

Analysis of the Preah-Vihear Temple Case, Cambodia v/s Thailand at the International Court of Justice under Common Territorial Claims involving Land Disputes

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Abstract

Sovereign rights of a State can be regarded as constituting of components such as territory, population, government and the capacity to enter into relations with other states according to Article 1 of the Montevideo Convention on Rights and Duties of State, 1933. Though sovereignty in itself is not limited to those specific criteria, the prime goals of most states remains however the acquisition of territory. Often when the question about territorial possession is raised, it follows an important factor that comes into play: the borders surrounding it. In fact history bears testimony to the innumerable international boundary disputes that have surfaced at the International Court of Justice and continue to draw worldwide attention in this modern era. This paper aims to rationalize the Temple of Preah-Vihear case that has been subject of a land dispute between Cambodia and Thailand, by using common territorial claims such as geography, treaty claim, *uti posseditis*, history, effective control of land and culture presented during the course of the proceedings. The Temple of Preah-Vihear Case is a typical land dispute that has been brought twice at the International Court of Justice. Even though the first judgment rendered in 1962 proved that Cambodia had sovereignty over the Temple of Preah-Vihear and its vicinity, due to heated situations along the borders that was threatening peace in that region and unsuccessful bilateral consensus, the International Court of Justice was solicited again by both countries in order to clear the misunderstandings that cropped up, by interpreting the initial judgment again in 2013. Whilst the International Court of Justice reached a decision in unanimity with its previous judgment, it can be noted that it relied greatly on the legal basis that treaty claim asserts. Not to undermine the importance of other territorial claims which, according to some skeptics, the court did not adequately acknowledged, the substantial role of the court in concordantly applying principles of international law to make up for the rebuttal of other territorial claims deemed as less compliant and legally indecisive, is emphasized. Finally the paper concludes the importance of proper border delimitation in territorial disputes and to what extent it would have quelled the tension between Cambodia and Thailand. In addition, even though no rule makes it a legal obligation to fully delimit land frontiers, border delimitation can be instrumental in the proper functioning of sovereignty and this methodology, if properly and duly implemented, can help to avoid land disputes already present or susceptible to occur in the future.

Keywords: land disputes, International Court of Justice, Sovereignty, territorial claims, land delimitation, Preah-Vihear Temple

1. Introduction

“The whole earth is designed to furnish sustenance for its inhabitants; but it cannot do this unless it be cultivated. Every Nation is therefore bound by natural law to cultivate the land which has fallen to its share.” Hand in hand to this axiomatic feature that underpins sovereignty exclusively as the use of land where people are not just ruled but governed, flourished another parallel thinking that the exercise of sovereign rights as a ‘State’, can be framed into respective component elements of territory, population and government. Sovereignty in itself is not strictly reducible to those specific components; however as Machiavelli averred, territorial acquisition is one of the prime goals of most states. Territorial possession consequently leads to borders, which delimitation proceeding on the basis that there are legitimate entitlements on either side, very often give rise to ongoing disputes. This nature of dispute has been the core of a lot of conflicts between lots of countries and has inevitably taken quite an important ascension. Irrefutably, Cambodia and Thailand, two neighboring South-East Asian countries which sought the adjudication of the International Court of Justice to settle a case of territorial sovereignty infringement at their borders, are no strangers to this sensitive issue over which there have been grueling tensions for almost a century.

The Preah-Vihear Temple which is now listed as a world heritage site by the UNESCO, is an ancient Hindu monastery built in the 9th century during the reign of the Khmer Empire. Situated on a promontory overlying the eastern part of the Dangrek mountain range, “which, in a general way, constitutes the boundary between the two countries in this region— Cambodia to the south and Thailand to the north,” the temple represents an exquisite architecture bestowed with an exceptional quality of carved stone ornamentation which has adapted to the natural environment and religious function but unfortunately was witness to a lot of

controversies that dimmed its illustrious and sacred aura.

2. The Initial Circumstances leading to the Legal Proceedings at the ICJ

In fact in 1954, Thailand breached the Charter of the United Nations as it sent detachments of its armed forces into this portion of territory, which is under the sovereignty of Cambodia. Whilst skirmishes on the outskirts were ever frequent since 1949, the holy ruins which up to now are of pilgrimage and worship value for the people of Cambodia were threatened by an abhorrent sacrilege at the mercy of violence. Cambodia refrained from replying by force to this serious violation of its territorial integrity but unsuccessful bilateral channels with The Kingdom of Thailand gave rise to such circumstances that proceedings in the case concerning the Temple of Preah-Vihear, between Cambodia and Thailand, were instituted on October 6 1959 by an Application of the Government of Cambodia at the International Court of Justice, in line with relevant rules of law and a very high instance to settle the matter in the most diplomatic way, since both countries recognize its jurisdiction as compulsory.

In the Judgment on merits the Court delivered in 1962, it concluded that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and, in consequence, that Thailand was under an obligation to withdraw any of its military or police forces or other guards or keepers, stationed at the Temple, or in its vicinity on Cambodian territory. In addition, the Court ruled that Thailand was obliged to restore to Cambodia any sculptures, stellae, fragments of monuments and artifacts of historical value that might, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

3. Resurface of the Territorial

However, almost forty-five years later after considerable dormancy, differences between the two countries again reappeared. In fact this time the matter became worse than ever, as in the wake of its publication of new 'secret' map and its objections to the inscription of the Temple by Cambodia as a World Heritage Site in the UNESCO, Thailand once again deployed troops into Cambodian territory in the region of the temple. Those incidents bore their tolls as in 2008 the opening of fire by Thai military convoys on Cambodian soldiers caused the death of two of them and injuries in two others. This grim scenario persisted sporadically till 2011 during which the exchange of heavy artilleries caused substantial damage in the area of the temple, destroying architectures and cost lives of many more soldiers and also many casualties including civilians.

Following the Paris Accords of 1991, as Cambodia finally overshadowed the conflict and instability caused by the Khmer Rouge regime in 1998 and the consolidation of an effective, democratic government in Cambodia able to conduct normal and peaceful relations with its neighbors and beyond, initiatives were taken to start unfruitful bilateral processes between Cambodia and Thailand which would have, otherwise, led to a stable situation being established, whereby the implementation of the Court's 1962 Judgment would have been entirely feasible. Moreover the relentless efforts made by the ASEAN community itself to try to talk both countries into a settlement proved unavailing. As deep concerns began to arise over peace-keeping, a motion for interpretation of the 1962 judgment was filed at the ICJ. After profound and minute considerations by the International Court of Justice, it was clear that there was a difference in interpretation of the court ruling in 1962 by both countries and hence adjudicated the case. As immediate and effective response exemplified by its Order of provisional measures of July 18 2011, the Court determined, as from the basic principle of the prohibition of the threat or use of force, enshrined into the UN Charter, the creation of a "provisional demilitarized zone" around the Temple of Preah-Vihear and in the proximities of the frontier between the two countries, and the immediate withdrawal of their military personnel, and the guarantee of free access to the Temple of those in charge of supplies to the non-military personnel present therein. It further determined the retaking and pursuance of negotiations between them, aiming at the peaceful settlement of the dispute, so as not to allow its aggravation.

On November 11 2013, the International Court of Justice pronounced its judgment which as expected emphasized the Judgment of June 15 1962. That is to say the temple and its "vicinity" were still found to be under Cambodian sovereignty and the symbiotic relationship that the first and second operative paragraphs of the 1962 Judgment bear, it was obvious that it remained Thai's obligation to withdraw its troops and personnel around the temple, and in good faith, respect the Cambodian sovereignty and continuingly promote peace and international integrity.

Undoubtedly it can be construed that the rulings of 1962 were fundamental and irrevocable. Since the verdict was consistent, it showed that the first judgment was indeed instrumental in finding a legal resolution to the territorial dispute that was present. In fact territorial disputes have perennially stemmed from claims made on the basis of several common justifications namely in terms of geography, treaty law, *uti possidetis*, effective control of the territory in question, cultural conformity and history. Using the appendage of these claims, the Temple of Preah-Vihear case is refined and analysis is made on how it ranks under those particular claims.

4. Common Territorial Claims

4.1 Geography

Geographical justifications for territorial boundaries remain a basic and very classical method for demarcations as mountain ranges, rivers and other bodies of water and physical formations provide more easily perceivable landmarks to divide political entities.

The temple of Preah-Vihear stands on a promontory of the same name, belonging to the eastern sector of the Dangrek mountain range which is made up of portions consisting of high cliffs-like escarpment that rise abruptly above the Cambodian plain. The main buildings of the temple have been erected at the apex of a triangular piece of high ground jutting out in the plain. According to Thailand, the access to the temple is much easier from its side than from the Cambodian side of the plain and represented a very rational claim. It is known that natural boundaries, present neighboring states with problems of precision in demarcation, delimitation, or both, and the temple of Preah-Vihear case certainly is no exception. In fact Thailand proposed a demarcation line that would run along the watershed in the area of the temple borders, by their nature can be difficult to mark. It was apparent from the description given that a frontier line which ran along the edge of the escarpment, or which at any rate ran to the south-east of the Temple area, would leave this area in Thailand; whereas a line running to the north or to the north-west would place it in Cambodia. Thailand also claimed that the edge of this escarpment would constitute the natural and obvious line for a frontier in this region. According to Thailand, the Parties expressed the desire to establish frontiers which would not only be “natural”, but visible and unmistakable-such as rivers, mountain ranges and hence escarpments where they exist. Ironically, natural borders certainly offer a buffer of security more difficult to dispute than borders less easily identifiable by a physical landmark. However it was clear that since the 730 kilometer long border was defined in 1907 by the placement of only 73 border markers, the exact location of the border was widely open to interpretation by both neighbors.

4.2 Treaty law

When it comes to treaty law, any territorial claim based on treaty justifications bears the most legal weight in nature and is more jurisdictionally convincing than other claims. It is much like a private agreement which aims at “creating legally recognizable conditions” between two parties. According to the ICJ in its Judgment of 1962, the Court found that the subject of the dispute was sovereignty over the region of the Temple of Preah Vihear and the dispute had its *fons et origo* in the boundary settlements made in the period 1904-1908 between France, then conducting the foreign relations of Indo-China, and Siam. The application of the Treaty of February 13 1904 was of great importance. That Treaty established the general character of the frontier the exact boundary of which was to be delimited by a Franco-Siamese Mixed Commission and in regards to this process of delimitation, it was agreed prior to a meeting on December 2 1906, that the Mixed Commission should travel along the Dangrek mountain range carrying out all the necessary reconnaissance, and that a survey officer of the French section of the Commission should survey the whole of the eastern part of the range. It had not been contested that the Presidents of the French and Siamese sections duly made this journey, in the course of which they visited the Temple of Preah-Vihear.

Reportedly, in January-February 1907, the frontier-line was already established and it therefore seemed clear that a frontier had been surveyed and fixed, though there was no record of any decision and no reference to the Dangrek region. Moreover, at the time when the Commission might have met for the purpose of winding up its work, negotiations were at full fledge towards conclusion of a further Franco-Siamese boundary treaty, the Treaty of March 23 1907. Consequently, the application of *uti posseditis*, which is a principle of law that is used to depict postcolonial boundaries in Latin America, Asia and Africa thus makes it clear that the map “Annex 1”, substantiated by the mandate devolved to what is now Cambodia and Thailand.

4.3 Effective Control

Effective control claim was based on which party had “uncontested administration of the temple and its surroundings. In fact under property law, possession is regarded as a major factor in determining property right. As it averts that one of the principal questions surrounding this claim is what constitutes its administration of the land and it was found that Thailand’s administrative acts over the temple of Preah-Vihear area were very negligible and not sufficient in themselves to assert a concrete territorial claim. To add more weight to the consistent attitude of the central authority displayed by Cambodia, the French Resident for the adjoining Cambodian province where the Temple is proclaimed to be found warmly welcomed the visit of Prince Damrong in 1930, in the most diplomatic ways and that too without any reaction from Siam thereby prompting that Cambodia was in naturally exercising its sovereign duty.

4.4 History

It was clear from records that the Annex 1 map was communicated to the Siamese Government as purporting to

represent the outcome of the work of the delimitation and there was no reaction on the part of the Siamese authorities, either then or for many years. With the passage of time that bolstered the strength of historical claim, it became quite obvious that the temple of Preah-Vihear was acquiesced by Cambodia. Moreover, the maps were also communicated to the Siamese members of the Mixed Commission, who said nothing, to the Siamese Minister of the Interior, Prince Damrong, who even showed gratitude to the French Minister in Bangkok for them, and also to the Siamese provincial governors, some of whom knew of Preah-Vihar. It was clear that the Siamese authorities accepted the Annex 1 map and now they could not plead any error vitiating the reality of their consent, which was given without proper investigation. In addition, according to the principle of Estoppel that applies to international law, Thailand, which could have voiced out its disagreement to the territorial parameters before the Franco-Siamese Conciliation Commission in 1947 in Washington, for some reasons or the other did not raise this issue.

4.5 Culture claim

The Temple of Preah-Vihear epitomizes the Hindu mythology inherited from the glorious past of the Khmer civilization and has been a place of worship for both the Hindu and the Buddhist people. In fact thousands of Cambodian people often go there for pilgrimage purposes and attach very high moral and spiritual values to the temple. This religious claim certainly adds a factor of self-determination that homogenizes the religious and cultural beliefs of Cambodia with respect to the temple and thus weaves a more emotional but yet essential link for Cambodian sovereignty over the Temple of Preah-Vihear.

5. Concluding Remarks

As it is, it cannot be denied that in the Temple of Preah-Vihear Case, the international Court of Justice was undoubtedly confronted to a very tedious and sensitive situation that involved strong claims from both Thailand and Cambodia. Like every case is unique and require the most attentive and diligent focus, the ICJ had to rely on its utmost ability in evaluating the legal implications to make sure that it adjudicates what falls into its jurisdiction and the conformity of international law. Although it was obvious that its decision in 1962 dwelled in majority upon the treaty law between Thailand and Cambodia that validated the Annex 1 map, the ICJ intrinsically attributed a lot of importance on *uti possidetis* and effective control as well. Not to completely imply that the ICJ has established a “tripartite hierarchy” for territorial disputes, but the existence of a boundary legal agreement and cartography certainly provided as a strong dispositive for the jurisprudence of the court and despite that the Parties relied upon other arguments of a physical, historical, religious and archeological character, the Court deemed that they were inadmissible due to lack of legal compliance and validity.

Reflecting back on the decision of the court in 2013 on the interpretation of the 1962 judgment, though criticisms points towards the fact that the court cannot discredit its entity by changing the verdict of 1962, it has to be noted that the ICJ in no doubt carried out its task with sheer transparency and impartiality not only by considering the ad-hoc panel of judges that the ICJ appointed, but also by the thorough application of the principle of international law. First of all, by acknowledging the boundary treaty signed in 1907 between Thailand and Cambodia, the ICJ emphasizes the importance of the principle *pacta sunt servanda* as enshrined in Article 26 of the VCLT which provides that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’ and as it is, good faith itself is a legal principle and forms an integral part of the *pacta sunt servanda* principle, which has to respected both by Cambodia and Thailand.

Secondly, by adhering explicitly to the Article 60 of its statute which embodies the principle of *res judicata*, the court also quells claims that it displayed modesty by restricting itself to consider only matters that were addressed by the court rulings in 1962, recalling that its jurisdiction on the basis of these articles of the Statute is not preconditioned by the presence or introduction of any other basis of jurisdiction as between the parties to the original case. Furthermore through Article 98, paragraph 2, of the Rules of Court, the ICJ makes it crystal clear that a party needs to indicate in its request for interpretation “the precise point or points in dispute as to the meaning or scope of the judgment”.

It cannot be overlooked that the ICJ remains an efficient and viable entity binding to international law, as it adjudicated the filing for interpretation of the judgment that was already pronounced, after it clarified the existence of divergent views as to the scope of the disagreement over the territory between Thailand and Cambodia till its systematic approach towards delivering its verdict.

Based on the procedural actions of the ICJ, it does not evade our attention that the importance of treaties to the ICJ, indeed comes as an aspirational legal thrust that not only provide as an easily provable and clearly admissible source of law, but also eases compliance when treating territorial disputes.

However when we refer to the concept of sovereignty, which cements the legal order predominant between co-ordinated and juxtaposed States, though treaties as demonstrated by the ICJ, unless defective, do represent a valid and more proven factor to sovereign rights, it remains equally decisive that other territorial claims should not be overlooked.

In spite of the fact that the court found that it was Cambodia who has sole sovereignty over the disputed Temple, Cambodia incessantly solicited the ICJ for the demarcation and delimitation of its boundary with Thailand, which the court did not entertain, as it deemed that this process did not fall within its jurisdiction and instead, it should be concluded upon a bilateral consensus between both countries following the Annex 1 map.

As it is, the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. For instance “there is no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not,” however in the Temple of Preah-Vihear Case, it can be extrapolated from the fact of events that a lot of conflicts could have definitely been avoided or at least minimized, if a clear demarcation of boundaries had been carried out. That is to say, the onus remained solely upon a bilateral understanding for delimitation processes that would not only help each country to preserve its territorial integrity but also ensure that Thailand and Cambodia can exert their sovereign rights freely without interference thereby making a huge leap towards peace keeping. Of course this consideration represents a colossal task tantamount to the resources that it entails, but nevertheless ideally contributes to an outstanding methodology when treating sovereign claims especially given that legitimate entitlements on both sides are involved.

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