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A SURVEY OF COLOMBIA'S NEW OUTER SPACE POLICY: REFORMS IN COLOMBIA LAW

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1. Abstract. [1]

This paper describes the changes the Colombian government needs to make in its legislation (including the Constitution), to provide a solid basis for its new outer space policy in consonance with international law.

In Article 101 prg. 3 the Colombian Constitution states that: The segment of Geostationary Orbit over Colombia is part of your national territory. This article is at odds with international law, which prohibits any claim of sovereignty over outer space. Until now, the issue has not caused any difficulty; however, Colombia has recently embarked on an outer space policy and the existence of this article may deter other nations from entering any agreement or joint project due to the fear of implicitly accepting this claim of sovereignty. What is more, in Colombia such agreements or projects may be declared illegal, since they do not comply with the Constitution.

However, the major problem is not this article, but the complex procedure required to change it. A Constitutional reform is necessary. Furthermore, outer space policy is not a priority issue on the public agenda. This barrier may hinder the efforts to set up a space program in Colombia.

We introduce an alternative solution that does not reform the Colombian Constitution but allows the development of the country's space policy. This solution involves identifying the space sectors that would not be affected by Art 101, prg 3 and including them in the space policy; checking that the non-definition of the limits of outer space means that the agreements with other nations are not affected; and finally, considering the possibility of making specific declarations of non-recognition of sovereignty over outer space in the agreements signed with other nations (Similar to the American flag over the moon declaration. EEUU Law 83 Stat. 202, sect 8). All these measures can help the development of Colombian space policy as we wait for the country to reach a definitive solution in accordance with international law.

[1] The content of this paper reflects the viewpoint of the author and not that of the Colombian government.

2. Problem outline:

Article 101 of the Constitution of the Republic of Colombia (1991) defines the national territory, its borders, and thus the area that falls under its jurisdiction. Paragraph 3 of this article states: *"The subsoil, the territorial waters, the contiguous areas, the continental shelf, the exclusive economic area, the airspace,* ***the segment of the geostationary orbit, the electromagnetic spectrum and the space in which it acts*** *shall also be part of Colombia, in accordance with International Law or with Colombian laws in the absence of international legislation".*

The section in bold reflects a dispute begun by the equatorial countries[2] in 1975 in which they claimed that the Geostationary Orbit (GO) forms part of the national territory and that this conferred rights of access and use of this area. Over the years the dispute has gradually evolved into a demand for equal access to this orbit that guarantees access to all nations, as the GO is considered a limited natural resource that will eventually become saturated. Colombia has signed but not ratified the three first UN treaties on the peaceful use of outer space (the Outer Space Treaty (OST), the Rescue Agreement and the Liability Convention) and has not signed the two most recent agreements (The Registration Convention and the Moon Treaty), so it is currently not bound by them. Consequently, Colombia has not been obliged to make an express declaration that the GO is not part of its national territory, since these treaties state that no part of outer space, the Moon or any other celestial bodies may be subject to national appropriation by claim of sovereignty.[3]

As a result of this longstanding dispute, some of the representatives responsible for drafting the new Colombian Constitution in 1991 tried to give this claim greater legitimacy by establishing in the national legislation that the GO and the electromagnetic spectrum formed part of the national territory.

Colombia has now begun to formulate a space policy that will facilitate the development of a national space program and the preliminary consideration of international agreements and technical cooperation in this area. However, the government may find it difficult to attract international cooperation and signatories to bilateral agreements due to its failure to ratify existing international agreements and the existence of Article 101 in the national constitution. There in lies the problem: Colombia cannot ratify any outer space treaty according to which the GO does not form part of the national territory, since this would contradict the National Constitution and the treaty would be rejected by the Constitutional Court, which is the institution responsible for upholding the constitution.[4] Even if a constitutional reform were considered, this would not be possible in the short term. Such a process is necessarily long and complex, since the proposed reform must be approved by two consecutive legislatures, receiving a minimum of eight votes in favor from the two houses of the Colombian Congress, and may not be altered during this period. The reform could also be passed by means of a

[2] Colombia, Brazil, Ecuador, Gabon, Indonesia, Kenya, Somalia, Uganda and the Democratic Republic of Congo (formerly Zaire).

[3] Outer Space Treaty, Article 2.

[4] National Constitution of Colombia, Article 241.

referendum or another constituent assembly[5], but this is unfeasible given the subject matter.

It is not our intention to establish whether Colombia should or should not ratify the outer space treaties or whether Article 101 of the national constitution should be amended. Rather, we present three alternative strategies that could be used to circumvent the legal complications described above. By applying one of these strategies, in the event that any country expresses reservations about signing a space collaboration agreement with Colombia due to Article 101 or its non-ratification of the existing Outer Space Treaties, the agreement may be signed without the risk of contravening Colombian constitutional law and Colombia will be free to pursue its national space program.

3. Space sectors.

Our first solution is to identify the sectors of space policy that do not fall under the description given in Article 101 of the Constitution. The article refers exclusively to the GO and the electromagnetic spectrum and, as such, all other areas of policy are free to be developed. This includes education, training and technology transfer, any activity involving polar or inclined orbits (remote sensing, remote monitoring, the environment, natural disaster prevention, etc.), space exploration beyond Earth orbit and many others.

The argument here is simple: if the national space program excludes the GO over Colombian territory, it violates neither Article 2 of the Outer Space Treaty nor Article 101 of the Colombian Constitution.

Once we have identified all areas in which Colombian sovereignty is not compromised and which do not involve tacit recognition of this claim to sovereignty on the part of other countries, we are left with a number of influential sectors that are affected. Most importantly, telecommunications (Internet, television, radio, telephone, data transfer) rely almost exclusively on geostationary satellites.

The telecommunications sector is clearly of vital importance, which renders this alternative unfeasible.

4. Delimitation of outer space.

Our second alternative is based on the arguments raised by the fact that there is no specific definition of the limits between outer space and Earth or of what can and cannot be considered part of outer space. According to these arguments, it is impossible to state unequivocally that the GO is part of outer space; as such, a signed agreement would contravene neither Article 101 (therefore making it constitutional) nor Article 2 of the OST. There is no written legislation that supports a definition of outer space[6]. There is no official document or clause in the relevant international treaties that establishes the point at which space begins and the Earth ends or which sets out the characteristics of each domain.

From a legal perspective, doctrine and jurisprudence have been similarly unable

[5] (bis) Article. 374

[6] The Karman line (at an altitude of 100 km above the Earth's surface) is the boundary recognized by the International Astronautical Federation.

to provide a solution, which leaves greater scope for legal vacuums and ensuing disputes.

In highlighting these discrepancies we are setting the legal arguments that recognize the GO as part of the national territory of Colombia against those that do not. Without a clear and specific international consensus on the matter, no argument can be considered valid or indeed invalid. This is the key to the problem: as absurd as it may seem, neither viewpoint can be accepted or rejected. In legal logic, this is what we might consider the *reasonable doubt* surrounding the issue. As such, the fact that the GO technically forms part or does not form part of outer space does not affect national legislation and, consequently, does not contravene the Colombian Constitution or International Law.

5. Declaration of non-recognition.

Finally, we come to an alternative that is commonly used in International Law to express reservations over a treaty or a particular clause and to restrict the application or rejection of a particular article. It would be possible to add a declaration at the end of the document to the effect that, by signing the agreement, the parties do not recognize the GO as part of Colombian national territory, or which clarifies whether the document refers to the entire GO or only a part of it, thus demonstrating that the agreement does not constitute a claim to sovereignty over outer space or the tacit recognition of this act by the other signatory nation.

The Apollo Program is a similar example, since it was established that the American flag would be planted to signify the success of the mission. This act was once considered by explorers to be a statement of territorial appropriation, the first claim to sovereignty over new land. Aware of this interpretation, the US Congress made a declaration in which it was clarified that this act was merely intended as a sign of friendship and recognition and not as a claim to sovereignty.[7]

6. Conclusion.

This paper summarizes the principle conclusions of the official report, from which we can deduce that:

- The process by which the Geostationary Orbit and electromagnetic spectrum were included in the Colombian constitution as part of the national territory did not reflect the thinking at the time, since the requests made by Colombia to the United Nations and the International Telecommunication Union were intended to ensure equal access to the GO and were not a claim to sovereignty over the orbit. This was not taken into account by the representatives at the time.

- The process of modifying the Constitution of Colombia in order to introduce reforms altering the territorial limits of the country is not feasible in the short term. To safeguard the legitimacy of its constitution, the reform process outlined in Colombian law is thorough and extremely intricate and entails a level of political demand that the government is currently unwilling to assume.

[7] USA Law 83 Stat. 202, sect. 8.

- There are a wide range of unaffected areas that do not involve the GO and should be able to provide real alternatives to facilitate the further development of a national space program in Colombia.

- In this specific case, the lack of a legal definition of what can be considered outer space and what cannot is in fact beneficial, since it provides a reasonable doubt as to whether the Colombian Constitution or the international outer space treaties signed by other nations are affected, which could pose an obstacle to bilateral cooperation agreements.

- Lastly, the declaration of intentions or expression of reservations regarding any space agreement, in which it is clearly stated that no claim to sovereignty is made by Colombia, is the most feasible alternative for resolving the problems described here so that the relevant treaties may be signed between Colombia and the international community.

7. Bibliography.

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