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# *The Choice between Restitution and Compensation*

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## **Abstract**

*The recent case before the International Court of Justice, Paraguay v. USA (Provisional Measures), highlights dramatically the fundamental uncertainties as to the availability of restitution in international law, and should serve as a warning to the International Law Commission not to be unduly dogmatic or over-ambitious in its quest for universal rules in its Draft Articles on the choice between restitution and compensation. The caution of the International Court of Justice in this and other cases provides a marked contrast to the ILC's 1996 Draft Articles. The current Draft Articles take a firm view on the primacy of restitution; this inevitably entails the need for limits and exceptions to the award of restitution. The ILC has run into difficulties in trying to provide for these while maintaining its distinction between primary and secondary rules. Moreover, if the exceptions are too wide they will offer loopholes to the wrongdoing states and undermine the primacy the ILC wants to assert; if the limits are too narrow they will be unrealistic. The reactions of states to the Draft Articles shows the need for the ILC to be flexible in its approach.*

The recent case before the International Court of Justice, *Paraguay v. USA (Provisional Measures)*,<sup>1</sup> highlights dramatically the fundamental uncertainties regarding the availability of restitution in international law. It should serve as a warning to the International Law Commission not to be unduly dogmatic or overambitious in its quest for universal rules in its draft articles on the choice between restitution and compensation. The caution of the International Court of Justice in this and other cases provides a marked contrast to the ILC's 1996 draft articles.<sup>2</sup>

In *Paraguay v. USA*, Paraguay sought restitution. Breard, a Paraguayan national, had been convicted of murder in the USA and was due to be executed. Paraguay argued that the USA had violated its obligations under the 1963 Vienna Convention on Consular Relations in not informing Breard of his right of access to the Paraguayan Consul and in not notifying the consulate of the detention of one of its nationals. Paraguay argued that by violating these obligations the USA had prevented it from

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<sup>1</sup> 37 *ILM* (1998) 810.

<sup>2</sup> 37 *ILM* (1998) 440.

exercising its consular functions and from ensuring the protection of its interests and those of its nationals. Breard had accordingly made unreasonable decisions during the criminal proceedings against him and did not comprehend the fundamental differences between the criminal justice systems of the USA and Paraguay. Therefore, Paraguay claimed that it was entitled to *restitutio in integrum*, the re-establishment of the situation that existed before the USA failed to provide the notifications required by the Convention. Paraguay also submitted an urgent request for the indication of provisional measures, so that Breard should not be executed pending the disposition of the case; this was necessary to protect the life of Breard and the ability of the International Court to order the relief to which Paraguay was entitled, restitution in kind. If the USA went ahead and executed Breard before the Court could consider the merits of the case, Paraguay would be deprived of the opportunity to have the *status quo ante* restored.

The USA admitted the breach of the Vienna Convention, but argued that the only consequence of a failure to notify a consulate of the detention of a national was that apologies were presented by the government responsible; it rejected the possibility of restitution. The USA claimed that the automatic invalidation of the proceedings and the return to the *status quo ante* as penalties for the failure to notify found no support in state practice and were unworkable. Therefore, the provisional measures requested should not be indicated because restitution could not be ordered by the Court on the merits of the case.

The International Court of Justice left the question of the availability of restitution open; it made no ringing re-endorsements of the famous dictum in the *Chorzow Factory* case as to the primacy of this remedy.<sup>3</sup> It simply found that there was a dispute as to whether the relief sought by Paraguay was a remedy available under the Vienna Convention. The existence of the relief sought by Paraguay under the Convention could only be determined at the merits stage; the issue whether any such remedy depended on evidence of prejudice to the accused in his trial and sentence was a question for the merits. As the execution of Breard would make it impossible for the Court to order the relief that Paraguay sought, the Court indicated in its order of provisional measures that the USA should take all measures at its disposal to ensure that Breard was not executed pending the final decision of the Court.<sup>4</sup>

The USA argument in this case was in some ways similar to that of Denmark in the *Passage through the Great Belt* case.<sup>5</sup> Denmark planned to build a bridge over the Great Belt strait; Finland argued that this would interfere with international navigation. As a provisional measure Finland sought an order that Denmark should not undertake any construction of the bridge. Denmark argued that the Court could not order restitution on the merits of the case as the destruction or modification of the bridge

<sup>3</sup> PCIJ Series A, No. 17, at 47.

<sup>4</sup> As is notorious, the USA did not secure compliance with this order of provisional measures and the execution of Breard went ahead. See 'Agora: Breard', 92 *AJIL* (1998) 666.

<sup>5</sup> ICJ Reports (1991) 12 or 31 *ILM* (1992) 107; see Gray, 'Passage through the Great Belt', 42 *ICLQ* (1993) 705.

would be too onerous for Denmark. The Court held that it would not at the provisional measures stage determine the character of the decision on the merits, but it would not *a priori* exclude a finding that such works must be modified or dismantled. Provisional measures were not urgently required because of Denmark's assurances to the Court that no obstruction of the strait would occur before the Court could determine the merits of the case, and accordingly the Court refused Finland's request. In both these cases the disagreement as to the proper remedy on the merits of the case affected the argument on the appropriate provisional measures.

The ILC Draft Articles currently under review take a firm view on the primacy of restitution. Within Part Two on 'Content, Forms and Degrees of International Responsibility', Chapter II deals with the 'Rights of the Injured State and Obligations of the State which Has Committed an Internationally Wrongful Act'; Articles 42 and 43 provide for reparation and restitution in kind:

*Draft Article 42*

*Reparation*

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

- (a) the injured State; or
- (b) a national of that State on whose behalf the claim is brought;

which contributed to the damage.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

*Draft Article 43*

*Restitution in kind*

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

- (a) is not materially impossible;
- (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

- (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation;
- (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Three main points emerge from these articles; all need further consideration. First, these provisions clearly indicate the primacy of restitution in kind. Not only does it come first in the list of means of reparation, but Draft Article 44 on Compensation also provides that:

The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

This primacy of restitution is confirmed by the commentary, which speaks of its 'logical and temporal primacy'.<sup>6</sup> Second, the text suggests that the choice between restitution and other remedies lies with the injured state. Third, these provisions for the primacy of restitution and for the choice of the injured state inevitably entail the need for limits and exceptions to the award of restitution.

The idea that restitution is the primary remedy for all breaches of international law has caused controversy in the past. One of the problems in establishing the primacy of restitution lies in the large gap between practice and theory. The case which includes the most famous affirmation of primacy, the *Chorzow Factory* case, is itself a symbol of this. The Court said:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral decisions — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.<sup>7</sup>

But it did not in fact award restitution. And the award of restitution was rare in the 200 years of modern arbitral practice and in the jurisprudence of the World Court.<sup>8</sup> Nevertheless, the current Draft Articles, after some earlier vacillation on the question of their scope, seem to be designed to establish restitution as the primary remedy both for international tribunals and in state practice generally.<sup>9</sup>

Another problem for the ILC arises out of its attempt to maintain the distinction fundamental to its work on state responsibility: the distinction between primary,

<sup>6</sup> *ILC Yearbook* (1992, II, Two) 62.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> See C. Gray, *Judicial Remedies in International Law* (1987).

<sup>9</sup> See Gray, 'Is There an International Law of Remedies?', 56 *BYIL* (1985) 25, on the early disagreements as to whether it is possible to provide general rules applicable both to tribunals and to state practice in general.

substantive rules and secondary, general principles of state responsibility, and to establish general rules on reparation for all kinds of international wrongs. The USA in its comments on the ILC Draft Articles wrote of certain types of breach peculiarly requiring restitution: illegal seizure of territory or of historic property. The USA also acknowledged that compensation is the preferred and practical form of reparation which has priority over restitution in practice.<sup>10</sup> Thus, the USA seems to accept that whether restitution is necessary or appropriate may depend on the rule broken. This was also its position in *Paraguay v. USA*, where it argued that the proper remedy for a violation of the rules on the detention of foreign nationals was not restitution but merely an apology.

However, the ILC, because of its separation of primary and secondary rules, cannot look into the question as to which rules require restitution and which require compensation in case of breach. Questions about the difficulty of maintaining this distinction have arisen in the context of providing for the consequences of international crimes. For example, the Czech Republic argued in its comments on the ILC Draft Articles that the injured state should not have any choice between restitution and compensation in cases of international crimes; they would not be able to choose compensation for themselves but must seek restitution in the international interest.<sup>11</sup> The ILC did not expressly commit itself to this position in the Draft Articles. If it abandons the attempt to provide detailed rules on international crimes then it will not be faced with this issue. Nor will it have to go into the related problem of the limits, if any, on restitution for international crimes.<sup>12</sup> And it will not have to resolve the problems posed by the very wide definition of injured state in the case of international crimes; Draft Article 40 stipulates that all states are injured states if an internationally wrongful act constitutes an international crime. This definition was seen by many as too broad, and it created problems as regards appropriate reparation, given that the normal provisions on reparation as well as the special regime in Chapter IV apply to international crimes.

But if the ILC did try to specify which rules require restitution in case of breach it could involve itself in the long-standing dispute between developed and developing states on the treatment of aliens and in particular on expropriation of foreign-owned property. This caused difficulties in the early work on Part II of the Draft Articles by Special Rapporteurs Riphagen and Arangio-Ruiz; there was a long debate as to whether internationally wrongful acts against foreign nationals were an exception to

<sup>10</sup> 37 *ILM* (1998) 468.

<sup>11</sup> The Czech comments were made in response to invitation by the UN General Assembly in Resolution 51/160 to comment on the 1996 ILC Draft Articles. The Czech position is similar to that adopted by Special Rapporteur Arangio-Ruiz when he suggested that the injured state should not have any choice of remedy if there were a breach of *jus cogens* or of an *erga omnes* obligation; *ILC Yearbook* (1988, II, Two), at para. 113.

<sup>12</sup> Draft Article 52 provides that the normal limits on restitution in kind in Article 43(c) and (d) will not apply in cases of international crimes.

any general rule of the primacy of restitution in kind.<sup>13</sup> The fundamental disagreement on this issue between the arbitrators in *Texaco v. Libya*<sup>14</sup> and *BP v. Libya*<sup>15</sup> is notorious. These cases are unusual in their relatively extensive discussion of appropriate remedies and in their examination of earlier jurisprudence, but they disagree radically as to the proper conclusions to be drawn. In the former the arbitrator awarded restitution on the basis that this was the primary remedy in international law. He relied on the dictum in the *Chorzow Factory* case and on the few other examples of restitution in arbitral practice, irrespective of whether these cases actually involved expropriation. He also relied on claims by states and on the writings of publicists. In contrast, the arbitrator in *BP v. Libya* focused on the field of economic interests and particularly on long-term commercial and industrial contracts. He said that the relevant issues with regard to remedies in this area could be fundamentally different from those in other areas such as sovereignty over territory. He examined not only the jurisprudence of judicial and arbitral decisions but also state practice in the area of expropriation and concluded that there was no support for the proposition that restitution was the primary remedy in international law available at the option of the injured state in cases of nationalization.

The contrast between these two approaches reflects the fundamental policy choice facing the ILC. Does it wish to maintain the primacy of restitution for all breaches of international law, for tribunals and for state practice generally, on the basis of the principle in the *Chorzow Factory* case? Or will the ILC acknowledge that the rarity of the award of this remedy in practice and its unsuitability for many types of breach of international law require it at the least to offer more flexibility than the current Draft Articles allow?<sup>16</sup>

The ILC does make some acknowledgement that the rules it has laid down on reparation in Draft Articles 42 and 43 may not be universal. Draft Article 37 on *lex specialis* provides:

The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act have been determined by other rules of international law relating specifically to that act.

The exact scope of this provision is not clear; it appears to have the potential to totally undermine the separation of primary and secondary rules and the attempt to provide general rules. It clearly includes special 'self-contained' regimes such as those of the EU and the WTO where there are institutional procedures and specific treaty

<sup>13</sup> *ILC Yearbook* (1988, II, One), at para. 121.

<sup>14</sup> 53 *ILR* (1979) 389.

<sup>15</sup> 53 *ILR* (1979) 297.

<sup>16</sup> The ILC commentary on Article 43 indicates that the aim of the Commission was indeed to secure flexibility, but this is not adequately reflected in the text; see *ILC Yearbook* (1992, II, Two), at 62–63.

rules as to reparation.<sup>17</sup> It is less clear whether Article 37 refers also to treaty regimes such as the Vienna Convention on Diplomatic Relations. The International Court of Justice referred to this in the *Iranian Hostages* case, in determining that the alleged interference by the USA in Iran's internal affairs did not justify Iran's conduct with regard to the taking of the American diplomatic hostages. The Court said that:

Diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions . . . the rules of diplomatic law, in short, constitute a self-contained regime . . . they provide the obligations of the receiving state and the means to counter abuse.<sup>18</sup>

Similarly, many human rights treaties create special regimes for the consequences of breach of international obligations. The International Court of Justice in the *Nicaragua v. USA* case considered this briefly. In response to a possible argument that the USA was justified in intervening in Nicaragua because of violations of human rights law by the Government of Nicaragua, the Court stated:

Where human rights are protected by international conventions that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves . . . use of force could not be an appropriate method to monitor or ensure such respect.<sup>19</sup>

There has been strong criticism of any suggestion that these diplomatic and human rights treaties create self-contained regimes that exclude general rules of international law on the consequences of breach, but the matter is left uncertain in the ILC Draft Articles.<sup>20</sup>

Article 37 also seems to regulate the relation between the ILC general rules on the consequences of breach and the regime in the Vienna Convention on the Law of Treaties, preserving the latter as a special regime, although this is not express.<sup>21</sup> Clarity is important if confusion of the type that arose in the *Rainbow Warrior* case<sup>22</sup> as to the relation of treaty law to the general law of state responsibility is to be avoided. The more recent *Gabcikovo-Nagymaros* case<sup>23</sup> maintained a more careful separation of the two regimes.

These cases also involved the question of the availability of orders for specific performance of treaty obligations in international law. The ILC has not made express provision on this question, apparently regarding it as subsumed within restitution or

<sup>17</sup> On self-contained regimes see Simma, 'Self-contained Regimes', 16 *Netherlands Yearbook of International Law* (1985) 110; Wellens, 'Diversity in Secondary Rules and the Unity of International Law', *Netherlands Yearbook of International Law* (1994) 3; McMahon and Akehurst, 'Settlement of Disputes in special Fields', in D. Davies, *International Disputes: The Legal Aspects* (1972) 211; Combacau and Alland, 'Primary and Secondary Rules in the Law of State Responsibility', *Netherlands Yearbook of International Law* (1985) 81.

<sup>18</sup> ICJ Reports (1980) 3, at paras 80–88.

<sup>19</sup> ICJ Reports (1986) 14, at paras 267–268.

<sup>20</sup> See Simma, *supra* note 17.

<sup>21</sup> See S. Rosenne, *Breach of Treaty* (1985) 79.

<sup>22</sup> 82 *ILR* (1990) 499.

<sup>23</sup> 37 *ILM* (1998) 162.

within the general provision in Article 36 on ‘Consequences of an Internationally Wrongful Act’.<sup>24</sup>

But this absence of express provision leaves some uncertainty as to the relation between specific performance, cessation and restitution. The *Rainbow Warrior* case shows dramatically the problems that may arise out of confusion between these measures. The majority of the tribunal misinterpreted the New Zealand request for an order that the two French agents involved in the blowing up of the *Rainbow Warrior* in Auckland harbour be returned to the Pacific island of Hao to serve the remainder of their three-year sentence as agreed by France and New Zealand. New Zealand expressly sought restitution, and apparently understood this as including an order for the specific performance of a treaty; it said that any other remedy would be inappropriate in this case. But the tribunal perversely regarded this as a request for the cessation of the wrongful act.<sup>25</sup> They also made strange use of the controversial ILC concept of continuing obligations in Draft Article 25, stating that: ‘[i]f the breach was a continuous one, that means that the violated obligation also had to be running continuously and without interruption’. Therefore, they concluded that the obligation on the French agents to serve a three-year sentence had terminated, although they had actually served only a small part of their sentence. They would not order cessation because an ‘order for cessation is only justified in the case of continuing breaches of international obligations which are still in force at the time the judicial order is issued’. In contrast, restitution would have been available because in those cases where material restitution of an object is possible the expiry of a treaty obligation would not be an obstacle for ordering restitution.<sup>26</sup> This bizarre award in the *Rainbow Warrior* case should act as a reminder to the ILC of the injustice that can result from an overly formalistic and technical approach to the rules of state responsibility.

The most controversial question about the interpretation of Article 37 on *lex specialis* is whether it includes customary international law rules which provide that breaches of certain rules have special consequences. If it does, then there must be doubts as to whether the general rules on the primacy of restitution will have any great practical significance. The USA in the *Paraguay v. USA* case argued that Paraguay was not entitled to restitution as reparation for the breach of the Consular Convention. It said that Breard’s guilt was well established. The USA recognized that he had not been informed of his rights under the Consular Convention but it said this was not deliberate. He had had all necessary assistance and understood English well. The assistance of the consular officers would not have changed the outcome of the

<sup>24</sup> This provides:

1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part.
2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

<sup>25</sup> 82 *ILR* (1990) 499, at paras 111–113.

<sup>26</sup> *Supra* note 24, para. 113.

proceedings. The USA referred to state practice: notification under the Consular Convention was unevenly made and the only consequence when a claim is made for failure to notify is that apologies are presented by the government responsible. The automatic invalidation of the proceedings and the return to the *status quo ante* as penalties for failure to notify found no support in state practice.<sup>27</sup>

It is not clear whether this US argument would count as a claim that there is a special regime under the Vienna Convention on Consular Relations, even though there is no specific provision in the Convention for the remedies stipulated by the USA. Would this qualify as a special regime under Article 37? If so, Article 37 is so flexible that there is little place for general rules. If not, the rules in the ILC draft on the primacy of restitution may be too restrictive and inadequately reflect state practice.

Article 43 gives the injured state a choice between restitution and compensation, but limits this by excluding cases where restitution (a) is materially impossible, (b) would involve a breach of *jus cogens*, (c) would involve a disproportionate burden on the wrongdoing state and (d) would seriously jeopardize the political independence or economic stability of the wrongdoing state. The need to provide for limits on restitution follows from its primacy. But there are clearly problems with devising acceptable general limits; if they are too wide they will offer loopholes to the wrongdoing states and undermine the primacy that the ILC wants to assert. If the limits are too narrow they will be unrealistic. If the Draft Articles did not establish a presumption in favour of restitution then such a list of exceptions and limitations might be avoided. This avoidance of detailed provisions on restitution may be desirable in the light of the reaction of states to Article 43.<sup>28</sup> Only the first of the list of exceptions to the award of restitution, material impossibility, has proved uncontroversial.

In its comments on the Draft Articles, France doubted the need for a provision excluding restitution where this would involve violation of a rule of *jus cogens*. The absence in the commentary of any example of the type of thing that was envisaged indicates that the ILC in this provision on remedies is operating on an unduly theoretical level; it is providing for possibilities that do not seem to have arisen in the past and do not seem likely to arise in the future. France seems correct in arguing that this provision is unnecessary. Some states were critical of the apparent duplication between the limits on reparation in general in Article 42 and the limits on restitution in particular in Article 43. Thus, the USA and UK were suspicious of the provisions in Article 42(2) which allow for account to be taken of the negligence of the injured state in the determination of reparation. With France they also opposed Article 42(3), which prohibits reparation that deprives the population of its own means of subsistence, and saw this apparently innocuous provision as a dangerous loophole. One suspects this may arise out of fears over the protection of investments and is another manifestation of the developed/developing split that has had such an impact

<sup>27</sup> *Supra* note 1, para. 18.

<sup>28</sup> Several states responded to the call by the UN General Assembly in Resolution 51/160 to provide comments on the 1996 Draft Articles.

on attempts to codify the law in this area. In contrast Germany, no doubt in the light of its own experiences after World War I, argued in favour of this provision. It said that ‘there are examples in history of the burden of full reparation being taken to such a point as to endanger the whole social system of the State concerned’. It also said that a thorough review of state practice might reveal that the principle of full reparation had been applied primarily in the context of arbitral awards that concerned individuals, not in the context of violations having such disastrous effects as war. Again, the difficulty of maintaining the separation of primary and secondary rules is all too apparent.

The UK seemed to have basic reservations about the right of the injured state to insist on a particular kind of reparation; it apparently favoured a flexible approach, whereby the right to reparation would be implemented while taking into account certain factors such as the importance of the rule and of the interest protected by it, the seriousness of the breach (and perhaps the degree of negligence or wilful misconduct involved) and the need to maintain international peace and security and to bring about the settlement of international disputes in conformity with principles of international law and justice.

The USA also called for clarification of Article 43(c), which excludes restitution where it would impose a disproportionate burden on the wrongdoing state, and of Article 43(d), which excludes restitution where it would seriously jeopardize political independence or economic viability; it saw these as unduly undefined terms which undermine the right to restitution. France opposed Article 43(d), arguing that it duplicated Article 43(c). There is a danger that this concern not to allow loopholes for the wrongdoing state could lead the ILC into the adoption of overly restrictive and unworkable provisions.

It is not clear that the current Draft Articles (let alone any more restrictive provisions) would cover arguments such as those of the USA in the *Paraguay v. USA* case or those of the International Court of Justice in its decision in the *Gabcikovo-Nagymaros* case between Hungary and the Slovak Republic. In the former, in addition to its argument that the breach of international law made no difference to the outcome of the trial of Breard, the USA argued that restitution would be unworkable. This does not appear to amount to a claim of material impossibility, but the question arises whether it could fit within the ILC exception in Draft Article 43(c) for cases where restitution would impose a disproportionate burden. In the light of the interests involved, this does not seem likely. The issue is whether the ILC provisions are flexible enough to allow for arguments like that of the USA on what counts as a disproportionate burden, and whether they should be.

In the *Gabcikovo-Nagymaros* case, the International Court of Justice took a very imaginative approach to the legal consequences of the internationally wrongful acts committed by the parties in breach of the 1977 Treaty regime on the building of dams to produce hydro-electricity, control floods and improve navigation on the Danube. Although it found that the 1977 Treaty was still in force and governed the relations between the parties, it acknowledged that some of the obligations had been overtaken by events. It said that it would be an administration of the law altogether out of touch

with reality if the Court were to order those obligations to be fully reinstated.<sup>29</sup> Also, it said that it would not order the destruction of recent works constructed in violation of the treaty regime. Even though the *Chorzow Factory* case prescribes that reparation ‘wipe out’ all the consequences of an illegal act, this was only ‘as far as possible’. In this case, the consequences would be wiped out if the parties resumed cooperation in the utilization of the shared water resources of the Danube and if the multi-purpose programme for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner.<sup>30</sup> The creative approach adopted by the Court in this case does not fit precisely into the ILC categories; despite the Court’s invocation of the *Chorzow Factory* case, this does not seem to be a case of material impossibility. If the ILC is to provide guidelines that will help to resolve — rather than to exacerbate — disputes, then it should consider the adoption of a similarly flexible approach to the primacy of restitution, the choice of the injured state and the limits on that choice.

<sup>29</sup> 37 *ILM* (1998) 162, para. 136.

<sup>30</sup> *Ibid.*, at para. 150.