INTERNATIONAL COURT OF JUSTICE

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)

WRITTEN OBSERVATIONS OF THE KINGDOM OF THAILAND

21 NOVEMBER 2011

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CHAPTER I

INTRODUCTION

A. Procedural Matters

1.1 On 28 April 2011, the Kingdom of Cambodia filed with the Court, pursuant to Article 60 of the Statute of the Court and Article 98 of the Rules of Court, an application for the interpretation of the Judgment of the Court of 15 June 1962 in the *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)*[1] (in Thai "Phra Viharn") and a request for provisional measures[2]. On the same date the Court informed the Kingdom of Thailand of the filing of the Request for interpretation ("Request") and provided Thailand with originals of the documents filed by Cambodia.

1.2 On 18 July 2011, the Court issued its Order on Cambodia's Request for provisional measures[3].

1.3 On 20 July 2011, the Registrar advised Thailand that, acting pursuant to Article 98(3) of the Rules of Court, the Court

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[1] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6.

[2] *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), Application Instituting Proceedings,* 28 April 2011 and *ibid*., *Request for the Indication of Provisional Measures*, 28 April 2011.

[3] *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), Provisional Measures, Order of 18 July 2011,* para. 69.

had fixed the date of 21 November 2011 for the filing of Written Observations by Thailand.

1.4 These Written Observations are filed pursuant to that decision of the Court.

B. The 1962 Judgment and Cambodia's Request for Interpretation

1.5 In its decision of 15 June 1962[4], the Court,

> "finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia," [operative paragraph 1]
>
> "finds in consequence",
>
> "that 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;" [operative paragraph 2]
>
> "that Thailand is under an obligation to restore to Cambodia any objects of the kind 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." [operative paragraph 3]

1.6 In its Request for interpretation of the 1962 Judgment, Cambodia does not state a specific question for interpretation.

[4] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, pp. 36-37.

However, the essence of Cambodia's Request appears in paragraph 45 as follows:

> "Given that 'the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia' (first paragraph of the operative clause), which is the legal consequence of the fact that the Temple is situated on the Cambodian side of the frontier, as that frontier was recognized by the Court in its Judgment, and on the basis of the facts and arguments set forth above, Cambodia respectfully asks the Court to adjudge and declare that:
>
> 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' (second paragraph of the operative clause) 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 Annex I map, on which the Judgment of the Court is based."[5]

1.7 Thus, Cambodia's Request for interpretation is based on a rather convoluted interrelationship of the first and second operative paragraphs of the *dispositif* of the 1962 Judgment. From the uncontested conclusion in operative paragraph 1 of the *dispositif*, that the Temple is "situated in territory under the sovereignty of Cambodia", the Cambodian Request leaps to the conclusion that this is a consequence of the Temple being on the

[5] *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), Application Instituting Proceedings,* 28 April 2011, para. 45.

Cambodian side of a "frontier recognized by the Court in its Judgment"[6].

1.8 This conclusion, or rather assumption of Cambodia, is central to its specific request to the Court which is to declare that operative paragraph 2 of the *dispositif* which required 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" is a consequence of the "general and continuing obligation" to respect the integrity of the territory of Cambodia which Cambodia claims was delimited "in the area of the Temple and its vicinity" by the line on the Annex I map[7].

1.9 On the face of it, then, Cambodia is seeking for the Court to declare that Thailand has a present day obligation by virtue of operative paragraph 2 of the *dispositif* to withdraw from any area on the Cambodian side of the Annex I line. In reality, what Cambodia wants the Court to do is to declare that the line on the Annex I map is the boundary between Cambodia and Thailand.

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[6] *Ibid.*

[7] References to the Annex I map in these Written Observations refer to the map annexed to Cambodia's Application to the Court of 15 September 1959 (*Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Pleadings, Oral Arguments, Documents,* Vol. I, p. 17). References to the "Annex I line" or the "Annex I map line" are references to the line on that map. In Chapter VI of these Written Observations the implications of the fact that there are other versions of the Annex I map will be discussed.

1.10 In short, operative paragraph 2 of the *dispositif* is being invoked by Cambodia as if it were in dispute as a vehicle for the Court to interpret operative paragraph 1 of the *dispositif*, which is not in dispute. And the whole objective, under the guise of interpreting a Judgment that is not in dispute, is to have the Court conclude that the Annex I line is a boundary – something that the Court in 1962 deliberately refused to do.

1.11 Cambodia's overweening desire to have the Court declare that the Annex I map line constitutes a boundary binding on the two Parties has led it to misrepresent the Annex I map in the *Annexes Cartographiques* attached to its Request for interpretation[8]. It asserts as fact that the map was annexed to the Judgment of the Court when it was annexed to Cambodia's pleadings before the Court. It labels the enlarged Annex I map as "adopted by the Court" when in fact the Court's Judgment contains no map whatsoever. This misrepresentation enables Cambodia to improperly describe the enlarged Annex I map in paragraph 5.2 of its Request as "the Court's map"[9]. Cambodia even goes so far as to describe, in the *Annexes Cartographiques*, the Annex I map line as "boundary recognized by the ICJ in 1962" when in fact the Court did not recognize any boundary. All of this is nothing more than a desperate attempt by Cambodia to include the Annex I map as part of the *res judicata*

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[8] *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), Application Instituting Proceedings,* 28 April 2011, *Annexes Cartographiques*.

[9] *Ibid*., *Application Instituting Proceedings,* para. 5.2.

of the 1962 Judgment, which Thailand will demonstrate in these Written Observations it clearly is not.

1.12 As Thailand will point out in these Observations, the Court does not have jurisdiction to provide the interpretation that Cambodia requests. There is no dispute between the Parties over the interpretation of either operative paragraph 2 or operative paragraph 1 and thus a claim for interpretation under Article 60 of the Statute is not admissible. And, as will equally be pointed out, the Court made no determination in 1962 of the sort that Cambodia claims. To the contrary, it expressly declined to do so. Cambodia's present Request for the determination of a boundary under the guise of interpretation of the 1962 Judgment must be rejected.

C. Thailand's Implementation of the 1962 Judgment

1.13 The 1962 Judgment provoked a substantial political reaction within Thailand. Notwithstanding the obvious difficulty in doing so, on 3 July 1962, Thailand announced that while disagreeing with the decision of the Court, it would nevertheless as a member of the United Nations honour its obligations under the United Nations Charter[10]. This was communicated by Note to the Secretary-General of the United Nations on 6 July 1962, which then was forwarded to all United Nations members,

[10] The Prime Minister's Office of Thailand, Communiqué of the Government, 3 July 1962 [Annex 11]. See also Ministry of Foreign Affairs of the Kingdom of Thailand, *Foreign Affairs Bulletin*, Vol. I, No.6, June - July 1962, pp. 128-130 [Annex 36].

including Cambodia. In that communication, Thailand stated that:

> "as a member of the United Nations, His Majesty's Government will honour the obligations incumbent upon it under the said decision in fulfilment of its undertaking under Article 94 of the Charter. I wish to inform you that, in 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."[11]

1.14 On 15 July 1962, Thai troops were withdrawn from the Temple, thus complying with Thailand's obligation under operative paragraph 2 of the Judgment "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". The Thai Council of Ministers had determined on the basis of the Judgment of the Court the area from which Thai troops had to withdraw and following the withdrawal a barbed-wire fence was to be constructed to mark the area from which Thai troops had been excluded and from which they were to be excluded in the future. The area enclosed by the barbed-wire fence was marked with signs stating, "BEYOND THIS POINT LIES THE

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[11] Minister of Foreign Affairs of the Kingdom of Thailand, Note to Secretary-General of the United Nations, No. (0601)22239/2505, 6 July 1962 [Annex 14]. See also Ministry of Foreign Affairs of the Kingdom of Thailand, *Foreign Affairs Bulletin*, Vol. I, No.6, June - July 1962, pp. 128-130 [Annex 36].

VICINITY OF THE TEMPLE OF PHRA VIHARN"[12]. And facing inward towards the Temple, clearly visible to all Cambodians at the Temple, a sign reads "*LES ENVIRONS DU TEMPLE DE PHRA VIHARN NE S'ETENDENT PAS AU DELA DE CETTE LIMITE*"[13].

1.15 Cambodia was well aware of these actions of Thailand. It objected to the reservation made in Thailand's Note of 6 July 1962 to the United Nations concerning eventual regaining of the Temple and took the view that this was itself a failure to comply with the 1962 Judgment. The barbed-wire fence was considered by Prince Sihanouk in 1963 to be encroaching on Cambodian territory but only by just a few metres and not worth complaining about[14].

1.16 During the period of 1962 to 1966, there were a number of incidents along the border between Cambodia and Thailand, including in the Phra Viharn area, reflecting a general deterioration of relations between the two sides. Although Cambodia complained to the United Nations that Thailand's actions constituted a failure to recognize Cambodia's sovereignty over the Temple and hence a failure to comply with the decision of the Court, at no time did Cambodia seise the Security Council with a complaint of non-compliance pursuant

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[12] Photograph of the sign erected to comply with the 1962 Judgment [Annex 40A]. See also para. 4.35 below.

[13] Photograph of the sign erected to comply with the 1962 Judgment [Annex 40B].

[14] See paras 4.45 and 5.68 below.

to Article 94(2) of the United Nations Charter and at no time did it complain that there had been a failure by Thailand to withdraw in accordance with operative paragraph 2 of the 1962 Judgment[15].

1.17 Further, during the 40-year period between 1967 and 2007-2008, although both Parties were aware that they had border problems to resolve, no issues were raised over compliance with the 1962 Judgment. Indeed, it was not until Cambodia made its present Request for interpretation of the 1962 Judgment that the issue of non-compliance was brought to the fore. Cambodia admits as much in its Request for interpretation and in the oral proceedings on its Request for provisional measures[16].

1.18 As Thailand will point out in these Written Observations, there is no present day dispute between Cambodia and Thailand over compliance with the 1962 Judgment. And even if there were, the Court would not have jurisdiction. The Court has jurisdiction only to interpret, not to resolve disputes over implementation. Cambodia is using a claim of non-compliance with the 1962 Judgment in order to manufacture a dispute over the interpretation of operative paragraph 2 of the *dispositif* with the objective of obtaining a ruling in the present day dispute between the Parties over their boundary.

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[15] See paras. 4.43-4.55 and 5.67-5.73 below.

[16] See paras. 4.56-4.58 below.

D. Cambodia's Calling into Question of the *Status Quo*

1.19 On 14 June 2000, a Memorandum of Understanding (MoU)[17] was entered into between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on the Survey and Demarcation of Land Boundary, which provided for a joint process for the survey and demarcation of the boundary between the two countries including in the Dangrek sector. There was no question but that the Parties were in dispute over that boundary and that the MoU provided for an amicable process to resolve that and other boundary disputes.

1.20 The MoU was an attempt by the Parties to put the past behind them. The outstanding boundary issues, including the boundary in respect of Phra Viharn, were to be negotiated within the framework of the Thai-Cambodian Joint Commission on Demarcation for Land Boundary (JBC). The basic documents for the Commission were mentioned in the MoU – the 1904 and the 1907 treaties, and maps resulting from the work of the boundary commissions and other documents relating to the 1904 and 1907 treaties[18]. The 1962 Judgment was not referred to – a clear indication that it was not relevant for the determination of

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[17] Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on the Survey and Demarcation of Land Boundary, 14 June 2000 [Annex 91].

[18] *Ibid*., Article I.

the boundary in relation to Phra Viharn, let alone for the whole of the area covered by the Annex I line.

1.21 It seemed that the amicable relations between the Parties at that time would bear further fruit. In 2004 a ministerial committee established by a joint Thai-Cambodian council of ministers met in Bangkok to discuss the possibility of submitting a joint nomination to include the Temple on the UNESCO World Heritage List. However, later that year, without informing Thailand, Cambodia made a unilateral request to UNESCO to list the Temple as a World Heritage Site and purported to define the area of its listing in a way that included a significant portion of Thai territory. Naturally Thailand opposed this, and although Thailand eventually did not oppose the listing, it has not accepted that Cambodia can include within a "Management Plan" for the Temple, areas of Thai territory. As a result Cambodia has been unable to proceed with the development of its "Management Plan"[19].

1.22 These events appear to have precipitated Cambodia's bringing of this Request for interpretation. Rather than treating the area as one in which the boundary has to be determined, as it did in the MoU, Cambodia now wants to treat the area as if it had already been delimited by the Court in 1962. This means now abandoning the position that it had taken since 1962 that

[19] See para. 4.114 below. See also Department of Treaties and Legal Affairs, *History of the Negotiations for the Inscription of the Temple on the UNESCO World Heritage List*, November 2011 [Annex 100].

the 1962 Judgment has been implemented by Thailand, and claiming that Thailand is not in compliance with its obligations under operative paragraph 2 of the *dispositif* thereby seeking to construct, artificially, a dispute over the meaning of that operative paragraph.

1.23 All of this is a form of subterfuge, because what Cambodia wants is for the Court to determine that the Annex I line is a boundary. But that is a contemporary dispute and not a question of interpretation of the 1962 Judgment. So, Cambodia has to pretend that there is a present day disagreement over operative paragraph 2.

1.24 Thus, contrary to its claim, it is Cambodia that has upset the *status quo* in the area, changing from working collaboratively to resolve differences over the boundary between the Parties to seeking to have the area determined to be subject to the sovereignty of Cambodia. And it is attempting to do this by a request to the Court for the interpretation of the 1962 Judgment. But, as Thailand will demonstrate in these Written Observations, Cambodia cannot incorporate the reasoning of the Court into the *res judicata* of operative paragraph 1 of the *dispositif*, under the guise of interpreting operative paragraph 2, in order to obtain from the Court today a ruling on precisely what in 1962 the Court refused to rule.

E. The Incidents at the Border

1.25 Apart from what the Cambodian Request refers to as "skirmishes"[20] in July and August 1962, around the time of Thailand's withdrawal of its troops from the Temple and its vicinity pursuant to the 1962 Judgment, and the incidents that occurred in 1966, the principal incidents that have taken place in the border area in the locality of the Temple have been since 2007. During the period from 1975 to the early 1990s incidents that took place along the border, including near the Temple, were internal to Cambodia and were the consequence of struggles between warring factions within the country or the result of foreign intervention; they were not related to sovereignty over the Temple.

1.26 More recently Cambodia began increasing its presence in the area beyond the Temple on the Cambodian side of the Annex I map line, encouraging civilians to settle there. On 25 November 2004, Thailand protested to Cambodia that the Cambodian community in this area was expanding "at an alarming rate"[21] with pollution affecting local Thai villages. The Note also expressed concern about the building of local

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[20] *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), Application Instituting Proceedings,* 28 April 2011, para. 12.

[21] Adviser to the Minister of Foreign Affairs and Co-Chairman of the Thailand-Cambodia Joint Boundary Commission, Note to Adviser to the Royal Government of Cambodia in Charge of State Border Affairs and Co-Chairman of the Cambodia-Thailand Joint Boundary Commission, No. 0803/1015, 25 November 2004 [Annex 93].

authorities' offices and pointed out that Cambodia was obliged under Article V of the MoU not to "carry out any work resulting in changes of environment of the frontier zone".

1.27 Those concerns were reiterated in a Note sent to Cambodia on 8 March 2005[22]. Concern was also expressed about the construction and improvement of a road by Cambodia from Komui Village, Preah Vihear Province to Phra Viharn Temple, which traverses localities subject to Thai sovereignty. Once again Thailand invoked Article V of the MoU.

1.28 Between November 2007 and April 2008, the JBC discussed possible provisional arrangements in the Phra Viharn region, including redeployment of troops, joint de-mining of heavily mined areas, and addressing the question of the Cambodian community introduced into the area.

1.29 Notwithstanding these attempts to deal amicably with the differences between the Parties, in October 2008, February 2009 and February 2011, armed incidents took place in the region of the Temple. All resulted from Cambodia's increased military and civilian presence in the area and Thailand responded in self-defence to armed attacks by Cambodian forces that even extended into undisputed Thai territory.

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[22] Adviser to the Minister of Foreign Affairs and Co-Chairman of the Thailand-Cambodia Joint Boundary Commission, Note to Adviser to the Royal Government of Cambodia in Charge of State Border Affairs and Co-Chairman of the Cambodia-Thailand Joint Boundary Commission, No. 0803/192, 8 March 2005 [Annex 94].

1.30 However, none of these incidents involved the encroachment of Thai forces into the Temple area – the area referred to in operative paragraph 2 as, "at the Temple, or in its vicinity on Cambodian territory". Since their withdrawal from the "ruins of the Temple" in 1962, Thai troops have never entered that area, respecting the ruling of the Court in 1962 that the Temple was situated in territory under the sovereignty of Cambodia. The border incidents that have occurred over recent years result from Cambodia seeking to assert authority over an area much greater than they have been content with in the past. They are not evidence of non-compliance by Thailand with the 1962 Judgment.

F. Outline of These Written Observations

1.31 In Chapter II of these Written Observations, Thailand will set out the initial claim made by Cambodia in the original proceedings and the way in which the Court defined the matter in dispute in the preliminary objections phase. Thailand will then consider the way in which the Parties dealt with the subject matter of the dispute in their written and oral pleadings. Thailand will show that the issue before the Court was simply sovereignty over the Temple. The Annex I map was invoked as evidence to demonstrate sovereignty over the Temple and not for the purposes of an independent ruling on the boundary.

1.32 In Chapter III, Thailand will show that the Court defined the "sole dispute" before it as relating to sovereignty over the

Temple. The language used by the Court in each of its three operative paragraphs confined the issue to the immediate area surrounding the Temple. The Court rejected an attempt by Cambodia to transform the matter before it in order to obtain a ruling on the status of the Annex I map and the boundary between the Parties.

1.33 In Chapter IV, Thailand will demonstrate that the Court has no jurisdiction to deal with this Request for interpretation; there is no dispute over the meaning and scope of the Judgment. The real purpose of Cambodia's Request is to obtain a ruling on the boundary between the Parties, and such a claim, in respect of a matter not *sub judice* in 1962, under the guise of a request for interpretation in accordance with Article 60, is inadmissible.

1.34 In Chapter V, in the alternative, if the Court were to find that it has jurisdiction, Thailand will demonstrate that Cambodia's Request misconstrues the 1962 Judgment. The Court did not determine a boundary between the Parties, nor did it grant any status to the Annex I line. The question of sovereignty over the Temple did not require the Court to make a determination of the location of the boundary between the Parties and the subsequent practice of the Parties indicates clearly that the Court did not do so. Cambodia has also confused the general obligation for States to respect the territorial integrity of each other with the specific determination of the Court in the 1962 Judgment. In addition, Cambodia fails to identify any basis in the 1962 Judgment for its claim that

Thailand has an obligation to withdraw from an area beyond that from which it withdrew in 1962 in implementation of the Judgment.

1.35 In Chapter VI, Thailand will further demonstrate that the Court could not have concluded that the Annex I map was the boundary because it is impossible to transpose the Annex I map line into a line on the ground. The map is riddled with ambiguities and errors that would create intractable problems in demarcating the boundary. Additionally, the Annex I map entered in the record of the proceedings in 1962 was not the version of the Annex I map received by Thailand in 1908. The version Thailand received differs from the Annex I map included in the 1962 proceedings in important respects, further demonstrating the impossibility of a simple transposition of an Annex I map line into a boundary on the ground.

1.36 Chapter VII will contain Thailand's conclusions.

CHAPTER II
THE DISPUTE IN THE ORIGINAL PROCEEDINGS (1959-1962)

2.1 From the outset, the dispute between Cambodia and Thailand over the Temple was narrowly defined; it was about withdrawing Thai troops from the ruins of the Temple and the claim of both Parties to sovereignty over the Temple. This was evident in the initial exchanges in 1949 between France and Thailand and was continued in Cambodia's Application to the Court in 1959. This set the scope of the dispute for both the jurisdictional and the merits phases of the case.

2.2 In section A, the treatment of the scope of the dispute in the preliminary objections phase by both the Parties and the Court will be dealt with, showing that the dispute was about sovereignty over the Temple. In section B, it will be shown that the treatment of the scope of the dispute by the Parties in their written and oral pleadings in the merits phase also limited the dispute to sovereignty over the Temple. The subject matter of the dispute did not include the determination of the boundary.

A. The Scope of the Dispute in the Preliminary Objections Phase

1. Historical Background

2.3 On 9 February 1949, the French Embassy in Bangkok

informed the Thai Ministry of Foreign Affairs that *"un gardien et trois hommes tous siamois ont été affectés à la garde des ruines de Préah Vihear"*[23]. The "ruins of Preah Vihear", the Embassy asserted, were in Cambodian territory. On 21 March 1949, the French Embassy in Bangkok asked the Thai authorities to bring the presence of Siamese guards at the ruins of the Temple to an end, and on 9 May 1949, the French Embassy formally requested the withdrawal of Thai guards from the ruins[24]. On each occasion the French authorities continued with their assertion that the Temple was in Cambodian territory, invoking maps that purported to show the ruins of the Temple on the Cambodian side of the boundary.

2.4 In 1954 a newly independent Cambodia renewed complaints about the presence of Thai military guarding the "ruins of Preah Vihear", asserting *"l'appartenance de ces ruines au Cambodge"* and referring to earlier French communications as proof of this position. The Cambodian Note referred to the matter as *"l'affaire des Ruines de Préah Vihear"*[25]. On 9 June 1954, Cambodia advised Thailand that in view of the presence of Thai military personnel at the ruins of the Temple, Cambodia

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[23] *I.C.J. Pleadings, Temple of Preah Vihear*, "Note de la légation de France à Bangkok en date du 9 février 1949", *Réplique du Gouvernement du Royaume du Cambodge*, Annex XIV, Vol. I, p. 103.

[24] *Ibid.*, "Note de la légation de France à Bangkok en date du 21 mars 1949", *Réplique du Gouvernement du Royaume du Cambodge*, Annex XV, Vol. I, p. 104.

[25] *Ibid.*, "Lettre du 31 mars 1954 de la légation royale du Cambodge au ministre des Affaires étrangères de Thaïlande", *Réplique du Gouvernement du Royaume du Cambodge*, Annex XIX, Vol. I, p. 110.

had suspended its efforts to have Cambodian troops occupy the ruins. Attempts by the two countries to settle the matter by diplomatic means were made in Bangkok in 1958 and then in Phnom Penh in 1959, but both were unsuccessful[26].

2.5 There was thus a pattern in these communications. France and then Cambodia wanted the withdrawal of Thai military personnel from the "ruins of Preah Vihear". They argued that the Temple ruins were under the sovereignty of Cambodia and they invoked maps to buttress their position. It was on this basis that Cambodia brought the matter to the Court on 6 October 1959.

2. THE QUESTION IN CAMBODIA'S 1959 APPLICATION

2.6 In its Application, dated 30 September 1959, Cambodia complained that Thailand had occupied

> *"une parcelle du territoire cambodgien, sis dans la province de Kompong Thom, où se trouvent les ruines d'un saint monastère, le temple de Préah Vihéar"*[27].

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[26] *I.C.J. Pleadings, Temple of Preah Vihear*, *Application*, Vol. I, p. 14, para. 30; see also *ibid.,* "Négociations Khméro-Thaïes à Bangkok du 18 août au 3 septembre 1958. Procès-verbaux officiels (Extraits)", *Réplique du Gouvernement du Royaume du Cambodge*, Annex XLV, Vol. I, p. 501; *ibid.*, "Extract from minutes of negotiations between Thailand and Cambodia in Bangkok, 1958", *Rejoinder of the Royal Government of Thailand*, Annex No. 51, Vol. I, p. 607.

[27] *Ibid., Application*, Vol. I, p. 4, para. 1.

By using the terms "*parcelle (...) où se trouvent les ruines*" Cambodia made clear that it was localizing the issue to the plot of land where the ruins of the Temple were situated. Although the English translation of the Cambodian Application uses the less precise term "portion of Cambodian territory", it is clear that it was a very restricted portion of what was alleged to be Cambodian territory that was being referred to. It was a question of sovereignty over what had been consistently described as the ruins of the Temple.

2.7 This is confirmed in Cambodia's request for relief, which mirrored the pattern of 1949 and 1954. It asked the Court to adjudge and declare:

> "(1) that the Kingdom of 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 the Kingdom of Cambodia."[28]

2.8 It is clear that the dispute as brought by Cambodia had a very narrow focus. It was about withdrawing Thai military personnel from the ruins of the Temple and sovereignty over the Temple itself. It was by its very terms not a boundary dispute. The maps that the French authorities had referred to in 1949 were being invoked because of what they would show regarding sovereignty over the Temple, and Cambodia asserted that:

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[28] *Ibid.*, Vol. I, p. 15.

> "[b]etween 1904 and 1954**,** the Thailand Government advanced no objection and made no diplomatic protest in regard to Cambodian sovereignty over Preah Vihear."[29]

2.9 At the outset then, there was no suggestion that Cambodia was asking the Court to resolve a broader boundary dispute. The Cambodian request was clear and precise – withdrawal of Thai troops from the ruins of the Temple and a declaration that sovereignty over the Temple rested with Cambodia. This simple and straightforward request was repeated in identical terms in Cambodia's Memorial[30].

3. The Treatment of the Question in the Preliminary Objections Phase

2.10 In their pleadings on preliminary objections, the Parties said little about the substantive dispute before the Court. However, what was said confirms that the two Parties saw sovereignty over the Temple as the matter at stake. Both Parties made reference to maps that had been produced supporting their respective positions. In the introduction to its preliminary objections Thailand stated:

> "[t]he boundary line (…) in the region in which the temple of Phra Viharn ('Preah Vihear' is the Cambodian

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[29] *Ibid.*, *Application*, Vol. I, p. 13, para. 25.

[30] *Ibid.*, *Mémoire du Gouvernement du Royaume du Cambodge,* Vol. I, pp. 118-119.

spelling) stands was laid down by the Franco-Siamese Treaty of 13th February, 1904"[31].

It then went on, "[t]he result was to leave the temple of Phra Viharn in Thai territory"[32]. Thailand produced a map to confirm that position.

2.11 In its Observations on Thailand's preliminary objections, Cambodia responded to what Thailand had said, disputing the Thai map and referring to a different map produced by the Royal Thai Survey Department which the French Embassy in Bangkok had noted in 1949 placed the "ruins of Preah Vihear" in Cambodian territory[33]. Thus, both Parties were continuing to make it clear that the case on the merits was about sovereignty over the Temple.

2.12 That this was the subject of the dispute was affirmed in the oral arguments on preliminary objections. Counsel for Thailand, Sir Frank Soskice, opened his statement to the Court with the words, "this case concerns the ownership as between Thailand and Cambodia of a very famous and ancient temple"[34]. The Agent for Cambodia, Mr. Truong Cang for his part referred in his opening statement to an act of occupation by Thailand of

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[31] *Ibid., Preliminary Objections of the Government of Thailand*, Vol. I, p. 133, para. 3.

[32] *Ibid*, p. 134, para. 3.

[33] *Ibid., Observations du Gouvernement royal du Cambodg*e, Vol. I, p. 153, para. 2.

[34] *Ibid., Oral Arguments (Preliminary Objections)*, Vol. II, p. 10 (Sir Frank Soskice, 10 April 1961).

"une parcelle du territoire cambodgien, sise dans la province de Kompong-Thom, où se trouvent les ruines d'un saint monastère, le temple de Préah Vihéar,"[35]. There was nothing said to deviate from the position taken in the written pleadings. The case was concerned with sovereignty over the Temple.

2.13 In its Judgment on preliminary objections of 26 May 1961, the Court leaves little doubt that it understood the dispute as concerning sovereignty over the Temple. The Judgment opens with the words:

> "On 6 October 1959, the Minister-Counsellor of the Royal Cambodian Embassy in Paris handed to the Registrar an Application by the Government of Cambodia, dated 30 September 1959, instituting proceedings before the Court against the Government of the Kingdom of Thailand with regard to the territorial sovereignty over the Temple of Preah Vihear."[36]

2.14 In describing the dispute further the Court said,

> "Cambodia alleges a violation on the part of Thailand of Cambodia's territorial sovereignty over the region of the Temple of Preah Vihear and its precincts. Thailand replies by affirming that the area in question lies on the Thai side of the common frontier between the two countries, and is under the sovereignty of Thailand. This is a dispute about territorial sovereignty;"[37]

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[35] *Ibid.,* Vol. II, p. 41 (H.E. Mr. Truong Cang, 11 April 1961).

[36] *Case concerning* the *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, p. 19.

[37] *Ibid*., p. 22.

2.15 The Parties themselves had never used either the term "region" or the term "precincts" in defining their dispute; both were introduced by the Court. Alone, the phrase "region of the Temple of Preah Vihear" might have been of uncertain scope, but it was qualified. It was not just the "region of the Temple of Preah Vihear" – it was "the region of the Temple of Preah Vihear *and its precincts*" (Emphasis added).

2.16 The term "precincts" carries the sense of enclosure. A precinct often refers to the grounds immediately surrounding a religious house or place of worship. This sense of "immediately surrounding" is also reflected in the French translation of precincts in the Judgment as *"environs"*. Thus, the reference to "precincts" would have covered the "ruins of the Temple" referred to in Cambodia's request. The "region" the Court was referring to was a confined one, encompassing only the Temple of Phra Viharn and its "immediate surroundings" – its precincts.

2.17 The Court rejected Thailand's preliminary objections and stated in the *dispositif* that it, "finds that it has jurisdiction to adjudicate upon the dispute submitted to it on 6 October 1959 by the Application of Cambodia."[38] That dispute as it had said earlier in the Judgment was the dispute about territorial sovereignty over the Temple and its precincts. Accordingly, the Court had at the preliminary objections phase defined the

[38] *Ibid.,* p. 35.

dispute with the effect of *res judicata* as concerning sovereignty over the Temple.

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2.18 The background to Cambodia's Application to the Court in 1959, the claim made by Cambodia, the way the Parties referred to it in their written and oral pleadings at the preliminary objections phase and the treatment of it by the Court in its Judgment on preliminary objections all indicate one thing. This was a dispute confined to sovereignty over the Temple. If Cambodia had sovereignty over the Temple, then it was justified in calling for withdrawal of Thai military personnel from the ruins of the Temple. And withdrawal of Thai troops from the ruins of the Temple was what France had raised right at the beginning in 1949.

2.19 The reference to the "ruins of the Temple" also constrained the scope of the area that was in issue. Cambodia itself defined its request as relating to the portion of Cambodian territory where the ruins of the Temple are found. It was not, in the very terms of the Cambodian request, about a broader area or the whole of the area on the Cambodian side of what became known as the line on the Annex I map. And, equally, there was nothing at this stage of the proceedings that provided any indication that what had been submitted to the Court was a boundary dispute or that the Court was being asked to determine the boundary between Thailand and Cambodia.

B. The Scope of the Dispute in the Pleadings of the Parties on the Merits

2.20 The previous section of this Chapter has established, first, that the territorial scope of the dispute submitted to the Court in 1959 was restricted to the ruins of the Temple; second and by way of consequence, that the Court found jurisdiction only in respect of this dispute relating to the Temple in its Judgment on preliminary objections. The present section is devoted to an analysis of the written and oral pleadings on the merits, submitted subsequently to the Judgment of 26 May 1961 on preliminary objections.

2.21 It is a generally recognized principle that the Court cannot adjudge beyond the claims of the Parties found admissible by the Court (the *non ultra petita* rule)[39]. Therefore, the assessment of the *petitum* in 1962 is necessary in order to understand the extent of the 1962 *res judicata*, and it is at the same time relevant for an appreciation of the admissibility of the Request for interpretation. A rigorous assessment of the subject matter and of the limits of the *petitum* of the Claimant is needed to determine the extent of the *res judicata* in the 1962 Judgment, which Cambodia seeks to put into question.

[39] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* pp. 18-19, para. 43; *Request for Interpretation of the Judgment of November 20th, 1950, in the asylum case, Judgment of November 27th, 1950, I.C.J. Reports 1950,* p. 402. See also paras. 3.22-3.23 below.

2.22 As will be shown:

(1) the subject matter of the dispute in the 1959-1962 proceedings was – and was only – to determine sovereignty over the Temple (1.);

(2) it did not include the determination of the boundary in spite of the role played by the line appearing on the Annex I map; this was used to determine the location of the Temple but, by no means of the boundary line in the region (2.); and

(3) the scope of the dispute initially submitted did not undergo any transformation throughout the proceedings, despite a late attempt by Cambodia to extend its initial submissions, which was unequivocally dismissed by the Court (3.).

1. The Subject Matter of the Initial Dispute Was Restricted to Sovereignty over the Temple of Phra Viharn

2.23 The subject matter of the dispute was straightforwardly understood during the written pleadings[40]. As Thailand put it in the Counter-Memorial:

> "The present dispute concerns the sovereignty over a portion of land *on which the temple of Phra Viharn stands*."[41]

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[40] See also paras. 2.6-2.9 above.

[41] *I.C.J. Pleadings*, *Temple of Preah Vihear*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, p. 169, para. 1. (Emphasis added).

2.24 This brief description calls for several remarks: first, the subject matter of the dispute is thus positively identified as concerning sovereignty over the Temple. Such clarification, in line with the Court's Judgment on preliminary objections[42], was necessary since the opening paragraph of the Application[43], reflected in Cambodia's first submission[44], could create the impression that the Court was primarily seised of a dispute about unlawful occupation and use of force, which was indeed not the case.

2.25 At the same time, this description delimits the territorial scope of the dispute submitted to the Court, which is restricted to "a portion of land *on which the temple of Phra Viharn stands*". In delimiting this territorial scope, Thailand did not attempt in any way to reduce the territorial scope of Cambodia's submissions; on the contrary, it used Cambodia's own terms as appearing in the Application, where Cambodia was denouncing "the occupation of *a portion of Cambodian territory* (...) *where there are the ruins* of (...) the Temple of Preah Vihear"[45].

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[42] See paras 2.10 - 2.17 above.

[43] *I.C.J. Pleadings, Temple of Preah Vihear, Application*, Vol. I, p. 4, para. 1.

[44] *Ibid.*, p. 15.

[45] *Ibid.*, p. 4, para. 1. (Emphasis added).

(a) The Existence of Concurrent Claims of Sovereignty over the Temple

2.26 Cambodia considered from the outset its title to sovereignty over the Temple to be so evidently established that it needed no argumentation. The core of its case is captured in the following paragraphs:

> "- In the first place, by the terms of the international conventions delimiting the frontier between Cambodia and Thailand, *sovereignty over the portion of territory where the Temple of PREAH VIHEAR is situated*, in the chain of the Dangrek at 102°20' East longitude and 14°25' North latitude, belongs to Cambodia.
>
> - In the second place, Cambodia has never abandoned *its sovereignty over the portion of territory* in question and has always continued, by virtue of the title established by the treaties, to exercise territorial powers effectively therein.
>
> - In the third place, Thailand has not performed *in the said portion of territory any acts of sovereignty* of such a nature as to displace the Cambodian sovereignty which is established by the treaties and is effectively exercised."[46]

2.27 The Memorial, six pages long, was highly elliptical and made no change to the subject matter of the dispute or to the facts on which it was based. It simply recalled arguments from the Application.

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[46] *Ibid*., p. 5, para. 2. (Emphasis added).

2.28 It is to this claim of sovereignty that Thailand endeavoured to respond in its Counter-Memorial, by asserting its own sovereignty, on the basis of the same legal principles as those Cambodia had put forward: the existence of a title whose origin was to be found in the same treaty as the one invoked by Cambodia (the 1904 Treaty) and the correlative exercise of sovereign acts over the territory in dispute:

> "The Government of Cambodia alleges that its 'right can be established from three points of view' (Application, par. 2). The first of these is said to be 'the terms of the international conventions delimiting the frontier between Cambodia and Thailand'. (...)
>
> The Government of Thailand agrees that this Treaty is fundamental. It is therefore common ground between the parties that the basic issue before the Court is the application or interpretation of that Treaty. It defines the boundary in the area of the temple as the watershed in the Dangrek mountains. The true effect of the Treaty, as will be demonstrated later, is to put the temple on the Thai side of the frontier. (...)
>
> The evidence adduced in support of the second contention is exiguous in the extreme. Against the final negative contention, the Government of Thailand will show that it has in fact exercised various *acts of sovereignty over Phra Viharn* for many years without any interference or protest."[47]

2.29 Comparing these three pieces of the written proceedings (Application, Memorial and Counter-Memorial), it is remarkable that both States shared the same conception of the

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[47] *Ibid.*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, p. 169, para. 3. (Emphasis added).

scope of the dispute submitted to the Court, namely sovereignty over the Temple and the Temple ground.

2.30 In the Application, the often-used expression "portion of territory" is always followed by an explanation specifying which "portion" is concerned – and, in all cases, it is defined as the "portion of territory *where the Temple of Preah Vihear is situated*"[48] or an equivalent formulation[49]. Where they were disagreeing was on the interpretation and respective weight of the evidence in support of their sovereignty.

2.31 The subsequent written proceedings confirmed this initial conception of the subject matter of the dispute. Cambodia's Reply did so by its silence in respect of the definition of the subject matter. This silence implied that Cambodia did not consider it necessary to reformulate its claim even after Thailand's main arguments, as set out in the Counter-Memorial, had become known to it. Among these arguments, the authenticity and accuracy of the Annex I line held a central position[50]. If delimitation on the basis of the map was its main concern, Cambodia could have attempted to modify its claim at that stage. Nothing of the kind happened.

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[48] *Ibid.*, *Application*, Vol. I, p. 5, para. 2; p. 9, para. 13; p. 10, para. 15; p. 11, para. 18. (Emphasis added).

[49] For instance: "where there are the ruins of a holy monastery", (*ibid.*, p. 4, para. 1).

[50] See also paras. 2.48-2.51 below.

2.32 In consequence, Thailand's Rejoinder simply responded to Cambodia's claims in the Reply, and did not revert to the definition of the subject matter of the dispute, which was considered at that stage as known to and shared by the Parties[51], and confirmed by the Court in the Judgment on preliminary objections:

> "It remains only to return to the basic issue in this case. The Court has remarked that 'it is a dispute about territorial sovereignty'"[52].

2.33 Therefore, the definition of the subject matter of the dispute only appeared incidentally in the development of the arguments. For instance when Thailand was arguing that it had been at all times in possession of the Temple:

> "Nothing was said or done before that Commission [the Washington Conciliation Commission] involving the frontier in the Dangrek range or challenging Thai *sovereignty over the temple area*. France did not claim the temple, and nothing was said which could have indicated to the Government of Thailand that *its right to Phra Viharn was disputed*."[53]

2.34 By contrast with the clarity of the written proceedings, the oral proceedings enshrouded the subject matter of the dispute in fog. In his opening speech Cambodia's first pleader, Mr. Dean Acheson, reintroduced an ambiguous conception of

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[51] *I.C.J. Pleadings, Temple of Preah Vihear*, *Rejoinder of the Royal Government of Thailand*, Vol. I, p. 572, para. 54.

[52] *Ibid.*, p. 597, para. 111.

[53] *Ibid.*, p. 579, para. 68. (Emphasis added).

the dispute, already present in the Application, which made Cambodia's case oscillate between a claim of sovereignty and the consequential request for a declaratory judgment and a claim of responsibility for violation of territorial integrity, which entailed a judgment calling on Thailand to do something (*un jugement prestatoire*):

> "As the President has remarked, the definitive judgment of May 1961, confirming the Court's jurisdiction of the present cause, brings us now to consideration of the substantive question presented by the present litigation. *That question is whether or not Thailand, by its military occupation of the Temple of Preah Vihear, has violated the territorial sovereignty of Cambodia*.
>
> As has been developed in the written pleadings, the Royal Government of Cambodia rests its claim to sovereignty over the Temple upon an express legal title."[54]

2.35 This opening paragraph of the opening speech highlighted anew the dual character of the dispute Cambodia had submitted in the Application. Cambodia was, on the one hand, requesting the Court to recognize and declare its sovereignty over the Temple and, on the other hand, to take note of the violation of its territorial sovereignty and draw consequences from this finding of violation. But, under neither version was the boundary line discussed as such[55]. However, as

[54] *Ibid.*, *Oral Arguments,* Vol. II, p. 139 (Mr. Dean Acheson, 1 March 1962). (Emphasis added).

[55] See paras. 2.59–2.65 below.

Thailand's Counsel later noted, this line of argumentation opened with a presumption which called for a demonstration:

> "The peculiar sequence of the two submissions invites comment. One would have thought that the logical order would be for Cambodia first to claim a right to territorial sovereignty and then to denounce the stationing by Thailand of armed forces in the Temple area. But the way it is put seems to me like placing the cart before the horse. Cambodia begins at the outset with the presumption that the Temple already belongs to her. Only as a corollary measure does Cambodia ask the Court to declare her right to territorial sovereignty. By making this initial presumption, Cambodia has already begun to distort the case."[56]

2.36 Though the pleadings restored the respective hierarchy of these two claims, they nonetheless both remained part and parcel of the definition of the dispute and of the *petitum*. This consequently had an impact on the *res judicata*, for the Court had to respond to both claims[57].

2.37 The second confusing element in Cambodia's positions during the oral pleadings was more disturbing. It revealed not so much a logical flaw, but rather a juridical flaw. Cambodia attempted to expand the territorial scope of its initial claims from the ruins of the Temple to the wider undefined region of the Temple, thus completely distorting the subject matter of the dispute as previously understood by both Parties. This first

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[56] *I.C.J. Pleadings*, *Temple of Preah Vihear*, *Oral Arguments,* Vol. II, p. 212 (Mr. Seni Pramoj, 7 March 1962).

[57] See paras. 3.5–3.13 below.

emerged in a terminological shift in the Agent's description of the dispute:

> "*Ainsi ramené à ses éléments essentiels, le différend comporte à la fois le retrait de ces forces de police frontalière qui font partie des forces armées thaïlandaises et la constatation pure et simple de la souveraineté territoriale du Royaume du Cambodge* sur la région de Préah Vihéar."[58]

This terminological shift was further confirmed in the revision of Cambodia's submissions[59]. Cambodia's new portrayal of the dispute contrasted with the one made in the written proceedings, which had solely referred to sovereignty over a portion of territory where the Temple was situated[60].

2.38 Such an insidious attempt to modify the scope of the dispute was straightforwardly opposed by Counsel for Thailand, Mr. Seni Pramoj, as an impermissible distortion of the subject matter of the dispute. He denounced it in terms which, retrospectively read in light of the Request for interpretation, sound premonitory:

> "But can we be sure if this is all that Cambodia wants? In the Application, Cambodia asked only that the Court adjudge and declare her territorial sovereignty over the Temple. However, at the beginning of these proceedings, the Agent for the Government of Cambodia came

[58] *I.C.J. Pleadings*, *Temple of Preah Vihear*, *Oral Arguments,* Vol. II, p. 138 (H.E. Mr. Truong Cang, 1 March 1962). (Emphasis added).

[59] See paras. 2.68–2.74 below.

[60] See paras. 2.23–2.25 above.

forward to declare that his Government wished to claim territorial sovereignty over the *region* of Phra Viharn.

Stopping to enquire into the nature of the newly presented Cambodian request, the Court may have noticed that to claim territorial sovereignty over the Temple, on the one hand, and to claim territorial sovereignty over the region of Phra Viharn, on the other hand, are quite different. The first claim is vague enough. But we were able, at least, to refer to the need to worship at the Temple in order to conclude that Cambodia wished the Court to declare and adjudge her territorial sovereignty over an area sufficient for such purpose. However, the latter claim for the whole region of Phra Viharn is entirely without any terms of reference. The word 'region' in itself is so ill-defined in relation to actual area that, by wishful thinking, it could be used to cover two or three more provinces. The basic question therefore arises as to what Cambodia is really seeking to claim. I have no need to remind the Court of the difficulties of a defendant when faced with such a vague and ill-defined claim. How are we to prepare our defence? Should we understand that the Cambodian claim refers to the entire border? It seems that this is what Cambodia now claims. In the final submission made by the Agent of the Government of Cambodia on Monday the 5th of this month, the Court was asked to uphold the entire Dangrek border as marked out in Annex I.

The Court will notice that *if confined to the original request for territorial sovereignty over the Temple of Phra Viharn, the border involved in the Cambodian submission would measure less than a quarter of one kilometre*, this being the extreme width of the promontory where the Temple's largest building is situated. The later submission, on the other hand, involves the whole stretch of Dangrek frontier allegedly delimited on Annex I by the Mixed Commission of 1904. This frontier extends for approximately 112 kilometres. Since Annex I is but one in a series of maps some of which were not superseded by the Treaty of

> 1907, it would be easy to argue afterwards 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. This entire frontier between Thailand and Cambodia covers a distance of nearly 200 kilometres. The contrast between this and the original Application is most striking and, I submit, most unusual."[61]

It thus immediately appeared that, through this terminological shift, Cambodia was attempting to transform a dispute over territorial sovereignty into a dispute over boundary delimitation.

2.39 This distortion was all the more confusing, and damaging to Thailand's position, since Cambodia's Counsel had, during the same oral proceedings, upheld contradictory positions in respect of the territorial scope of Cambodia's claims. Indeed, despite this terminological change in the Agent's opening speech[62] and the substitution of the original claims with new, enlarged claims[63], Cambodia's Counsel reaffirmed and repeated that the territorial scope of the dispute was indeed very limited, and did so during the second round of the oral proceedings[64].

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[61] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 216 (Mr. Seni Pramoj, 7 March 1962). (Emphasis added).

[62] See para. 2.37 above.

[63] See para. 2.68 below.

[64] See paras. 2.40–2.46 below.

(b) The Territorial Scope of the Dispute Was Circumscribed to the Ground on Which the Temple Stood [65]

2.40 Cambodia had never given the precise dimensions of the "portion of territory" it was claiming, since the focus of its claim was the Temple. However, the pleadings permit an understanding of them, by reference to the extent of the Temple, or more precisely of the ruins, as they existed at the time when the Application was introduced. Indeed, since Cambodia was asking not only for a right to access the Temple, as a cultural artefact, but also for sovereignty over it, this implied a claim to the ground on which the Temple stood. The intrinsic link between the extent of the Temple and the extent of the territory claimed was established in the Application[66] and was confirmed in the subsequent written and oral pleadings. As Professor Reuter underlined in elegant and unambiguous terms, during the second round of oral pleadings:

> "*Mais que l'on se rapporte à la conclusion finale première de la requête et on verra peut-être qu'avec un peu de maladresse, mais avec une clarté parfaite, ce que revendique le Cambodge, c'est* le temple.
>
> *Je lis la deuxième conclusion finale:* '*Le Royaume du Cambodge conclut à ce que la souveraineté territoriale* sur le temple *de Préah Vihéar appartient au Cambodge.*' *Formule peut-être un peu gauche, mais qui indique bien que l'on revendique non seulement le*

[65] Hereinafter referred to as *Temple ground*.

[66] See paras. 2.6 and 2.23–2.25 above.

> *territoire, mais nous dirions presque en premier lieu - et c'est là la gaucherie - le temple."*[67]

One could hardly have better explained the correlation: the territory in dispute was therefore of a limited area, and extended only to the Temple ground. It was "*un peu gauche*" (slightly clumsy) to separate the territorial claim from the claim on the Temple – but "*ce que revendique le Cambodge,* c'est le temple" (what Cambodia claims *is the temple*[68]).

2.41 The limited territorial scope of the dispute was further confirmed by the use of words or expressions that denote a circumscribed, confined territorial unit. The territory thus claimed is repeatedly described in the pleadings of both Parties as a "portion of territory" (*parcelle* in French)[69]. Whereas such terms do not give a precise indication of the extent of the territory claimed, they clearly mean that this territory is an entity that can be considered separately. Since this entity was seen as the Temple ground, the limits of the territorial entity could only be determined by establishing the limits of the Temple.

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[67] *I.C.J. Pleadings*, *Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 557 (Mr. Paul Reuter, 27 March 1962). (Emphasis in the original).

[68] Our translation.

[69] *I.C.J. Pleadings*, *Temple of Preah Vihear*, *Application*, Vol. I, p. 5, para. 2 (three times); p. 9, para. 13; p. 10, para. 15; p. 11, paras. 16 and 18; p. 12, paras. 22 and 23; *ibid., Counter-Memorial of the Royal Government of Thailand*, Vol. I, p. 169, para. 3; p. 170, para. 3. (without considering the number of times where the Application's terms were quoted). In the oral pleadings, see *ibid.*, Vol. II, p. 206 (Mr. Paul Reuter, 5 March 1962); p. 538 (twice) (Mr. Paul Reuter, 26 March 1962); p. 541 (three times), p. 546 (twice), p. 548, p. 553, and p. 554 (Mr. Paul Reuter, 27 March 1962).

2.42 Moreover, in the Reply and in the oral pleadings, Cambodia insisted that solely the land upon which the Temple was located ought to be considered in dispute before the Court. Such insistence was needed in order to dismiss Thailand's evidence of *effectivités* in the areas situated nearby the Temple, though not in respect of the Temple itself:

> "*A cet égard, les actes publics les plus significatifs sont ceux qui concernent* le temple lui-même - seule parcelle de la frontière contestée - *parcelle sans habitant où il n'y a pas lieu de développer les mesures de protection de la santé, de recouvrer des impôts, d'opérer des recensements.*
>
> *L'activité des autorités françaises et cambodgiennes s'est manifestée d'une façon publique, continue et effective dans ce domaine.*"[70]

In the same vein, it was further claimed:

> "*Les faits invoqués par la Thaïlande pour consolider ou affirmer sa souveraineté sont, eu égard à* la nature de la parcelle litigieuse*, pratiquement sans pertinence*."[71]

By rejecting the relevance of Thailand's sovereign activities in sectors outside the "*parcelle litigieuse*" ("disputed portion of territory") – that is the Temple – though these sectors were

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[70] *Ibid., Réplique du Gouvernement du Royaume du Cambodge*, Vol. I, p. 466, para. 57. (Emphasis added).

[71] *Ibid.*, Vol. I, p. 469, para. 68. (Emphasis added). For the same line of argument, in the oral pleadings, see *Ibid., Oral Arguments*, Vol. II, p. 189 and p. 190 (Mr. Roger Pinto, 3 March 1962); p. 538 (Mr. Paul Reuter, 26 March 1962); p. 541, p. 546, p. 548, p. 553 and p. 554 (Mr. Paul Reuter, 27 March 1962).

contiguous to it, Cambodia territorially limited the extent of both its claims and the area in dispute before the Court, making clear that only the Temple itself, including the ground on which it stood, had to be considered by the Court.

2.43 Occasionally, other expressions were used to designate the extent of the territory in dispute, all converging towards a restrictive notion: thus Mr. Acheson was insisting that "the area in dispute in these proceedings *is very small indeed*"[72] or Mr. Reuter was referring to it as to "*un fragment de territoire*"[73].

2.44 When scrutinizing the expert evidence brought by Thailand as to the real position of the watershed in the Dangrek region[74], Mr. Acheson actually made a geographical description of the area in dispute that can be reconstituted on the map he was explaining to the Judges[75]. He dismissed the error concerning the O'Tasem river[76], reminding the Court that it had

[72] *Ibid.*, Vol. II, p. 145 (Mr. Dean Acheson, 1 March 1962). (Emphasis added).

[73] *Ibid.*, p. 193 (Mr. Paul Reuter, 3 March 1962).

[74] *I.C.J. Pleadings, Temple of Preah Vihear,* "Report by Professor W. Schermerhorn, 1961", *Counter-Memorial of the Royal Government of Thailand*, Annex 49, Vol. I, pp. 432-436; and *ibid.,* "Hearing of the Witnesses and Experts", *Oral Arguments*, Vol. II, pp. 331-439.

[75] *Ibid.*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, p. 436, footnote 1, Map Sheet 2, attached to Annex 49: *Phra Viharn, scale 1:10,000 compiled from aerial photographs by I.T.C. Consulting Department, April 1961*. See also Carte annexée au Rapport de MM. Doeringsfeld, Amuedo et Ivey (Annexe I) filed as Annex LXVIc of Cambodia's Reply [Annex 101].

[76] Thailand considered this error on the Annex I map to be at the source of the major error of the watershed in the relevant area.

to focus upon the Temple only, which was the crucial or the critical area, meaning the area in dispute:

> "What, then, is it which has been suggested? In the first place, that the First Commission's officers, agents, surveyors or topographers, or whatever they should be called, made a mistake as to where a stream northwest of the Temple went when it disappeared around the side of Pnom Trap. It is said that these gentlemen, now doubtless gathered to their fathers, thought that the stream made a bend to the southward around the mountain into Cambodia; whereas it is now claimed that it makes a bend to the north and flows into Thailand.
>
> Suppose they did; what of it? (...)
>
> But this area, north-west of the Temple, *is not the crucial area*. It is not 'the doubtful area' which Professor Schermerhorn has pointed out, and to investigate which he said, in his second explanation of Mr. Ackermann's visit, was the principal purpose of that visit."[77]

He thus attempted to discredit Thailand's expert evidence by arguing that in the immediate vicinity of the Temple there was a stream flowing in 1907 that left the Temple in Cambodian territory, a hypothesis that had not been taken into account by D.A.I. experts[78]. He then concluded:

> "So I do not for a moment grant that the Commission was in error in placing the Temple on the Cambodian side of the border. Moreover, the error claimed to have been made in the critical area, in the circumstances now

[77] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, pp. 464-465 (Mr. Dean Acheson, 22 March 1962). (Emphasis added).

[78] *Ibid*., pp. 465-472.

prevailing in that area, was plainly, in words used by our distinguished adversary, *de minimis*."[79]

2.45 By saying this, Counsel for Cambodia explicitly excluded the Pnom Trap mountain from the scope of the dispute. This is of particular relevance for the Request for interpretation now before the Court, since the Pnom Trap is part of the territory that, Cambodia now claims, was awarded to it by the Court in 1962[80].

2.46 It is remarkable that it was Cambodia itself that insisted upon the exiguity of the area in dispute, Thailand's Counsel for their part simply acknowledged and accepted this definition of the dispute by the Claimant[81] or, occasionally, drew attention to Cambodia's impermissible attempt to transform it at a very late stage of the proceedings[82]. Even more remarkable is the fact that Cambodia's Counsel maintained this position during the second round of oral pleadings, even after the change in the Claimant's submissions, at the end of the first round of oral pleadings, when it tried to encompass a much broader area than the one envisaged in the Application[83].

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[79] *Ibid*., p. 473.

[80] See para. 5.63 below.

[81] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments,* Vol. II, p. 567 (Mr. Henri Rolin, 28 March 1962).

[82] See para. 2.38 above.

[83] See paras. 2.68–2.743 below.

2. The Subject Matter of the Dispute Did Not Include the Determination of the Boundary

2.47 A reading of the written and oral pleadings confirms that the Parties were both attached to establishing the soundness of their claims over the Temple, and not to establishing the course of their common boundary in the region of Phra Viharn or of the Dangrek mountains. No doubt the issue of the boundary occupied part of their pleadings, but it was never a matter in itself. The Parties showed little interest in the location of the line at this place, while they were, by contrast, most concerned with the position of the Temple in relation to the line.

(a) The Role of the Annex I Map in Cambodia's Argumentation

2.48 Before entering into the heart of the subject, a few words are necessary to recall the factual context explaining the rather lengthy developments in respect of the Annex I map in the pleadings. Cambodia introduced the map in its Application as proof of a treaty title over the Temple[84].

2.49 However, it must be noted that Cambodia's argumentation changed rather radically in this respect. In its Application, it had advanced two arguments to prove this conventional title: the Annex I map was in fact presented as

[84] *I.C.J. Pleadings, Temple of Preah Vihear, Application*, Vol. I, p. 6, para. 5.

being part and parcel of the 1907 treaty instrument[85], since it, allegedly, would have been annexed to it[86]. It was thus argued that the map was a mere illustration of the boundary provided for in the 1904 Convention[87]. In order to respond to this argument Thailand, in its Counter-Memorial, invoked the lack of authority[88] and of accuracy[89] of the Annex I map as reasons for the unreliability of the map as evidence of title. These arguments were further developed in the Rejoinder[90]. Clearly they were not devoid of merit, since Cambodia's arguments in its Reply and especially in the oral pleadings changed tack.

2.50 Thus, while in the Application and in the Memorial, Cambodia had maintained that Thailand had, subsequently to

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[85] *Ibid.*, Vol. I, pp. 6-7, paras. 5–8.

[86] After Thailand had made its arguments (see *ibid., Oral Arguments*, Vol. II, p. 230 (Mr. Henri Rolin, 7 March 1962)), Cambodia had to withdraw this affirmation, and recognize that the map was never annexed to any treaty (see *ibid.*, p. 444 (H.E. Mr. Truong Cang, 21 March 1962)).

[87] *Ibid., Application*, Vol. I, p. 5, para. 4. See also *ibid.*, *Réplique du Gouvernement du Royaume du Cambodge*, Vol. I, p. 439, para. 4.

[88] Chapter II of the Counter-Memorial of the Royal Government of Thailand was devoted to demonstrating that, contrary to Cambodia's allegations, the map had not been approved by the Delimitation Commission established under the 1904 Treaty. (See *ibid., Counter-Memorial of the Royal Government of Thailand*, Vol. I, pp. 172–180).

[89] Chapter V of the Counter-Memorial was devoted to demonstrating that, contrary to Cambodia's claim, the Annex I line did not illustrate the watershed. See *ibid.*, pp. 194–196 and the Report by Professor W. Schermerhorn produced as Annex 49 of the Counter-Memorial of the Royal Government of Thailand, *ibid.,* pp. 432-436.

[90] On the lack of authority of the Annex I map for lack of approval by the 1904 or the 1907 delimitation commissions, see *ibid., Rejoinder of the Royal Government of Thailand*, Vol. I, pp. 549-572. For the lack of accuracy, an argument to which Cambodia did not respond in the Reply, see *ibid.*, pp. 590–598.

the 1904-1907 settlement, recognized the validity of the boundaries established by these treaties, in the Reply, it focused on Thailand's recognition of the Temple being in Cambodia[91]. Likewise, in order to establish the existence of its title, Cambodia devoted a substantially more developed chapter to the exercise of its sovereignty over the Temple, extracting from the mass of facts those concerning the Temple alone, mainly examples of archaeological activities[92].

2.51 Cambodia's oral pleadings pursued the same line of argumentation: while still maintaining that the Annex I map was representing the work of the Delimitation Commission[93] and correctly illustrated the watershed line[94], at least as it had existed in 1904-1907[95], much more attention was devoted to

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[91] See paras. 2.53–2.58 below.

[92] *I.C.J. Pleadings, Temple of Preah Vihear, Réplique du Gouvernement du Royaume du Cambodge*, Vol. I, pp. 466–469.

[93] See *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, pp. 139-141, 149-153 (Mr. Dean Acheson, 1 March 1962); see also *ibid.,* pp. 161-164, pp. 167–179 (Mr. Roger Pinto, 2 March 1962); and during the second round, *ibid*., pp. 448-452 (Mr. Dean Acheson, 21 March 1962), *ibid*., pp. 489–506 (Mr. Roger Pinto, 23 March 1962).

[94] *Ibid*., pp. 143–147, 155–160 (Mr. Dean Acheson, 1 March 1962); see also *ibid.*, pp. 452–473 (Mr. Dean Acheson, 21 March 1962).

[95] The possibility of a change of the watershed line between 1904 and1962 was pleaded by Mr. Dean Acheson. See in particular the conclusions he had drawn from the cross examination of experts, *ibid*., pp. 464–473 (22 March 1962).

Thailand's recognition of Cambodia's sovereignty over the Temple and the Temple alone[96].

2.52 This shift in the centre of gravity of Cambodia's argumentation towards recognition by Thailand of a legal and factual situation implied however a radical change in its reasoning. Whereas Cambodia's initial position concerning the existence of a treaty title invited the Court simply to interpret the 1904 treaty provisions and the allegedly annexed map and to apply them to the case, reliance upon the recognition argument required deducing the sovereignty of Cambodia from Thailand's behaviour. While such an approach may sometimes be appropriate when the Court is invited to adjudge territorial sovereignty, it is much less so when a boundary is to be determined: it is indeed one thing to claim that Thailand recognized that the Temple was situated south of a boundary line and quite another thing to allege that it had accepted a line traced on the basis of contour lines and rivers erroneously depicted on a map. In other words, the approach adopted by Cambodia during the hearings consisted in focusing on the relation of the Temple to the line and in completely avoiding the question of the location of the line on the ground.

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[96] See *ibid*., pp. 164-166, 180-186 (Mr. Roger Pinto, 2 March 1962) and, especially, *ibid*., pp. 193-208 (Mr. Paul Reuter, 3 and 5 March 1962); during the second round of oral pleadings, see *ibid*., pp. 480–488, 506–521 (Mr. Roger Pinto, 23 March 1962) and again *ibid*., pp. 522–528 (Mr. Paul Reuter's entire second pleading, 26–27 March 1962).

(b) The Map Line as a Line for Determining the Location of the Temple

2.53 From the very outset, Cambodia made clear that the Annex I map was the best proof of its title over the Temple since Phra Viharn was marked upon it as being south of the boundary line[97]. This was further stressed in the Reply[98].

2.54 During the oral pleadings, Professor Pinto strongly insisted upon Cambodia's main inference that the explicit mention of the Temple on the Annex I map could only be the result of a decision of the 1904 Delimitation Commission to attribute the Temple to France. The map was again treated as a document of attribution of sovereignty and not as a delimitation instrument, since the only evidence sought by Cambodia's Counsel related to the Temple:

> "*Il nous faut alors rechercher comment les Parties se sont effectivement conduites en ce qui concerne la délimitation dans les Dangrek, et singulièrement à Préah Vihéar, dans la pratique française et dans la pratique siamoise. (...)*
>
> *Mais une carte est une publication comme une autre - les auteurs (...) relisent leur manuscrit et leurs épreuves. Ils les corrigent attentivement. Bien sûr, ils laissent passer quelques coquilles.*

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[97] *Ibid., Application*, Vol. I, p. 6, para. 5.

[98] "*La carte [de l'Annexe I] montre clairement l'emplacement du Temple de Préah Vihéar et situe clairement le temple du côté cambodgien de la frontière*." (*Ibid., Réplique du Gouvernement Royal du Cambodge*, Vol. I, p. 443; see also *ibid*., p. 460).

> *Dans la frontière des Dangrek, Préah Vihéar ce serait une coquille d'importance !*
>
> *(...)*
>
> *En rédigeant la carte de l'Annexe I telle que nous la connaissons, le colonel Bernard, le capitaine Tixier et les autres officiers, leurs collègues, ont bien marqué, par conséquent le sens qu'ils donnaient à la décision de la Commission de délimitation*."[99]

He concluded as to French practice:

> "*Monsieur le Président, Messieurs les Juges, le comportement de la Commission française de délimitation, de son président, des autorités du Gouvernement français, au lendemain même des travaux de délimitation, est clair. Sa logique est irréfutable. Elle éclaire le sens de la décision prise: Préah Vihéar a été attribué au Cambodge.*"[100]

He further inferred from certain facts that the Siamese authorities knew of this alleged decision of the Delimitation Commission to attribute Phra Viharn to France, and agreed with it or at least did not oppose it:

> "*Comment croire que le prince Damrong aurait continué à recevoir l'archéologue, après avoir appris de lui, ou de l'examen des cartes de la Commission de délimitation, l'attribution de Préah Vihéar si cette décision avait été contraire à l'accord intervenu entre commissaires français et siamois ?*"[101]

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[99] *Ibid., Oral Arguments*, Vol. II, p. 506 (Mr. Roger Pinto, 24 March 1962). See also *ibid.*, p. 502.

[100] *Ibid.*, p. 510.

[101] *Ibid.*, p. 514.

2.55 Cambodia did not simply insist on the positioning of the Temple in relation to the Annex I line: when it addressed the recognition arguments, it focused again on the position of the Temple on the various maps produced in the 1908-1962 period. The examples are far too many to be quoted *in extenso*. Some quotations from the pleadings should suffice to give a precise idea of the tenor of the argument:

> "*Les cartes* officielles*, publiées par la Thaïlande, placent Préah Vihéar du côté cambodgien de la frontière*."[102]

Thailand's refutations of these arguments are found in the Rejoinder[103] and they all confirm the focus on the positioning of the Temple. The boundary line, whether the Annex I line, or the one advanced by Thailand as illustrating the watershed, were never considered in themselves, but only in its relation to the Temple:

> "One of the sheets (...) covers Phra Viharn, and shows the frontier in its proper place and the temple on the Thai side of it."[104]

> "Only one map has been produced (...) showing the temple in Cambodian territory."[105]

[102] *Ibid., Réplique du Gouvernement Royal du Cambodge*, Vol. I, p. 463, para. 50 (Emphasis in the original). For examples of such maps, see *ibid*., paras. 51-52 or *ibid*., *Application*, pp. 10-11, paras. 16–17; *ibid*., p. 13, para. 24; *ibid., Oral Arguments*, Vol. II, p. 164, p. 170, 182–185 (Mr. Roger Pinto, 2-3 March 1962).

[103] See *ibid*., *Rejoinder of the Royal Government of Thailand*, Vol. I, pp. 573–583.

[104] *Ibid*., p. 574, para. 57. See also *ibid*., para. 59.

[105] *Ibid*., p. 576, para. 63. See also *ibid*., para. 64, p. 577, paras. 64-66.

2.56 The situation did not change during the hearings. In line with the conception of the dispute as limited to the Temple, Cambodia's Counsel obviously restricted their arguments to this area, and their only interest in a boundary line, regardless of the map that illustrated it, was because it was situated north of the Temple:

> "*Sur cette carte* [the Annex I map] *le colonel Bernard situe la frontière au nord du temple de Préah Vihéar*."[106]
>
> "*De plus, même après 1935, au cours de négociations diplomatiques, la Thaïlande a utilisé et produit des cartes géographiques qui plaçaient nettement Préah Vihéar du côté cambodgien de la frontière*"[107]

Thus Cambodia's Counsel, Professor Pinto, paid particular attention to maps bearing explicit mention of the Temple:

> "*La Cour verra, en s'y rapportant, que sur cette édition, sous le point rouge situé incontestablement en territoire cambodgien, il est non seulement indiqué 'Préah Vihéar', mais également 'ruines'*."[108]

And Mr. Pinto went back to this map a few minutes later:

> "*Monsieur le Président, je voudrais m'excuser auprès de la Cour: tout à l'heure, lorsque j'ai cité la carte au 1/500 000me, dont un exemplaire a été annexé au traité*

[106] *Ibid., Oral Arguments*, Vol. II, p. 163 (Mr. Roger Pinto, 2 March 1962). See also *ibid.*, pp. 506–507 (Mr. Roger Pinto, 24 March 1962).

[107] *Ibid.*, p. 164. See also, *ibid.*, p. 167, pp. 170–171, pp. 180, 181, 182, 183 and 184.

[108] *Ibid.*, p. 184.

> *de Tokyo, j'ai mentionné que sous le nom de Préah Vihéar se trouvait celui de ruines. En réalité, je ne m'étais pas reporté, et j'ai eu tort, immédiatement, sur le champ, à la carte. Ce n'est pas le mot de ruines qui se trouve indiqué, c'est plus précisément celui de temple.*"[109]

2.57 In the same vein, the other events allegedly implying recognition by Thailand of Cambodia's sovereignty could only apply to the Temple itself and were only invoked for that purpose. This is the case in particular with Prince Damrong's visit in 1930, which was considered by Cambodia as a crucial event for recognition purpose[110]. The same obviously applies to France's protests of 1949 against Thailand having placed guards in the Temple and Thailand's silence on the matter[111].

2.58 The Parties' pleadings explain the function of the boundary line in the 1959-1962 proceedings: the documents illustrating it (or rather them, since, as will be seen in the next paragraphs, several lines were presented to the Court) were

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[109] *Ibid.*, pp. 184–185 (Mr. Roger Pinto, 2 March 1962).

[110] *Ibid., Réplique du Gouvernement Royal du Cambodge*, Vol. I, pp. 464–465, para. 55. For Thailand's response, see *ibid.*, *Rejoinder of the Royal Government of Thailand*, p. 581, para. 73. For the oral pleadings, see also *ibid., Oral Arguments*, Vol. II, pp. 189-190 (Mr. Roger Pinto, 3 March 1962) and, in response for Thailand, *ibid.*, pp. 312-313 (Sir Frank Soskice, 13 March 1962). For other examples when Thailand should have raised reservations of sovereignty, see *ibid.*, p. 198 (Mr. Paul Reuter, 3 March 1962) (signature of an agreement of cooperation on archaeological matters between France and Siam); *ibid.*, p. 198 (Mr. Paul Reuter, 3 March 1962) – political negotiations within the 1946 Conciliation commission; Mr. Roger Pinto identified France's affirmations of sovereignty as providing many occasions on which Thailand should have protested (*ibid.*, pp. 507–514 (Mr. Roger Pinto, 24 March 1962)).

[111] *Ibid.*, pp. 201–202 (Mr. Paul Reuter, 3 March 1962).

considered as evidence of Cambodian sovereignty over the Temple, upheld by Cambodia and refuted by Thailand. But the Parties never engaged in a discussion on their differing views over the actual location of the boundary on the ground, and both Parties considered that the Court could determine who had sovereignty over the Temple without having first determined where the boundary lay.

(c) The Parties' Lack of Interest in the Map Line as a Boundary

2.59 The pleadings reveal the fact that Cambodia and Thailand held contradictory positions as to where the Annex I line would be located if plotted on the ground. This is not surprising since the topographical errors in the map render it amenable of various applications on the ground[112]. Thailand had raised the issue a few times, but Cambodia chose to avoid the question and in any event the Court decided the case without resolving the issue.

2.60 It was Cambodia's position during the pleadings that the Annex I line was located on the ground in the immediate proximity of the Temple. Although this position was not clearly articulated, since the boundary did not form part of its claim as such, it can nonetheless be inferred from several Cambodian statements.

[112] See paras. 6.26-6.29 below.

2.61 Thus, the 1949 French protests against the placement by Thailand of guards in the Temple, while basing themselves both on the Annex I map and on a map prepared by the *Services Géographiques Siamois*, underlined:

> *"Les deux fragments de carte, française et siamoise, ne sont pas rigoureusement superposables, ce qui n'a rien de surprenant. Mais ils présentent une grande similitude. Dans l'un comme dans l'autre, on reconnaît très bien les vestiges des ruines de Préah Vihéar et* la frontière qui passe nettement au Nord à 500 mètres."[113]

This position was restated by Professor Pinto during the hearings:

> "*Nous ne devons jamais perdre de vue en effet que la frontière passe* à quelque 500 mètres au nord du temple."[114]

This assertion seemed to surprise Sir Frank Soskice who responded:

> "On what principle Professor Pinto puts the boundary there I do not know. The line on Annex I is very much further north than that."[115]

The issue stopped there, since neither Mr. Pinto nor any other Counsel for Cambodia gave further explanations. The

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[113] *I.C.J. Pleadings, Temple of Preah Vihear,* "Note de l'Ambassade de France à Bangkok en date du 9 mai 1949, N° 114/49", *Application*, Annex XVI, Vol. I, p. 106. (Emphasis added).

[114] *Ibid., Oral Arguments*, Vol. II, p. 189 (Mr. Roger Pinto, 2 March 1962). (Emphasis added).

[115] *Ibid*., p. 306 (Sir Frank Soskice, 12 March 1962).

divergence of opinions expressed therein as to the location of the Annex I line on the ground was not further articulated in the pleadings and the Court did not engage in resolving it[116].

2.62 During the pleadings, Cambodia displayed a conception of the line passing very close to the Temple. This is corroborated by Cambodia's statement in its Reply that, when Prince Damrong visited the Temple in 1930, the French delegation who welcomed him had installed a flag pole *at the boundary*:

> "*On comprend que le drapeau français ait été hissé à la frontière entre le Siam et le Cambodge, sans qu'il soit nécessaire de tenter une autre explication de ce fait.*"[117]

Now, it is quite easy to establish where the flag pole was placed in 1930 from the pictures sent by Prince Damrong to the French authorities and filed with the Court in 1962[118], as well as from Princess Phun Phitsamai Diskul's affidavit. For Cambodia, the flag pole, and hence the boundary line[119], were very close to the Temple, *at the foot of the staircase*[120]. The affidavit recounts:

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[116] See paras. 5.6-5.18 below.

[117] *I.C.J. Pleadings, Temple of Preah Vihear, Réplique du Gouvernement Royal du Cambodge*, Vol. I, p. 465.

[118] *Ibid., Application*, Annexes VIII and VIIIbis, Vol. I, p. 96. See also Photographs of Prince Damrong's visit to the Temple of Phra Viharn (1930), filed as Annex VIIIbis of Cambodia's 1959 Application [Annex 1].

[119] *Ibid.*, *Réplique du Gouvernement Royal du Cambodge,* Vol. I, p. 465.

[120] See Royal Thai Survey Department, Sketch showing the location of the French flag pole in 1930*,* 17 November 2011 [Annex 98].

> "After crossing Takhop Stream towards the stair-cases leading up to the Temple we found a French reception committee there. They had built a temporary shed of attap roofing only large enough to bed down two or three people. There was a flag pole in front of that shed with a French flag flying."[121]

The hypothesis of a boundary passing immediately north of the Temple was again restated by Professor Pinto in his pleadings:

> "*Et, rappelons-le, la montagne de Préah Vihéar, même si le temple est du côté cambodgien de la frontière, n'est pas tout entière sur le territoire cambodgien. Toute une partie de cette montagne se trouve en territoire siamois, puisque* la frontière passe immédiatement au nord du temple*, d'après la carte même publiée en 1908.*"[122]

2.63 The lack of interest in the location of the Annex I line on the ground (and, therefore, in the issue of delimitation as such), is further highlighted by the fact that Cambodia did not deem it necessary to answer the Thai argument that the plotting of such a line was already considered in 1962 as raising insuperable technical difficulties.[123] The issue had been raised in the Rejoinder[124] and was further brought to the Judges' attention during the oral pleadings, as Mr. Rolin for instance, repeatedly did:

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[121] *I.C.J. Pleadings, Temple of Preah Vihear,* "Affidavit by M.C. Phun Phitsamai Diskul, dated 9 June 1961", *Counter-Memorial of the Royal Government of Thailand*, Annex 39f, Vol. I, p. 402.

[122] *Ibid., Oral Arguments*, Vol. II, p. 182 (Mr. Roger Pinto, 2 March 1962). (Emphasis added).

[123] This is still the case at present. See paras. 6.10-6.17 below.

[124] *I.C.J. Pleadings, Temple of Preah Vihear, Rejoinder of the Royal Government of Thailand*, Vol. I, pp. 597–598.

“*Ainsi, le Cambodge vous demande sérieusement dans ses conclusions - je cite textuellement:*

> *‘De dire et juger que la ligne frontière entre le Cambodge et la Thaïlande, dans le secteur des Dangrek, est celle qui est tracée sur la carte de la Commission de délimitation entre l’Indochine et le Siam (annexe no I au mémoire du Cambodge).’*

Je crois de mon devoir d’attirer respectueusement l’attention de la Cour sur les graves difficultés auxquelles conduirait un arrêt qui accueillerait cette demande cambodgienne, sur les véritables impasses auxquelles se trouveraient acculés les deux pays.

La première difficulté est celle à laquelle j’ai déjà fait allusion. À supposer que la carte annexe I reçoive ainsi cette confirmation solennelle de la plus haute juridiction des Nations Unies, que devrions-nous faire, en présence de cette constatation qui n’est plus guère déniée, qui a été faite par nos experts s’étant rendus sur le terrain, que certaines rivières qui peuvent paraître à certains endroits couler vers le sud se relèvent et déversent leurs eaux vers le nord, contrairement à ce qu’indique la carte de l’annexe I ? Que des courbes de niveau qui ont été établies en conformité avec ce cours inexact des rivières ne correspondent pas à ce que l’on constate dans la réalité ?

Il y a deux solutions: ou bien nous allons transporter sur le terrain, par latitude et longitude, les différents points successifs de la frontière tels qu’ils figurent sur cette carte quadrillée de l’annexe I, sans nous soucier de la configuration du terrain; ou bien nous allons nous souvenir que le traité veut que l’on suive la ligne de partage des eaux. Nous allons considérer que la Commission mixte a établi une ligne qui, elle aussi, est conforme aux rivières et aux contours tels qu’elle se les a représentés; qu’il n’y a, même dans la carte annexe I, pas d’indication que l’on ait abandonné la ligne de partage des eaux pour autre chose et que, pour bien

> *interpréter cette carte, nous devons donc nous conformer à ce qui existe sur le terrain.*
>
> *Dans ce dernier cas, Phra Viharn restera à la Thaïlande.*
>
> *Dans le premier cas, si nous devons faire le report mathématique, nous perdrons Phra Viharn.*"[125]

Professor Rolin insisted upon Cambodia's silence with regard to these difficulties and upon the interpretation of this silence as implying that Cambodia was only concerned with sovereignty over the Temple and not with the delimitation in the region:

> "*Mais nous avons déjà rendu la Cour attentive dans notre procédure écrite sur le fait que si l'on adoptait cette solution-là, étant donné l'inexactitude qui existe, non pas seulement en cet endroit-là, mais en d'autres endroits de la carte annexe I, nous allions avoir une frontière qui sans doute à certains endroits nous enlèverait de larges morceaux du plateau, mais qui en d'autres endroits descendrait hardiment de la falaise pour enlever au Cambodge de larges morceaux de la plaine cambodgienne. Extraordinaire frontière!* Nous l'avons indiquée telle qu'elle nous apparaît, telle que nos experts l'ont tracée et, à notre grande surprise, on ne nous a rien répondu. Nous avons interprété ce silence comme étant l'indication que nos adversaires ne voulaient pas se laisser entraîner au-delà de Phra Viharn, et que tout en ayant invoqué la frontière de l'annexe I*, ils se refusaient à tirer d'autres conséquences de ce principe que celles concernant le temple*.
>
> *Mais du moment qu'ils vous demandent une consécration officielle de toute la frontière des Dangrek,*

[125] *Ibid., Oral Arguments*, Vol. II, pp. 267–268 (Mr. Henri Rolin, 8 March 1962). (Emphasis added).

ils en veulent donc les conséquences. Je suis en droit d'attendre d'eux des explications complémentaires."[126]

2.64 These technical difficulties are major, since the transposition of the Annex I line could result in a boundary disconnected from the actual topography of the region. And yet, it was only during the second round that Cambodia seemingly answered these challenges, by simply denying the accuracy of the topography as represented on Thailand's maps and the accuracy of the transposition by Thailand of the Annex I line onto the modern map[127]. However, no positive suggestion was made on how to solve the difficulties.

2.65 This passive position of Cambodia was all the more surprising and unacceptable to Thailand since during the hearings Cambodia had changed its claim to encompass the delimitation of the whole region.

3. THE *PETITUM* AS DEFINED IN THE ADMISSIBLE SUBMISSIONS OF THE PARTIES

2.66 In the written pleadings, Cambodia's submissions went unchanged, in form and in substance: they only concerned a request for recognition of its sovereignty over the Temple (submitted as Cambodia's second submission) and a

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[126] *Ibid., Oral Arguments*, Vol. II, p. 268 (Mr. Henri Rolin, 8 March 1962). (Emphasis added). See also *ibid*., p. 271.

[127] *Ibid*., pp. 456–458 (Mr. Dean Acheson, 22 March 1962). For Thailand's answers, see *ibid*., pp. 568–569 (Mr. Henri Rolin, 28 March 1962).

consequential request for withdrawal of Thai troops from the Temple (introduced as Cambodia's first submission):

> "For these reasons,
>
> The submissions of the Kingdom of Cambodia are as follows:
>
> May it please the Court to adjudge and declare, whether the Kingdom of Thailand appears or not:
>
> (I) that the Kingdom of 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 the Kingdom of Cambodia."[128]

2.67 Thailand's research for documents and its response were therefore tailored to prove the unsoundness of these claims. Its own submissions were merely drafted defensively:

> "For these reasons
>
> the Government of Thailand submits:
>
> (1) that the claims of the Kingdom of Cambodia formulated in the Application and the Memorial are not sustainable and should be rejected:
>
> (2) that Phra Viharn is in Thai territory: and the Court is respectfully asked so to adjudge and declare."[129]

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[128] *Ibid., Application*, Vol. I, p. 15. See also *ibid.*, *Mémoire du Gouvernement Royal du Cambodge*, p. 119; *ibid.*, *Réplique du Gouvernement du Cambodge*, p. 475.

[129] *Ibid.*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, p. 198.

2.68 It was only at the end of Cambodia's first round of oral pleadings that its claims underwent a radical change, requiring the Court to delimit the whole Dangrek region. This new claim became the first of Cambodia's submissions:

> "1. To adjudge and declare that the frontier line between Cambodia and Thailand, in the Dangrek sector, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia);
> 2. To adjudge and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia;
> 3. To adjudge and declare that the Kingdom of 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;
> 4. To adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone mode1 and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand."[130]

2.69 Thailand's surprise and protest in face of those new claims were understandable, considering Cambodia's definition of the dispute throughout the whole proceedings[131] and the nature of the arguments that had been put forward[132]. It therefore promptly opposed this attempt to expand the initial

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[130] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 10. For the French original, *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, p. 209 (H.E. Mr. Truong Cang, 5 March 1962).

[131] See paras. 2.26–2.46 above.

[132] See paras. 2.47–2.52 above.

claims. This opposition concerned both the first and the fourth of Cambodia's new claims, but on different grounds: while for the latter rather formal opposition was raised on the basis of its tardiness[133]; for the former, Thailand's opposition was substantial, considering it actually implied a change of the subject matter of the dispute. This was affirmed by Mr. Pramoj, Counsel for Thailand:

> "It clearly appears from the pleadings just quoted that the subject of the dispute in this case instituted by Cambodia concerns only the Temple of Phra Viharn. It is further alleged that Thailand occupied the Temple with her armed forces, the implication being that Thailand has thereby deprived Cambodians of a sacred place of pilgrimage and worship. This sacred place of pilgrimage and worship occupies only a portion of Cambodian territory situated in the province of Kompong Thom. With these terms of reference, the claim put forward by Cambodia can only be *for the Temple grounds* and not for the entire border on the Dangrek range of mountains as claimed in Cambodia's latest submission.
>
> It also appears clearly from the same pleadings just quoted that the nature of the claim precisely stated by Cambodia in the Application and Memorial only concerns the withdrawal of Thai armed forces from the *Temple* of Phra Viharn and the declaration by the Court of the territorial sovereignty of the Kingdom of Cambodia over the *Temple* of Phra Viharn.
>
> But now, in the latest submissions made by the Agent for the Government of Cambodia, *the claims the Government of Cambodia have been enlarged beyond*

[133] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, p. 217 (Mr. Seni Pramoj, 7 March 1962).

recognition. The precise nature of the claim and of the subject of the dispute has been destroyed by Cambodia so that the Application and Memorial of the Government of Cambodia can no longer be sustained."[134]

2.70 Mr. Rolin further stressed the inadmissibility of such enlarged claims, especially pointing to Thailand's concerns about the practical problems posed by any attempt to determine the boundary on the basis of the Annex I map[135]:

> "*Encore une fois, comme je vous l'ai dit, à la rigueur, tant que nos adversaires se limitaient aux ruines, on pouvait considérer que cela n'avait trait qu'à l'argumentation, mais maintenant cela a trait à l'objet même de ce qu'ils demandent. Et cependant, bien que changeant leur conclusion et agrandissant leur objectif, ils persistent à se taire. Est-ce qu'ils croient vraiment que l'on peut se débarrasser d'une objection embarrassante en la passant sous silence? Je pense que la Cour partagera la curiosité de la délégation thaïlandaise quant aux explications que le Cambodge pourra donner sur ce point.*"[136]

Mr. Rolin was wrong only on one point here: the Court did not share Thailand's curiosity, since it did not decide on the boundary and, for the purposes of determining sovereignty over the Temple these explanations were not necessary[137].

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[134] *Ibid.*, p. 218 (Mr. Seni Pramoj, 7 March 1962). (Emphasis added).

[135] See para. 2.63 above.

[136] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, p. 271 (Mr. Henri Rolin, 9 March 1962).

[137] See paras. 3.67–3.78 below.

2.71 Not surprisingly, Thailand's submissions at the end of its first round of oral pleadings were directed mainly at having Cambodia's first and fourth submissions declared inadmissible, and for the two other submissions to be rejected:

> "Mr. President, Members of the Court, with respect to the submission presented by the Government of Cambodia on 5 March 1962, the Government of Thailand respectfully presents the following as its submission to the Court:
>
> I. The Court is asked not to entertain the claims put forward by Cambodia in paragraphs 1 and 4 of their submissions presented on Monday, 5 March, by the Agent for the Government of Cambodia, on the ground that both those claims are put forward too late and were not included as claims which the Government of Cambodia wished to present to the Court in their Application instituting these proceedings or in the course of the written pleadings, and were for the first time put forward by the Agent for Cambodia when he formulated Cambodia's conclusions.
>
> It is therefore submitted that these claims should not now be entertained by the Court.
>
> 2. Alternatively:
>
> In regard to the first of the said claims, Thailand submits the following conclusions:
>
> (i) The map Annex I has not been proved to be a document binding on the Parties whether by virtue of the Treaty of 1904 or otherwise.
> (ii) Thailand and Cambodia have not in fact treated the frontier marked out on Annex I as the frontier between Thailand and Cambodia in the Dang Rek region.
> (iii) For the above reasons, the frontier line marked on Annex I ought not to be substituted for the existing

boundary line in fact observed and accepted by the two Parties in the Dang Rek range.
(iv) Even, therefore, if the Court, contrary to the submission of Thailand, thinks it proper to entertain the said claim (i) now put forward by Cambodia, Thailand submits that on the merits this claim is not well founded and ought to be rejected:

3. Thailand submits the following further conclusions in answer to submissions 2 and 3 put forward by Cambodia:

(i) Abundant evidence has been given that at all material times Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia. Alternatively, if, which is denied, Cambodia in any sense carried out any administrative functions in the said area, such acts were sporadic and inconclusive, and in no sense such as to negative or qualify the full exercise of sovereignty in the said area by Thailand.
(ii) The watershed in the said area substantially corresponds with the cliff edge running round Phra Viharn and constitutes the treaty boundary in the said area as laid down by the Treaty of 1904.
(iii) To the extent that the cliff edge does not precisely correspond with the watershed, as shown, by the configuration of the ground in the area, the divergencies are minimal and should be disregarded.
(iv) The general nature of the area allows access from Thailand to the Temple, whereas access from Cambodia involves the scaling of the high cliff from the Cambodian plain.
(v) There is no room in the circumstances of the present case for the application in favour of Cambodia of any of the doctrines prayed in aid by Counsel for Cambodia, whether acquiescence, estoppel or prescription.
(vi) Cambodia ought not in any event now to be allowed by the Court to put forward a claim based on prescription, not having anywhere in her pleadings or until the very end of oral argument put forward any such claim.

> (vii) The evidence in favour of Cambodia is, in any event, wholly inadequate to support any prescriptive title in Cambodia.
>
> Cambodia's second and third submissions ought therefore to be rejected.
>
> 4. Further, and in the alternative with regard to Cambodia's fourth submission, it is submitted that this submission, even if entertained by the Court, is wholly unsupported by evidence, and the claim put forward by Cambodia in its fourth submission is accordingly unsustainable."[138]

2.72 In its final submissions, put to the Court before the second round of oral pleadings, Cambodia changed yet again their formulation. However, this change, while expanding again the original claims, introduced further uncertainty since it used concepts that were neither defined during the proceedings nor had a precise meaning:

> "1. To adjudge and declare that the map of the 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 adjudge and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighbourhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia);

[138] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, pp. 439–441 (Mr. Vongsamahip Jayankura, 20 March 1962).

> 3. To adjudge and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia;
> 4. To adjudge and declare that the Kingdom of 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 adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand."[139]

2.73 The revised submissions thus introduced yet another novel claim, since point (1) asked the Court to decide, in the *dispositif* of the Judgment, that the Annex I map had a conventional character. The issue had been addressed during the pleadings, but as an argument in order to establish sovereignty over the Temple, *not as an argument intended to show the location of the boundary line*, and *not as a claim*. Point (2) asking for a delimitation "in the disputed region in the neighbourhood of the Temple of Preah Vihear" (*dans la région contestée voisine du temple de Préah Vihéar*) somewhat restricted the territorial scope of the previous claim for delimitation of the boundary in the Dangrek sector[140]. The three other submissions remained unchanged.

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[139] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 11. For the French original, *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, p. 441 (H.E. Mr. Truong Cang, 20 March 1962).

[140] See para. 2.68 above.

2.74 Thailand's revised submissions, naturally drafted in the light of Cambodia's latest submissions, asked the Court to reject the claim on the status of the Annex I map. Thailand also requested the Court to decide that the claim on delimitation and the claim on the restitution of cultural objects were inadmissible, and to dismiss the claim for sovereignty over the Temple:

> "I. *With regard to the first claim of the revised Submissions*:
>
> 1. The whole of the evidence before the Court shows that the map of the sector of the Dang Rek which is Annex I to the Memorial of Cambodia was not prepared or published either in the name or on behalf of the Mixed Commission of Delimitation set up under the Treaty of 13 February, 1904; but, whereas the said Mixed Commission consisted of a French Commission and a Siamese Commission, the said Annex I was prepared by members of the French Commission alone and published only in the name of the French Commission.
>
> 2. The French officers who prepared the said Annex I had no authority to give any official or final interpretation of the decisions of the said Mixed Commission at points at which no decision had been recorded.
>
> 3. No decision of the said Mixed Commission was recorded about the boundary at Phra Viharn. If the said Mixed Commission did reach such a decision, that decision is not correctly represented on the said Annex I, but was a decision that in the Phra Viharn area the boundary should coincide with the cliff edge.
>
> 4. There was no subsequent agreement of the parties attributing a bilateral or conventional character to the said Annex I.
>
> 5. The conduct of the parties, so far from attributing any conventional character to the said Annex I, shows that the parties have not treated the line

marked on the said Annex I as the boundary in the Dang Rek; Thailand has remained in undisputed possession of all the territory at the top of the Dang Rek. Wherever there is a cliff edge in the Dang Rek the edge of the cliff is, and has been, accepted as constituting the watershed boundary established in this region by Article I of the said Treaty of 1904.

6. Even if the said Annex I were to be regarded as possessing a conventional character, the boundary line marked on it would not be binding on the parties when proved - as it has been in the disputed area - to be based on an inaccurate survey of the terrain.

II. *With regard to the second claim of the revised Submissions*:

I. The Court is asked not to entertain the claim, because:

(i) the claim to a region 'in the neighbourhood of the temple of Phra Viharn' constitutes an enlargement of the claim presented by the Government of Cambodia in the Application instituting these proceedings and throughout the written pleadings;

(ii) the terms of the claim are too vague to allow either the Court or the Government of Thailand to appreciate what are the limits of the territory claimed.

2. Alternatively, the Government of Thailand repeats paragraph 3 of its submissions presented at the sitting of the Court on 20 March 1962.

III. *With regard to the third and fourth claims of the revised Submissions*:

The Government of Thailand repeats paragraph 3 of its submissions presented at the sitting of the Court on 20 March 1962.

IV. *With regard to the fifth claim of the revised Submissions*:

1. The Court is asked not to entertain this claim, because it constitutes an enlargement of the claim presented by the Government of Cambodia in the Application instituting these proceedings and throughout written pleadings.

2. Alternatively, the rejection of the first, second and third claims of the revised Submissions must involve the rejection of this claim.

3. Alternatively, this claim should be restricted to any objects of the kinds specified in the claim proved by the evidence before the Court to have been removed from the temple since 1954 by the Thai authorities."[141]

2.75 During the second round of oral pleadings, Thailand's Counsel further explained why any claim relating to delimitation had to be declared inadmissible. Mr. Rolin stressed again that transforming the dispute submitted in the Application was impermissible:

"*Il a tant été question de cartes dans cette affaire que l'on semble avoir perdu de vue, du côté cambodgien, quel était réellement l'objet de leur demande. Cet objet n'est assurément pas la rectification des cartes thaïlandaises; c'est avant tout l'adjudication d'un territoire.*

On se pose la question, que maître Seni Pramoj a développée avec force au début de son intervention hier, de savoir quel territoire. Dans la procédure écrite, il s'agissait du temple de Phra Viharn, les bâtiments, et, j'imagine, de l'allée conduisant à l'escalier qui descend le long de la falaise sur la plaine du Cambodge.

Déjà nous avions remarqué - et M. Seni Pramoj l'avait fait observer dans sa première plaidoirie – que M. l'agent du Cambodge avait, dans ses premières remarques, employé une expression qui marquait un élargissement lorsqu'il avait réclamé la région de Phra Viharn.

[141] See *I.C.J. Pleadings, Temple of Preah Vihear,* "Letter of the Agent of the Government of Thailand to the Registrar, 20 March 1962, *Correspondence*, No. 187, Vol. II, pp. 785–786.

Dans les premières conclusions d'audience, cet objet s'est manifestement étendu, puisque les premières conclusions vous demandaient de dire et juger 'que la ligne frontière entre le Cambodge et la Thaïlande dans le secteur des Dangrek était celle qui était tracée sur la carte de la Commission de délimitation entre l'Indochine et le Siam'.

Vous vous rendez bien compte, Messieurs, que vous demander de dire que la carte indique dans tout le secteur des Dangrek la frontière officielle et obligatoire, c'est donner barre au Cambodge pour réclamer ensuite l'évacuation de toutes les autres parcelles de territoire qui se trouveraient au nord de cette ligne et qui seraient occupées par la Thaïlande.

Nous avons donc immédiatement dans nos conclusions d'audience, après que j'eus montré le caractère redoutable et insoutenable de cette revendication, opposé une fin de non-recevoir *en comparant ce dispositif à celui des conclusions de la procédure écrite et en vous montrant que* manifestement cette demande était ultra petita."[142]

2.76 Mr. Seni Pramoj also denounced the vagueness of the revised submissions:

> "In my previous address to the Court I had occasion to refer to the vagueness of the Cambodian claim as regards the precise limits of the territory for which she is claiming. Cambodia has revised her submissions in an attempt to be more precise, and Mr. Acheson, expressing regret that Cambodia's former language had caused concern, said that my criticisms were hence no longer applicable. I must beg to differ. In the amended submissions, Cambodia asked the Court to adjudge and declare that the frontier line between Cambodia and Thailand, in the *region* in the *vicinity* of the Temple of

[142] *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, pp. 566–568 (Mr. Henri Rolin, 28 March 1962). (Emphasis added).

> Phra Viharn is that which is marked on the map Annex I. The words now used are '*region* in the *vicinity* of the Temple'. In my submission, Mr. President, Members of the Court, this is even more ambiguous. The word 'region' with its inherent lack of precision is again used, and we have an innovation in the use of the word 'vicinity''"[143] .

2.77 Besides its concern about the vagueness of Cambodia's territorial claim[144], Thailand repeated its concerns about Cambodia claiming a line outside the strict area of the Temple. Mr. Rolin thus came back on how much at odds with the reality on the ground the Annex I line would be[145]. He stressed again that such plotting would result in a new boundary, differing considerably from the one the Parties had observed:

> "*Même si le Cambodge veut bien préciser quel est l'objet limité de sa demande, la portion limitée de territoire qu'il réclame, de l'avis de la Thaïlande la thèse défendue par le Cambodge continue à contenir en elle une menace dont les répercussions doivent, si elles étaient acceptées, inévitablement entraîner entre les deux pays de graves complications et être une source d'insécurité.*
>
> *En effet, nous lisons encore dans les dernières conclusions du royaume du Cambodge qu'il est demandé de dire et juger que la carte du secteur de Dangrek a été dressée et publiée au nom et pour compte de la Commission mixte de délimitation créée par le traité de 13 février 1904, qu'elle énonce des décisions prises par ladite Commission mixte et qu'elle présente tant de ce*

[143] *Ibid*., p. 559 (Mr. Seni Pramoj, 27 March 1962). (Emphasis in the original).

[144] On this point, see also *ibid.*, p. 567 (Mr. Henri Rolin, 28 March 1962).

[145] See para. 2.70 above.

> *fait que des accords et comportements ultérieurs des Parties un caractère conventionnel. Assurément c'est là* un dire pour droit *purement juridique, qui n'a pas directement de conséquence politique, puisqu'il nous serait toujours possible, si l'on cherchait ailleurs qu'à Phra Viharn à tirer parti d'une déclaration en ce sens, d'opposer d'autres arguments que le caractère non conventionnel de la carte, mais il n'en est pas moins vrai qu'il y a là un préjugé dont éventuellement on pourrait se servir ailleurs, et qui constituerait* une menace pour tous les points du secteur du Dangrek et peut-être des autres secteurs des onze autres cartes, où la frontière de fait, telle qu'elle est respectée par les deux pays, sans créer de difficultés, ne se trouve pas en conformité avec la frontière théorique indiquée sur la carte. *Car je ne crois pas qu'il pourra être contesté que Phra Viharn n'est pas le seul endroit où la frontière effective ne correspond pas à la carte annexe I.*"[146]

2.78 Counsel for Thailand insisted that, even assuming the Annex I line could be transposed onto the ground, the result would very much differ from the boundary as respected by the Parties[147]. He exhibited a map showing the portions of Cambodian territory that could be claimed by Thailand by virtue of a transposition of the Annex I line[148]. He then gave several examples of the difficulties that a transposition of the Annex I map line would raise, either because it would disregard

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[146] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, pp. 567–568 (Mr. Henri Rolin, 28 March 1962). (Emphasis added).

[147] Thailand expressed strong reservations as to the feasibility of such transposition. See paras. 2.63-2.64 above and *ibid., Rejoinder of the Royal Government of Thailand*, Vol. I, p. 597, footnote 1. Thailand will revert to this issue in the Chapter VI.

[148] *Ibid.,* Map showing strips of Cambodian territory attributed to Thailand if Annex I were declared valid, filed as Annex No. 76bis of Thailand's Rejoinder, *ibid.*, p. 687 [Annex 102].

decisions of the Commission of Delimitation established under the 1907 Treaty[149], or contravene a subsequent tacit agreement between Thailand and Cambodia[150]. He then concluded:

> "*Et alors, je vous pose la question, et c'est l'objet de ma démonstration, si telle est la situation, est-ce qu'il est raisonnable d'aller demander à la Cour, fût-ce dans un* dire pour droit *théorique, d'investir d'une sorte de caractère sacro-saint conventionnel, sur toute l'étendue de la frontière des Dangrek, cette ligne frontière indiquée dans la carte annexe I?*
>
> *Je pose la question: de la Thaïlande ou du Cambodge, quel est celui des deux États dont l'attitude, dans ce procès, pourrait être une cause d'insécurité et d'instabilité pour une frontière qui, à part Phra Viharn, n'a jamais donné lieu, depuis cinquante ans, à aucune difficulté?*"[151]

2.79 What Mr. Rolin underlined was the fact that, outside Phra Viharn, the Parties had not engaged before the Court in argument that would allow the Court to identify the respective claims of the Parties, the factual situation, the geographical and human reality, or the technical feasibility of the transposition of the line, all matters of paramount importance for delimitation.

C. Conclusion

2.80 In line with the positions of the Parties concerning the subject matter of the dispute as expressed,

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[149] *Ibid., Oral Arguments*, Vol. II, p. 571 (Mr. Henri Rolin, 28 March 1962).

[150] *Ibid.*, p. 570.

[151] *Ibid.*, p. 573. (Emphasis in the original).

- in the Cambodian Application,
- in the written and oral pleadings, and
- in their admissible submissions,

and in accordance with the definition given in the Judgment on preliminary objections, the Court was only called upon to decide on the sovereignty over the Temple and on the two claims put forward by Cambodia for the withdrawal of Thai military personnel and the return of cultural objects. The Court was not called on to decide on the boundary line between the Parties and was only invited in the pleadings to use the Annex I map as a piece of evidence of Cambodia's sovereignty over the Temple.

CHAPTER III
THE MEANING AND SCOPE OF THE 1962 JUDGMENT

A. Introduction

3.1 In its Judgment of 15 June 1962 on the merits of the dispute, the Court responded to the specific questions raised by Cambodia in its original application – sovereignty over the Temple and withdrawal of Thai military personnel from the ruins of the Temple – and added a further matter, the return of "sculptures, stelae, fragments of monuments, sandstone model and ancient pottery"[152] (hereafter referred to as "cultural objects"), something raised by Cambodia in the course of the proceedings. The attempt by Cambodia to broaden the issue before the Court to a determination of the boundary between Cambodia and Thailand and make a ruling about the status of the line on the Annex I map, was specifically rejected by the Court.

3.2 The language used by the Court in describing the dispute and in defining the area to which its decision related was simply a continuation of what it had said in the preliminary objections phase. The scope of the dispute was narrow. The area that the Court focused on was circumscribed. The Court used terms that confined what it was deciding to the Temple itself, which included the ground on which the Temple lay, exemplified by

[152] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, pp.10 and 11.

the use of terms such as "Temple area" and the "vicinity" of the Temple. The phrase found in the second operative paragraph, "at the Temple, or in its vicinity on Cambodian territory", on which Cambodia's Request for interpretation hinges, does not bear the expansive meaning that Cambodia now wishes to ascribe to it. The central question for the Court was sovereignty over the Temple, and maps were used to assist the Court in deciding in whose territory the Temple lay, but explicitly they were not used for the purpose of making a determination about the boundary between the Parties. In this regard, it is significant that the Court did not attach any map to its Judgment and it only requested the reproduction of the Annex I map with the pleadings. It did not include any modern map accurately reproducing the topographical reality[153].

3.3 A reading of the 1962 Judgment shows that whenever the Court in 1962 referred to the "area of the Temple", "the Temple area", or "the vicinity of the Temple", it was not referring to the whole area to which the Annex I line related. The Court's wording when it formulated operative paragraph 2 of the *dispositif* was precise and clear. It was talking about the Temple itself and the vicinity of the Temple. The words used were a direct response to the request that Cambodia had then made. They were not a response to what Cambodia now claims.

3.4 The analysis that follows demonstrates the narrow scope

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[153] See also para. 5.25 and, in particular, footnote 457 below.

of the Court's decision and of the confining nature of the language used by the Court in describing the dispute and explaining its decision.

B. The Scope and Content of the *Dispositif*

3.5 In its decision of 15 June 1962, the Court decided three things.

3.6 First, it decided that:

> "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia"[154].

This was the central finding of the Court and it was worded almost identically to the request of Cambodia in its third final submission[155]. It was a response to what had been asked for in the initial request of Cambodia and it was the basis on which the other findings could be made.

3.7 Second, the Court decided that Thailand was:

> "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"[156].

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[154] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p.36.

[155] The Court refers to "Cambodia" and not "the Kingdom of Cambodia" as Cambodia had worded its third final submission.

[156] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p.37.

This was a rewording of the fourth final submission of Cambodia, which had asked the Court to declare that Thailand was:

> "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"[157].

The Court said little about this second paragraph of the *dispositif*, noting that:

> "it also finds in favour of Cambodia as regards the fourth Submission concerning the withdrawal of the detachments of armed forces"[158].

Thus, the second operative paragraph of the *dispositif* was, according to the Court, simply giving effect to the submission of Cambodia.

3.8 Third, the Court decided that Thailand was:

> "under an obligation to restore to Cambodia any objects of the kind 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"[159].

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[157] *Ibid.*, p. 37.

[158] *Ibid.*, p. 36.

[159] *Ibid.,* p. 37.

Instead of repeating in full Cambodia's request that Thailand return all "sculptures, stelae, fragments of monuments, sandstone model and ancient pottery" taken from the Temple since 1954, the third operative paragraph simply contains a reference back to "objects of the kind specified in Cambodia's fifth submission". In fact, the Court acknowledged there had been no proof of anything having been taken from the Temple, but was nonetheless prepared to make a "finding of principle in favour of Cambodia"[160].

3.9 The second and third operative paragraphs of the *dispositif* were stated specifically by the Court to be consequential on the first operative paragraph[161]. Both the obligation to withdraw troops and the obligation to return cultural objects would as a matter of general international law rest on Thailand in any event as a result of the conclusion that the Temple was situated in territory under Cambodian sovereignty. As the Court said, the claims in both Cambodia's fourth and fifth submissions are "implicit in, and consequential on, the claim of sovereignty itself"[162].

3.10 In effect, the Court decided only one thing – that the Temple was situated in territory subject to Cambodian sovereignty. The rest just followed automatically. Because Cambodia had requested them, the Court gave specific answers

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[160] *Ibid.*, p. 36.

[161] *Ibid.*, pp. 36 and 37.

[162] *Ibid.,* p. 36.

to the fourth and fifth submissions. But even if not requested, they would have followed as a matter of course. It was for this reason that the Court saw no difficulty in responding to the fifth submission, even though it was not part of the original submissions of Cambodia. It could not represent any extension of Cambodia's claim because it was the inevitable consequence of the claim to sovereignty.

3.11 Not only did the Court decide just one thing, it explicitly declined to go further. In the course of the proceedings, on 5 March 1962, Cambodia added a new first submission[163], asking the Court:

> "To adjudge and declare that the frontier line between Cambodia and Thailand, in the Dangrek sector, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I to the Memorial of Cambodia)."[164]

In short, Cambodia wanted the Court to rule that the line on the Annex I map was the boundary between the Parties.

3.12 In its Final Submissions, on 20 March 1962[165], Cambodia added a further submission asking the Court:

> "To adjudge and declare that the map of the Dangrek

[163] See paras. 2.35-2.39 above.

[164] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p.10.

[165] See paras. 2.68-2.70 above.

> 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."[166]

This submission, which became the new first submission of Cambodia, sought to have the Court go further and state that the Annex I map had the character of a treaty.

3.13 The Court refused to rule on either of these submissions. It refused thereby to include any reference to the Annex I map in the *dispositif*. As will be pointed out later, such an approach was inevitable given the way the Court interpreted its mandate and defined the issue in dispute. If the sole matter for the Court was whether the Temple was situated in Cambodian or Thai territory, a ruling on the status of the Annex I map or of the Annex I line went beyond that. It was something that the Court was neither required nor prepared to do, and it did not do it. Yet today Cambodia wants the present Court either to pretend that the 1962 Court decided something that the Court deliberately refused to do, or to stand in the shoes of that Court and make a decision that the previous Court did not make.

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[166] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p.11.

C. The Narrow Scope of the Dispute as Defined by the Court

3.14 In setting out its view of what constituted the dispute that it had to decide, the Court made clear that it was the narrow question of sovereignty over the Temple that was at issue, and not a broader question of the status of the boundary or of the Annex I map or line. It continued to view the dispute in the narrow terms in which it had seen it at the preliminary objections phase and thus refused to rule on the submissions of Cambodia that were predicated on an expanded mandate of the Court.

1. The Link with the Judgment of the Court on Preliminary Objections

3.15 At the preliminary objections phase, the Court defined the dispute as "territorial sovereignty over the region of the Temple of Preah Vihear and its precincts"[167]. In its Judgment on the merits, the Court quoted what it had said in its Judgment on preliminary objections and, apparently encapsulating what it had there said, went on to say:

> "*Accordingly*, 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."[168]

[167] See paras. 2.14-2.17 above.

[168] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 14. (Emphasis added).

3.16 In short, the Court used what it had said at the preliminary objections phase to define the dispute for the purposes of the merits. The "region of the Temple of Preah Vihear" at the preliminary objections phase was the Temple and its precincts, and this same "region" was the area the Court was concerned with in its Judgment on the merits.

2. The Court's View of the Limited Scope of the Dispute

3.17 Having defined the dispute as applying to sovereignty over the region of the Temple of Phra Viharn and its precincts, the Court went on to explain the relevance of the frontier between the Parties and maps that had been submitted to it. The Court said.

> "To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector. Maps have been submitted to it and various considerations have been advanced in this connection. The Court will have regard to each of these *only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it*, *the subject of which has just been stated*."[169]

3.18 The "sole dispute submitted to it" was sovereignty over "the region of the Temple of Preah Vihear and its precincts", and the frontier line and the maps were relevant only to the extent that they could throw light on this question of

[169] *Ibid.* (Emphasis added).

sovereignty. They could be taken into account as reasons for the Court's decision, but they could not themselves give rise to matters that had to be determined. The Court was only deciding the "sole dispute submitted to it"– the question of sovereignty over the Temple and its precincts.

3.19 It is no surprise, therefore, that the Court in 1962 was not prepared to respond to the first and second final submissions of Cambodia. In stating that it could not give expression to these submissions "as claims to be dealt with in the operative provisions of the Judgment" the Court said it was "for the reasons indicated earlier at the beginning of the present Judgment"[170], drawing a direct link with its explanation that the frontier line and maps were relevant only to the extent that they could throw light on the question of sovereignty over the Temple and its precincts. In other words, a ruling about the status of the Annex I map or of the line contained within it, would have been simply outside of the scope of the Court's mandate. They were not part of the "sole dispute submitted to it".

3.20 In drawing its conclusions before making its findings, the Court further emphasizes what it regards as the "sole dispute" submitted to it. Twice it refers to the dispute as "sovereignty over Preah Vihear", saying definitively in the form of a summing up:

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[170] *Ibid.*, p. 36.

> "In the presence of the claims submitted to the Court by Cambodia and Thailand, respectively, concerning the sovereignty over Preah Vihear thus in dispute between these two States"[171].

The Court then went on to state its conclusions and findings. There can be no clearer indication of what the Court saw itself as deciding in this case. And sovereignty over Phra Viharn is precisely what the Court was dealing with in the first operative paragraph.

3.21 Thus, Cambodia's assertion in its Request in respect of the second operative paragraph that "the use of the phrase 'on Cambodian territory', which clearly indicates that Thailand's obligation to withdraw its military forces goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general"[172], by which Cambodia means all of the area on the Cambodian side of the Annex I line, is manifestly wrong. The "sole dispute" submitted to the Court related to sovereignty over the Temple of Phra Viharn, and that could mean no more than the Temple and its precincts. As a result of the Court's own defining of the dispute, the obligation on Thailand could not have extended further.

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[171] *Ibid.,* p. 36.

[172] *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), Application Instituting Proceedings,* 28 April 2011, para. 36.

3. THE SCOPE AND CONTENT OF THE *DISPOSITIF* WAS CIRCUMSCRIBED BY THE *PETITUM*

3.22 In delivering its judgment, a court cannot go beyond the claims of the Parties and award a Party something that it did not request (the *non ultra petita* rule)[173]. As Judge Buergenthal said in his Separate Opinion in the *Oil Platforms case*:

> "a cardinal rule governing the Court's judicial process, which does not allow the Court to deal with a subject in the *dispositif* of its Judgment that the parties to the case have not, in their final submissions, asked it to adjudicate"[174].

In saying this, Judge Buergenthal was simply reiterating what was said by the Court in the *Asylum Case* in the following terms:

> "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions"[175].

3.23 In short, what the Court decided in 1962 in each of the operative paragraphs of the *dispositif* can extend no further than what Cambodia requested. As a result, the three conclusions

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[173] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* pp. 18-19, para. 43.

[174] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), I.C.J. Reports 2003,* pp. 270-271, para. 3.

[175] *Request for Interpretation of the Judgment of November 20th, 1950, in the asylum case, Judgment of November 27th, 1950, I.C.J. Reports 1950,* p. 402.

that the Court did reach were inherently narrow and almost by definition could not have been broad in scope.

3.24 The request in Cambodia's third submission referred to sovereignty over the Temple. That request specifically dealt only with the Temple. That Cambodia itself saw the dispute as limited is evidenced by its description of the claim in its Application, which was repeated in the oral pleadings at the preliminary objections stage – *"une parcelle du territoire cambodgien"* on which the Temple stood[176]. And, Cambodia must have seen it as a limited request because why otherwise would it have added the first two submissions at a later stage?

3.25 If the *"parcelle du territoire cambodgien"*, which was the subject of the Application on 6 October 1959, had referred to the whole of the area on the Cambodian side of the Annex I line, there would have been no need for Cambodia to formulate the additional submissions relating to the Annex I map and the Annex I line. Like the fourth and fifth submissions they would have been incorporated in, or consequent upon, a conclusion on the question of sovereignty over the Temple. But, Cambodia clearly did not see it that way and found it necessary to add the first and second submissions because their content was not covered by the claim to sovereignty over the Temple.

[176] See para. 2.12 above.

3.26 Thus, the limited scope of the claim in the third submission – that "the Temple is situated in territory under the sovereignty of the Kingdom of Cambodia" – as intended by Cambodia and understood by the Court, circumscribes the scope and content of the first paragraph of the *dispositif*. Sovereignty over the Temple referred to just that; the physical Temple encompassed in what the Court frequently referred to as the "Temple area" which as will be pointed out below was narrowly constrained.

3.27 This has a further consequence. Since, as the Court said, the fourth and fifth submissions were consequential on the third, the Court's acceptance of them could not entail an expansion of the area to which the third submission applied. The requirement to withdraw troops and return cultural objects, being a consequence of the conclusion that Cambodia had sovereignty over the Temple, could only apply to the area covered in the determination of sovereignty. Thus, the second and third paragraphs of the *dispositif* could apply to an area no greater than that covered by the first paragraph of the *dispositif*. And, as will be seen later, the terms used by the Court make clear that it saw the area as a restricted one, and certainly not encompassing all of the territory on the Cambodian side of the Annex I map line as Cambodia would now like to claim.

3.28 Beyond this, however, independently the second and third paragraphs of the *dispositif* were themselves applicable only to a restricted area. The second paragraph of the *dispositif*,

relating to the withdrawal of troops, was said by the Court to be an acceptance of Cambodia's fourth submission. That submission called for Thailand "to withdraw the detachments of armed forces it has stationed, since 1954, in Cambodian territory, in the ruins of the Temple of Preah Vihear". By its very words, then, the Court was accepting in the second paragraph of the *dispositif* the request of Cambodia to order the removal of armed forces from "the ruins" of the Temple.

3.29 A reference to the ruins of the Temple was hardly an ill-considered formulation made in haste by Cambodia in its Final Submissions to the Court. This was a request that had been made by Cambodia at the outset in its Application. It had been repeated by Cambodia at each stage of the proceedings in identical terms. And, as pointed out earlier[177], removal of Thai military personnel from the "ruins of the Temple" had been what was at issue in 1949 and 1954.

3.30 The term "ruins of the Temple" can only refer to an area that encompasses structures that are part of the Temple itself. And there is nothing in the decision of the Court to indicate that it was going further than that and taking the request of Cambodia and expanding it to cover a much broader area than the ruins of the Temple, nor could it have done so without violating the *non ultra petita* rule. Thus, the terms used by the Court in the second paragraph of the *dispositif*, including the

[177] See paras. 2.3-2.5 above.

phrase "at the Temple, or in its vicinity on Cambodian territory" can be nothing more than a convenient way to describe what Cambodia had referred to as the "ruins of the Temple".

3.31 In the third paragraph of the *dispositif*, the Court accepted the fifth submission of Cambodia regarding the return of cultural objects. The fifth submission referred to cultural objects "that had been removed from the Temple". The word "Temple" in this request can refer to no greater an area than the reference to "Temple" in the third submission over which sovereignty was being determined. In fact, what the Court ordered in the third paragraph of the *dispositif* was the return of cultural objects "removed from the Temple or the Temple area".

3.32 However, the change in wording to encompass the "Temple area" could not affect the geographical scope of the order. The Court could not have expanded its order to cover an area well beyond the scope of the order requested. The reference to the "Temple area" could only be a reference to an area in close proximity to the Temple – the Temple precincts – otherwise the Court could again be subject to the accusation of deciding *ultra petita*. It clearly did not do that. And, in any event, cultural objects that could have potentially been removed would only have been in the Temple or in close proximity to it – they would have been part of the "ruins of the Temple". It makes no sense to consider that the reference to the "Temple area" in operative paragraph 3 was a reference to all of the area on the Cambodian side of the Annex I map line.

3.33 The meaning and scope of the 1962 Judgment can be ascertained by reference both to what the Court decided and to what the Court did not decide. It decided the question of sovereignty over the Temple and the consequential requirements to withdraw Thai troops and restore cultural objects. These were specifically what Cambodia had requested. It had not requested in its original Application that the status of the Annex I map or of the line on that map be determined. Its request had related only to the Temple. For that reason, Cambodia decided to broaden the question before the Court with its two additional submissions, covering the issue of the boundary between the Parties. The fact that the Court decided only on the initial request relating to sovereignty, and refused to deal with the Annex I map and the line in the *dispositif* is a clear indication that it saw the issue before it as relating only to sovereignty over the Temple, nothing more. And, what the Court did not decide cannot be revived as a decision of the Court under the guise of interpretation.

D. The Terms Used by the Court Circumscribed the Issue in Dispute

3.34 That the Court was dealing in the 1962 Judgment with a circumscribed area is illustrated by the terms used by the Court to describe the dispute and its scope. The terms used in the *dispositif* which describe the scope of the Judgment, “Temple”, “at the Temple, or in its vicinity on Cambodian territory” and “Temple area”, are all terms that reflect that it is a limited area

to which the Judgment applies. While the term “region” is used in the Judgment, although not in the *dispositif*, it is generally not used to define the subject of the dispute.

3.35 Central to Cambodia’s claim to interpretation in this case is the view that the term “vicinity on Cambodian territory” extends to all of the area on the Cambodian side of the Annex I map line. But, an analysis of the terms used by the Court show that this could not be so. The terms used by the Court reflect the fact that it was deciding sovereignty over the Temple, not that it was making a broad statement about the extent of Cambodian sovereignty asserted through the Annex I map. It was neither determining a boundary nor dealing with a broad area as Cambodia now claims.

1. THE MEANING OF THE TERM “TEMPLE” IN OPERATIVE PARAGRAPH 1

3.36 As pointed out in Chapter II[178], the Court defined the dispute in the preliminary objections phase as sovereignty over the region of the Temple and its precincts. This essentially limited the issue to the Temple itself, the ground on which it lay and its immediate surroundings – the precincts. At the beginning of its Judgment on the merits, the Court endorses that understanding of the scope of the dispute. This is reinforced by the way the Court describes its conclusion about sovereignty –

[178] See paras. 2.13-2.17 above.

"In the presence of the claims submitted to the Court by Cambodia and Thailand respectively, concerning sovereignty over Preah Vihear." It then endorses Cambodia's third submission which itself referred to "sovereignty over the Temple of Preah Vihear."

3.37 There is, thus, nothing in the 1962 Judgment to suggest that when the Court referred to sovereignty over the "Temple" it was referring to anything other than the structure of the Temple and its immediate surroundings. It was the area described by Cambodia as the "ruins of Preah Vihear" and what the Court itself referred to as "the Temple and its precincts". As will be pointed out below, it was also referred to as the "Temple area". But regardless, of the term, it was a narrowly confined area that the Court was concerned with. It was not all of the territory on the Cambodian side of the Annex I map line.

2. THE MEANING OF THE PHRASE "AT THE TEMPLE, OR IN ITS VICINITY ON CAMBODIAN TERRITORY" IN OPERATIVE PARAGRAPH 2

3.38 Apart from three uses earlier in the Judgment, the term "vicinity" is found just in operative paragraph 2 of the Judgment. The second operative paragraph, as already pointed out, was an acceptance by the Court of the Cambodian fourth submission calling for the withdrawal of Thai troops "stationed, since 1954, in Cambodian territory, in the ruins of the Temple."

On its face, the phrase "at the Temple, or in its vicinity on Cambodian territory" means nothing more than that.

3.39 Indeed the term "vicinity" as used here could not have a broader meaning. The Oxford English Dictionary defines the term "vicinity" as "the state, character or quality of being near in space; propinquity, proximity", and it defines "in the vicinity of" as "in the neighbourhood (of)", "near or close (to)"[179]. The notion of "vicinity" has to be related to a particular object or thing to which it is near. The extent of the "vicinity" depends on the thing to which the term is attached. There is thus some element of proportionality involved. The "vicinity" of a city is obviously a larger area than the "vicinity" of a house. The "vicinity" of a temple would be equally confined.

3.40 The vicinity of the Temple could refer only to the area near or close by the Temple, what was referred to in the diplomatic notes of 1949 and 1954 as the "ruins of Preah Vihear"[180]. The French text of operative paragraph 2 uses the term *"environs"* which has the sense of surrounding or encircling something. Since operative paragraph 2 was said by the Court to be an acceptance of the Cambodian request that police and military personnel be withdrawn from the "ruins of the Temple" the term vicinity could not have had a wide scope.

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[179] Oxford English Dictionary, online version September 2011 [Annex 103]; Merriam-Webster Dictionary defines "vicinity" as ": the quality or state of being near: proximity" (Merriam-Webster, Merriam-Webster's Collegiate Dictionary, Eleventh Edition, 2003, p. 1393 [Annex 104].

[180] See paras. 2.3-2.5 above.

3.41 On page 30 of its Judgment, the Court uses the term vicinity to refer to an area outside the Temple area. Speaking of alleged local and administrative activities by Thailand, the Court said, "it is not clear that they had reference to the summit of Mount Preah Vihear and the Temple area itself, rather than to places somewhere in the vicinity." Nevertheless, the sense of proximity remains, this time to the Temple area and the French text uses the term *"à proximité"*.

3.42 By contrast, the other usages of the term "vicinity" in the Judgment do not in their contexts have precisely the same limitations as to scope. On page 21, the Court referred to the contention of Thailand "that the frontier line indicated on the map was not the true watershed line in this vicinity". There the term vicinity is not directly attached to the word Temple and the vicinity referred to there relates to the frontier or watershed. It is instructive that the French translation of vicinity as it is used here is *"dans la région"*. It avoids the term *"environs"* used in operative paragraph 2 of the *dispositif*.

3.43 The term "vicinity" is also used in the Judgment when the Court indicates that it does not need to decide whether the Annex I map line follows the watershed. It notes that:

> "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"[181].

Here the use of the term "vicinity" has a narrower scope. The Court is talking about the map line in proximity to the Temple. This is acknowledged in the French text by the use of neither the broader term "*région*" nor the narrower term "*environs*". It uses the term "*dans ces parages*".

3.44 The limited scope of the phrase "the Temple, or in its vicinity" in operative paragraph 2 is further illustrated by the additional words used in that paragraph. The Court does not just refer to "the Temple or in its vicinity". It refers to the Temple or in its vicinity "on Cambodian territory". As Thailand pointed out in oral argument in the hearing on provisional measures[182], reference to the vicinity of the Temple "in Cambodian territory" carries the clear implication that the vicinity of the Temple also includes Thai territory. If the Court had intended to say that all Thai military personnel had to be withdrawn from all areas of the Cambodian side of the Annex I map line, there would have been no need to refer to the Temple or in its vicinity at all. It would have sufficed to order the withdrawal of "any military or police forces, or other guards or

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[181] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 35. See also paras 2.44 above and 5.15-5.16 below.

[182] *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), Request for the Indication of Provisional Measures,* 30 May 2011, CR 2011/14, p. 24, para. 7 (Mr. Alain Pellet).

keepers, stationed by her on Cambodian territory as defined by the Annex I map line." But, the Court did not do this.

3.45 Again, it is to be recalled, the Court was doing precisely what Cambodia requested. Cambodia had not requested the Court to declare that Thailand was "under an obligation to withdraw the detachments of armed forces it has stationed, since 1954, in Cambodian territory." It added the qualification "in the ruins of the Temple of Preah Vihear." The reference was to a specific part of what was referred to as Cambodian territory – the ruins of the Temple. A request by Cambodia to have the Court declare that Thailand was under an obligation to remove its military personnel from the area on the Cambodian side of the Annex I map line would not have needed such a qualification.

3.46 It is clear then, that the phrase "at the Temple, or in its vicinity" in its context in operative paragraph 2 of the *dispositif* refers only to a confined area including the Temple itself and the area in close proximity to it, what would have been encompassed by "the ruins of the Temple" in Cambodia's request. This is confirmed by the way in which the Court used other terms in its Judgment – "Temple area" and "region".

3. THE MEANING OF THE TERM "TEMPLE AREA" IN OPERATIVE PARAGRAPH 3

3.47 That the Court was intending to refer to a restricted area in operative paragraph 2 of the *dispositif* is confirmed by its use in the Judgment of the term "Temple area".

3.48 The term "Temple area" was used frequently in the case to describe the subject of the dispute. It occurs thirteen times in the Judgment and occurs also in operative paragraph 3. The word "area" has no intrinsic limitation as to geographic scope. An area can be either large or small and its meaning in any particular case depends on the context in which it is used. A review of the uses of this term in the 1962 Judgment indicates that "Temple area" was a convenient way of localizing what was in dispute without being precise about the specific bounds of the Temple itself.

3.49 As pointed out earlier, drawing on its statement of the subject of the dispute in its Judgment on preliminary objections, the Court stated, "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."[183] And, "the region of the Temple of Preah Vihear" meant "the Temple and its precincts".

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[183] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962,* p. 14.

3.50 Having stated this, however, the Court no longer treats the subject matter of the dispute in terms of sovereignty over "the region of the Temple of Preah Vihear and its precincts". Thereafter it refers to sovereignty over the "Temple area". The first reference to the term "Temple area is found on page 15 ("south and east of the Temple area") but the first reference to it in terms of sovereignty over the Temple is on pages 16-17 of the Judgment, where the Court says, "the Court can only give a decision as to the sovereignty over the Temple area after having examined what the frontier line is." This use of the term "Temple area" continues on page 21 ("Temple area" twice), page 22 ("sovereignty over the Temple area"), page 29 ("the Temple area was not in issue before the Commission"; sovereignty over the Temple area"), page 30 ("sovereignty over the Temple area" and "the Temple area itself"), page 33 ("sovereignty over the Temple area"; "Temple area").

3.51 It is clear that in each of these references, the Court was simply using the term "Temple area" as a reference to what is at issue in the case. It was talking about more than just the Temple itself and it distinguished the Temple from the Temple area. Speaking of the obligation that became operative paragraph 3, the Court said,

> "no concrete evidence has been placed before the Court showing in any positive way that objects of the kind mentioned in this Submission have in fact been removed by Thailand from the Temple or Temple area since

Thailand's occupation of it in 1954"[184].

3.52 A clear sense of what the Court had in mind when referring to the Temple area can be gained by looking at the Court's description of the Temple and its location. It said:

> "the main Temple buildings stand in the apex of a triangular piece of high ground jutting out into the plain. From the edge of the escarpment, the general inclination of the ground in the northerly direction is downwards to the Nam Moun river"[185].

The map before the Court[186] showed the main Temple buildings at the tip of the promontory and ruins extending downwards in a northerly direction[187]. This is what the Court would have seen as the Temple area – what had been referred to since 1949 as the "ruins of Preah Vihear".

3.53 It is also apparent that the Court saw the Temple area as a restricted one, contained within the promontory on which the Temple is situated. Referring to a series of maps that had been sent to Siam the Court said:

> "Amongst these [maps] was one of that part of the Dangrek range in which the Temple is situated, and on it

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[184] *Ibid.,* p.36.

[185] *Ibid.*, p.15.

[186] Carte annexée au Rapport de MM. Doeringsfeld, Amuedo et Ivey (Annexe I), filed as Annex LXVIc of Cambodia's Reply [Annex 101].

[187] Sketch of cross-section plan of the Temple of Phra Viharn and aerial photograph of the Temple of Phra Viharn [Annex 105].

> was traced a frontier line purporting to be the outcome of the work of delimitation and showing the whole Preah Vihear promontory, with the Temple area, as being on the Cambodian side"[188].

In the view of the Court, therefore, the "Temple area" was something less than the whole of the "Preah Vihear promontory".

3.54 Moreover, the Court appears to distinguish the Temple area from the summit of Mount Phra Viharn. Speaking of acts of local and provincial officials, it said, "it is not clear that they had reference to the summit of Mount Phra Viharn and the Temple area itself, rather than to places somewhere in the vicinity"[189].

3.55 That the Court intended its use of the term "Temple area" to apply to a confined area is also indicated by the French text of the Judgment which consistently uses the term "*zone du Temple*" for "Temple area". If a broader area had been intended the terms "*région*" would have been a more appropriate translation of the term "area".

3.56 That the term "Temple area" was intended by the Court to refer to a confined area is also illustrated by its use in paragraph 3 of the *dispositif*. As pointed out earlier, the third

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[188] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962,* pp. 20-21.

[189] *Ibid*., p. 30.

paragraph was an acceptance of the fifth submission of Cambodia. That submission referred only to cultural objects removed from "the Temple". The Court's reference in operative paragraph 3 to "the Temple and the Temple area" reflects the fact that cultural objects that could have potentially been removed would only have been in the Temple or in close proximity to it. The Court saw itself as determining the question of sovereignty over the "Temple area" and thus the area in which the requirement to return cultural objects would be the area over which the Court had determined sovereignty. It makes no sense to consider that the reference to the "Temple area" in operative paragraph 3 was a reference to all of the area on the Cambodian side of the Annex I line. Cambodia's request did not relate to that area, nor did the Court give any indication that it was referring to such an area.

3.57 In his dissenting opinion Judge Sir Percy noted:

> "In its Application and Memorial the Kingdom of Cambodia asked the Court to declare that the territorial sovereignty over the Temple belongs to it. In neither did it describe the actual Temple area over which it claims sovereignty nor has it since done so" [190].

He pointed out that inherent in the Cambodian argument was that all of the area on the Cambodian side of the Annex I line would be subject to Cambodian sovereignty, and then went on to say that:

[190] *Ibid.,* p. 102 (Dissenting Opinion of Sir Percy Spender).

> "This area in fact included the site of the Temple and the land *immediately* surrounding."[191]

3.58 Two points arise from this. First, Judge Spender saw the Cambodian claim to be in relation to the Temple, although it had never provided a definition of the Temple area, and second, Judge Spender's reference to "the Temple and the land immediately surrounding" indicates that he understood the Temple area in precisely the same way as the Court did. It provides further confirmation that the Court was focusing on a confined area around the Temple and not on the whole area on the Cambodian side of the Annex I line when it formulated its orders in operative paragraphs 2 and 3.

3.59 In sum, references by the Court in its 1962 Judgment to the "Temple area" were references to a restricted area. And it is over this restricted area that the Court was determining sovereignty for the purposes of deciding whether the Temple was in territory under the sovereignty of Cambodia. Given that the Court had such a restricted area in mind, it could only have had the same restricted area in mind when it gave its order in operative paragraph 2 "in consequence" of its determination in operative paragraph 1 that the Temple was situated in territory subject to Cambodian sovereignty. This confirms the conclusion that the phrase "at the Temple, or in its vicinity" in operative paragraph could only have been referring to an equally if not more restricted area.

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[191] *Ibid*. (Emphasis added).

4. THE MEANING OF THE TERM "REGION"

3.60 Although it is not mentioned in the *dispositif*, the term "region" is used by the Court throughout its Judgment. A "region" can be broad or narrow depending on the context in which it is used. In some instances the Court uses region in a relatively narrow sense, in others it uses it in a broader sense.

3.61 As pointed out above, the Court used the term "region of the Temple of Preah Vihear" to define the subject of the dispute drawing on what it had said in its 1961 Judgment on preliminary objections. In the 1961 Judgment the Court had referred to the "region of the Temple of Preah Vihear and its precincts". Thus, when in 1962 Court said, "Accordingly, 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"[192] it was referring to "the Temple of Preah Vihear and its precincts". In this context, therefore, the word region is rather confined.

3.62 In fact, this was the only time that the Court used the term "region" in relation to the subject of the dispute. After initially treating the subject of the dispute as "sovereignty over the region of the Temple of Preah Vihear and its precincts", the Court began to characterize the dispute as relating to "sovereignty over the Temple area" and did so consistently for

[192] *Ibid.*, p. 14.

the remainder of its Judgment. As pointed out earlier[193], sovereignty over the Temple area could only have meant what all along had been referred to as "the ruins of Preah Vihear" – the main Temple buildings and ruins extending northwards[194].

3.63 The Court did, however, continue to use the term "region" in its Judgment. An example of this is found on page 18 where the Court says,

> "It seems clear therefore that a frontier was surveyed and fixed; but the question is what was that frontier (in particular in the region of Preah Vihear), by whom was it fixed, in what way, and upon whose instructions?"[195]

Here the Court is concerned with the frontier in relation to the Temple, not with defining the subject of the dispute. A similar reference is made on page 22 to the "frontier in the region of Preah Vihear". And again, on page 26, the Court said, "the map itself drew such pointed attention to the Preah Vihear region". Indeed the term "region" often appears in relation to the frontier as on pages 17, 20 and 26, where the Court refers to the "frontier region". The term "region" is frequently used as well in relation to broader areas such as "the Dangrek region" (pages 18, 19, 23).

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[193] See paras. 2.47-2.59 above.

[194] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 15. See also Sketch of cross-section plan of the Temple of Phra Viharn and aerial photograph of the Temple of Phra Viharn [Annex 105].

[195] *Ibid.*, p.18.

3.64 The use of the term "region" in the Judgment is not unlike the use of the term "sector" which is found frequently relating to words such as "Dangrek", as in "the Dangrek sector"[196] or "the eastern sector of the Dangrek range"[197]. The reference is to a large area and the term is not used to define the subject matter of the dispute.

3.65 The use of the term "region" in the 1962 Judgment reinforces the position set out above that when the Court used the phrase "at the Temple, or in its vicinity" in operative paragraph 2, or referred to the "Temple area" in operative paragraph 3, it was referring to a relatively restricted area in close proximity to the Temple. The only time the phrase "region of the Temple of Preah Vihear" was used to define the subject matter of the dispute it was done in a qualified way. The full reference was to "region of the Temple of Preah Vihear *and its precincts*"[198] thus indicating that when the word region was being used in defining the subject matter of the dispute it was intended in a very narrow and specific sense. Moreover, the fact that the Court never used the term "region" in the *dispostif*, reinforces that the Court's decision related to a limited or confined area.

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[196] *Ibid.*, p. 14.

[197] *Ibid.*, p. 15.

[198] *Ibid.*, p. 14. (Emphasis added).

3.66 The terms “Temple”, “at the Temple, or in its vicinity on Cambodian territory” and “Temple area”, are used in the *dispositif* to indicate a confined area and confirm that it was to a limited area that the Judgment applies. The term “region” is used in the Judgment, but not in the *dispositif*. Moreover, in the only instance where the term “region” is used to define the subject of the dispute, it too refers to a restricted area – “the Temple of Preah Vihear and its precincts”.

E. The Role of the Annex I Map Line in the Reasoning of the Court

3.67 In refusing to treat the first and second of Cambodia’s final submissions as claims to be dealt with in the operative part of the Judgment, the Court stated that these submissions, “can be entertained only to the extent that they give expression to grounds”[199]. As pointed out above, this approach was the logical consequence of the position taken by the Court earlier in the Judgment. It said:

> “To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector. Maps have been submitted to it and various considerations have been advanced in this connection. The Court will have regard to each of these only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it, the subject of which has just been

[199] *Ibid.,* p. 36.

stated."[200]

3.68 Thus, the frontier and maps would be considered only to the extent that they were helpful in providing reasons for the Court's decision. The Court was not considering these matters in order to make rulings about them. The Court said it would "have regard to" the frontier line between the two states in this sector; it did not say that it would determine what the frontier was in this sector. As in the case of the maps, the frontier was to be taken account of to the extent it provided reasons for the decision and nothing more.

3.69 The "sole dispute" submitted to the Court was the question of sovereignty over the Temple. Thus, the Court was explicit that the frontier lines and maps were relevant only in so far as they might shed light on the question of sovereignty over the Temple. The Annex I map and line fell clearly into that category.

3.70 The Court was not looking at the Annex I map in order to establish a boundary; its role was much more limited than that. The potential importance of the map was set out by the Court early in the Judgment. It was because the line on it was "purporting to be the outcome of the work of delimitation and showing the whole Preah Vihear promontory, with the Temple area, as being on the Cambodian side."[201] In short, the map was

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[200] *Ibid.*, p. 14.

[201] *Ibid.,* p. 21.

important because it purported to be authoritative and it placed the Temple on the Cambodian side of the line.

3.71 Thailand had, of course, challenged the authority of the map. The Boundary Commissioners had not endorsed it and it contained a palpable error – the line on the map did not follow the watershed. But, for the Court what mattered was the fact that Thailand had failed to raise objections to the map when it had critical opportunities to do so. And it was a failure to point out that in Thailand's view the Temple of Phra Viharn was on the wrong side of the boundary. It was failure to object in relation to Phra Viharn that was at the heart of the Court's decision.

3.72 That the Court was not concerned with the boundary but only with the Temple is illustrated early in the Judgment. It noted that a line that ran to the south and east of the Temple would place the Temple in Thailand, but a line running to the north and west would place it in Cambodia[202]. The central issue was clearly sovereignty over the Temple, not the determination of the boundary.

3.73 There are a number of other instances in the Judgment that illustrate this. The Court took pains to point out that the map had been seen by Siamese officials who were familiar with

[202] *Ibid.*, p. 15.

Phra Viharn[203]. The map itself, the Court said, "drew such pointed attention to the Preah Vihear region"[204] and "the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line."[205] Although Thailand eventually produced maps showing Phra Viharn on the Thai side of the boundary, Thailand, the Court said, "continued, even for public and officia1 purposes, to use the Annex 1 map, or other maps showing Preah Vihear as lying in Cambodia."[206] The Court referred to the:

> "occasions (…) on which it would have been natural for Thailand to raise the matter, if she considered the map indicating the frontier at Preah Vihear to be incorrect"[207].

The 1947 meeting of the Franco-Siamese Conciliation Commission provided, the Court said, "an outstanding opportunity for Thailand to claim a rectification of the frontier at Preah Vihear," but, it went on to say, Thailand "filed with the Commission a map showing Preah Vihear as lying in Cambodia"[208].

3.74 A further and critical factor indicating that the issue was failure to object to indications of Cambodian sovereignty over

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[203] *Ibid.,* pp. 24-25.

[204] *Ibid.,* p. 26.

[205] *Ibid*.

[206] *Ibid.,* p. 27.

[207] *Ibid.,* p. 28.

[208] *Ibid*.

Phra Viharn is the famous incident involving Prince Damrong, who visited the Temple and was considered to have given tacit recognition to Cambodian sovereignty over Phra Viharn. This was an incident that related to the Temple. As Thailand pointed out in the oral hearing on provisional measures, Prince Damrong visited the Temple; he was not making a tour of the boundary[209]. His actions, in the Court's view demonstrated Thailand's acceptance, or at least failure to object to, a manifestation of sovereignty by the French Representative. It was a manifestation of sovereignty in respect of the Temple, not in respect of the line on the Annex I map. The visit of Prince Damrong had no probative value as evidence about the boundary. If determination of the boundary had been the issue, Prince Damrong's visit to the Temple would have been simply irrelevant.

3.75 And even when the Court does refer to the frontier line in its reasoning, it is done in a way that makes clear that it was the frontier at Phra Viharn that was critical, because that had the effect of placing Phra Viharn on the Cambodian side of the line. The Court made it clear that it was not the boundary as such that it was concerned with. Rejecting Thailand's arguments that the Annex I map had no authority because it had not been endorsed by the Mixed Commission, the Court said that the "real question":

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[209] *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), Request for the Indication of Provisional Measures,* 30 May 2011, CR 2011/14, p. 36, para. 10 (Mr. James Crawford).

> "is whether the Parties did adopt the Annex 1 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* "[210].

3.76 And in considering what should have alerted the Thai officials about the Annex I map, the Court said:

> "anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the Annex I map to put him upon enquiry"[211].

3.77 Speaking of Thailand's failure to raise the matter in the Franco-Siamese Commission, the Court said:

> "The natural inference from Thailand's failure to mention Preah Vihear on this occasion is, again, that she did not do so because she accepted the frontier *at this point* as it was drawn on the map, irrespective of its correspondence with the watershed line."[212]

The reference to the frontier "at this point" indicated once again that the Court's concern was limited to Phra Viharn.

3.78 Further, after setting out Thailand's explanation for its silence, the Court observed:

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[210] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962,* p. 22. (Emphasis added).

[211] *Ibid.,* p. 26.

[212] *Ibid.,* p. 29. (Emphasis added).

> "The acceptability of this explanation must obviously depend on whether in fact it is the case that Thailand's conduct on the ground affords *ex post facto* evidence sufficient to show that she never accepted the Annex I line in 1908 *in respect of Preah Vihear*, and considered herself at all material times to have the sovereignty over the Temple area."[213]

3.79 In respect of claims by Thailand to have performed administrative acts in the area, the question, said the Court, was whether these acts, "sufficed to efface or cancel out the clear impression of acceptance of the frontier line at Preah Vihear"[214]. And, finally, a possible implication of the visit of Prince Damrong, the Court said, was that it showed that Thailand "accepted the frontier at Preah Vihear as it was drawn on the map."[215]

3.80 It is clear, therefore, on the basis of the way the Court defined the dispute and its references to the frontier at or in the region of Phra Viharn, when it spoke of acceptance of the line on the Annex I map the Court was not speaking of the line as a whole. It was speaking about it in a more limited way. The issue the Court had to decide was sovereignty over the Temple and the attitude of Thailand towards the Annex I map was relevant in so far as it related to the frontier at the Temple. The issue of the boundary more generally was not before the Court, nor was the Court pronouncing on it. The Court makes this very

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[213] *Ibid*. (Emphasis added).

[214] *Ibid.,* p. 30.

[215] *Ibid.,* p. 31.

clear in refusing to deal with the first and second submissions of Cambodia as claims to be dealt with in the operative part of the Judgment.

F. Conclusion

3.81 The Judgment of 15 June 1962 is very clear in the restriction of its scope to the Temple itself. Various terms were used to describe the Temple, but they were consistent in their application to a confined area. The Court had indicated that the subject of the dispute was sovereignty over the Temple area, which meant the Temple itself, the ground on which it lay and the immediately surrounding area. This was what Cambodia referred to when it wanted troops withdrawn from the "ruins of Preah Vihear" and what the Court meant when it referred to the Temple and its precincts. And the Court rejected the attempt by Cambodia to expand the matter in dispute to the status of the Annex I map or whether the map line constituted a boundary. That simply went beyond the "sole dispute submitted to it."

CHAPTER IV
LACK OF JURISDICTION OF THE COURT AND INADMISSIBILITY OF THE REQUEST FOR INTERPRETATION

4.1 In its Order of 18 July 2011 on the Cambodian Request for the indication of provisional measures, the Court stated that "the decision given in the present proceedings (...) in no way prejudges any question that the Court may have to deal with relating to the Request for interpretation"[216]. In accordance with its usual jurisprudence concerning provisional measures[217], the *prima facie* conclusions concerning the admissibility of Cambodia's Request for interpretation are not a bar for the Court to assess admissibility definitively at the proper stage of the proceedings. This is now the proper stage for the Court to engage in a thorough analysis of Thailand's arguments relating to the admissibility of Cambodia's request.

[216] *Request for interpretation of the judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011*, paras. 41 and 68.

[217] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 397-398, para. 148; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v*. United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 331, para. 79; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 249, para. 90.

4.2 The existence of a *prima facie* finding concerning the jurisdiction of the Court or the admissibility of the request does not create a legal presumption that the conditions for the Court to exercise its jurisdiction are actually met[218]. The case-law on the relation of *prima facie* jurisdiction and jurisdiction proper applies to litigation on interpretation. Thus, in its Judgment on Preliminary Objections in *Georgia* v. *Russia*, the Court insisted upon the provisional character of the findings of 15 October 2008 Order, recalling that

> "this provisional conclusion [was] without prejudice to the Court's definitive decision on the question of whether it [had] jurisdiction to deal with the merits of the case, which [was] to be addressed after consideration of the written and oral pleadings of both Parties."[219]

4.3 Such an approach allows the Court to deal with the urgency of a request for provisional measures and thus to preserve a necessary independence of mind for a renewed appreciation of the conditions of admissibility.

4.4 This is all the more true in the case of a Request for interpretation, in light of the conditions for admissibility laid down by the Court's jurisprudence. In the *Asylum Case*, the Court explained that Article 60 of the Statute

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[218] See *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952*, *I.C.J. Reports 1952*, pp. 102-103.

[219] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment of April 1st,* 2011, para. 129.

> "lays down two conditions for the admissibility of such a request:
>
> (1) The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. (...)
>
> (2) In addition, it is necessary that there should exist a dispute as to the meaning or scope of the judgment."[220]

4.5 The application of these conditions for the exercise of the jurisdiction of the Court[221] in the case of a request for interpretation is often combined with the merits of the case, since their appreciation is contingent upon the previous determination of the meaning and scope of the judgment. Indeed, showing the absence of a dispute as to the meaning and scope of the judgment implies showing that the Parties have a common understanding of the Judgment. However, demonstrating that the request purports "to obtain an answer to questions" not decided with binding force implies determining the limits of what is *res judicata*. In both cases, the

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[220] *Request for Interpretation of the Judgment of November 20th, 1950, in the asylum case*, *Judgment of November 27th*, *1950, I.C.J. Reports 1950*, p. 402.

[221] Although in its Judgment on the *Asylum Case* quoted above (para. 4.4), the Court mentioned "two conditions *for the admissibility* of such a request", it might be more appropriate to analyse the second of those conditions as concerning the jurisdiction of the Court since the Court could hardly be said to have jurisdiction in the absence of a dispute concerning the interpretation of the challenged judgment. In any case, the obvious result of the absence of one or the other of the conditions in question is that the Court cannot exercise its alleged jurisdiction.

determination of the meaning and of the limits of the judgment is necessary.

4.6 The difficulty of appreciating the fulfilment of Article 60 requirements at the provisional measures stage without going too much into the merits, appeared with clarity in the *Avena* case. Unsurprisingly, at the merits stage, the Court found it appropriate,

> "to review again whether there does exist a dispute over whether the obligation in paragraph 153(9) of the *Avena* Judgment is an obligation of result. The Court will also at this juncture need to consider whether there is indeed a difference of opinion between the Parties as to whether the obligation in paragraph 153(9) of the *Avena* Judgment falls upon all United States federal and state authorities."[222]

4.7 The link between the conditions for admissibility and the merits of the case is a noticeable characteristic of litigation under Article 60 of the Statute. This also explains why generally admissibility and the merits are considered in a single phase. It is for the same reason that, in the present proceedings, Thailand has not raised *preliminary* objections. But the fact remains that Cambodia's Request for interpretation does not meet the well-established requirements imposed by Article 60 of the Statute and clarified by the Court's case-law. In the absence of any

[222] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 10, para. 20.

dispute between Thailand and Cambodia on the meaning and scope of the 1962 Judgment (A), and in a context where Cambodia is seeking to have the Court decide on the delimitation of the boundary, a matter not *sub judice* in 1962 (B), the Court cannot allow Cambodia's Request for interpretation.

A. Absence of a Dispute as to the Meaning and Scope of the Judgment

4.8 In its Order of 18 July 2011 the Court made clear that "at this stage, it need not satisfy itself in a definitive manner that a dispute within the meaning of Article 60 of the Statute exists"[223]. Thailand will show in the present Section that further examination of Cambodia's Request for interpretation of the 1962 Judgment on the one hand and of the *dispositif* of that Judgment on the other hand show unambiguously that such a dispute does *not* exist.

4.9 While it is certainly true that the existence of a dispute on the interpretation of a judgment "does not require the same criteria to be fulfilled as those determining the existence of a

[223] *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), Provisional Measures, Order of 18 July 2011*, para. 21.

dispute under Article 36, paragraph 2, of the Statute"[224], it is nevertheless:

> "established that a dispute within the meaning of Article 60 of the Statute must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause"[225].

4.10 It thus appears that the requirement concerning the existence of a dispute under Article 60 of the Statute involves specific characteristics, since what can be achieved through interpretation (the object of the dispute) is necessarily circumscribed by the operative part of the judgment to be interpreted. It is only if the Court identifies a genuine dispute over the interpretation of an operative clause that it may have recourse to reasons that are inseparable from the *dispositif*, in order to settle that dispute.

> "[A] request for interpretation must relate to *a dispute between the parties relating to the meaning or scope of*

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[224] *Ibid.*, para. 22, and the case-law cited therein: *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-12; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 325, para. 53.

[225] *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), Provisional Measures, Order of 18 July 2011*, para. 23 and the case-law cited therein: *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 323, para. 47.

> *the operative part of the judgment* and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part."[226]

4.11 Moreover, the reality of the dispute must be assessed against the difficulty for the Parties to implement the judgment in relation to the uncertainty of its text. Successful implementation of the judgment speaks for the agreement of the Parties on its meaning and scope, and therefore for the absence of any dispute that may require interpretation.

1. NO DISPUTE ON THE MEANING AND SCOPE OF THE OPERATIVE PART OF THE 1962 JUDGMENT

4.12 Cambodia's Request of 28 April 2011 is rather confusing as to the paragraphs of the operative part of the 1962 Judgment on which Thailand and Cambodia are said to disagree. Indeed, in its final submission, the Claimant expressly mentions paragraphs 1 and 2 of the *dispositif* of the Judgment[227] but, far from asking the Court to interpret these passages, it expressly invites the Court to explain its reasons – to the exclusion of the

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[226] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v*. United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 323, para. 47. See also *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 35, para. 10.

[227] *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), Application Instituting Proceedings,* 28 April 2011, para. 45.

dispositif itself, on the meaning of which there is no dispute between the Parties. Article 98 of the Rules of the Court requires the Party introducing a Request for interpretation to indicate "the precise point or points in dispute as to the meaning or scope of the Judgment". Paragraphs 5 and 6 of the Request are probably intended to respond to this requirement[228], but hardly manage to do so: while paragraph 6 appears as a *chapeau* presenting the following section, paragraph 5 fails to identify the points of the Judgment that are said to be unclear, ambiguous, or contradictory.

4.13 The paragraph of the Request referring to Article 98 paragraph 2 of the Rules of the Court reads as follows:

> "(1) according to Cambodia, the Judgment is based on the prior existence of an international boundary established and recognized by both States;
>
> (2) according to Cambodia, that boundary is defined by the map to which the Court refers on page 21 of its Judgment, which 'has become known in the case (and will be referred to herein) as the Annex I map', a map which enables the Court to find that Cambodia's sovereignty over the Temple is a direct and automatic consequence of its sovereignty over the territory on which the Temple is situated (for convenience, the Annex I map and the Court's map showing an enlargement of the area of the Temple are attached as Cartographic Annexes 1 and 2);
>
> (3) according to the Judgment, Thailand is under an obligation to withdraw any military or other personnel

[228] *Ibid.,* paras. 5-6.

> from the vicinity of the Temple on Cambodian territory. Cambodia believes that this is a general and continuing obligation deriving from the statements concerning Cambodia's territorial sovereignty recognized by the Court in that region."[229]

4.14 On a simple reading of points (1) and (2), it can readily be seen that neither actually identifies any paragraph of the *dispositif* that is arguably unclear between the Parties. They both refer to the way in which Cambodia reads the arguments upon which the Court reached its conclusion in 1962. Points (1) and (2) refer to arguments of the Judgment, but do not identify any disagreement as to the conclusion the Court drew from these arguments. The existence of a dispute on the substance of these arguments, a fact not denied by Thailand, but clearly outside the scope of Article 60[230], has no impact on the meaning of the operative part: by virtue of the *dispositif*, "the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia". There is no dispute between the Parties on this point.

4.15 As for point 3 of paragraph 5 of the Request[231], it presumably refers to paragraph 2 of the 1962 *dispositif*, since it discusses the obligation of withdrawal incumbent upon Thailand. Again, Cambodia fails to identify any dispute in this respect.

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[229] *Ibid.*, para. 5. See also *ibid.*, para.45.

[230] See paras. 4.70-4.72 below.

[231] See para. 4.13 above.

(a) No Dispute on Paragraph 1 of the Dispositif

4.16 Paragraph 1 of the *dispositif* is indeed crystal-clear:

> "[The Court] finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia"[232];

or, in French:

> "[La Cour] *dit que le temple de Préah Vihéar est situé en territoire relevant de la souveraineté du Cambodge*."[233]

4.17 The territorial scope of this recognition is limited to the Temple: the subject matter of paragraph 1 of the *dispositif* of the 1962 Judgment is *the Temple* of Preah Vihear and it is clear that the Court intended to limit the scope of its findings, whatever they might be, to the Temple only. It may be that the territory "under the sovereignty of Cambodia" is larger than that referred to in the findings of the Court, i.e. the Temple ground. But the Court's finding tells no more than what it says: the Temple is located in the territory under the sovereignty of Cambodia, the limits of that territory remaining unspecified. Clearly, the Court did not intend to go beyond this finding; it did not need to; and, indeed, it did not go beyond it in fact. To read this sentence as implying delimitation of the whole Dangrek region (covered by the Annex I map) is *manifestly* a pure extrapolation of the Court's finding in paragraph 1 of the *dispositif*. The formula

[232] See paras. 3.6, 3.10 and 3.17-3.20 above.

[233] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36.

used by the Court is simply telling of the Court's will to pronounce upon a question of sovereignty without deciding a matter of delimitation.

4.18 Thus, paragraph 1 of the *dispositif* reveals its full meaning and can therefore produce (and in effect produced)[234] its full effect without having any recourse to the reasons of the Judgment. Accordingly, there is no need to question the Court about the status of the Annex I line: whether for good or bad reasons, it decided that the Temple is under the sovereignty of Cambodia – because it "is situated in territory under the sovereignty of Cambodia"; and this reason stands by itself.

4.19 In fact, Cambodia itself, though in a rather contorted way, admits in its Request that the Court's recognition of its territorial sovereignty does not extend beyond the ground of the Temple. Thus, paragraph 24 of the Request, where the dispute is tentatively described, reads as follows:

> "For Cambodia, however, Thailand's argument amounts to the Court recognizing sovereignty solely in respect of the Temple itself, which the Court rejected very clearly in its Judgment, since the first paragraph of the operative clause specifies *expressis verbis* that the Temple belongs to Cambodia *on the basis*[235] of the *sovereignty over the territory in which the Temple is situated*[236]."

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[234] On its implementation by Thailand, see paras. 4.33-4.46 below.

[235] Emphasis in the original.

[236] Emphasis added.

4.20 It therefore appears that, for Cambodia, either the Court determined the extent of the entire territory over which Cambodia has sovereignty or that the Court was only concerned with the sovereignty of Cambodia on the territory serving as ground for the Temple. Since the first interpretation is manifestly untenable, only the second can stand. There can therefore be no doubt that the Court could perfectly well decide which of the two States was sovereign over the Temple without deciding the extent of their respective territorial sovereignty and therefore without determining the limit between their respective territories.

4.21 For the rest, Cambodia itself admits that, concerning the Temple ground, there is no dispute between itself and Thailand:

> "Thailand accepts Cambodia's sovereignty over the Temple, but denies that this has effects beyond a limited perimeter confined strictly to the Temple itself."[237]
>
> or
>
> "Thailand does not dispute Cambodia's sovereignty over the Temple — and only over the Temple itself."[238]

This actually and necessarily involves an admission that there is no dispute on paragraph 1 of the *dispositif*.

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[237] *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), Application Instituting Proceedings,* 28 April 2011, para. 24.

[238] *Ibid*., para. 25.

(b) No Dispute on Paragraph 2 of the Dispositif

4.22 Thailand has already explained the context and the scope of paragraph 2 of the *dispositif*[239].

4.23 Paragraph 5 (3) of the Request[240], the only one that attempts to identify a dispute as to the *dispositif* itself, concerns 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". As this formulation makes clear, this obligation is consequential ("The Court... finds *in consequence…*" ["*La Cour ... dit* en conséquence…"]) and, as such, cannot go beyond the scope of the main finding in paragraph 1[241].

4.24 The practice of such orders of withdrawal is quite usual in territorial disputes. However, it is recognized that they do not go beyond the scope of the main findings. The interdependence between the main or basic finding and the consequential one was clearly expressed for instance in the *Land and Maritime Boundary between Cameroon and Nigeria* case, where the Court:

> "*Decides* that the Republic of Cameroon is under an obligation expeditiously and without condition to

[239] See paras. 3.9-3.10 and 3.38-3.46 above.

[240] See para. 4.13 above.

[241] See also para. 3.10 above.

> withdraw any administration or military or police forces which may be present in the territories which fall within the sovereignty of the Federal Republic of Nigeria pursuant to point II of this operative paragraph. The Federal Republic of Nigeria has the same obligation in respect of the territories which fall within the sovereignty of the Republic of Cameroon pursuant to point II of this operative paragraph"[242].

4.25 Moreover, the second and third findings required action in response to Cambodia's claim of a violation of its territorial sovereignty over the Temple as a consequence of Thailand's occupation of it in 1954[243]. As such, they are extinguished when the measures ordered therein are taken, at least if the injured Party considers the violation to be repaired. As will be shown more amply below, in the aftermath of the 1962 Judgment, and clearly for a very long period afterwards, Cambodia has made no complaint as to the way paragraph 2 of the *dispositif* was implemented by Thailand.

2. No Dispute over Thailand's Compliance with the 1962 Judgment

4.26 When seised of a Request for interpretation under Article 60 of the Statute, the Court must assess its scope against the principle of the finality of a judgment. The *ratio legis* of this provision of the Statute resides in the necessity to give the

[242] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 457, para. 325.

[243] See paras. 2.34 and 3.9-3.10 above.

Parties the full possibility to implement the judgment, by removing any obstacle standing in the way of compliance:

> "The question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need *to avoid impairing the finality, and delaying the implementation*, of these judgments."[244]

4.27 It is common sense that a judgment can hardly be fulfilled if its binding findings reveal uncertainties or contradictions. But the corollary is equally true: it is hard to conceive that a judgment that has been implemented, especially if it has been implemented a very long time ago, should reveal all of a sudden uncertainties or contradictions. In that case, the invocation of a dispute as to its meaning or scope rather appears as a deceptive manoeuvre on the part of the Party introducing the interpretation proceedings, the purpose of which is to obtain an extension (or, as the case may be, a reduction) of the scope of the *res judicata* principle[245]. One way or the other, the Request for interpretation is as an attempt to impair the finality of the judgment.

4.28 This is an outstanding feature of Cambodia's Request: it postulates that interpretation is needed now for a judgment given half a century ago and complied with by Thailand in its

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[244] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v*. Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 36, para. 12. (Emphasis added).

[245] See paras. 4.96-4.103 below**.**

immediate aftermath; compliance that, in Cambodia's own words, has not raised any difficulty or objection from its part since 1962 and until 2007[246], that is during forty-five years.

4.29 The tardiness of the Request is not in itself a cause of inadmissibility, and it is recognised that a dispute within the meaning of Article 60 of the Statute can arise from facts subsequent to the delivery of a judgment; the Court noted this in its 18 July Order[247]. The fact remains that in this particular case, tardiness poses major challenges to the integrity of Article 60 procedure[248]. As such it is inadmissible.

4.30 The implementation of a court's judgment is, unless otherwise stipulated, an immediate obligation, to be complied with within a reasonable time after it has been rendered. From this point of view, facts from the period immediately following the pronouncement of the 1962 Judgment become particularly relevant as to the existence or not of a dispute regarding its meaning or its scope. The subsequent consolidation of the factual situation resulting from Thailand's implementation confirms that the Parties shared a common understanding of the obligations resulting from the Judgment.

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[246] *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), Application Instituting Proceedings,* 28 April 2011, para. 12.

[247] *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), Provisional Measures, Order of 18 July 2011*, para. 37.

[248] See paras. 4.70-4.72 below.

4.31 Already in 1962 Thailand had taken the measures necessary to comply with the Judgment. Its acts in this respect were celebrated by Cambodia and welcomed by the international community. And the modalities of this compliance were not subsequently challenged by Cambodia; in particular Cambodia did not seise the Security Council with a complaint of non-compliance pursuant to Article 94 (2) of the United Nations Charter. On the contrary, the effects of this implementation, visible on the ground, subsisted for nearly half a century. Yet Cambodia is now calling into question a *status quo* which has endured for a very long time and which rests on a common understanding of Thailand and Cambodia of the obligations arising from the 1962 Judgment.

4.32 The documents from the decade 1962 - 1971 reveal that, after a period of suspicion and mistrust preceding its taking possession of the Temple, as early as September 1962, Cambodia acknowledged Thailand's compliance with the Judgment and by January 1963, Prince Sihanouk declared himself completely satisfied with Thailand's implementation. Now, the documents from this period must be read against the fact that various disputes continued to exist between the Parties and that their diplomatic relations, suspended by Cambodia on 24 November 1958[249], were only resumed on

[249] See Letter dated 29 November 1958 from the Permanent Representative of Cambodia Addressed to the Secretary-General, U.N. Doc. No. S/4121, 2 December 1958 [Annex 4].

13 May 1970[250]. They must equally be comprehended in the context of the cold war period, echoes of which are often present in the exchanges between Cambodia and Thailand, and also having in mind the particular history of the Southeast Asia of that period, a period of civil and inter-state armed conflicts. Thus, although the pre-1970 documents do not always reveal agreements between the Parties, at the same time, they don't display any dispute on the interpretation of and compliance with the 1962 Judgment, the only aspect relevant for the present proceedings.

(a) The 1962 Documents

4.33 While the Court's Judgment of 15 June 1962 was celebrated in Phnom Penh as "Cambodia's greatest victory in several centuries"[251], inspiring its Head of State, Prince Sihanouk to "shave his head in thanksgiving"[252] and to declare a holiday "to commemorate this historic event"[253], in Thailand,

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[250] See Ministry of Foreign Affairs of the Kingdom of Thailand, *Déclaration commune entre la Thaïlande et le Cambodge*, 13 May 1970, *Foreign Affairs Bulletin 1970 Vol. IX, Nos. 1-6 (August 1966-July 1970),* pp. 436-437 [Annex 79] and *Chao Thai Newspaper*, 14 May 1970, "Ambassadors will be exchanged soon. Cambodia is attacked and its domestic affairs interfered" [Annex 80]. See also *Daily News*, 14 May 1970, "Thailand and Cambodia issued a joint communiqué to resume diplomatic ties in 2 weeks" [Annex 81].

[251] News report, 18 June 1962, "Populace rejoices over border decision" [Annex 6].

[252] *Ibid*.

[253] *Ibid*., p. 1.

the initial reactions show perplexity and incomprehension[254]. Within a short time (actually, on 21 June 1962), the Thai Government nonetheless announced its commitment to comply with the Judgment, even though the modalities of implementation had still to be decided[255]. The handing over of the Temple carried dramatic weight for Thai officials and population[256].

4.34 The decision was however notified to the United Nations, by a letter dated 6 July 1962, addressed to the Secretary-General by Thailand's Minister of Foreign Affairs. This letter, annexed by Cambodia as Annex 1 of the Request for interpretation, stated the unambiguous commitment to comply with the Judgment:

> "In an official communiqué dated July 3, 1962, His Majesty's Government made a public announcement, expressing its disagreement with the above-mentioned decision of the Court on the ground that, in its opinion,

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[254] See *Le Monde*, 19 June 1962, "La Thaïlande ne paraît pas prête à accepter la décision de la Cour internationale" [Annex 7] ; United States Permanent Mission to the United Nations, Telegram to United States Secretary of State, No. 4053, 19 June 1962 [Annex 8]; *Le Monde*, 20 June 1962, "La Thaïlande récuse la décision de la Cour internationale" [Annex 9], Ministry of Information of Cambodia, *Cambodge d'aujourd'hui, No. 45,* June - July 1962, p.5 [Annex 37].

[255] United States Embassy in Bangkok, Airgram to United States Secretary of State, "Full Text of Bangkok Post article of June 21, 1962 concerning Prime Minister Sarit's Announcement Thailand will Comply with ICJ Decision on Phra Wiharn Case", No. A-425, 23 June 1963 [Annex 10].

[256] See Prime Minister of Thailand, Public Address on The Temple of Phra Viharn Case, 4 July 1962 [Annex 12]. See also United States Embassy in Bangkok, Telegram to the United States Secretary of State, No. 24, 5 July 1962 [Annex 13].

> 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, but stating nonetheless that, *as a member of the United Nations, His Majesty's Government will honour the obligations incumbent upon it under the said decision in fulfilment of its undertaking under Article 94 of the Charter*.
>
> I wish to inform you that, in 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 the Temple of Phra Viharn to Cambodia."[257]

4.35 A few days later, the Government made known to the public the measures it would take to ensure successful compliance with the Judgment[258]. A barbed-wire fence surrounding the Temple was thus put in place to make visible

[257] *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), Application Instituting Proceedings,* 28 April 2011, Annex 1. (Emphasis added). The letter was transmitted to the Permanent Missions of the States Members of the United Nations. The same letter was published bythe Ministry of Foreign Affairs of the Kingdom of Thailand, *Foreign Affairs Bulletin,* Vol. I, No. 6, June - July 1962*,* pp. 128-130 [Annex 36].

[258] See *Chao Thai Newspaper*, 13 July 1962, "Flag Lowering Ceremony: United Nations and Cambodia informed" [Annex 17]; United States Embassy in Bangkok, Telegram to United States Secretary of State, No. 43, 6 July 1962 [Annex 15].

the area awarded by the Court to Cambodia[259] and wooden signs were installed to notify Thais and Cambodians where the vicinity of the Temple started or ended. The sign facing Thailand was in Thai and English languages[260], whereas the one facing Cambodia was in Khmer and French languages[261]. The armed forces in the area were withdrawn and a highly symbolic ceremony of moving the flag from the Temple to Thai territory, in which Thailand's Minister of Interior participated, was organized on 15 July 1962[262]. These visible measures of implementation seemed justified in order to ensure secure conditions for the transfer of sovereignty, considering the mistrust existing between the Parties.

4.36 The press reports show that, in deciding the way to implement the decision of the Court, Thailand paid particular attention to ensure unhindered access to the Temple from

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[259] Photographs of the barbed-wire fence erected to comply with the 1962 Judgment , 1962 – 1963 [Annex 39]. The enclosure was thus described to the press by Thailand's Prime Minister: "[T]he marking of the vicinity of the Temple of Phra Viharn would be done by the Royal Thai Government unilaterally and the Government had already decided the limit which was 20 metres from the Temple's naga staircase toward the main road, two roads paralleling the Temple's stairs at 100 metres each. At the back, 30 metres from the broken staircase at the steep cliff. The area is a trapezium with an area of approximately 150 rais." (*Chao Thai Newspaper*, 13 July 1962, "Flag Lowering Ceremony: United Nations and Cambodia informed" [Annex 17]).

[260] Photographs of the sign erected to comply with the 1962 Judgment 1962-1963 [Annex 40].

[261] *Ibid.* [Annex 40].

[262] United States Embassy in Bangkok, Telegram to United States Secretary of State, No. 103, 16 July 1962 [Annex 19]; *Thai Rai Wan Newspaper*, 17 July 1962, "Terrible weather as Thailand loses territory to thief at the last minute" [Annex 21]; *New York Times*, 17 July 1962, "Thailand yields sovereignty over Temple to Cambodia" [Annex 22].

Cambodia, by the staircases that had been in use for centuries to access the Temple from the south:

> "When asked how Cambodia would access the Temple, General Thanom said there is only one way which is the broken staircase on the cliff which can be repaired or done otherwise by Cambodia."[263]

4.37 Cambodia, as well as the United Nations, was informed of all these steps of implementation[264]. Thailand's Foreign Affairs Bulletin published Communiqués of the government announcing compliance with the Judgment[265] and the letter from the Thai Foreign Minister to the Secretary-General of the United Nations informing him of Thailand's decision to comply with the 1962 Judgment[266]. Cambodia's immediate reactions to the measures taken by Thailand reflected – to use the words of the U.S. Chargé d'affaires in Phnom Penh – "continued Cambodian skepticism over dependability RTG commitment, compounded with expressions of righteous satisfaction and smugness over Thai discomfiture."[267] However, Prince Sihanouk, Cambodia's

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[263] *Chao Thai Newspaper*, 13 July 1962, "Flag Lowering Ceremony: United Nations and Cambodia informed" [Annex 17].

[264] *Ibid*.

[265] Ministry of Foreign Affairs of the Kingdom of Thailand, *Foreign Affairs Bulletin*, Vol. I, No.6, June - July 1962, pp. 128-130 [Annex 36].

[266] *Ibid.*

[267] United States Embassy in Phnom Penh, Airgram to Department of State, "Preah Vihear: Cambodian Reaction to Thai Announcement of Compliance with ICJ Ruling", No. A-32, 12 July 1962, p. 1 [Annex 16]; see also United States Embassy in Phnom Penh, Airgram to Department of State, "*Réalités* Discusses Problems of Preah Vihear Turnover", No. A-37, 16 July 1962 [Annex 20].

Head of State, announced his intention to organize a pilgrimage for officially taking possession of the Temple, initially scheduled to take place in December 1962[268] and finally organized on 5 January 1963[269]. And thus Cambodia's Foreign Minister[270], Mr. Huot Sambath, could declare at the rostrum of the General Assembly of the United Nations, on 27 September 1962:

> "By an overwhelming majority, the judges found in favour of Cambodia. It was only after having refused several times to accept that decision and having uttered many a threat against us that the Thai Government, feeling that it was the object of world-wide disapproval, *complied with the Court's decision*."[271]

4.38 Thailand's compliance with the Judgment could not extinguish all the disputes between the Parties, be they in the region of the Temple or in other border areas. In August 1962, occasional skirmishes took place in several areas, for which

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[268] French Embassy in Phnom Penh, Télégramme, No. 773/777, 25 August 1962 [Annex 27].

[269] See paras. 4.43-4.47 below.

[270] Mr. Huot Sambath's position, despite the appellation in the Cambodian system of the time (State Secretary for Foreign Affairs), was the political head of foreign policy of Cambodia. He was a member of the Cambodian Council of Ministers and was in charge of foreign affairs (see List of members of Cambodian Cabinet in 1962-1964 [Annex 106]). He was also recognized and treated by the United Nations as the Foreign Minister of Cambodia (Gauthereau, Cable to David Owen, No. CAM 228, 24 December 1964 [Annex 61]).

[271]United Nations, *Official Records of the General Assembly*, *Seventeenth Session, Plenary Meetings,* 1134th Meeting, p. 174, para. 91 (Mr. Huot Sambath (Cambodia)) [Annex 28]. (Emphasis added)

each Party denied responsibility[272]. On that occasion, Prince Sihanouk accused Thailand of attempting to take back the Temple, by fighting from behind the barbed-wire fence:

> "*Il y a mieux encore, car bien que les militaires stationnés à Préah Vihéar en aient été retirés, le pied de la colline est environné de fils de fer barbelé et le Ministre de l'Intérieur thai a donné l'ordre à ses forces de police de tirer sur quiconque s'approcherait de ces barbelés. Il est clair donc qu'ils n'ont pas renoncé à leurs visés sur Preah Vihear. (...)*
>
> *L'incident qui nous occupe est sans nul doute le contrecoup de l'affaire de Preah Vihear où la Thaïlande a subi une grande perte de face devant le monde. Ils veulent par la guerre 'laver cet affront' et annexer une partie encore plus grande de notre territoire. Comme je l'ai dit, mes amis occidentaux ne voient pas ce à quoi les Thaïlandais et les Sud-Vietnamiens veulent en venir et croient voir chez moi une manie de la persécution.*"[273]

4.39 It is in this context that Thailand requested the United Nations to nominate a mediator[274], in the hope that bilateral relations could improve and maybe diplomatic relations be re-established. With Cambodia's consent, Mr. Nils Gussing was appointed as personal representative of the Secretary-General of the United Nations to inquire into the problems between

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[272] United States Embassy in Bangkok, Telegram to United States Secretary of State, No. 236, 13 August 1962 [Annex 24]; United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 106, 14 August 1962 [Annex 25].

[273] United States Embassy in Phnom Penh, Airgram to Department of State, "Sihanouk Charges Thai Aggression in Statement to Press", No. A-88, 16 August 1962, pp. 4 and 5 [Annex 26].

[274] See French Ambassador to Thailand, Note to Minister of Foreign Affairs, No. 479-AS, 27 September 1962, p. 3 [Annex 29].

Cambodia and Thailand[275]. Mr. Gussing's mission covered a wide range[276], but it was admitted that the question of sovereignty over the Temple of Phra Viharn was clearly outside the scope of his mission, since it had already been decided by the Court[277]. However, it was believed that delimitation of the boundary and access to the Temple could fall within the mission's mandate, since this would not be interfering with the *res judicata*:

> "5. The representatives of Thailand and Cambodia were informed that, in the opinion of the Secretary-General, the question of *sovereignty over the Temple at Preah Vihear should, in view of the judgment delivered by the International Court of Justice in the matter*, be considered outside the scope of the Mission's activities.
>
> (...)
>
> 20. The Mission has carefully borne in mind the understanding reached in New York that the question of sovereignty over the Temple should not be raised. The question of access to the Temple, however, would seem to be within the Mission's mandate, and it would appear desirable, subject to instructions to the contrary, that the Mission should make a strong effort to persuade both

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[275] Office of Public Information of the United Nations, "U Thant Appoints Personal Representative to Inquire into Cambodia-Thailand Problems", Press Release SG/1339, 9 October 1962 [Annex 30].

[276] See Letter from the Secretary General addressed to the President of the Security Council concerning the question of sending a Special Representative to inquire into the difficulties which had arisen between Cambodia and Thailand Terms of reference for Mr. N. Gussing's mission (United Nations, Letter dated 18 December 1962 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. No. S/5220, 18 December 1962 [Annex 35]).

[277] See French Ambassador to Thailand, Note to Minister of Foreign Affairs, No. 636/AS, 29 November 1962 [Annex 33].

> Governments not to let this question and, in particular its relationship to the impending visit of Prince Sihanouk, flare up into a major incident. The Mission is of the opinion that if this visit takes place without any untoward incident, it may mark a turning point in the present situation and contribute in some measure to a relieving of current tensions."[278]

4.40 As Mr. Gussing observed, important problems continued to exist between Cambodia and Thailand. Notably, on the promontory of Phra Viharn, but largely in the Dangrek region, issues of delimitation and demarcation were bound to arise[279], since the Judgment had not provided for them[280].

4.41 There is little doubt that if the Parties could have reached agreement on the delimitation of the boundary in the region, such an agreement would have facilitated Thailand's compliance with the Judgment. However, Khmero-Thai relations had deteriorated too far, and the tone often too bellicose to leave any illusion that prospects of this kind could come about. Meanwhile, Thailand remained under an obligation to implement the Judgment, even in the absence of an agreement on the delimitation of the boundary. The *dispositif* was unconditional in requiring implementation and it was only

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[278] Mission to Thailand and Cambodia, First Report by the personal representative of the Secretary-General, PL/111 Confidential Report No. 1, 25 November 1962, pp. 3-4, para. 5 (emphasis added) and respectively pp. 11-12, paras. 19-20 [Annex 32].

[279] *Ibid*., p. 14, para. 23.

[280] See also paras. 3.68-3.78 above; see also United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 68, 2 August 1962 [Annex 23] ; French Ambassador to Thailand, Note to Minister of Foreign Affairs, No. 479-AS, 27 September 1962, p. 5 [Annex 29].

addressed to Thailand. And although Cambodia expressed reservations[281], unilateral implementation appeared not only as more realistic but also better than delayed implementation.

4.42 And, as Mr. Gussing had pointed out[282], while the Temple issue and the implementation of the Judgment still appeared to be a bone of contention between Cambodia and Thailand, even on the eve of Prince Sihanouk's pilgrimage to the site[283], much was nonetheless expected from this event, organized to mark officially Cambodia's taking possession of the Temple. And Mr. Gussing seemed reassured that the Thai authorities would do their best to prevent any incident:

> "10. Prince Sihanouk's visit to the Temple at Preah Vihear on 5 or 6 January presents possibilities of a border incident of a major sort. The Mission has been given to understand by the Thai authorities that their soldiery or police will do nothing to interfere with the visit as long as Prince Sihanouk and his suite, which may now include more than a few members of the Diplomatic Corps, remain strictly within what the Thai authorities consider to be Cambodian territory (marked by barbed wire)."[284]

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[281] See para. 4.37 above.

[282] See para. 4.40 above.

[283] See French Embassy in Phnom Penh, Télégramme, No. 3, 2 January 1963 [Annex 41] and *ibid*., No. 5, 2 January 1963 [Annex 42].

[284] J.F. Engers, Note to Mr. Gussing, 9 January 1963 and Second report by the personal representative of the Secretary-General, 2 January 1963, p. 6 [Annex 50].

(b) Prince Sihanouk's Pilgrimage to the Temple on 5 January 1963 and Cambodia's Subsequent Satisfaction with Implementation

4.43 As announced several months in advance[285], Cambodia intended to celebrate the victory in The Hague by organizing an official pilgrimage to the Temple, with Prince Sihanouk leading it. And if it only occurred on 5 January 1963, it was because substantial public works had to be undertaken in preparation for the visit[286]. Planes and helicopters were used to shuttle guests to this remote region, where airfields had been built to accommodate them[287]. French chefs prepared lavish meals and fine wine and cognac was free-flowing[288]. Professors Reuter and Pinto, to whom Cambodia felt deeply indebted for the services before the Court, were part of the cortège, as were the entire Cabinet, members of the National Assembly, province governors, all heads of diplomatic missions, all *chargés d'affaires* in Phnom Penh, a number of priests and the local population. The estimated cortège was formed of about one thousand five hundred pilgrims[289]. This was a celebration, on a

[285] See para. 4.37 above. See also Cambodian Head of State, Press Conference, 5 November 1962 [Annex 31].

[286] United States Embassy in Phnom Penh, Airgram to Department of State, "Cambodian Official Reoccupation of Preah Vihear", No. A-325, 10 January 1963, pp. 2-3 [Annex 51].

[287] *Ibid.*, p. 4.

[288] *Ibid*.

[289] United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 528, 7 January 1963[Annex 48]. See also Ministry of Information of Cambodia, *Cambodge d'aujourd'hui,* Nos. 48-49-50-51, September - December 1962 [Annex 38].

princely scale, of the return of the Temple. It was not done by half measures. It would have been very strange if the return it was celebrating had been any less complete.

4.44 The visit received wide publicity. Diplomatic cables were transmitted to capitals[290], Cambodian[291], Thai[292] as well as foreign newspapers[293] reported on it. Overall, it was considered a complete success and Thailand did nothing to obstruct it, quite to the contrary, it prevented any interference from its side with this event[294].

4.45 Prince Sihanouk reached the Temple on foot up the ancient Eastern Staircase from the Cambodian territory at the

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[290] See French Embassy in Phnom Penh, Télégramme, No. 14.15, 5 January 1963[Annex 44] and United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 528, 7 January 1963 [Annex 48] and United States Embassy in Phnom Penh, Airgram to Department of State, "Cambodian Official Reoccupation of Preah Vihear", No. A-325, 10 January 1963, pp. 2-3 [Annex 51].

[291] A special number of *Cambodge d'aujourd'hui* was devoted to it (Ministry of Information of Cambodia, *Cambodge d'aujourd'hui*, Nos. 48-49-50-51, September - December 1962 [Annex 38]).

[292] See *Bangkok Post*, 5 January 1963, "Cambodians, Europeans Get Up To Khao Phra Viharn" [Annex 45]; *Bangkok World*, 6 January 1963, "Sihanouk Arrives. Calm Prevails at Phra Viharn" [Annex 46]; *Bangkok Post*, 7 January 1963, "Sihanouk Leaves Guard at the Temple; 'Thai Visit' Offer" [Annex 47]; *Thai Rai Wan Newspaper*, 19 January 1963, "Sihanouk told Hong Kong newspaper that he has come to good terms with Thai people" [Annex 54].

[293] *New York Times*, 8 January 1963, "Peaceful Overture Held in Cambodia at Disputed Shrine" [Annex 49] and *New York Times*, 10 January 1963, "Take over Disputed Temple" [Annex 52].

[294] "Thailand's border police are alert against any attempt to cause a disturbance from the Thai side and are forbidding strangers from entering the area." (*Bangkok Post*, 5 January 1963, "Cambodians, Europeans Get up to Khao Phra Viharn" [Annex 45]).

foot of the cliff. During his stay on the promontory, he never set foot beyond the barbed-wire fence or on any ground considered by Thailand to be part of its territory[295]. When Prince Sihanouk was asked about the barbed-wire fence, which had given some cause for concern prior to the pilgrimage[296], the following exchange occurred:

> "When he mentioned the Thai construction of the barbed-wire area, he described it as Thai encroachment by several meters on Cambodian territory awarded it by the International Court of Justice. He said that *he would not, however, make an issue of this matter as these few meters were unimportant*."[297]

4.46 While on the spot, Prince Sihanouk enthusiastically spoke of "fraternizing going on at the barbed-wire barrier between Thai and Cambodian soldiers"[298]. A reporter from the *New York Times* described his attitude towards the fence and the Thai personnel beyond it as follows:

> "Noting that Cambodian provincial guards had passed some bottles of French cognac to the Thai border police on the other side of the barbed-wire fence at the frontier, only a few yards from the temple, the Prince told

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[295] See para. 4.42 above.

[296] See paras. 4.39 above.

[297] United States Embassy in Phnom Penh, Airgram to Department of State, "Cambodian Official Reoccupation of Preah Vihear", No. A-325, 10 January 1963, p. 5. (Emphasis added) [Annex 51].

[298] United States Embassy in Phnom Penh, Airgram to Department of State, "Cambodian Official Reoccupation of Preah Vihear", No. A-325, 10 January 1963, p. 5 [Annex 51]. See also French Embassy in Phnom Penh, Télégramme, No. 14.15, 5 January 1963 [Annex 44].

> diplomats from East and West: 'This is a good beginning for negotiations for the return of friendship between our two countries.'"[299]

4.47 And indeed, although before taking possession of the Temple, Cambodia had seemed to want to submit the issue of the barbed-wire fence to the United Nations[300], the pilgrimage placed it in its true perspective: a *de minimis* issue to Cambodia and not issue at all to Thailand. Moreover, never again did Cambodia claim that Thailand's compliance with the Judgment had not been completed because of the barbed-wire fence.

4.48 Further declarations made in the summer of 1963 confirm Cambodia's satisfaction with Thailand's compliance. Thus, in an interview published by the newspaper *La Vérité*, on 9 June 1963, Sihanouk underlined that the restitution of the Temple having been completed, there was no more cause for dispute between Cambodia and Thailand:

> "*Journaliste: Votre Altesse, à propos de vos relations avec vos voisins y aurait-il quelque chance d'une reprise des relations diplomatique avec la Thaïlande ?*
>
> *Samdech : Je préfère ne pas trop en dire là-dessus. C'étaient de mauvais voisins. Il faut que nous arrêtions de nous accuser mutuellement. Nous avons employés des moyens pacifiques...celle de la Cour de Justice Internationale sur l'affaire du Temple de Preah Vihear.*

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[299] *New York Times*, 8 January 1963, "Peaceful Overture Held in Cambodia At Disputed Shrine" [Annex 49].

[300] United States Embassy in Phnom Penh, Airgram to Department of State, No. 520, 2 January 1963 [Annex 43].

> Le temple nous ayant été restitué, il n'y a plus de matière à dispute."[301]

4.49 The same satisfaction was expressed in an interview published in the *Far Eastern Economic Review*, on the 11 July 1963:

> "*M.: Monseigneur, y a-t-il une perspective quelconque d'une reprise rapide des relations avec la Thaïlande ?*
>
> *N.S. : Je préfère ne pas trop en parler. Nous devons cesser de nous accuser réciproquement. Nous avons utilisé des moyens pacifiques : la Cour internationale de Justice à propos de Preah Vihear.* Cette affaire conclue, nous n'avons plus de raison de nous disputer. *Mais les relations diplomatiques avec la Thaïlande sont problématiques*."[302]

4.50 In this appeased context, Mr. Gussing continued his conciliatory mission[303]. In September 1963, he submitted a five-point "friendly agreement" for consideration by Thailand and Cambodia. These five points included:

> "1. Resumption of diplomatic relations.
> 2. Respect for the territorial integrity of both countries.

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[301] *La Vérité*, 5 June 1963, "Interview du Prince Sihanouk par un journaliste indien", p. 2 [Annex 55]. (Emphasis added).

[302] Le Bulletin de l'Agence Khmère de Presse, "Interview du Prince Norodom Sihanouk, Chef de l'Etat du Cambodge, accordée à 'Far Eastern Economic Review'", 11 July 1963, p. 6 [Annex 56]. (Emphasis added).

[303] See J.F. Engers, Note to Mr. Gussing, 9 January 1963 and Second report by the personal representative of the Secretary-General, 2 January 1963 [Annex 50] and Mission to Thailand and Cambodia, Third Report by the Personal Representative of the Secretary-General, 18 January 1963 [Annex 53].

> 3. Acceptance of treaty obligations especially those arising from the settlement agreement between France and Thailand signed at Washington on 17 November 1946.
> 4. Acceptance of obligations under United Nations Charter, including acceptance of decisions and recommendations of principal organs of United Nations to extent applicable.
> 5. Reiteration of willingness to abide by terms of agreement signed in New York on 15 December 1960."[304]

4.51 It appears from the Parties' reaction to these proposals that Cambodia mostly desired a declaration in respect of the boundaries, as defined by the documentation it had submitted to the Court and also for Thailand to withdraw its reservation of rights made in respect of the Judgment[305], to which Thailand could not agree[306]. No progress could be made on these points. Mr. Gussing terminated his mission in December 1964[307] with a feeling of futility in face of the lack of political commitment to succeed. In his view, the "Thai Government would welcome normalization of the relations with Cambodia"[308], but Cambodia

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[304] J.F. Engers, Aide-Mémoire on the Secretary-General's Five Points of 3 September 1963, 19 September 1963, p. 1 [Annex 58].

[305] See para. 4.34 above.

[306] J.F. Engers, Aide-Mémoire on the Secretary-General's Five Points of 3 September 1963, 19 September 1963, pp. 2-3 [Annex 58].

[307] United Nations, Letter dated 9 November 1966 from the Secretary-General to the President of the Security Council, U.N. Doc. No. S/6040, 9 November 1964 [Annex 59].

[308] N. Gussing, Note to the Secretary-General of the United Nations, "Mission to Thailand and Cambodia", 14 September 1963, para. 8 [Annex 57].

seemed less willing[309]. For the present proceedings, Mr. Gussing's reports are important not so much for what they say, but more for what they do not say: indeed no further disagreement regarding the Temple or Thailand's compliance with the Judgment is recorded therein.

(c) The Post-1963 Period: New Armed Clashes and Continuing Negotiations for the Resumption of Diplomatic Relations

4.52 In 1966 a series of armed clashes occurred between the Cambodian and Thai military in various places along the boundary. The records show that the two States held opposing views over to whom the responsibility for these clashes was to be attributed[310]. And although, in April 1966, the Temple was also the theatre of armed clashes[311], Thailand denied being responsible for any attack upon the Khmer guards posted inside the Temple. It must not be forgotten that, at the time, various rebel movements, and in particular the Khmer Serei, were operating in Cambodian territory.

4.53 It was in this context, that Cambodia sent various communications to the United Nations, accusing Thailand of aggression. In a letter addressed by the Permanent Mission of Cambodia to the United Nations on 11 April 1966, Cambodia

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[309] *Ibid.*, paras. 9, 11 and 12 in particular [Annex 57].

[310] United Nations, *Yearbook of the United Nations,* 1966*,* pp. 162-163 [Annex 74].

[311] *Ibid*.

accused Thailand of attacks over the Temple, in violation of the Charter and of the Judgment[312]. Presumably referring to Thailand's reservation of rights, it claimed that Thailand "refused to recognize the judgment of the International Court, and it has now manifested its refusal by forcibly reoccupying this Khmer territory"[313].

4.54 In another letter of protest, Cambodia referred to several border incidents, only a few of which were said to have taken place in the Temple or in its neighbourhood[314]. In that letter, Cambodia raised the question of a number of border incidents some with no connection to the Temple, but all of them allegedly amounting to "acts of aggression" and "all acts constituting violations of the United Nations Charter and the Judgment of the International Court of Justice"[315]. Cambodia's letter went on to mention, *en passant,* Article 94 (2) of the Charter, resurrecting a statement by Prince Sihanouk[316], made on 4 January 1963, prior to the pilgrimage to the Temple, in which he had complained about the barbed-wire fence[317]. The anachronistic character of this reference, after more than three

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[312] Permanent Representative of Cambodia to the United Nations, Notes to the Secretary-General, Nos. 1442 and 1449, 11 April 1966 (French in the original) [Annex 62].

[313] *Ibid*.

[314] United Nations, Letter dated 23 April 1966 from the Minister for Foreign Affairs of Cambodia Addressed to the President of the Security Council, U.N. Doc. No. S/7279, 3 May 1966 [Annex 65].

[315] *Ibid*., p. 2 [Annex 65].

[316] *Ibid*., p. 3 [Annex 65].

[317] See para. 4.38 above.

years of silence on the issue, and the reference to Article 94 (2) took aback some of the members of the Security Council, who wondered what the meaning of it could be. In fact, Cambodia's position as to the role of the Security Council on the issue was anything but clear[318]. As reported in a cable sent by the United Kingdom's Mission to the United Nations, it appeared that the Cambodian Government was sounding out the possibility of taking,

> "the Thai / Cambodian *border dispute* to the Security Council under Article 94 of the Charter, *presumably using the I.C.J. judgment on the Preah Vihear Temple as an entry card*. This idea has apparently occurred to the [Cambodian] Ambassador following discussion in the corridors about the applicability of Article 94 in connexion with South West Africa."[319]

And the United Kingdom's Representative continued:

> "It seems improbable that anything will come of this and one view is that it is simply a personal initiative of the Ambassador, designed to sound out the ground. No doubt a Council discussion brought in this way would provide the most favourable possible basis from the Cambodian point of view, since they would clearly appear as plaintiffs. On the other hand, given their recent rejection of Rolz-Bennet as the Secretary General's personal representative, the moment would not seem particularly opportune for them."[320]

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[318] See United Kingdom Mission to the United Nations, Note to Foreign Office, No. 954, 5 May 1966 [Annex 66]; compare with British Embassy in Phnom Penh, Cable to Foreign Office, 9 May 1966 [Annex 68].

[319] United Kingdom Mission to the United Nations, Cable to Foreign Office, 14 July 1966. (Emphasis added) [Annex 69].

[320] *Ibid*.

4.55 It appears that Cambodia was invoking an alleged misapplication of the Court's Judgment by Thailand as an entry card to the Security Council in order to raise a series of border issues. However, no real concern existed with respect to the implementation of the Judgment, which explains why Cambodia had to fall back on a statement by Prince Sihanouk made before his visit to the Temple. In any event, Thailand emphatically reaffirmed its compliance with the Court's Judgment[321] and eventually "neither party requested consideration of the situation by the Security Council."[322]

4.56 It was in this context that a new Special Representative of the Secretary-General, Mr. Herbert de Ribbing, was nominated as mediator between the Parties[323]. His task proved no less labourious than that of his predecessor, Mr. Gussing. In respect of the Temple, Prince Norodom Kantol, Prime Minister of Cambodia at the time, raised with Mr. de Ribbing[324] the April 1966 incidents, restating the story put forward to the United Nations[325]. In this regard, he mentioned again the barbed-wire fence as "being not even half-way between the Temple and the

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[321] Acting Permanent Representative of Thailand to the United Nations, Note to the Secretary-General, No. 335/2509, 22 April 1966, p. 4 [Annex 63].

[322] United Nations, *Yearbook of the United Nations,* 1966, p. 162 [Annex 74].

[323] United Nations, Letter dated 16 August 1966 from the Secretary-General to the President of the Security Council, U.N. Doc. No. S/7462, 16 August 1966 [Annex 70].

[324] See Herbert de Ribbing, Note to the Secretary-General, "Report by the Special Representative on his First Visit to Cambodia and Thailand and First Contact with their High Authorities", 13 September 1966 [Annex 72].

[325] See paras. 4.54-4.55 above.

border line fixed by the Court"[326], but confirmed that Cambodia was not willing, at least for the moment, to put the matter before the Security Council. When the issue was brought up in the discussion with Mr. Thanat Khoman, Thailand's Minister of Foreign Affairs, Mr. de Ribbing was reminded that the Court had made no decision on the boundary and that Thailand had complied with the Judgment[327]. However, Mr. de Ribbing's reports show that the barbed-wire fence was not a real issue in the relations between the Parties, and it was never mentioned again. As far as the Temple was concerned, Cambodia insisted on Thailand's withdrawal of its reservation of rights in respect of the Judgment, as a condition for their resuming diplomatic relations[328]. Thailand's assurances that the reservation was purely legal and had no irredentist purpose[329] did not succeed in taking Cambodia into immediately resuming the diplomatic relations[330]. Mr. de Ribbing's mission, as in the case of

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[326] Herbert de Ribbing, Note to the Secretary-General, "Report by the Special Representative on his First Visit to Cambodia and Thailand and First Contact with their High Authorities", 13 September 1966, p. 6, para. 10 [Annex 72].

[327] *Ibid*., p. 12, para. 20 [Annex 72]; see also Ministry of Foreign Affairs of the Kingdom of Thailand, Memorandum of Conversation between the Foreign Minister and Ambassador de Ribbing, Special Representative of the UN Secretary-General on 6 September 1966, p. 6 [Annex 71].

[328] Herbert de Ribbing, Note to the Secretary-General, "Report by the Special Representative on his First Visit to Cambodia and Thailand and First Contact with their High Authorities", 13 September 1966, p. 14, para. 25 [Annex 72].

[329] *Chao Thai Newspaper*, 24 July 1967, "Should seek future benefit. Quarrel is detrimental to both sides" [Annex 75]; French Embassy in Bangkok, Télégramme, No. 382/84, 27 July 1967 [Annex 76]; French Embassy in Bangkok, Télégramme, No. 400/402, 4 August 1967 [Annex 77]; Herbert de Ribbing, Cable to the Secretary-General, 16 October 1967, p. 2 [Annex 78].

[330] See French Embassy in Bangkok, Télégramme, No. 686/688, 2 November 1966 [Annex 73]; see also Herbert de Ribbing, Cable to the Secretary-General, 16 October 1967, p. 2 [Annex 78].

Mr. Gussing's, was terminated on Cambodia's initiative[331], without any further major improvement of the relations between the Parties.

4.57 Only in 1970 could the Parties resume their diplomatic relations, due much to the fact that Prince Sihanouk was no longer in power[332]. The Joint Communiqué issued on the occasion simply mentioned that:

> "*Les deux Ministres réaffirment leur strict attachement aux buts et principes de la Charte des Nations Unies. Conformément à ces principes, ils réitèrent leur respect pour les frontières communes actuelles des deux pays*."[333]

In this context, not once was the implementation of the Judgment mentioned as a cause for friction.

4.58 By 1970, the situation in Cambodia had become increasingly difficult because of fighting between internal factions and Viet Cong incursions into Cambodian territory, in particular in the Dangrek Mountains and the Phra Viharn area.

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[331] Herbert de Ribbing, Cable to the Secretary-General, 16 October 1967, p. 1 [Annex 78].

[332] See *Chao Thai Newspaper*, 14 May 1970, "Ambassadors will be exchanged soon. Cambodia is attacked and its domestic affairs interfered" [Annex 80]; and *Daily News,* 14 May 1970, "Thailand and Cambodia issued a joint communiqué to resume diplomatic ties in 2 weeks" [Annex 81].

[333] Ministry of Foreign Affairs of the Kingdom of Thailand, Déclaration Commune entre la Thaïlande et le Cambodge of 13 May 1970, *Foreign Affairs Bulletin*, 1970, Vol. IX, Nos. 1-6 (August 1966-July 1970), para. 5 [Annex 79].

As far as the Temple was concerned, Thailand received requests from Cambodia to protect it[334].

4.59 During the period from 1975 to the early 1990 incidents involving struggles between warring factions took place along the border, including in the neighbourhood of the Temple, However, these were internal to Cambodia, or in some instances linked to foreign interventions. There is no record that any of these tragic events were related to sovereignty over the Temple.

(d) The Post-1990 Period

4.60 After 1990, life resumed its course even on Phra Viharn. For the return to normality to be possible, however, much depended on the will of the local authorities, on the Cambodian as well as the Thai sides, allowing the Temple to recover its vocation as a place of worship and tourism.

4.61 The Governors of the adjoining Cambodian and Thai provinces in the region of the Temple met in Thailand at the Si Sa Ket provincial hall on 7 November 1991 to negotiate the opening of the Temple to tourists[335]. The result of their meeting

[334] *Daily News*, 12 July 1970, "[…] but sends border police to Phra Viharn" [Annex 82]; *Daily News*, 24 March 1971, "Revealing conditions of Khmer Soldiers on Khao Phra Viharn 'Cut off'. Thai side has to assist" [Annex 83]; *Chao Thai Newspaper*, 27 October 1971, "Thai and Khmer joined forces" [Annex 84]; *Daily News*, 30 October 1971, "The Day Viet-Cong attacks" [Annex 85]; *Daily News*, 3 November 1971, "Khao Phra Viharn Front is Not Serious" [Annex 86].

[335] Summary of a meeting on the opening of Khao Phra Viharn as tourist site between Thai side and Cambodian side, 7 November 1991 [Annex 87].

was an agreement establishing the rules for the management of tourism at the Temple[336]. The agreement covered the main points relevant to its subject matter: ticketing arrangements, opening hours, food hygiene, safety and security measures. This agreement constitutes a *modus vivendi* by which the local authorities sought to overcome the difficulties arising from the absence of any delimitation and demarcation of the boundary in the area in order to allow the development of tourism at the site of Phra Viharn.

4.62 Within this context, the main access to the Temple was meant to be from Thailand, rather than by the staircase coming from the Cambodian plain, followed in 1963 by Prince Sihanouk. As a result, it was then understood that Thai, Cambodian and foreign tourists alike were "to access the Temple of Phra Viharn from the Thai side through the iron gate at the Tani stream which had been built by Si Sa Ket Province"[337]. A Thai control post and a ticket office were established by Thailand at the foot of the northern staircase, some one hundred metres from the Tani stream bridge[338]. Access to the Temple through this route was controlled by Thailand.

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[336] *Ibid*.

[337] Affidavit of Lieutenant General Surapon Rueksumran, 9 November 2011, para. 2 [Annex 97]. See also Photograph of the iron gate at Tani stream [Annex 88].

[338] See Royal Thai Survey Department, Sketch of 1991 arrangements for tourism, 17 November 2011 [Annex 99].

4.63 This was the route taken in 1930 by Prince Damrong and his entourage. After crossing the stream, they proceeded approximately a hundred metres to the south, where they were met by the French reception committee at the flag pole some 20 metres from the foot of the northern staircase of the Temple[339]. This is the point where Cambodia said, in its Reply, was the boundary[340].

4.64 The 1991 agreement also provided that the "Thai side shall construct restrooms (...) in the area on Khao Phra Viharn."[341] As Lieutenant General Surapon Rueksumran testified:

> "At first, it was proposed that each side would bear the cost in its own area on the respective side of the existing fence. However, the Cambodian side claimed that it did not have enough budgets and asked the Thai side to provide construction materials and to build restrooms for the tourists in the Temple of Phra Viharn. The Thai side hesitated to accept the request because such area was beyond Thai territory but it eventually accepted the request. (...)

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[339] See *I.C.J. Pleadings, Temple of Preah Vihear*, "Affidavit by M.C. Phun Phitsamai Diskul, dated 9 June 1961", *Counter-Memorial of the Royal Government of Thailand*, Annex 39f, Vol. I, pp. 401 - 403.

[340] See para. 2.62. See also Photographs of Prince Damrong's visit to the Temple of Phra Viharn (1930) [Annex 1] and Royal Thai Survey Department, Sketch showing the location of the French flag pole in 1930*,* 17 November 2011 [Annex 98].

[341] Summary of a meeting on the opening of Khao Phra Viharn as tourist site between Thai side and Cambodian side, 7 November 1991, para. 7.1 [Annex 87].

> In November 1991, after the two sides jointly agreed to open the Temple of Phra Viharn as a tourist site, the Thai side constructed restrooms for the tourists in the Temple of Phra Viharn at Lan Phya Nakarat between the Temple staircase and the first Gopura, on the west side of the Temple, slightly opposite the Temple Pond (Sra Song). Later, the Thai side considered it necessary to construct another set of restrooms north of the Temple staircase, approximately 30 metres from the barbed-wire fence."[342]

4.65 The two sides also agreed to establish a joint committee to regulate construction in the Temple area[343]. The provincial authorities adopted a further agreement on similar subject matter and with similar provisions in 2001[344].

4.66 This was the situation which until recently prevailed on the ground, and was fully consistent with Thailand's compliance with the Judgment in 1962. It constitutes the parameters that had been known to Cambodia ever since 1962, and with which Cambodia itself had agreed, according to what it said in the Request for interpretation:

> "[T]here was nothing to suggest, until recently, that Thailand would interpret that Judgment in a way that

[342] Affidavit of Lieutenant General Surapon Rueksumran, 9 November 2011, paras. 2 and 3 [Annex 97].

[343] Summary of a meeting on the opening of Khao Phra Viharn as tourist site between Thai side and Cambodian side, 7 November 1991, para 7.3 [Annex 87].

[344] Record of joint meeting between Delegation of the Governor of Si Sa Ket Province and Delegation of the Deputy Governor of Phra Viharn Province, 22 February 2001, with Annex A (schedule of agreement) [Annex 92].

> differed from Cambodia's consistent interpretation of it."[345]

4.67 Against this factual background, Cambodia's claim that it has only recently – in 2007 – discovered Thailand's interpretation of the Judgment, on a map produced unilaterally[346], is puzzling. As far as the Temple is concerned, this map only illustrates the placement of the 1962 barbed-wire fence. From the very beginning, Cambodia knew precisely where the barbed-wire fence was located. The events and documents surrounding Prince Sihanouk's visit leave no doubt as to that[347]. This is further confirmed by the 1962 *Aide-Mémoire on the Khmero-Thai Relations* published by Cambodia's Ministry of Foreign Affairs[348]. This *Aide-mémoire* presents on pages 76 and 77 photographs and a sketch with the placement of the barbed-wire fence.

4.68 Cambodia claims that it was in 2007 when Thailand's interpretation of the Judgment changed:

> "After 1962, and until the events following the process of including the Temple on UNESCO's list of World Heritage sites in 2007, no official claims were made by

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[345] *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), Application Instituting Proceedings,* 28 April 2011, para. 27.

[346] *Ibid*., para. 14.

[347] See paras. 4.40-4.47 above.

[348] See Ministry of Foreign Affairs of the Kingdom of Cambodia, *Aide-mémoire sur les relations khméro-thaïlandaises*, circa November 1962 [Annex 34].

Thailand in the area of the Temple which is now claimed by that State."[349]

4.69 But in 2007, Thailand simply restated the position it had made public in July 1962[350] and as it was marked on the ground by the barbed-wire fence[351]. In fact it is Cambodia's position that has changed. While for more than forty years, Cambodia did not dispute Thailand's implementation of the 1962 Judgment, the inclusion of the Temple on the UNESCO World Heritage List created the necessity to reach an agreement on the delimitation and the demarcation of the area surrounding the Temple, in order to properly establish the buffer zone necessary for the protection and the management of the property according to UNESCO's standards. Instead of engaging in good faith negotiation with Thailand in this regard, Cambodia took a convenient shortcut to appropriate a portion of Thai territory under the guise of a request for an interpretation of the 1962 Judgment. At best, Cambodia's Request constitutes a delayed complaint against the implementation of the Judgment, whose defects would seem to be revealed, in Cambodia's view, from a completely new factual situation, born in 2007[352].

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[349] *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), Application Instituting Proceedings,* 28 April 2011, para. 12.

[350] See paras. 4.33-4.34 above.

[351] See para. 4.35 above.

[352] *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), Application Instituting Proceedings,* 28 April 2011, paras. 12-15 and 17.

(e) In Any Case, Disputes over Implementation Are outside the Scope of Article 60

4.70 Cambodia's Request is based on the assumption that the finding in paragraph 2 of the *dispositif* entails a continuing legal obligation on Thailand to withdraw from the territory the Court found to be under Cambodia's sovereignty. This assumption is false on both legal[353] and factual grounds[354]. Admitting, for the sake of argument, that such an assumption were true, *quod non*, this would mean that Cambodia is complaining about a *violation* of the 1962 Judgment: under Cambodia's argument, Thailand never withdrew yet somehow, at some point, managed to return[355]. Either way this would be a violation of paragraph 2 of the *dispositif*, a matter of implementation not of interpretation. But in any event, Thailand withdrew and cannot be ordered now to do something it already did[356].

4.71 Cambodia goes even further and accuses Thailand, contrary to the whole factual record, of secretly aiming to take back the Temple. This is implied in statements such as the following: "Everything which has reoccurred since 2008 is thus no more than Thailand demonstrating the impossibility of it

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[353] See paras. 5.52-5.58 below.

[354] See paras. 5.60-5.62 below.

[355] See *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), Application Instituting Proceedings,* 28 April 2011, para. 44. See also paras 5.66-5.79 below.

[356] See also para. 5.80 below.

recovering sovereignty over the Temple."[357] Such unfounded accusations hint at a violation of paragraph 1 of the *dispositif*. Thailand will not discuss here the unsoundness of these allegations. It only points out that, for the purpose of interpretation under Article 60, they have the consequence of making the Request inadmissible. The Court indeed made clear in *Avena* that "Article 60 of the Statute, (...) does not allow it to consider possible violations of a judgment which it is called upon to interpret."[358] A Request for interpretation is not, and cannot be, a request for the implementation of a judgment – but it would be so if the Court were to consider claims for the non-implementation of a judgment that is clear. There can be no doubt about the true meaning of paragraphs 1 and 2 of the *dispositif* of 1962; any complaint that Thailand would be in breach of these clear decisions of the Court could only concern their *implementation*, not their *interpretation*.

4.72 Cambodia must have perceived this contradiction in its own argumentation, since it specifies in its Request, "that, through this Application, it is in no way seeking any means of

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[357] *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), Application Instituting Proceedings,* 28 April 2011, para. 12. In the same vein, see The Cambodian National Commission for UNESCO, *A Challenge to Thailand's denunciation of UNESCO and the World Heritage Committee*, 2009, pp. 16-17 [Annex 95].

[358] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Judgment, I.C.J. Reports 2009*, p. 20, para. 56.

forced compliance with the 1962 Judgment"[359]. The expression (*forced compliance* – in the French original, *exécution forcée*) is extremely confusing since it shows that Cambodia mistakes the Court for the Security Council. It nonetheless illustrates that Cambodia has only just discovered that it has a problem with the way the Judgment was implemented nearly half a century ago. Rather than a clarification, this is actually a statement against interest: it admits that, even if taken on its own flawed premises, Cambodia's Request is inadmissible.

B. Cambodia's Disregard for the Principle of *Res Judicata*

4.73 The exceptional possibility for a State unilaterally to seise the Court under Article 60 of the Statute must not be diverted into an attempt to impair the *res judicata* of the main judgment. This is apparent in the drafting of this article and in the succession of the sentences forming it: the first refers to the finality of the Judgment and the second opens the possibility for the Court to interpret it:

> "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."[360]

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[359] *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), Application Instituting Proceedings*, 28 April 2011, para. 31.

[360] Article 60 of the Statute of the International Court of Justice.

4.74 As the Court had noted in relation with the Nigeria's Request for interpretation in *Cameroon* v. *Nigeria*,

> "It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are 'final and without appeal'. Thereafter, the Article provides that in the case of a 'dispute as to the meaning or scope of the judgment', it shall be construed by the Court upon the request of any party. The language and structure of Article 60 reflect the primacy of the principle of *res judicata*. That principle must be maintained."[361]

4.75 Thailand showed in the previous section that there is no dispute between the Parties on the *dispositif* of the 1962 Judgment. The three paragraphs of the *dispositif*, the meaning of which is crystal-clear, were implemented by Thailand, and Cambodia has acknowledged that Thailand had complied with the Judgment until the UNESCO World Heritage episode in 2007. In reality the disagreements between the Parties relate to the delimitation of their common boundary, *inter alia* in the Dangrek region, which is the region represented on the Annex I map, a question which was deliberately *not* decided by the Court in 1962. In its Request for interpretation, Cambodia is seeking to have this dispute now decided by the Court, portraying it as a dispute over the interpretation of the 1962 Judgment. This Request openly violates the requirements and conditions laid down in Article 60 of the Court's Statute:

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[361] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v*. Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 36, para. 12.

> "The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal."[362]

4.76 As will be seen below in further detail, the Request for interpretation revives two claims relating to the status of the Annex I map and to the delimitation of the "boundary in the disputed region in the neighbourhood of the Temple of Preah Vihear"[363]; these two claims had been expressly excluded by the Court from the *dispositif*, and thus were clearly placed outside the scope of the *res judicata*. And yet, they are the very subject matter of Cambodia's Request for interpretation. Using as a pretext the existence of a dispute over the reasons in the 1962 Judgment, where the two issues had been touched upon, it asks the Court to introduce into the *dispositif* of a judgment on interpretation what the Court had excluded from the operative part in 1962.

4.77 In so doing, Cambodia acts in a way similar to Colombia in the *Asylum Case*:

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[362] *Request for Interpretation of the Judgment of November 20th, 1950, in the asylum case*, *Judgment of November 27th*, *1950, I.C.J. Reports 1950*, p. 402.

[363] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 11. See also paras. 2.66-2.73 above.

> "The 'gaps' which the Colombian Government claims to have discovered in the Court's Judgment in reality are new questions, which cannot be decided by means of interpretation. Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions.
>
> In reality, the object of the questions submitted by the Colombian Government is to obtain, by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer."[364]

4.78 Therefore, like Colombia in the *Asylum Case*, Cambodia addresses to the Court questions of "interpretation" not relating to points decided with binding force (1). There is nonetheless a difference between the *Asylum Case* and the present case: what Cambodia seems to have discovered in the Court's 1962 Judgment is not 'gaps', but rather 'omissions' in the *dispositif*, forgetting that these 'omissions' were deliberate exclusions (2). For these reasons, its Request must be declared inadmissible; attempts of this kind must be discouraged by the Court, since they are clearly an abuse of process.

1. The Object of Cambodia's Request Does Not Concern Points Decided with Binding Force by the Court

4.79 It is a well-known principle that only the findings of the operative part of a Judgment enjoy *res judicata* status together with the reasons which are indispensable to clarify its meaning.

[364] *Request for Interpretation of the Judgment of November 20th, 1950, in the asylum case*, *Judgment of November 27th*, *1950, I.C.J. Reports 1950*, p. 403.

While the reasons may be used to clarify, if need be, the meaning of the *dispositif*, these reasons are not in themselves *res judicata*. The Permanent Court of International Justice stated it in perfectly clear terms:

> "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. (...) But it by no means follows that every reason given in a decision constitutes a decision; (...) [T]he Court is unable to see any ground for extending the binding force attaching to the declaratory judgment on the point decided to reasons which were only intended to explain the declaration contained in the operative portion of this judgment and all the more so if these reasons relate to points of law on which the High Commissioner was not asked to give a decision."[365]

4.80 This cardinal principle of international litigation was equally understood by arbitral tribunals as being of strict application:

> "*L'opinion que le juge exprime incidemment, sans la traduire par un dispositif, ne crée toutefois pas, en principe, chose jugée. S'il est appelé à trancher positivement la question, il peut, après nouvel examen, revenir sur une opinion première. Cette dernière ne peut* a fortiori *lier un autre juge, qui doit dès lors décider librement*."[366]

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[365] *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J. Series B, No. 11*, p. 30.

[366] *Junghans case, Second Part, Award, 1940, Germany* v. *Romania*, *Reports of International Arbitral Awards*, Vol. III, p. 1889.

4.81 Indeed, the binding force of the *dispositif* may extend to some of the reasons in the judgment, but it is only so to the extent that the scope of these reasons coincides with the scope of the *dispositif*. The scope of the *res judicata* is thus solely determined by the operative clause of a judgment:

> "Once a decision has been duly given, it is only its contents that are authoritative, whatever may have been the views of its author (…) [I]t 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*."[367]

4.82 This proposition finds a necessary corollary in the conditions of admissibility of a request for interpretation:

> "[A]ny request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part."[368]

The condition stated therein is thus clear: the object of a request for interpretation must solely be the operative part. Such a request can relate to the inseparable reasons of the judgment alone, to the extent that the *dispositif* is unclear, and only for the purpose of dissipating an uncertainty identified therein.

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[367] *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J. Series B, No. 11*, pp. 28-30. (Emphasis added).

[368] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 35, para. 10.

4.83 This approach for establishing the *res judicata* was recently applied by the Court in order to assess the admissibility of Honduras' request for intervention in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case. The Court had to determine whether the 2007 Judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case was a bar to the request for intervention, essentially because Honduras was basing its claims on matters already decided by the Court. In order to determine the extent of the *res judicata* of the 2007 Judgment, the Court first analysed the text of the operative clause, "which *indisputably* has the force of *res judicata*"[369]. Afterwards, the Court referred to the reasons which were "an essential step leading to the *dispositif* of that Judgment"[370], but only because "[w]ithout such reasoning, it may be difficult to understand why the Court did not fix an endpoint in its decision."

4.84 For determining the scope of the binding force of a judgment, it is therefore imperative to examine first the scope of the *dispositif* itself. In 1962, the dispute was about territorial sovereignty and the other submissions recognized as admissible by the Court derived from that dispute[371]. Therefore, the scope of the operative clause is necessarily limited to territorial sovereignty. The adjudication of territorial sovereignty is

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[369] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, I.C.J. Judgment,* 4 May 2011, para. 69. (Emphasis added).

[370] *Ibid*., para. 70.

[371] See para. 4.76 above.

contained in paragraph 1 of the *dispositif*, which, on a plain reading, shows that it extends only to the Temple area[372]. It does not go an inch beyond that. First of all, this is clear in the text of the *dispositif* itself. Paragraph 1 of the *dispositif* is actually so self-evident that Cambodia does not address any request to the Court related to it. And it could not be otherwise since the Court does not interpret clear texts. *Interpretatio cessat in claris*[373].

4.85 Such confined territorial scope is further confirmed by the pleadings of the Parties. Thailand devoted a Chapter to these pleadings, which amply showed that the territorial scope of the dispute put before the Court in 1962 was limited to the Temple ground: this appears in the formulation of the dispute in the 1959 Application and its confirmation in the further written proceedings; this appears again in the characterization, by Cambodia's Counsel, of the territorial scope of its claim; this is also apparent in the final conclusions considered admissible by the Court[374].

4.86 Should there be any doubt as to the scope of the Court's decisions, *quod non*, it would ultimately be dissipated by reference to the 1959-1962 pleadings. And there is no doubt that they are highly relevant for determining the scope of the dispute and of the Court's decision, thus, ultimately of the limits for the

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[372] See paras. 3.47-3.55 above.

[373] *The Case of the S.S. "Lotus", 1927, P.C.I.J. Series A, No. 10*, p. 16; *Interpretation of the Statute of the Memel Territory, 1932, P.C.I.J. Series A/B; No. 49,* p. 294.

[374] See paras. 2.6-2.9 and 2.26-2.46 above.

request for interpretation. The link between the three acts – the Application instituting the Proceedings, the Judgment on the merits[375] and the Request for interpretation – is inextricable. It is by "having regard to the manner in which the dispute was defined"[376] in the act instituting the main proceedings that the Court determines the limits of the judgment to be interpreted and, consequently, of the request for interpretation:

> "[A]n interpretation -given in accordance with Article 60 of the Statute- of the judgment (...) cannot go beyond the limits of that judgment itself, which are fixed by the special agreement."[377]

4.87 Finding no support for its Request for interpretation in paragraph 1 of the 1962 *dispositif*, Cambodia turns to paragraph 2, in an unconvincing attempt to comply with the conditions of admissibility. It nonetheless fails to identify any matter to be interpreted therein. The section in the Request is drafted in the form of a quotation of paragraph 2 of the operative clause of the 1962 Judgment, an academic analysis of the obligation stated in this point, and two incidental sentences reading like comments by Cambodia, not as questions addressed to the Court or bearing on any obscurity of the *dispositif* of the Judgment:

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[375] See also the Judgment on the Preliminary Objections (*Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, pp. 19 or 22) which is echoed in the Judgment on the Merits (*Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 14).

[376] *Interpretation of Judgment No. 3, Judgment, Chamber of Summary Proceedings, 1925, P.C.I.J. Series A, No. 4*, p. 6.

[377] *Ibid.*, p. 7.

> "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' (second paragraph of the operative clause) 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 Annex I map, on which the Judgment of the Court is based."[378]

4.88 It is apparent that no question is actually addressed here to the Court. Cambodia purported question refers to the nature of Thailand's obligations stated in paragraph 2 of the 1962 *dispositif*, the obligation of withdrawal being presented as a "general and continuing obligation to respect the integrity of the territory of Cambodia". The Parties had never articulated opposing views on this matter, and therefore it can hardly be argued that there is any dispute between them on this point. But even assuming, *arguendo*, that this is a real question, Cambodia fails to show how the answer to it would have any implications for the understanding of paragraph 2. The point is, even if the judicial obligation was extinguished by implementation, the general international law obligation still stands. But this is not a matter for interpretation[379].

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[378] *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), Application Instituting Proceedings,* 28 April 2011, para. 45.

[379] See also paras. 5.57-5.59 below.

4.89 As Judge Charles de Visscher pointed out in his celebrated book, *Problèmes d'interprétation judiciaires en droit international public*:

> "*Dans l'exercice de sa juridiction contentieuse, la Cour ne statue que sur des demandes ; elle n'a pas à faire réponse à des questions ou à des propositions que les Parties s'aviseraient de soumettre à son appréciation*."[380]

4.90 As it stands, Cambodia's Request, which specifically fails to ask for any clarification of the operative part of the 1962 Judgment, is inadmissible. The way Cambodia formulates its request highlights its embarrassment in respect of its real request. What Cambodia actually attempts to do, by referring to paragraph 2, is to extend the territorial scope of the Court's findings, as determined in paragraph 1 of the *dispositif*. However, such an attempt cannot succeed: paragraph 2, as already noted, is simply a consequential finding. However, this finding has no autonomous territorial scope: being consequential, it is dependent on the main finding, that is on paragraph 1. As the Court described this claim of Cambodia (as well as the claim for restitution of cultural objects), it was a claim stemming from the claim to sovereignty over the

[380] Charles de Visscher, *Problèmes d'interprétation judiciaires en droit international public*, Paris, Pedone, 1963, pp. 255-256. See also *Interpretation of the Statute of the Memel Territory, Dissenting Opinion by M. Anzilotti, 1932, P.C.I.J. Series A/B, No. 49*, p. 350, confirmed by *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 126.

Temple[381]. Its territorial scope thus cannot go beyond the territorial scope of the finding of sovereignty, which relates only to the Temple[382].

4.91 The reference to paragraph 2 is actually just a pretext to introduce the two incidental phrases of paragraph 45 of the Request[383], which reveal the real question Cambodia wishes the Court to respond to: "that territory [Cambodia's territory] having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based". Indeed, Cambodia's Request seeks to have the Court provide an answer "to the question of whether the Judgment did or did not recognize with binding force the line shown on the Annex I map as representing the frontier between the two Parties", as the Court reformulated it in its Order on provisional measures[384]. This is, without the shadow of a doubt, the question Cambodia wants the Court to answer. The long and convoluted development of the Request for interpretation stands as witness to this[385].

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[381] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 11.

[382] See also paras. 3.9-3.10.

[383] See para. 4.87 above.

[384] *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), Provisional Measures, Order of 18 July 2011*, para. 31.

[385] *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), Application Instituting Proceedings*, 28 April 2011, paras. 5, 16, 39, 40-42.

4.92 The tortuous formulation of Cambodia's Request in paragraph 45[386] is yet further proof of its attempt to obscure the inescapable fact that these proceedings aim at having the Court decide as the boundary the line drawn on the Annex I map. Another artifice used by Cambodia consists in treating the developments on the status of the Annex I map and on the line represented upon it as inseparable reasons for the Judgment[387] in the hope of obtaining a decision upon these issues in the *dispositif* of a judgment on interpretation. In doing so, Cambodia neglects the imperative principle according to which the reasons in themselves cannot be the object of an interpretation under Article 60[388] - and certainly all the more so in the present case where the Court has clearly considered an identical Cambodian submission as inadmissible in its 1962 Judgment.

4.93 Allowing the reasons of the 1962 Judgment to be the autonomous object of a Request for interpretation, when no ambiguity exists in the *dispositif* of that Judgment and when this Request has a larger scope than the one of that *dispositif*, would be to fly in the face of the principle of *res judicata*. Indeed, as the Permanent Court of International Justice explained:

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[386] See para. 4.87 above.

[387] *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), Application Instituting Proceedings*, 28 April 2011, para. 40.

[388] See para. 4.82 above.

> "[T]he object of Article 59 [of the Statute] is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States *or in other disputes*."[389]

4.94 Since Cambodia's Request for interpretation aims at the delimitation of the region shown on the Annex I map, which is not only an extension of the territorial scope of the 1962 operative clause, but also a dispute different from the one it had submitted to the Court in 1962 which the Court had found admissible, it is plain that the objective of its present Request is to have the 1962 reasoning binding "in other disputes".

4.95 Thus, Cambodia's Request is inadmissible: not only because the Court did not deal with the issue now submitted to it in the operative clause of the 1962 Judgment, not only because "the clarification" requested does not help in any way to clarify the operative clauses of that Judgment, the meaning of which stands alone, but also because the Court had already declared a Cambodia's submission to the same effect inadmissible in 1962.

2. The Purpose of Cambodia's Request Is to Revive a Claim Relating to Delimitation Declared Inadmissible in 1962

4.96 Thailand has already stressed the fact that the Court explicitly refused to adjudge Cambodia's claims relating to the

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[389] *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, p. 21. (Emphasis added).

status of the Annex I map and of the line shown on it. They were explicitly excluded from the *dispositif* and this exclusion renders Cambodia's Request for delimitation according to the Annex I line inadmissible (a). Even a quick reading of Cambodia's Request leaves no doubt that this is indeed the dispute it attempts to have settled by the Court in these proceedings (b).

(a) The Court Declared Inadmissible Cambodia's Claim Relating to Delimitation

4.97 It is to be recalled that the claims relating to the status of the Annex I map and on the delimitation of the boundary were raised by Cambodia only at a very late stage of the proceedings, the latter for the first time at the end of the first round of oral pleadings[390] and the former in the final submissions. The claim for delimitation underwent a further modification as to its territorial scope[391]. The Court declared both submissions to be inadmissible:

> "Cambodia's first and second Submissions, calling for pronouncements 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 grounds, and not as claims to be dealt with in the operative provisions of the Judgment."[392]

[390] See para. 2.68 above.

[391] See paras. 2.40-2.46 above.

[392] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36.

4.98 It is also recalled that, throughout the oral pleadings, Thailand opposed the introduction of the submission on delimitation, considering it to be an impermissible transformation of the subject matter of the dispute submitted to the Court in the 1959 Application[393]. And the Court clearly echoed Thailand's objections to the transformation of the subject matter of the dispute initially submitted to it in the Application in the paragraph placed at the end of its analysis where it refers to "the reasons indicated at the beginning of the present Judgment"[394], where it had described the subject matter of the dispute submitted to it[395].

4.99 As the Court itself appreciated, the late submission of these claims was not the cause of their inadmissibility. Indeed, when it concluded that the fifth claim on the return of cultural objects was implicit, and did not represent an extension of Cambodia's initial claim, the Court implied *a contrario*, that such an extension would be inadmissible for reason of lateness. The Court indeed added that "it would have been irreceivable at the stage at which it was first advanced."[396]

4.100 But this was not the basis on which the claims relating to delimitation were dealt with. Rather than lateness, which is a

[393] See paras. 2.38 and 2.75-2.76 above.

[394] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36.

[395] *Ibid.*, p. 14.

[396] *Ibid.*, p. 36.

technical default, the Court put forward their substantial inadmissibility: if they had been accepted as part of the *petitum*, they would have transformed beyond recognition the subject matter of the dispute submitted to the Court in the Application. And that truly would have been the case: the initial dispute about sovereignty over the Temple would have become a dispute on the delimitation of a territory whose extent was unknown and specified neither in the Submissions nor in the pleadings of the Claimant[397].

4.101 By specifying that "Cambodia's first and second Submissions, calling for pronouncements 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 grounds, and not as claims to be dealt with in the operative provisions of the Judgment"[398], the Court in no way endowed these grounds with the binding force attached to the decisions appearing in the operative part of its Judgment. This conclusion stems first from legal principles and from the Court's jurisprudence. It should indeed be recalled that in the years preceding the 1962 Judgment, the Court had found that the reasons in its judgments are not decisions in themselves:

> "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this

[397] See paras. 2.76-2.77 above.

[398] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36.

> way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree."[399]

4.102 As a further argument, it must be recalled that the Court enjoys a wide discretion in choosing the reasons for a judgment. In its findings, the Court must respond to the claims of the Parties, as they are stated in the proceedings and must not go beyond them[400]. It is in respect of these claims that the Parties defined their positions. What would become of this freedom of the Court if the reasons in themselves were *res judicata*? What would become of the rights of the Parties if they were to be bound by reasons to which they had not responded or deemed it necessary to respond, since they were not part of the *petitum*?

4.103 It is because the reasons in themselves do not have binding force that the Court relegated Cambodia's claims on the status of the Annex I map and on delimitation to the non-dispositive part of the Judgment. Only this can explain (and does explain) the Court's mysterious phrase in the concluding part of its reasons in the 1962 Judgment. Concerning the claims

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[399] *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 126. See also *Case concerning Right of Passage over Indian Territory (Merits)*, *Judgment of 12 April 1960, I.C.J. Reports 1960*, pp. 31-32.

[400] The Court underlined this balance in the *Arrest Warrant* case: "While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning." (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 19, para. 43).

on the status of the Annex I map and the determination of the boundary, the Court stated:

> "[O]n the other hand (...) Thailand, after having stated her own claim concerning sovereignty over Preah Vihear, confined herself in her Submissions at the end of the oral proceedings to arguments and denials opposing the contentions of the other Party, *leaving it to the Court to word as it sees fit the reasons on which its Judgment is based*."[401]

(b) Cambodia's Request Reveals a Dispute over the Delimitation of the Boundary

4.104 Despite the Court's findings on the inadmissibility of its claims on delimitation, Cambodia subsequently adopted the pretence that the Court had actually made a decision on delimitation. Such an attitude can be traced back as early as 1962 and has been repeated over and over again, as if these claims had a life of their own, and the Court's declaration of inadmissibility had no impact upon them. But this attitude is not an interpretation of the Court's Judgment; it is rather a misappropriation of the 1962 Judgment for political purposes.

4.105 A few examples illustrate this misappropriation. First, all the declarations relating to the misplacement of the barbed-wire fence rest on the assumption that the Court did decide on the

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[401] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36. (Emphasis added).

delimitation and demarcation of the boundary[402]. But the barbed-wire fence was intended to show the extent of the area on which the Court declared Cambodia had sovereignty and not a boundary on which the Court had decided.

4.106 Boundary delimitation and demarcation, in the Dangrek region, but also beyond that, was an issue considered to be important for the relations between the Parties by the two special representatives of the Secretary-General, Mr. Gussing and Mr. de Ribbing. The five-point proposal referred to by Mr. Gussing[403] contained a point 2 on “Respect for the territorial integrity of both countries.” In Cambodia’s view, this point should have included “the definition of frontiers according to the maps appended to Cambodian documentation during the Preah Vihear Case at the International Court of Justice”[404]. Here, Cambodia seemed to be acknowledging the unilateral and not juridical character of its position.

4.107 But this honesty did not last for long. Soon, the discourse moved towards pretending that the Court had decided on the delimitation of the boundaries in general. Seemingly, this was part and parcel of Cambodia’s argumentation in order to obtain a declaration recognizing its boundaries:

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[402] See paras. 4.38-4.43 and 4.54 above.

[403] See para. 4.50 above. See also N. Gussing, Note to the Secretary-General of the United Nations, “Mission to Thailand and Cambodia”, 14 September 1963, para. 3 [Annex 57].

[404] J.F. Engers, Aide-Mémoire on the Secretary-General's Five Points of 3 September 1963, 19 September 1963, p. 1 [Annex 58].

- in 1964, in an article published in *Réalités Cambodgiennes*, a publication said to be "semi-official organ"[405] of Prince Sihanouk, the following was said:

> "*Le Cambodge a toujours affirmé; et je saisis cette occasion pour l'affirmer à nouveau, qu'une reprise des relations normales avec la Thaïlande ne pourrait se faire que si cette dernière accepte de reconnaître et de respecter les frontières actuelles entre nos deux pays, frontières qui sont d'ailleurs parfaitement établies par les accords internationaux et confirmées en 1962 par un arrêt de la Cours Internationale de Justice*."[406]

- the same argument was repeatedly advanced before the General Assembly of the United Nations by Cambodia's Permanent Representative to the United Nations:

> "For the information of the General Assembly, I venture to point out that the present common frontiers between Thailand and Cambodia were established and clearly defined by international treaties and were confirmed by the Agreement between France and Siam regulating their relations of 17 November 1946, then by the report of the Conciliation Commission on the Siamese-Indochinese

[405] See United States Embassy in Phnom Penh, Airgram to Department of State, "Réalités Discusses Problems of Preah Vihear Turnover", No. A-37, 16 July 1962 [Annex 20].

[406] *Réalités Cambodgiennes*, 18 December 1964, "Les ruades de Thanat Khoman", p. 3 [Annex 60].

> frontier dispute of 27 June 1947, and finally by the Judgment of the International Court."[407]

4.108 Cambodia's statements put into light a newly independent State's preoccupation with its boundaries, especially when they were not previously delimited. However, this is not enough reason for misstating the Court's Judgment, which deliberately did not deal with the issue.

4.109 And still, this is the very issue that is brought now before the Court. The heart of the dispute is thus described by Cambodia in paragraph 24 of its Request:

> "Thailand accepts Cambodia's sovereignty over the Temple, but denies that this has effects beyond a limited perimeter confined strictly to the Temple itself. A number of assertions by Thailand thus derive from this situation: (1) that *the frontier in the area of the Temple has not been recognized by the Court* and has still to be determined in law; (2) that *this allows Thailand to lay claim to territory beyond the strict precincts of the Temple* on the basis of the "watershed line", as that State argued before the Court in 1959-1962."[408]

or again in paragraph 25:

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[407] United Nations, *Official Records of the General Assembly, Twenty-first Session, 1428th Plenary Meeting*, 4 October 1966, p. 19, para. 161 (footnote omitted). In the same vein, see also *ibid., 1444th Plenary Meeting*, 17 October 1966, p. 5, paras. 65-66; *ibid.*, *Twenty-second Session, 1590th Plenary Meeting*, 13 October 1967, pp. 16-17, paras. 159-161; *ibid.*, *1591st Plenary Meeting*, 13 October 1967, p. 23, paras. 234-235; *ibid.*, *Twenty-third Session, 1701st Plenary Meeting*, 21 October 1968, p. 7, para. 60.

[408] *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), Application Instituting Proceedings,* 28 April 2011, para. 24. (Emphasis added).

> "For Cambodia, not only are the two versions of Thailand's argument incompatible with one another, they are also and above all incompatible with what the Court decided in 1962. This is clearly demonstrated by the fact that each version requires the creation of new and artificial lines in order to connect the "watershed line", claimed by Thailand in the previous proceedings before the Court, with the "Temple area", defined by the 1962 Judgment as coinciding with the line on the Annex I map; in other words, for the first time in many years since the Court's Judgment, artificial demarcation lines are created which did not exist in 1962 and for which no basis can be found, either in the legal instruments on which the Court relied in 1962 in order to render its Judgment, or in the terms of the Judgment itself."[409]

4.110 It is indeed Thailand's case that the Court's findings in 1962 do not concern delimitation of the boundary in the region portrayed in the Annex I map. Thailand does not argue that no dispute on the delimitation and demarcation of the boundary exists between Cambodia and Thailand; and it fully accepts that the 1962 Judgment, in deciding the question of sovereignty over the Temple, created a situation to be taken into account in the delimitation and demarcation process. Nor does Thailand deny that the delimitation and demarcation of the boundary can only have a salutary effect upon the relations of the Parties in border areas, and be beneficial to the Temple's management as a UNESCO World Heritage site.

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[409] *Ibid*., para. 25.

4.111 But, as Cambodia itself admits[410], this is a matter for the Parties to decide jointly and it is the purpose of the Memorandum of Understanding of 14 June 2000[411] to provide for a process to that end. Article I of the MoU sets out the instruments that the Parties will apply for the survey and the demarcation:

> "(a) Convention between Siam and France modifying the Stipulations of the Treaty of the 3 October 1893, regarding Territorial Boundaries and other Arrangements, signed at Paris, 13 February 1904 (*La Convention entre le Siam et la France modifiant les stipulations du Traité du 3 Octobre 1893 concernant les territoires et les autres Arrangements, signée à Paris, le 13 février 1904*) ;
>
> (b) Treaty between His Majesty the King of Siam and the President of the French Republic, signed at Bangkok, 23 March 1907 (*Le Traité entre sa Majesté le Roi de Siam et Monsieur le Président de la République française, signé à Bangkok, le 23 mars 1907*) and Protocol concerning the delimitation of boundaries and annexed to the Treaty of the 23 March 1907 (*le Protocole concernant la délimitation des frontières et annexé au Traité du 23 Mars 1907*) ; and
>
> (c) Maps which are the results of demarcation works of the Commissions of Delimitation of the Boundary between Indo-China and Siam (Commissions de Délimitation de la Frontière entre l'Indo-Chine et le Siam) set up under the Convention of 1904 and the Treaty of 1907 between Siam and France, and other documents relating to the application of the Convention

[410] *Ibid*., para. 30. See also, *ibid*., paras. 18-19.

[411] See Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on the Survey and Demarcation of Land Boundary, 14 June 2000 [Annex 91].

> of 1904 and the Treaty of 1907 between, Siam and France"

4.112 If the Court had decided in 1962 on the delimitation of the boundary, the absence of any mention of its decision in this provision is inexplicable. If it is indeed Cambodia's interpretation of the Judgment as having decided on the boundary, then what becomes inexplicable is the fact that the *travaux préparatoires* of the MoU do not show Cambodia having mentioned the Judgment for that purpose[412].

4.113 The Joint Boundary Commission established under the MoU started its work in 2003. However, on the promontory of Phra Viharn and even beyond it, this work was complicated by the inscription of the Temple on the UNESCO World Heritage List.

4.114 The history of the inscription of the Temple of Phra Viharn on the World Heritage List shows Cambodia's awareness that the zone was still to be delimited according to the MoU provisions. In the process, Cambodia recognized that the promontory of Phra Viharn was part of the area to be delimited. In particular, after some initial attempts in 2008 to create doubt about the extent of the buffer zone for the Temple – indispensable for a complete inscription – Cambodia has since

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[412] Agreed Minutes of the First Meeting of the Thai-Cambodian Joint Commission on Demarcation for Land Boundary, 30 June-2 July 1999 [Annex 89] and Agreed Minutes of the Second Meeting of the Cambodian-Thai Joint Commission on Demarcation for Land Boundary, 5-7 June 2000 [Annex 90].

2010 officially recognized that Thai territory on the promontory is to be excluded from that zone, pending delimitation of the area[413].

4.115 Against this background, Cambodia's Request appears as an attempt to by-pass the procedure and the bodies established under the MoU and to have the Court decide, through a Judgment on interpretation, a boundary delimitation that attributes to it an area in Thai territory that would constitute the buffer zone required for the complete inscription of the Temple on the World Heritage List. The long discussion in the Request on the UNESCO-related events leaves no doubt about this aim[414]. But the scope of Cambodia's Request extends well beyond, to the whole of the Dangrek region shown on the Annex I map, since the question it submitted to the Court is actually "whether the Judgment did or did not recognize with binding force the line shown on the Annex I map as representing the frontier between the two Parties"[415].

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[413] See Department of Treaties and Legal Affairs, History of the Negotiations for the Inscription of the Temple on the UNESCO World Heritage List, November 2011 [Annex 100].

[414] *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), Application Instituting Proceedings,* 28 April 2011, paras.13-15, 17 and 35.

[415] *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), Provisional Measures, Order of 18 July 2011*, para. 31. See also paras. 4.90-4.92 above.

C. Conclusion

4.116 Cambodia's attempt to bypass the negotiation mechanisms agreed by the Parties for the demarcation of their boundary and appeal to the Court for the very claims declared inadmissible in the 1962 Judgment, all under the guise of a Request for interpretation, is a *détournement de procédure*, incompatible with the consensual character of the jurisdiction of the Court. Indeed, Cambodia's Request reveals a dispute on delimitation and demarcation of the boundary that was outside the Court's jurisdiction in 1962 and remains so under Article 60 of the Statute.

4.117 Jurisdiction under Article 60 is not dependent upon specific consent. However, the principle remains that an inter-State dispute cannot be adjudged by the Court without the consent of the States concerned. The principle of consent is respected in the case of a Request brought under Article 60 if and only if the request for interpretation does not aim to the adjudication of a dispute not submitted to the Court in the initial proceedings.

4.118 Accordingly, given the absence of a dispute on the meaning and scope of the 1962 *res judicata* and the fact that Cambodia's claim related to boundary delimitation and demarcation, a matter not decided in 1962, the Court cannot exercise jurisdiction under Article 60 of the Statute.

CHAPTER V
CAMBODIA'S MISCONSTRUCTION OF THE MEANING AND SCOPE OF THE 1962 JUDGMENT

A. The Apparent Purport of Cambodia's Request

5.1 In its Request submitted to the Court on 28 April 2011, instituting the present proceedings, Cambodia demands that the Court address matters which do not fall within its jurisdiction under Article 60 of the Statute. In Chapter IV of these Written Observations Thailand has set out its jurisdictional objections, which it maintains in their entirety.

5.2 In the present Chapter Thailand will, in the alternative, address the serious misconstructions of the Judgment of 15 June 1962, contained in the Request.

5.3 In its Request Cambodia makes extensive allegations as to modern factual circumstances in its boundary region[416], which are difficult to understand except as either

(i) a request to adjudicate a series of general issues in connection with the definition of the Thai-Cambodian boundary; or

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[416] *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), Application Instituting Proceedings,* 28 April 2011, paras. 13-20 and 33-34.

(ii) a request to declare whether or not the Parties to the 1962 Judgment at present are acting in accordance with it,

rather than a request to settle a genuine difference as to what that Judgment meant.

5.4 At paragraph 5 of its Request, Cambodia seems to construe the 1962 Judgment as having meant that

(1) the Annex I map line is binding as a definitive statement of the boundary between the Parties;

(2) the obligation in the second paragraph of the *dispositif* is a continuing obligation; and

(3) Thailand had been in unlawful occupation of an area greater in extent than that from which Thailand withdrew in 1962.

The second element of Cambodia's construction of the Judgment seems, however, not to be consistently maintained. In the paragraph which appears to constitute Cambodia's formal submission in the Request, Cambodia refers to the "continuing obligation to respect the integrity of the territory of Cambodia"[417]—which, of course, is not controversial. But this is not the same thing as the alleged continuing and specific obligation of carrying out a withdrawal which Thailand already performed some fifty years ago and which Cambodia seems to have requested again in paragraph 5. Thailand will respond here to the Request on the assumption that Cambodia maintains a

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[417] *Ibid*., para. 45.

submission that there exists a continuing obligation to withdraw from specific territory[418].

5.5 In the present Chapter, Thailand will show that each of Cambodia's three main requests identified above involves a misconstruction of the Judgment of 15 June 1962. Cambodia misconstrues the Judgment (1) when it asserts that the Annex I map line was adopted in 1962 as a binding delimitation which the Parties are obliged to implement on the ground; (2) when it asserts that the obligation to withdraw from the Temple and its vicinity on Cambodian territory is a continuing obligation; and (3) when it asserts that the area from which Thailand withdrew in 1962 was not the area to which the Judgment in its operative part referred.

B. Ignoring the Text of the 1962 Judgment, Cambodia Erroneously Asserts That the Court Determined That the Boundary Is to Be Traced on the Basis of the Annex I Map Line

5.6 Cambodia says that "the greater part of the 1962 Judgment was strictly devoted to the establishment by the Court of the line that was to constitute the frontier between the two

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[418] *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), Provisional Measures,* 30 May 2011, CR 2011/13 pp. 12-13 (statement of President Hisashi Owada); *ibid*., p. 13 (statement of the Registrar).

States in the area in question."[419] This is an entirely question-begging formulation. The main question raised by Cambodia's Request is just that: whether the Court established the line so as "to constitute the frontier." The Court certainly considered the map. But the Court never adopted the map as the basis for "constitut[ing] the frontier between the two States". Cambodia's assertion that the Annex I map forms part of the *res judicata* of the case is erroneous in at least five respects.

5.7 First of all, in contending that the Annex I map line is the basis on which the boundary must be traced, Cambodia fails to respect the Court's express refusal in 1962 to make such a determination. Second, Cambodia demands that the Court today treat as *res judicata* other matters in relation to the Annex I map which the 1962 Judgment did not address at all. Third, Cambodia misconceives the question of sovereignty over the Temple as having necessitated a determination of the precise location of the boundary. Fourth, Cambodia ignores the subsequent practice of the Parties indicating that the Court had not determined the precise location of the boundary. And fifth, Cambodia attempts to impute to the map a purpose for which the Court in 1962 did not employ it.

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[419] *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), Application Instituting Proceedings*, 28 April 2011, para. 10.

1. Cambodia's Request, in Contending That the Annex I Map Line Is the Basis on Which the Boundary Must Be Traced, Fails to Respect the Court's Express Refusal in 1962 to Make Such a Determination

5.8 Central to Cambodia's Request for interpretation is the contention that the Court in 1962 determined that the Annex I map line is the basis on which the Parties are obliged to trace their boundary. According to Cambodia, a "great deal of the 1962 Judgment was (...) devoted by the Court to establishing the line that was to constitute the frontier between the two States in the area of the Temple."[420] It is unsurprising that the Court considered the line with some care: the Parties had devoted a great deal of their pleading to disputing the status, accuracy and relevance of the Annex I map. But the question is not how carefully the Court considered the line; the question is what did the Court establish about the line. The problem for Cambodia is that the Court, in express terms, simply did not "establish (…) that the line (...) was to constitute the frontier".

5.9 It is helpful here to recall what Cambodia requested in 1962. Thailand has already set out Cambodia's Final Submissions[421]. The particular submission in the 1962 case relevant to Cambodia's present contention about the Annex I line is that by which Cambodia requested the Court "[t]o adjudge and declare that the frontier line (...) in the disputed

[420] *Ibid*., para. 4.

[421] See paras. 2.72-2.73 above.

region in the neighbourhood of the Temple (...) is that which is marked on the map."[422] The Court rejected this. It indicated that the "legal status of the Annex I map" and the "frontier line in the disputed region, can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment."[423] The first answer to Cambodia's contention about the map line—a complete answer—is that the Court decided, expressly, that this was a point which it would not decide.

5.10 It follows that, far from presenting a true request for interpretation of the Judgment of 15 June 1962, Cambodia seeks, in effect, to appeal against the decision of the Court in 1962 not to entertain Cambodia's most far-reaching submissions. The Request is a plea to nullify an outcome which was expressly adopted in the terms of the Judgment.

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[422] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 11; *I.C.J. Pleadings, Temple of Preah Vihear, Oral Arguments*, Vol. II, p. 441 (H.E. Mr. Truong Cang, 20 March 1962).

[423] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 36.

2. Cambodia's Request Demands That the Court Today Treat as *Res Judicata* Other Matters in Relation to the Annex I Map Which the 1962 Judgment Did Not Address at All

5.11 Cambodia accuses Thailand of "seeking to minimize the legal effects of the 1962 Judgment"[424]. Cambodia says that Thailand "not only calls into question the whole of the 1962 Judgment (and not merely the operative part), but also replaces what the Court *finds* in the reasoning of its Judgment with its own reading based on what the Court *does not find*."[425] That Cambodia believes that the Court "finds" something in its "reasoning" reveals a fundamental flaw in Cambodia's theory of its case: the Court does not "find" determinations in the reasoning; the reasoning, instead, contains considerations which support the actual findings of a judgment. It is in truth Cambodia which seeks to *add to* and *expand* the Judgment, by demanding that matters which the Court did not decide at all be treated as binding decisions. Two further matters in particular were not decided in 1962 but are central to the revised judgment which Cambodia wishes now to impose on Thailand. First, contrary to Cambodia's Request, the Judgment did not determine that the boundary does not follow the watershed. And, second, the Judgment did not address at all the difference

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[424] *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), Application Instituting Proceedings,* 28 April 2011, para. 24.

[425] *Ibid*., para. 25. (Emphasis in the original).

between the Parties as to whether it would be practical to transpose the Annex I map line onto the terrain.

(a) Cambodia's Assertion That the 1962 Judgment Determined the Boundary Not to Follow the Watershed

5.12 Cambodia says that the Court rejected "Thailand's earlier claim" that the boundary in the Dangrek range is to follow the line of the watershed: "(...) this [modern Thai] map *generally adopts* the watershed line according to Thailand's earlier claim that was rejected by the Court in 1962"[426]. To be clear, the modern map of which Cambodia here complains by no means disrespects the 1962 Judgment: the line on that map shows the Temple to be in Cambodia. It follows that the map is not inconsistent with the 1962 Judgment in any way at all. Cambodia, to advance its contention that to "generally adopt" the watershed line is to ignore a determination of the Court, adds to the 1962 Judgment a determination which the Court explicitly did not make. The 1962 Judgment did not "reject" any "claim" by Thailand that the boundary generally follows the watershed. To the contrary, the Court said as follows:

> "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

[426] *Ibid*., para. 14. (Emphasis added).

> correspond in 1904-1908, or, if not, how the watershed line in fact runs."[427]

Notably, the Court here was concerned only with Phra Viharn—and, even in respect of the line at Phra Viharn, expressly declined to say whether the boundary line did, or did not, follow the watershed. This means that whatever the Annex I map might say about the relation between the map line and the watershed is not part of the 1962 Judgment. Cambodia asserts in its Request that the Court "rejected" the watershed line, a matter on which the Court in truth was agnostic.

5.13 On examining the Annex I map, what an observer with no information besides the map sees is an apparent watershed line. A watershed line is also, of course, what Article I of the Treaty of 13 February 1904 between France and Siam requires explicitly[428]. It is therefore unsurprising that cartographers, within the limits of their technical appreciation of the true contours of the ground, have attempted at different times to draw the line in this way. Thailand's experts showed in 1962 that, on examination of the actual contours of the terrain, it was clear that the line on the Annex I map was not well-drawn, for watercourses were in critical respects inaccurately

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[427] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 35.

[428] See *I.C.J. Pleadings, Temple of Preah Vihear*, "The Treaty of the 13th February, 1904, between France and Siam", *Counter-Memorial of the Royal Government of Thailand*, Annex 4, Vol. I, p. 220.

represented[429]. If taken at face value, however, the Annex I map's depiction of the relation between watercourses and the map line appears to accord with Article I of the 1904 Treaty. Later Thai maps likewise have aimed to trace a line along the watershed, respecting at the same time the operative part of the Judgment of 1962 determining sovereignty over the Temple.

5.14 It is therefore striking, for a State which relies repeatedly in its pleading on the principle of the stability of boundaries, that Cambodia now says that the Judgment of 15 June 1962 determined that the boundary does not follow the watershed line. Not only does Cambodia's assertion deprecate the principle of stability, but it also ignores what the Court actually said. The Court in 1962 did not come to any conclusion whatsoever as to whether the line on the Annex I map was in truth an accurate portrayal of the watershed line. In light of Cambodia's accusation that Thailand seeks to ignore parts of the Judgment, it is important to keep in mind what the Judgment actually said about the map line.

5.15 The Parties, of course, were not silent about the relation between the Annex I map line and the watershed. The deviation of the map line from the watershed was addressed by Thailand

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[429] See *I.C.J. Pleadings, Temple of Preah Vihear,* "Report by Professor W. Schermerhorn, 1961", *Counter-Memorial of the Royal Government of Thailand*, Annex 49, Vol. I, p. 432.

at length[430]. Cambodia denied there was any deviation material to the case. There was the extensive criticism of Thailand's expert survey of the watershed[431], from which Cambodia concluded:

> "there was no error; (...) the delimitation in the crucial area which put the Temple on the Cambodian side of the border was competent and correct in accordance with the technical means and standards of the times;"[432]

> "*L'erreur (...) se mesure en centimètres ou tout au plus en mètres. Une telle erreur peut difficilement être qualifiée d'erreur substantielle*."[433]

According to Cambodia, in any event, such deviations as may have entered the line, were to be expected and had no legal consequence:

> "*Cette erreur de pur fait nous paraît finalement comme trop insignifiante pour entraîner une conséquence juridique quelconque*."[434]

Thailand's evidence that the map line was in error—i.e., that it failed to follow the watershed—was important to its defence, as Thailand pleaded that the error vitiated any purported

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[430] See *ibid.*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, pp. 194-196, paras. 76-80 ; *ibid.*, *Rejoinder*, Vol. I, pp. 590-598, paras. 95-112.

[431] See *ibid.*, Vol. II, pp. 464-473 (Mr. Dean Acheson, 22 March 1962).

[432] *Ibid.*, p. 473.

[433] *Ibid.,* p. 516 (Mr. Roger Pinto, 23 March 1962).

[434] *Ibid.,* p. 517 (Mr. Roger Pinto, 23 March 1962). See also *ibid.*, p. 464 (Mr. Dean Acheson, 21 March 1962)

acceptance by which Thailand otherwise might have been bound by the map[435]. This was in stark opposition to Cambodia's assertion that the error, if an error existed at all, was too small to be of any legal consequence whatsoever.

5.16 The Court did not answer the question raised in these sharp exchanges. That it did not do so is perfectly rational: the question did not matter in light of the clarity of the map in respect of the one matter which fell to the Court to decide. The map clearly placed the Temple in Cambodia. Mr. Acheson, for Cambodia, took the meaning of the map to be so clear that Thailand's doubts were worthy of sarcasm: he said that if Thailand had not recognized what the symbol of the Temple on the map meant, then, perhaps "they (...) thought that there was a French Gothic cathedral on the cliff."[436] The Court dealt with the matter as follows:

> "An inspection indicates that the map itself drew such pointed attention to the Preah Vihear region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region. If, as Thailand has argued, the geographical configuration of the place is such as to make it obvious to anyone who has been there that the watershed must lie along the line of the escarpment (a fact which, if true, must have been no less evident in 1908), then the map made it quite plain that

[435] *Ibid.*, *Rejoinder of the Royal Government of Thailand*, Vol. I, pp. 590-591, para. 97; *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 21.

[436] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 455 (Mr. Dean Acheson, 21 March 1962).

> the Annex I line did not follow the escarpment in this region since it was plainly drawn appreciably to the north of the whole Preah Vihear promontory. Nobody looking at the map could be under any misapprehension about that.
>
> Next, the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line, using for the Temple a symbol which seems to indicate a rough plan of the building and its stairways.
>
> It would thus seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the Annex I map to put him upon enquiry."[437]

The Court made two affirmative statements in this passage of the 1962 Judgment: in the second paragraph quoted, there is the Court's statement that the Annex I map illustrated with clarity that the Temple belongs to Cambodia; and, in the first paragraph, there is the Court's statement that the map line at the Temple clearly did not follow the escarpment. There is also, however, an important reservation in this passage: the Court did not say that the map line, in truth, followed the watershed; nor did it say that it did not. These statements and the Court's reservation merit some brief observations.

5.17 In respect of the clear illustration of sovereignty, the Court affirmed why the Annex I map was significant in the dispute: it "marked [the Temple] itself quite clearly as lying on

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[437] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 26.

the Cambodian side of the line". Because the line was "appreciably to the north of the whole [Temple] promontory", nobody interested in the matter "could have failed to see what [it] was purporting to do"[438]. The boundary, on the representation clearly communicated in the Annex I map, was nowhere near the vicinity of the Temple—it was "appreciably" to the north—and, because it was north, not south, of the Temple, the line was evidence that sovereignty should fall to Cambodia. This was, in effect, to accept Cambodia's view, that, whether or not the map line represented the true watershed, the juridical significance of the map was not affected. Deciding whether a particular State has sovereignty over a particular place is one type of question; the Annex I map was relevant to such a question because it displayed, between the Temple and the line, a relation which could not have generated "any misapprehension." Deciding the precise co-ordinates of that line on a complex topography is a different question, and the Court did not purport to do so.

5.18 But, as the Court would later emphasize[439], the Court was not saying whether the map line followed the watershed or not. The Court said that the "fact" as pleaded by Thailand that the line deviated from the watershed, "*if true*, must have been no

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[438] See also *ibid.,* p.57 (Separate Opinion of Sir Gerald Fitzmaurice): "The Siamese authorities, in 1908 and thereafter, cannot possibly have failed to realize that the Annex I map showed Preah Vihear as being in Cambodia, since it so clearly did".

[439] *Ibid.*, p. 35.

less evident in 1908"[440]—but this was without saying whether the "fact" *was* true. The Court also said, "It would thus seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment (...) there was everything in the Annex I map to put him upon enquiry"[441]—but this, too, left open the question disputed so sharply between the Parties of where the watershed line lay.

5.19 That the Judgment elided the watershed question did not go unnoticed. Judge Sir Percy Spender in his dissenting opinion considered the significance of the watershed line to the treaty settlement. In Judge Spender's view, the Commission established under the treaty was charged with producing maps to reflect what was already agreed, not to change or to impart more precision to what the treaty stipulated[442]. Judge Spender concluded, in view of the evidence submitted, that "Annex I in fact is not in conformity with the treaty line of the watershed as stipulated in Article I of the Treaty of 1904" and, moreover, "[t]he experts from both sides [were] (...) in agreement that in the small and limited area immediately adjacent to the Temple the frontier line shown on Annex I is not (...) the line of the watershed."[443] Judge Spender described this as a "fundamental error in the construction of the frontier line in Annex I."[444]

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[440] *Ibid.*, p. 26.

[441] *Ibid.*

[442] *Ibid.,* p. 117 (Dissenting Opinion of Sir Percy Spender).

[443] *Ibid.*, p. 122.

[444] *Ibid.*, p. 123.

Judge Sir Gerald Fitzmaurice, though concurring with the Judgment, like Judge Spender, went out of his way to say that the map line did not refer to the true watershed[445]. The Judgment, as seen above, differed on this point: the Court declined to say whether there was such an error in the map.

5.20 The silence of the Court on the question of the fidelity of the map line to the watershed in itself casts serious doubt on Cambodia's contention today that the Judgment definitively treats the map as a delimitation. Cambodia says that "[t]he MoU [of 14 June 2000 establishing the Joint Boundary Commission] (...) cites, *with a view to carrying out this survey and demarcation,* the same legal instruments as those used by the Court in its 1962 Judgment"; and pleads on the basis of that assertion that "[t]here is no question of going back over the delimitation of the boundary in this area."[446] But to use a map to determine if a fixed place is in one country or in another country is one thing; to use it "with a view to carrying out [a] survey and demarcation", as Cambodia contends, erroneously[447], the Joint Boundary Commission now is obliged to use it, is another. If the map were to serve that purpose, the Parties would need to be confident that they could rely on it as reflecting the treaty settlement *for that purpose*. At least to a

[445] *Ibid*., p. 57 (Separate Opinion of Sir Gerald Fitzmaurice).

[446] *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), Application Instituting Proceedings,* 28 April 2011, para. 19. (Emphasis added).

[447] See paras. 5.27-5.32 below.

person examining the map with limited knowledge of the terrain, the line appears to be the line stipulated in the treaty—i.e., the watershed. Nothing on the map purports to show that the line deviates in any given location from the watershed. Its outward appearance is that the line adheres to the watershed throughout. With the map in hand, a person going into the field for the purpose of tracing the line would look for the watershed line. The natural way to resolve ambiguities which might come to light when comparing the map against the real terrain would be to place the line along the watershed—i.e., to do what both the map and the treaty text agree should be done.

5.21 The Judgment expressly avoided establishing any position inconsistent in this regard: the Court said that whether the map followed or did not follow the watershed did not matter in relation to the question which fell to be decided. All the Judgment said is that, regardless of the conformity of the line to the watershed, the Temple falls in Cambodia. It follows that the only issue which the Court took the line to elucidate was the single issue adjudicated—sovereignty over the Temple area. By contrast, under Cambodia's theory that the Judgment constitutes a delimitation, the absence of a judicial determination as to fidelity between the watershed and map line would be a source of confusion. For the Parties to go into the field today under an obligation to treat the Judgment as a delimitation would be to give both Parties license to say that the relation of the line to the true watershed is irrelevant. It hardly need be said that this would be inimical to the stability of the boundary.

(b) Cambodia's Request Ignores That the 1962 Judgment Did Not Address the Difference between the Parties as to Whether it Would Be Practical to Transpose the Annex I Map Line onto the Terrain

5.22 There is another problem in Cambodia's contention that the Court in 1962 adopted the Annex I map as the basis for tracing the boundary on the ground. Thailand in the proceedings in 1962 expressly reserved whether the map was suitable at all as a basis for delimitation. This reservation was necessitated "because the inaccuracy of the physical features, such as contour lines, streams or rivers, marked on Annex I makes it very difficult to transpose the boundary line to a modern map."[448] The context of this reservation is important. With the Rejoinder, Thailand introduced Annex 76, a Royal Thai Survey Department map printed in 1951. On the Annex 76 map Thailand showed the difficulties which would arise if one were to attempt to trace the Annex I map line onto the ground as represented in a more accurate modern map. This was done by attempting to transform the Annex I map line onto the Annex 76 map. Thailand observed as follows:

> "This map shows that it is not only at Phra Viharn, but at many other places as well that Annex I, by following erroneous contour lines, attributes to Cambodia strips of territory, or sometimes small plots, amounting to enclaves, separated from Cambodia by the steep cliff

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[448] *I.C.J. Pleadings, Temple of Preah Vihear*, *Rejoinder of the Royal Government of Thailand*, Vol. I, p. 597, para. 112, footnote 1.

> face. In several places on the other hand the boundary runs south of the cliff and attributes to Thailand parts of the Cambodian plain (Annex No. 76*(bis)*)[449]. It need hardly be said that there has never been any question of the application of such a line by the parties. Yet if, because of the position at Phra Viharn, the boundary lines marked on Annex I were declared valid, the whole state of things existing for more than fifty years in the eastern Dangrek would be put in question, and reciprocal claims might be introduced. One wonders whether even Cambodian interests would be served by such a state of things."[450]

The point in Thailand's analysis was to show that the Annex I map contained such defects that to identify where in the real world the line it depicted should be traced, with nothing in aid besides the map, would be impossible.

5.23 Cambodia was emphatic in its response to Thailand's demonstration of the impasse which would result if one were to treat the Annex I map as a delimitation. Mr. Dean Acheson, in oral argument, said that there was no point in attempting to show the discrepancies between the Annex I map and the true terrain, which he likened to a "foolish exercise"[451]. Thailand's demonstration was said to be performed "only by a trick" of choosing a deliberately unsuitable terrain map for purposes of

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[449] See Map showing strips of Cambodian territory attributed to Thailand if Annex I were declared valid, filed as Annex No. 76bis of Thailand's Rejoinder [Annex 102].

[450] *I.C.J. Pleadings, Temple of Preah Vihear*, *Rejoinder of the Royal Government of Thailand*, Vol. I, pp. 597-598, para. 112.

[451] *Ibid., Oral Arguments*, Vol. II, p. 458 (Mr. Dean Acheson, 22 March 1962).

the intended comparison[452]. According to Mr. Acheson, "if this effort of the ill-matching maps were intended to show topographical defects in the map Annex I, it has singularly failed in its purpose."[453]

5.24 Thailand did not abandon the point but, rather re-affirmed it, challenging Mr. Acheson's attempted rebuttal[454].

5.25 This was a plain example of a matter which was, in the terms of the classic expression of *res judicata* in international law, "distinctly put in issue"[455]. But the other half of the expression is that, in order to have acquired the character of *res judicata,* the matter must have been "distinctly determined"[456]. In the 1962 Judgment, the Court did not determine the matter, distinctly or otherwise. It remained silent about it. The prolonged skirmish between the Parties as to the practical difficulties which the defects of the Annex I map entailed presented an issue which, if the map were to be incorporated into the Judgment as a delimitation, had to be addressed. The

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[452] *Ibid*., p. 457 (Mr. Dean Acheson, 22 March 1962).

[453] *Ibid*., p. 458 (Mr. Dean Acheson, 22 March 1962).

[454] *Ibid*., pp. 568-569 (Mr. Henri Rolin, 28 March 1962).

[455] *AMCO* v. *Indonesia*, Resubmitted Case, Decision on Jurisdiction, 10 May 1988, *ICSID Rep.*, vol. I, 1993, p. 550, referring to the *Orinoco Steamship Company* case, *Hague Court Reports* (1916) 226.

[456] *Ibid*.

silence of the Court on this point was complete[457]. This is a sufficient answer to Cambodia's erroneous contention that the Judgment constituted a delimitation.

3. Cambodia Misconceives the Question of Sovereignty over the Temple as Having Necessitated a Determination of the Precise Location of the Boundary

5.26 Cambodia insists that "the Court (...) confirm[ed] and validate[d] that boundary, on the basis of the Annex I map, *in the reasoning that was essential for it to render its decision*."[458] There are at least three faults in Cambodia's formulation here. First, Cambodia fails to acknowledge that how a court or tribunal relates a dispute over sovereignty over a particular place to evidence of the location of boundaries depends on the question that has to be determined. Second, Cambodia, in its eagerness to treat as *res judicata* a map line which the Court in 1962 expressly declined to "confirm" or "validate," treats the reasoning of the Judgment as if it was directed toward doing just

[457] Except, perhaps, if a distinct statement of the Court is discerned in its decision not to reproduce in the 1962 published pleadings the Annex 76 maps: "Of the maps annexed to the pleadings, filed in the Registry by the Parties, only those which the Court deemed necessary for an understanding of the Judgment of 15 June 1962 have been reproduced in the present edition", *I.C.J. Pleadings, Temple of Preah Vihear*, Vol. I, p. *ix* footnote 1. Annex 76 and Annex 76 *(bis)* were not reproduced (see *ibid*., pp. 686-687), and so the matter they attempted to elucidate "the Court deemed [un]necessary for an understanding of the Judgment."

[458] *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), Application Instituting Proceedings,* 28 April 2011, para. 16. (Emphasis added).

that. But when the Court in the past has considered whether a reason was essential, it considered whether it was *essential to the judgment as actually adopted*—not "essential" to some alternative result which a party seeks. Cambodia misconstrues the reasons for the 1962 Judgment. Finally, the Court was clear that the conduct of Thailand amounted to recognition of Cambodian sovereignty over the Temple.

(a) Cambodia, Insisting Now That the Original Proceedings Were for the Purposes of Constituting a Boundary, Ignores What the Court in 1962 Had Been Called upon to Determine

5.27 Until the institution by Cambodia of the present proceedings, it was clear that the Judgment of 15 June 1962 determined a question of sovereignty over territory. Cambodia, at least ten times in its original pleadings[459], was clear that the subject matter which was in dispute was "*[une] parcelle contestée*"—not a contested boundary[460]. When Mr. Acheson, former U.S. Secretary of State, considered acting on behalf of Cambodia, he asked his government for clearance to do so; he represented that "[t]he issue in the proceeding is whether a certain temple falls on the Cambodian side of the boundary (…) or the Thai side"[461]. The "issue" thus was sovereignty over the Temple—which could be (and would be) addressed by

[459] See the list at para. 2.41 and footnote above.

[460] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 538 (Mr. Paul Reuter, 26 March 1962).

[461] Dean Acheson, Letter to United States Secretary of State, 31 October 1960 [Annex 5].

considering the relation between the Temple and the boundary, but which did not require deciding where precisely the boundary lies between these two States.

5.28 The Court itself repeatedly affirmed that the question in issue was territorial sovereignty. In the 1961 Judgment on jurisdiction, which these Written Observations have recalled above[462], the Court said, "*This is a dispute about territorial sovereignty*."[463] In the Judgment on the merits, the Court reiterated this:

> "Accordingly, the subject of the dispute submitted to the Court *is confined to a difference of view about sovereignty* over the region of the Temple (...) To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector."[464]

The Court from the start knew that it "*must have regard to* the frontier line", an indication of the relevance of the frontier line as evidence. This was a situation in which Cambodia had pleaded extensive evidence about the line, and as the Court noted, what the line purported to show was clear—in respect of the Temple. It would have been surprising if the Court had felt

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[462] See paras. 2.13-2.14 above.

[463] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, pp. 17, 22. (Emphasis added).

[464] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 14. (Emphasis added). See also paras. 3.15-3.16 above.

that it was not necessary to "have regard to the frontier line." But this would have been a rather oblique way to refer to a delimitation.

5.29 To have regard to the map line as evidence in respect of sovereignty over the Temple is not the same as saying where exactly the line is: the Parties differed on the point, but the Court did not give any indication that that particular difference mattered[465]. The difference which did matter was the "difference of view about sovereignty"—the question which the Court did have to decide. This was the difference to which the "subject of the dispute" was "confined". The Court spoke of the territorial issue in limitative terms. There was no need to "have regard" to the Annex I map line except insofar as it shed light on the question of sovereignty. If it was north or northwest of the Temple (however far north or northwest), as the Court itself recognised[466], then Thailand had been on notice of a powerful expression that the Temple belonged to Cambodia.

5.30 Thus Cambodia is incorrect when it insists that the case was about "establishing the line that was to constitute the frontier between the two States in the area of the Temple."[467]

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[465] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 189 (Mr. Roger Pinto, 2 March 1962); and *ibid*., p. 305 (Sir Frank Soskice, 12 March 1962).

[466] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 15.

[467] *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), Application Instituting Proceedings,* 28 April 2011, para. 4.

The Judgment, as actually written, is concerned only with the relation between the Temple and the map line[468]. Once that relation was identified, the Court had sufficient information to settle the submitted dispute. No more was needed; and no more was decided.

5.31 This is why ascertaining a boundary with precision is not necessary to settling every sovereignty dispute. The distinction has been evident in the manner in which courts and tribunals have dealt with cases giving rise to one, the other or both types of questions[469]. It has even been suggested that sovereignty disputes and boundary delimitations belong to separate conceptual categories[470]; and courts and tribunals dealing with the former address matters relevant to sovereignty as distinct from delimitation[471].

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[468] See para. 3.69 above. As to the Parties' pleadings, see paras. 2.53-2.58 above.

[469] See, e.g., the Tribunal's differentiated treatment between four disputed territories and the question of the definitive boundary in *Honduras borders (Guatemala, Honduras),* Opinion and Award of 23 January 1933, *RIAA*, Vol. II, pp. 1307, 1325-1351, 1351-1366.

[470] See, e.g., *Case concerning Sovereignty over Certain Frontier Land, Judgment of 20 June 1959, I.C.J. Reports* 1959, p. 209. See also *Re The Berubari Union and Exchange of Enclaves*, Supreme Court of India, 14 March 1960, [1960] 3 S.C.R. 250, 280, reprinted 53 ILR 181, 199-200.

[471] See, e.g., the Philippines claim to North Borneo: *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene by the Government of the Philippines*, 13 March 2001, p. 4 (paras. 4(a), 5(a)). See also the Court's acknowledgment of the territorial dispute as distinct conceptual category: *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* pp. 27-28, para. 43.

5.32 The Chamber of the Court in *Burkina Faso/Mali* saw the relation between delimitation and sovereignty disputes as being a "difference of degree as to the way the operation in question is carried out."[472] In this regard, the further fault with Cambodia's Request, in addition to its confusion as to the object of the 1962 Judgment, is that it fails to consider at all "the way the operation in question" was presented by the Parties and carried out by the Court. There was nothing obscure about the Court's *modus operandi*: this was a question of sovereignty, explicitly identified and limited as such, and the Court examined the Annex I map in order to settle that question; it most certainly did not examine sovereignty over the Temple in order to decide the exact placement of the Thai-Cambodian boundary. The Annex I map was relevant only to the extent it cast light on the question which it fell to the Court to decide.

(b) Cambodia's Portrayal of the Precise Location of the Boundary as Essential to the 1962 Judgment Is Unconvincing

5.33 Cambodia goes to great lengths in its Request to paint a dire, almost apocalyptic, picture of what would happen to the Judgment of 15 June 1962, if the Annex I line were not now deemed to form part of the *res judicata* of the case. Cambodia says Thailand seeks to "neutraliz[e] its true significance"[473].

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[472] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 563.

[473] *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), Application Instituting Proceedings,* 28 April 2011, para. 12.

Cambodia further says that Thailand's implementation of the Judgment, because it treats some of the territory near the Temple as falling within Thailand's sovereignty, is "incompatible with what the Court decided"[474]. Cambodia culminates by accusing Thailand of attempting, in effect, to undermine the Judgment and thus to regain the Temple:

> "The fact is that in 1962, the Court placed the Temple under Cambodian sovereignty, because the territory in which it is situated is on the Cambodian side of the boundary. To refuse Cambodia's sovereignty over the area beyond the Temple as far as its 'vicinity' is to say to the Court that the boundary line which it recognized is wholly erroneous, *including in respect of the Temple itself*."[475]

On Cambodia's assertion, the terms of the Judgment demand the conclusion that no territory in any proximity to the Temple belongs to Thailand. Thailand will address this assertion later, for it is clearly groundless in terms of the second paragraph of the *dispositif* [476]. For present purposes, the significance of Cambodia's assertion is that it connects the boundary line inseparably to sovereignty over the Temple: if any part of the vicinity is not Cambodian, then none of it, "*including (...) the Temple itself*", is Cambodian[477]. Under Cambodia's all-or-

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474 *Ibid*., para. 25.

475 *Ibid*. (Emphasis in the original).

476 See paras. 5.66-5.89 below.

477 See also *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), Application Instituting Proceedings,* 28 April 2011, para. 39.

nothing theory of the Judgment, the Annex I map and the determination that the Temple belongs to Cambodia are one and the same thing. Under Cambodia's theory, without the map and the precise specification of the boundary which Cambodia insists was contained in the 1962 Judgment, the Temple would revert to Thailand and thus a revisionist agenda lurks behind the Respondent State's understanding of the map evidence[478].

5.34 An initial difficulty with Cambodia's theory is that Cambodia itself, far from precisely specifying the boundary, cannot decide where it thinks the boundary line to be[479]. Cambodia's Permanent Mission to the United Nations, around the time of the original proceedings, published a document addressing the dispute with Thailand over sovereignty over the Temple. In the document, Cambodia stated as follows:

> "The two fragments of the French and Siamese maps are not exactly matching, but they present close similarities and the ruins of Preah Vihear are clearly shown in both. *The frontier distinctly runs north of the ruins, at a distance of about 500 metres. A comparison of the two documents proves beyond all doubt that Preah Vihear was placed, by common consent of the two parties, within Cambodian territory*."[480]

[478] The contention that Thailand will "jeopardize compliance" indeed runs through the entire Request. See, e.g., *ibid*., para. 28. See also *ibid*., para. 43. For further discussion, see paras. 4.67-4.69 above.

[479] See also paras. 2.59-2.63 above.

[480] Permanent Mission of Cambodia to the United Nations, Note on the Question of Preah Vihear, circa 1958, p. 6. (Italics in the original, emphasis added) [Annex 3].

Cambodia in its 1962 pleadings effectively repeated the position that the boundary runs "about 500 metres" north of the Temple. According to Mr. Pinto, presenting oral argument for Cambodia, "*Nous ne devons jamais perdre de vue en effet que la frontière passe à quelques 500 mètres au nord du temple*."[481] Cambodia was not particularly concerned, in either the 1958 document circulated at the UN or in its pleadings in 1962 before the Court, to say *precisely* where the boundary runs. For Cambodia's purposes at that time, it was sufficient to say that the boundary was "about" ("*quelques*") 500 metres from the ruins.

5.35 But the greater difficulty with Cambodia's theory is not imprecision: Cambodia, at different times, has explicitly postulated that the boundary line has been in different places altogether. Advancing its Request for interpretation to the Court in 2011, Cambodia indicates that the Keo Sikha Kiri Svara Pagoda is "situated 700 metres (...) from the frontier, inside Cambodian territory."[482] This is to repeat the view, expressed by Cambodia's Permanent Representative to the United Nations in a letter dated 15 October 2008 addressed to the President of the Security Council, that the Pagoda is "situated at approximately 300 meters from the Temple (...) and 700 meters

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[481] *I.C.J. Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, p. 189 (Mr. Roger Pinto, 2 March 1962).

[482] *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), Application Instituting Proceedings,* 28 April 2011, para. 33.

from the border."[483] The Pagoda is indeed "approximately 300 meters from the Temple"—*to the northwest*. To place the boundary *700 metres* from a pagoda which is itself some distance north of the Temple means that the boundary is certainly not "about 500 metres" from the Temple; it is to say that the distance from the Temple to the boundary is in excess of 700 metres. In fact, the Pagoda lies more than 100 metres north of the Temple, meaning that the total distance—on Cambodia's 2008 and 2011 view—is more than 800 metres from the Temple to the boundary. It is remarkable that a State would insist that it would "neutralize" a judgment if the precise location of a boundary line is not enshrined therein yet that State fails to adopt a stable view as to where the line might be. By expressing a shifting view, Cambodia, in contradiction to the main object of its Request, tacitly acknowledges that the precise location of the boundary line, far from being an essential basis for the Judgment as to sovereignty over the Temple, was irrelevant to it.

5.36 The Parties in 1962 argued at length about evidence of *effectivités*[484]. Among the examples, from which the Parties drew contrary conclusions, was that of the visit of Prince Damrong. According to Mr. Pinto :

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[483] *Ibid*., Annex VII, "Letter dated 15 October 2008 from the Permanent Representative of Cambodia to the President of the United Nations Security Council".

[484] See e.g. *Pleadings, Temple of Preah Vihear*, *Oral Arguments*, Vol. II, pp. 186-190 (Mr. Roger Pinto, 2 March 1962).

> "*A aucun moment donc les autorités thaïlandaises compétentes n'ont pu ignorer cette affirmation et cet exercice de souveraineté territoriale de la France et du Cambodge.*"[485]

In Cambodia's view, though *"[l]es fonctions étatiques à Préah Vihéar consistaient essentiellement en activités archéologiques*," the evidence established that *"[l]es fonctions étatiques (...) de la France et du Cambodge ont été incontestablement supérieures à celles de la Thaïlande*."[486] Sir Frank Soskice, for Thailand, said the visit pointed the other way: the Prince had not asked permission of France to enter the Temple and, so, the Temple was not in French territory[487].

5.37 There had been an earlier contact between Prince Damrong and the subject matter of the 1962 proceedings. This was when the Prince had received copies of the Annex I map in 1908. Mr. Pinto referred to two acts of Prince Damrong—first, his reaction to the map in 1908, and, second, his visit to the Temple in 1930. According to Mr. Pinto, "*En 1908* comme en 1930*, le prince Damrong ne proteste pas*."[488] Of course, the failures to protest were in regard to different things at different times. In 1908, this was the failure to say anything about what the map clearly purported to show about the Temple; and in 1930, this was the failure to say anything about what French

[485] *Ibid*., p. 190 (Mr. Roger Pinto, 2 March 1962).

[486] *Ibid*.

[487] *Ibid*., pp. 304, 312-313 (Sir Frank Soskice, 12 March 1962). See also para. 2.42 above.

[488] *Ibid*., p. 512 (Mr. Roger Pinto, 22 March 1962). (Emphasis added).

official conduct at the Temple showed about the same thing. In respect of both, the Prince "*ne peut ignorer* l'attribution de Préah Vihéar."[489] The two things, separate in time, led to the same conclusion: the Temple belonged to France.

5.38 The Court did not adopt Cambodia's pleadings on Prince Damrong's visit word for word. But it accepted the conclusion. The Court said as follows:

> "The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined."[490]

This explicitly places the Prince's visit on a footing no less clear than any other evidence in the case. If "[a] clearer affirmation of title" could not have been produced, then nothing else in the case affirming title could have affirmed it more. The Court underscored its conclusion:

> "Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title (...) or else she decided not

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[489] *Ibid*. (Emphasis added).

[490] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 30.

> to assert it, which again means that she accepted the French claim"[491].

This was recognition of the sovereignty which Cambodia had sought to prove.

5.39 The Parties in 1962 thus pleaded in respect of competing evidence of *effectivités*[492]. The Court found some of this not to be "legally decisive"[493]; but, in other respects, the *effectivités* were directly material to the question submitted. The question submitted was that of sovereignty over the Temple. Accordingly, the evidence of sovereignty adduced by the Parties in the 1962 proceedings was just that: it was evidence to determine to which State the Temple belonged. The Prince in 1930 was not touring the boundary; he was visiting the Temple. In Cambodia's depiction of the proceedings, however, it is as if either *effectivités* had not been discussed at all; or their distinct character as evidence was irrelevant, because they were all in service of a determination of the precise location of the boundary. But *effectivités* were discussed; and they would have been of little use in carrying out the task which Cambodia wishes the Court had performed.

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[491] *Ibid.*, pp. 30-31.

[492] *I.C.J. Pleadings, Temple of Preah Vihear*, *Counter-Memorial of the Royal Government of Thailand*, Vol. I, pp. 184-194; *ibid.*, *Réplique du Gouvernement du Royaume du Cambodge*, Vol. I, pp. 466-471.

[493] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 15.

5.40 As a final point in this connection, Thailand recalls that the text on which Cambodia relies for its view that reasons for a judgment may be subject to interpretation under Article 60 expressed this as an exception. "[A]ny request for interpretation (...) cannot concern the reasons for the judgment *except in so far as these are inseparable from the operative part.*"[494] As such, any party arguing that a reason for a judgment may be subject to interpretation must bear the burden of establishing that that reason is in truth "inseparable from the operative part." The Annex I map line was evidence for purposes of determining sovereignty, not for purposes of establishing a delimitation; and, even if the Annex I map had not been considered at all, other reasons, in the Court's words, equally supported the Judgment. Cambodia fails to satisfy the burden it sets for itself.

4. Cambodia Ignores the Subsequent Practice of the Parties Indicating That the Court Had Not Determined the Precise Location of the Boundary

5.41 Though it is the talisman of Cambodia's present Request that a precise tracing of the boundary belongs to the *res judicata* of the 1962 Judgment, subsequent practice demonstrates that that is a matter which it remains for the Parties to agree. Most

[494] *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections, *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 36, para. 10, quoted in *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), Application Instituting Proceedings*, 28 April 2011, para. 40.

revealing in this connection is the adoption on 14 June 2000 of the Memorandum of Understanding on the Survey and Demarcation of the Land Boundary between Cambodia and Thailand (MoU). Thailand now will consider the MoU and, briefly and subsidiarily, third States' understanding of the Judgment.

(a) The Memorandum of Understanding of 14 June 2000

5.42 The conduct of the Parties, until recently, indicated that the Annex I map line had not been adopted in 1962 as the basis for tracing their boundary. In particular, as recalled above[495], when Cambodia and Thailand concluded the MoU in 2000, they affirmed their recognition of the need for a joint process to agree the precise tracing of the boundary which Cambodia now in its Request says is already fixed and determined. This is an agreement for the survey and demarcation of "the entire stretch of the common land boundary"[496].

5.43 If ever a clear opportunity arose to say in terms that the Annex I map line settled the matter and was binding on the Parties in a future demarcation process, it was the conclusion of the MoU. Rather than provide for survey and demarcation of "the entire stretch of the common land boundary," the Parties

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[495] See paras. 1.19-1.20 and 4.111 above.

[496] Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia on the Survey and Demarcation of Land Boundary, 14 June 2000 [Annex 91].

might have adopted a text which identified an excluded segment. So, too, under Article I of the MoU, they might have indicated that the 1962 Judgment defines the boundary. They did neither. The MoU calls for survey and demarcation of the boundary as a whole; and it is clear about the instruments on which the two States are to base the survey and demarcation. Article IV of the MoU identifies the scope as comprehensive. And Article I sets out the relevant instruments with particularity. The Judgment of 15 June 1962 is conspicuous in the MoU only in its absence[497]. Nor did either Party mention it in the Agreed Minutes of the Thai-Cambodian Joint Commission on Demarcation for Land Boundary in the meetings of that Commission leading to the conclusion of the MoU[498].

5.44 Yet Cambodia now criticizes Thailand for observing that the "boundary line 'in the area adjacent to the Temple' is still to be determined" and that "the Joint Boundary Commission provided for by the MoU is responsible" for setting down the boundary[499]. Cambodia also complains that "the Commission's work has remained on hold in the disputed area [sic]" on

[497] See paras. 4.111-4.113 above.

[498] Agreed Minutes of the First Meeting of the Thai-Cambodian Joint Commission on Demarcation for Land Boundary, 30 June - 2 July 1999 [Annex 89]; Agreed Minutes of the Second Meeting of the Cambodian-Thai Joint Commission on Demarcation for Land Boundary, 5-7 June 2000 [Annex 90].

[499] *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), Application Instituting Proceedings*, 28 April 2011, para. 16.

account of Thailand[500] and that "a mutually agreed solution within the framework of bilateral negotiations"—i.e., under the terms of the MoU—is impeded by the alleged "difference of interpretation"[501]. According to Cambodia, this is why it refers in its Request to the MoU: the implementation of the MoU is supposedly a "recent event (...) which *justif[ies] Cambodia's present Application*"[502]. By this assertion, Cambodia apparently means that the difficulties in moving forward with the survey and demarcation agreed under the MoU will be solved, if Cambodia receives the determination from the Court which its Request now seeks.

5.45 But Cambodia's misconstruction of the 1962 Judgment does not solve the difficulties. Moreover, what Cambodia seeks, in truth, is not an interpretation of the 1962 Judgment but an interpretation of the MoU. The Parties saw no need to mention the Judgment of 15 June 1962 in their MoU because it is clear that the Judgment did not concern the subject matter addressed under that instrument. The Judgment determined a question of sovereignty, and the Parties are clear that that question is settled. Equally clear is that the Parties in 2000 agreed to a comprehensive set of rules and a process to address an outstanding subject—the fixing of their boundary. Cambodia now denies that fixing their boundary was an outstanding subject in 2000; Cambodia says that that question had been

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[500] *Ibid.*, paras. 16 and 20.

[501] *Ibid.*, para. 17.

[502] *Ibid.*, section heading B. (Emphasis added).

finally settled in 1962 and the Joint Boundary Commission constituted under the MoU has nothing to do with it. This is a striking interpretation of a boundary agreement. On the theory espoused by Cambodia in the Request, the Court is to interpret the Judgment of 1962; determine now that the Court established a map line (which it expressly excluded from the *dispositif* in 1962); all in the hope that this would affirm Cambodia's interpretation of the MoU. But even if the delays to the implementation of the MoU were the result of a *bona fide* legal difference as to what the language of the MoU means, such a difference would in no way be settled by any judgment which the Court in 1962 might have given. Even if the Court in 1962 had adopted quite a different judgment—a judgment accepting (rather than rejecting) Cambodia's submission in respect of the Annex I map—this would have said nothing at all about what the Parties agreed in 2000. The text of the MoU, in any event, is clear: the Parties agreed in 2000 to a comprehensive process and rules for demarcating their boundary in its entirety.

(b) Third States Were Clear That the Boundary Issue Remained Unsettled by the 1962 Judgment

5.46 The subsequent practice of Cambodia and Thailand, in particular their MoU, indicates that they both understood the boundary issue to remain unsettled after the 1962 Judgment. This is a complete answer to Cambodia's present claim that no further survey or demarcation is necessary along the Dangrek range. Also relevant in this connection, though in a subsidiary

way, are the views of third States in respect of the 1962 Judgment and its implementation which confirm that the boundary issues were still to be resolved.

5.47 At least two third States took the contrary view—i.e., that Cambodia and Thailand, following the 1962 Judgment, now had to reach agreement as to their boundary. For example, it was the view of the French Ambassador to Thailand that there were still "*grandes incertitudes sur le tracé de la frontière autour de Preah Vihear*"[503]. The United States considered a request by Cambodia that it use its "good offices" to assist in the handover of Phra Viharn in 1962; the United States Embassy in Phnom Penh in this connection said that "obviously one of their [the Parties'] most important problems would be to reach agreement on where [their] border lies"[504]. Such assessments were consistent with the subsequent practice of the Parties themselves. The precise location of the boundary remained an open question.

5. Cambodia Attempts Now to Impute to the Annex I Map a Purpose for Which the Court in 1962 Declined to Employ It

5.48 The Court in the 1962 Judgment considered the Annex I

[503] French Ambassador to Thailand, Note to Minister of Foreign Affairs, No. 479-AS, 27 September 1962, p. 4 [Annex 29].

[504] United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 68, 2 August 1962, p. 1 [Annex 23].

map as evidence of Cambodia's sovereignty over the Temple of Phra Viharn. To the extent the Court determined that the map was opposable to Thailand—i.e., to the extent the Court determined that the map had legal force in the relations of the Parties—it was in respect of that issue only. The Court both expressed and implied this limitation. Expressly, it said that it would consider the map, as well as the other evidence in the case, only "to such extent as it may find in [the evidence] reasons for the decision it has to give *in order to settle the sole dispute submitted to it*"[505]. The "sole dispute" was that concerning sovereignty over the Temple.

5.49 The limitation in the purpose of the map is implied in what the Court said about the map as proof. The map illustrated what "no interested person (...) could have failed to see": it was purporting to show that the Temple was in Cambodia[506]. That this was the limit of the purpose for which the Court employed the map is all the more clear, when it is recalled that the Court expressly declined to say that the map constituted a delimitation[507]. Moreover, as noted above, the question of the suitability of the map line as a basis for delimitation was raised by Thailand; contested by Cambodia; and left unanswered in the

[505] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 14. (Emphasis added).

[506] *Ibid*., p. 26.

[507] See paras. 3.11-3.13, 5.8-5.10 above.

Judgment[508]. These were hardly obvious points which "no interested person (…) could have failed to see". The Court used the map as proof only of what was obvious—the relative position of the Temple as an expression of sovereignty.

C. Cambodia Confuses the General and Continuing Obligation of States to Respect One Another's Territorial Integrity with the Specific Determination Reached by the Court in 1962

5.50 As noted at the start of this Chapter, it is not altogether clear what Cambodia seeks, when it refers to continuing obligations[509]. If Cambodia requests a declaration that Thailand is always obliged to respect its neighbours' territorial integrity, then it has identified no difference of legal position whatsoever between itself and Thailand. Thailand will proceed on the assumption that Cambodia's position is that the specific obligation set out in paragraph 2 of the *dispositif* is a continuing one[510]. This is a position which not only misconstrues the Judgment but also ignores the law of State responsibility, in

[508] See paras. 2.63-2.64, 5.22-5.25 above.

[509] Compare *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), Application Instituting Proceedings*, 28 April 2011, paras. 5 and 45.

[510] See *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), Provisional Measures,* 31 May 2011, CR 2011/15, p. 17, para. 4 (Sir Franklin Berman).

particular the distinction, central to the law, between breach and its consequences.

5.51 The Court having determined the question of sovereignty, Thailand under the second paragraph of the *dispositif* of the 1962 Judgment was specifically obliged to withdraw its personnel "at the Temple, or in its vicinity on Cambodian territory."[511] Thailand did so, thereby satisfying its obligation under the second paragraph of the *dispositif*. That paragraph reflected the obligation of States under general international law to respect the territorial integrity of other States. But that did not give the second paragraph perpetual life, with a perpetual guarantee in the form of Article 60 of the Statute. The Court did not have jurisdiction to address all claims which might arise that the general obligation had been infringed. Nor did the proceedings present any discrete question independent from the question of sovereignty. Neither Party had pleaded that it had a right, on some special rule or conventional arrangement, to keep personnel on the other State's territory. In short, withdrawal was not a matter in issue as such in the dispute. It was a consequence of the application of the general rule of territorial integrity to the specific determination expressed in the first paragraph: as the Temple was Cambodia's, Thailand had to withdraw.

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[511] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 37.

5.52 The Court in the 1962 Judgment was clear that the second and third paragraphs of the *dispositif* followed from the first paragraph. The second and third paragraphs were captioned as having been found "in consequence" of the first[512]. This consequence required no extensive analysis. The second and third paragraphs were "*implicit in, and consequential on, the claim of sovereignty itself*."[513] This was a simple application of general international law to a particular determination about sovereignty to territory. Once the question of sovereignty was decided, the general law, applied to that decision, led to the decisions in respect of restitution and withdrawal.

5.53 According to Cambodia,

> "[T]he fact that the obligation borne by 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' appears directly within the operative clause, as a consequence of the principal finding, also leads in Cambodia's view to a further and associated conclusion, namely that the Court *did not intend to make this obligation a specific and immediate one* at the time of the Judgment, but that it was to be understood as *a general and continuing obligation not to violate Cambodian territory by actions of the kind referred to above*. Since it appears that the findings concerning Cambodia's sovereignty in the first paragraph of the operative clause must be understood as a permanent situation, the result is that the *consequences* of that permanent situation, as recognized and stated by the Court, *likewise acquire a permanent character*; in

[512] *Ibid*., pp. 36-37.

[513] *Ibid*., p. 36. (Emphasis added).

> other words, *the Judgment of the Court must be understood as entailing a definite obligation for Thailand not to advance unilaterally into Cambodian territory in the future*."[514]

While the sovereignty of Cambodia is certainly a "permanent situation," the Court, when it determines a breach, does not assume it will continue forever. But this is the assumption necessarily contained in Cambodia's description of the second paragraph of the *dispositif.* The Temple is Cambodia's, and the consequential obligation to withdraw, on Cambodia's assumption, is never capable of being fulfilled, for it has a strict symmetry with the primary obligation: it "likewise acquire[s] a permanent character."

5.54 Cambodia's description of the *dispositif* fails to accord with the international law of responsibility. To be sure, the permanent and continuing obligation under general international law—the primary obligation—is a necessary ingredient to arrive at the specific determination of an "obligation borne by Thailand" to withdraw. But these two obligations, under the law of international responsibility, are of different scope and neither originate nor terminate at the same time. The obligation upon States to respect the territorial integrity of other States applies in all inter-State relations to all State territories; the consequence that Thailand had to withdraw applied in respect of

[514] *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), Application Instituting Proceedings*, 28 April 2011, para. 37. (Emphasis added). See also *ibid*., para. 5(3).

Thailand's relation with Cambodia in respect of one place at one time.

5.55 It is vital, however, to Cambodia's theory of interpretation today that the Judgment of 15 June 1962 rested on a jurisdiction to address not only the question of sovereignty over the Temple but also any allegation of breach of Cambodia's territorial integrity at that time or at any time in the future. But jurisdiction under Article 60 does not extend beyond the jurisdiction exercised in reaching the judgment to be interpreted. As reflected in the *dispositif,* the Court in the 1962 Judgment did not exercise jurisdiction over any question besides that of sovereignty over the Temple and the legal consequences of that sovereignty for the situation as at the time of the Judgment.

5.56 Cambodia confuses the primary obligation under general international law with the consequences of the wrongful act as indicated in the Judgment. This, in turn, has the effect of confusing the proper scope of the Court's interpretative powers with jurisdiction to adjudicate new claims of breach. The power to interpret is a continuing one, but it is not a power to adjudicate new claims. Cambodia says, that "[t]oday, the question remains that of the violation of Cambodia's sovereignty by incursions and the presence of Thai military forces in the area of the Temple and its vicinity."[515] In truth

[515] *Ibid.*, para. 8. See also *ibid.,* para. 9 : "Thailand had persistently refused— and still refuses – to withdraw".

there is no question of the "violation of Cambodia's sovereignty," but in any event the question does not fall to be determined today: if there were a new incursion, this would be a new breach of the primary obligation to respect territorial integrity. To say, as Cambodia must if it is to confine its Request to the jurisdictional limits of Article 60, that the Judgment already determined the question which Cambodia now poses is to attribute to the Judgment determinations it did not and could not have made.

D. Cambodia's Allegation That Thailand Failed to Withdraw in accordance with the 1962 Judgment Is without Merit

5.57 In the last paragraph of the Request, quoting the second paragraph of the *dispositif,* Cambodia asks the Court to adjudge and declare that Thailand was obliged 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'"[516]; and goes on to ask the Court to adjudge and declare that this was consequential upon the obligation "to respect the integrity of the territory of Cambodia." But this is not to ask for an interpretation: it is to ask the Court to repeat, *verbatim,* what it said in 1962. If that is all that Cambodia requests, then Thailand answers by repeating that it has accepted

[516] *Ibid*., para. 15, quoting *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 37.

the binding character of the *Temple* Judgment of 15 June 1962 ever since the cabinet decision of 10 July 1962[517].

5.58 If there is more to Cambodia's Request, then it would appear to be to address matters with which the 1962 Judgment had, and could have had, no concern whatsoever. Cambodia states that "[t]oday, *the question* remains that of the violation of Cambodia's sovereignty by incursions and the presence of Thai military forces in the area of the Temple and its vicinity."[518] If "the question" is that of an alleged violation "today", then Cambodia's Request is in truth a request to adjudicate a new alleged breach of Cambodia's territorial integrity. Thailand, above, has observed that, for this reason, to the extent that that is what it asks for, Cambodia's Request is inadmissible[519].

5.59 But an allegation that a State has breached a general international law obligation—or that it failed to implement a specific obligation set out in a judgment of the Court—is extremely serious. For this reason, Thailand in these Written Observations addresses Cambodia's allegation that Thailand

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[517] See, e.g., *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), Provisional Measures,* 30 May 2011, CR 2011/14, pp. 10-11, paras. 2-3 (Mr. Virachai Plasai). See also United States Embassy in Bangkok, Telegram to the United States Secretary of State, No. 24, 5 July 1962 [Annex 13]; and Prime Minister of Thailand, Public Address on The Temple of Phra Viharn Case, 4 July 1962 [Annex 12].

[518] *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), Application Instituting Proceedings*, 28 April 2011, para. 8. (Emphasis added).

[519] See paras. 4.70-4.72 above.

failed to withdraw in accordance with the 1962 Judgment, an allegation which is without merit.

1. Cambodia Fails to Identify the Further Area from Which It Now Contends Thailand Failed to Withdraw

5.60 The 1962 Judgment defined the scope of Thailand's obligation to withdraw as (i) the Temple; and (ii) its vicinity, to the extent that its vicinity is on Cambodian territory. In service of its quest for an ever-widening construction of the Court's decision in 1962, Cambodia however appears to contend that the obligation concerned a much larger, and essentially undefined, area. Cambodia says as follows:

> "It is possible to summarize the import of this dispute as follows: (...) Thailand accepts Cambodia's sovereignty over the Temple, but denies that this has effects beyond a limited perimeter confined strictly to the Temple itself. A number of assertions by Thailand thus derive from this situation: (1) that the frontier in the area of the Temple has not been recognized by the Court and has still to be determined in law; (2) that this allows Thailand to lay claim to territory beyond the strict precincts of the Temple on the basis of the 'watershed line', as that State argued before the Court in 1959-1962; (3) that this permits Thailand to occupy that area regardless of the Judgment, in particular the second paragraph of the operative clause."[520]

[520] *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), Application Instituting Proceedings*, 28 April 2011, para. 24.

Cambodia's representation of the "import of [the] dispute" is revealing. It can be expressed by taking the final "assertion" which Cambodia attributes above to Thailand, and then reversing it, as apparently it is Cambodia's intention to demand the Court to do. The result would be that Thailand must withdraw from "that area"—i.e., from territory beyond that from which Thailand withdrew in 1962. And this putative obligation of withdrawal would be regardless of which side of the watershed line "that area" is found. So the final result which Cambodia seeks is an order requiring Thailand to withdraw from an area—i.e., an order reversing, to use Cambodia's phrase, the situation which until now has "*permit[ted] Thailand to occupy that area*". But Cambodia offers no indication as to what "that area" might be. And with good reason: the true purport of Cambodia's putative difference as to the meaning of the "vicinity of the Temple" is to adjudicate a vaguely-defined dispute over territory which has arisen in the present day.

5.61 Immediately following the extract above, Cambodia says as follows:

> "Thailand's argument amounts to the Court recognizing sovereignty solely in respect of the Temple itself, which the Court rejected very clearly in its Judgment, since the first paragraph of the operative clause specifies *expressis verbis* that the Temple belongs to Cambodia *on the basis of the sovereignty over the territory in which the Temple is situated*"[521].

[521] *Ibid*., para. 24. (Emphasis added).

This is apparently to say that legal consequences follow from the fact that the Temple exists on a given territory. Cambodia says that "the first paragraph of the operative clause specifies *expressis verbis* that the Temple belongs to Cambodia *on the basis* of the sovereignty over the territory in which the Temple is situated"[522]. This is a formulation on which Cambodia places considerable stress. But Thailand is at a loss to understand how the existence of a link between the Temple and the territory on which it stands in any way advances Cambodia's present case. It is self-evident that the Temple is located on territory. No interpretation is required on that point. What Cambodia seems to try, instead, to say, but fails to say, is what is the territory to which the Court referred in 1962 but from which Thailand did not withdraw?

5.62 Cambodia attempts to give definition to its ill-defined claim by imputing a definition to Thailand. According to Cambodia, the obligation on Thailand in 1962 to withdraw applied, and on its erroneous theory of a continuing obligation, continues to apply[523],

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[522] *Ibid*. (Emphasis added).

[523] See paras. 5.50-5.56 above.

> "to all Cambodian territory in the area of the Temple, territory which is currently the subject of armed incursions and is claimed by Thailand within a perimeter enclosing 4.6 sq km, *unilaterally and arbitrarily determined by that State*."[524]

An initial observation in respect of Cambodia's putative "4.6 sq km unilaterally and arbitrarily determined" area is that, even if it were the case that Thailand had determined that that area exists, this would have been a recent determination—i.e., one reached after the present difficulties had arisen in 2007. As such, that area could be the subject matter of a new dispute over allegations of an incursion in breach of sovereignty, but it could not be the subject of a request for the interpretation of the 1962 Judgment. On Cambodia's own terms, the putative area is defined by the allegation that it is "*currently* the subject of armed incursions"[525].

5.63 It is, moreover, a putative area which Cambodia in 1962 pointedly excluded from the subject matter of the dispute. As noted above in these Written Observations[526], counsel for Cambodia in 1962 said, "But this area, north-west of the Temple, *is not the crucial area*."[527] There was no doubt as to

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[524] *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), Application Instituting Proceedings*, 28 April 2011, para. 44. (Emphasis added).

[525] *Ibid*. (Emphasis added).

[526] See para. 2.44 above.

[527] *I.C.J. Pleadings, Temple of Preah Vihear*, Oral Arguments, Vol. II, pp. 464-465 (Mr. Dean Acheson, 21 March 1962). (Emphasis added).

what Mr. Acheson meant: this was "where a stream northwest of the Temple went when it disappeared around the side of Pnom Trap."[528] But, in Cambodia's present Request, the area around that hill is exactly the crucial area, the area concerning which Cambodia seeks an interpretation of the Court[529].

5.64 Cambodia says that "Thailand puts forward the existence of an area of territory said to be the subject of overlapping territorial claims" and that Thailand defines "the area of the Temple" as an area "lying within a perimeter that encloses some 4.6 sq km"[530]. Cambodia attributes the 4.6 sq km area to Thailand's letter of 21 July 2008 to the President of the Security Council and its annexed Fact Sheet[531]. The further difficulty is that Thailand in the 21 July 2008 letter and annexed Fact Sheet does not refer to a "4.6 sq km area". Cambodia tacitly acknowledged that the territory to which its Request now obliquely refers is not to be found in the 1962 Judgment, but erroneously imputes to Thailand the equation of a 4.6 sq km territory with the Temple area. Cambodia has failed to identify the further area from which it now contends the 1962 Judgment obliged Thailand to withdraw.

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[528] *Ibid*.

[529] *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), Application Instituting Proceedings*, 28 April 2011, paras. 33 and 34.

[530] *Ibid*., para. 25.

[531] *Ibid*., citing Annex IV of the Request.

5.65 When it imputes a defined "area of territory (…) subject of overlapping territorial claims" to Thailand, Cambodia also asserts that "Thailand's argument seems to have emerged in different forms since 2007."[532] By "different forms," Cambodia seems to contend that (i) Thailand posited the existence of the alleged overlapping claims involving a 4.6 sq km area; and then (ii) "[i]n the same document, however (…)" alleged this area "to be directly under Thailand's sovereignty"; Thailand, Cambodia goes on to say, in this way "immediately supplies an answer in its own favour to the two States' supposed claims in this area." But Thailand has been consistent about the boundary; nothing new "emerged" in any form in 2007 or after. This is an area over which the boundary "is (…) still to be determined by both countries in accordance with international law"[533]. As provided under Article V of the MoU, the boundary zone is not to be subject to "any work resulting in changes of environment" by either Party. Thailand thus protested the introduction of troops and settlers and their attendant works around the Keo Sikha Kiri Svara Pagoda[534]. Thailand also consistently protested Cambodia's proposal to inscribe the Temple on the World Heritage List as prejudicing the resolution of boundary questions[535]. Far from "immediately suppl[ying] an answer" to

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[532] *Ibid*., para. 25.

[533] *Ibid.*, Annex IV, Attachment I (Fact Sheet: Overlapping territorial claims of Thailand and Cambodia in the area of the Temple of Preah Vihear), para. 1.

[534] *Ibid*., Annex IV, para 4.1.

[535] *Ibid*., Annex IV, para. 4.2. See also Department of Treaties and Legal Affairs, *History of the Negotiations for the Inscription of the Temple on the UNESCO World Heritage List*, November 2011 [Annex 100].

the situation at their boundary, Thailand's consistent position has been to reserve the settlement of that situation to the mechanism which the Parties have agreed in the MoU.

2. CAMBODIA HAS REPEATEDLY ACKNOWLEDGED THAT THAILAND WITHDREW IN ACCORDANCE WITH THE 1962 JUDGMENT

5.66 Finally, the defects in Cambodia's Request are cast in even starker light, when Cambodia's overall practice is considered: Cambodia has repeatedly acknowledged that Thailand in 1962 already had withdrawn in accordance with the Judgment of the Court.

(a) Cambodia's Explicit Acknowledgement in the General Assembly of Thailand's Compliance with the 1962 Judgment

5.67 As recalled above[536], Cambodia explicitly acknowledged before the General Assembly of the United Nations that Thailand in 1962 had "*complied with the Court's decision*."[537] This was a categorical statement and it admitted of no doubt. According to Cambodia's Foreign Minister, speaking at the United Nations, Thailand had done as the Court directed it to do; Thailand had "complied with the Court's decision."

[536] See para. 4.37 above.

[537] United Nations, *Official Records of the General Assembly*, Speech by Mr. Huot Sambath, *Seventeenth Session, Plenary Meetings,* 1134th Meeting, p. 174, para. 91 (Mr. Huot Sambath, Cambodia) [Annex 28].

Thailand already has acknowledged in the present proceedings, as was well-known at the time, that implementation of the 1962 Judgment was difficult for Thailand in light of the feelings of the Thai people in respect of the Temple. But the question is not whether Thailand implemented the 1962 Judgment with enthusiasm or was happy with the outcome of the case[538]. It reflected the gravity of the one issue settled by the Court—not the precise disposition of the boundary in what was then a trackless, remote and sparsely settled area but sovereignty over an ancient religious monument—that emotions in Thailand ran high. But Thailand has never questioned the importance of judgments of the Court. The material point in respect of Cambodia's present contentions is, instead, that Cambodia in 1962 was clear that Thailand had complied with the decision. Cambodia's present Request is predicated on an assertion of non-compliance which Cambodia's own practice refutes.

(b) The Visit of the Other Prince

5.68 When Prince Sihanouk made his momentous visit to the Temple in January 1963, he could not possibly have failed to see the implication of Thailand's implementation of the Judgment on the ground. Nor did he[539]. He acknowledged that Thailand had withdrawn and remarked that the time had come

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[538] *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), Provisional Measures,* 31 May 2011, CR 2011/16, p. 23, para. 22 (Mr. James Crawford).

[539] See paras. 4.43-4.47 above.

"for the return of friendship between our two countries"[540]. The whole purpose of this visit was to show a symbolic transfer of the Temple to Cambodia. And the visit was widely regarded as a huge success. Nothing could demonstrate more clearly the fact that Thailand had withdrawn. This confirmed the earlier indications that there were no issues as to implementation remaining. For example, according to a diplomatic cable, when Cambodia began work on access roads to the Temple in November 1962, the Prince,

> "gave 'formal assurance' that route would be exclusively in Cambodian territory. Added that repair work on traditional access road to temple to be undertaken"[541].

The route to which the cable referred was the access route which would be used for the 4-5 January 1963 visit. This was a route to the base of the escarpment; it was not a route all the way to the Temple. Once at the base of the escarpment, the Prince and his pilgrims had to make the ascent up the steps. If Cambodia had believed Thailand's implementation of the Judgment had not been applied in its proper territorial scope and thus there remained some other extent of territory which should have reverted to Cambodian control, this was the occasion on which to say so. But, instead, Cambodia, giving assurance that any route it was building to the Temple would remain in

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[540] *New York Times*, 8 January 1963, "Peaceful Overture Held in Cambodia at Disputed Shrine" [Annex 49].

[541] United States Embassy in Phnom Penh, Telegram to United States Secretary of State, No. 438, 11 November 1962 [Annex 31bis].

Cambodian territory, said nothing to indicate that it had a right to build routes along a more convenient course, as might have been open to it if Cambodian territory had extended to a wider area around the Temple.

(c) Cambodia's Allegations in 1966

5.69 The present Request is not the first time that Cambodia referred to the 1962 Judgment when expressing concern over later problems in its relations with Thailand. In particular, there were Cambodian communications after serious difficulties had arisen in the boundary area in 1966.

5.70 Cambodia, as in its pleadings in 1962, claimed that stability in the region was at stake, for "[f]rom their repetition these provocations [allegedly committed by Thailand] appear clearly, as in September 1940, to be the prelude to a large-scale aggression against Cambodia"[542]. These alleged "provocations" were in the neighbourhood of the Temple; Cambodia even accused Thailand of seeking to take back the Temple. This would have been another obvious occasion on which to articulate a contention that Thailand had not satisfied its obligations under the 15 June 1962 Judgment in the first place.

[542] Permanent Representative of Cambodia to the United Nations, *Note to the Secretary-General*, No. 1449, 11 April 1966 [Annex 62]. For Thailand's explanation of the events, see Président du Conseil des Ministres et Ministre des Affaires étrangères du Gouvernement Royal du Cambodge, *Note to the Secretary-General*, No. 335/2509, 22 April 1966 [Annex 63].

But Cambodia said nothing in that connection. It did say the following:

> "It will be remembered that the Bangkok Government, *while evacuating the Temple of Preah Vihear,* refused to recognize the judgment of the International Court, and it has now manifested its refusal by forcibly *reoccupying* this Khmer territory."[543]

The wording of this protest is noteworthy in two respects. First, it refers to Thailand "*reoccupying* this Khmer territory." To allege that a State "reoccupied" a territory is to accept that the State at one time before had *left*. Second, Cambodia in the protest note expressly acknowledged that Thailand had "evacuate[ed] the Temple"—the remedy which Thailand had been required to undertake under the 1962 Judgment.

5.71 Also when Cambodia alleged that Thailand had "ret[aken] and reoccupied the Temple"[544], this was in terms which acknowledged that Thailand earlier had withdrawn. Cambodia then contended that Thai troops, "[w]hile withdrawing *to their territory*", proceeded to commit serious breaches of international law[545]. This was a protest directly concerned with alleged misconduct in and around the Temple. Yet, far from saying that the position of Thai troops before or

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[543] Permanent Representative of Cambodia to the United Nations, *Note to the Secretary-General*, No. 1449, 11 April 1966 (Emphasis added) [Annex 62].

[544] Permanent Representative of Cambodia to the United Nations, *Note to the Secretary-General*, No. 1442, 11 April 1966 (Translated from French) [Annex 62].

[545] *Ibid.*

after the putative incursions failed to respect Cambodia's territorial integrity, Cambodia affirmed that they were on "their [i.e. Thailand's] territory."

5.72 Then there was Cambodia's unconsummated approach to the Security Council, already recalled in these Written Observations[546]. This is the episode in which Cambodia's Prime Minister had quoted Prince Sihanouk as asserting that "[t]he Thais have finally, after much prevarication and many delaying manoeuvres, evacuated Preah Vihear."[547] So, evidently, Cambodia's communications to the Security Council, whatever they may have meant, were not for the purpose of alleging that Thailand had failed to withdraw. Whatever the purpose of Cambodia's invocation of Article 94 (2), it did not request consideration of the situation by the Security Council[548]. There was no follow-up, no Security Council discussion of the matter, and no Security Council decision or other action in respect of Thailand's withdrawal. Cambodia abandoned the matter not long after it first had brought it up[549].

5.73 The inconstant record of protest, which eventually trailed off completely, is telling both for what it says and for what it does not say. If there had been an occasion calling for

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[546] See paras. 4.53-4.55 above.

[547] United Nations, Letter dated 23 April 1966 from the Minister for Foreign Affairs of Cambodia Addressed to the President of the Security Council, U.N. Doc. No. S/7279, 3 May 1966, p. 3 [Annex 65].

[548] See also para. 4.55 above.

[549] United Nations, *Yearbook of the United Nations 1966,* p. 162 [Annex 74].

Cambodia to articulate an objection about incomplete implementation of the 1962 Judgment, it was in the protest notes of April 1966. When Cambodia might have alerted Thailand that Cambodia believed Thailand's withdrawal from the Temple to have been insufficient, it did not do so. To the contrary, as seen above, Cambodia acknowledged the fact that Thailand had withdrawn.

(d) Cambodia's Subsequent Prolonged Silence

5.74 As seen above, Cambodia in different ways affirmed that Thailand had implemented the 1962 Judgment in respect of the territory with which that judgment was concerned. Then, for much of the period 1967 to 2007, Cambodia said nothing about Thailand's conduct around Phra Viharn at all.

5.75 One of the notable episodes in that period was the Parties' resumption of diplomatic relations in 1970. Relations had been discontinued because of the breakdown of understanding over Phra Viharn in 1958[550]. It would have been expected, if this remained a matter in doubt, that Cambodia would have made some note or reservation to that effect. The joint communiqué of 14 May 1970 by which the two States

[550] See para. 4.32 above.

resumed diplomatic relations however did not refer to Phra Viharn[551].

5.76 It is true that tragic difficulties befell Cambodia during part of the forty years in which Cambodia remained silent in respect of Phra Viharn. Thailand does not in any way seek to disregard or diminish that painful history. It must however observe, in the context of proceedings brought by Cambodia on the premise that Thailand's implementation of the 1962 Judgment was flawed or incomplete, that opportunities continued to present themselves for Cambodia to express its position. Until 2007, the acts and omissions of Cambodia only acknowledged, sometimes implicitly and sometimes expressly, that Thailand in 1962 had acted in accordance with the Judgment.

(e) Recent Cambodian Practice

5.77 Cambodia's recent practice further implies that Thailand's withdrawal in 1962 from the territory with which the 1962 Judgment was concerned was complete.

5.78 The agreement of 7 November 1991 between the Governors of adjoining provinces in the region of the Temple

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[551] Ministry of Foreign Affairs of the Kingdom of Thailand, Déclaration commune entre la Thaïlande et le Cambodge of 13 May 1970, *Foreign Affairs Bulletin 1970*, Vol. IX, Nos. 1-6 (August 1966-July 1970), pp. 436-437 [Annex 79].

has already been noted[552]. This was an agreement having special regard for access to the Temple through Thailand and for regulation of activities in the Temple area. If Cambodia believed that Thailand had failed to make a complete withdrawal or that Thailand's present position around the Temple constituted an encroachment on the area from which withdrawal in 1962 was still required, then the 1991 agreement was another occasion when it might have done so. Nothing in the agreement indicated even the slightest Cambodian objection or reservation. The further provincial agreement of 2001 had nothing to say on the point either[553]. The Cambodian side repeatedly declined to say anything to call into question Thailand's conduct at Phra Viharn.

5.79 As recently as the Request of 28 April 2011 by which Cambodia instituted the present proceedings, Cambodia is clear that it did not see anything objectionable in Thailand's implementation of the Judgment when Thailand withdrew after 10 July 1962. According to the Request,

> "After 1962, and until the events following the process of including the Temple on UNESCO's list of World Heritage sites in 2007, no official claims were made by

[552] See paras. 4.61-4.65 above; and Summary of a meeting on the opening of Khao Phra Viharn as tourist site between Thai side and Cambodian side, 7 November 1991 [Annex 87].

[553] Record of joint meeting between Delegation of the Governor of Si Sa Ket Province and Delegation of the Deputy Governor of Phra Viharn Province, 22 February 2001 [Annex 92].

> Thailand in the area of the Temple which is now claimed by that State."[554]

The vicinity of the Temple on Thai territory was clearly indicated when Thailand implemented the Judgment and withdrew beyond the barbed-wire fence. This withdrawal was complete as at the date of Prince Sihanouk's celebration. He saw its results and did not object. His Foreign Minister said in 1962 that Thailand had "complied with the Court's decision"[555]. To say that there were "no official claims" between 1962 and 2007 is to acknowledge yet again that Thailand's position after its withdrawal in 1962 did not amount to a "claim" but rather was the result of a proper, considered implementation of the Judgment. This further shows that, in truth, there is no difference between the Parties that the area from which Thailand withdrew in 1962 is the area to which the Judgment referred.

E. Conclusion

5.80 For these reasons:

(1) Cambodia's contention that the boundary is to be traced on the basis of the Annex I map line has no merit, for the Court in 1962 expressly declined to go further than was necessary to decide the question of sovereignty over the Temple;

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[554] *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), Application Instituting Proceedings*, 28 April 2011, p. 4, para. 12.

[555] See para. 4.37 above.

(2) Cambodia's Request ignores that the Parties in 1962 contested whether the Annex I map line traced the line of the watershed and whether it would be possible to trace the boundary on the basis of the Annex I map line; and that the Court never resolved their difference on these questions;

(3) Cambodia, failing to address that the Annex I map was not incorporated by reference in the *dispositif* and was not more than a reason supporting a decision concerning the Temple area, fails to support its portrayal of the Annex I map as part of the *res judicata* of the 1962 Judgment;

(4) As to the second paragraph of the *dispositif*, Cambodia confuses the general and continuing obligation of States to respect one another's territorial integrity with the specific determination reached by the Court in 1962; and

(5) Cambodia now contradicts its own prior position, expressed in a number of ways over forty years, that the Court did not determine sovereignty over an area in addition to that from which Thailand withdrew in 1962 in implementation of the Judgment.

CHAPTER VI
THE PROBLEMS OF TRANSPOSING THE LINE ON THE ANNEX I MAP TO THE TERRAIN

A. Introduction

6.1 In its Request, Cambodia categorically asserts that the territory "in the area of the Temple and its vicinity" was "delimited (...) by the line on the Annex I map"[556]. It therefore appears to be Cambodia's contention that the Annex I map constitutes a binding and precise expression of the location of the boundary in the Dangrek Range. If so, then Cambodia must have in mind a method by which that line is to be transposed onto the terrain.

6.2 As recalled in Chapter V above, the Parties in 1962 had a disagreement on the prior point: they could not agree whether the Annex I map line could be used to trace the boundary precisely on the terrain at all[557]. The Court did not settle the question. It was unnecessary to do so, on the Court's understanding of the case[558]. Cambodia's Request for interpretation now seeks, under Article 60 of the Statute of the ICJ, to put the question again in issue. Thailand has set out the reasons why such a question cannot now be entertained by the

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[556] *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), Application Instituting Proceedings,* 28 April 2011, para. 45.

[557] See paras. 5.11-5.25 above.

[558] See paras. 5.15-5.16 above.

Court[559]. However, in light of Cambodia's Request, Thailand is led to ask, in the event that the Court were to grant the Request, how would the Parties use the Annex I map to trace their boundary?

6.3 Thailand submits that, on the terms of the Request, Cambodia has the burden on this point[560]. Nothing in Cambodia's Request or in Cambodia's statements during the *procès- verbaux* addressed the burden. Emphasizing that it is not for Thailand to answer the questions raised by the map, much less to *disprove* that it is a suitable basis for tracing the boundary, Thailand has nonetheless consulted boundary experts to evaluate the map. Alastair Macdonald MBE, Honorary Research Fellow, and Professor Martin Pratt, Director of Research, of the International Boundaries Research Unit of the Durham University visited the Department of Treaties and Legal Affairs of the Ministry of Foreign Affairs in Bangkok, Thailand, and the Dangrek escarpment between 15-18 August 2011. Referring to their field visit, the map evidence and relevant parts of the 1962 proceedings of the Court, the boundary experts prepared an *Assessment of the task of translating the Cambodia-Thailand boundary depicted on the 'Annex I' map onto the*

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[559] See paras. 4.76-4.95 above.

[560] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, 6 November 2003, I.C.J. Reports 2003*, p. 189, paras. 57-59; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, 26 November 1984, I.C.J. Reports 1984*, p. 437, para. 101.

ground ("IBRU Assessment")[561]. The present Chapter considers the main findings of the IBRU Assessment as they are relevant to the questions raised by Cambodia's Request.

B. Defects in the Annex I Map

6.4 The IBRU Assessment identifies a large number of defects and limitations in the Annex I map[562]. These would appear to be the result of constraints on production methods faced by the mappers in 1907[563]. Each will be considered here briefly.

1. Deviation of the Boundary Line from the Watershed

6.5 The Annex I map line deviates considerably from the line of the watershed in the Dangrek range. The deviation is illustrated generally in Figure 5 in the IBRU Assessment[564].

6.6 The IBRU team identify five particular "obvious errors" involving deviations of the boundary line from the watershed on the Annex I map; four of the errors are to Cambodia's advantage[565]. One was an error involving the Temple: as Judge

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[561] *International Boundaries Research Unit, Durham University,* "Assessment of the task of translating the Cambodia-Thailand boundary depicted on the 'Annex I' map onto the ground", *October 2011* [Annex 96].

[562] *Ibid.*, pp. 12-19, paras. 24-39.

[563] *Ibid.*, pp. 10-12, paras. 17-23.

[564] *Ibid.*, p. 13 (Figure 5).

[565] *Ibid.*, p. 14, para. 26(i)-(v).

Sir Percy Spender had concluded in his dissenting opinion[566], the watershed around the Temple is wrongly depicted; the IBRU team confirm that this is in consequence of an error in the tracing on the map of the O'Tasem stream[567]. That mistake does not matter to the question of sovereignty over the Temple, which was settled by the 1962 Judgment. The most significant error, as measured by distance of the Annex I map line from the true watershed, is that at 104º 13' East (Greenwich)[568]. This is an error depicting a stream cutting 7.5 kilometres north of the true position of the watershed. The result is to push the Annex I map line 7.5 kilometres farther north into Thailand than the true watershed line.

6.7 The IBRU team are confident in their assessment that the stream in question was drawn incorrectly on the Annex I map. According to the IBRU team,

> "It would appear that the footpath running northwards to the west of the problem stream was followed [by Captain Oum in 1907]. We too have followed a track in a southerly direction in a similar location passing Hill 463 and walking the last 500 metres towards the watershed. There was no doubt we were following rising ground and it is difficult to understand how a competent

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[566] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports* 1962, p. 122 (Dissenting Opinion of Sir Percy Spender).

[567] *International Boundaries Research Unit, Durham University,* "Assessment of the task of translating the Cambodia-Thailand boundary depicted on the 'Annex I' map onto the ground", *October 2011*, p. 14, para. 26(iv) [Annex 96].

[568] Or 101º 48' E (Paris) on the longitude system used on the map.

> surveyor walking the track in 1907 would think otherwise. He might at least have been concerned enough to cut his way down to the stream to check its direction before inserting on the map the longest incursion by any stream through the escarpment of the Dangrek."[569]

This, then, was not a watershed line, though, owing to the faulty representation of the stream, a person looking at the map alone would assume that it was: the intention of the map-makers appears to have been to represent a watershed line. The confluence of Article I of the 1904 Treaty and the apparent intention displayed in the map suggests a ready method for dealing with parts of the line which deviate: the present-day surveyors in the field should find the true watershed and set the line as tracing it[570]. But if the line in the Annex I map is arbitrarily fixed as depicted, then, owing to the manifold further defects (to be considered next), there would be no obvious way to deal with the deviations.

2. THE GAP BETWEEN LINES AT THE WESTERN END OF THE ANNEX I MAP

6.8 The surveyor responsible to the Second Commission for Sector 5 of the boundary immediately to the west of the Pass of

[569] *International Boundaries Research Unit, Durham University,* "Assessment of the task of translating the Cambodia-Thailand boundary depicted on the 'Annex I' map onto the ground", *October 2011*, pp. 15-16, para. 30. (Underscoring in original) [Annex 96].

[570] See *ibid.*, p. 19, para. 40; also *ibid.*, p. 44, para. 62. "We believe that a new on-the-ground definition of the watershed would be the best solution even though it would be a very difficult task in some section."

Kel — i.e., the sector immediately to the west of the western end of the sector for which responsibility lay with the First Commission and which was depicted on the Annex I map — discovered two significant errors in the depiction of the watershed in this area – one in earlier Sector 5 work close to the Pass of Kel and one in the Annex I map. The first is not relevant to the present discussion. As to the Annex I map error, Lieutenant Malandain, the surveyor, recognized that there was no wide valley running north from the general line of the escarpment and therefore that the purported extension of the stream 7.5 kilometres north into Thailand was mistaken. His map shows the line of the escarpment running across the mouth of the purported valley though, as he provides no stream information, this cannot be said to be the line of the watershed; the Mixed Commission "appears to have approved this correction" (22 March 1908)[571]. Lieutenant Malandain's correction is noted on the eastern end of the map sheet covering the region to the west of the Annex I map sheet (the Sector 5 map): these are overlapping map sheets. The erroneous northward extension of the map line (charted by Captain Oum for the First Commission) and the correction (by Lieutenant Malandain for the Second Commission) are compared in Figure 7 in the IBRU Assessment[572].

6.9 One is thus left with a difficult problem in interpreting the boundary in this vicinity. It is clear from modern mapping

[571] *Ibid.*, p. 17, para. 33.

[572] *Ibid.*, p. 16 (Figure 7).

and recent observations by the IBRU team that Captain Oum was wrong in showing a Cambodian stream rising some 7.5 kilometres north of the general line of the watershed and flowing south. It is also clear that this was known in 1908 when Lieutenant Malandain submitted his map to the Mixed Commission. However, Lieutenant Malandain only supplied the line of the escarpment and omitted any stream information. His escarpment merges into Captain Oum's escarpment in the vicinity of Ph. Key at a point where the boundary line on the Annex I map is shown as lying some 1,500 metres north of the escarpment. Thus his map cannot be used to define the correct boundary line from the Pass of Kel to the vicinity of Ph. Key, a distance of roughly 13 kilometres. But neither can the Annex I map be claimed to represent the view of the Mixed Commission in 1908. If this leads to the view that the boundary is indeterminate in this section and has to be redefined in the present, then the demarcation party will be faced with how and where to connect the newly defined boundary line with the Annex I line. There is no principle, cartographic or legal, which would tell the Parties how to rejoin the lines.

3. Positional Errors

6.10 Known and readily identified features—such as hilltops, junctions of watercourses, and, of course, the Temple—can be examined on the Annex I map; and their co-ordinates—as indicated by their position on the graticule of that map (adjusted to the Greenwich Meridian)—noted. For example, the

Rossey/Sreng junction, on the Annex I map, is depicted at 14.289 degrees North; 104.202 degrees East[573]. If the Annex I map had no positional errors, then the co-ordinates of the known features noted on that map would be identical to the co-ordinates of the same features on a reliable modern map.

6.11 The IBRU team selected fifteen known and readily identified features[574]. They marked each feature on a modern map. Then they added to the modern map a second mark for each feature. The second mark they placed at the co-ordinates which the Annex I map says are the co-ordinates of the feature.

6.12 The Annex I map failed to give the correct co-ordinates for any feature. The Rossey/Sreng junction, for example, in truth is at 14.284 degrees North; 104.161 degrees East. According to the IBRU team,

> "Even a quick visual comparison of the positions of the common points on the two maps makes it immediately obvious that not only significant positioning errors exist in the Annex I map, but that the errors vary across the map."[575]

This confusion of positional data is illustrated at Figures 9a and 9b in the IBRU Assessment[576]. The confusion is severe. The IBRU team considered ways this problem might be addressed,

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[573] *Ibid*., p. 21, para. 45.

[574] *Ibid*.

[575] *Ibid*., p. 21, para. 46.

[576] *Ibid*., pp. 22-23 (Figures 9a & 9b).

which will be summarized in Section D below, but other than accepting that the proper line is the watershed and then finding the watershed, there is no satisfactory solution to the severe positional errors in the Annex I map.

4. Topographical Errors

6.13 The Annex I map, like other maps of the period, was prepared without aid of aerial or satellite photography. It therefore would not be expected to represent the topography of the boundary region it concerns as reliably as a modern map. But topographical errors in the Annex I map suggest deficiencies of execution even by the standards of its time[577]. Differences between the real elevations and locations of hills and valleys and escarpment are legion; they are too difficult to depict comprehensively[578]. The drainage pattern—of critical importance in determining a watershed line—cannot be discerned from the Annex I map with any confidence at all: water courses depicted on the map bear, at best, only a very general correspondence to the actual pattern on the ground. The blue-coloured lines in Figure 8 in the IBRU Assessment are those from the Annex I map; the green-coloured lines, the actual watercourses as depicted on a map drawn with benefit of modern technology[579]. If the Parties were to examine the Annex I

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[577] *Ibid.*, p. 43, para. 60.

[578] *Ibid.*, p. 17, para. 35.

[579] *Ibid.*, p. 18 (Figure 8).

map in the hope that it would help locate the boundary line by its relation to rivers and streams, then they would do so in vain.

5. Scaling Problems

6.14 The Annex I map is a small scale map. According to the IBRU team, "[e]ven if the map is accurate, the scale will define the precision with which the position of any feature on the map can be determined"[580]. The map scale and the size on the map of the cross symbols which comprise the Annex I map line is one limitation on precision; another limitation is the "fairly crude" depiction of contour lines[581]. The IBRU team indicate, in light of the limitations, that, even assuming that the Annex I map contained no errors, the map would contain a "degree of uncertainty of the order of up to ±100 metres in the position of the boundary"[582].

6. Conclusions as to the Defects in the Annex I Map Line

6.15 It is clear, on considering the host of defects and limitations in the Annex I map, that transposing the boundary line from that map onto the terrain would not be straightforward. To attempt the transposition would put in contention each defect and limitation: each of these produces ambiguities as to the precise location of the boundary, and the ambiguities cover a

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[580] *Ibid.*, p. 17, para. 36.

[581] *Ibid.*

[582] *Ibid.*, p. 17, para. 37.

range which would be significant in a modern demarcation. The ambiguities would have to be resolved, but the map is of no help in resolving them. Section D below will relate the mathematical approach which the IBRU team tested for transforming the line from map to ground. As will be seen, this introduces a range of different results which inevitably would give rise to further differences between the Parties.

6.16 In considering the defects in the Annex I map, it is the opinion of the IBRU team that one thing is clear: it had been "the intention of the cartographers who produced the map (…) to depict a boundary which followed the watershed along the Dangrek range"[583]. Thailand notes that this is in accord with Article I of the Treaty of 13 February 1904. The IBRU team conclude that the watershed line indeed is the reliable basis on which to trace the boundary:

> "If we were given nothing but the map and asked to say where the boundary should run on the ground, our recommendation would be to set the map aside, identify the watershed in the field using modern surveying techniques, and define the boundary along the line of the surveyed watershed."[584]

Though identifying the watershed would be "a very difficult task in some sections"[585], it would appear to be the way to address the multiple defects in the Annex I map noted above and

[583] *Ibid*., p. 19, para. 40.

[584] *Ibid*.

[585] *Ibid*., p. 44, para. 62.

resolve them in an objective manner capable of practical application on the terrain.

6.17 In the Annex I map as submitted by Cambodia in the 1962 proceedings, there is a further defect, originating not from the cartographic work of the surveyor but from a registration error in the process by which the map was printed. Thailand briefly now will consider the registration error and the questions it would present if one were to attempt to use the Annex I map as Cambodia requests.

C. The Registration Error and the Revised Version of the Map

6.18 The IBRU team on their visit to Bangkok found that the Department of Treaties and Legal Affairs (DTLA) does not hold the version of the map submitted by Cambodia to the Court in 1959 as the "Annex I map"[586]. Instead, DTLA's map is what could only have been a later, revised version. Further inquiry discloses that the copies of the map in the following repositories also are not the Annex I map but, instead, the revised version: the archives of the French Ministry of Foreign Affairs, the archives of the French Ministry of Colonies, the *Bibliothèque Nationale de France* and the Royal Geographical Society (London)[587]. The *Institut Géographique National* (IGN) holds yet another version, though one very similar to the revised

[586] *Ibid*., p. 5, para. 7.

[587] *Ibid*., p. 8, para. 9.

version held by DTLA and the other four repositories[588]. The differences between the evidently more widely-distributed revised version and the second revised version (which the Thai research team could find only at IGN) do not seem material for present purposes.

6.19 The differences between the Annex I map and the widely-distributed revised version—the version which Siam received in 1908[589]—are however significant.

6.20 The revised version refined the contour lines and some of the watercourse lines. It also appears to have added further data. For example, contour lines are drawn on the revised version, which do not appear on the Annex I map, thus giving at least the appearance of a more precise depiction of the terrain. The data for these changes perhaps was contained in notes sent to Paris by the officers in Indochina, though it seems impossible to know for sure on what basis the Paris cartographers made these revisions to the map. Purely presentational changes are also in evidence, such as improved lettering of place names; and a small index map at the top right hand corner of the sheet[590].

6.21 But far and away the most significant change between the Annex I map and the revised map is the correction of a registration error. The maps were printed from colour plates,

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[588] *Ibid.*

[589] *Ibid.*, p. 8, para. 11.

[590] *Ibid.*, p. 5, para. 7 and p. 6 (Figure 3).

one plate for each colour. The brown colour plate contained the contour lines. The Annex I map displays a noticeable displacement in the brown registration[591]. This means that the Annex I map shows all other features—including the boundary line—in a different relation to the topography than in the revised (corrected) version. Examples of differences are illustrated in Figure 4 in the IBRU Assessment. To a surveyor in the field, with nothing to go on but the map and visual sighting of the terrain, the revised version and the Annex I map would locate the boundary in different places[592].

6.22 The registration error in the Annex I map and the acceptance by Siam of the revised version would present at least two questions, if the Annex I map were to be employed as proposed in Cambodia's Request.

6.23 First, the error in the brown contour registration means that the Annex I map itself would be of limited or no value in plotting the line in reference to topographical features. According to the IBRU team:

> "if the course of the boundary needs to be determined with reference to the topography depicted on the Dangrek sheet, the existence of three versions of the sheet, with slightly different contour patterns in places and *a 200-500 metre difference in the location of contour lines across the whole sheet* becomes

[591] *Ibid*., p. 5, para. 7.

[592] *Ibid*., p. 7 (Figure 4).

> significant, complicating an already challenging task still further"[593].

The boundary line depicted on the Annex I map, owing to the dislocation of the contour lines, runs in places along hillsides and cliff faces and cuts back and forth across the watershed and would be impossible to locate by reference to watercourses, as these are depicted, in numerous places, in an irrational manner—e.g., flowing up hill. Examples are circled in colour in Figure 2 in the IBRU Assessment[594]. The disarray of the topographical representation arising out of the registration error was of no concern in 1962, because the Annex I map was submitted into evidence to establish sovereignty over the Temple, not to fix the exact location of a boundary line. The symbol on the map representing the Temple, regardless of the contour line displacement, still is located south of the line. But to establish the Annex I map as a binding instrument which determines how the Parties fix the boundary would make the reliability of the contour lines centrally important; they would shift from the periphery of the case to its heart. Their disarray would become a major concern.

6.24 Second, a question would arise as to the logic of the Court's statement that Thailand accepted the Annex I map. The Court said that "the Siamese authorities (…) received the Annex

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[593] *Ibid.*, p. 10, para. 16. (Emphasis added).

[594] *Ibid.*, p. 4 (Figure 2).

I map and (…) they accepted it"[595]. Because "no interested person (…) could have failed to see what the map was purporting to do in respect of that region", Thailand could not have escaped its legal consequences on grounds that the map contained an error[596]. But "what the map was purporting to do" was in respect of sovereignty over the Temple located in that region; that was the matter which fell to the Court to adjudicate and which it proceeded to decide. To say, instead, that the map was purporting to give a reliable picture of the relation between the boundary line and the contours of the local terrain is a different matter. The map which Siam received was not the Annex I map; it was the revised map. The difference was irrelevant, in so far as the map is used only as an attestation of sovereignty over the Temple. The difference is central and material, if the map is to be imposed on the Parties as the authoritative basis for tracing their boundary. There is no clear way to reconcile Cambodia's Request with the statement of the Court that what the map was purporting to do was obvious and therefore binding on Thailand[597].

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[595] *Case Concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 26.

[596] *Ibid.*, pp. 26-27.

[597] What is more, the confusion over the Annex I map appears to have a long afterlife. The map which Cambodia submitted as "Carte annexée No. 1" in the present proceedings is not the Annex I map as submitted in the original proceedings. It is the revised version.

D. Transformation of the Annex I Map Line to the Terrain

6.25 The IBRU team, presented with a map riddled with manifest errors and limitations, were asked how, if required, one would trace the boundary line depicted on the map onto the terrain. The IBRU team's answer is that the only satisfactory approach would be to form a view as to what the map-makers had *intended* to represent; and then go into the field and implement that intention[598]. As noted, the map would appear to have been an attempt to trace the boundary along the watershed; and this would accord with Article I of the 1904 Treaty. But, understanding Cambodia to request a literal transposition of the Annex I map line onto the terrain, without regard for Article I or the map-makers' intention, Thailand asked the IBRU team how one would transpose *that* line onto the ground.

6.26 The IBRU team explain that:

> "The poor quality of the Annex I map and the many errors it contains mean that mathematical methods for transferring the boundary line into the real world will always be compromised by the amount of error present."[599]

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[598] *International Boundaries Research Unit, Durham University,* "Assessment of the task of translating the Cambodia-Thailand boundary depicted on the 'Annex I' map onto the ground IBRU Assessment", *October 2011*, p. 19, para. 40; p. 44, para. 62 [Annex 96].

[599] *Ibid*., p. 19, para. 41.

If, however, a mathematical approach were obligatory, then "the obvious method is that of transformation"[600]. The IBRU team describe transformation as follows:

> "Transformation is the term given to the adjustment of the size, shape and position of one map so that points of detail (or a linear feature such as a boundary line) on it can be directly compared to equivalent points of detail on another map produced on a different projection and datum."[601]

For the Annex I map, the following steps would have to be followed:

(i) Common points on the Annex I map and a modern map are selected;

(ii) The graticule on the Annex I map is transformed in a Geographic Information System to the datum of the modern map; and

(iii) The Annex I points are made to fit the coordinate positions of the points as they are known today[602].

The IBRU team draw attention to two limitations inherent in the transformation process. First, the method "depends entirely on the choice of common points"; and, second, such transformations "only force the *chosen common points* to the

[600] *Ibid.*, p. 20, para. 42.

[601] *Ibid.*, p. 20, para. 42.

[602] *Ibid.*, p. 20, para. 43.

correct positions"; for a boundary line, segments between the common points can retain "[s]ignificant errors"[603].

6.27 It is immediately clear that the process of transformation entails a threshold question for which no legal principle holds the answer: which are the common points to be used? The choice of common points, though arbitrary, is consequential to the result achieved through this mathematical process: one choice of common points produces one line; a different choice produces a quite different line. To test the possibilities, the IBRU team performed a number of transformations, each based on different common points.

6.28 The result of selecting a variety of common points and performing transformations on the basis of each is a variety of boundary lines. The differences between boundary lines are significant. This is not a series of slight variations. Indeed, the distances between the various lines produced by each of the transformations performed in the IBRU Assessment are substantial, especially so relative to the area which Cambodia now claims is in dispute. The IBRU Assessment, in Figures 12a, 12b, 12c and 12d, illustrates the variant results which would be produced, depending on which common points are chosen for purposes of a transformation[604]. Figures 13a, 13b,

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[603] *Ibid*., p. 20, para. 44. (Emphasis added).

[604] *Ibid*., pp. 35-38. (Figures 12a, 12b, 12c & 12d).

13c and 13d present an aggregate of the possible transformations which the IBRU team tested[605].

6.29 There is no principled basis on which to choose common points for purposes of transforming the Annex I map line to the terrain. This is not a matter which can be determined by any legal rule applicable as between the Parties. Nor is there an applicable cartographic or mathematical principle. According to the IBRU team,

> "To achieve this, agreement would have to be reached with Cambodia over the common points to be used. The result would probably be a search by each side for the most advantageous points to produce the greatest territorial gain, and there would be no scientific grounds for determining who was right. No matter which common points are chosen, the boundary would only coincide with the watershed in a handful of places—and in some areas it would lie several kilometres from the watershed."[606]

As is clear from the figures referred to above, the choice of points is highly material to the transformation which Cambodia demands: different points produce substantially different dispositions of the line. To adopt the Annex I map line for the purpose that Cambodia requests would introduce this new question as well.

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[605] *Ibid*., pp. 39-42. (Figures 13a, 13b, 13c & 13d).

[606] *Ibid*., p. 44, para. 63.

E. Conclusion

6.30 The IBRU Assessment identifies serious difficulties which would be faced, if one were to use the Annex I map and the line it depicts as the authoritative basis for tracing the boundary in the Dangrek range. To summarize, the difficulties are as follows:

(i) the map line deviates significantly from the watershed;

(ii) there is no clear method for joining the map line to the map line entering the sector from the west;

(iii) positional errors permeate the map and cannot be corrected by any simple process, as their valence and scope differ from one part of the map to another;

(iv) topographical errors, including in the representation of watercourses, are severe;

(v) scaling problems introduce a degree of imprecision which would remain, even if none of the errors existed;

(vi) there are later versions of the Annex I map, which itself contains a registration error displacing the contour lines to a significant extent; and

(vii) mathematical transformation of the Annex I map line depends upon selection of common points, for which there is no principle, but different common points generate considerably different boundary lines.

Taken individually, each of these is an extremely serious problem. Taken in aggregate, the problems identified in the IBRU Assessment make the proposed task impossible.

6.31 It is a leitmotif of Cambodia's Request for interpretation that the interpretation Cambodia requests would remove sources of friction between the Parties. Noting the initiatives of the Secretary-General of the United Nations and others, Cambodia says,

> "[t]here is no question that all these initiatives to maintain international peace and security (...) illustrate the seriousness of a situation which the International Court of Justice could bring to an end by interpreting the Judgment of 15 June 1962"[607].

It is Cambodia's contention that the Court, by adopting the Annex I map line today, would "bring to an end" difficulties between the Parties. Conversely, Cambodia asserts that, if the putative difference of interpretation is not settled, "a dispute (...) may be prolonged and may seriously threaten international peace and security at any time"[608]. Cambodia further asserts that the interpretation which it demands is the "only" way the Court "can provide a means of ensuring lasting peace and security in th[e] region"[609]. So not only would enshrining the

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[607] *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), Application Instituting Proceedings,* 28 April 2011, para. 35.

[608] *Ibid.*, para. 43.

[609] *Ibid.*, para. 44.

Annex I map line as a definitive fixing of the boundary be helpful; according to Cambodia it is the indispensable measure without which "peace and security in the region" will be forfeited. But the Annex I map, as seen above, riddled with ambiguities and errors, is the product of a mapping exercise carried out without benefit of modern technology and deficient even under the more limited standards of its day. Far from "removing uncertainty from their legal relations", which is one of the "essentials of the judicial function"[610], to impose the Annex I map line over the Parties' agreed process of modern survey and demarcation would introduce new and in practice intractable questions.

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[610] *Case concerning the Northern Cameroons* (*Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 34.

CHAPTER VII
CONCLUSIONS

7.1 Thailand has demonstrated in these Written Observations that

First, Thailand has complied with the 1962 Judgment, and there is no dispute between the Parties over Thailand's compliance. Cambodia's recent claim of non-compliance puts into question the *status quo* that has prevailed between the Parties since 1962. The claim is an attempt to create an imaginary dispute over the scope and meaning of paragraph 2 of the *dispositif* of the 1962 Judgment in order to disguise Cambodia's real objective of obtaining from the Court a ruling in the new dispute between the Parties over their boundary. This present day boundary dispute is distinct, separate from the initial dispute that is the subject matter of the 1962 Judgment, i.e. sovereignty over the Temple. It arose during the years 2007-2008 following Cambodia's attempt to inscribe the Temple on the World Heritage List and the resulting need to appropriate a portion of Thai territory to form part of a buffer zone necessary for the complete inscription of the Temple.

7.2 Second, in the preliminary objections phase of the original proceedings, the subject matter of the dispute as defined by Cambodia's Application, the oral and written pleadings of the Parties, and the Judgment of 26 May 1961 was indisputably and solely territorial sovereignty over the Temple and its

precincts. It did not include any determination of a boundary between the Parties.

7.3 Third, in the merits phase of the original proceedings, the written and oral pleadings of the Parties, as well as the *petitum* as defined in their admissible admissions, confirm that the subject matter of the initial dispute was confined to the issue of sovereignty over the Temple and the immediately surrounding area, and did not include a determination of the boundary between the Parties. The Annex I map was invoked as evidence to demonstrate sovereignty over the Temple and not for the purposes of an independent ruling on the boundary.

7.4 Fourth, in its 1962 Judgment, the Court confined the issue before it to sovereignty over the Temple and the immediately surrounding area and expressly rejected a last minute attempt by Cambodia to expand the matter before it to obtain a ruling on the status of the Annex I map and the boundary between the Parties. The three operative paragraphs of the *dispositif,* the only points decided with the binding force of *res judicata*, did not include the determination of the boundary between the Parties and were circumscribed by the *petitum* and the terms used by the Court. Thus, "Temple" in operative paragraph 1, "at the Temple, or in its vicinity on Cambodian territory" in operative paragraph 2 and "Temple area" in operative paragraph 3 are used in the *dispositif* to indicate a confined area limited to what was referred to as "the Temple of

Preah Vihear (Phra Viharn) and its precincts" or "the ruins of the Temple".

7.5 Fifth, the Court has no jurisdiction to deal with Cambodia's Request for interpretation, as there is no dispute between the Parties over the meaning and scope of the 1962 Judgment. In addition, Cambodia's Request is inadmissible because, under the guise of an interpretation request under Article 60 and in total disregard of the principle of *res judicata*, it seeks a ruling on a point outside the scope of the initial dispute that was not decided with binding force in the 1962 Judgment. Cambodia's Request is also inadmissible because it seeks to revive a claim already declared inadmissible in the 1962 Judgment.

7.6 Sixth, in the alternative, if the Court were to find that it has jurisdiction and that Cambodia's Request is admissible, Cambodia misconstrues the meaning and scope the 1962 Judgment in a number of respects.

Cambodia first erroneously asserts that the Court determined that the boundary between the Parties was to be traced on the basis of the Annex I map line. This assertion fails to respect the Court's express refusal in 1962 to make such a determination. It also amounts to demanding that the Court today treat as *res judicata* matters that had to be addressed if the Annex I map were to be incorporated into the 1962 Judgment as a delimitation, but that the Judgment did not address at all. The Judgment was silent on the question of the fidelity of the Annex

I map line to the watershed and did not determine, as argued by Cambodia, that the boundary does not follow the watershed, and it did not address at all the difference between the Parties as to whether it would be practical to transpose the Annex I map line onto the terrain. Cambodia also misconceives the question of sovereignty over the Temple as having necessitated a determination of the precise location of the boundary. Cambodia ignores that in 1962 the Court had been called upon to determine sovereignty over the Temple and not the delimitation of the boundary and fails in its attempt to portray the precise location of the boundary as essential to the 1962 Judgment and the Annex I map as inseparable from the *dispositif*. Cambodia's assertion, moreover, ignores the subsequent practice of the Parties and the understanding of third States indicating that the Court did not determine the precise location of the boundary. Cambodia's assertion, finally, is a failed attempt to impute to the Annex I map a purpose for which the Court in 1962 did not employ it.

7.7 In misconstruing the meaning and scope of the 1962 Judgment, Cambodia also confuses the general and continuing obligation of States to respect the territorial integrity of each other with the specific determination of the Court in paragraph 2 of the *dispositif* of the 1962 Judgment. The Court in the 1962 Judgment did not rule on any question besides that of sovereignty over the Temple and the legal consequences of that sovereignty. As a consequence of paragraph 1 of the *dispositif,* paragraph 2 reflected, with regard to one place at one time, the

obligation of States under general international law to respect the territorial integrity of other States. It was not given perpetual life with a perpetual guarantee in the form of Article 60 of the Statute. Cambodia confuses the primary obligation under general international law with the consequences of the wrongful act as indicated in the 1962 Judgment. This, in turn, has the effect of confusing the proper scope of the Court's interpretative powers with the question of jurisdiction to adjudicate new claims of breach.

7.8 Finally, Cambodia's allegation that Thailand failed to withdraw in accordance with the 1962 Judgment is without merit. Cambodia contends that Thailand failed to withdraw from an area in addition to that from which Thailand withdrew in 1962, but fails to identify that further area. The area that Cambodia mentions in its Request of 28 April 2011 is not to be found in the 1962 Judgment, but can only be defined, even on Cambodia's own terms, by reference to the recent boundary dispute that had arisen in 2007-2008. As such, the area in question could be the subject matter of a new dispute over an alleged breach of territorial integrity, but it could not be the subject of a request for an interpretation of the 1962 Judgment. In any event, Cambodia has repeatedly acknowledged since 1962 that Thailand withdrew in accordance with the 1962 Judgment. Thus, Cambodia now contradicts its own prior position, expressed in a number of ways over forty years, that the Court did not determine sovereignty over any area in

addition to that from which Thailand withdrew in 1962 in implementation of the Judgment.

7.9 Seventh, Cambodia has the burden to establish that the Annex I map line can be used as the basis to trace the boundary between the Parties and fails to do so. An independent expert assessment demonstrates to the contrary that the Annex I map contains defects, limitations and a registration error, such that it is impossible to transpose the line shown on it to the terrain without making arbitrary choices of agreed common points for reference (between the Annex I map and a selected modern map) and without producing significant errors and uncertainties in the segments between those common points. Moreover, the Annex I map entered in the record of the original proceedings was not the widely-distributed revised version that Siam received in 1908. Although both maps show the Temple as lying on the Cambodian side of the boundary line, the Annex I map differs from the revised version in important respects that would become central and material if the map is to be established as a binding instrument for determining the boundary. In particular, the Annex I map shows all features – including the boundary line – in a different relation to the topography than the revised version. Due to this registration error, the Annex I map and the revised version would locate the boundary line in different places. To establish the Annex I map as the authoritative basis for tracing the boundary line would therefore give rise to further disputes between the Parties, rather than solve the present one.

SUBMISSIONS

For all the above reasons and reserving the right to amend or add to these submissions:

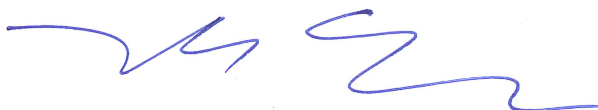
The Kingdom of Thailand requests the Court to adjudge and declare:

- that the Request of the Kingdom of Cambodia asking the Court to interpret the Judgment of 15 June 1962 in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* under Article 60 of the Statute of the Court does not satisfy the conditions laid down in that Article and that, consequently, the Court has no jurisdiction to respond to the Request and/or that the Request is inadmissible;

- in the alternative, that there are no grounds to grant Cambodia's Request to construe the Judgment and that there is no reason to interpret the Judgment of 1962;

- in the further alternative, that the 1962 Judgment does not determine that the line on the Annex I map is the boundary line between the Kingdom of Thailand and the Kingdom of Cambodia.

The Hague, 21 November B.E. 2554 (2011)



(Virachai Plasai)
Agent of the Kingdom of Thailand
before the International Court of Justice

Certification

I hereby certify that the documents annexed to these Written Observations are true copies of and conform to the original documents and that the translations provided by the Kingdom of Thailand are accurate.

The Hague, 21 November B.E 2554 (2011)

(Virachai Plasai)
Agent of the Kingdom of Thailand
before the International Court of Justice

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