FOREIGN INVESTMENT
is not always welcome

The Colombian State is being sued for billions of pesos at the International Centre for Settlement of Investment Disputes by foreign investors who came to the country under the protection of bi-national treaties. The International Law Research Group of the Universidad del Rosario analyzed the implications of those agreements and the importance of counting on clear policies on foreign investment, with a robust model for measuring its benefits. Laura Victoria García and Enrique Prieto, professors at the Faculty of Jurisprudence, explain their findings.

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Photos: Leonardo Parra, 123RF

In March, Camilo Gómez Alzate, director of the country´s National Agency for Juridical Defense, announced that a number of multinationals are suing Colombia in international tribunals for the sum of 14 billion pesos. Among the plaintiffs there are the multinational mining company Glencore, the Spanish Gas Natural Fenosa company (for the case of Electricaribe) and the multinational Gran Colombia Gold, which has brought three lawsuits against the country.

While the news was a surprise to Colombians in general, it was not for the members of the International Law Research Group at the Faculty of Jurisprudence of the Universidad del Rosario. "When the Colombian State began to be the subject of lawsuits in 2014, we were worried and began to investigate why; also, the circumstances of the country at that time meant that attention was focused on the dispute with Nicaragua and the peace negotiations," explains Enrique Prieto Ríos, the main researcher of the study entitled *International Law on Foreign Investment: A limit to the Regulatory Capacity of the Colombian State.*

The project sought to analyze the limitations of the country´s regulatory capacity, based on a study of the notification of law

suits foreign investors brought against Colombia. "I don´t think we can say that those Free Trade Agreements were poorly designed, simply that they failed to deal with some subjects which made Colombia weak in the face of foreign investors," Prieto Ríos clarifies.

To understand the lawsuits against the Colombian State, it is important to understand three historic moments which governed the course of foreign investment in the country. The first took place after the administration of former president César Gaviria Trujillo, when the first agreements were signed, which were a faithful copy of the ones already in force in the world.

The second important event was the modification of Article 58 of the Constitution, which deals with private property and had not authorized the signing of those kinds of agreements. And the third occurred during the administration of former president Álvaro Uribe Vélez, when other agreements were negotiated with the aim of making some changes in the protection of the financial sector and some industrial sectors, although they were not major ones.

These events showed that Colombia felt an urgent need to attract foreign investment. "The discussions about the need of developing countries, like our own, to sign these bilateral investment treaties were based on the premise that foreign investment is beneficial for their development, in terms of creating jobs, improving technology, innovation, increased taxes and other gains," explains professor Laura Victoria García Matamoros, Vice-Dean of the Faculty of Jurisprudence and a member of the research group.

The project wanted to find out precisely what is promoted by a bilateral investment treaty and what the State obtains from it in the end, particularly one like Colombia, which does not necessarily have coherent plans in terms of economic, social or juridical policies.

"For me, the problem lies in the fact that the country lacks a policy for foreign investment and the handling of lawsuits. At times, it seems like the only policy is to attract foreign investment and hire good lawyers to defend us; however, the ideal would to be to ask ourselves about the kind of foreign

investment we need to attract and what are the clauses which are needed to avoid these lawsuits," Prieto says.

The lawsuits which Colombia faces and will face

The first clarification Prieto, the main researcher, makes is that Colombia no longer faces the five law suits which had been lodged in the courts at the time of the study, since there are currently 11 in the arbitration stage and 9 in the pre-arbitration stage. The best known case has to do with the *páramo* (high Andean moor) of Santurbán. "It is a typical example of the State´s schizophrenia. First, there are reforms, laws, decrees, decisions of the Constitutional Court and permits for exploitation, then they are withdrawn or annulled," adds Enrique Prieto.

These experts explain that, to start with, there was no knowledge of the secondary effects bilateral agreements might have and there was no awareness of the impact they might have on the regulatory capacity of the State. And many of these law suits are the result of a policy for protecting the public interest, which covers the protection of human rights, the environment and minority communities, among others. In fact, the lawsuits are the result of decisions to that effect by the Constitutional Court.

"What this shows is a conflict between a number of international obligations which Colombia has acquired and other, national ones, which are set forth in the Constitution. In my analysis, this winds up with some investors exploiting that "disorder of the State" and they ask for more money than they were going to obtain, because the situation also allows them to ask for an amount based on their expectations," professor Prieto explains.

To the above should be added the fact that some of those investors sell the lawsuit to international funds, companies which are interested in becoming involved in such litigation in countries like Colombia.

A look at the past helps us to understand the future

The main aim of the international law on foreign investment is to protect the rights of foreign investors when they arrive at another country and it is expressed in international treaties like the free trade agreements between countries. These treaties aim to protect investors from political, juridical or economic risks which are regarded as the responsibility of the State where they carry out their operations.

For example, Cemex operates in Colombia under a free trade agreement with Mexico and the aim is to protect the company from the adverse effects of decisions taken by the Colombian State, including its three branches and its autonomous watchdog agencies like the Comptroller-General´s Office (Contraloría) or Procurator´s Office (Procuraduría).

There is a movement in Latin America which seeks to rethink how it can continue to be part of the international community and attract investment, but with a preventive handling of the lawsuits.

This right goes back to 1959. However, it only came into force in our country with the "*Apertura económica*", the liberalization of the economy undertaken by the administration of César Gaviria, which began to negotiate bilateral treaties to encourage and protect foreign investment. But it was only in 2014 that the effects of those treaties came to the attention of ordinary people, due to the lawsuits which foreign investors brought against the Colombian State.

"The interesting thing about this system is that the international law on foreign investors allows private-sector companies to directly sue the State when their interests and rights have been violated," notes Prieto, who also points out that it allows individuals to take their cases to international courts and thus, they no longer need to exhaust their possibilities of success in the national courts.

A number of multinationals are suing Colombia for the sum of 14 billion pesos. Among them are the multinational mining company Glencore, the Spanish Gas Natural Fenosa company and the multinational Gran Colombia Gold.

In the opinion of Laura García, the problem arises when the free trade agreements are implemented, because the affected States face a contradiction. The idea is attract such investors, but when the State takes measures to protect the environment or local communities, for example, they wind up harming the interests of the investors and the lawsuit results.

Ideas for a solution

Due to the abovementioned vulnerability, the countries of Latin America are the subject of many lawsuits at the International Centre for Settlement of Investment Disputes. The most dramatic case is that of Argentina, which is still facing the consequences of the measures it took to deal with its financial crisis. Bolivia, Ecuador and Venezuela are also on the list. None of the lawsuits brought against Colombia has been ruled on so far.

The reaction to these circumstances is beginning to be seen. There is a movement in Latin America which seeks to rethink how it can continue to be part of the international community and attract investment, but with a preventive handling of the lawsuits. That is, says Vice-Dean García, the idea is to work on clear policies on foreign investment, analyze which sectors require it and whether they are vulnerable or not and what limits should be imposed.

The approach of Southeast Asia is a good example to follow. "It is not quite true that those countries are an example of how foreign investment is necessary, because they were absolutely strategic about deciding what investments they needed, what amounts they would allow and how long they would let them enter their countries," she explains.

→ The researcher Enrique Prieto is convinced that the Free Trade Treaties were not poorly designed but that they simply failed to deal with some aspects which left Colombia weak in the face of foreign investors.

→ The Vice-Dean of the Faculty of Jurisprudence, Laura Victoria García, believes that the discussions about the need of developing countries to sign these bilateral investment treaties were based on the premise that foreign investment is beneficial for their development.

In the face of such lawsuits, countries like Bolivia and Ecuador have taken measures to avoid the abovementioned problems. The former decided to reject any further foreign investments in its natural resources and the latter denounced its treaties, which, in international investment law, means informing the counterpart that it will no longer adhere to them.

They are now working on their own model of a bilateral treaty which would allow them to strengthen their negotiating power. "The most important feature is that these models result from a measurement of risks and a number of coordinated policies on the part of the State. That is what we are seeking with our study, to contribute to this discussion," Laura Victoria García concludes.