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Temple of Preah Vihear: Lessons on Provisional Measures

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Abstract

Cambodia and Thailand have been engaged in a territorial dispute over land in the vicinity of the temple of Preah Vihear, located near the countries' shared border, for over fifty years. This dispute has persisted in spite of a 1962 International Court of Justice (ICJ) judgment declaring the temple to be in Cambodia and a long history of negotiation and mediation attempts following the judgment. More recently, in July 2011, the ICJ, in connection with a request for interpretation of its 1962 judgment, indicated provisional measures creating a demilitarized zone around the temple and steering both countries to cooperation with the help of the Association of Southeast Asian Nations (ASEAN). The establishment of this demilitarized zone, which included territory not subject to overlapping claims, was hotly contested among judges on the court, raising broader questions about the scope of the court's authority to issue provisional measures. Additionally, the court's inclusion of ASEAN as a body to facilitate resolution of the dispute fashioned the provisional measures into a channel for integrated dispute resolution, pairing adjudication with mediation. This Comment explores the lessons these two features of the ICJ's order teach us about the court's provisional measure authority and use of that authority to effectuate dispute resolution.

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For decades, Cambodia and Thailand have been embroiled in a dispute over the control of land on the mountainous borderlands surrounding the temple of Preah Vihear. A Hindu sanctuary dating back to the eleventh century, Preah Vihear is of considerable historical and cultural significance. In 1962, the International Court of Justice (ICJ) ruled that the Temple was situated in Cambodia. Since then, the temple has been the subject of protests and the site of skirmishes. The most recent episodes of violence occurred in April 2011.

This conflict led to Cambodia's request for interpretation of the 1962 judgment and for an indication of provisional measures. On July 18, 2011, the ICJ responded by court order with an indication of provisional measures. While both parties were pleased with the indication of provisional measures, two features of these measures stand out: (1) the court's demarcation of a provisional demilitarized zone (DMZ) and (2) the court's utilization of a regional body to further cooperation between Cambodia and Thailand. The first feature offers

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1 See UNESCO, Temple of Preah Vihear, online at http://whc.unesco.org/en/list/1224 (visited Apr 3, 2012). The temple is designated as a UNESCO World Heritage site. Id.
3 See Richard S. Ehrlich, Thai–Cambodian Fighting Turns Villagers to Refugees; Long-Simmering Dispute over Holy Site along Border Boils Over, Wash Times A10 (Apr 25, 2011).
5 Id at *19.
insight into the court’s authority to issue provisional measures, and the second models a promising approach for international dispute resolution (IDR).

In fact, the provisional DMZ was at the heart of a disagreement on the court over the scope of the ICJ’s authority to indicate provisional measures. Several of the dissenting judges believed that the scope of the provisional DMZ, which included territory not directly subject to the parties’ dispute, was an abuse of authority. While there is no practical machinery for review of ICJ decisions, an abuse of authority still carries real consequences.8 Parties may pronounce the decision a nullity, in line with customary international law, and respond with non-compliance.9 Compliance with provisional measure orders is already a putative problem.10 The court may also lose the trust of states, which is critical to the operation of its consent-based jurisdiction.11 Further, an abuse of judicial power may become entrenched in ICJ case law. Though the ICJ’s decisions are not binding beyond the parties and the dispute before the court, the court does, in practice, treat its past decisions as highly persuasive.12 For these reasons, if the court did abuse its authority to indicate provisional measures in the case concerning Preah Vihear, this abuse would carry significant consequences. This Comment will assess the legitimacy of the court’s decision to include a provisional DMZ encompassing undisputed territory in its order.

The ICJ’s adoption of a measure utilizing a regional organization to facilitate party cooperation was not a part of the debate over the court’s authority. Nonetheless, it is instructive for a separate reason. By involving a regional mediator, the ICJ adopted an integrated IDR approach, combining the processes of mediation and adjudication. Synergistic benefits flow from the use

8 See Ebere Osieke, The Legal Validity of Ultra Vires Decisions of International Organizations, 77 Am J Intl L 239, 241-42 (1983) (discussing the lack of review bodies to explain why international organizations, like the ICJ, are responsible for determining their own jurisdictions). Note that ICJ judgments are final without opportunity for appeal. Statute of the International Court of Justice, Art 60, 59 Stat 1055 (1945) (ICJ Statute). In theory, the UN General Assembly could respond to an ICJ abuse of power by championing a countervailing amendment of the ICJ Statute, but this has never happened. Amendment requires a two-thirds majority vote in the General Assembly and ratification by two-thirds of the states. Id at Art 69; UN Charter Art 108.
of an integrated IDR approach. This Comment will situate integrated IDR in the context of the Cambodia and Thailand territorial dispute, as well as provisional measures more broadly.

In Section II, I discuss the court's authority to indicate provisional measures. Section III then provides a factual overview of the dispute between Cambodia and Thailand, with a focus on the relevant ICJ proceedings. In Section IV, the 2011 provisional measures order is described in detail, including arguments advanced by both the majority and dissenting opinions. I analyze these arguments and explore the basis of the court's authority to prescribe the provisional DMZ in Section V. Section VI discusses the court's use of integrated IDR in its indication of provisional measures and the benefits of replicating this approach in future cases. Section VII concludes.

II. ICJ Provisional Measures

A. Scope of ICJ Power

A provisional measure of protection, also known as an interim measure, is a valuable procedural mechanism available to parties to a suit brought before the ICJ. Proceedings take time, and states may, and often do, have an interest in preserving the status quo while a case is pending before the court. A court indication of provisional measures seeks to protect the respective rights of the parties and ensure that the final judgment is not rendered ineffective. To this end, parties can request provisional measures at any time during the proceedings. The requesting state must specify the measures requested, reason for the request, and consequences of refusal.

However, the court is not strictly bound to the parties' requests. Indeed, the court may indicate measures sua sponte or indicate measures that differ from the states' requests. The core provision conferring the ICJ with the power to

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14 According to one estimate, the average duration of a case (from initiation to final judgment) is approximately thirty months, though cases have lasted up to eleven years. See Arthur Eyffinger, The International Court of Justice: 1945–1996 133 (Kluwer 1996).

15 See Karin Oellers-Frahm, Expanding the Competence to Issue Provisional Measures—Strengthening the International Judicial Function, 12 German L J 1279, 1279 (2011).


17 Id. Note that requests for provisional measures commonly provoke counter-requests for certain measures. Thus, it need not be the case that only one party requests such measures. Oda, Provisional Measures at 550 & n 8 (cited in note 10).

18 See ICJ Rules, Art 75 (cited in note 16).
indicate provisional measures is found in Article 41 of the Statute of the Court: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Ultimately, these measures remain in force for the duration of the case, unless revoked, amended, or otherwise specified.

Over time, the court has issued a wide variety of provisional measures reflecting the diverse body of disputes that have come before it. The ICJ has ordered states to desist from racial discrimination, refrain from executing certain foreigners, abstain from nuclear testing activity, and limit fishing activity, among other measures. Many cases have been politically charged and mired in armed conflict. In cases implicating military action or risking outbreaks of violence, the court typically has included measures directing parties to refrain from action that will "aggravate or extend the dispute." As to security matters,

It has to be recalled that the court does not have direct responsibility for the maintenance of international peace; that responsibility is expressly confided in the Security Council by Article 24 of the UN Charter. On the other hand, the court is entitled to rely on the general good faith of the parties not to exacerbate a dispute with which it is dealing.

To be sure, the ICJ wields significant power in electing to issue provisional measures and crafting the content of those measures; yet, this power is not without bounds. Five conditions must be satisfied for the court to issue a provisional measure: (1) prima facie jurisdiction, a link between the provisional measure(s) requested and the right(s) the requesting party claims to derive from the pending judgment, (3) plausibility, (4) urgency, and (5) risk.

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19 ICJ Statute, Art 41(1) (cited in note 8).
20 See ICJ Rules, Art 76 (cited in note 16).
22 See LaGrand (Germ v US), Provisional Measures, 1999 ICJ 9, 16 (Mar 3, 1999).
25 See, for example, Land and Maritime Boundary between Cameroon and Nigeria (Cam v Nigeria), Provisional Measures, 1996 ICJ 13, 24 (Mar 15, 1996); Military and Paramilitary Activities in and against Nicaragua (Nicar v US), Provisional Measures, 1984 ICJ 169, 187 (May 10, 1984); Diplomatic and Consular Staff, Provisional Measures, 1979 ICJ at 21.
27 Legality of Use of Force (Yugo v US), Provisional Measures, 1999 ICJ 916, 923 (June 2, 1999).
29 Questions Relating to the Obligation to Prosecute or Extradite (Bolg v Sen), Provisional Measures, 2009 ICJ 139, 151 (May 28, 2009).
30 Passage through the Great Belt (Fin v Den), Provisional Measures, 1991 ICJ 12, 17 (July 29, 1991).
of irreparable prejudice.\textsuperscript{31} These conditions are laid out in the court's jurisprudence and are grounded in the very purpose of a provisional measure: to preserve the respective rights of the parties. The rights to be protected must be those at issue in the main proceeding, thus the "link" requirement. Given the potential gravity of an indication of provisional measures—protecting a party's rights will, in effect, constrain the other party and may even frustrate its political interests—there must be good reason for such an order. Provisional measures would be inappropriate if the rights at stake could be protected adequately by compensation awarded in a final judgment.\textsuperscript{32} Therefore, the court seeks proof of urgency, irreparable prejudice, and plausibility. Owing to the interlocutory nature of provisional measures, the decision whether to order these measures should not prejudice the case merits, which are judged in the main proceeding.\textsuperscript{33}

Provisional measures are curbed in another notable way: lack of a direct enforcement mechanism.\textsuperscript{34} Under Article 94(1) of the UN Charter, members party to an ICJ case should "undertake[ ] to comply with the decision." Further, if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.\textsuperscript{35}

However, the Security Council has not acted yet under this provision to impose sanctions or authorize military activity to enforce a judgment.\textsuperscript{36} A decision to do so would be entirely within the council's discretion but subject to council power and political dynamics.\textsuperscript{37} Moreover, Article 94(2) speaks of judgments, not orders, and the Security Council has questioned its own ability to enforce provisional measure orders.\textsuperscript{38} As a result, enforcement rests largely on states' willingness to comply and to exercise domestic executive powers.

\textsuperscript{31} Fisheries Jurisdiction, Interim Protection, 1972 ICJ at 16.
\textsuperscript{32} Oda, Provisional Measures at 551 (cited in note 10).
\textsuperscript{33} See Aegean Sea Continental Shelf Case (Gre v Tur), Interim Protection, 1976 ICJ 3, 13 (Sept 11, 1976).
\textsuperscript{34} "[I]nternational tribunals do not operate as part of a coherent and unified world government. They exist in an interstitial legal system that lacks a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change." Eric A. Posner and John C. Yoo, Judicial Independence in International Tribunals, 93 Cal L Rev 1, 13 (2005).
\textsuperscript{35} UN Charter Art 94, § 2.
\textsuperscript{37} For example, a permanent member of the Council could exercise its veto rights against a resolution to enforce an ICJ judgment. The US Supreme Court noted this possibility in its Medellin decision. See Medellin v Texas, 552 US 491, 509-10 (2008).
\textsuperscript{38} See 2 Restatement (Third) of Foreign Relations Law § 903 n 6 (1987).
Nevertheless, compliance rates with ICJ judgments are considered high. One study estimates a 68 percent compliance rate. When decisions were categorized by topic, the compliance rate rose to 86 percent for border and maritime delimitation cases. Rational choice theory would sooner predict no compliance, given the lack of centralized sanctions. The high rate of compliance, in spite of the lack of an institutional enforcement mechanism, has been explained variously by the reputational costs of non-compliance, the benefit of third-party expression to resolve ambiguity, and the utility of continued access to ICJ adjudication. In contrast, scholars note the comparatively low, even “abysmal,” incidence of compliance with provisional measures orders. This has been attributed to perceptions that the measures are prescribed without the provision of due process and represent an improper
exercise of the court’s authority. Additionally, prior to the ICJ’s LaGrand decision, some parties treated provisional measures as non-binding.

B. Evolution of Provisional Measures

Since 1922, the ICJ and its predecessor, the Permanent Court of International Justice, have heard nearly fifty requests for provisional or interim measures. Ten such requests were made in the most recent decade, 2000–2010. Court treatment of these provisional measures requests has evolved in recent history. While the doctrine of stare decisis does not formally apply to the ICJ—decisions bind only the parties in the instant case—in practice, the court regards its decisions as highly persuasive, perhaps even precedential. For this reason, ICJ cases do tend to build off of one another, and the court’s jurisprudence can be framed in a way that reveals evolution in its rulings.

In 1999, the court held in Legality of Use of Force that it could issue provisional measures without “finally satisfy[ing] itself that it has jurisdiction on the merits of the case” so long as there is a prima facie indication of jurisdiction. Given the interlocutory nature of an interim measure order, the court exercises a form of incidental jurisdiction. The prima facie jurisdiction

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44 See Addo, 48 Intl & Comp L Q at 680 (cited in note 43); Oda, Provisional Measures at 554 (cited in note 10).
45 LaGrand (Ger v US), Judgment, 2001 ICJ 466 (June 27, 2001). In 1982, Karl and Walter LaGrand, both German nationals, killed one individual and severely injured another in an armed robbery of an Arizona bank. Id at 475. Following criminal proceedings in Arizona, both men were convicted of murder in the first degree (among other crimes) and sentenced to death. Id. However, at this time, the German consular post was not alerted of the LaGrands' arrest, and neither man was informed of his rights under the Vienna Convention on Consular Relations, a convention to which both the US and Germany were parties. Id. The day before Walter LaGrand's scheduled execution, Germany instituted ICJ proceedings against the US and requested that the US stay Walter LaGrand's execution until the ICJ rendered a final decision on the merits. LaGrand, Judgment, 2001 ICJ at 478–79. Though the ICJ granted Germany's request for provisional measures, Walter LaGrand was executed as scheduled. Id. In its 2001 judgment, the ICJ held that the US breached Vienna Convention obligations owed to Germany. Id at 515–16. Further, the court concluded that provisional measures were binding (a point of dispute between the parties) and held that the US breached the ICJ order indicating provisional measures. Id at 506, 516.
48 See id.
49 ICJ Statute, Art 59 (cited in note 8).
50 Sloane, 34 Yale J Intl L at 79 (cited in note 12).
51 Legality of Use of Force, Provisional Measures, 1999 ICJ at 923.
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requirement is an attempt to balance the risk of state abuse of the device with the risk of irreparable harm to the rights at issue.

Two years after *Legality of Use of Force*, the court ruled in *LaGrand* that provisional measures were binding. In light of the prima facie jurisdiction requirement, this enables the court to issue binding provisional measures when jurisdiction is later deemed absent, an apparent expansion of the court's competence. Further, as a general matter, there is no option to appeal.

The ICJ issued its first provisional measure in an Article 60 proceeding in 2008. Under Article 60 of the Statute of the ICJ, parties that dispute the meaning or scope of an ICJ judgment can later ask the court to interpret that judgment. The court's jurisdiction to hear the original dispute confers upon it the jurisdiction to later interpret the judgment, despite the fact that a state's consent to jurisdiction may have since lapsed. The indefinite nature of Article 60 jurisdiction and the binding nature of an Article 41 provisional measure is a powerful combination—a combination that court dissenters have questioned.

Scholars have also criticized the reach of the court's provisional measures in recent years. Former ICJ Judge Shigeru Oda has expressed concern over attempts by the ICJ to "deliver an interim judgment under the name of provisional measures," for the measures may prejudge the merits of the case.

The court's indication of provisional measures in the Preah Vihear case directly implicates concerns over the ambit of the ICJ's Article 41 powers. It was the second case in which the court indicated provisional measures pending an Article 60 interpretation proceeding and the first case in which the court clearly delimited a DMZ. The main source of division among the judges on the court

53 See *LaGrand*, Judgment, 2001 ICJ at 506.
54 Oellers-Frahm, 12 German L.J at 1292–93 (cited in note 15).
55 ICJ Statute, Art 60 (cited in note 8). The ICJ has been described as "a court of first instance for contentious cases, with no possibility of appeal." Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo Wash Int'l L Rev 107, 150 (2009).
56 See generally *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mex v US)*, Provisional Measures, 2008 ICJ 311 (July 16, 2008).
57 ICJ Statute, Art 60 (cited in note 8).
58 See id; *Temple II*, Provisional Measures at *6 (cited in note 4).
60 Oda, *Provisional Measures* at 554 (cited in note 10).
was the scope of this provisional DMZ and the fact that it covered undisputed territory in both countries.  

III. BACKGROUND ON THE TEMPLE OF PREAH VIHEAR DISPUTE

Though the dispute concerning the Preah Vihear temple did not come before the ICJ until 1962, and then again in 2011 in the form of a request for interpretation, events that gave rise to the dispute date back to 1904. In 1904, France (then in control of Cambodia) and Siam (modern-day Thailand) entered into a treaty that described the frontier between Siam and Cambodia by reference to certain geographic features. In the region surrounding Preah Vihear, the border was to be determined by the watershed line delimited by a mixed commission, consisting of Siamese and French representatives. Tracing the boundary by the watershed line would have placed the temple in Siam.

Then, in 1907, the French government arranged for a series of frontier maps to be drafted and published. One of these maps covered the Preah Vihear region, but due to deviations from the watershed line, it showed the temple’s location on Cambodian territory. These maps were distributed to members of the Siamese government, including mixed commission officials, shortly after publication. But it was not until 1958, during negotiations with Cambodia concerning various territorial matters, that Thailand directly and explicitly contested the territorial sovereignty of the temple.

In 1959, Cambodia instituted proceedings against Thailand, calling upon the ICJ to declare that Preah Vihear was situated in Cambodia and to order the removal of Thai forces (present since at least 1954) from the temple. In its 1962 judgment (Temple I), the court reasoned that Thailand had tacitly accepted Cambodia’s sovereignty over the temple by failing to object to the rival claim

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61 See Section V.
63 Id at 17.
64 See id at 21.
65 Id at 20.
66 Temple I, Judgment, 1962 ICJ at 20–21. Thailand pled that “the map embodied a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed.” Id at 21. However, Thailand did not go so far as to plead that this error was deliberate. Id.
67 Id at 23.
68 Temple I, Judgment, 1962 ICJ at 28, 32.
69 Id at 8.
70 To distinguish the 1962 judgment from the 2011 indication of provisional measures, the court decisions are referred to as Temple I and Temple II, respectively.
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represented by the 1907 map for nearly 50 years. It found that Cambodia had relied on Thailand's acceptance of the map and that Thailand's plea of error—the map's deviation from the watershed line—did not vitiate consent, since the country was on notice of this error. The court thus ruled that: (1) the temple is in Cambodia; (2) Thailand must withdraw its forces, guards, and keepers from the temple and “its vicinity on Cambodian territory”; and (3) Thailand must return artifacts removed from the temple to Cambodia.

Tension between the countries reignited in 2008, following Cambodia's nomination of the temple as a UNESCO World Heritage site. Thailand reacted because Cambodia initially pursued registration of the site without its agreement, and land surrounding the temple, purportedly belonging to Thailand, was included in the application. Although Thai leaders later supported the application, the temple became the object of protests and political contention. Bilateral negotiations failed, and Thailand initially rejected assistance from ASEAN, an organization promoting peace and stability in the region.

The dispute began to escalate. Over 1,500 Thai and Cambodian soldiers were deployed to Preah Vihear, and border tension bled over to other temples. What followed was a series of military clashes beginning in October 2008 and lasting well into 2011. The fighting took lives, displaced residents of nearby villages from their homes, and continued in spite of ceasefire agreements.

On April 28, 2011, Cambodia requested that the ICJ interpret its 1962 ruling. Cambodia alleged that there was a dispute over the meaning and scope of the judgment's “vicinity on Cambodian territory” language, the duration of Thailand's obligation to withdraw from the temple and its vicinity, and the

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72 See id at 26–27.
73 Id at 36–37.
75 See A Cambodia Team to Visit Bangkok on Preah Vihear Issue (Nation Feb 21, 2008), online at http://www.nationmultimedia.com/The%20Region/A-Cambodia-team-to-visit-Bangkok-on-Preah-Vihear-i-30066069.html (visited Apr 3, 2012).
binding nature of the 1907 map in establishing the countries’ frontier. The court agreed that such a dispute existed and acceded to the request.

Cambodia also requested that the Court order Thai forces to withdraw from Cambodian territory near the temple, cease military action, and refrain from activity that could “aggravate the dispute in the principal proceedings.” In a July 18, 2011 order (Temple II), the ICJ indicated that:

Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone . . . and refrain from any military presence within that zone and from any armed activity directed at that zone;

Thailand shall not obstruct Cambodia’s free access to the Temple of Preah Vihear or Cambodia’s provision of fresh supplies to its non-military personnel in the Temple;

Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone; [and]

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Despite the fact that the area of overlapping claims near the temple was confined to approximately five square kilometers, the provisional DMZ encompassed an area of approximately seventeen square kilometers. While one minister questioned whether the ICJ order violated state sovereignty, on the whole, Thailand and Cambodia reacted favorably to the ICJ judgment, affirming their commitment to comply with the ICJ order and peacefully resolve the border dispute. Cambodia’s foreign minister equated the order to “a permanent ceasefire,” and Thailand’s prime minister noted that successful compliance depended largely on the countries’ ability to coordinate military pullback.

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80 Temple II, Provisional Measures at *7 (cited in note 4).
81 Id at *8.
82 Id at *5.
83 The Rules of the Court expressly authorize departures from the requested measures. ICJ Rules, Art 75, ¶ 2 (cited in note 16).
86 Thomas Fuller, Court Orders Thailand and Cambodia to Withdraw from Disputed Temple, NY Times A12 (July 19, 2011).
87 See Cambodia, Thailand Agree to Solve Disputes Peacefully (cited in note 6).
89 Id.
Though the order was well received by the parties, there was vigorous disagreement on the court over the ICJ’s authority to create the provisional DMZ. The following section describes the majority and dissenting positions.

IV. COURT DIVISION

A. Court Majority

In an order responding to Cambodia’s request for provisional measures, the court, in step-wise fashion, assessed whether each of the five preconditions for an indication of provisional measures was met. The court majority determined that a dispute regarding the meaning or scope of the 1962 judgment existed; therefore, there was prima facie jurisdiction under Article 60 of the Statute of the ICJ, which addresses proceedings aimed at interpreting a prior judgment. The majority noted that this jurisdiction exists indefinitely, given the lack of a time requirement in Article 60. This is particularly important because Thailand’s consent to jurisdiction had lapsed in the time since the initial judgment. The requirement that there be a link between the measures requested and the rights underpinning the main proceeding was also met. Cambodia’s proposed provisional measures were designed to protect the country’s territorial integrity and sovereignty over the area surrounding the temple. The rights of sovereignty and territorial integrity are precisely what Cambodia claimed stemmed from the ICJ’s 1962 judgment. Further, they were plausible rights. Noting the clashes in February and April of 2011 and the failed ASEAN intervention, the court determined that

the situation in the area of the Temple of Preah Vihear remains unstable and could deteriorate ... [and] because of the persistent tensions and absence of a settlement to the conflict, there is a real and imminent risk of irreparable prejudice being caused to the rights claimed by Cambodia.

In light of these circumstances, the majority concluded that there was indeed urgency and risk of irreparable prejudice, fulfilling the final two preconditions.

Satisfied that provisional measures were appropriate, the majority proceeded to set out the measures. Far less analysis was provided to rationalize

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90 Temple II, Provisional Measures at **6–8 (cited in note 4).
91 Id at *10.
94 Id at *11.
95 Id at *10 (concluding that the rights were plausible because they were based on a rational interpretation of Temple I that the court, in reaching its decision, recognized a frontier between Cambodia and Thailand that placed the temple and its vicinity in Cambodia).
96 Id at *15.
97 Temple II, Provisional Measures at *15 (cited in note 4).
the choice of measures. A desire to preserve specific rights, to “prevent[] the aggravation or extension of the dispute,” and, through the DMZ, “to prevent irreparable damage from occurring,” appeared to guide the court’s choice of measures. In a conscious departure from Cambodia’s proposals, the majority indicated measures applying to both states. Both parties were ordered to remove military personnel and cease armed activity directed at the zone. Four coordinates, depicted on a sketch map, defined the DMZ bounds.

B. Dissenting Opinions

Four of the five dissenting judges criticized the conclusion that the provisional DMZ was linked sufficiently to the rights to be protected in the main proceeding. Judges Donoghue and Owada framed this criticism in terms of jurisdictional constraints and argued that provisional measures are circumscribed by the jurisdictional limitations placed on the main case, given the need to “preserve the respective rights of either party.” Under this view, the provisional measures in Temple II should be subject to both the requirements of Articles 41 and 60. Judge Donoghue used Avena, the only other Article 60 case in which the ICJ ordered provisional measures, to illustrate this interplay.

Since the court should not go beyond the scope of the underlying judgment it is asked to interpret (for example, by considering facts subsequent to that judgment), it should be so bound when ruling on provisional measures.

According to this position, the provisional DMZ represents an overextension of court authority in three important ways. First, territoriality of
the temple was undisputed, as was certain land encompassed by the DMZ, so there were no rights that should have been preserved with respect to that land. In other words, the link between the right to sovereignty and the measure, so far as the undisputed land was concerned, was incomplete. Provisional measures should have been limited to disputed areas, consistent with right of state sovereignty. Second, the present-day conflict concerns facts beyond the 1962 judgment, and is consequently outside of the ICJ’s jurisdiction. The court cannot declare remedies (including non-aggravation directives) addressing this conflict. Jurisdiction to order such expansive remedies ended when Thailand’s consent lapsed. Lastly, the majority’s exercise of authority was unprecedented and without valid justification. This argument is less about the link requirement and more about the perceived departure from the persuasive authority of past decisions. Of the three prior cases in which the ICJ ordered parties to withdraw forces from an area, no provisional DMZs were created and undisputed territory was not implicated. There provisional DMZ was unnecessary, as other measures were available that fit more squarely within the court’s authority.

In light of these excesses, dissenters expressed concerns about future party behavior. Judge Donoghue believed the order might chill state consent to ICJ jurisdiction in the future. Fearful of court proclivity to indicate provisional measures that unjustly infringe on state sovereignty, states might not agree to ICJ jurisdiction ex ante. After all, other dispute resolution options are often available. Further, given the central role of consent in ICJ cases, court abuse of power could diminish the court’s role in the international legal arena. Party

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105 The disputed area has been described as a 4.6 square-kilometer zone near the temple of overlapping claims. See Bunthea, 5 Econ Today at 33 (cited in note 85).

106 See Temple II, Donoghue Dissent at **5–6 (cited in note 59); Temple II, Xue Dissent at *1 (cited in note 100); Temple II, Owada Dissent at **3–4 (cited in note 100). Judge Donoghue notes that it may be acceptable in an Article 36 case to order measures that apply to undisputed territory in the interest of non-aggravation; however, he contends that the limited nature of Article 60 proceedings forecloses this justification in Temple II. See Temple II, Donoghue Dissent at *7 (cited in note 59). According to Judge Owada, the UN Security Council, not the ICJ, has the power to order such measures without state consent. Temple II, Owada Dissent at *3 (cited in note 100).

107 Temple II, Donoghue Dissent at *6 (cited in note 59).

108 Temple II, Xue Dissent at **1–2 (cited in note 100); Temple II, Owada Dissent at **2–3 (cited in note 100).

109 Temple II, Xue Dissent at *3 (cited in note 100); Temple II, Owada Dissent at **3–4 (cited in note 100); Temple II, Al-Khasawneh Dissent at *1 (cited in note 100).

110 Temple II, Donoghue Dissent at *8 (cited in note 59).

111 See Section VI.

112 See Koivurova, 22 J Envir L & Litig at 296 (cited in note 11).
consent also is correlated demonstrably with judgment compliance rate. Judge Cot feared that parties would attempt to circumvent the consent requirement by grafting a new case onto the request for interpretation. Provisional measures could be brought to bear on rights tangentially connected to a request for interpretation with Article 60 functioning as a mere vehicle for jurisdiction.

Moreover, dissenters found fault in the practicality and efficacy of the provisional DMZ. They noted that the DMZ introduces implementation challenges making it inferior to other measures. Removed from the ground situation, the court lacked information to design around these challenges.

Collectively, the dissenting judges presented several alternatives that could have ameliorated these issues. The court could have limited the DMZ to the disputed area, which was nearly one-quarter the area of the court-defined zone. Alternatively, the ICJ could have banned military activity “in the area of the temple”—language bearing likeness to the 1962 judgment. The parties also could have been given a chance to define the DMZ with ASEAN assistance, failing which the court would intervene. Lastly, the court could have expedited a decision on the merits, doing away with provisional measures altogether.

In the next section, I analyze the majority and dissenting opinions in tandem to determine whether the court did, in fact, exceed its authority. Additionally, I assess the consequences of problems posed by the ordered DMZ.

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113 See Posner and Yoo, 93 Cal L Rev at 37 (cited in note 34).
114 Temple II, Cot Dissent at *3 (cited in note 104).
115 See id.
116 See Temple II, Xue Dissent at *3 (cited in note 100); Temple II, Owada Dissent at *4 (cited in note 100); Temple II, Cot Dissent at **4–5 (cited in note 104). The parties presumably have a better sense of the bounds of the disputed territory than the artificial demarcations on the ICJ-created sketch map. Temple II, Owada Dissent at *4 (cited in note 100).
117 See Temple II, Xue Dissent at *3 (cited in note 100). While the court did have some information about the topography of the zone, topography does not fully capture ground realities that bear on the ease of implementing the DMZ. See Temple II, Owada Dissent at *4 (cited in note 100).
118 See Temple II, Donoghue Dissent at *6 (cited in note 59). The disputed area was a 4.6 square-kilometer zone and the provisional DMZ a 17.4 square-kilometer zone. Bunthea, 5 Econ Today at 33 (cited in note 85).
119 Temple II, Xue Dissent at *3 (cited in note 100); Temple II, Al-Khasawneh Dissent at *1 (cited in note 100).
120 Temple II, Xue Dissent at *3 (cited in note 100).
121 See Temple II, Donoghue Dissent at *3 (cited in note 59).
V. ANALYSIS OF THE CONFLICT OVER THE PROVISIONAL DMZ

Assuming there is a dispute over the scope or meaning of the 1962 judgment, the majority and dissenting opinions agree that there is: (1) prima facie jurisdiction, (2) a plausible right to be protected, (3) urgency, and (4) risk of irreparable prejudice. What remains is a dispute over the link between the alleged rights and the provisional measures—in particular, the DMZ. Central to this dispute is an argument over the allowable geographic scope of the DMZ.123

A. Spatial Concerns: Inclusion of Undisputed Areas

The rights to be preserved in the main proceeding are the rights to sovereignty and territorial integrity.124 The court majority finds that the DMZ preserves these rights.125 Even so, the court arguably has overstepped what was necessary by including undisputed areas. These undisputed areas lack the link to the rights underpinning the main proceeding, and including these areas in the DMZ may itself actively infringe the parties’ rights. This reasoning raises the question: How broad are the measures of preservation that the court can legitimately order? Also, is the court limited to what is necessary and no more?

The statutory language granting the ICJ power to order provisional measures supports a broad construction of the type and scope of measures available to the court. It reads: “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”126 This language is both broad (“any”) and restrictive (“ought to be taken” and “circumstances so require”). The “if it considers” and “ought to be taken” language introduce subjective elements, which nod to the court’s discretion in ordering provisional measures.127 The language seems to place greater restriction on the circumstances giving rise to provisional measures than on the nature or scope of the measures. Only “ought to be taken” seems to constrain the breadth of the

122 Judge Cot expressed skepticism regarding this point in his dissent. See Temple II, Cot Dissent at **2–3 (cited in note 104). If there is no basis for the Article 60 proceedings, then provisional measures could not in turn be issued in this case due to lapse of consent.
123 As a threshold matter, Judge Donoghue takes issue with the indication of (any) provisional measures motivated by events subsequent to Temple I. See Section V.B. Nevertheless, it is the scope of the DMZ that dominates the debate between the majority and dissenting judges.
125 See id at *16.
126 ICJ Statute, Art 41(1) (cited in note 8).
127 See Oellers-Frahm, 12 German LJ at 1282 (cited in note 15) (“[T]he power of the judicial body is not strictly defined but is, to a high degree, discretionary, a fact that is inherent in the character of the institution of interim protection.”).
measures. Yet, the court has discussed “ought” in the context of whether provisional measures are binding as opposed to the measures’ scope.  

Provisional measures have been described as necessary safeguards to parties’ rights. Provisional measures have been described as necessary safeguards to parties’ rights. However, “necessary” does not by definition mean that a particular measure must be the only way to protect these rights. It implies a relationship between the measures and the protection of rights (a return to the notion of a link), but various measures may satisfy this requirement. For example, a DMZ covering only disputed land and a DMZ as defined in Temple II both may satisfy the link requirement. The plural “any provisional measures” language is compatible with, and perhaps even supportive of, this view.

Further, if the provisional DMZ can be framed as a non-aggravation measure, the non-aggravation element may:

widen the margin of appreciation of the Court in determining what measures should be ordered. In particular, the existence of a risk of aggravation of a dispute may justify the indication by the Court of measures that are not strictly needed to prevent the rights of the parties from being irreparably prejudiced. This accords the ICJ more leeway as circumstances become more exigent. Thus, the DMZ does not have to be necessary, suggesting that the inclusion of undisputed territory does not flout the limitations of provisional measures.

Moreover, the inclusion of undisputed territory in a DMZ may itself serve a variety of purposes, purposes that would provide valid justification for the majority’s order and strengthen the link between the provisional DMZ and the rights to be protected. For example, it could create a buffer zone to distance fighting parties from one another or to reduce the chance that armed activity

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128 See LaGrand, Judgment, 2001 ICJ at 501-03 (noting that the French and English versions of Article 41 are “not in total harmony,” and that while the “ought,” “indicate,” and “suggested” language from this article does not imply that provisional measures are binding, the purpose of the statute does imply binding character).  
129 See id at 503 (“The power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties.”).  
130 “Necessary” means “required to be done, achieved, or present; needed.” “Require” means “needed for a purpose or dependent on.” See Barnali Choudhury, Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements, 49 Colum J Transnatl L 670, 709 (2011), quoting The Concise Oxford English Dictionary 956, 1222 (Oxford 11th ed 2008). It follows that a necessary measure is one needed for the purpose of preserving the rights of the parties. See Choudhury, 49 Colum J Transnatl L at 709. According to these definitions, a necessary measure need not mean that it is the “only way” to achieve a stated objective. Id.  
131 See id.  
133 Recall that the dissenting judges criticized the provisional DMZ for lack of a valid justification and a logical link to the rights to be preserved. See Section IV.B.
directed at an area adjacent to the DMZ would inflict damage on the temple or people within the DMZ. This could further justify the inclusion of "undisputed" land. Regrettably, the court did not articulate any of these rationales for the zone that it selected. Nevertheless, a DMZ encompassing undisputed territory may (in theory) serve to preserve parties’ rights of sovereignty and territorial integrity.

B. Temporal Concerns: Facts Subsequent to the 1962 Judgment

Judge Donoghue suggests that because provisional measures are constrained by both Articles 41 and 60, facts outside of the interpretation proceedings should not be relevant to granting a request for provisional measures.

If so, this would remove the 2008–2011 clashes from the court’s consideration; these clashes, which resulted in loss of life and property destruction, arguably served as the primary factual basis for the indication of provisional measures.

The only other case with this statutory dynamic (and the

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134 DMZs, also referred to as buffer zones, generally are created “to provide sanctuary, to provide a neutral area that allows for supervision where contending claims exist (in order to, potentially, facilitate cooperation), and to simply reduce tensions through separation of disputants.” M. Shane Smith, Buffer Zones (Conflict Information Consortium Sept 2003), online at http://www.beyondintractability.org/bi-essay/buffer-zones (visited Apr 22, 2012). All else equal, the distance between disputants separated by a DMZ can have an appreciable effect on the likelihood of lasting peace. One study finds that peace typically lasts when the DMZ is at least two kilometers wide. Virginia Page Fortna, Peace Time: Cease-Fire Agreements and the Durability of Peace 181 (Princeton 2004). In other border disputes, DMZs have been defined such that the zone extends to land not subject to the territoriality dispute. See, for example, Security Council Res No 687, UN Doc S/RES/687 (1991) (establishing an Iraq–Kuwait DMZ extending five kilometers into Kuwait and ten kilometers into Iraq across the countries’ border).

135 There is evidence that the temple itself was site to conflicts, and both parties agree that according to Temple I, the temple belongs to Cambodia. See Temple II, Provisional Measures at **12–13 (cited in note 4). Thus, while it made sense to include this territory in the DMZ from a non-aggravation standpoint, sovereignty over the temple itself was not at issue in the case.

136 The lack of justification renders the zone susceptible to the criticism that it is arbitrary. Problems may arise when a DMZ is mapped out on an uninformed basis without regard to factors such as the parties’ history, population distribution, and claimed property rights. See David M. Morriss, From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations, 36 Va J Intl L. 801, 853 (1996). Typically, DMZs are created with at least a reference point in mind, such as an agreement mandating withdrawal by a specified distance from an identified cease-fire line. Id at 907. Given this defect, the zone likely is imperfect in its coverage, and the court’s credibility may even be impaired. Nevertheless, the lack of explanation does not by itself connote an overextension of court authority.

137 See Temple II, Donoghue Dissent at *3 (cited in note 59).

138 See id; Temple II, Provisional Measures at **12–15 (cited in note 4).
one that Donoghue relies on) is *Avena*. In *Avena*, Mexico sought interpretation of language in a 2004 ICJ judgment ordering the US "to provide . . . review and reconsideration" of convictions and sentences imposed upon Mexican nationals whose Vienna Convention rights were violated. Mexico also requested provisional measures that would stay the executions of certain Mexican nationals in conjunction with the Article 60 proceeding. In granting provisional measures, however, the *Avena* court considered the 2008 execution date of one Mexican national and the ongoing risk of execution to several other Mexican nationals—facts subsequent to the 2004 judgment it was called to interpret. Thus, the very case Donoghue uses to advance one element of his argument—*Avena*, unlike *Temple II*, lies within the scope of the court’s Articles 41 and 60 powers—cuts against another—under Article 60, facts subsequent to a judgment should not bear on interpretation of the judgment.

If the goal of provisional measures is the preservation of parties’ rights to ensure effective judgment, then it is appropriate for the court to consider the very facts evincing risks to these rights. Provisional measures are said to strike "a compromise between the urgency of action . . . and the sovereignty of states which need not accept any action of a court without their consent." The court has been and should be willing to make these compromises.

C. Precedential Concerns: No Prior Provisional DMZ

The court has issued provisional measures in three former border dispute cases: *Frontier Dispute*, *Land and Maritime Boundary*, and *Certain Activities Carried Out by Nicaragua in the Border Area*. Although the disputes concerned territory, these cases demonstrate that the court will take steps to protect human life when other sovereign rights are also at issue and that the court may even liberally interpret the link requirement. *Temple II*, however, does stand apart from these

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140 See *Avena*, Provisional Measures, 2008 ICJ at 312–14.

141 Id at 317.

142 See id at 329–32. In *Avena*, years had elapsed in between the original judgment and the request for provisional measures; in *Temple II*, decades had elapsed. In both cases, the court faced the very real need to update its understanding of the parties’ situation to properly respond to the parties’ requests.

143 Oellers-Frahm, 12 German L J at 1284 (cited in note 15).

144 See generally Frontier Dispute (Burk v Mahz), Provisional Measures, 1986 ICJ 3 (Jan 10, 1986).


147 See Alison Duxbury, Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights, 31 Cal W Int’l L J 141, 157 (2000). See also Bernhard Kempen and Zan He,
other cases with its unprecedented provisional DMZ. Nonetheless, each of the other cases also differed from one another with respect to how the court ordered the withdrawal of forces. In *Frontier Dispute*, the parties were given twenty days to reach an agreement as to the bounds of troop withdrawal.\footnote{Frontier Dispute, Provisional Measures, 1986 ICJ at 12.} In *Land and Maritime Boundary*, troops were ordered to retreat back at least as far as their positions prior to a certain date—the date of the parties’ first armed conflict relevant to the dispute.\footnote{Land and Maritime Boundary, Provisional Measures, 1996 ICJ at 24.} Most recently, the court ordered the parties in *Certain Activities Carried Out by Nicaragua in the Border Area* to “refrain from sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security.”\footnote{ Certain Activities Carried Out by Nicaragua, Provisional Measures at *19 (cited in note 146).} It is, therefore, unremarkable that the court’s means of ordering military removal in *Temple II* differs from prior cases.

What of the court’s inclusion of undisputed territory? This is a more significant difference, but perhaps its effect is not far removed from an order for forces to retreat to positions prior to a particular date. If forces occupied positions outside of the disputed land, then such an order would also implicate undisputed territory. Each measure attempts to preserve rights of sovereignty or territorial integrity, though by different (perhaps imperfect) means.

There is a further question concerning the extent to which provisional measures should be ordered in Article 60 cases. At the time of *Temple II*, *Avena* was the only precedent for exercising Article 41 powers in an Article 60 case. The indefinite window within which a party can bring an Article 60 case, and the binding nature of an Article 41 indication, raise concerns of abuse.

Yet the same concern that animates the need for provisional measures in other non-Article 60 cases holds for Article 60 cases. Namely, the actions of either party could undermine the judgment (specifically, the announced interpretation) if either party were permitted to pursue actions that erode the rights of the other. For example, if the ICJ prescribed no measures to placate the parties and if fighting persisted, then more locals would presumably be displaced and further damage to the temple and local lands could ensue. Insofar as the court seeks to clarify, and perhaps even vindicate, rights of sovereignty and territorial integrity through its interpretation, the court would face a real risk that this effort would be frustrated by the parties’ acts diminishing these rights.

Additionally, Articles 41 and 60 functionally curb gross abuse of provisional measures in an interpretation proceeding. As in a non-Article 60 case, the court must reason, in its published order, that the provisional measure
preconditions have been satisfied.\textsuperscript{151} While the indefinite jurisdiction window exists, it is tempered by the requirement that there be prima facie evidence demonstrating a genuine "dispute as to the meaning or scope" of the judgment in question.\textsuperscript{152} Thus, these requirements create a limited world of cases and available measures, while the court's self-interest in attracting consenting litigants and maintaining its position of legitimacy limits its exercise of discretion.

The benefit of preserving party rights with Article 41 and inherent checks against the abuse of Article 41 favor the continued use of interim measures in Article 60 cases. Nevertheless, the ICJ should be discerning in these cases when evaluating requests for provisional measures due to the unique concerns posed.

D. Forward-Looking Concerns: Negative Consequences

Though legitimate, the court's indication of provisional measure may generate consequences that are not altogether positive. The provisional DMZ arguably skirted the bounds of court authority.\textsuperscript{153} Hypothetically, this could embolden future parties to request measures more tenuously linked to the rights to be preserved. However, since the court can indicate measures that vary from the parties' requests, it is unclear that radical requests would lead to the abuse of Article 41 powers.\textsuperscript{154} It is up to the court to exercise due restraint and to ensure that the provisional measures indicated are sufficiently tied to party rights. As mentioned in Section V.C, the ICJ has incentives to do just this in order to incite party consent and build court legitimacy.

The greater risk is that \textit{Temple II} could chill party consent to ICJ jurisdiction or suppress party compliance with ICJ indications of provisional measures.\textsuperscript{155} Compliance with provisional measures admittedly is low, which has been ascribed to a perceived lack of due process and abuse of authority in provisional measure proceedings.\textsuperscript{156} If \textit{Temple II} exacerbates these concerns for future parties, a possibility given the court's own division, parties may continue to

\textsuperscript{151} See Section II.A.

\textsuperscript{152} See ICJ Statute, Art 60 (cited in note 8).

\textsuperscript{153} See Section V.A–C.

\textsuperscript{154} See ICJ Rules, Art 75 (cited in note 16).

\textsuperscript{155} This fear has historical basis. For example, the US failed to comply with the ICJ's 1984 judgment in \textit{Military and Paramilitary Activities in and against Nicaragua (Nic v US)}, arguing that the ICJ did not have the jurisdiction or competence to issue the judgment. See Attila Tanzi, \textit{Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations}, 6 Euro J Intl L 539, 544–45 (1995). The UN Security Council ultimately failed to enforce the judgment, against the request of Nicaragua. Id at 545.

\textsuperscript{156} See Addo, 48 Intl & Comp L Q at 680 (cited in note 43); Oda, \textit{Provisional Measures} at 554 (cited in note 10).
disregard these orders or even bring their disputes to other forums. These chilling effects are of moment to the court, because, in a sense, states are the court’s clientele. However, at present, it is hard to argue with what seems to be a positive result. Cambodia and Thailand reacted favorably to the ICJ’s decision; both parties appear to be attempting to adhere to the court order; and there have been no skirmishes since the measures were declared. If this continues, it seems unlikely that Temple II will, on its own, chill requests for provisional measures or suppress compliance rates. To the contrary, if Temple II becomes a mark of ICJ success, this order could help raise the profile of provisional measures.

The critique that the provisional DMZ introduces implementation challenges because it was insufficiently informed by ground realities is well founded. As of December 2011, both parties agreed to withdraw from the provisional DMZ but had not yet executed the withdrawal. Even if implementation moves forward without problem, information about population distribution, local geography, property rights, and positions of forces is perceived to be important in demarcating DMZs. A better solution might have leveraged ASEAN and the parties’ respective knowledge of the area to define the DMZ through mediation. This is distinguishable from a pure reversion to dispute resolution by mediation or negotiation. Cambodia and Thailand tried and failed to resolve their disagreement through mediation and negotiation prior to Temple II. It would be imprudent to think that these methods, in isolation, effectively would resolve the territoriality conflict. However, by invoking mediation or negotiation within the framework of the ICJ, certain synergies may be realized that are absent when these methods are pursued in isolation.

In this vein, the next section discusses why the interplay between ASEAN and the ICJ actually may enhance the prospect of compliance with the indication of provisional measures and why, from an IDR perspective, the ICJ’s order was crafted intelligently. I make the further point that provisional measures offer particularly fertile ground for future use of integrated IDR approaches.


158 See id at 444.


160 See Morriss, 36 Va J Intl L at 853 (cited in note 136).

161 This is akin to what Judge Xue suggested in his dissent. Temple II, Xue Dissent at *3 (cited in note 100).

162 See *UN Help Sought over Temple Row* (cited in note 77).
VI. Temple II: A Case of Integrated IDR Methods

Conflicts over territory or borders commonly turn combative. They can become politically charged matters for the states involved, as was the case for Cambodia and Thailand. States must weigh their IDR options, mindful of the tangled web of legal, political, and security issues.

The principal types of IDR are negotiation, mediation, arbitration, and adjudication, each of which can be characterized by its level of party control and enforceability. Negotiation offers the greatest amount of party control, as it involves direct party-to-party communication to settle the dispute. For most states, negotiation occurs through diplomatic channels and is the method of first resort. However, communications can easily break down, and agreements reached are non-binding. Mediation interjects a third party into the dialogue to facilitate communication and agreement. It permits a high degree of party control (though less than negotiation), and does not generate binding obligations. An arbitral panel’s decision binds parties, though the dispute is funneled through a process stripping parties of some control. Adjudication involves even less party control, but offers a binding judicial decision. Crucially, binding and enforceable judgments are not equivalent; adjudicative bodies may lack the requisite enforcement capacity. Yet, at least so far as the ICJ is concerned, reputational costs, court legitimacy, utility of court access, and expressionism benefits enter into party compliance calculus and enable binding judgments to stick. Even so, the ICJ is a venue of last resort, and studies indicate that amid armed conflict, states prefer mediation to adjudication.

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165 Id.; Spain, 32 U Pa J Int’l L at 9 (cited in note 13).

166 Spain, 32 U Pa J Int’l L at 9 (cited in note 13).


168 Spain, 32 U Pa J Int’l L at 10 (cited in note 13).

169 Id.


171 Id at 553–54.

172 See Section II.A.

Standing alone, these IDR mechanisms present sharp tradeoffs that go beyond party control and enforceability. For example, adjudication before the ICJ can be costly and slow, and it can fail to address underlying political, social, or environmental issues.\textsuperscript{174} States may even disregard the binding nature of ICJ orders and choose not to comply with adverse rulings, frustrating other IDR efforts. As noted in Section II, this problem arises with indications of provisional measures. Notwithstanding these weaknesses, the prospect of compliance may still be greater than other non-binding IDR methods, particularly in the presence of international pressures.\textsuperscript{175} Parties also benefit from certainty of process. Though often preferred by parties, mediation is stunted by its limited capacity “to adequately respond to the volume and array of international disputes”\textsuperscript{176} and by its low success rates.\textsuperscript{177} On the other hand, mediation is unlikely to infringe state sovereignty, provides ad hoc flexibility, entails lower political costs, and enables states to maintain long-term relationships, which is quite important in the context of neighboring states.\textsuperscript{178}

Hybrid IDRs are a proposed solution to these assorted advantages and disadvantages.\textsuperscript{179} By blending IDR methods, the strengths of single methods can be amplified and weaknesses diminished. As one scholar noted:

The ICJ can enhance the problem-solving qualities of mediation by providing the institutional capacity of a powerful framework that establishes a protective environment as parties engage in the cooperative, and sometimes vulnerable, venture of problem solving. At the same time, mediation can pick up where legal settlement stops by assisting parties in resolving matters that extend beyond legal questions, into political, environmental and social matters. Such approaches can enhance the complementary dynamics of power and cooperation.\textsuperscript{180}

\textsuperscript{174} Id at 16–18.
\textsuperscript{175} See generally Stephen E. Gent and Megan Shannon, The Effectiveness of International Arbitration and Adjudication: Getting into a Bind, 72 J Pol 366 (2010) (concluding that binding third-party IDR methods are effective at ending territorial claims because they supply legality, reputation costs, and domestic political cover). See also Matthew S. Dunne III, Note, Redefining Power Orientation: A Reassessment of Jackson’s Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System, 34 L & Poly Intl Bus 277, 312–13 (2002) (noting that international institutions, such as the ICJ, can channel moral and political pressure to promote compliance).
\textsuperscript{176} Spain, 32 U Pa J Intl L at 6 (cited in note 13).
\textsuperscript{177} Compared with ICJ adjudication, UN mediation has a weaker success rate. Compare Spain, 32 U Pa J Intl L at 22 (cited in note 13) (noting a success rate of 35.7 percent for UN mediation) with Ginsburg and McAdams, 45 Wm & Mary L Rev at 1315 (cited in note 39) (noting a 68 percent compliance rate with ICJ judgments).
\textsuperscript{178} See Spain, 32 U Pa J Intl L at 24, 29 (cited in note 13).
\textsuperscript{179} See id at 41–49.
\textsuperscript{180} Id at 42.
While use of integrated IDR has been discussed, the framework still needs to be developed. This will require more information about how it is being employed.\textsuperscript{181} Temple II can contribute to the evolving understanding of integrated IDR methods. Following Temple I, Cambodia and Thailand attempted to resolve border tensions through both diplomatic negotiation and ASEAN mediation.\textsuperscript{182} Failing resolution by these means, the parties turned back to the ICJ, seeking interpretation of Temple I as well as provisional measures to preserve the rights of sovereignty and territorial integrity. Cambodia and Thailand resorted to negotiation, mediation, and adjudication in series. More remarkable was the use of integrated IDR in the ICJ’s indication of provision measures. The court ordered the parties to “continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone.”\textsuperscript{183} This represents an order to pursue mediation and ICJ adjudication in parallel, a move that leverages the complementary interaction between mediation and adjudication. It is the first time in an indication of provisional measures that the ICJ has referred states to a regional body to settle some aspect of a dispute.\textsuperscript{184} IDR, at both a regional and international level, affords additional benefits to Cambodia and Thailand. While Asia is far from a “coherent unit,”\textsuperscript{185} ingrained in Asian Pacific states is a general preference for consensual decision-making, good neighborly relations, and conflict avoidance mechanisms.\textsuperscript{186} Mediation through ASEAN is more conducive to honoring these regional values than is mediation by a global organization or adjudication by the ICJ.\textsuperscript{187} Furthermore, conflict prevention is one of ASEAN’s core competencies.\textsuperscript{188} International exposure can also introduce broader reputational costs and political pressures that create credible consequences for failing to resolve a dispute. Additionally, a body like the ICJ has the benefit of international legitimacy and a proven track

\textsuperscript{181} Id at 23.

\textsuperscript{182} See Temple II, Provisional Measures at *14 (cited in note 4); UN Help Sought over Temple Row (cited in note 77).

\textsuperscript{183} Temple II, Provisional Measures at *20 (cited in note 4).

\textsuperscript{184} This is based on a review of ICJ indications of provisional measures from 1947 through 2011. For a list of ICJ orders, sorted by year, see ICJ, Judgments, Advisory Opinions and Orders by Chronological Order, online at http://www.icj-cij.org/docket/index.php?p1=3&p2=5 (visited Apr 3, 2012).

\textsuperscript{185} Li-ann Thio, Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to Go before I Sleep,” 2 Yale Hum Rts & Dev L J 1, 5 (1999).


\textsuperscript{187} For example, regional mediation has an empirically higher success rate than mediation by the UN. Spain, 32 U Pa J Ind L at 21–22 (cited in note 13).

\textsuperscript{188} Paul Martin, Regional Efforts at Preventive Measures: Four Case Studies on the Development of Conflict-Prevention Capabilities, 30 NYU J Ind L & Pol 881, 924 (1998).
record. In contrast, the High Council of the Treaty of Amity of Cooperation, a dispute resolution panel established by ASEAN, has not settled any disputes to date.\textsuperscript{189} Including ASEAN in the operative language of the order enhances the legitimacy and visibility of ASEAN. It also introduces the risk of Security Council intervention should either party stop cooperating with ASEAN.\textsuperscript{190}

Provisional measures are uniquely suited to integrated IDR. First, an integrated IDR approach can improve party compliance with the ICJ's indication of provisional measures, while preserving the court's ability to make concrete rulings of law through the judgment. The low provisional measure compliance rate has been associated with perceived lack of due process, improper exercise of court authority, and the politically charged nature of requests.\textsuperscript{191} Although integrated IDR would not solve fully compliance issues (particularly if a party contested court jurisdiction and flatly refused all measures), returning some control to the parties over the scope and terms of the measures through a method like mediation or negotiation would help ameliorate these problems.

Second, due to the interim posture of provisional measures, mixed methods of IDR can be implemented in parallel, as opposed to in series. Parties often do pursue one method of IDR after another (thus the characterization of the ICJ as a venue of last resort); however, this approach does not extract the full complementary value of multiple IDR methods that comes from contemporaneously combining methods. A court judgment calling for mediation would channel the parties to mediation following adjudication. In contrast, an order for provisional measures is capable of leveraging mediation to help preserve the parties' rights in the midst of ongoing adjudication.

Finally, provisional measure IDR can accelerate party cooperation. Provisional measures seek to preserve party rights pending judgment. To this end, parties seeking a meaningful judgment have incentives to agree on provisional-measure matters in a timely fashion through the complementary


\textsuperscript{190} The Security Council, in an unprecedented move, could sanction the non-cooperating country and invoke military action to enforce the ICJ decision. See Section II.A. Note that both parties had been cooperating with ASEAN, so the ICJ was not defeating a fundamental trait of mediation, namely consent. ASEAN is committed to the principles of non-interference and "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States." See ASEAN Charter (2007), Art 2(2)(a), (e), (f) (2008), online at http://www.aseansec.org/publications/ASEAN-Charter.pdf (visited Apr 3, 2012). Therefore, the continued consent of Thailand and Cambodia to ASEAN's involvement remains important so that ASEAN is not deemed to be acting in contravention of its chartered authority.

\textsuperscript{191} See Oda, Provisional Measures at 554–56 (cited in note 10) ("It is not going too far to state that the provisional measures indicated by the Court have had hardly any practical effect in most cases of a highly charged political nature."); Addo, 48 Intl & Comp L Q at 680 (cited in note 43).
IDR method. Without time constraints imposed by the main proceedings and judgment, IDR by negotiation or mediation, though flexible, risks protraction.192

VII. CONCLUSION

In sum, the ICJ did not exceed its authority by establishing a provisional DMZ in Temple II, even though the zone included undisputed territory. Under the Statute of the ICJ, the court’s powers to issue provisional measures are broad. Furthermore, there is sound reason for affording the court additional latitude when instituting non-aggravation measures. Hostility between Cambodia and Thailand in recent years has elevated the urgency and risk of the border conflict. The court rightfully weighed these concerns in an effort to preserve the parties’ rights, pending its interpretation of Temple I. In line with other border dispute cases, the ICJ has once again demonstrated its willingness to break from past practice and use novel means to preserve these rights.

Though the court may not have exceeded its authority in Temple II, this does not eliminate concerns raised by the exercise of this authority. Provisional measures are exceptional instruments that must be used sensibly. In view of the evolving use of these instruments and the purported lack of compliance, the ICJ should evaluate critically the scope of the provisional measures it indicates.

Apart from the creation of the provisional DMZ, the ICJ’s order is remarkable for yet another reason: its application of an integrated IDR approach. Future ICJ indications of provisional measures stand to benefit from an integrated IDR approach, as exemplified in Temple II. Tethering particular measures to mediation or negotiation may not be appropriate in all cases, but it is one way to realize simultaneously the benefits of party control, certainty of process, and enforceability. This strategy is attractive for indications of provisional measures given their interim nature and the opportunity to enhance and expedite party compliance. The decision whether to adopt such an approach will likely depend on the relationship between the states and the availability of a suitable third party intermediary. Use of integrated IDR methods in provisional measures is still in its infancy, so only time will tell the reach of its influence.

192 If the ICJ referred the parties entirely to mediation or negotiation by provisional measure, this would extend the IDR process without necessarily advancing the parties’ positions in the process. Thus, the court is wise to issue concrete orders and, as appropriate, leverage other IDR methods.