

# Current state of the trade and environment debate in EU law

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# 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

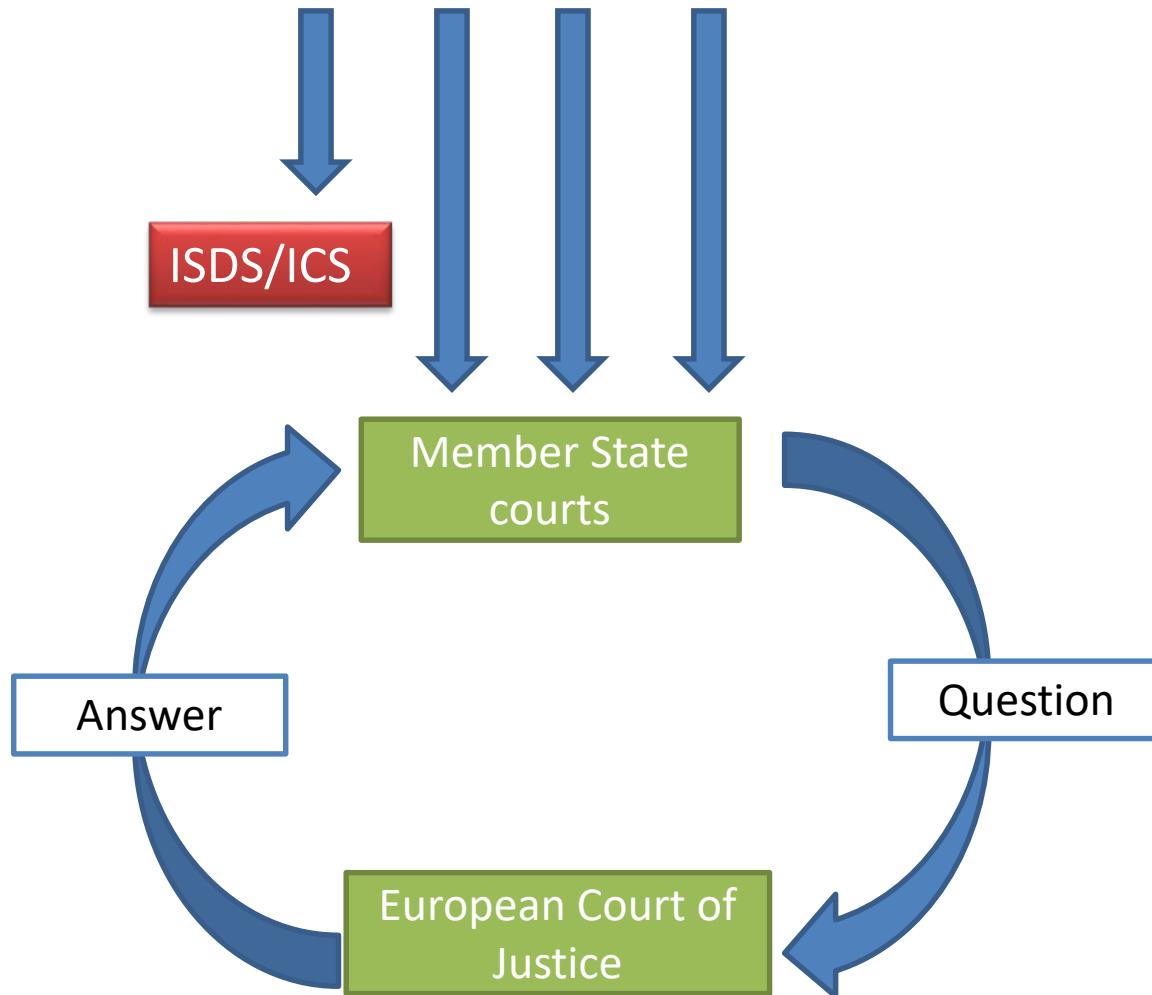
- The EU's 'cooperative model'
- **Opinion 2/15**
  - As a result of the Lisbon Treaty, the objective of sustainable development is an 'integral part of the common commercial policy' (para. 147)
  - 'Sanctions' possible on the basis of CIL and VCLT (para. 161)

# 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