

## DISSENTING OPINION OF JUDGE WELLINGTON KOO

To my great regret I am unable to concur in the Judgment of the Court. Although I reserve my own final conclusion in the case for reasons explained toward the end of this statement, I find that the grounds upon which the Judgment is based cannot be sustained in fact or in law.

1. The basic issue of the dispute, as it appears clear from the final submissions of the Parties as well as from their respective pleadings, both written and oral, is the question whether the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia or under that of Thailand.

2. Cambodia relies on the map of the Dangrek sector (Annex I to the Memorial); and contends that it "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 behaviour of the Parties, it presents a treaty character". She further claims that "the frontier line between Cambodia and Thailand, in the disputed region in the vicinity of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam" and that "the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia".

3. Thailand denies any validity to the claims of Cambodia and argues, principally, that "the map Annex I has not been proven to be a document binding on the Parties whether by virtue of the Treaty of 1904 or otherwise"; that "Thailand and Cambodia have not in fact treated the frontier marked out on Annex I as the frontier between Thailand and Cambodia in the Dangrek region"; and that "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 Dangrek range". She further contends "that at all material times Thailand has exercised full sovereignty in the area of the Temple to the exclusion of Cambodia" and that "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".

## I

4. Does the Annex I map possess, as claimed by Cambodia, a treaty character and therefore impose a binding obligation on Thailand? To give a correct answer to this question, it is necessary first of all to examine closely what evidence has been produced before the Court by both Parties. A careful perusal of the relevant documents, however, reveals nothing to show or even suggest that any discussion of the boundary line marked on Annex I map took place in the Mixed Commission of Delimitation or that any decision was taken by it. Twenty-five Minutes of the said Commission have been filed with the Court and they contain no record of any such discussion or decision. Yet it will be recalled that at the very first meeting of the said Commission on 31 January 1905 held at Svai Don Keo, a French and a Siamese secretary were respectively appointed by the two Presidents to draw up minutes of the meetings, and it was agreed by them that "the task the Commission had to fulfil was therefore divided into three parts:

1. The reconnoitring of the territory.
2. Surveying the territory.
3. Discussion and definite fixing of the frontier."

5. At the meeting of the Commission on 7 February 1905, when a difference of opinion arose as to the best way of determining the frontier line with reference to the sources of the Prek Kompong Prak and the watershed between the Stung Pursat and the river Mong, Commandant Bernard, the French President, reminded General Mom Chatidej Udom, the Siamese President, of the procedure established at the first meeting, according to which:

"the Commission should first carry out a general reconnoitring, gather information of various kinds which would make it possible to fix on the spot the points through which the frontier passed, then mark that frontier on the map and finally, if necessary, discuss whether it was correct and make any essential modifications. As soon as agreement was reached, the frontier line would have been finally determined by the members of the two Commissions signing the map on which the frontier had been marked."

As another example of the importance which the Mixed Commission attached to the agreed procedure of delimitation, as stated above—and there are many others in the Minutes of its meetings—I may refer to the discussions between the two Chairmen at a meeting of the said Commission on 18 January 1907 at Pak-Moun relating to the Siamese proposal to take as frontier the central meridian falling between the O Roun and the former bed of the Prek Kompong Tiam, when Colonel Bernard replied:

"The question could not be studied until the two Commissions were in possession of the maps which were then in course of preparation and which the topographical officers were to take with them to Bangkok."

6. Since it has not been claimed that other meetings of the Mixed Commission had been held, the Minutes of which had been lost, it can be concluded that no other meeting had taken place and that no decision concerning the frontier line of the Dangrek sector to the east of Kel Pass and west of the Pnom Padang as marked on the map Annex I, according to which the Temple of Preah Vihear is situated within Cambodian territory, had ever been taken.

7. It appears equally clear from the agreed procedure of the Mixed Commission for its work of delimitation that the French officers who were charged with the making of the maps, including the Annex I map, had no authority to give any final interpretation about any part of the proposed boundary line including the line marked on the said map, in regard to which no decision had been taken by the Mixed Commission. Nor could it be maintained, in the absence of any evidence of specific instructions from the said Commission, that whatever power of adaptation which the Treaty of 1904 may have conferred on this Commission as a body, also appertained to the French topographic and geodetic officers whether for the Dangrek sector or for any other part of the frontier to be delimited.

8. The meeting of 18 January 1907 to which I have just referred was in fact the last meeting<sup>1</sup> of the Mixed Commission which dealt with any question connected with the work of delimiting the frontier line stipulated in the Treaty of 1904. At this meeting the only decision taken was one which, in regard to "the determination of the frontier in the region of Pnom Pa Dang (Phu Pha Dang)" fixed the thalweg of the Huei Don as the boundary from where this stream meets the Mekong and stated: "The frontier would go up that thalweg as far as the source of the water course and would then follow the crest of the Phu Pha Dang to the south-west." This decision was also alluded to in Colonel Bernard's letter of 20 February 1907 to the French Minister in Siam:

"All along the Dang Rek and as far as the Mekong, the fixing of the frontier could not have involved any difficulty. It was only a question of determining at what point Pnom Padang adjoins the Mekong. On this point there was no possible discussion for the mountain joins the river at one point about seven kilometres below Paknam."

<sup>1</sup> There was another meeting of the Mixed Commission on 19 January 1907, but it was held solely for the purpose of determining "the plots of land that are to be conceded to the French Government at the mouth of the Semoun, in conformity with Article 8 of the Treaty of 13 February 1904".

Here in the passage quoted above, Colonel Bernard, besides reporting the determination by agreement of the said point, was obviously expressing his own view as to the task of fixing the boundary all along the Dangrek. For on 20 February 1907 the report of Captain Oum, who had been assigned the work of surveying this sector of the Dangrek, had not yet been received, since we learn from Colonel Bernard's report of 6 March 1907 to the Governor-General of Indo-China that "the topographical officers arrived here between 18 February and 4 March and the provisional maps of the frontier region could not be completed until yesterday". "Here" evidently meant Bangkok and "yesterday" 5 March 1907. It is, therefore, clear that the Mixed Commission could not possibly have had a discussion, not to say taken a decision, at its meeting of 18 January 1907 to fix the boundary line all along the Dangrek westward from the Mekong to Kel Pass.

9. Another plenary meeting of the Mixed Commission had, indeed, been contemplated, as it was reported in the letter of 23 February 1907 of the French Minister in Bangkok to the French Minister for Foreign Affairs:

"The maps indicating the frontier can be brought up to date in a fairly short time and the plenary meeting of French and Siamese Commissioners will probably be held before 15 March."

Colonel Bernard himself considered that "the Delimitation Commission could not be dissolved without having closed the work by a final agreement" and used this point as one of his reasons for urging Mr. Strobel, General Adviser of the Siamese Government, whom he had already seen several times since his arrival in Bangkok on 1 March 1907, to push a French proposal, based upon his "more ambitious plan" of acquiring for French Indo-China the three provinces of Battambang, Siem Reap and Sisophon from Siam. According to Colonel Bernard's Report to the Governor-General of Indo-China of 19 March 1907, a plenary meeting of the Mixed Commission "which was to have taken place the next day, 8 March, was postponed indefinitely"—Annex 50 to Rejoinder. The French Minister in Bangkok, in his letter of 27 March 1907 to the French Minister for Foreign Affairs, states that:

"the delay that occurred with regard to the plenary meeting of the Commission was properly explained by the fact that topographical officers had not yet returned to Bangkok and no definitive map could therefore be submitted for the deliberations of its Members".

10. The same letter of the French Minister adds:

"On 8 March the first steps were taken and the conversations continued actively for six days. Mr. Strobel ... was definitely won over by the prospect of an arrangement of which he perceived all the advantages in the interest of both countries..."

From 8 March on, a rapid succession of events followed. Colonel Bernard was in daily conferences with Mr. Strobel. In the evening of 13 March, the King of Siam, accompanied by his Ministers, met Mr. Strobel at the latter's residence for three hours and finally "authorized Mr. Strobel to proceed to written negotiations and recommended to expedite matters". A draft treaty was drawn up on 14 March and formed the basis of the negotiations. The final text of the Treaty of 1907 was prepared on 19 March. The treaty with its protocols and agreements was signed at 10 p.m. on 23 March 1907 by the Siamese Foreign Minister and the French Minister in Bangkok. Colonel Bernard left the Siamese capital on the 26th for Saigon from which he sailed for France on 5 April without holding a final meeting of the Mixed Commission to close its work he had contemplated.

11. I have given the above brief account of the busy events which fully occupied the time and attention of Colonel Bernard, who was also second French plenipotentiary to negotiate the Treaty of 1907, in order to indicate the circumstances which led to the indefinite postponement of the contemplated plenary meeting of the Mixed Commission of Delimitation. It was at this proposed meeting that, among other questions, the sketch map of a frontier line in the Dangrek sector from the foot of Pnom Padang westward to Kel Pass, drawn up by Captain Oum (a Cambodian officer and member of the French Commission, who, according to Colonel Bernard, "could not see these ancient glories of his country without writing or bringing him his complaints") was to have been discussed and decided upon, but actually no such meeting took place. In fact the work of delimitation of the First Mixed Commission was left unfinished.

12. It is true that, as a result of the meeting of the Mixed Commission of 2 December 1906 the Presidents of its French and Siamese groups made a journey together along the Dangrek range and probably visited the Temple of Preah Vihear. But there is no substantial reason to suppose that they took any decisions as to the frontier line in the Dangrek sector or as to the attribution of the Temple. It will be recalled that they, following an agreement reached at the said meeting of the Commission, travelled eastwards along the range from Kel Pass by the same route which Captain Tixier had reconnoitred in February 1905, and which was 10-15 kilometres from the crest of the Dangrek, on the Siamese side. The purpose of the journey had been explained by Colonel Bernard, the French President, when he had said that:

"from that road to the crest of the mountains, they would be able to make all the reconnaissances that might be thought necessary since they would be some ten to fifteen kilometres at most from that range".

The surveying of the crest was yet to be undertaken by Captain Oum who had just been assigned the task. These two Presidents may have inspected the general topography of the sector and made all the necessary "reconnaissances" from distance but could not possibly have fixed any precise line, indispensable to a delimited frontier, without a complete report with sketch maps of the work of the survey officer and it would have been equally impossible to attribute the Temple to one Party or the other without knowing first where the finally delimited frontier line would be located in the sector.

13. Under Clause III of the Protocol attached to the Treaty of 1907 the second Mixed Commission of Delimitation set up under its Article IV "shall determine and trace if necessary, on the spot, that portion of the frontier which is described in Clause I of the present Protocol". In other words, it had the power and the duty, in case of need, to delimit any part of the portion defined in the latter provision, referring, obviously, to any portion which had not been delimited or the delimitation of which had only been partially done. But the second Mixed Commission did not avail itself of this power as regards the work of the first Commission. Could this fact be logically or reliably considered as showing that the first Mixed Commission must have completed its task including the final delimitation of the frontier in the whole Dangrek sector? From what has been pointed out earlier, the only decision taken at the meeting of the first Mixed Commission on 18 January 1907 related to the fixing of the eastern terminal point of the frontier line connecting with the Mekong and the adoption of a line westward as far as the sources of the Huei Don and, following the crest of the Pnom Padang, to the foot of this mountain range. This portion approximates less than 15 kilometres of a frontier line of some 300 kilometres long to be delimited from the said point westward to Kel Pass in the Dangrek sector. The failure of the second Mixed Commission to complete the unfinished work of the preceding Commission, though it had the power to do it, was obviously due to a misapprehension of the nature of the line adopted by the first Commission on 18 January 1907 as mentioned at the end of the penultimate paragraph of Clause I of the Protocol attached to the Treaty of 1907—a misapprehension which is explained in the following paragraph 16.

14. It is thus seen that the frontier line marked on the Annex I map was neither approved nor even discussed by the Mixed Commission of Delimitation nor was it agreed to by the French and Siamese Presidents of the said Commission. It follows from these indisputable facts that the map in question does not possess a treaty character as claimed by Cambodia and therefore, as such, obviously cannot be binding upon Thailand in regard to the issue of territorial sovereignty over the Temple of Preah Vihear.

15. It is contended that even if the line on the Annex I map had not been approved by the First Mixed Commission, the Siamese Government had requested the French Commission to make this map as well as the other ten, and therefore the said map, though prepared in Paris by French officers under the supervision of the President of the French Commission of Delimitation, carried the consent and authority of Siam. But what is the nature of the request, and what is the real character of the map requested of the French Commission? The answer to these questions is clearly indicated in the Minutes of the meeting of the Mixed Commission of 29 November 1905. Commandant Bernard stated at this meeting:

“that he wished, before the Commission started work, to thank the Siamese Government for the proof of confidence it had just given the French Commission by requesting that the map of the whole frontier region should be executed by the French officers”.

General Mom Chatidej Udom said in reply:

“that by leaving it to the French Commission to draw up the map of the frontier region, the Siamese Government had indeed wished to show that it had complete confidence in the French officers”.

It appears that the requested map was a separate matter not directly connected with the work of delimitation of the Mixed Commission, and, as such, when it was made, certainly it could not be regarded as constituting or implying any binding obligation on Thailand as to the character of the map to be made. The correctness of this view of the nature of the request is borne out by the Minutes of the meeting of the Mixed Commission on 17 January 1906 at which Commandant Bernard, in discussing the programme of work for the French officers and the possibility for them to push on with the triangulation as far as the Dangrek so as to join up that year's work with the work of the following year, stated:

“If not, Captain Tixier and Lieutenant Sée would be employed in extending the surveys carried out by Captain de Batz and Lieutenant Tournyol so as to give a more complete map of the frontier region. At that moment there was no satisfactory map in existence and it would be useful for the two countries to have.”

Clearly, this was to be a general map of the whole frontier region and did not form a part of the regular programme of delimitation of the Mixed Commission. Those portions of this map which contained frontier lines the determination of which was within the competence of the Commission and which were approved by it, of course possess a treaty or conventional character, not from the fact of a request by the Siamese Government, but from the fact of their approval by the said Commission, and the other portions

showing frontier lines, though also within its competence but not yet approved by it, such as map Annex I, cannot have this character.

As to the reference to "the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers" made in the letter of the Siamese Minister in Paris of 20 August 1908 to the Minister of Foreign Affairs in Bangkok transmitting the maps he had received from Captain Tixier of the French Commission, I do not attach particular importance to it. For it is not known what was the source of his information. There is no evidence of any of the Siamese Commissioners having communicated with him about their work or about the maps in question. Nor does it appear that his letter was in reply to any communication from his Government. More probably he simply repeated what Captain Tixier had presumably told him, verbally but imprecisely, while handing him fifty copies of the eleven maps including the Annex I map for forwarding to the Siamese Government, on the basis of the fact that the request of the Siamese Government for the French officers to prepare a general map of the whole frontier region had formed the subject of an exchange of friendly remarks between the Presidents of the two national Commissions at the meeting of the Mixed Commission mentioned above.

Consequently, the argument for the validity of the Annex I map based upon the request of the Siamese Government or even upon a request of the Siamese Commissioners, if true, to the French officers to prepare a general map of the whole frontier region between Siam and French Indo-China does not appear well-founded.

16. Nor, in my view, does the contention that the Protocol annexed to the Treaty of 23 March 1907 was a confirmation of the Annex I map have more substance. Clause I of this Protocol, after describing the greater part of the new frontier between French Indo-China and Siam as the result of the mutual cessions of territory stipulated in the 1907 Treaty, states that:

"it continues in a straight line to a point situated on the Dang-Rek, half way between the passes called Chong-Ta-Koh and Chong-Sa-Met",

and then it reads in its third paragraph:

"From the above-mentioned point situated on the crest of the Dang-Rek, the frontier follows the watershed between the basin of the Great Lake and the Mekong on the one side, and the basin of the Nam-Moun on the other, and reaches the Mekong downstream of Pak-Moun, at the mouth of the Huei-Doue, in conformity with the line adopted by the preceding Commission of Delimitation on the 18th January, 1907."



What had been decided on 18 January 1907 was to fix the eastern terminal point of the proposed frontier line which meets the Mekong in pursuance of the relevant provision of the Treaty of 1904 and to approve a small portion of the frontier line therefrom as far as the source of the Huei-Doue (Huei Don) and the end of the crest of the Pnom Padang (Phu Pha Dang). This delimited portion was shown in a rough sketch attached to Colonel Bernard's letter to the Governor-General of Indo-China of the same date as the said meeting of the Commission. No sketch map covering the whole line along the Dangrek from the Mekong west to Kel Pass had been brought back by Captain Oum as yet. He was then on his way west to Bangkok and was not due there until after 20 February 1907, and the sketch map was not completed till 5 March 1907. The Mixed Commission could not have had this sketch at its meeting of 18 January 1907. The only line which could have been and was "adopted by the preceding Commission of Delimitation on the 18th January, 1907" was the one shown in the sketch enclosed in Colonel Bernard's letter just mentioned. I have already referred earlier to an apparently similar misapprehension on the part of the Second Mixed Commission of Delimitation set up under the 1907 Treaty of the character of the line adopted by the first Mixed Commission at its meeting on 18 January 1907. In no way can the said protocol be validly said to have the effect of confirming the whole frontier line in the Dangrek range east of Kel Pass as marked on the Annex I map.

## II

17. In the face of the established fact that neither the line shown on the Annex I map nor a sketch of it was ever approved or seen by the first or second Mixed Commission of Delimitation at any of its meetings, the Judgment of the Court seeks to infer an alleged acceptance of the said map by Siam from certain circumstances.

18. One of these circumstances is that after the eleven maps of the different sectors of the frontier, including the Annex I map, were prepared and printed in Paris under the supervision of Colonel Bernard in 1908 and fifty copies of each were delivered by Captain Tixier, a French member of the Mixed Commission of Delimitation, to the Siamese Legation in Paris for transmission to the Siamese Government, the Siamese Minister in Paris, after retaining two copies each for the use of his Legation and distributing one copy each to the Siamese Legations in London, Berlin, Russia and America, forwarded the rest to his Government in Bangkok which received them without raising an objection, or making a reservation, to the frontier line marked on the Annex I map. It is also emphasized that Prince Damrong, the Siamese Minister of the Interior, thanked

the French Minister for sending him an extra set and even asked for fifteen more sets for the purpose of distributing them among the Siamese provincial authorities.

19. The essence of the argument under consideration is that the Siamese authorities mentioned in the preceding paragraph must, upon receiving it, have seen the line mapped and noticed the location of the Temple of Preah Vihear on the Cambodian side, yet they did not raise any objection. It is quite probable that the said Siamese authorities did look at the map but it does not necessarily follow that therefore they must have discovered the actual location of the Temple. The said map is one of a set of eleven, and there was no special reason why the Annex I map should have been singled out at the time for particular attention. No question about the Temple had been raised by either France or Siam during the negotiations for the Treaty of 1904 or subsequently in the meetings of the Mixed Commission of Delimitation. It had never been in issue between the two Parties at any time before 1908. Moreover, the Annex I map was drawn on the scale of 1 : 200,000, which means that the distance of 500 metres on the ground lying between the alleged frontier line and the Temple area is represented on the map by a width of only 2.5 millimetres. And because the Temple is perched on the summit of the promontory of Preah Vihear, the mark indicating the Temple is buried in a tangle of contour lines in a small part of the map. Even if one looks specially for the mark, it is by no means easy to find it. The alleged reason, far from constituting a legal basis for the presumption of Siam's acceptance of the Annex I map, is no more than a conjecture.

20. It was certainly not unusual for Prince Damrong to have expressed his appreciation upon receiving an extra copy of the whole series from the French Minister who obviously did it as a special act of courtesy. Nor is it difficult to understand that he should have requested more copies for distribution to the Siamese provincial authorities, especially when it is recalled that at the time Siam did not yet have a good modern map showing the whole frontier region between Siam and French Indo-China, and that the Siamese Government had previously requested the President of the French Commission to have one made by the French topographical officers. In the light of these facts the Prince's expression of appreciation to the French Minister and his request for more copies, in my view, have no special significance and cannot reasonably be considered to support a legal presumption of Siam's acceptance of the boundary line marked on map Annex I.

21. Under an authorization of the French Minister of the Colonies dated 26 May 1908, Captain Tixier undertook to allocate the series

of II maps including the Annex I map. To the "Members of the two Commissions" he sent 19 copies, so the Siamese members of the first Mixed Commission of Delimitation obviously also received their share of the copies. But this fact, in my view, does not bear the special significance attributed to it. The said Commission had ceased to function for more than a year, and its unfinished work had been taken over by the second Mixed Commission set up under the Treaty of 1907, so that the Siamese members of the preceding Commission had no longer any official capacity as such. They may or may not have examined the maps they received, but they certainly had no obligation to verify the accuracy or inaccuracy of the maps. Whatever may have been their reaction or attitude, their silence or neglect could not justly be considered to entail responsibility upon the Siamese Government as evidence of its tacit acceptance of the Annex I map.

22. A "Franco-Siamese Commission for the Transcription of the Map of the Frontier" was organized in 1909 and held two meetings to carry out its task. The two Siamese members, while they performed their part of the common duties, said nothing about the Annex I map. Could their silence on these occasions be validly considered to have a significant bearing upon the principal issue in the present case? According to the minutes of this body, the first meeting was held on 25 March 1909 and "the purpose of the Commission" was stated by Commandant Luang Bhuwanart Narubal of Siam to be:

"To try to find a system of transcription for adoption by the two countries in order to obviate any misunderstanding arising from the perusal of maps in which the names were erroneous or badly spelt. With that object, he had drawn rules for the transcription of Siamese characters in Roman characters and *vice versa*. He then submitted his work to the French Commission and the latter approved it after making a few modifications." (Annex XLVIII (c) to Cambodian Reply.)

The second meeting took place on 4 October 1909 and it is recorded in its minutes:

"The purpose of the meeting was to determine the main lines for the production of the general map. In the Protocol signed in Bangkok on May 1908, following on the operations of the Commissions for the delimitation of the frontier between Indo-China and Siam, one of the clauses stated that a general map of the new frontier would be drawn up jointly by French officers and Siamese officers." (Annex XLVIII (d) to Cambodian Reply.)

The text of the said Protocol has not been produced, but the nature of the work of the Transcription Commission is clearly indicated in the minutes:

“The object in view was to make available to officials of the two nations a document of identical nature, as detailed as the scale agreed upon would permit, which should do away with the errors in names that were so frequent, particularly when a frontier incident occurred...

The division into sheets as shown on the attached assembly table, showed that, by producing the maps which are surrounded by a red line, the whole of the abovementioned frontier zone would be covered by fifteen sheets and three half-sheets.

The format adopted would give a height of 250 millimetres and a width of 400 millimetres excluding borders and margins, so that each sheet would represent a portion of territory measuring 125 kilometres × 200 kilometres.” (*Ibid.*)

It is thus seen from the above-quoted passages that the work of the Commission, both as regards the transcription between Siamese and Roman characters on the maps and as regards the production of a general map, was entirely of a technical character to be carried out jointly by the French and Siamese members, who were apparently all experts in the field of cartography. They were not called upon by their terms of reference to verify the accuracy or inaccuracy of the frontier line marked on any of the maps they used in their work nor did they have any good reason to take up the task of verification on their own initiative. Consequently, the silence of the Siamese members of the Transcription Commission as to the line on the Annex I map in no way constitutes a substantial reason to support the contention of Siam's tacit acceptance of the said line.

23. In 1934-1935, as the result of a survey by her own officers, Siam discovered for the first time the erroneous location of the Temple of Preah Vihear on the Cambodian side of the frontier line as marked on the Annex I map. On the basis of this fact it is argued that since she raised no question about the error until 1958, she must be presumed to have accepted the Annex I map as correct. It is, however, to be recalled that as soon as the relative position of Siam *vis-à-vis* French Indo-China became less unbalanced as a result of the development of world events in 1940, the Siamese Government posted a Siamese guardian at the Temple to signify Siam's title of sovereignty over the area. When in 1953 Cambodia dispatched three guardians of its own to watch the Temple, they were sent back by the Thai (Siamese) authorities. When in 1954 the Cambodian Minister in Bangkok notified the Thai Minister for Foreign Affairs of his Government's intention to dispatch a detachment of troops to take possession of the Temple, Thailand at once sent a unit of its armed frontier police to the area in order to forestall the contemplated action of the Cambodian Government. These positive acts clearly evidence the absence of any intention on the part of Siam or Thailand to acquiesce in or accept the said

map line.

24. Importance is also attached to the Treaties of 14 February 1925 and 7 December 1937 and the Settlement Agreement of 17 November 1946 as further confirmation of the frontier line in the Dangrek shown on the Annex I map. But an examination of the relevant provisions of these instruments fails to bear out the assertion. Article 2 of the 1925 Treaty states:

“The High Contracting Parties confirm and reciprocally guarantee to respect the frontiers established between their territories by virtue of and in conformity with the provisions of former agreements and maintained by Article 27 of the present Treaty”;

and the relevant portion of this Article 27 reads:

“It shall also annul as from the same date the other treaties, conventions and agreements concluded between France and Siam with the exception, however, of the clauses regarding the definition and delimitation of the frontiers (contained in the Treaty of October 3, 1893, the Convention of February 13, 1904, the Treaty of March 23, 1907 and the Protocol annex thereto) ...”

Again, Article 22 of the 1937 Treaty states:

“The present Treaty shall, as from the date of its entry into force, replace the Treaty of Friendship, Commerce and Navigation concluded at Bangkok on February 14th, 1925. It shall also annul, as from the same date, the other Treaties, Conventions and Agreements concluded between Siam and France, with the exception, however, of the clauses relating to the definition and demilitation of the frontiers, the guarantee in respect thereof, and the demilitarization of the Mekong frontier (contained in the Treaty of October 3rd, 1893, the Convention of February 13th, 1904, the Treaty of March 23rd, 1907 and the Protocol annexed thereto, and the Treaty of February 14th, 1925) ...”

It can be seen from the foregoing provisions that the confirmation is of a general character, and refers to the whole body of territorial settlements determined by the previous treaties still in force. Nothing is said therein about the particular frontier line in the Dangrek marked on the Annex I map. Indeed, the question of this confirmation appears clearly to have been only an incidental one because the main subjects of negotiation related to quite different subjects, as the titles of both instruments indicate, namely, Treaties of “Friendship, Commerce and Navigation between Siam and France”.

25. It is argued that if Siam had considered the Temple of Preah Vihear to have been incorrectly placed on the Cambodian side of the frontier line shown on the map Annex I, she should have made a reservation to that effect in the Treaties of 1925 and 1937, the Settlement Agreement of 1946 and the Report of the Commission in 1947, because all these instruments confirmed or restored the

territorial settlements stipulated in the earlier Treaties, including the Treaty of 1904 and the frontier lines delimited by the Mixed Commission set up under the said Treaty; and that her failure to do so must be regarded as evidence of her tacit acceptance of the frontier line on the Annex I map.

26. As has been pointed out earlier, the said confirmation is entirely of a general and incidental character. The two Treaties of 1925 and 1937 deal principally and almost exclusively with the questions of "Friendship, Commerce and Navigation between Siam and France". Of the 29 Articles and 2 Protocols of the Treaty of 1925, only Articles 2 and 27 relate to the confirmation of the definition and delimitation of the frontiers provided for in the former Treaties. The Treaty of 1937 contains 24 Articles, 1 Protocol and 6 Exchanges of Notes, but only one of them, Article 22, provides for the said confirmation. These two occasions could hardly be regarded as appropriate for making a reservation as to the question of sovereignty over the Temple area. There is no evidence to show that in 1925 Siam had already found out that the Temple was incorrectly located, and, even assuming it had, it would still appear reasonable to ask whether the occasion, such as it was, was one which would normally have called for or justified a reservation of the character stated. By 1937 Siam's own survey department had, in 1934-1935, as already noted, discovered the mistake as regards the location of the Temple on the Annex I map, but the circumstance in which the Treaty of 1937 was negotiated was not so different from that of the 1925 Treaty as to warrant a reservation.

27. Moreover, the two bilateral instruments referred to above could not have been intended, and certainly they do not stipulate, to cure any inherent defect in any of the previous Treaties, protocols annexed to them, and agreements relating to territorial settlements and delimitations of boundary lines. This observation applies even with greater force to a document unattached to any of the said instruments such as the map Annex I. By their general language they simply confirm these instruments as they stand with their perfections and imperfections; they detract nothing from their contents nor add anything to them. The fact that the Annex I map was not approved by the Mixed Commission of Delimitation set up under the Treaty of 1904 still stands as a pertinent fact, and its lack of a treaty character remains true today.

28. The Settlement Agreement of 1946 was negotiated and concluded at the request of France for the purpose of restoring the *status quo ante* in regard to the whole boundary line between French Indo-China and Siam prior to the Convention of Tokio of 9 May 1941. In fact it provided for the abrogation of the said convention and for the restoration *in toto* of the territorial settlements confirmed in the Treaties of 1925 and 1937. If this act of restoration is to be regarded as an act of confirmation of the terri-

torial settlements effected by the Treaty of 1904, it certainly amounts to no more than what is confirmed by the Treaties of 1925 and 1937.

29. The Report of the Conciliation Commission was issued in 1947 after Siam and France had respectively argued for and against certain territorial changes proposed by the former, the Siamese claim aiming to recover certain whole provinces from France. It would have been out of place for the Siamese Government to raise, on that occasion, the question of sovereignty over the small piece of territory as the Temple area, the more so, since this question was not in issue at the time. Moreover, the Temple continued to be watched by a Siamese guardian since 1940. In view of this fact, it would seem to have been more appropriate for France to make a reservation or protest at the time, but none was made either.

30. The fact that the Siamese Royal Survey Department produced a map in 1937 showing Preah Vihear as lying in Cambodia is, in my view, of no significance as regards the question of Thailand's attitude to the Annex I map. As explained by Counsel for Thailand, it was intended for use by the Siamese military authorities. It is nothing unusual that in the privacy of a country's own survey department maps of any kind, of whatever origin, should have been reproduced for its own use either for their scale and useful details or for other reasons.

31. Thailand's use of a map before the Franco-Siamese Commission of Conciliation in 1947, in which the Temple of Preah Vihear is located on the Cambodian side, may appear striking at first sight. But it has no more significance than the map of 1937 just considered, when the circumstances in which it was used are taken into account. As has been stated earlier, Thailand's case before the Commission consisted of claims the chief of which was for retrocession from France of several entire provinces which she had reluctantly yielded to her mainly in 1904-1907, and the map was obviously used to indicate their location and limits. The question of the Temple of Preah Vihear was not in issue, since to raise this question at the time, involving the territorial sovereignty of an area of the size covered by the ruins of this sanctuary along with Thailand's principal claim for the retrocession of several provinces would obviously have appeared incongruous and out of place. The occasion, as has been noted earlier, was clearly not a compelling or appropriate one for this purpose.

32. The incident of a visit of Prince Damrong to the Temple of Preah Vihear in January 1930 and the presence of the French Resident of the neighbouring Cambodian province of Kompong Thom on the scene in his official uniform with decorations and the appearance of the French flag on a pole in front of his own pavilion

is regarded as particularly significant. But the facts are simple and do not support the claim of significance assigned to it. The Prince then was no longer Minister of the Interior; he was President of the Royal Institute of Siam with duties connected with the National Library and archaeology. He made the trip to Preah Vihear in the latter capacity, accompanied by his three daughters and a suite of officials. The French Resident had with him his assistant and the noted French archaeologist Henri Parmentier. When the parties met on the Temple grounds, speeches of welcome and thanks were exchanged and toasts were drunk. The Resident said he had come to present the compliments of the Superior Resident and his own to the Prince for his "reputation as a sincere friend of France and her subjects and protégés" and also as a well-known archaeologist. No allusion was made by the French Resident to any question about the territorial sovereignty over the Temple, though Parmentier, speaking as a fellow archaeologist and extolling the fame of the Prince for his interest in archaeology, referred to the Temple as "another of the monuments of our Cambodia" (Annex LIII *b* to Cambodian Reply). The Prince, in his reply, said that "he had come to see the Temple and had nothing to do with politics".

33. According to a statement of his daughter who accompanied him on the visit, he suggested to the French officer "to get out of his uniform". The display of his national flag by a foreign official, even by a private Occidental, was not an uncommon sight in an Asiatic country during that epoch; it may or may not have displeased the Prince. There was no clear cause for the Prince to make a protest at the time or to ask his Government to lodge one in Bangkok, though in the affidavit of one of his daughters who was with the Prince during this visit, it is stated that he privately considered the hoisting of the French flag at the place of their meeting and the donning of his official uniform by the French officer to be "impudent". The despatch of a letter of thanks and some photographs taken during his visit by Prince Damrong to the French Minister for transmission to the French authorities in Indo-China meant no more than a customary act of Oriental courtesy. In a word, the incident viewed in the light of the available evidence and the then prevailing conditions in Siam—and, in fact, in other parts of Asia—did not have the meaning and significance sought to be inferred from it.

34. It is of course an undisputed fact that both the pavilion in which the French Resident and his associates spent the night and the flag pole on which was hoisted the French national flag had been put up specially for the temporary purpose of welcoming the Siamese Prince. In view of this fact, taken together with the other



related circumstances referred to above, it may be reasonable to presume that the French officer's presence had been intended to assert French authority or Cambodia's sovereignty over the Temple area and that the Prince or the Siamese Government must have regarded the episode in itself as constituting a sufficient cause for protest. However, even if this presumption is correct, it does not necessarily follow that they should not have waited for a more propitious occasion to make one than in the actual circumstances prevailing at the time. The reason why "he did not ask the Government to lodge a protest" was eloquently stated by his daughter, Princess Phun Phitsamai Diskul, who went with him during the visit to the Temple, to be as follows:

"It was generally known at the time that we only give the French an excuse to seize more territory by protesting. Things had been like that since they came into the river Chao Phya with their gunboats and their seizure of Chanthaburi."

In view of the history of the relations between Siam and French Indo-China at the time and earlier during the preceding decades, the Princess's explanation seems natural and reasonable. It was a situation not peculiar to Siam. It was, generally speaking, the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion.

35. Thailand's failure to reply to the four notes addressed by the French Legation in Bangkok to the Ministry of Foreign Affairs, at first enquiring about the presence of Thai guardians at the Temple of Preah Vihear, later stating that the ruins of this sanctuary were "indubitably situated in the territory of Cambodia", asking that measures should be taken to put an end to the situation, and setting out the French point of view as to the historical and legal aspects of the frontier question, is regarded as another ground for presuming Thailand's tacit acceptance of the boundary line marked on the map in question. What were the actual considerations which induced the Siamese Government to refrain from replying to the notes in question is not known. But whatever they were, whether it was because the French claim was clearly based on an error in relying on the Protocol attached to the Treaty of 1907 or it was because Siam had always regarded the Annex I map as of no binding character, or for any other reason, her consistent attitude and conduct during the five decades since 1904 in respect of her title to sovereignty over the Temple area are facts which clearly refute the presumption. Moreover, it will be recalled, as Prince Naradhip stated at the time of negotiations with the Cambodian plenipotentiaries in 1958, that the Thai guardians of the Temple had remained on post since 1940. This is a significant fact to be noted; it

indicates the true intention and attitude of Thailand in respect of the question of sovereignty over the Temple area.

### III

36. Since Cambodia's claim of sovereignty over the area in which the Temple of Preah Vihear is situated is based upon an alleged treaty character of the Annex I map which shows its location of the Temple on the Cambodian side of the frontier line marked thereon, and since the said map has been shown to be devoid in this character, it is important to consider the comparative attitude and conduct of the two Parties as tending to throw light on their respective intentions in regard to the question of sovereignty over the Temple.

37. With reference to this point, Cambodia has produced a number of documents and photographs relating to the "administrative tours" of the Governor of Kompong Thom "to Preah Vihear" and to the visits of several foreign missions, accompanied by him, to the Temple. According to the dates stated therein, all these visits and tours took place during the term of office of Governor Suon Bonn who also testified at the hearing. In other words, it was from 1948 to 1953. The more important of the documents submitted include a decree of the Governor-General of Indo-China of 16 May 1925 relating to the classification of the historic monuments and including the Temple of Preah Vihear among them (Annex XII to Memorial), a report of Commandant Lunet de Lajonquière in 1907-1908 on the ancient monuments, including the Temple of Preah Vihear, published in the *Bulletin of the Archaeological Commission of Indo-China* in 1909, in which he stated:

"The last delimitation of the frontiers attributes Preah Vihear, which is studied in that work under No. 398, to France." (Cambodia's Annex LXXXVI.)

38. Thailand, on her part, has filed with the Court a number of affidavits and copies of original documents as evidence of acts of administrative control by Siamese authorities in exercise of sovereignty in the area in which the Temple of Preah Vihear is situated. These acts relate, among other matters, to the building of roads to the foot of Mount Preah Vihear, the collection of taxes by Siamese revenue officers on the rice fields of Mount Preah Vihear, the grant of permits to cut timber in the area, the visits and inspections by Siamese forestry officers, the taking of an official inventory in 1931 of ancient monuments which included the Temple of Preah Vihear, the visit of the Under-Secretary of the Ministry of the Interior in 1924-1925 and the visit of Prince Damrong in 1930, both visits including the Temple of Preah Vihear.

39. It is difficult to find substance in the argument which rejects Siam's positive acts of administrative control in the disputed area as evidence of conduct as sovereign for the alleged reason that these acts were performed by local or provincial authorities in contradiction with the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped. This is an assumption refuted by the facts as shown. Moreover, administrative acts in the Mount Preah Vihear area, on which the Temple of the same name is situated, must necessarily have been performed by local officials as they were in other areas—acts such as collecting taxes, building roads, inspecting the forests, etc. They carried out these duties under the supervision of the Governor of Khukhan Province upon whom they depended for orders. The Governor himself was appointed by the King of Siam and was responsible to the Government in Bangkok. He not only had to submit periodic reports of his administration to the central government but also to carry out its instructions. The correspondence relating to the visit of the Deputy Minister of the Interior to his Province on an inspection tour in 1925 (Annexes 37 *a*-37 *i* to Counter-Memorial) and a like visit of Prince Damrong in 1930 (Annexes 39 *a*, 39 *b* and 39 *c* to Counter-Memorial), both visits including the Temple of Preah Vihear, shows further that the central government was in close contact with the provincial authorities, who in turn kept in close touch with the local officials. The "report of H.R.H. Krom Phra Nakhonsawan Woraphinit to His Majesty the King" in 1926 on the results of his inspection tour of the provinces is particularly illuminating. There can be little doubt that the acts of administrative control performed by the local authorities in the Temple area, far from contradicting any attitude of acquiescence in the said frontier line, reflect and confirm the consistent belief of the central Siamese government that the said area was under the sovereignty of Siam. In this connection it is pertinent to quote a particularly significant passage in the report of His Royal Highness just mentioned:

"The Governor [of Khukhan] informed me that in the area of the District Office of South Sangkha within the frontier mountain there is a stone temple on five elevations which is very big and beautiful, called Phra Viharn. (In the French map it is called Preah Vihear.) This stone temple is within our territory." (Annex 22 to Counter-Memorial.)

40. The belief that the Temple of Preah Vihear is within Siamese territory has not been confined to the prince alone but entertained generally by the Siamese central and local authorities. It is well

supported by a series of relevant facts. Before "the last ratification of the Treaty [of 1904] with France" the Siamese Minister of the Interior "sent telegrams to the various Governors-General forwarding a draft Proclamation concerning the territories ceded to France with the advice that it is to be made ready for posting, upon ratification, for the information of the inhabitants". Upon ratification, he sent telegrams, dated 10 December 1904:

"advising that the Proclamation should be posted within 15 days from receipt of the telegrams and asking for confirmation of the dates on which the local authorities in the territories ceded to France shall have received the same, so that the French Government may be informed accordingly for the purpose of taking over such territories".

On 16 December 1904 he informed the Siamese Foreign Minister further that:

"a telegram has been received from H.R.H. Sanphasit, His Majesty's High Commissioner for Isan, No. 19 dated the 11th instant, that advice has been given with instructions to Champasak and Khukhan to forward the Proclamations to 14 districts where all official work should stop so that the work of handing over the territories to France may be attended to".

Khukhan is the province in which the Temple of Preah Vihear is situated.

41. From the passages quoted above, it appears certain that all the territory ceded to France under the Treaty of 1904 was handed over to the French authorities in due course and that the Mount Preah Vihear, on the top of which the Temple of the same name stands in ruins, and the immediate vicinity were not understood by either Party to be part of the ceded territory. For it is an uncontroverted fact that the Siamese authorities continued to enforce administrative control over the area without any protest from the French authorities or any objection by the local inhabitants. This fact is significant, because the documentation shows that the French authorities had been alert and vigilant in having France's newly acquired territorial sovereignty respected by Siam. Thus, take one example out of many contained in the documentation to illustrate French alertness and vigilance. When five months after certain villages situated in the territory between the Pnom Padang and the Mekong had been handed over to the French authorities in January 1905, a Siamese official informed the local populations that the villages in question belonged to Siam and forbade them to obey the orders of the authorities of Bassac in Cambodia and later the same Siamese official sent agents to take a census of the inhabitants, animals and vehicles in those villages, the authorities of Bassac protested at once. The matter was reported to the Administrator of that province, the Resident Superior of

Laos and the Governor-General of Indo-China. The question was finally brought to the attention of the President of the Siamese Commission of Delimitation by the President of the French Commission. An investigation was made in due course, the complaints were found to be justified, and the Siamese President attributed the matter to "a mistake in the interpretation of the Treaty". Yet as regards the Temple area, though the Siamese local authorities continued to exercise administrative control after the Treaty of 1904 as they had done before, the French authorities did not protest at any time nor did the local inhabitants make any complaint, a course of action which they would certainly have taken if they had considered the Temple area to be part of the ceded territory.

42. Even though it might be said that the question of which Party was at the time entitled to the right of exercising sovereignty in the said area could not have been definitively settled until after the determination of a precise line of frontier by delimitation, the fact that, with the plausible exception of the episode of Prince Damrong's visit to the Temple of Preah Vihear in 1930, the French authorities did not at any time assert French authority or Cambodia's sovereignty, or raise any question or make any protest to Siam against continued performance of administrative acts in the Temple area until 1949 cannot be explained, except on the ground of their tacit recognition of Siam's sovereignty over the said area, or, presumably, on the ground of their knowledge that the frontier line on the Annex I map which had been drawn tentatively by Captain Oum, a Cambodian Member of the French Commission and an apparently ardent Cambodian irredentist<sup>1</sup>, had not been approved by the Franco-Siamese Mixed Commission of Delimitation to make it binding on Siam.

43. Another important fact evidencing Siam's consistent belief in her title of sovereignty over the Temple area should be noted. In accordance with a Royal Proclamation of 17 January 1924, relating to the inspection and preservation of archaeological objects in Siam, Prince Damrong, President of the Royal Institute, addressed two communications to the Governor-General of Nakhon Ratchasima, respectively of 23 July 1930 and 22 July 1931, calling for a verified inventory of ancient monuments in the Monthon. On 31 August 1931, the said Governor-General sent a reply enclosing an inventory in which "Khao Phra Viharn [Temple of Preah Vihéar] constructed of stone with fourteen edifices, built on five elevations, some of which are rectangular in shape of various sizes" is clearly stated to be one of the four ancient monuments in Changwat Khukhan, one of the provinces under his jurisdiction. (Thailand's Annexes 78 a-78 b.)

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<sup>1</sup> See Annex 58 to Rejoinder.

## IV

44. The foregoing account of facts and circumstances summarizes the situation which underlies the present dispute between the Parties. To resolve the dispute by a presumption of Thailand's tacit acceptance of the Annex I map on the ground of her silence or failure to react on several enumerated occasions runs, in my view, counter to the established facts and to the real character of the circumstances alleged to be relevant. For the purpose of evaluating the legal significance of silence relating to a claim of sovereignty words and conduct are the recognized indices or criteria. In the present case I have examined the evidence and found no statement or declaration of any kind by Siam or Thailand which recognizes, or can be considered to recognize, Cambodia's title to sovereignty over the Temple area. As to conduct, far from implying any acceptance of the Annex I map, she has consistently indicated a belief on her part throughout the past decades that the area in question continues to belong to her own sovereignty.

45. Thailand's claim in the present case to sovereignty over the Temple involves no question of good faith on her part. International jurisprudence attributes importance to silence as a relevant factor in determining the intention of a party in regard to a claim of sovereignty only in the light of its unequivocal conduct and of the attendant circumstances. Thailand's exercise of sovereignty in the form of sustained administrative control in the Temple area bears witness to her true intention. The evidence adduced refutes the argument in support of a presumption of her tacit acceptance of Cambodia's title to sovereignty over the Temple area as marked on the Annex I map.

46. Moreover, there is no valid ground in law for holding Thailand accountable for acquiescence. The rule of Roman law that "he who keeps silent is held to consent if he must and can speak" is, in my view, not applicable because the several occasions which are alleged to have been such as to call for a protest or reservation by her have been shown earlier to be entirely of a different character. Silence or failure to react, even when it constitutes a relevant factor, cannot alone be considered as implying recognition or acceptance of the other party's claim of sovereignty. In the *Anglo-Norwegian Fisheries* case, this Court attached legal importance to "prolonged abstention" of the United Kingdom from protesting against the Norwegian system of delimiting territorial waters but only as one of the factors: "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant

Norway's enforcement of her system against the United Kingdom" (*I.C.J. Reports 1951*, p. 139). In the case under consideration, no evidence has been adduced of any declaration or act by Siam or Thailand pointing clearly to her intention to recognize or accept Cambodia's claim of sovereignty over the Temple area.

47. Nor is there substantial ground for application of the principle of preclusion. The legal basis of that principle is that one party has relied on the statement or conduct of the other either to its own detriment or to the other's advantage. In the present case Thailand has not made a statement at any time indicating her acceptance or recognition of the frontier line marked on the Annex I map. As regards the allegation of her silence as warranting the presumption of such acceptance or recognition, it is plainly contradicted by evidence of sustained State activity in exercise of sovereignty in the Temple area. There is no evidence to show that France, as Cambodia's protecting State, ever relied on Thailand's silence to her own detriment. Thailand's unequivocal conduct relating to the Temple area has continued to be the same after 1904-1908 as it had been before this period. France's own failure to make a protest or raise any question about it until 1949 appears to have confirmed Thailand's belief that the said area had always remained under Thai sovereignty under the Treaty of 1904. Nor could it be validly argued that Thailand had derived special advantage from France's reliance, if there had been such, on her alleged silent acceptance of the Annex I map in 1908. In fact, as has just been shown, for over 40 years no such reliance appears to have been placed by France on the alleged binding character of the said map. What benefit Thailand may have received from the stability of the frontiers marked on the other ten maps, she has been entitled to it under the Treaty of 1904 and the delimitation work of the first Mixed Commission. These maps have not been put in question at any time. As regards the frontier of the Dangrek sector, if Thailand could be said to have enjoyed the advantage of stability, apart from her constant belief of the Temple area being always under her own sovereignty, it was due, not to any reliance by France upon Thailand's alleged acceptance of the Annex I map as binding on her, but rather to an apparent doubt on the part of the French authorities as to where the correct line really was with reference to the location of the Temple—a doubt which explains their continued silence and failure to raise any question in the face of the continued exercise of sovereignty by Thailand in the said area. In the light of the foregoing reasons, the application of the principle of preclusion against Thailand in the present case is, in my view, not justified.

48. The usual object of a boundary treaty, of course, is to achieve certainty of the frontier to which it relates in accordance with the principle of stability, and the recognized procedure to attain this object is by joint delimitation on the ground. In the present case it was precisely this procedure which had been stipulated in Article 3 of the Treaty of 1904. Therefore, the argument which seeks to support the application of the principle of stability by setting aside the clear intention of the Parties, as expressed in the said Article providing for careful delimitation by a Mixed Commission, and by basing it upon the presumed consent of Siam to an undelimited line on the Annex I map, seems to me to be strained and unreal.

## V

49. From the foregoing examination of the pertinent facts in this case and consideration of the law applicable to it, I summarize my twofold conclusion as follows:

- (1) that Cambodia has not succeeded in establishing the alleged binding character of the Annex I map; and
- (2) that Cambodia's contention of Thailand's silence as tacit acceptance of the frontier line marked on the map Annex I is refuted by fact and not warranted in law.

50. Where is, then, the frontier line in the Dangrek with reference to the Temple area and on which side of this line, in Thailand or Cambodia, is the Temple of Preah Vihear situated? The answer is provided, in principle, by Article 1 of the Treaty of 13 February 1904, which defines the frontier in the Dangrek as the ridge of "the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and of the Nam Moun, on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong". Of course it goes without saying that what is pertinent of this frontier in the present case, as has been stated at the outset, is only that portion which relates to the area in which the Temple in question is situated.

51. The essential task, then, in order to decide the case, is to apply or interpret the 1904 Treaty. But where is the true location of the treaty-defined watershed? This is a crucial question, and a correct answer must be given. The two Parties in the case have submitted reports by their respective experts which purport to give the necessary answer. However, while the four reports, two from each side, agree on the general location of the watershed line in the disputed area, they disagree on the crucial precise line. The International Training Centre for Aerial Survey of Delft, Holland, on behalf of Thailand, presents a line which places the major part of



the Temple ground on the Thai side whereas Doeringsfeld, Amuedo and Ivey, "Specialists in Photogeology and Photo-interpretation", of Denver, Colorado, submit a line placing the main portion of the Temple on the Cambodian side. The conflicting character of the two expert recommendations presents a perplexing problem, and the difficulty has been further increased by the outcome of the examination and cross-examination of the experts and witnesses at the oral hearing. From their testimony, it appears that besides the I.T.C. line and the D.A.I. line, there are two other possible alternative lines: one at Point 3 near Letter F on Map Sheet 2 attached to Annex 49 of the Counter-Memorial, and another one from Contour Line point No. 605, which is just a little west of the D.A.I. line close to the western side of the Temple and which almost coincides with the latter line.

52. There is also the question of the nature of the terrain of the saddle near F, and its elevation, which, according to Thailand's expert, who went out to the Temple area and made an investigation on the spot, blocks the eastward flow of stream 3 on the Map Sheet 2 into the Cambodian plain and causes it to turn westward to join stream 2 flowing northward into Thai territory. Counsel for Cambodia casts doubts on the accuracy of this statement and, in support of his incredulity, he cites, among other works on archeology, a passage from "*L'Art Khmèr classique*" by Henri Parmentier, Chapter IV, in which this author records his study of the Temple of Preah Vihear on the spot in February 1930 and mentions "a rocky plateau" near the north-east corner of the Temple, which

"falls in a somewhat steeper slope towards the east where there is a rocky ravine, the water from which flows towards Cambodia, forming a fairly considerable stream, the O Kbal Pos Nakrac".

The divergence of these two views, moreover, raises the following questions: what is the altitude of the saddle near F? Is its elevation uniform throughout its surface? What is the character of its terrain? Does it bear any traces of change by the hand of man?

53. Since there is no available record of any sketch map drawn up by Captain Oum on the basis of the survey he carried out in the Dangrek sector east of Kel Pass in the period of December 1906 and January and February 1907—which was the dry season—showing a precise line of the watershed in the said sector, except what is claimed by Cambodia to have been marked on the Annex I map, whereas the I.T.C. line was verified on the spot during the wet season in July 1961, it is also pertinent to ask for the purpose of ascertaining the precise line: To what extent does the topography of the

stream channels in the Temple area vary between the dry and wet seasons of a normal year?

54. Furthermore, Cambodia has maintained that what is relevant in regard to the location of the watershed in the Temple area is where it was in the period of 1904-1908 and not where it is in 1961-1962. This point gives rise to other questions: could the location of a watershed change in the course of time by natural phenomenon such as an earthquake, faulting of rock-beds, landslide or rock fall, etc.? Or is the watershed now found by the experts of both Parties in the Temple area part of the same watershed which the negotiators of the 1904 Treaty had in mind or which Captain Oum presumably marked on his sketch map on the basis of his survey on the spot in the Dangrek sector?

55. All the foregoing questions are of a technical character and call for an independent expert or experts to supply reliable answers. I am of the opinion that the Court would have been well advised, under Articles 44 and 50 of the Statute, to send its own expert or experts to investigate on the spot and make a report of their observations and recommendations, as was done in the *Corfu Channel* case (*I.C.J. Reports 1949*). Such a report would have been of great assistance to the Court in deciding the case by law on the basis of all the relevant facts of a technical as well as other character. I for one feel unable to reach a final conclusion satisfactory to myself without knowing the answers to the technical questions which I have defined above and which, in my view, bear a vital importance for a correct determination of one of the crucial issues in the present case.

(Signed) WELLINGTON KOO.