilateral conduct" [p. 305], which the other party might interpret as consent.

28. Although such passages did not contradict the Special Rapporteur's proposition concerning the legal effects of recognition as preventing contestation in the future, they did not—since they linked recognition with acceptance or acquiescence—provide adequate support for the existence of a specific consequence of recognition. His conclusion, therefore, was that research on the question—along with others that had been dealt with more succinctly by the Special Rapporteur—should be carried much further. One way of doing so would be to appoint a small working group with the task of assisting the Special Rapporteur, in the sense of actually working alongside him in the examination of what was an extraordinarily complicated topic.

29. Mr. DUGARD said that, interesting and challenging as the report was, he took issue with some of the Special Rapporteur's statements. For example, the assertion in paragraph 1 of his report that the Commission must examine any legal institutions that it was asked to or must respond appropriately to the requests made by Governments was an exaggerated description of the Commission's subordinate role to its perceived political masters. The Commission was ultimately the master of its own house, being made up of independent experts who were not slaves to

Governments or the Sixth Committee. The use of such language merely served to confirm the opinion of those who thought otherwise.

30. The purpose of the report appeared to be to illustrate the nature of unilateral acts by the study of recognition as a unilateral act. Paragraph 17 of the report, however, drew a false distinction between recognition as an institution and unilateral acts of recognition. It was impossible to examine the one without the other.

31. Although recognition as a unilateral act had been on the list of topics suggested by Lauterpacht as a subject suitable for codification in 1947,<sup>6</sup> the topic had repeatedly been rejected by some as being too controversial or political. However, the present report came perilously close to examining recognition of States as an institution through the back door. He would welcome a direct study of the topic, despite its controversial nature.

32. Some of the Special Rapporteur's comments on recognition as an institution could not go unchallenged. As Mr. Gaja had said, too little account had been taken not only of State practice but also of theory, as developed in the work of Chen, for example. The Special Rapporteur's comments were of great interest but required further scrutiny. He had, for example, ventured into the debate on whether recognition was a declaratory or a constitutive act. That debate usually related to the consequences of recognition. The Special Rapporteur nonetheless looked at it from the standpoint of the nature of the act of recognition, whether declaratory or constitutive. The majority of writers considered it declaratory, but that interpretation did not cover all cases: an examination of State practice led to quite different conclusions. Thus, the purpose of the United States in recognizing Panama in 1903 had been to secure the right to build the Panama Canal, and that recognition, premature as it might have been, had been constitutive. Similarly, the recognition by four or five African States of the breakaway region of Biafra had taken place in order to prevent the violations of human rights occurring during the war with Nigeria. Turkey had recognized the Turkish Republic of North Cyprus, and, in the apartheid era, South Africa had recognized its own Bantustans. Most recently, Bosnia and Herzegovina had been recognized by the European Union and admitted as a Member State of the United Nations while it was still engaged in a full-scale war and had no effective Government. Its recognition, under the terms of the Convention on Rights and Duties of States, had been designed precisely to terminate the conflict. Such examples might be held to be unfortunate, but in each case the intention of the recognition had been to create a State. Hence, it could not be simply said that the act of recognition was declaratory in nature; it might well have a constitutive purpose.

33. With regard to criteria for recognition, there appeared to be a contradiction between the first and second sentences of paragraph 35 of the report. In his view, criteria undoubtedly had a role to play in the recognition of States, although the Convention on Rights and Duties of States might no longer constitute a full statement of the criteria, since it might be necessary to have regard

<sup>4</sup> D. Anzilotti, *Cours de droit international* (Paris, Sirey, 1929), p. 347.

<sup>5</sup> See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (Paris, Pedone, 1975).

<sup>6</sup> See H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947).

to human rights, self-determination and United Nations resolutions in recognizing a State. The question then arose whether recognition was discretionary. In that context, it was regrettable that paragraph 39 gave no consideration to Lauterpacht's controversial view that States were under a duty to recognize an entity that met the requirement of statehood expounded in the Convention.

34. Raising the question of whether admission to the United Nations was a form of collective recognition, the Special Rapporteur correctly dismissed the question as irrelevant to the topic. His remarks did, however, whet the appetite as to whether admission to the United Nations was a form of collective recognition or not. There was a further contradiction between the suggestion in paragraph 54 of the report that collective recognition was possible because a United Nations vote constituted a form of declaration and the statement in paragraph 32 that collective recognition did not fall within the Commission's mandate. The issue required further study.

35. A further question was whether non-recognition was discretionary. Paragraph 45 of the report suggested that it was not: the fact that the Security Council could direct States not to recognize a new entity that claimed to be a State surely gave rise to the duty of non-recognition. As for the withdrawal of recognition, in the case of failed States the Special Rapporteur suggested in paragraph 96 that no withdrawal of recognition was possible, whereas paragraph 101 acknowledged that in some circumstances such withdrawal was indeed possible. The matter was important in view of the growing phenomenon of failed States, but again the Special Rapporteur whetted the reader's appetite yet failed to pursue the topic.

36. Finally, the Special Rapporteur said that implied recognition was not relevant to the study. Nevertheless, since no form was required for the act of recognition, it surely followed that implied recognition could exist. Thus, in the past, South Africa had maintained diplomatic relations with Rhodesia, which implied recognition. Yet the Special Rapporteur dismissed the point.

37. He congratulated the Special Rapporteur on a provocative report, which nonetheless lacked the requisite clarity: it touched on a host of controversial issues, without examining any of those that had troubled jurists for over 100 years. Indeed, it simply added to the growing awareness that recognition, as a unilateral act, was very difficult to codify. The report mixed theory and practice, with the result that it was vulnerable on both counts: State practice was inadequately examined, while the account of recognition as a unilateral act was not convincing.

38. He was uncertain how the Commission should proceed—whether it should adopt a theoretical approach or should examine State practice in detail. He agreed with Mr. Gaja that the latter would be more fruitful. An examination of State practice would enable the Commission to establish the common principles relating to the nature of recognition.

*The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.*

39. The CHAIR said that, following informal consultations on how best to proceed, support had emerged for the

establishment of a small *ad hoc* group that would meet before the text was referred to the Drafting Committee. The group would convene immediately, with the task of defining the basis and objective of the study of unilateral acts with a view to progressive development.

40. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he fully supported the Chair's proposal and suggested that the *ad hoc* group should be chaired by Mr. Pellet, who had expressed a willingness to start at once, thus enabling the Drafting Committee to undertake its work on the topic during the session.

41. The CHAIR said he took it that the Commission was in favour of establishing an *ad hoc* group that would work on definitions and undertake research into State practice, beginning immediately after the end of the meeting.

*It was so decided.*

*The meeting rose at 12.25 p.m.*

## 2772nd MEETING

*Wednesday, 9 July 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

### Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,<sup>1</sup> A/CN.4/L.646)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOSKENNIEMI commended the Special Rapporteur's decision to turn from the generalities of unilateral acts to the specific topic of recognition and, in particular, the recognition of States. By the same token, he was not in favour of drawing up a grand table containing all type of unilateral acts, as advocated by Mr. Pellet. In relation to the general approach outlined in the introduction to the sixth report (A/CN.4/534, paras. 1–16), he noted that the Special Rapporteur had doubts about the

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).