VI.2.3
COLOMBIA AND SEABED MINING

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Introduction

Probably, the most sensible feature concerning Colombia's maritime domain is that the country is not an UNCLOS party. At the conclusion of the negotiations of the *United Nations Convention on the Law of the Sea* (UNCLOS), on 10 December 1982, Colombia signed the instrument, but, to date, has not ratified it.

The current practice of Colombia, therefore, poses interesting legal questions, especially regarding deep sea mining because of the possibility envisioned in its domestic mining regulations to engage in direct participation with the International Seabed Authority as a non-UNCLOS party.

In addition to that, the access and uses of the seabed and subsoil on its continental shelf are currently constrained by the expectations arising from the pending cases with Nicaragua before the International Court of Justice (ICJ), the conclusion of the boundary delimitation with Venezuela, suspended since 1992,[2] and a growing strong practice in establishing marine protected areas.

1 The opinions contained in this section are expressed in the personal capacity of the author and do not reflect the views of the institutions he is affiliated to.

2 Following the so-called 'Acta de San Pedro Alejandrino' of 1990, negotiations arrived at a dead point when Hugo Chaves came to power in Venezuela, and they have not restarted. Cfr. J. Londoño, *Colombia en el Laberinto del Caribe*, Bogotá: Ediciones Rosaristas, 2015, pp. 219–246. J. Londoño, *Episodios sobre la Fijación de las Fronteras Nacionales*, Bogotá: Ediciones Rosaristas, 2017, pp. 38–59. For an overview of the maritime question in the context of the bilateral relations, A. Zalamea, *Catálogo de Errores: la crisis colombo-venezolana*, Bogotá: Editorial Oveja Negra, 1987.

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Colombia and the United Nations Convention on the Law of the Sea

On 29 April 1958, Colombia signed the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR), the Convention on the Continental Shelf (CCS), and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. Colombia ratified the CCS on 8 June 1962,[3] as well as the CFCLR on 3 January 1963.[4]

As referred above, despite having an active participation in the negotiations of UNCLOS, Colombia signed the *United Nations Convention on the Law of the Sea* but has not ratified it. Additionally, Colombia has not signed, nor ratified, the 1994 *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* of 10 December 1982[5], nor has it expressed its intention to do so.

The reasons for not ratifying UNCLOS are not clear. In 1984, the Government seemed determined to do so,[6] and one of the main reasons for that was the expectations and possibilities concerning the access to minerals of the ocean soil and subsoil. The issue was discussed and debated over the years in formal and informal fora and scenarios,[7] but since Nicaragua instituted proceedings against Colombia before the International Court of Justice in 2002, the question was put on hold and it was never made public why, when, or at what level it was decided not to ratify the Convention.

Geographical extent of the waters and continental shelf

Colombian maritime territory extends over 2,070,408 square kilometres (km^2). Of these, 55.15 per cent (1,141,748 km^2) covers the continental and insular areas,[8] and 44.85 per cent corresponds to maritime areas (589,560 km^2 in the Caribbean and 339,100 km^2 in the Pacific Ocean); all this with 4.171 kilometres (km) of coast, which spans over 2,582 kilometres (km) in the Caribbean and 1,589 km in the Pacific Ocean.[9]

3 Approved by Law No. 9 of 13 March 1961, ratified on 8 June 1962.

4 Approved by Law No. 119 of 24 November 1961, ratified on 3 January 1963.

5 United Nations, *Treaty Series*, vol. 1836, p. 3.

6 Ministerio de Relaciones Exteriores, *El Nuevo Derecho del Mar*, Imprenta Nacional: Colombia, 1983; Comisión Colombiana de Oceanografía & Dirección de Soberanía Territorial, *Análisis de la incidencia para Colombia al ratificar la Convención de las Naciones Unidas sobre el Derecho del Mar de 1982 (CONVEMAR), en lo relativo a las partes XII (Protección del Medio Marino), XIII (Investigación Científica Marina) y XIV (Desarrollo y Transmisión de Tecnología Marina)*, Ministerio de Relaciones Exteriores, 2000, enero.

7 G. Vega-Barbosa, S. Serebrenik-Beltrán, and M.C. Aponte-Martínez, 'Colombia y la Convención de Naciones Unidas sobre el Derecho del Mar: Análisis jurídico frente al dilema de la ratificación', *Revista chilena de derecho* 45-1, 2018, 105–130; J.J. Gori Leiva, 'El Derecho del Mar: Origen, aprobación y proyecciones de la nueva Convención', *Nueva Frontera*, 19 July 1982, pp. 31–32; 26 July 1982, pp. 25–28; 2 August 1982, pp. 28–30; 9 August 1982, pp. 25–29; G. Cavelier, *Política Internacional de Colombia: Tomo IV, 1957–1997*, Bogotá: Universidad Externado de Colombia, 1997; E. Gaviria Liévano, *La Desintegración del Archipiélago de San Andrés y el fallo de la Corte de La Haya*, Bogotá: TEMIS, 2014.

8 Related as 'submerged lands' in policy documents.

9 DIMAR, Colombia potencia bioceánica sostenible 2030, Documento CONPES 3090, 2019.

Delimitation

In the North, in the Caribbean, Colombia has borders with Panamá,[10] Costa Rica,[11] Nicaragua,[12] Honduras,[13] Jamaica,[14] Haiti,[15] and the Dominican Republic.[16] Colombia also shares joint development areas with the Dominican Republic and with Jamaica. This last one has a particular agreement for oil and gas.[17]

In their delimitation treaty of 1993, Jamaica and Colombia agreed to establish 'a zone of joint management, control, exploration and exploitation of the living and non-living resources'. The delimitation of the zone excludes two circular areas of 12 nautical miles surrounding the cays of the Seranilla Bank and the cays of Bajo Nuevo, 'pending the determination of the jurisdictional limits of each Party', in reference to two previous agreements on fishery resources from 1981 and 1984.[18] In 2008, Colombia and Jamaica signed a (simplified) *Agreement to Expand the Exploration of Hydrocarbon Resources in the Area*.

Concerning the cases instituted by Nicaragua against Colombia before the International Court of Justice on the delimitation of the extended continental shelf and on the violation of sovereign rights in the maritime areas adjudicated by the decision of 2012,[19] by Presidential Decree 1946 of 9 September 2013 – amended by Decree No. 1119 of 7 June 2014 – the Government established an 'integral contiguous zone' around the maritime spaces in the Archipelago of San Andrés, Providencia, and Santa Catalina. In August 2021, the Government announced the exclusion of the blocks located in the Caribbean Sea the Colombia basin ("Cuenca Colombia") from the fourth round of Permanent Process for the Allocation of Areas (PPAA), the 'Colombia Round 2021', for

10 *Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia*, 20 November 1976 (entry into force: 30 November 1977).

11 *Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica* (17 March 1977). In Colombia approved by Law 8 of 4 August 1978. The National Assembly of Costa Rica never approved it.

12 *Treaty Concerning Territorial Questions at Issue between Colombia and Nicaragua*, Managua, 24 March 1928. (in force 5 May 1930) Cfr. *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports 2007*, p. 832, para. 79.

13 *Maritime Delimitation Treaty between Colombia and Honduras*, 2 August 1986 (entry into force: 20 December 1999).

14 *Maritime Delimitation Treaty between Jamaica and the Republic of Colombia*, Kingston, 12 November 1993 (entry into force: 14 March 1994); *Bilateral (simplified) Agreement to Expand the Exploration of Hydrocarbon Resources in the Joint Regime Area (JRA) shared by Jamaica and Colombia*, 4 November 2008.

15 *Agreement on Delimitation of the Maritime Boundaries between the Republic of Colombia and the Republic of Haiti*, 17 February 1978 (entry into force: 16 February 1979).

16 *Agreement on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Dominican Republic*, 13 January 1978 (entry into force: 15 February 1979).

17 Located between the Jamaica coast and the Archipelago of San Andrés and Providencia. For more information on the regional context, see in this book E. Jiménez Pineda, 'South American region and seabed mining', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, London: Routledge, 2023, chapter VI.1.6.

18 J. Londoño, *Colombia en el Laberinto del Caribe*, Bogotá: Ediciones Rosaristas, 2015, pp. 291–296.

19 The related cases are: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports 2016*, p. 100, Judgement, 13 July 2023 and *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports 2016*, p. 3. Judgement, ICJ Reports 2022, p.266. See V.J.M. Tassin, 'Territorial and Maritime Dispute (Nicaragua v. Colombia, 2001)', in P. Wojcikiewicz and J-M Sorel (eds), *Latin America and the International Court of Justice*, London: Routledge, 2017, pp. 225–236.

inshore and offshore exploration and production of oil and gas, to avoid any involvement with the cases.[20]

However, in the Judgment of the case concerning *the Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, delivered on April 21 2022, the International Court of Justice found, '(5) [By thirteen votes to two,] that the "integral contiguous zone" established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, is not in conformity with customary international law, as set out in paragraphs 170 to 187'; and '(6) [By twelve votes to three,] that the Republic of Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua'.

In the Pacific Ocean, Colombia has boundary agreements with Panama,[21] Ecuador,[22] and Costa Rica.[23] On 9 August 1979, it signed the Agreement for its incorporation into the 'South Pacific System', including the accession to the principles and fundamental principles of the Santiago Declaration of 1952, with Chile, Peru, and Ecuador, approved by Law No. 7 of 1980. According to its Preamble, 'none of the principles and fundamental norms referred to (the Declaration of Santiago) shall affect the sovereignty and jurisdiction of the States Parties on their respective continental shelf beyond 200 miles, in conformity with international law'.[24]

Marine protected areas

The expansion of maritime protected areas reflects a growing interest in the conservation and environmental protection over other considerations concerning the exploitation of the maritime resources. These areas include, in the Caribbean, the Seaflower Biosphere Reserve, established in 2000 under the umbrella of United Nations Educational Scientific and Cultural Organisation, which covers the insular and maritime territory of the Archipelago of San Andres, Providencia, and Santa Catalina (300,000 km^2); and in the Pacific, the Malpelo Flora and Fauna Sanctuary (27,000 km^2) and the Yuruparí – Malpelo National Integrated Management District (450,000 km^2).[25]

20 'Colombia tiene en la actualidad ocho contratos de costa afuera y offshore en vigencia', *La Republica,* 30 August 2021. Available online <https://www.larepublica.co/economia/colombia-tiene-actualmente-ocho-contratos-de-costa-afuera-y-offshore-en-vigencia-3224077 > (accessed on 22 December 2021).

21 *Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia*, 20 November 1976 (entry into force: 30 November 1977).

22 *Tratado de Límites entre el Gobierno de la República de Colombia y el Gobierno de la República del Ecuador,* 15 July 1916 (in forcé on 26 January 1917); *Agreement Concerning Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republics of Colombia and Ecuador 23 August 1975* (entry into force on 22 December 1975); *Acuerdo para la Demarcación del Punto de Inicio de la Frontera Marítima en la Desembocadura del Río Mataje. Puerto de San Lorenzo*, Esmeraldas, Ecuador, 13 June 2012.

23 *Treaty on the Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica,* additional to the Treaty signed at San José on 17 March 1977, 6 April 1984 (entry into force: 20 February 2001).

24 Approved by Law 7 of 4 February1980, ratified on 12 March 1980.

25 Following COP 26 President Duque announced the establishment of new areas comprising 160,000 km^2 to comply with the initiative Global Ocean Alliance 30 by 30. Other institutional arrangements are the Environmental Coastal Units (UAC by their acronyms in Spanish), and the maritime component of the so-called '*línea negra*' (black lines), which refers to the ancestral lands of the indigenous communities of the Sierra Nevada de Santa Marta in the North coast – Arhuaco, Kogui, Wiwa and Kankuamo – as recognized by Decree No. 1500 of 2018 (art. 348).

Regulation of seabed mining activities

There is not a single comprehensive regime for the seabed and its resources. Like many countries,[26] the Political Constitution of 1990 (article 101) enlists the components of the Colombian territory, including the subsoil and the continental shelf, 'in accordance with international law or the laws of Colombia in the absence of international regulation'.

As mentioned above, Colombia signed and ratified the CCS convention of 1958 and in the course of the ICJ Territorial and Maritime dispute case with Nicaragua, Colombia recognized article 76, paragraph 1, of UNCLOS as customary international law. And in Law No. 10 of 4 August 1978, article 10, national sovereignty shall extend to the continental shelf for the purposes of exploring and exploiting its natural resources, without defining, nor regulating the continental shelf.

It should also be noted that although there are specific regulations for offshore gas and oil,[27] marine scientific research,[28] underwater cultural heritage,[29] and seabed mining, none of these legislations prevail, nor prevent the application of general environmental and maritime regulations in any given case.

A number of institutions are responsible for the formulation and execution of policies and regulations in the mining sector,[30] the Ministry of Mines, the National Mining Agency, the Geological Service Agency, and the Mining and Energy Planning Unit; at the environmental level, the National Authority for Environmental Licenses and the Regional Environmental Corporations; and for maritime activities, the National Maritime Authority (DIMAR).

In practice, inter-agency coordination is critical but difficult to achieve. The competence and powers of these institutions tend to overlap, affecting coordination and synergies between them.[31]

Mining activities are regulated by the Political Constitution and by the Mining Code adopted by Law No. 685 of 2001 (hereinafter the Code). Its Chapter XV, articles 137 through 151, upgraded the 'coastal and submarine mining' provided for in the previous Code, into 'seabed mining', which covers both mining on the continental shelf and in the Area.

Articles 6 and 143 of the Code reiterate the Constitutional principle (art. 332 of the Constitution) that mineral resources are the property of the State and, according to article 145 of the Code, their exploitation must be carried out through concession agreements with favourable concept from DIMAR. This requirement also applies to prospecting activities, with the correlative obligation of giving previous notice to DIMAR (arts. 39 and 40 of the Code).

As for mining and related activities in areas beyond Colombian maritime jurisdiction, the key provision is found in article 146 of the Code, according to which the participation of the State in the exploration and exploitation of minerals in the soil and subsoil on international waters, before the International Seabed Authority, shall be conducted through cooperation agreements with other States or through contracts of representation with private companies – whether national or foreign.

26 W. Arévalo Ramírez, 'Resistance to territorial and maritime delimitation judgments of the International Court of Justice and clashes with "territory clauses" in the Constitutions of Latin American states', *Leiden Journal of International Law* 35-1, March 2022, 185–208.

27 Decreto 1073 of 2015.

28 Decreto 644 of 1990 and 1 Decreto 070 of 2015.

29 Ley 1675 of 2013; Decreto 1698 of 2014; Decreto 1080 of 2015; Decreto 1530 of 2016; Decreto 1389 of 2017.

30 Decreto No. 1073 of 2015; Constitutional Court, Decision SU095/18, Case T-6.298.958, 11 October 2018, p. 4.

31 *Plan Nacional de Ordenamiento Minero (PNOM)*, Documento Anexo a Resolución UPME 0256, Bogotá, June 2014.

These provisions marked a departure from the previous Code of 1998 (Decree No. 2655 of 23 December 1998), under which only the Ministry of Mines and Energy and its entities could carry out submarine and coastal mining, including exploration and exploitation – directly or under agreement with other public entities or private companies. It reiterated general legal powers of DIMAR and required its previous favourable concept from DIMAR and the Ministry of Foreign Affairs (chapter XV, articles 118 through 122).

Articles 138 through 142 of the Code incorporate the UNCLOS definitions for the territorial sea, the contiguous zone, the continental shelf, and the exclusive economic zone. Interestingly enough, it does not include interior waters or the extended continental shelf, and instead of baselines, it refers to the 'external limits of territorial waters'.

The first hypothesis of article 146 referred to above, pertains to the direct participation of the State before the International Seabed Authority (ISA or the Authority). According to article 148, the application shall be filled by the State before the Authority, including the working plan, the compensations and economic burdens, and the management of benefits derived from the exploitation of the minerals, according to the pertinent international regulations or, in their absence, to the laws of the Republic of Colombia.

The second relates to participation through cooperation agreements with other States. Article 149 establishes that those agreements shall be negotiated and concluded on the basis of equity and good faith applicable in each case. For the conclusion and execution of each agreement, the National Mining Authority shall nominate a designated government agency.

The third has to do with the participation through delegation with private companies, whether foreign or national. According to article 150, the agreements of representation should establish that the delegation shall include the payments of fees and royalties, and to provide that the responsibility arisen from any breaches of contract, or from the damages to the environment against the Authority or against third parties, shall be assumed fully and with no limitation or restriction by the private company.

Article 151 of the Code contains a general provision applicable to cooperation or delegation agreements, requiring 'permanent and timely' transfer of technology, in favour of the State, covering a wide array of mechanisms for said transfer, including any form of scientific advancement, technical knowledge, manuals, designs, instructions, assistance, and any form of training.

Insofar as the Government of Colombia intends to keep the present status of the country as a non-UNCLOS party, it therefore poses complex questions on the possibilities for ISA to enter into agreements with non-UNCLOS parties, outside of the UNCLOS system, and conversely on whether non-UNCLOS parties could enter into agreement with ISA, while maintaining its non-UNCLOS status.

However, that seems not legally feasible. Two considerations can be advanced in that respect. In the first place, it is argued that, under the recognition of the Area as common heritage of mankind,[32] the provisions of articles 136, 137, 140, and 141 of UNCLOS among others, refer to 'all States', instead of 'Parties', as beneficiaries of the access to the Area and its resources.[33] Furthermore, the provisions requiring the Authority to grant non-discriminatory and equal access to the Area (art.

32 *Delimitation of Maritime Areas (St Pierre and Miquelon) (Canada and France) (1992) 31 ILM 1145*, 1172, para. 78; *Responsibilities and obligations of States with respect to activities in the Area*, *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 226.

33 S. Voneky and A. Hofelmeier, Articles 136 mn [18], 137 mn [14], 140 mn [6–12], 141 mn [9], in Proelss (ed.), *United Nations Convention on the Law of the Sea: a commentary*, 1st edition, Oxford: Hart and Baden-Baden: Nomos Verlagsgesellschaft, 2017, pp. 955, 973, 983–984.

152 of UNCLOS) to all States, as well as the obligations to refrain from claiming sovereignty or appropriating parts of the Area are of a customary nature and apply to non-UNCLOS Parties.[34]

In contrast, there seems to be no clear basis for seabed mining rights in the Area, under customary international law in general. According to Voneky and Hofelmeier, the practice of States and the *opinio juris* in this area are ambiguous.[35] It could moreover be argued that a parallel system based on customary international law would make ineffective the regime laid out by UNCLOS and the Agreement relating to the Implementation of Part XI of UNCLOS (1994 Agreement), where the ISA shall organize, carry out, and exercise control of the activities in the Area on behalf of mankind as a whole.

Similar arguments have been made concerning the requirement to assent to be bound to UNCLOS, when establishing the consent to the Agreement of 1994 contained in its article 4, paragraph 2 and the extent of the 1984 Provisional Understanding Regarding Deep Seabed Matters between the United States, Belgium, France, Germany, Italy, Japan, the Netherlands, and the United Kingdom, regarding deep seabed matters, and of the 1987 Agreement on the Resolution of Practical Problems between Belgium, Canada, Italy, Netherlands, and the Union of Soviet Socialist Republics.[36]

In the second place, as mentioned elsewhere in this work, activities in the Area shall be carried out in association with the ISA by States Parties, or by state enterprises or by nationals of States Parties or individuals that are effectively controlled by them or their nationals, when sponsored by such States (UNCLOS article 153, Annex III article 4 (a)).[37]

Additionally, a main contention for this case is whether, in the wording of article 18 of the Vienna Convention on the Law of Treaties of 1969, the agreements provided for in articles 146 to 150 of the Mining Code, outlined above, conform to the purpose and object of UNCLOS.[38] In that sense, a plausible approach could be to interpret said agreements as preliminary measures on the road to the ratification of UNCLOS.

Conclusion

To conclude, it can be argued that, despite the provisions of the Mining Code, policy and institutional arrangements for deep sea and seabed mining are still pending in Colombia. Official policy documents are silent on the matter[39] and there are a number of assignments awaiting, including strengthening inter-agency coordination, defining policy options for sponsorship, and the development of a precautionary approach for deep sea mining, among other things. And to that end, it is just possible that for the country, the time has come to rethink its relation to UNCLOS.

34 J. Siegfried, Article 152 mn [4], in Proelss (ed.), *UNCLOS*, 1st edition, Hart, 2017, pp. 1077–1078.

35 S. Voneky and A. Hofelmeier, in op. cit., pp. 963–964.

36 United Nations Treaty Collection Series Vol. 1409. I-23601; 26 I.L.M. 1502,1987. See S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, Cambridge: Cambridge University Press, 2016, pp. 147–211.

37 *Responsibilities and obligations of States with respect to activities in the Area*, op. cit., par. 74–79.

38 Article 18 (a) of the *1969 Vienna Convention on the Law of Treaties*. See P. Gragl and M. Fitzmaurice, 'The Legal Character of Article 18 VCLT', *ICLQ* 68-3, 2019, 699–717.

39 Departamento Nacional de Planeación, *Colombia Potencia Bioceánica Sostenible 2030*, Documento CONPES 3090, Bogotá D.C., 31 March 2020; Vicepresidencia de la República-Comisión Colombiana del Océano-Armada de Colombia, *Intereses Marítimos Colombianos*, in Vicepresidencia de la República (ed.), Serie Publicaciones Especiales CCO, Bogotá D.C., 2021.