

DISSENTING OPINION OF SIR PERCY SPENDER

I regret that I am not able to associate myself with the Judgment of the Court. The reasons which have led me to differ from the conclusion at which the Court has arrived should I think be stated.

In the nature of things different minds approach problems in different ways. The approach to a legal problem is no exception. What is to be solved will be solved according to the manner of him who solves it.

The present proceedings are burdened with a great volume of evidence, a considerable amount of which is quite irrelevant.

The task is to sift the wheat from the chaff.

The case, in my view, is peculiarly one in which a conclusion may safely be reached only by a detailed examination of the evidence and a strict application thereto of the relevant principles of international law.

My own examination has led me to the conclusion that Cambodia has failed to make out any claim for relief.

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Article 40 of the Statute of the Court provides that the Application to the Court shall state the subject of the dispute. Article 32 (2) of the Rules of Court provides that it must also, as far as possible, state the precise nature of the claim and give an accurate statement of the *facts* and *grounds* on which the claim is based.

The subject of the dispute in this case is the Temple of Preah Vihear (in Siamese called Phra Viharn) over which the Kingdom of Cambodia claims sovereignty. Its claim as stated in the Application is based upon the *terms* of international conventions delimiting the frontier between it and Thailand.

The convention which the Application states is fundamental to the present dispute is the Treaty of 1904. This Treaty, supplemented by a protocol dated 29 June 1904, relates to a long line of frontier between Thailand and Indo-China. Article 1 thereof which dealt with a part of this frontier line stated, *inter alia*, that on the mountain chain of the Dangrek—on which the Temple happens to be situate—the frontier line should follow the line of the watershed until it reached a mountain range known as Pnom Padang, the crest of which it should follow towards the east as far as the river Mekong. Article 3 stipulated that the delimitation of “the frontier

determined by Article 1" should be carried out by a Mixed Commission. Such a Commission was duly established.

Cambodia's contention, as stated in the Application and Memorial, is that the work of delimitation was carried out from 1904 to 1907 and that, so far as concerns the delimitation of the frontier on the chain of the Dangrek, "the final frontier line was adopted by the Delimitation Commission during the year 1907" in the form of a map or map sheet known in this case as Annex I. On that Annex the area where the Temple is situated is shown as within Cambodia. This "frontier line" is stated in the Application as having been "formally approved" by a Protocol to the Treaty of 1907.

As will subsequently appear this last statement had no foundation. The statement was a complete misapprehension of the true position, first on the part of France, and later by Cambodia, and throws considerable light upon these proceedings and upon the reasons why Cambodia ultimately became obliged to move away from her case as formulated in her Application and resort to other and new grounds upon which to seek a basis for her claim for relief. There was no approval of the frontier line on any part of the Dangrek by the Protocol of 1907. The reference to what had been "formally approved" related to a decision of the Mixed Commission recorded at a meeting of 18 January 1907 when a point on the eastern extremity of the northern frontier between Indo-China and Siam, of which frontier the Dangrek formed the western sector, was determined.

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In the course of the oral proceedings Cambodia has endeavoured to extend her claim as stated in the Application and Memorial and the grounds on which it rests. But the principal ground on which it relies remains that stated, namely, that Annex I represents the delimitation of the Dangrek frontier by the Mixed Commission under the Treaty of 1904.

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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. It is however inherent in its Application and Memorial that its claim of sovereignty over the Temple is based upon the proposition that Annex I was a delimitation of the Dangrek frontier by the Mixed Commission established under the Treaty of 1904—and *solely* by that Commission. Sovereignty over the whole area shown on Annex I as south of the frontier line was, it claims, accordingly vested in it. This

area in fact included the site of the Temple and the land immediately surrounding.

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I shall first address myself to the principal ground on which Cambodia bases her claim to relief, the only ground indeed which Cambodia, in accordance with her Application, came to the Court to litigate.

The juridical foundation for the claim of Cambodia is to be found in Articles 1 and 3 of the Treaty of 1904. The legal system by virtue of which the frontier was to be delimited is set forth in Article 3 and nowhere else. It was for the Mixed Commission to be created under Article 3, and solely for that body, to make the delimitation.

The Temple finds no mention in the Treaty. Before a decision can be made as to which State has sovereignty over the Temple it is necessary to determine what is the line of the frontier. This is the central question.

The frontier was defined in Article 1 of the Treaty. What was to constitute a sufficient delimitation of that frontier was for the Mixed Commission to decide. It could, if it so wished in respect of any part of the frontier, delimit it by a reference in terms to the text of the Treaty and Protocol. That was a matter entirely for itself to decide.

Whatever the delimitation made, however, it was not a delimitation at large, it was controlled by Article 1 of the Treaty which "determined" the frontier¹. Subject to whatever power of adaption the Mixed Commission may inherently have possessed, the delimitation had to be established on the basis of the criterion laid down in Article 1 which on the Dangrek was the line of the watershed and only on the basis of this criterion. If it was not on the basis of this criterion, any purported delimitation would lack any legal force.

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The Minutes of the meeting of the Mixed Commission from the date of its first meeting on 3 January 1905 to that of 18 January 1907, which was to prove its last, were placed before the Court by Thailand.

In the course of oral argument it was faintly suggested by Cam-

¹ See Article 3 of the Treaty.

bodia that perhaps one or more Minutes might be missing, or perhaps all decisions taken by the Mixed Commission had not been recorded, or perhaps in particular a decision as to which State sovereignty in the Temple should be attributed was not noted.

There is no foundation for these suggestions. For quite apart from the internal evidence which the Minutes themselves provide there is other documentary evidence which establishes beyond reasonable controversy that the Minutes produced are a complete record of the deliberations and the decisions of the Mixed Commission. A report by Colonel Bernard, the President of the French Commission of Delimitation, of 14 April 1908 to the French Minister of the Colonies in which he forwarded an original copy of the Minutes indicating the number forwarded, establishes this. It is utterly unlikely that any decision of delimitation failed to be recorded in these Minutes.

The Minutes were the work of French and Siamese secretaries appointed by the Mixed Commission at its first meeting, who were "responsible for drawing up the minutes". The practice was for them to be drawn up by the French and submitted to the Siamese for approval and thereafter to be signed respectively by the President of each Commission. The Minutes were manifestly prepared with considerable care and in great detail. No record is to be found within them to support in any way the contention of Cambodia that a frontier line corresponding to Annex I or indeed a frontier line on the Dangrek shown on any map or sketch was at any time either discussed or decided upon by the Mixed Commission. Nor is there any reference at all to the Temple of Preah Vihear which indeed does not appear to have acquired any real importance for either State until many years later.

The matter of the frontier on the Dangrek was referred to at the first meeting of the Mixed Commission early in 1905. It was decided that the work of delimitation of the frontier from the Great Lake to the Dangrek and thence easterly to the Mekong should be postponed until a later season.

Nothing directed to this end was undertaken until December of 1906. It was not till then that the frontier line defined in Article 1 of the Treaty of 1904 received any direct consideration.

At a meeting of the Mixed Commission held on the 2nd of that month it was agreed to make a reconnaissance from the Great Lake to the Dangrek and thence easterly to the river Mekong to the point at which the crest of the mountain range known as the Pnom Padang met that river. This reconnaissance was in fact made and was completed by 10 January 1907, and so far as the Dangrek mountain range is concerned, apparently before the 3rd of that month, since at that date the Mixed Commission was at Ban Mek near the Mekong.

The labours of the Mixed Commission had until December 1906 been directed to the region of Luang Prabang¹, which was far to the north of and beyond the Kingdom of Cambodia, and to the region, within the Kingdom, between the Great Lake and the sea to the south.

In December 1906, when the labours of the Mixed Commission were directed to the frontier defined in Article 1 of the Treaty which was north of the Great Lake, Colonel Bernard had already other ideas as to where the western frontier line south of the Dangrek should be, ideas which were not in conformity with the frontier stipulated in Article 1 of the Treaty of 1904.

He was opposed to any part of the frontier being determined by a parallel and a meridian as laid down in that Article. It is evident from the Minutes of the Mixed Commission that he was determined, if he could, to prevent this taking place. His constant view made known at the first meeting of the Mixed Commission was that "it was absolutely essential that there should, above all, be a frontier that was visible and known to everyone". The frontier as stipulated in Article 1 of the Treaty north of the Great Lake, notwithstanding the clear terms of that Article, was inadmissible².

At the first meeting of the Mixed Commission in January 1905 he had lost no time in making his views known. The record of the Minutes of that meeting reads as follows:

"Commandant Bernard said that the task which their respective Governments had entrusted to the Commission was that of determining the frontier by following in its main lines the Treaty concluded between France on 13 February 1904... Thus as far as that frontier was concerned to the north of the Great Lake, it was stipulated that the frontier should start from the mouth of the river Stung Roluos and should follow the parallel from that point eastwards until it met the river Kompong Tiam; then turning northwards, it was to lie along the meridian from that meeting point to the mountain chain of the Pnom Dangrek.

Such a frontier was inadmissible between two civilized nations such as France and Siam..."

He never departed from this view. As late as the last meeting held by the Mixed Commission on 18 January 1907 he stated that:

"When accurate maps were available [italics added] a new frontier defined by topographical features should be sought."

Unable, as the Minutes reveal, to persuade the leader of the Siamese Commission to agree with his views on a new frontier line to the north of the Great Lake—the latter who throughout the work of the Mixed Commission endeavoured as a general rule to

¹ Article 2 of Treaty of 1904 and Article II of the Protocol.

² Minutes of Meeting of 31 January 1905.

adhere to the Treaty line, having made it clear that he was not empowered to discuss "*any frontier different from that of the Treaty*" [italics added]—Colonel Bernard conceded it was in those circumstances necessary for the Mixed Commission to define strictly the parallel and meridian indicated in the Treaty. In so doing, he stated, they would have established the rights of the two States and this would subsequently permit the final frontier in that region to be settled by a system of compensation.

The record reveals that at this point of time Colonel Bernard, and since October of the preceding year, had in mind plans to extend the frontiers of France a considerable distance to the west of those provided in the Treaty of 1904 and was concentrating his efforts to carry them into effect.

This finally he succeeded in accomplishing through the Treaty of 23 March 1907.

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The leader of the Siamese Commission having been insistent upon following the Treaty line, the two Commissions on 5 December 1906, by compromise, agreed upon a point which should be deemed to be the mouth of the river Stung Roluos within the meaning of Article 1 of the Treaty of 1904, and on 3 January 1907, again by compromise, agreed upon a point which should be deemed to be where the parallel from the former point met the river Prec Kompong Tiam within the meaning of the said Article.

Until these two points could be agreed upon it was not possible either to fix the frontier line from the Great Lake north to the Dangrek, or the commencing point on the frontier of the Dangrek whence it ran in an easterly direction to the Mekong.

Only one further meeting of the Mixed Commission was in fact to be held, namely, on 18 January 1907.

At its meeting of 2 December 1906, when the Mixed Commission's reconnaissance of the Dangrek and easterly to the Mekong was agreed to be made, it had been decided that a Captain Oum—an officer in the French military forces—"would *survey* the whole region of the Dangrek" whilst other French officers would carry out the survey measurements. A Captain Kerler with another French officer was to start work from the Great Lake working north to join up with the Dangrek where it was met by the meridian. The survey work was done exclusively by French officers, as was almost universally the case throughout the whole of the frontier regions. Captain Oum and Captain Kerler are those officers whose work on the spot is noted on the left-hand top corner of Annex I. The topographical surveys could not in any manner constitute delimitations. It is common ground between the Parties that the topographical and survey officers were vested with no discretion and had no power to delimit or discuss any question of delimitation of

any part of the frontier. Their duties were strictly technical.

Captain Oum was to commence his survey at the far eastern extremity of the Dangrek. He could not have commenced much before 10 December. He worked from east to west. The reconnaissance made by the Mixed Commission was made from west to east and to the north generally of the crest of the Dangrek. It is utterly unlikely that the Mixed Commission and Captain Oum made any contact and the Minutes do not suggest they did nor does any contemporary document.

On 18 January 1907 the topographical and survey officers were still engaged on their work. As the Minutes of that date reveal, the survey or map sheets of the region were still in course of preparation. Only a little over two weeks had expired since Captains Oum and Kerler had received instructions to commence their surveys, the former operating in particularly difficult terrain where progress was bound to be slow. On 18 January the Mixed Commission was at Pak-Moun on the Mekong. It had completed its reconnaissance of the frontier from the Great Lake to the Mekong at least a week before then.

The following day the two Presidents signed a minute of delimitation in respect of one of the small plots of land which had been agreed to be ceded to France by Siam under Article 8 of the Treaty of 1904. This proved to be the Mixed Commission's last official act.

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From as early as October 1906 Colonel Bernard had been agitating his superiors to enter into negotiations with the Siamese Government with a view to acquiring "all the old Cambodian provinces". If this could be accomplished it would result in carrying the western boundaries of Indo-China a considerable distance to the west. In that same month he was successful in obtaining official approval of his proposals. From that moment on his activities were mainly directed to this end. It is evident he was anxious to accomplish his purpose as soon as he could and then to wind up the Mixed Commission.

In the first week of March, on the arrival in Bangkok of Mr. Strobel, the adviser to the Siamese Government, his activities increased in their intensity.

On his journey through Paris Mr. Strobel had been informed of difficulties on the frontier north of the Great Lake. From the moment of Mr. Strobel's arrival events moved rapidly. They throw an interesting light upon the circumstances in which the work of the Mixed Commission came to an end.

The French topographical officers arrived in Bangkok at different times between 18 February and 4 March. They had by this latter date just completed their work in the field. Provisional maps of the frontier region were not completed *until* 5 March, and no final maps were in existence. A meeting of the Mixed Commission was provisionally called for 8 March by Colonel Bernard.

On this day however the first steps were taken by Colonel Bernard in discussions with Mr. Strobel to negotiate a new boundary treaty with Siam. The meeting of the Mixed Commission called for the same day was "postponed indefinitely".

Colonel Bernard's conversations with Mr. Strobel continued for six days.

At this point of time His Majesty the King of Siam was about to depart on a visit to France. Mr. Strobel sought to postpone solution of the question of absorption of the "old Cambodian provinces" until the King's return. Colonel Bernard was insistent upon it being settled before the King's departure.

Finally he persuaded Mr. Strobel to his point of view. He was, as the record abundantly reveals, an efficient officer and a dominating personality.

From that moment events moved rapidly.

A draft treaty was first drawn up on 14 March. It was signed on 23 March. Colonel Bernard left Bangkok on the 26th and on 5 April he sailed from Saigon for France where he remained.

No further meeting of the Mixed Commission was held. It dispersed and ceased to exist.

Colonel Bernard has given us his own commentary on these events:

"We had to take as the frontier a certain parallel and then discover at what point that parallel cut across a river called the Preck Kompong Tiam—and from that point we had to draw a meridian as far as the Dangrek mountains. But the river did not exist... A fresh start had therefore to be made and we could not complete the delimitation without concluding what was really a new treaty.

Moreover the need for tearing up the 1904 Treaty and for preparing a new one had become quite obvious to us the previous year."¹

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Annex I was one of eleven map sheets of the whole frontier regions covered by the Treaty and Protocol of 1904. Whatever survey sketches may have existed previously, these map sheets did not come into being until November of 1907. This is therefore a critical date since at that point of time the Mixed Commission no

¹ Lecture delivered by Colonel Bernard to the *Société de Géographie*, 20 December 1907.

longer existed. Since the Mixed Commission never met after 18 January 1907 and the topographical officers did not complete their work until at least a month later, it is evident that no report from Captain Oum and no sketch or working map in relation to the Dangrek frontier region of any description could ever have been placed before the Mixed Commission for discussion or decision. None ever was.

In the face of the facts stated—all of which are established beyond controversy—it is an unproductive exercise to have recourse to presumptions or inferences from the subsequent conduct of the Parties in an effort to establish that the Mixed Commission must in fact have made a decision delimiting the Dangrek by agreeing to the frontier line shown in or in the form of Annex I or in the form of any sketch or map.

No presumption can be made and no inference can be drawn which is inconsistent with facts incontrovertibly established by the evidence.

These facts admit of only one conclusion, namely: that the frontier line on Annex I was not a line agreed upon by the Mixed Commission as a delimitation of the frontier of the Dangrek.

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Independently of the facts stated it would seem a little unlikely to say the least that, when the Treaty and Protocol of 1907 was drafted, if there had been any map or sketch agreed to by the Mixed Commission which delineated the frontier line on any part of the Dangrek or the Pnom Padang east to the river Mekong that no reference whatever to such a map or sketch would have been made in the text of that Treaty.

Article I of the Protocol to the Treaty of 1907 described the new frontier between Indo-China and Siam. Included within the description was the frontier which extended along the Dangrek—from a point considerably west of the 1904 Treaty line—and ran across the Pnom Padang easterly to the river Mekong. Yet no map or sketch relating to the Dangrek is mentioned.

There was indeed in Article I of the Protocol of 1907 a reference to a sketch of the frontier, but this sketch did not cover the region of the Dangrek shown in Annex I. There was also a reference therein to a line (*tracé*) adopted by the Mixed Commission. This however related to the eastern extremity of the frontier above mentioned, and to a decision taken by the Mixed Commission at its last meeting on 18 January 1907 and recorded in the Minutes of that date to the effect that the thalweg of a certain river—the Huei Don—should be the agreed point at which the crest of the Pnom Padang met the river Mekong within the meaning of Article 1 of the Treaty of 1904.

Colonel Bernard played the principal role in the drafting of the Treaty and Protocol of 1907 particularly, I would think, in the technical description of the frontier. If an inference may be drawn it would seem permissible to assume, certainly all the probabilities would suggest, that at the date of that Treaty and Protocol, namely 23 March 1907, if there had been any map or sketch which up to that point of time had been agreed to by the Mixed Commission as delimiting any part of the frontiers from the Kel Pass on the Dangrek along the Pnom Padang to the east, it would at least have warranted some reference. The fact that there is no mention of any such decision is in the circumstances powerful, indeed, I think, overwhelming evidence that no such delimitation had been made.

Moreover, having in mind the great importance which today is said to have attached to the Temple in 1907-1908, it seems scarcely conceivable that, if as has been suggested, the Mixed Commission during its reconnaissance of the Dangrek made some decision of delimitation dealing with the Temple or Temple area, or the frontier in the region of the Temple, that it should be mentioned neither in the Minutes nor in the Treaty and Protocol of 1907 nor in any contemporaneous document.

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The reference in Article I of the Protocol of 1907 to a sketch and "tracé" immediately following the description of the frontier line on the Dangrek and Pnom Padang is, I think, of no little importance in this case. It has a distinct bearing upon the manner in which Cambodia has presented her case and why quite late in the proceedings she shifted from the ground on which she relied in her Application and added grounds which were neither set forth nor foreshadowed therein.

It is evident from paragraph 6 of the Application that Cambodia regarded this reference in Article I of the Protocol of 1907 as a formal treaty confirmation of the frontier line shown in Annex I.

In this—a very important part of her case—she was mistaken. It is evident also that France and later Cambodia were under a total misapprehension as to the meaning of this reference in the Protocol of 1907 for very many years.

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When the meeting of the Mixed Commission of 18 January 1907 had concluded, Colonel Bernard believed that the work of the Mixed Commission, at least in the field, had been completed. He said so in so many words in a telegram of the 28/29 January 1907.

If there were any decision of the Mixed Commission made by it during its reconnaissance of the Dangrek which, for some quite unknown reason, was not in any manner referred to in either the Minutes of 3 January or 18 January—or indeed on the next day when they met again together—it is manifest that it could not have been in the form of any line appearing on any sketch or map since, not only was there not then even a topographical sketch map of the frontier region in existence, but the topographical survey work, without which no line of the watershed of any description was capable of being drawn up and decided upon, was unfinished. Captain Oum was still in the Dangrek.

If then there had been any prior decision delimiting the northern frontier when the Mixed Commission held its meeting on 18 January 1907, it could never have been a decision to adopt a line corresponding with that on Annex I, or a line shown on a sketch or map. It would seem probable that it could only have been one to the effect that between the point on the Kel Pass on the west and an agreed point at the Mekong on the east the frontier line would be that stipulated in Article 1 of the Treaty, namely the line of the watershed on the Dangrek and the crest on the Pnom Padang.

Although, however, it is established that there never could have been any delimitation which adopted a line on any sketch or map, it does not follow that there was no delimitation of the Dangrek by the Mixed Commission.

The question whether there was any delimitation of the Dangrek, either in itself, or as part of the total northern frontier, and, if there were, in what form, will now be pursued.

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Since the Minutes of the Mixed Commission cover, as I am satisfied they do, all meetings of the Mixed Commission and record all decisions taken by it, if there were any delimitation of the northern frontier line, in particular of the Dangrek, it should be capable of being ascertained from them.

One possibility has been canvassed during the case, namely that during the reconnaissance of the northern frontier made by the Mixed Commission there may have been a decision taken by it, in which it was decided that the frontier line in the region of the Temple should for some local or other reason run in such a manner that the Temple would be on the Cambodian side of the boundary.

Apart from what I think is the inherent unlikelihood of such a decision, it is straining credulity too far to suggest that it would find no mention in the Minutes of the Mixed Commission. I am

quite unconvinced by attempts to explain this away by a suggestion that perhaps there was not sufficient opportunity to record the decision after the Mixed Commission had completed its reconnaissance, and that perhaps such a decision or at least one which related to the delimitation of the Dangrek generally would have been recorded at the meeting called for 8 March had it been held.

There was an opportunity on 3 January to record whatever decisions the Mixed Commission may have made in the course of its reconnaissance. If that opportunity was not sufficient there was another on the 18th of that month. Moreover, if any delimitation in relation to the Temple region had been made by the Mixed Commission it passes understanding why it—or any decision other than those recorded in the Minutes—was not mentioned at any time by Colonel Bernard in his numerous official letters and reports to his superiors at the time, and in particular was not mentioned in his report of 20 February 1907 to the French Minister in Bangkok—a document of cardinal importance in the case—when he reviewed in full the delimitation under the 1904 Treaty made in the course of its final campaign and covering as it did the frontier line from the Great Lake to the Mekong.

Moreover Colonel Bernard—as appears from his final report dated 14 April 1908 to the French Minister of the Colonies before referred to, had “in letters written day by day” reported to the Minister “all the incidents that occurred” during the course of the delimitation. Yet not the slightest hint of any decision in connection with the Temple area or the region of the Temple is to be found.

Colonel Bernard attached to this report a number of documents including the Minutes of the Mixed Commission which in his view were “from the diplomatic point of view of considerable importance”.

It does not seem likely that Colonel Bernard would have sent incomplete minutes or if for any reason there had, on 18 January 1907, been any decisions of delimitation which had not been recorded, particularly a decision relating to the Temple itself, that he would have failed to make the record complete by referring to them.

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On 18 January 1907 the Mixed Commission believed that it had completed the task of delimitation assigned to it under the Treaty of 1904.

The Minutes note that on that day it had fixed the point at which the crest line of the Pnom Padang met the Mekong within

the meaning of Article 1 of the Treaty of 1904. Immediately following this notation it is recorded that the frontier line had been "thus determined".

What frontier line is referred to? Was it just the frontier line at the point at which the northern frontier line met the Mekong?

In my view the reference is to the whole frontier line from the Great Lake to the Mekong which was the subject of the Mixed Commission's third and last campaign directed to the delimitation of the frontier defined in Article 1 of the Treaty of 1904.

The question is whether the evidence establishes that the Mixed Commission did delimit the whole frontier line defined in that Article; and if so whether there can, with sufficient certainty, be extracted from the Minutes the nature of the delimitation made on the Dangrek.

No difficulty presents itself in ascertaining the delimitation made by the Mixed Commission from the Great Lake to the Dangrek. No difficulty arises in fixing on the Dangrek the western extremity of the northern frontier as determined by it. None arises in respect to the eastern extremity of that frontier.

The question however is whether there is evidence which sufficiently establishes a delimitation—particularly on the Dangrek—of the frontier between these two extremities.

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Since there is not to be found in the Minutes of the Mixed Commission a record of a decision of delimitation specifically referring to the Dangrek, it might appear that the conclusion should be that there never was a delimitation of the Dangrek of any description.

In the course of sifting the evidence I have however become persuaded to the opinion that the probabilities and the evidence both point to the conclusion that the Mixed Commission did make a decision delimitating the Dangrek and it did so by determining that, along the whole of the northern frontier between two agreed points, one on its western, the other on its eastern extremity, the frontier should follow the treaty line; that of the line of the watershed on the Dangrek and the crestline of the Pnom Padang.

The northern frontier from the Kel Pass which was its western extremity, to the point on the Mekong where the Pnom Padang ran down to it which was its eastern, was one frontier line. Because however the Temple happens to be situated on the Dangrek range and because Annex I happens to cover that region of the Dangrek on which the Temple is situated, attention throughout this case has been concentrated on that part of the Dangrek which is within the purview of Annex I and more particularly on that small portion of the frontier line in Annex I which is immediately adjacent to the Temple. This fixation of attention on Annex I and upon this small

sector of the frontier line adjacent to the Temple has tended to distract attention from the fact that the northern frontier was not a number of separate frontier sectors and was not considered by the Mixed Commission on that basis. It was one line of frontier and the Mixed Commission dealt with it as such.

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The beginning of December 1906 marked what Colonel Bernard referred to as the third campaign of delimitation.

At that point of time the Commission had completed its task of delimitation of all the frontier defined in the Treaty and Protocol of 1904 with the exception only of that from the Great Lake north to the Dangrek and thence easterly to the Mekong.

As has been noted the western frontier line north of the Great Lake to the Dangrek had been delimited by decisions identifying the meridian and the parallel. Colonel Bernard remained dissatisfied. He was awaiting preparation of the maps of the region known as Siem Reap so as to take up again with the Siamese Commission the matter of substituting a natural and visible line for what he regarded as the artificial line stipulated by the Treaty.

Subject however to this particular point which was not one of delimitation but of exchange of territory to achieve a natural line of frontier, the work of delimitation, in Colonel Bernard's view at least, was completed.

It is unlikely that the Mixed Commission having, during the season 1906-1907, set itself the task of delimiting the frontier from the Great Lake to the Mekong would have left its work unfinished, the northern frontier undelimited. It seems more probable that their work was finished when the meeting of 18 January concluded, and that the only reason why the meeting called for 8 March was cancelled and the Mixed Commission thereafter ceased to function was because the subject-matter on which it would have deliberated, namely the substitution by way of a system of compensation of a natural and visible line for the treaty line of the parallel and meridian, was about to be settled by the Treaty of 1907.

It hardly seems reasonable to believe that Colonel Bernard would have departed for France as he did unless he was fully satisfied that, with the signing of the 1907 Treaty, not only had the problem of the artificial line been resolved, but also the Mixed Commission had completed its task of delimitation of the northern frontier.

That this is the view which he genuinely held appears from his telegram of the end of January 1907 to the French Minister at Bangkok, in which he said:

“delimitation work accomplished without incident. *Frontier line definitively determined* except the Siem Reap region.”

This is confirmed by a despatch dated 31 January 1907 on behalf of the French Minister of Foreign Affairs to the French Minister of the Colonies, in which it is said:

“The representative of the Republic in Siam informs me that Colonel Bernard, after completing the work of delimitation of the Siamese frontier, has just left Ubone for Bangkok where he is expected to arrive on 10 February. I understand that, throughout the operations, relations with the Royal Commissioners left nothing to be desired and that the frontier line has been *definitively determined* except in respect of the region of Siem Reap.”

I do not doubt that the view expressed in these two documents, which is confirmed in other official documents of the same time, correctly represents the views of the Presidents of both the French and the Siamese Commissions.

The statement that the frontier had been definitively determined is consistent with the Minutes of the Second Mixed Commission appointed under the Treaty of 1907 to delimit the new frontiers in which, when dealing with a sketch of the proposed frontier of the Dangrek *west* of the Kel Pass placed before it on 22 March 1908, there appears the statement “the latter pass is the point where the new frontier line rejoins the former one”.

Since there is no reason to doubt the statements made by Colonel Bernard at the time, it seems proper to conclude that the northern frontier in fact had been delimited and that such delimitation must have been completed by 18 January 1907, the date of the Mixed Commission’s last meeting.

On that date the Minutes record as follows:

“Colonel Bernard passed to the question of the determination of the frontier in the region of Pnom Pa Dang (Phu Pha Dang). According to the terms of the treaty that frontier followed the crest ... as far as the Mekong... In order to have a very distinct frontier in the immediate neighbourhood of the river the thalweg of the Huei Don could be taken as the boundary. The frontier would go up that thalweg [i.e. of the Huei Don] as far as the source of the watercourse and *would then follow the crest of the Phu Pha Dang to the south west*. The valleys of all the watercourses which flowed into the Mekong to the east and to the south of that line would belong to French Indo-China and those of all the watercourses which flowed into the Mekong or into the Semoun on the west and to the north would belong to Siam.”

The President of the Siamese Commission accepted this proposal, immediately following which there appear the words previously referred:

“The frontier line having been thus determined...”

It is known that at this date the topographical and survey officers were in the field, from which they were not to return until a month

and more later. It would seem however that the Mixed Commission, having made this decision—the last decision of delimitation set out in the Minutes—regarded the frontier line as having been determined by it—at least so far as it could be done by it on the spot.

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The statement that “The frontier line” had been “thus determined” is not free from doubt. It could and on its face appears to refer solely to the fixing of the point at the Mekong and the frontier immediately adjacent. Read however in the light of the repeated statement of Colonel Bernard that the whole frontier had been definitively determined, the Minutes of 18 January are I think a reference to the whole frontier line to the south west of the Mekong—from the reconnaissance of which frontier the Mixed Commission had just returned—and that the decision fixing the point at which the frontier met the Mekong represented the last decision required to be taken to complete the delimitation of the whole frontier.

A reading of the Minutes which covers this third and last campaign of delimitation and of the contemporaneous documents in my opinion confirms this.

It was for the Mixed Commission and for it alone to determine what was a sufficient delimitation. It was at liberty to delimit any part of the frontier by reference to its Treaty definition. It is significant that the Mixed Commission under the 1907 Treaty in delimiting the frontier on the Dangrek west of Kel Pass did precisely this.

* * *

Any agreement to deviate from the Treaty line of the watershed on the Dangrek under any inherent power of adaptation is excluded since, not only is there no evidence whatever to suggest that the Mixed Commission ever contemplated any deviation from the line of the watershed, but at the very last meeting of the Mixed Commission and on the same day on which the decision fixing the frontier point on the Mekong was noted, the President of the Siamese Commission had made it clear he had no authority to discuss “any frontier different from that of the Treaty”. Furthermore, since any question of there having been some unrecorded delimitation of or in relation to the region of the Temple area or the Temple itself must, for reasons already given, be dismissed from consideration, there seems little doubt that, if the delimitation of the frontier under the Treaty was completed, as Colonel Bernard specifically states as the fact, and as the Minutes themselves go to indicate, it must have been the line of the watershed on the Dangrek which

it was agreed should constitute the frontier line in that region.

The Presidents of the two Commissions were practical men. The mountain ranges of the Dangrek and the Pnom Pa Dang were in inhospitable and forbidding terrain. They were called on to make a practical decision.

No question of demarking the northern frontier ever arose and, so far as the record shows, that frontier has never been demarked during the fifty odd intervening years. It remains much the same today as it was then. The Mixed Commission appears to have decided to fix the points of the extremities of the northern frontier on the west and on the east and to have agreed that between those two points the frontier needed no further delimitation other than the Treaty itself provided.

The stipulation of the line of the watershed on the Dangrek—and the crest line on the Pnom Padang was itself an obvious and appropriate way of defining definitively and with certainty the northern frontier line. There is no reason why the Mixed Commission having once fixed or decided to fix the points of its extremities should not have delimited that frontier by reference to its definition in the Treaty. The line of the watershed—and the crest line—were natural and permanent lines. There are, as the Judgment of the Court points out, boundary treaties which do no more than refer to a watershed line or a crest line and which make no provision for any further delimitation. It is not evident why the Mixed Commission should have felt obliged to give to the line of the watershed—or the crest line—any more specific delimitation than that which the Treaty already provided. As already noted, the Mixed Commission under the 1907 Treaty in delimiting the Dangrek west of the Kel Pass did not feel obliged to do so. That Mixed Commission recorded its decision specifically to read “From the last mentioned point the frontier inclines to the East, *following the watershed* between the basin of the Great Lake and that of the Semoun as far as the Kel Pass.”

It is a misconception of the functions of the Mixed Commission to suggest that it was bound to give or should be expected to have given a further definition to the northern frontier or any part of it beyond that which the Treaty already provided.

The northern frontier was after all a part only, and a lesser part both in magnitude and importance, of the whole frontier described in the Treaty and Protocol of 1904.

It is moreover in my opinion without warrant to suggest that France and Siam did not attach any special importance to the line of the watershed as such. This suggestion is not reconcilable with

the fact that in the Treaty of 1907, more than two months after the Mixed Commission had held its last meeting, it is the line of the watershed which is again stipulated should be the frontier line on the Dangrek and when in 1949 France and later Cambodia, in 1954, protested Thailand's occupancy of the Temple area, it was the line of the watershed as defined in the Treaty of 1907 which, it was insisted, continued to be the frontier between the two States.

In particular there is no reason whatever why the Mixed Commission should not have agreed that, from a fixed point on the Dangrek where that range was met by the meridian, the frontier should be the line of the watershed on the Dangrek until it joined the Pnom Padang and then the line of the crest of that mountain range as far as the fixed point at the Mekong. Indeed there seems no practical reason why this should not have been precisely the decision it did take.

Nor is there any reason why a delimitation of the Dangrek required any line shown on any map either to establish a delimitation or to confirm one. Nowhere does the Treaty of 1904 give any indication that any map was necessary or considered desirable to accomplish a delimitation of any part of the frontier.

The assertion that it was the map line of the watershed, not the Treaty line of the watershed, which was regarded as of overriding importance, I do not find supportable. If the assertion were correct, it would mean that agreement between the two States was not in 1908-1909 a mere formality as has been contended; it was the very gist of the delimitation of the Dangrek. The map would itself constitute the delimitation. If the assertion were correct all that needs to be said is that the two States in 1908-1909 could not have conducted themselves in a more casual and inconsequential manner in matters affecting territorial sovereignty.

If the delimitation of the northern frontier had been made by the Mixed Commission in 1906-1907 in terms of the line of the watershed as defined in Article 1 of the Treaty of 1904, a map subsequently produced by France or Siam was not in any manner necessary to give effect to that decision. A frontier line shown on such a map would possess no probative value—except to the extent to which it was in conformity with the decision of delimitation of which the map in a general sense might be said to have been an outcome.

If the Mixed Commission did in fact delimit the Dangrek, it would seem evident that it did so by reference to the Treaty line of the watershed.

That this was the course followed by the Mixed Commission finds I think confirmation in a number of documents.

In the first place the procedure followed accords with that laid down by the Mixed Commission at the commencement of its labours in 1905, namely that it would be sufficient to determine the principal points through which the frontier in any region passed¹.

It accords also with the procedure which, as will appear, was followed in other frontier regions covered by the Treaty of 1904 where a watershed line was to form part of the frontier line².

The procedure appears to have been constant.

Light upon the meaning of the decision of the Mixed Commission, recorded in the Minutes of its Meeting of 18 January 1907, is shed by a letter of the same date written by Colonel Bernard immediately after the meeting to the Governor-General of Indo-China in which he said:

“The frontier line which I have indicated summarily on the attached sheet is as follows: Starting from the Mekong the frontier follows the course of the Nam Lon as far as its source and thereafter the *crest* of the Phu Pha Dang [*Pnom Padang*] to the southwest as far as *the watershed between the Mekong and the Nam Moun*. The valleys of all the watercourses which are tributaries of the Mekong and are situated to the east and south of the line belong to French Indo-China...”

This is clearly enough a reference not only to the crest line on the Pnom Padang which the frontier line was to follow but as well to the watershed line on the Dangrek in terms of Article 1 of the *Traité* of 1904.

Attached to the letter was a rough sketch. It shows the point at which the frontier met the Mekong, as agreed on 18 January 1907, and the general direction of the line of frontier for a short distance south west of that point.

The report by Colonel Bernard of 20 February 1907 to the French Minister in Bangkok, already referred to, in which he reviewed at length the third and last campaign of the Mixed Commission, affords further confirmation.

Dealing with the frontier line of the Dangrek and the Pnom Padang as far as the Mekong he had however little to say, but what he did say is eloquent enough. Read in the light of the facts which have been established, it does more than negative any suggestion that there may have been some special delimitation in respect to the Temple area, or that the two Presidents may have decided to depart from the Treaty line of the watershed; it also establishes that a delimitation of the Dangrek was made and how it was made.

Colonel Bernard reported as follows:

¹ Minute of Meeting of 7 February 1905.

² See Article 2 of the Treaty and Articles I and II of the Protocol.

"All along the Dangrek 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 the Pnom Padang adjoins the Mekong*. On this point there was no possible discussion for the mountain joins the river at one point only about seven kilometres below Paknam."

At the date of this report it will be recalled not even a provisional map of the Dangrek or Pnom Padang frontier regions was in existence.

Further, in the Protocol of the Treaty of 23 March 1907, in the drafting of which Colonel Bernard had played such a key part, Article I thereof describes the new frontier which had been agreed to in the March negotiations.

After describing the boundaries of the new frontiers in the south and the west, it indicated the point some hundred kilometres more or less to the west of the Kel Pass where the new western frontier met the Dangrek. It went on to provide:

"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 [*Huei Don*], in conformity with the line [*tracé*] adopted by the preceding Commission of Delimitation on the 18th January, 1907."

In the light of this treaty provision it cannot, I think, be contemplated that any decision of the Mixed Commission under the Treaty of 1904 could have departed in any way from the line of the watershed.

Colonel Bernard, who knew exactly what was decided by the Mixed Commission during the third campaign and the basis on which the delimitation of the northern frontier was effected, must have understood that the fixing of the point at which the Pnom Padang adjoined the Mekong, as recorded in the Minutes of 18 January 1907, was the last decision necessary to be taken to delimit the whole of the northern frontier.

The fact that the second Mixed Commission, under the Treaty and Protocol of 1907, delimited the frontier from west of the Kel Pass until it reached that pass by strictly adhering to the line of the watershed, serves to show a consistency of treatment by both Commissions of the whole frontier line of the Dangrek.

When Colonel Bernard reported that the frontiers had been definitely determined he was I think stating the fact. The manner in which the delimitation of the northern frontier was effected is apparent. Once the point on the Mekong had been agreed to, that frontier followed the treaty line stipulated in Article 1, namely the crest of the Pnom Padang and the watershed of the Dangrek, until

it reached the point at which on the latter mountain range it met the meridian mentioned in the article. Whatever decision or viewpoint was arrived at or expressed by the two Presidents during their reconnaissance of the Dangrek and the Pnom Padang, or at any time, would accord with this view.

Colonel Bernard has left his testimony.

In the lecture given by him in Paris on 20 December 1907, he described the three campaigns of delimitation from 1905 to 1907. What he has to say he says with illuminating conciseness. These are his words:

“Almost everywhere it was the *watershed* which formed the frontier and there was room for argument *only at the two extremities.*”

His testimony remains to explain the meaning which should, I am convinced, be given to the Minutes which cover the third and last campaign of the Mixed Commission. The view he expressed seems eminently a commonsense one.

* * *

The review made of the Minutes and the contemporaneous documents lead I think to the following conclusions:

1. There was no adaptation of the treaty line of the watershed on the Dangrek by the Mixed Commission to meet any local or special problem, condition or circumstance.

2. There was no decision of delimitation which specifically dealt with the Temple region or area.

3. There was no decision of any kind to deviate from the line of the watershed. On the contrary it must be inferred that the Mixed Commission decided to adhere strictly to that line.

4. There was a delimitation of the northern frontier. This delimitation included the Dangrek.

5. The delimitation of the frontier line on the Dangrek was that it should follow the treaty line of the watershed.

It follows that if the frontier line shown on Annex I has any probative value it must find its authority within the limits of the decision of the Mixed Commission. It was the decision of the Mixed Commission which was binding upon France and Siam, not any map which purports to reflect that decision. The map merely notes or purports to note that decision.

If the line of frontier shown on Annex I does not accord with that decision to the extent to which it does not, it is devoid of probative value, unless of course it has since acquired probative force from some other source.

* * *

Annex I in fact is not in conformity with the treaty line of the watershed stipulated in Article 1 of the Treaty of 1904. Leaving aside for the moment the comparatively small and limited area immediately adjacent to the site of the Temple, elsewhere the frontier line delineated in Annex I deviates considerably from the treaty line of the watershed. Having regard to the expert evidence placed before the Court by both Cambodia and Thailand, this cannot be disputed.

This deviation was due to a serious mistake in the construction of Annex I made in the line of the watershed close to the site of the Temple, a mistake caused by an incorrect location of a river known as the O'Tasem. This mistake resulted in throwing the frontier line shown on Annex I completely out of alignment with the line of the watershed in the region of the Temple. The result was to leave the Temple wholly within the territory of Cambodia.

The experts from both sides are also in agreement that in the small and limited area immediately adjacent to the Temple the frontier line shown on Annex I is not today—and I am satisfied was not in 1906-1908—the line of the watershed. They differed only to the extent that whereas the experts on behalf of Cambodia showed the line of the watershed as suddenly turning north from the cliff face on the south immediately before it reaches the western and southernmost side of the Temple and so just barely bringing the Temple within the Cambodian side of the watershed line, those on behalf of Thailand showed the watershed line as continuing to follow generally the line of the cliff face and so bringing the Temple within the Thai side of the line.

The error in the frontier line shown in Annex I caused by the wrong location thereon of the river O'Tasem and the effect of that error in relation to the frontier line near the Temple shown on Annex I needs further explanation.

The river O'Tasem in fact passes to the *south* of a mountain known as Pnom Trap—which is situate but a few kilometres to the west of the Temple. The course of the river as it is today is the same as it was at the beginning of this century and for hundreds of years before then. Annex I however places the river as running around this mountain to the *north* of it.

The nature of the mistake is made clear by Professor Schermerhorn, the Dean of the International Training Centre for Aerial Survey at Delft, and his explanation was fully confirmed by the observations and evidence of one of his officers, a Dr. Ackermann, who went to the area to qualify himself to give evidence of what

he observed on the spot.

Professor Schermerhorn in his evidence stated:

“It is obvious that the border line shown on the Annex I map was drawn by constructing the watershed line in accordance with the contour lines represented there. This construction was done correctly on the basis of the given contour lines. However, due to the mistake about the O’Tasem river, the line of the watershed is shifted incorrectly to the north, placing the Pnom Trap mountain completely in Cambodian territory that is to say south of the border line as drawn in the Annex I map. This displacement of the watershed line to the north goes up to two kilometres at certain points. If this mistake is rectified in the Annex I map then the watershed constructed on the basis of the correct contour lines would be in agreement with the I.T.C. map [that of the International Training Centre at Delft]. In that case the watershed would run over the Pnom Trap mountain and go from there along the southern rim of the Phra Viharn mountain to the temple.”

This was a fundamental error in the construction of the frontier line in Annex I. The significance of this mistake in relation to the frontier line shown on Annex I in this region is evident having regard to the close proximity of the Pnom Trap mountain to the Temple and the mountain on which it stands. By placing the river O’Tasem to the north of Pnom Trap mountain the line of the watershed as shown on Annex I was thrown considerably north of the correct watershed line, attributing to Cambodia territory to which she was not entitled. The fact that from the southern edge of the cliff face on which the Temple is situate to the watershed line shown on Annex I immediately and directly to the north thereof is a distance of only some two kilometres is an indication of the importance of this mistake.

The line of the watershed shown on Annex I is also known to be wrong at the Kel Pass, where it wrongly attributes certain territory to Cambodia. Though this has no direct bearing on the Temple area—it is far to the west of it—it has however a bearing on the frontier line shown on Annex I, more particularly so since this mistake was discovered in 1908 and corrected by two survey officers appointed by the second Mixed Commission to put down boundary marks in the vicinity of Kel Pass. The fact is that at the Kel Pass the accepted boundary is not, and has not since 1908, been, that shown on Annex I.

Finally, having regard to the technical evidence presented to the Court by both Cambodia and Thailand, I am left in no doubt that the line of the watershed today—and in 1904—runs along the southern rim of the Phra Viharn mountain, thus placing the Temple on the Thai side of the line.

The frontier line placed on Annex I accordingly is not in conformity with the delimitation of the Dangrek by the Mixed Commission. Alternatively if the fact be that there was no delimitation by the Mixed Commission of the Dangrek the frontier line on Annex I is not in conformity with the treaty line, in particular, in the region of the Temple. The line shown on Annex I is not and was not the line of the watershed.

* * *

In 1908, when Annex I came into existence, the law as between France and Siam was the line of the watershed, whether based on a decision of the Mixed Commission or—on the assumption there was no delimitation—on the definition of the frontier in Article I of the Treaty of 1904, or more precisely in Article I of the Protocol to the Treaty of 1907. This line could not be altered by the unilateral act of either France or Siam.

* * *

Neither France nor Siam, when the map was issued in 1908, was aware that the frontier line shown in Annex I was not in conformity with the line of the watershed. France certainly believed it was. It was in the confidence of that belief and on the basis that it was correct that she distributed copies of the maps. Siam had no reason to believe that it was not. The mistake in Annex I caused by the misplacement of the river O'Tasem was indeed not discovered by Thailand or France or Cambodia until these proceedings had been commenced. Indeed Thailand had no cause to think of any error in the watershed line shown on Annex I until an officer of the Royal Thai Survey Department, during the course of a survey of the border between Thailand and Indo-China, and taking the watershed along the Dangrek range as the dividing line, concluded that Mount Phra Viharn lay in Thai territory.

Another survey was carried out in 1937. Again the watershed line was taken as the frontier line. The same conclusion was reached.

Up till around 1935-1937 it would not appear there was any particular reason why Thailand should have questioned the accuracy of France's map.

Both France and Siam, acting in perfect good faith, believed the line on Annex I—as well no doubt the frontier lines shown on each of the other ten map sheets—correctly translated the decisions of the Mixed Commission.

* * *

When Annex I appeared, the frontier line delineated thereon was not binding on either Siam or France. Unless Siam is by her conduct precluded from alleging that it was not—which is an entirely different question—all that may be envisaged is the creation of a new obligation binding upon her, voluntarily entered into, a new obligation entered into between herself and France by which each State agreed to accept the line in Annex I as the established frontier between them.

* * *

It is important to review the circumstances in which the map sheets came into existence, were printed and distributed.

Neither Annex I nor any of the ten other map sheets which went to make the total map of the frontier regions of the 1904 Treaty came into existence solely in response to a request of Siam. In 1904-1907 there were few reliable maps possessed by either France or Siam of any part of these frontier regions. This finds ample confirmation in the Minutes of the Mixed Commission, particularly those of 17 January 1906, when Colonel Bernard expressed the view that it would be of value to have a more complete map.

“At that moment”, he said, “there was no satisfactory map in existence and it would be useful for *the two countries* to have one. Captain Tixier and Lieutenant Sée would ... be able to extend the map as far as the Menam on the one hand and as far as Phetchabun and Nong-Khai on the other.”

It was just a few weeks before this that the Siamese Government had made a request

“that the map of the *whole* frontier *region* should be executed by French officers”.

It is quite evident that this was not a mere map to show the frontier line but a general map of the frontier regions.

As will appear, and I think quite sufficiently, France, for her own purposes, wanted general maps of the frontier regions and wanted them to extend as far as possible each side of the frontier lines. There is little doubt she intended to construct these maps during the course of the work of the Delimitation Commission and intended to do this before any request was made by Siam.

In November of 1907—two years after the Siamese Government made its request—the map consisting of the eleven sheets was completed.

It was not until July of 1907 that Colonel Bernard, then in France, sought the approval of the French Minister of the Colonies for the publication of the map then being drawn up "by the Franco-Siamese Delimitation Commission of which he was the President" and requested the provision of funds for that purpose. The decision to publish the maps was made by the Minister; Siam was not consulted about it. The printing and publication of the map did not follow, as a matter of course, from the operations of the Mixed Commission in 1905-1907. Ultimately, funds were authorized for publication of the "Bernard Commission map" to be provided out of the budget of Indo-China.

An order for printing was given to a map publisher in Paris. 1,000 copies were ordered to be struck off. These were to be delivered to the Ministry of the Colonies by June of 1908. They were delivered around that time.

About May of 1908, Colonel Bernard gave instructions for the distribution of the maps when printed. Copies were to go to the geographical service of the French Ministry of the Colonies, to the French Ministry of Foreign Affairs, to the Siamese Government and to members of "the two Commissions" and a number of copies to different national and foreign geographical societies. Over 700 were to be delivered to the French Ministry of the Colonies for despatch to Indo-China. 100 were to be made available to the publisher for sale.

The copies to be delivered to the Siamese Government—50 in all—were handed personally to the Siamese Minister in Paris without any covering letter. Subsequently further copies were requested by Siam. There was no written communication of any kind from the French Government to the Siamese Government in connection with the map. No comment from Siam was at any time sought. Indeed, none I am satisfied was expected.

There is no evidence whatever even to suggest that Siam knew of the contents of any of the map sheets before they were delivered to its Minister in Paris. It is unlikely that she could have.

Siam was not consulted at any stage whilst the map sheets were in the course of preparation, nor was she consulted on the distribution to be made. The French authorities went ahead with printing, publication and distribution of the maps solely of their own accord, without seeking the prior views or approval of Siam.

To the extent the map sheets showed frontier lines, it is evident that the details thereof appearing on them were based upon field notes and topographical and survey calculations made by a number of French officers whose names are noted on each of the sheets as having done the work on the ground. Siam had no access whatever to these basic materials. The documents that served for drawing up

the maps were then in France.

Nor is there any evidence that they were ever made available to her and I am satisfied it is wholly unlikely that they were. In any case, there was no way in which Siam could have checked the frontier line delineated on Annex I even if it might, in all the circumstances, reasonably have been expected that she should have done so, without herself undertaking an independent topographical survey of the frontiers including the Dangrek, a task for which at that time, as France knew, and as the Minutes of the Mixed Commission and contemporaneous documents sufficiently reveal, she was not technically equipped to undertake.

Such maps of her own as Siam had in 1908 were unco-ordinated. The receipt of these maps drawn by French officers must no doubt have provided an occasion in its way. They were however French maps expressed in Roman characters. "French maps", stated Commandant Montguers, the President of the Mixed Commission under the Treaty of 1907, in a letter of 17 June 1908 to the Governor-General of Indo-China, were "of no great use" to Siam. It was for this very reason that it was agreed between France and Siam that a Siamese map "should be drawn up by French officers assisted by Siamese officers".

This resulted in the establishment of the Transcription Committee.

It has been suggested on behalf of Cambodia that on this occasion Siam had the opportunity to check the frontier line and if she did not avail herself of it that was her own fault.

The contention completely misapprehends the function of the Transcription Committee. It had nothing to do with the checking of frontiers. Its sole function was to achieve a system of transcription of names on the French maps.

Little is known about the work of the Committee. It met for the first time on 25 March 1909 and the Minutes of its Meeting are in the record. The problem was to transcribe names of places. The map sheets, written as they were in Roman characters, were not likely to be understood, so the Minutes record, by certain of the Siamese officers who might have to use them. A system of transcription from Roman characters to Siamese characters and *vice versa* was the task which the Committee had to discharge, a task further complicated by the fact that, in the basin of the Great Lake, many villages bore both a Cambodian and Siamese name. It was this problem and only this problem which the Transcription Committee was called upon to deal with.

Moreover, there was no real reason in any case why the Siamese members of the Transcription Committee should think of checking the frontier lines, not only because it was not within the task which was allotted to them, but because both States at that time had no

reason to think there was any mistake in the maps; both States proceeded on the assumption they were correctly delineated.

* * *

The circumstances in which the maps came into existence and were distributed is of importance as providing part of the background against which the conduct of France and Siam is to be evaluated, particularly in considering whether the adverse inferences which are sought to be drawn from Thailand's silence and lack of protest on the line shown on Annex I bear any relation to the realities.

Before however considering whether the conduct of the two States created an implied conventional agreement between them that the line shown on Annex I should be the established frontier line between them, there are a few observations of a general character which I think are apposite.

It is easy to fall into the error of judging the events of long ago by present day standards, indeed sometimes by standards which do not always have relation to real life.

In determining what inferences may or should be drawn from Thailand's silence and absence of protest regard must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general political conditions existing in Asia at this period, to political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might then have been applied to highly developed European States.

There is a further general consideration of some significance. There can be little doubt that, at least in the early part of this century, Siam was apprehensive about the aspirations of France.

There is evidence of this.

In 1930, on the occasion of the visit of Prince Damrong to the Temple, which has figured so prominently in this case, he was accompanied by his daughter Princess Phun Phitsamai Diskul. In her statement which was placed before the Court she states the reason why her father did not ask the Thai Government to protest about the presence at the Temple of a French officer in full military uniform. She states:

"It was generally known at the time that we had only to 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."

No matter how unjustified this view may have been I am satisfied that it was not a view conjured up for the purposes of this case. It finds confirmation elsewhere.

In March 1907, in referring to the negotiations for the Treaty of 1907 then being conducted, Colonel Bernard, in a report of 19 March to the Governor-General of Indo-China, wrote:

“There is such mistrust of us in Siam and such dread of possible military action...”,

and later in the same report:

“After five hours of discussion which the nervous state of the Siamese made painful, we concluded by reaching agreement...”,

and on 17 June 1908, only two months before the map sheets of which Annex I is one were handed to Siam, Commandant Montguers, in his report to the Governor-General of Indo-China reveals the same apprehension on the part of Siam. The Commandant speaks of:

“Dispelling as far as possible the mistrust that is so deeply rooted in them.”

This apprehension on the part of Siam as to France's attitude towards her is a factor which cannot be disregarded in evaluating Siam's conduct—her silence, her lack of protest, if protest might otherwise have been expected of her.

* * *

I have already given the reasons which have persuaded me to the opinion that there was in fact a delimitation of the northern frontier including the Dangrek. I have stated the nature of that delimitation and why Annex I fails to draw any probative force from it. If subsequent to its communication by France to Siam the line shown thereon acquired any probative force that could only occur (apart from any question of preclusion) by virtue of the two States entering into a new conventional arrangement giving rise to new mutual obligations between them.

The Court's approach is quite different and marks a point of departure between my views and those of the Court.

Judgment is based upon the conclusion that Siam, by her silence and failure to protest against Annex I and the line indicated on it within what is said to be a reasonable time after she received it, recognized, adopted, acquiesced in or acknowledged it as representing what is called the “outcome” of the work of delimitation of the frontier in the region of Preah Vihear and thereby conferred upon

it a binding character. Thus, the Court finds, it, in 1908-1909 became binding on Siam.

From the subsequent failure (on the part of Siam) to protest, the Court draws inferences to support its conclusion that Siam had in 1908-1909 recognized and acquiesced in Annex I with the character the Court has assigned to it.

The Judgment speaks of the contingency of a departure from the criterion of the watershed line stipulated in Article 1 of the Treaty. It however dismisses as irrelevant the question whether a departure may have occurred since, whatever was the nature of any inherent power of adaptation possessed by the Mixed Commission, it was it states certainly within the power of Siam in 1908-1909 to adopt any departures.

Either France or Siam was of course entitled to adopt or fail to adopt any attitude towards Annex I as it thought fit. The crucial question which, in my opinion, calls for an answer however is not whether Siam recognized, acknowledged, adopted or acquiesced in Annex I whatever the character assigned to that document may be; but whether the conduct of France and Siam ever gave rise to an implied conventional arrangement between the two States under which they mutually agreed to be bound by the frontier line shown on Annex I, whether it was or was not in conformity with the criterion of the watershed stipulated in the Treaty of 1904. This question, in my opinion, the Court leaves unanswered.

It is my view that unless the conduct of Thailand since 1908 has resulted in her being precluded from denying that the line on Annex I is the frontier line—a quite separate question which will be later considered—or unless there can be established a new and fresh conventional arrangement between the two States, any recognition by Siam of Annex I and of the line shown thereon cannot be conclusive against Thailand.

A State may of course recognize—or acquiesce in—any fact or situation either of law or fact and its intention to do so may be evidenced expressly or by implication. The recognition may become the source of a legal right or obligation to the extent to which it provides an essential element in the establishment of a legal right or obligation, as for example in preclusion or prescription. It may provide evidence of a fact or a state of facts, the probative value of which depends upon all the surrounding circumstances. It may afford aid in the interpretation of a document or conduct.

The act of recognition is not however a unilateral juridical act which of its own force precludes a State from thereafter challenging the fact or situation recognized. It may, depending upon the circumstances, provide strong, perhaps overwhelming, evidence of the truth of the fact or situation recognized; it may provide only evidence which is destroyed or modified by other evidence. Pre-

clusion—or, to use its Anglo-Saxon equivalent, estoppel—may however only occur where all the elements which constitute the principle of preclusion can be shown to exist.

There is a close affinity between prescription, preclusion, recognition, acquiescence and absence of protest. The principle of preclusion is however, in my view, quite distinct from the concept of recognition (or acquiescence), though the latter may, as any conduct may, go to establish either prescription or preclusion.

To accord to the concept of recognition by a State of a fact or situation, without more, the legal consequence of a preclusion not only finds, in my opinion, despite the views of certain writers, no authority as a principle of international law under Article 38 of the Statute of the Court, but provides an invitation to apply to the determination of a case in which recognition of a fact or of a situation is relied upon, considerations which are scarcely distinguishable from considerations *ex aequo et bono*.

The concepts of recognition and acquiescence are important elements of international law. They are not likely to add to their usefulness if pushed beyond their proper content.

In the present case any recognition by Siam of Annex I and the line of frontier shown thereon, or any acquiescence by Siam therein, is in my view of evidentiary value only.

Recognition by Siam of Annex I and the line of frontier thereon—if any were made—is of course evidence of an admission by Siam (and Thailand), which may be read against her to establish that there was in fact a decision of delimitation of the frontier on the Dangrek. It might perhaps be construed as an admission that that decision was correctly represented by the frontier line shown on Annex I.

Were any such admission the only evidence in this case it could well be conclusive. But it is not the only evidence. There is a great deal more. The task of the Court is to ascertain the true facts. It may in doing so be influenced by an admission established by the conduct of Siam. It cannot however be controlled by it if other evidence negatives or modifies or is inconsistent with the admission which a recognition may establish. The recognition is not conclusive.

In short, the evidentiary value of the recognition or acquiescence must be weighed against all other relevant evidence disclosed in the record.

When regard is had to other relevant evidence in the record, it will be seen that such admissions as may be spelt out of the conduct of Siam by the Court have little if any evidentiary value in the determination of this case.

It is established that there never was any decision of the Mixed Commission agreeing to any line on any map or sketch. It is established that there never was any decision of delimitation by virtue of which the Mixed Commission, pursuant to an inherent power of adaptation of the correct line of the watershed, placed the Temple region for some special local or any other reason within Cambodian territory. It is established that there never was a decision to depart from the Treaty line of the watershed but, on the contrary, the evidence is that the Mixed Commission decided that that line should be adhered to. It is established that if there were a delimitation of the Dangrek it could only have been one to the effect that the frontier line should follow the line of the watershed, and if there were no decision of delimitation the frontier line remained the line of the watershed pursuant to the Treaty of 1904. It is established that Annex I does not follow the line of the watershed but, on the contrary, seriously departs from it at the critical area of the Temple region, and it will be established that the line on Annex I purports to show the line of the watershed and no other line.

* * *

It seems necessary to repeat that the line on Annex I had not been before the Mixed Commission when it came to an end. In fact, it could never have existed at all until after the Mixed Commission's last meeting.

The instructions of survey officers Captains Oum and Kerler are set forth in the Minutes of the Mixed Commission of 7 September 1906. Their task was to carry out a survey and nothing else.

It was contended on behalf of Cambodia that the task of the topographical officers—though they were in no way authorized themselves to delimit the frontier—included that of marking on the map the frontier line. Sometimes, it was suggested, this was done pursuant to a prior decision of the Mixed Commission; at other times the Mixed Commission, it was said, determined the line only after the map had been drawn up.

Even if the evidence gave any support to this contention it is clear that neither of these eventualities occurred. Captain Oum left to survey the Dangrek before the Mixed Commission had even started on its reconnaissance of the northern frontier, and the Mixed Commission held its final meeting over a month before he or Captain Kerler, who was surveying the region from the Great Lake to the Dangrek, reached Bangkok from their field operations.

Annex I never became part of the work of delimitation of the Mixed Commission and never accordingly could be said to have become an integral part of the treaty settlement.

The conclusion of the Court based on recognition is, in my opinion, inconsistent with the established facts.

* * *

The conclusion of the Court that Annex I, as a consequence of Siam's recognition of it as representing the outcome of the work of delimitation is that it caused the map to enter the treaty settlement and thus to become an integral part of it, presents a difficulty which, in my view, goes to the heart of this case.

It is not necessary for me to express any opinion on whether, or to what extent, this recognition could cause the map to enter the treaty settlement. The point to which I desire to direct attention is that it follows from the Court's conclusion that Annex 1 is to be treated as if there had been a decision of the Mixed Commission that the frontier on the Dangrek should be delimited in accordance with the line shown thereon.

It would then fall for determination whether it was a delimitation established on the basis of the criterion laid down in Article 1 of the Treaty of 1904 which was that the frontier line should follow the line of the watershed. If the delimitation were not established on that basis, the line on Annex I could not, in my opinion, have any probative value; it could have no binding force upon either Siam or France.

The Court seeks to resolve the difficulty on the basis, not of a new conventional agreement—since none is shown or could be shown to exist—but on the basis of treaty interpretation.

The line shown on Annex I is beyond doubt not the line of the watershed, in particular it is not that line in the critical vicinity of the Temple. On the basis that Annex I is, or represents, a delimitation of the Dangrek by the Mixed Commission it is evident that the line in Annex I is not established in accordance with the criterion laid down in the Treaty.

The Court however does not see it this way. Basing its reasoning on a proposition that the two States, despite the clear provisions of Article 1, did not attach any special importance to the line of the watershed but were concerned with what is described as the overriding importance of adhering to a map line in the interests of finality—a conflict between the line in Annex I and Article 1 of the Treaty of 1904 is resolved as a matter of treaty interpretation in favour of the line on the map sheet.

I do not agree either with the proposition on which the Court bases its reasoning or with its reasoning. I cannot agree that a derogation from what is provided in the Treaty, namely that the frontier should follow the line of the watershed, can be disposed of

in this manner by treating the map, the line on which was to conform to the Treaty, as in law overriding it.

This, in my view, is not treaty interpretation. It amounts, in my opinion, to redrafting the Treaty of 1904 in accordance with a presumed intention of the two States, an intention indeed which is not to be found within the terms of the Treaty itself nor, in my view, elsewhere in the evidence; a presumed intention which is moreover quite inconsistent with the plain terms, not only of Article 1 of the Treaty, but as well with Article 3 thereof which provided that the work of the Mixed Commission had as its object "the frontier *determined* by Article 1".

Moreover, it hardly seems possible even as a matter of treaty interpretation to pronounce in favour of the line of Annex I in the absence of a determination of the extent to which Annex I does or does not in fact conform to the stipulations contained in Article 1 of the Treaty itself.

Finally, if the record establishes, as I believe it does, that the Dangrek was in fact delimited by the Mixed Commission and that the decision was that the frontier should follow the line of the watershed there would be a conflict between the line on Annex I and the decision of the Mixed Commission. This conflict could not be resolved by the method of treaty interpretation to which the Court has had resort. The decision of the Mixed Commission that the frontier line should be the line of the watershed destroys the foundation on which the Court's reasoning is based. In any case, there could be no doubt that the decision of the Mixed Commission, that the frontier line was to follow the line of the watershed, must prevail over any map line which purports but fails to reflect that decision.

* * *

There are further difficulties in the way of the thesis which the Judgment expounds. Annex I and the ten map sheets accompanying it were delivered to Thailand and received by the latter at the same time and in the same circumstances.

If Annex I became part of the treaty settlement of 1904 by virtue of the recognition found by the Court, so did they all. Yet, between the time when the Mixed Commission under the 1904 Treaty held its last meeting and ceased to function, and the end of March 1907, France had entered into the Treaty and Protocol of 1907.

Six of the eleven maps related to the frontier region between Siam and Cambodia. The frontier line on three of them covering the regions between the Great Lake and the sea to the south no longer existed as frontier lines. Not only did they not exist, but the whole region covered by these map sheets—issued in 1908—were

no longer in Thai territory. There seems little purpose in Siam having adopted or recognized them.

Of the three remaining map sheets, namely those which covered the northern frontier, two covered the region of the Pnom Padang; one of which also covered part of that mountain range and a section of the eastern part of the Dangrek. It would not I think, as a matter of treaty interpretation, be possible to reconcile the frontier line shown on these two maps, in so far as they relate to the region of the Pnom Padang, with the frontier line stipulated in the Treaty of 1907.

Under this Treaty, the line of the frontier on that range of mountains as far as the Mekong no longer followed the *crest*, as the decision of the Mixed Commission of 18 January indicates it should do in accordance with the provisions of the 1904 Treaty, but the line of the *watershed*. Article I of the Protocol of 1907 was the law which governed the two States.

This is also the position with regard to the Dangrek. After the Mixed Commission under the 1904 Treaty had ceased to function, Article I of the Protocol of the Treaty of 1907 stipulated in clear and unambiguous terms that the frontier line on the Dangrek should be that of the watershed. The line on Annex I cannot as a matter of treaty interpretation be reconciled with the 1907 Treaty. The Treaty must prevail.

Unless therefore France and Siam thereafter entered into a new conventional arrangement that the line on Annex I was to become binding upon them irrespective of whether it did or did not answer to the criterion of the line of the watershed, it is the watershed line of the 1907 Treaty on the Dangrek which must prevail.

That the law governing the two States subsequent to 1907 was the treaty line defined in Article I of the Protocol of 1907 was acknowledged by France in her diplomatic note of 1949 to Siam, in which she said in specific and unmistakable terms that the frontier line between herself and Siam was that stated in the 1907 Protocol, namely the watershed which *continued* to be the frontier line between the two States. This is the same position which Cambodia took up in its own diplomatic note of 1954.

* * *

I turn now to the question whether the evidence establishes any consensual agreement between France and Siam in relation to the frontier line shown on Annex I.

An agreement between the two States could have taken a number of forms. Neither was subject to the limitations of authority which the Treaty of 1904 imposed upon the Mixed Commission. Each State had plenary powers. Either could, had its mind been directed to the matter, have sought modification of the line shown

on Annex I or refused to agree to it. The two States could have agreed that, notwithstanding the terms of any treaty between them, having regard to certain political or other considerations, the line should be altered, which was precisely what the two Governments in 1905 did agree to do outside the terms of the Treaty of 1904 in respect of the region of Kratt on the sea south of the Great Lake. The two States could have agreed to accept the line on Annex I as representing the line of the watershed whether it did or did not conform with that line. They could have agreed that the line on Annex I should be deemed to have been a delimitation by the Mixed Commission under the 1904 Treaty whether there had or had not been such a delimitation. They could have expressed their agreement in the form of a new convention—they could, but in my view most improbably, have left their agreement to be evidenced by their conduct.

The matter was at large.

Whatever agreement were reached, it would have involved a new or fresh obligation undertaken by each State in relation to the other. Whether in the events which happened any such agreement was made—and if so what was the nature and content of it—depends upon whether any may be implied from the evidence.

The Judgment directs its consideration almost exclusively to an examination and criticism of Thailand's conduct of silence and non-protest. There is however another side of the picture.

* * *

Criticism may indeed be directed against Thailand and inferences adverse to her drawn from the fact that on a number of occasions over the years since 1908-1909 she remained silent on the map sheets. The fact however is that France herself innocently, but none the less to a major extent, directly contributed to the very conduct of Thailand that Cambodia has sought to rely upon, and the Court thinks is of such significance. For it was the act of France in presenting the map sheet Annex I which purported to show a frontier line drawn correctly to represent the line of the watershed—whether based upon a decision of the Mixed Commission or upon the Treaty line—that induced Thailand to believe that the line shown on Annex I had been correctly drawn.

My own approach to the facts, as well as to the legal issues involved, differs from that of the Court. I take another view of the facts and my enquiry is directed to a different end, namely to determining whether there was a consensual arrangement between France and Siam that the line on Annex I was to be the established frontier between the two States.

* * *

A few general observations should first be made.

In the first place, the concentration of attention on the small area of the Temple as shown at Annex I tends to shut out of view or obscure other and more important facts. It is of course true that although the Court has been requested by Cambodia to declare that the line shown on Annex I is the line of the frontier in the region covered by that map, it is only called upon to pronounce on the claim as stated in the Application, namely whether sovereignty over the Temple is vested in Cambodia. But this it cannot do except by first arriving at a conclusion one way or the other on whether the frontier line on Annex I as a line which legally is binding on the two States.

This being the essential step in reaching a decision, little purpose, it seems to me, is served by stressing, indeed I think overstressing, the fact that if you look at the map sheet Annex I it will be seen the Temple lies on the Cambodian side of the frontier line. That is evident. It becomes perhaps more insistently pressed upon the eye the more one looks at the comparatively small part of a large map sheet.

It is easy to fall into the error of thinking that the Temple and who was to obtain sovereignty over the Temple was the principal or the prime concern of the two States in 1908-1909 and that, when Thailand received the maps, almost the first thing which she might be expected to do would be to see whether sovereignty over the Temple had been accorded to her. All this, I think, bears little relation to the realities.

Quite apart from the fact that the Temple was not of any great significance to either State in 1908-1909—it never found a mention in any of the voluminous correspondence of Colonel Bernard—what the two States were concerned with under the 1904 Treaty was the delimitation of frontiers of considerable length. In so far as one part of the frontier was concerned, namely the Dangrek, the line was to be the line of the watershed. If that line placed the Temple or any other part of the territory between the two States one side or the other, that was the result of the Treaty and could hardly be the subject of protest.

France, in whose technical capacity accurately to construct the map of the frontier regions Siam reposed confidence, prepared the map sheets. That Siam did so repose confidence in France's technical capacity to do this is beyond dispute. France, by preparing the map sheet Annex I, represented in my view, when it was delivered by her to Siam, that it was correctly drawn and that the frontier line shown thereon was in accordance with the decision of the Mixed Commission or, if there was no such decision, was in accordance with the Treaty line. In particular, she unequivocally represented that

the frontier line so depicted was the true line of the watershed.

In these circumstances alone, on any approach to this case I would find little justification in demanding from Thailand that she should, within some time regarded as reasonable after she received Annex I, have herself ascertained whether the line represented by France as correctly showing the line of the watershed was accurate or not and that, having failed to protest, it should be concluded against her that she acknowledged the line was correct whether she in fact knew it was or not—and should be held bound by it.

A second observation of a general character throws light upon the circumstances in which the Parties were placed at the relevant period of time.

Prior to 1904 Thailand exercised sovereignty over the whole area of the Dangrek right to the cliff face. Such acts of administration as were, prior to 1904, effected by her in the area were, I am satisfied, continued on thereafter. Certainly, until 1949, when the present dispute about the Temple first asserted itself, these acts of administration were of a sporadic character. They were, however, less sporadic and covered a larger part of governmental activity than any acts exercised by France. Although much has been heard in this case about the importance of final and settled frontiers, apart from the one incident of Prince Damrong's visit to the Temple, neither State appears to have been aware of what the other was doing. It is significant that the Governor of the Cambodian province adjacent to the Temple had not the slightest idea where the frontier lines were. All he appeared to know was that the Temple was, so he claimed, within Cambodian territory.

The reason is not hard to find. The Temple ruins, which were the subject of a number of scattered visits by archaeologists, were allowed to submit to the years and the elements. The region to the immediate north of the escarpment dominating the Cambodian plains was forbidding and remained so. A few people apparently from time to time eked out an existence there. The whole district along the escarpment on the Dangrek was covered with sparse forest and stunted trees and was, in Colonel Bernard's view, "despairingly monotonous". After the summer rains it swarmed with game. In the dry season "there could not be", he says, "a more desolate landscape". The rivers were dry and "water was only to be found in loathsome pools where all the wild animals come to drink".

It was, in short, territory, certainly not in the early part of this century, of any great consequence to France or Thailand. The picture of France or Thailand at this period of time being specially

interested in having an agreed line on a map to indicate where the frontier was—irrespective of whether it was or was not the line of the watershed—or in knowing which side of that line the Temple fell does not strike me as a real one. It was indeed, in my opinion, only much later that the limited region near the Temple, for archaeological and military reasons, acquired any real significance on the political level for either State.

* * *

The issue to be decided is whether the record establishes an agreement between France and Siam that Annex I and the frontier line indicated thereon would be accorded by each of them conventional force. The proper enquiry under this issue is whether in 1908 or thereabouts the conduct of the two States establishes a common intention to contract mutual obligations and rights in relation to the frontier line shown on that map sheet and, if so, what was the nature of the agreement to which their common intention gave expression.

The right of entering into an international engagement is an attribute of State sovereignty. That a State has entered into such an engagement may not lightly be inferred from conduct.

Conduct may, however, be such that it may be inferred that two or more States have entered into an international engagement. The intention of a State to enter into such an engagement may however only be inferred from facts which conclusively establish it.

The evidence in this case falls far short of such a test.

In the normal course of events, had there been any intention on the part of either of the two States to enter into an international engagement in relation to the line on Annex I, it might be expected that some trace of that intention would have been left, if not in written form then at least by some unequivocal overt act on its part indicating that intention. There is none. It can scarcely be contended that the act of France in delivering to Siam copies of a map which were at the same time delivered by her to third parties evidenced any intention on her part to enter into an international engagement. There is nought save silence on her part; silence unbroken for forty years. When, in 1949, at the time she despatched to Thailand a diplomatic note alleging infringement of her territorial sovereignty in the region of the Temple, she broke the silence, it was not to suggest that any agreement had arisen in 1908-1909, nor indeed to suggest that Thailand had by her conduct in those years or since recognized the line in Annex I as being the frontier line. It was to say something which, in my view, is inconsistent with either suggestion.

Nor has there been left any trace of any intention on Thailand's part to enter into an international engagement. Here too there is silence over the decades.

The reason why no trace of any intention on the part of either State to enter into any international engagement is to be found is, I think, evident enough. There just was no such intention.

France prepared the map sheets primarily, as I think was the case, for her own purposes, and partly in response to the request of Siam made in November 1905 that a map of the frontier regions should be drawn up by French officers.

The printing of the map sheets did not follow as a matter of course on any work of the Mixed Commission. The map sheets were indeed not directly the necessary consequence or the outcome of the work of delimitation of the Treaty of 1904. Long after the Mixed Commission had ceased to function, authority to print them had, as has been noted, first to be obtained from the French Minister for the Colonies. Moreover, the map sheets, as even a casual look at them reveals, though based on work done by officers attached to the French Commission during the occasion of the work of the Mixed Commission, was not the work of the Mixed Commission. The major part of the detail appearing thereon is wholly unconnected with any work of delimitation.

It is abundantly evident from the report of his mission by Colonel Bernard to the French Minister of the Colonies of 14 April 1908, in which he reviewed the studies the French Commission "had to carry out", that the French Delimitation Commission was, during the course of the operations of the Mixed Commission, engaged in work which went far beyond the work of delimiting frontiers. The work of the French Commission included "ethnographical research and cartographical work". Attached to his report, in addition to all the Minutes of the Mixed Commission, were a number of reports by different officers attached to his Mission including one, for example, on the highway from Bangkok to Xieng Khong in the far north of Siam. The description of the reports suggests that the work of the French Commission, reflected in large measure in the various map sheets, had been by no means limited to work of delimitation called for by the Treaty of 1904.

It appears reasonably evident that whether Siam had or had not requested that French officers should execute maps of the frontier region, or however their request had originated, that the French Commission intended to prepare these maps in any case.

Moreover, the French Minister of the Colonies, who authorised the printing and publication of the maps, or his departmental officers, were acquainted with the contents of the Minutes of the Mixed Commission and accordingly knew from them and the many

reports of Colonel Bernard precisely what decisions had been taken by that Commission.

France knew what the record disclosed and they rested content with the record, confident in the reliability of their own topographers and cartographers.

If, however, they believed that some confirmation was necessary, to establish a decision of the Mixed Commission which was not recorded or not sufficiently recorded in the Minutes, it might reasonably be expected they would have specifically raised the matter and not remained silent about it. On the other hand, if they knew that there was no decision of the Mixed Commission delimiting the Dangrek they would certainly know there was no decision to depart from the line of the watershed and that accordingly the frontier was governed by the line of the watershed stipulated in the Treaty and Protocol of 1907. Whichever way the matter is viewed they knew it was the line of the watershed. The frontier line shown on Annex I is not consistent with any other hypothesis.

The examination of Annex I serves, in my view, to establish this. It shows the contours of the terrain on the Dangrek. It is, I think, evident, even to one not expert in the reading of contour lines, that the frontier line shown on Annex I over its whole length is directly connected with and based on these lines. It would appear probable on the face of Annex I that the frontier line was drawn so as to follow the line of the watershed as indicated by the various contours of the terrain shown thereon.

That this was in fact so is borne out, certainly in the critical region surrounding the Temple, by the evidence of Professor Schermerhorn who stated that the frontier line shown on Annex I was drawn up by constructing the watershed line in accordance with the contour lines shown. If the contour lines were correct the line of the watershed would have been correct. As, however, has been shown, the contour lines were not correct.

France accordingly knew Annex I represented the line of the watershed. If it was correctly drawn, as she was quite certain was so, there was no need for any further agreement between herself and Siam.

Moreover France, I am satisfied, was aware that Siam did not have the technological capacity to carry out a check survey. She certainly knew Siam had no means of knowing whether the frontier line on Annex I was correct or not and she knew that Siam was relying on her. It seems impossible in those circumstances to imagine she could ever have had any contractual intention in sending the map sheet to Siam or that she should think that Siam had any such intention.

Furthermore, France knew when she delivered the map to Siam that certain of the map sheets were of no possible practical value to Siam as a consequence of the Treaty of 1907.

What applies to Annex I must apply also to all the map sheets. There is no room for a contract being implied in relation only to Annex I. If any conventional agreement is to be implied it must be one which relates to all the map sheets which were the constituents of the one map. The fact that certain of the map sheets had no longer any frontier significance goes to confirm that France never had the intention of creating any conventional arrangement between herself and Siam.

Finally, when in 1949 France protested by diplomatic note against the stationing by Thailand of guards at the Temple, not a word is said about any conventional arrangement having been made between herself and Siam. In her diplomatic note of 9 May of that year France set out with particularity the grounds on which it contended that sovereignty in the Temple was vested in her.

The note disclosed that France relied upon the Protocol annexed to the Treaty of 23 March 1907. It stated that the frontier was, and *continued* to be, that defined by Article I of the Protocol, namely the line of the watershed. It claimed that Annex I showed in detail the frontier line *so defined* and that the map was drawn up in 1904-1905 (*sic*) under the direction of Colonel Bernard and that the line shown on that map was the line referred to in Article I of the Protocol as "in conformity with the line adopted by the preceding Commission of Delimitation on 18th January, 1907". This is the same ground on which Cambodia put forward her claim to sovereignty in the diplomatic note in 1954. It is the same ground which was put forward by Cambodia in her Application and Memorial.

At no time, until after these proceedings commenced, was there any suggestion of any implied agreement arising out of conduct. France's claim for sovereignty, and later Cambodia's, rested solely on express agreement.

No implied agreement has been made out.

* * *

I come now to the question whether Thailand as a result of her conduct in 1908 and since is precluded from contesting that the line shown on the frontier in Annex I is the established frontier.

* * *

Whether Thailand is precluded from contesting the frontier line shown on Annex I cannot be answered until the essential legal elements which constitute preclusion are ascertained.

The words "adoption", "acceptance", "acquiescence" and "recognition" which, in the course of the proceedings have been so often used, are apt I think to cloud legal principles unless it is quite clear in what sense they are being used.

These words are principally concerned with factual situations to which certain general principles of international law may apply and in so doing operate so as to affect legal rights and obligations as between States.

Moreover, phrases such as "a party may not blow hot and cold" or "*allegans contraria non est audiendus*" and others to the same effect do not, in my view, express general principles of international law. They are but a convenient and compendious way in which, in a general sense, the reasons which underlie certain legal principles and rules may be described.

Any situation may, as has been stated, be the subject of an act of recognition or may be acquiesced in. A situation so recognized or accepted may, and usually does, acquire evidential value and in certain circumstances may attract or produce legal consequences creating, affecting, or changing a legal relationship between States.

There is however, in my view, no foundation in international law for the proposition that an act of recognition by a State or acquiescence by a state in a situation of fact or law is a unilateral juridical act which, operating of its own force, has the legal consequence of precluding a party giving or making it from thereafter challenging the situation which is the subject of recognition or acquiescence.

The cases of *Legal Status of Eastern Greenland* (Series A/B No. 53), *Status of South West Africa* (I.C.J. 1950) and *Arbitral Award by the King of Spain* (I.C.J. 1960) do not support, in my view, this proposition. To claim that they do is to read into their facts law which is not there.

* * *

The principle of preclusion is a beneficent and powerful instrument of substantive international law. Based as it is upon the necessity for good faith between States in their relations one with another, it is not to be hedged in by artificial rules. It should not however be permitted to become so indefinite as to acquire the somewhat formless content of a maxim. And since the principle, when it is applicable to any given set of facts, substitutes relative truth for the judicial search for the truth, it should be applied with caution.

In my opinion the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either ex-

pressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.

Unless the elements so stated can, in any particular case, be shown to exist, the principle has no application.

The *Arbitral Award of the King of Spain* (I.C.J. 1960) neither extended nor cut down this principle. It applied it. All the constituent elements were, in my view, established in that case.

Whether the principle applies to the present case is an issue of fact and law.

* * *

The question of preclusion was not raised by Cambodia in her Application, but during the course of the oral proceedings. It occupied a distinctly subordinate place in the presentation of Cambodia's claim.

If a State claims it has been prejudiced by the conduct of another State in circumstances which prevent that other State from legally contesting what otherwise is an important fact or situation and fails to raise the issue of preclusion in any way until very late in the day, that is a circumstance which cannot be disregarded. It bears upon whether there is any substance in the claim.

* * *

I greatly doubt whether any of the elements of preclusion have been established by Cambodia. Even were it established that Thailand's conduct did amount to some clear and unequivocal representation, and that France relied upon it and was entitled so to do, I do not think there is any evidence that France—or Cambodia—suffered any prejudice. Certainly no piece of evidence so far as I can recall was ever presented which could establish that either State did.

Nor is it apparent what benefit Thailand can be said to have obtained as a result of her absence of protest.

I do not find it, however, necessary to examine these matters.

In my opinion the evidence quite fails to establish any clear and unequivocal representation on the part of Thailand.

Moreover, I am satisfied that France never acted upon the faith of any representation which may be inferred from Thailand's conduct.

It is not sufficient to assert that she did, the evidence must establish it. The burden of proof lies upon Cambodia and, in my view, she has failed to discharge the burden.

France never in any manner, over a period of 50 years, suggested that she had relied upon any conduct on Siam's part. Indeed, her diplomatic note of 9 May 1949 before referred to, gives not the slightest suggestion that she ever had.

The explanation is, I think, evident. France did not rely upon any conduct of Thailand in relation to Annex I. On the contrary, she relied solely upon the accuracy of the surveys and calculations of her own topographical officers and the map sheets drawn up by her own cartographers based upon those surveys and calculations. She acted not on the faith of Thailand's silence or other conduct, but upon the faith she reposed in the competence of the officers who established Annex I. She was quite confident that the question of the frontier between herself and Siam was governed by Article I of the Protocol of 1907 and that Annex I was correct. Moreover, she mistakenly believed, as at all times did Cambodia, that the reference in that Article to "the line (*tracé*) adopted by the preceding Commission of Delimitation on 18th January, 1907" was a reference to Annex I and the line depicted thereon and thus was formally confirmed by that Protocol.

It was indeed not Thailand's reaction or attitude to the map sheets which determined France's course of action. On the contrary, as France knew, it was Siam who relied upon her in the drawing up of maps. In a letter of March 1909 the French Minister in Siam, reporting to the French Foreign Minister on the work of the Transcription Committee, reveals clearly enough that it was the policy of France that Siam should continue to rely upon her in matters touching the drawing up of maps. French interest in the Transcription Committee was not limited to its work. There was, the French Minister writes, also "an ultimate aim ... entertained from the outset". The objective was "to persuade the Siamese to embark on a course that is likely to lead them to the goal we have in view, that is to say, to cause them, at a later stage, to appeal *invariably* for our help for the purpose of drawing up a general map of Siam...".

For my part, I am satisfied that France, except in terms of her general political policy and of attracting Siam to a closer dependence upon her, had not the slightest interest in how Siam reacted to Annex I or any other of the map sheets; there was no reaction she could have expected. She knew the extent to which Siam was dependent upon her in the construction of the maps and she wanted that sense of dependence to remain. I am quite unimpressed by the contention put forward late in the day—a contention which there is not one piece of direct evidence to support—that France relied upon Siam's acceptance of Annex I. France produced the map sheets, including Annex I, was satisfied they were correctly drawn up and required no confirmation—and remained at all times satis-

fied they were correct. On that basis, and that basis alone, France conducted herself thenceforth.

In my opinion, Thailand is not precluded from alleging that the line on Annex I is not the frontier line.

* * *

I regret exceedingly that I have found it necessary to express my views at such length. This case, important though it is for the two States directly concerned, has however a significance which extends beyond the confines of the present litigation.

Whether the Mixed Commission did or did not delimit the Dangrek, the truth, in my opinion, is that the frontier line on that mountain range is today the line of the watershed.

The Court however has upheld a frontier line which is not the line of the watershed, one which in the critical area of the Temple is an entirely different one.

This finds its justification in the application of the concepts of recognition or acquiescence.

With profound respect for the Court, I am obliged to say that in my judgment, as a result of a misapplication of these concepts and an inadmissible extension of them, territory, the sovereignty in which, both by treaty and by the decision of the body appointed under treaty to determine the frontier line, is Thailand's, now becomes vested in Cambodia.

(Signed) Percy SPENDER.