



# INTERNATIONAL COURT OF JUSTICE

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## Summary

Unofficial

Summary 2023/8

1 December 2023

### *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*

#### Request for the indication of provisional measures

The Court begins by recalling that, on 29 March 2018, the Government of the Co-operative Republic of Guyana instituted proceedings against the Bolivarian Republic of Venezuela with respect to a dispute concerning “the legal validity and binding effect of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899” (hereinafter the “1899 Award” or the “Award”). In its Application, Guyana sought to found the jurisdiction of the Court, under Article 36, paragraph 1, of its Statute, on Article IV, paragraph 2, of the “Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana” signed at Geneva on 17 February 1966 (hereinafter the “Geneva Agreement”).

In its Judgment of 18 December 2020 (hereinafter the “2020 Judgment”), the Court found that it had jurisdiction to entertain the Application filed by Guyana on 29 March 2018 in so far as it concerns the validity of the 1899 Award and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela. The Court also found that it did not have jurisdiction to entertain the claims of Guyana arising from events that occurred after the signature of the Geneva Agreement.

In its Judgment of 6 April 2023 (hereinafter the “2023 Judgment”), the Court rejected Venezuela’s preliminary objection concerning the exercise of the Court’s jurisdiction and found that it could adjudicate upon the merits of the claims of Guyana, in so far as they fell within the scope of the operative clause of the 2020 Judgment.

The Court then recalls that, on 30 October 2023, Guyana filed a Request for the indication of provisional measures. In its Request, Guyana states that “[o]n 23 October 2023, the Government of Venezuela, through its National Electoral Council, published a list of five questions that it plans to put before the Venezuelan people in a . . . ‘Consultative Referendum’ on 3 December 2023”. According to Guyana, the purpose of these questions is

“to obtain responses that would support Venezuela’s decision to abandon these proceedings, and to resort instead to unilateral measures to ‘resolve’ the controversy with Guyana by formally annexing and integrating into Venezuela all of the territory at issue in these proceedings, which comprises more than two-thirds of Guyana”.

At the end of its Request, Guyana asks the Court to indicate the following provisional measures:

- “1. Venezuela shall not proceed with the Consultative Referendum planned for 3 December 2023 in its present form;
2. In particular, Venezuela shall not include the First, Third or Fifth questions in the Consultative Referendum;
3. Nor shall Venezuela include within the ‘Consultative Referendum’ planned, or any other public referendum, any question encroaching upon the legal issues to be determined by the Court in its Judgment on the Merits, including (but not limited to):
  - (a) the legal validity and binding effect of the 1899 Award;
  - (b) sovereignty over the territory between the Essequibo River, and the boundary established by the 1899 Award and the 1905 Agreement; and
  - (c) the purported creation of the State of ‘*Guayana Esequiba*’ and any associated measures, including the granting of Venezuelan citizenship and national identity cards.
4. Venezuela shall not take any actions that are intended to prepare or allow the exercise of sovereignty or *de facto* control over any territory that was awarded to British Guiana in the 1899 Arbitral Award.
5. Venezuela shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

## I. INTRODUCTION (PARAS. 13-16)

The Court recalls that it has already set out the general background and context of the dispute between Guyana and Venezuela in its two Judgments in the present case. The dispute dates back to a series of events that took place during the second half of the nineteenth century, when Guyana was still a British colony, known as British Guiana. At that time, the United Kingdom and Venezuela both claimed the territory located between the mouth of the Essequibo River in the east and the Orinoco River in the west. In 1897, an arbitral tribunal was established to settle the boundary between British Guiana and Venezuela. In its Award rendered on 3 October 1899, the arbitral tribunal granted the entire mouth of the Orinoco River and the land on either side to Venezuela; it granted to the United Kingdom the land to the east extending to the Essequibo River. Between November 1900 and June 1904, a joint Anglo-Venezuelan commission demarcated the boundary established by the 1899 Award. On 10 January 1905, after the boundary had been demarcated, the British and Venezuelan commissioners produced an official boundary map and signed an agreement accepting, *inter alia*, that the co-ordinates of the points listed were correct.

On 14 February 1962, Venezuela informed the Secretary-General of the United Nations that it considered there to be a dispute between itself and the United Kingdom “concerning the demarcation of the frontier between Venezuela and British Guiana”. The Government of the United Kingdom, for its part, asserted that “the Western boundary of British Guiana with Venezuela [had been] finally settled by the award which the arbitral tribunal [had] announced on 3 October 1899”, and that it did not “agree that there [could] be any dispute over the question settled by the award”. After various attempts to resolve the matter failed, the representatives of the United Kingdom, Venezuela and British Guiana signed the Geneva Agreement on 17 February 1966. On 26 May 1966, Guyana, having attained independence, became a party to that agreement. Attempts

were made in the ensuing decades to resolve the dispute through different means of settlement envisaged in the Geneva Agreement, all of which failed, leading the Secretary-General of the United Nations, in January 2018, under the Geneva Agreement, to choose the Court as the means to resolve the dispute.

The Court then notes that, on 20 October 2023, the National Electoral Council of Venezuela published a list of five questions to be put before the Venezuelan people in a consultative referendum on 3 December 2023. The relevant resolution of the National Electoral Council reads as follows:

“[T]he National Electoral Council . . .

RESOLVES:

FIRSTLY: To announce to the Venezuelan people, whose sovereignty is inalienable, in accordance with Article 5 of the Constitution of the Bolivarian Republic of Venezuela, the questions to be asked in the Consultative Referendum in defence of Guayana Esequiba, so that the will of the people may be expressed on the third (3rd) day of December 2023; those questions being as follows:

FIRST: Do you agree to reject by all means, in accordance with the Law, the line fraudulently imposed by the 1899 Paris Arbitral Award, that seeks to dispossess us of our Guayana Esequiba?

SECOND: Do you support the 1966 Geneva Agreement as the only valid legal instrument to reach a practical and satisfactory solution for Venezuela and Guyana to their dispute over the Guayana Esequiba territory?

THIRD: Do you agree with Venezuela’s historic position of not recognizing the Jurisdiction of the International Court of Justice to resolve the territorial dispute over Guayana Esequiba?

FOURTH: Do you agree to oppose, by all means, in accordance with the Law, Guyana’s claim to unilaterally have at its disposal a sea yet to be delimited, illegally and in violation of international law?

FIFTH: Do you agree with the creation of the Guayana Esequiba State and that an accelerated and comprehensive plan be developed for the present and future population of that territory, including, *inter alia*, the granting of Venezuelan citizenship and identity cards, in accordance with the Geneva Agreement and International Law, consequently incorporating that State into the map of Venezuelan territory?

SECONDLY: To refer this Resolution to the Constitutional Chamber of the Supreme Tribunal of Justice, so that it may rule on the constitutionality of the five (5) questions to be asked in the Consultative Referendum.” *[Translation by the Court.]*

## II. JURISDICTION (PARAS. 17-18)

The Court recalls that, in accordance with its jurisprudence, it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded. In the present case, the Court has already found, in its 2020 Judgment, that it has jurisdiction to entertain the Application filed by Guyana on 29 March 2018 in so far as it concerns the validity of the 1899 Award and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela. The Court further recalls

that, in its 2023 Judgment, it found that it could adjudicate upon the merits of the claims of Guyana, in so far as they fell within the scope of the operative clause of the 2020 Judgment.

### **III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 19-26)**

With regard to the rights whose protection is sought, the Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting provisional measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court recalls its finding in the 2020 Judgment that a land boundary dispute exists between the Parties. It further observes that the territory which forms the object of that dispute was awarded to British Guiana in the 1899 Award. For these reasons, the Court considers that Guyana's right to sovereignty over the territory in question is plausible.

The Court next turns to the requirement of the existence of a link between the right claimed by Guyana which the Court has found to be plausible and the provisional measures requested. It observes in this regard that one of the provisional measures requested by Guyana seeks to ensure that Venezuela does not "take any actions that are intended to prepare or allow for the exercise of sovereignty or *de facto* control over any territory that was awarded to British Guiana in the 1899 Award". The Court considers that this measure is aimed at protecting Guyana's right which the Court has found plausible.

The Court concludes that a link exists between the right claimed by Guyana that the Court has found to be plausible and the above-mentioned requested provisional measure.

### **IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 27-37)**

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision.

The Court observes that the fifth question of the referendum refers explicitly to the "creation of the Guayana Esequiba State", as well as "an accelerated and comprehensive plan [to] be developed" for the "granting of Venezuelan citizenship and identity cards" to the population of that territory, consequently incorporating the "[Guayana Esequiba] State into the map of Venezuelan territory". The Court further observes that Venezuela's Supreme Tribunal of Justice has confirmed the constitutionality of the questions to be posed in the referendum.

The Court notes that Venezuela stated during the oral proceedings that it "will not turn its back on what the people decide in the referendum" of 3 December 2023. On 24 October 2023, the President of Venezuela, Mr Nicolás Maduro Moros, publicly stated that the referendum would, for the first time, give Venezuelans the means to take "a collective decision as a country" [*translation by the Court*]. The Court also notes that other official statements suggest that Venezuela is taking steps with a view towards acquiring control over and administering the territory in dispute. For

instance, on 6 November 2023, the Minister of Defence of Venezuela, General Vladimir Padrino López, made an appeal to “go to combat” with reference to the territory in question. Furthermore, Venezuelan military officials announced that Venezuela is taking concrete measures to build an airstrip to serve as a “logistical support point for the integral development of the Essequibo”.

The Court considers that, in light of the strong tension that currently characterizes the relations between the Parties, the aforementioned circumstances present a serious risk of Venezuela acquiring and exercising control and administration of the territory in dispute in the present case. It therefore concludes that there is a risk of irreparable prejudice to the right claimed by Guyana in the present proceedings that the Court has found plausible. The Court further considers that Venezuela’s expressed readiness to take action with regard to the territory in dispute in these proceedings at any moment following the referendum scheduled for 3 December 2023 demonstrates that there is urgency, in the sense that there is a real and imminent risk of irreparable prejudice to Guyana’s plausible right before the Court gives its final decision.

#### **V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 38-44)**

The Court concludes from all of the above considerations that the conditions for the indication of provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the plausible right claimed by Guyana. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Guyana and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court observes that the situation that currently prevails in the territory in dispute is that Guyana administers and exercises control over that area. The Court considers that, pending the final decision in the case, Venezuela must refrain from taking any action which would modify that situation.

The Court emphasizes that the question of the validity of the 1899 Award and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela are matters for the Court to decide at the merits stage.

The Court recalls that Guyana has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Venezuela. When indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In the current case, having considered all the circumstances, in addition to the specific measure it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute between them.

#### **OPERATIVE CLAUSE (PARA. 45)**

The full text of the operative clause of the Order reads as follows:

“For these reasons,

The COURT,

*Indicates* the following provisional measures:

(1) Unanimously,

Pending a final decision in the case, the Bolivarian Republic of Venezuela shall refrain from taking any action which would modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area;

(2) Unanimously,

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

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Judge SEBUTINDE appends a declaration to the Order of the Court; Judge ROBINSON appends a separate opinion to the Order of the Court; Judge *ad hoc* COUVREUR appends a separate opinion to the Order of the Court<sup>1</sup>.

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<sup>1</sup> The summaries of declarations and opinions are annexed in the language available.

### **Declaration of Judge Sebutinde**

While Judge Sebutinde voted with the majority in favour of the provisional measures indicated in this Order, her view is that these measures do not go far enough in protecting the plausible rights of Guyana. The Court should have recognized Guyana's right to settlement by the Court of the land boundary between Guyana and Venezuela as "plausible", alongside its right to sovereignty over the territory awarded to it in the 1899 Award and to the integrity of its territory. A link exists between these plausible rights and some of the provisional measures requested, particularly the fourth measure.

In Judge Sebutinde's view, the Court's Order also should have reflected the conditions of urgency and irreparable prejudice with regard to both of Guyana's asserted rights. As evidenced by statements of its high-ranking officials, Venezuela, through its planned referendum and its aftermath, plans to take steps to exercise sovereignty over the territory at issue. These threatened acts would be tantamount to the *de facto* annexation of territory that is currently under Guyana's sovereignty, before the final decision of the Court. Guyana has exercised sovereignty over this territory for over 200 years and the Order does not fully or accurately describe this status quo, which Venezuela is required not to "modify".

As a result, the first provisional measure indicated in the Order is not strong enough.

### **Separate opinion of Judge Robinson**

1. In his separate opinion, Judge Robinson explains his concern with the Court's reasoning in certain parts of the Order as well as the formulation of the first provisional measure set out in operative paragraph 45 of the Order. In particular, Judge Robinson is dissatisfied with the Court's characterization of the extant factual situation as one where the "the situation that currently prevails in the territory in dispute is that Guyana administers and exercises control over that area" (see paragraph 41). According to Judge Robinson, Guyana is and has been exercising sovereignty, rather than mere control, over the territory in question since Guyana became independent in 1966. He explains in this regard that the existence of a dispute between Guyana and Venezuela in respect of that territory does not alter the factual situation.

2. Judge Robinson also questions the Court's assessment of Venezuela's ambition in respect of the disputed territory. In paragraph 37 of the Order, the Court concludes that "the circumstances described above present a serious risk of Venezuela acquiring and exercising control and administration of the territory in dispute in the present case". However, Judge Robinson believes that the evidence placed before the Court (see paragraphs 34-36 of the Order) makes clear that the Venezuelan intention is to annex and incorporate the disputed territory as part of Venezuela — revealing that the ultimate plan of Venezuela is to exercise sovereignty, and not just control, over the disputed territory.

### **Separate opinion of Judge *ad hoc* Couvreur**

In his separate opinion, Judge *ad hoc* Couvreur explains that a legal process creates a general obligation of "procedural fairness", stemming from the principle of good faith, which is incumbent on every party to the proceedings by the very fact of being a party. This obligation consists in particular in not prejudicing, *pendente lite*, the rights in dispute. In so far as the Court's Order seeks to reiterate this general obligation by adapting it to the circumstances of the case, which are characterized by strong tensions between the Parties that threaten the integrity of their rights on the merits, and to protect those rights as a precaution by imposing the status quo of the existing territorial

situation until the Court has rendered its final decision, Judge Couvreur voted in favour of the said Order.

In his opinion, Judge Couvreur also sets out the reasons why he considered that the Court was right not to indicate the measures requested by the Applicant, which sought to interfere with the holding of the referendum that the Venezuelan authorities have decided to conduct on 3 December, with the wording of the questions to be asked in that context and with the organization of any other consultation on matters submitted to the Court.

After making a number of introductory observations relating to the “reserved domain” of States, the Court’s attitude towards domestic law, national legislation and international legality, as well as the constitutional characteristics of the proposed referendum and the scope of the questions posed, Judge Couvreur sets out to examine whether the measures requested by the Applicant could have satisfied the conditions traditionally laid down for the Court to be able to indicate them. His conclusion in this respect is negative.

First, while the Court manifestly has jurisdiction to rule on the rights claimed by the Applicant on the merits, within the limits specified in its Judgment of 18 December 2020, and could therefore indicate measures to protect those rights, it could not have indicated any provisional measures, and in particular provisional measures that would have interfered with Venezuela’s exercise of sovereign constitutional prerogatives, in the absence of international obligations limiting that exercise. The Court could not have given effect to Article 41 of its Statute in a manner that would have contravened Article 2, paragraph 7, of the Charter of the United Nations, to which the said Statute is annexed.

Secondly, while the rights relied on by the Applicant on the merits appear plausible (as do, moreover, those of the Respondent, which this finding in no way prejudices), in order for the requested measures to be indicated, they would also have had to be sufficiently connected with the protection of those rights. This, however, could not be the case here. The holding of the planned referendum could not, in and of itself, affect the Applicant’s plausible rights to sovereignty over the disputed territory and, consequently, any measure intended to prevent the said referendum, or to alter the manner in which it is to be held, would have been unsuitable to protect those rights. The required connection between the rights to be protected and the protective measures to be indicated would therefore have been lacking.

Lastly, thirdly, since the referendum at issue would be purely consultative in nature and the Venezuelan Government would remain free, in law, to determine the ensuing action to be taken, it could not have been concluded that the mere holding of that referendum would per se have constituted or created a “real and imminent risk” of irreparable prejudice to the rights claimed by the Applicant.

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