entre los países que eventualmente se incorporarán al nuevo sistema, la UE favorecerá un sistema basado en los siguientes principios. El tribunal debe ser una institución internacional permanente; los jueces deben ser titulares, calificados y recibir una remuneración permanente. Su imparcialidad e independencia deben estar garantizadas; los procedimientos ante el tribunal deben llevarse a cabo de manera transparente; el tribunal debe dar la posibilidad de apelación contra una decisión; la aplicación efectiva de las decisiones del tribunal sería vital; el tribunal debe pronunciarse sobre las controversias que surjan de los tratados de inversión existentes y futuros que los países decidan asignar a la autoridad del tribunal.

El arbitraje entre un Estado miembro y un inversor de otro Estado miembro es incompatible con el Derecho de la UE, en particular en el marco de los TBI internos de la UE

La Comisión ha publicado el 19 julio 2018 una Comunicación (COM(2018) 547/2)[1] con el objeto de ayudar a los inversores de la UE a hacer valer sus derechos ante las administraciones y los órganos jurisdicciones nacionales y ayudar a los Estados miembros a proteger el interés público de conformidad con la legislación de la UE. Entre sus objetivos, figuran los siguientes:

I. Potenciación de la inversión en el mercado único de la UE

La presente comunicación tiene como objeto consolidar el entorno empresarial para los inversores de la UE. Se trata de un elemento crucial para potenciar la inversión en el mercado único de la UE. El Derecho de la Unión no resuelve todos los problemas a los que pueden enfrentarse los inversores en sus actividades. No obstante, la Comunicación precisa que el Derecho de la UE protege los derechos de los inversores de la UE y que los inversores pueden hacer valer estos derechos ante las administraciones y los órganos jurisdiccionales nacionales. Los inversores de la UE ya no pueden confiar en los tratados bilaterales de inversión (en lo sucesivo, "TBI internos de la UE"). Como la Comisión ha declarado reiteradamente, estos tratados son ilegales porque se solapan con las normas del mercado único de la UE y discriminan entre inversores de la UE. En una sentencia reciente (en el asunto *Achmea*), el Tribunal de Justicia de la Unión Europea confirmó que el arbitraje inversor–Estado en los TBI internos de la UE es ilegal. A raíz de esta sentencia, la Comisión ha intensificado su diálogo con todos los Estados miembros, pidiéndoles que tomen medidas para poner fin a los TBI internos de la UE.

[1] "http://ec.europa.eu/finance/docs/policy/180719–communication–protection–of–investments_en.pdf".

Confiere a las empresas y a los ciudadanos el derecho a crear una empresa, invertir en una compañía y ofrecer bienes y servicios a través de las fronteras europeas. Los inversores de la UE están también protegidos por los principios generales de no discriminación, proporcionalidad, seguridad jurídica y confianza legítima. La legislación de la UE reconoce igualmente derechos fundamentales como la libertad de empresa, el derecho a la propiedad y el derecho a la tutela judicial efectiva. Las normas de la UE que protegen a los inversores se encuentran en el Tratado de la Unión Europea, en la Carta de los Derechos Fundamentales de la Unión Europea, en los principios generales del Derecho de la Unión y en una amplia legislación sectorial específica.

Al mismo tiempo, el Derecho de la UE permite la regulación de los mercados para perseguir intereses públicos legítimos como la seguridad pública, la salud pública, los derechos sociales, la protección de los consumidores o la preservación del medio ambiente, lo que podría tener consecuencias negativas para los inversores. Las autoridades públicas de la UE y de los Estados miembros tienen el deber y la responsabilidad de proteger la inversión y de regular los mercados. Por lo tanto, la UE y los Estados miembros pueden tomar medidas legítimas para proteger esos intereses. Sin embargo, solo pueden hacerlo en determinadas circunstancias y bajo determinadas condiciones, y de conformidad con el Derecho de la UE.

La presente comunicación pretende contribuir a evitar que los Estados miembros adopten medidas que vulneren las normas de la UE y a ayudar a los inversores a hacer valer sus derechos ante las administraciones y los órganos jurisdiccionales nacionales. También ayudará a los profesionales de la justicia a aplicar las normas de la UE.

II. Arbitraje

El arbitraje entre un Estado miembro y un inversor de otro Estado miembro es incompatible con el Derecho de la UE, en particular en el marco de los "TBI internos de la UE", como ha dictaminado recientemente el Tribunal de Justicia en la sentencia en el asunto Achmea. En dicho asunto, el Tribunal de Justicia consideró que las cláusulas arbitrales entre inversionistas y Estados en los tratados de inversión bilaterales de la UE no son compatibles con el Derecho de la Unión y no tienen efectos jurídicos. La sentencia *Achmea* también es pertinente para la aplicación del Tratado sobre la Carta de la Energía entre Estados miembros de la UE. Según la Comisión, este Tratado no puede utilizarse como base para la resolución de litigios entre los inversores de la UE y los Estados miembros de la UE. El Derecho de la UE ya ofrece un marco jurídico general y eficaz, que incluye vías de recurso, a los inversores de la UE cuando invierten en otro Estado miembro.

Del texto de la Comunicación cabe resaltar lo siguiente

The European Union's single market is a unique area of investment opportunities. A key objective in the Investment Plan for Europe1 is to create a more predictable, stable and clear regulatory envi-

ronment to promote investments. As part of this strand of work, the Capital Markets Union ('CMU') *Action Plan*[2] and its *Mid–term review*[3] emphasised that a stable business environment is crucial for encouraging more investment within the European Union. The Commission is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors' rights. This Communication aims to provide guidance on existing EU rules for the treatment of crossborder EU investments.

EU law, as progressively developed over decades, provides investors with a high level of protection, even though it may not solve all problems investors may face in their activities. EU law has been the basis for the development of the single market as an area where investors enjoy freedom to establish a business, to invest in companies, to import and export goods and to provide services across borders and benefit from equal and non–discriminatory treatment across borders. The free movement of capital underpins any investment and the Treaty prohibits measures unduly preventing or discouraging cross–border capital movements and payments.

At the same time, EU laws allows for markets to be regulated to pursue legitimate public interests such as public security, public health, social rights, consumer protection or the preservation of the environment, which may have consequences also for investments. Public authorities of the EU and of the Member States have a duty and a responsibility both to protect investment and to regulate markets. Therefore, the EU and Member States may legitimately take measures to protect those interests, which may have a negative impact on investments. However, they can do so only in certain circumstances and under certain conditions, and in compliance with EU law.

Cross–border investors in the EU may invoke directly applicable EU rights which have supremacy over national law. National judges have a special role and responsibility in protecting investment. Together with the Court of Justice of the EU ("CJEU" or "Court of Justice") through the preliminary reference procedure[4] , national judges must ensure in complete independence the full application of EU law and judicial protection of the rights of individuals in all Member States. Moreover, cross–border investors' rights are protected in the EU also through a number of public mechanisms aiming at preventing infringements and solving difficulties that investors may experience with national authorities.

In the last decades, governments have encouraged cross–border investments by concluding bilateral investment treaties (BITs). These BITs typically include the right to national treatment and most favourable nation treatment, to a fair and equitable treatment, to the protection against expropriation and to the free transfer of funds. Investors can claim violations of those provisions before investor–State arbitration tribunals. Similar provisions are to be found in the Energy Charter Treaty, a plurilateral investment treaty initiated by the EU to stimulate investments in the energy sector[5]. The EU has embarked on substantial reform of these agreements in the EU external context.

Some countries with which EU Member States had previously concluded BITs have since joined the EU. As a result of accession, the substantive rules of BITs, as applied between Member States ("intra–EU BITs"), became a parallel treaty system overlapping with single market rules, thereby preventing the full application of EU law. This is the case, for example, when intra–EU BITs are interpreted in such a way that they constitute the basis for the award of unlawful state aid in violation of the level playing field in the single market.

Intra–EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the principle of non–discrimination among EU investors within the single market under EU law. In addition, by setting up an alternative system of dispute resolution, intra–EU BITs take away from the national judiciary litigation concerning national measures and involving EU law. They entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice.

[2] COM(2015)0468 final.
[3] COM(2017)292 final.
[4] Article 267 TFEU.
[5] The Energy Charter Treaty was signed by the EU, its Member States and a number of third countries.

For these reasons, the European Commission has consistently taken the view that intra–EU BITs are incompatible with Union law. Through its reasoned opinions of 23 September 2016, the Commission sent a formal request to Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their intra–EU BITs.

In the recent preliminary ruling concerning the Achmea case[6], the Court of Justice confirmed that investor–State arbitration clauses in intra–EU BITs are unlawful.

Following the *Achmea* judgment, the Commission has intensified its dialogue with all Member States, calling on them to take action to terminate the intra–EU BITs, given their incontestable incompatibility with EU law. The Commission will monitor the progress in this respect and, if necessary, may decide to further pursue the infringement procedures.

In the aftermath of the *Achmea* judgment, the unlawfulness of intra–EU investor–State arbitration may result in the perception that EU law does not provide for adequate substantive and procedural safeguards for intra–EU investors. However, the EU legal system protects cross–border investors in the single market, while ensuring that other legitimate interests are duly taken into account. When investors exercise one of the fundamental freedoms, they benefit from the protection granted by: i) the Treaty rules establishing those freedoms; ii) the Charter of Fundamental Rights of the European Union ("Charter"); iii) the general principles of Union law; and iv) extensive sector–specific legislation covering areas such as financial services, transport, energy, telecommunications, public procurement, professional qualifications, intellectual property or company law[7].

Without being exhaustive, this Communication recalls the most relevant substantive and procedural standards in EU law for the treatment of cross–border investments in the EU. It shows that EU law protects all forms of EU cross–border investments throughout their entire life cycle. It recalls the obligation on Member States to ensure that national measures they may take to protect legitimate public interests do not unduly restrict investments. It draws the attention of investors to the EU rights they may invoke before administrations and courts.

The Achmea judgment and its consequences

In the Achmea judgment the Court of Justice ruled that the investor–to–State arbitration clauses laid down in intra–EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. Recourse to such clauses undermines the preliminary ruling procedure provided for in Article 267 TFEU, and is not compatible with the principle of sincere cooperation. This implies that all investor–State arbitration clauses in intra–EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra–EU BITs.

The Achmea judgment is also relevant for the investor–State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra–EU relations. This provision, if interpreted correctly, does not provide for an investor–State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra–EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra–EU application of such a clause which, just like the clauses of intra–EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a

[6] C–284/16 *Achmea*, ECLI:EU:C:2018:158, paras 56 and 58.

[7] While this Communication mentions some examples drawn from sector–specific legislation, a detailed analysis of such legislation would go much beyond its remit.

party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States.

Scope of this Communication

This Communication focuses on intra–EU investment and thus does not concern investments made by EU investors in third countries or investments made by third country investors in the EU[8]. Treaty rules on free movement apply to situations with a cross–border element or when cross–border movement is at least possible[9]. However, some EU directives and regulations which specify and further develop the fundamental freedoms may apply also to purely internal situations, thus benefiting all investors including national ones. This Communication focuses on the protection of investors against national measures and not against measures adopted by the EU institutions and bodies. The fundamental freedoms and the majority of related EU secondary law also apply in substance to Iceland, Liechtenstein and Norway, through the Agreement on European Economic Area ('EEA Agreement'), which forms part of EU law[10]. As a result, the single market by and large includes these three countries[11].

Entrada en vigor del Protocolo entre la Comunidad Europea y el Líbano, que establece un mecanismo de solución de diferencias relativas a las disposiciones comerciales del Acuerdo Euromediterráneo de Asociación

De acuerdo con la notificación publicada en el DOUE el 6 agosto 2018 en 1 septiembre 2018 entrará en vigor el Protocolo entre la Comunidad Europea y sus Estados miembros y la República Libanesa, que establece un mecanismo de solución de diferencias relativas a las disposiciones comerciales del Acuerdo Euromediterráneo de Asociación entre la Comunidad Europea y sus Estados miembros, por una parte, y la República Libanesa, por otra, firmado en Bruselas el 11 noviembre 2010.

El objetivo de este instrumento es evitar y resolver cualquier diferencia comercial entre las Partes con objeto de llegar, cuando sea posible, a una solución de mutuo acuerdo. A tal efecto, las Partes procurarán resolver toda

[8] The Treaty also protects capital movements to and from third countries. However, under Article 64(3) TFEU, the Council may unanimously adopt measures which constitute a step backwards as regards the liberalisation of movement of capital to and from third countries. In addition, in the context of the common commercial policy, on 14 September 2017 the Commission proposed a European framework for screening of foreign direct investments from third countries by Member States on grounds of security or public order: Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM/2017/0487 final: https://eur–lex.europa.eu/legalcontent/EN/TXT/?uri=COM:2017:487:FIN

[9] C–67/08 Block, para. 21; C–98/15 Berlington Hungary, E, para. 28; Joined Cases C–197/11 and C–203/11 Libert, para. 34; Joined Cases C–570/07 and C571/07 Blanco Pérez and Chao Gómez, para. 40; Joined Cases C–51/96 and C–191/97 Deliège, ECLI:EU:C:2000:199, para. 58.

[10] The CJEU clarified that, in light of the objective of the EEA Agreement to interpret and apply in a uniform manner its provisions that are substantially identical to those in EU legislation, fundamental freedoms for investment protection apply mutatis mutandis to investments between the EU and the above–mentioned EFTA States. See C–476/10 Pepic, para. 33–35 C–72/09 Établissements Rimbaud, , para. 20–22.

[11] C–452/01 Ospelt, ECLI:EU:C:2003:493, para. 29.