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Collection
Evolution of Acquiescence/Estoppel: The Dilemma of Justice
(A Reappraisal of the Temple of Preah Vihear Case)

August 2013

Graduate School of Law
Seoul National University
Seoul, Korea

Thol Theany
Evolution of Acquiescence/Estoppel: The Dilemma of Justice

(A Reappraisal of the Temple of Preah Vihear Case)

A master’s degree thesis presented

By

Thol Theany

To

Graduate School of Law

Seoul National University

Seoul, Korea
I remember when I asked my academic adviser, Professor Chung In Seop, about his thoughts on my proposed master’s degree thesis, the topic being the Temple of Preah Vihear dispute, he was a little bit puzzled at first. Then, he asked me back straightforward: “So then your thesis will be for Cambodia, as a Cambodian person?” I wholeheartedly replied to him: “No, it is not”. It was that short answer that pushed me to understand what the heart of ‘justice’ intrinsically is.

Being a Cambodian, I admit that I naturally have a moral responsibility to defend my nation, in any circumstance. As a reasonable person and a human being, however, I have also acknowledge that I am bound by another duty to bear the truth before mankind, especially when concerning the matters of war and peace. Because only understanding the truth will allow people to live long together peacefully, therefore I decided to remain myself neutral and impartial, when judging such matters that touch at the ‘heart of justice’. This paper, “Evolution of Acquiescence/Estoppel: The Dilemma of Justice”, is an illustration of my own definition and conscience in regard to what the terms and essences of justice and fairness are really about.

This thesis could not be successfully completed without receiving supports from many important people. I could not thank enough my advisor, Professor Chung In Seop, who has always been helpful to me and my studies at Seoul National University, from the beginning until completion. He provided me tremendous knowledge of international law and has been the only person who I could mostly count on during my difficult journey throughout education here. Being his student is one of the luckiest opportunities I ever had in life. I also would like to express my sincere thanks to Professor Rhee Sang Myon who taught me how to become a better and more responsible lawyer. Although I had little time to know him, his bravery and exceptional charisma have already entered deep into my mind and my heart. Also, to Professor Lee Guen Kwan, I would like to thank him for giving me such remarkable advice and recommendations regarding the improvement of my thesis. Of course, without him, my thesis would not be what it is.
My special thanks is for my best Costa Rican buddy, Edu, and my Indonesian friend, Budi, who just like my brothers, helped sharing joys and pains throughout this couple-years of life abroad. Also, I want to thank my American friend, Isaac, who never hesitated to help solve my linguistic difficulties.

I also want to thank the Korean government (NIIED) who provided me such an invaluable chance to study in this land of opportunities. Frankly, my life would not have been more educated without this scholarship.

Last, and the most important, I cannot forget to thank to my family back home, who always stood by and gave limitless support to me from far away. In particular, I would like to express my deepest gratitude to my mother, who has always stood behind to keep me walking on this rocky journey and in every other challenge of life. There is nothing else more valuable in this world than being your son. Thank you so much mother.

Thol Theany
August, 2013
Abstract

In 1962, when the International Court of Justice (ICJ) awarded the Temple of Preah Vihear to Cambodia, there were a growing number of critics, which accused the Judgment of being equitably unfair and legally mistaken. Those critics strongly condemned the Court of misusing the equitable principle, so called ‘estoppel by acquiescence’. They contended that the Court had misinterpreted the term of ‘acquiescence’, and that wrong interpretation had shifted the implication of the principle away from its initial objective and scope.

This thesis, “Evolution of Acquiescence/Estoppel: The Dilemma of Justice”, is intended to explore those reasons with which critics expressed strong disapproval of the Court’s decision. By comparing to other relevant case studies, this paper attempts to analyse and to discover whether there was a legal relation between the centre of the dispute and the justification for ‘acquiescence’. Furthermore, it will deeply examine how legally and equitably reasonable those critics were, before evaluating whether the principle of acquiescence in this case has been consistently implemented by the Court.

Finally, by analysing the particularities of this dispute, this paper will provide suggestions, in regard to what extent the principle of acquiescence may possibly be applied in order to maintain its boundary of justice and fairness.

Key Words: Estoppel by Acquiescence, Initial Objective, Inconsistency, Justification, Justice and Fairness

Thol Theany

Student ID: 2010-24146

Master’s Degree

Public International Law

Graduate School of Law

Seoul National University
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<td>Association of South East Asian Nations</td>
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<tr>
<td>DMZ</td>
<td>Demilitarized Zone</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>JBC</td>
<td>Joint Boundary Commission</td>
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<td>Memorandum of Understanding</td>
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<td>Overlapping Claims Area</td>
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<td>Permanent Court of International Justice</td>
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(Figure 1): Location of the Preah Vihear Temple along the Cambodia-Thai borders


(Figure 2): A picture of the Preah Vihear Temple located on the top of Dangrek Mountain cliff

Source: farang-isan.bling.fr
(Figure 3): The exact course of “watershed line” according to the Treaty of 13th January, 1904

Source: www.asiafitnest.com

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Source: www.khmerbird.com
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Source: KI Media Site

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Source: Cambodian Council of Ministers

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Source: www.khmer.rfi.fr
Chapter I
Introduction

“In law we must beware of petrifying the rules of yesterday and thereby halting progress in the name of progress. If one consolidates the past and calls it law he may find himself outlawing the future.”

- Judge Manfred Lachs- ¹

Equity plays a crucial role in the fulfillment of the law, as law itself is still far away from being perfect. Since the establishment of an international legal and judicial system, various kinds of equitable principles have been implemented in settling many international disputes, following the development by and the influence of the Roman legal system. Particularly when concerning disputes over territorial sovereignty, one of the most outstanding principles which has been ambitiously used by the International Tribunals is known as “estoppel by acquiescence”.

Section 1: Definition of “Acquiescence/Estoppel”

Estoppel by acquiescence, ‘a form of equitable estoppels recognized as a general principle of law as justice”², may arise in the situation when one person gives a legal warning to another based on some clearly asserted facts or legal principle, while the other does not respond within ‘a reasonable period of time’.³ Consequently, the other person is generally held as being acquiesced

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¹ Judge Manfred Lachs, President of the International Court of Justice, Commemorative Speech at the United Nations General Assembly (Oct. 12, 1973).


and considered to have ‘lost the legal rights to assert the contrary’.\textsuperscript{4} Acquiescence can be interpreted many ways, sometimes as consent, sometimes as refusal, and sometimes it can happen through other conducts that deemed to produce a legal effect, simply due to the act of silence.\textsuperscript{5} Franck, thus, came to conclude that: “…silence or absence of protest may preclude one state from later challenging the claim of another”.\textsuperscript{6}

Acquiescence can probably be assumed to be ‘the most delicate and of the greatest practical importance’, simply because, ‘the absence of protest can in certain circumstance be translated as implied or tacit recognition’.\textsuperscript{7} MacGibbon defined this equitable principle as follows:

“…acquiescence takes the form of silence or absence of protest in circumstance which generally calls for a positive reaction signifying an objection”.\textsuperscript{8}

In addition, Browlie recognized the possible existence of estoppels by acquiescence without necessarily requiring an explicit agreement, and thus went on to describe that:

“…in international law, the effect of consent for the transfer of territory has been considered previously with respect to the cession, which is a procedure which includes the agreement to transfer…however…in many cases, recognition and acceptance of territorial sovereignty may occur in contexts where there is no agreement to transfer, as the claimant is in possession already, the transaction may be unilateral, and the recognition is on the part of third states and not necessarily the ‘losing’ state”.\textsuperscript{9}

\textsuperscript{4} Ibid.


\textsuperscript{6} Thomas M. Franck, \textit{supra} note, Ibid.


\textsuperscript{8} Ibid, also see: I.C. MacGibbon: “The Scope of Acquiescence in International Law”, The British Year Book of International Law, (1954), pp.143.

Through these explanations, Brownlie came further to conclude that:

“...acquiescence has the same effect as recognition, but arises from conduct the absence of protest when this might reasonably be expected”.10

Because the term ‘acquiescence’ and ‘recognition’ sometimes can be confused, Shaw Malcom and Brownlie tended to explain their similarities and differences as follows:

“...while recognition is a positive act by a state accepting a particular situation and, even though it may be implied from all the relevant circumstances, it is nevertheless an affirmation of the existence of a specific factual state of affairs, even if that accepted situation is inconsistent with the term in a treaty. Acquiescence, on the other hand, occurs in circumstances where a protest is called for and does not happen or does not happen in time in the circumstance”.11

In other words, as they continued to explain the particular characteristics of ‘acquiescence’:

“...a situation arises which would seem to require a response denoting disagreement and, since this does not transpire, the state making no objection is understood to have accepted the new situation”.12

Finally, they acknowledged the ‘detrimental reliance’ requirement of this principle, concluding that:

“...the idea of estoppel by acquiescence in general is that a party which has made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other’s benefit cannot thereupon change its position”.13


12 Ibid.
The principle of acquiescence undoubtedly has a place in international law. It has played a pivotal role in settling various territorial disputes which have come before international tribunals. One of the most outstanding and controversial cases regarding the question of ‘acquiescence’ that is currently problematic for the achievement of justice and fairness, can be seen in the Temple of Preah Vihear Case (Cambodia vs. Thailand, 1962). This case, which was once ruled by the International Court of Justice (ICJ), had been recently brought again before the Court (2011), by the plaintiff (Cambodia), for a interpretation/clarification of the Judgment’s implication.

Section 2: Origin of the Preah Vihear Dispute and Legal Questions

The central of dispute over the areas of Preah Vihear Temple can be widely understood by studying three fundamental facts and circumstances. First, the essential clauses/stipulations of the Franco-Siam Treaty of 1904 and 1907 regarding demarcations of the Cambodia-Thailand Boundary (See: Figure 1), and the inconsistent applications of those Treaties, have to be well examined, to determine what exactly were the ‘intentions’ of the parties. Second, the following ‘absence of protest’ for many years toward the inconsistency of those Treaties by Thailand, the main reason through which the 1962 Court decisively relied on, shall be deeply investigated, in order to discover what was the ‘nature’ of that abstention, and to further analyse whether there was a legal justification for ‘estoppel by acquiescence’ in those particular circumstances. Last, a diligent analysis on the meanings and scopes of the Judgment 1962 needs to be conducted to unveil the consequences of that decision which has been the main root of the controversies over the current dispute of the Overlapping Claims Area (OCA, 4.6 km²).

The subject of the Preah Vihear conflict has been included with the sovereignty over the Temple of Preah Vihear and the surrounding areas situated at the top the 525-meter (1722 ft) cliff in range of the Dangrek Mountains (See: Figure 2). Siam (later known as Thailand) and France (protectorate of Cambodia) had officially agreed on the delimitation of the Cambodian-Thai border in several Treaties. The first officially-recognized Franco-Siamese agreement, or the

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Ibid.
Treaty of 13th January, 1904, which did not directly refer to the temple, stipulated that the borders in the region of Preah Vihear areas where the temple situated were to be delimited in correspondence with the principle of ‘watershed’ (Article 1) (See: Figure 3). In addition, it was also stipulated in the same Treaty, that the work on delimitation of borders would be carried out by a ‘Mixed Commission’, which simply referred to the combination of both Siam and French officials (Article 3). In spite of these clear stipulations, some irregularities started to occur when the Treaty was implemented.

Initially, due to the lack of necessary technical expertise, the Siamese government had requested that the French do the work of drawing the maps unilaterally, on the behalf of the ‘Mixed Commission’. The French was then assigned the task of preparing maps of the frontier, with the Siamese authority. The map in the areas of Preah Vihear Temple, later called by the ICJ as ‘Annex I’ (See: Figure 4), showed the Temple as situated on the Cambodian side of the border, however, the map did not follow the course of ‘watershed’ line as the parties had previously agreed. The former Thai Foreign Minister, Kantathi Suphamongkhon wrote in an article of a Thai newspaper that: “…had the watershed principle been adhered to, the Temple would have likely been placed in Thailand, completely”(See: Figure 2 & 3). Despite such inconsistency, when presented to her authorities in 1907, Siam had accepted the ‘Annex I’ map without conducting any personal investigation. Later, France and Siam concluded another supplementary agreement, called the Treaty of 23rd February, 1907, to incorporate the initial 1904 Treaty and the maps. Later on, despite of the fact that her own survey conducted in 1933-1934 had discovered

14 The relevant provisions of the Treaty of February 13, 1904: Article 1: “The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from the point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain, the crest of which it follows eastwards as far as the Mekong. Upstream from the point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article 1 of the Treaty of 3 October 1893.” Article 3: “There shall be a delimitation of the frontiers between the Kingdom of Siam and the territories making up French Indo-China. This delimitation will be carried out by Mixed Commissions composed of officers appointed by the two contracting countries. The work will relate to the frontier determined by Articles 1 and 2, and the region lying between the Great Lake and the sea.”; also see: Wikipedia, Cambodia-Thai Border Dispute, ( latest updated March, 2013), available here: http://en.wikipedia.org/wiki/Cambodian%E2%80%93Thai_border_dispute#cite_note-preah-vihear.com-13

that the “Annex I” was wrong (See: Figure 4), Thailand was still circulating the ‘Annex I’ map as an officially recognized map, and furthermore its authorities also requested further copies of the map.\textsuperscript{16} During the fifty years following her reception of the ‘Annex I’, the Siamese government raised no objections, although within that period there were, undisputedly, many opportunities to do so. Only upon the French exit from Cambodia in 1953, had Thailand come to take possession of the Temple and its surrounding areas, and declared ownership over the areas of Preah Vihear, by claiming the ‘Annex I’ map of being legally wrong and invalid. Following unsuccessful negotiations between the two countries, in October 1959, Cambodia eventually commenced proceedings against Thailand in the ICJ, claiming legal ownership over the Temple of Preah Vihear.\textsuperscript{17}

During the proceedings, the Court initially found that the ‘Annex I’ map was not of itself binding, agreed with Thailand about the initial depiction of the watershed, and hence concluded that the boundary was erroneous. However, as the Court continued, since the Siamese authorities had “accepted the ‘Annex I’ map without further investigation”, consequently “the acceptance caused the map to enter the treaty settlement”.\textsuperscript{18} The Court reasoned that, “…the parties had adopted an interpretation of that settlement which caused the map line to prevail over the provision of the Treaty”.\textsuperscript{19} The Court went further to say that “…Thailand could not now plead any error vitiating the reality of their consent, and furthermore they had already passed up several other opportunities in which to raise the matter”.\textsuperscript{20} In the end, the Court held that Siam’s failure to object to the contents of the ‘Annex I’ amounted to acquiescence, and as a result, Siam already had given up ownership rights over the Temple of Preah Vihear.\textsuperscript{21}


\textsuperscript{17} Ibid.

\textsuperscript{18} Ibid.

\textsuperscript{19} Ibid.


\textsuperscript{21} Thomas M. Franck, supra note, pp. 54.
When the verdict was issued in 1962, despite the fact that Thailand was not satisfied with the outcomes, Thailand declared willingness to accept the Court’s orders as complying with its duty under international law. However, on the other side, the country had also publicly declared the intention to reserve every legal right to recourse and to keep the future possibility of the case invocation. It is due to that reservation, that Thailand has always kept insisting that the ICJ’s 1962 Judgment only addressed the issue of the Temple, leaving the surrounding areas of the vicinity under dispute. Currently, it is this 4.6 square kilometres of land adjacent to the Temple both parties are claiming (See: Figure 6), that is laying down the seeds of today’s problem.²²

**Legal Questions:**

The questions over the old Preah Vihear dispute (1959) and the current one (2011) are indifferent in form. Thus, before understanding what the new dispute actually is about, first, one needs to understand the objectives of the old dispute. Therefore, the legal questions should reflect on the original rationales of the 1969 Judgment, before looking to explore its exact meaning and scope.

*(I)* What exactly was the main legal dispute of this case? Was it about the inconsistency of the Treaty, or was it about the subsequent conduct of parties?

*(2)* Based on what legal or moral foundations, did the ICJ of 1962 decide that Thailand’s acceptance of the ‘Annex I’ map (See: Figure 4) amounted to ‘estoppel by acquiescence’? Was that decision legally justifiable and morally fair?

*(3)* Did the Court consider validity of the ‘Annex I’ map, when deciding that the Temple of Preah Vihear be under Cambodian territory? More specifically, was the ‘Annex I’ map as a whole, a legally valid document?

*(4)* Is there any fundamental difference between the old dispute (1959) and the current one (2011)? Then, what would be the most likely outcome of the interpretation?

*(5)* Are there any future anticipated consequences of the ICJ’s approach?

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²² See: Professor Kantathi Suphamongkhon, *supra* note, para. 11.
Section 3: Structure of the Thesis

To answer all these questions, this paper is comprised of five chapters. **Chapter I**, outlined above, gives a general definition of what is “estoppel by acquiescence”, and by also briefly providing a basic understanding of the nature of the Preah Vihear dispute. It concisely mentions some core reasons behind the ICJ’s Judgment, before studying the later circumstances that lead to misunderstanding between the involved parties about the Judgement’s implications.

**Chapter II** addresses in detail an overview of the 1962 Judgment. It tries to discover what exactly the Court considered to be the main root and subject matter of the disputes. Later, it looks to explore the legal foundations on which the Court regarded the case as a justification for ‘estoppel by acquiescence’. Furthermore, it also examines the different arguments of each party, and by also pointing out some opinions of critics in regard to the Judgment. Afterward, this Chapter also scrutinizes the ‘meanings’ and ‘scope’ of the 1962 Judgment, more specifically by analysing the provisional measures of the 1962 decision which were regarded as having a significant impact on the current controversy. Finally, it reaches out to studying the difference between Thailand and Cambodia in their preferences toward dispute resolution mechanisms.

**Chapter III** briefly provides some essential historical facts, the key factors which brought on an establishment of the Franco-Siam Treaty of 1904 and 1907. Later, it carefully looks into the formation of each of the Treaties, by closely examining their legal characteristics and justifying their conditions of validity. Then, it goes on to study the general concept of ‘estoppel by acquiescence’, analysing whether there was a legal justification between this principle and the subsequent conduct of the involved parties. Eventually, it will examine the conventional element(s)/condition(s) of the principle of ‘estoppel by acquiescence’, by comparing the Temple of Preah Vihear dispute with other relevant case studies.

Considering the ‘principle of acquiescence’ as imperfect, **Chapter IV** explores the nature of this legal principle, investigating how it has been applied over time by International Courts as a supplement of equitable justice. In addition, it also looks into the challenges and critiques posed by the development and the interpretation of this principle by the Court, particularly in the
Temple of Preah Vihear Case. Last, this Chapter outlines other relevant legal and equitable factors the Court in the Temple Case may also take into consideration.

Last, Chapter V briefly wrap up the whole paper, by raising up some personal analysis, thoughts, understandings, feedback, and critiques regarding how fairly and correctly the 1962 Court had enforced the principle of acquiescence to solve this legally controversial dispute. It will end by giving some reasonable suggestions indicating the directions which the new jurisdiction may take into consideration, in order to lead to a better and a fairer decision for both parties, and more importantly to secure that all unconditional factors of international relations, including justice, future peace and prosperity, be maintained.
Chapter II

ICJ’s 1962 Judgment and Its Judicial Consequences

Section 1: Overview of the Judgment

In the Temple of Preah Vihear Case (Cambodia vs. Thailand, 1962), Cambodia alleged Thailand violated Cambodia’s territorial sovereignty over the ‘region of the Temple of Preah Vihear’ and its ‘precincts’. Thailand replied by affirming that the area in question lied on the Thai side of the common frontier between the two countries, and was under the sovereignty of Thailand. This case, as the Court confirmed, was a dispute about ‘territorial sovereignty’.

In its Judgment, the Court, by nine votes to three, found that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and, as a consequence, Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed at the Temple or in its vicinity in Cambodian territory.

A. Cambodia’s Claim

The case was first brought before the ICJ on October 6, 1959, by Cambodia. Since the application was filed unilaterally by Cambodia, and without prior agreement from Thailand, the Court, where the jurisdiction is based on the consent of the parties, had to decide whether it had

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23 Judgment of 26 May 1961, by which the ICJ upheld its jurisdiction to adjudicate upon the dispute submitted to it by the Application filed by the Government of Cambodia on 6 October 1959.

24 Ibid.

25 See: Temple of Preah Vihear Case (Cambodia v. Thailand), Summary, supra note, para. 2

26 Ibid.
competence over the case. On the preliminary question over jurisdiction of the Court, the Judges regarded Siam’s earlier declaration recognizing the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ). Accordingly, the Court went on to say that, due to its previous acceptance of the compulsory jurisdiction of the PCIJ, whose body was dissolved in 1946 following the resolution of the League of Nations, it implied that Thailand had automatically accepted the compulsory jurisdiction of the ICJ (known as PCIJ’s successor). Therefore, on 26 May 1961, the Court found that it had jurisdiction over the case, and rejected Thailand’s two preliminary objections.

As the case went into proceedings, Cambodia, as plaintiff, requested judgments in five Final Submissions. In its first claim, Cambodia asked the Court to recognize the validity of the French map (later know as ‘Annex I’ by ICJ) in the Dangrek Mountain sector (See: Figure 4), which itsaid, was drawn up and published in the name and on behalf of the ‘Mixed Commission’ set up by the Treaty of 13th February 1904. Second, with the validity of that map, Cambodia also demanded that the disputed border in the Preah Vihear areas shall be drawn in correspondence with the ‘Annex I’ map it presented to the Court. More specifically, Cambodia claimed that the Temple of Preah Vihear, marked on the said map, is situated in territory under its territorial sovereignty. Furthermore, Cambodia also called for withdrawal of Thailand’s troops stationed at the Temple, and the return of the temple stone and ancient pottery which had been removed from the Temple by the Thai authorities in 1954.27

In the oral arguments, Cambodian representatives argued that Cambodian sovereignty over Preah Vihear was clear from three viewpoints. First, citing the conclusion of the Franco-Siam Treaty of

27 Cambodian Five Final Submissions:
1. To adjudge and declare that the map of the Dangrek sector (Annex I map to the Memorial of Cambodia) was drawn up and published in the name and on behalf of the Mixed Delimitation Commission set up by the Treaty of 13 February 1904, that it sets forth the decisions taken by the said Commission and that, by reason of that fact and also of the subsequent agreements and conduct of the Parties, it presents a treaty character; 2. To adjudge and declare that the frontier line between Cambodia and Thailand, in the disputed region in the neighborhood of the Temple of Preah Vihear, is that which is marked on the map of the Commission of Delimitation between Indo-China and Siam (Annex I map to the Memorial of Cambodia); 3. To adjudge and declare that the Temple of Preah Vihear is situated in territory under the sovereignty of the Kingdom of Cambodia; 4. To adjudge and declare that the Kingdom of Thailand is under an obligation to withdraw the detachments of armed forces it has stationed, since 1954, in Cambodian territory, in the ruins of the Temple of Preah Vihear; 5. To adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand.
1904 and 1907 (together with the attached maps), the lawyers for Cambodia argued that, according the applicable international agreements delimiting the frontier between Cambodia and Thailand, the Temple of Preah Vihear, in the chain of the Dangrek Mountains, belonged to Cambodia. Additionally, they also emphasized that in any circumstances, Cambodia had never abandoned its sovereignty over the territory in question, and on the other hand, had always continued, by virtue of the title established by the treaties, to exercise effectively therein her territorial powers. Finally, they pointed out that, Thailand had not performed any acts of sovereignty in the disputed territory which might be considered to displace the sovereignty of Cambodia as established by the cited treaties and thereafter effectively exercised.  

All these Cambodian assertions, however, were turned down by Thailand.

**B. Thailand’s Defense**

Following the Court’s rejection of its preliminary objections, Thailand turned to focus on the round of proceedings. In the proceedings, Thailand, as defendant, strongly denied the validity of the ‘Annex I’ map presented by Cambodia, claiming that it was not proven to be a document binding on the Parties whether by virtue of the Treaty of 1904 or otherwise. Furthermore, Thailand contested the map on the following grounds: (1) the map was not the work of the ‘Mixed Commission’, and therefore had no binding character; (2) the ‘Annex I’ embodied a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed; (3) Thailand contended that it never accepted the ‘Annex I’ map or the frontier line indicated on it, so far as Preah Vihear was concerned. Rather, if the map was accepted, Thailand did so only under, and because of, a mistaken belief (upon which it relied) that the map line was correctly drawn to correspond with the watershed line.

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30 Ibid.
(See: Figure 3 & 4); or simply put, there was an error which the Siamese authorities were unaware at the time when they accepted the map.\textsuperscript{31}

Denying all evidence presented by Cambodia, Thailand insisted that the ‘Annex I’ map was not prepared or published either in the name of, or on behalf of the ‘Mixed Commission’ of Delimitation set up under the Treaty of the 13\textsuperscript{th} February, 1904.\textsuperscript{32} Thailand took a firm stand that the said map was prepared by members of the French Commission alone and published only in the name of the French Commission, whereas according to law the actual ‘Mixed Commission’ should have consisted of a combination of both French and Siamese Commission.\textsuperscript{33} Additionally, Thailand asserted that, there was no decision by the ‘Mixed Commission’ recorded about the boundary at Preah Vihear, and even if the Commission did reach such a decision, that decision was not correctly represented on the said ‘Annex I’ map.\textsuperscript{34} Strictly considering the value of the ‘Annex I’ map, in the end, Thailand went further to maintain that:

“...in the absence of any delimitation approved and adopted by the Mixed Commission, or based on its instructions, the line of the frontier must necessarily, by virtue of Article 1 of the Treaty of 1904\textsuperscript{35}, follow strictly the line of the true watershed”.\textsuperscript{36}

Regarding the questions related to the legal authority and effectiveness over the production of the map, Thailand argued that, “there had never been any effective delimitation of the frontier in the eastern sector of the Dangrek range, as required by Article 3 of the Treaty of 1904”.\textsuperscript{37} Thailand also interpreted that, “in the absence of the delimitation required by Article 3, on completion of Article 1, the latter provision could not have taken any practical effect, so that no new frontier

\textsuperscript{31} Ibid, Thailand Oral Arguments, pp. 26-27.

\textsuperscript{32} Ibid, pp. 10-12.

\textsuperscript{33} Ibid.

\textsuperscript{34} Ibid.

\textsuperscript{35} See: the relevant provisions of the Treaty of February 13, 1904, \textit{supra} note.

\textsuperscript{36} Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, \textit{supra} note, pp. 22-23.

\textsuperscript{37} Ibid, (Separate Opinion of Sir Gerald Fitzmaurice), pp. 53-54, also see: the relevant provisions of the Treaty of February 13, 1904, \textit{supra} note.
line under the Treaty of 1904 would have come into existence at all, and the frontier would have remained as it was previously to 1904".\textsuperscript{38} While admitting that the ‘Mixed Commission’ had a certain discretion given by Siam authorities over the delimitation of the borders, however, Thailand contended that, “any mistake such as to place the Temple, which it called ‘Phra Viharn’ in Cambodia would have far exceeded the scope of any discretionary powers the ‘Mixed Commission’ could have had”.\textsuperscript{39}

As a matter related to the reception of the ‘Annex I’ map was concerned, Thailand on the other hand insisted that: “…there was no subsequent agreement of the parties attributing a bilateral or conventional character to the said ‘Annex I’ map”. Moreover, Thailand defended its own administrative activities and further accused Cambodia of exercising ineffective administration over the areas, giving reasons as follows:

“...at all times, she never abandoned her territory but exercised full sovereignty in the area of the Temple to the exclusion of Cambodia...however...if alternatively her argument regarding the possession in the areas was denied, any administrative functions in the said area carried out by Cambodia were sporadic and inconclusive, and thus such acts disqualified Cambodia from the full exercise of sovereignty in the said area”.\textsuperscript{40}

Finally, considering the inconsistency and ineffective adoption of the map, together with its own administration activities over the areas, Thailand came to contest the possibilities for being held as acquiesced, saying that:

“...the conduct of the parties, so far from attributing any conventional character to the said ‘Annex I’, showed that the Parties have not treated the line marked on the said ‘Annex I’ as the boundary in the Dangrek...in consequence...Thailand has remained in undisputed possession of all the territory at the top of the Dangrek....and...there was no

\textsuperscript{38} Ibid.

\textsuperscript{39} Ibid, pp. 22-23.

\textsuperscript{40} Ibid, (Dissenting Opinion of Judge Wellington Koo), pp. 75-76.
room in the circumstances of the present case for the application in favour of any of the doctrines whether acquiescence, estoppel or prescription".41

C. Majority Support

Stipulations of the Franco-Siam 1904-1907 Treaties

Regardless of any situation that existed prior to the agreements between parties, the 1962 jurisdiction only took into account the significance of the Franco-Siamese Treaties of 13th February 1904 and of 23rd March 1907, and more essentially the subsequent conduct of the parties toward application of those treaties, stating that:

“... the present dispute has its Fons et Origo in the boundary settlements made in the period of 1904-1908, between France and Siam (as Thailand was then called) and, in particular, that the sovereignty over Preah Vihear depends upon a boundary treaty dated 13th February 1904, and upon events subsequent to that date”.42

The Court comprehended the fundamental provisions of the Treaty, mentioned that,“whereas the general character of the frontier established by Article 1 was, along the Dangrek range, to be a watershed line, the exact course of this frontier was, by virtue of Article 3, to be delimited by a Franco-Siamese Mixed Commission”.43 Through these, the Court went further to say that:

“...these articles make no mention of Preah Vihear as such...and...the frontiers between Siam and French Indo-China, although had prima facie, shall be carried out by reference to the criterion indicated in Article 1, following the purpose of which was to establish the actual line of the frontier...consequently...the line of the frontier would, be the line


42 Ibid, pp. 16-17.

43 Ibid, pp. 17-18, also see: the relevant provisions of the Treaty of February 13, 1904, supra note.
resulting from the work of delimitation of the joint commission, unless the delimitation was shown to be invalid”.

Was there an Effective Production of the ‘Annex I’ map?

The Court acknowledged the nature and effectiveness of the work of the ‘Mixed Commission’ on delimiting the border line, and recognized that: “…for the execution of this technical work, the Siamese Government, which at that time did not dispose of adequate means, had officially requested that French topographical officers should map the frontier region”. From its investigation, the Court further discovered that Siam had in fact given her authority and inspiration to the French for its assignment on mapping.

“...it was clear from the opening paragraph of the minutes of the meeting of the first Mixed Commission on 29 November 1905 that this request had the approval of the Siamese section of the Commission, which may indeed have inspired it, for in the letter of 20 August 1908 in which the Siamese Minister in Paris communicated to his Government the eventual results of this work of mapping...that deliberate policy of the Siamese authorities is also shown by the fact that in the second 1907 ‘Mixed Commission’, the French members of the Commission were equally requested by their Siamese colleagues to carry out cartographical work”.

As the facts were well recorded, the Court discovered some turning points of irregularities in regard to Siam’s initial opportunity to investigate so as to reject the erroneous map, stated the following:

“...the eleven maps covering a large part of the frontier between Siam and French (Indo-China), prepared by a team of four French officers...in due course communicated to the Siamese Government, as being the maps requested by the latter...and...amongst these

44 Ibid.


46 Ibid.
was one of Dangrek range parts in which the Temple is situated...it was this “Annex I” map that showed the whole Preah Vihear promontory, with the Temple area as being on the Cambodian side, which Siam was not called upon either to accept or reject them”.

While admitting that the ‘Annex I’ map never received any formal approval from the ‘Mixed Commission’, the Court came to recognize that the map indeed possessed a basic character of the said Commission’s work, giving the following reasons:

“...although the map was never formally approved by the first ‘Mixed Commission’ as such, since that Commission had ceased to function some months before the production of the map...although the record also does not show whether the map and the line were based on any decisions or instructions given by the Commission to the surveying officers while it was still functioning...and although admitting the non-binding character of the map at the moment of its production...what was certain is that the map must have had a basis of work of the surveying officers in the Dangrek sector, produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute...thus...it had its own inherent technical authority; and its provenance was open and obvious”.

Reception/Implied Recognition of the ‘Annex I’ map

In regard to the question over the divergence of the border line from the ‘watershed’ line, the Court, on the other hand, did not consider the provisions of the Treaty of 1904 as fundamentally important in this dispute. What was more important, as most of the Judges agreed, was the subsequent events after the reception of the ‘Annex I’ map. Thus, the Court contended that:

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47 Ibid.

48 Ibid, pp. 21-22.
“...whether such departures occurred at Preah Vihear fell within the Mixed Commission's discretionary powers or not, the Court reasoned that, the important point is that, it was certainly within the power of the Governments to adopt such departures”.

In correspondance with the majority opinions of the Judges, the Court concluded that, the real question which was the essential one in this case, therefore was “whether the parties did adopt the ‘Annex I’, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character”. The Court discovered that there was an unofficial reception of the ‘Annex I’ map on the part of Siamese authorities, saying that:

“...the map was communicated to the Siamese members of the ‘Mixed Commission’...and...Siamese authorities must have known that this map could not have represented anything formally adopted by the ‘Mixed Commission’, and therefore they could not possibly have been deceived by the title of the map, namely, ‘Dangrek Commission of Delimitation between Indo-China and Siam’ into supposing that it was purporting to be a production of the Mixed Commission as such...and...the Siamese members of the Commission must also have seen the notice appearing in the top left-hand corner of the map sheet to the effect that the work on the ground had been carried out by Captains Kerler and Oum”.

Furthermore, what continued to convince the Court was the conduct of the Siamese high profile representative which was deemed to be a practical recognition of the ‘Annex I’ map.

“...the Siamese authorities acknowledged the receipt, and recognized the character, of these maps, and what they purported to represent, is shown by the action of the Minister of the Interior, Prince Damrong, in thanking the French Minister in Bangkok for the maps, and in asking him for another fifteen copies of each of them for transmission to the

49 Ibid.

50 Ibid.

52 Ibid, pp. 24-25.
Siamese provincial Governors...the full original distribution consisted of about one hundred and sixty sets of eleven maps each...fifty sets of this distribution were allocated to the Siamese Government".\textsuperscript{53}

The Court also mentioned the words in the letter written by the Siamese Minister in Paris to the Minister of Foreign Affairs in Bangkok, dated 20\textsuperscript{th} August 1908, regarding the recognition of the ‘Annex I’ map as purporting to represent the outcome of the work of delimitation, in which he said, as the Court quoted:

“...regarding the Mixed Commission of Delimitation of the frontiers and the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers, the French Commissioners have now finished their work”\textsuperscript{54}

Furthermore, the Court also went further to regard the importance of the wide recognition of the map by other third nations.

“...the map was given wide publicity in all technically interested quarters by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested; to the Siamese legations accredited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese”\textsuperscript{55}

In such circumstances, the Judges held that Siam’s conducts, by not protesting, had amounted to acquiescence that is recognized as a principle of law.

“...there was a necessary call for some reaction, within a reasonable period, on the part of the Siamese authorities, regarding the serious question of the ‘Annex I’...but Thailand

\textsuperscript{53} Ibid.

\textsuperscript{54} Ibid.

\textsuperscript{55} Ibid, pp. 23-24.
did not do so, either then or for many years, and thereby must be held to have acquiesced (Qui tacet consentire videtur si loqui debuisset ac potuisset)". 56

Questions of Error and Obligation to Investigate

Regarding the possibility of invoking an error map, the Court mentioned that, in some particular situations, the victimized states could not claim invalidity of the Treaty, if those states contributed to or received a warning notice of that error.

“...it is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error...” 57

Replying to the arguments by Thailand regarding the error of the ‘Annex I’ map and the inconsistency of “watershed line”, the Court reiterated that Thailand was under an obligation to investigate the map or at least to enquire about it, and concluded that the negligence to fulfill these tasks was a violation of its own obligations.

“...the Siamese Government knew or must be presumed to have known, through the Siamese members of the Mixed Commission, that the ‘Annex I’ had never been formally adopted by the Commission...and...the Siamese authorities knew it was the work of French topographical officers to whom they had themselves entrusted the work of producing the maps...consequently...they accepted it without any independent investigation, and cannot therefore now plead any error vitiating the reality of their consent”. 58

56 Ibid.
Furthermore, the Court also reflected that the character and qualifications of the persons who saw the ‘Annex I’ map on the Siamese side would alone make it difficult for Thailand to plead error in law.\(^59\) Since history was recorded, the Court discovered the following facts that:

“...the maps were seen by such persons as Prince Devawongse, the Foreign Minister, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission, the Siamese members of the Commission of Transcription...all or most had local knowledge...and...some must have had knowledge of the Dangrek region...also...it is clear from the documentation in the case that Prince Damrong took a keen personal interest in the work of delimitation, and had a profound knowledge of archaeological monuments”.\(^60\)

Finally, the Court concluded that, whether, in fact, the Siamese authorities did show these maps only to minor officials, “they clearly acted at their own risk, and the Court cannot accept these contentions either on the facts or the law”.\(^61\)

**Obligation to Protest and Justification for Acquiescence**

The Court also raised the issue over the 1934-1935 survey conducted by Thailand which established a divergence between the ‘Annex I’ map line and the true line of the ‘watershed’ (See: **Figure 3 & 4**). The Court saw that, despite the discovery of the error on the ‘Annex I’ map, Thailand did not raise any protest against it, and moreover, even officially continued to use it.

“...despite that survey which led Thailand to produce some maps of its own showing the Preah Vihear Temple as being in Thailand, eventually Thailand was still continuing, even

\(^{59}\) Ibid, pp. 26-27.

\(^{60}\) Ibid.

for public and official purposes, to use the ‘Annex I’ map, or other maps showing Preah Vihear as lying in Cambodia, without raising any query about the matter”.  

Furthermore, the Court noted that there were many independent opportunities in which Thailand failed to raise the question of the regularity of the ‘Annex I’ map, including in its own 1934-1935 survey of the frontier regions, the negotiations for the 1925 and 1937 Treaties of Friendship, and the 1947 Franco-Siam meeting in Washington. Thus, the Court gave the following reasons that:

“...it would have been natural for Thailand to raise the matter, on the other hand, she did not do so and she even, as has been seen, produced a map of its own in 1937 showing Preah Vihear as being in Cambodia”.

Looking at these incidents as a whole, the Court considered that such situations and conditions deemed to amount to a tacit recognition by Siam of the sovereignty of Cambodia over the Preah Vihear Temple. Regardless of the value and the objective of the original terms that were written in the Treaty of 1904, the Court considered that, “Thailand in 1908-1909 did accept the ‘Annex I’ map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line”. Thus, the Court decided that, “the acceptance of the ‘Annex I’ map by the parties caused the map to enter the treaty settlement and to become an ‘integral part’ of it”. In other words, as the Court concluded, “parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty”.

63 Ibid, pp. 28-29.
64 Ibid.
65 Ibid, pp. 31-32.
66 Ibid, pp. 32-33.
67 Ibid, pp. 33-34.
68 Ibid, pp. 34-35.
At last, the Court remarked that the objective of its decision was not only to provide justice for the disputing parties but also to discover and to guarantee a stable frontier for them.

“...Thailand has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier...when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality...such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered”.  

D. Critiques of Judgment

Some minority Judges and legal scholars, who opposed the ICJ’s 1962 decision which recognized the acceptance of the ‘Annex I’ map as overriding the objective of the Treaty, tended to have in mind a common understanding toward the incontestable legal value of the stipulations of the 1904 Treaty. They furthermore insisted that, the subsequent events related to the implementation of the Treaty should be classified under a particular regime, due to the difficult circumstances of the world.

Treaty vs. Map

Judge Moreno Quintana, for instance, in his dissenting opinion, argued against the validity of the ‘Annex I’, and reasoned that, “the map Cambodia submitted to its Memorial, which mistakenly placed the temple of Preah Vihear on the Cambodian side, was an unknown decision”.  
He continued that,” the map, which was not signed by any authorized experts, bears no date, was published by Barrere, a Paris geographical publisher, acting apparently on behalf of only one of the two Commissions”. Where the value of an expert investigation carried out by a similar

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69 Ibid, pp. 32-33.
70 Ibid, pp. 34-35.
71 Ibid, (Dissenting Opinion of Judge Moreno Quintana), pp. 73-74.
72 Ibid.
procedure, Moreno referred this to the Case of Corfu Channel (United Kingdom vs. Albania, 1949), quoting the Court’s expression in the latter case that:

“...the Court cannot fail to give great weight to the opinion of the experts who examined the locality in a manner giving every guarantee of correct and impartial information”.73

Similarly, among other minority objections, Sir Percy Spender also regarded the very fundamental importance of the 1904 Treaty, and emphasize that: “...whatever the delimitation made, it was controlled by Article 1 of the Treaty which ‘determined’ the frontier”.74 He strongly reiterated the radical essences of the Treaty which provided the very clear and fundamental intention and conditions for the delimitation of borders between Cambodia and Thailand.

“...subjected 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...while...if it was not on the basis of this criterion, any purported delimitation would lack any legal force”.75

Following these reasons, Judge Spender continued to argue that, “in 1908, when the ‘Annex I’ map 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’, this line could not be altered by the unilateral act of either France or Siam”.76 By considering the confidence that the parties put in each other as intrinsically fundamental, Spender maintained that, their ignorance to the error of the maps infer that both countries had not deserved any other map to be different from the terms of the Treaty.

73 Ibid.
74 Ibid, (Dissenting Opinion of Sir Percy Spender), pp. 103-104.
75 Ibid.
76 Ibid, pp. 124-125.
“…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…and…it was in the confidence of that belief and on the basis that it was correct that she distributed copies of the maps…consequently…Siam had no reason to believe that it was not”.77

Spender also contested against the validity of the map, arguing that the ‘Annex I’ was a document that was solely prepared by the French, with the lack of significant work of the ‘Mixed Commission’, and without Siam’s final approval.

“…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…moreover…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…finally…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”.78

Different from the Court, Spender saw the dispute as mainly concerning the violation of the Treaty by the map, rather than related to the subsequent acceptance of the map by parties. Thus, he expressed his personal opinions:

“…the decision by the Court to consider the ‘Annex I’ as representing the outcome of the work of delimitation, presents a difficulty, which goes to the heart of this case”.79

In the end, by again reiterating the superior value of the Treaty over the map, he came to conclude the following:

77 Ibid.
78 Ibid, pp. 126-127.
79 Ibid, pp. 133-134.
“...it would then fall for determining 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...and...if the delimitation were not established on that basis, the line on ‘Annex I’ could not have any probative value; it could have no binding force upon either Siam or France” \(^8^0\).

**From ‘Tacit Recognition’ to ‘Acquiescence’**

Related to the question of Siam’s recognition of the ‘Annex I’ map, Judge Moreno Quintana stated that, in the absence of explicit agreement to the map, the interpretation of the Treaty shall be conducted following the original objective of the Treaty itself.

“...there was no conclusive evidence showing any tacit recognition by Thailand of the alleged Cambodian sovereignty over the area in question...consequently...the case amounts to interpreting the said Article 1 of the 1904 Treaty according to its ‘natural and ordinary meaning’...” \(^8^1\)

Phil W. C. Chan, who also strongly criticized the 1962 Judgment, additionally contended that Cambodia could not rely on its own mistake to benefit from Thailand’s silence.

“...there was no evidence showing that France, as Cambodia’s protecting State, ever relied on Thailand’s silence (acquiescence) to her own detriment” \(^8^2\)

This kind of argument, according to Chan, is based on a ‘very strict definition’ of acquiescence. \(^8^3\)

Arguing that it was the intended objective of this equitable principle, Chan attempted to interpret the meaning of acquiescence in a narrow sense as follows:

\(^8^0\) Ibid.

\(^8^1\) Ibid, (Dissenting Opinion of Judge Moreno Quintana), pp. 67-68

“...while a wide definition would simply suggest that a State cannot claim a right which is contrary to its own previous declaration, conduct or silence, a ‘narrow definition’ requires that the State who advances the argument of acquiescence and estoppel has suffered certain detriment by relying on the conduct or the silence of another, and that this conduct or silence must have been made ‘voluntarily’...”.

Due to the particularity of the circumstances, Judge Wellington Koo furthermore considered the invalid character of the subsequent implied agreement, and thus maintained that there should be no valid ground in law for holding Thailand accountable for acquiescence.

“...the rule of Roman law that ‘he who keeps silent is held to consent if he must and can speak’, and alleging that Siam’s silence or failure to react cannot alone be considered as implying recognition or acceptance of the other party’s claim of sovereignty, when such call for a protest or reservation is shown to be entirely different character”.

20th Century Circumstances

Related to the matter of silence and absence of protest by Thailand to the erroneous map, Judge Spender considered this situation as occurring in a particular moment of world events, giving the reasons as follows:

“...Thailand’s silence or absence of protest must be held to the period of time when such world events took place, in regard with the general political conditions existing in Asia, the political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned, when one was Asian and another was European”.

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83 Ibid.
84 Ibid.
85 The Temple of Preah Vihear Case, supra note, (Dissenting Opinion of Judge Wellington Koo), pp. 96-97.
Bearing in mind similar analysis and consideration, Judge Koo also admitted that, Siam’s temporary recapture of the territory after the French defeat during WWII was a true expression of willingness to protest.

“…international jurisprudence attributes importance to silence as a relevant factor in determining the intention of a party in regard to a claim of sovereignty only in the light of its unequivocal conduct and of the attendant circumstances...the relative position of Siam vis-a-vis French Indo-China became less unbalanced as a result of the development of world events in the early 20th century...the Siamese Government posted a Siamese guardian at the Temple to signify Siam’s title of sovereignty over the area...and thus...Thailand’s exercise of sovereignty in the form of sustained administrative control in the Temple area bears witness to her true intention”.  

Likewise, Phil C. W. Chan also saw the nature of Siam’s temporary action in the disputing territory as an expression of rejection to the conduct of estoppels.

**Section 2: Unsolved Disputes and Controversies over Settlement**

Whereas Cambodia asserted that the 1962 Court used the ‘Annex I’ map as a basic material for its decision, Thailand, however, continued to argue that the implication of the Court’s decision could only be translated to the extent that was declared in the depositif of the verdict. This, according to Thailand, simply meant that the Judgment of 1962 could only be applied to the body of the Temple, as mainly claimed by Cambodia, not all disputing areas that are included in the ‘Annex I’ map (See: **Figure 6**). Thus, Thailand maintained that, the surrounding areas of the Temple, which was later called the Overlapping Claims Area (OCA), have unquestionably always remained in dispute.

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Despite such controversies ever since the 1962 Judgment was issued, the dispute only erupted again fifty years later. More recently, both parties have disagreed not merely on the ‘meaning’ and ‘scope’ of the Judgment, moreover in the later case, they also have been unable to reach a consensus on any mechanism of settlement. Eventually, the conflict was again brought before the ICJ by Cambodia.

A. Overlapping Claims Area, OCA (4.6 km²)

i. Dispute Outbreak and Thailand’s Insistence

Despite the fact that the 1962 Judgment was respectively implemented by both parties, the Thai government subsequently registered a protest against that decision and furthermore reserved rights for the future possible recourse, as stated in and allowed by Article 61 of the ICJ Statute.89

Following the declaration of the Judgment that awarded the Temple to Cambodia in late June 1962, the Prime Minister of Thailand publicly announced that his government would carry out its obligations under the United Nations Charter in respect to the Court’s decision which demanded cession of the Temple to Cambodia. At the same time, however, the Thai Foreign Minister, Mr. Thanat Khoman, also sent a Note to the United Nations on July 6, 1962 to formally inform Thailand’s disappointment in the acceptance of the Court decision that regarded Cambodia’s title over the Temple. In that letter he wrote:

“…Thailand expressed her disagreement with the decision of the Court on the ground that, in its opinion, the decision goes against the express terms of the relevant provisions of the 1904 and 1907 treaties and is contrary to the principles of law and justice…”90

89 Article 61 of the ICJ Statute of states:
1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence. 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground. 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision. 4. The application for revision must be made at latest within six months of the discovery of the new fact. 5. No application for revision may be made after the lapse of ten years from the date of the judgment.
In the same Note, he also mentioned that:

“...his Majesty's Government desires to make an express reservation regarding whatever rights Thailand has, or may have in the future, to recover the Temple of Phra Viharn by having recourse to any existing or subsequently applicable legal process, and to register a protest against the decision of the International Court of Justice awarding the Temple of Phra Viharn to Cambodia...” 91

It was this Note that Thailand maintained, it always adhered to a boundary line drawn on its own map (different from the “Annex I”), and consequently resulted in overlapping territorial claims (See: Figure 6 & 7) over the adjacent land surrounding the Temple of Preah Vihear. 92

The conflict which had been tranquillized for decades intensively broke out after Cambodia expressed its intention to propose to the United Nations Educational, Scientific and Cultural Organization (UNESCO) for the inclusion of the Temple of Preah Vihear as a World Heritage Site, in 2008. In an Article written on the site of the Ministry of Foreign Affairs of Thailand, Thailand denied the unilateral application by Cambodia, but also defended that it did not oppose Cambodia’s nomination of the Temple of Preah Vihear as World Heritage Site. 93

“...Thailand maintained that she had generally supported her neighbor’s application, and furthermore she insisted the claim that Thailand deliberately hampered the inscription of the Temple of Preah Vihear on the World Heritage List is therefore inaccurate”. 94


91 Note to U.N. Acting Secretary-General No.(0601) 22239/2505 Ministry of Foreign Affairs, Bangkok, July 6, B.E. 2505 (1962).


93 Ibid, para. 7-8.

94 Ibid.
However, as Thailand continued to mention:

“…what worried Thailand was not the title over the Temple but rather the fact that the zonings, 4.6 km², stipulated in the documents submitted by Cambodia to the UNESCO for the purpose of inscribing…that area, according to Thailand, includes areas in the vicinity of the Temple which Thailand considered to be Thai territory”.95

In addition to this, Thailand defended that it mainly pushed for declaring the temple site a World Heritage Site of both countries, fearing that Cambodia would otherwise be able to use the UNESCO decision to buttress its claims to the contested area surrounding Preah Vihear (cited in BBC Monitoring Asia Pacific 2008).96

In spite of these reasons presented by Thailand, when Cambodia was submitting its application to the UNESCO, the World Heritage Committee’s resolution made it clear the land in question would not be included before settlement of the boundary dispute between the two countries.97 Regardless of this clarification, Thailand still continued to protest against the inscription of the Temple. In spite of the protests, on 8 July 2008, UNESCO accepted a Cambodian application by declaring the Preah Vihear Temple complex a World Heritage Site. That decision triggered diplomatic tension between the two nations. Both countries respectively started sending troops to the disputed areas along their borders, including the Temple. The conflict became increasingly severe when parties accused each other of encroaching the territory they claimed, and the events led to several arm clashes that caused dozens of deaths as well as damage to the Temple stones.

In response to the incidents, in 2008, Cambodia sent a Letter to the Security Council to request international intervention. The Letter brought by Cambodia described Thailand’s occupation of the surrounding areas nearby the Temple as an act of aggression and endangering peace.

95 Ibid, para. 9.


97 The Nation: “Conflict over Preah Vihear should be kept within the ICJ”, April 24, 2013, available here: http://www.nationmultimedia.com/national/Conflict-over-Preah-Vihear-should-be-kept-within-t-30204670.html
Responding to the letter, the Permanent Representative of Thailand to the UN Security Council asserted that Thailand was acting to defend its own territorial sovereignty, based on the following reasons: (1) the location of the boundary was still not yet determined by international law, (2) the ICJ ruled that it did not have jurisdiction over the question of the land boundary, (3) the ICJ 1962 Judgment did not determine the land boundary. In addition, Guenter Weissberg, one of Thailand’s former lawyers, put forward what appeared to be Thailand’s reasoning in the 2008 Letter, from his personal article “Maps as Evidence in International Boundary Disputes”, in which he quoted that: “…the Judgment did not determine the frontier in the disputed area and left the precise line of the watershed on the Preah Vihear promontory unclear”.

A Thai legal commentator, Monticha Pakdeekong, also defends Thailand’s arguments that, by having ruled the Temple as under Cambodia’s sovereignty, however, the Court did not rule on its surrounding lands, an area which still remains in dispute. This author tended to favour a narrow interpretation of the Court’s final disposit, by reciting the Court’s remarks that:

“...calling for pronouncements on the legal status of the ‘Annex I’ and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to the ground, and not as claims to be dealt with in the operative provisions of the Judgment”.

Furthermore, Pakdeekong went on to argue that, the Court had not completely decided over the whole validity of the ‘Annex I’ map and the exact location of borders between Cambodia and Thailand.

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101 Ibid.
“...the 1962 Court refrained from deciding on Cambodia’s Submission 1 and 2 which were the status of the map of the Dangrek sector scale 1/200,000 (Annex I) and the corrections of the frontier line indicated on it...consequently...the 1962 Justice did not rule on the exact location of the boundary line between Thailand and Cambodia in the area...therefore...the judgment did not rule that ‘Annex I’ map showed the frontier line between Thailand and Cambodia”.102

Due to this hypothesis, the implication of the Judgment 1962 has always been partly unclear for both parties. Consequently, it left space for parties to adopt their own interpretations of the Court’s intention. On one side, Cambodia not only fully accepted that 1962 Judgment, but also considered the Court’s recognition of the validity of the ‘Annex I’ map, which Cambodia previously submitted to. On the other side, Thailand insisted that, except the body of the Temple of Preah Vihear, the Court had not yet decided on the exact location of the boundary line between Thailand and Cambodia. Thailand claimed that the operative clauses of the Judgment only mentioned the ownership over the temple, not the other surrounding areas of it. And it is this 4.6km² adjacent land that Thailand, based on her own map, asserted had always been under its sovereignty.

ii. Implication of the 1962 Judgment

In the preliminary round of the request for interpretation, Thailand initially argued that, the Court clearly refused to rule, in the operative clauses of its Judgment, on Cambodia’s submissions to it regarding both the legal status of the ‘Annex I’ map and the frontier line in the disputed area.103 However, in the past, it was occasionally requested of the Court to clarify the ‘meaning’ and ‘scope’ of the operative terms of the Judgment it already rendered, as parties proclaimed the decision to be unclear and having different implications. In the context of interpretation, if the dispute is about the ‘meaning’ or ‘scope’ of the operative part of the judgment, as specified by Article 60 of the Statute, the Court considered that it must have jurisdiction over the case that

102 Ibid.

was requested for interpretation. Thus, in 2011, considering this new dispute as concerning the interpretation of the ‘meaning’ and ‘scope’ of its 1962 Judgment, the Court finally found its competence in the case.

The Court agreed that it did indeed consider the ‘Annex I’ map in order to decide that the Temple be situated under Cambodian territory, on the other hand, Thailand defended that, in the reasonings of its 1962 Judgment, the Court did not deduce the entire frontier in the area derived from that map.104 Based on Thailand’s interpretation, the 1962 ICJ’s decision only covered the body of the Temple, not other surrounding areas which were also in dispute. This, according to Thailand, meant that, despite the Court applying the ‘Annex I’ map as a basis document for its decision over ownership of the Temple, the map itself had only been partly valid and thus could not be applied to other disputes.

According to Cambodia, however, the 1962 Court made its decision mainly based on the ‘Annex I’ map. Despite the dispositif of the decision only referred to the Temple, as Cambodia maintained, the general meaning and scope of the Judgment also covered other surrounding areas determined by the ‘Annex I’ map. Cambodia insisted that, although not referred to directly in its dispositif, the Court recognized the validity of the ‘Annex I’ map in its motif. And this according to the Cambodian lawyer, was based on the principle of ‘inseparability’ between the ‘motif’ and the ‘dispositif’ of the Judgment.105 Therefore, for Cambodia, the current boundary dispute should be settled through that ‘Annex I’ map that was already presented to the Court in 1962.

The real question here must be therefore related to the ‘intention’ of the 1962 Judgment. Did the 1962 Court’s decision adopt the whole ‘Annex I’ map, which delimited the frontier in the Preah Vihear region, as a binding legal document?

104 Ibid.

In terms of interpretation in regard to the ‘meaning’ and ‘scope’, the operative part of the 1962 Judgment, outlined an obligation to withdraw any military or police forces, or other guards or keepers, stationed by Thailand at the Temple, or in its ‘vicinity’ on Cambodian territory. This, according to Cambodian lawyers, was simply a consequence of the fact that the Temple is situated in territory under the sovereignty of Cambodia.106

Cambodia interpreted that the main objective of the *motif* which the Court struck on, when it was deciding the case, was only related to the effective adoption of the ‘Annex I’ map by parties that eventually led to the recognition of the new border line.

“...the real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character”.107

Furthermore, Cambodia also argued that the Court, in the last part of its decision, recognized the superior value of the ‘Annex I’ map over the provisions of the Treaty, the effect of which eventually led the map to enter into a new dispute settlement.

“...the acceptance of the ‘Annex I’ map caused it to enter the treaty settlement; the Parties had at that time adopted an interpretation of that settlement which caused the map line to prevail over the provisions of the Treaty and, as there was no reason to think that the Parties had attached any special importance to the line of the watershed as such, as compared with the overriding importance of a final regulation of their own frontiers...”.108


107 Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15, June, 1962, supra note, pp. 22.

108 See: Temple of Preah Vihear Case (Cambodia v. Thailand), Summary of the Judgement 1962, supra note, para. 10.
Finally, Cambodian lawyers put forward that, the Court did not attribute sovereignty over the Temple to Cambodia, but recognized that sovereignty as an automatic consequence of the fact that the Temple is situated in territory under the sovereignty of Cambodia, as determined by the reasoning of the decision on the basis of the Annex I map. In other words, the Court recognized that “there is no separate title to the Temple other than that which already exists to Cambodia’s sovereign territory”. 109

Keith Highet also came into a similar interpretation with Cambodia that, “the Judge held that Thailand had already accepted the ‘Annex my’ in 1908-1909 as representing the result of delimitation, and had recognized the map line as being the frontier line”. 110 By that, Highet reasoned, in order to make a decision the ICJ already considered: “the ‘Annex I’ map entered the treaty settlement and became an ‘integral part’ of it”. 111

Another commentator, Katelin Santhin, also agreed that the Court decided the case based on the delimitation line determined by the ‘Annex I’ map drawn up by the Franco-Siamese Mixed Commission, and that delimitation is the official border between Cambodia and Thailand. According to this author, the 1962 decision indicated that both Cambodia and Thailand adopted the ‘Annex I’ map which delimited the frontier in the region of the Temple of Preah Vihear. As such, ‘Annex I’ is binding and Thailand must respect the borders established by the document. 112

B. Controversial Settlement Mechanisms

i. Thailand’s Bilateral Approach

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109 Request for Interpretation of the Judgment of 15 June, 1962, Application of the Kingdom of Cambodia, supra note, para. 38.

110 Bora Touch, supra note, pp. 217.

111 Ibid.

After failure at the ICJ in 1962, Thailand was held to handover the Temple to Cambodia as complying with its obligation under international law. In spite of accepting the Court’s ruling, in addition, Thailand had unilaterally declared that it would reserve every legal right to reclaim ownership of the temple, and also other rights over the other OCA where upon those areas were not covered by the Court’s ruling.

Later, as the diplomatic relations between the two neighbours stabilized, Thailand expressed interest and a tendency toward solving the other remaining disputes with Cambodia through a bilateral framework. It took up until 1997 for a new negotiation over the Cambodia-Thailand disputed borders to resume. In July 1999, however, the negotiations stalled because Thailand insisted that all the documents of the 10-year survey and demarcation works starting from 1909 to be used by the ‘Mixed Commission’ should be the basis for the boundary demarcation. Cambodia contested that only the maps annexed to the Treaty of 1904 and the Treaty of 1907 and documents relevant to the application of those Treaties be used as the basis. Cambodia’s insistence prevailed.\textsuperscript{113} Therefore, in 2000, both governments agreed to establish a Joint Boundary Commission (JBC), in accordance with the Memorandum of Understanding (MoU) between Thailand and Cambodia on the Survey and Demarcation of Land Boundary of 2000.\textsuperscript{114} The new agreement included abiding by the 1904 and 1907 Treaties, creating a Cambodian-Thai Joint Commission on Demarcation for Land Boundary and a Joint Technical Sub-Commission, among whose tasks were to establish the exact locations of the existing boundary pillars.\textsuperscript{115} In a joint press release, the parties also explained the purpose of the MoU, by declaring that:

“...MoU aims at surveying and demarcating the land boundary between the two countries and shall be jointly conducted on the basis of Franco-Siamese Convention of 1904 and the Treaty of 1907 and Protocol annexed to the said Agreements and the Maps of the Franco-Siamese Commission of Delimitation”.\textsuperscript{116}

\textsuperscript{113} Bora Touch, \textit{supra} note, pp. 225-226.

\textsuperscript{114} Ministry of Foreign Affairs of Thailand: \textit{“Understanding the Temple of Preah Vihear Issue Recent Media”}, \textit{supra} note, para. 4.

\textsuperscript{115} Wagener, Martin, \textit{supra} note, pp. 33.

\textsuperscript{116} Bora Touch, \textit{supra} note, pp. 226.
In spite of being successful at the start, the meetings which the parties agreed to hold frequently according to the 2000 MoU, collapsed after the 2008 UNESCO decision that inscribed the Temple of Preah Vihear as a World Heritage Site. The diplomatic tension between the neighbours gained momentum, and Cambodia refused to negotiate and hold further talks with Thailand, unless Thai troops stationing at the OCA were withdrawn. The Association of South East Asian Nations (ASEAN), to which both nations belong, offered to mediate over the issue. However, Thailand kept insisting that bilateral discussions could better solve the problem. Partly, due to the establishment of the MoU and the JBC, Thailand argued that both countries had agreed to solve their remaining border disputes bilaterally, without seeking help from a third party. The former Thai Prime Minister, Abhisit Vejjajiva, put forward in a press conference that:

“...third countries should not interfere with the Thai-Cambodian territorial dispute as the two countries signed an MoU with the JBC in operation...and...those who are dissatisfied with the MoU and JBC should understand that the existence of these two would help prevent third country and the UN from interfering into the territorial dispute between the two countries”.

Regarding this issue, an outspoken Cambodian scholar and also a border expert, Sean Pengse, expressed his personal opinions that, by signing the 2000 MoU with Thailand, Cambodia gave up many advantages to Thailand. He reasoned that Cambodia had a strong and valid legal ground to claim ownership over the areas surrounding the Temple based on international law and the ICJ 1962 decision. Although it may have helped to preserve good neighbourhood relations, however, as he continued, by resolving the dispute through negotiation, it would only serve to keep the conflict unresolved, contradictory to Cambodian national interests.

**ii. Cambodian Third Party Resolution**

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From a legal point of view, Cambodia has always been in a better position to solve these border disputes with Thailand through a third party mechanism. As in the ICJ in 1959, Cambodia possesses stronger legal grounds to win the case, if the matters go before international law. However, according to the facts, Cambodia seemingly did not oppose using a negotiation approach to solve the problems, as perhaps acknowledgment that that process may help in promoting neighbourhood and economic relations between the two historical rivals. Unfortunately, the bilateral framework, which parties established during the 1990s, did not work out as planned. The failure occurred due to each party’s strong desire for the ownership over the overlapping areas (OCA), followed by the recent development of local political events. The tension, which led to several arm clash breakouts, had nothing to do with solving the dispute, on the other hand, only raised a nationalistic emotion among citizens and aggravated the diplomatic relation between the two neighbours.

After several unsuccessful attempts to stabilize the situations, in 2008, Cambodia formally sent a letter to the United Nations Security Council (UNSC), and accused Thailand of violating Cambodia’s territorial sovereignty and endangering regional peace. Notwithstanding, the letter which demanded an immediate intervention by the Council was turned down. Instead, the UN sent recommendations that both parties exercise maximum restraint and should seek consultation and help from the ASEAN, to which both parties belong, as complying with the Charter of the United Nations.

Initially, Cambodia and Thailand agreed to seek help from ASEAN. Therefore, in February 2011, negotiators from regional bloc ASEAN began to mediate in the dispute, with Indonesia as a chair-nation. Initially, both sides said they would allow ASEAN monitors access to the disputed areas. However, intervention by Indonesia never formally occurred, and in the end ASEAN could do nothing to prevent further clashes. In consequence, talks between the leaders of the two countries failed to break the deadlock. In early May 2011, Cambodia, decided to seek help from the ICJ for the clarification of its 1962 decision.
At the ICJ, the Judges regarded the new dispute appearing to exist between the parties as to the ‘meaning’ or ‘scope’ of the 1962 Judgment. Refusing the counter request by Thailand, the Court, pursuant to Article 60 of its Statute, found its jurisdiction over the request for interpretation of the Judgment submitted by Cambodia. In July, the ICJ designated a Demilitarized Zone (DMZ) around the temple and ordered troops from both countries to leave the area (See: Figure 8).

Section 3: Summary

In 1962, the ICJ ruled the Temple of Preah Vihear as under Cambodian sovereignty, based on Thailand’s longtime acceptance of the ‘Annex I’ map. However, in its disposit, the Court did not expressly determine the exact borders surrounding the site. Nor did the Court state clearly whether it had adopted the ‘Annex I’ as a valid document. Due to that, the Court had given room for parties to interpret its decision based on their unilateral understandings.

To date, although it can no longer claim the ownership over the Temple, Thailand is still strongly insisting its ownership over the surrounding areas of the Temple (OCA, 4.6 km²), arguing that the 1962 decision applied to only the Temple of Preah Vihear, and left other areas in dispute.

The current dispute, which has been unsolved ever since the 1962 ICJ’s decision, immediately erupted in 2008 when Cambodia inscribed the Temple as a UNESCO World Heritage Site. Thailand, despite recognizing the Temple as under Cambodian sovereignty, asserted that the inscription was intended to provide an edge for Cambodia to proclaim rights over the OCA, because the map that Cambodia attached with the UNESCO application was the ‘Annex I’ which Cambodia used at the ICJ in 1959.

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120 Request for Interpretation of the Judgment of 15 June 1962, ICJ, supra note, para. 31.
121 Ibid.
Thailand further insisted that the disputes with Cambodia be settled only through bilateral framework, based on an MoU they signed together in the 1990s. Cambodia, however, rejected this proposal after experiencing many negotiation failures, and had repeatedly appealed to the UN and ASEAN to seek a third party approach. Cambodia, after diplomatic and third party approach deadlock, eventually brought the case before the ICJ again in order to seek clarification of the 1962 decision.
Chapter III

The Franco-Siam Treaties and the Subsequent Estoppel

The dispute in this case lies in a legal consideration between the value of the ‘stipulations’ and actual ‘application’ of the Treaty. To understand this clearly, first a study on the ‘exact intention’ of the parties and how the treaty was mistakenly implemented needed to be conducted by examining the general characteristics of each of the agreements. Only then is it possible to analyse and evaluate which one of the two legal challenges possesses a heavier moral (if not legal) weight over another. Later, a deep study on the the principle of acquiescence is also conducted in order to explore its originality, and its element(s) which have been developed overtime by the Court.

Section I: Validity of the Franco-Siam 1904-1907 Treaties

A. Nature of the Treaties and Maps

The origin of the Franco-Siam boundary demarcation dated back to the period of French colonization over the Indo-China region (Cambodia, Laos and Vietnam). During the period of the French protectorate, Siam and France as the governing power in Cambodia tried to arrive at a new boundary settlement. The first Franco-Siamese Treaty of 1867 forced Siam to renounce suzerainty over Cambodia, and left Siam the control of Battambang, Siem Reap, Banteay Meanchey and Oddar Meanchey provinces, which officially became provinces of Thailand.

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123 Andreas Buss, supra note, para. 3.

As the Cambodia-Siam boundary was still unclear, in 1904 another boundary Treaty was initiated.

In the Treaty of February 13th, 1904, the articles\textsuperscript{125} made no mention of Preah Vihear Temple as such. The only main clauses of the agreement were that, whereas the general character of the frontier established by Article 1 was to be a ‘watershed line’ along the Dangrek range, the exact course of this frontier was to be delimited by the ‘Franco-Siamese Mixed Commission’ set up under Article 3.\textsuperscript{126}

In the same year, Siam and the French colonial authorities ruling Cambodian formed a ‘Mixed Commission’ to demarcate the borders. In the vicinity of the temple, the group was tasked by the two governments to work on producing the maps along the Dangrek mountain range, under the principle of ‘watershed line’\textsuperscript{127}. The ‘Mixed Commission’ set up under Article 3 of the Treaty began its work in 1905.\textsuperscript{128} Notwithstanding, as the Siamese government admitted its lack of technical expertise for such a complicated task, Siam requested France to draw and prepare the map on the behalf of the joint commissions.\textsuperscript{129} Consequently, a sole French team started working on the production of boundary maps, without the Mixed Commission’s formal imprimatur.\textsuperscript{130}

In 1907, after survey work, French officers drew up maps to show the border’s location. Eleven maps were prepared, one of which showed the whole Preah Vihear promontory. However, the line on the 1907 map departed from the ‘watershed’ so as to place Preah Vihear Temple on the

\textsuperscript{125} See: the relevant provisions of the Treaty of February 13, 1904, supra note.

\textsuperscript{126} See: A.G. Noorani, India’s National magazine from the publishers of The Hindu: “The Thai-Cambodia border clashes show yet again that maps have no binding juridical significance unless they are accepted by both sides.” (2011), available here: http://www.hindu.com/thehindu/thscrip/print.pl?file=2011032528060600.htm&date=f2806/&prd=fline&


\textsuperscript{129} See: A.G. Noorani, supra note.

Cambodian side, which differed from the terms of the Treaty of 1904 (See: Figure 3 & 4).\textsuperscript{131} Had the watershed principle been adhered to, the Temple would have likely been placed in Thailand, completely.\textsuperscript{132} Despite this error, when later presented to her authorities, Siam accepted the French maps drawn on her behalf, without raising further inquiry or investigation. The continuation of using this French map by Siam as an official document for many years, (although having knowledge about its contradiction to the objective of the Treaty) raised a very contentious issue over the validity of the ‘Annex I’ map.

According to this fact, there was indeed a conflict between the Treaty of 1904 and the ‘Annex I’ map. At the ICJ, while Cambodia adhered to the map which she argued was later adopted by the parties, Thailand, on the other hand, pushed the Court to recognize the ‘initial provisions’ of the Treaty of 1904. In such case where there was a conflict between two legal agreements, the Court then had to decide which one possessed a valid character and thus legal superiority over the other.

**B. Formation of a Valid Treaty**

One of the main sources of international law regarding the matters of treaty is the Vienna Convention on the Law of Treaties 1969 (VCLT). The Vienna Convention outlined the very fundamental rules regarding the formation of a valid Treaty.

**i. Purpose of Treaty**

In the principles of the law of treaties, parties have to demonstrate or express their pure will and intention to be bound by agreements. Although, as has been suggested in jest, as Paul Reuter maintained: “agreements between hidden thoughts and ulterior motives may well be the only genuine treaties, law cannot take into consideration anything that remains buried away in the

\textsuperscript{131} See: A.G. Noorani, supra note.

minds of the parties”\textsuperscript{133}. In addition to being spelled out, he continued that: “their wills must concur to form the object and purpose of the agreement, both of which play so prominent role in the whole law of treaties”\textsuperscript{134}. One of the leading Soviet scholars, professor Tunkin, also wrote that: “agreement is the essence of custom in that it expresses the ‘will of a State’ to ‘consent’ to a rule and thus become bound by it”\textsuperscript{135}.

In the sphere of international law, consent (or pure intention) fundamentally constitutes a very indispensable condition that allows an agreement to be valid. When concluding a treaty, parties involved tend to reach an agreement by stating a specific purpose illustrating a common intention which they are willing to obey. At the same time, parties are under obligation not to undermine that essential basis of their consent and have to perform that obligation in good faith. Furthermore, parties to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects, as mentioned in Article 18 and Article 26 of the Vienna rules\textsuperscript{136}.

In the Temple Case, when France and Siam concluded the 1904 Treaty, they had obviously made it clear in their intention written in Article 1, that the borders between Cambodia and Thailand along the range of Dangrek Mountains shall follow the line of ‘watershed’. In the contents of the Treaty, there was no doubt that the original purpose of the boundary demarcation was ‘clear’ and ‘definitive’, meaning that whatever happens the maps shall not be drawn in respect to other the principle, but the exact ‘watershed’ line.

However, while both parties, French and Siam, had an obligation to draw maps together in correspond to Article 3 of the Treaty, the Siamese authorities who were at the moment lacking of


\textsuperscript{134} Ibid.


\textsuperscript{136} The Vienna Convention of the Law of Treaties 1969 VCLT, Article 18; A State is obliged to refrain from acts which would defeat the object and purpose of a treaty. Article 26 “Pacta sunt servanda”: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
technical skills, requested the French to do the work unilaterally; and that was indeed the beginning point of controversy.

International law strictly binds states with an obligation not to frustrate the purpose of the treaty; however, the maps drawn up by the French technicians with permission from Siam appeared to have defeated the objective of the Treaty (watershed) that they had previously agreed to. As a consequence, it resulted in a contradiction between the Treaty and the maps.

The Vienna convention does not mention specifically what rules would be applied, when two agreements (Treaty vs. Maps) overlap each other as such. However, it does provide some basic rules of interpretation. The use of this phrase in the Vienna rules had its origins in the link made with treaty interpretation in the original version of the provision, reflecting the obligation of states to implement treaties in good faith, *pacta sunt servanda*.\(^\text{137}\)

The term ‘good faith’ is also articulated in the Court’s basic documents, including Article 38 of the ICJ Statute as well as Article 2 (2) of the United Nations Charter. This principle “is sometimes viewed as an overarching principle, from which the *pacta sunt servanda* derives, and not surprisingly, the ICJ also treats contractual compliance as an important part of international and customary law”.\(^\text{138}\) Hersch Lauterpacht wrote that: “…most of the current rules of interpretation, whether in relation to contracts or treaties...are no more than the elaboration of the

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\(^{137}\) Vienna Convention 1969, *Article 31*: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended. *Article 32*: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

fundamental theme that contracts must be interpreted in good faith...”\(^{139}\). In addition, Richard K Gardiner went further to define ‘good faith’ as an “excellent example of a term whose ordinary meaning is elusive”.\(^{140}\) According to him, “treaties must be interpreted in light of their object and purpose, and reservations to a treaty are, in the absence of any specific provisions, only permissible to the extent that they are not incompatible with a treaty’s object and purpose”.\(^{141}\)

For instance, in the Nicaragua Case (Nicaragua vs. USA, 1986)\(^{142}\), in answer to the question of good faith regarding the act of modification or withdrawal without notice of a declaration accepting the Court’s jurisdiction, the Court put forward that:

“...it appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal form or termination of treaties that contain no provision regarding the duration of their validity”.\(^{143}\)

Nevertheless, in not every case can the term ‘good faith’ easily be defined. Some legal scholars understand the difficulties the Court faces when it has to deal with some situations where there is an ‘actual’ and ‘voluntary’ contradiction between the subsequent performance of a treaty and what parties previously agreed to do. Richard K Gardiner, for instance, acknowledged that:

“Good faith is an accompaniment to an activity may partly explain why it is difficult to extract from judgments a clear dividing line between interpretation and application, when judgments refer to good faith as an element in treaty interpretation they sometimes link this with the notion of abuse of rights, the latter relating to how a right is exercised

\(^{139}\) H Lauterpacht: “Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties” (1949) 26, B.Y, 48- 56.


\(^{141}\) Ibid.

\(^{142}\) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility), 1984, ICJ.

\(^{143}\) Ibid, Reports 420, para. 63.
rather than how its content is determined...the borderline between interpretation and application become blurred...when the courts and tribunals refer to good faith in treaty interpretation, they tend to stress its fundamental importance”. 144

Concretely, in the Temple Case, there was indeed some difficulties the Court faced when having to use good faith to decide a case of conflict between two legal valid agreements, one of which was explicit agreement while the other was implicit. Facing such critical challenge, the Court had to choose which one between the two agreements is more legally important. In other words, by relying on the principle of good faith, the Judges had to find out whether the real purpose of the parties was laid on the ‘contents’ of their agreement, or on the ‘subsequent reality’ which they later voluntarily adopted. Since the facts of this case were indeed much more complicated than answering the simple question of good faith, the Court also looked at other surrounding factors that could be taken into account.

**ii. Unilateral Error**

A state’s consent may be invalidated, if there was an erroneous understanding of a fact or situation at the time of conclusion, which deemed to attack the ‘essential basis’ of the state’s consent. 145 However, an erroneous consent will not be invalidated if that misunderstanding was due to the contribution from the losing state’s own conduct, or if the truth should have been evident. 146 These principles and exceptions regarding the matters of error are enlightened in Article 48 of the Vienna rules. 147 In this case, the conditions of invalidity also involve elements of counter responsibility, as Paul Reuters commented:

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146 Ibid.

147 Vienna Convention, *Article 48*: 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

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“...the injured party cannot avail itself of the error if it is to some degree responsible for it, either because it contributed to the error by its own negligence or failed to take into account circumstance which made it possible. Yet error does remain above all a factor vitiating consent, exerting its effects as such...”\textsuperscript{148}

In international practice, errors rarely occur in this specific sense, except in the particular field of treaty delimiting or transferring territories on the strength of inaccurate geographical descriptions or maps, as shown in some judicial cases.\textsuperscript{149} Thus, Ian Sinclair maintained that, “instead of appearing in the treaty itself, errors often materialize only in subsequent acts carried out in the application of the treaty”\textsuperscript{150}

However, in customary international law, as Sinclair continued, “instances in which errors of substance have been invoked as a ground for vitiating consent are extremely rare”.\textsuperscript{151} In a similar sense, Anthony Aust reasoned that, since the risk of material errors is reduced to the minimum, almost all the recorded cases where an error has been invoked to invalidate a treaty have concerned mistakes in maps.\textsuperscript{152} Sometimes, as Aust continued, “the error was treated more as affecting the application of the treaty rather than its validity”.\textsuperscript{153}

In practical cases, the effect of error can be seen in both the Eastern Greenland Case\textsuperscript{154} and the Temple However, in neither of the cases had claim of error appeared to be effective, due to certain contributing mistakes made by the victimized states. Case.

\textsuperscript{148} Paul Reuters, \textit{supra} note, pp. 137.


\textsuperscript{150} Ibid.

\textsuperscript{151} Ibid.


\textsuperscript{153} Ibid.

\textsuperscript{154} Legal Status of Eastern Greenland, (1933) PCIJ, Series A/B, No. 53.
In the Eastern Greenland Case, the Foreign Minister of Norway, Mr. Ihlen, answered a specific question put to him by the Danish Minister. Mr. Ihlen made a declaration regarding the extent of Danish sovereignty over Greenland, declaring that: “…the plans of the Royal Danish Government respecting Danish sovereignty over the whole of Greenland would be met with no difficulties on the part of Norway”.\(^{155}\) Although later, that declaration turned out to be mistaken and that was claimed to not have been authorized by the Norwegian Government. The PCIJ, however, took the view that there was no relevant question of error raised in the case, as Mr. Ihlen’s statement was couched in ‘definitive’ and ‘categorical’ terms.\(^{156}\)

Similarly, in the Temple Case, the trouble arose when the agreed boundary came later to be shown on the ‘Annex I’ map.\(^{157}\) Thailand contended that the ‘Annex I’ map presented by Cambodia contended an erroneous material, and consequently should be held as legally invalid. However, from its investigation, the Court found that, although the map itself was error, Siam had an obligation to verify it. Drawn up unilaterally by the French, however, the Court found that the maps indeed possessed certain legal characteristic of the Mixed Commission’s work, with the request or so-called “legitimate authority” from the Siam counterpart. The Court admitted that there was a duty to conduct an investigation on the part of Siam, and thus concluded that the violation of that duty held Siam responsible before the error of the ‘Annex I’ map.

“…if the Siamese authorities accepted the ‘Annex I’ map without any investigation; they could not now plead any error vitiating the reality of their consent”.\(^{158}\)

The Court considered that Thailand had indeed contributed to that error through its own negligent conduct which brought on the conclusion that it no longer possessed an ability to


request invalidating the erroneous maps. Additionally, the ICJ also do not consider that type of error as an important part of consent, by observing that:

“... any error of this kind would evidently have been an error of law, but in any event, the Court does not consider that the issue in the present case is really one of the errors...furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given”.¹⁵⁹

Within a contractual relationship, error and fraud are similar and can sometimes be confused. Earlier Special Rapporteurs, notably Fitzmaurice, sought to distinguish between unilateral error and mutual error, maintaining that unilateral error could be invoked only if the error had been induced by fraud, fraudulent misrepresentation, concealment or nondisclosure, or culpable negligence, of the other party.¹⁶⁰

iii. Possible Fraud

In the history of international relations, there has been almost no case of fraud between States. However, the Vienna Convention does not fail to include ‘fraud’ as one of the main conditions of invalidity of a Treaty.¹⁶¹ William Edward Hall also remarked that:

“...freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract”.¹⁶²

In reality, fraud shares a lot of commonalities with and can hardly be differentiated from errors. Although not easy to distinguish, theoretically there is still a fundamental difference between the

¹⁵⁹ Here, the ICJ would seem to be saying much the same thing as Lord Atkin had said in the leading English case of Bell v. Lever Brothers Ltd (1932) A.C. 161, at p. 217: “If mistake operates at all, it operates so as to negative or in some cases to nullify consent”.


¹⁶¹ See: Vienna Convention, Article 49: If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty

term ‘fraud’ and ‘error’. The difference between them can be observed through the examination of the ‘intention’ and ‘conduct’ of gaining states. Schwarzenberger appears to have made a short shift of the matter in these words, saying that:

“...a party which by its fraud has induced another party to enter a treaty is estopped from invoking the treaty...where a State has not contributed to the error of the other, such error cannot affect the validity...and this is the distinguishing mark between unilateral mistake and fraud...”\(^{163}\)

In addition to that, Sir Humphrey Warldock also mentioned cases of innocent misrepresentation (as opposed to fraudulent representation) would not affect the validity of consent, unless the innocent misrepresentation led to an error which could be invoked as invalidating consent.\(^{164}\) In certain circumstances, as he insisted, “innocent misrepresentation by one party might help to defeat the suggestion that the other party ought to have discovered the error”.\(^{165}\) In such case, in order to invalidate the treaty, the conditions of fraud require that the victim states have to prove that they are induced to enter into a treaty as a result of fraudulent conduct by other states. Through this explanation, it can be implied that, had they known beforehand about the fraudulent character of the treaty, victim states would not have been willing to enter into the agreement.

In the Temple Case, although claiming the ‘Annex I’ map of being an erroneous material, it had never been argued by Siam that the said map was drawn on purpose with a fraudulent intention by the French for the interest of its colonized territory (Cambodia). Neither was there any evidence nor presumption of such fraudulent events, although according to the fact it seemed clear from the beginning that only the French would have benefited from the error of this map that it was assigned to produce, and that Thailand would suffer a loss of territory if she failed to react.


\(^{164}\) Explanation given by Sir Humphrey Waldock in response to a question posed by a representative of Ceylon (Pinto) at the 44\(^{th}\) meeting of the Committee of the Whole: Official records, first session, 45\(^{th}\) meeting.

\(^{165}\) Ibid.
iv. Colonial Coercion

Like fraud, coercion rarely appeared in the history of international agreements. Only a few cases of coercion by use of force occurred during wartime and colonial periods. Although unlikely to happen in this modern time, coercion is also included in Article 52 of the Vienna Convention\textsuperscript{166}, as one of the key elements to invalidate consent of a treaty.

In the Temple Case, the matter of coercion is perhaps also worth discussion, since it is widely understood that the 19th century was an era of intense colonization. As history has well recorded, Siam was the only country in Southeast Asia that never had been colonized by any foreign nation. At that time, Siam was a sandwich nation between colonial powers, Britain and France. While Britain dominated most nations in South Asia (including India, Pakistan and Myanmar), France ruled over Indo-China (Cambodia, Laos and Vietnam). Regarding the issue of conclusion and implementation of the Franco-Siam Treaty of 1904 and 1907, there have been quite a number of interesting comments which focus on the suppressive character of those agreements.

Phil C.W. Chan, for instance, compared the reverse situation between the Temple Case and the Anglo-Norwegian Fisheries Case (United Kingdom vs. Norway, 1953). He strongly stressed that:

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"...Siam’s alleged silence cannot be equated with the United Kingdom’s admitted abstention in Anglo-Norwegian Fisheries over Norway’s then illegal adoption of straight baselines in the delineation of territorial waters...because Siam was under daily threat of colonialism whilst the United Kingdom was an established Power on the seas".\textsuperscript{167}
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According to Chan’s arguments, the Franco-Siam Treaty was seemingly unequal, first due to imbalance of military powers of the contracting parties and second due to timing.\textsuperscript{168} At that context of time, the League of Nations had not come into existence yet, and the world security

\textsuperscript{166} See: Vienna Convention, \textit{Article 52}: A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.


\textsuperscript{168} Ibid.
was monopolistically in the hands of colonialism. In such circumstances, as it was also recorded, Siam was struggling with colonial powers to remain itself as a sovereign nation. Thus, it might be presumable that Siam was not in the same foot of equality, in terms of implementing the Treaty with the French.

Despite these subjectively reasonable facts, there had never been any particular evidence nor further arguments on the part of Thailand that Siam was being coerced or under any military or political pressure, when implementing the Treaties with France. One may have in mind that by accepting the ‘Annex I’ map, Siam was perhaps subjectively forced not to react, possibly not because Siam wanted to be silent, but rather because she had no other choice but to give up a very small part of territory for the sake of the whole nation, due to the frenzy of colonial expansion. These reasons, however, could only be presumable, but still not evident, and therefore the Court would find it hard to accept even if they were previously mentioned.

Section 2: Concept of Acquiescence/Estoppel

A. Origin and Recognition

i. Origin

To understand profoundly the exact meaning of acquiescence, it is necessary to explore the very nature of this equitable principle. In principle, it is generally accepted that acquiescence originates from the concept of estoppels. Estoppel, essentially a rule of evidence, in its broadest sense, is a legal term referring to a series of ‘legal’ and ‘equitable’ doctrines169 that preclude “a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied”.170 The common law doctrine of

170 Recited from Wikipedia, Estoppel, supra note, 28 Am Jur 2nd Estoppel and Waiver § 1
estoppel by acquiescence, is applied when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time, and as a consequence, the second party is said to have automatically acquiesced to the claim, and is estopped from later challenging it, or making a counterclaim.\textsuperscript{171}

Shabtai Rosenne reported that the principle of acquiescence usually is applied in situations of law-application rather than lawmaking.\textsuperscript{172} In other words, it happens to exist in the ‘situations’ rather than in ‘norms’.\textsuperscript{173} This doctrine surely ranks as one of the most ‘mystical doctrines’ of international law, apart from the fact that sometimes its very existence is challenged, and its contents are rather nebulous.\textsuperscript{174}

The term ‘acquiescence’ can sometimes be confused with ‘recognition’. Prescott and Triggs sought to differentiate between the two, saying that, “while recognition and acquiescence are founded in express or implied consent, the principle of estoppel operates to require a state to maintain a position that does not represent its intentions”.\textsuperscript{175} Anthony D’Amato also agreed that it is not easy to distinguish meaningfully between consent and acquiescence, and especially between implied consent and acquiescence.\textsuperscript{176} MacGibbon, further attempted to explain the particularity of acquiescence, saying the the following words:

\textsuperscript{171} Definition of Estoppels by Acquiescence by IT Law Wikia, available here: \url{http://itlaw.wikia.com/wiki/Estoppel_by_acquiescence}

\textsuperscript{172} Recited from Jan Klabbers: “The Concept of Treaty in International Law”, Kluwer Law International, (1996), pp. 93, Shabtai Rosenne reportedly “hoped” that the Institute de Droit International “would resolve to banish the term estoppel from the vocabulary of international law.” See the debates recorded in 60 AIDI (1984/II), at 133.

\textsuperscript{173} Ibid.

\textsuperscript{174} Ibid.


“...if a state does not protest the actions of other states which generally call for a positive reaction signifying an objection, by being silenced in such circumstances, the losing state is principally held to have acquiesced”.\textsuperscript{177}

The essential meaning of ‘estoppels’, according to Dr. Slouka, is that “if a state gives the impression of going along with a certain practice or rule, perhaps by not protesting against it when it was convenient to do so, that state should not be allowed later to disavow the practice or the rule”.\textsuperscript{178} In short: “blowing hot and cold is inadmissible”.\textsuperscript{179} In addition to that, Jan Klabbers explained: “the importance of estoppel lies predominantly in the granting of legal effects to what are purportedly non-legally binding agreements”.\textsuperscript{180} According to him, there have been several authors claiming that, “even if some agreements are never intended to be legally binding, notwithstanding they may over time acquire legal effects on the grounds of estoppels”.\textsuperscript{181} Thus, as a consequence, Klabbers concluded:

“...states may end up being estopped from acting contrary to a non-legal binding agreement they concluded...or in other words, at some point in time, their original intent not to become legally bound has been overruled by estoppels”.\textsuperscript{182}

\textbf{ii. Recognition}

Many legal scholars agreed on a traditional interpretation that international law does not exist unless every individual state agrees on its existence, and therefore no individual state shall be

\begin{itemize}
\item \textsuperscript{177} Recited from Anthony D’Amato, \textit{supra} note, pp. 5, MacGibbon, “The Scope of Acquiescence in International Law”, 31 BRIT. Y. B. INTL. L. 143 (1954).
\item \textsuperscript{179} Ibid.
\item \textsuperscript{181} Ibid.
\item \textsuperscript{182} Ibid.
\end{itemize}
bound by anything that it has not consented to.\textsuperscript{183} However, according to the modern definition and rapid development of international law, it no longer means that any norm that is not accepted (or simply abstention) by an individual state is not international law. This simply infers that, to be a norm of international law does not require a consensus of each and every individual state. If a given rule or the practice, that gave rise to a rule, meets with the approval by the overwhelming majority of states which express a willingness to recognize that rule as a basis legal instrument governing international relations, then that rule will automatically be defined as a rule of international law.\textsuperscript{184} The development of this rule, in fact, is based on the principle of utilitarianism legislation.

In case of estoppels, there are considerable numbers of states which support the view that it is a general principle of international law, resting on the principles of ‘good faith’ and ‘consistency’.\textsuperscript{185} Considering this principle as an unrestricted rule of international law, Brownlie maintained that, “the essence of estoppel is the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some degree of prejudice”.\textsuperscript{186} “By either acquiescing in or recognizing the otherwise illegal act of a State as in conformity with existing international law”, as Browlie continued to explain, “the acquiescing or recognizing States are precluded from later denying the legality of such act”, and thus, “before a tribunal the principle may operate to resolve ambiguities and as a principle of equity and justice: here it becomes a part of the evidence and judicial reasoning”.\textsuperscript{187}

This principle, which supplements \textit{pacta sunt servanda}, enshrined in Article 38(1)(c)\textsuperscript{188} of the Statute of the International Court of Justice, and later on inserted into the Vienna Convention,

\textsuperscript{183} Anthony D’Amato, \textit{supra} note, pp. 2.

\textsuperscript{184} Ibid, pp. 6.


\textsuperscript{186} Ibid.

\textsuperscript{187} Ian Brownlie, (1998), \textit{supra} note, pp. 646.

\textsuperscript{188} ICJ Statute, Article 38: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (c) the general principles of law recognized by civilized nations.
Article 26 and Article 45.\textsuperscript{189} is a cornerstone of international law which obliges all States to uphold contractual obligations.\textsuperscript{190}

Since international law is the law which is manifested in the practice of all or most of the states, the recognition of estoppels has undoubtedly extended to the international sphere, and there is no more uncertainty whether estoppel is a general principle of international law.\textsuperscript{191} Thus, estoppels, originating from good faith, are definitively regarded as a principle of customary international law as well as a general principle of law: “a man shall not be allowed to blow hot and cold”, or simply in the term of international relations, a state cannot “affirm at one time and deny at another”. Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel’, or by any other name, it is one which courts of law have in modern times most usefully adopted\textsuperscript{192}, and therefore has been featured in the jurisprudence of the International Court of Justice and its predecessor, the PCIJ, in a number of cases.\textsuperscript{193} It is a universally recognized principle of public law that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation’s title and rightful authority.\textsuperscript{194} However, in functional terms, as Anthony D’Amato argued, “the notion of

\textsuperscript{189} Vienna Convention, Article 26 (\textit{PactaSuntServanda}) and Article 45: A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (b) it must be reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

\textsuperscript{190} Recited from Phil C.W. Chan, \textit{supra} note, pp. 424, D.W. Bowett, \textit{“Estoppel before International Tribunals and its Relation to Acquiescence”}, 33 British Year Book of International Law (1957), 176, 181

\textsuperscript{191} Ian Brownlie, (2003), \textit{supra} note, pp. 616.

\textsuperscript{192} Recited from Andrew D. Mitchell: \textit{‘Good Faith in WTO Dispute Settlement’}, Melbourn Journal of International Law, Volume 7, footnote n57, Cave v Mills (1862) 7 Hurlstone & Norman 913, 927, as quoted in Cheng, above n 38, 141–2. But see O’Connor, above n 8, 122–3.

\textsuperscript{193} Although estoppel has featured in the jurisprudence of other international judicial bodies, the exclusive focus of this paper is on the decisions of the Court and its predecessor. The reason for this is two-fold. First, the Court, as the ‘principal judicial organ of the United Nations’ (Charter of the United Nations art 92), is considered to be the most authoritative international judicial body. See, eg, Clive Parry, The Sources and Evidences of International Law (1965) 91. Secondly, the Court itself very rarely makes use of the decisions of other international judicial bodies on estoppel. Therefore, in this area of international law, decisions of other international judicial bodies do not seem to be perceived by the Court as persuasive in their reasoning.

\textsuperscript{194} Indiana v. Kentucky, 136 US 479 (1890), 510.
acceptance or acquiescence does not normally help us decide what the rules in the international legal system in fact are” 195

To understand sharply what acts can be classified into categories of acquiescence, the next part will examine the particular characteristics of each of the acts that can be considered justification for acquiescence, based on various case studies which preceded their legitimate reasons and conditions.

**B. Condition(s) of Acquiescence/Estoppel**

The term ‘estoppel by acquiescence’ has appeared in many judicial precedents. This equitable principle is also particularly popular in the territorial disputes. International Tribunals have dramatically developed and ambitiously interpreted the meaning of ‘estoppel by acquiescence’ in many ways. However, until now, this principle has not acquired a unique or clear legal definition. Its legal condition has been blurred, and its justification has been based only on judicial considerations of various factual and moral grounds.

**i. Tacit Consent (Silence)**

The idea that a state is not bound by a rule of international law, unless it had previously consented to it, is an extreme form of the traditional international law and jurisprudence which flourished in the nineteenth century. 196 Nevertheless, upon the rapid development of the international legal system and international relations, in many international contractual events, silence occasionally implies acceptance. By being silent on the fact or interference for which a response is necessarily required, Prescott and Triggs maintained that, “the law presumes that victimized parties give up their rights by taking that silence as a consent to be bound, thus cannot later reclaim that rights”. 197 However, they also understood, a mere fact of silence can be

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ambiguous, and authorities have been reluctant to treat silence as consent, without knowledge of
relevant facts. 198

Silence later transformed into an act of acquiescence is a related doctrine that can mean, and
have the legal effect, that when confronted with a wrong or an act that can be considered a
tortuous act, where one’s silence may mean that one accepts or permits such acts without protest
or claim thereby loses rights to a claim of any loss or damage. 199 Compared to recognition,
acquiescence is essentially passive and consists of tacit consent where more active protest might
reasonably have been expected. Thus, Judge Alfaro provided his opinion that:

“...a State may also be bound by a passive or negative attitude in respect of rights
asserted by another State, which the former State later on claims to have. Passiveness in
front of given facts is the most general form of acquiescence or tacit consent. Failure of a
State to assert its rights when that right is openly challenged by another State can only
mean abandonment to that right”. 200

Judge Fitzmaurice also reached the same conclusion, but in a more moderately worded statement
that has been frequently quoted:

“...where a general rule of customary international law is built up by the common
practice of States, although it may be a little unnecessary to have recourse to the notion
of agreement (and a little difficult to detect it in what is often the uncoordinated,
independent, if similar, action of States), it is probably true to say that consent is latent in
the mutual tolerations that allow the practice to be built up at all; and actually patent in

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198 Ibid, pp. 177.

199 U.S. Supreme Court Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1932).

200 See: Temple of Preah Vihear Case (Separate Opinion of Vice-President, Judge Alfaro), pp. 40.
the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law”.

The binding effect of passiveness or inaction of a State can be seen in the Grisbadarna Case (Norway vs. Sweden, 1909). In that case, the tribunal considered consistent acts of exercising power as owner over the Grisbadarna areas by Sweden, through some concrete actions, as an implied consent to the Norway’s many years inactivity in the disputed areas:

“...the circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought she was exercising her rights but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards...”.

Similarly, in the Yukon Lumber Case (Great Britain vs. United States, 1913), a claim was put forward by Great Britain for the value of some timber cut in trespass upon Canadian territory, subsequently sold to the Government of the United States, and used by it in the construction of certain military bridges in Alaska. The Tribunal upheld the United States arguments and reasoned that:

“...Great Britain, by the course taken by her officials, was estopped from denying that a full and complete title to the timber had legally vested in the United States, that the Canadian land and timber agent stood by silently and watched the American Government acquire this timber bona fide and continue for six months to pay the instalments due in respect of it, and that, accordingly, Great Britain could not now be heard in a demand

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that the United States should pay for the timber which it was permitted to acquire under false representations’. 203

Also, in the Temple Case, the Court concluded that Thailand had voluntarily accepted the ‘Annex I’ map without conducting any preliminary investigation. And despite later conduct which discovered that the ‘Annex I’ map was wrong in 1934-1935, Thailand was silent and moreover continued circulating it as an official document. For fifty years after the reception of that map, the Court held that Thailand’s acts tacit acceptance over and failure to protest against the facts which required an immediate reaction had amounted to acquiescence.

**ii. Unilateral Declaration**

Sometimes, States can be legally bound under international law, even though it has acted unilaterally through its representatives. 204 Notwithstanding, not all unilateral acts are implied as obligation. When States make statements, their freedom of action is to be limited, and a restrictive interpretation is called for. 205 One of the basic principles governing the creation and performance of legal obligations through an act of unilateral declaration, whatever source it is, is based on the principle of good faith. 206 Just as the very rule of *pacta sunt servanda*, treaties are based on the conduct of good faith, so thus an act of unilateral declaration is the binding character of an international obligation. 207 One of the main reasons for this is that, “trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential”. 208 As a consequence, States may

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203 See: Temple of Preah Vihear Case (Separate Opinion of Vice-President, Judge Alfaro), pp 44-46, also see: Lauterpacht, opus cit., para. 132, pp. 280.


205 Ibid.

206 Ibid.

207 Ibid.

208 Ibid.
take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.209

With regard to the question of form, however, “international law does not impose any special or strict requirements, whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law”.210

In the Eastern Greenland Case (Norway vs. Denmark, 1933), it can be debatable, whether there was a valid conclusion of an international agreement. During the proceedings, the Court found a declaration made by the Norwegian Foreign Minister as legally binding. After careful consideration, the Court observed that, the Norwegian Foreign Minister had made a unilateral declaration, later known as “Ihlen Declaration”, as to which, as the PCIJ maintained:

“...what Denmark desired to obtain from Norway was that the latter should do nothing to obstruct the Danish plans in regard to Greenland. The Declaration which the Minister for Foreign Affairs gave on July 22nd, 1919, on behalf of the Norwegian Government, was definitely affirmative: ‘I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question’...”.

Regardless of the willingness of the country, the Court went further to say that, the character and the capacity of its representative were sufficient to bring about an expression of a State, and that expression was undisputedly clear. It eventually held Norway responsible for the words made by its authorities.

“...whether Norway actually intended to become bound was not determined; given the fact that the statement was made by the Foreign Minister, to his Danish counterpart...the

209 Ibid.
210 Ibid.
211 The Legal Status of Eastern Greenland (Denmark vs. Norway), 1933 PCIJ, Serie A/B, no. 53, pp.70-71.
‘Ihlen declaration’...that Norway would not contest Denmark’s claim to the whole of Greenland, was ‘unconditional’ and ‘definitive’...”\textsuperscript{212}

Similarly, in the Nuclear Test Cases (Australia, New Zealand vs. France, 1974), during the process when Australia and New Zealand were bringing applications to the ICJ demanding cessation of atmospheric nuclear tests being carried out by France in the South Pacific, the French government announced that, “it had completed its series of tests and did not plan more tests”. The Court considered the relevance of the statements by the French authorities and concluded that:

“...it is well recognized that declaration of unilateral acts, concerning legal or factual situations, created certain legal obligations. Declaration...often is very specific... illustrates the intention of the State making the declaration...that it should become bound according to its terms...the State being thenceforth legally required to follow a course of conduct consistent with the declaration...if given publicly, and with an intent to be bound...”\textsuperscript{213}

\textbf{iii. Peaceful / Effective Occupation}

Occupation is an exercise of sovereignty (often initially by discovery) over previously unclaimed territory (\textit{terra nullius}).\textsuperscript{214} In this context, acquiescence, or simply called prescription, is an act of peaceful exercise of sovereignty by a State, for “a reasonable period of time without objection” from other States.\textsuperscript{215} This inferred that an occupation of a territory, although presumably ineffective from the start, could later be legally recognized, if such occupation was exercised peacefully, with an absence of protest by other contesting states, within a certain period of time.


\textsuperscript{213} The Nuclear Tests Cases, supra note, pp. 253, 457.


\textsuperscript{215} Ibid.
In the Clipperton Island Case (France vs. Mexico, 1931), the Arbitrator held that, “the proof of a historic right of Mexico’s is not supported by any manifestation of her sovereignty over the island, since she had never have willing to exercise sovereignty until the expedition of 1897”. Accordingly, the Judges held that, “there is ground to hold as incontestable, the regularity of the act by which France in 1858 made known in a clear and precise manner, her intention to consider the island as her territory”. The Arbitrator thus came to give reasons as follows:

“...taking of possession is a necessary condition of occupation...consisting in the act, or series of acts, by which the occupying state reduces to its possession the territory...taking steps to exercise exclusive authority there...strictly speaking...establishing in the territory itself an organization capable of making its laws respected...but a means of procedure to the taking of possession is not identical...it is unnecessary to have recourse to this method...if a territory was completely uninhabited from the first moment when the occupying state makes its appearance there...at the absolute and undisputed disposition of that state...moment the taking of possession must be considered as accomplished, and the occupation is thereby completed...”.

Finally, the Arbitrator found that, Clipperton Island was legitimately acquired by France on November 17, 1858, and emphasized that:

“...there is no reason to suppose that France has subsequently lost her rights by derelictio, since she never had the animus of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected”.


217 Ibid.

218 Ibid.

219 Ibid.
Similarly, in the Island of Palmas Case (USA vs. Netherlands, 1928), at the beginning, Judge Huber doubted that relevant information would be available in practice because a clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible.\textsuperscript{220} He reasoned that, “not only would it be impossible, it would contradict any assertion of effective occupation”.\textsuperscript{221} However, as he finally came to conclude, “the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as title”.\textsuperscript{222}

Also, in the Serbian Loans Case (France v. Serb-Croat-Slovene State, 1929), as reported by Bowett, “the question arose whether in accepting payment of interest upon the loans in French francs, as opposed to ‘gold francs’, the French bondholders had represented that they were prepared to accept payment in French francs. If they had, despite the derogation from the terms of the loan, it was arguable that they were henceforth estopped from claiming payment according to the strict terms of the loans”.\textsuperscript{223} During the proceedings, the Permanent Court held that, France was estopped from demanding the Serb-Croat-Slovene State to strictly pay the debt with the ‘gold francs, even contradictory to the terms of the agreement, considering its consistent and practical acceptance of the ‘French franc’ from those States.

\begin{quote}
\textit{“\ldots\textcolor{red}{\textit{when the requirements of the principle of estoppel to establish a loss of rights are considered, it is clear that no sufficient basis has been shown for applying the principle in this case. There was no clear and unequivocal representation of the bondholders upon which the debtor State was entitled to rely and has relied”}}\textsuperscript{224}}
\end{quote}

\textsuperscript{220} Island of Palmas Case (USA vs. Netherlands), Permanent Court of Arbitration, PCA, (1928), pp. 839.

\textsuperscript{221} Ibid.

\textsuperscript{222} Ibid.

\textsuperscript{223} Recited from the Separate Opinion of Judge Alfaro in the Temple of Preah Vihear Case, pp. 44, provided a reference regarding the Serbian Loans Case, ‘\textit{Estoppel before International Tribunals’, British Year Book of International Law, 1957.

\textsuperscript{224} Serbian Loans Case (France vs Serbia), P.C.I.J., Series A, Nos. 20-21, pp. 39.
In the Temple Case, the Court reasoned that Cambodia had exercised her control over the Preah Vihear areas, without any formal objection or protest from Thailand. Although Cambodian occupation was initially inconsistent with the terms of the Treaty, by exercising an act of peaceful control and other ownership activities over the said territory, according to the Court, such concrete administrative activities by Cambodia had caused the “Annex I” map to enter into a new implicit agreement. Without emphasizing whether the Cambodian occupation was legally effective or not, the Court only regarded the enjoyment and satisfaction of the Treaty by Thailand for fifty years by not raising any claim or interference.

iv. Failure to Protest

Failure to protest may cause States to lose certain ability to claim rights over a territory. As Prescott and Triggs noted, “International Tribunals have regularly concluded that title in one state has been demonstrated where the competing state has failed to protest”. Lauterpacht also asserted that, “failure to protest in circumstances when protest is necessary”, according to the general practice between States, “does likewise signify acquiescence or tacit recognition”, and consequently, “the State concerned must be held barred from claiming before the international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed”. Mentioning the utility of this principle, and considering that one of its main purposes is to maintain the element of friendship and to strengthen co-operation within the international community, Judge Alfaro explained that: “acquiescence is also rooted in the necessity of avoiding controversies as a matter of public policy (interest rei publicae ut sit finis litium)”.227

In the international arena, there are many cases where a failure to protest by contesting states resulted in a loss of rights. In the Honduras Borders Case (Honduras vs. Guatemala, 1933), the Tribunal awarded title to Guatemala where Honduras failed to protest public assertions of sovereignty. The Court held that:


“...the intense feeling existing at the time, and the natural jealousy of the new States with respect to their territorial rights, would have caused a prompt reaction. But it does not appear that such a protest was made or that opposing action was taken by Honduras”.

Also, in the Grisbadarna Case (Norway vs. Sweden, 1909), the Tribunal stressed the coexistence of expenditure and acquiescence, that:

“...the payment of considerable sums...and together with the stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests...”.

Furthermore, in the Island of Palmas Case (USA vs. Netherlands, 1928), the ICJ noted the complete lack of ‘contestation’ or ‘protest’ against activities by the Netherlands. And accordingly, in the Minquiers and Ecrehos Cases (France vs. United Kingdom, 1953), the Court also condemned “the failure of France to protest against the application of British legislation to the islands”.

Finally, in the Anglo-Norwegian Fisheries Case (United Kingdom vs. Norway, 1951), it was principally arguable that “protests can prevent a state from acquiring territory that is terra nullius”. In that case, as a consequence, there was an implication was that, “had the United

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228 Ibid, pp. 1328.
229 Ibid, pp. 176.
231 Victor Prescott and Gillian D. Triggs, supra note, pp. 176.
232 Ibid.
Kingdom constantly and unambiguously objected to the Norwegian system of delimitation, the baselines would not have been opposable against it”.

However, not all protests may prevent the effective exercise and enjoyment of sovereignty by other States. In the Eastern Greenland Case, for instance, the Court concluded that:

“...the declaration meant that ‘Norway is under an obligation to refrain from contesting Danish sovereignty’, but that was as far as it went. It did not create an obligation to definitively recognize Danish sovereignty”.

Prescott and Triggs also gave an explanation for the Court’s decision that, Norway’s protests against Denmark’s displays of sovereign authority in Greenland did not alter the peaceful character of Denmark’s claim to the title. It is also likely that, as they illustrated further, “where a state has effectively occupied the territory, the protests of a competing state could at best be a temporary bar to title where the occupying state continues to remain in possession”.

In the Temple Case, the Court came to conclude that, Thailand had repeatedly failed to react against the ‘Annex I’ map, although it indeed had many independent opportunities. By failing to protest, despite its own conducted discovery of the error of the maps in 1934-1935, and its absence in raising the issues in various bilateral negotiations with the French, implied that Thailand had tacitly recognized the ‘Annex I’ map.

v. Long Term Acceptance

Acquiescence may also arise when one person gives a ‘legal warning’ to another based on some clearly asserted facts or legal principles, and the other person does not respond within ‘a

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233 Ibid, pp. 178.
235 Victor Prescott and Gillian D. Triggs, supra note, pp. 178.
236 Ibid.
reasonable period of time. By not responding or by remaining silent for a certain period of time, that person is generally considered to have lost the legal rights to assert the contrary. However, neither law nor practice has prescribed the exact amount of time that shall be presumed as a “reasonable period of time”.

In the Islands of Minquiers and Ecrehos Case, in the oral proceedings, Sir Gerald Fitzmaurice regarded the legal effect of a longtime abandonment and inaction by a State as a justification for acquiescence, giving some personal opinions as follows:

“...title to territory is abandoned by letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. Could anything be imagined more obviously amounting to acquiescence that is in effect an abandonment? Such a course of action, or rather inaction, disqualifies the country concerned from asserting the continued existence of the title...”

Also, in the Anglo-Norwegian Fisheries Case, it was concluded that the general toleration of the international community, Great Britain’s prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom. The Court thus concluded that:

“...the method of straight lines, established in the Norwegian system had been consolidated by a constant and sufficient long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law”.

Ibid.
See: Temple of Preah Vihear Case (Separate Opinion of Vice-President Judge Alfaro), pp. 43-45.
Fisheries Case (United Kingdom vs Norway), ICJ Report 1951, pp. 116, 139.
Ibid.
In the Temple Case, one of the main reasons which the Court took into account was not due to the ‘Annex I’ map itself, but rather due to ‘longtime acceptance’ by Thailand of the map that was mistakenly drawn up by the French on the behalf of the ‘Mixed Commission’. The Court reasons that, it took nearly fifty years (1907-1953) for Thailand to start protesting against the ‘Annex I’ map which later she proclaimed to be an erroneous document. That excessive amount of time that Thailand had given up, according to the Court, had expired her legal right to reclaim the title of the territory which originally belonged to her.

**vi. Recognition of the Title**

When a state gives expressed recognition through a treaty to the existence of title of the other party to the dispute, that state will effectively be estopped from denying title. Recognition by one State that the title to territory lies in another, whether expressed or implied, will be indisputable evidence of the title of the latter. MacGibbon further explained the role of acquiescence as a recognition as follows:

“...it constitutes a procedure for enabling the seal of legality to be set upon the rules which were formerly in process of development and upon rights which were formerly in process of consolidation. The primary purpose of acquiescence is evident; but its value lies in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical...”.

In the Eastern Greenland Case, the Court was convinced that, although being unable to rely on the declaration made by the Norwegian Foreign Minister in order to claim definitive sovereignty, Denmark was entitled to rely on treaties between it and other states, other than

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243 Ibid.


Norway, to the extent that they constituted evidence of recognition of sovereignty over Greenland.\textsuperscript{246} Due to that, the Court went on to say:

\textit{"In 1921, after having obtained the written assurances from Great Britain, France, Italy and Japan, it asked both Sweden and Norway for written recognitions. Sweden complied; and, Norway did not, at least not unconditionally. Recognition by the competing state is thus both binding on the recognizing state and powerful evidence of title".}\textsuperscript{247}

Also, in the Shufeldt Case (Guatemala vs. USA, 1930), the United States contended that Guatemala, having for six years recognized the validity of the claimant’s contract, and received all the benefits to which she was entitled thereunder, and having allowed Shufeldt to continue to spend money on the concession, was precluded from denying its validity, even if the contract had not received the necessary approval of the Guatemalan legislature.\textsuperscript{248} The Arbitrator upheld the United States position, providing reasons that these contentions were “sound and in keeping with the principles of international law”.\textsuperscript{249}

\textit{vii. Absence of Knowledge}

Acquiescence is also a legal term used to describe an action through which a person knowingly stands by without raising any objection to the infringement of his/her rights, while someone else unknowingly and without malice aforethought makes a claim on his/her rights.\textsuperscript{250} As a consequence, that person whose rights are infringed loses the ability to make a claim against the

\textsuperscript{246} Victor Prescott and Gillian D. Triggs, \textit{supra} note, pp. 176.

\textsuperscript{247} Ibid.


\textsuperscript{249} Ibid.

infringer.251 This term is more generally known as a ‘permission’ given by ‘silence’ or ‘passiveness’.252

The existence of knowledge, which led to eventually hold a State as being acquiesced from a wrongdoing act, occurred in the second Georgia v. South Carolina Case (1990)253, when the U.S. Supreme Court ruled that Georgia could no longer make any claim to an island in the Savannah River, despite the 1787 Treaty of Beaufort’s assignment to the contrary. In its decision, the court said that:

“...the state had knowingly allowed South Carolina to join the island as a peninsula to its own coast by dumping sand from dredging, and to then levy property taxes on it for decades. Georgia thereby lost the island-turned-peninsula by its own acquiescence, even though the treaty had given it all of the islands in the river”.254

In the case of Pensions of Officials of the Soar Territory255, according to Phil C. W. Chan, the Arbitral Trinual made a precedent that the right of a Government to protest was acquired only at the moment when it knew of the facts.256 Chan maintained that, “undeniably, knowledge is all the more essential when it comes to an allegation of general acquiescence”.257 He also mentioned the original assertions of Johnson, that:

251 Ibid.
252 Ibid.
253 See: Georgia v. South Carolina Case (1990) 497 U.S. 376
255 Phil C.W. Chan, supra note, pp. 429, footnote n 56, 3 Reports of International Arbitral Awards (United Nations Series) 1563, as cited in MacGibbon, above n.9,175.
256 Ibid, footnote n 57, Ibid., 1567, as quoted in MacGibbon, ibid.
“...acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all”\textsuperscript{258}.

The requirement that acquiescence cannot occur in the absence of relevant knowledge raises the question whether, as Judge Huber asked in the Island of Palmas Case, it is a ‘condition of legality’ that a claimant should notify its pretensions to other states. \textsuperscript{259} Prescott and Triggs maintained that, “it is probable that notification is not required by international law, though states have objected when they have not received notification of occupation of territory”. \textsuperscript{260} They continued to insist that, “notification may, in practice, be made both to avoid such objections and as evidence of the intent and will to act as sovereign”, giving an example that “when transferring part of its claim to the Antarctic Territory to Australia in 1933, the UK was careful to advise France accordingly”. \textsuperscript{261}

\textbf{Section 3: Summary}

In some international disputes, the Court occasionally faced dilemmas and difficulties when answering questions related to the paradoxical implications between two existing laws. Prescott and Triggs explained that, “where there are discrepancies between the terms of a treaty and a map which has been incorporated in the text”, as it is a usual interpretive practice, “that an express provision in the treaty will override the map”. \textsuperscript{262}

In the Temple Case, however, the Court considered reversely. The Court interpreted that, Thailand had accepted the boundary as mistakenly represented on the map, and the effect of that reception for a certain period of time without raising any protest had led to a justification for

\begin{itemize}
\item \textsuperscript{258} Ibid.
\item \textsuperscript{259} Victor Prescott and Gillian D. Triggs, \textit{supra} note, pp. 177.
\item \textsuperscript{260} Ibid.
\item \textsuperscript{261} Ibid.
\item \textsuperscript{262} Ibid, pp. 205.
\end{itemize}
‘estoppel by acquiescence’. In other words, the Court concluded that, the recognition by Thailand of Cambodia’s sovereignty over the temple, and the location of the boundary had automatically prevailed the legal value of the map over the provisions of the treaty.\textsuperscript{263} According to Weissberg, the Court’s application of the principle of acquiescence in such case is important, because the effect of the decision is that, “in the interest of certainty, stability, and finality of frontiers, and unsigned maps in derogation of a treaty provision supersedes the text as a matter of treaty interpretation”.\textsuperscript{264}

The next Chapter looks further into how the principle of ‘estoppel by acquiescence’ has been interpreted and applied over time by the Court, and the challenges posed by that judicial development. It then explores whether there are other legal or moral factors that the Court in the Temple Case may also consider in order to make a decision that can be fairer.


\textsuperscript{264} Ibid.
Good faith is undoubtedly one of the main foundations of all branches of law. Good faith makes and fulfills law and justice. It also plays a supplementary role when the law itself is absent. Further, it also gives birth to the recognized principle of estoppels. In the context of a conflict between a treaty and estoppels, good faith comes to weigh a balance of justice, providing reasons and weight for the norm that possess a legal superiority, before giving a direction through which a decision can be made in order to reach a fair and just solution.

Notwithstanding, the modern evolution of the various principles of good faith sometimes faces challenges and criticism. For instance, in the Temple Case, where there was a misapplication of the Treaty which eventually led to its fundamental inconsistency, critics contended that, if both parties were found to have contributed to mistakes of that inconsistency, good faith should be referred that both countries be held mutually responsible. They expressed a regret that, the Court had on the other hand misinterpreted the ‘meanings’ of good faith, and that misguidance had led the decision to be wrong in both law and morality.

Section 1: Legal Foundation of Estoppel by Acquiescence

A. Principle of Good Faith, *Pacta Sunt Servanda*

What is good faith?
John Simpson and Edmund Weiner defined that term ‘good faith’, which is often used interchangeably with *bona fides*, referring to ‘freedom from intent to deceive’.\(^{265}\) The ordinary meaning of good faith, according to Arthur Delbridge, is based on ‘honesty of purpose’ or ‘sincerity of the declaration’ or the ‘expectation of such qualities in others’.\(^{266}\) The touchstone of good faith is therefore ‘a subjective state of mind’, but the principle can also incorporate notions of ‘fairness’ and ‘reasonableness’, both of which concern an objective state of affairs, as Shabtai Rosenne maintained.\(^{267}\) In addition, O’Connor suggested that good faith can also emerge from “the necessity for a minimum of human co-operation and tolerance if group living is to emerge and survive”.\(^{268}\) Finally, as Grotius recognized, “good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with”.\(^{269}\)

Unquestionably, the obligation to act in accordance with good faith, is a general principle of law, and this a part of international law.\(^{270}\) Judge Alfaro also maintained that, the primary foundation of good faith is that it must prevail in international relations.\(^{271}\) Good faith has a great deal of normative appeal, and most commentators would acknowledge that it plays a role in all legal systems.\(^{272}\) Although good faith has origins in the earliest human societies, O’Connor suggests that the Roman concept of ‘*bona fides*’, (associated with trustworthiness, conscientiousness and honorable conduct), represents its most direct ancestor.\(^{273}\)


\(^{269}\) Recited from Andrew D. Mitchell, * supra* note footnote n21, Hugo Grotius, *De Jure Belli ac Pacis*LibriTres (1625)

\(^{270}\) Certain Norwegian Loans (France v Norway), 1957 ICJ Rep 9, 53.

\(^{271}\) See: The Temple of Preah Vihear Case (Separate Opinion of Vice-President Judge Alfaro), pp. 62.


\(^{273}\) Ibid.
By about 1450, good faith was applied in both civil and common law systems, and was “reflected in specific rules incorporating or referring to good conscience, fairness, equitable dealing and reasonableness”.274 Like good faith generally, the principle of pacta sunt servanda (agreements must be kept) also originated from the Roman law and was later incorporated into customary international law and treaty obligations.275 This principle was recognized as a general principle of law during the drafting of the Statute of the PCIJ.276 It is described as “a foundation of all laws and a fundamental principle of law”.277 Schwarzenberger and Brown also listed good faith as one of the seven fundamental principles of international law.278 And according to the ICJ, good faith is “one of the basic principles governing the creation and performance of legal obligations”.279

Unfortunately, among all other principles of international law, good faith is perhaps one of the hardest concepts to be defined. Bin Cheng acknowledged that the ‘blurred meaning’ of acquiescence comes from its ‘illustration’ rather than from its ‘definition’, because this principle mainly involves with the very subjective ‘conduct of human’ such as ‘honesty’ or ‘malice’.280 O’Connor, in his conducted study on this principle, considered that good faith includes the general elements of ‘honesty’, ‘fairness’ and ‘reasonableness’,281 and then went on to propose a more specific definition as follows:

“...the principle of good faith in international law is a fundamental principle from which the rule pacta sunt servanda and other legal rules distinctively and directly related to

275 Ibid, pp. 8, 37.
276 See comments of Lord Phillimore in Permanent Court of International Justice: Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes (1920) 335.
277 John O’Connor, supra note, pp. 2.
279 Nuclear Tests Case (Australia v France) (Merits) 1974 ICJ Rep 253, 268.
281 Ibid, footnote n39, O’Connor, above n 8, 118–19.
honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time”. 282

Regarding to its role in Treaty interpretation, Rosenne insisted that, “the essential function of good faith in this context is to give a broad interpretation of the scope of equitable principles, provided that in so doing the treaty is not revised; and in turn to emphasize the flexibility by appropriate language in the treaty”. 283 In fact, as one may conclude, the core meaning of good faith is importantly laid on what exists inside the minds of those conflicting parties, rather than in concrete actions which are simply a consequence of their intentions.

**Role of good faith in a conflict between laws, (Treaty vs. Estoppel)**

In the aspect of law, the modern international legal system, which is known to have been influenced and developed by western nations, can be perceived as the most liberal structure at all times, fundamentally based on the principle of *laissez-faire*. Ameliorated by both Civil and Common Law, the current system tends to provide enormous freedom for parties to establish whatever agreement they wish, with various flexible forms (written, oral, and even silence). Because freedom within the contractual relationship is overwhelming, parties are under no restriction in repeatedly replacing an old agreement with a new one, from time to time (not to exclude the Treaties related to territorial sovereignty).

In some cases, a conflict of law arises, when a new agreement is contradictory to the previous one, as so far the parties have not terminated the validity of the old one yet. Under a similar scenario, agreements may also conflict each other, when parties do not apply the terms of an agreement in correspondance to its ‘core meaning’ and ‘initial objective’. Simply saying, what parties subsequently did contrasted what they had previously agreed to do. In such cases, when the agreements possess a characteristic of ‘paradoxical implication’, there is some question

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regarding the legal values of each of the agreements. In the law of treaties, international law requires a close examination into the ‘intention’ of the parties, as mentioned in Article 31 of the VCLT: “…agreements shall be interpreted through good faith in accordance with their ordinary meaning...”. 284

The requirement of good faith is also mentioned by the ICJ in Article 26 of its Statute, refers to the meaning that, the purpose of the treaty and the intentions of the parties should prevail over its literal application. 285 The principle of good faith obliges the parties to apply the Treaty in a reasonable way and in such a manner that its purpose can be realized. 286 The Special Rapporteur also stated in relation to the draft of the VCLT provisions that:

“...the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty”. 287

These suggestions infer that a state may sometimes violate the obligation to perform treaties in good faith, even though in reality it does not violate the treaty itself. The case of such indirect violation could arise, “where a state seeks to avoid or ignore the obligation which it has accepted, or to do indirectly what it is not permitted to do directly”. 288 As McNair stated:

“...a State may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of

284 Vienna Convention 1969, Article 31: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.


286 Ibid.


288 Ibid, footnote n50, Goodwin-Gill, above n 41, 93
treaty; in such cases a tribunal demands good faith and seeks for the reality rather than the appearance”. 289

It is through this sense, Frederick Pollock asserted that estoppel became one of the “most powerful and flexible instruments to be found in any system of court jurisprudence”. 290

In the Temple Case, the Court adopted the principle of good faith and insisted that Thailand with her own conduct of severe negligence had contributed to the loss of rights to the ownership over the territory. Regardless to the importance of the stipulations stated in the Franco-Siam Treaty of 1904, the Court went on the say that Thailand had an obligation to ‘diligently investigate’ whether the ‘Annex I’ map was correctly following the terms of the Treaty. Although such obligation is not clearly mentioned in any particular principles of international law, the Court referred, that Thailand had violated her obligation by not investigating the maps which the French unilaterally draw up following Thailand’s authorization. Thus, the Court came to conclude that:

“...if the Siamese authorities accepted the “Annex I” map without investigation, they could not now plead any error vitiating the reality of their consent”. 291

Furthermore, what the Court saw as more important was that, Thailand had failed to protest against the ‘Annex I’ map which it subsequently discovered to be an erroneous document. By this repeatedly mistaken conduct, the Court insisted that, Thailand had accepted the frontier at Preah Vihear as it was drawn on the “Annex I” map, irrespective of its correspondence with the stipulations of the Treaty. The Court reasoned that, the absence of fulfilment of that ‘indispensable obligation’, and more importantly following her long-time acceptance of the map implied that Thailand had in good faith accepted the ‘Annex I’ map as a valid document and thus had deliberately given up any ownership rights over the disputing areas.


Regarding the initial question of the inconsistency of the ‘Annex I’ map, however, the Court did not see it as important. Neither did the Court considered the French conducted error on the maps might have caused a violation of the good faith principle. Judge Alfaro put forward that:

“...this is so in all walks of life. A man who consults a lawyer, doctor, architecture or other experts, is held to accept the possibility that that expert may be mistaken in the advice he gives, or less than perfect in the work he does. Like all human beings, he is fallisible”.292

Eventually, this decision which provided a justification and an existence of ‘estoppel by acquiescence’, according to others, had gone far beyond the scope of good faith itself. Critics condemned that the Court had misunderstood the meaning of this principle, and charged that the main objective of ‘estoppel by acquiescence’ had not been applied consistently.

B. Development and Challenges

Original Concepts and Development of ‘Estoppel by Acquiescence’

The introduction of good faith into the principles of international law, pacta sunt servanda, which respectively led to an adoption of estoppels, originally came from some basic moral concepts developed by the Romans.

- Inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendusest).
- A State must not be permitted to benefit by its own inconsistency to the prejudice of another State (nemo potest mutare consilium suum in alterius injuriam).
- A fortiori, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its rights or prevented from exercising it (Nullus commodum capere de sua injuria propria).

292 See: The Temple of Preah Vihear Case, (Separate Opinion of Sir Gerald Fitzmaurice), pp. 58.
The party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the rights it is claiming before an international tribunal is precluded from claiming that rights (venire contra factum proprium non valet). 293

These basic principles of good faith have been widely accepted and are found in all major legal systems. 294 They underlie the various types of estoppels in Common Law jurisprudence 295, also known as preclusion, debarment and foreclusion in Civil Law. 296 In the jurisprudences of the Court, estoppel obliges a State “to be consistent in its attitude to a given factual or legal situation”. 297 Such a demand has the potential to encourage “finality, stability and predictability” 298 in international relations, especially “in an age when this cooperation in many fields is becoming increasingly essential”. 299 The rule of estoppels (good faith) increases contracting parties’ confidence that contractual obligations will be performed. 300 As Judge Alfaro reasoned, another basis of the principle is the necessity for security in contractual relationships.

“...a State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge
of reciprocal obligations denotes a mutually satisfactory state of things which is permanent in character and is bound to last as long as the treaty is in force. A State cannot enjoy such a situation and at the same time live in fear that someday the other State may change its mind or its conduct and jeopardize or deny rights that for a long time it has never challenged. A continuous and uncontroverted fulfilment of a treaty is tantamount to a pledge, a security renewed day by day that the treaty is valid and effective as signed, intended and understood by the parties. Such a security must be upheld as an indispensable element of fruitful harmony in all treaty relationships.”\textsuperscript{301}

The concepts of subsequent agreement and subsequent practice are premised on the idea that, over time parties can informally consent to new ways of interpreting the treaty obligations.\textsuperscript{302} The VCLT also codified subsequent agreement and practice in Article 31, prioritizing the importance of the principle of consent in the formation of a new treaty, as explained by Alexander M. Felman that: “… the subsequent agreements are objective evidence of parties’ understanding of a treaty interpretation, in that they are ‘later expressions of the will of the parties’…”\textsuperscript{303} Under the doctrine of pacta sunt servanda, if such subsequent agreements come from the expressions of party intent, they will prevail over earlier understandings of the treaty obligation.\textsuperscript{304}

However, it is not always easy for the Court to decide the overriding value of the subsequent treaty over the initial one. Difficulties with applying such subsequent practices have led tribunals to question what kinds of state conduct could be considered as to have amounted to a ‘new

\textsuperscript{301} See: The Temple of Preah Vihear Case (Separate Opinion of Vice-President Judge Alfaro), pp. 62.


\textsuperscript{303} Ibid, pp. 662-663.

\textsuperscript{304} Ibid, pp. 663. An agreement after the conclusion of the treaty is an authentic interpretation by parties and must be read into the treaty for purposes of interpretation. Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, [1966] 2 Y.B. Int’l L. Comm’n 221, ¶ 14, U.N. Doc. A/CN.4/SER. A/1966/Add.1.
agreement’, and whether those subsequent practices establish an ‘effective agreement’ among the parties as to the interpretation and/or modification of the terms of the original treaty.\footnote{Ibid, pp. 664.}

**Critiques and Challenges**

International Tribunals have developed various forms of estoppel and translated them in various flexible ways. In English jurisprudence, for instance, a number of branches or categories of estoppels, with different origins and inconsistent rules, have been interpreted over the years.\footnote{Elizabeth Cooke: “The Modern Law of Estoppel”, (2000), Oxford University Press, pp. 16.}

Within these ambitious and conclusive interpretations by the Courts, however, there have also been a growing number of critics, who accused those judicial approaches of “not adopting the technicalities of specific forms of estoppels”\footnote{Recited from Alexander Ovchar: “Estoppel in the Jurisprudence of the ICJ, A Principle Promoting Stability Threatens to Undermine It”, Bond Law Review, Volume 21, Issue 1, (2009), the Berkeley Electronic Press, pp. 4, Müller and Cottier, above n 14, 118. See also Temple of Preah Vihear, 40 (Separate Opinion of Judge Alfaro), 62,5 (Separate Opinion of Judge Fitzmaurice). For support in extra-curial literature, see especially Lauterpacht, Private Law Sources and Analogies of International Law, above n 2, 395.6.}

Alexander Ovchar, for instance, reiterated the statement of MacGibbon that:

“...the very diversity of the forms, in which the principle of estoppel has been applied, tends to make the concept so diffuse as to impair its value as a term of art”.\footnote{Recited from Alexander Ovchar, supra note, pp. 2. MacGibbon. ‘Estoppel in International Law’, above n 6, 478. See also Christopher Brown, ‘A Comparative and Critical Assessment of Estoppel in International Law’ (1995) 50 University of Miami Law Review 369, 410.12.}

When mentioning the application of estoppels by the Courts, critics, like Ovchar, tend to compare the two most likely cases where estoppels are found to be risen from, (1) unilateral declaration, and (2) silence.

In the case of ‘acquiescence by unilateral declaration’, Ovchar upheld the Court’s interpretation, saying that “the Court has been consistent in holding that a declaration of a state gives rise to an
estoppel if the declaration is clear and consistent”.309 For instance, in the Serbian Loans Case, he observed that, to give rise to estoppels the Court stated that a declaration must be ‘clear’ and ‘unequivocal’.310 Also, in the North Sea Continental Shelf Case, as he continued to mention, the Court decided that the Federal Republic of Germany would be estopped if it ‘clearly’ and ‘consistently’ evinced acceptance311 of a Convention it did not ratify.

However, when it came to the questions over ‘acquiescence by silence’, Ovchar emphasized that, the Court on the other hand has not been consistent in holding under what circumstances it will give rise to an estoppel. Ovchar criticized that, International Courts usually had a tendency to consider that the mere fact of silence may give rise to an estoppel.

“...silence and lack of protest are so fundamental that the Courts decide by themselves alone the matter in the dispute”.312

According to his arguments, it seems that this author tends to interpret that only the statements that expressly and clearly mentioned the ‘intention’ and ‘willingness’ of parties can hold them acquiesced to the previous agreements they made. And, therefore, the simple acts of silence which are usually unclear and implied, should not highly be considered in the case of the Treaty, especially in those types where the objectives are related to the importances of internal law, like territorial sovereignty.


310 Ibid, Payment of Various Serbian Loans Issued in France (France v Serb, Croat, Slovene) [1929] PCIJ (ser A) No 20, 38 (‘Serbian Loans’). Estoppel received passing attention in Factory at Chorzow (Germany v Poland) (Jurisdiction) [1925] PCIJ (ser B) No 3 and European Danube Commission (Advisory Opinion) [1927] PCIJ (ser B) No 14. However, the brevity of the judicial examination of estoppel does not allow one to draw any useful conclusions about the principle in the jurisprudence of the Court. See J C Witenberg, ‘l’Estoppel, Un Aspect Juridique du Probleme des CreancesAmericaines’ (1933) 60 Journal du Droit International 531, 537.


312 Ibid, pp. 9-11, Temple of Preah Vihear Case (Separate Opinion of Judge Alfaro), pp.43.
Consequently, Ovchar came to his own conclusion that, when the Court simply adopted the mere facts of silence as a conclusive factor, without considering other factors and circumstances, “it will be giving the State claiming estoppels an unfair advantage and creating other undesirable consequences”. 313 Giving the reasons to his critics for the Court’s decision, and as a legal conservatism, Ovchar went on to defend that there are many reasons behind an act of silence by a State, which the Court should have taken into account.

“...a State may be silent in light of an adverse claim against it for a number of reasons...firstly, for diplomatic reasons, it may prefer to let a dispute lie dormant for a time...secondly, it may not be aware of an adverse claim against it...finally, it might assume that there is no need to protest”. 314

For instance, in the Temple Case, he mentioned the Siamese Princess’ explanation of the act of silence by Siam in the light of historical relations between Siam and France at the time.

“...one of the reasons why Thailand did not officially protest the Cambodian claim of sovereignty over the Temple was that Thailand, in the words of Princess Phun Phitsamai Diskul, ‘only gave the French an excuse to seize more territory by protesting’...”. 315

As a consequence, Ovchar went on to compare the situation of this case to the current Sino-Indian territorial dispute where India currently claims sovereignty over the Aksai Chin region which China has administered since the Sino-Indian War. 316 He reasoned that, “while abstaining from protest over this dispute, India has been actively cooperating with China on various


314 Ibid. pp. 27.

315 Ibid, pp. 28.

Thus, he concluded that, it is clearly not India’s intention to ignore the problem over the disputing region, however, it is merely a temporary lack of protest aiming to better diplomatic progress on other fronts.\textsuperscript{318}

Back to the Temple Case, Ovchar maintained that, the Court was deeply mistaken when it gave a decisive conclusion solely based on such mere act of silence. This, according to him, was because, “by further to giving the State claiming estoppel an unfair advantage, a conclusive view of silence puts an emphasis on inaction and protest as part of State conduct, rather than objective and clear conducts it will lead to undesirable practical consequences”.\textsuperscript{319} In addition, Ovchar also criticized that the Court’s decision was wrong in both law and equity, giving reasons that the Court had considered a justification for estoppels in the absence of detrimental reliance.

“...the Court should only allow an estoppel to arise if detrimental reliance has been established. An estoppel without detriment is not well grounded in theory and is undesirable as a matter of policy. The principle of estoppels, that one should not benefit from his or her own inconsistency, stems from fundamental notions of justice and fairness, which are ‘almost universally cited for estoppel in international law’. What injustice is caused by a State going back on a representation (declaration or silence) that causes no detriment to anyone? How is it fair to allow a State to claim that another is estopped when it is not prejudiced in any way from its reliance on the representation?”.\textsuperscript{320}


\textsuperscript{318} Ibid, pp. 28.

\textsuperscript{319} Ibid, pp. 30.

\textsuperscript{320} Ibid, pp. 31.
In the end, Ovchar understood and acknowledged that, although many are asserting some interpretations of estoppels ‘have no particular coherence in international law’, only a few commentators have struggled to explain in what ways the principle of estoppels have inconsistently been applied, but none has made suggestions as to how the Court should eliminate the inconsistencies. Therefore, according to him, it seems that the question regarding what extent the principle of estoppel by acquiescence can be applied is still controversial and remains unanswered among legal scholars.

Section 2: Other Legal and Moral Relevances

A. Contributory Negligences

The Vienna Convention mentioned some kinds of agreements that shall be classified as having particular characteristics, and the possibilities for invoking such agreements when their effect violates the rule of the internal law of fundamental importance. However, it does not specify deeply what kinds of treaties are fundamentally important to internal law.

In fact, as generally known, territorial matter is the most essential thing for every nation. Agreements related to territorial sovereignty deserve to be subjected to a particular regime of strict rules. Because territorial sovereignty must be considered as of great consequence, in the context where there is a territorial dispute resulting from a very controversial or complicated agreement, the originality of that controversy should not be easily treatable or ignored. Within

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321 Ibid, pp.2, Brownlie, above, n 3, 616.

322 Ibid, Studies by Bowett, above n 9 and MacGibbon, ‘Estoppel in International Law’, above n 6, although indepth, are now outdated, because the majority of cases on estoppel were heard by the Court after these articles were written, and it is precisely in these cases that the inconsistencies in treatment of the principle appear. The studies by YousefYouakim, Estoppel in International Law (PhD Dissertation, Cornell University Law School, 1969) and Martin, above n 9, although more recent, are encyclopaedic in content and do not attempt to isolate the inconsistencies. Other recent studies examining the topic have generally been incorporated into larger studies of international law, thus treating estoppel in a somewhat truncated manner.

323 See: Vienna Convention, Article: 48 (1). A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
the application of the treaty, if a mistake or error is found to be made by any of the parties, that mistake shall be regarded as fundamentally serious, and the root of that mistake must be examined deeply. A close examination must be conducted to determine where the mistake came from and who was the first to introduce it to harm the purpose of the Treaty. Parties who are found to have intentionally or even negligently participated in spoiling the objective of the agreement shall be held responsible, according to the level of severity they contributed. If the mistake was made bilaterally, from the equitable point of view, both parties shall be mutually accountable. And, in cases where that mistake is found to have led to an introduction of the ‘domino effect’ of irregularity or inconsistency, which eventually resulted in some paradoxical implications of the agreements, the rule of interpretation of the treaty should be conducted not just to explore the very simple and ordinary meaning of the treaty but also to strongly condemn the party who initially brought on the mistake to frustrate the purpose of the treaty.

In the Temple Case, not only the root of the border dispute was complicated in its history, indeed, both the process of conclusion and the implementation of the Treaties already went far beyond the scope of legal complexity. However, the matters which the ICJ decided to deal with only related to certain legal controversies, and emerged from the nature of misapplication of the Treaties and its subsequent events. In reality, the deep root of that misapplication which respectively brought about an inconsistency, if examining every single fact deeply, as some might have argued, was caused by mistakes jointly made by both parties.

In fact, since the beginning of implementation of the Treaty of 1904, parties did not accurately follow the ‘procedure’ and ‘substance’ they set out in the provisions. In its clear terms, the 1904 Treaty obviously stated that the Siam-Indo-China border should be mapped following the ‘watershed line’, and the work of producing the maps should be carried out by the ‘Mixed-Commission’ which was composed of both French and Siamese technicians. Nevertheless, in each of these provisions, there was a fault.

First, as the critics said, if the French did no commit any error on the maps in the first place, there would have been no dispute along the borders at all. The French map, which was supposed to determine the borders in the Preah Vihear areas following the course of ‘watershed line’, did
not correspond to the original purpose of the Treaty, and consequently resulted a line divergent from ‘watershed’. While the ‘Annex I’ map obviously violated the principles of the Treaty, the Court had ignored to see this as important. As a result, some critics condemned the Court for not taking the ‘purpose’ of the Treaty and ‘initial intention’ of the parties seriously. They reasoned that, as a matter of territorial sovereignty was concerned, no matter if the ‘Annex I’ was mistakenly drawn up on ‘purpose’ or by ‘negligence’, that error of the map could not be easily unaccounted, when such mistake deemed to strike at the ‘heart’ of the agreement. They insisted that, the essence of the Treaty was mentioned ‘clearly’ and ‘definitely’ in its stipulations, and therefore the error of ‘Annex I’ map originally caused by the French was indisputably an inexcusable mistake. They went further to contend that, since there was a lack of a ‘legality condition’ of the map from the beginning of its implementation, and consequently Cambodia could not rely on its administration activities over the areas as being legally effective and furthermore it could not rely on Thailand’s acts of silence or absence to protest as a justification for acquiescence. In addition, they argued that, the ‘Annex I’ map provides for Cambodia an illegal enrichment of a part of the territory which according to the exact meanings of the Treaty did not belonged to them. Finally, they ended up concluding that, the 1962 Judgment was illegal and morally unfair, because its impact had made Thailand lose her territory; however, if the decision was reversed, it would not make any party lose anything.

It is from these points of view, some commentators argued that the error of the ‘Annex I’ map shall be placed as the main subject of the dispute, and the French must also be at least held responsible for its mistake.

According to the facts, it could be reasonable enough for the ‘Annex I’ map to be voided, as it severely frustrated the purpose and essence of the Treaty. Why did the Court decide not to void such a mistaken map that was made to strike at the ‘heart’ of the Treaty?

While some lawyers might have expected the violation of the ‘procedures’ and ‘substances’ of the Treaty of 1904 to be the main subject of dispute, on the other hand, the ICJ considered differently. In the 1962 jurisdiction, the Court did not see the ‘unilateral production’ and the ‘error’ of the ‘Annex I’ map as a turning point of misguidance. The issue of ‘procedural’ and
‘substantial’ mistake on the map, according to the majority of the Judges, caused nothing concerning the real legal dispute in this case. While the minority of the Judges regarded the violation of the clauses and stipulations of the Treaty as the centre of the dispute, the Court, on the other hand, considered the main question of the dispute as only related to the subsequent conduct of parties during and after the map was adopted. In other words, while the minority Judges insisted that the ‘principles’ and ‘terms’ of the Treaty be more fundamentally important, most of the Judges tended to focus on the ‘subsequent practices’ of that Treaty. As a consequence, not only between the parties, the opinion among the Judges also entered into a conflict. While the minority Judges considered the main dispute in question originally emerged from the French mistaken conducts, on the other side of the Court, the majority Judges tend to put weight on the long term acceptance of the ‘Annex I’ map by Thailand as a new valid practical agreement between parties.

Eventually, the question regarding contributory negligence in this case was neglected by the Court, when the majority of the Judges who were legally liberal only took into account the adoption of a new agreement by parties, regardless of the first phase of its inconsistency.

B. History, Culture and Moral Value

Based on history involving the Preah Vihear dispute, some analysts might have argued that Cambodia would have stronger reasons to claim what culturally belonged to its peoples’ ancestors. And truly, most historians came to agree on the fact that the territory, including the areas of Preah Vihear Temple, which both parties have been claiming, historically belonged to the Khmer (later called Cambodia), before falling into wars, invasions and seizures with her neighbours.

Preah Vihear, which Thais call ‘Phra Viharn’, long predates the modern states of Southeast Asia. Most surviving parts of the temple date from the 11th and 12th centuries, during the golden age of the Khmer Empire. 324 The Khmer people were the direct ancestors of modern Cambodians,

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who still refer to themselves as Khmers. Their kings constructed the magnificent complex at Angkor and governed much of mainland Southeast Asia, including most of modern-day Thailand (then called Siam). Preah Vihear, the Hindu temple was built mainly in the 11th and 12th centuries, by the same Khmer civilization that built Angkor Wat. The Khmer Empire had been one of the leading powers of Indo-China in the twelfth century, and the Khmers dominated the region for five centuries, indeed large parts of Thailand from the ninth to the twelfth centuries. In fact, apart from Angkor Wat and its neighbouring temples, the most spectacular remaining Khmer sanctuaries are found in the border region between Cambodia and Thailand.

Despite its Khmer origins, Preah Vihear has not always been under Cambodian control. The areas have sometimes been governed and occupied by Siamese kingdoms and the modern Thai state that succeeded them. Over the next four centuries, Siam gradually chipped away at Cambodian territory, and by 1794, a greatly weakened Khmer monarch ceded control to Siam over the northwestern provinces around modern-day Sisophon and Battambang. Fearing the continual Siamese expansion, eventually, Cambodian King Norodom formally requested French protectorate status in 1863. In the nineteenth and the first half of the twentieth century, Cambodia became an object of Siam’s and French Indo-China’s claims to power; throughout the East-West Conflict, it was at the centre of the respective competitions between Thailand and Vietnam, and between the United States and the Soviet Union. The former Khmer Empire had been degraded to a plaything of neighbouring states.

Regardless of these historical facts, the ICJ’s decision in 1962 that awarded the Temple to Cambodia said nothing about the sensitive issues of ‘cultural’, ‘moral’ or even ‘inheritance’ rights. In territorial disputes, the International Tribunals usually do not consider old history.

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325 Ibid.
327 Ronald Bruce St John, supra note, pp. 4-14.
328 Ibid.
329 Wagener, Martin, supra note, pp. 39.
330 John D. Ciorciari, supra note.
culture or moral heritage as having a legal essence or value. And, the principles of international law also do not include these sensitive factors as their resource. The sources of international law have been extended to only the principles that were mentioned in Article 31 (1) of the ICJ Statute. The exclusion of these historical matters is not virtually wrong, because if the Courts regarded such factors as playing an essential role in the substantial part of the settlement, it would only trigger a widespread outbreak of disputes and endangers stability and peace in other regions of the world.

One can still argue that, in term of morality, a man shall, by nature, inherit a right to own a work of his father. However, when it comes into the areas of diplomacy and negotiation, especially within international relations of this 21st century, when peace and stability are placed above everything, the question of heritage or morality is generally ignored. It must be understood that the current world is being governed by an international legal system; therefore any unsolved international disputes shall be subjected to the current valid and applicable law between states, regardless of culture and history. This is simply because the world cannot be in peace, if it is governed by history rather than by law.

Section 3: Summary

“Estoppel by acquiescence” exists in almost every legal system. Some system applied the principle strictly, while the other applied it much more flexibly. For instance, in the western legal system, contractual relationship is principally based on freedom of choice (or consensus), rather than on law. International Tribunals have dramatically developed the principle of acquiescence and struggled to utilize it, by pointing out that a long term prosperity shall be prioritized in order to achieve international stability and peace. According to Prescott and Triggs, International

\[ Article 38(1) \] of the Statute of the International Court of Justice is generally recognised as a definitive statement of the sources of international law. It requires the Court to apply, among other things, (a) international conventions "expressly recognized by the contesting states", and (b) "international custom, as evidence of a general practice accepted as law". To avoid the possibility of non liquet, sub-paragraph (c) added the requirement that the general principles applied by the Court were those that had been "the general principles of the law recognized by civilized nations". As it is states that by consent determine the content of international law, sub-paragraph (d) acknowledges that the Court is entitled to refer to "judicial decisions" and the most highly qualified juristic writings "as subsidiary means for the determination of rules of law".
Tribunals take into consideration many factors that are not strictly formal roots of title when considering which claimant states has the better title of territory, because they have been concerned to promote international harmony by awarding the title to one contender rather than to create a legal vacuum”.332

However, the further the Court interpreted this ‘equitable principle’, the more critiques it received. Critics seemed to have a unique mindset that the Court has not been strict enough in applying the principle of “estoppel by acquiescence” in a consistent manner, and that inconsistent application eventually shifted the objective of the principle far beyond its borderline of equity. In the Temple Case, as an example, the result of erroneous maps drawn up unilaterally by the French, whose work was based on the request of Thailand, turned out to be contradicted to the original objective of the Treaty, by mistakenly placing the territory in Cambodia. After an absence of protest over many years, the tacit acceptance of the ‘Annex I’ map by Thailand eventually led the ICJ to decide a legal ownership over the Temple by Cambodia.

Critics of the decision mentioned that, while both Cambodia and Thailand were mutually involved with making mistakes from the moment of Treaty implementation, the 1962 ICJ only took into account the ‘acts of negligence’ and ‘absence to protest’ of Thailand, regardless of the ‘initial mistake’ or ‘error’ made on the ‘Annex I’ map by the French (on behalf of Cambodia). In such context, critics were doubtful when the Court regarded Thailand’s mistakes, (1) absence of the investigation and (2) long-time acceptance of “Annex I”, as seemingly much more severe than the falsified production of the ‘Annex I’ map by the French. Finally, critics contended that the Court’s decision was unfair because it left Thailand alone responsible for the mistakes that were made bilaterally.

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Chapter V

Conclusion

Legal Conservatism vs. Liberalism, Which is Right?

Rightness is knowing what is proper, what is right and what is moral. This, like loyalty, is based on one’s duty in a situation and that, of course, is based on one’s status. Rightness is what is appropriate. What is right is based on one’s role, and the specifics of the situation. It is the standard of moral behaviour, dependant on the situation. Human-being’s consideration of an act as right or wrong is unarguably influenced by distinctive cultures, practices and beliefs. Some people are more conservative, thus aim to preserve what they have been practicing for a long time, and they do not frequently want to change their current status quo. Others are more flexible and tend to always look forward to further improvement. The question of rightness sometime is blurred and unanswerable, when the ideas of conservatism contrast those of liberalism.

The Temple of Preah Vihear Case represents an excellent example of a legal conflict between two existing laws. This case concerned a conflict between a theoretical law written in the Treaty and another practical law that emerged from a subsequent practice by the parties. During the ICJ’s 1962 hearing, while the minority of the Court considered the dispute as mainly concerning the inconsistent application of the stipulations of the 1904 Treaty, the majority, however, regarded the problem as only extending to the subsequent reception of the ‘Annex I’ map by the parties. In other words, while the minority Judges were more legally conservative by seeing the originality of the Treaty 1904 as having an unchallenged legal value, on the other hand, the majority of the Judges tended to be more legally flexible by weighing on the practical development of the Treaty as much more essential. As a result, the Western Court, in its final decision, concluded that the reception of the ‘Annex’ map without investigation and the

acceptance of it for half a century by parties caused the map to enter into the Treaty settlement. In other words, as the Court explained, the conflicting parties voluntarily adopted a new implied agreement which overrode the meaning of the Treaty they had previously agreed, consequently they were acquiesced from holding the meanings of the previous agreements as having more legal value than the latter.

**Thailand’s Silence: a Fair Justification For Acquiescence?**

Good faith in the contractual relationship refers that parties of the agreements have to act with good intentions and behaviour toward each other. States have to respect their duties faithfully, avoiding any act of dishonesty and manipulation which could frustrate the purpose and objective of the treaty, as already mentioned in Article 18 and Article 26, respectively of the VCLT. From these moral standpoints, good faith simply refers that States cannot agree to do this today and do the opposite tomorrow (States cannot blow hot and blow cold). It is from this evolution of legal theories that eventually led to the creation of the legal principle that we know today as “estoppel by acquiescence”.

In the Temple Case, while the ICJ noted that there was an existence of acquiescence on the part of Thailand, some critics of that decision thought differently. One of the famous critics was Phil. C. W Chan\(^{334}\), who strongly condemned the Court’s decision, mentioned that by considering the case as amounting to ‘estoppels’ the Courts did not define the principle clearly nor provide its key justifications. Chan maintained that the Court based on its own interpretation, further revolutionized the scope of estoppels, without specifying any conventional criteria of the principle. Together with Judge Koo\(^{335}\), Chan also asserted that, rather than seeing that tacit acceptance by Thailand as an acquiescence, the Court should have deeply examined other relevant subjective and circumstantial factors. The reasons for this is that, it is common sense that if Thailand knew that she was losing the territory by adopting the ‘Annex I’ map, she would not be willing to, unless in a situation where she had no other choice but was subjectively forced

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\(^{335}\) Ibid, also see: the Temple of Preah Vihear Case, *supra* note, (Dissenting Opinion of Judge Wellington Koo), pp. 96-97.
to do so. Chan and Judge Koo also agreed on the facts that the implementation of boundary treaty between Siam and France at the beginning of the 20th century represented an imbalance between two contracting parties. They insisted that, since those Treaties were a series of agreements between a colonial superpower and a country which was struggling to escape from colonization, during a time when the world was being ripped apart, it would be inconceivable that Thailand was immanently at the same foot of equality with France, when exercising the power of boundary delimitation.

Another notable circumstance that should be closely observed was that, when Thailand conducted her own surveys in 1933-34 which discovered that the French map was an error, why did Thailand not raise the issue? Why did Thailand continue to use the “Annex I” map, although having knowledge that it was wrong? Or, did Thailand intend to give up her territory to Cambodia, despite still being in a position of holding a legal capacity to claim back the lost land? This point is very critical, but not hard to imagine.

While the ICJ’s reasoned that Thailand’s actions amounted to acquiescence existed as a result of its absence to protest against the ‘Annex I’ map despite having many independent opportunities in hand, critics had some additional and different thoughts. Chan and some of the minority Judges expressed their personal opinions that, the reasons that Thailand didn’t protest, despite having later knowledge that the ‘Annex I’ map was an erroneous material, was because Thailand did not think that the colonization would have come to a brink in the middle of the 20th century following the end of WWII. According to the facts, it seems logical since Thailand had not invoked the matter until the French departure from Cambodia in 1953. This can be a clear indicating reason that Thailand did not protest (or want to protest) the ‘Annex I’ map earlier, having not expected that the French would depart Cambodia in 1953. If Thailand had known this beforehand, perhaps it would have protested earlier against the ‘Annex I’ map, and if it had happened, the consequence would have been completely different. However, Thailand did not expect that to happen. It was from these assumptions, critics reasoned that Thailand’s discovery of the wrong map together with the uncertainty about the future of the French presence in Cambodia made it fearful that any immediate reaction could trigger more war or an invasion by the French who were on the march in the Indo-China region.
However, in the 1962 Court’s hearing, the Judges did not read these psychological facts at all. And neither did Thailand try to insist that it was under threat or menace as a reason it chose not to protest when implementing the boundary Treaties with France. This was because Thailand would have to prove that despite having knowledge that ‘Annex I’ map put it in a position of disadvantage, it had no other choice but to follow what had been decided by the French colonial power that was on the match. Since all facts and circumstances were subjective, any evidence that Thailand could bring to the Court would also be subjective, and that the Court would not accept.

By not taking these psychological factors into account, some commentators asserted that the 1962 Judgment was wrong and unfair, providing a legal justification for an act of illegal enrichment of the territory to Cambodia. Furthermore, critics contended that the decision that favoured Cambodia was not only legally mistaken but also morally unjust, because it made Thailand lose her own territory. And, while if it favoured Thailand, it would not make Cambodia lose anything. They went on to argue that a territorial Treaty shall be highly regarded as more essential than any other kinds of agreement. And, any presumption or unclear implication resulting from silence shall be strictly interpreted and deeply examined. Therefore, in this case, critics condemned that the Court did not adequately analyse the performance behind the scene (ability of the parties, and circumstances), consequently it had adopted an equitable principle ‘estoppel by acquiescence’ to conclude a result that was legally wrong and equitably unfair.

**Mutual Mistake, So Mutual Responsibility?**

The conservative perception was not virtually wrong. From the equitable point of view, any party who made mistake shall be held responsible. If both parties are involved with making mistakes, they shall be mutually held responsible for any defect and misapplication of the Treaty according to the level of severity they contributed.

However, in the Temple Case, the Judgment was seemingly absolute, weighing only on one party (Thailand), while the problem was seemingly invoked by both. In these boundary Treaties, no matter if the French mistakenly drew up the ‘Annex I’ map on purpose or by negligence, that
mistake could not be easily discounted due to a long term silence (or tacit acceptance) on the part of Thailand, especially in such circumstances.

From my personal point of view, I think that Thailand made some serious mistakes by violating her own obligations: (1) not to verify the correction of the “Annex I” map, (2) not to protest against the ‘Annex I’ map even despite having later comprehended its error, and consequently could not avoid a responsibility, as the Court also mentioned. However, I also think that the French, on the behalf of Cambodia, also made an inexcusable mistake, which the Court had ignored. I, like other legal conservatives, believe that the matters related to territory sovereignty are not just a normal type of agreements in which an error either through an act of negligence or willingness can easily be disregarded. The Vienna Convention also mentioned in Article 48 (1) and Article 31 (1) that: “…a State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty”, and respectively: “…treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

For me, the intentions of the parties in this disputed case were already ‘clear’ and ‘unquestionable’ that the borders of Siam-Indo-China shall be mapped following the ‘watershed’ line. Both the Siamese and French authorities also would not wish or expect the maps to be erroneous or different as such (Annex I). Siam relied on the French expertise because it lacked a technical skill, and it was presumable that at the moment Siam had no clear knowledge about the location of the Temple of Preah Vihear areas regarding the course of the ‘watershed’ line. Thus, it would be quite unfair to say that Siam’s reliance on the mistaken French expertise and together with absence in a personal investigation of the wrong map could refer to its own ‘solely’ contributed conduct to the error. And therefore, I think that the Court, by disregarding the importance of the Treaty of 1904 had ‘devalued’ the essences of law which expressly stipulated the initial intentions of the parties.
Notwithstanding, of course, on one part, I agreed with the Court that Thailand shall be held accountable for her own repeated negligence; but, on the other part, I also think that it is absolutely not fair for Cambodia to gain a part of the territory, which according to the purpose of an ‘expressed’ Treaty and original willingness of the parties, did not belong to it. Although being unintentional or deliberate, Cambodia did not wish and should not benefit a part of territory from its own (French) conduct of error that deemed to strike at the ‘heart’ of the Treaty. This is why I personally came to conclude that a fair decision should be a decision that holds both parties responsible for the inconsistency and misapplication of the Treaty.

**Possible Anticipatory Consequences of the ICJ’s Decision**

I disagreed with the Court’s opinion that its 1962 decision was for a State “to be consistent in its attitude to a given factual or legal situation” and also in order to “encourage finality, stability and predictability” in international relations, in an age when this cooperation in many fields is becoming increasingly essential. For me, if the Court allows Cambodia alone to succeed in the case from the mistaken ‘Annex I’ it (the French) made and for her own sake, I believe that it will unfaithfully encourage falsified behaviour by states in implementing the treaty, as some Thai lawyers reasoned. This is because, by having reasons for negligence, states will tend to have a desire to take illegal advantage from every corner of agreement with their counterparts. I think that such ICJ decisions that favoured this type of atmosphere only ruined friendships and diplomatic co-operation between rivals, and mainly eliminated the long term spirit of honesty and confidence between each them. And that lacking of the important factors of international relations will inevitably blow up the vulnerable boundary conflicts between neighbouring countries, again sometime in the future.

Imagine if the Court gives a victory alone to Cambodia again, and condemns only Thailand for her unilateral mistake, will Thailand ever give up her ideas of someday recapturing the territory she had lost to Cambodia? The answer will be most likely negative. Although her government declared that, with no other choice, Thailand will respect the decision of the Court as complying with international law, the majority or minority of her nationalist group won’t accept that sort of decision. And, although Thailand might have admitted her own mistakes which the Courts
considered a serious factor, Thailand would never agree with the Court majority opinions to ignore the initial error of the ‘Annex I’ map made by the French, which she and some minority judges considered as profoundly severe in the nature of law of treaties. And possibly in the future, imagine if another large scale war happened again, triggering an event quite similar to World War I or World War II, Thailand could perhaps struggle to induce Cambodia to make an error of transferring back the territory to Thailand, either by acts of subjective force or manipulation, just like in the circumstances when Thailand mistakenly implemented the Treaties with France. This may be possible, because the ICJ’s 1962 decision only considered the practicality of the Treaty that can always be changed from time to time, regardless of the written law (Treaty of 1904) which clearly stated the indisputable intentions of the parties.

Therefore, the decision of the Court, by condemning only one party for the bilateral mistake, was not only seemingly unjust, but also perhaps will not preserve the longevity of regional peace, certainty and stability.

**Law vs. Diplomacy, and War vs. Peace**

The decision regarding the interpretation of the 1962’s Judgement is scheduled to be delivered late in 2013. The likeliness that the new decision will favour Thailand seems not to be the case. One must know that Thailand cannot claim back the Temple she lost to Cambodia in 1962, because the Temple Case can only be appealed within a period of ten years after the Judgment, according to Article 60, and 61 (5) of the ICJ Statute. Accordingly, Thailand’s ability to appeal had already passed by 1972. The most likely scenario is that the new Judgment will not be reversed, or at least different from the old one which was rendered in 1962, as many legal commentators already presumed this situation as a case of Res Judicata.

The Court is the last resort parties can rely on when conflicts arrive at the point of deadlock. When a bilateral mechanism (diplomacy or negotiation) is locked up, only the Court can give a just and unbiased solution to avoid further instability, uncertainty and war. The new Court decision will be crucially important, because it will determine the future prosperity, stability and peace over the longstanding unsolved disputed areas. It is worth noting that the dispute over the
4.6km² adjacent lands is merely one among the other remaining territorial disputes along the Cambodia-Thai borders. In fact, as a result of erroneous maps made between the French and Siam more than a century ago, along the contemporary Cambodia-Thai borders, there are still a number of disputes over the lands where demarcations have been overlapped. The 2013 hearing will inevitably affect the other disputes, and perhaps future war and other causalities may possibly happen, if any of the parties refuse to accept or accept the decision unwillingly. Thus, the Court has to be wise in making sure that its decision will be fair and acceptable for both, not just from a legal or equitable corner, but also for the sake of long term peace and friendship. This is not to mean that the Court should switch its role from being a judicial to a political institution. However, what the international community had learned in the past, especially from the failure of the Treaty of Versailles that substantially led to the birth of World War II already provided some basic international relations experiences regarding the dark side of the supremacy of strict rule over diplomacy (mutually beneficial rule). This is a clear motivation that the role of International Court is not only to maintain justice, but more importantly is to guarantee the longevity of peace within the international community.
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초록

1962년 국제사법재판소(ICJ)가 프레아 비헤아르 사원(Temple of Preah Vihear)이 캄보디아에 귀속한다고 확인하였을 때, 이러한 재판소의 판단이 정의의 관념에서 불공정(equitably unfair)하며 법적으로도 잘못되었다는 많은 비판이 있었다. 비판의 핵심은 재판소의 판단이 소위 묵인의 금반언(estoppels by acquiescence)이라는 정의의 원칙에 반한다는 것이다. 이러한 비판에 따르면 재판소는 ‘묵인’의 의미를 잘못 이해하였으며, 그로 인해 위 법칙의 함의가 초기 목적과 범위에서 벗어나게 되었다는 것이다.

본고 “묵인/금반언의 진화: 정의의 딜레마”는 위 재판소의 결정에 대한 비판적인 견해의 논거들을 검토하고자 한다. 본고에서는 관련된 다른 사건들과의 비교를 통하여, 프레아 비헤아르 사원 사건에서 묵인의 법칙이 법적으로 정당하게 적용될 수 있는가에 대하여 검토하고자 한다. 또한 한 걸음 더 나아가, 앞서의 비판적인 견해들이 얼마나 법률적으로 그리고 정의의 관념에서 합리적인지에 대하여 심도 있게 검토한 후에, 이 사건에서 묵인의 법칙이 법원에 의하여 얼마나 일관성 있게 적용되고 있는가 평가해보고자 한다.

마지막으로 이 사건의 특수성에 대한 분석을 통하여, 본고는 묵인의 법칙이 정의와 공정의 경계를 준수하면서 어느 범위까지 적용될 수 있는가에 대한 제안을 하며 마무리짓고자 한다.

주요어: 묵인의 금반언, 초기 목적, 상호모순, 정당화, 정의와 공정

툴티니
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