



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

*Academic Directors: Ignacio Torterola  
Loukas Mistelis\**

## REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 15 JUNE 1962 IN THE CASE CONCERNING THE *TEMPLE OF PREAH VIHEAR*

(CAMBODIA V. THAILAND)

GENERAL LIST NO.151

ORDER

Case Report by Anita Ghazi Rahman\*\*  
Not Yet Edited\*\*\*

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An Order rendered on July 18, 2011, by the International Court of Justice (“ICJ”) having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court.

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

**Claimant’s delegation:** H.E. Mr. Hor Namhong, Sir Franklin Berman, Mr. Jean-Marc Sorel

**Defendant’s delegation:** H.E. Mr. Virachai Plasai, Mr. Alain Pellet, Mr. James Crawford, Mr. Donald McRea

\* Directors can be reached by email at [ignacio.torterola@internationalarbitrationcaselaw.com](mailto:ignacio.torterola@internationalarbitrationcaselaw.com) and [loukas.mistelis@internationalarbitrationcaselaw.com](mailto:loukas.mistelis@internationalarbitrationcaselaw.com)

\*\* Anita Ghazi Rahman is the Founder of The Legal Circle specializing in Company and Corporate Law. She can be reached at [anita@legalcirclebd.com](mailto:anita@legalcirclebd.com) or +880-1713-036917.

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## Digest

### 1. *Facts of the Case*

The ICJ had delivered a Judgment on June 15, 1962 in the case of the *Temple of Preah Vihear (Cambodia v. Thailand)* [the “1962 Judgment”] in which the Court *inter alia* declared in the operative part of the judgment that “*the Temple of Preah Vihear is situated under the sovereignty of Cambodia*”<sup>1</sup> and that “*Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed at her Temple, or in its vicinity on Cambodian territory*”<sup>2</sup>. On April 28, 2011, Cambodia filed an Application at the Registry of the Court, requesting an interpretation of the 1962 Judgment. The Application was accompanied by an urgent Request for the indication of provisional measures following the occurrence of serious armed incidents<sup>3</sup> having occurred in the area of the Temple of Preah Vihear<sup>4</sup> (the “Temple”) and at several locations situated along the boundary between Cambodia and Thailand. These incidents had caused fatalities, injuries and the evacuation of local inhabitants, and which incidents, Cambodia contends, had been caused by the Kingdom of Thailand (“Thailand”)<sup>5</sup>.

Based on the declarations in the 1962 Order (as stated above), Cambodia maintains that the jurisdiction of the Court to entertain a request for interpretation of one of its judgments is based directly on Art. 60 of the Statute of the International Court of Justice (the “Statute”) which stipulates that “[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”<sup>6</sup>.

Two rounds of oral observations on this Request for the indication of provisional measures were held on May 30 and 31, 2011. At the end of the Appellant’s oral observations, taking into account the gravity of the situation, Cambodia requested for provisional measures as a matter of urgency as follows:

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<sup>1</sup> Order ¶1

<sup>2</sup> Order ¶2

<sup>3</sup> The Court observed in ¶53 of the Order that since July 15, 2008, armed clashes have taken place and have continued to take place in the area of the Temple, in particular between February 4 and 7, 2011, leading to fatalities, injuries and displacement of local inhabitants. That damage has been caused to the Temple and the property associated with it. That in spite of attempts to settle the dispute peacefully, through intervention of the Security Council and ASEAN, there was a further exchange of fire between the Parties on April 28, 2011 in the area of the Temple.

<sup>4</sup> A world heritage site included in the UNESCO World Heritage list.

<sup>5</sup> Order ¶8

<sup>6</sup> Order ¶4

“Having regard to all the written and oral statements presented by Cambodia, and without prejudice to the Court’s interpretation on the merits of the dispute, Cambodia respectfully requests the Court to indicate the following provisional measures, pending the delivery of the Judgment:

- an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear;
- a ban on all military activity by Thailand in the area of the Temple of Preah Vihear;
- that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.”<sup>7</sup>

At the end of the Respondent’s oral observations, Thailand asked that “In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Kingdom of Cambodia and its oral pleadings, the Kingdom of Thailand respectfully requests the Court to remove the case introduced by the Kingdom of Cambodia on 28 April 2011 from the General List”.<sup>8</sup>

## 2. *Legal Issues Discussed in the Decision*

(a) *Dispute as to the meaning or scope of the 1962 Judgment and Jurisdiction of the Court (paras. 19-32)*

The Court stated that when it receives a request for the indication of provisional measures in the context of proceedings for interpretation of a judgment under Art. 60 of the Statute, the Court has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied<sup>9</sup>. Art. 60 of the Statute provides that: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”.

The Court expressed that a “dispute” within the meaning of Art. 60 of the Statute must be understood as a difference of opinion or views between the Parties as to

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<sup>7</sup> Order ¶11

<sup>8</sup> Order ¶18

<sup>9</sup> Order ¶19

the meaning or scope of a judgment rendered by the Court<sup>10</sup> and stated that it is an established principle by case law that a dispute within the meaning of Art. 60 of the Statute must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause<sup>11</sup>.

In light of the submissions of the Parties, the Court was of the view that a difference of opinion or views appears to exist between the Parties as to the meaning of the 1962 Judgment in that the difference, (a) appears to relate to the meaning and scope of the phrase “vicinity on Cambodian territory”; (b) appears to relate to the nature of the obligation imposed on Thailand to “withdraw any military or police forces, or other guards or keepers”; and in particular to the question whether this obligation is of a continuing and instantaneous character; and (c) to the question as to whether the 1962 Judgment did or did not recognize with binding force the line shown on Annex I map<sup>12</sup> as representing the frontier between the Parties<sup>13</sup>. The Court was therefore unable to accede to Thailand’s request that the case be removed from the General List and opined that there is sufficient basis for the Court to be able to indicate provisional measures requested by Cambodia.

*(b) Legal Conditions required for indication of Provisional Measures (paras. 35-56)*

The Court indicated that the power to indicate provisional measures under Art. 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court and this power may be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible. The Court examined the conditions of ‘plausibility’ one by one and concluded that the conditions had been satisfied. Firstly, it considered that the rights claimed by Cambodia (namely, the right to respect for its sovereignty in the area of the Temple and its right to territorial integrity<sup>14</sup>), as derived from the 1962 Judgment, in light of the interpretation thereof, was plausible. Second, the Court considered that the provisional measures requested were intended to protect the rights invoked by Cambodia in its request for interpretation and that the requisite link

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<sup>10</sup> Order ¶22

<sup>11</sup> Order ¶23

<sup>12</sup> A map drawn up in 1907 by the Franco-Siamese Mixed Commission as representing the frontier between Cambodia and the Kingdom of Thailand in the area of the Temple: ref. Order ¶1

<sup>13</sup> Order ¶31

<sup>14</sup> Order ¶39

between the alleged rights and the measures sought were therefore established<sup>15</sup>. Thirdly, the Court considered that there was a real and imminent risk of irreparable damage being caused to the rights claimed by Cambodia before the Court had given its final decision, and that therefore there was urgency<sup>16</sup>. It was also clarified by the Court that Art. 60 of the Statute does not impose a time-limit on requests for interpretation<sup>17</sup>.

*(c) Extent of the Court's Powers in indicating Provisional Measures and Formulation of the Provisional Demilitarized Zone (paras. 58-68)*

The Court recalled that under Art. 75¶2 of the Rules of Court<sup>18</sup>, it has the power to indicate measures that are in whole or in part other than those requested by a party, or measures that are addressed to the party which has itself made the request and also possesses the power, independent of the parties' request, to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require<sup>19</sup>.

Considering the material presented before it, the Court deemed it appropriate to indicate provisional measures addressed to both Parties. In view of the facts that the Temple has been the scene of armed clashes between the Parties, which clashes the Court found could reoccur, the Court observed that it is for the Court to ensure that no irreparable damage is caused to persons or property in the area pending the delivery of its judgment on the request for interpretation. Moreover, the Court stated that in order to prevent irreparable damage from occurring, all armed forces should be provisionally excluded from a zone around the area of the Temple, without prejudice to the judgment, which the Court will render on the request for interpretation. Therefore, the Court considered it necessary to define a zone which is to be kept provisionally free of all military personnel (without prejudice to normal administration) including the presence of non-military personnel necessary to ensure the security of persons and property<sup>20</sup>.

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<sup>15</sup> Order ¶45

<sup>16</sup> Order ¶56

<sup>17</sup> Order ¶37

<sup>18</sup> Art. 30 of the Statute of the International Court of Justice provides that "the Court shall frame rules for carrying out its functions". These Rules are intended to supplement the general rules set forth in the Statute and to make detailed provision for the steps to be taken to comply with them.

<sup>19</sup> Order ¶¶58-59

<sup>20</sup> Order ¶61

The Court accordingly framed and identified a Provisional Demilitarized Zone (“PDZ”) (see sketch-map attached)<sup>21</sup>.

The Court in conclusion reminded the Parties, amongst others, that the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of the United Nations and also obliged to settle international disputes by peaceful means in a manner that international peace, security and justice are not endangered. The Court thus reminded the Parties that they are obliged, by the Charter and general international law, to respect these fundamental principles of international law<sup>22</sup>.

(d) *Dissenting Opinions and the issue with a Provisional Demilitarized Zone*

A number of dissenting opinions were appended to the Order of the Court by President Owada Judge Koroma, Judge Al-Khasawneh, Judge Cançado Trindade, Judge Xue and Donoghue and Judges *ad hoc* Guillaume and Cot, the contents of some of which are discussed below.

President Owada voted against sub- ¶(B)(1) of the operative part of the Order in ¶69, which sub-clause required both parties to immediately withdraw their military personnel currently present in the PDZ and refrain from any military presence within that zone and from any armed activity directed at it. President Owada noted that out of a total of some 40 Orders of the Court on the indication of provisional measures, there are 3 cases<sup>23</sup> in which the issue of withdrawal of forces came about and where the Court in fact indicated provisional measures to disengage their respective armed forces from actual or potential armed conflict and withdraw their respective forces from a certain zone specified in the Order. However, in none of the 3 cases has “the Court gone so far as to order the parties to withdraw from a “Provisional Demilitarized Zone” which is devised artificially by the Court for the purposes of military disengagement of the parties and which comprises part of the territories that indisputably belongs to the sovereign of one or the other of the parties...”<sup>24</sup>. President Owada regarded the

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<sup>21</sup> Order ¶62

<sup>22</sup> Order ¶66

<sup>23</sup> *Frontier Dispute (Burkina Faso/Mali)*, Provisional Measures, Order of January 10 1986, I.C.J. Reports 1986, p.12, ¶32; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of March 15, 1996, p.12, ¶49; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* Provisional Measures, Order of March 8, 2011, ¶86.

<sup>24</sup> ¶7 of the Dissenting Opinion of President Owada

PDZ to be devoid of legal justification and opined that the Court in ordering, with binding force, that each of the Parties be compelled to withdraw its forces from a certain portion of its own territory over which no one disputes that it has unfettered sovereignty, even if on a provisional basis, clearly goes beyond the power of the Court. President Owada noted that the legal situation would be quite different if such provisional measures were to be taken by the Security Council under Chapter VII of the United Nations Charter, which the Security Council is empowered to take, and warned that the International Court of Justice is not the Security Council<sup>25</sup>.

President Owada expressed his agreement to parts of the operative part of the Order except to the extent it indicates the establishment of some PDZ. The issue with the PDZ, to President Owada, “is not the question of *enforcement* of the demilitarized zone by a third party authority, but the feasibility of *implementation* of the demilitarized zone by the Parties”<sup>26</sup>. He noted with regret that the quadrangular PDZ included more of the territory of one party than that of the other and noted that the artificial line of demarcation to designate the PDZ may be clear on the map but it may turn out to be difficult for the Parties to implement.

Judge Xue in summary, is of the opinion that the PDZ as indicated in sub-¶(B)(1) of the Order fails to maintain the necessary link between the rights which form the subject matter of the main proceedings on the merits and the measures requested, within reasonable bounds. He expressed his agreement with the Court’s decision to indicate provisional measures but expressed his “serious reservation”<sup>27</sup> to defining the PDZ as stated in sub- ¶(B)(1) of the Order, and like President Owada, found the PDZ to cover undisputed territories of the Parties. Judge Xue found this measure to be excessive in light of the current situation between the Parties and believed it to put into question the proper exercise of the judicial discretion of the Court in indicating provisional measures, both under law and by the jurisprudence of the Court. Judge Xue opined that the Court did not give sufficient reasons for adoption of the PDZ as one of the provisional measures and particularly on what considerations such extraordinary measure was warranted. He was of the view that it would have been sufficient for the Court to just order the Parties to refrain from any military activities in the area of the Temple and since this case relates to the interpretation of the Court’s

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<sup>25</sup> ¶11 of the Dissenting Opinion of President Owada

<sup>26</sup> ¶15 of the Dissenting Opinion of President Owada

<sup>27</sup> ¶1 of the Dissenting Opinion of Judge Xue



judgment, at this stage there was no real need for the Court to identify an area for demilitarization. In Judge Xue's opinion, the Court could have indicated a similar provisional measure as in the case of *Burkani Faso/Mali* by asking the Parties, with the co-operation of the Association of Southeast Asian Nations (ASEAN) to determine first by themselves the positions to which their armed forces should be withdrawn. Failing such agreement, the Court could then, if necessary, draw such lines by means of an Order.

Judge Al-Khasawneh also expressed his dissent to sub- ¶(B)(1) of the Order. He noted that the Court's power to indicate measures is wide, and warned that because of this it should be exercised with caution. He found the imposition of a demilitarized zone, the spatial definition of which is not defined on the basis of a discernible criterion to be unnecessary for the protection of the rights in issue and "infinitely" open to accusations of arbitrariness. In his view, a more sensible approach would have been to restrict the provisional measures to a strict observations of a ceasefire in the area of the Temple, together with a measure directing Thailand not to obstruct access to the precincts of the Temple and a measure directing the two Parties to allow the observers, appointed by ASEAN, to access the Temple area.

### 3. *Decision*

In its Order, the Court first unanimously rejected Thailand's request for the case introduced by Cambodia to be removed from the General List (as set out in section 2 of this Summary). It then indicated various provisional measures, as follows:

(a) that both parties should immediately withdraw their military personnel currently present in the provisional demilitarized zone (PDZ), as defined in ¶ 62 of the Order, and refrain from any military presence within that zone and from any armed activity directed at it. This decision was reached by a majority of 11 to 5 votes.

(b) that having noted that the Temple area had been the scene of armed clashes between the Parties and that such clashes might reoccur, the Court decided that in order to ensure that no irreparable damage was caused, there was an urgent need for the presence of all armed forces to be temporarily excluded from a PDZ around the area of the Temple.

(c) that Thailand should not obstruct Cambodia's free access to the Temple, or prevent it from providing fresh supplies to its non-military personnel. That

Cambodia and Thailand should continue their co-operation within ASEAN and, in particular, allow observers appointed by ASEAN to have access to the PDZ and both Parties should refrain from any action which might aggravate or extend the dispute before the Court or make it difficult to resolve. This decision was reached by a majority of 15 to 1 votes.

(d) that each of the Parties should inform the Court as to its compliance with the above provisional measures and that, until the Court had rendered its judgment on the request for interpretation it would remain seised of the matters which form the subject of the Order.