

REGIONAL FOCUS & CONTROVERSIES

Who Owns the Preah Vihear Temple? *A Cambodian Position*

Bora Touch*

1. Introduction

The issue of the ownership of the Preah Vihear Temple¹ (Temple), which, it will be argued was settled by the International Court of Justice (ICJ) in 1962, was reignited recently following a successful application by Cambodia to have the Temple listed on the UNESCO World Heritage List. On 15 July 2008, Thai armed forces occupied the land surrounding the Temple. Thai troops have been occupying ever since. On 3 October 2008, armed clashes between the Cambodian and Thai armies occurred in three different places around the Temple. The military situation is still tense.²

The territorial dispute over the region of the Temple has been longstanding. In October 1959, following unsuccessful negotiations between the two countries, Cambodia commenced proceedings against Thailand (Proceedings) in the ICJ.³ In the

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¹ For historical discussion of the Temple, See Charles Spinks, *The Khmer Temple of Prah Vihar*, The Australian National University (1959); John Black, *The Lofty Sanctuary of Khao Phra Vivar*, XLIV The Journal of Siam Society, Pt 1, (Apr. 1956), 1-33. Etienne Aymonier, *Khmer Heritage in Thailand*, WHITE LOTUS 241-257 (1999).

² Raoul Jennar, *The Truth of Trust and Confidence shall be verified* (Oct. 22, 2008), available at <http://msnpvk.com/documentations.htm> (last visited on Jan. 7, 2009) Thai army shelled the area near the "disputed" area: "Reactions of the Spokesman of the Ministry of Foreign Affairs: Will send a diplomatic Protest Note even if Thailand apologizes," KOHSANTPHEAP NEWSPAPER, Feb. 17, 2009; "Thais Give Apology Letter to Hun Sen After Shelling 'Error,'" CAMBODIA DAILY, Feb. 20, 2009. Sam Rith, *S'pore minister says ASEAN can help solve Preah Vihear dispute*, PHNOM PENH POST, Feb. 26, 2009; Nopporn Wong-Anan, *Thai, Cambodian PMs meet as border tension eases*, REUTERS, Feb. 27, 2009.

³ Official Summary of the Judgment of 15 June 1962. *Case Concerning the Temple of Preah Vihear (Merits)* Judgment of 15 June 1962, available at <http://www.I.C.J-cij.org/docket/index.php?sum=284&code=ct&p1=3&p2=3&case=45&k=46&p3=5> (last visited on Jan. 12, 2009) and for the whole decision, *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* 1962 I.C.J.6 ("I.C.J Report (Merits) hereafter"); 56 AM. J. INT'L L. 4, 1033-1053 (Oct. 1962).

Proceedings, the ICJ ruled on the ownership of the Temple and its surrounds and the Judgment states that that the Temple and its surrounds are within Cambodian territory.⁴

Thailand is now asserting that in the Proceedings the ICJ did not address the question of the land boundary nor did it determine the location of the land boundary and, as such, this is a matter yet to be determined under international law.⁵

This paper will argue that the ICJ did, in fact, address the question of the land boundary and that the location of the boundary has been determined.

2. The ICJ Judgment

The Temple is located on a high promontory of the Dangrek mountains which form part of the boundary between Thailand and Cambodia. On 13 February 1904, France (Cambodia, the French Protectorate) and Siam (as Thailand was then known) entered into a treaty (Treaty)⁶ which stipulated, in Article 1, that the boundary was to follow the watershed along the eastern section of the Dangrek mountains.⁷ By virtue of Article 3 of the Treaty, a Franco-Siamese mixed commission (Mixed Commission) was set up to carry out the actual delimitation of the boundary.⁸ By the instructions of the Mixed

⁴ *Id* at 37; “The Preah Vihear Temple Case,” in Abdulgaffar Peang-Meth, *Cambodia and the United Nations: Comparative Foreign Policies Under Four Regimes*, PhD Dissertation, The University of Michigan 278 (1980); Phil Chan, *acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 CHINESE J. INT’L L. 426 (2004); *Note Sur la Question de Preah Vihear*, Mission Permanente du Cambodge au Nation Unies; *Note on the Question of Preah Vihear*, Royal Embassy of Cambodia, Canberra, Australia (Jan. 1958).

⁵ Letter of 21 July 2008 of the Permanent Representative of Thailand to the President of the UN Security Council, S/2008/474, 1-9.

⁶ The Cambodian-Thai Boundary is governed by two treaties, (1) *Franco-Siamese Convention of 13 February 1904, Treaty Between France and Siam*, Mar. 23, 1907. *Recueil des Actes du Gouvernement Cambodgien* 123 (1920). All relevant sections of the Franco-Siamese treaties and protocols (1867-1937) relating to the Thai-Khmer boundary were re-printed in: Victor Prescott, *A Study of the Delineation of the Thai-Cambodian Boundary*. Canberra: Office of National Assessments 123-127 (1985). Important to note that before the 1907 Treaty was entered into, the Khmer King pressed for the return of some of the provinces which had been taken by Siam before the French arrival: “We insist on the former natural limits of the Khmer Kingdom which, prior to the Siamese invasion, included on Siam’s side the provinces of Battambang, Siem Reap, Stung Treng, Tonle Ropov, M’lou Prey, Kuckhan [Sisaket], Prey Sar, Soren [Surin], Sankeac [Sangkha], Neang Rong [Buriram], Nokoreach Seima [Kora], beyond the Phnom Dangrek Mountain, Koh Kong, Krat and Chantabor [Chantaburi] touching upon Bacnam [paknam] and the Kingdom of Champassac,” “Letter of the King of Cambodia HM Sisowath to the French Colonial Governor to Cambodia” (Nov. 5, 1906), I.C.J Reports (Pleadings), 479-480.

⁷ *Id.* Article 1 of the 1904 Treaty provides that the boundary “...follows the line of the watershed between the basins of the Nam Sen and the Mekong Rivers on the one hand and that of the Nam Moun on the other, and rejoins the Phnom Padang range, of which it follows the crest eastwards until it reaches the Mekong...”

⁸ For general discussion of the Khmer-Thai boundary, See Sarin Chhak, *La Frontière khméro-thaïlandaise* (DACTYLOGRAPHIÉE ed., THÈSE DE DROIT PUBLIC, 1966); and SARIN CHHAK, *LE TRACE DE LA FRONTIERE CAMBODGIENNE AVEC LE LAOS ET LE SUD-VIETNAM*, Thesis Pour la Doctorate de Sciences Politiques, Faculte de Droit et des Sciences et

Commission of 2 December 1906, Captains Oum and Kerler of the Mixed Commission, surveyed and fixed the section of the boundary between Kel pass and the Col de Preah Chambot, which included the area of the Temple.⁹ Following the survey, the Siamese government requested France to prepare and publish maps of the frontier. In autumn 1907, eleven maps were completed and provided to Thailand in 1908. One of the maps (referred to as “Annex 1” in the Proceedings) showed the Temple in Cambodian territory.

Cambodia claimed sovereignty over the region of the Temple on the basis that Thailand had accepted Annex I then and was therefore precluded from subsequently denying the validity of Annex I.¹⁰

Economiques, Universite de Paris (1964); Khim Chhun Y, *Prum Daen Kampuchea* [or The Cambodian Boundaries], Vol. 1 (Pt 11) and 2 (Pt21), Phnom Penh, Cambodia, (2000); Larry Palmer, *Thailand's Kampuchea Incidents-Territorial Disputes and Armed Confrontation along the Thai-Kampuchean Frontier*, 1 NEWS FROM KAMPUCHEA 4, 1-31 (1977); Natalie Gurney, *A History of the Territorial Dispute Between Siam and French Indochina and Post-War Political Developments in the Disputed Territories* (May. 1950) (unpublished Master Thesis, John Hopkins University (on file with author); Thadeus Flood, *The 1904 Franco-Thai Border Dispute and Phibun Songkhraam's Commitment to Japan*, 10 JOURNAL OF SOUTHEAST ASIANS HISTORY 2, 304-244 (1969); K. Landon, *Thailand's Quarrel with France in Perspective*, THE FAR EASTERN Q. 25-42 (Nov. 1941); Lawrence Briggs, *The Treaty of March 23, 1907 Between France and Siam and the Return of Battambang and Angkor to Cambodia*, THE FAR EAST Q. 439-455 (1945-6).

⁹ Victor Prescott, *A Study of the Delimitation of the Thai-Cambodian Boundary*. Canberra: Office of National Assessments (1985) 15, 20.

¹⁰ JCJ Reports (Merit), 21; Pippa Tubman, *National Jurisprudence in International Tribunals*, 28 N.Y.U.J. INT'L L. & POL. 134 (1995-1996). It is important to note that Prince Damrong Rajanubhab, then Minister of Interior of Thailand, was involved in negotiations of both Thai-Khmer 1904 and 1907 boundary treaties. He received the 11 maps in 1908 from France. He would have noticed that Preah Vihear was in Cambodian territory on Annex I because before his official trip to the Temple in 1930, he, who was not only as the President of the Royal Institute of Siam but also Senior Minister or *Aphiratmontri*, had written to seek permission from France to visit the Temple. This was proof of recognition of the Cambodian sovereignty over the Temple and acceptance of the boundary line on the Annex I map. This fact was recently exposed by a respected Thai scholar, Professor Charnvit Kasetsiri, *Prasat Phra Vihear - karani siksar pravatisatr kar muang lathichatniyum* [Preah Vihear temple - a Case study on Politics and Nationalism], Southeast Asian Studies Program, Thammasat University, Bangkok, Thailand 1-7 (Jun. 20, 2008), available at <http://www.charnvitkasetsiri.com/PDF/PreahVihearFor20June.pdf> (last visited on Jun. 7, 2008).

Also of note, when Prince Damrong arrived at the Temple, he ordered that his and his entourage's pavilion be erected on Thai side, i.e. the northern bank of the *Takhop* stream which served as the boundary of the two states: “Affidavit of HRH Phun Pisatmai Diskul of 9 June 1961,” in *Case Concerning the Temple of Preah Vihear. Pleadings, Oral Arguments, Documents*, I.C.J Reports, (1962), 401 (“I.C.J Reports, - Pleadings”). The Prince was actively involved in map trainings, and zoning (administrative division) of Thailand from 1892-1915. See generally, Thongchai Winichakul, *SIAM MAPPED, A HISTORY OF THE GEO-BODY OF A NATION* (1994); PAITON MIKUSOL, *SOCIAL AND CULTURAL HISTORY OF NORTHEASTERN THAILAND FROM 1868-1910: A CASE STUDY OF THE HUAMUANG KHAMEN PADONG* (1984) (Surin, Sangkha and Khukhan) (unpublished Ph.D. dissertation, University of Washington) NEIL ENGLEHART, *CULTURE, CHOICE AND CHANGE IN THAILAND IN THE REIGN OF KING CHULALONGKORN 1868-1910* (1996) (unpublished Ph.D. dissertation, University of California) (on file with author); ALFRED BATTYE, *THE MILITARY, GOVERNMENT AND SOCIETY IN SIAM: 1868-1910: POLITICS AND MILITARY REFORM DURING THE REIGN OF KING CHULALONGKORN* (1974) (unpublished Ph.D. dissertation, Cornell University).

Thailand's defense in the Proceedings was, in summary, as follows:

(1) Annex I was not the work of, and was only prepared by one party to, the Mixed Commission and thus was not binding on it; (2) the map contained a material error as the Commission did not have power to deviate from the watershed in such a significant margin;¹¹ (3) it never accepted the map or the frontier depicted on it such that it was bound or, alternatively, if it had accepted the map, it did so on a mistaken belief that the map line was drawn to correspond with the watershed line. In its counter-claim, Thailand claimed territorial sovereignty over the Temple.¹²

The ICJ relevantly ruled in the Proceeding:

(1) although the preparation (the drawing) and publication of the map were not approved by the Mixed Commission, Annex I was based on the work of the Mixed Commission and was valid. According to the ICJ, the essential question in the Proceedings was “whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character.”¹³

(2) Even if there was an error in the preparation of Annex I, Thailand had adopted Annex 1. According to the ICJ, it is an “established rule of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible.”¹⁴

¹¹ Cambodia maintained that the boundary line of the area on Annex I map is the correct watershed, “Reply by Mr. Acheson” in 2 I.C.J. Pleadings, 466-472. Importantly, a report by Thai-French Officers, Sanam Rithikray and Henri Dessemond, of Mixed Commission who placed the boundary stone pillar at Kel Pass, clearly reported that the boundary line was not running along the edge of the Preah Vihear escarpment. “Report of Placing of Boundary Stone at Kel Pass, November 12, 1908, I.C.J. Reports (Pleadings), 675. The plea of error and that the error was not noticed by Siam/Thailand had no factual basis.

¹² I.C.J. Reports (Merits) 30; also Victor Prescott, *Map of Mainland Asia by Treaty* (1975), 437. According to a Thai former Minister for Education, General Manich Jumsai, Thailand had lost the maps annexed to the 1907 Treaty and therefore no one in Thailand knew whether or not the Preah Vihear was situated in Thailand, but he claimed it for Thailand any way. Brig. Gen. Manich Jumsai, *History of Thailand & Cambodia (from the Days of Angkor to the Present)*, Bangkok 213-216 (1970). Other sources, however, suggested that Thailand did have the relevant maps. Larry Sternstein, “A Catalogue of Maps of Thailand,” 1 *The Siam Society. Fiftieth Anniversary Commemorative Publication* 72 (1954); and Thailand did know that the boundary line ran along the Takhop stream north of the Temple and not along the eastern escarpment of the Temple. CHARUWAN PHUNGTIAN, *THAI-CAMBODIAN CULTURE RELATIONSHIP THROUGH ARTS* (2000) (unpublished Ph.D. dissertation, Magadh University) Bodh-Gaya 248.

¹³ I.C.J. Reports (Merits), 22; Krishna Rao, *The Preah Vihear Case and the Sino-Indian Boundary Questions*, New Delhi-1 (1963), 4; R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 49 (1963).

¹⁴ I.C.J. Reports (merits), 26; A. Rustemeyer, Temple of Preah Vihear Case, *Encyclopedia of Public International Law*

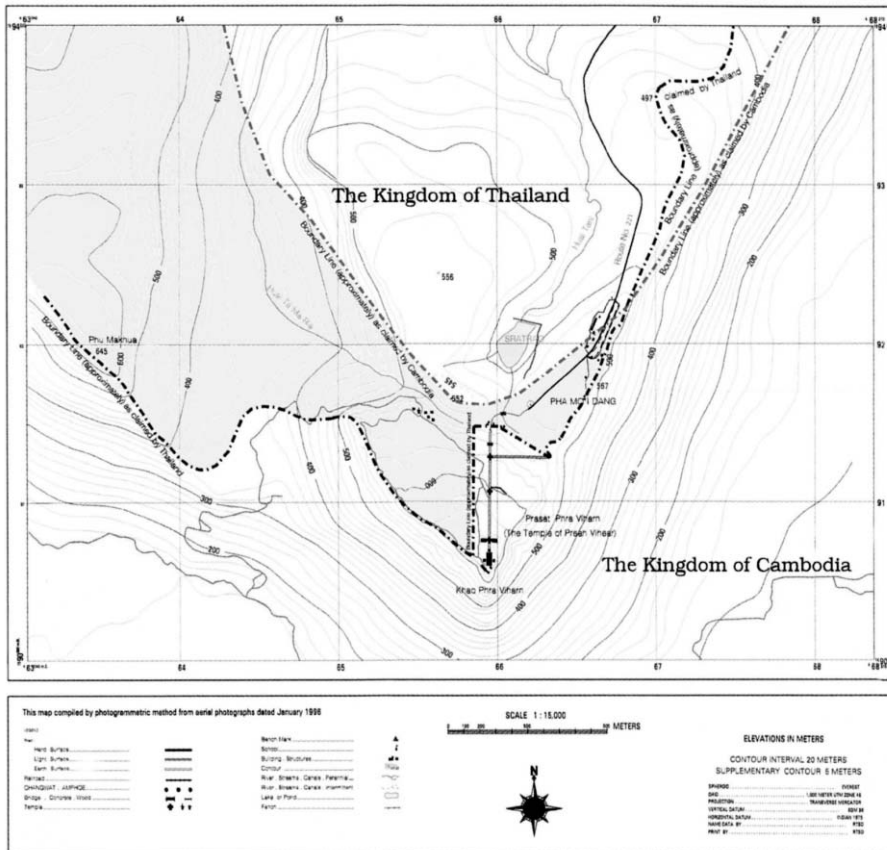
(3) Thailand had accepted the boundary map and now was precluded from denying it¹⁵. According to the ICJ: “Even if there were doubt as to Siam’s acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she had not accepted it.”¹⁶

The ICJ rejected the Thai claim of sovereignty over the Temple. It was contradictory for Thailand to argue on the one hand that the boundary had not been determined and, on the other hand, that it had acted in a way that resulted in Cambodia relinquishing sovereignty. The implication of the Thai argument on the sovereignty claim was that it believed that boundary line was correct. In such circumstances, the presence of Thai authorities was a deliberate violation of the Cambodia’s sovereignty. Thailand could not have both ways.¹⁷

By its Note of 6 July 1962 to the Secretary General of the United Nations (the 1962 Note), Thailand decided, with reservation, to “comply with the decision of the International Court of Justice.”¹⁸ All the successive Thai governments “accepted” the ICJ ruling.¹⁹ On 15 July 1962, Thailand evacuated the Temple and its surrounds²⁰

(1981), 273-4; C. Thornberry, *The Temple of Preah Vihear (Cambodia vs. Thailand)*, 26 MOD. L. REV. 448-451 (1963).

- ¹⁵ The I.C.J. ruling is understood as such by everyone, including officials and Counsel of Thailand. Brig. Gen. Manich Jumsai, *History of Thailand & Cambodia (from the days of Angkor to Present)* 215 (1970). PHILLIP JESSUP, *THE PRICE OF INTERNATIONAL JUSTICE* 15 (1971). Thomas Donovan, *The Marouni River tract and its Colonial Legacy in South America*, CHICAGO-KENT J. INT’L & COMP. L. 4, 11-12 (2004); Ashraf Ibrahim, *The Doctrine of Laches in International law*, 83 VA. L. REV. 654 (1997); Thoma Grant, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STAN. J. INT’L L. 321 (1997); Joaquin Roy, *Lawyers Meet the Law: Critical US Voices of Helms-Burton* 6 U. MIAMI Y.B. INT’L L. 64 (1997-1998); Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT’L L. & COMP. L. Q. 4, 810 (Oct. 1986).
- ¹⁶ I.C.J. Reports (Merits), 30; Durward Sandifer, *Evidence Before International Tribunals* (1975); James Gathii, *Geographic Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu (Botswana/Namibia)*, 15 LEIDEN J. INT’L L. 616 (2002); PHILLIP JESSUP, *THE PRICE OF INTERNATIONAL JUSTICE* 15 (1971), MASAHIRO MIYOSHI, *CONSIDERATION IN THE SETTLEMENT OF TERRITORIAL AND BOUNDARY DISPUTES* 114 (1993); Ralph Brock, *The Republic of Texas is no More: An Answer to the Claim that Texas was unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 740 (1997).
- ¹⁷ G. M Kelly, *The Temple Case in Historical Perspective*, 39 BRIT. Y. B. INT’L L. 467 (1963); I.C.J. Reports (Merits) 33 ; Giovanni Distefano, *The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law*, 19 LEIDEN J. INT’L L. 1059-1061 (2006).
- ¹⁸ “Note to U.N. Acting Secretary General,” (July 6, 1962), Ministry of Foreign Affairs, Bangkok, 1(6) *Foreign Affair Bulletin* (June-July 1962), 130; *THE BANGKOK POST*, 22 June 1962; Bangkok World, 4 July 1962; *Intelligence Memorandum - Cambodia’s Boundary Problems*, Directorate of Intelligence, Central Intelligence Agency (CIA/BGI GM 88-2) (Feb. 27, 1968), 5.
- ¹⁹ “Understanding the Temple of Preah Vihear Issue,” Statement 25 March 2008 of the Ministry of Foreign Affairs, Bangkok, Thailand; Supalak Ganjanakhundee, “Thailand, Cambodia to cooperate on Preah Vihear: Kasit,” *The Nation* 26 December 2008.
- ²⁰ The I.C.J. Decision caused an uproar in Thailand, *Bangkok World*, 16 July 1962; L. P. Singh, *The Thai-Cambodian*



Map 1: Recent map for the same area unilaterally prepared and presented by the kingdom of Thailand. The grey colored area indicates the claim by Thailand.

3. The Current Dispute

In a letter dated 21 July 2008 from the Permanent Representative of Thailand to the President of the UN Security Council (2008 Letter), Thailand asserted, in summary, that:

- the ICJ ruled that it did not have jurisdiction over the question of the land boundary;

Temple Dispute, 2 ASIAN SURVEY 8 (Oct., 1962). Thai army officers pleaded with PM Marshal Sarit "for permission to march right to... have lunch in" the national Capital of Phnom Penh, *Bernard Gordon, Cambodia: Where Foreign Policy counts*, 5(9) ASIAN SURVEY 445 (1965).

- the ICJ did not determine the land boundary; and
- the matter of the land boundary is yet to be determined in international law.²¹

In relation to the first point, Thailand referred to Cambodia's initial submissions in the Proceedings where Cambodia sought determination of the following issues:

- (1) that [Thailand] is under an obligation to withdraw the detachments of armed forces it has stationed since 1954 in the ruins of the Temple of Preah Vihear;
- (2) That the territorial sovereignty over the Temple of Preah Vihear belongs to [Cambodia].

Based on these initial submissions, Thailand asserts that the jurisdiction of the ICJ in the Proceedings was restricted to determination of sovereignty over the Temple itself. Thailand refers to the ICJ's Judgment of 15 June 1962 (Merits) where the ICJ stated, in part: "the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear."²² Thailand further relies on the ICJ's statement that: "Cambodia's first and second Submissions, calling for pronouncement on the legal status of the Annex I Map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to the grounds, and not as claims to be dealt."

In relation to the second point made by Thailand in the 2008 Letter, that the ICJ did not determine the issue of the land boundary, Thailand asserts that the only operative findings of the ICJ in the Proceedings are:

- (a) The Temple of Preah Vihear is situated in territory under sovereignty of Cambodia;
- (b) Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; and
- (c) Thailand is under obligation to restore to Cambodia any objects of idols specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.²³

²¹ Letter from the Permanent Representative of Thailand to the President of the UN Security Council on July 21, 2009 (S/2008/474), 5, 6, 7.

²² *Id.* at 5.

²³ *Id.* at 6.

Thailand asserts that the ICJ had regard to the issue of the frontier line only to determine the narrower dispute of territorial sovereignty over the Temple.

Finally, in relation to its assertion in the 2008 Letter that “[t]he precise location of the boundary line is still to be determined,” Thailand asserts:

Cambodia’s first and second Submissions, calling for pronouncement on the legal status of the Annex I Map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to the grounds, and not as claims to be dealt with in the operative provisions of the judgment.²⁴

The crux of Thailand’s argument is that Annex I is not an integral part of the Treaty, the ICJ did not give Annex I legal status and, in any event, the basis for demarcation is not Annex I but the Treaty “which defines the boundary line in this area along the watershed line.”²⁵

4. The ICJ had jurisdiction over the issue of the land boundary

The ICJ did have jurisdiction over both the territorial and boundary questions and the boundary was clearly determined by the ICJ.

Although the Terms of Reference in the Proceedings referred to the territorial sovereignty dispute, this is the case that can be defined as relating to both boundary and territorial disputes.²⁶ This is because, Cambodia based its territorial (sovereignty) claim on Annex I map - the boundary map made pursuant to the 1904 Treaty²⁷ - and the two

²⁴ Letter of 21 July 2008 of the Permanent Representative of Thailand to the President of the UN Security Council, (S/2008/474), 5.

²⁵ Letter of 16 October 2008 of the Permanent Representative of Thailand to the President of the UN Security Council, S/2008/65, 2.

²⁶ Brian Summer, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1812 (April 2004); “...there is no clear distinction between the two types, many disputes could easily be defined as relating to both territory and boundaries. Territorial disputes involve the disputed title to sovereignty usually over a large area of territory and its population. In some cases a territorial dispute may not involve land boundaries, as in the case of disputed islands or in case where the extent of territory is clearly defined. However, a territorial dispute will often have a boundary element, in terms of defining the exact extent of the disputed area.” Elia Zureik & Mark Salter, *Global Surveillance and Policing, Border, SEC. & IDENTITY* 175 (2005). According to I.C.J. caselaw, the I.C.J. adjudicated the whole dispute even though this went beyond the scope of the terms of reference. In *Case Concerning the Continental Shelf (Libyan Arabic Jamahiriya v Malta)*, I.C.J. Reports 13 (1985), in the Special Agreement, the Parties did not ask the Court explicitly to draw the delimitation line, but the Court interpreted the agreement in the a way that it was deemed to include the function of delimitation. Para.19. In *Case Concerning the Continental Shelf (Tunisia v Libyan Arabic Jamahiriya)* I.C.J. Report 18 (1982), the parties asked the I.C.J. to take into consideration newly accepted trends of the law of sea at the Third United Nation Conference on the Law of the Sea, the I.C.J. ruled that even if it was not asked to do so, it would have still done it itself. Para 24.

²⁷ Pippa Tubman, *National Jurisprudence in International Tribunals*, 28 N.Y.U. J. INT’L. & POL. 134 (1995-1996); Gary

questions are, effectively one and the same.²⁸

In a similar ICJ case prior to the Proceedings, the Case Concerning Sovereignty Over Certain Frontier Land (Belgium vs. Netherlands, 1959), by a special Agreement, the ICJ was requested to determine “sovereignty over the plots shown in the survey and known from 1838 to 1843 as Nos. 91 and 92, Section A, Zondereygen.”²⁹ Despite the application requesting a determination on sovereignty, the ICJ treated the issue as a boundary dispute. At issue was a map, which was incorporated in the relevant Boundary Convention by reference. The ICJ ruled that the map and boundary line depicted therein were valid.³⁰

In the *Case Concerning the Frontier Dispute* (Burkina Faso vs. Mali, 1986),³¹ the Chamber of the ICJ was asked to determine a frontier dispute. Besides the fact that it was clear in the Memorial submitting the case to the ICJ that the parties asked the Chamber to determine the boundary dispute, there was an issue raised by the parties regarding the classification of boundary disputes and attribution of territory/territorial sovereignty disputes. The Chamber noted that the two disputes are only different in degree and not in nature.³²

Generally, arbitral and judicial decisions of international tribunals suggest that territorial and border disputes are interdependent.³³ According to one writer: “Sometimes a claim to territory involves a precise claim to given boundaries; sometimes boundary definition has been a subsequent exercise and one may be able legitimately to distinguish between the claim to the territory and the claim to the boundaries which define it”³⁴ Boundary and territorial disputes therefore form “part of the larger question of territorial sovereignty³⁵” The difference between the two concepts is insignificant as “border disputes and territorial disputes both involve, at their core, sovereignty over disputed land.”³⁶

Importantly, in the Frontier Dispute case the ICJ ruled that “the effect of any judicial

Scott & Craig Car, *The I.C.J and Compulsory Jurisdiction: the Case for Closing the Clause*, 81 AM. J. INT'L L. 64 (1987).

²⁸ Brian Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1812 (Apr. 2004).

²⁹ *Case Concerning Sovereignty Over Certain Frontier Land (Belgium v. Netherlands)* 1959, I.C.J. Reports (1959), 209 WL 5; J. Castellino & S. Alien, *Title to Territory in International Law, a Temporal Analysis*, (2003), 122-3.

³⁰ *Id.* at 122-3.

³¹ *Case Concerning the Frontier Dispute (Burkina Faso vs. Mal)* I.C.J Reports (1986).

³² *Id.*, para. 17

³³ S. AKWEEN, INTERNATIONAL LAW AND PROTECTION OF NAMIBIA'S TERRITORIAL INTEGRITY 5 (1997); ENNO MILMAN & CHRITINE CHINKIN, UNLAWFUL TERRITORIAL SITUATION IN INTERNATIONAL LAW (2006), IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL LAW 151 (1998).

³⁴ A. ALLOTT, 9 BOUNDARY AND LAW IN AFRICA IN AFRICAN BOUNDARY PROBLEMS 13 (C.G WIDSTAND ed., 1969).

³⁵ SURYA SHARMA, TERRITORIAL ACQUISITION & DISPUTES AND INTERNATIONAL LAW 23 (1997).

³⁶ Brian Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1812 (April 2004).

decision rendered either in a dispute as to attribution of territory [territorial dispute] or in a delimitation [boundary] dispute is necessarily to establish a frontier”³⁷. In the *Island of Palmas case*³⁸ the parties’ agreed terms of the reference were for the arbitrator to determine the territorial dispute. The arbitrator proceeded to make reference to rules governing both the territorial and frontier disputes. The two categories of disputes are interdependent.³⁹

In the Terms of Reference in the Proceedings, Cambodia referred to “*territorial sovereignty*,”⁴⁰ but the substance of its case included both territorial/sovereignty and boundary claims. The question for the ICJ was whether or not Annex I was valid. At the beginning of its Judgment, the ICJ laid out the subject of dispute to be determined: “This is a dispute about territorial sovereignty.” In order to determine the issue of territorial sovereignty, however, the ICJ went on to say that “the Court must have regard to the frontier line between the two States”⁴¹ Because Articles I and II of the Treaty did not

³⁷ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, I.C.J Reports 1986, 563; Surya Sharma, *Case Concerning the Frontier Dispute (Burkina-Faso/Republic of Mali) - A Critique*, 11 & 12 KURUKSHETRA L.J. 150 (1985 -86).

³⁸ *The Island of Palmas Case (United States and Netherlands)*, 2 U.N. REPORTS OF INTERNATIONAL ARBITRATION AWARDS (1928), 829.

³⁹ *Id.*, 838, 840. *Case Concerning Sovereignty Over Certain Frontier Land (Belgium v. Netherlands)* 1959, I.C.J. Reports 209 (20 June 1959). The principle is confirmed by subsequent case, i.e. *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, and *Case Concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J Reports 1. “As far as the application of acquiescence and estoppel, the distinction between the territorial and boundary disputes are irrelevant,” Nuno Sergio Margo Antunes & Estoppel, *Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 2 IBRU BOUNDARY AND TERRITORY BRIEFING 8, 6 (2000).

⁴⁰ In its Application and Memorial, Cambodia asked the I.C.J to adjudicate and declare:

- 1 that [Thailand] is under an obligation to withdraw the detachments of armed forces it has stationed since 1954 in the ruins of the Temple of Preah Vihear.
- 2 That the territorial sovereignty over the Temple of Preah Vihear belongs to Cambodia.

In its Final Submissions, Cambodia asked the I.C.J:

- (1) To adjudicate and declare that the map of Dangrek sector (Annex I to the Memorial of Cambodia) was drawn up and published in the name and on behalf of the Mixed Delimitation Commission set up by the Treaty of 13 February 1904, that it sets forth the decisions taken by the said Commission and that, by reason of that fact and also of the subsequent agreements and conduct of the Parties, it presents a treaty character;
- (2) To adjudicate and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighborhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indochina and Siam (Annex I map to the Memorial of Cambodia);
- (3) To adjudicate and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of [Cambodia];
- (4) To adjudicate and declare that [Thailand] is under an obligation to withdraw the detachments of armed forces it has stationed since 1954, in Cambodian territory, in the ruins of the Temple of Preah Vihear;
- (5) To adjudicate and declare that sculptures, stelae, fragments of monument, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to [Cambodia] by [Thailand]

mention the Temple, the ICJ concluded that it “can only give a decision as the sovereignty over the Temple area after having examined what the frontier line is.”⁴²

It is clear from these statements of the ICJ and Cambodia’s Application and Memorial that the ICJ had jurisdiction over both the territorial (sovereignty) and boundary disputes. There was no distinction between the two categories of disputes. To determine the territorial sovereignty is to decide on the boundary line.⁴³

The expansion of Cambodia’s claims from two claims/submissions originally made under its Application and Memorial (which focused on sovereignty over the Temple and removal of Thai troops from the Temple) to five claims/submissions under the title of Final Submissions was allowed by the ICJ.⁴⁴ The ICJ accepted all five Submissions. The First and Second Submissions which, in summary, requested the ICJ to determine the validity of Annex I and to adjudicate and declare that the frontier line was that on Annex I, were used as basis or grounds for reasoning in the Judgment but not in the operative provisions because this was not necessary. This is because the ICJ found that Annex I was valid for reasons other than that it had been published by and issued in the name of the Mixed Commission.⁴⁵

In rejecting Thailand’s argument that the fourth submission in the Final Submissions (regarding return of sculptures and other items taken from the Temple) was too late to be determined, the ICJ held that, like the submission that Thai troops be withdrawn, it was “implicit in, and consequential on, the claim of sovereignty itself.”⁴⁶

5. The Judgment did determine the location of the boundary

Annex I, as conceded by Prince Vongsamahip Jayankura, Agent of the Royal Government of Thailand and another Counsel for Thailand, was “*the central point of the case.*”⁴⁷ In fact, the main question on which Thailand asked its lawyers for legal advice

⁴¹ I.C.J REP. 1962 (Merits), 14.

⁴² I.C.J REP. 1962 (Merits), 17.

⁴³ SURYA SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 27 (1997); Brian Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1812 (April 2004).

⁴⁴ I.C.J Reports 1962 (Merits), 10; see *supra* note 38 for submissions that were made by Cambodia.

⁴⁵ Victor Prescott, *Map of Mainland Asia by Treaty* 437 (1975); “Prasat Phra Viharn & Phra Viharn Mountain,” in Charuwan Phungtiam, *THAI-CAMBODIAN CULTURE: RELATIONSHIP THROUGH ARTS* 247 (unpublished Ph.D. dissertation, Magadh University 2000).

⁴⁶ I.C.J Reports (Merits), 36; and D. Johnson, *Judgment of May 26, and June 15, 1962, Case Concerning the Temple of Preah Vihear*, 11 INT’L & COMP. L. Q. 1202 (1962).

⁴⁷ “Rejoinder of the Royal Government of Thailand,” Vol. 2 I.C.J Reports (Pleadings), 547, *Argument of Mr. James Nevins Hyde*, 273, in Vol. 2 I.C.J Reports (Pleadings); Sakeus Akweenda, *The Legal Significance of Maps in Boundary Questions: a Reappraisal with Particulars Emphasis on Namibia* 60 BRIT. Y.B INT’L L. 222 (1989); Dennis Rushworth, “Mapping in Support of Frontier Arbitration: Maps as Evidence,” IBRU BOUNDARY AND SECURITY

in 1959 was “whether a map or a treaty definition of a boundary would prevail.”⁴⁸

One of Thailand’s former lawyers puts forward what appears to be Thailand’s reasoning in the 2008 Letter. In Guenter Weissberg’s article “Maps as Evidence in International Boundary Disputes”⁴⁹ he states: “the Judgment did not determine the frontier in the disputed area and left the precise line of the watershed on the Preah Vihear promontory unclear. Indeed, the Court did not find necessary ‘to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904-1908, or, if not, how the watershed line in fact run’ ... and thus failed to pass on one of the Cambodian submissions’ ” In support of this, Weissberg went on to cite the dissenting opinion of minority Judge Percy who stated that it was “hardly... possible... to pronounce in favor of the line of Annex I in the absence of a determination of the extent to which Annex I does or does not in fact conform to the stipulations contained in Article I of the Treaty itself.”⁵⁰

The fact of the matter is the Court did determine all of the five submissions. The first and second submissions were dealt with in the reasoning part of the Judgment and the third-fifth submissions were dealt in the operative portion of the Judgment. Furthermore, Weissberg did not cite the Judgment completely or correctly. He misleadingly omitted to refer to the following:

“the indication of the line of the watershed in Article I of the 1904 Treaty was itself no more than an obvious and convenient way of describing a frontier line objectively, though in general terms. There is, however, no reason to think that the Parties attached any special importance to the line of the watershed as such, as compared with overriding importance, in the interests of finality, of adhering to the map line as eventually delimited and accepted by them. The Court, therefore, feels bound, as a matter of treaty interpretation, to pronounce in favor of the line as mapped in the

BULLETIN (Winter 1997-1998), 53; WILLIAM BISHOP, INTERNATIONAL LAW. CASES AND MATERIALS 446-447 (1962); ALEXANDRA DENES, RECOVERING KHMER ETHNIC IDENTITY FROM THE THAI NATIONALIST PAST: AN ETHNOGRAPHY OF THE LOCALISM MOVEMENT IN SURIN PROVINCE 138 (unpublished Ph.D. dissertation, Cornell University 2006) (on file with author).

⁴⁸ James N. Hyde, *Jessup: Memorials and Reminiscences*, 80 AM. J. INT’L L. 903 (1986). The advice was that the treaty definition would prevail. The Court, however, held otherwise, as one of counsel, Phillip Jessup, for saw it “*the Court found that Siam did not at the time challenge the accuracy of the map and that its conduct was acquiescent...Thailand is now precluded from asserting that she had not accepted the map.*” PHILLIP JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 15 (1971).

⁴⁹ Guenter Weissberg, *Maps as Evidence in International Boundary Disputes: a Reappraisal*, 57 AM. J. INT’L L. 798 (1963).

⁵⁰ *Id.*, at 798. The dissenting opinion of a minority judge is not binding, not the Court’s opinion and it could not transform into an obligation. See R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT’L & COMP. L. Q. 3, 797-798 (Jul. 1965). See generally 68 INET’ CT. JUST. Y.B. (1947-8).

disputed area”⁵¹

The above paragraph, consequentially, is followed by the paragraph cited by Weissberg (and Thailand in the 2008 Letter)⁵²: Both paragraphs must be considered and read together to understand the Judgment

“Given the grounds on which the Court bases its decision, it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond to in 1904-1908, or, if not, how the watershed line in fact runs.”

Because the boundary location depicted on Annex I has been accepted, there was no need for the ICJ, as Professor Victor Prescott points out, to “*pronounce whether the boundary around the northern perimeter of the Temple coincided with the watershed because the matter was decided before this question needed an answer*”⁵³ Another scholar, Keith Highet concludes:

“The Court held that since the location indicated in the map had been accepted, it was unnecessary to examine the physical location of boundary as derived from the terms of the Treaty (i.e., the location of the “watershed” line. The intricate and technical questions of geography and geomorphology intended to support the description in the Treaty were therefore never resolved by the Court since its legal determination in the case made it unnecessary to reach those facts.”⁵⁴

The Judgment held that Thailand had already accepted Annex I in 1908-1909 as representing the result of delimitation, and had recognized the map line as being the frontier line.⁵⁵ According to the ICJ, “[a]s a result, the map entered the treaty settlement and became ‘an integral part of it.’”⁵⁶ Even if the map line diverged from the watershed

⁵¹ I.C.J Reports 1962 (Merits), 35; D.H.N. Johnson, *Judgment of May 26, 1961, and June 15 1962, Case Concerning the Temple of Preah Vihear*, 11 AM. J. INT’L L. (1962), 1188.

⁵² “as a consequence” to use the words of J.H. W. Verzijl, *International Court of Justice. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 9 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 248 (1962).

⁵³ VICTOR PRESCOTT, *MAP OF MAINLAND ASIA BY TREATY* 437 (1975).

⁵⁴ Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT’L L. 25 (1987); also Durward Sandifer, *Evidence Before International Tribunals* 338-339 (1975). Note that Phillip Jessup, a counsel advising and defending Thailand in the case, provided his statement of support of the book in Forward of the book.

⁵⁵ Krishna Rao, *The Preah Vihear Case and the Sino-Indian Boundary Question*, New Delhi-1 (1963), 2; I.C.J Reports (Merits), 32.

⁵⁶ Guenter Weissberg noted and quoted it in *Maps as Evidence in International Boundary Disputes: a Reappraisal*, 57 AM. J. INT’L L. 797 (1963).

line, Annex I was accepted by both governments.⁵⁷ The effect of the decision, as Weissberg points out: "...is that in the interest of certainty, and finality of frontiers, an unsigned map in derogation of a treaty provision supersedes the text as a matter of treaty interpretation."⁵⁸

Criticizing Cambodia's addition of new (first and second and fifth) Submissions, Thai Counsel Seni Pramroj put forward that, "since Annex I is but one in a series of maps some of which were not superseded by the Treaty 1907, it would be easy to argue forwards that if the Court pronounces judgment on the basis of Annex I, the Court must necessarily uphold the frontier line as drawn on the other maps in the same series as well."⁵⁹

By implication, the ICJ did uphold the frontier line on the rest of the maps.⁶⁰ According to the ICJ:

"In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause on the parent treaty is discovered. Such a process could indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious. It must be asked why the parties in this case provided for a delimitation, instead of relying on the Treaty clause indicating that the frontier line in the region would be the watershed. There are boundary treaties which do no more than refer to a watershed line, or to a crest line, and which make no provision for any delimitation in addition. This could only have been because they regarded a watershed indication as insufficient by itself to achieve certainty and finality. It is precisely to achieve this that delimitation and map lines are resorted to."⁶¹

6. *Ratio Decidendi* and *Dispositif* of the ICJ Judgment

Thailand's statement in the 2008 Letter that "[i]n the operative provisions of the

⁵⁷ I.C.J Reports 1962 (Merits), 34.

⁵⁸ Guenter Weissberge, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, AM. J. INT'L L. 802 (1963); VICTOR PRESCOTT & GILLIAN TRIGGS, *INTERNATIONAL FRONTIERS AND BOUNDARIES, LAW, POLITICS AND GEOGRAPHY* (2008), 210.

⁵⁹ I.C.J Reports 1962 Vol 2 (Pleadings), 216.

⁶⁰ Victor Prescott, *A Study of the Delimitation of the Thai-Cambodian Boundary*. Canberra: Office of National Assessments (1985) 15, 20.

⁶¹ I.C.J Reports 1962 (Merits) 34; *see also* KAIYAN KAIKOBAD, *INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISIONS* 315 (2007); Kaiyan Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, BRIT. Y.B. INT'L L. 118-141 (1984),

Judgment, the Court did not address the question of the boundary line in any way”⁶² suggests that the ICJ’s ruling in the reasoning part (*ratio decidendi*), which principally dealt with the validity of Annex I, is not binding. This is not the case.

As set out above, in its reasoning, the ICJ upheld and pronounced the legal status of Annex I as being a valid and legitimate and as an integral part of the Treaty : “The Court, therefore, feels bound, as a matter of treaty interpretation, to pronounce in favor of the line as mapped in the disputed area.”⁶³

It is a principle of international law that *dispositif* or operative provisions and the reasons in the reasoning portion of the judgment have binding force so long as the reasons do not go beyond the scope of the operative part.⁶⁴ In its first case, *Pious Fund Case* (1902), the Permanent Court of Arbitration established this rule of international law. It held that:

“...all parts of the judgment or decree concerning the points debated in the litigation enlighten and mutually supplement each other, and .. they all serve to render precise the meaning and the bearing of the *dispositif* [operative portion of the judgment] and to determine the points upon which there is *res judicata* and which thereafter cannot be put in question.”⁶⁵

This international law rule was also articulated by the predecessor to the ICJ, the Permanent Court of International Justice, in *Polish Postal Service in Danzig case* (1925) where it held that it is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. In that case, the Permanent Court said: “it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned”⁶⁶ The Permanent Court also “recognized that it was impossible to vote upon the operative part of a decision and not upon the grounds thereof; for, under Article 56 of the Statute, the statement of reasons and the operative clauses are regarded an indivisible whole.”⁶⁷

⁶² Letter of 21 July 2008 of the Permanent Representative of Thailand to the President of the UN Security Council, S/2008/474, 6.

⁶³ I.C.J Reports 1962 (Merits), 36.

⁶⁴ MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 161-163 (1996).

⁶⁵ “Decision of Permanent Court of Arbitration in the Matter of the Pious Fund, October 14, 190,” 2 AM. J. INT’L L. 900 (1908); see also Michael Reisman, *The Breakdown of the Control Mechanism in ISCID Arbitration*, DUKE L. J. 800 (Sept. 1989).

⁶⁶ *Permanent Court of International Justice, Series B, No.11* (1925), (“PCLJ”) 29-30.

⁶⁷ PCLJ, SERIES E, No. 9, 174.

In the words of the ICJ President in South West Africa case “the *dispositif* cannot be disemboweled from the Court’s opinion as expressed in its motivation [reasoning part] [because] the content of the judgment must be obtained from reading together the decision and the reasons upon which it is based.”⁶⁸

This approach was adopted by the ICJ in the United Kingdom v. French Case.⁶⁹ The United Kingdom filed an Interpretation Application with the Court of Arbitration of the Court’s decision of 30 June 1977 because there were inconsistencies between the ICJ’s reasoning (which contained the coordinates defining the boundary in question) and *dispositif* (containing the application principles of law to the case). The parties differed on the scope of *res judicata*. France argued that *res judicata* only contained in the *dispositif*. The UK challenged the *res judicata* principle by pushing to have the reasoning part prevail over the *dispositif*. It “identified passages of the body of the Decision itself constitute essential elements of the Award which equally have the authority of *res judicata* and... form an integral part of the Court’s response to the question specified in Article 2 - issue put before the Court.”⁷⁰ The ICJ upheld the UK’s contentions. It said that it is

“...well settled that in international proceedings the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not its reasoning. In the opinion of the Court, it is equally clear that having regard to the close links that exist between the reasoning of a decision and the operative provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*.”⁷¹

That is true because the provisions in the operative part often are the non-self-explanatory result of a compromise which has been reached only by formulating the operative part in vague and imprecise terms.⁷²

In Continental Shelf Case (Tunisia vs. Libya), Tunisia attempted to take advantage of the difference between the Court’s reasoning and the *dispositif*: the former suggested coordinates for a change in direction of the Tunisian coast, the latter did not include

⁶⁸ *South West Africa*, I.C.J Reports (1966), 56.

⁶⁹ Decision of 14 March 1978 on *Delimitation of the Continental Shelf* (Interpretation of the Decision of 30 June 1977, Court of Arbitration (UK v. France), 54(6), *ILLR*. (1978) para. 28.

⁷⁰ *Supra*, note 68, para. 22.

⁷¹ *Supra* note 68, para. 28. More recent *Genocide Case*, the Court reaffirmed the interdependence of the two parts by saying that: “a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it”, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment of 26 February 2007, para 126.

⁷² Stephan Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 *EUR. J. INT’L L.* 603 (2007).

those coordinates. Tunisia therefore argued that the coordinates did not form part of what was *res judicata*. The Court held that the whole judgment was binding, not just the *dispositif*:

“The terms of the Court’s Judgment are definitive and binding... They stand, not as something proposed to the Parties by the Court, but as something established by the Court.”⁷³

However, following the *Continental Shelf Case*, if the “express findings” of the ICJ in the reasoning portion constituted a condition essential to its decision, they are to be included among the points settled with binding force.⁷⁴ Thus without the considering the “express findings” in the Proceedings, including regarding the validity of Annex I and its being an integral part of the Treaty, then the pronouncement of the ICJ in the operative provisions that “The Temple of Preah Vihear is situated in territory under sovereignty of Cambodia” would make no sense without consideration of how the ICJ reached this conclusion.⁷⁵ The interlocking of the express findings and operative provision is essential, as the ICJ held that: “To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two states.”⁷⁶

It would therefore be incorrect to suggest that the operative parts are alone binding in an ICJ judgment. Contrary to Thailand’s assertions, the express findings in the reasoning part of the judgment in the Proceedings are not merely part of the reasoning; rather they are themselves conclusive findings of the ICJ.⁷⁷

7. The location of the land boundary has been determined in international law

As discussed above, the location of the Cambodian-Thai boundary, especially the Temple section as depicted on Annex I, has been determined by international law. The finality and stability of the boundary were confirmed as such by the ICJ in the Proceedings 1962.⁷⁸ Further in 2000, Thailand has recognized Annex I⁷⁹ and thus the

⁷³ Application for Revision and Interpretation of the Judgment of 24 February 1982 in the *Case concerning the Continental Shelf (Tunisia/Lybia)*, Judgment of 10 December 1985, para. 48.

⁷⁴ Decision of 14 March 1978, 54 I.L.R. (1978), 171.

⁷⁵ I.C.J Reports (1962) 32; also Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 69 UTAH L. REV. 706 (2007).

⁷⁶ I.C.J Reports (Merits), 14.

⁷⁷ “Judgment of May 26, 1961 and June 15, 1962, Case Concerning the Temple of Preah Vihear,” 11 *I.C.L.Q.*, (Oct., 1962), 1199.

⁷⁸ Hyung Lee, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL’Y J. 170-176 (2005); Peter Radan, *Post-Session International Border: A*

location of the boundary thereon and now seeks to resile from this acceptance.

A. Notification of compliance.

The 1962 Note stated that Thailand expressed “its disagreement with the... decision of the Court on the ground that, in its opinion, the decision goes against the express terms of the relevant provisions of the 1904 and 1907 treaties and is contrary to the principles of law and justice.” The 1962 Note went on to state a reservation:

“[i]n deciding to comply with the decision of the International Court of Justice in the case concerning the Temple of Phra Viharn, His Majesty's government desires to make an express reservation regarding whatever rights Thailand has, or may have in future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process, and to register a protest against the decision of the International Court of Justice awarding to the Temple of Phra Viharn to Cambodia”

Members of the current Thai Parliament have argued that the 1962 Note is valid permanently in accordance to Article 61 of the Statute of the ICJ.⁸⁰

It is interesting to note that when the UN Secretary General and Cambodian Permanent Representative at the UN originally received the 1962 Note, no map was annexed and there was no suggestion in the 1962 Note that it contained an annex. A map, as shown in figure 2 below, only appeared as an annex to the 1962 Note when it was later published in the *Foreign Affair Bulletin*⁸¹ The document was not published in UN official documents, nor does it exist in the UN databases.⁸² The reason that the map

Critical Analysis of the Opinions of the Badinter Arbitration Commission, 24 MELB. U. L. REV. 59 (2000); Peter Trooboff, Haihua & Eric Keong, *Treaties - Treaty of Peace Between Egypt and Israel - Demarcation of Internationally Recognized Boundaries - Arbitration of Dispute - Taba*, 83 AM. J. INT'L L. 595 (1989); Lung-chu Chen & W.M. Reismant, *Who Owns Taiwan: a Search for International Title?*, 81 YALE L. J. 673, (1972); Thomas Donovan, *Challenges to the Territorial Integrity of Guyana: a Legal Analysis*, 32 GA. J. INT' & COMP. L. 714 (2004); Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 397, 402 (1996).

⁷⁹ Article of 1(c) of the *Memorandum of Understanding Between the Government of Kingdom of Cambodia and the Government of Kingdom of Thailand on the Survey and Demarcation of Land Boundary* (14 June 2000).

⁸⁰ Supalak Ganjanakundee, “Preah Vihear Controversy a Hot Topic in No-confidence,” *The Nation*, 25 June 2008; Abhisit Vejjajiva. Now Prime Minister of Thailand, “*Thailand never accepted the map that Cambodia represented to the World Court in 1962 and that Thailand intended to seek the return of Preah Vihear ‘when the opportunity arose’*” Bertil Lintner, *Temple Furor Exposes Delicate Ties*, FAR EASTERN ECONOMIC REV. 39, Jul. & Aug.(2008). The Note has been used to as the guidance for the ongoing negotiations. Supalak Ganjanakundee, “Common Sense Should decide the issue of Preah Vihear Temple, unless it becomes politicized,” *THE NATION*, 2 July 2008.

⁸¹ 1(6) June-July (1962) FOREIGN AFFAIR BULLETIN, Ministry of Foreign Affairs, Thailand, 130.

⁸² Results of searches by the author and advice by the officials of UN References Unit, Dag Hammarskjöld Library, 12 August 2008.

was not annexed was because the map and the text of 1962 Note contradicted each other.⁸³ When Cambodia later received a similar map, it rebuffed that the map “was in complete disagreement with the Court’s decision.”⁸⁴

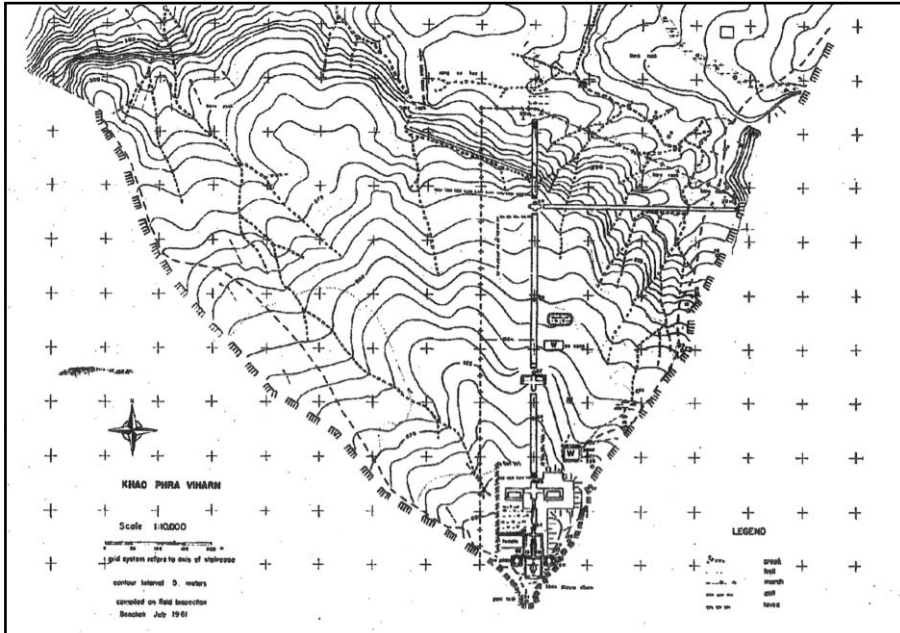


Figure1. The caption reads “Map representing the area where the temple of Phra Viharn is situated over which Thailand has her sovereignty.” Source: Ministry of Foreign Affairs, Bangkok Thailand, 1962.

Thailand has not fully complied with the judgment of the ICJ.⁸⁵ Legally, if the 1962 Note was meant to serve as a demand for revision, it is “vague,” to use the word of the

⁸³ The implication of the statement in the 1962 Note that “the decision goes against the express terms of the 1904 and 1907 treaties and is contrary to the principle of international law and practice” is this: Traditionally, where the textual terms of the treaty differed with boundary map, the text of the treaty prevailed, as Thailand was advised by its counsel: *supra*, note 54, at 798, but the I.C.J in the Temple case accepted the map over the text of the Treaty.

⁸⁴ Aide Memoire *Sur Les Relations Khmero-Thaïdaises/Aide Memoire on Khmero-Thai Relations* (Oct. 1962), 75.

⁸⁵ Alastair Lamb, *Asian Frontiers. Studies in a Continuing Problem* (1968) 5; Nejib Jibril, *The Binding Dilemma: From Bakasi to Badme - Making State Comply with Territorial Decisions of the International Judicial Bodies*, 19 AM. U. INT’L L. REV. 680 (2004) ; Gary Scott and Craig Carr, *The I.C.J and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT’L L. 63-64 (1987); *CAMBODIA: GENERAL SURVEY, NATIONAL INTELLIGENCE SURVEY, NIS 43A GS* (April 1972), 46.

US Statement Department.⁸⁶ It did not state purpose of it, i.e. demand a revision under Article 61 of the ICJ Statute or request an interpretation under Article 60 of the Statute. Further, it is invalid because it was not addressed to the court (the ICJ) which rendered the judgment.⁸⁷ In any event, the 10 year statute of limitations for making a revision application has long ago expired.⁸⁸

8. Redress for failure to comply and State responsibility

By sending its armed forces to attack and invade region of the Temple on 15 July 2008⁸⁹ and occupy Cambodian territory, Thailand violated Article 2(4) of the Charter of United Nations. Member states have the “duty to give effect to the Judgment of the Court’ by voiding superficial implementation or circumventing the Judgment.”⁹⁰ Article 94 (1) of Charter of United Nations provides that “Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”⁹¹ Article 94(2) of the same Charter stipulates “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”⁹² By deliberately avoiding to comply fully with ICJ judgment, Thailand has committed a breach of its undertaking under this provision the effect of which is a violation of the Charter of United Nations.⁹³ Cambodia has recourse to the Security Council for an appropriate measures.

⁸⁶ U.S. DEPARTMENT OF STATE, INTERNATIONAL BOUNDARY STUDY NO. 40 (REVISED), CAMBODIA-THAILAND BOUNDARY, (Nov. 23, 1972), 2.

⁸⁷ Durward Sandifer, *Evidence before International Tribunals* (1975), 455; see also Advisory Opinion P.C.I.J. SERIES. B, No. 9 (1927) , at 22.

⁸⁸ Generally, D. W. Bowett, *Res Judicata and the Limits of Rectification of Decisions by International Tribunal*, 8 Pt.3 AFR. J. INT’L & COMP. L. 577-591 (1996); KAIYAN KAIKOBAD, INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISION (2007); SHABTAI ROSENNE, INTERPRETATION, REVISION AND OTHER RECOURSES FROM INTERNATIONAL JUDGMENTS AND AWARDS (2007).

⁸⁹ Letter of 18 July 2008 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council (S/2008/470), 2; Letter of 28 July 2008 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council (S/2008/917), 1-2; Letter of 15 October 2008 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council (S/2008/653).

⁹⁰ Gabcikovo Nagymaros Project 1 I.C.J Report (1997) para. 141-74; KAL RAUSTIALA & ANNE-MARIE SLAUGHTER, INTERNATIONAL LAW, INTERNATIONAL RELATIONS AND COMPLIANCE, in HANDBOOK OF INTERNATIONAL RELATIONS 538-9 (WALTER CARLSNAE ed., 2002); Colter Paulson, *Compliance with Final Judgment of the International Court of Justice*, 98 Am. J. Int’ L. 436 (July 2004).

⁹¹ The Charter of United Nations, reprinted in D.J HARRIS, CASE AND MATERIALS ON INTERNATIONAL LAW, (1998), 1064.

⁹² *Id.*

⁹³ N. SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 41, (1989); M. BULTERMAN, M. KUIJER, H. SCHERMERS, COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS, 26-27 (1996).

Since “the unlawful occupation of part of the territory of another state or stationing armed forces in another state without its consent” is a wrong act⁹⁴ Cambodia also claim for reparation for moral and material injuries caused in the form of restitution, compensation.⁹⁵

9. The Memorandum of Understanding of 2000 on Demarcation

Article 1 of the Treaty relates to delimitation⁹⁶ and Article 3 of the Treaty relates to demarcation.⁹⁷ The boundary had been delimited and (albeit sparsely) demarcated.⁹⁸

Negotiations to resolve the dispute and to set up a Cambodian-Thai Mixed Commission started in 1954.⁹⁹ At the end of 1958, the negotiations broke down over the proposed terms of reference to be used by the Mixed Commission.¹⁰⁰ The apparent reason of the breakdown was:

“Thailand accepted ‘the treaties and the Protocols’ annexed, but would not accept the use of the words ‘documents annexed,’ because these words had a wider meaning and might refer to a sketch which has no accuracy. Cambodia insisted on the ‘documents annexed’ ... Therefore no agreement could be reached”¹⁰¹

The negotiations restarted in 1997.¹⁰² In July 1999, the negotiations stalled because Thailand insisted all the documents of the 10-year survey and demarcation works

⁹⁴ J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY* 136 (2002). See generally M. POLI & G. NESI (EDS), *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* (2004).

⁹⁵ *Id.* at 21L; See also Enrico Milano, Territorial Disputes, Unlawful Territorial Situations and State responsibility,” in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* (2004).

⁹⁶ “Delimitation...means the laying down - not the laying down on the ground, but the definition on paper, either in words or on a map - of the limits of a country,” J. Trotter, *The Science of Frontier Delimitation*, ROYAL ARTILLERY J. (1897), cited in D. Ruschworth, *Mapping in Support of Frontier Arbitration: Delimitation and Demarcation*, IBRU BOUNDARY AND SECURITY BULLETIN 61 (1997).

⁹⁷ “Argument of James Nevin Hyde, Counsel of the Government of Thailand,” I.C.J Reports (Pleadings), 272. “...demarcation [means] the physical marking of the boundary on the ground,” Ruschworth, *supra* note 96.

⁹⁸ VICTOR PRESCOTT, *POLITICAL FRONTIERS AND BOUNDARIES* 236 (1987) H.J. COLLIER, D. PRESCOTT & V. PRESCOTT, *FRONTIERS OF ASIA AND SOUTHEAST ASIA* 59 (1977).

⁹⁹ Khien Theeravit, *Thai-Kampuchean Relations: Problems and prospects*, 22 *ASIAN SURVEY* 6, 567 (1982).

¹⁰⁰ Michael Leifer, *Cambodia and Her Neighbors*, 34 *PACIFIC AFFAIRS* 4, 365-366 (1961-1962); Letter of 8 December 1958 of the Permanent Representative of Thailand to the President of Secretary General (S/4126); Letter of 29 November 1958 from the Permanent Representative of Cambodia to Secretary General. (S/4121); SARIN CHHAK, *LA FRONTIÈRE KHMÉRO-THAËLANDAISE, THÈSE DE DROIT PUBLIC, DACTYLOGRAPHIÉE* (1966), 60.

¹⁰¹ *Relations Between Thailand and Cambodia*, Ministry of Foreign Affairs, Bangkok, Thailand (1959). When it transpired that Thailand's strategy “to drag out the negotiation past May 1960 when she would not be bound by the Court's jurisdiction in disputes where other party had accepted the competence of the Court under Article 36 of the its statute,” Michael Leifer, *Cambodia and Her Neighbors*, 34 *PACIFIC AFFAIRS* 4, 366 (1961-1962).

starting from 1909 to be used by the Mixed Commission should be the basis for the boundary demarcation. Cambodia insisted that only the maps annexed to the Treaty and the Treaty of 1907 and documents relevant to the application of these treaties be used as the basis¹⁰³.

Cambodia's insistence prevailed. On 7 June 2000, a MoU was signed *ad referendum*. In a joint press release, the parties explained the purpose of the MoU:

"MoU aims at surveying and demarcating the land boundary between the two countries and shall be jointly conducted on the basis of Franco-Siamese Convention of 1904 and the Treaty of 1907 and Protocol annexed to the said Agreements and the Maps of the Franco-Siamese Commission of Delimitation."¹⁰⁴

On 14 June 2000 the MoU was signed by both States.¹⁰⁵ The MoU is an agreement to demarcate the boundary between the two states. In addition to the survey and demarcation to be jointly conducted in accordance with the Treaty and the Treaty of 1907, Article 1(c) stipulates that reliance is also to be placed on:

"Maps which are the results of demarcation works of Commissions de Delimitation de la Frontiere entre l'Indochine et le Siam... set up under the Convention of 1904 and the Treaty of 1907 between France and Siam, and other documents relating to the application of the Convention of 1904 and the treaty of 1907 between France and Siam."¹⁰⁶

Evidently, Thailand now accepted the terms of reference, including accepting the "maps" (including Annex I) of French-Siamese Mixed Commission. The MoU is a binding international agreement.¹⁰⁷

Thailand now is saying that it does "not recognize [the Annex I] under the

¹⁰² "Borders," BANGKOK POST (May 28, 1997).

¹⁰³ Discussion between the author with H.E Var Kimhong, Adviser to the Royal Government in Charge of State Border Affairs of Cambodia, in 2006; and Saritdet Marukatat; "Drawing a Very Fine Line," BANGKOK POST (July 8, 1999).

¹⁰⁴ *Joint Press Release of The Cambodian-Thai Joint Commission on Demarcation for land Boundary, Phnom Penh, Cambodia* (June 7, 2000).

¹⁰⁵ "Thai-Cambodian Relations," BANGKOK POST (June 14, 2000); "Cambodia-Thailand Cooperation Boosted," Press Release by Ministry of Foreign Affairs repeated joint press release of 7 June 2000.

¹⁰⁶ *Memorandum of Understanding Between the Government of Kingdom of Cambodia and the Government of Kingdom of Thailand on the Survey and Demarcation of Land Boundary*, (June 14, 2000), 2.

¹⁰⁷ Generally & McNeil, Memorandum of Understanding, 88 AM. J. INT'L L. (1994) D.J. Harris, Case and Materials on International Law, (1998) 771; YEARBOOK OF INTERNATIONAL LAW COMMISSION II (1966) 188; Jerry Z. Li, *The Legal Status of Three Sino-US Joint Communiqués* 5 CHINESE J. INT'L L. (2006) 617. A bilateral Meeting Between Cambodia and Thailand. Hor Hamhong: If Thailand Adheres to the MoU, Solving the Boundary Issues is no Difficulties," KOHSANTAPHEAP NEWSPAPER (Mar. 2, 2009).

Memorandum of Understanding of 2000 as the basis for demarcation.”¹⁰⁸

10. Conclusion

By the Proceedings, the ICJ determined conclusively the boundary between Cambodia and Thailand, including the area surrounding the Temple. Thailand has accepted the ICJ decision in the Proceedings and is obligated under international law to comply fully with that judgment. It has further accepted under the MoU that demarcation will proceed on the basis of Annex I, among other documents and maps. Thailand’s current conduct could constitute a threat to the world peace, Cambodia should seek appropriate measures and enforcement of the judgment in the Proceedings under Article 94 of the UN Charter.¹⁰⁹

¹⁰⁸ Letter of 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council, S/2008/657, 2. This letter is a reply to Cambodia’s letter of 15 October 2008 to the President of Security Council, S/2008/653.

¹⁰⁹ Instead of seeking enforcement of the I.C.J judgment under Article 94 of the UN Charter, Cambodia seems to want to go to an international court again to solve the current boundary disputes should bilateral negotiations fail: Aide Memoire: *Cambodia-Thailand Boundary Issue Settlement*, The Royal Government of Cambodia (Oct. 13, 2008) 3.