

The Temple Torn Between Two Nations: A Legal and Political Analysis of the On-Going Conflict Over the Preah Vihear Temple on the Cambodian-Thai Border

The origins of the border dispute between Cambodia and Thailand surrounding Preah Vihear Temple can be traced back to a series of border commissions established to determine the boundaries between the two countries between 1904 and 1909.<sup>1</sup> Because of the continued controversy surrounding the border following these commissions, specifically the issue of whose sovereignty Preah Vihear Temple was under, the case was brought before the International Court of Justice (ICJ). In 1962, the ICJ ruled that the temple was situated in territory under Cambodian sovereignty.<sup>2</sup> However, this decision did not quell the ongoing border dispute between the two countries. The dispute resurfaced in July of 2008 when Cambodia successfully registered the temple as a United Nations Educational, Scientific, and Cultural Organization's (UNESCO) World Heritage Site.<sup>3</sup> Soldiers from both the Cambodian and Thai armies have been stationed at the border since 2008 and several clashes have transpired ending in injuries and deaths.<sup>4</sup> It is impossible to analyze the issues precipitating the current dispute or entertain viable solutions without addressing both the legal and political issues at play.

Part I of this paper will focus on the legal framework behind the border dispute with an in-depth analysis of the 1962 ICJ decision and its critiques. In Part II the political framework of the dispute will be analyzed. It should be noted that the arguments, although widely accepted and prevalent, are speculative and drawn from inferences,

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<sup>1</sup> Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6.

<sup>2</sup> Id.

<sup>3</sup> Galis, A., *Unesco Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites*, 38 Ga. J. Int'l & Comp. L. 205, 218 (2009).

<sup>4</sup> Id. at 219.

opinion articles, and some interviews.<sup>5</sup> Part III will consider possible solutions to the dispute given the legal and political framework. Part IV concludes that the current political reality of the controversy is inhibiting any viable solutions from being implemented. However proper mechanisms are in place for the dispute to be resolved in a peaceful manner if both countries are able to put politics aside in order to resolve the conflict.

## **Part I: Legal Framework**

### **A. ICJ: Case of Cambodia v. Thailand**

The International Court of Justice is the primary judicial organ of the United Nations. One of its main functions is to settle legal disputes submitted to it by states.<sup>6</sup> In 1959 in response to Thailand's continued occupation of Preah Vihear Temple and the failed negotiations between the two countries, Cambodia initiated proceedings before the ICJ.<sup>7</sup> The issue before the court was whether Cambodia or Thailand had territorial sovereignty over the region of the Temple of Preah Vihear. In deciding this issue, the court applied the doctrines of acquiescence and estoppel and essentially gave legal effect to a map that at its inception had no binding character. While maps do not, of themselves, conclusively determine a territorial boundary, they may be determinant evidence of the location of a boundary if the map has been integrated as part of a treaty

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<sup>5</sup> Author lived in Cambodia for two months and interviewed mostly college-educated Cambodians of all ages.

<sup>6</sup> *International Court of Justice*. Retrieved August 28, 2010, from <http://www.icj-cij.org/court/index.php?p1=1&p2=6>.

<sup>7</sup> Wagner, M. (2006, November). "Temple of Preah Vihear Case." *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

between the relevant states.<sup>8</sup> It was the acceptance or acquiescence by Thailand of the map delineating the boundary that rendered it a part of the treaty itself and thereby bound both states.<sup>9</sup> The Court, on the basis of the doctrine of estoppel, also decided Thailand was precluded from denying the legality of the map fifty years later – irrespective of its possible incorrectness.<sup>10</sup> Because this map placed the temple in Cambodian territory, the court held that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and that Thailand was obligated to withdraw any military or police forces stationed at the Temple or in its vicinity on Cambodian territory.<sup>11</sup>

## **B. Background Facts**

Although the background facts of the opinion are lengthy and highly detailed, they are crucial to having a proper understanding of the reasoning behind the Majority’s decision. The facts are essentially split into two sections: 1) The treaties and commissions that occurred between 1904 and 1909 and 2) The events post-1909 up until the time the case was brought before the ICJ in 1959.

### **1. Treaties and Commissions between 1904-1909**

On February 13, 1904 a treaty was established between Thailand (then Siam) and Cambodia (then a French protectorate) to arrive at a new boundary settlement.<sup>12 13</sup> Both parties agreed that sovereignty over Preah Vihear depended on this treaty and upon

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<sup>8</sup> Prescott, V., & Triggs, G.T. (2008). *International Frontiers and Boundaries: Law, Politics and Geography*. Leiden & Boston: Martinus Nijhoff Publishers. pg. 204

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6.

<sup>12</sup> Id. at 16.

<sup>13</sup> “Siam” and “Thailand” will be used interchangeably as will “Cambodia” and “France”.

events subsequent to that date.<sup>14</sup> Article 1 of this treaty stated that the frontier between Thailand and Cambodia would follow the watershed between the basins on the Nam Sen and Mekong Rivers on the one hand and the Nam Moun River, on the other hand.<sup>15</sup> If the watershed principle had been followed, the Temple would have been situated in Thailand. However, Article 3 of the treaty provided for a delimitation of the frontier to be carried out by a Mixed Commission (First Mixed Commission) composed of members of both countries. The First Mixed Commission was to survey the area and produce a final determination of the frontier, the last intended step being the signing by all commissioners of a map on which the frontier had been fixed.<sup>16</sup> The court reasoned that although Article 1 said the watershed line should be followed, this was merely a reference point, and that the purpose of Article 3 was to establish the *actual* and final line of the frontier.<sup>17</sup>

On November 29, 1905 the First Commission under the Treaty of 1904 was formed and held their first meeting.<sup>18</sup> They were charged with the task of delimiting the frontier on the sector of the Dangrek where Preah Vihear was located. It was made clear from the minutes of the meeting that the Thai (Siamese) government, which lacked the technical expertise for the production of maps, officially requested that French topographical officers map the frontier region.<sup>19</sup>

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<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Wagner, M. (2006, November). "Temple of Preah Vihear Case." *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

<sup>17</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 17.

<sup>18</sup> Id.

<sup>19</sup> Id.

On December 2, 1906 another Mixed Commission meeting was held in which the route and method of delimitation was specified, and it was agreed that a French member of the Commission would depart the next day to survey and map the area.<sup>20</sup> The court saw this meeting as a clear intention by the Commission to delimit the region, as it had taken all the necessary steps to do so.<sup>21</sup> Under normal conditions another meeting would have been held to analyze and approve of the provisional maps from the work on the ground, but there is no further reference to any later meeting by the First Commission. There is evidence that the delimitation work for the First Mixed Commission was completed, however, because the French Minister notified the Minister of Foreign Affairs in Paris that the work was complete in January of 1907.<sup>22</sup>

In the fall of 1907 maps were printed and published. The map of the disputed eastern Dangrek region placed the whole promontory and Temple on the Cambodian side. These maps were given to the Thai government who thanked the French Minister and asked for another 15 copies to distribute to the Thai provincial Governors.<sup>23</sup> However, because the First Commission had ceased to function before production of the map was formally approved, the court found the map was not binding. Cambodia still relied heavily on this map (referred to as Annex 1 map) even given its initially non-binding character.

Meanwhile, a Second Mixed Commission was formed on March 23, 1907 and a Third Mixed Commission was formed in March of 1909. The Second Commission was created to cover the frontier not covered in the First Commission - to delimit new

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<sup>20</sup> Id.

<sup>21</sup> Id. at 18.

<sup>22</sup> Id.

<sup>23</sup> Id. at 24.

frontiers. The region where Preah Vihear is located was not delimited, the presumption being that both countries recognized that the First Commission had done so already. The Third Commission was formed to consolidate the first two commissions. During this time many Thai government officials had seen and reviewed the Annex 1 map, and Thailand never objected to or suggested that the line was unacceptable.<sup>24</sup> This would have been an opportune time to object.

## **2. Events Post-1909**

Between 1909 and 1958 Thai authorities never questioned the Annex 1 map even though they had many opportunities to do so. First, when Prince Damrong of Thailand made a “quasi-official” visit to the temple in 1930, they did not react to being officially received by the French Resident of Cambodia with the French flag flying high.<sup>25</sup> Second, Thailand conducted its own surveys between 1934 -1935, finding that the true watershed line placed the Temple in Thailand. Despite this finding, Thailand continued to rely on and publish maps indicating Preah Vihear’s location on the Cambodian side of the border.<sup>26</sup> Third, during negotiations with Cambodia concerning the 1925 and 1937 Franco-Siamese treaties over frontiers, Thailand did not raise the matter. Lastly, in 1947 Thailand failed to raise the issue before a Franco-Siamese Conciliation Commission, which would have been an appropriate time to claim a rectification.<sup>27</sup> Thailand waited until 1958 to raise the issue in a conference held in Bangkok to discuss territorial issues.

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<sup>24</sup> Id. at 24.

<sup>25</sup> Galis, A., *Unesco Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites*, 38 *Ga. J. Int’l & Comp. L.* 205, 216 (2009).

<sup>26</sup> Id.

<sup>27</sup> Id.

Thailand did temporarily come into possession of the temple in 1941, but after the war Thailand accepted a settlement agreement that reverted the land back to the status quo pre-1941.<sup>28</sup> However, they continued to occupy the temple claiming they had sovereignty over the temple before the war. Between 1949 and 1954 Cambodia sent 7 protest notes to Thailand regarding their occupation of the Temple. Thailand responded to only one out of the seven notes with mere acknowledgment of receipt but with no explanation or justification for the troop (police) presence at the temple.<sup>29</sup>

### **C. Majority decision**

While accepting Thailand's view that the Annex 1 map was not binding and that the area on which the Temple of Preah Vihear is located would have belonged to Thailand if the border line had been drawn in accordance with Article 1 of the 1904 treaty, the court's decision was based on a different set of questions, namely whether the map had been accepted by the parties in such a way as to become an integral part of the treaty and prevail over the clause in Article 1 and also whether this precluded Thailand from contesting their acceptance.<sup>30</sup>

#### **1. Acquiescence and Estoppel**

Acquiescence and estoppel often go hand in hand, but the doctrines are distinct. In international law, acquiescence denotes consent and concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances where protest would be called for.<sup>31</sup> The role of acquiescence can directly affect the outcome of

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<sup>28</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 28.

<sup>29</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 31.

<sup>30</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6.

<sup>31</sup> Antunes, N.S.M. (2006, September). "Acquiescence." *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

cases and is therefore quite powerful. In this case it influenced the deviation from the express words of a treaty and the change of a land boundary.

The principle of estoppel operates to prevent a State contesting before the Court from presenting a situation contrary to a clear and unequivocal representation previously made by it to another State.<sup>32</sup> The representation can be express or implied, but as a result the other State must have relied on the representation to their detriment or the State making the representation must have secured some benefit or advantage for itself.<sup>33</sup> Estoppel is essentially a means of excluding a denial that might be “correct”; it prevents the assertion of what might in fact be true.<sup>34</sup> Estoppel often stems from an acquiescing conduct, which fulfills the unequivocal representation element, as the court found here, but one does not necessarily lead to the other.

## 2. Analysis

Even though the Annex 1 map was not binding, the Court analyzed Thailand’s conduct and found that its failure to protest for over 50 years amounted to consent/acquiescence. They followed the principle of *qui tacet consentire videtur si loqui debuisset ac potuisset* (he who keeps silent is assumed to consent if he must and can speak).<sup>35</sup> The maps were given wide publicity and disseminated to many of Thailand’s own government officials and also to British, German, Russian, and United States governments. Thailand also requested more maps and they had ample

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<sup>32</sup> Cottier, T., Muller, J.P. (2007, April). “Estoppel.” *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

<sup>33</sup> *Id.*

<sup>34</sup> Prescott, V., & Triggs, G.T. (2008). *International Frontiers and Boundaries: Law, Politics and Geography*. Leiden & Boston: Martinus Nijhoff Publishers. pg. 178

<sup>35</sup> Antunes, N.S.M. (2006, September). “Acquiescence.” *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

opportunities to speak up between 1909 and 1958 but remained silent. The Annex 1 map clearly showed the Temple in Cambodian territory so as to put on notice a person who expected the watershed line to have been followed. Merely to look at the map would have put such a person on notice. Therefore Thailand could not claim they did not know of the error. Even if Thailand never formally acknowledged or accepted the map, its conduct amounted to a direct acceptance. It is clear that if the Thais wished to disagree with the map or had any serious questions to raise, “they did not do so, either then or for many years, and thereby must be held to have acquiesced.”<sup>36</sup> The effect of acquiescence in this case was that the express provision in article 1 of the treaty of 1904 was overridden by the boundary line created in the Annex 1 map.

The court also used the estoppel doctrine and found that Thailand’s acceptance, or lack of objection to the maps, established grounds for precluding Thailand from asserting its non-acceptance in court fifty years later. Thailand’s acquiescence fulfilled the element of a clear and unequivocal recognition of the map and Thailand benefited from its recognition because it created border stability. A major consideration that the court took into account was the notion that the primary purpose of establishing this frontier was to achieve stability and finality. They found it would have been impossible to do so if the line so established could at any moment be called into question and its rectification claimed.<sup>37</sup> This is another reason why the court precluded Thailand from denying the depiction of the Annex I map.

#### **D. Critiques of the ICJ Majority Decision**

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<sup>36</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 23.

<sup>37</sup> Kaikobad, K.H., (2007). *Interpretation and Revision of International Boundary Decisions*. Cambridge: Cambridge University Press.

### **1. Text of Treaty Trumps the Map**

Three judges - Moreno Quintana, Wellington Koo, and Sir Percy Spender - dissented from the majority opinion. Judge Quintana argued that Article 1 of the Treaty of 1904 constituted legal title to sovereignty over the temple area. The frontier delimitation work prescribed in Article 3 was no more than the physical implementation of the watershed requirement stated in Article 1.<sup>38</sup> He referenced the Treaty of Versailles which states the rule that “when there is a discrepancy concerning a frontier delimitation between the text of a treaty and maps, it is the text and not the maps which is final.”<sup>39</sup> In other words, he argued that the principles of estoppel and acquiescence were inapplicable in this case because the terms of the treaty, following the actual course of the watershed line, was the true intention of the parties.

### **2. ICJ Majority’s “broad” interpretation of acquiescence/estoppel**

Many argue that the use of acquiescence and estoppel in international law, especially broad interpretations, should be used with caution as they are terms that are open to misuse. A narrow definition requires that the State who advances the argument of acquiescence and estoppel has suffered certain detriment by relying on the conduct of the silence of another, and that this conduct or silence must have been made voluntarily.<sup>40</sup> The ICJ applied a wide definition, which simply suggests that a State cannot claim a right which is contrary to its own previous declaration, conduct or silence. Interestingly, in

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<sup>38</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 67.

<sup>39</sup> *Id.* at 68.

<sup>40</sup> Buss, A., *The Preah Vihear Case and Regional Customary Law*, 9 Chinese J. Int’l L. 111 (2010).

more recent cases, such as the *Gulf of Maine Case* of 1984, the ICJ has adopted a more restrictive approach.<sup>41</sup>

The notion of acquiescence is open to dispute because the nature of silence and inaction can be interpreted in many ways. There are two competing maxims with respect to acquiescence. The ICJ applied the maxim, “he who keeps silent is held to consent”. The contradicting maxim is, “he who keeps silent is held neither to deny or accept”. Judge Spender in his dissent would not deduce from Thailand’s silence any intention to be bound by the map.<sup>42</sup> Furthermore, because the map was produced by *French* cartographers in *Paris* and was never approved by the Mixed Commission, it was made unilaterally and not binding in any way to Thailand, especially because she never made any statement indicating her acceptance or recognition of the frontier line marked on the map. Applying a broad definition, Thailand never voluntarily accepted this unilateral map therefore there was no acquiescence.

With respect to estoppel, some would argue Cambodia never relied on the representation implicit in Thailand’s silence to her own detriment, nor did Thailand derive any special advantage from making the representation, therefore an essential element of estoppel is missing.<sup>43</sup> Judge Spendor’s dissent also notes that Cambodia did not rely on any conduct by Thailand in relation to the Annex 1 map; Cambodia (France) relied solely upon the accuracy and surveys of her own cartographers and topographical officers. Also, Thailand did not gain any advantage. Whatever benefit Thailand may

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<sup>41</sup> Cottier, T., Muller, J.P. (2007, April). “Estoppel.” *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

<sup>42</sup> Wagner, M. (2006, November). “Temple of Preah Vihear Case.” *Max Planck Encyclopedia of Public International Law*. Retrieved from <http://www.mpepil.com>.

<sup>43</sup> Id.

have arguably received from the stability of the frontiers marked on the maps, she was entitled to under the Treaty of 1904 and the delimitation work of the first Mixed Commission. In fact, it is argued that Thailand's continued presence and administrative activity in the area of Preah Vihear many years after the publication of the map should have caused the charges of acquiescence and estoppel to be laid squarely against Cambodia and not Thailand.<sup>44</sup> Thailand built roads to the foot of the Temple, Thai revenue officers collected taxes on the rice fields nearby, and an official inventory of ancient monuments, including Preah Vihear, was taken by the Thai government in 1931.<sup>45</sup> At no time did the Cambodian/French government lodge any protests against these activities.

### **3. Context of Colonialism and De-colonialism**

Another criticism of the ICJ majority opinion was its failure to take into consideration the inequality of bargaining power between Thailand and Cambodia, then under the protectorate of France. It is argued that if Thailand's acquiescence was due to coercion in any way, then their silence was not voluntary and thus the doctrine of acquiescence could not be upheld. Thailand was one of the few non-colonized Asian countries, so if she felt constantly threatened by colonization, her silence is justified.

The majority relied heavily on the visit by Prince Damrong, saying it was "quasi-official" in nature and emphasizing the fact that the French flag was displayed, and that Thailand did not protest being received by Cambodia. Judge Koo contested the majority's finding in his dissent, stating that the visit by the Prince was private in nature

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<sup>44</sup> *Id.*

<sup>45</sup> Chan, P., *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 Chinese J. Int'l L. 421 (2004).

and not endorsed by the Thai government. The Prince held no ministerial rank at the time. But more importantly, because this was a period of colonial expansion, and Thailand was a relatively weak non-colonised Asiatic state, she must have naturally felt compelled to yield to foreign pressures in order to protect herself against colonization.<sup>46</sup> This was the common experience of most Asiatic States in their intercourse with the Occidental Powers during this time.<sup>47</sup>

In reinforcing his position, Judge Koo pointed to the period of growing decolonization after World War II and the effect the balancing of powers had on Thailand's actions. Where before she may have felt compelled to yield to colonial powers, in 1940 a Thai guard-post was stationed at the Temple. So, as soon as the relative positions of Thailand and French Indo-China became less unbalanced, it was actually France's silence upon the stationing of the Thai guard-post which further indicated *Cambodian* acquiescence rather than Thai.<sup>48</sup>

According to Judge Koo, the Majority's reliance upon Thailand's failure to protest on the occasion of the visit by Prince Damrong completely ignores the threat of French colonialism that Thailand was under. This is not suitable or desirable, as it does not promote good faith, reliance, or confidence in international relations, which the principles of acquiescence and estoppel are precisely intended to protect.<sup>49</sup>

## **Part II: Political Framework**

The political framework of the border dispute between Cambodia and Thailand is more operational today than the legal framework, but much harder to substantiate with

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<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

facts. Thailand argues that even if the Temple itself is under Cambodian sovereignty, the ICJ decision did not decide ownership of the area surrounding the Temple. The dispute gained new life when Cambodia petitioned UNESCO to inscribe Preah Vihear as a World Heritage Site in 2008. By mid-July approximately 1500 combined Thai and Cambodian troops had been stationed along the border.<sup>50</sup> Armed clashes in October of 2008, April of 2009, January of 2010, and April of 2010 have led to injuries and deaths. Many argue that Cambodia and Thailand have used the conflict to their political advantage. The dispute has stirred up nationalist emotions in an already sensitive political climate in both countries. Furthermore, the media, often controlled by the state, plays a vital role in sensationalizing the conflict.

## **A. Nationalism**

### **1. Thailand**

Many people believe that nationalism in Thailand has become a highly destructive force. Since 2007, in their campaign to topple the governments that emerged from the post-2006 coup elections, which ousted Prime Minister Thaksin Shinawatra, the opposition parties have claimed to represent the “true face” of Thai nationalism as a way to garner political support.<sup>51</sup> Thai society is deeply polarized between those who support former Prime Minister Thaksin and want him to stage a political comeback and those

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<sup>50</sup> Galis, A., *Unesco Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites*, 38 Ga. J. Int'l & Comp. L. 205, 218 (2009).

<sup>51</sup> Chachavalpngun, P. (2009, September 21). “Thai Nationalism Heats Up” KI-Media. Retrieved from <http://ki-media.blogspot.com/2009/09/thai-nationalism-heats-up.html>.

who loathe his leadership style and mistrust the motives of the government led by his party.<sup>52</sup>

Thaksin ran a populist campaign and garnered much support from the rural and agricultural sector of Thailand when he was Prime Minister in 2000. But he was later overthrown in the coup of 2006. His government faced allegations of electoral fraud, corruption, authoritarianism, and muzzling of the press. Thaksin was accused of tax evasion and selling national assets to international investors so he fled the country.

Thaksin returned to Thailand after the People's Power Party (PPP), which he supported, won the post-coup elections in 2007 over the opposition. This is also when Cambodia decided to register Preah Vihear as a World Heritage Site and informed Thailand of their plans. Although Thaksin was not officially in power, Noppadon Pattama, Thaksin's former lawyer, was Thai Foreign Minister at the time. Noppadon signed a joint communique with Cambodia, signaling the parties' intent to cooperate in a joint attempt to have the Temple listed as a World Heritage Site.<sup>53</sup>

A week later anti-Thaksin protests held at the border led Cambodia to close the border crossing to Preah Vihear. Soon after, the Thai Constitutional Court declared the joint communique unconstitutional. As a result Noppadon was forced to resign.<sup>54</sup> The opposition party accused Noppadon and the Thaksin proxy-government of caring more about money than Thailand's traditions and interests. This is one example of how Thailand used the Temple to their political advantage. The opposition party essentially forced Noppadon to resign and effectively destabilized the PPP government.

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<sup>52</sup> Head, J. (2008, July 15). "Political tensions driving temple row." BBC News. Retrieved from <http://news.bbc.co.uk/2/hi/asia-pacific/7507425.stm>.

<sup>53</sup> Id.

<sup>54</sup> Id.

The destabilization continued in 2008 when PPP's Prime Minister Samak Sundaravej was removed on corruption charges. Thaksin's brother in law, Somchai Wongsawat, was then voted into power. But the Constitutional Court removed him from office on charges of PPP election fraud. Members of Parliament then allegedly formed an anti-PPP/anti-Thaksin coalition and in 2008 elected Abhisit Vejjajiva, of the Democrat Party, as the new Prime Minister of Thailand. Thailand had four different Prime Ministers in a span of three years.

The volatile state of Thai internal politics is one of the principal reasons the border dispute has inflated and become such a prominent issue. Many would argue that Abhisit would not currently be in power were it not for anti-Thaksin parties' accusing the pro-Thaksin PPP of selling out the country and attacking Thaksin's loyalty to Thailand. The conflict can inevitably be traced back to 2007 when the pro-Thaksin government initially supported Cambodia's bid to list the temple.<sup>55</sup>

## **2. Cambodia**

Many Cambodians feel that the Preah Vihear border dispute stems from Thailand's domestic political instability, but many people also believe that the Cambodian government, though arguably more stable, benefits from the dispute as well. For example, the timing of the UNESCO meeting and the listing of the Temple as a World Heritage Site was the same month as the Cambodian election for Prime Minister, in which Hun Sen, who has been in power since 1979, was running. Most Cambodians have vivid memories of the day the Temple became a World Heritage Site.<sup>56</sup> There were

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<sup>55</sup> Head, J. (2008, July 15). "Political tensions driving temple row." BBC News. Retrieved from <http://news.bbc.co.uk/2/hi/asia-pacific/7507425.stm>.

<sup>56</sup> Based on conversations with 8 of author's co-workers.

parties everywhere and people celebrating in the streets. National TV stations featured stars, traditional Khmer performances, and fireworks shows in celebration of the event. On July 14th the government organized a concert in Phnom Penh's Olympic Stadium hosted by Deputy Prime Minister Sok An. The general sentiment was that Hun Sen had protected the temple and Cambodian sovereignty from being taken away by Thailand. The successful inscription of the temple on the list of UNESCO sites was publicized to voters as a result of Hun Sen's charismatic leadership.<sup>57</sup>

Whether he did this intentionally or not, Cambodian nationalism was very high during this time and Hun Sen acknowledged this and continues to support Preah Vihear belonging to Cambodia. The dispute is not always a "hot issue" but does seem to resurface at opportune times. In promoting a nationalistic election theme it helped to be able to point to an aggressor and Hun Sen used the Preah Vihear issue to portray himself as a strong leader responsible for uniting Cambodia against Thai aggression. Of course it did not help diplomatic relations between the two nations when in 2009, Hun Sen appointed Thaksin as his economic advisor. Thailand's protest leaders believed Hun Sen's actions intentionally showed hostility toward Thailand, its government, and its people. This issue also propelled both sides to defend themselves and publicly denounce their allegedly predatory neighbor.

### **B. Role of the Media**

The media plays a large role in influencing public perception, inciting nationalism and providing a public forum for the controversy between Cambodia and Thailand to

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<sup>57</sup> Chachavalpungpun, P. (2009, July 10). "Hun Sen, Cambodia's agent provocateur?" KI-Media. Retrieved from <http://ki-media.blogspot.com/2009/10/hun-sen-camboidas-agent-provacateur.html>.

play out. The repercussions of publishing/airing false stories can be dangerous. There is no better example than that of Thai actress Suvanant Kongying, who was accused of claiming that Angkor Wat was Thailand's property. The misquote immediately stirred up a sense of nationalism. Hun Sen was quoted as saying, "Suvanant is not even worth a blade of grass at Angkor".<sup>58</sup> After a day of flag burning and anti-Thai chanting, a crowd gathered at the Thai embassy where rocks were thrown and the embassy was eventually set on fire. Some would argue that Hun Sen's anger was not so much about protecting Cambodian dignity, but that the circumstances surrounding the outburst were more important. The Cambodian general election was around the corner so a conflict with Thailand could have been used to favor his political allies and undermine his opponents.<sup>59</sup>

Another example of how the media effectively promotes nationalism is through their many fundraisers for Cambodian soldiers, which they air on local Cambodian TV stations.<sup>60</sup> The programs show images of soldiers at the border, protecting Cambodia from the "enemy", and they show images of poor families or homeless people who have nothing, but still contribute because they believe in the Cambodian cause. These are powerful images that Cambodians of all socio-economic and educational backgrounds can relate to. Whether or not the money actually gets to the soldiers is a different story. Judging by soldiers' dinner of only rice and fish paste and their insistence that if you wish

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<sup>58</sup> Id.

<sup>59</sup> Chachavalpungpun, P. (2009, July 10). "Hun Sen, Cambodia's agent provocateur?" KI-Media. Retrieved from <http://ki-media.blogspot.com/2009/10/hun-sen-camboidas-agent-provocateur.html>.

<sup>60</sup> One of the main TV stations is owned by Hun Sen's daughter.

to support you do so directly, it seems as though the fundraising does not directly support the soldiers.<sup>61</sup>

Both countries also use the media to create the illusion that they are advancing and taking stands on important issues. Critics would argue that they talk the talk but rarely walk the walk. More often than not, the contents of news articles are misleading, contradictory, or just plain lies. If Cambodian and Thai citizens can not trust what they read in the newspapers or hear on the radio or television, then what are they supposed to believe? The blind faith in the media by the majority of the population serves the governments on both sides well and is another way of creating nationalist sentiment and mistrust of the other side.

### **Part III: Recommendations**

#### **A. Third Party Intervention**

One of the most natural solutions to the border dispute, from a legal perspective, is that Cambodia seek to enforce the ICJ decision and force Thailand to remove their troops. In theory, the ICJ does produce a binding ruling on parties that agree to submit to the ruling of the court.<sup>62</sup> All UN members have a duty to comply with decisions of the Court involving them and if parties do not comply, the issue may be taken before the Security Council.<sup>63</sup> Cambodia could petition the United Nations Security Council whose role it is to enforce ICJ decisions. However, in practice the ICJ's powers have been limited by the unwillingness of the losing party to abide by the Court's ruling, and by the

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<sup>61</sup> Interview with a co-worker who spoke to a soldier at Preah Vihear

<sup>62</sup> *International Court of Justice*. Retrieved August 28, 2010, from <http://www.icj-cij.org/court/index.php?p1=1&p2=6>.

<sup>63</sup> *UN Security Council*. Retrieved August 28, 2010, from <http://www.un.org/sc/members.asp>.

UN Security Council's unwillingness to impose consequences. There is also always the concern that a third party will be biased against one of the parties or inclined to help the other.

At the same time it makes sense for a third party to be involved where the two parties do not seem to be able to agree on anything. How can two prime ministers, who have obtained political support and backing by vilifying the other, possibly come to an agreement without letting down their constituents, losing their support and consequently their political power? Bringing in a neutral third party such as the United Nations Security Council or the Association of South East Asian Nations (ASEAN) makes sense and is necessary where the parties cannot not admit they are wrong in order to save face. Thus far Thailand has been more vocal in her rejection of third party mediation, probably because the ICJ ruled against her in 1962.<sup>64</sup> However, Thailand has valid and strong arguments against that ruling as is evidenced in Part I of this paper.

### **B. UNESCO's role in registering World Heritage Sites**

The UNESCO World Heritage Convention was adopted in 1972 and was intended to identify, protect, and preserve cultural and natural heritage sites of outstanding universal value around the world.<sup>65</sup> Although some safeguards are in place, absent from the selection criteria and nomination process at large is any mechanism for dealing with sites that are the source of, or otherwise involved in political debate. UNESCO seems to have paid little attention to the potential for armed conflict that resulted from the listing of Preah Vihear as a Cambodian World Heritage Site.

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<sup>64</sup> Galis, A., *Unesco Documents and Procedure: The Need to Account for Political Conflict When Designating World Heritage Sites*, 38 Ga. J. Int'l & Comp. L. 205 (2009).

<sup>65</sup> Id.

Although it may be too late in the case of Preah Vihear, UNESCO should add a formal provision dealing with political unrest surrounding site selection and management. Sites should not be listed as being World Heritage Sites if they will result in political unrest. Such a provision would have been useful this past July as both countries geared up for the World Heritage Committee meeting in Brazil. Instead of using the opportunity to openly discuss the situation, however, Thailand proclaimed that they would oppose Cambodia's management plan long before the meeting even began. They protested the management scheme and even threatened to withdraw from UNESCO if the Cambodian plan was approved. There were demonstrations against the management plan and rising tension along the border.

There should be an explicit mechanism to address this type of political conflict in the World Heritage Convention guidelines and maybe even an arbitral body to resolve conflicts as they arise during the nomination and selection process.<sup>66</sup>

### **C. Joint Border Commission**

If countries negotiate a solution to their boundary dispute it is almost certain that there will be a compromise and both countries will benefit. When a dispute is settled in court there is the possibility that one country will win and the other party will lose.<sup>67</sup> For this reason a joint border commission seems like a plausible and likely solution to the dispute between Cambodia and Thailand.

In 1999, Cambodia and Thailand's foreign ministers agreed to establish a Thai-Cambodian Joint Border Commission (JBC) charged with demarcating the area near

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<sup>66</sup> Id.

<sup>67</sup> Prescott, V., & Triggs, G.T. (2008). *International Frontiers and Boundaries: Law, Politics and Geography*. Leiden & Boston: Martinus Nijhoff Publishers. pg. 93

Preah Vihear.<sup>68</sup> Both sides expressed optimism that the border conflicts could be resolved. The problem is that it is now 2010, meetings have been sporadic, and its creation seems to have been more for posterity than to actually progress in setting a mutually acceptable border. In 2008 the JBC met and again, both sides said they were committed to a peaceful and just solution without further delay. But in 2009 the JCB met and Cambodia and Thailand failed to agree on issues of border demarcation and consequently could not sign a memorandum of understanding concerning key points discussed in the meeting.<sup>69</sup> Finally, in 2010, recent articles state that the JCB meetings could be further delayed while the Thai government sets up a joint panel to study the minutes of the previous meetings.<sup>70</sup>

It is unclear why the JCB, which is such an important mechanism to achieve a solution, is moving so slowly. It can most likely be attributed to a lack of urgency by both parties who clearly benefit from the conflict.

#### **D. Addressing Broader Societal Issues**

In general, broader societal problems need to be addressed in both countries. The links may seem attenuated, but there is no question that better education, an independent media, and access to information will produce well-rounded citizens, less likely to be manipulated by nationalism and more inclined to participate in politics. This would in turn promote and create more democratic space and put pressure on both governments to be responsible leaders.

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<sup>68</sup> Withitwinyuchon, N. (2010, August 20). "Border Dispute wit Cambodia to bring social unification of division in Thailand?" Retrieved from [http://findarticles.com/p/news-articles/xinhua-news-agency-ceis/mi\\_8007/is\\_20100820/news-analysis-border-dispute-cambodia/ai\\_n54893364/](http://findarticles.com/p/news-articles/xinhua-news-agency-ceis/mi_8007/is_20100820/news-analysis-border-dispute-cambodia/ai_n54893364/).

<sup>69</sup> Id.

<sup>70</sup> Id.

Of course these are not problems that can be fixed overnight, but the implementation of rigorous educational policies and professional development for teachers, a national access-to-information campaign, and laws ensuring freedom of the press and consequences for those who violate that right will have a far-reaching and positive effect on political participation and democracy.

#### **Part IV: Conclusion**

There are viable options available to Cambodia and Thailand to solve their border dispute, the Joint Border Commission being the most likely to work and easiest to implement since it has already been created. However, until the political hostility between Cambodia and Thailand subsides, neither country has any incentive to seriously address the issue.

If anything, the Preah Vihear dispute demonstrates the importance of good governance and the need for democratic elections and stronger political parties. Thailand cannot continue to rely on nationalism to garner political power and overturn its opposition party – it needs open and fair democratic elections. And Cambodia, which has arguably turned into a one-party state, needs to support and nurture its other political parties. If there is no strong opposition party and no meaningful dialogue, the party in power can do whatever it wants. Hun Sen and the Cambodian People's Party are free to use the Temple to maintain power instead of focusing their energy on governing effectively.

Hopefully these two nations can come together before their nationalistic rhetoric leads to serious violence at the border. Until then, development partners, civil society, and NGOs must continue to work together to educate their citizens, hold the media

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accountable and promote political participation and good governance. Perhaps with pressure from their own citizens, the two countries can come to a meaningful and truly bi-lateral agreement.

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