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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2011

Audience publique

tenue le mardi 31 mai 2011, à 10 h 30, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire relative à la* Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande)* (Cambodge c. Thaïlande)**

COMPTE RENDU

YEAR 2011

Public sitting

held on Tuesday 31 May 2011, at 10.30 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning the* Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* (Cambodia *v.* Thailand)**

VERBATIM RECORD

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
MM. Guillaume
Cot, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
	Judges *ad hoc*	Guillaume
		Cot
	Registrar	Couvreur

Le Gouvernement du Royaume du Cambodge est représenté par :

S. Exc. M. Hor Namhong, vice-premier ministre et ministre des affaires étrangères et de la coopération internationale,

comme agent ;

S. Exc. M. Var Kimhong, ministre d'Etat,

comme agent adjoint ;

S. Exc. M. Long Visalo, secrétaire d'Etat au ministère des affaires étrangères et de la coopération internationale,

S. Exc. M. Hem Saem, ambassadeur extraordinaire et plénipotentiaire du Royaume du Cambodge auprès du Royaume des Pays-Bas,

M. Sarun Rithea, assistant du vice-premier ministre,

M. Hoy Pichravuth, assistant du vice-premier ministre,

comme conseillers ;

M. Jean-Marc Sorel, professeur de droit international à l'Université Paris I (Panthéon-Sorbonne),

sir Franklin Berman, K.C.M.G., Q.C., membre du barreau d'Angleterre, membre de la Cour permanente d'arbitrage, professeur invité de droit international à l'Université d'Oxford et à l'Université de Cape Town,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Eversheds LLP (Paris),

comme conseils ;

M. Guillaume Le Floch, professeur à l'Université de Rennes 1,

Mme Amal Alamuddin, membre des barreaux d'Angleterre et de New York,

Mme Ivrea Degeaive.

The Government of the Kingdom of Cambodia is represented by:

H.E. Mr. Hor Namhong, Deputy Prime Minister and Minister for Foreign Affairs and International Co-operation,

as Agent;

H.E. Mr. Var Kimhong, Minister of State,

as Deputy Agent;

H.E. Mr. Long Visalo, Secretary of State at the Ministry of Foreign Affairs and International Co-operation,

H.E. Mr. Hem Saem, Ambassador Extraordinary and Plenipotentiary of the Kingdom of Cambodia to the Kingdom of the Netherlands,

Mr. Sarun Rithea, Assistant to the Deputy Prime Minister,

Mr. Hoy Pichravuth, Assistant to the Deputy Prime Minister,

as Advisers;

Mr. Jean-Marc Sorel, Professor of International Law at the University of Paris I (Panthéon-Sorbonne),

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Ms Ivrea Degeaive.

Le Gouvernement du Royaume de Thaïlande est représenté par :

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comme agent ;

M. Ittiporn Boonpracong, directeur général du département des traités et des affaires juridiques du ministère des affaires étrangères,

comme agent adjoint ;

S. Exc. M. Kasit Piromya, ministre des affaires étrangères ;

M. Chavanond Intarakomalyasut, secrétaire auprès du ministre des affaires étrangères, ministère des affaires étrangères,

S. Exc. M. Asda Jayanama, conseiller auprès du ministère des affaires étrangères, président de la commission mixte thaïlando-cambodgienne sur la démarcation de la frontière terrestre (partie thaïlandaise), envoyé spécial de la Thaïlande chargé des questions relatives au Temple de Phra Viharn,

M. Theerakun Niyom, secrétaire permanent du ministère des affaires étrangères,

M. Thani Thongphakdi, directeur général du département de l'information du ministère des affaires étrangères,

le général Nopphadon Chotsiri, directeur général du service géographique royal thaïlandais, quartier général des forces armées du Royaume de Thaïlande,

M. Chukiert Ratanachaichan, secrétaire général adjoint du bureau du conseil d'Etat, cabinet du premier ministre,

M. Chatri Archjananan, directeur de la division des affaires juridiques au département des traités et des affaires juridiques du ministère des affaires étrangères,

Mme Wasana Honboonheum, directrice de la division des frontières au département des traités et des affaires juridiques du ministère des affaires étrangères,

comme conseillers ;

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat,

M. Donald McRae, professeur à l'Université d'Ottawa, titulaire de la chaire Hyman Soloway, membre de la Commission du droit international, membre du barreau de l'Ontario,

The Government of the Kingdom of Thailand is represented by:

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as Agent;

Mr. Ittiporn Boonpracong, Director-General, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs,

as Deputy Agent;

H.E. Mr. Kasit Piromya, Minister for Foreign Affairs;

Mr. Chavanond Intarakomalyasut, Secretary to the Minister for Foreign Affairs, Ministry of Foreign Affairs,

H.E. Mr. Asda Jayanama, Adviser to the Ministry of Foreign Affairs, Chairman of the Thai-Cambodian Joint Commission on Demarcation for Land Boundary (Thai side), Special Envoy of Thailand on Matters concerning the Temple of Phra Viharn,

Mr. Theerakun Niyom, Permanent Secretary, Ministry of Foreign Affairs,

Mr. Thani Thongphakdi, Director-General, Department of Information, Ministry of Foreign Affairs,

Lieutenant-General Nopphadon Chotsiri, Director-General, Royal Thai Survey Department, Royal Thai Armed Force Headquarters,

Mr. Chukiert Ratanachaichan, Deputy-Secretary-General, Office of the Council of State, Office of the Prime Minister,

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Mr. Thomas Grant, Member of the New York Bar, Senior Research Associate, Lauterpacht Centre for International Law, University of Cambridge,

as Counsel.

The PRESIDENT: Please be seated. The sitting is now open and the Court meets this morning to hear the second round of oral observations on the request for the indication of provisional measures submitted by the Kingdom of Cambodia in the case concerning the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear *(Cambodia* v. *Thailand)*. This morning we shall hear the representatives of Cambodia to whom I shall therefore give the floor. I now invite Professor Jean-Marc Sorel to take the floor.

M. SOREL :

1. Monsieur le président, Mesdames, Messieurs les Membres de la Cour, je vous remercie de me donner de nouveau la parole ce matin, et je le fais cette fois-ci en premier car il me faut *rapidement et préalablement balayer* les arguments présentés hier par nos contradicteurs concernant les mesures conservatoires.

A cet égard, et pour un bon déroulement du processus judiciaire, nous répondrons *effectivement* aux arguments de la Thaïlande, alors que l'agent de cet Etat nous a prévenu hier après-midi, «qu'étant donné les délais qui ont été fixés pour les audiences»[1], il nous faudrait attendre ce soir pour obtenir des réponses complètes à nos arguments présentés hier matin auxquelles nous ne pourrons bien sûr répondre.

2. Concernant les mesures conservatoires demandées, la Thaïlande semble nous dire qu'il n'y a pas d'urgence, pas de préjudice irréparable, pas de risque d'aggravation ou d'extension du différend, ainsi qu'une absence de lien entre les mesures demandées et la requête en interprétation au principal puisqu'il n'y aurait tout simplement pas de demande en interprétation recevable. Sur ce dernier point mon collègue sir Franklin Berman démontrera que cet argument est dénué de tout fondement.

3. Il ne m'appartient donc pas de reprendre tous les points développés hier, mais simplement de revenir sur certains d'entre eux, de les compléter et de les préciser. En reprenant *l'argumentaire de la Thaïlande*, donc en quelque sorte en me plaçant du point de vue de la Thaïlande, cet Etat

[1] CR 2011/14, p. 21, par. 39.

rejetterait toute intervention d'un tiers dans ce différend car le processus bilatéral serait à l'œuvre et garantirait de toute extension du différend et de tout préjudice grave imminent. Consécutivement, toujours en suivant ce raisonnement, à cette absence de risque, aucune urgence n'existerait, d'autant que les incidents qui incitent le Cambodge à réclamer des mesures se situeraient nous dit on, en dehors de la zone concernée par l'arrêt à interpréter. Enfin, ces mesures si elles étaient prononcées seraient, selon la Thaïlande, un préjugement du fond de l'affaire. Voilà *globalement résumé* ce que la Thaïlande nous dit en substance.

Il n'en est rien car nous verrons que les prétendues négociations ne préservent pas de la commission d'un préjudice irréparable (I), que par conséquent l'urgence subsiste (II) d'autant que les mesures demandées se limitent bien à la zone du temple de Préah Vihéar (III), et qu'il ne s'agit nullement d'obtenir un préjugement sur le fond (IV).

4. Mais il doit être clair que l'ensemble de ces points *sont reliés les uns aux autres :* tous se rapportent au caractère urgent de la demande en raison du risque réel et imminent de préjudice irréparable qui pèse sur le temple de Préah Vihéar et sur la population alentour.

I. Une étrange justification à l'absence de préjudice irréparable ou d'extension du différend

5. Le Cambodge doit de nouveau signaler que nous sommes dans une situation inédite. J'ai pu indiquer hier que l'Etat qui a gagné en 1962 est celui qui est obligé de porter l'affaire devant votre juridiction. J'ajoute aujourd'hui — *si l'on en croit la Thaïlande* — que c'est l'Etat qui agresse, donc le Cambodge, qui doit demander des mesures conservatoires. Décidément, la Thaïlande nous donne le tournis.

En effet, la Thaïlande nous a indiqué être en état de légitime défense face aux agressions du Cambodge, je cite les propos de l'agent[2]. Soit. Le Cambodge ne fera pas l'injure à la Cour de citer le très connu article 51 de la Charte des Nations Unies, mais il rappellera quand même que l'Etat agressé peut se défendre «jusqu'à ce que le Conseil de sécurité ait pris les mesures nécessaires pour maintenir la paix et la sécurité internationales».

Or, la Thaïlande non seulement n'a pas saisi le Conseil de sécurité, alors que le Cambodge l'a fait en provoquant une réunion le 14 février 2011, la Thaïlande n'a pas saisi la Cour

[2] Voir, notamment, l'intervention de l'agent de la Thaïlande (CR 2011/14, p. 15).

internationale de Justice, alors que le Cambodge l'a fait, la Thaïlande n'a pas donné pour le moment suite au processus de médiation régionale de l'Association des nations d'Asie du Sud-Est, alors que le Cambodge l'a fait, la Thaïlande n'a pas souhaité donner suite à la réunion de l'Unesco sous les auspices de sa directrice générale du 25 au 27 mai dernier, alors que le Cambodge souhaite le faire.

Enfin, la Cour a pu se rendre compte dans le processus qui nous concerne aujourd'hui, que la Thaïlande invoque bien des combats, des victimes, mais refuse des mesures conservatoires car elle estime la Cour incompétente *prima facie* et les mesures inutiles.

6. Tous ces refus sont justifiés par une seule ligne de défense : *la Thaïlande prétend poursuivre un processus bilatéral* dans lequel elle place tous ses espoirs et qui pourtant, depuis plusieurs années, ne connaît que reports et reculades. C'est un argument avancé devant toutes les instances internationales ou régionales pour, en quelque sorte, *les faire patienter*.

Si l'on se penche sur ce processus bilatéral dans lequel la Thaïlande place tous ses espoirs, là encore, *que de miracles depuis peu de temps*. Rappelons que ce processus a été initié, comme il a été rappelé hier, par l'accord du 14 juin 2000. Ce processus n'a pas pour objectif de délimiter la frontière, mais bien de la «démarquer» et de l'«aborner». Rappelons que celle-ci — cette frontière — a déjà été délimitée, ce que la Cour a pour le moins reconnu lors de son arrêt de 1962 pour placer le temple du côté du Cambodge. Car, quoi qu'on en dise, et quelles que soient les discussions sur la distinction entre conflits territoriaux et conflits frontaliers, chacun reconnaîtra qu'il faut bien, à un moment donné, fixer une limite pour attribuer un territoire. C'est tout simplement pour fixer précisément cette limite, autrement dit pour démarquer la frontière que l'accord du 14 juin 2000 existe et il n'est nul besoin de citer dans ce cadre l'arrêt du 15 juin 1962 puisque les instruments juridiques cités par cet accord sont identiques à ceux utilisés par la Cour et ne peuvent donc faire parvenir les Etats qu'à la même conclusion.

Selon les informations données par le professeur McRae[3], dans le cadre de ce processus bilatéral, l'acceptation par le parlement thaïlandais des procès-verbaux des réunions de la commission mixte des frontières de 2008-2009 se serait débloquée le 1er mai dernier, alors qu'il

[3] CR 2011/14, p. 53–54, par. 38.

faut attendre plus de trois ans pour que finalement la cour constitutionnelle thaïlandaise — je tiens à le préciser — décide que ces procès-verbaux ne relèvent pas de la compétence du parlement. Le processus reste donc toujours incertain. Ceci s'est passé le 1er mai dernier. On peut s'en féliciter, au même titre que le cessez-le-feu accepté le jour même du dépôt de la requête, à savoir le 28 avril.

Beaucoup d'heureux hasards pour que disparaissent, comme par enchantement, toutes les traces du différend.

Décidément, l'agneau — puisqu'il faut bien reprendre la fable initiée hier par la Thaïlande — prend plaisir à se faire dévorer par le loup. Et il semble rechigner clairement à faire appel à l'entraide du «troupeau».

C'est décidément bien une fable.

7. Pourtant, la Thaïlande prétend être un pays pacifique imprégné des principes de paix et de justice. Nul n'en doute, mais il est alors permis de se demander pourquoi un Etat membre actif de la communauté internationale — respecté — à une époque où les moyens de régler pacifiquement les différends sont nombreux et où les dénonciations de tout acte d'agression peuvent être immédiatement relayées, bref, pourquoi dans une telle situation un Etat qui se dit agressé ne réagirait-il pas ?

Il y a là une logique qui échappe au Cambodge même si, au fond, il la comprend parfaitement.

En revanche, c'est une sorte de théorie du complot qui est agitée par l'agent de la Thaïlande. L'accusation d'attaques du Cambodge qui auraient servi à justifier une demande en indication de mesures conservatoires — c'est ce que l'on nous a expliqué hier — est tout simplement saugrenue. Il ne s'agit plus d'une fable, nous sommes proches de la malveillance. Le Cambodge est désolé de rappeler que la requête et la demande en indication de mesures conservatoires sont bien du 28 avril, comme la lettre insérée dans le dossier des juges le prouve. Vous la trouverez à l'onglet no 14. Une simple erreur de date rapidement rectifiée ne méritait pas de mettre en branle un processus intellectuel digne d'un roman policier.

Le filet de sécurité que la Thaïlande prétend instaurer à l'aide de cette liaison bilatérale dont on connaît les multiples failles ou blocages ne saurait donc, pour le Cambodge, constituer la

garantie de l'absence d'un préjudice irréparable aux droits que le Cambodge souhaite voir protéger par la Cour.

II. Une urgence toujours présente

8. Les mesures ne seraient pas justifiées, selon nos contradicteurs, car aucun incident ne se serait produit dans la zone du temple depuis février 2011. Il n'y aurait donc pas d'urgence à indiquer des mesures ; c'est en substance ce que l'on nous a expliqué. Il serait peut-être plus simple de dire que, par chance, aucune victime n'est à déplorer depuis cette date dans la zone du temple car des incidents ont bien eu lieu, comme le professeur McRae l'a lui-même indiqué en citant un incident armé du 26 avril 2011, soit deux jours avant la saisine de la Cour. Le Cambodge a d'ailleurs réagi à cet incident en signalant le jour même la violation de son espace aérien par la Thaïlande, ainsi que des tirs d'artillerie lourde, notamment dans la région du temple de Préah Vihéar. Et ceci est spécifié[4].

Et ce que le Cambodge a souhaité exprimer hier, c'est que ces incidents peuvent rapidement dégénérer, y compris dans la zone du temple, sans qu'il paraisse nécessaire de devoir invoquer des incidents graves le jour même du dépôt de la demande. A cet égard, le calcul auquel s'est livré le professeur McRae est intéressant : sept jours auraient séparé les incidents et la demande de mesures dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria*, alors que six jours auraient séparé les incidents de la demande de mesures dans l'affaire opposant la Géorgie à la Fédération de Russie[5]. Le Cambodge ne souhaite nullement établir une sorte de «record» en la matière mais est obligé de constater que deux jours seulement séparent les derniers incidents dans la zone du temple de Préah Vihéar et la demande en indication de mesures conservatoires. Au surplus, ces incidents sont la suite d'une trop longue série d'incidents et rien n'indique que la situation ne dégénérera pas de nouveau. On nous a expliqué également hier que les mesures sollicitées ne se situeraient pas dans la zone du temple de Préah Vihéar.

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[4] Note de protestation du ministre des affaires étrangères et de la coopération internationale, n° 744 MFA-IC/CL4, 26 avril 2011.

[5] CR 2011/14, p. 52, par.32.

III. Les mesures sollicitées se situent dans la zone du temple de Préah Vihéar

9. Concernant ces incidents qui se situeraient donc en dehors de la zone du temple, l'impression étrange cette fois-ci est que les plaidoiries du Cambodge hier matin n'ont pas été écoutées. Il a en effet été clairement rappelé que ces incidents en dehors de la zone du temple, notamment ceux se situant, bien réels, dans d'autres endroits de la frontière à 150 kilomètres à l'ouest, ne constituent nullement l'objet des mesures demandées à votre Cour. Il a simplement été précisé que les faits constituent un ensemble et qu'ils sont liés — en clair, que la Thaïlande lance une sorte de vaste offensive pour contester militairement l'ensemble de la frontière —, mais que le Cambodge ne demande des mesures que dans la zone du temple.

Les droits dont le Cambodge demande la protection se situent bien dans la zone du temple et concernent bien le patrimoine culturel et spirituel que représente le temple, ainsi que le préjudice que pourrait subir le Cambodge à travers les atteintes à sa souveraineté, son intégrité territoriale et la survie de sa population.

Le Cambodge ne sait comment l'exprimer plus simplement et plus clairement. Enfin on nous affirme que les mesures conservatoires seraient une forme de préjugement du fond, argument somme toute assez classique.

IV Les mesures conservatoires comme préjugement du fond

10. Les mesures conservatoires seraient, selon la Thaïlande, le moyen d'obtenir ce que le Cambodge ne pourrait obtenir au fond en préjugeant ce que votre juridiction va dire. D'une part, c'est faire peu de cas du travail de votre juridiction et supposer qu'elle tomberait ainsi dans une sorte de «piège», d'autre part, les mesures demandées par le Cambodge ont strictement pour objectif de protéger ses droits en attendant que la Cour se prononce au fond. Le Cambodge ne cherche pas à obtenir un jugement provisionnel lui adjugeant une partie des conclusions de sa requête[6]. Dans le cadre de sa demande en indication de mesures conservatoires, le Cambodge ne demande que le retrait des troupes et l'arrêt des hostilités, autrement dit préserver ses droits en attendant que la Cour tranche au fond la contestation qui l'oppose à la Thaïlande sur l'interprétation de l'arrêt de 1962. Il est clair, pour le Cambodge, que ces demandes sont bien liées

[6] Affaire relative à l'*Usine de Chorzów (indemnités) (mesures conservatoires), ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12*, p. 9 et suiv.

à l'instance principale comme ceci fut amplement démontré hier — il ne me semble pas nécessaire à l'instant d'y revenir —, mais il est tout aussi clair que le Cambodge souhaite simplement protéger ses droits pour que la Cour se prononce dans la sérénité, sans nullement préjuger le fond. Le Cambodge le voudrait-il qu'il lui serait bien difficile d'obtenir un tel résultat.

Voilà brièvement résumées, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, quelques remarques en réponse aux arguments présentés hier après-midi par nos contradicteurs. Je vous remercie de votre attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à mon collègue, sir Franklin Berman.

The PRESIDENT: I thank you, Professor Jean-Marc Sorel, for your presentation. I now invite Sir Franklin Berman to the floor.

Mr. BERMAN:

1. Mr. President, Members of the Court, these proceedings are on a request for the indication of provisional measures of protection, and Professor Sorel has just laid out for the Court exactly why the present circumstances both justify and require the measures Cambodia has requested. Our opponents, however, have not stopped at questioning those measures — which is of course, their right to do — but have tried to convince the Court that it has no competence at all even to consider those measures, because Cambodia's underlying Request for interpretation is manifestly ill-founded, and it is that claim that I must now address.

Cambodia's rights derive from a judgment

2. The Court has rightly limited the time allowed to each Party for its reply, so I will make matters as simple as I can. I can't respond, Mr. President, on every point to the torrent of argumentation with which the Court was deluged yesterday, and indeed there is no call for me to do so, given how deeply our opponents tried to delve into the merits — without much obvious regard for the injunction in Practice Direction XI of which you reminded us, Mr. President. I will not follow them down that route, but confine myself strictly to the principle that an applicant for provisional measures is not required to establish the substantive merits of its case at that stage, but only to show that the rights that are affected are "plausible" — or, as Judge Greenwood put it in

Costa Rica v. *Nicaragua* "arguable" — in other words that there are sufficient indications that such rights exist, even though the opposing Party may challenge them. Our opponents were all too prone yesterday to brush aside the fact that Cambodia's rights derive from a judgment of the Court; of course they do, this is a request for interpretation and I make no apology for insisting on that. A request for interpretation is based on a judgment. And a judgment of the Court establishes rights for the successful Party; that is its whole point. There is no room left for argument as to whether Cambodia's rights *exist*, only as to whether there is a real dispute over their interpretation.

3. I propose to organize my remarks, then, around three simple questions:

A. Is there a dispute?

B. Is it about the meaning and scope of the Judgment?

C. Can the issue be raised now?

1. Is there a dispute?

4. I start with the existence of a dispute. The thrust of Thailand's argument on jurisdiction is that there is no dispute. You were told: "no dispute, no jurisdiction". What emerges from Thailand's *own pleadings*, however, is in fact confirmation that a dispute over the meaning and scope of the 1962 Judgment does exist. Let me give you one concrete example out of many. Professor Pellet says that the second paragraph of the *dispositif* of the Judgment, the paragraph requiring the withdrawal of Thai forces from the area around the Temple, "impose[] à la Thaïlande des obligations *ponctuelles et instantanées*"[7]. But, Mr. President, Cambodia, in its Request, asks the Court to say whether this obligation to withdraw is in fact *continuous and permanent* because it is the consequence of the fact that a State should not violate the territorial sovereignty of another State. In Thailand's view, and again I'm citing from the transcript, "il suffit de lire le texte de ce paragraphe pour se convaincre que c'est bien d'une obligation immédiate et instantanée qu'il s'agit"[8]. Well, Cambodia argues the opposite, and Thailand then complains that: "L'Etat demandeur . . . transform[e] l'obligation instantanée résultant pour la Thaïlande du paragraphe 2 du dispositif en une obligation continue"[9]. There, you have, Mr. President, Members of the Court, a

[7]CR 2011/14, p. 24, para. 7 (Pellet).

[8]*Ibid.*, p. 25, para. 11 (Pellet).

[9]*Ibid.*

clear divergence of views as to the meaning and scope of what the Court has decided with binding force in its *dispositif*, and it is based on what the Respondent party has itself put forward in argument before the Court. This more than satisfies the jurisdictional showing required of us at this stage. And of course, at the substantive level, the fallacy behind Professor Pellet's "simple" reading of the *dispositif* is that it would allow Thailand to withdraw its troops the day after the Judgment and move them back in again a week later. The point is obvious, but it is one for determination at the merits stage, and not now.

5. What then, Mr. President, are the serious grounds on which Thailand says there is no dispute? The two arguments offered are:

(i) because the two States have been in agreement for at least 40 years as to the interpretation of the Judgment and its implementation by Thailand;

(ii) because a new bilateral process was set in train by a Memorandum of Understanding concluded between the two States in the year 2000.

That these two arguments stand in plain contradiction to one another is something I have no time to develop now. Let me rather look at each of the arguments on its own demerits.

There is no dispute because there has been an agreement over the last 40 years as to interpretation of the Judgment?

6. According to Thailand, Cambodia specifically accepted the Thai interpretation. I quote from what the Agent said yesterday: "Le Cambodge a par ailleurs formellement accepté l'interprétation thaïlandaise selon laquelle la frontière dans la région du temple de [Preah Vihear] n'est pas *res judicata* selon l'arrêt de 1962, et doit être donc déterminée conjointement par les deux pays conformément au droit international."[10] Really? That is pure assertion by the Agent of Thailand, without a shred of evidence being put forward to back it up. On the contrary, he tells the Court in the very next paragraph that it was a meeting of the Thai Council of Ministers on 10 July 1962 that "détermina l'étendue de l'emprise du temple ['emprise du temple' is a new term to me, which I do not find anywhere in the Judgment — *il détermina l'étendue de l'emprise du temple*] aux fins de l'exécution de l'arrêt"[11]. Note, Mr. President, that that resolution, of the

[10]CR 2011/14, p. 12, para. 8 (Plasai).

[11]*Ibid*., para. 9 (Plasai); emphasis added.

Council of Ministers, has never been produced, not even now, not even to the Court, so that we, Cambodia, and you, the Court, can see what it is and what it says. All that we had in its place was some photographs, photographs of a group of presumably Thai officials standing in front of some barbed wire — some barbed wire which is no longer there today — and a notice proclaiming "from this point lies the vicinity of the Temple". But note the *implication* in the Agent's assertion, Mr. President: the implication that the effect and consequence of a Judgment of your Court is to confer on the losing Party the exclusive right to proceed to an entirely unilateral interpretation of the effects of the Judgment and to rest on that *contra mundum*! But the unilateral nature aside, what is that, Mr. President, other than an *interpretation* placed on the "meaning and scope of the Judgment". Cambodia did not agree with that interpretation then, and does not now; and, again, you could hardly have a more perfect example of the kind of dispute that enters directly within the province of Article 60 of the Statute as it has been consistently interpreted by the Court.

There is no dispute because a bilateral process was set in train by a Memorandum of Understanding?

7. Now, Mr. President, as to the alternative argument that everything changed in the year 2000 because the two States signed a Memorandum of Understanding on the Survey and Demarcation of Land Boundary and, says the Agent proudly, it covers the entire frontier, *including* the sector at the Temple, and it does not even refer to the Court's Judgment. I can only invite the Court to look at this document — we did put it in ourselves, Mr. President; it is at Annex 6 to our Request for interpretation — and to form its own view. The MoU, as its title suggests, deals with *demarcation*, the placing of boundary markers, not the establishment of a frontier; it was agreed *before* Thailand's aberrant interpretation of the Judgment emerged and was unveiled in 2007-2008; it does not refer to the Judgment, but it does refer to all of the formal treaty documents and the maps on which the Court based its Judgment. And, Mr. President, is it remotely conceivable that Cambodia would, in a Memorandum of Understanding, signed at Departmental level, *abandon* the Judgment or the formal Treaty settlement on which the Judgment was based? We say no.

2. The dispute relates to the meaning and force of the Judgment

8. I move rapidly now on to the second section of my exposé: Is the dispute about the meaning and scope of the Judgment? And this was the subject of an immense amount of argument by counsel for Thailand, all aimed at establishing that the Court in 1962 had decided nothing more than that the Temple alone belonged to Thailand, and indeed had formally disabled itself from anything wider than that. I select a few out of many remarks to that effect: according to Professor Crawford, for example, "the dispute was to settle the question, and only the question, to which State a particular cultural property, the Temple, pertained". Again the reference is in our written text, Mr. President[12]. And elsewhere Professor Crawford makes a similar remark: "In 1962, you [that is you, the Court] didn't decide on a boundary at all; you simply decided that the Temple was in Cambodia. But that is not now in dispute."[13] All of that is simply wrong. It ignores the Court's own definition of the dispute that it was deciding: "a dispute about territorial sovereignty" *and* it ignores the second point of the *dispositif* pursuant to which Thailand was obliged to withdraw its forces and personnel not only from the Temple, *but also* from Cambodian territory in its vicinity.

9. Moreover, Mr. President, Members of the Court, all of this argument by Thailand simply misses the point, and that for a whole series of reasons, which I have to go into one by one, because the issue is so central to the case:

(i) firstly, because the interpretation Cambodia has requested does bear directly and in explicit terms on the *dispositif* of the Judgment and on the uncertainties in its meaning raised precisely by Thailand's conduct assertedly in giving effect to the Judgment's meaning[14];

(ii) secondly, because there is no room for doubt — there really is no room for doubt — that the reasoning of the Court can be part of the process of interpreting how the *dispositif*

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[12]CR 2011/14, p. 35, para. 7 (Crawford).

[13]*Ibid.*, p. 33, para. 2 (Crawford).

[14]Cambodia's Request explicitly relates to the terms of the *dispositive* itself. It requests interpretation of:

> "The obligation incumbent upon Thailand 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' *(point 2 of the operative clause [of the Judgment rendered by the Court in 1962])* is a particular consequence of the general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the map [referred to on page 21 of the Judgment], on which [the latter] is based."

should be understood, so long as the reasoning is inseparable from the *dispositif*, which is what the Court laid down in the interpretation phase of the *Cameroon* v. *Nigeria* case. It appeared yesterday as if counsel for Thailand was relying entirely on one paragraph in the 1962 Judgment, at page 36, in which the Court declined to accept the new and enlarged formulation of Cambodia's formal Submissions in the case. But the Court did emphatically not decline, even in that paragraph, to entertain these further Submissions, it merely said they could in the circumstances be entertained only as giving expression to grounds for the Court's decision, and that is exactly the link between reasons and operative part on which Cambodia relies in its Request for interpretation presently before the Court. Counsel's reading of that paragraph at page 36, in isolation, ignores entirely those parts of the 1962 Judgment that do not suit his argument: notably the paragraph at page 14 of the Judgment which we cited *in extenso* in our Request for interpretation and in my pleading yesterday, the passage in which the Court repeats what it said the previous year on jurisdiction, that Cambodia alleged violations of its territorial sovereignty over *the region of* the Temple, that Thailand replied that *the area in question* lay on the Thai side — on the Thai side of what? — of *the common frontier between the two countries*, and it was in that context that the Court described the dispute as being one "about territorial sovereignty"; but most of all, Mr. President, Members of the Court, this disjointed reading of the Judgment ignores entirely the key passage at pages 16-17 where the Court, having begun its analysis of the Treaty settlement between France and Siam, points out that the operative articles make no mention of Preah Vihear as such and the Court then goes on to say "[i]t is for this reason that the Court *can only give* a decision as to the sovereignty over the Temple area *after having examined what the frontier line is*" (emphasis added) — can only give its decision after that examination. Could anything be clearer than that? It certainly puts paid at a stroke to Professors Crawford and Pellet's theory that the Court was deciding nothing but sovereignty over the Temple. But more than that, here we have the Court itself saying directly: "the reasons that are about to follow are inseparable from the formal decision to which they will lead". And that is Cambodia's submission precisely. And it explains why, at page 32 of the Judgment, the

Court states as its "conclusions" — the Court's own word, not "arguments", not "reasons", but "conclusions" — *inter alia* that acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it.

Mr. President, I pause here for the briefest of moments to refer to the case of Prince Damrong, about which Professor Crawford seems to be so mesmerised, no doubt because it relates to a visit to the Temple alone. I observe simply that this little incident occupies perhaps two paragraphs in the Judgment, by contrast with the nine pages which the Court devotes to a minute analysis of nothing other than the frontier line, after which it adds in Prince Damrong, as a sort of supplementary confirmation of the conclusions *it had already reached* as to the status of the Annex I map. But the element that was missing from Professor Crawford's argument was that *if*, as he says, the Court held Prince Damrong's actions to amount to an estoppel, that must constitute *res judicata*; Thailand cannot now claim that she was not estopped. But does the estoppel appear in the *dispositif*? Certainly not; it appears in the Court's conclusions on the way to its formal decision in the operative part of the Judgment. Could one have a clearer illustration that *res judicata* can, in appropriate circumstances, be found in the reasoning, in the *motifs*, of a Judgment of the Court?

(iii) my third point, Mr. President, is that it is firmly established in the Court's jurisprudence, and we heard citations yesterday from the interpretation phase of *Chorzów Factory* and from the *Tunisia/Libya* case; I do not have to repeat those citations today. It is firmly established that a dispute over whether something has or has not been established with binding force *does* enter within the scope of interpretation under Article 60. That is established. Counsel for Thailand did not even address this, even though it now appears to be exactly the present situation in this case. Cambodia says that a proper understanding of the *res judicata* in the *dispositif* requires one to interpret the *dispositif* in the light of the reasoning. In particular the acceptance of the Annex I map as marking the line between the two countries in the area of the Temple;

Cambodia relies on the Court's own statement that it can "only" decide on the Temple's sovereignty after having examined where the frontier line is and, indeed, that is nothing

more than simple logic. But Thailand says no; you can only look at the bare words of the *dispositif*, you are not allowed to interpret them in context. So we have a classic case of a dispute between the Parties over what has, or has not, been decided with binding force, and that is exactly what the Permanent Court and then the present Court had in mind in the two Judgments cited.

10. I come finally to an aspect I am somewhat reluctant to raise, Mr. President, but it has to be done. The slide which Professor Pellet projected on the screen yesterday, the slide which purported to show the *dispositif* of the 1962 Judgment incorporated a distortion. One must hope that it was accidental but it was a distortion all the same. It was there and its effect was serious. The slide omitted entirely the phrase "in consequence", which the Court employed to link the second and third paragraphs of the *dispositif* to its first paragraph. The phrase is there and it must have been deliberate on the part of the Court. It shows that the second paragraph and the third paragraph derive from the principal finding in the first paragraph. They are not independent decisions in their own right but consequences that flow from the principal finding, which is a finding about territory. It follows automatically that it cannot be right to interpret these paragraphs in isolation, as counsel for Thailand would have the Court do.

Can the issue be raised now?

11. Mr. President, time moves on and I must also move on to the third part of my pleading: Granted the existence of a dispute and a dispute over the meaning or scope of the Judgment, can the issue be raised now?

12. It is not entirely easy to understand what our opponents' argument is over the question of timing. It seems to be composed of three parts: first, that the passage of time shows that Cambodia is seeking enforcement of the Judgment, not its interpretation; and then that there is some sort of an implicit time-limit in Article 60 of the Statute as a safeguard against abuse; and then that a party may not ask the Court, in incidental proceedings of this kind, to base itself on facts dating from after the judgment was pronounced.

13. Well, as to the first of these, enforcement versus interpretation, I need go no further than to recall to the Court that paragraph 31 of the Request — the Request for interpretation — contains

the clearest possible disclaimer that Cambodia is seeking anything other than interpretation. Cambodia stands by that disclaimer, and I repeat it now. In addition, the question posed to the Court is plainly one of the meaning to be given to the *dispositif*, it says so in terms. In these preliminary proceedings, which are on interim measures, there is no warrant for going behind that. But of course it stands to reason, Mr. President, that any State applying to the Court for interpretation is not simply seeking a piece of paper, but an authoritative ruling which it intends to use on the diplomatic plane towards the settlement of an actual dispute. If that were to be ruled out as amounting to *enforcement*, there would be nothing left of interpretation, nothing at all.

14. I come next, Mr. President, to the question of implicit time-limit. Thailand tries to import one, to read one into the terms of Article 60 of the Statute, but fails entirely to confront the fact that no time-limit is to be found there. It fails even to suggest that the omission was an unfortunate accident on the part of the drafters of the Statute of the PCIJ, which their successors failed inexplicably to correct when framing the present Statute of the present Court. There is not a single word either about the clear statement in the Opinion of Judge Buergenthal, of very recent date, that there is no time-limit to a request for interpretation under Article 60. Mr. President, the contrast, the textural contrast with the very next Article in the Statute, dealing with revision, is striking. Article 61 contains not just one time-limit, but two: six months from the discovery of the new fact, and then an overall limit of ten years. Well, the reasons for the limits in the one case and the absence of any limit in the other are fairly obvious, and they have been set out in Cambodia's Request, at paragraph 28. I add simply that the Court does not need a fixed time-limit as a protection against abuse; the Court is perfectly capable of deciding — in the circumstances of particular cases — whether a request is genuinely one for interpretation — as it is in this case — or is an abuse of the statutory provision. But, in any case, any question as to implying into Article 60 a time-limit is clearly one for the merits and not one for decision at the preliminary stage of provisional measures.

15. The most difficult element to understand, however, Mr. President, is Professor Crawford's confusing argumentation about subsequent facts. So far as we were able to follow it, though, this theory comes to grief in that it embodies a complete confusion between three kinds of facts: the facts which the Court took into account in framing a judgment; the facts put

forward by an applicant for interpretation to demonstrate the existence of a relevant dispute over the interpretation of a judgment; and the facts adduced in support of an urgent request for the indication of provisional measures of protection — including, as here and in the *Avena* case, on the interpretation of a judgment. It is the first of these — the facts relied upon by the Court in framing a judgment — and only the first of these — that the Permanent Court had in mind in the passage from the *Chorzów Factory Interpretation* decision that Professor Crawford cited to you. The facts that go into the making of a judgment are of course fixed — they are fixed by the judgment itself — and of course it is not admissible to ask the Court thereafter to accept new facts; that would amount to revision, not interpretation, and it is governed by Article 61. There has never been any question of that in this case. When it comes to *interpretation*, though, it is simply impossible for an applicant State to come to the Court for the interpretation of a judgment without producing facts apt to demonstrate that there exists a dispute in that regard. That is exactly what Thailand has been demanding of us in this courtroom. But by definition facts of that kind have to post-date the Judgment. You cannot interpret a judgment until after it has been delivered, and still less can you establish a *dispute* over interpretation until after two conflicting interpretations have come into the open. Obviously, all that has to happen after the judgment has been handed down, and on occasion it may take some considerable time — as here. Finally, the last kind of facts — the facts justifying an application for provisional measures — well, they have, by their very nature, to be facts arising or existing at the point at which the application for provisional measures is made. Again, that is just what our opponents have been demanding of us, to establish the necessary urgency — urgency as of now. So this entire theory about subsequent facts looks more and more like a house of cards that tumbles to the ground at the very first breath of rational analysis. If the "subsequent facts" theory held, a losing party could purchase itself impunity by claiming to accept the judgment today, then conditioning its acceptance by an unacceptable interpretation tomorrow, put the unacceptable interpretation into practice the day after that, and then claim that the Court was disabled from exercising its power of interpretation because —why? — because that would depend on asking the Court to make an assessment of subsequent facts.

16. Mr. President, I summarize my argument briefly before concluding. The summary can be drawn together under the general rubric of "plausibility", or "the establishment of a prima facie

case". It is Thailand, not Cambodia, that asks the Court to resign its statutory power to indicate provisional measures of protection and on the basis that Cambodia will not be able, in the merits phase on its Request for interpretation, to establish the existence of the rights for which it claims protection today. In response, Cambodia is under no requirement to establish those rights today; that would be to enter prematurely into the merits and is excluded by the Court's consistent line of decisions. Practice Direction XI warns us that we should not go into the merits except so far as is absolutely necessary. All that Cambodia has to do is to show that the existence of such rights is reasonably arguable. We submit that that threshold test has been amply fulfilled: because the rights Cambodia invokes are laid down in a judgment of the Court; because Thailand has placed those rights in issue by an invalid interpretation of the same judgment; because there plainly is a dispute between the two States entailing *at the very least* a difference between them over what the Court did decide with binding force; because it is only recently that the nature and extent of that dispute began to emerge; and because neither the wording of the Statute nor the *ratio legis* incorporates a time-limit on the Court's "duty" or "obligation" to interpret its judgments on receipt of a valid request to that effect, such as Cambodia's Request dated 28 April 2011.

Mr. President, that concludes my pleading. May I now respectfully ask you to invite the Agent for Cambodia to read out Cambodia's formal submissions.

The PRESIDENT: I thank you, Sir Franklin Berman, for your pleadings. Now I invite the Agent of Cambodia, His Excellency Mr. Hor Namhong, Vice Prime Minister of the Kingdom of Cambodia, to the floor.

M. HOR : Monsieur le président, Mesdames et Messieurs les juges, au vu de l'ensemble des exposés écrits et oraux présentés par le Cambodge, et sans préjuger de l'interprétation de la Cour sur le fond du différend, le Cambodge prie la Cour de bien vouloir indiquer les mesures conservatoires suivantes jusqu'au prononcé de l'arrêt de la Cour :

— Un retrait immédiat et inconditionnel de toutes les forces thaïlandaises des parties du territoire cambodgien dans la zone du temple de Préah Vihéar.

— L'interdiction de toute activité militaire de la Thaïlande dans la zone du temple de Préah Vihéar.

— L’abstention de tout acte ou action de la part de la Thaïlande qui pourrait entraver les droits du Cambodge ou aggraver le différend dans l’instance au principal.

Je vous remercie, Monsieur le président et Mesdames et Messieurs les juges. Merci.

The PRESIDENT: I thank His Excellency Hor Namhong, Vice Prime Minister of Cambodia, for his statement of the conclusion of Cambodia. Now that ends the second round of oral observations of Cambodia. The Court will meet again this afternoon at 5 p.m. to hear the second round of oral observations of Thailand. The Court now rises.

The Court rose at 11.30 a.m.