

Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the
Temple of Preah Vihear (Cambodia v. Thailand)

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INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

International Court of Justice—interpretation of previous judgment—principle of non ultra petita—territorial dispute—obligation to respect territorial integrity

REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 15 JUNE 1962 IN THE CASE CONCERNING THE *TEMPLE OF PREAH VIHEAR (CAMBODIA v. THAILAND)* (Cambodia v. Thailand). At <http://www.icj-cij.org>.

International Court of Justice, November 11, 2013.

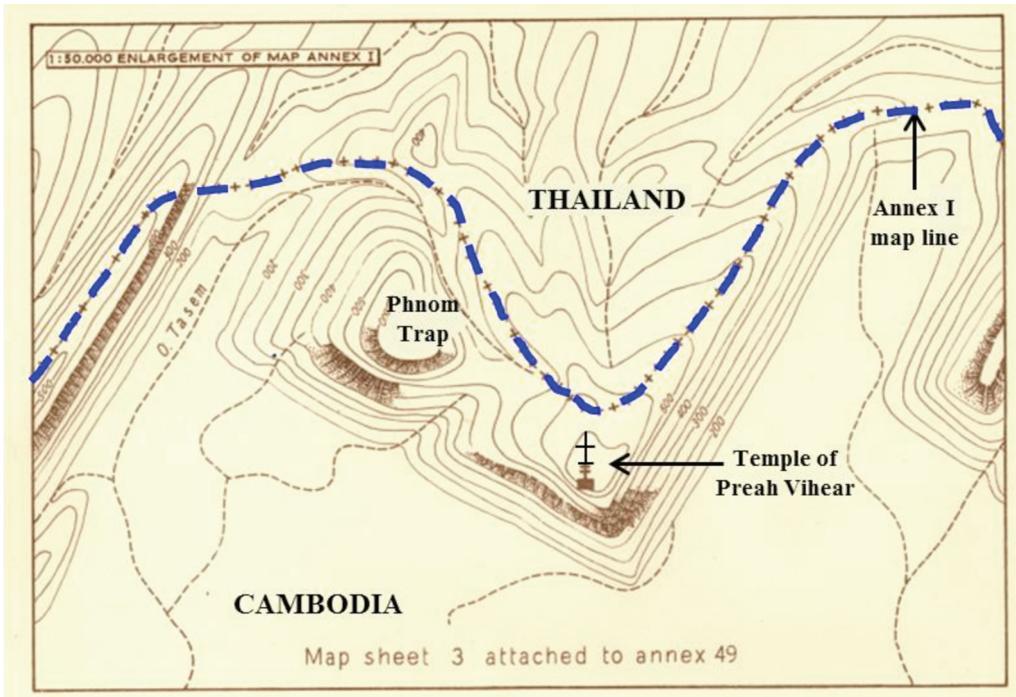
On November 11, 2013, the International Court of Justice (Court or ICJ) handed down an interpretation of its 1962 judgment on the dispute between Thailand and Cambodia concerning the ancient temple of Preah Vihear and its environs.¹ The 1962 judgment awarded the temple to Cambodia, but the parties disagreed on whether and how the decision applied to a disputed 4.6-square-kilometer strip of land beside the temple. That area is located in the Dangrek Mountains near the countries' shared frontier and includes the rest of the promontory on which the temple stands, the adjacent hill of Phnom Trap, and the valley in between. Cambodia requested the interpretation on April 28, 2011, after a series of military clashes in and around the disputed area—clashes that arguably brought Thailand and Cambodia closer to war than any two standing members of the Association of Southeast Asian Nations in the association's forty-seven-year history. The ICJ unanimously interpreted the 1962 judgment in a manner that gave Cambodia sovereignty over the entire promontory but left the status of Phnom Trap and the precise extent of the promontory subject to further bilateral negotiation (paras. 98–99, 108).

The roots of the dispute lie in the settlement of the Franco-Siamese War of 1893. In 1904, France and Siam (Thailand's name before 1939 and from 1945 to 1949) concluded a treaty agreeing, inter alia, that the frontier between them in the region of the Dangrek Mountain range would follow the natural watershed line between the basins of the Sen and Mekong Rivers in Cambodia and the Moun River in Siam.² They created a mixed commission to delimit the border, and later the Siamese government requested that the French prepare a map of the region to illustrate the border delimitation. The map produced by a team of French officers in 1907 showed the temple, the promontory, Phnom Trap, and some of the surrounding valleys

¹ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thai.) (Int'l Ct. Justice Nov. 11, 2013). ICJ judgments and decisions cited herein are available at <http://www.icj-cij.org>. Thais refer to the temple as *Phra Wihan*, but for clarity this note uses the term *Preah Vihear*, adopted by the ICJ and other international bodies.

² Convention concernant les relations politiques des Parties contractantes, Fr.-Siam, Art. 1, Feb. 13, 1904, 32 Martens Nouveau Recueil (ser. 2) 130, 1905 FOREIGN RELATIONS OF THE UNITED STATES 833, 835 (Eng. trans.).

FIGURE 1. ENLARGED PORTION OF THE ANNEX I MAP



Source: Counter-Memorial of the Royal Government of Thailand, Temple of Preah Vihear (Cambodia v. Thai.), [1962] 1 ICJ Pleadings, Annex 49, map sheet 3 (Sept. 8, 1961) (highlighting and labeling by the present author).

on Cambodia's side of the frontier. The officers sent the map to Siamese officials, who distributed it widely without registering objections.³ Thailand also missed other opportunities to object, including a quasi-official 1930 visit to Preah Vihear by former Siamese minister of interior Prince Damrong, who was received by French officials as the tricolor flew over the temple.⁴

Shortly after Cambodia gained independence in 1953, Thai troops occupied the temple area. After several rounds of diplomacy failed, in 1959 Cambodia brought the case to the ICJ. To support its claim, Cambodia attached the 1907 French-drawn map, which became known as the "Annex I map" (see figure 1).

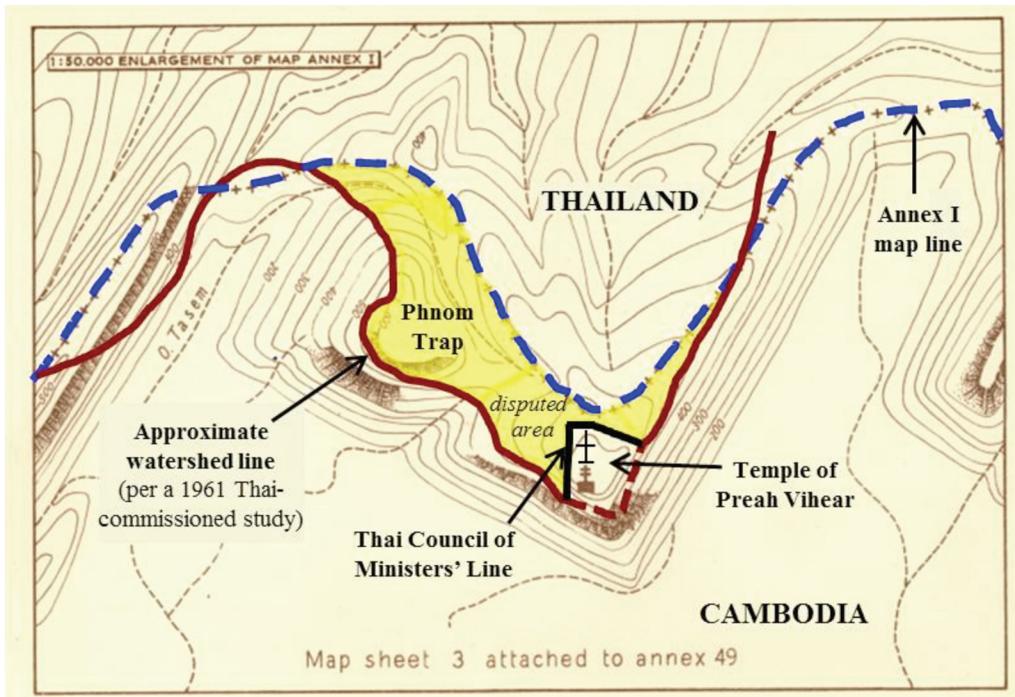
Thailand argued that the Annex I map line violated the 1904 Franco-Siamese treaty, because the natural watershed line runs along the edge of the steep V-shaped cliff that separates the promontory and temple from the Cambodian plains to the south and east, and from the cliff's edge to the top of Phnom Trap. Using that line as the frontier would put the promontory, the temple, and half of Phnom Trap on Thai soil.

Nevertheless, in the reasoning for its 1962 judgment, the Court concluded that Thailand had accepted the Annex I map line without protest, and hence "recognized the line on that map

³ Temple of Preah Vihear (Cambodia v. Thai.), 1962 ICJ REP. 6, 17–27 (June 15) [hereinafter 1962 Judgment].

⁴ *Id.* at 27–31.

FIGURE 2. COMPETING TERRITORIAL CLAIMS



Source: Further Written Explanations of the Kingdom of Thailand, Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thai.), Annex 49 (June 21, 2012) (highlighting and labeling by the present author based on maps submitted by Thailand in Annex 46, *id.*).

as being the frontier line” and caused it to become an integral part of the 1904 treaty settlement.⁵ In the *dispositif*, the Court ruled that “the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia,” and that, “in consequence,” Thailand had an obligation to withdraw any personnel it had stationed at the temple or in its “vicinity on Cambodian territory.”⁶ But the Court did not define the region under dispute or the temple’s “vicinity on Cambodian territory,” and it did not pronounce upon the status of the Annex I map line in the operative clauses.

Shortly after the judgment, in July 1962, the Thai Council of Ministers adopted a nonpublic resolution outlining its views on what the ICJ verdict required and attaching a map with a revised Thai rendering of the border (Thai Council of Ministers’ line). The Thai Council of Ministers’ line deviated from the frontier Thailand had claimed during the proceedings to put the temple itself on Cambodian soil (see figure 2).

Thai personnel withdrew from the temple buildings and built a barbed-wire fence along the Thai Council of Ministers’ line, separating the temple complex from the rest of the promontory. In November 1962, the Cambodian Ministry of Foreign Affairs published an aide-

⁵ *Id.* at 32.

⁶ *Id.* at 36–37 (also requiring, *id.* at 37, that Thailand return to Cambodia certain enumerated classes of objects that may have been taken from “the Temple or the Temple area by the Thai authorities”).

mémoire asserting that the limit marked by the barbed-wire fence “was in complete disagreement with the Court’s decision which confirmed the frontier as it appeared on the 1907 [Annex I] map” (para. 42). The dispute soon subsided, however, and Preah Vihear succumbed to fighting among warring Cambodian factions keen to control its strategic cliff-top position. One of the last slivers of Cambodia to fall to the Khmer Rouge in May 1975, the temple area was also the site of the final major surrender of Khmer Rouge guerrilla fighters in 1998.

In 2000, with the temple accessible again, Thailand and Cambodia created a Joint Boundary Commission to demarcate the land boundary, and talks on the frontier resumed. But they bore little fruit and the dispute reignited in 2007, when Cambodia requested that UNESCO inscribe the temple on the World Heritage List. Cambodia’s application to the World Heritage Committee included a map showing the Annex I map line as the frontier in the temple area. Thailand objected and submitted its own map, making public for the first time the 1962 Thai Council of Ministers’ line (figure 2). Thai objections led the World Heritage Committee to delay inscription of the temple, but in July 2008 the committee unanimously approved Cambodia’s application. Shortly afterward, as nationalist protests raged in Bangkok and pressed the Thai government to take a hard line, violent clashes erupted in the temple area. A military buildup on both sides and a diplomatic war of words followed. After nearly three years of unsuccessful bilateral negotiations and significant armed altercations in February and March 2011, Cambodia asked the ICJ to interpret its 1962 verdict. In July 2011, the Court ordered provisional measures that excluded armed forces of both sides from a specified area around the temple pending its judgment on Cambodia’s request for interpretation.⁷

Article 60 of the ICJ Statute provides that “[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.” Citing prior jurisprudence, the Court found that a dispute exists if it can be shown that the parties hold different views on the meaning or scope of a judgment (para. 33).⁸ For the Court to engage in interpretation, the dispute must relate to the *dispositif* and may concern the reasons for the judgment only insofar as they are “inseparable from the operative clause” (para. 34)⁹ or, in the words of the Permanent Court of International Justice, constitute a “condition essential to the Court’s decision.”¹⁰

Thailand denied that an interpretive dispute existed, arguing that the 1962 judgment was clear and that Cambodia’s failure to object to the Thai withdrawal to the Thai Council of Ministers’ line amounted to acceptance of Thailand’s interpretation of the verdict. Thailand contended that the dispute had reemerged at the time of Cambodia’s application to UNESCO and related to border delimitation—a different issue from the dispute before the ICJ in 1962 and one the Court had declined to address in the *dispositif*. Thailand also claimed that Cambodia’s request was inadmissible, because its real purpose was not to clarify the 1962 judgment but to

⁷ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thai.), Provisional Measures, 2011 ICJ REP. 537 (July 18).

⁸ E.g., Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), 1927 PCIJ (ser. A) No. 13, at 11 (Dec. 16) [hereinafter *Factory at Chorzów*]; Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mex. v. U.S.), Provisional Measures, 2008 ICJ REP. 311, 325–26, para. 54 (July 16) [hereinafter *Avena Order*].

⁹ Quoting Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (Nigeria v. Cameroon), Preliminary Objections, 1999 ICJ REP. 31, 35 (Mar. 25); see also *Avena Order*, *supra* note 8, at 323, para. 47.

¹⁰ Quoting *Factory at Chorzów*, *supra* note 8, at 20.

obtain a ruling that Cambodia had not requested and that the Court had not issued in the original proceedings: that the Annex I map line constitutes the parties' common frontier in the temple area. Thailand maintained that such a ruling would violate the principle of *non ultra petita*.

The Court rejected those arguments and accepted the claims of Cambodia that its November 1962 aide-mémoire showed an early difference in views on the scope and meaning of the *dispositif*, and that official documents the parties sent to UNESCO and the UN Security Council in 2007–08 demonstrated continuing disagreement. The Court found that the dispute centered on three questions: whether the 1962 judgment had determined that the Annex I map line constitutes the frontier in the temple area; the meaning of the temple's "vicinity on Cambodian territory"; and whether Thailand had a continuing obligation to withdraw from that vicinity.

Proceeding to an interpretation, the Court found that the 1962 verdict bore three key features. First, the 1962 Court had made clear that it did not consider the dispute before it to be one of border delineation but, rather, one "confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear" (para. 20).¹¹ Second, however, the Annex I map had featured crucially in the Court's reasoning. Third, the Court had focused narrowly on the "region of Preah Vihear," an area it understood to be much smaller than that covered by the Annex I map, which depicted a stretch of the frontier and surrounding territory some 100 kilometers wide (paras. 76–78).

The crux of the interpretive challenge lay in the second paragraph of the *dispositif*. That paragraph required Thailand to "withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory"¹² but left the term "vicinity" undefined. Cambodia argued that the 1962 judgment's conclusion that the Annex I map line was binding in the temple area served as a condition essential to the operative clauses of the *dispositif*. Thus, the temple's "vicinity" could best be understood as referring to the area between the Annex I map line and the watershed line proposed by Thailand in the original proceedings—namely, the temple grounds and the disputed 4.6 square kilometers. For its part, Thailand defended the line drawn by its Council of Ministers in 1962 and argued that since the Court had declined to define the term "vicinity" in the judgment, defining it by reference to the Annex I map line would embroil the Court in border delimitation questions that were *ultra petita*.

The Court found that the only context for the reference to an area of territory in the second paragraph of the *dispositif* was "in indicating which of its personnel Thailand was under an obligation to withdraw" (para. 81). In the original proceedings, Thailand had called an expert witness, Professor Friedrich Ackermann, who testified that during his visit to the temple for several days in July 1961, he had seen a detachment of Thai frontier police stationed at a camp north-east of the temple and a temple guard living in a house a short distance west of the police camp. Thai counsel later confirmed the camp's location.

The Court reasoned that the second paragraph of the *dispositif* must have meant that Thailand's obligation to withdraw should "apply to the police detachment referred to by Professor Ackermann, since, except for the solitary Temple guard (who seems to have been living near the police camp), there was no evidence of the presence of any other Thai personnel anywhere

¹¹ Quoting 1962 Judgment, *supra* note 3, at 14.

¹² *Id.* at 37.

near the Temple” (para. 88). That camp was located north of the line drawn by the Thai Council of Ministers in 1962 and “a very short distance south” of the Annex I map line—within the part of the disputed strip to the north of the temple (para. 90). The Court thus concluded that the Thai Council of Ministers’ line did not reflect a correct interpretation of the 1962 judgment (para. 88).

The Court then considered the temple’s geographic environment, noting that the temple sits on “an easily identifiable geographical feature”—a promontory with cliffs on the east and south that slowly descends into a valley to the west and northwest (para. 89). Therefore, “[a] natural understanding of the concept of the ‘vicinity’ of the Temple would extend to the entirety of the Preah Vihear promontory” (*id.*). To the north, the “vicinity on Cambodian territory” had to extend at least as far as the police station but no further than the Annex I map line, which had featured so centrally in the Court’s reasoning in 1962 (para. 90).

Nevertheless, the Court rejected Cambodia’s claim to the entire 4.6-square-kilometer strip. It reasoned that the promontory and Phnom Trap are “distinct geographical features” presented as such on the Annex I map (para. 93). It noted that Cambodia’s counsel, Dean Acheson, had spoken in the 1962 proceedings of an area of concern “less than two or three square kilometers in size”—a strip too small to include both the promontory and Phnom Trap—and had described Phnom Trap as lying outside “the crucial area” (paras. 78, 94).¹³ A witness for Cambodia, former provincial governor Suon Bonn, had also expressed his belief, uncertainly, that Preah Vihear and Phnom Trap belonged to two different provinces (para. 94). Moreover, the Court emphasized that there was no evidence of the presence of Thai personnel on Phnom Trap in 1962 or any other reason to believe the hill was relevant to the Thai obligation to withdraw. Finally, the Court reasoned that the 1962 judgment had made no finding on the watershed line, and thus it was “implausible” that the definition of the temple’s “vicinity” should hinge on finding the intersections of the proposed Thai watershed line with the Annex I map line (para. 96). Taking these arguments together, the Court concluded that in 1962, the Court did not intend the “vicinity” of the temple to extend beyond the promontory (para. 97).

The Court thus interpreted the 1962 judgment to give Cambodia sovereignty over the entire promontory, which represents roughly half of the disputed 4.6 square kilometers, bounded by the Annex I map line to the north and extending to the west until the ground begins to rise at the foot of Phnom Trap (paras. 98, 108). Taking note of Thai concerns about the difficulty of transposing the Annex I map line onto a modern map, it left the precise location of that line, the frontier at the foot of Phnom Trap, and sovereignty over the remainder of the disputed strip subject to further negotiation (para. 99). It also noted Thailand’s obligation to respect Cambodia’s territorial integrity once the dispute is resolved, obviating the need to address the continuing relevance of the Thai withdrawal obligation under the 1962 verdict (para. 105).

* * * * *

Interpretation of the 1962 judgment presented the ICJ with two related tests. It required the Court to clarify vague provisions that have contributed to conflict between the parties while

¹³ Quoting Reply of Mr. Dean Acheson, Temple of Preah Vihear (Cambodia v. Thai.), [1962] 2 ICJ Pleadings 473, 465 (Mar. 22, 1962).

upholding the principles of *res judicata* and *non ultra petita*. More broadly, it tested the Court's institutional capacity to facilitate the peaceful resolution of dangerous interstate disputes.

Whether by design or sloppy drafting, the 1962 judgment was undeniably vague. It left the Court with the interpretive challenge of reconciling a reasoning section dominated by discussion of the Annex I map line with operative clauses that plainly excluded it. The chosen interpretive approach was not entirely convincing. The Court's use of Professor Ackermann's testimony to invalidate the Thai Council of Ministers' line is somewhat problematic, because the *dispositif* required withdrawal of *any* Thai military and police forces in the area, admitting the possibility that no Thai personnel were stationed in the vicinity or that the 1962 Court was unsure—a reasonable proposition, since Ackermann had observed the area in July 1961, nearly a year before the verdict.¹⁴ In addition, the Court's finding that a "natural understanding" of the temple's vicinity would encompass the entire promontory has no explicit basis in the reasoning of the 1962 judgment.

The Court's rationale for excluding Phnom Trap from the temple's vicinity also suffers from certain weaknesses (paras. 93–95). The geographic distinctness of Phnom Trap, Acheson's references to a "crucial area" and imprecise estimates of the size of the disputed territory, Suon Bonn's uncertainty about provincial boundaries, and the absence of evidence of Thai military or police there are all consistent with the notion that the 1962 ICJ judges meant to exclude the hill from the temple's vicinity. But none of these factors necessarily leads to that interpretation, and even when they are taken together, as the judges did, the Court's reasoning on this issue is not entirely convincing.

The Court's ruling on the scope of the temple's vicinity is commonsensical, but it required reaching well beyond the reasoning in the original decision. This ruling thus suggests that the current Court is willing to engage in significant efforts to fill interpretive gaps where the language of prior judgments lacks clarity, which is an appropriate function for the ICJ and often a way for it to contribute to peaceful dispute resolution. At the same time, the reluctance of the Court to opine on the status of Phnom Trap—or to specify the location of the frontier to the north and west of the temple—shows its caution regarding *ultra petita* and necessitates further negotiation.

A specific binding judgment sometimes encourages peaceful dispute resolution by emanating a sense of legal closure and finality. The fact that the Preah Vihear temple itself has not been in dispute in recent years evidences the power of an ICJ decision to take a contentious issue off the table. Conversely, the continuing feud over the surrounding 4.6-square-kilometer strip shows the problem with leaving judicial rulings too open to interpretation—a feature of some ICJ decisions that may reflect the Court's diverse judicial composition, susceptibility to competing political pressures, or efforts to issue rulings both parties are apt to accept.

The ICJ's interpretation of the *Preah Vihear* decision again leaves ample scope for discord. Cambodian foreign minister Hor Namhong has already stated that the Court's invocation of the Annex I map line means that Phnom Trap is Cambodian—a position certain to elicit a negative Thai response.¹⁵ In recent months, both the Thai and Cambodian governments have

¹⁴ Indeed, the mention of military personnel, absent from Ackermann's testimony, suggests that the Court did not know who would be stationed in the temple's vicinity on the judgment date.

¹⁵ *Cambodia Awaits Talks with Thailand on Implementation of ICJ's Ruling*, XINHUA, Dec. 21, 2013, available in LEXIS, News & Business Library, Wire Service Stories File.

been under severe pressure from opposition groups, and the incentives to take hard-line positions remain strong on both sides,¹⁶ raising the danger that talks over the details of the ruling and the status of Phnom Trap will again spiral toward conflict.¹⁷

Nevertheless, flexibility also has its role. The exercise of caution on setting strict boundaries and deciding on Phnom Trap has helped insulate the Court from charges of overreach. It has also enabled both sides to claim a partial victory,¹⁸ which is especially important in Thailand, where the incumbent government has faced an intense campaign of opposition protests organized by nationalist “yellow shirts” with strong links to the military. A more decisive ruling in favor of Cambodia would have risked a significant backlash in Thailand.

Thus, while the ruling certainly does not provide a final resolution to the territorial dispute surrounding Preah Vihear, it does provide some added clarity and may help set the stage for more productive bilateral negotiations. If it does so, the Court’s interpretation will certainly be counted an institutional success.

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European Convention on Human Rights—freedom of expression—right to privacy—responsibility of Internet news portal for defamatory comments posted by readers

DELFI AS v. ESTONIA. Application No. 64569/09. At <http://hudoc.echr.coe.int>. European Court of Human Rights, October 10, 2013.

On October 10, 2013, a chamber of the European Court of Human Rights (Court) delivered its judgment in *Delfi AS v. Estonia*,¹ the first case ever decided by the Court on whether an Internet news portal can be held liable for offensive comments posted by its readers. The chamber found unanimously that, in holding the news portal liable for such (mostly anonymous) comments, the government of Estonia had imposed justifiable and proportionate restrictions on the company’s freedom of expression and had therefore not violated Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁶ Bertil Lintner, *Few Clear Lines in Preah Vihear Ruling*, ASIA TIMES ONLINE, Nov. 15, 2013, at http://www.atimes.com/atimes/Southeast_Asia/SEA-02-151113.html.

¹⁷ *No Rush to Talk with Thailand After ICJ’s Verdict: Cambodian Spokesman*, XINHUA, Nov. 18, 2013, available in LEXIS, News & Business Library, Wire Service Stories File (stating that Cambodia, as the “winner,” intended to “slow down talks” with Thailand to avoid letting Thai extremists and opposition politicians use the issue to pressure the Yingluck Shinawatra government).

¹⁸ In Phnom Penh, Hor Namhong said, “Of course, we cannot say the verdict of this court today satisfies our aims 100 per cent, but we are happy, as the ruling met the majority of our demands.” *Partial Victory at the ICJ*, PHNOM PENH POST, Nov. 11, 2013, available in LEXIS, News & Business Library, Individual Publications File. In Bangkok, Thai foreign minister Suraphong Tovichaichaikul said, “Both sides are satisfied with the court’s decision.” *Even-Handed Temple Ruling Cools Heat in Thailand, Cambodia*, BANGKOK POST, Nov. 11, 2013, available in *id.*

¹ *Delfi AS v. Estonia*, App. No. 64569/09 (Eur. Ct. H.R. Oct. 10, 2013). Judgments and decisions of the European Court of Human Rights cited herein are available online at <http://hudoc.echr.coe.int>.