THE LAST JUDGMENT: LEGAL EFFECTS OF THE DECISIONS OF INTERNATIONAL COURTS AND ARBITRAL TRIBUNALS IN THE PROCEEDINGS OF NATIONAL COURTS

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1 INTRODUCTION

Johan Lammers has devoted a significant part of his academic and diplomatic career to a dispute between France and the Netherlands with respect to the pollution of the Rhine with chlorides.1 The discharge of waste salts by the Mines de Potasse d’Alsace, a French state-owned company, contributed in a considerable amount to the high salinity levels in the Rhine that caused damage downstream in the Netherlands to market gardeners and other water consumers.2 In the early 1970s, a group of market gardeners initiated proceedings against the French Potassium Mines before a court in the Netherlands. They substantiated their claim with reference to, amongst others, the arbitral award rendered in the Trail Smelter case.3 This award addressed a dispute between

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1 See Award of 12 March 2004 of the Arbitral Tribunal in Affaire concernant l’apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du protocole du 25 septembre 1991 additionel à la convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976 (Netherlands/France), in which Johan Lammers acted successfully as the Agent for the Netherlands.


3 See Trail Smelter (Canada/United States), Award of 11 March 1941, II UNRIAA 1905.
Canada and the United States with respect to damage caused in the United States by fumes originating in a lead and zinc smelter in Canada. Thus, the market gardeners invoked an interstate arbitral award in national proceedings between private parties, in particular the finding of the tribunal that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein”.

The District Court of Rotterdam accepted this argument and founded the unlawfulness of the discharge of waste salts by the Potassium Mines on unwritten rules of international law as well as national tort rules. However, this reasoning was rejected by the Court of Appeal of The Hague. This Court considered it “incorrect to apply, as the District Court did, the unwritten rules of international law, which have no direct effect but which apply exclusively to States as subjects of law, in a dispute between private persons as is the case here”. Instead, it applied national tort rules and found that the discharges constituted a tort under the law of the Netherlands. Although the supremacy of international law, at least of treaties and binding decisions of international organizations, over national law is well-established in the legal order of the Netherlands, Johan Lammers has always pointed to the procedural hurdles that would have to be overcome by a litigant who invokes international law in national court proceedings in the Netherlands. The case above is a perfect illustration of his point.

The objective of this chapter is to determine whether a national court is bound by and must apply an international judicial decision that addresses the State of which that court is a judicial organ. The term ‘international judicial decision’ refers in this chapter to a judgment or an opinion rendered by an international court or arbitral tribunal. It should be noted that it is only the operational part of the international judicial decision that may be binding for national courts and not the reasoning of the international court or arbitral tribunal underlying such operational part. The reasoning may provide an interpretation of international law, but is as such not binding for national courts.

4 Id., at 1965.
5 See Decision of 16 December 1983, reproduced in 15 NYIL 471 (1984) at 479 (para. 8.10) and 481 (para. 9.8) respectively; see also Interlocutory Judgment of 8 January 1979, reproduced in 11 NYIL 326 (1980).