

Current state of the trade and environment debate in EU law

EULawSD webinar

9 May 2018

Dr. Laurens Ankersmit

Background



- Controversy since the 90's
 - Debate on PPMs (process- and production method regulation) and investor-state dispute settlement
- The distinct European context
 - The EU Treaties and trade & environment
- Current Commission policy
 - Trade for all strategy
 - Focus on FTAs: TTIP and CETA, Mercosur, Indonesia

Outline

1. EU **external** trade regulation
 1. EU trade agreements
 2. EU trade instruments
2. EU **internal** regulation
 1. EU regulation
 2. Member State activity and the free movement of goods
 3. Competition law and CSR

EU trade agreements

Trade and sustainable development chapters

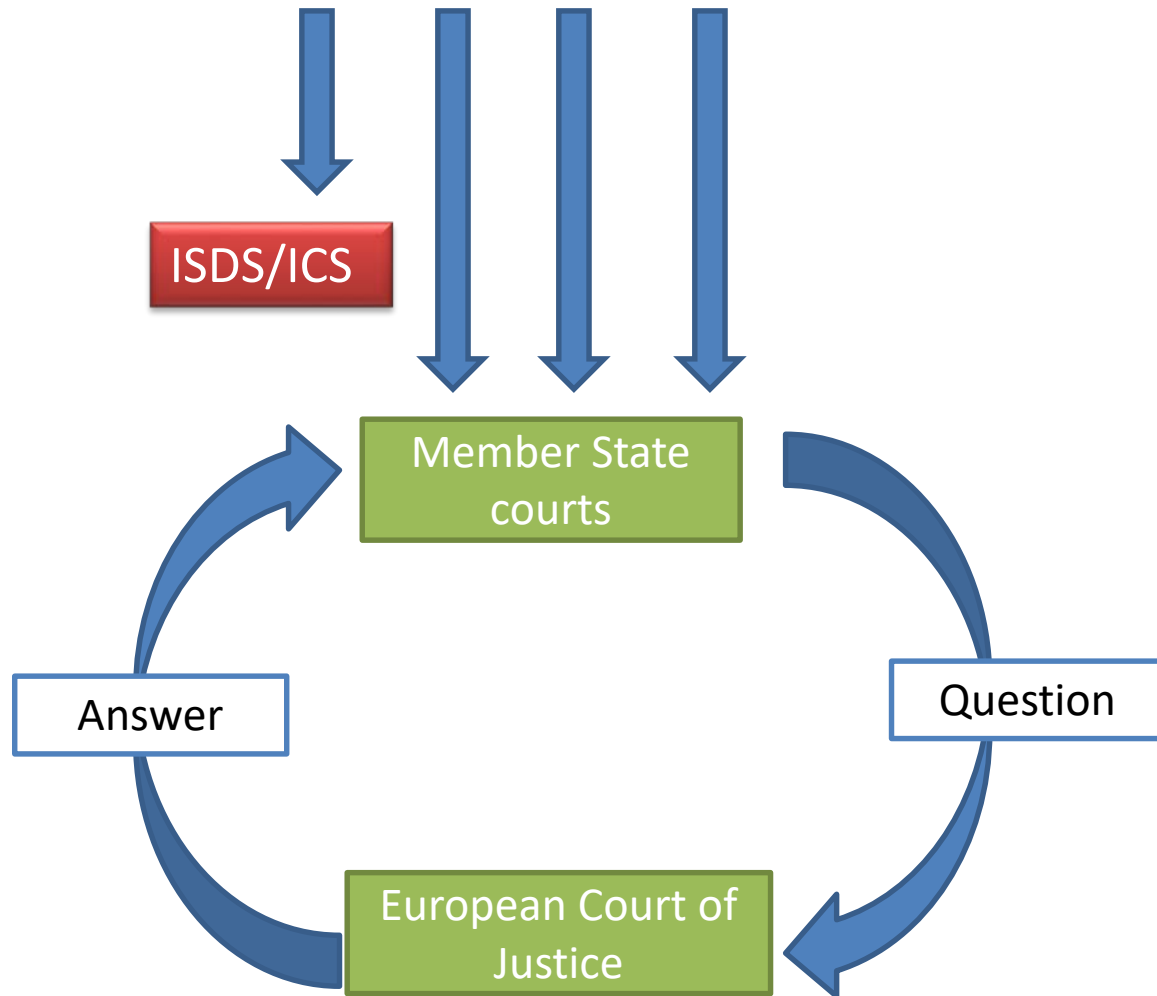
- The EU's 'cooperative model'
- **Opinion 2/15**
 - As a result of the Lisbon Treaty, the objective of sustainable development is an 'integral part of the common commercial policy' (para. 147)
 - 'Sanctions' possible on the basis of CIL and VCLT (para. 161)

EU trade agreements (2)

Investment

- The controversy surrounding investor-state dispute settlement (**ISDS**)
 - Notable cases: *Santa Maria*, *Bilcoin*, *Keystone XL*, *Metalclad*, *S.D. Myers*, *Vattenfall I & II*
 - Energy transition
- From ISDS to the ‘Investment Court System’ to the Multilateral Investment Court
- **Opinion 1/17** and **C-284/16 Achmea**

Disputes in fields covered by EU law



EU trade agreements (3)

Regulatory cooperation

- Context matters
- Who benefits?
- Concerns are mainly over implementation and approach to regulation

EU trade instruments

- **Anti-dumping**

- EU antidumping rules in Regulation 2016/1036 revised in late 2017
- Innovative element in constructing the **normal value** (Art. 2 (6a) (a))
- Will the Commission take environmental standards into account in determining whether there are “significant distortions”?

EU trade regulation

PPM measures

- The EU's PPMs
 - Conflict minerals regulation (2017/821)
 - Leghold trap regulation (3254/91)
 - 'Conflict diamonds' regulation (2368/2002)
 - Eco-labelling regulation (66/2010)
 - Organic labelling regulation (834/2007)
 - Egg marking rules
 - Sustainability criteria for biofuels (Dir. 2009/28/EC)
 - Seal products regulation (1007/2009)
 - Timber regulation (995/2010)
 - Cosmetics regulation (1223/2009)
 - Calves, pigs, and slaughtering rules Directives
- Canada and the Fuel Quality Directive
- Regulation of palmoil? (EP res. 2016/2222(INI))

Member State regulatory activities

- **Free movement of goods**

- ECJ is generally permissive when it comes to justifications for obstacles to trade in goods (art. 34 TFEU) eg C-379/98 *PreussenElektra*
- Internal taxation: PPMs explicitly permitted
 - Case 140/79 *Chemical Farmaceutici*, 127/75 *Bobie*, C-213/96 *Outokumpu Oy*

- **Public procurement** (Directive 2013/24/EU)

- Permissive towards PPMs **but** PPM criteria must 'linked to the subject matter of the contract' (Case C-368/10 *Max Havelaar*, Case C-448/01 *EVN Wienstrom*)

Private initiatives

- Examples of CSR that are blocked by Dutch NCA:
 - Closure of coal fired power plants
 - Ban on selling factory farmed chicken
- Why is this a restriction of competition?
- Justification options
 - 101 (3) TFEU
 - *Wouters/Meca-Medina* line of cases

Concluding remarks

- New challenges since Lisbon (ISDS, FTAs)
- **Externally** constitutional and societal challenges to the EU's approach
- **Internally** scope for environmental rule-making with a few exceptions